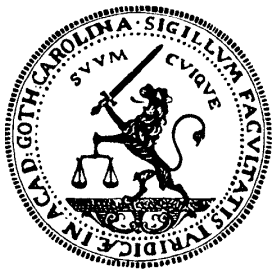

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- The African Union way

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Innehåll

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Summary

Unconstitutional changes of government has been a major problem in Africa since decolonization with military coups being a more common way of changing government than democratic elections. The African Union (AU) was established in 2001 and has since then provided a significant development of the African law, not the least in the branch of law covering the AU response to unconstitutional changes of government (UCG). The AU predecessor Organization of African Unity (OAU) had the general policy that unconstitutional changes of government were to be considered a national concern. Consequently the OAU did not have any provisions allowing measures to be taken against them. Since the establishment of the AU the organization has developed an extensive legal framework for response to unconstitutional changes of government, which is a very important development towards giving the rule of law and the compliance with international law a greater impact in Africa. This includes first and foremost a definition of what an unconstitutional change of government is according to the AU. Secondly the provisions governing the measures to be used against the unconstitutional changes of government are an important part in this framework. The third part of the AU response to unconstitutional changes of government is the decision making structure and the division of legislating, implementing and executive power between the Union organs.

The furthest reaching measures in the AU framework for such responses are targeted sanctions. The policy of adopting targeted sanctions are the last step in a process starting with condemnation of the unconstitutional change of government, suspension from the meetings of the union and mediation/negotiation efforts to get the coup makers to restore constitutional order. Sanctions as the most interfering and legally controversial measure of these has a special focus in this thesis which aims at taking stock of the development of international law that has taken place within the African Union. Another research question is what shortcomings the AU law has in the respect of being a successful framework for rule of law and compliance with international law.

The African Union is a very important actor for promoting democracy on the African continent and the existing regime for imposing sanctions against those breaking the democratic principles holds a lot of hope for the future. At the same time both the design of this regime and the implementation of it have defects. Theses are for instance a too narrow definition of an unconstitutional change of government leaving out type two unconstitutional changes of government from the main framework of response and that the provisions for imposing sanctions, especially on type two UCGs, not are forcing but allows the political will to decide whether or not sanctions should be implemented or not. The organizational structure of the AU also has its defects causing a low efficiency in the work towards increased democracy and stability on the continent. This is to a large extent

due to a lack of implementation and monitoring mechanism, such as an efficient union court. Positive legal development can though be seen, for example the AU in February 2010 decided not to allow coup makers to stand in elections to restore constitutional order anymore. Given the modest starting point of the union, what it has achieved in ten years is very impressive and promising for a future Africa more in harmony with international law.

Sammanfattning

Ickekonstitutionella regeringsförändringar har varit ett stort problem i Afrika sen avkoloniseringen och militärkupper har varit en minst lika vanlig form av regeringsbyte som demokratiska val. Afrikanska unionen (AU) har sen den bildades 2001 utvecklat den afrikanska internationella rätten för att kunna hantera dessa situationer. AU:s föregångare Organisationen för afrikansk enighet (OAU) hade inställningen att ickekonstitutionella regeringsförändringar i allmänhet var att betrakta som en nationell angelägenhet och hade således inga regler som tillät åtgärder för att bemöta dem. AU däremot, har under senare tid utvecklat ett relativt omfattande regelverk för respons vid icke-konstitutionella regeringsförändringar. Detta är ett mycket viktigt steg mot att öka rättssäkerheten och inflytandet av internationell rätt i Afrika. Detta inkluderar först och främst en definition av vad en ickekonstitutionell regeringsförändring är enligt AU men också föreskrifter för med vilka medel dessa ska behandlas, vilka organ som är inblandade i beslutsfattande, verkställande och utvärdering.

De åtgärder som är mest långtgående i AU:s åtgärdspaket är riktade sanktioner av olika slag. Dessa är sista steget i en process som startar med fördömelse av den ickekonstitutionella regeringsförändringen, utestängning från unionens möten och medling/förhandling med kuppmakarna för att återställa konstitutionsenlig ordning. Sanktioner som den mest ingripande och folkrättsligt kontroversiella åtgärden har getts extra fokus i denna uppsats vilken syftar till att inventera den internationella rätt som utvecklats inom AU. Vidare ska också de brister som fortfarande finns i AU rätten för att den ska bli framgångsrik som regelverk för ökad rättssäkerhet och åtlydnad av internationell rätt undersökas.

AU är en oerhört viktig aktör för att främja demokrati i Afrikanska stater och AU:s regelverk för att implementera sanktioner mot ledare som bryter demokratiska principer är mycket hoppingivande för framtiden. Samtidigt finns stora brister både i utformningen av detta regelverk och i verkställandet. Bristerna är bland annat en för smal definition av ickekonstitutionella regeringsförändringar, sanktionsföreskrifter som ej är tvingande utan till stor del tillåter den politiska viljan avgöra huruvida sanktioner ska implementeras eller inte. AU som organisation har också brister som leder till en för låg effektivitet i arbetet mot ökad demokrati och stabilitet på kontinenten. Detta beror till stor del på bristen på verkställande och övervakande mekanismer inom unionen, vilket till exempel en unionsdomstol skulle kunna råda bot på. Positiva tendenser i unionens utformning av ett juridiskt ramverk är dock tydliga och med tanke på att Afrikanska Unionen har kommit från i princip ingenstans till dit den är idag på inte ens tio år är utvecklingen imponerande och mycket hoppingivande inför ett rättssäkrare Afrika i framtiden.

Acknowledgments

I want to thank my colleagues at the Swedish Defence Research Agency in Stockholm, where I did an internship working with to this thesis related issues, for there for their patience and help. Special thanks are given to my wonderful supervisor there Mikael Eriksson who has been an invaluable support and inspiration to me during the whole process, helping me with everything from small details to straightening out my overarching thoughts on the subject.

I have also received a lot of help with finding important information about the AU and its work from Daniel Kuwali *Captain, Legal Officer of the Malawi Defence Force*, Mathias Krüger *First Secretary at the Swedish Embassy to Ethiopia*, Roba D. Sharamo *Programme Head of the Conflict Prevention Programme at the Institute for Security Studies* (ISS) in Addis Ababa and Professor Charles Manga Fombad *Head of the Department of Public Law*, University of Pretoria.

Last but not least I also wish to express my sincere gratitude to my supervisor, Karol Nowak at Raul Wallenberg institute, for his valuable feedback on this thesis.

For all this help I am most grateful!

Preface

When working with and studying international law African states are sometimes seen as a problem area where western values of democracy and rule of law are being ignored. With this thesis I wanted to study the efforts made by the young regional organization, the African Union, to deal with democracy problems, more specifically unconstitutional changes of government, which has been a problem on the continent. This to show that there is a very important and positive development going on in Africa that is often overlooked, and not supported and acknowledged enough.

Another reason for studying this area is that it is a very new and so far unexplored field of law, which definitely needs more attention. The African Union is still under development and it needs input to become the influential and reliable actor in international law and promoter of democratic values that Africa and the whole world needs.

I want to dedicate this thesis to the people who inspired me and helped me in the, not always easy but very rewarding work of finalizing this essay. Thank you all, you know who you are!

Abbreviations

AFS	African Standby Force
APSA	African Peace and Security Architecture
AU	African Union
CA	Constitutive Act of the African Union
CEWS	Continental Early Warning System
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
IGAD	Inter-Governmental Developmental Authority
MAES	AU Electoral and Security Assistance Mission to the Comoros
MDC	Movement for Democratic Change
NARC	North African Regional Capability
NGO	Non Governmental Organization
OAU	Organization of African Unity
REC	Regional Economic Community
RoPA	Rules of Procedure of the Assembly of the Union
SADC	Southern African Development Community
PSC	African Union Peace and Security Council
UCG	Unconstitutional change of government
UN	United Nations
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZEC	Zimbabwe Electoral Commission

1 Introduction

Africa has since the decolonization in the 1960s seen many problems. Conflicts, starvation, droughts, wars and corrupt leaders have plagued the continent but Africa is also a part of the world that has a lot of potential which the precursor to the African Union wanted to promote when it was established already in 1963. Positive development is taking place in many corners of the continent today and the cooperation between the countries is an important part of this. The thought of ”African solutions to African problems” that has been a guiding principle in the striving for a more prosperous continent has already given Africa more credibility and a higher self esteem in the context of international law.

The African Union (AU) has, notwithstanding its short life span, become central in this development and elaborated a whole new legal framework for actively preventing and responding to unconstitutional changes of government. The AU predecessor, Organization of African Unity (OAU) saw unconstitutional changes of government as a national concern, to be handled by the individual member state and did not deal with the problem.

To change this policy and create a more effective union taking the non compliance with international law more seriously, new statutes governing the countries interaction on matters like peace, security and development was adopted. New institutions were built, with more extensive powers than the previous organs. An important change that came with the new organization was the set up of a more ambitious peace and security architecture.[1] The most important step in realizing this was the establishment of the African Union Peace and Security Council in 2004 and the mandate it got including the legal power to deploy military and political interventions and impose sanctions on member states. This was a radical change from the OAU principle of non intervention and it shows a new found confidence and a political will to create a safer and more peaceful Africa through development of AU law.[2]

Since the establishment of the AU, the organization has engaged in the work against unconstitutional changes of government and developed a whole set of rules on how and when sanctions against these unwanted incidents are to be implemented. In this essay these regulations and how they are implemented in reality will be closer examined. Since sanctions are the part of the AU package to restore constitutional order which is most intrusive of the member states sovereignty, these will be reviewed a little closer than the other measures provided for. To get an idea of the level of implementation in reality four countries will be investigated to see if the Union follow its own statutes on how and when to react to different types of unconstitutional change of government.

[1] Engel pp. 1-10
[2] Akokpari pp.3-4

Although there is contemporary and considerable scholarly discourse on the peace and security architecture of the African Union in general no comprehensive examination on the union's sanctions regime has been made with regard to its legal aspect.[3] So far the most tangible research has been made by among others Paul Williams who has inter alia focused on the PSC as an acting body. Since the organ is so new not many studies have examined the actual achievements of the PSC but only the framework for it to act under. There is also some existing research on the peace keeping missions of the AU and on the AU right to intervene but the sanctions regime in regard to unconstitutional changes of government is on the whole unexplored land. Professor Charles Fombad has investigated the legal status of African Union legal acts, but not with focus on the AU response to unconstitutional changes of government. Another scholar in the field is Issaka K. Souare who has studied the phenomenon of unconstitutional changes of government itself.[4] All these studies are most interesting but lacking the holistic view, of the Union's legal possibilities and practical capacity to respond efficiently to unconstitutional changes of government, presented in this thesis. Here the AU organs and the legal framework within which they can act against unconstitutional changes of government will be examined and the analysis will focus on if the existing AU law is complied with by union organs and what would need to be improved for a better working rule of law and predictability of the AU response to these incidents.

1.1 Purpose and Aim

The aim of this study is to analyze the African Union's legal capacity to respond to unconstitutional changes of government. More specifically the aim is to demonstrate what kind of situations the Union's legal acts find illegal and when the union has the power to take decisions and implement sanctions against a member state. One important way of doing this is to discuss and deconstruct AU's legal definition of unconstitutional changes of government according to the AU legal framework. After examining the situations that are possible to sanction an investigation of what types of sanctions the AU can use, and which of the organs that are authorized to take that kind of decisions will be made. The purpose of this is to analyze the AU response to unconstitutional changes of government and see if the legal framework is suitable for combating this type of incidents. To get a

[3] Ebobrah, *The African Charter on Democracy, Elections and Governance: A New Dawn for the Enthronement of Legitimate Governance in Africa?,* El Abdellaoui, *The Panel of the Wise - A comprehensive introduction to a critical pillar of the African Peace and Security Architecture,* Engel, *The African Union's New Peace and Security Architecture: Toward an Evolving Security Regime?,* Sturman, *Challenges facing the AU's Peace and Security Council,* Touray, *The Common African Defence and Security Policy,* Williams, *Thinking about security in Africa* and *The Peace and Security Council of the African Union: evaluating an embryonic international institution.*

[4] Also see Souaré, *Mauritania: Auto-Legitimising Another Coup-Maker in Africa?* and *The AU and the challenges of unconstitutional changes of government in Africa.*

picture of how the AU provisions have been implemented in reality a closer examination will be made of four cases of unconstitutional changes that have occurred in the last few years. The selection of the countries is based on what kind of unconstitutional change of government that has taken place there and a number of other considerations which will be presented in chapter five.

The comparison of the case studies will be made on basis of a number for guiding questions to identify the answers to the research questions below; when and how have the decisions been taken? Have the decisions been followed by activity as prescribed in the legal acts or in an amount one could wish for? In situations where no sanctions have been implemented, has that been due to shortcomings in the constitution of the Union or in political will? Reflections will also be made on what changes could be executed to get a more effective sanctions regime. To sum up, is the AU law on this field satisfactory or what needs to be improved to achieve an acceptable level of rule of law and compliance with international law?

1.1.1 Research Questions

To clarify what issues this thesis will deal with and try to answer these are the questions in focus:

- What does the African Union's law on sanctions look like?
  - In what type of situations can the African Union impose sanctions?
  - What sanctions can be used?
  - What organs can make the decisions and how?

- How have sanctions been implemented/ not implemented in these four countries:
  - Madagascar
  - Mauritania
  - Comoros
  - Zimbabwe

- Has the existing AU law been complied with in these four cases?

- What are the pros and cons in a legal perspective of the African Union structure and the African Union sanctions regime including the definition of unconstitutional changes of government?
- What shortcomings does the existing AU law have in the sanctions area and what could be done to improve it?

1.2 Method, Materials and Theory

The methodology to answer my research questions has mainly been a traditional legal method which includes strict rules for what sources of law that should be studied for finding the answer to the eternal question; what does the law really imply? The main sources of international law are according to article 38 of the Statute of the International Court of Justice three:

- International conventions of general or particular nature
- International practice, as evidence of general practice accepted as law
- The general practice of law as recognized by civilized nations

To find the answers to what the law really implies I have followed these rules. To this aim I have used AU treaties as the basic legal source and studied the African Unions statutes, charters and protocols and interpreted them and their legal value according to fundamental legal principles and international treaty law. Other sources of law acknowledged in a traditional legal method are preparatory works and case law.[5] Unfortunately there is not any official preparatory work to the AU law that one can use as guidelines and neither and case law, since there is not yet a operationalized AU Court interpreting the AU law. Doctrine is also scares on the topic of AU law in general, not the least on the field of sanctions and unconstitutional changes of government, as mentioned before. Because of that, general international law has been used as guiding principles and the political will has served as a hint on how to understand the underlying objective of the law, or at least how it most likely will be realised by the AU. When trying to establish a definition for the term unconstitutional changes of government several legal instruments were studied and interpreted in correlation with the others. International treaty law was helpful here but since no legal cases could be studied the discussion had to be purely theoretical.

Since this study also include political aspects and elements of organizational structure I have tried to widen the legal approach to also let other factors be influential in my analysis. The utility of society has therefore also been a factor included in the analysis of how effective the framework for response to unconstitutional changes of government is.

The theory I use is due to my background and education very influenced by a western perspective on democracy as the leading form of government, it puts rule of law as a central component in achieving democracy and prosperity and sees this as the only acceptable development. My theory accepts sanctions against unconstitutional changes of power as a means to restore democracy and therefore finds it justifying the intrusion in state sovereignty that it involves. Another premise is that a unified and strong

[5] Kelsen, p. 111-114

Africa with a high level of democracy and stability is better than the opposite and that sovereignty might have to be surrendered for a certain amount supra nationality, as long as it is based on promotion of human rights and rule of law, to achieve this. It is in these fundamental values this thesis has its starting point.

The material reviewed in this study is mainly basic legal instruments of the AU, such as the Constitutive Act of the African Union and the Rules of Procedure of the Assembly. Regulations, decisions and protocols adopted by the Assembly or the Peace and Security Council have also been important sources. The African Union website is somewhat informative and contains most of these important documents. The thesis is also based on secondary literature from academic, civil society and African Union sources as well as doctrine. Finding information for the case studies about the situation in the different countries was a little harder. I did a lot of database searching, reading of articles, looking through magazines and newspapers, reviewing of all AU Assembly decisions, Executive council decisions and Peace and Security Council communiqués I could find.

1.3 Delimitations

This study is investigating the African Union's capacity to impose sanctions in general and also how it has been implemented in four specific cases. The review is not meant to be a complete list of all the Unions sanctions but four situations will be studied in debt to illustrate examples of how the AU has acted. The thesis is neither a comprehensive exposition of sanctions in general but takes its starting point in the African Union's framework of rules regarding sanctions. The legal basis for the AU to impose sanctions, the different types of sanctions the AU can use and the rules providing legal powers to the AU organs to take the necessary decisions are the issues regarding sanctions that will be studied.

The thesis is dealing with different kinds of unconstitutional changes of government. I will not look into reasons for why unconstitutional change of government happen or for example try to distinguish if there are more or less wanted unconstitutional changes of government. Four specific cases of two different types of unconstitutional changes of government and the AU response to these will be studied in chapter five. The division of the unconstitutional changes of government into two categories is based on two different regimes in the AU legal acts allowing sanctions to be implemented. Two countries were chosen from each category to enable a study of the differences between the frameworks of response covering the different categories. Another aspect that were considered when selecting the four cases were the point in time when the unconstitutional change of government happened, after the operationalization of the Peace and Security Council to better be able to compare the responses. Also the availability of information and that AU at all had responded or discussed the case was criterions that had to be fulfilled to make the study meaningful.

Another limitation of the study is the time period under investigation. The African Union was established in 2001 and therefore the study is limited to the time period from 2001 to 2009. Some of the rules now in force as a part of the African Unions sanctions regime were established under the OAU and but the OAU is not the focus of this study and will therefore not be studied in debt or compared with the current Union's regime. Excluded from the essay are also the evaluation of the implementation process and the effectiveness of sanctions implemented.

1.3.1 Definitions

Sanctions are according to the International Law Commission reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community.[6] A further description of what sanctions are will be given in chapter three.

There is no single definition of unconstitutional changes of government. I will first of all work with the definition applied by the African Union according to its different legal instruments (type one UCG), but also go beyond that and develop my own definition (type two UCG).

Type one unconstitutional change of government is defined in the Constitutive Act of the African Union, The Lomé Declaration and the Rules of Procedure of the Assembly.

Type two unconstitutional change of government– in this concept I include unconstitutional abidance in power described in article 23(5) of the African Charter on Democracy, Elections and Governance (Addis Charter). Situations not included in the Addis Charter but allowing AU to impose sanctions according against them according to the article 23 (2) of the Constitutive act are also included in the type two category. These situations include member states that fail to comply with decisions and policies of the Union in this case the breach of fundamental democratic principles contained in 4(m) of the Constitutive act and article 17 of the Addis Charter.

The definition of response to unconstitutional changes of government used in this thesis include all types of active, official response from the African Union against a country, junta or coup leader after and unconstitutional change of government, aiming at restoring constitutional order. This includes sanctions, but also condemnation, suspension from the union and mediation efforts.

