



**POWER TO THE PEOPLE: RIGHT TO INTERVEN OF THE UNION
TO RESTORE 'LEGITIMATE ORDER' UNDER ARTICLE 4 (H) OF
THE AFRICAN UNION CONSTITUTIVE ACT**

By

Meles, Tewodros Alefe

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Supervisor: Professor Istvan Pogany

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EXECUTIVE SUMMARY

The thesis examines right to democratic governance issues and especially investigates the realm of democracy installed by force by military intervention of the international community. Post-colonial African people have witnessed undemocratic governments come and go—mostly thanks to nature’s course. During the OAU’s regime of 38 years, will of the people have been forestalled countless times and “the club” did nothing, under the guise of sovereignty, to take measures against its members who failed to respect the will of the people. The wind which blew in the 1990’s, right to democratic governance & the sentiment that it is the people who are the true sovereign but not the illegitimate governments, crossed Africa in with the establishment of the AU. The amendment to the Constitutive Act in February 2003 came with “good” news to the staggering democracy: an amendment to principle 4 (h) to include legitimate order as one ground of intervention. The amendment to the AU Constitutive Act is the first international binding document to articulate intervention on the ground of threat to legitimate order and is a break through, at least normatively, in Africa’s bid to build democracy.

Building on the claim that the right to democratic governance should attain international as well as regional legitimacy, if it already hasn’t, and for the violation of which should attract responsibility, the thesis argues that the international community of states should intervene militarily in blatant situations and if other mechanisms fail or are ineffective to ensure the right of citizens to democratic governance. The military intervention of the AU to defend and protect the will of the people when threatened is a legitimate cause that advances the whole tenet of the purpose of the UN Charter. Hence, the regional military intervention envisaged under the AU Constitutive Act does not abridge the elements in Article 2 (4), namely, territorial integrity, political independence, and purposes of the UN Charter.

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INTRODUCTION

Following the Recommendations of the AU Executive Council, the Heads of State and Government of the African Union (AU) meeting in their First Extraordinary Session on 3 February 2003 adopted without debate an amendment to Principle 4 (h) of the AU Constitutive Act (the Act).¹ The amendment² expanded the Union's right to intervene on the ground to restore legitimate order in addition to the other grounds, i.e., Genocide, War Crimes, and Crimes against Humanity. The amendment to the Act entered in to force in 2003 after deposit of instruments of ratification by two-third majority of the AU member states.

The thesis examines right to democratic governance issues and especially investigates the realm of democracy installed by force by military intervention of the international community. The African Union, in its Constitutive Act, has included military intervention to restore legitimate order or constitutional governments as one of its principles and intervened in a couple of member states. But many wonder whether this will remain as an illusion due to lack of political will from the leaders or the principle will transform Africa in to a politically stable continent.

The right to intervene of the Union to restore legitimate order under principle 4 (h) of the Constitutive Act is a break through, at least normatively, in Africa's bid to build democracy. Post-colonial African people have witnessed undemocratic governments come and go-mostly thanks to nature's course. During the OAU³'s regime of 38 years, will of the people have

¹ (African Union constitutive Act 2002)

² (Amendment Protocol 2003)

³ (Organization of African Unity 1963)

been forestalled countless times and “the club” did nothing, under the guise of sovereignty, to take measures against its members who failed to respect the will of the people. The wind which blew in the 1990’s, right to democratic governance & the sentiment that it is the people who are the true sovereign but not the illegitimate governments, crossed Africa in with the establishment of the AU. The amendment to the Constitutive Act in February 2003 came with “good” news to the staggering democracy: an amendment to principle 4 (h) to include legitimate order as one ground of intervention. The amendment to the AU Constitutive Act is the first international binding document to articulate intervention on the ground of threat to legitimate order.

The Declaration on a Common African Defence and Security Policy of 2004⁴ took one step the pledge to protect democracy in Africa by making unconstitutional changes of government, the improper conduct of electoral processes and situations that prevent and undermine the promotion of democratic institutions and structures, popular participation and good governance as main areas of military cooperation and intervention. The AU further came up with the African Charter on Democracy, Elections, and Good Governance⁵ which was adopted in January 2007 that outlines the commitment of the member states to play by the fair rules of the game-democracy. The African continent is flooded with normative commitments to democracy with in such a short period of time tempting some commentators⁶ to claim that the tide is changing.

⁴ (Declaration on a Common African Defence and Security 2004)

⁵ (African Charter on Democracy, Elections, and Good Governance 2007)

⁶ (Udombana, Articulating the Right to Democratic Governance In Africa 2004, 5)

In less than a year after the amendment, the Union threatened to intervene in response to the Sao Tome e Principe coup in 2003⁷ and actually intervened in the Comoros⁸ crisis in March 2008 in both cases for the cause of democracy and democratic institutions. There we find similar situations in Zimbabwe, Kenya, Ethiopia, Madagascar, Mauritania, Sudan, Guinea as a moot test to the Union, see whether it can even threaten to intervene while there is an apparent failure of democracy. Though to inconclusive to comment, these two instances may be indicative of where the Union is heading to. The precedent set in the Comoros intervention may haunt the Union in both legal and political aspects of the principle it set out under article 4 (h) of the Constitutive Act. The normative development, though welcomed, raised the sceptic of its implementation given its predecessors inaction and raises the well familiar question whether the leaders have the political will to live up to their promises.

Many of the literatures internationally⁹ as well as in the continent¹⁰ focus in articulating the emerging right to democratic governance the violation of which should attract responsibility. The emerging entitlement to democratic governance is further articulated internationally¹¹ as well as in the continent¹² in a number of non-binding documents but set forth bench marks for state behaviour Vis-à-vis democracy. Despite such flood of works in articulating the entitlement to democratic governance, plenty of them do not address the issue of

⁷ (Sao Tome and rincipe; AU explores Military Option in Sao Tome; Nigeria Vows to Restore Democracy 2003)

⁸ (UN Secretray General Warns Coup Leaders of Military Intervention 1997)

⁹ See (Franck 1992)

¹⁰ See (Udombana, Articulating the Right to Democratic Governance In Africa 2004)

¹¹ See (Copenhagen Document 1990); (See UN Declaration on Democracy 1997)

¹² (See Addis Ababa Declaration 1990); (See Lome Declaration 2003); (See Algiers Declarations 1997)

responsibility in the form of collective and authorized military intervention for the violation of such right especially in Africa. How the intervention is to be treated Vis-a-Vis the peremptory norm against the use of force, given the hard time humanitarian intervention had to reach the status it was assented to in 2005? Will this be an effective way of building democracy in Africa? Numerous questions, of course, would arise in the aftermath of intervention such as resources to restore and reconstruct the ravaged nation, such issues and others around the legality and efficacy of use of force to restore legitimate order should be subjects for further investigation which this thesis hopes to give a brief insight.

The above facts give rise to a potential of articulating the right to militarily intervene on the ground that there is a serious threat to legitimate order. Given the short history of building democracy through external intervention¹³ and its reach in to law and politics makes it a noble area for interdisciplinary investigation of its merits and demerits. The main focus of the thesis will be to investigate the legal aspects of the principle and its contribution to build democracy in Africa. Hence, the thesis mainly focuses on investigating its [the intervention] status in international law and constructing the argument that the right to democratic governance is worthy of protection and recognition under international law that “basis of legitimacy for internal matters should be extended to the international play”¹⁴; the second aspect of the research goes in to analysis on the contribution of the intervention in to building democracy and promoting political stability: issues like the political commitment, reinstating and protecting democratic institutions, and the role of different actors. To such effect, an analysis of state parties considered under such principle by the AU will be offered as first insights in to the principle. By undertaking this research, the author of this thesis hopes to add

¹³ (Falk 1995, 252)

¹⁴ (Roth 1993, 17)

in to the scanty literature in the area and practical contributions to democratic governance in Africa. Besides, the thesis will ignite the debate of military intervention to restore legitimate order in the hope of finding a common ground to put it in to practical operation than to remain a paper work.

Building on the claim¹⁵ that the right to democratic governance should attain international as well as regional legitimacy and for the violation of which should attract responsibility, the thesis argues that the international community of states should intervene militarily in blatant situations and if other mechanisms fail or are ineffective to ensure the right of citizens to democratic governance. The AU, through its Amendment to the Act, took a bold step towards ensuring will of the people is the only source of legitimacy for governments in Africa these transforming decades of moral and customary commitments internationally in to hard law in the form of treaty. It is a laudable step! But the Union have to make sure that it will live up to its promises building on the lessons of its predecessor.

In the hope of fostering the above argument, the thesis, in chapter 1, begins by articulating the close-to-settled idea of right to democratic governance. Issues like contents of Democratic Governance, Will of the People as Source of Legitimacy, Domestic legitimacy as International concern, the correlation between Democracy, Human Rights and Peace will be discussed in this chapter in brief as ladders to the main issue of intervention.

The 2nd chapter offers a brief explanation of the transition process from Organization of African Unity (OAU) to the African Union (AU). This chapter also discusses fundamental

¹⁵ See (Franck 1992); (Udombana, Articulating the Right to Democratic Governance In Africa 2004) for their conclusions on the emergence of a right to democratic entitlement

changes introduced by the AU and the African Charter on Democracy, Governance, and Elections as precursors to the amendment of the AU's Constitutive Act of the right to intervene. This chapter highlights the institutional structure set up by the Act for the purpose of implementing the principle and draws a parallel comparison to its efficacy as compared to its predecessor.

The general intervention rules will be discussed in the 3rd chapter to articulate the principle and its modalities. This chapter also offers an insight in to how the Union is actually dealing with issues under the principle. Measures taken in the form of suspension from membership and actual military intervention will be dealt with to determine the practicality of the principle.

Chapter 4 tries to address the challenges to military intervention. This chapter addresses the principles of the Act vis-a-vis the pre-emptory international norm against intervention of the UN Charter and the double-edged obligation of the member states of the AU. Finally, some conclusions building on the totality of the thesis will be offered as concluding observations.

CHAPTER I: RIGHT TO DEMOCRATIC GOVERNANCE

Triggered by the social, economic, and political changes around the world¹⁶ and determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and rule of law¹⁷ the African Union through its Constitutive Act has introduced as objectives the promotion of democratic principles and institutions, popular participation, and good governance.¹⁸ To achieve its objectives of promoting democratic principles and institutions, popular participation, and good governance, the Union set out guiding principles such as condemnation and rejection of unconstitutional changes of governments¹⁹ followed by a sanction which stipulates that “governments which shall come to power through unconstitutional means shall not be allowed to participate in the affairs of the Union.”²⁰

But, the most sweeping commitment towards the promotion and protection of democratic principles made its way through an amendment to Article 4 (h) of the Constitutive Act, i.e., “the right of the union to *intervene (emphasis added)*...a serious threat to legitimate order...to the member state of the union upon the recommendation of the Peace and Security Council.²¹” An attempt will be made in this chapter, before dealing with the issue of intervention, to offer a cursory view on the development of the right to democratic

¹⁶ (African Union Constitutive Act Preamble paragraph 5)

¹⁷ (African Union Constitutive Act Preamble paragraph 9)

¹⁸ (African Union Constitutive Act Article 3 (g))

¹⁹ (African Union Constitutive Act Article 4 (p))

²⁰ (African Union Constitutive Act Article 30)

²¹ (Amendment Protocol Article 4 (h))

governance internationally as well as in the continent, which some scholars claim that it can be considered as the 4th generation of rights²²

Right to Democratic Governance: Internationally

International law for long has considered states as legitimate subjects at the international arena irrespective of the method by which their governments have come to power. The means and nature of assent to power of governments in states was considered as a matter of domestic concern and shielded from international scrutiny especially before the creation of the United Nations in 1945. Chief Justice Taft, as quoted by Jackson Nyamuya²³ in the Tinoco Arbitration Case stated:

“The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government within its jurisdiction?”²⁴

A ruling which indicates that irrespective of the will of the people a government in effective control of the state machinery is the legitimate representative of its people at the international level. This echoed for decades to come.

²² (Udombana, Articulating the Right to Democratic Governance In Africa 2004, 9)

²³ (Maogoto 2003)

²⁴ (Maogoto 2003, 2)

The principle that how the state treats its citizenry is a subject of domestic jurisdiction and beyond the realm of the international community dominated the scholarly works till 1990 even after the United Nations in 1945 proclaimed in its Charter that the protection of human rights and fundamental freedoms of individuals is its milestone. Hans Kelsen, for example, restated the principle in the following manner.

“Under what circumstances a national legal order begins or ceases to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become-on the whole-efficacious; and it ceases to be valid as soon as it loses this efficacy...The government brought in to permanent power by a revolution or coup d’etat is, according to international law, the legitimate government of the state, whose identity is not affected by these events.”²⁵

The principle is further reinforced by the United Nations Charter which mandates for the respect of ‘matters which are essentially within the domestic jurisdiction’ of member states under Article 2 (7) of the Charter which states that ‘Nothing contained in the present charter shall authorize the united nations to intervene in matters which are essentially within the domestic jurisdiction of any state...’and some states have argued that even discussion of a state’s human rights violations was prohibited by this article let alone their internal governance structure²⁶. The prohibition or protection ‘against the threat or use of force’ on a member state under Article 2(4) of the Charter was another caveat permeated in to the denial of the right to democratic governance.

