Collectively Protecting Constitutionalism and Democratic Governance in Africa: A Tale of High Hopes and Low Expectations?

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Abstract

Initially introduced as a response to the recurrent problem of military coups d'état, the rejection of unconstitutional changes of government has evolved to become the lynchpin of the African Union's policy on constitutionalism and democratic governance in Africa. However, the prevailing political realities in many African countries, including the (re-)introduction of anti-democratic policies and dubious constitutional manoeuvres by incumbent governments, as well as recent events associated with the so-called 'Arab Spring' have highlighted the limitations of the African Union's existing strategy both in theory and practice. Based on a critical analysis of the African Union's regime on unconstitutional changes of government, its normative design and practical application, this article argues that—and explains why—the organisation has so far generally overpromised, but under-delivered, on the stated goal of collectively safeguarding constitutional democracy in its member states. While recognising its achievements in the progressive development and consolidation of a regional norm outlawing unconstitutional changes of government, the analysis identifies a host of conceptual and practical problems that have hampered the capacity of the African Union to effectively deal with diverse forms of illegitimate disruptions of democratic processes in several African countries. Apart from cases involving popular uprisings, in respect of which the organisation is still in search for a coherent policy framework, there is also a lack of conceptual clarity as to which cases of democratic backsliding can be brought under the rubric of unconstitutional changes of government, as well as a general reluctance on the part of the African Union to apply its policy against incumbent governments entangled in unconstitutional preservations of power. The article provides some recommendations aimed at realising the potential of the African Union's normative framework on unconstitutional changes of government as a meaningful tool for the promotion of constitutional democracy in Africa.

Keywords

Constitutionalism, Democracy, Africa, African Union

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1 Introduction

The 50th Anniversary Solemn Declaration of the Organization of African Unity (OAU) and the African Union (AU), adopted by the Assembly of Heads of State and Government of the AU in May 2013, includes a section on ‘democratic governance’, in which African leaders reiterated their rejection of unconstitutional changes of government (UCG), while at the same time seemingly qualifying this rejection by the remarkable recognition of what they called ‘the right of our people to peacefully express their will against oppressive systems’.¹ Obviously, this new, two-pronged approach was influenced by the so-called ‘Arab Spring’ and the dynamics it has set free in a number of countries in the Maghreb and Mashreq region. A year later, the AU Peace and Security Council (AUPSC)—the AU’s standing decision-making body responsible for the maintenance of continental peace and security—acknowledged that both UCG and popular uprisings were ‘deeply rooted in governance deficiencies’.² In an open session specifically devoted to the theme, the Council went on to elaborate on the language used in the 50th Anniversary Solemn Declaration by expressing its support for the right of peoples to peacefully stand up against oppressive systems ‘[i]n circumstances where governments fail to fulfil their responsibilities, are oppressive and systematically abuse human rights or commit other grave acts and citizens are denied lawful options’.³

While the above statements are by no means meant to put an end to the strict rejection of UCG by the AU, they nevertheless highlight some of the dilemmas and tensions that characterise the policy. Indeed, a key dilemma currently facing the AU is the question of how to place the outlawing of unconstitutional accession to, and preservation of, political power within the overarching objective of supporting transitions to democracy in Africa more broadly. Though defining the precise contours of a regional norm on the rejection of UCG remains a contested process,⁴ there seems to be increasing acceptance for a broadening of the scope of the norm to include serious instances of ‘democratic backsliding’ in addition to the forceful (usually military-backed) ouster of an elected government (the traditional coup d’état scenario).

Overall, the case for the region-wide support of democracy clearly extends beyond the issue of UCG, as evidenced by the comprehensive nature of existing AU instruments on human and peoples’ rights, elections, constitutionalism and democratic governance. Nevertheless, recent political and constitutional developments in a number of African

¹ Assembly of the African Union, 50th Anniversary Solemn Declaration (26 May 2013) Assembly/AU/Decl.3 (XXI), para F(ii).

² Peace and Security Council of the African Union (AUPSC), ‘Press Statement on Unconstitutional Changes of Governments and Popular Uprisings in Africa’ (29 April 2014) PSC/PR/BR (CDXXXII).

³ *ibid.* Other situations that were identified as ‘potent triggers for unconstitutional changes of government and popular uprisings’ include mismanagement of diversity, marginalisation, corruption, refusal to accept electoral defeat, as well as unconstitutional constitutional revisions and manipulations.

⁴ See, eg, Julia Leininger, ‘A Strong Norm for Democratic Governance in Africa’ (2014) IDEA Discussion Paper <https://www.die-gdi.de/uploads/media/Leininger_2014_A-Strong-Norm-for-Democratic-Governance-in-Africa.pdf> accessed 30 April 2015.

countries have highlighted some significant conceptual weaknesses in the AU's existing pro-democracy framework. Based on a critical analysis of the normative design and practical application of the current AU regime on UCG, it will be argued here that Africa's principal intergovernmental organisation has so far generally overpromised, but under-delivered, on its stated goal of collectively safeguarding constitutional democracy in its member states.

Following this introduction, the second part of the present paper will briefly revisit the wider international context of the AU's current efforts at promoting and protecting constitutionalism and democracy in Africa. The third part will then explore in more detail the relevant standards and mechanisms set up by the AU as part of its anti-coup/pro-democracy strategy. The paper's fourth part will subsequently try to carve out the limitations and shortfalls of the AU's existing legal and policy framework by taking a closer look at the organisation's response to some recent instances of UCG, including cases involving popular uprisings against elected regimes. The final section summarises the major findings and presents some recommendations as to the future of the AU's strategy on UCG.

2 Collectively safeguarding constitutionalism and democratic governance: The international legal context

For much of the history of international law, the notion that 'every State [possesses] the faculty of adopting any Constitution it likes and of changing such Constitution according to its discretion'⁵ was taken as an undisputable legal proposition flowing directly from the paramount principle of state sovereignty and the concomitant rule of non-intervention in a state's domestic affairs. Even the adoption, in 1945, of the Charter of the United Nations (UN Charter) did not seem to pose any direct challenge to this long-standing dictum. The UN Charter reaffirmed both the principle of state sovereignty and the rule of non-intervention in a state's domestic affairs. It also only made vague references to the novel, yet ideologically contested idea, of 'human rights and fundamental freedoms for all'.⁶ However, with the subsequent evolution of the UN Charter-inspired international human rights system—ushered in by the 1948 Universal Declaration of Human Rights (UDHR)⁷—and the UN's gradual outlawing of colonial regimes and racially motivated repression, the traditional dogma of international law's blindness towards domestic constitutional orders soon came under fire. During the years of the Cold War, the most relevant example in this respect was the UN's long struggle for a democratic, non-racially segregated South Africa. In the course of that struggle, the UN Security Council at some point went as far as to declare the country's 1983 apartheid

⁵ Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green & Co 1905) vol 1, 403.

⁶ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) arts 1(3), 55(c), 62(2).

⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

Constitution 'null and void' for the purposes of the international community.⁸ As Tom Farer has rightly noted, the sustained efforts by the UN to bring about majority rule in South Africa can be seen as 'one of the clearest precedents for [international] action to promote and defend democracy' in a sovereign state.⁹

Following the end of the Cold War, the UN's engagement with domestic political and constitutional issues grew considerably both in degree and in substance. As a result of this gradual process, the organisation is today no longer limiting itself to the selective condemnation of some particularly repulsive (fascist, colonial or racist) regimes. Rather, it has singled out one specific regime type—democracy—as the preferred 'standard model' of governance.¹⁰ In practice, evidence for this new posture comes in a number of ways including, inter alia, the regular adoption of thematic resolutions on democracy-related matters by the General Assembly and UN human rights bodies; the implementation by the UN of various forms of electoral assistance and democracy support programmes, as well as the almost routine integration of a democracy component in 'third-generation' UN peacekeeping and post-conflict state building operations. In addition—using its enforcement powers under Chapter VII of the UN Charter—the Security Council has occasionally adopted coercive (political, economic and even military) measures in defence of democratically elected governments, based (at least implicitly) on a determination that the disruption of democracy in the country concerned has led to a 'threat to international peace and security'.¹¹ Eventually, therefore, the fact that the UN Charter does not formally contain a 'democracy clause' has not prevented the UN from identifying democracy as 'a universal and indivisible core value and principle' of the organisation.¹² Rather, it has seemingly heeded the 1993 Vienna World Conference on Human Rights' call on the international community to 'support the strengthening and promoting of democracy (...) in the entire world'.¹³

⁸ UNSC Res 554 (17 August 1984) UN Doc S/RES/554, para 2. In the judgment of the Security Council, South Africa's 1983 Constitution had not brought any significant changes to the oppressive system of apartheid (which would ultimately remain in place until the promulgation of South Africa's first democratic Constitution in 1993).

