

Concerning Kenya: The Current AU Position on Unconstitutional Changes in Government

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Ahead of the forthcoming tenth summit of the African Union (AU), to be held in Addis Ababa in January 2008, this article sets out the legal foundations and principles that should inform the decisions of the AU and international community in responding to the allegations and issues arising from the current situation in Kenya.

The Constitutive Act of the African Union provides among the foundational principles of the AU established by Article 4 that the Union ‘shall function in accordance with’:

- ...
- (m) Respect for democratic principles, human rights, the rule of law and good governance;
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- (o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; and
- (p) Condemnation and rejection of unconstitutional changes of governments.

Specifically, Article 30 of the Constitutive Act provides:

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

The prohibition of unconstitutional changes in government is very well established in the AU. This norm is a fundamental principle of the AU. More significantly, it is the only commitment in the Constitutive Act for whose breach a sanction is prescribed, suggesting that the treaty recognizes it as a limitation to the general principle of domestic jurisdiction and non-interference.

Unconstitutional changes in government establish dictatorships, subvert democratic governance, preclude the exercise of the rights of people to constitute or change their government, and lead to gross violations of human rights. The prohibition of unconstitutional changes in government by the Constitutive Act may thus be seen as a distinct African recognition of a right to constitutional democratic governance in international law.¹ It is inherent in the right to participation contained in Article 13 of the African Charter on Human and Peoples’ Rights.² Udombana argues that ‘democratic governance has emerged as a human right under general and particular international law.... Dictatorship in every ... manifestation, has become a taboo in Africa.’³ Roth adds in a study on governmental illegitimacy that ‘governments violate international law where they do not predicate their rule on popular will.’⁴

¹ See Udombana N., *Human Rights and Contemporary Issues in Africa*, Chapter 2, 35-106 (2003) Crawford J., ‘Democracy and International Law’, 64 *BYIL*. 113 (1993); Franck T., ‘The Emerging Right to Democratic Governance’, 86 *AJIL* 46 (1992).

² African Charter on Human and Peoples’ Rights, Article 13(1): ‘Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law’

³ Udombana N., *Human Rights and Contemporary Issues in Africa*, *supra*, 92.

⁴ Roth B., *Governmental Illegitimacy in International Law*, 37-38 (2000).



The prohibition against unconstitutional changes in government no doubt sought to address the problem of perennial governmental instability in Africa. Between the Egyptian revolution in 1952 and 1998, there were 85 violent or unconstitutional changes in government,⁵ 78 of which took place between 1961 to 1997.⁶ For the most part, the Organisation of African Unity (OAU), the African Union's predecessor, regarded these as essentially within the domestic jurisdiction of its member States. Howsoever defined, and as long as this practice of the OAU remained, there existed a fundamental tension in African inter-state practice between the OAU's attitudes to unconstitutional changes in government and Article 13 of the African Charter. By firmly prohibiting unconstitutional changes in government, the African Union finally resolves these tensions in favour of the right to participation and validates the constitutive role of popular will in establishing legitimate government.

During the lifetime of the OAU, the manner of accession to power was, with very few exceptions, an irrelevant factor in regime recognition. Occasionally, however, recognition of usurper regimes was deferred or delayed because of strong opposition by a few member states based on ideological affinity with the deposed presidents, as in the case of Tanzania's opposition to the usurpers of Nkrumah in Ghana and Obote in Uganda. In some other cases, such opposition was founded on geo-strategic calculations (as in the case of Libya's opposition to the regime of Hissène Habré in Chad). The initial isolation of the Liberian regime of Samuel Doe in 1980 seems to have been informed by a collective fear within the then leadership of the OAU of an indiscriminately bloody form of unconstitutional change master-minded by junior and non-commissioned military officers.⁷

The story of the emergence of this norm in the OAU/AU illustrates the ways in which the different institutions with a role in international law-making in Africa have worked together to set in place the new principle. The Constitutive Act does not define unconstitutional change in government. However, for the fifteen years before it was adopted, the responses in practice to controversial regime change in African states had already been establishing its meaning.

During the 1990s, the African Commission on Human and Peoples' Rights, responsible for ensuring respect of the African Charter, was required to interpret Articles 13 and 20 of the Charter, on political participation and self determination,⁸ in relation to two forms of unconstitutional changes of government, in cases against Nigeria and The Gambia. In June 1993, the military regime in Nigeria annulled a general election mid-way through the announcement of voting returns. Deciding on a communication challenging this decision, the African Commission held that the annulment violated Articles 13 and 20(1) of the Charter.⁹ In a later case brought by deposed Gambian President Dawda Jawara, the Commission concluded that a 'military *coup d'état* was, therefore, a grave violation of the right of Gambian people to freely chose their government as enshrined in Article 20(1) of the (African) Charter.'¹⁰

In 1993, the OAU adopted the Cairo Declaration establishing a Conflict Resolution Mechanism within the OAU, enabling OAU member states to establish through practice the consequences of

⁵ van der Linde M., 'Emerging Electoral Trends in the Light of Recent African Elections', I AHRLJ 127, 128 (2000).