²⁵ (Kelsen 1961, 220)

²⁶ (Halberstam 1993, 1)

These provisions of the charter shielded those who come to power and retain it without the will of the people on the pretext of non interference on the internal affairs of a state. Thus, the international community was put in a moral dilemma and legal lacuna to the ideals they cherish most in their own states: that legitimate government is the one that respects their will in establishing as well as de-establishing it.

The discourse on the right to democratic governance, in an effort to make individuals are legitimate concerns for the international community and thereby eroding the centuries old doctrine of non intervention in the domestic affairs of states, was further hindered by the ideological divide of the cold war. Despite the greatest achievement of the United Nations Charter in asserting that the international community can protect human rights, every issue was tied to ideological divides by the cold war there by paralysing the UN machinery in achieving its ideals of protecting human rights, including the right to democratic governance, and froze the principles and purposes of the UN in paper that are hardly seen in practice.²⁷

The issue, right to democratic governance, was further complicated due to its political nature and close association with sovereignty. Sovereignty mainly expressed, among others, by the ability of the state in determining its internal government structure including on how and when political office should be hold and relinquished. Any criticism to that effect is considered by that particular state as an infringement on its political sovereignty. This was more glaring in Africa after it attained independence in the 1960's. The principle of non interference in the internal affairs was the building block of the Charter of the Organization of African Unity²⁸ and the marshalling agenda of the organization for over four decades of

²⁷ (Halberstam 1993, 5)

²⁸ (Organization of African Unity Charter Article 2 (3))

the organization's existence. Understandably so, in the early periods of independence it was with the aim of preserving the dearly won independence from colonial rule. But, even after the completion of decolonization the principle continued to be an instrument in a bid to cling to power.

Despite such difficulties, three events are worth mentioning here that can be considered that the right to democratic governance could be a legitimate agenda for the international community for years to come, though overdue: The decolonization process, the condemnation and even punitive sanctions over the Apartheid system in South Africa, and the end of the cold war due to the fall of the USSR and Eastern Europe.

The process of decolonization was the most important step in attracting consensus for decisions in the divided world. The international community, the UN as well, developed a consensus that denial of majority rule in Africa and Asia shall be considered as '...an international delict.'²⁹ Hence, the international community rejected governments and governance structures imposed against the will of the people by recognizing that the colonial government is illegitimate and the majority of the people should decide on their legitimate government as part of their self-determination right.

The white-minority Apartheid regime in South Africa was subjected to even larger international scrutiny for it was considered as an imposition against the will of the majority. The international community took a common ground in condemning the regime and even agreed on economic and diplomatic sanctions witnessing that international action may be possible against a government considered illegitimate by its own people as well as the

²⁹ (Maogoto 2003, 3)

international community.³⁰ Though an exception of its own time the actions on Apartheid South Africa signalled a window of light at the end of the tunnel for years to come.

The cold war is considered to have paralysed the UN system from achieving its principles and purposes including the protection of human rights. During the cold war it was almost impossible for the international community to take a common stand in categorizing a particular state as undemocratic and should be called to answer on its delict before the international community. The UN system was not an exception that it was heavily divided on considering states as undemocratic and thereby holding them responsible. The end of the cold war signalled an opportunity to be seized by the UN and the international community lost in its four decades of existence and to be used in advancing its principles and purposes. Jackson Nyamuya explained the end of the cold war and its repercussion in the following well articulated manner:

“New challenges arising from the strengthening of international human rights norms and the seemingly unprecedented spirit of international cooperation accompanied the end of bipolar geostrategic and ideological confrontation. The end of the cold war witnessed a dramatic increase in the number, diversity and proportion of states formally committed to democratic principles. Many states also displayed a greater willingness to countenance foreign intervention in the name of democracy and human rights.”³¹

More states have committed themselves to democratic governance through treaties or non-binding but influential declarations tempting some commentators to claim that ‘democracy is

³⁰ (Maogoto 2003, 3)

³¹ (Maogoto 2003, 6)

an idea whose time has come.’³² Moreover, states, international organizations, international tribunals, and scholars sought to imbue the content of the right to which this thesis dares not to deal with in fear of contaminating the intervention principle.

A wave of condemnations to unconstitutional change of governments, economic and diplomatic sanctions, and even military interventions for the cause and under the guise of democracy flooded the world at the turn of the century. Development aid and loans were made conditional by donor states and international organizations upon commitment by the receiving state to democratic ideals, tempting some critics to consider the wave as “...a gimmick, and that international law has no business promoting what will merely legitimize a neo-imperialist agenda to remake the world in the image of the West.”³³ The end of the cold war also saw the rise of emphatic scholars that claim the right to democratic governance is an emerging international legal norm by analyzing legal instruments, state and UN practices. Now let’s turn to some specifics on how the right to democratic governance progressed in the last two decades to supplement our general overview of the right to democratic governance above.

Thomas Franck³⁴, in his pioneering and seminal work, ‘the emerging right to democratic governance’, analysed legal documents, state and International Organizations’ practice and proclaimed to the world in 1992 that “...there is a recognized or recognizable right to

³² See (Franck 1992); (Maogoto 2003); (Wippman, *Defending Democracy through Foreign Intervention* 1997); (Wippman, *Defending Democracy through Foreign Intervention* 1997) for their analysis on the emerging idea of democratic governance after the end of the cold war

³³ (Udombana, *Articulating the Right to Democratic Governance In Africa* 2004)

³⁴ (Franck 1992, 6)

democratic governance under international law.” In articulating his proclaimed global entitlement to democratic governance, he proceeded to state that:

*“Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”*³⁵

Thomas Franck argues that the global entitlement to democratic governance has developed through three phases of normative frame work. The first generation being the right to self-determination, followed by the right to free expression, ‘which opens fro the free market of ideas necessary for democratic governance’, and culminated in the genuine and free elections.³⁶ These three developments may truly show the extent how the right to democratic governance has evolved overtime and has waited just for the right time to come. Two events, according to Thomas Franck, triggered the further articulation and acceptance of the right to democratic governance: the August 1991 Coup d’etat in Russia and the overthrow of the Haitian president in September 1991. In the former, the community of states lined up in condemning the coup d’etat which marked the departure from the business-as-usual tendency of the cold war.³⁷ In the latter, the UN General Assembly unanimously approved a resolution demanding the return to power of the deposed president, restore constitutional order, and respect for human rights in Haiti signalling the UN is growing biting teeth. The Organization

³⁵ (Franck 1992, 2)

³⁶ (Franck 1992, 2)

³⁷ (Franck 1992, 3)

of American States (OAS), with equal force, resolved for the return of constitutional order. Both organizations invoked democratic entitlement as their basis for the strong condemnation and further discussion on the possible use of force at the OAS.³⁸

Despite Thomas Franck's assertion that UN instruments and practices in the field of human rights and electoral assistance are the sources for the emergence of the right, Others, however, associate and "...trace the development to the insistence by Western aid donors on open and accountable government as a condition precedent to development assistance to the poorer countries of the South."³⁹

Both claims, with different routes and analysis, share a common assertion that there indeed is a right to democratic governance. Though, Thomas Franck may have been right in claiming that consent of the governed should be the basis of legitimacy for a government at both national and international play, he would have conceded that his bold assertion of collective international promotion and protection of the right is not realized even at the close of the first decade of the 21st century.

To further add to the justification that there indeed is a global right to democratic governance, looking at some international as well as regional instruments is imperative. The departure point in this attempt is the Universal Declaration of Human Rights (UDHR) proclaimed in 1948.⁴⁰ Article 21 of the Declaration states that "(t)he will of the people shall be the basis of the authority of government," and that "this will shall be expressed in periodic and genuine elections." Implicitly, then, Article 21 links governmental legitimacy to respect for the

³⁸ (Franck 1992, 3)

³⁹ (Udombana, *Articulating the Right to Democratic Governance In Africa* 2004, 12)

⁴⁰ (Universal Declaration of Human Rights 1948)

popular will. But this linkage does not appear in the subsequent, and legally binding, International Covenant on Civil and Political Rights (ICCPR).⁴¹ Article 25 of the Covenant speaks of the right to participate in public affairs--including the right to genuine and periodic elections--but it does not purport to condition governmental authority on respect for the will of the people. In illustrating the above claim, David Wippman stated:

*“The language of Article 25 was intentionally drafted broadly enough to accommodate the wide range of governmental systems in place among the initial parties to the Covenant. As a result, even Soviet-bloc states felt free to ratify the Covenant. From their perspective, communist states satisfied the requirements of Article 25 by affording voters access to various participatory mechanisms as well as an opportunity to ratify their leadership in periodic, albeit single-party, elections. Thus, the cost of consensus was language broad enough to obscure sharp differences among states on the nature of their commitment to democratic rule.”*⁴²

The UN General Assembly, at its forty-fifth session on February 21 1991, adopted a resolution⁴³ entitled Enhancing the effectiveness of the principle of periodic and genuine elections. This nonbinding, yet important, document reaffirms and further specifies the electoral entitlement first outlined in the Universal Declaration of Human Rights and later embodied in Article 25 of the Covenant. It stresses" the member nations' conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience,

⁴¹ (International Covenant on Civil and Political Rights 1966)

⁴² (Wippman, *Defending Democracy through Foreign Intervention* 1997, 3)

⁴³ (GA Res. 45/150 (Feb. 21, 1991) Paragraph 2)

the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.”⁴⁴

Parallel to the UN system, regional systems were developing their own articulation of the right to democratic governance in various instruments. Among such initiatives are the OAS and Organization for Security and Cooperation in Europe (formerly CSCE: Conference on Security and Cooperation in Europe). The Charter of the OAS⁴⁵ in Article 5 stipulates that member states have an obligation to promote the effective exercise of representative democracy followed by other developments in the form of resolutions which repeatedly called for a representative democracy and the people have the right to choose their representatives.

The Copenhagen Document⁴⁶, in paragraph 6, states that “the participating states declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all governments” and proceeds in specifying the responsibility of the participating states to defend and protect the democratic order freely established through the will of the people against activities by persons, groups or organizations to jeopardize the democratic order of their own or that of another participating state. It also outlines measures to be taken to ensure will of the people is entrenched and respected.⁴⁷

⁴⁴(GA Res. 45/150 (Feb. 21, 1991) Paragraph 2)

⁴⁵ (Organization of American States Charter 1948)

⁴⁶ (Copenhagen Document 1990)

⁴⁷ (Copenhagen Document 1990, Paragraph 7)

Right to Democratic Governance: In Africa

The African continent was also moving on the direction of articulating the right to democratic governance in continental instruments and indirectly through international instruments. The African Charter on Human and Peoples Right⁴⁸ stipulates in Article 20 that "[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." The right of a people to determine their "political status" is a counterpart of article 13 and involves the right of citizens to be able to choose freely those persons or party that will govern them. Government by force is incompatible with the rights of peoples to freely determine their political future. Consequently, any forcible conquest of government by any group contravenes articles 13(1) and 20(1) of the Charter.⁴⁹ The African Commission on Human and Peoples Rights has been seized in numerous occasions through communications to interpret Article 13 and 20 of the Charter to which effect ruled that unconstitutional assent to power is in-compatible with the provisions of the charter.

During the 1990s, the African Commission on Human and Peoples' Rights, responsible for ensuring respect of the African Charter, was required to interpret Articles 13 and 20 of the Charter, on political participation and self determination in relation to two forms of unconstitutional changes of government, in cases against Nigeria and The Gambia. In June 1993, the military regime in Nigeria annulled a general election mid-way through the announcement of voting returns. Deciding on a communication challenging this decision, the

⁴⁸ (African Charter on Human and Peoples Rights 1981)

⁴⁹ (Udombana, *Articulating the Right to Democratic Governance In Africa* 2004, 18)

African Commission held that the annulment violated Articles 13 and 20(1) of the Charter.⁵⁰ In a later case brought by deposed Gambian President Dawda Jawara, the Commission concluded that a ‘military *coup d’état* was, therefore, a grave violation of the right of Gambian people to freely chose their government as enshrined in Article 20(1) of the Charter.’⁵¹

In addition to the charter and jurisprudence of the commission, the commission was developing soft laws on the charter; the most important for the right to democratic governance is the Commission's Resolution⁵² on Electoral Process and Participatory Governance, adopted during the Commission's Nineteenth Ordinary Session at Ouagadougou, Burkina Faso in 1996. The resolution affirmed and asserted that "elections are the only means by which the people can elect democratically the government of their choice in conformity to the African Charter" It called on states party to the Charter to take necessary measures to preserve and protect the credibility of the electoral process, including the presence of national and international observers during the elections. Access to the electoral process and personal safety should be guaranteed, to enable such observers to fulfil their mission and prepare their report on elections in a proper manner. The resolution ordered African countries and institutions to participate in observation of elections in State Parties. It emphasized that States Parties should provide those tasked with organizing elections with "adequate material resources and any items necessary for the preparation and holding of elections."⁵³

⁵⁰ (Communication 129/94)

⁵¹ (Communications 147/95 and 149/96)

⁵² (Commission Resolution on electoral process and participatory Governance 1996)

⁵³ (Commission Resolution on electoral process and participatory Governance 1996)

The Addis Ababa Declaration, the Algiers Declaration, the Lome Declaration, and the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government are some of the regional instruments designed to further articulate the right to democratic governance in Africa. The OAU Framework⁵⁴, for example, rejects unconstitutional changes of governments and defined what constitutes unconstitutional change of government. According to the OAU Framework unconstitutional change of government constitutes: (i) military coup d'etat against a democratically elected Government; (ii) intervention by mercenaries to replace a democratically elected Government; (iii) replacement of democratically elected Governments by armed dissident groups and rebel movements; [and] (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections. These articulations have to be seized further by the AU Constitutive Act.