[6] Rosenne, p. 325

1.4 Outline of thesis

This thesis starts with a summary of the development and the structure of the African Union in the second chapter. There the organs and their purposes in the imposition of sanctions will be explained. In the third chapter a short background on the use of sanctions and the development of targeted sanctions in the world will follow. In the fourth chapter a review of the definition of unconstitutional changes of government as contained in the AU legal instruments will be made together with a close study of the African Union's sanctions provisions regarding these issues, including regulations on how and when to implement sanctions and also the decision-making process in these cases. In the fifth chapter the four case studies will be examine and the regulations and the decision-making process studied as applied in these practical situations. In the sixth chapter an analysis will be made regarding the African Unions ability to follow its own resolutions and my reflections on what should be done to enhance this. Lastly in chapter seven a conclusion is offered and some recommendations on concrete improvements that could be done.

2 The African Union

The aim of this chapter is to give the reader a sense of the context this study takes place within, how the African Union was founded, what organs it contains and what functions these have. First the establishment of the African Union will be examined together with the reasons for why the African leaders in the end of the last century decided to abandon the Organization of African Unity (OAU) in favor for the new union.

2.1 The Establishment of the African Union

The predecessor to the African Union (AU), the Organization of African Unity (OAU), made the decision to transform the organization into the AU in the Libyan city Sirte in September 1999 through the Sirte Declaration.[7] The purpose of the new Union was ”to forge unity, solidarity and cohesion, as well as cooperation, between African people and among African States.”[8] The OAU had existed since 1963[9] but had not been as successful as hoped due to ideological differences and resistance against making the organization stronger and more efficient through a supranational structure.[10] All African states but Morocco and Eritrea are members of the Union. Morocco refused to join because the other member states recognition of West Sahara which Morocco regards as a part of it's territory.[11] Eritrea withdrew its membership after AU called on the United Nations (UN) to implement sanctions against Eritrea in 2009, but is still a party to the Constitutive Act.[12]

The work to establish the new union started immediately. Within a year the African Union Constitutive Act (CA) was completed. It was adopted in Lomé, Togo in July 2000 and by March the following year all member states had acceded to it and it came into force.[13] According to art 33 (1) of the Constitutive Act the document replaces the OAU Charter and the OAU was with that transferred into the AU. High expectations came with the transformation and the Constitutive Act verbalized some of these in new visions, objectives and responsibilities.[14] Promotion of peace, security and stability, greater unity and solidarity between the African countries and

[7] Touray p. 635
[8] Packer p. 371, Sirte Declaration.
[9] Engel pp. 1-10
[10] Touray p.637
[11] Williams, *The Peace and Security Council of the African Union: evaluating an embryonic international institution*, p. 621
[12] Afrol News, http://www.afrol.com/articles/10577, retrieved 2009-11-20
[13] Packer p. 371
[14] Engel p. 2

promotion of democratic principles and institutions were some of the new union's aims according to article 3 in the Constitutive Act.

The Constitutive Act is the fundamental act of the union and it contains articles on the main objectives and purposes of the union as well as on the different organs and their tasks. The Constitutive act is an international treaty and therefore binding on its members according to the 1969 and 1986 Vienna Conventions on the law of Treaties. Decisions by the AU Assembly are binding according to rule 33 (1) of the Rules of Procedure of the Assembly of the Union and the Peace and Security Council can take decisions binding all member states according to article 7 of the Protocol establishing the Council.

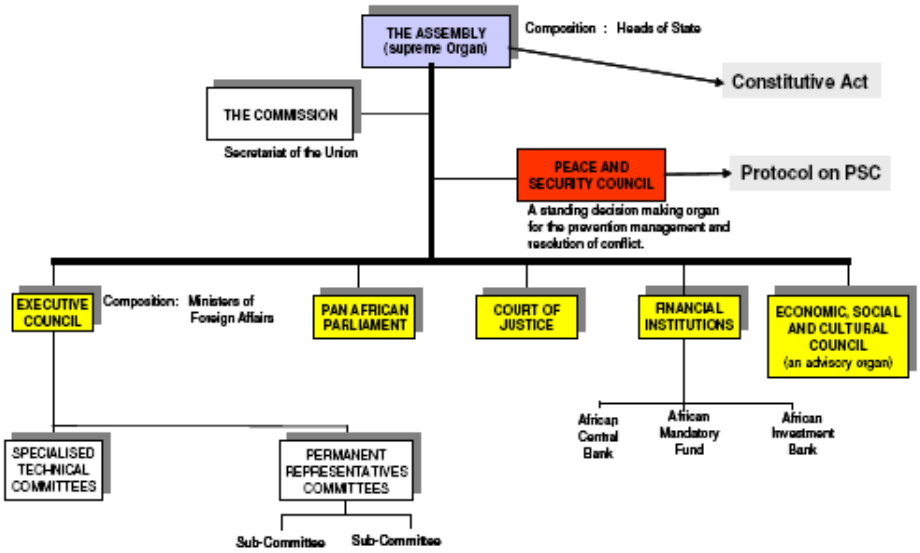
2.2 The Structure of the African Union

The structure of the African Union resembles the institutional framework of the European Union and consists of the Assembly of Heads of State and Government (Assembly) the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Peace and Security Council (PSC), the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions.

Nine of the organs and their assignments are described in the Constitutive Act (articles 5 – 22). Some of these institutions are not very precisely portrayed in the Constitutive Act but are further developed on in protocols.[15] The Assembly was also given the power to establish other necessary organs, which it did with for example the Peace and Security Council in 2002.[16] Since the Assembly and the Peace and Security Council are the vital organs for deciding and implementing sanctions they will be more deeply examined than the other organs.

[15] Packer p. 374
[16] Fombad p. 24

Figure 1: Structure of the AU.



2.2.1 Assembly of the Union

The Assembly is the supreme organ of the organization. It is composed of all the member states' heads of state and government and is based in Addis Ababa. The Assembly is to meet once a year for an ordinary session and a two-thirds majority can call for an extraordinary sessions (article 6 of the Constitutive Act). The Assembly is responsible for the common policies of the Union such as its approach to unconstitutional changes of government and can give directions to the Executive Council and the Peace and Security Council on matters such as management of conflicts and other urgent situations.[17] A two-third majority is needed to take decisions on for example imposition of sanctions.[18]

The Assembly can make decisions in three different forms *regulations* that member states need to "take all necessary measures to implement", *directives* which are "addressed to any or all member states, to undertakings or to individuals" and "bind member states to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation." rule 33(1) Rules of Procedure of the Assembly of the Union. The third form of decisions is *recommendations, declarations, resolutions, opinions* etc. These are non binding but intended to "guide and harmonize the viewpoints of member states."[19] If the member state fails to implement a regulation or a directive this can result in sanctions according to art 23 of the Constitutive Act. The third, non binding form of decisions still has potential to be influential but

[17] Packer p. 375
[18] Engel p. 2
[19] Ibid.

this depends on the political will of the member states. Decisions on sanctions are taken in binding form.[20]

The Assembly has a rotating chair that shifts every year on a regional basis. A new country is elected to chair the Union at the ordinary session, usually in January or February. In 2009 the Assembly was chaired by Libya and its leader Muammar Khadafi and in 2010 the Malawian president Bingu wa Matharika was elected.[21]

The assembly is involved in the decision to implement sanctions against unconstitutional change of government according to the Rule 36 (1) of the Rules of Procedure of the Assembly of the Union and shall decide to impose sanctions upon recommendation by the Executive Council.

2.2.2 The Executive Council

The Executive Council functions both as a political and an economic organ and is composed of the ministers of the 53 member states designated by the governments of the member states. The Executive Council both coordinates and monitors the implementation of the union's policies and is responsible to the Assembly.[22] To its help the Executive Council has the Permanent Representative Committee which is composed of the permanent representatives of Member States accredited to the Union. The Committee is in charge of preparing the work of the Executive Council according to rule 5 of the Rules of Procedure of the Executive Council. The Executive Council shall recommend the Assembly to impose sanctions according to the Rule 36(1) Rules of Procedure of the Assembly and also apply the sanctions decided upon according to Rule 36 of the Rules of Procedure of the Executive Council, but is not one of the main players.

2.2.3 The Pan African Parliament

The Pan African Parliament (The Parliament) was launched in 2004 and has the assignments of ensuring full participation of African peoples in governance, development and economic integration of the continent. It also has the mission of spreading democracy, prosperity and peace on the continent. The President of the Parliament is elected every five years and the current one is Idriss Ndele Moussa from Chad.[23] After the first legislature the parliament was meant to become a legislative body instead of its now only consultative and advisory powers, this change has not taken place even though the new legislature that started in 2009 was very positive towards an

[20] Fombad p. 25
[21] BBC 2010-01-31
[22] Fombad p. 26
[23] The Pan African Parliament Website, Located at: http://www.pan-african-parliament.org/, retrieved 2010-05-29

increase in powers.[24] The specific functions of the Parliament are described in the Protocol on the Pan African Parliament.[25] The Parliament now has minimal influence over the implementation of sanctions but this can be changed if the transformation into a legislative body takes place.

2.2.4 The Commission

The Commission is the secretariat of the Union and is partly established to assist the Assembly and implement the Assembly agenda.[26] It is based in Addis Ababa and composed of a chairperson, currently Jean Ping from Gabon, a deputy chairperson, eight commissioners and staff members. The eight commissioners each have a specific area of responsibility for example the one covering political affairs including fields like good governance and democracy[27] and the commissioner handling issues on peace and security including sanctions.[28]

The Commission is a key organ in the day to day management of the AU and amongst its tasks are elaborating common positions of the Union, preparing strategic plans to be considered by the Executive Council and harmonizing programmes and policies of the Union with the Regional Economic Communities in Africa (article 3 of the Statute of the Commission of the African Union). It should also coordinate and monitor the implementation of decisions of the organs of the union and report regularly to the executive council according to article 3 (2) of the Statute of the Commission. The section of the Commission that supports the Peace and Security Council has an important task in monitoring the development in member states where unconstitutional changes of government has taken place and report to the Council on these matters and on how any mediation efforts taking place is according to article 10 of the protocol relating to the establishment of the Peace and Security Council.

Moreover at the 13th AU Summit (2009) the African leaders agreed to set up an "Authority" to replace the AU Commission to simplify and strengthen the structure of the organization and also agreed on the structures and a plan of action for it.[29] The new "Authority" will coordinate defense, foreign relations and trade policies. The change has not been ratified and since it is a politically sensitive issue about sovereignty against supra nationalism it might take some time before the transformation actually takes place.[30]

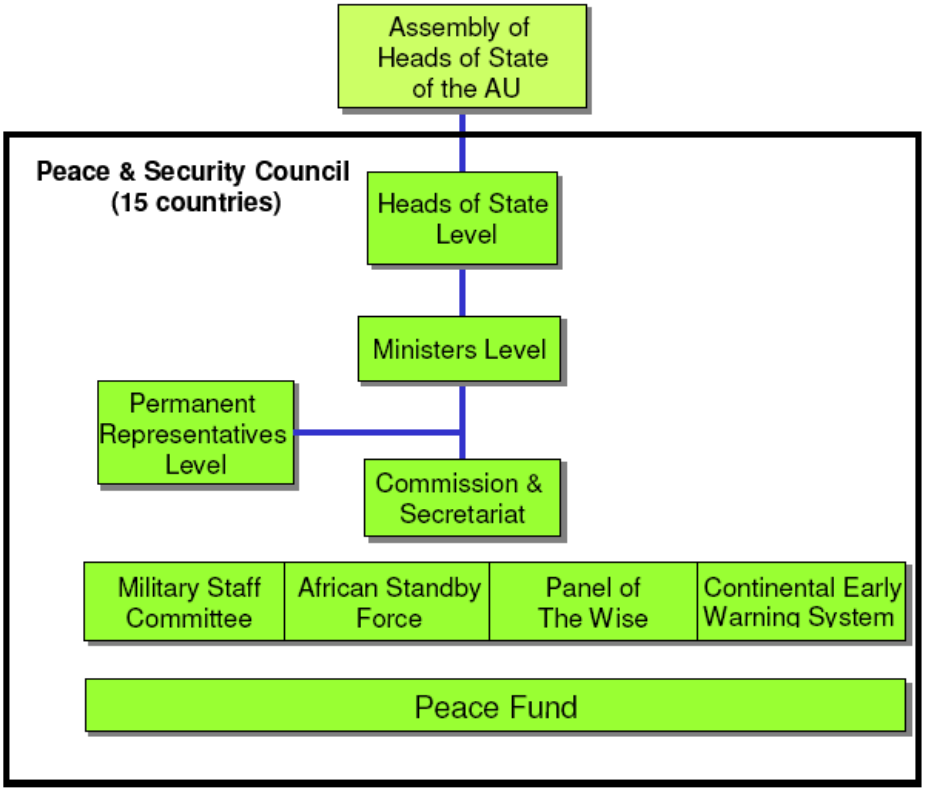
[24] Mathaba News Agency 2009-10-28
[25] Protocol to the treaty establishing the African economic community relating to the Pan African Parliament
[26] Packer p. 375
[27] Fombad p. 27
[28] African Union Website, Located at: http://www.africa-union.org/root/au/index/index_july_2009.htm
[29] Africa Research Bulletin 2009-04 p. 17923
[30] African Research Bulletin 2009 Volume 46 Number 7 p. 1

2.2.5 The Peace and Security Council

The Peace and Security Council (PSC) is the most important AU organ for matters regarding unconstitutional changes of government and sanctions. It was established by the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (the PSC Protocol) in 2002 and not by the Constitutive Act as the other institutions. It came into force in December 2003 and then replaced the Organization of African Unity's Central Organ for conflict prevention and managing.[31]

Ten representatives, elected for a two year period and five representatives elected for three years constitute the Peace and Security Council. To become a member of the PSC the states need to fulfill a number of criteria inter alia commitment to uphold the principles of the Union; contribution to the promotion and maintenance of peace and security in Africa and respect for constitutional governance, in accordance with the Lomé Declaration, as well as the rule of law and human rights according to article 5(2) of the Protocol Establishing the Council. When looking at the countries that have been members of the PSC so far one can conclude that these criteria have not always been fulfilled.[32]

Figure 2: The Structure of the AU Peace and Security Council



Source:http://www.iss.co.za/uploads/CEWSNOV04.PDF, retrieved 2010-06-01.

[31] Fombad p. 29
[32] Ibid p. 32

In March 2004 the first members of the Peace and Security Council were elected and in May the same year the Council had its first meeting and constituted itself. Since then three meetings per month have been held in average. Consensus is the guiding principle in decision making but when this is impossible to reach a two-third majority is enough.[33] So far all PSC decisions have been made by consensus and details of the discussion within the PSC has not been made public.[34] No member state has the right to veto a decision but in some areas they need authorization from the Assembly to become legitimate.[35]

The Peace and Security Council is a powerful organ since it binds all the AU members with its decisions according to article 7 of the PSC Protocol. The member states have by signing the protocol agreed to "accept and implement the decisions of the PSC" and to "extend full cooperation to, and facilitate action by, the Peace and Security Council for the prevention, management and resolution of crises and conflicts" article 7 (4) the PSC Protocol. What a decision is, is not defined but non compliance with them can lead to sanctions according to the article 23(2) of the Constitutive Act.

Amongst the objectives of the Peace and Security Council are promotion of peace, security and stability by anticipation and preventing conflicts according to article 3 the Constitutive Act. If a conflict occurs the PSC is to use mediation, consultation and dialogue to create peace.[36] Article 7 (1) also requires the Council to impose sanctions against an unconstitutional change of government and some other situations (that will be further described in chapter four). Besides these measures, the Council also has extensive powers to mount and deploy peace support missions and lay down the guidelines for the conduct of these. It can also recommend to the Assembly an intervention in a member state pursuant to the rules on crimes against humanity, genocide and war crimes. Most important in this context is the PSC's authority to impose sanctions when an unconstitutional change of government happens in a member state according to article 7 (g).

The Peace and Security Council is an important part of the African Peace and Security Architecture (APSA) which is "an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace support operations and intervention, as well as peace-building and post-conflict reconstruction". The APSA also include *the Panel of the Wise*, *the Continental Early Warning System*, *the African Standby Force*, *the Peace Fund* and *the Military Staff Committee*. [37]

In the last couple of years the importance of the involvement of regional organizations (RECs) in the AU defense and security policy has been

[33] Engel pp. 2-10
[34] Williams, *The Peace and Security Council of the African Union: Evaluating an embryonic International Institution*, p. 612
[35] Engel pp. 2-10
[36] Touray p. 643
[37] Engel pp. 2- 3

emphasized. The PSC protocol states that "the Regional Mechanisms are part of the overall security architecture of the Union". The Chairperson of the Commission has the task to coordinate the RECs and the AU's actions.

2.2.5.1 Sanctions Committee

In March 2009 the PSC decided, in conformity with article 8(5) of the PSC Protocol to establish a Committee on Sanctions.[38] The committee would administer, monitor and implement AU sanctions and it would also have a secretariat that would provide administrative support and gather practical information to avoid unwanted consequences. [39] The Commission got two months to present a study on the modalities for the functioning of the Committee.[40] It has not yet been operationalized.

2.2.6 The Courts of the Union

The *African Court of Human and People's Rights* was launched by the AU in 2006 and is based in Arusha, Tanzania. The court deals with human right cases between states and citizens and both parties have the right to file a claim to the court. [41] A potentially very important organ is the African Court of Justice and Human Rights, which is one of the union's organs according to the article 5 Constitutive Act. The Court is going to be, when it gets operationalized a merge between the African Court of Human and People's Rights and the never established African Court of Justice.

The establishment of *The African Court of Justice and Human Rights* which shall be the main judicial organ of the African Union was decided by the Assembly in 2004[42] and the founding document, the Protocol on the Statute of the African Court of Justice and Human Rights (the Protocol) was eventually adopted in 2008.[43] The protocol enters into force thirty days after the deposit of the instruments of ratification by fifteen (15) Member States and pursuant to article 9 but when this will happen is uncertain since only two countries had ratified the Protocol as of March 2010, namely Libya and Mali.[44]

The new Court will have two sections: a General Affairs Section and a Human Rights Section composed of eight Judges each. The general Affairs Section shall be competent to hear a wide range of issues regarding international law and the interpretation and application of AU legal acts and decisions and save those concerning human and/or people's rights issues

[38] PSC Meeting 2009-03-16
[39] ISS 2009-10-28
[40] Norwegian Embassy to Ethiopia 2009-03-20
[41] Africa Research Bulletin, 2006-07, p.16707
[42] Assembly/AU/Dec.45 (III)
[43] Assembly/AU/Dec.196 (XI)
[44] List of Countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights.

which shall be handled by Human Rights section. Member States can according to article 28 of the Protocol be held responsible for any lack of implementation of decisions or breaches of international law and also be deemed to pay reparation for these breaches a. Today there is no mechanism has responsibility for this task which is a big problem for the Union. The ensuring of implementation of decisions is instead left to the discretion of the member states and considering the often failing political will to even take proactive decisions one can understand that the implementation is not always exemplary. A problem is that the Court's jurisdiction over AU regulations, directives and decisions does not include the power to annul these acts which could result in that the judgment only would have declaratory effect. The Court could possibly claim that for judicial review to be meaningful the power to annul must be regarded as implied.[45]

Although the jurisdiction of the future court is relatively wide, unfortunately the group of entities eligible to submit cases to the court is not. The general affairs section of the court is pursuant article 29 only open to state parties and the Assembly, the Parliament and the other organs of the Union authorized by the Assembly. The Human rights section has a somewhat wider admissibility also including for example the African Commission on Human and People's Rights. Individuals or relevant Non- Governmental Organizations accredited to the African Union or its organs can be allowed standing before the Human Rights section. This if the state party makes a supplementary declaration accepting the competence of the Court to include admitting cases by individuals according to article 8 of the Protocol. Albeit the somewhat unclear jurisdiction and the narrow admissibility the Court has a lot of potential and the main problem is naturally that it is not yet in force.