⁹ Tom J Farer, 'The Promotion of Democracy: International Law and Norms' in Edward Newman and Roland Rich (eds), *The UN Role in Promoting Democracy* (UNU Press 2004) 35.

¹⁰ Christian Pippan, 'Democracy as a Global Norm: Has it Finally Emerged?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2013) 212.

¹¹ So far, the Security Council has (albeit infrequently) resorted to such measures in two sets of cases: i) when a democratic government, whose claim to power appears to be reliably based on the will of the people, is forcefully ousted by anti-democratic forces; ii) when a democratically elected leader is arbitrarily prevented from taking office by the incumbent regime. For an overview of relevant cases, see Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2008) 34 Brooklyn J Intl L 33, 75–81; Thilo Marauhn, 'The United Nations and Political Democracy' in Michael Bäuerle and others (eds), *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde* (Mohr Siebeck 2013) 659, 669–72.

¹² UNGA Res 60/1 (16 December 2005) UN Doc A/RES/60/1, para 119.

¹³ UNGA, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23 (1993 Vienna Declaration) para I(8).

Regional organisations in practically all parts of the globe have adopted a similar stance.¹⁴ In fact, some organisations, particularly in Europe and in the Americas, must even be considered ‘forerunners’ of the normative trend alluded to here. For instance, ever since its adoption, the Statute of the Council of Europe (CoE) has provided in article 3 that every member state ‘must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’.¹⁵ Democratic principles are not explicitly mentioned in the operative part of the Statute; yet, since its preamble declares individual freedoms and the rule of law to form ‘the basis of all genuine democracy’,¹⁶ the said principles have always been regarded by the CoE as an implicit element of article 3.¹⁷ Likewise, while any reference to human rights and democratic values has been absent from the early European Treaties (including the 1957 Treaty establishing the European Economic Community),¹⁸ it has not taken the European Council—then and today the highest political body within the supranational structure of the ‘European Project’—too long to confirm that the principle of representative democracy has to be respected and safeguarded as one of the ‘cherished values of the legal, political and moral order’ of all states belonging to the (then) European Communities.¹⁹ Today, this approach is codified in the Treaty on European Union (TEU).²⁰ Article 2 TEU lists democracy among the values upon which the Union is founded, and which must be adhered to both by the EU itself and by its Member States.²¹ Furthermore, article 7 TEU provides for a sanction procedure allowing for the suspension of certain rights deriving from EU membership to a Member State found to be in ‘serious and persistent breach’ of the Union’s values (including democracy).²²

¹⁴ For a general discussion, see Jon C Pevehouse, *Democracy from Above: Regional Organizations and Democratization* (CUP 2005) 15ff, 77ff; Theodore J Piccone, ‘International Mechanisms for Protecting Democracy’ in Morton H Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington Books 2005) 101ff; Edward R McMahon and Scott H Baker, *Piecing a Democratic Quilt? Regional Organizations and Universal Norms* (Kumarian 2006) 35ff.

¹⁵ Statute of the Council of Europe (5 May 1949) 87 UNTS 103 (CoE Statute) art 3.

¹⁶ CoE Statute, preamble, para 3.

¹⁷ Only (European) states which are deemed to be able and willing to fulfil the provision of art 3 may be invited to become a member of the CoE (CoE Statute, art 4). Art 8 CoE Statute contains both a suspension and an expulsion clause, the application of which may be considered by the Committee of Ministers of the CoE whenever a member state has ‘seriously violated’ the (written and unwritten) commitments enshrined in art 3.

¹⁸ Treaty establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) EEC Doc 11957E/TXT.

¹⁹ European Council, Declaration on Democracy (7–8 April 1978) Bull EC No 3-1978, 5.

²⁰ Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU).

²¹ Art 2 TEU. Art 49 TEU extends the obligation to respect the principle of democracy to all European countries aiming to become full members of the Union.

²² For a recent discussion of art 7 TEU and its practical application, see Bojan Bugarić, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LSE ‘Europe in Question’ Discussion Paper No 79/2014, 14ff <<http://www.lse.ac.uk/EuropeanInstitute/LEQS/LEQSPaper79.pdf>> accessed 30 April 2015.

With regard to the 'Wider Europe', the Organization (formerly Conference) of Security and Cooperation in Europe (OSCE) has adopted a series of important documents in the early 1990s entailing far-reaching political commitments in respect of democracy and the rule of law.²³ In a ground-breaking 1991 meeting in Moscow, the OSCE's member states also pledged to 'support vigorously (...), in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law'.²⁴ Since then, however, the lack of effective enforcement tools, the organisation's conventional mode of decision-making (according to which practically all important decisions are taken by consensus) and the accelerated expansion of other organisations in Europe have left the OSCE with a rather limited role in protecting democracy in the region.²⁵

Extensive commitments concerning the promotion and protection of democracy are also part and parcel of the normative framework of the Organization of American States (OAS). Although a provision indicating that the political organisation of member states shall be based on 'the effective exercise of representative democracy' was already included in the original text of the OAS Charter,²⁶ mechanisms providing for collective responses to anti-democratic developments at member state-level were only introduced in the final decade of the 20th century.²⁷ Based on a resolution adopted by its General Assembly in June 1991, the OAS is empowered to concern itself with 'any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member States'.²⁸ If such a situation arises, a complex procedure can be set in motion, at the end of which the Ministers of Foreign Affairs or the General Assembly are free to adopt 'any decisions deemed appropriate', in accordance with the OAS Charter and international law. The organisation's determination to serve as an 'above-the-state' guarantor of democracy in the Americas was further enhanced in 1997 with a revision of the OAS Charter (providing, inter alia, for the suspension of a state's right to representation in the organs of the OAS if its democratically constituted

²³ See, in particular, Conference of Security and Cooperation in Europe (CSCE), Document of the Copenhagen Meeting of the Conference on the Human Dimension (26 January 1990) (1990) 29 ILM 1305; Charter of Paris for a New Europe (adopted 21 November 1990) (1991) 30 ILM 193.

²⁴ CSCE, Document of the Moscow Meeting of the Conference on the Human Dimension (3 October 1991) (1991) 30 ILM 1670 (1991 CSCE Moscow Document) para 17.1.

²⁵ See Richard Burchill, 'Cooperation and Conflict in the Promotion and Protection of Democracy by European Regional Organizations' in David J Galbreath and Carmen Gebhard (eds), *Cooperation or Conflict? Problematising Organizational Overlap in Europe* (Ashgate 2010) 67.

²⁶ Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 1602 UNTS 48 (OAS Charter) art 5(d).

²⁷ For a detailed account of the evolution of the 'OAS democratic paradigm', see Jorge Heine and Brigitte Weiffen, *21st Century Democracy Promotion in the Americas: Standing Up for the Polity* (Routledge 2015) 30ff.

²⁸ OAS GA Res AG/RES 1080 (XXI-O/91) (5 June 1991).

government has been overthrown by force)²⁹ and with the adoption, in 2001, of the landmark Inter-American Democratic Charter.³⁰ The latter reiterates, among other things, that democracy is ‘the only legitimate form of government’ in the Americas, and obliges the states of the hemisphere ‘to promote and protect’ it.³¹ Following the lead of the OAS, many Latin American (sub-)regional organisations likewise established mechanisms in support of democracy. While a democratic form of government is regularly a *sine qua non* for membership, some organisations have also gone further by providing for the adoption of additional (diplomatic and/or economic) measures in defence of democracy.³²

The firm anti-coup/pro-democracy policy of the AU will be dealt with in the following sections. It should be noted here, however, that—similar to the situation in the Americas—this policy is by no means limited to the continental organisation as such. Rather, it is supplemented and supported by a growing number of African sub-regional organisations as evidenced, for example, by the revised 2001 Southern African Development Community (SADC) Charter,³³ the 2001 Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance,³⁴ and the 2006 International Conference on the Great Lakes Region (ICGLR) Protocol on Democracy and Good Governance.³⁵ By contrast, regional arrangements in Asia have long been reluctant to concern themselves with domestic constitutional issues, such as a government’s political character and/or source of authority. At least in the case of the

²⁹ Protocol of Amendment to the Charter of the Organization of American States (14 December 1992) (1994) 33 ILM 1005 (Protocol of Washington) art 9.

³⁰ Inter-American Democratic Charter (adopted 11 September 2001) (2001) 40 ILM 1289.

³¹ Although the Inter-American Democratic Charter is not legally binding as such, it counts as one of the region’s defining international instruments, entailing authoritative interpretations and clarifications of the pro-democracy provisions of the OAS Charter and relevant General Assembly resolutions.