Taking a lesson from its predecessor and building on the declarations, the AU Constitutive Act has made democratic governance as one of the Union's bricks. The African Union through its Constitutive Act has introduced as objectives the promotion of democratic principles and institutions, popular participation, and good governance. To achieve its objectives of promoting democratic principles and institutions, popular participation, and good governance, the Union set out guiding principles such as condemnation and rejection of unconstitutional changes of governments followed by a sanction which stipulates that "governments which shall come to power through unconstitutional means shall not be allowed to participate in the affairs of the Union."⁵⁵ In-fact, this is the principle for the breach of which a sanction is stipulated in the Constitutive Act.

⁵⁴ (OAU Framework 2000)

⁵⁵ (African Union Constitutive Act 2002, Article 30)

The AU's normative articulation of the right to democratic governance in the Constitutive Act was followed in 2002 by the adoption of a Declaration on the Principles Governing Democratic Elections in Africa.⁵⁶ A regional Charter on Democracy, Elections and Governance adopted in January 2007 finally gave treaty status to the definition of unconstitutional changes, adding to the four categories recognized in the Declaration on the Framework for an OAU Response, a fifth, namely: 'manipulation of constitutions and legal instrument for prolongation of tenure of office by (an) incumbent regime'.⁵⁷ Thus the AU crystallized a sanction-backed prohibition against unconstitutional changes in government from regional custom to treaty law. If the determination is that an incumbent regime has refused to accept the outcome of a freely organized election or tries to change legal instruments to cling to power after the expiry of popular will, then there is a strong basis for asking the AU member states to abide by their responsibility under the Constitutive Act.

After analysing the developments of right to democratic governance in Africa, Udombana summarized in the following list of conclusions that:

- ✓ Democratic governance has emerged as a human right under general and particular international law.
- ✓ This right, at least, is a species of the right of self-determination.
- ✓ Dictatorship, in every one of its manifestations, has become taboo in Africa.
- ✓ Democratic elections are the basis of the authority of any representative government.
- ✓ Democracy offers the most viable route to good governance in Africa.
- ✓ Democracy promotes peace and economic development; in fact, the former is a *sine qua non* to the latter.

⁵⁶ (Declaration on the Principles Governing Democratic Elections in Africa 2002)

⁵⁷ (Charter on Democracy, Elections and Governance 2007)

- ✓ Democracy promotes human rights and the rule of law; indeed, "the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law."
- ✓ The judiciary, media, and other civil society bodies play indispensable roles in democratic governance.
- ✓ Election monitoring is a norm of the democratic process.⁵⁸

This chapter analyzed the development of the right to democratic governance at international and regional levels, without looking in to the contents of the right, in an attempt that the right should attain the level of recognition it deserves, if in fact it has not yet achieved the level of recognition it deserves. Some aspects of the contents of the right are subjects for discussion in the fourth chapter in an attempt of outlining the challenges to military intervention to restore legitimate order.

⁵⁸ (Udombana, *Articulating the Right to Democratic Governance In Africa* 2004, 26)

CHAPTER II: THE AFRICAN UNION (AU): A HISTORICAL PERSPECTIVE

Introduction: Prelude to the Institutionalization & Transition

The continent is undergoing its institutional transformation from an old to a new pan African organization, the African Union. The creation of the African Union as a new Pan-African body is not a sudden happening that has not been anticipated in the African history. It was rather a result of the age-old process of pan-African movements in different courses of history. No one can dare to have a full-fledged figure of the historical roots of the African Union without paying much attention to the Pan-African movements, which may be considered as a founding stone of the OAU, the African Union and any other forthcoming political and economic integration between and among the African states. The spirit of Pan-Africanism has been used as an engine for the creation of cooperation of African peoples and states in different generations, and is expected to be the same in the future.

Amate described Pan Africanism as an ‘invented notion’ that harboured the marginalization and alienation of Africans’, both within and outside the continent, coupled with the fragmented nature of the existence of Africans’ resulted in underdevelopment and Pan-Africanism is “...a recognition that the only way out of this existential, social and political crisis is by prompting greater solidarity amongst Africans.”⁵⁹ As can be inferred from the above description, Pan-Africanism is neither a name of an African organization nor an ideal imagination of what Africa should be in the future. It is rather an engine for a continued African solidarity and integration that can spur the effectiveness of Afro-Centric regional integrations. It has served as such in different times in history.

⁵⁹ (Amate 1986, 68)

It can be said that Pan-Africanism has so far undergone three phases of institutionalization. By institutionalization we are referring to the coming up of an organization that claims to further the ideals enshrined in the Pan-African movement. The first institutionalization of Pan-Africanism is the series of Pan-African Congresses held in Chicago in 1896 and the establishment of an African Association in London. In both instances, the term ‘Pan-African’ was widely used to signify the coming together of people of African descent. The second institutionalization of Pan-Africanism came with the inauguration of the OAU in 1963. This achievement witnessed a greater commitment on the part of the African states to the Pan-African movement which served as a driving force for such occurrence. This historical trend goes ahead with the third institutionalization of Pan-Africanism under the existing African Union. The second institutional wave is more relevant in understanding the context under which the third wave has unfolded in the turn of the 20thC.⁶⁰

The precursor: The Organization of African Unity (OAU)

The emergence of the pan African organization in the 1960’s was laden by antecedents and contexts that competed to define the future of the organization. Prior to the birth of the OAU, there was an inter-state politics in Africa which was characterized by growing rivalry between the Casablanca and Monrovia group of states. This rivalry, at least for a while, hindered the realization of the OAU.⁶¹

The Casablanca group was principally led by Kwame Nkrumah of Ghana, Sekou Toure of Guinea, and Madibo Keita of Mali. The group vehemently opposed colonialism, racism and

⁶⁰ (Amate 1986, 68)

⁶¹ (Harshe 1988, 15)

neo-colonialism. Among other things, it opposed the Katanga secessionist movement, gave an extended support to Patrice Lumumba's efforts to oust the Belgians from Congo, demanded French withdrawal from Algeria and was sympathetic towards the Soviet Union due to concrete Soviet support to their activities. This group had a more radical approach involving the creation of the federation of African states with joint institutions and a joint military command.⁶²

The Monrovia group, on its part, was constituted by the Brazzaville group including most of the moderate Francophone states such as Ivory Coast, Gabon, Niger, Senegal, Monrovia, etc. In addition, it had members like Ethiopia, Liberia, Nigeria and Somalia, which were neutral towards the rivalry between Casablanca and Brazzaville groups. It stood for the protection of national sovereignty, territorial integrity and independence of its members. It defended the principle of mutual non-interference in inter-state relations and welcomed interstate technical and economic cooperation. Instead of snapping the ties with the west, the Monrovia group sought western cooperation in the process of promoting development.⁶³

The rivalry between the Casablanca and Monrovia groups was not, however, an unbridgeable gulf that could prevent the birth of the OAU. By the mediatory efforts of uncommitted (i.e. not strictly a proponent of either group) states like Ethiopia gave birth to the Organization of African Unity. Having passed all these ups and downs, the OAU was formally established in Addis Ababa, Ethiopia in May, 1963. The OAU Charter presented both views but using the vision of the Monrovia group as its core.⁶⁴

⁶² (Harshe 1988, 13)

⁶³ (Harshe 1988, 13)

⁶⁴ (Harshe 1988, 17)

Timothy states the tension in early days of the OAU and the compromise adopted as follows. “The main contention that surrounded the founding of the OAU is well known: whether the institution should lead to a union of states or merely to an association of the independent units.”⁶⁵ Nweke, also states “The OAU was the product of a compromise between African statesmen who wanted political union of all independent African states and those who preferred functional cooperation as a building block towards the construction of an African socio-psychological community.”⁶⁶

Article II of the OAU Charter specifies the purposes of OAU and indicates areas of intra-African cooperation. The following are the purposes of the OAU:

- ✓ To promote the unity and solidarity of the African states,
- ✓ To coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa;
- ✓ To defend their sovereignty, their territorial integrity, and their independence;
- ✓ To eradicate all forms of colonialism in Africa, and
- ✓ To promote international cooperation, having due regard for the Charter of the United Nations and the Universal Declaration of Human Rights,

Article III of the Charter specifies the basic principles of the OAU. The principles of the OAU include:

- ✓ The sovereign equality of all member states;
- ✓ Non interference in the internal affairs of member states;

⁶⁵ (Murithi 2005, 57)

⁶⁶ (Nweke 1987, 108)

- ✓ Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existences;
- ✓ Peaceful settlement of disputes by negotiation, mediation, conciliation, or arbitration;
- ✓ Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring states or any other state;
- ✓ Absolute dedication to the total emancipation of the African territories that are still dependent; and
- ✓ Affirmation of a policy of non-alignment with regard to all blocs.

Many of the purposes and principles of the OAU were keen in those days. Most of them are, however, not pertinent to the contemporary situation of Africa. A clear example of such a holding may be the last that state the principle of the OAU i.e., affirmation of a policy of non-alignment with regard to all blocs. By now, the mentioned blocs, the capitalist and socialist blocs are no more in rivalry. The OAU, apart from setting its purposes and principles, created organs designed to further its purposes and principles, the analysis of which is not dealt here in this thesis.

The Cross-Roads: Challenges & Opportunities of OAU

The strengths and weaknesses of the OAU can be considered as good historical lessons to the African Union. In this section attempts are made to highlight the major strengths and weakness of the OAU. To begin with its strengths, decolonization is the most important achievement of the OAU, which has to be written in bold. Decolonization, like colonization, is a long drawn out historical process. In an attempt to assist the decolonization process, the OAU established a Coordinating Committee for the Liberation of Africa in 1963. This Committee offered moral and material assistance to anti-colonial struggles in different parts

of the African continent. Nothing more than the Durban Declaration in tribute to the OAU attests to its success in this realm.⁶⁷

Strength of the OAU is perhaps closely related to its actions against racism and Apartheid.⁶⁸ The OAU resolutions have ritually condemned racism in general and the system of apartheid which institutionalized racism in South Africa and Namibia in particular. The strategy of the OAU for the liberation of South Africa, in particular, has been a mixture of support for freedom fighters and appeal to the conscience of the international community. In 1991, the apartheid policy was done away once and for all and marked the final step for Africa in the struggle of political emancipation from colonial and racist rule.

Strength of the OAU that is worth being mentioned is its important task in coming up with the establishment of the African Economic Community in 1991. The Treaty seeks to build the African Economic Community through a common market built on the regional economic communities. This effort of the OAU proved to be instrumental as regional economic communities are today consolidating and proving to be engines for integration.

⁶⁷ See Paragraphs 3 and 4 of the Durban Declaration which states: *The OAU was instrumental in creating an African Identity and in promoting solidarity among the African people. Today, being an African is not a philosophical proposition but a reality. Today, our people find expression in a common identify as Africans. That common identity and unity of purpose become a dynamic force at the service of the African people in the pursuit of the ideals are predecessors believed in and in which we continue to believe. Nowhere has that dynamic force proved more decisive than in the African struggle for decolonization. Africa saw its independence as meaningless as long as a part of it remained under colonial tyranny. Immense human and material resources were consecrated to the task of decolonizing Africa. Through the OAU Coordinating Committee for Liberation, Africa worked and spoke as one with undivided determination in forging an international diplomatic consensus for liberation and in prosecuting the armed struggle.*

⁶⁸ (El-Ayouty 1984, 95)

The OAU's major weakness is its principles related to the culture of non-intervention for which the OAU has been much criticized. Among the principles of the OAU, as stated in Article III of the OAU Charter, non-interference in the internal affairs of member states is one. The OAU is blamed for taking a "hands-off" approach to internal struggles in member states. Though there were rampant political instabilities within the territories of its member states, the OAU miserably failed in taking an action due to the culture of non intervention. Capitalizing on this point,⁶⁹ Murithi stated that 'Indeed the OAU did not intervene as much as it should have in the affairs of member states to prevent war crimes and crimes against humanity which has bequeathed upon present generation of Africans the legacy of human rights atrocities and the domination, exploitation and manipulation of societies within states.'⁷⁰

Another weakness of the OAU is its failure to feature protection of Human Rights as one of its principal aspirations. This does not mean that Human Rights were wholly neglected by the OAU Charter since it makes references, albeit slight, to Human Rights. The principal objectives of the OAU have been to defend the sovereignty and territorial integrity of its member states. That may explain why it took 20 years for the OAU to adopt a Human Rights document, The African Charter on Human and Peoples Rights (ACHPR).