2.2.7 Other Organs

The Economic, Social and Cultural Council is an advisory organ composed of 150 civil society organizations. One of the functions of the ECOSOCC is to undertake studies at the request of other organs. The institution is organized in ten sectoral clusters committees whereof the one covering sanctions is the committee on political affairs. Although the ECOSOCC has an advisory role it can exercise important pressure on states not reaching the democratic goals of the union.[46]

Besides these organs there are a number of *Specialized Technical Committees* on different issues. Furthermore there are *The Financial Institutions* consisting of the African Central bank, the African Monetary Fund and the African Investment Bank.[47] Neither of these are involved in

[45] Van der Mai p. 36
[46] Fombad p. 28
[47] African Union Website, Located at: http://www.africa-union.org/root/au/organs/Specialized_Technical_Committee_en.htm, retrieved 2010-05-21.

the handling of unconstitutional changes of government or imposition of sanctions and will therefore not be described further here.

2.3 Regional Economic Communities

In the Constitutive Act article 3(l) there are regulations for when the AU should cooperate and harmonize its actions with the different regional organizations of Africa.[48] Some of these organizations are stronger than the AU and has more of a routine for its activities than the AU has. In the Lomé Declaration it says that "In implementing a sanctions regime, the OAU should enlist the cooperation of Member States, Regional Groupings and the wider International/Donor Communities."[49] The Protocol on relations between the African Union and the Regional Economic Communities regulates in detail the cooperation between the organizations.[50] Since the Regional Economic Communities all have different structures and legal frameworks they can not be further examined here.

2.4 Finances

To realize its policies and implement its decisions fully the African Union organs need funding. The AU is financed by the member states and international donors and in 2009 the budget was US$ 164,2 million which was an increase of 17,3% from 2008.[51] The budget for 2010 was approved by the Assembly to US$ 250,5 million.[52]

There are five main member state contributors to the budget that together pay 75% of the regular budget. These are Algeria, Egypt, Libya, Nigeria and South Africa.[53] The unbalanced financing of the union has lead to a marginalization of the smaller countries and an increased role for the main donors, for example Libya, under which's chairmanship in 2009 the AU decided not to cooperate with the International Criminal Court's (ICC) decision of charging the Sudanese president Omar al Bashir for crimes against humanity.[54]

[48] The REC:s that are the most important partners to the AU are the Arab Maghreb Union, AMU, the Community of Sahel-Saharan States,CEN-SAD, the Common Market for East and Southern Africa, COMESA, the East African Community, EAC, the Economic Community of Central African States, ECCAS, the Economic Community of West African States, ECOWAS, Inter-Governmental Developmental Autrority, IGAD and the Southern African Development Community, SADC. Akokpari p. 3
[49] Lomé Declaration
[50] The protocol on relations between the African Union and the Regional Economic Communities
[51] Emerging minds 2009-02-03
[52] African Press Organization 2010-02-09
[53] Williams, *The Peace and Security Council of the African Union: evaluating an embryonic international institution*, p. 618
[54] Business Day 2010-02-02

The Peace and Security Council is mainly financed by the voluntary Peace Fund established under the PSC (as seen in fig. 2 above). Member states were supposed to contribute six percent of its total AU contribution to this fund, but so far the main donor has been the European Union. In 2008 the EU made a contribution on 300 million Euros for the period of 2008-2010.[55] At the AU summit 2010 the Assembly decided to increase the member states' obligatory contribution to the Peace Fund from 6% to 12% by 2014.[56]

Collecting all the member states contributions have so far been a problem for the AU. At the AU Summit 2008 only 29 of the 53 members had fully paid their shares. According to article 23 (1) of the Constitutive Act the Assembly has the power to impose sanctions on member states that defaults in the payment of its contribution to the budget of the Union.[57]

[55] Engel p. 9
[56] African Press Organization 2010-02-09
[57] Williams, *The Peace and Security Council of the African Union: evaluating an embryonic international institution,* p. 618

3 Sanctions

Sanctions are the most far reaching measure in the AU framework of response against unconstitutional changes of government. They are imposed, as will be further explained in chapter four, when mediation and warnings have not induced the perpetrators of unconstitutional changes of government to restore constitutional order. In this chapter a general background to what sanctions are and how the use of them has developed in the international sphere is given. This to put the African Union's use of sanctions in a context and to give the reader an understanding of why sanctions are used and what kind of sanctions that is the favored type today.

3.1 The development of sanctions

Sanctions are an extraordinary measure of international law and have for a long time been used to restore peace and security internationally as an alternative to armed interventions. The first system for multilateral sanctions was developed for when the League of Nations was established in 1919. A set of rules regulating conventional sanctions was then included when the UN Charter was adopted in 1945.[58] A great deal of the legal powers to maintain and restore international peace was bestowed upon the UN Security Council pursuant to article 24(1) of the UN Charter. The powers of the Council are laid down in for example chapter VII which allow it to impose sanctions or use of force to restore or maintain international peace and security (article 39-42 of the UN Charter). Chapter VII of the UN Charter authorizes the Security Council to adopt a wide range of mandatory measures against state and non-state entities.[59] Measures adopted by the Security Council are mandatory for the UN member states to impose pursuant to article 25 of the Charter (under which states "agree to accept and carry out the decisions of the Security Council"). Although the word sanction is not used in the UN Charter the terms has lately been used in conjunction with the enforcement of powers under chapter VII.[60] In the beginning the sanctions the Council adopted where comprehensive and they started to get heavily criticized in the 1990s because of their large side effects on civilians, for example in Iraq and Haiti. A new type of sanctions started to take shape – the targeted sanction.[61] In 1998 the UN Secretary General said:

> "I welcome the fact that the concept of "smart sanctions", which seeks to pressure regimes rather than peoples and thus

[58] Stenhammar pp. 20 - 26
[59] Gowlland- Debbas p. 1
[60] Gowlland- Debbas p. 4
[61] Kuwali p. 208

> reduce humanitarian costs, has been gaining support among Member States".[62]

The aim of developing the targeted sanction was to avoid negative humanitarian consequences by making the sanction more "smart" and precise. Still the sanction needed to be imposed in a balanced way to ensure effectiveness to the desired result.[63] This is a definition on what targeted sanctions are according to two researchers on the field

> "In our definition, a smart sanctions policy is one that imposes coercive pressures on specific individuals and entities and that restricts selective products or activities, while minimizing unintended economic and social consequences for vulnerable populations and innocent bystanders."[64]

3.2 Targeted sanctions

To explain what the African Union provisions authorizing the Union organs to impose sanctions actually prescribes when it uses the term targeted sanctions, this section will examine the different types of targeted sanctions. The main ones are economic sanction, travel restrictions and diplomatic and cultural sanctions. Economic sanctions include trade sanctions for example limitations in trading with the targeted entity and embargoes on a specific product, and financial sanctions which involve immobilizing of financial assets and preventing of access to new assets. The negative side effects of comprehensive trade sanctions was one of the reason for the sharp critique of sanctions in the 90s and the targeted trade sanctions that are used today are often limited to one important commodity for example diamonds, timber or arms.[65] Targeted financial sanctions implemented against decision makers instead of innocent civilians minimize unintended consequences and are more effective than general trade sanctions and have therefore become a commonly used form of sanction.[66]

Arms embargoes are the most frequently used form of economic sanction of the UN. It is a logic instrument in peace- and security- building that can cause a direct reduction in the level of armed conflict, save lives and still be without any negative effects to civilians.[67] Diamond bans is a relative new form of embargo and the reason for it is to make it harder for forces opposed to legitimate and internationally recognized governments to finance their activities such as military rebellion and human rights abuse. To avoid rebels that control diamond rich areas from benefiting from this very lucrative business a diamond needs to be from an approved area to be legal for

[62] Annan 1998, Report of the Secretary General on the Work of the Organization- 1998.
[63] Kuwali p. 210
[64] Cortright and Lopez p. 2, Eriksson.
[65] Stenhammar p. 119
[66] Cortright p. 93
[67] Ibid. p. 153

trade.[68] Arms, diamond and timber embargoes can be imposed on a specific entity like a guerrilla group or the government or on all parties in a conflict.[69]

Travel restrictions involve travel bans i.e. visa denial of the listed person but also suspension of border crossing traffic, aviation sanctions and air cargo traffic controls. [70] The impact of visa denial is concentrated to the targeted decision making elites while the impact of aviation sanctions is a little broader depending on its design. Side effects of aviation sanctions might be loss of income for the affected airline company which can result in unemployment, but these are not particularly grave in comparison to comprehensive sanctions. To avoid a worsened situation for the population exemptions are usually made for humanitarian needs, religious pilgrimages and travel to conduct peace negotiations.[71]

Diplomatic sanctions can be suspension of all diplomatic contacts with the targeted state or just a reduction in diplomatic presence in there. Cultural sanctions include restrictions for the state to participate in sporting, cultural and scientific events. Cultural sanctions above all have a symbolic effect, nonetheless they can cause a strong public opinion effect due to high visibility.[72] Combinations of different types of sanctions are frequently imposed for maximal effect. The effectiveness of sanctions depends on a variety of factors, for example effective monitoring and enforcement and comprehensive international compliance. This is though a very complex field of study that is to large to investigated here.

Sanctions have been imposed on African countries a number of times by the UN for example in Somalia and Eritrea 1992, Sierra Leone 1997, Liberia 2003, Cote d'Ivoire 2004 and Sudan 2005. The sanctions used have mainly been arms embargoes, assets freeze and travel bans but also more specific embargoes like diamond bans. The AU has consistently used travel bans and assets freeze against unconstitutional changes of governments but not to the same extent against other threats to peace and security like conflicts which has been the main reason for UN.

In conclusion the use of sanctions originally has its base in the UN Charter and therefore also in international law. However the AU has developed its own laws regulating the imposition of sanctions against its member states for unconstitutional changes of government but also for non compliance with Union decisions and policies. The rules on imposition of sanctions are a part of the AU framework of response to unconstitutional changes of government which will be further explained in the next chapter.

[68] Ibid. p. 182
[69] Stenhammar p. 120
[70] Ibid.
[71] Cortright p. 134
[72] Eriksson

4 Responding to unconstitutional changes of government

This chapter answers the question of what the African Union provisions on unconstitutional changes of power look like. Different definitions of this phenomenon will be discussed in an attempt to structure the content of the provisions. Further more the chapter will answer the question of when and how sanctions are to be imposed. To do this the chapter has been divided in five parts. The first is about the important legal instruments regulating the African Unions definition of unconstitutional changes of government and the action plan for these incidents. What type of documents are these and what legal status do they have? In the second part focus will be put on how these acts define unconstitutional changes of government and the similarities and differences in definition between the different instruments. In this section the two categories of unconstitutional changes of government this thesis deals with will be presented and defined. The third part looks at the course of action the AU organs are expected to take after an unconstitutional change of government including suspension and condemnation. Following that is a passage about the decision making process and the obligations of the different organs. In the fifth chapter the various types of sanctions the AU is able to enforce according to the same documents will be examined.

4.1 AU Documents on Unconstitutional Changes of Government

The idea of dealing with unconstitutional changes of government in Africa existed before the African Union. There are three important AU instruments that together shape a definition of unconstitutional changes of government within the AU. The first is the *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* (henceforth the Lomé Declaration) which was adopted by the OAU in July 2000, and later taken over by the AU. The second is *The African Charter on Democracy, Elections and Governance* (henceforth the Addis Charter) which was adopted in Addis Ababa in 2007 but is not jet in force, this will happen thirty days after the deposit of fifteen instruments of ratification by AU member states. So far only Mauritania (28 July 2008) and Ethiopia (6 January 2009) have ratified the charter.[73] The third important document is the *Constitutive Act* of the AU which is the founding document of the African Union and has been ratified by all member states. Also the *Rules of*

[73] Souaré 2009-08-14

Procedure of the Assembly of the Union and the *PSC Protocol* are important when looking at the AU sanctions regime.

The fundamental provisions mandating the AU to at all impose sanctions are found in the Constitutive Act. The most important articles are:

> "Article 4
> Principles
> The Union shall function in accordance with the following principles:...
> (p) condemnation and rejection of unconstitutional changes of governments.
>
> Article 23
> Imposition of Sanctions
> ...
> 2. Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly."

One of the decisions and policies the member states shall comply with, for not risking sanctions, is the principle of "respect for democratic principles, human rights, the rule of law and good governance" Article 4 (m) Constitutive Act. An unconstitutional change of government is therefore a reason to impose sanctions on a member state, and so are other breaches of democratic principles. This is not a forcing principle and there is not a condition of democracy to be a member of the AU, but if the political will is there the legal basis allows sanctions to be imposed.

The Lomé Declaration is a very important document when looking at sanctions since it prohibits illegal changes of regimes and gives examples on what kind of sanctions that can be used when such a situation occur.[74] As a declaration this is not a legally binding document but it is still aimed at influencing the conduct of the member states and therefore offers guidance on what actions the member states should take in event of an unconstitutional change of government (UCG). The political acceptance of the declaration as binding gives it high status and it is often referred to in decisions implementing sanctions.[75] The declaration offers an interpretation of the Article 4(p) of the Constitutive Act which condemns unconstitutional changes of government but also a definition of what an unconstitutional change of government is, measures the AU can take against and

[74] Draft Charter on Democracy, elections and governance: explanatory note
[75] Roba Sharamo, *Programme Head of the Conflict Prevention Programme at the Institute for Security Studies* (ISS) in Addis Ababa.

unconstitutional change of government and an description of the decision making process.[76]

At the 2006 summit of the AU the Addis Charter was developed but never finally agreed upon. The outstanding issue was a rule about outlawing the extension of a president's term by changing of the constitution.[77] Even though the charter is not in force all but this article was agreed upon and it represents a common ground of values for the African Heads of State. The Addis Charter is the most far reaching act with the widest definition of unconstitutional changes of government and providing the strictest measures.

In the Rules of Procedure of the Assembly of the Union and the PSC Protocol there are rules regulating what the specific organs should do in event of an unconstitutional change of government. This shall be described in chapter 4.4 and 4.5.

4.2 What is an Unconstitutional Change of Government?

The definitions of an unconstitutional change of government contained in the different relevant instruments of the African Union are not completely uniform. The Lomé Declaration states

> *" situations that could be considered as situations of unconstitutional change of government are:*
>
> 1. *Military coup d'état against a democratically elected Government;*
> 2. *Intervention by mercenaries to replace a democratically elected Government;*
> 3. *Replacement of democratically elected Governments by armed dissident groups and rebel movements;*
> 4. *The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections*."

Note the wording "could be considered". Apparently these situations do not have to constitute an UCG. In the Rules of Procedure of the Assembly rule 37.2 other words are used. There it is stated that "In conformity with the Lomé Declaration, the situations are to be considered as unconstitutional change shall be, among others:" and then a slightly different list where other coup d'états than military has been included, in other words the Rules of Procedure include political coups in its unconstitutional change of government definition. Furthermore another situation is added to the list in 37.3 namely:

[76] Fombad p. 20
[77] Africa Research Bulletin 2006-07

- The overthrow and replacement of a democratically elected government by elements assisted by mercenaries.

Significant is that the Lomé Declaration only refers to actions taken against democratically elected governments, which excludes an overthrow of any of the numerous undemocratic governments of Africa, from the unconstitutional change of government definition.[78]

In the Addis Charter illegal means of accessing or maintaining power through an ”amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government” constitute an unconstitutional change of government. This is a considerably wider definition and it was the provision blocking the charter from entering into force in 2007. These types of accessing or maintaining power are not included in any of the other instruments and therefore not legally binding as an unconstitutional change of government for the AU.[79]

4.2.1 Type one and type two unconstitutional changes of government

The definition this thesis will take its base in is divided into two categories which will be called type one and type two unconstitutional changes of government. To summarize an unconstitutional change of government according to the AU legal acts definitely includes:

1. Military coup d’état against a democratically elected Government;
2. Intervention by mercenaries to replace a democratically elected Government;
3. Replacement of democratically elected Governments by armed dissident groups and rebel movements;
4. The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections. (Lomé Declaration)
5. The overthrow and replacement of a democratically elected government by elements assisted by mercenaries. (Rule 37.3 Rules of Procedure of the Assembly)

The Addis Charter further adds:

6. Amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

[78] Fombad p. 22
[79] Nguendi Ikome

The first category of unconstitutional changes of government, type one, will include the first five situations above and is the accepted definition of unconstitutional changes of government. Type two includes the sixth situation provided by the Addis Charter as well as the situations falling under article 23(2) of the Constitutive Act including breaches of the decisions and policies of the Union. This provision embraces situations where a government access or maintain power by breaches of democratic principles, other than those included in the type one category, and allows the Assembly to impose sanctions. This is not an undisputed definition but it will be used to facilitate a review of all situations where a government access or maintain power by unconstitutional means and the African Union has the legal power to impose sanctions. This whether it falls under the narrow but fully recognized AU definition of unconstitutional changes of government or the wider but not yet altogether incorporated one.

4.3 Immediate response to Unconstitutional Changes of Government

Rule 37.4 of the Rules of Procedure of the Assembly describes the course of action after the Assembly should take after a type one unconstitutional change of government. It includes that the Chairperson to the Assembly shall; *condemn* the action, *urge* for a speedy return to constitutional order, *warn* that the act will not be tolerated or recognized, request the PSC to convene and to *suspend* the Member State. If the state refuses to restore constitutional order, sanctions should be immediately applied (Rules of Procedure of the Assembly 37.4). In the Lomé Declaration there is a time limit on six months that should be given before sanctions should be instituted. The Declaration also asks the Central Organ (now replaced by the PSC) to convene urgently to discuss the matter whenever an unconstitutional change of government has taken place. At the request of its chairman, the secretary general or any AU member state, the PSC may also be convened to consider any given situation that could be considered as constituting an unconstitutional change.

The Chairperson of the Commission shall also in consultation with the Chairperson of the Assembly:

- “gather the facts relevant to the unconstitutional change of Government;
- establish appropriate contacts with the perpetrators with a view to ascertaining their intentions regarding the restoration of constitutional order in the country, without recognizing or legitimizing the perpetrators;

- seek the contribution of African leaders and personalities in order to get the perpetrators of the unconstitutional change to cooperate with the Union;
- enlist the cooperation of the RECs to which the concerned country belongs." (Rule 37.6 Rules of Procedure of the Assembly)

Beside the formal rules of the AU organs controlling the member states' compliance with the democratic principles of the organization, there is a voluntary "peer review" scheme according to which the members are encouraged to supervise each others adherence to the same. The result of this mechanism has not been overwhelming since the political will to question a fellow member state's actions seems to be weak.[80]

The rules governing the response to type two unconstitutional changes of government are not as developed. The only provision regarding type two UCGs is the article 23(2) of the Constitutive Act which simply states that the Assembly may impose sanctions "such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly". The provision though allows for the Assembly to act immediately and impose sanctions on a member state that fails to comply with the decisions and policies of the Union.

4.4 Deciding to impose sanctions

If the above mentioned measures do not suffice to motivate the country to restore constitutional order after an unconstitutional change (including both categories) of government the Assembly *shall*

> "determine the sanctions to be imposed on any Member State for… violation of the principles enshrined in the Constitutive Act and these rules, non-compliance with the decisions of the Union and unconstitutional changes of government." (Rule 4(g) Rules of Procedure of the Assembly)

The decision to impose sanctions on a member state *shall* be made by the assembly, upon a request of the Executive Council according to the rule 36 of Rules of Procedure of the Assembly but the Assembly can also initiate the process itself by making a suggestion to the Agenda. The Executive Council also has the important assignment of applying sanctions imposed by the Assembly against "non-compliance with decisions and policies; and unconstitutional changes of government; as specified in Rules 35, 36, and 37 of the Rules of Procedure of the Assembly" (Rule 36 of the Rules of Procedure of the Executive Council).