³² See, inter alia, Additional Protocol to the Cartagena Agreement: Andean Community Commitment to Democracy (adopted 7 August 1998, entered into force 10 June 2000) <http://www.sice.oas.org/CAN/Protodmc_e.asp> accessed 30 April 2015; Ushuaia Protocol on Democratic Commitment in the Mercosur, the Republic of Bolivia and the Republic of Chile (adopted 24 July 1998, entered into force 17 January 2002) 2177 UNTS 375; Additional Protocol to the Constitutive Treaty of Unasur on Commitment to Democracy (adopted 26 November 2010, entered into force 19 March 2014) <http://www.isags-unasur.org/it_biblioteca.php?cat=1&lg=3&bb=166> accessed 30 April 2015; Special Declaration on the Defence of Democracy and Constitutional Order in the Community of Latin American and Caribbean States (adopted 3 December 2011) <http://www.embavenelibano.com/music/04-Declaracion_Defensa_Democracia-e.pdf> accessed 30 April 2015.

³³ Consolidated Version of the Treaty of the Southern African Development Community (adopted 17 August 1992, as amended 14 August 2001, consolidated version 21 October 2015) (SADC Treaty) <http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf> accessed 30 December 2015. According to art 5(1)(c) of the Treaty, one of SADC’s main objectives is to ‘consolidate, defend and maintain democracy, peace, security and stability’.

³⁴ Economic Community of West African States (ECOWAS), Protocol on Democracy and Good Governance (21 December 2001) ECOWAS Doc A/SP1/12/01 (ECOWAS Protocol).

³⁵ International Conference on the Great Lakes Region, Protocol on Democracy and Good Governance (1 December 2006) (ICGLR Protocol) <http://www.icglr.org/images/LastPDF/Protocol_on_democracy_and_Good_Governance.pdf> accessed 30 April 2015.

Association of Southeast Asian Nations (ASEAN), arguably the region's most prominent organisation, the situation has however started to change in recent years. While still putting much emphasis on the traditional values of non-interference and respect for national identity, the 2007 ASEAN Charter now mandates the organisation in surprisingly clear terms to 'strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights'.³⁶ At least on paper, this commitment also extends to ASEAN member states, which are required (under article 5) to 'take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter'.³⁷

What, then, explains the increasing willingness of international organisations to openly embrace democracy and to engage in diverse activities geared towards the promotion and protection of democratic regimes? From a normative perspective, two strands of explanation take centre stage here.³⁸ On the one hand, there seems to be a general consensus that democracy has considerable instrumental benefits with respect to two of the modern international community's most important concerns: the maintenance of (international) peace and universal respect for fundamental human rights. According to the neo-Kantian 'democratic peace' argument, democracies are normally less inclined to fight each other.³⁹ Though questioned (in full or in part) by some authors, the thesis generally does appear to be supported by historical experience. Hence—to borrow from the text of the 1991 CSCE Moscow Document—the development of societies based on pluralist democracy is widely seen as a 'prerequisite for a lasting [international] order of peace, security and justice'.⁴⁰ Closely related to this argument (and likewise broadly supported) is the view that democratic, inclusionary and representative constitutional structures are also significantly reducing the risk of violent political conflict within states.⁴¹ In a similar vein, the contemporary international system is clearly informed by the belief that human rights are usually better and more effectively protected in a democratic, rather than in a non-democratic, constitutional setting. At the global level, this is succinctly reflected by the standard formula, now routinely repeated in relevant

³⁶ Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) (ASEAN Charter) art 1(7) <<http://www.asean.org/storage/images/archive/publications/ASEAN-Charter.pdf>> accessed 30 April 2015.

³⁷ ASEAN Charter, art 5(2). For a closer analysis, see Richard Burchill, 'Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons from ASEAN' (2007) 13 Asian YB Intl L 51.

³⁸ See Gregory H Fox, 'Election Monitoring: The International Legal Setting' (2000) 19 Wisconsin Intl LJ 295, 304–08; Charles Sampford and Margaret Palmer, 'The Theory of Collective Response' in Morton H Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington Books 2005) 27ff; Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 211ff.

³⁹ For a discussion of the thesis and its impact on the contemporary international legal order, see Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 73ff.

⁴⁰ 1991 CSCE Moscow Document (n 24) preamble, para 6. See also the OAS Charter, preamble, para 3: 'Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region.'

⁴¹ UNGA Res 68/164 (21 February 2014) UN Doc A/RES/68/164, preamble, para 10.

UN documents, that ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing’.⁴²

On the other hand, the enhanced international concern for democracy is also the result of a re-interpretation of the meaning of sovereignty in the so-called ‘post-Westphalian age’.⁴³ Indeed, as the decolonisation saga has elevated the principle of self-determination from a political objective to a universal norm, a revised, more people-oriented understanding of sovereignty has begun to gradually permeate the international system. Departing from traditional international law’s exclusive focus on the rights of ‘states’, the said principle emphasises the right of ‘peoples’ to ‘freely determine their political status (...) and their economic, social and cultural development’.⁴⁴ While first predominantly seen as a legal tool for the emancipation of dependent peoples from colonial oppression, the right has soon come to be viewed as being equally applicable to ‘all peoples’, including those in sovereign states.⁴⁵ The UN General Assembly (UNGA) highlighted the internal aspect of self-determination in its famous 1970 Friendly Relations Declaration, by declaring that states can only be deemed to fully adhere to the principle of self-determination if they are ‘possessed of a government representing the whole people belonging to the territory without distinction’.⁴⁶

Evidently, states are afforded with a considerable measure of discretion as to the practical realisation of this requirement. Yet, if one reads it in conjunction with the proposition—famously articulated in article 21 UDHR, and repeatedly reaffirmed in more recent UNGA resolutions—that ‘the will of the people [as expressed in periodic and genuine elections] shall be the basis of the authority of government’,⁴⁷ the normative contours of the notion of ‘governmental representativeness’ become markedly clearer. At the very least, such a reading allows for the conclusion that a state will normally be in compliance with the right to self-determination when it verifiably respects the ground rule of popular sovereignty; ie, when the authority of government is rooted in the consent of (a majority of) the people concerned.⁴⁸ In turn, a state will generally be in

⁴² See, eg, 1993 Vienna Declaration (n 13) para I(8); UNGA Res 60/1 (16 December 2005) UN Doc A/RES/60/1, para 119; UNGA Res 64/12 (9 November 2009) UN Doc A/RES/64/12, preamble, para 4.

⁴³ See, eg, Jackson N Maogoto, ‘Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept’ in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-Envisioning Sovereignty: The End of Westphalia?* (Ashgate 2008) 211; Simona Tutuianu, *Towards Global Justice: Sovereignty in an Interdependent World* (Asser 2013) 43ff.

⁴⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.

⁴⁵ See Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 77–85; James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Nijhoff 2007) 372ff.

⁴⁶ UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/2625/XXV, para V; see also 1993 Vienna Declaration (n 13) para I(2).

⁴⁷ UNGA Res 217/III (10 December 1948) UN Doc A/RES/217/III, para 21; UNGA Res 68/164 (21 February 2014) UN Doc A/RES/68/164, preamble, para 11.

⁴⁸ According to some authors, a modern reading of the right to self-determination, combined with recent interpretations of the participatory rights enshrined in global and regional human rights instruments, both

violation of the self-determination norm when its government is imposed on the people, particularly—as explained by Michael Reisman—when a regime ‘seizes and purports to wield the authority of the government against the wishes of the people by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 per cent of the electorate purportedly votes for the incumbent’s list.’⁴⁹

3 The African Union policy on the protection of constitutionalism and democratic governance: Evolution and design

Similar to the case of many other organisations, the recent AU engagement with constitutionalism and democratic governance represents a departure from previous practice. For the most part of its existence, the AU’s predecessor—the OAU—placed a particularly strong premium on state sovereignty and the principle of non-interference in internal affairs. In practice, this has been particularly visible in the organisation’s policy on the recognition of governments, which was unable to effectively discourage the seizure of political power through military coups.⁵⁰ Likewise, in spite of the entry into force of the African Charter on Human and Peoples’ Rights in 1986 (Banjul Charter),⁵¹ the organisation was unable and unwilling to speak out against notoriously undemocratic practices of ruling elites, ranging from vote rigging to various manipulations of constitutional processes with the obvious aim of extending a government’s claim to power almost indefinitely. Overall, the OAU operated as a statist institution, thus earning it the characterisation of a ‘mutual preservation club’ for incumbent regimes.⁵²

In the wake of the changing global and regional realities following the end of the Cold War, the OAU came under increasing pressure to gradually reform its policies. The 1990s witnessed the collapse of military regimes in several African countries, and occasioned a renewed commitment to representative government through the holding

by relevant treaty bodies and by international organisations, does in fact provide the normative core of an (emerging) ‘right to democratic governance’ in contemporary international law. See, in particular, the seminal contribution by Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46. For a more recent assessment of the ‘democratic entitlement thesis’, see Susan Marks, ‘What has Become of the Emerging Right to Democratic Governance?’ (2011) 22 EJIL 507; Jean d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law’ (2011) 22 EJIL 549; Pippin (n 10) 206ff.