⁶ Adeyanju A. 'Africa records 78 coups in 30 years', *The Guardian*, Lagos, 9 February 1997.

⁷ Kufuor K.O., 'The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future', 17 Am. U. Int'l L. Rev. 369, 380-385 (2002).

⁸ African Charter on Human and Peoples' Rights, Article 20(1): 'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.'

⁹ Communication 102/93, Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, (2000) AHRLR, 191, 198, paras 50-53.

¹⁰ Communications 147/95 and 149/95, Sir Dawda K. Jawara v. The Gambia, (2000) AHRLR. 107, 118, para. 73.

unconstitutional changes.¹¹ In 1995, the organization constituted a committee of ambassadors to examine ways of dealing with unconstitutional changes in government.¹² In July 1996, the states of the Great Lakes region of East and Central Africa resolved to impose a regional blockade on the government of Burundi following an unconstitutional change of government.¹³ By 1997, guided by the principles of the Conflict Resolution Mechanism, the OAU ‘strongly and unequivocally’ condemned the military coup that overthrew President Tejan Kabbah in Sierra Leone, and called on ‘all African countries and the international community at large to refrain from recognizing the new regime and lending support in any form whatsoever to the perpetrators of the *coup d’état*.’¹⁴ This was the first time in the history of the OAU that it had achieved unanimity on the question of refusal to recognise a new regime.

Also in 1997, the OAU Assembly of Heads of State and Government adopted two decisions both reaffirming the right to participation as the basis of legitimate government,¹⁵ and setting a time limit for governments established by unconstitutional means to restore constitutional government.¹⁶ In its Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government adopted in 2000, the Assembly agreed on the following definition of situations that could be considered to be unconstitutional changes of government:

- 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; and
- iv) *the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.* (Emphasis added.)¹⁷

This Declaration also outlined the measures to be taken by the OAU in the event of unconstitutional changes in government, including the suspension of the usurping regime from the OAU, an ultimatum to re-establish elected government within a stipulated period of not more than six months and a peer-pressure instrument through an Eminent Persons Contact Group mobilised at the instance of the Chairperson of the AU Commission.¹⁸

¹¹ See OAU, Resolving Conflicts in Africa: Implementation Options (1993).

¹² OAU, Report of the OAU Central Organ Sub-Committee on the Preparation of a Blue Print for Dealing with Unconstitutional Changes of Government in Africa, Sub-Cttee/Central Organ/Rpt. (III) (1996).

¹³ This resolution was later supported by the United Nations Security Council and by the OAU. See, Communication 157/1996 - Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, 17th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Annex VII, para 2. See CM/Dec.355 (LXVI) (1997).

¹⁴ CM/Dec. 357 (LXVI), para. b (1997).

¹⁵ Decision on the Rights of Political Participation, AHG/Dec. 141 (XXXV) 1999.

¹⁶ Decision on Unconstitutional Changes in Government, AHG/Dec. 142 (XXXV), 1999.

¹⁷ AHG/Decl.5(XXXVI). This definition was a partial adoption of a much wider ranging definition recommended by a Sub-Committee of the Central Organ (of the OAU Conflict Resolution Mechanism) which was constituted in 1995 and reported in 2000. The categories of unconstitutional changes in government recommended by the Sub-Committee, included, in addition to the four adopted eventually by the Assembly, the refusal by a government to call for general elections at the end of its term of office; any manipulation of the Constitution aimed at preventing a democratic change of government; 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. See OAU, Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa, paras 25(v)-(iv), (2000).

¹⁸ In response to the most recent coup in Africa in Mauritania on 3 August 2005, the AU decided on 4 August 2005 to suspend the State from the Union, and required the usurper military Committee for Justice and



This was followed in 2002 by the adoption of a Declaration on the Principles Governing Democratic Elections in Africa.¹⁹ A regional Charter on Democracy, Elections and Governance adopted in January 2007 finally gave treaty status to the definition of unconstitutional changes, adding to the four categories recognized in the Declaration on the Framework for an OAU Response, a fifth, namely: ‘manipulation of constitutions and legal instrument for prolongation of tenure of office by (an) incumbent regime’.²⁰ Thus the AU crystallized a sanction-backed prohibition against unconstitutional changes in government from regional custom to treaty law.

If the determination is that an incumbent regime has refused to accept the outcome of a freely organized election, then there is a strong basis for asking the AU member states to abide by their Constitutive Act and suspend the participation of Kenya in the activities of the Union.

Democracy (CMJD), to restore constitutional government by March 2007. See, African Union, Report of the Commission for the Period July to December 2005, EX.CL/233 (VIII), paras 165-165.

¹⁹ Declaration on the Principles Governing Democratic Elections in Africa, OAU AHG/Decl. 1(XXXVIII), 2002.

²⁰ African Charter on Democracy, Elections and Governance, Article 27(5).