[80] BBC 2009-03-26

The Peace and Security Council also has a responsibility to impose sanctions. It *shall* according to article 7 (g) of the PSC Protocol in conjunction with the Chairperson of the Commission institute sanctions whenever an unconstitutional change of government (meaning only type one UCGs) takes place in a Member State, as provided for in the Lomé Declaration. Against type two unconstitutional changes of government the Peace and Security Council, which has the main legal responsibility to act against type one UCGs, does not have any competence. This is an important difference since the Council is a more effective and powerful organ when it comes to immediate action since it convenes much more often than the Assembly and also has the benefit of only having to reconcile 15 member states instead of all 53.

Sanctions by the AU are supposed to be imposed in cooperation and harmony with other organizations. The Lomé Declaration states:
"In implementing a sanctions regime the OAU should enlist the cooperation of member states, regional groupings and the wider International/donor communities."[81]

In the 10th chapter of the Addis Charter a mechanism for application of the charters principles is provided. This includes provisions on how individual states should act, how the Commission should act to coordinate the implementation of sanctions and what roles the Regional Economic Communities should play. In article 44 of the Charter states are required to initiate legislative, executive and administrative measures to harmonize national laws and policies with the Charter. The AU Commission is responsible for ensuring 'that effect is given to decisions of the AU relating to unconstitutional changes of government', but how this is supposed to be performed is not clear.[82]

All sanctions provided for in the Lomé Declaration which only regards type one UCGs can be imposed after a time limit of six months or after a refusal by the coup makers to restore constitutional order. Suspension on the other hand, which is considered a sanction according to rule 37 of the Rules of Procedure of the Assembly, shall be executed immediately. There are no rules providing time limits or allowing suspension for type two unconstitutional changes of governments but according to article 36 (3) of the Rules of Procedure of the Assembly the Assembly shall stipulate a time frame for compliance before sanctions will be imposed.

[81] Lomé Declaration
[82] Ebobrah

4.5 Types of sanctions used against unconstitutional changes of government

The sanctions suggested for unconstitutional change of government are the same in both Lomé Declaration and Rules of Procedure of the Assembly namely:

- visa denials for the perpetrators of the unconstitutional change;
- restriction of Government to Government contacts;
- trade restrictions;

The Constitutive Act and Rules of Procedure of the Assembly provide further sanctions:

- Denial of transport and communications links with other Member States. (Constitutive Act article 23 (2)) (Rules of Procedure of the Assembly Rule 36.2)
- Other measures of a political and economic nature to be determined by the Assembly (Constitutive Act article 23 (2)) (Rules of Procedure of the Assembly Rule 36.2)
- Any additional sanction as may be recommended by the Peace and Security Council.

These sanctions are applicable against both categories of unconstitutional changes of government whereas Rule 37 only concerns type one. In paragraph 5 (e) of rule 37 the Council is given power to recommend additional sanctions, including possible military intervention by the AU if the perpetrators refuse to restore democracy. Also arms, diamond and timber embargoes and financial sanctions are possible for the PSC to suggest according to this paragraph.

Rule 37 of the Rules of Procedure of the Assembly has the headline "Sanctions for Unconstitutional Change of Government". In paragraph one of this article it is stated that "Member States in which Governments accede to power by unconstitutional means shall be *suspended* and shall not participate in the activities of the Union." Consequently suspension from the AU activities is within the AU sanctions regime considered a sanction, even thought this is not the case when speaking of sanctions in general. No provision states how long the suspension shall be in effect but in general it is lifted after elections, that the AU consider free and fair, have been held. Worth noticing is that a country's membership in the UN is unaffected by an unconstitutional change of government since the UN does not have any democracy criterion that needs to be fulfilled.[83]

According to the far reaching, but non binding, Addis Charter article 25.4 the perpetrators of the unconstitutional change of government shall not be allowed to participate in elections held to restore democracy, this rule is not included in neither the Lomé Declaration nor the Rules for procedure for the

[83] A UN member state can only be suspended after having preventive or enforcing actions taken against it by the UN Security Council. (UN Charter art. 5)

assembly, but confirmed at the AU Assembly Summit of 2010 and lately put in practice by the AU for example in Mauritania.[84] The Addis Charter also allows for the Assembly to decide on other forms of sanctions against unconstitutional change of government perpetrators such as punitive economic measures. The Charter furthermore in article 25 declares that state parties not shall harbor perpetrators of unconstitutional change of government and that these shall be brought to justice or be extradited either to the court of the union or to another state party.

On the AU summit in January 2010 the Union agreed on taking tougher measures against unconstitutional changes of government after recommendations by the Peace and Security Council. The changes include stronger sanctions in case diplomatic efforts fail or get stuck. The AU Assembly:

> "**DECIDES** that, in cases of unconstitutional changes of Government, in addition to the suspension of the country concerned, the following measures shall apply:
> **a.** non-participation of the perpetrators of the unconstitutional change in the elections held to restore constitutional order;
> **b.** implementation of sanctions against any Member State that is proved to have instigated or supported an unconstitutional change in another State;
> **c.** implementation by the Assembly of other sanctions, including punitive economic sanctions.
>
> **DECIDES ALSO** that Member States should, upon the occurrence of an unconstitutional change of Government, not recognize the *de facto* authorities; and **CALLS ON** all non-African international bodies, including the United Nations and its General Assembly, to refrain from granting accreditation to such authorities, thus strengthening the automatic suspension measures taken by the AU against those countries in which unconstitutional changes of Government have taken place."[85]

The Assembly also underscored the importance of signing and ratifying the Addis Charter which would imply a significant innovation of the AU framework of response to unconstitutional changes of government.[86] The fact that AU encourages the UN not to grant accreditation to de facto authorities that have gained power through a unconstitutional change of government is notable. This since the UN, unlike the AU, does not have any kind of democratic requirement for its member states to participate in meetings.

[84] Souaré 2009-08-14
[85] AU Assembly Summit 2010, Assembly/AU/Dec.269(XIV) Rev.1
[86] African Press Organization 2010-02-09

4.6 Summary

In this chapter the definition of unconstitutional changes of government has been studied. This showed that the definition contained in the different legal instrument of the AU were not uniform. First there are the incidents that fall under the definition in the Lomé Declaration and the Rules of Procedure of the Assembly including the five types of incidents listed above which are the type one unconstitutional changes of government. The type two UCG the situation of someone accessing or maintaining power through an ”amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government”.

Both types of unconstitutional change of government can be subject to sanctions according to Rules of Procedure of the Assembly rule 4(1) (g) for failing to comply with the decisions and policies of the union according to article 23(2). Type one can cause sanctions according to rule 37(5) where the formulation is stronger (*The Assembly shall immediately apply sanction...).* Also the PSC in conjunction with the Chairperson of the Commission in *shall* institute sanctions on type one UCGs. The type two unconstitutional change of government *may* be subjected to sanctions such as denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the assembly (article 23(2) Constitutive Act and Rule 4(1)(g) Rules of Procedure of the Assembly). The difference in reactions from the AU between the two types is going to be investigated in the case studies in chapter five.

5 Case Studies

In this chapter four case studies will be made to illustrate how the rules and regulations investigated above have been used in practice. The countries that will be studied are Madagascar, Mauritania, the Comoros and Zimbabwe. The questions to be answered are; how have sanctions been implemented/ not implemented in these four countries and also if the AU responded within the limits of the legal framework. In the conclusion some thoughts will be offered on how the provisions on response to unconstitutional changes of government are working in practice and if the AU uses it to its full potential.

5.1 Selection of Cases

The selection of countries for this study was based on a couple of criteria. First of all, all the countries had to have suffered an unconstitutional change of government. Then two countries were chosen from each category of unconstitutional changes of government to enable a study of a possible difference in treatment between the two types. Since type two unconstitutional change of government require a breach of an AU policy and an investigation of the exact definition of what is included in the AU policies is impossible here, the selection was made among “obvious cases” meaning cases where a strong democratic principle was brutally violated.

The provisions for sanctions the AU can apply include different types of sanctions for the different types of UCG. The rules though *allow* for a quite wide variety of action and it is interesting to examine how this potential is used and if it varies between the types of UCG. Since there is a difference between the types of sanctions that are possible to use in the two situations the type of sanction is not going to be the main focus but whether any sanctions have been implemented at all and how powerfully this has been made.

Another criterion was that the unconstitutional changes of government must have occurred after May 2004 when the PSC had its first meeting. Since the PSC had somewhat of a slow start no situations that arouse before 2006 were elected. This was also to make the study an updated and examination of AU action, as the AU response to unconstitutional changes of government has changed over time.

The availability of information was of course an important factor when choosing countries. The media reporting from Africa is mildly put insufficient, especially from some countries, and since I did not have the opportunity myself to travel to these four countries, second hand information was the main source and its availability indispensable.

Some AU action after the unconstitutional change of government was another criterion. Studying situations where AU has not even mentioned the issue officially is not relevant in this thesis where a part of the aim is to understand the differences in AU actions. If AU has not talked about the issue this would be a very difficult task. Therefore countries where at least a discussion had been going on, was selected. In the process of finding such countries I found that many type two unconstitutional change of government are not even discussed within the AU. There apparently needs to be a more than an amendment or revision of the constitution which infringe on the principles of democratic change of government for the AU to even discuss sanctions. In more than ten cases leaders stayed far more than two term periods, oppressed the opposition to a degree that no free and fair elections are possible but declared themselves winner and stayed in power etc.

Further more the similarity of the situations was an important factor when choosing countries. It is more interesting to compare how measures and sanctions have been used in cases that have similar circumstances when examining the range of possible reactions to the same type of situation. Madagascar and Mauritania was therefore chosen for type one unconstitutional change of government countries. Both of these countries have had a military coup respectively since the PSC started its work and neither have severe conflicts going on under that period, complicating the picture. For the type two unconstitutional changes of government the Comoros and Zimbabwe was selected because there in these cases has been a discussion and at least some activity from the AU, unless many type two situations. In the category type one unconstitutional change of government Madagascar and Mauritania was chosen since they were the only type two unconstitutional changes of government since 2007 except Guinea that has a more complicated situation and Niger, which had happened to recently to see the full picture.

The selection was made from a compilation of unconstitutional changes of government that has taken place in Africa since the AU was founded, which is found in Supplement A.

5.2 Type one Unconstitutional Changes of Government

In this chapter the unconstitutional changes of Madagascar and Mauritania, which have both suffered type one unconstitutional change of government will be studied. First a short review of the unconstitutional change of government followed by an examination of the AU response to it, will be made. After the review of the incident and the response comes an analysis of how the AU reaction reflects the provisions of the Lomé Declaration and other relevant legal acts. The question that will be answered is ‘Does the AU follow its own provisions?’

5.2.1 Madagascar

5.2.1.1 The Unconstitutional Changes of Government

On the 17th of March 2009 the Malagasy president Marc Ravolamanana resigned from office after weeks of popular protests, violence and pressure form the military and handed over power to a Military Directorate.[87] Four days later Andry Rajoelina, appointed by the military, was sworn in as president.

The event is to be considered an unconstitutional change of government since Rajoelina was not elected according to the Malagasy constitution.[88] The Article 25(1) of the Malagasy constitution states that when a head of state resigns ”the duties of the President of the Republic shall be temporarily exercised by the President of the Senate” until new elections can be held. This situation falls under the definition of an unconstitutional change of government in the Lomé Declaration as a “Replacement of democratically elected Governments by armed dissident groups and rebel movements” and rule 37(2)(c) of the Rules of Procedure of the Assembly and is therefore a type one UCG.

5.2.1.2 Reaction of the AU and the Development of the Situation

The AU had already before the coup sent a special envoy to Madagascar to find a solution to the growing tension, in consistency with the Malagasy constitution.[89] A condemnation of the unconstitutional change of government and a suspension of Madagascar from the AU was made by the Peace and Security Council on the 20th of March 2009, three days after the coup. The council also expressed its determination to ”impose all the measures provided for by the Algiers Decision of July 1999[90], the Lomé Declaration of July 2000, the Constitutive Act of the AU and the Protocol Relating to the Establishment of the Peace and Security Council, including sanctions”.[91]

Negotiations were initiated by AU and the regional organization, SADC, in late March to try to reach an agreement between Rajoelina and Ravolomanana. A contact group on Madagascar was formed with representatives from inter alia AU and SADC to pursue the negotiations.[92] In August 2009 a power sharing deal, the Charter of the Transition, was singed in Maputo.[93] The Maputo agreement included a transitional authority to govern the country until elections in October 2010 but when the leader of

[87] Report of the Chairperson of the Commission on the situation in Madagascar
[88] Maunganidze 2009-03-19
[89] PSC Meeting 2009-03-17
[90] 35th Ordinary Session of the OAU Assembly
[91] PSC Meeting 2009-03-20
[92] Report of the Chairperson of the commission Enhancing Africa’s resolve and effectiveness in ending conflict and sustaining peace
[93] Reuters 2010-03-17

this transitional authority was to be appointed, the parties could not agree and the negotiations broke down.[94] Rajoelina unilaterally named a prime minister who formed a government which was instantly rejected by the AU. The Peace and Security Council had meetings in August and September where it welcomed the Maputo agreement, condemned the decisions taken unilaterally by Rajoelina. It also called on him to resume the dialogue and return to constitutional order within the time limit of fifteen months prescribed in the Maputo agreement, but not much happened.[95]

An extension to the Maputo deal was finally signed in Addis Ababa in November 2009, which was welcomed by the Peace and Security Council at its 208th meeting. At this meeting the Council also requested the chairperson of the commission to establish a Monitoring Mechanism and to dispatch an assessment mission to evaluate Madagascar's electoral needs.[96] The extended agreement included that Rajoelina should remain president but be flanked by two co-presidents. The consensus did not last long and Rajoelina refused to participate in further negotiations and then fired the prime minister that was jointly appointed by the parties.[97] In December Rajoelina formally abandoned the power sharing deal by appointing a military prime minister and firing the agreed co-presidents.[98] The Council expressed its deep concern at the continuing deadlock, facing the formation of the Government of National Unity in Madagascar, which it said could jeopardize the progress achieved so far in the process of ending the crisis.[99]

During its yearly summit the AU assembly discussed the matter and adopted a decision on Madagascar involving encouragement to fulfill the Maputo agreement and a request to the Peace and Security Council that in due time "take the required decision in light of the relevant AU instruments." for example impose sanctions [100] It also reiterated its total rejection of unconstitutional changed of government and adopted a decision to enhance the effectiveness of AU response to unconstitutional changes as explained in chapter four.[101] In February 2010 Rajoelina postponed parliamentary elections to May and the vice prime minister, assigned according to the power sharing deal resigned as a result of growing differences within the government.[102]

The chairperson of the commission on the situation in Madagascar presented his report to the Peace and Security Council on the 19th February 2010 in which he advices it to impose sanctions. The Council decided that:

[94] Maunganideze p. 6
[95] PSC Meeting 2009-09-10
[96] PSC Meeting 2009-11-09
[97] Reuters 2010-03-17
[98] BBC 2009-12-21
[99] South South information gateway 2009-12-10
[100] Assembly/AU/Dec.279(XVI)
[101] Assembly/AU/Dec.269(XIV) Rev.1
[102] Reuters 2010-03-17

> "if by 16 March 2010, the *de facto* authorities borne out of the unconstitutional change do not comply with the full and timely implementation of Maputo Agreements and the Addis Ababa Additional Act, the following sanctions shall be applied, starting from 17 March 2010:
> (i) travel ban against all members of the institutions set up by the *de facto* authorities borne out of the unconstitutional change and all other individuals members of the Rajoelina camp whose actions impede the AU and SADC efforts to restore constitutional order…
> (ii) the freezing of funds, other financial assets and economic resources of all individuals and entities contributing, in one way or another, to the maintenance of the unconstitutional *status quo* and impeding the AU and SADC efforts to restore constitutional order…
> (iii) the diplomatic isolation of the de facto authorities borne out of unconstitutional change, through concerted action by Member States to challenge the participation of the representatives of these *de facto* authorities in the activities of non-African international organizations, including the United Nations and its agencies and other concerned bodies…"[103]

These sanctions were implemented by the PSC on March 17 2010 since Rajoelina had not complied with the Maupto agreement.[104]

5.2.1.3 Did the AU follow the Sanctions Regime?

AU immediately defined the situation in Madagascar as an unconstitutional change of government according to the Lomé Declaration. The first steps of the AU framework for response to unconstitutional changes of government type one were followed by the AU in the Malagasy case. The coup was condemned and the country was suspended from the Union according to the Rules of Procedure of the Assembly rule 37(1) and (4) and the Constitutive Act article 30. The Council also declared it was ready to "impose all the measures provided for by the Algiers Decision of July 1999, the Lomé Declaration of July 2000, the Constitutive Act of the AU and the Protocol Relating to the Establishment of the Peace and Security Council, including sanctions".[105] These tasks were originally supposed to be performed by the Assembly but the power has been delegated to the Peace and Security Council according to the Constitutive Act article 9(2) which allows the Assembly to delegate any of its power to another organ of the Union.

Then negotiations started pursuant to rule 37(6) of the Rules of Procedure of the Assembly in cooperation with the Regional Economic Community of the area, SADC. The agreement that followed was not an AU document, but should as it is signed by member state still comply with AU law which it can be argued that it do not. First the agreement allows the coup maker

[103] PSC Meeting 2010-02-19
[104] PSC Meeting 2010-03-17
[105] PSC Meeting 2009-03-20

Rajoelina to stay in power as president. This is against the fundamental principles on democracy and good governance of international law and the African Union law (Constitutive Act 4 (m). Further more it against article 25 of the Addis Charter which states that the perpetrators shall not be allowed to stand in elections and that they shall be brought to justice by the member states or the Court of the Union. When the agreement was signed this was not a binding provision but notable is that the Assembly just a few months later, in February of 2010 adopted a decision stating that perpetrators not shall be allowed to participate in elections to restore constitutional order and that *de facto* authorities shall not be recognized.[106]

Secondly the time limit of 15 months that was given Rajoelina to restore constitutional order in the agreement is far from the six months time limit the Lomé Declaration provides before sanctions should be imposed. The 6 months time limit is not a binding limit but it, together with the other legal acts definitely gives the AU a possibility to impose sanctions before the passing of 15 months. For example the Rules of Procedure of the Assembly 37(5) states that sanctions should be implemented immediately if the state "refuses to restore constitutional order". This could have been done maybe not before the Maputo agreement, since Rajoelina up till then seemed to have been relatively cooperative at the negotiations but definitely after that he broke the agreement in the beginning of September 2009. How "refusing to restore constitutional order" should be defined is an interesting question. Apparently Rajoelina did not attain this level since sanctions were not imposed against him at that point. In December he aborted the cooperation with the co-presidents, fired the consensus prime minister and appointed a military one instead. This was an official cancellation of the Maputo agreement but still the AU did nothing more than expressing its deep concern. At this point one would think it was apparent that Rajoelina "refused to restore constitutional order", but AU still showed hope for a diplomatic solution. Two months later, in February 2010 the Council set a deadline for Rajoelina to comply with the agreement and when he did not sanctions were imposed exactly a year after the unconstitutional change of government. The Peace and Security Council has the legal power to impose sanctions against a type one unconstitutional change of government according to article 7(g) of the PSC Protocol.