⁴⁹ W Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 239, 243.

⁵⁰ Akinwande Bolaji Akinyemi, ‘Organization of African Unity: The Practice of Recognition of Governments’ (1975) 36 Indian J Pol Sci 63, 63–79. See also Kofi Oteng Kufuor, ‘The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future’ (2002) 17 American U Intl L Rev 369, 369–92.

⁵¹ African Charter on Human and Peoples’ Rights (adopted on 27 June 1981, entered into force 21 October 1986) 1520 UNTS 26363 (Banjul Charter).

⁵² Samuel M Makinda and F Wafula Okumu, *The African Union: Challenges of Globalization, Security and Governance* (Routledge 2008) 11.

of multi-party elections and the promulgation of new constitutions. In February 1990, participatory democracy was made the primary focus of the International Conference on Popular Participation in the Recovery and Development Process in Africa.⁵³ Although primarily organised by the UN Economic Commission for Africa, the conference drew active participations of diverse stakeholders, including African and non-African governments, NGOs and the OAU. The conference adopted the African Charter for Popular Participation in Development and Transformation (Arusha Charter), which highlighted the importance of popular participation in Africa's political and socio-economic transformation and urged African governments unequivocally 'to yield space to the people, without which popular participation will be difficult to achieve'.⁵⁴ Meeting in July 1990 in Addis Ababa, the Assembly of Heads of State and Government of the OAU affirmed the necessity 'to promote popular participation (...) in the processes of government and development', while at the same time stressing the right of member states 'to determine, in all sovereignty, their system of democracy on the basis of their socio-cultural values'.⁵⁵

In contrast to the picture portrayed by these developments, the fledgling democratisation process was faced with serious setbacks in a number of African countries; the major threat being the continued practice of (military) coups d'état. As a result, the organisation could no longer ignore the urgent need for a formal anti-coup policy as a key element of a region-wide overall strategy on the promotion and protection of democracy. The May 1997 coup in Sierra Leone, which had deposed the democratically elected president Ahmed Tejan Kabbah, provoked particularly serious international reactions, thereby also galvanising regional efforts towards a more principled anti-coup approach. Meeting days after the event, the OAU Council of Ministers harshly condemned the coup and called for an immediate restoration of the democratic constitutional order.⁵⁶ The Council also called on African governments and the international community not to recognise the coup-regime, and requested the intervention of ECOWAS to reinstall President Kabbah to power. The UN Security Council soon followed suit by likewise condemning the coup and endorsing the ECOWAS intervention.⁵⁷

The OAU's stance on the coup in Sierra Leone and the ultimate success in reinstalling constitutional order in the country provided the momentum to accelerate efforts at generally promoting democratic governance and constitutional fidelity on the African continent. In April 1999, the first OAU Ministerial Conference on Human Rights

⁵³ International Conference on Popular Participation in the Recovery and Development Process in Africa (Arusha, 12–16 February 1990).

⁵⁴ African Charter for Popular Participation in Development and Transformation (16 February 1990) UN Doc E/ECA/CM.16/11 (Arusha Charter) para 16.

⁵⁵ OAU, Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (11 July 1990) OAU Doc AHG/Decl I (XXVI) para 10.

⁵⁶ Decisions of the OAU Council of Ministers (28 May–4 June 1997) OAU Doc CM/DEC (LXVI).

⁵⁷ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132, para 1; UNSC Res 1156 (16 March 1998) UN Doc S/RES/1156, para 1.

adopted the Grand Bay Declaration and Plan of Action, which affirmed, inter alia, 'the interdependence of the principles of good governance, the rule of law, democracy and human rights'.⁵⁸ Nevertheless, the problem of UCG continued unabated. In 1999, four African countries (Niger, Côte d'Ivoire, Guinea Bissau and the Comoros) experienced coups just within a month. This prompted the 1999 Algiers Summit, for the first time in the OAU's history, to adopt a decision rejecting UCG as a matter of principle.⁵⁹

Support for such a move also came from the African Commission on Human and Peoples' Rights (ACHPR)—the treaty body established under the Banjul Charter—which around the same time started to address the issue of UCG by creatively employing the Banjul Charter's article 13 (on the right to participation) and article 20 (on the right to self-determination). In *Jawara v The Gambia*, the ACHPR considered the question of legality of the 1994 coup d'état which had ousted the democratically elected government of former Gambian President Dawda Jawara.⁶⁰ In its recommendation, the ACHPR reasoned that 'the military regime came to power by force (...) not through the will of the people who, since independence, have known only the ballot box as a means of choosing their political leaders'.⁶¹ It went on to declare that the military coup amounted to 'a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the [Banjul] Charter'.⁶² A further ground-breaking case (*Constitutional Rights Project v Nigeria*) dealt with the military dictatorship of Sani Abacha, who had assumed power following the annulment of Nigeria's 1993 presidential elections.⁶³ In deciding the case, the ACHPR held that 'the annulment of the election results, which reflected the free choice of the voters, is in violation of Article 13(1) [of the Banjul Charter]'.⁶⁴ It also stated that the actions of the military violated the right of the people to determine their political status under article 20(1), which it considered to be 'the counterpart of the right enjoyed by individuals under Article 13'.⁶⁵

⁵⁸ OAU, Ministerial Conference on Human Rights: Grand Bay Declaration and Plan of Action (16 April 1999) OAU Doc MIN/CONF/HRA/Decl 1, paras 1, 3, 8.

⁵⁹ OAU, Declarations and Decisions Adopted by the 35th Assembly of the Heads of State and Government (12–14 July 1999) OAU Doc AHG/Decl.1 (XXXV) (Algiers Declaration). In a noteworthy passage (para 19), the Algiers Declaration reads: 'We are convinced that (...) the establishment of democratic institutions that are representative of our peoples and receiving their active participation would further contribute to the consolidation of modern African States.'

⁶⁰ *Sir Dawda K Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) 118, para 73.

⁶¹ *ibid.*

⁶² *ibid.* In light of the OAU's inability to react to the coup, the ACHPR decision can be considered a key contribution to the then emerging anti-coup policy of the regional organisation: see Terrence Lyons, 'Can Neighbors Help? Regional Actors and African Conflict Management' in Francis M Deng and T Lyons (eds), *African Reckoning: A Quest for Good Governance* (Brookings Institution 1998) 83.

⁶³ *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (2000) AHRLR 191 (ACHPR 1998) 198, para 50.

⁶⁴ *ibid.*

⁶⁵ *ibid.* para 52. By further arguing that '[i]t would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election was the final arbiter of whether the election took place in accordance with international standards', the ACHPR applied remarkably progressive reasoning, highlighting the importance of international law in the context of elections.

In July 2000, the growing anti-coup sentiment finally led to the adoption of the Declaration on the Framework for an OU Response to Unconstitutional Changes of Government in Africa during the 36th OAU Summit in Lomé, Togo (Lomé Declaration).⁶⁶ The Lomé Declaration officially declares the resurgence of coups d'état in Africa to be a 'threat to peace and security' and 'a serious setback to the ongoing process of democratization in the Continent'.⁶⁷ Regarding the essential question as to what exactly constitutes a UCG, the Declaration lists four instances:

- i) a military coup d'état against a democratically elected government;
- ii) intervention by mercenaries to replace a democratically elected government;
- iii) replacement of a democratically elected government by armed dissident groups and rebel movements;
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁶⁸

The first three cases may be considered to be pro-incumbent provisions proscribing instances of 'unconstitutional accession to power'.⁶⁹ The fourth case, on the other hand, addresses the problem of 'unconstitutional preservation of power' or 'reverse coup' by incumbent governments.⁷⁰ In the event of a UCG, the Lomé Declaration provides for a range of both diplomatic and coercive measures to safeguard constitutional rule, including—inter alia—calls on perpetrators to effect a return to constitutional order within six months, suspension of the state in question from participation in organs of the continental organisation, and targeted sanctions (for example, visa denials, restrictions of government-to-government contacts and trade restrictions) in case of failure to restore constitutional order within the six-month period.⁷¹ Taken together, the Lomé Declaration and the AU Constitutive Act (which were both adopted at the same OAU

⁶⁶ OAU, Declaration Adopted by the 36th Assembly on the Framework for an OAU Response to Unconstitutional Changes of Government (10–12 July 2000) OAU Doc AHG/Decl.5 (XXXVI) (Lomé Declaration).