The Transition: From OAU to AU

The OAU, with its challenges & opportunities, served the continent for almost four decades until it was finally replaced by another pan African organization in 2001, the African Union. But, the formation of AU may not be considered as one time takeoff. The antecedents and

⁶⁹ (Murithi 2005, 12)

⁷⁰ (Murithi 2005, 12)

contexts discussed above create a historical link between the OAU and the African Union. In the contention that surrounded the founding of the OAU, the latter statement views the OAU as an association of the independent units prevailed over the creation of a union of states. The latter view had to wait for another favourable historical ground to be a reality. (Wolfer) states that the former position which failed to be operational has left its foot prints in the naming of the organization. He states “the agreed name [for the organization] was proposed in French by President Hubert Maga of Dahomey (possibly at the instigation of President Kwame Nkrumah of Ghana); and President William Tubman of Liberia insisted that the English translation be organization **of** (*emphasis added*) African Unity, rather than organization **for** (*emphasis added*) African unity.”⁷¹

It can be argued that the African Union was conceived in the womb of the OAU. Stated otherwise, though the objectives and principles of the African Union and the OAU are different, as is evident from the surrounding historical conditions, the idea of establishing the African Union was consolidated inside the OAU. Baimu shares this opinion as “...it was noted that in the period between 1966 and 1999 efforts were made to realize African unity through the means of economic integration.”⁷² This was expressed theoretically in a number of OAU declarations, resolutions and plans of actions that were adopted between 1968 and 1980, and in concrete terms in the formation of several sub-regional blocs.⁷³

⁷¹ (Baimu, Current Developments: 'The New African Union and its Constitutive Act' 2002, 23)

⁷² (Baimu, Current Developments: 'The New African Union and its Constitutive Act' 2002, 24)

⁷³ The conception of the African Union inside the OAU is highly reflected in a number of resolutions, decisions and declarations adopted by the OAU Assembly of the Heads of States and Government with a desire to realize African economic integration. The Monrovia declaration of commitment on the guidelines and measures for national and collective self-

Besides the long conceived idea of a united Africa, the end of the millennium led to a sense of urgency among African leadership to reposition the OAU in order to set the African continent as a whole on a firm path to development and peace in the new millennium. It was in this context that the forty four African leaders met in Libya from 8 to 9 September 1999 at an extraordinary summit of the OAU called by the Libyan leader Muammar Gaddafi, to discuss the formation of a 'United States of Africa'. The summit basically aimed at 'strengthening OAU's capacity to enable it to meet the challenges of the new millennium.' It was there that the African leaders adopted the Sirte Declaration which called for the establishment of The African Union.

Having been instructed to model it on the European Union and taking into account the Charter of the OAU and the Abuja Treaty Establishing the African Economic Community, the OAU legal unit drafted the Constitutive Act of the African Union. The resulting draft Constitutive Act was debated on a meeting of legal experts and parliamentarians and later at a ministerial conference held in Tripoli from 31 May to 2 June 2000.

The Constitutive Act of the African Union was adopted by the OAU assembly of Heads of States and Governments in Lome in July 2000. By March 2001, all members of the OAU had signed the Constitutive Act and hence the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya, from 1 to 2 March 2001 declared the establishment of the relations in economic and social development for establishment of a new international order called for the creation of the African Economic Market as a prelude to an African Economic Community, and the Lagos Plan of Action (LPA) which was adopted by the second extraordinary summit of the OAU in April 1980 and envisaged the creation of an African Economic Community by the year 2000. The idea of continental economic integration was concretized in the 1991 Abuja Treaty Establishing the African Economic Community, which was adopted under the auspices of the OAU on 3 June 1991 and entered in to force on 12 May 1994 after the requisite number of ratifications was attained.)

African Union. However, to fulfil the legal requirements for the African Union, the Constitutive Act had to wait for ratification by two thirds of the member states of the OAU. It was on 26 April 2001 that this requirement was met. On 26 May 2001, the Constitutive Act entered in to force and thereby making the African Union a legal and political reality.

The rationale for the establishment of the African Union is not something that is alien to what has been stated hereinbefore. It is a cumulative effect of the urgency to rectify the downsides of the OAU and build a new paradigm of African integration and solidarity that can enable the continent as a whole to cop-up with the challenges of the day. Several reasons might be mentioned as pushing factors to African unity.

The first factor could be the fact that the challenges that Africa began to face as of the beginning of the 1980 were no longer the same as those of the 1960s. Eradicating colonialism and establishing the independence of African nations had been virtually completed except for the continued struggle in South Africa. The objectives and principles of the OAU were basically targeted at securing the process of decolonization. In the 1980s, this target became less important, if not totally irrelevant, than it used to be when the OAU was founded. Hence, Africa is now in a state of a different scenario which demands a different solution from the one proposed by the OAU machinery.⁷⁴

The second pushing factor for the birth of the new African Union is the political global changes in the beginning of the 1990s mainly characterized by the end of the cold war and the down fall of the Soviet bloc. This global change was not corroborated by a response from the side of Africa, despite the vital influence it had on the continent. El-Ayouty,

⁷⁴ (Maglivers and Naldi 2003, 2205)

described this scenario by saying “With the end of the cold war, the world completely changed. Africa and the OAU, however, did not.”⁷⁵

The complete change in the global political order affected Africa in many ways. During the cold war, the two super powers, the USA and The USSR, were in a state of competition in most part of the world. They tried to assume leading roles in promoting their own ideologies and thereby assisted a country or a region which came to form a group within their spheres of influence. But the end of the cold war heralded the collapse of the USSR; the order of the game has begun to change.⁷⁶

While explaining the situation in Africa in his article entitled, ‘an OAU for the future: an assessment’, El-Ayouty said the following:

“In the process of playing the friendship and cooperation game with either the East or West, Africa incurred the following hazards: It did not rely effectively on the OAU for conflict resolution; several of its states became pawns in the superpower chess games, the civil wars in Angola, Mozambique, Ethiopia, Sudan, Chad and the Sahara were allowed to go on without African solutions, the motto of “African Solutions for African problems” become a hollow slogan...”⁷⁷

Thus, end of the cold war posed a threat that was different from what it had used to be there during the cold war. The end of the cold war heralded the dawn of the new era of globalization in which Africa has become increasingly marginalized and struggled to define its place and role in the new global system. The challenge has now become different. Rather

⁷⁵ (El-Ayouty 1984, 35)

⁷⁶ (El-Ayouty 1984, 35)

⁷⁷ (El-Ayouty 1984, 35)

than playing El-Ayouty's chess games on African soil, the great powers increasingly declined to assume leading roles in promoting peace and development in the continent.

The Durban Declaration of the first ordinary session of the Assembly of the African Union shares the above stated pushing factor for the realization of the African Union. The Declaration states the following:-

“[I]n 1990's, when the world was undergoing fundamental changes with the collapse of the Soviet Union and the redefinition of the global power relations, the OAU moved quickly to assess African's place in the new environment and charted a course for itself, aimed at stemming its marginalization and ensuring its continued strategic relevance and to address the challenges of development and of peace and security in the continent.”⁷⁸

The third pushing factor for the establishment of the African Union that is worth being noted here is the economic situation that was getting worse and worse in Africa. This may be considered as a sign of Africa's marginalization in the world order of the day. It has been commented that 'the economic crisis in the continent has now become literally a matter of life and death and has to be dealt with. In response to the economic challenges, the OAU came up with the Abuja Treaty Establishing the African Economic Community in 1991.

The final pushing factor that contributed to the coming into feature of the African Union was the in-built weaknesses of the OAU. Experts agreed that the OAU charter needed revision, most specifically with regard to the principles of sovereignty and non-interference. These were among the basic principles of the OAU Charter and their contention was not a simple

⁷⁸ (Durban Declaration 2002)

matter. However, Africa was in a state of necessity to enable the regional organization to take measures in internal affairs of member states.

Among other things, Africa was forced by the aforementioned factors to come up with a re-invented notion of Pan-Africanism which would not limit itself in defending the rights of African states against external interference but to devise a scheme not to let Africa continue as a safe haven for undemocratic leaders who assume power by virtue of an unconstitutional manner. The order of the day demanded Africa to firmly get together than ever before and solve its problems by its own. All these led to the birth of a new form of Pan-African alliance through the African Union.

Fundamental Structural Changes in AU

For the purpose of the issue at hand it is imperative to look in to some of the fundamental institutional structures within AU. The AU Constitutive Act has established a number of organs tasked with the implementation of the objectives of the Union. Discussion on all organs of the Union

The Assembly

The Assembly is the ‘supreme organ of the African Union’ composed of Heads of States and Governments. It meets once in a year in ordinary session, and it can meet in extraordinary session at the request of any member state that has to be approved by a two-third majority of the member states. The Assembly shall be chaired by a Head of State or Government from among the member states who is elected based on consultations among the member states. The chairman shall remain in the position for a period of one year.

As regards to the powers and functions of the Assembly, Article 9 of the Constitutive Act of the African Union lists down the mandates that the Assembly has by virtue of the agreements of the member states as expressed in the Constitutive Act, which is a manifestation of their common volition. Article 9 of the Constitutive Act describes the Powers and Functions of the Assembly as:

- ✓ determine the common policies of the Union;
- ✓ receive, consider and take decisions on reports and recommendations from other organs of the Union
- ✓ consider requests for membership to the Union;
- ✓ establish any organ of the Union;
- ✓ monitor the implementation of policies and decisions of the of the Union as well ensure compliance by all member states;
- ✓ Adopt the budget of the Union;
- ✓ give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;
- ✓ Appoint and terminate the appointment of judges of the Court of Justice;
- ✓ Appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.

Being the supreme organ of the Union, the Assembly has a final say over important matters mentioned above. The Assembly of the Union may be equated to the General Assembly of the United Nations. It has the ultimate power in determining the destiny of the organization itself.

Concerning the decision making process within the Assembly of the Union, the Constitutive Act authorizes the Assembly to adopt its own detailed Rules of Procedure. Accordingly, the Assembly has adopted its own Rules of Procedure as of July, 2002. A detailed explanation

of the contents of the same might be a verbose attempt as most of the provisions of the Rules of Procedure are either reiteration of what has been provided in the Constitutive Act or too detail and routine to be discussed separately. The Assembly shall conduct its session at least once in a year on an ordinary basis. It may also conduct an extraordinary session provided that a member state or the Chairperson of the Union requested so and the request is approved by a two-third majority of the member states. Unless a member state requests to host the sessions of the Assembly, it shall be held at the headquarters of the Union, Addis Ababa, Ethiopia. But in any case, the Assembly is bound to make a session in Addis Ababa at least every other year.

With respect to the decision making process of the Assembly, Rules 18-35 of its Rules of Procedure govern the details. Not all member states of the Assembly may always have a voting right on the decisions of the Assembly. A member state may be sanctioned not to exercise its voting rights as per Article 23(1) of the Constitutive Act due to its failure to make the appropriate payment of its contribution to the budget of the Union. A state may as well be suspended due to an unconstitutional change of government. Except in the cases of these exceptional circumstances, each member state shall have one (1) vote. Under normal circumstances, the Assembly is expected to take its decisions by consensus. In cases where unanimity is not possible, the Assembly shall take questions of procedure by a simple majority and other decisions by a two-thirds majority of the member states eligible to vote.

The Assembly may take its decisions in three different forms. The first form of decision is that of Regulations which are meant to be applicable and binding on member states, organs of the Union and the Regional Economic Communities. These entities are under obligation to take all the necessary measures to implement the Assembly's Regulations. Another form which the decision of the Assembly may take is Directives. Similar to that of Regulations, the Directives of the Assembly are binding on the three different categories of entities

mentioned above. What makes them distinct from Regulations is that they give discretionary power for national authorities so as to determine the form and the means used for the implementation of the same depending on their peculiar surroundings. Recommendations, declarations, resolutions, and opinions, etc are another category of the forms of the decisions of the Assembly. These kinds of decisions are not binding. They are basically targeted at guiding and harmonizing the viewpoints of the member states.

The Assembly is mandated to sanction a member state that fails, without good and reasonable cause, to comply with the binding decisions and policies of the Union. In such instances, the Assembly shall stipulate the timeframe for compliance with the decision. Should a state fail to observe the stipulated timeframes, the Assembly may impose sanctions in accordance with Article 23(2) of the Constitutive Act of the African Union. The sanctions to be imposed may include denial of transportation and communication links with other member states and other measures of political and economic nature to be determined by the Assembly.

Condemnation and rejection of unconstitutional changes of governments is one of the sixteen cardinal principles of the African Union. In pursuance of this principle, Article 30 of the Constitutive Act provides that governments which shall come to power via unconstitutional means shall be suspended from participating in the activities of the Union. Condemnation of unconstitutional change of government by the Union is a decision of paramount importance in Africa where such things are not uncommon. The procedure to be followed in such instances is stipulated in Rule 37 of the Rules of Procedure of the Assembly.

The Executive Council

The Executive Council, responsible to the Assembly, is composed of Ministers of Foreign Affairs who meet twice a year in ordinary session. Member states may designate other ministers or authorities in place of the ministers of the foreign affairs.