In conclusion the AU did not take full advantage of the possibilities to impose sanctions on Madagascar but instead relied on diplomacy to solve the problem for a whole year notwithstanding Rajoelina's lack of engagement in the process to restore democracy.

[106] AU Assembly Summit 2010, Assembly/AU/Dec.269(XIV) Rev.1

5.2.2 Mauritania

5.2.2.1 The Unconstitutional Changes of Government

The political instability started to build up in Mauritania when a vote of no confidence was passed by the parliament against the government of Sidi Ould Cheikh Abdallahi in 2008. President Abdallahi then threatened to dissolve the parliament and formed an alliance with the former president Taya. When president Abdallahi on the 6th of August 2008 also tried to fire five high military leaders this upset the army and members of parliament withdrew their support and criticized Abdallahi for his mismanagement of the country. [107] The same day Abdallahi was arrested by the army and coup leader General Mohamed Ould Abdelasziz took power.[108]

The incident constitutes a type one unconstitutional change of government as it falls under the Lomé Declaration's exemplification "Military coup d'état against a democratically elected Government" and the Rules of Procedure of the Assembly rule 37(2)(a).

5.2.2.2 Reaction of the AU and the Development of the Situation

AU immediately declared the incident an unconstitutional change of government and condemned it and suspended Mauritania from the union. The Chairperson of the Commission also decided to dispatch the Commissioner for Peace and Security to engage the coup makers in a process to return to constitutional order and re-establish the democratic institutions.[109] A few days later the junta behind Abdelaziz had established a State Council and appointed new military leaders and seemed to be planning to stay in power. AU sent a mediation delegation and negotiations started between Abdelaziz, the AU, Arab League, the UN and the donor community.[110] The AU Commission on the Situation in Mauritania, which is a part of the regular Commission assisting the Council, reported to the Peace and Security Council on the 22nd of September 2008. At the meeting the Council noted with deep concern that despite the efforts made, no progress had been made to restore constitutional order. It also demanded the restoration of Abdallahi in his function of president by the 6th of October 2008 and warned the coup makers against the risk of sanctions if they would not follow the demand.[111] This time frame was not complied with and on the 11th November the chairperson of the commission Jean Ping initiated new consultations on the situation in Mauritania for the involved parties. The meeting was held and

[107] Zounmenou
[108] Walker
[109] PSC Meeting 2008-08-07
[110] Zounmenou
[111] PSC Meeting 2008-10-22

the outcome was a reiteration of the PSC warning of sanctions contained in the communiqué of the Council's meeting on September 22.[112]

The following day the Peace and Security Council had a new meeting and requested the Commission to submit concrete measures to be put in place in accordance with the Lomé Declaration.[113] On 13th of November Abdallahi was released from his captivity which the Council noted at its meeting in December as a step in the right direction. The council also gave a new time frame for Mauritania to restore constitutional order or sanctions would be imposed. The date was set to the 5th of February 2009. No reflection was made over the fact that one time limit had already been broken and no discussion was officially held on whether sanctions should be implemented already then.[114] This time the warning was realized and on the 5th of February 2009 sanctions were imposed by the AU PSC against Mauritania. The sanctions imposed were visa denials, travel restrictions and freezing of assets, to all individuals whose activities are designed to maintain the unconstitutional status quo in Mauritania. Encouragement for continued negotiations was expressed.[115]

On June the 3rd 2009 after negotiations chaired by the AU an agreement was reached by the Mauritanian parties. It included a framework for the way out of the crisis and was welcomed by the Peace and Security Council at its meeting the 10th of June 2009.[116] At the 29th of June the Dakar Framework Agreement entered into force and a national transitional union was formed to govern the country until elections were held. In the agreement the PSC takes note of i.e. "the decision of president…Abdallahi to hand in his mandate to the Mauritanian people, and the President of the Senate taking over as acting President of the Republic". Sanctions and the suspension were also lifted since this was seen as a return to constitutional order.[117] President elections were held on the 18th July of 2009 and Abdelaziz won the first round with 52% of the votes. The AU observation mission and other international observers confirmed the election process as "free, transparent, credible and democratic" and the president was inaugurated on August the 5th.[118]

Ironic is that Mauritania just a month before the coup occurred, as the first and only state, ratified the African Charter on Democracy, elections and governance, the Addis Charter.

[112] Communiqué of the Consultative meeting on the situation in Mauritania, Addis Ababa, 10 November 2008
[113] PSC Meeting 2008-11-11
[114] PSC Meeting 2008-12-22
[115] PSC Meeting 2009-02-05
[116] PSC Meeting 2009-06-10
[117] PSC Meeting 2009-06-29
[118] Report of the Chairperson of the commission Enhancing Africa's resolve and effectiveness in ending conflict and sustaining peace p. 21

5.2.2.3 Did the AU follow the Sanctions Regime?

To start with the AU followed all the steps set out in the framework. It immediately condemned the coup as provided for in rule 37(4) of the Rules of Procedure of the Assembly and the PSC gathered the following day and suspended Mauritania from the AU pursuant to 37(1) of the same Rules of Procedure and the Constitutive Act article 30. The Chairperson of the Commission sent the Peace and Security commissioner to engage the coup makers in negotiations according to rule 37 (6) of the Rules of Procedure and article 7 and 10 of the PSC Protocol.

In September the Peace and Security Council warned the coup makers of the risk of sanctions if they did not comply with AU demands before the 6th of October 2008 (article 36 of the Rules of Procedure), which is a relative short time frame of only two months compared to the Lomé Declaration respite of sic months. At the November meeting the warning was reiterated but sanctions were not imposed although Abdelaziz and his junta had not restored constitutional order or even taken any steps towards it. Considering the six months time limit in the Lomé Declaration during which diplomatic efforts shall be made, imposing sanctions after only two months would have been a drastic decision since immediate sanctions are only expressly prescribed for when the coup maker refuses to restore constitutional order (Rule 37(5) of the Rules of Procedure). The junta partook in negotiations and even if not much was achieved during them it showed a sign of will which gave them a further respite. When sanctions later were imposed (according to article 7(g) of the PSC Protocol) from the 5th of February exactly six months had passed since the coup and not many steps towards democracy had been taken. Sanctions and the suspension stayed in force until the Dakar Framework Agreement entered into force in June 2009 and AU considered the democracy restored as provided for in article 26 of the Addis Charter.

At this point the AU had not explicitly, as it has now, distanced itself from coup leaders standing in elections directly following a coup. The Addis Charter states “The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or to hold any position of responsibility in political institutions of their State.” But since this is not yet in force, even though Mauritania has ratified it and one could argue for the country’s compliance, the AU was not bound. As argued in the Madagascar case the African Union is though bound to respect democratic principles according to article 4(m) of the Constitutive Act and should therefore not have let Abdelaziz stand in the election anyway. It is also noteworthy that a leader that has taken power by force and that in September 2008 got the reaction of the AU that “all measures of constitutional, institutional and legislative nature taken by the military authorities and that followed the coup d'état of 6 August, 2008” will be null and void, not even a year later is considered capable of signing an agreement on behalf of Mauritania to restore constitutional order and then get accepted as a legally elected president. As for the rest the AU in the Mauritanian case followed its own framework for response to

unconstitutional changes of government relatively well and the political will was enough to implement sanctions after only six months. Encouraging is that the Assembly in 2010 has taken a decision that will eradicate the possibility of a coup leader legitimate himself through an election and solutions to unconstitutional changes of government will look differently in the future.

5.3 Type two Unconstitutional Changes of Government

Concerning type two unconstitutional changes of government these are not included in the same framework for response as type one UCGs. Type two unconstitutional changes of government can still be sanctioned according to art 23(2) of the constitutive act if the political will is there. In this chapter the successfulness of the AU to do this will be examined in two specific cases; the Comorian case which regards an unconstitutional stay in power by the former president after an election 2007 and the Zimbabwean case where Mugabe in 2008 went through with elections despite wide spread violence against the opposition and the pull out of the only other candidate.

5.3.1 The Union of the Comoros

5.3.1.1 The Unconstitutional Changes of Government

On June the 10th 2007 president elections were held in the Union of the Comoros which consists of three islands. Each island of the union has its own parliament and president but they also have a federal president which rotates between the three islands every fourth year.[119] The electoral system was agreed upon in an OAU brokered peace agreement in 1999.[120] The union presidency had since elections 2002 belonged to Mohamed Bacar, president of Anjouan. In April 2007 the constitutional court of the Comoros appointed an interim president to rule the union until the elections, since Bacar's five year term had ended. Bacar declared he would not step down and when violence broke out on the Anjouan island, as a result of that, the interim president of the Comorian Federation decided to postpone the elections on the island a week, till the 17th of June to ensure a free and fair election.[121] Bacar did not agree with this decision and went ahead with the elections on the 10th and then declared himself winner with 90 % of the votes. The AU had warned Bacar an election held on the 10th would not be recognized[122] and when it was carried out anyway both the AU and the union government of the Comoros declared the election invalid.[123]

[119] Ayangafac p. 1
[120] Antananarivo Agreement 1999
[121] PSC Meeting 2007-16-09
[122] PSC Communiqué 2007-06-09
[123] Ayangafac p. 2

The incident on Anjouan constitutes a type two unconstitutional change of government since Bacar stayed in power in contradiction with the ruling of the constitutional court and with unconstitutional means. That he then held an election in opposition to the decision of the interim president and the will of the AU and declared himself winner in an election that was not free and fair does not change that. This is a breach of democratic principles that can be responded to with sanctions according to article 23(2) of the Constitutive Act.

5.3.1.2 Reaction of the AU and the Development of the Situation

Already in May 2007 the Peace and Security Council authorized the deployment of the AU Electoral and Security Assistance Mission to the Comoros to overlook the process leading up to the planned election in June.[124] After the election mediation efforts were made by the regional organization SADC represented by South Africa and the AU Commission on the situation in the Comoros was established and the chairman was requested to write a report on the situation. In August the PSC decided

> "…to review the mandate of the AU Electoral and Security Assistance Mission (MAES) and the strength of its forces, with a view to ensuring the effective implementation of the institutional framework as provided for in the Constitution of The Comoros. In this respect, Council requests the Commission to work closely with the Ministerial Committee of the Countries of the Region, with a view to submitting within one month, concrete proposals, without excluding any option, for the consideration of the Council, regarding the implementation of the Cape Town and the Pretoria framework."[125]

The Report of the Chairman of the Commission was submitted on the 10th of October. The Peace and Security Council regretted that the illegal authorities of Anjouan had continued to reject proposals put forward by the SADC negotiation team and approved the proposal by the countries of the region and decided to impose sanction. Since they refused to cooperate or comply with the demands of the mediation team the Peace and Security Council decided to impose travel bans and assets freeze in October, four months after the unconstitutional change of government. A number of people in the illegal Anjouanese authorities and other persons that impeded the reconciliation process were targeted. [126]

Furthermore all air and sea transport to or from Anjouan was to be monitored to ensure that they did not, in any way, benefit to the illegal authorities of Anjouan and to their supporters. The PSC further decided to

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124 PSC Meeting 2007-05-09

125 PSC Meeting 2007-08-13

126 PSC Meeting 2007-10-10

strengthen and widen the MAES mandate to include the support of implementation of sanctions, prepare elections on Anjouan, assist the establishment of an internal security force and facilitate the restoration of the authority of the union in Anjouan.[127]

The Electoral and Security Assistance Mission to the Comoros was not allowed onto Anjouan and could therefore not start its work there.[128] The union government then requested the AU member states for assistance to restore its authority in Anjouan and at the AU Assembly 10th Ordinary Session in January 2008 the Assembly requested the member states to provide necessary support to the Comorian government.[129] A meeting was held with the interested parties the 20th of February. Countries attending were Tanzania, Libya, Senegal and the Sudan. The meeting agreed that military measures would be employed to support the Government of the Union of the Comoros to restore its authority in Anjouan.[130]

A last attempt to resolve the situation diplomatically and to avoid the use of force was made on the 27th of February by a delegation consisting of the Head of the AU Liaison Office in Moroni, the French Ambassador in the Comoros, the Chargé d'Affaires of the US Embassy in Madagascar and a representative of the League of Arab States. The mission's proposal including a demand to hold free and fair elections was rejected by Bacar, which opened the door for military intervention.[131] The operation, called Operation Democracy, consisting of about 1500 troops commenced on 25th of March 2008 and had the whole island under control by the next day. Sanctions were lifted in connection with the intervention.[132] South Africa which had been active in the negotiations was opposed to the military intervention since it thought the diplomatic efforts had not been exhausted.[133]

In May the constitutional court of the Comoros approved the candidature of five contenders to run in the presidential elections. Bacar was disapproved as a candidate and sentenced to five years of prison for "for usurpation of title".[134]In December 2009 the legislative elections were held and in May 2009 a referendum amended the 2001 constitution. President election on Anjouan were held on the 15th of June 2008,[135] in a run off in June 29 Moussa Toybou won with 52.37 percent. "The elections were well

[127] Ibid.
[128] Report of the Chairperson of the Commission on the situation in the Comoros since the 10th Ordinary Session of the Assembly of the African Union Held in Addis Ababa from 31 January to 2 February 2008
[129] AU Assembly 10th Ordinary Summit 2008-01-31
[130] Ministerial Meeting on the Comoros, 20 February 2008
[131] Report of the Chairperson of the Commission on the situation in the Comoros since the 10th Ordinary Session of the Assembly of the African Union Held in Addis Ababa from 31 January to 2 February 2008
[132] Svensson pp. 21-30
[133] ISS Peace and Security Council Report No. 8, March 2010 p. 8
[134] Afrique en ligne 2008-05-20
[135] AFP 2008-06-16

organized in a calm and serene atmosphere - all international and local observers hailed the election as free, fair, credible and transparent," the UN Resident Coordinator in the Comoros said.[136] The African Union welcomed the election of a new democratic president at a PSC meeting on June 29.[137]

5.3.1.3 Did the AU follow the Sanctions Regime?

The situation in the Comoros did not fall under the definition of type one unconstitutional change of government. Bacar neither seized power from someone else nor refused to relinquish power after a free and fair election, which is the definition according to the Lomé Declaration. To stay in power after an election that is declared void by the whole international community is not considered an unconstitutional change of government by the AU. Not even the Addis Charter includes this kind of situation. It talks about accessing or maintaining power through an "amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government". Instead this situation falls under the type two category of unconstitutional change of government since it is not a legal form of maintaining power and breaks the Comorian constitution and fundamental democratic principles spelled out in for example the article 17 of the Addis Charter which states:

> **"Article 17**
> State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall:
> 1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
> 2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner.
> 3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.
> 4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels."

Even though the Comorian situation was not included in either the Lomé Declaration or the Addis Charter the AU was very active and realized the possible measures it has to its disposal. Already before the June 10th election the AU was engaged on the Anjouan island with its election observing mission the Electoral and Security Assistance Mission. The AU has an aim to enhance democracy by sending observer missions to elections in its member states and has established a special unit under the Commission to

[136] All Africa 2008-07-02
[137] PSC Meeting 2008-06-29

handle these issues.[138] Mediation started immediately after the void election, and cooperation with the Regional Economic Communities was carried out as provided for in the AU instruments governing type one unconstitutional changes of government. This is consequently a measure instituted beyond the responsibilities that the AU legally has. Rule 37 of the Rules of Procedure of the Assembly and article 30 of the Constitutive Act that calls for immediate measures against unconstitutional changes of government applies only to type one unconstitutional changes of government and condemnation and suspension was therefore not taken against the Comoros. However the AU actions were inspired by many of the other paragraphs of rule 37. First of all the AU conveyed a warning to Bacar before the election (37.4 (b)) it worked for consistency of action at the bilateral, interstate, sub-regional and international levels (37.4(c)) in its cooperation with for example SADC, the League of Arab States, the US and France. Further more the Peace and Security Council met on a regular basis and discussed the matter (37.4 (d)) and contact with the perpetrators was established to work for a restoration of constitutional order without recognizing or legitimizing them (37.6 (b)).

The rules that govern the imposition of sanctions against the type two unconstitutional change of government is inter alia found in Rule 4 of the Rules of Procedure of the Assembly. According to this the Assembly shall "determine the sanctions to be imposed on any Member Stater for… violation of the principles enshrined in the Constitutive Acts…" (article 23(2) Constitutive Act). In the Comorian case sanctions were imposed in October, four months after the unconstitutional change of government, by the Peace and Security Council. The Council has according to its own protocol only the explicit authority to impose sanctions in case of unconstitutional changes of government (article 7(g)), and not like the Assembly against countries that have violated the principles of the Constitutive Act . The action can though be justifies by falling under its objectives and principles as promoting peace and working for peaceful settlements of disputes (article 3-4 of the PSC Protocol) and also being included in some of its powers according to article 7

a. "anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity;
b. undertake peace-making and peace-building functions to resolve conflicts where they have occurred;
c. authorize the mounting and deployment of peace support missions…"(article 7 PSC Protocol)

The military intervention that the AU by a decision in the Assembly authorized some member states to perform was not a part of the regular sanctions regime. It was possible to execute according to article 7(f) of the PSC Protocol which states that the Council can approve the modalities for an intervention by the Union in a member state following a decision by the

[138] EX.CL/Dec.300 (IX)

Assembly, if a member state requests it according to article 4(j) Constitutive Act, which is exactly what happened. The AU action in the Comorian case proves that the organization has the ability to act even though the situation is not defined as a type one UCG. If the political will is there, the organs definitely have the mandate to respond powerfully also to type two unconstitutional changes of government.

5.3.2 Zimbabwe

5.3.2.1 The Unconstitutional Changes of Government

On the 29th of March 2008 presidential, senatorial, parliamentary and local government elections where held simultaneously in relative peace in Zimbabwe. [139] Observer teams from 47 regional and sub- regional organizations and countries had been invited to overlook the election. Most of these including among others Southern African observers declared Zimbabwe's elections free and fair on the basis of the tranquil situation before and during the Election Day. Others say that the political climate in the country including incidents like the brutal assault of opposition officials (MDC) by police in 2007 and the total control over media by incumbent president Robert Mugabe could not result in free and fair elections. [140] The subsequent development of the situation changed the mind of most of the international community. First it took more than a month, until the 2nd of May before presidential election results were announced by the Zimbabwe Electoral Commission (ZEC). These stated that Morgan Tsvangirai of the Movement for Democratic Change (MDC) got 47.9% of the valid voted and incumbent President Robert Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) received 43.2%. Because none of the candidates had reached 50% of the votes a run off would be necessary according to Zimbabwean law. The reason for the delay in publication of the presidential election result was errors and miscalculations according to ZEC, which the Zimbabwe High Court on the 14th of April ruled to be a legitimate reason for postponing the announcement.[141] Opponents within the country claimed that state institutions worked for the best of the ruling party and that both the court and the ZEC were biased for the benefit of Mugabe and ruled according to that in this situation.[142]

During the month of election result delay many cases of ZANU-PF violence against MDC supporters were reported. In May the MDC claimed that at least 20 of its supporters had been murdered, many hundreds brutally beaten and thousands driven from their homes by a military directed campaign. [143] Human Rights Watch said ''The army and its allies-'war-veterans' and supporters of ZANU-PF-are intensifying their brutal grip on wide swathes

[139] Africa Research Bulletin March 2008 – 17449
[140] Badza p. 3
[141] Judgement of the High Court of Zimbabwe 2008-04-14
[142] Badza p. 3
[143] Africa Research Bulletin Volume 45 Issue 4, p. 17485

of rural Zimbabwe to ensure that a possible second round of presidential elections goes their way'' and also stated they had identified two cases of revenge attacks by MDC. The run off was set to the 27th of June and Tsvangirai pledge to stand in it.[144] However the violence against MDC continued and five days before the run off Tsvangirai pulled out claiming armed forces backing Mugabe had made it clear that anyone who voted for MDC risked being killed.[145] In a letter to the Chairman of the ZEC Tsvangirai said the election could not take place giving a number of reasons including:

- The failure by the electoral commission to ensure free and fair elections.
- Violence and intimidation against the MDC supporters.
- Non access to media.
- Banning of MDC rallies and meetings.