⁶⁷ *ibid* preamble. The document also outlines a number of key elements regarding this process, including the adoption of a constitution that shall be in conformity with generally acceptable principles of democracy; respect for the constitution and the rule of law; separation of powers; political pluralism; regular, free and fair elections; the constitutional recognition and protection of fundamental rights; and the principle of democratic change of government. A similar set of principles is included in: AU, Declaration on the Principles Governing Democratic Elections in Africa (8 July 2002) AU Doc AHG/Dec.1 (XXXVIII).

⁶⁸ Lomé Declaration (n 66) para 11.

⁶⁹ See Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) Institute for Global Dialogue Occasional Paper No 55 <<http://www.igd.org.za>> accessed 30 April 2015; Issaka K Souaré, 'The African Union as a Norm Entrepreneur on Military Coups d'État in Africa (1952–2012): An Empirical Assessment' (2014) 52 *J Modern African Studies* 69, 78–79.

⁷⁰ *ibid*.

⁷¹ Lomé Declaration (n 66) paras 12–15. However, the six-month grace period under the Declaration was shortened to 90 days in a decision of the AU Assembly, which was adopted in February 2010. See AU, Decision on the Report of the Peace and Security Council on its Activities and on the Peace and Security Situation in Africa (2 February 2010) AU Doc Assembly/AU/Dec.268 (XIV) para 5(i).

Summit) clearly reflect a new regional emphasis on key constitutional ideals such as democracy, the rule of law and constitutional fidelity.⁷² Notably, the AU Constitutive Act further limits the scope of the traditional non-interference rule by permitting the organisation to intervene in member states in cases of war crimes, genocide, and crimes against humanity.⁷³ Moreover, by confirming the principle of rejection of UCG and the threat of suspension of states whose regime came to power through unconstitutional means, the AU Constitutive Act translates central aspects of the Lomé Declaration into 'hard (international) law'.⁷⁴

A further milestone achievement in the promotion of constitutional rule in Africa was made in January 2007, when the AU adopted the African Charter on Democracy, Elections and Governance (Democracy Charter) at its 8th Summit in Addis Ababa.⁷⁵ The Democracy Charter, which came into force in February 2012, is a remarkably ambitious instrument. While its preamble reiterates the state parties' concern about the problem of UCG and their determination 'to entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections', the operative provisions deal with several cross-cutting issues of governance, including democracy and constitutional rule, the rule of law, respect for human rights and various aspects of economic and social policies.⁷⁶ As to implementation and enforcement, the Democracy Charter transfers upon the AUPSC two central tasks. On the one hand, the AUPSC is empowered to act, in accordance with the relevant provisions of its Protocol,⁷⁷ whenever a situation arises in a state party 'that may affect its democratic political institutional arrangements or the legitimate exercise of power'.⁷⁸ In the specific case of a UCG, on the other hand, the AUPSC shall 'immediately' suspend the state in question from participation in AU activities, in accordance with article 30 of the AU Constitutive Act and article 7(g) of the AUPSC Protocol.⁷⁹ Moreover, additional to the measures already foreseen under the Lomé Declaration, the AUPSC is authorised to take a number of further steps in order to effectively deal with 'UCG situations', such

⁷² Constitutive Act of the African Union (adopted 1 July 2000, entered into force 26 May 2001) 2158 UNTS 37733 (AU Constitutive Act).

⁷³ For an assessment, see Grimachew A Aneme, *A Study of the African Union's Right of Intervention Against Genocide, Crimes against Humanity and War Crimes* (Wolf Legal Publishers 2011).

⁷⁴ See, eg, the language of AU Constitutive Act, arts 4(p), 30.

⁷⁵ African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) (Democracy Charter) <http://www.achpr.org/files/instruments/charter-democracy/aumincm_instr_charter_democracy_2007_eng.pdf> accessed 3 January 2016.

⁷⁶ Democracy Charter, preamble.

⁷⁷ AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) (AUPSC Protocol) art 7 <<http://www.peaceau.org/uploads/psc-protocol-en.pdf>> accessed 4 January 2016.

⁷⁸ Democracy Charter, art 24.

⁷⁹ Democracy Charter, art 25(1). However, the PSC applies a grace period of two weeks in practice before the suspension of the state concerned from membership. See Addis Ababa Institute for Security Studies, 'Peace and Security Council Report' (2014) 64, 3 <<https://www.issafrica.org/publications/peace-and-security-council-report?page=2>> accessed 2 March 2016.

as ensuring that coup perpetrators are prohibited from taking part in elections held to restore constitutional order, or imposing sanctions on any member that has instigated or supported a UCG in another member state.⁸⁰

On account of its binding and comprehensive nature, the Democracy Charter currently occupies a central position in the AU's emerging African Governance Architecture (AGA).⁸¹ Interestingly, the Democracy Charter does not employ the catchword 'constitutionalism' per se, although its provisions repeatedly refer to related notions such as 'constitutional rule' and 'constitutional order'.⁸² However, apart from its reaffirmation of what has been labelled the 'trinitarian mantra of the constitutionalist faith' (democracy, the rule of law and human rights),⁸³ the Democracy Charter's allegiance to core elements of constitutionalism is plainly reflected in its endorsement of the principles of supremacy of the constitution, separation of powers, independence of the judiciary, and civilian control of the military and security forces.⁸⁴ Moreover, the Democracy Charter seemingly pays tribute to a 'thick' conception of democracy, by requiring not only the organisation of 'regular, transparent, free and fair elections', but also the promotion of political pluralism through the provision of adequate space for opposition parties and civil society.⁸⁵

As to the cardinal principle of non-acceptance of UCG, article 23 of the Democracy Charter reiterates the four instances of unconstitutional changes mentioned in the Lomé Declaration, followed by a supplementary prohibition of 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principle of democratic change of government'.⁸⁶ The somewhat awkwardly formulated clause was introduced as a modification to an earlier draft, which would have explicitly proscribed

⁸⁰ Democracy Charter, art 25(2)–(10). Beyond the fact that the latter is obviously *lex specialis* to the former, the relationship between art 24 and art 25 Democracy Charter is not entirely clear.

⁸¹ See AU, 'Towards Greater Unity and Integration through Shared Values' (31 January 2011) AU Doc Assembly/AU/Decl 1 (XVI). In addition to the Democracy Charter and the AU Constitutive Act, the AGA comprises a number of further OAU/AU instruments addressing diverse governance issues in Africa (including the African Charter on Human and Peoples' Rights; the Algiers Declaration; the Lomé Declaration; the 2002 Declaration on Principles Governing Democratic Elections in Africa; the AUPSC Protocol; AU, Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) <http://www.eods.eu/library/AU_Convention%20on%20Combating%20Corruption_2003_EN.pdf> accessed 4 January 2016; AU, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) AU Doc CAB/LEG/66.6; and AU/New Partnership for Africa's Development, Post-Conflict Reconstruction Policy Framework (June 2005) <<https://www.issafrica.org/uploads/PCRPOLJUN05.PDF>> accessed 4 January 2016). The fact that the majority of these instruments also make up the African Peace and Security Architecture (APSA) speaks to the intertwined nature of the objectives of peace and democratic governance in Africa.

⁸² Democracy Charter, arts 2(2), 5, 14, 15, 24.

⁸³ Mattias Kumm, 'Editorial: How Large is the World of Global Constitutionalism?' (2014) 3 Global Constitutionalism 1, 3.

⁸⁴ Democracy Charter, arts 2–3.

⁸⁵ Democracy Charter, arts 3(11), 12.

⁸⁶ Democracy Charter, art 23(5).

the amendment of constitutions with a view to extending term limits.⁸⁷ The ensuing debate on this draft provision proved to be controversial and, hence, the final text settled for a more softened and deliberately flexible language. While some observers regret the abandonment of the initial draft, which is seen as having directly challenged the notorious practice of some African leaders of tampering with the term limit provisions of their state's constitution,⁸⁸ a closer look appears to allow for the argument that the broad language of article 23 is well suited to generally addressing constitutional manoeuvres that have 'the cumulative effect of maintaining government in power illegitimately', including the problematic practice of unduly prolonging presidential term limits.⁸⁹

4 Limitations and shortfalls of the existing AU regime: A glimpse at recent practice

Since the adoption of the Lomé Declaration and the entry into force of its Constitutive Act in 2001, the seriousness of the AU in enforcing the new regional norm on UCG has been visible in a number of cases; a process that has received a further boost with the coming into force of the Democracy Charter in 2012. Thus, the organisation has condemned and/or sanctioned UCG, for example, in the Central African Republic (2003), São Tomé and Príncipe (2003), Guinea-Bissau (2003, 2012), Togo (2005), Mauritania (2005, 2008), Guinea (2008), Madagascar (2009), Côte d'Ivoire (2010), Niger (2010), Mali (2012), Egypt (2013), and Burkina Faso (2015).⁹⁰ Yet, despite this activism, it is glaringly clear that neither the AU's comprehensive normative regime on UCG nor the regime's enhanced practical implementation have, up until now, yielded significant democratic gains. Although the fact that African states 'span all shades along the democracy spectrum'⁹¹ cautions against a simplistic or generalised picture of the state of democratisation in Africa, the recent trend nevertheless appears to be one of decline rather than progress. The latest Freedom House Report describes only 10 countries in Sub-Saharan Africa as 'free', while 21 countries are labelled as 'not free', and 18 others as

⁸⁷ Antonia Witt, 'Rather Turbulence than Wave: The Development of Continental Norms on Democratic Governance' (5th European Conference on African Studies, Lisbon, 27–29 June 2013) 15.