Article 13 of the Constitutive Act provides a list of functions of the Executive Council in the following manner:

1. The Executive Council shall coordinate and take decisions on policies in areas of common interest to the member states, including the following:
 - a. Foreign trade;
 - b. Energy, industry and mineral resources;
 - c. Food, agricultural and animal resources, livestock production and forestry;
 - d. Water resources and irrigation;
 - e. Environmental protection, humanitarian action and disaster response and relief;
 - f. Transport and communications;
 - g. Insurance;
 - h. Education, culture, health and human resources development;
 - i. Science and technology;
 - j. Nationality, residency and immigration matters;
 - k. Social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;
 - l. Establishment of a system of African awards, medals and prizes.
2. The Executive Council shall be responsible to the Assembly. It shall consider issues referred to it and monitor the implementation of policies formulated by the Assembly.

3. The Executive Council may delegate any of its powers and functions mentioned in paragraph 1 of this Article to the Specialized Technical Committees established under Article 14 of this Act.

As it can be deduced from a simple reading of the long list of functions the Executive Council of the African Union is a vital organ of the Union. Like the case of the Assembly of the Union, the Executive Council is a collection of political authorities of a given state. Though these personalities may have the political determination in furtherance of the above stated functions, they may lack expertise in fields of focus specified in Articles 13(1) of the Constitutive Act which is the rationale to authorize the Council to designate any of its functions to the Specialized Technical Committees who are composed of individuals with a comparatively better expertise in the fields.

The Commission

The Commission is the Secretariat of the African Union, and as such, has numerous functions. The Statute of the Commission of the African Union enumerates a list of functions that the Commission is mandated for. These include representing the African Union and defending its interests, implementing decisions taken by other organs of the African Union, promoting integration and socio-economic development, ensuring the promotion of peace, democracy, security and stability, and ensuring the mainstreaming of gender in all programs and activities of the African Union.

The Commission is composed of a Chairperson, a Deputy Chairperson, and the eight Commissioners. The Chairperson and the eight Commissioners, act as international officials responsible only to the Union as specified in Article 4(1) of the Statute of the Commission of the African Union. The eight Commissioners are elected to be responsible for a particular

portfolio. The portfolios are peace and security, political affairs, infrastructure and energy, social affairs, human resources, science and technology, trade and industry, rural economy and agriculture, and economic Affairs. In general, the Commission of the African Union, as indicated in Article 20 of the Constitutive Act, is a standing organ of the African Union that runs the organization's day-to-day business.

The Pan African Parliament

The Pan-African Parliament is one of the organs of the African Union as envisaged in Article 5(1) (c) of the Constitutive Act. The Pan-African Parliament was formally inaugurated in 2004. The notion of having it was, however, first outlined in the 1991 Abuja Treaty Establishing African Economic Community. The Treaty envisaged the Pan African Parliament as one of its organs and left the details for a protocol relating thereto which was signed in 2002.

The Pan-African Parliament was meant to provide a vehicle through which African citizens can contribute towards deliberating and providing advice on how to deepen democratic governance and promote development. Article 2 of the protocol in relation to the Pan African Parliament provides the following:

1. Member states hereby establish a Pan-African Parliament the composition, functions, powers and organization of which shall be governed by the present protocol.
2. The Pan-African parliamentarians shall represent all the peoples of Africa.
3. The ultimate aim of the Pan-African Parliament shall be to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage. However, until such time as the member states decide otherwise by an amendment to this protocol:

- i. The Pan-African Parliament shall have consultative and advisory powers only;
and
- ii. The members of the Pan-African Parliament shall be appointed as provided for in Article 4 of this protocol.

As stated above, the Pan-African Parliament has not yet assumed full legislative powers. The parliament is expected to become more effective after 2010 when it was expected to become an elected body and assumed full legislative powers.

The Pan-African Parliament is mandated to exercise oversight on issues of governance and development on the continent. It can discuss or express an opinion on any matter, either on its own initiative or at the request of the African Union Assembly. It can also make recommendations on how to achieve the objectives of the African Union and strives to contribute to the coordination and harmonization of policies, programs and activities of the Regional Economic Communities and African's national parliaments.

As regards to its composition, the Pan-African Parliament shall be composed of parliamentarians of member states. Each member state shall be represented in the Pan-African Parliament by five members, of whom, at least, one must be a woman. As the protocol stands now, the Pan-African parliamentarians shall be elected or designated by the respective National Parliaments or any other deliberative organs of the member states from among their members. The term of office of an individual parliamentarian depends on his/her term of office in the national parliament or other deliberative organ to which he/she is a member.

The Peace and Security Council

Of all the organs of the AU, the Peace & Security Council stands high in dealing with the issue at hand. Hence, a more detailed analysis of the Peace & Security Council is in order.

Establishment of a common defense policy for the African continent is one of the sixteen cardinal principles of the African Union. While explaining the historical roots of the Peace and Security Council, Timothy stated that the founders of the African Union deliberately endowed it with more interventionist power than the OAU which was criticized as having been a toothless talking shop where a club of presidents and prime ministers informally embraced a policy of non-intervention in the internal affairs of their member states. The misdeeds of the past have to take the blame for the untold miseries of the Africans in different parts of the continent including Rwanda, Sierra Leone, Democratic Republic Congo and the Sudan. Africa can be expected to have a bright future only in so far as there exist a scheme whereby the members of the African Union can function as, to use Thabo Mbeki's words, their brothers' keeper. This can be realized with a Peace and Security Council of the African Union.

Despite all the above pressing demands for the need to have a Peace and Security Council of the African Union, the Constitutive Act of the Union did not mention it as one of the principal organs of the African Union. The Constitutive Act was, however, open enough to let the Assembly establish any other organ of the union which it deems necessary.

Accordingly, the African Union established its Peace and Security Council on 26 December 2003 when the protocol⁷⁹ relating to the Council was entered into force. This was a remarkable step taken by the Union so as to act according to its principles of establishment of a common defense policy for the African continent. This step could demonstrate African Union's commitment to good governance and its willingness to legally sanction any infractions against the legally established constitutional order of a member state and there by give effect to the Constitutive Act. In a continent where numerous states are engaged in

⁷⁹ (Peace and Security Council Protocol 2003)

conflicts of varying degrees, the Peace and Security Council is undoubtedly of vital importance. Article 9 of the protocol on Amendments to the Constitutive Act of the African Union formally established the Council.

One might wonder as to what power does the Peace and Security Council of the African Union have mainly in light of similar and perhaps overlapping tasks that it has with the Security Council of the United Nations. The protocol relating to its establishment (herein after referred to as the Protocol) was framed taking this dilemma into account. It reaffirms its conviction to the Charter of the United Nations which conferred on its Security Council the responsibility of maintaining the international peace and security. It is based on the foundation of the powers of the Peace and Security Council on the United Nations Charter as it recognizes the role of regional arrangements in the maintenance of international peace and security. Therefore, the Peace and Security Council is meant to function in collaboration with the Security Council of the United Nations. It is as a manifestation of this commitment that the Protocol pledges to be guided by the principles enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights along with the Constitutive Act of the African Union.

The objectives of the Peace and Security Council are enumerated in Article 3 of the protocol. The notable objectives of the Council, *inter alia*, include promotion of peace, security and stability in Africa, anticipation and prevention of conflicts, assist the peace building and post conflict reconstruction activities, join African hands in the fight against terrorism and developing a common defense policy for the African Union.

The Council is expected to attain its objectives by performing tasks which vary from preventing the occurrence of conflicts in Africa to managing the conflicts which have already occurred. Article 7 of the Protocol specifies the specific powers that it has. For the

purpose of a general understanding of the mandates of the Council, let's have a look at what is provided in the Protocol itself as a list of functions meant to be performed by the Peace and Security Council. Article 6 of the Protocol states:

The Peace and Security Council shall perform functions in the following areas:

- a. Promotion of peace, security and stability in Africa;
- b. Early warning and preventive diplomacy;
- c. Peace-making, including the use of good offices; mediation, conciliation and enquiry;
- d. Peace support operations and intervention, pursuant to Article 4(h) and (j) of the Constitutive Act;
- e. Peace-building and post-conflict reconstruction,
- f. Humanitarian action and disaster management;
- g. Any other function as may be decided by the Assembly.

The Peace and Security Council shall be composed of fifteen member states of which ten of them shall remain in-charge for a term of two years and five of them for a term of three years. The term of office of the latter category is extended by a year as compared to the former with a view to ensure continuity of tasks within the Council. Unlike the case in the Security Council of the United Nations, where the five permanent members have the so called veto power, all members of the Peace and Security Council shall have equal votes in decision making. On top of that, the Peace and Security Council is different from the Security Council of the United Nations in that no member has permanence in this position and it will be rotated among member states of the Union. The Chairmanship of the Peace and Security Council shall be held in turn by the members of the Council in the alphabetical order of their names and shall hold office for one calendar month. A set of criteria is listed down in Article 5(2) of the Protocol that would be used by the Assembly in electing the

fifteen members of the Council. The Assembly is duty bound to apply the principle of equitable regional representation and rotation among member states of the Union. In addition to that, the Protocol listed down nine detailed criteria that the Assembly shall take into account in the process of electing member states. These nine criteria may be generalized so that the prospective member state shall have the adequate capacity and commitment to discharge the functions attributed to the Council.

The Peace and Security Council is a standing decision-making organ for the prevention, management and resolution of conflicts in Africa. The Protocol vows to organize the Council so as to be able to function continuously. In pursuance of this pledge, each member state of the Council shall, at all times, be represented at Addis Ababa, the Headquarters of the Union. Thus the capacity of a member state to have a sufficiently staffed and equipped permanent mission at the Headquarters of the Union and the United Nations is used a criterion in electing member states to the Council. A state that can comply with such requirements is expected to be able to shoulder the responsibilities which go with the membership to the Council.

The Peace and Security Council may establish subsidiary bodies which it believes to be appropriate for the proper accomplishment of its mandates. In particular, it may set up *ad loc* committees for mediation, conciliation, or enquiry, consisting of an individual state or group of states. It is also required to seek military, legal and other forms of expertise as it may be necessary in the circumstances of the case. The functions of the Council are highly intrusive in the sovereignty of a member state wherein the intervention is going to be made. This would obviously complicate the tasks that it has given the well-entrenched jealousy and respect that most African states have towards their sovereignty.

With regard to the Agenda to be seized by the Peace and Security Council, it shall provisionally be determined by the Chairperson of the Council based on proposals submitted by the Chairperson of the Commission and the member states. The Council has similar quorum requirements like most other organs of the African Union. The presence of two-thirds of the fifteen members should constitute a quorum.

Similar with that of the other organs of the African Union, the meetings of the Council shall be held in closed meetings. As an exception to this rule, the Council may decide to hold open meetings.

It is not unlikely for a member state of the Peace and Security Council to be a party to a conflict or a situation that is being examined. In such cases, the member state concerned shall be treated as though it were not a member of the Council. Accordingly, it shall only be involved in the discussion, but not in the decision making by casting votes. In all other cases, each member of the Council shall have one vote. In the absence of unanimity of votes, the Council shall adopt its decision on procedural matters by a simple majority and by a two-thirds majority on matters other than the procedural issues.

As it could be inferred from what has been stated hereinbefore, the Peace and Security Council has an important and sensitive mandate. To make it able to function properly and thereby facilitate timely and efficient responses to conflict and crisis situations in Africa, the Council shall be assisted by other entities. In particular, it shall be supported by the African Union Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund.

CHAPTER III: FROM BULLET TO BALLOT BOX: MILITARY INTERVENTION TO RESTORE LEGITIMATE ORDER

*“The Right of the Union to **Intervene** in a member state pursuant to the decision of the Assembly in respect of grave circumstances, namely: ...as well as a **serious threat to legitimate order**...upon the recommendation of the Peace and Security Council.”⁸⁰ (Emphasis added)*

The principle of intervention articulated in Article 4 (h) of the Amendment to the Constitutive Act is so sweeping that it allows the Union to intervene, including military intervention, upon the recommendation of the Peace and Security Council and the decision of the Assembly of the Heads of States and Governments of the Union. Members of the Union in adopting the Constitutive Act considered suspension from membership in case where the government of the member state under consideration comes to power through unconstitutional means would suffice to advance its proclaimed principle of promoting and protecting democracy and solve the perennial problem in Africa since independence.

It is upon second thought that the members ventured on revisiting an appropriate mechanism to defending the right to democratic governance and came with an amendment to the Constitutive Act to elevate the measures equivalent to war crimes, crimes against humanity, and genocide and allow intervention when ever there is a serious threat to ‘legitimate order.’ The intervention can be in various ways such sanctions, but the aim of this thesis is to deal with the issue of intervention in the form of the use of force, i.e., military intervention.

⁸⁰ (Amendment Protocol 2003, Article 4 (h))

Thus, military intervention for the cause of democracy is transformed into binding international law through a treaty, a status unparalleled in neither the UN system nor other regional instruments. Though military intervention is argued to exist as a resort for the cause of democracy, none exists in a binding treaty but in the forms of UN Security Council authorizations, General Assembly Resolutions, unilateral actions, regional body resolutions, and documents.