These are all apparent breaches of the democratic principles enshrined in for example the Addis Charter article 17 and could therefore result in sanctions (article 4(m) and 23(2) of the Constitutive act). Tsvangirai also wrote that the election could not "be an election as provided for by our law and accordingly, it will be a nullity if it were to be proceeded with."[146] Regional leaders including from Nigeria, the Southern African Development Community (SADC) and the African Union called on Mr Mugabe to postpone the vote and negotiate with the opposition but he did not adhere and went on with the election as planned which caused the international communities condemnation. It was called a sham by the EU and condemned by the UN, SADC and South Africa among others.[147] Mugabe as an only candidate won the elections with 85% of the vote after many people where forced to vote threatened with violence if they did not. Still the turnout was low.[148] Most of the international community declared the election illegitimate and the election observation team from SADC concluded that the election "did not represent the will of the people of Zimbabwe".[149] The African Union observer mission wrote in their report that the "atmosphere prevailing in the country, at the time, did not give rise to the conduct of free, fair and credible elections" but no action was taken.[150]

On the 21st day of July 2008 the MDC and ZANU-PF entered into an agreement with inter alia the following objectives and priorities of the new government:

"(b) POLITICAL
- New Constitution

[144] African Research Bulletin Volume 45 Issue 5, p. 17530
[145] African Research Bulletin Volume 45 Issue 6, p. 17565
[146] The letter of Zimbabwe's opposition Movement for Democratic Change (MDC) sent to the Zimbabwe Electoral Commission (Zec) on June 23 2008
[147] African Research Bulletin Volume 45 Issue 6, p. 17565
[148] New York Times 2008-07-28
[149] Dugger
[150] Report of the Pan African Parliament election observer mission, June 27, 2008

- Promotion of equality, national healing and cohesion, and unity
- External interference
- Free political activity
- Rule of law
- State organs and institutions
- Legislative agenda priorities

(c) SECURITY

(i) Security of persons and prevention of violence"[151]

The negotiations resulting in this agreement were facilitated by SADC representative and South African president Thabo Mbeki. In September they lead to an agreement between the parties including a decision to draft a new constitution but also a number of provisions ensuring basic human rights and a constitutional structure and a framework for a new government. The new government would according to the agreement consist of Robert Mugabe as remaining President, chairing a Cabinet of 31 ministers, 15 from the ZANU-PF party, 13 from Morgan Tsvangirai's MDC-T and 3 from Arthur Mutambara's MDC-M. Morgan Tsvangirai was, together with the rest of the government sworn in as Prime Minister at a ceremony on the 11th of February 2009, and became head of a Council of Ministers, which was made up of the entire Cabinet. [152] The relative powers of the two bodies were spelled out in the agreement but their interaction remained to be decided upon.[153] Since then the implementation of the agreement has gone slowly forward. Negotiations on the new constitution has started and Mugabe has called for a limitation of presidential terms, still he in March 2010 confirmed that he himself will stand in the next election, planned for 2011 despite the fact that he has already been in power for thirty years.[154]

5.3.2.2 Reaction of the AU and the Development of the Situation

The AU had the Pan African Parliament Election Observer Mission's (PAP-EOM) in Zimbabwe to oversee the election. Its objectives were:

> "To assess whether the Presidential Run-off and By-Elections in Zimbabwe met the guidelines set out in the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa.
>
> - To determine whether these elections were conducted in accordance with the constitutional and electoral framework in force in the country;
> - To establish whether the results of the elections were a true reflection of the democratic will of the people of Zimbabwe;

[151] Memorandum of understanding between the Zimbabwe African National Union (Patriotic Front) and the two movements for democratic change formations. July 21st Harare
[152] Statement by his excellency Jakaya Mrisho Kikwete, 12th AU Summit, 2009.
[153] Cornwell
[154] Nyathi

- To establish that the rule of law prevailed and was being respected.
- To make recommendations for possible actions that could be to improve the holding and conduct of subsequent elections in Zimbabwe and on the African continent."[155]

When the observation mission presented its report on the March election to the parliament it said "irregularities that were detected up to the election day, were not so major as to compromise the flow of the electoral process." It was concerned about the delay of the outcome of the results and expressed doubt about ZEC's control over the electoral process and its constitutional obligation.[156] The mission was given a mandate to examine whether the election was complying with the law of Zimbabwe but the lack sharpness in its analysis is deplorable and the possibility to spur an AU response went lost. Consultations between the AU Chairperson, SADC and the other regional leaders took place to decide on the best way to address the situation.[157] There are no rules prescribing the AU to hold mediation in type two unconstitutional changes of government but inspirations has been sought from some of the most basic principles of the Union that says the AU should promote democracy, peace and security (articles 3(f) and (g) of the Constitutive Act). After the continued violence and the pull out of Tsvangirai the Head of Observer Mission said:

> "The announcement by the president of the MDC was not something unexpected …particularly considering the fact that the violence was not on the decrease. If anything it was escalating. Here is a situation whereby one party is not free to campaign; one party has no access to public or state media; one party is not allowed to travel the length and breadth of this country as it pleases. So it became clear to some of us that it's becoming more and more a one-sided election."[158]

This is a clear and relatively strong statement confirming the breach of democratic principles which could have resulted in imposition of sanctions, or at least a warning. The AU did not take this opportunity but instead called on Mugabe to postpone the election. Mugabe responded that the AU had "no right in dictating to us what we should do with our constitution and how we should govern this country".[159] The AU observer mission declared that the run off elections had not been free and fair and that new credible elections should be held as soon as possible. In the interim the mission supported the SADC negotiations towards a transitional settlement.[160] At the AU ordinary session in June 2008, only days after the run off had taken place, the Assembly expressed deep concern over the situation in Zimbabwe

[155] Report of the Pan African Parliament election observer mission, June 27, 2008
[156] BBC 2008-06-23
[157] Press statement of the Commission 2008-06-23
[158] BBC 2008-06-23
[159] Africa Research Bulletin June 2008 – 17569
[160] Report of the Pan African Parliament election observer mission, June 27, 2008

and the negative reports from observers of the run-off election, but took no action. It urged the Zimbabwean parties to work together to overcome the challenges and called for an immediate end to all acts of violence. It decided to:

> "1. TO ENCOURAGE President Robert Mugabe and the leader of the MDC Party Mr. Morgan Tsvangirai to honor their commitment to initiate dialogue with a view to promoting peace, stability, democracy and the reconciliation of the Zimbabwean people;
> 2. TO SUPPORT the call, for the creation of a Government of National Unity;
> 3.TO SUPPORT the SADC Facilitation, and to recommend that SADC mediation efforts should be continued in order to
> 4. resolve the problems they are facing. In this regard SADC should establish a mechanism on the ground in order to seize the momentum for a negotiated solution;
> 4. TO APPEAL to states and all parties concerned to refrain from any action that may negatively impact on the climate of dialogue"[161]

The panel of the wise discussed the issue of election related conflicts and the situation in Zimbabwe at its second meeting in Addis Ababa 17 July 2008. It expressed its support of the SADC efforts in the country. At its third meeting in October 2008 it expressed an opinion on the development in Zimbabwe.[162]

On its 12th Summit in February 2009 the Assembly welcomed the agreement between the Zimbabwean parties and commended and supported the work done by SADC. It also called for immediate lifting of sanctions on Zimbabwe, imposed by EU and the US.[163] The matter seems not to have been further officially discussed by AU member states but have been handled by SADC.

5.3.2.3 Did the AU follow the Sanctions Regime?

The line of incidents that followed the 2008 election in Zimbabwe was not seen as an unconstitutional change of government by the AU. Accordingly the AU has did not take any of the measures provided for in the AU sanctions regime. There was no condemnation, no urge for a speedy return to constitutional order and no warning the act would not be tolerated, no suspension and no sanctions as prescribed for type one unconstitutional changes of government in Rule 37 of the Rules of Procedure of the

[161] African Union Summit Resolution on Zimbabwe 2008-07-01
[162] El Abdellaoui 2008-08-01
[163] Common Position 2004/161/CFSP (OJ L 50, 20.2.2004, p. 66), Council Regulation (EC) No 314/2004 (OJ L 55, 24.2.2004, p. 1), Executive Order 13288

Assembly. Mugabe even participated in the AU summit days after the disputed run-off election and no signs of denial of his legitimacy were seen.[164]

According to the definitions used in this thesis the situation falls under the type two category of unconstitutional change of government. This although it is not included in article 23(5) of the Addis Charter on illegal means of accessing or maintaining power. Still it falls under article 23(2) of the Constitutive Act since it is a breach of democratic principles (4(m) Constitutive Act and article 17 of the Addis Charter).

Going through with elections even though the only opponent has pulled out after being threatened by high level officials and thereby winning the election should not lead to recognition as a president. The AU observer mission reported on the violence against MDC supporters and declared the election not free and stated that new legitimate elections should be held as soon as possible. This gives the AU the possibility to react according to article 23(2) of the Constitutive Act and Rule 36 of the Rules of Procedure of the Assembly. These rules are not forcing and the AU can therefore escape with passivity without breaking its own laws, which is regrettable. That the African Union after a report as such have nothing more than support of the SADC negation to offer is quite remarkable. It is against all fundamental democratic principles to recognize a leader who maintains power under such circumstances as in this case as the legitimate President of a country.

Mediation was surrendered to SADC and none of the few AU statements that were made on Zimbabwe expressed any dissociation with Mugabe's actions. This was probably because the AU member states had different views on the matter. Not many strong statements were made but the Kenyan prime minister suggested that Mugabe be suspended from AU until he allowed free and fair elections. This was not agreed on by all the other member states and not the slightest reprimand was officially directed at Mugabe, though it was apparent to most of the world that he stood behind the violence and the realization of an election that would not be free or fair. Omar Bongo, president of Gabon, said "he was elected, he took an oath, and he is here with us, so he is president" this seems to be the general approach in AU to Zimbabwe. Among Mugabe's allies have been Angola, Namibia, Tanzania and Democratic Republic of Congo whereas Zambia, Botswana and Mozambique have been more sceptical.[165]

The matter has been a low priority to the AU. It was touched upon at the ordinary sessions of the assembly in June 2008 and February 2009, but no extraordinary meetings were held and the PSC have not discussed the matter publically at all. The fact that the AU called on the international community to lift sanction on Mugabe confirms the view that AU did not find any wrong doing in Mugabes actions. Likewise did the fact that Zimbabwe was

[164] AU Monitor 2008-07-01
[165] BBC 2008-06-30

elected into the Peace and Security Council in 2010. No work has been done to, as the AU observer mission recommended, hold new elections as soon as possible, which is remarkable indeed.

The AU has an ability to act powerfully and/or implement sanctions even if an unconstitutional change of government according to their definition has happened, as we saw in the Comorian case. The framework provided for in article 23(2) of the Constitutive Act and Rule 4(g) and 36 of the Rules of Procedure of the Assembly gives the AU power to act against type two unconstitutional changes of government, but the rules are not forcing which leaves it up to the politicians to decide what should be done. The Zimbabwean case was handled in a completely different way than the Comorian, despite resembling situations. This shows that if the political will is lacking the provisions for imposition of sanctions against type two unconstitutional changes of government are falling short of their aim.

5.4 Analysis of the Case Studies

This section will analyze the answer to the question if the provisions on unconstitutional change of power and the sanctions provided for against these are used to their full potential. It will also investigate whether there is a difference in the way the cases have been treated and if this difference seems to be related to what type of unconstitutional change of government the case is. The provisions for reaction to type one unconstitutional change of government are different from those regarding type two even though they allow for pretty much the same measures. The question is if these possibilities are taken advantage of equally in type one and type two cases. First the type one UCGs and the AU reactions to them will be examined followed by the type two UCGs. After that a general conclusions will be made analyzing the similarities and differences between the reactions to type one and type two UCGs.

5.4.1 Type one Unconstitutional Changes of Government

In the type one unconstitutional change of government situations the framework for sanctions where in both case activated directly after the coups. Condemnation and suspension was made followed by mediation efforts and eventually also sanctions were imposed. This shows that the rules regarding the immediate response to type one unconstitutional changes of government is working satisfactory.

In the Malagasy case it took the AU a year before they imposed sanctions. It implies that the AU rather solves unconstitutional changes in government with diplomacy and mediation rather than imposing sanctions straight away.

In the Mauritanian case, which happened almost a year before Madagascar the AU acted quicker and sanctions where imposed after only six months. In both cases negotiations with the perpetrators where initiated immediately after the coups but in Mauritania the negotiations did not result in any steps against democracy. The junta did not want to cooperate and it only took two months before the PSC threatened to impose sanctions. Neither in Madagascar the negotiations where very successful and they broke down several times but unlike in Mauritania an agreement was reached. Five months after the coup the agreement was signed but it was breached by Rajoelina pretty soon and even though new negotiations started a satisfying development towards democracy was never established. Still since Rajoelina at least on the surface showed some willingness to cooperate the AU waited much longer in the Malagasy case than in the Mauritanian to impose sanctions. The discretion the rules give the Peace and Security Council on when to impose sanctions must be seen as positive since it is better to have the perpetrators voluntary agree to restore constitutional order than having to impose sanctions. These rules must therefore be seen as relevant and suitable for their aim.

After the sanctions were imposed the Mauritanian authorities changed attitude and started negotiating which in July 2009 resulted in an agreement the AU found restoring constitutional order. Unfortunately there were no exclusion of coup makers standing in the election and Abdelaziz was elected and reinstalled as president, and is now a “democratically” elected one. At the next AU summit held in January 2010 the AU policy on this changed as explained above which means Rajoelina does not have the possibility to do the same thing in Madagascar. This is indeed a positive development of the AU framework of response to unconstitutional changes of government which will lead to the end of auto legitimizing coup makers. To conclude the rules regarding type one unconstitutional changes of government are effective in the way that they allow the Peace and Security Council to act powerfully and with the discretion of deciding when to impose sanctions. Still the framework has a certain strictness to it that minimize the risk of passivity.

5.4.2 Type two Unconstitutional Changes of Government

The Zimbabwean and the Comorian situations were very similar. Both had presidents who went through with elections though the situation in the countries did not provide a safe environment to hold elections in. The international community including the AU in both cases had warned the leaders not to go through with the elections and that the result would not be recognized. All though the situations where very similar the responses by the AU were very different. None of the countries where suspended from the AU, since that “sanction” is limited to applying in type one cases, but

there the similarities end. The fact that there are no rules prescribing immediate response to type two unconstitutional changes of government is great misfortune. Warning a government not to go through with elections is not a sufficient response since it is merely a symbolic statement with obviously little effect. The existing rules leave the AU with too much discretion and to little incentives to respond strongly to these situations which for example could be changed by a widening the type one UCG definition to also include type two situations so they would fall under the same rules for immediate response.

In the Comorian case the AU was active through the whole situation starting even before the UCG. After Bacar went ahead with the elections contrary to the will of the interim president the election was declared invalid and he illegal by the AU. Negotiations were initiated but when Bacar refused to hold new elections sanctions were imposed four months after the coup and when they did not result in a restoration of constitutional order the AU intervened military. This proves that article 23(2) of the Constitutive Act has a wide field of application and provides the AU with adequate power to impose sanctions on type two unconstitutional changes of government.

After the election in Zimbabwe the AU observer mission described it as "not representing the will of the Zimbabwean people" still no demands of the holding of new elections where made, as in the Comorian case. Mugabe was accepted as the president and regarding the grave violence before the election, mostly carried out by Mugabe supporters against political opponents he did not have to take any responsibility. No demand was made that new elections should be held even though Mugabe had been the only standing candidate. Instead he was encouraged to partake in negotiations with his opponents and to enter a power sharing agreement. An initial agreement was reached a few months after the election where Tsvangani was made prime minister. A new election has never been mentioned as a condition by the AU although the existing one was deemed not free and fair. Sanctions have also not been mentioned though it took no more than four months to impose such against Anjouan. The Zimbabwean case shows that although article 23(2) allows the AU to act, the rules regarding the decision making process in the Assembly are not well designed for this type of situation. Since the Assembly by tradition takes it decision by the consensus all member states have to agree to impose sanctions on another member state. This is not an acceptable design of the framework since it gives the political will of the member states a decisive role undermining predictability in the AU response to type two unconstitutional changes of government.

In the Comorian case the AU found a completely new line of possible measures to take whereas in Zimbabwe hardly anything has been done. Noteworthy is also that AU acted in the Comoros despite the lack of active support from the usual main players South Africa, Kenya and Nigeria. Here Tanzania, Libya, Senegal and the Sudan stepped up and took responsibility.

[166] Apparent is that the AU has the possibility and the ability to act powerfully and implement sanctions even against type two UCG's if the political will is there. It also shows that the framework for measures against unconstitutional changes of government can be effective not only against type one UCGs but also against type two. The problem in the type two cases is the lack of rules for immediate action and also the article 23(2) that puts too little pressure on the AU to act.

5.4.3 General conclusions

Looking at these four cases one could draw the conclusion that the AU framework of response for unconstitutional changes of government allows for a wide range of measures against both type one and type two UCGs. One can also see that the plan of action is clearer and firmer for type one UCGs than for type two. The reactions against Mauritania and Madagascar were pretty similar while the Comorian and Zimbabwean cases provoked very different reactions. The framework of response for type one situations has a satisfactory design which provides a sufficient imperative for the Peace and Security Council to act. One improvement that could be made is the introduction of an absolute time frame for when sanctions the latest should be implemented.

In type two cases the space for discretion is much wider. This gives political will great influence which is unsatisfactory when the aim is an effective implementation of sanctions also against type two unconstitutional changes of government. To achieve this, stricter rules will be needed. More specifically rules for immediate action such as condemnation, suspension and warning of sanctions would be very helpful. Giving the Peace and Security Council mandate to impose sanctions on type two UCGs would also be a vital improvement. This would considerably simplify the taking of decisions to impose sanctions and streamline the framework action. Most important for an efficient response to type two UCGs is a forcing provision saying the AU *shall* impose sanctions in case of breaches of fundamental democratic principles. This is the key to predictability since it minimizes the role of political and institutional will which is not always very dependable. Political will is likely to vary and may not always be there in the cases where its needed the most, see tragic examples such as Rwanda. The African Union's Peace and Security Council commissioner, Ramtane Lamamra has said that "Sanctions are not the best tool that modern democracy has invented. The African Union has a different line of thinking on how to help African countries to move forward under such circumstances."[167] If this is the prevailing view on sanctions it will be hard to see how any sanctions at all would be implemented if it was not mandatory for the AU to do so. Fortunately this seems not to be the case and the rate of imposition of sanctions has been high against type one UCG's

[166] Svensson p. 23
[167] Abawo 2008-07-02

and even a development towards more frequently imposed sanctions against type two UCGs can be seen.[168]

[168] See Appendix 1

6 Analysis

The problem of unconstitutional changes of government has since the African Union was established received recognition within the continent as a serious threat to the development of the continent which must be dealt with by the union and not individually by member states. To this aim the Union inter alia developed a framework for response to unconstitutional changes of government. Analyzing the African Union framework for response to unconstitutional changes of government includes considering a wide range of legal instruments and provisions but also the organizational structure and the mandates of the Union organs. In the first section of this chapter the structure of the organization and its ability to implement sanctions will be discussed. This includes the organs efficiency and shortcomings and AU's suitability and actual ability to respond to unconstitutional change of government in a way that seriously discourages African states to perform them. In the following passage the definition of unconstitutional change of government will be analyzed together with the decision making process and the political versus legal approach to unconstitutional changes of government. Here an answer to the question weather the AU definition to unconstitutional change of government is functional to the aim of making Africa a more democratic continent, will be attempted. This analysis is made from a point of view where the rule of law, predictability and effective enforcement of decisions and policies and are seen as the higher aim. Implementation of sanction in both type one and type two unconstitutional change of government situations are seen as something positive. The discussion of whether or not sanctions are the most efficient measure for combating unconstitutional changes of government is an interesting one but does not belong in this thesis.