⁸⁸ Sekai Sangweme, 'A Critical Look at the Charter on Democracy, Elections, and Governance in Africa' Africa Governance Monitoring & Advocacy Project Paper (Open Society Institute 2007) <http://www.afrimap.org/english/images/paper/ACDEG_Sangweme.pdf> accessed 30 April 2015.

⁸⁹ Edward R McMahon, 'The African Charter on Democracy, Elections and Governance: A Positive Step on a Long Path' Africa Governance Monitoring & Advocacy Project Paper (Open Society Institute 2007) <http://www.afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf> accessed 30 April 2015.

⁹⁰ For a selected discussion of these cases, see Jeremy I Levitt, 'Pro-democratic Intervention in Africa' (2006–07) 24 *Wisconsin Intl LJ* 785; Eki Y Omorogbe, 'A Club of Incumbents? The African Union and *Coups d'État*' (2011) 44 *Vanderbilt J Transnatl L* 123, 137ff; Souaré, 'The African Union as a Norm Entrepreneur on Military Coups d'État in Africa' (n 69).

⁹¹ Patrick J Glen, 'Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance' (2012) 5 *African JL Studies* 119, 120.

‘partly free’.⁹² Overall, the Report points to a net decline of freedom both in North Africa and Sub-Saharan Africa, suggesting a general trend of ‘democratic backsliding’ on the African continent.⁹³

The AU is not necessarily—and certainly not exclusively—to be blamed for this fairly sober assessment. To state the obvious, success or failure in defending democracy and preventing authoritarian regression usually depends on a host of complex political dynamics within the countries concerned. External actors, such as the AU, are only one of many players in such scenarios and will, more often than not, play only a limited or secondary role.⁹⁴ That said, the AU’s exceptionally broad mandate nevertheless affords the organisation a fairly broad arsenal to contribute to the resolution of political conflicts in member states, ranging from promotional activities to more interventionist policies in defined crisis situations.

As indicated in the previous section, the relevant AU regime applies to cases of: i) a military coup against a democratically elected government; ii) intervention by mercenaries to replace a democratically elected government; iii) replacement of a democratically elected government by armed dissidents or rebels; iv) refusal by an incumbent government to relinquish power to the winning party or candidate after free and fair elections; and v) amendment or revision of the constitution in violation of the principles of democratic change of government.⁹⁵ Evidently, the protection accorded to incumbent governments in the first three instances specifically applies to ‘democratically elected governments’, implying that the ouster of unelected regimes may not amount to an unconstitutional change in a technical sense.⁹⁶ Similarly, the fourth instance of unconstitutional preservation of power is designed to benefit an opposition party or candidate that has won in democratic elections.⁹⁷ Finally, the fifth case seeks to prevent possible attempts at subverting basic elements of democratic governance through constitutional amendment or other changes to the legal system.⁹⁸ As mentioned above, this provision can and should serve as a major tool against various forms of ‘democratic backsliding’,⁹⁹ including the scrapping of (presidential) term limits by incumbent leaders.

As far as conventional coup situations are concerned, recent practice seems to support the impression that the AU has in fact adopted a blanket policy covering all

⁹² Freedom House, ‘Discarding Democracy: Returning to the Iron Fist’ (Freedom in the World Report, 2015) <https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf> accessed 30 April 2015.

⁹³ *ibid.* Some African countries did gain positive scores, which however did not change their principal designation (with the exception of Tunisia, which graduated from ‘partly free’ to ‘free’, and Guinea-Bissau, which improved from ‘not free’ to ‘partly free’).

⁹⁴ On the significance of domestic factors for the ‘success’ of efforts by international organisations at promoting democracy, see generally Daniel Silander, *Democracy From the Outside-In? The Conceptualization and Significance of Democracy Promotion* (Vaxjö UP 2005) 61ff.

⁹⁵ Lomé Declaration (n 66) para 11; Democracy Charter, art 23.

⁹⁶ Lomé Declaration (n 66) para 11; Democracy Charter, art 23(1)–(3).

⁹⁷ Lomé Declaration (n 66) para 11; Democracy Charter, art 23(4).

⁹⁸ Lomé Declaration (n 66) para 11; Democracy Charter, art 23(5).

⁹⁹ Freedom House (n 92).

coups, not just those directed at democratically elected governments. In part, this might be explained by the predominance of peace and security considerations when dealing with such events. Thus, strictly limiting the prohibition of coups to cases affecting elected governments may ultimately obstruct the AU's overall aim of ensuring regional peace and stability. Moreover, a literal interpretation of the regional norm against UCG might reinforce the impression that only coups against elected governments are considered illegal, while those targeting unelected regimes appear perfectly lawful. Implicitly, this would lead to a distinction between good (or 'legitimate') and bad (or 'illegitimate') coups—an exercise the AU has never been particularly keen to indulge in, favouring instead a rhetoric of 'zero tolerance' vis-à-vis all coups.¹⁰⁰ At the same time, however, the distinction between good coups and bad coups has been openly debated in academic and policy circles.¹⁰¹ According to some commentators, good coups may be defined as those that topple authoritarian governments and usher in a transition towards democracy, while bad coups can be understood as those that target democratic governments and hence thwart the will of the people.¹⁰² Along these lines, several observers have considered the 2005 Mauritanian coup a 'good' coup, despite the fact that it was met with condemnation and sanctions on the part of the AU.¹⁰³

Upon closer inspection, though, one can indeed detect some subtle variations in the tone and aggressiveness of the AU in its reaction to the 2005 coup in Mauritania, especially if compared to its actions in respect to the 2008 coup in the same country. The 2005 coup attracted much local and international sympathy in light of the repressive nature of the government of Maaouya Ould Sid'Ahmed Taya, who had seized power in a 1984 coup and later established his grip by winning subsequent elections that were widely considered to be a sham. While the AUPSC swiftly condemned the coup and suspended Mauritanian membership, demanding a restoration of constitutional order, the organisation generally supported the transition process as laid out by the leaders of the coup, and lifted the suspension as soon as Sidi Ould Cheikh Abdallahi was elected as president.¹⁰⁴ However, the rule of the newly elected president was short-lived as he, too, was deposed in a further coup in August 2008. This coup provoked a decidedly

¹⁰⁰ See AU Assembly, Report of the Chairperson of the Commission submitted to the 14th Ordinary Session of the AU Assembly on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage Such Situations (31 Jan–2 Feb 2010) AU Doc Assembly/AU/4(XIV), para V(30).

¹⁰¹ For an early account, see Charles Sampford, 'Coups d'État and the Law' (1989) 13 Bull Australian Soc L Phil 253, 284–85. See also Andrew C Miller, 'Debunking the Myth of the "Good" Coup d'État in Africa' (2011) 12 African Studies Q 45; Omorogbe (n 90) 153–54.

¹⁰² Ozan O Varol, 'The Democratic Coup d'État' (2012) 53 Harvard Intl LJ 292, 295.

¹⁰³ Issaka K Souaré, 'The AU and the Challenge of Unconstitutional Changes of Government in Africa' (2009) ISS Paper No 197, 5 <<http://africacenter.org/wp-content/uploads/2009/08/Th-AU-and-the-Challenge-of-Unconstitutional-Changes-of-Government-in-Africa.pdf>> accessed 4 January 2016. See also Boubacar N'Diaye, 'Mauritania, August 2005: Justice and Democracy, or Just Another Coup?' (2006) 105 African Affairs 420, 421–41.

¹⁰⁴ AUPSC, Report of the 163rd Meeting of the Chairperson of the Commission on the Situation in Mauritania (22 December 2008) AU Doc PSC/MIN/3 (CLXIII) (AUPSC Mauritania Report).

more aggressive reaction from the AUPSC, which immediately demanded 'the return to constitutional order through the unconditional restoration of (...) Abdallahi, President of the Islamic Republic of Mauritania, in his functions' within two weeks.¹⁰⁵ In addition to again suspending the country from the AU, the AUPSC imposed sanctions, including visa denials, travel restrictions and the freezing of assets on 'all individuals, both civilian and military, whose activities are designed to maintain the unconstitutional status quo in Mauritania'.¹⁰⁶ The AU's robust stance produced some effect, as the ousted president was made the head of a transitional government on the basis of a power-sharing deal. Mauritania's suspension was eventually lifted; the subsequent election, however, produced a somewhat unsatisfactory outcome for the AU, as General Mohamed Ould Abdel Aziz, the main author of the coup, finally became the newly elected president.