An attempt will be made in this chapter to outline the development of military intervention for the cause of democracy upon analysis of the UN system, unilateral initiatives, and regional instruments and practices thereby establishing the realm of military intervention in support of the will of the people. A close scrutiny will be offered on the irreversible tide visited Africa in 2003, i.e., military intervention to restore legitimate order

Setting the Scene: Military Intervention & Right to Democratic Governance

The US's unilateral intervention on Grenada, Nicaragua, and Panama were justified mainly on the loss of legitimacy of the incumbents' against whom intervention was directed. The permanent representative of the US to OAS Luigi R. Einaudi, for example, emphatically voiced that restoration of democracy is one of the articulated objectives of the December 1989 invasion of Panama. The permanent representative went on to say:

“[A] great principle is spreading across the world like a wild fire. That principle, as we all know, is the revolutionary idea that the people, not governments, are sovereign. This principle has, in this decade, and especially in this historic year-

1989-acquired the force of historical necessity. Democracy today is synonymous with legitimacy the world over; it is, in short, the universal values of our time.”⁸¹

The unilateral military interventions were justified mainly by ‘Illegitimacy Thesis’ or ‘Reagan Doctrine’ which asserts that governments cease to be legitimate when acting contrary to the will of the governed and be subjected to intervention (Foot note: see Brad R. Roth for analysis). The unilateral interventions, despite its accompanied criticisms and praises, signalled that the conventional interpretation of the principle of non-intervention is falling pray to challenges and the interventions, as vividly put, are “customary-law-generating milestones along the path to a new non-statist conception of international law that changes previous non-intervention formulas.”⁸² D’Amato’s claim of the interventions as customary-law-generating events is too hasty and unwarranted as “the international community overwhelmingly condemned the actions.”⁸³

Irrespective of the status of the military interventions in Grenada, Nicaragua, and Panama, it is evident that they started to set a changing dynamics in the application of the non-intervention principle. Although US invocation of the illegitimacy thesis to support uses of force does not itself signify a change in international law, the development of international sensibilities should not be overlooked. These interventions opened eyes for future interventions on the grounds of humanitarian and legitimacy of governments’. They were inspiring in that future developments took the courage that military interventions can be used

⁸¹ Bureau of Public Affairs., US Department of State, Current Policy Number 1240, Panama: A Just Cause 2, 1990

⁸² (D’Amato 1990, 886)

⁸³ (Roth 1993, 11)

to uphold the will of the people in instruments like the Copenhagen Document and the African Union Constitutive Act. One shall bear in mind that those instruments does not allow unilateral intervention. The African Union Constitutive Act, for example, stipulates that for an intervention to be allowed there shall be a recommendation from the Peace and Security Council and a decision to that effect from the Assembly of the Heads of States and Governments of the AU. The interventions ignited a new debate which shall be taken further in re-defining the statist intervention formula.

Despite Brad R. Roth's rejection that the interventions could be justified on the grounds of 'illegitimacy thesis' and that the interventions are law-generating, customary or otherwise, Roth admits the emergence of a movement to revisiting principles of intervention in the following vivid words.

*"It does not follow, however, that the illegitimacy thesis is a dead letter. The international community has not always unquestioningly accepted regime legitimacy on the basis of the "effective control" criterion. International practice contains precedents for questioning a regime's method of seizing and holding power. In this era of unprecedented international cooperation and in light of strong international reaction to the Haitian situation, these precedents will inevitably be examined anew to determine whether they may provide the basis for broad multilateral action, perhaps including the use of force, against regimes that can be identified as usurpers. The result may well be some movement, albeit cautious, in the direction of 'a new non-statist conception of international law that changes previous non-intervention formulas'."*⁸⁴

⁸⁴ (Roth 1993, 12)

Roth is right in anticipating, albeit cautiously, the emergence of revisiting process to the existing non-intervention formulas. Haiti then became the first case when the aim of the military intervention and the nation-building attempt were the same: to establish a democratic state. It was also the first time the United Nations Security Council⁸⁵ sanctioned intervention to restore a democratically elected government. The U.N.'s supervision of the 1990 elections gave the international community a stake in restoring Aristide to office. Additionally, the military's human rights violations, the misery caused by U.N. sanctions, and U.S. concern over refugee flows all combined to create pressure on the Security Council to authorize the use of force. Even so, there was considerable opposition within the U.N. to the proposed intervention. Indeed, even within the OAS, which took prompt action to impose economic sanctions on Haiti following the coup, many OAS member states were strongly opposed to the use of force.⁸⁶

As this was the first time that the international community intervened to restore democracy through the authorization of the UN Security Council, there still is room for sceptics that there actually is a revision of intervention formula. But the intervention in Haiti is important when considered in its role in re-establishing the principle that military interventions should be upon the authorization of the UN Security Council and in enlightening regional organizations to articulate collective authorization and military intervention for the cause of democracy. These attempts were further articulated in the Copenhagen Document of the OSCE and the African Union Constitutive Act.

⁸⁵ (S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994))

⁸⁶ (Wippman, *Defending Democracy through Foreign Intervention* 1997, 6)

The Copenhagen Document was a result of the meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (currently the Organization on Security and Cooperation in Europe), one of the several meetings of the CSCE on Human Dimension of the Conference. United States, Canada, Western Europe, Russia, and Hungary constituted the Conference while the Copenhagen Document was adopted on June 29, 1990.⁸⁷ The document was sweeping in that it reaffirmed its unwavering commitment to the protection of human rights and maintaining and upholding democratic governance.

The Copenhagen Document under paragraph 6 makes it a responsibility for the participating states to “defend and protect the democratic order freely established through the will of the people against terrorism or violence aimed at the overthrow of that order or of that of another participating state.”⁸⁸ It can be noted that the participating states have a duty not a right to protect and defend a government formed through the will of the people, in contrast to the African Union’s Constitutive Act which is worded in the form of a right not a responsibility. But a question arises on how a participating state can discharge its obligation under the document? Or does the Copenhagen Document contemplate the use of force or intervention as one means to discharging their responsibility? Does the Copenhagen Document authorize a participating state to intervene and when?

Paragraph 6 of the Copenhagen Document is framed in such way that the responsibility to defend and protect a legitimate government is to be exercised when there is terrorism or violence aimed at overthrowing the legitimate government. This framing assumes that there

⁸⁷ (Halberstam 1993, 167)

⁸⁸ (Copenhagen Document 1990, paragraph 6)

may be circumstances which warrant the use of force by a participating state to avert the terrorism or violence as other measures would definitely be unwise or ineffective. The Copenhagen Document does not clearly specify the use of force as an instrument that can be employed by participating states in discharging their responsibility under the Document. Neither does it prohibit intervention by participating states. Absent clear prohibition and expectation and anticipation of participating states at the Conference, Malvina argues that:

“... the Copenhagen document does provide such authorization-that if (1) there is a freely elected government, and (2) it is either barred from taking office or deposed by violent means, other states have not only a right but a responsibility to restore it to power and, if necessary, to use force to that end. The language of paragraph 6 suggests that states are authorized to take whatever steps are necessary to defend and protect the democratic order of participating state. While paragraph 6 does not specifically authorize the use of force, neither does it prohibit the use of force. The participating states must have been aware that force may be necessary to defend and protect against the activities of persons, groups or organizations that engage in terrorism or violence⁸⁹.”

Malvina rightly argues that the Copenhagen Document does allow participating states to use force to restore legitimate order when necessary. Thus, the Copenhagen Document articulated the use of military intervention for the cause of democracy by allowing participating states to use force to defend and protect a legitimate government. Moreover, the Copenhagen Document articulated military intervention as duty not as a right, which gives a strong normative validity.

⁸⁹ (Halberstam 1993, 167)

While not a treaty, the Copenhagen Document, adopted by 35 countries reflects the position of the participating states vis-à-vis a legitimate defence towards a legitimate government installed by the free will of the people and the will of the people is worthy of respect and protection even at the cost of military intervention. Through the Copenhagen Document, the participating states have clearly affirmed that “...the promotion of human rights and fundamental freedoms is one of the basic purposes of government, that freely elected governments are essential for the protection of those rights, and that the participating states have a responsibility to defend such governments against violence and terrorism.”⁹⁰ Thus, the Copenhagen Document can be considered as the first international instrument, though not binding, to articulate use of force in support of democracy.

Right of the Union under the Constitutive Act: Content

The first internationally binding treaty that authorizes military intervention for the cause of democracy was yet to come almost a decade after the Copenhagen Document echoed that states have the responsibility to take all necessary measures, including the use of force, when a legitimate government, is threatened by terrorism or violence from persons, groups or organizations. The Copenhagen Document, as argued by Malvina⁹¹, contemplates the use of force even without the prior authorization of the Security Council, an argument unacceptable for Thomas Franck who contemplated that “...all states unambiguously renounce the use of unilateral, or even regional, military force to compel compliance with the democratic entitlement in the absence of prior Security Council authorization under chapter VII of the

⁹⁰ (Halberstam 1993, 166)

⁹¹ (Halberstam 1993, 166)

Charter.”⁹² Though both agree on the new emerging revisiting formula of intervention, diverge on the procedures and modalities on the use of force for the cause of democracy, to which part the thesis will offer detail examination in the next chapter.

Following the Recommendations of the AU Executive Council, the Heads of State and Government of the African Union (AU) meeting in their First Extraordinary Session on 3 February 2003 adopted without debate an amendment to Principle 4 (h) of the AU Constitutive Act (the Act). The amendment expanded the Union’s right to intervene on the ground to restore legitimate order in addition to the other grounds, i.e., Genocide, War Crimes, and Crimes against Humanity. The amendment to the Act entered in to force in 2003 after deposit of instruments of ratification by two-third majority of the AU member states. The large number of states that participated in the extraordinary session and the fact that the amendments were adopted without debate appears to indicate widespread support. Of the 53 member states of the AU, 47 have signed the protocol of amendment while only 25 have ratified the protocol and submitted their instrument of ratification as of February 2010.⁹³

The changes to the Act include the addition of three new objectives aimed at ensuring more effective participation of women in decision making, development and promotion of common policies and encouraging participation of the African Diaspora in the AU. There are also three novel principles related to the right of the Union to intervene in situations where legitimate order is under serious threat, restraint of member states to enter in to agreements which are incompatible with the principles of the AU as well as the prohibition of the use of the territory of member states to subvert other states.

⁹² (Franck 1992, 81)

⁹³(See:<http://www.africaunion.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Amendments%20to%20the%20Constitutive%20Act.pdf>, accessed on 11 June 2010)

Interestingly enough, the AU's formation was heralded as a turning point in Africa's international relations not simply because it adopted the radical objective of intervening in a member state where grave circumstances, such as war crimes, genocide or crimes against humanity, were taking place, but for taking the courageous move in less than a year to amend its Constitutive Act and allow intervention in a member state when there is a serious threat to legitimate order. The AU Act and its Amendment Protocol is the first international treaty to recognize the right to intervene for a humanitarian as well as democratic governance purposes. The recognition of the right to intervene in the AU Act and its Amendment Protocol can be viewed as reflective of the AU's sensitivity to needs and aspirations of the African people.

The AU is able to showcase itself as being different from its toothless predecessor, the OAU, by putting into practice its newly coined phrase 'from non-interference to non-indifference'. Recast under the mantra of 'African solutions to African Problems', this newly acquired principle raised the expectation of many that a new dawn is coming to Africa at the start of the century.

The African Union Constitutive Act, by way of an amendment, legalized the use of force when there is 'serious threat to legitimate order'. Building on the lessons of the concerns of international law, especially that of Article 2 (4) & (7) of the UN Charter, in cases of unilateral intervention⁹⁴ and adherence reluctances to non-binding international instruments⁹⁵, the AU took a bold step to introduce collective authorization and intervention principles in a binding treaty. The Amendment to the Constitutive Act provides in part:

⁹⁴ Condemnations to the intervention in Panama were based on these 2 sub-articles

⁹⁵ See for example the Copenhagen Document

*“The **Right** of the Union to **Intervene** in a member state pursuant to the **decision of the Assembly** in respect of grave circumstances, namely: ...as well as a **serious threat to legitimate order**...upon the **recommendation of the Peace and Security Council**.”⁹⁶ (Emphasis added)*

What constitutes the intervention principle is the next legitimate question which should be analysed in light of the conditions and procedures laid down in Article 4 (h) of the Act.

“Right” to Intervene

First, the intervention principle is framed in such a way as giving the Union the ‘right’ to intervene. This could be viewed as giving the AU discretion to decide whether or not to intervene. On the other hand, the Copenhagen document discussed above makes it a responsibility of the participating states to defend and protect the will of the people. It is unfortunate that the principle is framed as entailing a duty rather than a right. The sense of obligation to intervene would have been more likely triggered if it was considered as a duty rather than a right. But, this does not mean that it will taint the reach of the principle of intervention if there is strong recommendation from the Peace and Security Council of the AU and a blatant case for decision by the Assembly.