6.1 The Organizational Structure's Ability to Respond Effectively to Unconstitutional Changes of Government

The structure of the AU is ambitious with many organs and programmes for enhancing democracy. The establishment of the Peace and Security Council in 2002 shows a will to work with the problem of unconstitutional changes of government and the powers the Council has been given are far-reaching. The PSC is the most active organ with a competence to act quickly against urgent incidents. This is an important part of the AU response to unconstitutional changes of government since it deals with the problem immediately. The Peace and Security Council can impose sanctions after a type one unconstitutional change of government with a two third majority of

the 15 member states, compared to decisions in the Assembly which needs the approval of two thirds of all the 53 member states. Important is also that the PSC decisions are binding for all AU member states, even those not members of the Council. The PSC has also shown a determination to deal with the problems and has held more than 80 official meetings on conflict management[169], six countries have so far had sanctions targeted at them, which is a pretty impressive result for an organization that has less than ten years of experience and as Williams have expressed it:

> "Ultimately, any evaluation of the PSC must take a stance on whether it has made a real difference to the maintenance of peace and security in Africa. In this regard, it is reasonable to assume that despite the obvious problems, the security situation in Africa would probably have been worse without the PSC. To use a clichéd phrase, if the PSC didn't exist, it would be wise to invent it."[170]

The Assembly on the other hand is the supreme organ of the African Union and has a wider mandate to for example institute sanctions but in practice the Assembly meets too seldom and has a to complicated decision making process to be a very active player in the direct response to unconstitutional changes of government . The Assembly's main task is instead to make decisions, adopt provisions and developing policies for the Union which upon the PSC can act. Two examples of the contribution of the Assembly to enhance the framework for response to unconstitutional changes of government are the initiative to establish the Sanctions Committee together with the decision at the 2010 Summit to forbid coup makers to stand in subsequent elections. The principle of not allowing coup makers in subsequent elections is taken from the Addis Charter and made into a binding rule. This could possibly be interpreted as the beginning of a very positive trend accepting more and more of the non binding rules in the Addis Charter.

The cooperation with the Regional Economic Communities and the international community is a very important part of the AU's work. It is vital to harmonize efforts for enhanced democracy and to include all concerned parties, especially African ones, to improve the result. The AU has the goal to create African solutions to African problems and the cooperation with the Regional Economic Communities is a good path to go to strengthen the ability to achieve this and to lessen the dependency of the donor community.

The African Union will always have the benefit of being a more legitimate actor in Africa than the EU or even the UN can be. All African countries except Morocco and Eritrea are members of the union and this is an important advantage when working to enhance democracy on the continent.

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[169] Williams, Thinking *about security in Africa.*
[170] Williams, *The Peace and Security Council of the African Union: evaluating an embryonic international institution.*

The initiative and the will power to create a more stable and democratic continent is coming from the own people and this is the only way Africa will ever reach the goals. There is a wide spread wish in Africa to become less dependent on the donor community and also a skepticism against the involvement of western countries in Africa. The international community should always be there for the AU to inspire and support but hopefully the AU will grow with increased responsibilities and in the future be the trustworthy organization dealing with and solving African problems that the continent and the world needs.

6.1.1 What needs to be changed in the organizational structure?

For a more effective response to unconstitutional changes of power the AU organizational structure would benefit from some changes. First of all a larger budget with more focus on combating UCG's would be helpful. Today only a fraction of the budget is dedicated to this and an increase would facilitate a larger and more qualified commission to prepare and execute the decisions of the Assembly and the PSC's decision. More energy should also be put on monitoring the implementation of and member state compliance with already imposed sanctions and evaluate their effects. The establishment of the AU Sanctions Committee and its secretariat shows that the AU is aware of the need. How the AU decides to design the legal mandate of the Committee is crucial and a measure for it to put pressure on member states not complying with a decision to impose sanctions would be most desirable.

The AU budget for 2010 is 250.5 million USD which is approximately 1/1000 of EU's budget. This will naturally influence the capacity of the AU organs. For example the AU parliament has a budget on $ 6 million which is enough to meet twice in a year while the European counterpart has a budget on € 1 billion. The AU Commission has a budget on $ 20 million which allows it to employ a few hundred civil servants compared to the European Commissions 22, 000 employees. A larger budget would therefore be of high importance to enhance the AU capacity.[171] Notable is though that the Council of Europe, including the European Court of Human Rights has a budget equivalent of the EU budget for 17 minutes. Still it succeeds in developing and enforcing human rights law in Europe at an astonishing level and without parallel in the whole world.

Another problem linked to the funding of the AU is that five countries pay 75% of the total budget. This undermines the equal influence that all member states should have. The political influence over most decisions is still a fact which results in an uncertainty and unpredictability in the

[171] Van der Mei p. 31.

responses to unconstitutional changes of government in general and type two unconstitutional changes of government in particular. The decisions taken in the AU, as in other organizations, are too dependent on the ambitions and political will of its leaders. If there is no political will and no forcing provisions pressuring the organization to act, nothing will be done. To remedy this there must be rules and structures for ensuring effective work to fulfill of the aims and objectives of the union and enforcing its decisions. A useful development would be to move from the now prevailing decision making by consensus to majority decisions which would make it considerably easier to reach decisions both in the Assembly and in the PSC.

The lack on monitoring and enforcement mechanism is a great problem for the AU. If the member states and the unions knew they would be held accountable for their inaction, the compliance with union decisions and policies would be enhanced. The operationalization of the African Court of Justice, which was founded by the Constitutive Act would facilitate this. The existing Court of Human and People's Rights does only handle human rights cases and the lack of an institution interpreting the union law and ensuring the enforcement of the union's decision is fatal. The existence of an African Court of Justice would also increase the notion that the AU is based on the rule of law. The Protocol on the AU Court of Justice might not be as allowing as one could hope for when it comes to permitting submissions to the court. Remembering the weak start of the European Court of Justice and its development to a now fundamental organ in the EU structure this should not be a reason for too much alarm.

The discussion of turning the Assembly into a union "Authority" and increase the supra nationalism is a very important issue for the development of the African Union since it could strengthen the union's operational power considerably and enhance the rule of law and predictability in response to unconstitutional changes of power. Unfortunately the future of the "Authority" just like the Court of Justice is unclear and the operationalizing plan without a time frame due to insufficient political support. Some states are already eager to proceed in the development of the AU and the Senegalese senior Minister of Foreign Affairs, has said that the 12-15 states that are ready for the establishment of a Union Government should be allowed to go ahead without further delay.[172]

The Pan African Parliament was supposed to develop into a legislating body after the first four years. That did not happen and the PAP has still very little influence and power. The democratic character of the PAP is an important part of the AU's credibility as representing the Africans and an expansion of the organs powers would therefore be desirable.

Compared to the EU Commission the AU Commission is a very weak organ with a mainly administrative purpose and no influence on decision making. In unconstitutional change of government situations and sanctions

[172] AU Monitor 2008-07-01

implementation the Commission has the important task to report on the situation in the country to the PSC and for this, a considerable budget should be provided to ensure genuine investigation of the situation and level of implantation of the possible sanctions. The Commission would also benefit from having a more independent role and not be so strictly governed by the other organs.[173]

6.2 The AU definition of and framework for response to unconstitutional changes of government

In this part of the conclusion the definition of unconstitutional changes of government will be analyzed first and then the African Union's possibilities to impose sanctions will be evaluated. These two issues are interrelated and dependent on each other but an attempt to discuss them separately for the sake of clarity will be made. They are both crucial to the effectiveness of the response to unconstitutional changes of government.

The definition of unconstitutional changes of government is too narrow in the Lomé Declaration, the Ruled of Procedure of the Assembly but also in the Addis Charter. The Lomé definition includes:

5. *Military coup d'état against a democratically elected Government;*
6. *Intervention by mercenaries to replace a democratically elected Government;*
7. *Replacement of democratically elected Governments by armed dissident groups and rebel movements;*
8. *The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.*"

The Rules of Procedure of the Assembly goes one step further and also includes "other coup d'états than military" meaning political coups, and

- "The overthrow and replacement of a democratically elected government by elements assisted by mercenaries."

The widest definition is offered in the Addis Charter which also includes:

- "Amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government"

However all the instruments leave out situations like the undemocratic elections in Zimbabwe and the Comoros which in practice, but apparently not in theory, are extensions of the term limits in breach of the constitution since such elections only have one possible outcome, the victory of the sitting president. It is unacceptable that situations like these, both severely

[173] Van der Mei, p. 31.

undemocratic and unconstitutional, are not considered as severe as political coups for example when the result is the same. For the AU to expedite the democratic development on the continent vigorous efforts must be taken in the same degree against these unconstitutional abidances in power as against type one UCGs. To accommodate this, the definition should be widened to include also type two UCGs. A simple way to at least partly achieve a widening would be to ratify the Addis Charter so amendments and revisions of the constitution infringing democratic principles also would be included. This solution is not perfect though since arranging of unconstitutional elections without an amendment to the constitution would not be covered. For a satisfying definition also these situations should be added to the list of situations considered to be unconstitutional changes of government according to the AU legal framework.

Ikome has criticized the Lomé Declaration definition for focusing too much on the process of acquisition of power and not enough on the maintenance. He argues that the Lomé Declaration fails to acknowledge that the root cause of unconstitutional changes in government is poor governance. [174] This is a very good point which should be taken into consideration by the Assembly when continuing to develop the response to unconstitutional changes of government.

The possibility to impose sanctions partly depends on the definition of unconstitutional changes of government but also on the type of provisions describing the response. To enhance the framework not only the definition needs to be changed but also the firmness regarding when sanctions shall be imposed.

The type one unconstitutional change of government has a clear cause of action attached to it prescribed in the PSC Protocol and the Rules of Procedure of the Assembly including a provision saying the Peace and Security Council *shall* institute sanctions whenever an unconstitutional change of government takes place in a Member State. The provisions on response to type two unconstitutional changes of government do not have the same rigidity to it. The provisions *allowing* sanctions to be imposed against type two unconstitutional changes of government are found in the constitutive act and states that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions”.

This is not a satisfying regulation since these rules are not forcing and therefore allows a discretion that undermines the rule of law and the equal handling of equally unwanted incident. The remedy for this could be to change the word “may” to “shall” in article 23(2) of the constitutive act. This would be a very important improvement especially together with a rule providing a firmer time frame for when sanction shall be imposed the latest. Critique has also been aimed at the AU actions for the participation of

[174] AU Monitor 2010-04-03

undemocratic countries like Sudan and Libya in acting against unconstitutional changes of government and for not being consistent.[175] This should all be remedied by a wider unconstitutional change of government definition and forcing rules applying to all these situations.

[175] Svensson p. 33

7. Conclusion

The AU sanctions regime is relatively strong regarding type one unconstitutional changes of government and the PSC Protocol confers more explicit legal authority to the PSC than the UN Charter does to the UN Security Council.[176] The rules are forcing in some aspects which provides for good predictability and effectiveness but the situations that falls outside this definition still has an insufficient response connected and relies on political will to be effective, this is very unfortunate and needs to be changed.

However all well formulated, binding and forcing rules in the world can not make a continent democratic if there are no institutions ensuring the implementation of the rules and regulations. The member states and the AU organs must also be held responsible for their actions and in-actions. This is why the African leaders has to find the political will to give up some of their sovereignty and work for a more supra national organization based on the rule of law. To this aim the operationalization of the Court of Justice and Human Rights is vital, so that it can ensure the fulfillment of union principles and enforcement of decisions.

An alternative way of looking at this is that the critique directed against the AU for dealing with the problems of unconstitutional changes of government too leisurely, has a western approach and does not respect African values. African states must be allowed to decide what is best for their own continent and if they want to take a more gradual approach based on consensus and compromise that should be accepted. The problem with this outlook is that it will result in a longer process to reach the aim which though will be justified and more legitimate if it really stems from a true wish of the African people and is not a poor excuse for African leaders to be able to stay in power longer.[177]

No matter what viewpoint one chooses for examining the African Union one has to be mindful of the fact that the organization is still very young and in a process of evolving. The organization has to be given time to develop into the well functioning, effective union Africa needs. Compared to other large organization like the European Union and the United Nations that have had a much longer time to become what they are today, the AU has developed impressively fast into an organization. It has high ambitions and an actual ability to deal with the problems that exist in Africa today, not least unconstitutional changes of government. This is a very fortunate progress giving high hopes for the future which should be encouraged and supported by all advocates for democracy.

[176] Levitt p.830
[177] McMahon

7.1 Recommendations

The conclusion reached in this study is that more supra nationalism based on rule of law is needed for a more efficient framework of response against unconstitutional changes of government in Africa. The union also needs to facilitate better compliance with the objectives and principles of the Union by ensuring accountability for breaches of them. Some summarized recommendations on concrete actions to be taken are:

- Important legal documents like the Lomé Declaration and the Addis Charter should be ratified and binding.
- A broader definition of unconstitutional changes of government should be designed to include all illegal means of accessing and maintaining power, even situations like those in Zimbabwe and the Comoros. This would partly be facilitated by the ratification of the Addis Charter.
- The framework of response for unconstitutional change of government type one should be forcing and have a time limit for how long the implementation of sanctions can be postponed, to eliminate the risk of passivity.
- The response to type two unconstitutional changes of government should be the same as for type one unconstitutional changes of government since the present framework totally relies upon the political will and lacks predictability and accountability for the AU organs. This could be achieved by a widening of the definition or a change of the word “may” into “shall” in the article 23(2) of the constitutive act.
- The African Union needs to operationalize the planned Court of Justice and Human Rights to ensure the fulfillment of union principles and enforcement of its decisions. The rule regulating the admissibility should also be expanded to allow NGOs and individuals to submit cases to the court.

Supplement A

Statistics on Countries in Africa

-where conflict or unconstitutional change of government has taken place since 2000

Coups, conflicts and unconstitutional incidents/ year

Updated 2010-04-21

Year	Political and military coups	Unconstitutional incidents	War and conflicts
Before 2000		12	
2000		1	11
2001		1	12
2002	1	2	12
2003	3	3	7
2004			8
2005	2	2	5
2006		1	8
2007		2	9
2008	2	3	8
2009	1	3	5
2010-04-21	1	1	
Total	10	31	89

Total Number of countries: 38

Year	Political and military coups	AU Reaction	Unconstitutional incidents	AU Reaction
			Angola	-
			Congo Brazzaville	-
			Egypt	-
			Equatorial guinea	-
			Eritrea	-
			Gambia	-
			Libya	-
			Morocco	Not member!
			Namibia	
			Somalia	yes
			Sudan	negotiation
			Swaziland	-
2000			Burkina Faso	
2001			DRC	-
2002	Madagascar	Weak reaction		
2002			Togo	-
2002			Tunisia	-
2003			Gabon	-
2003			Rwanda	-
2003			Guinea	
2003	Guinea Bissau	condemnation		
2003	Sao Tome & Principe	Condemnation		
2003	Central African Republic	Condemnation Sanctions		
2005	Mauritania	Suspension condemnation		
2005	Togo	Suspension sanctions		
2005			Uganda	-
2005			Chad	-
2006			Cote d'Ivoire	yes
2007			Kenya	condemnation
2007			Comoros	Sanctions Intervention
2008	Guinea	Suspension, condemnation		
2008	Mauritania	Suspension Sanctions		
2008			Algeria	-
2008			Cameroon	-
2008			Zimbabwe	-
2009			Guinea	sanctions
2009			Comoros	-
2009	Madagascar	Suspension, sanctions		
2009			Niger	weak
2010	Niger	Suspension (so far)		
2010			Djibouti	

Total	**10**		**31**	

Reactions:

Number of countries against which AU has reacted strongly: 13

Burundi, Central African Republic, Comoros, Cote d'Ivoire, Guinea, Guinea Bissau, Kenya, Madagascar, Mauritania, São Tomé & Príncipe, Somalia, Sudan and Togo.

Number of countries that have been suspended from AU: 5

Central African Republic, Guinea, Madagascar, Mauritania, Togo.

Number of countries against which AU has imposed classic sanctions: 6

Central African Republic, Comoros, Guinea, Madagascar, Mauritania and Togo.

Number of countries against which UN has imposed classic sanctions: 11

Angola, Cote d'Ivoire, Democratic Republic of Congo, Eritrea, Ethiopia, Liberia, Libya, Rwanda, Sierra Leone, Somalia and Sudan.

Number of countries against which EU has imposed classic sanctions: 10

Comoros, Cote d'Ivoire, Democratic Republic of Congo, Guinea, Liberia, Niger, Sierra Leone, Somalia, Sudan and Zimbabwe.

Number of countries against which the EU or the UN has reacted strongly: 9

Burundi, Central African Republic, Chad, Guinea, Guinea Bissau, Kenya, Madagascar, Mauritania, Niger, São Tomé & Principe and Togo.

Number of countries against which the Regional Economic Communities (RECs) has reacted strongly: 10

CEMAC (: Central African Republic
ECOWAS: Cote d'Ivorire, Guinea, Guinea Bissau, Liberia, Niger and Togo.
IGAD: Eritrea and Somalia
SADC: Madagascar

Definitions

Classic Sanctions include travel restrictions, assets freeze, arms embargos etc. Not including peace keeping.

Conflict at least 25 battle-related deaths in a year but fewer than 1000. Definition according to Department of Peace and Conflict Research, Uppsala University terminology (see Harbom).

Political and military coups Succeeded to stay in power at least for a little while, not including coup attempts.

Strong Reaction Including Peacekeeping missions, condemnations, freezing of aid and suspensions. Not including observatory missions, negotiation or fact finding teams etc.

Unconstitutional incidents Number of countries where a conflict or war was active that year, not number of conflicts. Including violent elections, unconstitutional change of government, abortion of term limit, staying in power more than to presidential term limits.

War at least 1000 battle-related deaths in a year. Definition according to Department of Peace and Conflict Research, Uppsala University terminology (see Harbom).

War and conflicts Number of countries where a conflict or war was active that year, not number of conflicts.

Bibliography

Statutes, Charters, Protocols etc.

African Charter on Democracy, Elections and Governance, adopted by The Eighth Ordinary Session of The Assembly, held In Addis Ababa, Ethiopia On 30th January 2007

African Charter on Human and Peoples' Rights, Nairobi, Kenya, June 1981, entered into force 21 November 1986.