Prompted by the Mauritanian situation, the 2010 AU Summit decided that, as a matter of principle, perpetrators of coups should be barred from taking part in transitional elections (thereby affirming a rule of the Democracy Charter which had not yet come into force at the time).¹⁰⁷ Yet, complying with this rule in a coherent fashion is all but an easy task to complete, particularly in a post-crisis environment. In fact, the Mauritanian situation has vividly exemplified the recurring problems posed by a resort to power-sharing arrangements in an attempt at resolving coup-related stand-offs. While some coups may simply be the result of a personal thirst for power, or of rivalry between politicians and disgruntled members of the military, many coups in Africa tend to exploit existing ethnic and/or religious cleavages, as well as deep-rooted conflicts over the distribution of power and resources within society, hence garnering significant support from sections of the population. Such situations are putting the AU in the difficult position of having to deal with not just the coup in question, but also with the usually complex political and socio-economic issues underlying it. At the end, power-sharing arrangements are often seen as a necessary, if not desired, tool for conflict resolution.¹⁰⁸ The main challenge for the AU is that these arrangements may be in conflict with the logic of the regional norm on UCG by permitting coup perpetrators to participate in the newly formed transitional government. To subsequently bar these actors from standing as candidates in elections, which usually are seen as the culmination of a successful transition period, may not be easy to explain, and runs the risk of undermining the acceptance of the entire process by significant segments of the population of the country concerned.

¹⁰⁵ AUPSC, Communiqué (22 September 2008) AU Doc PSC/MIN/Comm.2 (CLI).

¹⁰⁶ AUPSC Mauritania Report (n 104).

¹⁰⁷ AU Assembly, Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage such Situations (2 February 2010) AU Doc Assembly/AU/4 (XIV) 5 (AU Decision on the Prevention of UCG).

¹⁰⁸ For a discussion, see Andreas Mehler, 'Introduction: Power-Sharing in Africa' (2009) 44 *Africa Spectrum* 2; Carl LeVan, 'Power Sharing and Inclusive Politics in Africa's Uncertain Democracies' (2011) 24 *Governance: Intl J of Policy, Administration & Institutions* 31; Stef Vandeginste, 'The African Union, Constitutionalism, and Power Sharing' (2013) 57 *J African L* 1.

Cooperation with other external actors involved in the resolution of coup-related crisis situations in Africa is a further (potentially) problematic issue for the AU. On the one hand, the AU often needs to rely on actors such as the UN, the EU, African sub-regional organisations and/or individual states,¹⁰⁹ all of which might be in a more favourable position to force conflicting factions into agreeing to a political settlement and to impose hard-hitting sanctions in case of non-compliance. The apparent reason for this is the fact that, absent more far-reaching economic integration at the continental level, the AU simply lacks the capacity to impose effective sanctions (the temporary suspension of states from membership or visa denials are all too often not ‘convincing’ enough to force perpetrators to ensure a speedy return to constitutional order).¹¹⁰ On the other hand, the plurality of actors may easily result in incoherence and contradictions in the approaches followed by the various institutions involved in coup-related crisis situations. A case in point is the 2011 Libyan crisis, in which the AU preferred a negotiated solution. Although the AU had condemned ‘the indiscriminate and excessive use of force (...) against peaceful protesters’ by the (former) regime of Muammar Gaddafi, it had also explicitly rejected ‘any foreign military intervention, whatever its form.’¹¹¹ However, this fairly clear message did not deter the non-permanent African members of the UN Security Council at the time (South Africa, Nigeria and Gabon) to vote in favour of Security Council Resolution 1973, which eventually authorised NATO’s heavily debated intervention in Libya.¹¹²

The so-called ‘Arab Spring’ presented further challenges to the AU policy on UCG. For one, the North African uprisings served as a further reminder of the need for a more effective linkage of the rejection of the UCG norm with the broader goal of democratisation. In addition, the events in Tunisia, Libya and Egypt revived the debate on ‘good’ coups versus ‘bad’ coups and, to some extent, forced the AU to openly engage in the debate by considering the question of whether and under what circumstances legitimacy should be accorded to regime changes based on popular uprisings.¹¹³ Indeed, some commentators have advised the AU to recognise revolutions and broad-based popular uprisings as a matter of principle.¹¹⁴ As has been argued elsewhere, such proposals

¹⁰⁹ As to the involvement of foreign states, it suffices to recall the decisive role played by France in the recent coup-related conflicts in Côte d’Ivoire (2010–11), Mali (2012), and Central African Republic (2013).

¹¹⁰ Other punitive measures envisaged by the Democracy Charter, such as the trial of perpetrators by a regional court (art 25(5)), remain elusive at this point because of the absence of a court to exercise such jurisdiction.

¹¹¹ AUPSC, Communiqué (23 February 2011) AU Doc PSCPR/COMM (CCLXI).

¹¹² UNSC Res 1973 (11 March 2011) UN Doc S/RES/1973. To be sure, the ‘regime-changing’ result of NATO’s UN-authorized air operation and the murdering of Colonel Gaddafi (a prominent long-time backer of the OAU/AU) at the hands of rebel groups did not go down well within AU circles.

¹¹³ Varol (n 102) 356; Jordan Paust, ‘International Law, Dignity, Democracy, and the Arab Spring’ (2013) 46 Cornell Intl LJ 1; Jonathan M Powell, ‘An Assessment of the Democratic Coup Theory: Democratic Trajectories in Africa’ (2014) 23 African Security Rev 1.

¹¹⁴ Solomon A Dersso, ‘The Adequacy of the African Peace and Security Architecture to Deal with Serious Democratic Deficits’ (2012) 21 African Security Rev 4, 13–15; Mehari T Maru, ‘The North African Uprisings Under the African Union’s Normative Framework’ (*Mehari Taddele Maru*, 11 October 2012)

tend to prematurely conflate the question of 'legality' with the question of 'legitimacy' of such events.¹¹⁵ Considering the AU's overall pro-democracy framework, one would assume that the latter should be determined not just by the degree of popular support for regime change (however that change is effectuated) but—first and foremost—by the democratic nature of the post-revolutionary process and resulting (new) government.¹¹⁶ Inconveniently, such an evaluation can almost always only be carried out retrospectively. The spectacular case of Egypt 2011–13 may serve to illustrate the problem.

While the protests in Tunisia, which triggered the Arab Spring, did not raise substantive legal issues, as they quickly led to the peaceful resignation of the government of former President Ben Ali, one may have thought that the ousting of President Mubarak during the 2011 Egyptian revolution (which only succeeded in the end due to the involvement of the military on the side of the protesters) would present a more critical situation to the AU. However, unimpeded by its previous practice on UCG, the AU was willing to throw its blessings on the revolution by publicly expressing support to what it described as 'the legitimate aspirations of the people'.¹¹⁷ As already pointed out in the paper's introduction, the AU's 50th Anniversary Solemn Declaration (adopted two years after the Egyptian revolution) even went to such lengths as to generally recognise 'the right of [the] people to peacefully express their will against oppressive systems'.¹¹⁸ Yet, only a month after the adoption of the 50th Anniversary Solemn Declaration, Egypt was to witness a further regime change at the hands of the military, again allegedly based on popular support, this time resulting from wide-spread dissatisfaction with the governance record of the new government under President Mohamed Morsi. This time, however, the protests and the subsequent action taken by the military were directed at a President who had been elected in free and fair elections and who served his term on the basis of a new democratic constitution (promulgated in December 2012).¹¹⁹

While the 50th Anniversary Solemn Declaration may appear to be generally sympathetic to regime changes based on popular protests, such an interpretation is, at best, unwarranted if the AU's strong reaction to the July 2013 Egyptian coup is anything to go by. In stark contrast to the muted response of other major international actors, such as the UN and the EU, the AU suspended Egypt from the organisation, thereby apparently demonstrating its will to ensure coherence in the implementation of the regional norm on UCG. In its decision, the AUPSC recalled the provisions of the Lomé Declaration and the Democracy Charter, and declared that 'the overthrow of

<<http://meharitaddele.info/2012/10/the-north-african-uprisings-under-the-african-union-s-normative-framework/>> accessed 4 January 2016.

¹¹⁵ Kalkidan N Obse, 'The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice' (2014) 27 LJIL 817, 822.