What sort of “Intervention”

Second, the Act does not specify what sorts, from the available pool of intervention tools, of intervention it envisages to give meaning to the right of intervention. Does it include the use of force or military intervention? Does it include mediation, peace keeping missions,

⁹⁶ (Amendment Protocol 2003, Article 4 (h))

sanctions and any other non-forcible measures? A strong argument, similar to the argument made by Malvina on the Copenhagen Document, can be made that the AU does envisage the use of force to restore legitimate order apart from the non-coercive measures of intervention. The restoration of a legitimate order could only be effective if it were to be allowed to intervene militarily. The practice of the Union after the principle was adopted fosters the argument that the Act does authorize the use of force to restore legitimate order. The intervention in the Comoros Island in March 2007 can be considered one such practice of the Union.

“Serious Threat” to “Legitimate Order”

Third, what constitutes ‘serious threat to legitimate order’? What constitutes ‘legitimate order’ and ‘serious threat’ should be considered in reverse order. ‘Legitimate order’ constitutes the subject for intervention while ‘serious threat’ refers to the threshold for triggering the authorization of the Assembly for military intervention. Hence, separate treatment of the subject of intervention and threshold will help us in understanding the condition for intervention.

Intervention under the Act is allowed only to protect legitimate order and hence, once considered illegitimate it shall not be subject of intervention. Neither the Act nor other instruments of the African Union define what constitute a legitimate order. Hence, resort should be made to other international experiences and especially to the jurisprudence of the African Commission on Human and Peoples Rights. A government is considered legitimate if it holds and retains office in accordance with the will of the governed. Will of the governed is determined through periodic elections conducted in secret ballot and with the participation of

all concerned⁹⁷. The African Charter on Human and Peoples Rights also provides in Articles 13 and 20 that all peoples have the right to participate and self-determination in the formation of their governments. The African Commission on Human and Peoples Rights had the opportunity to pronounce will of people as the source of legitimacy based on Articles 13 and 20 of the Charter in various communications. Thus, legitimate order is a result of free and fair elections by which the majority decide whom they wish to govern them though free and fair election is itself a contentious issue in Africa. Writing on the absence of consensus on what constitutes free and fair elections in African state practices and conflicting election observation results and the challenges it pose to the Union in its right of intervention, Baimu and Sturman stated:

*“In practice, election observers have failed to reach consensus about the freeness and fairness of the election in certain African states. The outcome of the Zimbabwean election is but one example where many Western governments and NGOs concluded that the elections were neither free nor fair, while the OAU and SADC observers as well as observers from African countries such as South Africa and Tanzania were prepared to conclude that even if there were not free and fair they were at least legitimate. The uncertainty about whether a particular election has resulted in the imposition of legitimate order coupled with the fact that many African states and even the AU itself adopt a very low threshold of what constitutes a legitimate election, makes the question of determining the circumstances where the AU could intervene on grounds of threat to legitimate order very complex and controversial.”*⁹⁸

⁹⁷ (Franck 1992); (Halberstam 1993); (Udombana, *Articulating the Right to Democratic Governance In Africa* 2004)

⁹⁸ (Baimu and Sturman, *Amendment to the African Union's Right to Intervene: A Shift From Human Security to Regime Security?* 2003, 41)

Similar situations were faced in the Ethiopian election of 2005 where the EU Observation Mission concluded that the election was neither free nor fair but escaped the scrutiny of the Peace and Security Council and there by the Assembly. The Kenyan election of 2008 is also considered by many as neither free nor fair. In both states violence following the elections resulted in the loss of life and destruction of property. But, neither was considered by the AU for a possible intervention partly due to mixed election observation results. Despite such scepticism there is still room for optimism. It is too early and too inconclusive to judge the AU's intervention principle as inefficient and close the doors for optimism in just less that a decade of the principles existence in the continent. There still is a room for optimism if the AU would commit to act, as it did in some situations, for example in Comoros, in blatant cases for example in the clear cases of unconstitutional changes of governments through coup d'etat as outlined by the Charter on Democracy, Governance, and Elections in Africa.

For an intervention to be authorized by the Assembly, there must be a threat to legitimate order and that the threat should be 'serious'. How serious? Unlike the other grounds of intervention, namely, war crimes, crimes against humanity and genocide, whose meaning is well articulated in various instruments such as the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, and the Rome Statute of the International Criminal Court, no clear meaning of the threshold for the intervention on the ground of restoring legitimate order is to be found neither in the Act nor in other instruments. A closest possible interpretation of the threshold is to be inferred from the AU's definition of 'unconstitutional change of governments'. The Charter on Democracy, Governance, and Elections in Africa defines unconstitutional change of governments as:⁹⁹

I. Military coup d'etat against a democratically elected Government

⁹⁹ (The Charter on Democracy, Governance, and Elections in Africa 2003)

- II. Intervention by mercenaries to replace a democratically elected Government
- III. Replacement of democratically elected Governments by armed dissident groups and rebel movements
- IV. The refusal by an incumbent government to relinquish power to the winning party after a free, fair and regular elections
- V. Manipulation of constitutions and legal instrument for prolongation of tenure of office by (an) incumbent regime

Thus, one can assume that, at least currently, the above situations will constitute serious enough to trigger the Union its right of intervention under Article 4 (h) of the Act.

“Who Decides”

Finally, the procedure to set in motion the Union’s right of intervention is the recommendation from the Peace and Security Council advising the Union to intervene upon analysis of the situations and fulfilling the conditions.¹⁰⁰ The Union then takes the matter to the Assembly of Heads of States and Governments for decision and authorization of the use of force to restore legitimate order to the member state which is under consideration by the Union for intervention.¹⁰¹

The Union & the Principle so far

Coup d'etat as a means to assuming power was and remains a huge, lingering problem in the African continent. The phenomenon has continued to assail and stymie Africa's faltering

¹⁰⁰ (See chapter 2 of this thesis for the working procedures of the PSC)

¹⁰¹ (See chapter 2 of this thesis for the working procedures of the Assembly)

progress. By choosing to thread the path of violent change of regimes instead of an orderly route, various African countries and aspiring leaders manifest very appalling unwillingness to align themselves to enduring, albeit challenging disposition in political development. The collective effect of violent changes of government in Africa has been telling in the retardation of progress on virtually all positive fronts. The situation and its attendant instability substantially explain Africa's unenviable profile as the poorest and least developed region in the world in spite of ranking among the most resource-endowed parts of the world. At the root of this placement are, among others, crisis of leadership and incessant coup d'etat.

Unconstitutional change of governments through coup d'etat¹⁰² has been the main challenge to advancing democracy and democratic institutions in Africa apart from clear violations of democratic entitlements in the conduct of elections or manipulation of legal instruments to cling to power. It is in respect to the main challenge, unconstitutional change of governments through coup d'etat, and where consensus by the member states could easily be reached that the AU threatened to intervene in some situations and actually intervened in others.

In less than a year after the amendment, the Union threatened to intervene in response to the Sao Tome e Principe coup in 2003 and actually intervened in the Comoros crisis in March 2008, in both cases for the cause of democracy and democratic institutions. Long perceived as a toothless bulldog, the African Union (AU) appears to be finally shedding this tag in response to attempts by some African leaders to undermine democracy on the continent. In a rare, but necessary show of resolve, AU mobilised troops to quell a simmering rebellion on the Indian Ocean islands of the Comoros.

¹⁰² Since the Egyptian revolution in 1952 Africa has experienced approximately 90 violent or unconstitutional changes of government, though many more unsuccessful attempts have been made to overthrow governments. For general information see (Hough 1999)

The first test to the Union's principle occurred in less than a year after it was adopted in Sao Tome e Principe. On July 16, 2003, soldiers seized key sites and government ministers in Sao Tome and announced that they have toppled the government and have new plans for Sao Tome. The coup d'etat was condemned by the AU as well as the international community. They took the condemnation one step further and contemplated the use of military intervention to restore the legitimate government to office. The then president of the AU, president Joachim Chisano discussed the possibility of military intervention and asserted that the position of the African continent as enshrined in the AU charter on the means of changing government will be upheld at all times.¹⁰³ The AU did not actually intervene militarily for the situation was resolved peacefully with the restoration to power of the deposed president of Sao Tome. But, this shows that the Union started to take seriously that unconstitutional change of governments in Africa is unacceptable and the member states are ready to live by the rules of the principles they have signed to.

The second test was Comoros. Since independence from France in 1975, Comoros endured more than 20 coups and secessionist activities. None of the previous coups attracted the level of attention they should have deserved from the OAU as it did by the Union in 2007. The Comoros conflict pits Anjouan leader Mohamed Bacar against President Ahmed Abdallah Sambi. Bacar organised local elections last year and declared himself president of the Indian Ocean breakaway Anjouan Island against the orders of the government and the African Union. The AU authorized¹⁰⁴ Tanzania, Senegal, Libya, and Sudan to intervene and end the crisis in Comoros. It is the first time AU is intervening militarily to pre-empt an imminent

¹⁰³ (Sao Tome and Principe; AU explores Military Option in Sao Tome; Nigeria Vows to Restore Democracy 2003)

¹⁰⁴ (See AU Assembly Decision on Comoros 2008)

slide into political turmoil. In the past, African presidents avoided poking their noses into other countries' affairs. Hitherto the organisation has been involved in peacekeeping, not peace-enforcement, as is the case in the Comoros. AU precursor, the Organisation of African Union (OAU), had a clause in its charter on non-interference that barred African states from intervening in internal affairs of fellow African countries.¹⁰⁵

The above are the two situations where military intervention has been used or at least discussed as an option after the principle of intervention made its way to the African continent. It is worth noting that the Union acted only in such two circumstances in small states despite apparent failure of democracy in other parts of the continent. The apparent failure of the Union to discuss and even consider military option in Zimbabwe and Kenya tempted some commentators to claim that the Union is acting in a "...big man syndrome..."¹⁰⁶ where bigger states won't be subjected to the same level of scrutiny. But this may be too early to conclude as the Union so far has only intervened in clear cases as coup d'état but not other sources of unconstitutional change of governments. This may be due to the apparent lack of consensus on the level of legitimacy required out of elections as noted earlier in this chapter in connection with election observation results.

A recent notable progress by the AU is its decision on recent coups in Africa. The Assembly in its decision entitled 'Decision of the Resurgence of the Scourge of Coups D'état in Africa' expressed its concern the resurgence of coup d'état in Africa citing three coups in 2008, i.e., the coup in Mauritania on 6 August 2008, the Republic of Guinea on 23 December, and the

¹⁰⁵ (AU is Gradually Growing Teeth to Bite Errant Leaders 2008)

¹⁰⁶ (AU is Gradually Growing Teeth to Bite Errant Leaders 2008)

attempted coup in the Republic of Guinea Bissau on 5 August 2008.¹⁰⁷ The AU condoned the decisions made by the Peace and Security Council and requested the immediate return to constitutional order. The Peace and Security Council has suspended the power usurpers in the three states from participating in the affairs of the Union. The Assembly, in such a decision, reaffirmed its unwavering commitment to Articles 4 (p) and 30 of the Constitutive Act and other instruments which condemn unconstitutional change of governments.¹⁰⁸

All the issues discussed in this sub-section surely point to one consensus that the AU is setting the standards of condemnation, suspension, and intervention at least in cases of coup d'état in Africa while not yet ready to push the developments to encompass the measures to others forms of unconstitutional change of governments as stipulated in its various instruments including the Constitutive Act. The AU in other circumstances has advanced a role of constructive mediations when ever there was crisis as a result of election problems. The clearest scenario is that of Zimbabwe. After the election crisis in Zimbabwe, the Assembly issued a resolution on its 11th ordinary session concerning the situation in Zimbabwe. The Assembly, in its resolution, acknowledged that the election in Zimbabwe falls short of the AU standards for conducting democratic elections in Africa drawing conclusions from the reports of SADC, the African Union and the Pan-African Parliament observers on the Zimbabwean presidential run-off election held on June 27, 2008. Despite such assertion, the Assembly was shy-off from using strong words let alone condemning and even further articulating intervention in the situation. It simply called on all the concerned parties to resolve their differences amicably.

¹⁰⁷ (Assembly Decision 2009)

¹⁰⁸ (Assembly Decision 2009)

This apparently shows that the Union is unwilling or unable to take its intervention commitment too far for understandable reasons. For one, most Heads of States are not immune from claims of rigged elections and even some of them never had real elections at all thereby shying away from being at the receiving end of intervention. They do not want to set a precedent for it will haunt them so long as they continue their business-as-usual style of governance. Secondly, interventions in situations like Zimbabwe would paralyze the very fabric of intervention, decision making procedures in the Assembly, thereby even precluding intervention on situations like coup d'etat. It is less than two decades that most African states embraced the idea of conducting elections and less than a decade that they pledged to intervene for the cause of democracy. Hence, the Union is opting a method of one-at-a-time approach in dealing with intervention than to sweepingly applying intervention in black and white. This may have its own advantages and disadvantages

The apparent failure to intervene or even condemn on the other grounds of unconstitutional change of governments, does not squarely rebuff the steps the Union took first in establishing a norm of intervention and then actually testing it in practice in other situations. True that it would have been good to boldly apply intervention principles to all grounds of unconstitutional change of governments, taking the grounds one by one by developing concrete rules and developing consensus common ground of the member states on the treatment of free and fair elections.