Constitutive Act of the African Union, adopted in Lomé, Togo 11 July 2000, entered into force 26 May, 2001.

Declaration on the framework for and OAU response to unconstitutional changes of government, (Lomé Declaration), AHG/Decl.5 (XXXVI), July 10-12, 2000, Lomé, Togo.

Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, Sirte, Libya, 2 March 2001, entered into force 14 December 2004.

Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ouagdougou, Burkina Faso, 10 June 1998 , entered into force 25 January 2004.

Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Durban, South Africa, 10 July 2002, entered into force 26 December 2003.

Protocol on the Statute of the African Court of Justice and Human Rights, Adopted by the Eleventh Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt, 1st July 2008.

Rules of procedure of the Assembly of the union, First Ordinary Session 9 - 10 July 2002, Durban, South Africa.

Rules of Procedure of the Executive Council Assembly of the Union, First Ordinary Session, 9 - 10 July 2002, Durban.

The Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government, September 8-9, 1999, Sirte, Libya.

Statute of the Commission of the African Union, First Ordinary Session 9 - 10 July 2002, Durban, South Africa.

The protocol on relations between the African Union and the Regional Economic Communities, Ninth Ordinary Council, 1-3 July 2007, Accra, Ghana.

Charter of the United Nations, San Fransisco, United States, June 26, 1945.

Official Documents

Assembly
Decisions, Declarations and Resolutions, Assembly of the African Union, Fourteenth Ordinary Session, 31 January – 2 February 2010
Addis Ababa, Ethiopia.

- Assembly/AU/Dec.279(XVI) Decision on Madagascar.
- Assembly/AU/Dec.269(XIV) Rev.1 Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage such Situations.

Decisions, Declarations, Message of Congratulations and Motion, Assembly of the African Union, Twelfth Ordinary Session, 1-3 February 2009
Addis Ababa, Ethiopia.

African Union Summit Resolution on Zimbabwe Adopted at the 11th Ordinary Session of the African Union Assembly, 1 July 2008, Sharm El Sheikh, Egypt.

Decisions, Declarations and Resolution, Assembly of the African Union, Fifth Ordinary Session, 4 – 5 July 2005, Sirte, Libya.

- Assembly/AU/Dec.83 (V), Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union (Doc. Assembly/AU/6 (V))

Decisions and Declarations, Tenth Ordinary Session, 31 January – 2 February 2008, Addis Ababa, Ethiopia.

35th Ordinary Session of the OAU Assembly OAU/Third Ordinary Session of AEC12-14 July 1999 AHG/Decl. 1-2 (XXXV) AHG/OAU/AEC/Dec.1 (III).

Executive Council
Executive Council Decisions, The 5th Ordinary Session of the Executive Council, 30 June- 3 July, 2004, Addis Ababa, Ethiopia.

EX.CL/Dec.300 (IX), Durban, South Africa July 2002

Peace and Security Council
PSC 2007-05-09 PSC/MIN/Comm.1 (LXXVII) adopted at its 77th meeting held in Durban, South Africa

PSC 2007-06-09, PSC/PR/COMM (LXXVIII), 78th Meeting.

PSC 2007-07-31 84th MEETING, ADDIS ABABA, ETHIOPIA PSC/PR/Comm(LXXXIV)

PSC 2007-08-13 87TH MEETINGADDIS ABABA, ETHIOPIA PSC/PR/Comm(LXXXVII)

PSC 2007-10-10, 95th Meeting, Addis Ababa, Ethiopia, PSC/PR/Comm(XCV)

PSC 2008-04-30 124TH MEETING ADDIS ABABA, ETHIOPIA PSC/PR/Comm(CXXIV)

PSC Meeting 2008-06-29, 138th Meeting, Sharm el- Sheik, Egypt, PSC/HSG/Comm (CXXXVIII)

PSC Meeting 2008-08-07, 144 Meeting Addis Ababa, Ethiopia, PSC/PR/Comm(CLIV).

PSC Meeting 2008-10-22, 155th Meeting New York, PSC/MIN/Comm.2 (CLI).

PSC Meeting 2008-11-11 156th Meeting, Addis Ababa, Ethiopia, PSC/PR/Comm(CLVI).

PSC Meeting 2008-12-22, 163rd Meeting, Addis Ababa, Ethiopia, PSC/MIN/Comm.3(CLXIII).

PSC Meeting 2009-02-05, 168th Meeting, Addis Ababa, Ethiopia, PSC/PR/(CLXVIII).

PSC Meeting 2009-03-16, 179th Meeting in Addis Ababa, Ethiopia, PSC/PR/ (CLXXIX).

PSC Meeting 2009-03-17, 180th Meeting in Addis Ababa, Ethiopia, PSC/PR/COMM.(CLXXX).

PSC Meeting 2009-03-24, 181th Meeting, PSC/PR/Comm(CLXXXII).

PSC Meeting 2009-06-10, 192nd Meeting, Sirte, Libya, PSC/PR/Comm.3(CXCII).

PSC Meeting 2009-06-29, 196th Meeting, PSC/MIN/COMM.(CXCVI).

PSC Meeting 2009-09-10, 202th Meeting, Press statement PSC PR/BR/(CCII).

PSC Meeting 2009-11-09, 208th Meeting, PSC/PR/Comm.(CCVII).

PSC Meeting 2010-02-19, 216th Meeting PSC/PR/COMM.1(CCXVI).

PSC Meeting 2010-03-17, 221st Meetning, PSC/PR/COMM.(CCXXI).

Other
Communiqué Consultative meeting on the situation in Mauritania, Addis Ababa, 10 November 2008

Draft Charter on Democracy, elections and governance: explanatory note Located at: http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm#2

Ministerial Meeting on the Comoros, 20 February 2008, Addis Ababa, Ethiopia

Press statement of the Commission 2008-06-23 Located at: http://www.iss.co.za/uploads/ZIMAU23JUN08.PDF

Report of the Chairperson of the commission *Enhancing Africa's resolve and effectiveness in ending conflict and sustaining peace* 2009-08-30 SP/ASSEMBLY/PS/RPT(I)

Report of the Chairperson of the Commission on the situation in Madagascar PSC/PR(CCXVI) Peace and Security council 126th Meeting, 19 February 2010, Addis Ababa, Ethiopia

Report of the Chairperson of the Commission in the Situation in the Comoros since the 10th ordinary session of the assembly of the African union held in Addis Ababa from 31 January to the 2 February 2008. PSC/PR/2(CXXIV)

Report of the Pan African Parliament election observer mission presidential run- off election, June 27, 2008 PAP/S/RPT/76/08

Statement by his Excellency Jakaya Mrisho Kikwete, the outgoing African Union Chairman and President of the United Republic of Tanzania at the 12th Summit of the Heads of State and Government of the African Union, Addis Ababa, Ethiopia, 1st to 3rd February 2009.

Litterature

Akokpari, John, Ndinga-Muvumba, Angela, Murithi, Tim, *The African Union and its Institutions,* Fanele, Aukland, South Africa, 2008.

Cortright, David; A. Lopez, George, *Sanctions and the search for security, Challenges to UN action,* Lynne Rienner Publishers, Inc. Colorado 2002.

Engel, Ulf; João Gomes, *The African Union's New Peace and Security Architecture: Toward an Evolving Security Regime?*, Special Issue of African Security: Regional Organizations in African Security, Vol. 2, Issue 2 & 3, 2009.

Eriksson, Mikael. *Rethinking Targeted Sanctions*, The European University Institute: Florence, 2009.

Gowlland- Debbas, Vera (editor), *United Nations Sanctions and International Law,* Kluwer Law International, The Hague, 2001.

Kelsen, Hans, *Den Rena Rättsläran,* Thales, Stockholm 2008.

Kuwali, Daniel *Persuasive Prevention – Implementation of the AU Right of Intervention,* University of Lund 2009.

Rosenne, Shabtai, *International Law Commission Draft Drticles on State Responsibility*, Part 1 articles 1-35, Kluwer Academic Publishers, Netherlands 1991.

Stenhammar, Fredrik, *Riktade FN-sanktioner och Rule of Law i Folkrätten,* Jure Förlag AB, Stockholm 2008.

Svensson, Emma, *The African Union's Operation in the Comoros -MAES and Operation Democracy,* Försvarets forskningsinstitut, Stockholm 2008.

Articles

Abawo 2008-07-02, By Kennedy Abwao and Alan Cowell, *African Union Calls for Settlement in Zimbabwe*, Located at: http://www.nytimes.com/2008/07/02/world/africa/02zimbabwe.html?_r=1&scp=1&sq=zimbabwe+%22african+union%22&st=nyt, retrieved 2010-04-13

AFP Jun 16, 2008, *Comoros isle of Anjouan headed for second round,* Located at: http://afp.google.com/article/ALeqM5ijMOLl_1d87lq3FLVK0DaMD2Zk6g retrieved 2010-04-08.

African Union Website, Located at: http://www.au.int/?q=about/brief retrieved 2010-03-29.

African Press Organization 2010-02-09, *Decisions of the 14th African Union summit*, Located at: http://appablog.wordpress.com/2010/02/09/decisions-of-the-14th-african-union-summit/, retrieved 2010-05-09.

Africa Research Bulletin April 1st–30th 2009.

African Research Bulletin 2009 Volume 46 Number 7 p. 1

Africa Research Bulletin, April 2008, p.17463C-17465B, *Comoros Islands: AU Troops Invade Anjouan*.

Africa Research Bulletin March 2008.

Africa Research Bulletin July 1st–31st 2006, p.16707, *African Union Posturing Outweighs Policy.*

Africa Research Bulletin, June 1st -31st July 2006.

Afrique en ligne 2008-05-20, *Five candidates vie for the presidency of Anjouan*, Located at: http://www.afriquejet.com/index.php, Received 2010-04-08.

Afrol 2009-11-20, *Eritrea breaks with African Union,* Located at: http://www.afrol.com/articles/10577 Retrieved 2010-03-25.

AFP 2009-12-15 *African rights court unable to hear Habre trial petition*.

All Africa 2008-07-02, *Comoros: Cautious Optimism After Calm Anjouan Elections,* Located at: http://allafrica.com/stories/200807020943.html, retrieved 2010-04-08.

AU Monitor 2010-04-03, *The Challenge of Unlawful Changes of Regime,* Located at: http://www.pambazuka.org/aumonitor/comments/the_challenge_of_unlawful_changes_of_regime/, retrieved 2010-05-09.

AU Monitor 2010-02-09 *Bingu wa Mutharika highlights his priorities,* Located at: http://www.pambazuka.org/aumonitor/comments/2644/ retrieved 2010-05-09.

AU Monitor 2008-07-01, *Senegalese FM Makes Case for Union Government*, Located at: http://www.pambazuka.org/aumonitor/comments/senegalese_fm_makes_case_for_union_government, Retrieved 2010-05-02.

Ayangafac, Chrysantus, ISS Situation Report, *Situation Critical: The Anjouan Political Crisis*, 2008-03-05.

Badza, Simon, *Zimbabwe's 2008 election and their implications for Africa,* African Security Review Vol 17 No 4.

BBC 2010-01-31, Gaddafi *thwarted over African Union presidency,* located at: http://news.bbc.co.uk/2/hi/8489724.stm, retieved 2010-05-22.

BBC 2009-03-26, *African Union Profile*, AU Located at: http://news.bbc.co.uk/2/hi/country_profiles/3870303.stm, retrieved 2010-05-09.

BBC 2009-12-26, *Madagascar country profile*, Located at: http://news.bbc.co.uk/2/hi/country_profiles/1063208.stm Retrieved 2010-03-25.

BBC 2009-12-26, *Timeline: Comoros*, http://news.bbc.co.uk/2/hi/africa/1070770.stm, retrieved 2010-03-25.

BBC 2009-12-21, *Madagascar leader Rajoelina scraps power-sharing deal*, Located at: http://news.bbc.co.uk/2/hi/africa/8424084.stm, retrieved 2010-04-30.

BBC 2008- 06-23, *Tsvangirai withdrawal: key quotes*, Located at: http://news.bbc.co.uk/2/hi/africa/7468091.stm, retrieved 2010-05-21.

BBC 2008-06-30 *"Kenya urges AU to suspend Mugabe"* Located at: http://news.bbc.co.uk/2/hi/africa/7481857.stm Retrieved 2010-03-25

Business Day 2010-02-02, *A rare glimpse of courage*, Located at: http://allafrica.com/stories/201002020446.html, retrieved 2010-05- 21.

Copnall, James, 2008-08-06, *What next for Mauritania coup leaders?*, Located at: http://news.bbc.co.uk/2/hi/africa/7545934.stm, retrieved 2010-04-16.

Cornwell, Richard, 16 September 2008: *Zimbabwe: A wait-and-see agreement***,** ISS, Located at: http://www.iss.co.za/pgcontent.php?UID=7243, retrieved 2010-05- 21.

Dugger, W Celia and Bearak, Barry, 2008-06-30, *Mugabe Is Sworn In to Sixth Term After Victory in One-Candidate Runoff*, Located at: http://www.nytimes.com/2008/06/30/world/africa/30zimbabwe.html, retrieved 2010-04-13

Ebobrah, Solomon T, *The African Charter on Democracy, Elections and Governance: A New Dawn for the Enthronement of Legitimate Governance in Africa?*, Open Society Institute, May 2007.

El Abdellaoui, Jamila, *The Panel of the Wise - A comprehensive introduction to a critical pillar of the African Peace and Security Architecture*, ISS Occasional Paper 193, August 2009, Located at: http://www.issafrica.org/pgcontent.php?UID=18589, retrieved 2010-05-21.

Emerging minds 2009-02-03, *African Union budget shows a 17% increase over last year*, Located at: http://emergingminds.org/African-Union-budget-shows-a-17-increase-over-last-year.html, retrieved 2010-05-21.

Europolitics 2007-10-02, *Defence: EU Chad Mission Could be Less European.*

Fombad Charles Manga, *The African Union, Democracy and Good Governance*, Curren African Issues No. 32 AU, NEPAD and the APRM, Democratisation Efforts Explored, edited by Henning Melber Nordiska Afrikainstitutet, Uppsala 2006.

ISS 2009-10-28, *Enhancing the African Union sanctions regime,* located at: http://www.issafrica.org/uploads/28OCT09REPORT.PDF, retrieved 2010-05-08

Levitt, Jeremy I. *Pro- Democratic Interventions in Africa,* Wisconsin International Law Journal 2006-2007.

Mathaba News Agency 2009-10-28, *The Task Ahead for the Pan African Parliament,* Located at: http://www.mathaba.net/news/?x=622048

Maunganidze, Ottilia A 2009-03-19, *Madagascar: What Now?*, Located at: http://www.iss.co.za/pgcontent.php?UID=8590, retrieved 2010-04-06.

Maunganideze, Ottilia, ISS 2009-10-16 *Situation Report: Madagascar: Anatomy of a Recurrent Crisis*, Located at: http://www.iss.co.za/uploads/MADAGASCAR15OCT09.PDF, retrieved 2010-04-06.

McMahon, Edward, *The African Charter on Democracy, Elections and Governance: a Positive Step on a Long Path,* Open Society Institute, May 2007.

New York Times 2008-07-28, *In Zimbabwe, Voters' Fear Joins Mugabe on Ballot*, Located at: http://www.nytimes.com/2008/06/28/world/africa/28zimbabwe.html?scp=173&sq=&st=nyt, retrieved 2010-04-06.

Nguendi Ikome, Francis, *Good coups and bad coups – The limits of the African Union's injunction on unconstitutional changes of power in Africa*, Institute for Global Dialogue, Johannesburg South Africa, February 2007.

Norwegian Embassy to Ethiopia 2009-03-20, *Sanctions Committee established,* Located at: http://www.norway.org.et/News_and_events/au/sanction/ Retrieved 2010-03-29, retrieved 2010-04-06.

Nyathi, Kitsepile, 2010-03-15, *Mugabe's party now wants presidental term limit*, Daily Nation, Located at: http://www.nation.co.ke/News/africa/-/1066/879948/-/item/0/-/1f6ju9/-/index.html, retrieved 2010-04-30.

Odinkalu, Chidi Anselm, *Concerning Kenya:
The Current AU Position on Unconstitutional Changes in Government*, Open Society Justice Initiative 2008-01, Located at: http://www.afrimap.org/english/images/paper/AU&UnconstitutionalChangesinGovt_Odinkalu_Jan08.pdf, retrieved 2010-04-06.

Packer, *Current developments – The new African Union and its Constitutive Act*, 2002 American Society of International Law.

The Pan African Parliament Website, Located at: http://www.pan-african-parliament.org/AboutPAP_StructureofthePAP_Bureau.aspx retrieved 2010-03-29.

Reuters 2010-01-21, *AU Madagascar compromise stresses power-sharing*, Located at: http://www.reuters.com/article/idUSLDE60K2GL, retrieved 2010-03-25.

Reuters 2010-03-17, *Timeline – Madagascar sanctioned by African Union*, Located at: http://af.reuters.com/article/madagascarNews/idAFLDE62G25D20100317, retrieved 2010-05-21.

Souaré, Issaka K, 14 August 2009: *Mauritania: Auto-Legitimising Another Coup-Maker in Africa?*, African Security Analysis Programme, Institute for Security Studies.

Souaré, Issaka K 2009-08, *The AU and the challenges of unconstitutional changes of government in Africa* Institute for Scurity Studies, ISS paper 197, August 2009

South -South information gateway 2009-12-10, *AU Security Council Briefed on Situation in Madagascar*, Located at: http://www.ssig.kpkk.gov.my/ssig/news/fullnews.php?news_id=83453&news_cat=sn, retrieved 2010-05-21.

Touray, Omar, *The Common African Defence and Security Policy*, Oxford University Press, 2005.

Van der Mei, Anne Pieter, *The Ordeal of African Unity – Past, Present and Future of the African Union*, Maastricht Faculty of Law Working Paper 2009-5.

Walker, Peter *Mauritania's president deposed in coup*, Located at: http://www.guardian.co.uk/world/2008/aug/06/1, retrieved 2010-04-15.

Williams, Paul D. *The Peace and Security Council of the African Union: evaluating an embryonic international institution*, The Journal of Modern African Studies (2009), 47:603-626 Cambridge University Press.

Williams, Paul D. *Thinking about security in Africa*, International Affairs 83: 6 (2007) 1021–1038.

Zounmenou, David, Institute for security Studies, 15 August 2008, *Is a Military Coup an Answer to the Political Crisis in Mauritania?* Located at: http://www.issafrica.org/pgcontent.php?UID=8528, retrieved 2010-05-09

Other

The letter of Zimbabwe's opposition Movement for Democratic Change (MDC) sent to the Zimbabwe Electoral Commission (Zec) on June 23 2008, Located at: http://news.bbc.co.uk/2/hi/africa/7472129.stm, retrieved 2010-05-09.

Memorandum of understanding between the Zimbabwe African National Union (Patriotic Front) and the two movement for democratic change formations. July 21st Harare, Located at: http://www.iss.co.za/uploads/ZIMMOU21JUL08.PDF, retrieved 2010-05-09.

Judgement of the High Court of Zimbabwe 2008-04-14 Located at: http://www.iss.co.za/uploads/ZIMELECTCOURTDEC.PDF, retrieved 2010-05-09.

Antananarivo Agreement, April 19, 1999, Antananarivo, Madagascar.

Report of the Secretary General on the Work of the Organization- 1998, Located at: http://www.un.org/Docs/SG/Report98/ch1.htm, retrieved 2010-05-21.