¹¹⁶ *ibid.*

¹¹⁷ AUPSC, Communiqué (16 February 2011) AU Doc PSCPR/COMM (CCLX). For a detailed account of the Egyptian 'coup' of 2011 and the AU's response, see Varol (n 102) 339–56.

¹¹⁸ 50th Anniversary Solemn Declaration (n 1).

¹¹⁹ Constitution of the Arab Republic of Egypt (2012).

the democratically elected President does not conform to the relevant provisions of the Egyptian Constitution and, therefore, falls under the definition of an unconstitutional change of Government'.¹²⁰ Eventually, however, the suspension was quickly lifted following a new round of presidential elections in May 2014, in which the main architect of the 2013 coup, Abdul Fattah al-Sisi, was perfectly able to take part¹²¹—a practice quite obviously deviating from the text of the African Democracy Charter and official AU Assembly Decisions.¹²²

The 2014 coup in Burkina Faso further illustrates the difficulty in adequately responding to unconstitutional regime changes associated with popular uprisings. As such, the coup was directly rooted in President Blaise Compaore's attempt to (again) extend his 27 years in power through constitutional amendment.¹²³ Though Burkina Faso had, at the time, already ratified the Democracy Charter, the AU was unable to intervene in the dispute concerning the constitutional amendment, only arriving at the scene following the popular uprising which led to the resignation of the President and the military's eventual stepping in to lead the ensuing transition.¹²⁴ The AUPSC responded by expressing its acknowledgement of the 'profound aspiration [of the people of Burkina Faso] to uphold their Constitution and to deepen democracy in the country', while at the same time condemning the military's suspension of the constitution and assumption of power as constituting 'a coup d'état'.¹²⁵ Tellingly, however, the AUPSC—being aware of the lack of ECOWAS support for such action—shied away from suspending Burkina Faso from the AU, although it demanded that 'the military steps aside and hands over power to a civilian authority (...) within a maximum period of two weeks (...), failure of which, [sanctions] shall be instituted'.¹²⁶ Burkina Faso's new regime seemed rather unimpressed. While confirming his government's will to soon take steps towards a civilian-led transition process and the restoration of constitutional order, the country's interim leader, Lieutenant Colonel Isaac Zida, responded to the AU's threat of sanctions by stating: 'We are not afraid of sanctions; [we] care much more about stability. (...) We have waited on the African Union in moments when it should have shown its fraternity and friendship but instead was not there'.¹²⁷

¹²⁰ AUPSC, Communiqué (5 July 2013) AU Doc PSC/PR/COMM (CCCLXXXIV).

¹²¹ AUPSC, Communiqué (17 June 2014) AU Doc PSC/PR/COMM.2 (CDXLII).

¹²² Democracy Charter, art 25(4); AU Decision on the Prevention of UCG (n 107).

¹²³ See 'Burkina Faso General Takes over as Compaore Resigns' *BBC News* (1 November 2014) <<http://www.bbc.co.uk/news/world-africa-29851445>> accessed 4 January 2016.

¹²⁴ As a result, the AU has arguably neglected art 23(5) Democracy Charter.

¹²⁵ AUPSC, Communiqué (3 November 2014) AU Doc PSC/PR/COMM (CDLXV).

¹²⁶ *ibid.*

¹²⁷ See 'Burkina Faso's Isaac Zida dismisses African Union intervention' *BBC News* (7 November 2014) <<http://www.bbc.com/news/world-africa-29948773>> accessed 30 April 2015.

5 Concluding remarks

In recent years, the AU has gone to great lengths in establishing and consolidating a regional norm against UCG; a norm it has clearly linked to the broader goal of entrenching constitutionalism and democratic governance in Africa. However, notwithstanding the AU's 'zero-tolerance' rhetoric in respect of UCG and the formal strengthening of its sanction machinery against coup perpetrators under the 2007 Democracy Charter, the organisation continues to grapple with the general difficulty of applying a rather static and formalistic international rule to what will almost always present itself as a complex, fluid and inherently political domestic crisis situation. Indeed, both 'unconstitutional accessions to power' as well as 'unconstitutional preservations of power' will usually have the effect of altering the existing political and legal status quo in the country concerned, thereby producing a new situation (*a fait accompli*), which makes the task of restoring the status quo ante a tremendously difficult undertaking. In the African context particularly, authors of coups often exploit ethnic and/or religious cleavages as well as deep-rooted social conflicts over the distribution of power and resources, hence garnering significant support for their actions from sections of the population. If successful, such coups thus usually force international actors involved in the resolution of the crises to pursue an outcome that is somehow acceptable to the coup plotters and their respective support base. This partly explains the difficulty facing the AU in enforcing the more punitive aspects of the regional norm against UCG and the resort to power-sharing arrangements when attempting to resolve coup-related stand-offs. Specifically, it explains the AU's repeated inability to enforce the rule prohibiting coup perpetrators from taking part in post-coup elections and newly formed governments.

Recent events associated with the 'Arab Spring' have presented further challenges to the AU policy on UCG, and forced the organisation to openly engage the question of whether (and under what circumstances) to accord legitimacy to regime changes based on popular uprisings. Egypt obviously is the most significant example in this regard. While the AU has been generally supportive of the 2011 Egyptian revolution, the 2013 coup—again allegedly based on 'legitimate' demands by the Egyptian people—clearly has tested the AU's initial enthusiasm for popular uprisings. At the end, the AU's handling of the case—especially its quick lifting of the Egypt's suspension from the organisation after the contested 2014 presidential elections (which were held without participation of the Muslim Brotherhood, whose political arm had won every prior post-Mubarak electoral contest)—has sent conflicting messages. More recently, the 2014 coup in Burkina Faso is a further reminder of the difficulty in responding to UGC that are presumably in accordance with the will of a vast majority of the population concerned. In its reaction to this crisis, the AU designated the eventual stepping in of the military as a coup d'état, regardless of the fact that the military's move was preceded by widespread civilian protest against the ousted ruler's attempt to once again extend his 27 years in power through constitutional amendment. In what appears to be a sort of 'self-restraint', however, the AU refrained from suspending Burkina Faso from the organisation.

While the AU has generally been more hostile to unconstitutional action against (elected) incumbent governments, it has, more often than not, turned a blind eye to cases of unconstitutional preservation of power by governments that refuse to accord equal rights and a level playing field to opposition candidates (particularly in the context of elections).¹²⁸ Although there has been increasing realisation within the AU that UCG result from various ‘democratic deficits’, it is still unclear which cases of ‘democratic backsliding’ can be brought under the rubric of UCG. Owing to its limited scope, the regional norm on the rejection of UCG only seems to outlaw some of the most obvious instances of threats to democratic governance. In spite of the progressive nature of the relevant normative framework, cases of failure to respect democratic principles and the rule of law short of coups d’état and unconstitutional removals of existing term limits simply lack reliable and efficient monitoring and enforcement mechanisms within the AU. Theoretically, the standing African Court on Human and Peoples’ Rights (ACtHPR) could have a role to play here—a thought assisted by the Court’s 2013 decision in the *Mtikila* case, in which it interpreted article 10 (freedom of association) and article 13 (participation in government) of the Banjul Charter so as to firmly uphold the right of independent candidates to run for presidency (thereby rendering illegal a recent constitutional amendment in Tanzania that has barred such candidates from presidential elections).¹²⁹ Unfortunately, as a result of the current non-ratification of its Statute by half of the AU’s member states, and the fact that only a handful of those who ratified have also recognised its capacity to entertain individual complaints, the ACtHPR suffers the fate of a rather neglected institution within the AU system.¹³⁰

Overall, the recent emergence of a comparatively progressive AU framework tackling the continent’s recurring problem of UCG is, as such, certainly a positive and laudable development. However, given its significant limitations and shortcomings, particularly in terms of practical implementation and enforcement, any hopes that the existing AU regime on UCG will bring about the effective protection and lasting entrenchment of the values of constitutionalism and democratic governance in Africa should be balanced by realistic and, hence, decidedly lowered expectations.

¹²⁸ Ademola Abass, ‘African Regional Organizations, the African Peace and Security Architecture and the Protection of Human Rights’ in Ademola Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 280.

¹²⁹ *Mtikila and others v Tanzania* App nos 009/2011 and 011/2011 (ACtHPR, 14 June 2013) paras 99, 114.

¹³⁰ Of the 54 AU member states, 27 have so far ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 10 June 1998, entered into force 25 January 2004) OUA Doc OUA/LEG/EXP/AFCHPR/PROT (III), with only seven of these states making the optional declaration permitting the Court to entertain individual complaints. Against this backdrop, it is particularly regrettable that the AU has so far been overly sluggish in establishing the planned (merged) African Court of Justice and Human Rights, whose broad mandate would likely enable it to interpret the obligations entailed under the full range of instruments that make up the AGA.