CHAPTER IV: THE CONCERN: CHALLENGES TO MILITARY INTERVENTION

After articulating the right to democratic governance in Africa, military intervention to restore legitimate order, and the institutional setups and procedures in the previous chapters, the thesis now turns to analyzing the possible challenges that the Union may face in its venture of military intervention to restore legitimate order as described under Article 4 (h) of the Constitutive Act.

Article 4 (h) vis-à-vis Article 4 (g) of the Constitutive Act

Article 4 (g)¹⁰⁹ of the Constitutive Act prohibits interference by any member state on the internal affairs of another member state while Article 4 (h) stipulates for the right to intervene, thus offering a seemingly contradictory principles in one treaty. But a closer look at the two principles reveals that there actually is no contradiction between the two. The prohibition under Article 4 (g) applies to non-interference by member states not to the Union and the right to intervene under Article 4 (h) is that of the Union not member states. Hence, the Constitutive Act is well crafted so as to avoid such contradiction and the two principles are compatible to each other.

The Union would usually use the African Standby Force for its authorized intervention under article 4 (h) of the Constitutive Act. But the Union would also use sub-regional arrangements such as the ECOMOG and a lead member state to intervene in a member state to restore legitimate order. If the Union decides to use sub-regional arrangements or even a lead member state in case of intervention against a member state, it would not be considered as violating the principle under article 4 (g) of the Constitutive Act.

¹⁰⁹ (African Union Constitutive Act 2002, Article 4 (g))

First, the means and methods by which governments of member states assume and relinquish power are no more considered as an internal affair of a state. The various commitments made by the member states in a number of binding and non-binding regional instruments concerning democracy, condemnation of unconstitutional change of governments, conduct fair and free elections, and others testify that the member states are now treating domestic legitimacy is subject to at least regional scrutiny. Other member states as well as the Union have a legitimate stake at how governments are assuming and relinquishing power. Second, the intervention under article 4 (h) is pursuant to the authorization of the Assembly upon the recommendation of the Peace and Security Council. This reveals that the intervention is not by a member state, as prohibited by article 4 (g) of the Constitutive Act, but a collective intervention beyond the realm of Article 4 (g).

The apparent compatibility issue has far reaching implications. The shift from non-interference to non-indifference ushered by article 4 (h) of the Constitutive Act may be stained with the non-interference prescription under article 4 (g) of the Constitutive Act. Member states when they become at the receiving end of the intervention under article 4 (h) may challenge on the ground that the intervention violates the prohibition under article 4 (g). Though it can be argued that their submission for challenging article 4 (h) would fall afoul taking the arguments in the previous paragraphs, the matter can not be considered as settled until and when the African Court of Justice is seized upon the matter and give its final interpretation on the compatibility of article 4 (h) of the Constitutive Act with article 4 (g) of the constitutive Act.

Article 4 (h) vis-à-vis Articles 2 (4) & (7) of the UN Charter

Apart from its internal compatibility issue, it is pertinent to examine right of intervention's compatibility with Article 2 (4)¹¹⁰ of the UN Charter as all members of the African Union are members of the United Nations. Article 103¹¹¹ of the UN Charter provides that obligations of the member states under the UN Charter prevail over all their obligations under any international instrument. One of the obligations of the UN member states is to refrain from the use of force against the territorial integrity or political independence of another UN member state and non-interference in the internal affairs of another member state under Article 2 (4) and (7)¹¹² of the UN Charter, respectively. Members of the African Union by adopting the Constitutive Act, which provides for the right of intervention, are assuming an obligation to intervene for the Union may use a lead member state in addition to the African Standby Force and sub-regional organizations. Is the obligation under the Constitutive Act compatible with the obligations under the Charter?

¹¹⁰ Article 2 (4) of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

¹¹¹ Article 103 of the UN Charter States: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

¹¹² Article 2 (7) of the UN Charter states: in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The United Nations is the only international organization with the right to decide on enforcement action. Chapter VII of its Charter allows the Security Council to take enforcement action in cases of a threat to or breach of international peace and security. Some commentators have therefore questioned the right conferred on the African Union by its Constitutive Act to decide on intervention outside the UN framework and have raised the issue of what would be the role of the United Nations in such interventions.

Article 2(4) of the UN Charter states that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This general prohibition on the use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case* (1949) and the case concerning *Military and Paramilitary Activities in and against Nicaragua* (1986) and is considered to be a rule of *jus cogens*, i.e. a peremptory norm of international law from which no derogation is permitted. The African Union is classified by the United Nations as a regional organization within the meaning of Chapter VII of the Charter of the United Nations, whilst the regional mechanisms, such as ECOWAS, are recognized as sub-regional organizations. In deciding on intervention, the African Union will have to consider whether it will seek the authorization of the UN Security Council as it is required to do under Article 53 of the UN Charter.

The African Union does not seem to seek for Security Council Authorization under Article 53 of the Charter to exercise its right of intervention under the Constitutive Act. Under Article 4 (h) of the Act stipulates the right of intervention to be based on the ‘recommendation of the Peace and Security council’ and upon the ‘decision of the Assembly’. Further, the Protocol¹¹³

¹¹³ (Peace and Security Council Protocol 2003)

relating to the Establishment of the Peace and Security Council has mandated that organ to perform functions in the area, inter alia, of peace support operations and intervention, pursuant to Article 4 (h) and (j) of the Constitutive Act. In respect of Article 4 (h) it makes recommendations to the Assembly, whilst in relation to Article 4 (j) it approves the modalities for intervention following a decision by the Assembly. No mention, albeit deliberately, of Security Council authorization to be found in the text of the Act or other instruments. The intent and wordings of the Act are clear, in that it provides for regional right of intervention without the authorization of the Security Council. How then Article 4 (h) of the Constitutive Act shall be treated vis-à-vis the pre-emptory norm of Article 2 (4) of the Charter against the use of force unless authorized by the Security Council. Any use of force authorized by the Security Council is justified and poses no problem on the one who used force. That would equally apply to cases of intervention by the Union pursuant to authorization from the Security Council. The problem is what if the Union decided to intervene without requiring Security Council authorization, as the Constitutive Act seems to position so.

There seems to be no clear consensus among scholars on the compatibility of unilateral and regional intervention with the prohibition against the use of force. Some would argue that the prohibition against the use of force by the Charter is absolute and not subjected to exception. Louis Henkin, as quoted by Malvina, argues that “the Charter...prohibits the use of armed force by one state on the territory of another...for any purpose, in any circumstances.”¹¹⁴ The argument would allow no exceptions to unilateral or regional intervention to restore legitimate order that would abate pretexts that would unravel from an exception, albeit too extreme. Thomas Franck also argues that no unilateral or even regional military intervention

¹¹⁴ (Halberstam 1993, 168)

should be allowed, though military actions for the cause of democratic entitlements are welcome if authorized by the Security Council. In building his argument that there should always be Security Council authorization, Franck states:

“...that all states unambiguously renounce the use of unilateral, or even regional, military force to compel compliance with the democratic entitlement in the absence of prior Security Council authorization under chapter VII of the Charter; such authorization, except for regional action under Article 53, would require a finding that the violation had risen to the level of a threat to the peace. Such a pledge would merely reiterate the existing normative structure of the Charter, Articles 2(4), 51 and 53 in particular. Yet this reiteration is necessary, in view of the history of unilateral interventionism which has undermined that self-denying ordinance. Specifically, states must acknowledge that the evolution of a democratic entitlement cannot entitle a state or group of states to enforce the right by military action under the pretext of invoking Articles 51 or 53.”¹¹⁵

But Franck’s argument against the use of unilateral or even regional military action for the cause of democratic entitlement is “...based more on political consideration—the needs to allay the fears of small states of abuse by powerful states—than on provisions in the instruments he cites in support of a right to democratic governance.”¹¹⁶ Thus, it would be safe to assume that Franck would have no problem on legal grounds to allowing unilateral and regional intervention unless it was for political expediency.

¹¹⁵ (Franck 1992, 84)

¹¹⁶ (Halberstam 1993, 171)

The case for unilateral intervention is well articulated by Malvina in the work on the Copenhagen Document that stipulated use of force which states that:

*“While permitting unilateral enforcement poses certain risks of abuse, limiting enforcement measures to those taken under UN auspices poses another risk—than no action will be taken at all. This risk was demonstrated by the UN response to the Idi Amin regime in Uganda. In spite of the horrors being perpetrated in that country, the United Nations failed to Act, and ultimately it was the unilateral use of force by Tanzania, without UN authorization, that resulted in Amin’s ouster. Significantly, after Amin was deposed, Uganda’s new president complained not of Tanzania’s unilateral action, but of the United Nation’s failure to act. ...
...Whatever abuses resulted from intervention by democracies would pale by comparison to the horrors perpetrated by totalitarian regimes that were permitted to continue in the name of intervention.”¹¹⁷*

The inaction of the UN on matters touch most to Africa, Malvina’s position fosters a stronger case for Africa to develop its own rules of intervention that would not depend on the blessing of the Charter. If not unilateral to the member states of the AU, collective decision and action by the Union should be a permissible, as is the case now under the Constitutive Act, exception under the prohibition against the use of force. Despite a generalized argument of intervention under the AU Constitutive Act, could intervention to restore legitimate order be considered as intervention against the ‘Territorial Integrity’ or ‘Political Independence’ or ‘Inconsistent with the Purposes of the United Nations’? Malvina, as well as the author of this thesis, think not so.

“If elections are held, the legally elected government is deposed by violence (internal or external), and a second state intervenes, removes those who deposed

¹¹⁷ (Halberstam 1993, 173)

the legally elected government, restores that government and withdraws, leaving the legitimate government in charge, the second state has not acted against but in support of the “territorial integrity” and “political independence” of a state. Nor is action restoring the freely elected government “otherwise inconsistent the purposes of the United Nations”. Restoration of the freely elected government furthers one of the fundamental purposes of the Charter, the promotion of human rights, and is a vindication of one of the principles affirmed in the Charter, self-determination,”¹¹⁸

The above quote vividly explains that unilateral military intervention, in case of the AU regional, to defend and protect the will of the people when threatened is a legitimate cause that advances the whole tenet of the purpose of the Charter. Hence, if the regional intervention envisaged under the AU Constitutive Act does not abridge the elements in Article 2 (4), namely, territorial integrity, political independence, and purposes of the UN Charter, there should be no cause for concern.

¹¹⁸ (Halberstam 1993, 173)

CONCLUSION

The thesis began, albeit concisely, with analyzing the emerging right to democratic governance which, by some, is categorized as the fourth generation of right. The basis for the emergence of the right to democratic governance, both internationally as well as at the continent, is systematically discussed in the first chapter. In this part the thesis argued that there indeed is a right to democratic governance despite divergent views on the content and reach of the right.

The principle of non-interference in the domestic affairs of a state is well established, albeit construed widely, in international law. The means and methods by which the government of a nation holds and remains in office were long considered as a domestic concern. States were considered legitimate representatives of individuals within their jurisdiction irrespective of the method by which they assume power. Thus, will of the people as source of legitimacy to govern was neglected in international law. The principle of non-interference in the internal affairs of a state shielded those governments that govern without the consent of the governed from scrutiny by the international community.

Despite improvements concerning the status of individuals in international law with the creation of the United Nations in 1945, shifts in international law were impeded by the cold war that divided the world in to ideological tabs. The United Nations Charter pledged that protection of human rights is one of its pillars. This pledge was further reinforced when the United Nations General Assembly approved the Universal Declaration of Human Rights (UDHR) that contains that all have the right to a representative form of government that reflects the will of the people through periodic elections. Though not binding, the Universal

Declaration of Human Rights reflects the behaviour of states vis-à-vis international law. The International Covenant on Civil and Political Rights (ICCPR), a binding instrument, reiterated the echo of the UDHR regarding the will of the people, albeit tainted by the ills of the cold war.

Despite well concerted international movements echoing the individual should be legitimate subject of international law especially in the field of human rights, it was received with slow response by the ideologically divided world. But the events during the cold war were not only news of pessimism but had certain news for optimism. Two events during the cold war and the collapse of the Soviet Block were considered as events that sparkled to the emergence of the right to democratic governance in the 1990's. The process of decolonization and condemnation, followed by sanctions, of the White-Minority Apartheid rule in South Africa demonstrate that governments imposed against the will of the majority people are began to be considered illegitimate in their international dealings and the act itself as an international delict. But these were exceptions of their time and did not extend to other cases. The collapse of the Soviet Block ushered the fall of communism thereby expiring the ideological divide. The international community could agree more on issues now than it was during the cold war that facilitated the idea that will of the people is the source of legitimacy for governments.

By analysing the development of the right to self-determination, free expression, and electoral trends, it is stated that there indeed is an emerging right to democratic entitlement. The unsuccessful coup in Russia and the military intervention in Haiti by the United States are events that marked the international community is getting serious on the will of the people. Wave of condemnations, sanctions, and even military interventions for such cause signalled a new era is dawning that upholds the will of the people. Apart from the scholarly

works, various international resolutions and documents were in the making towards the turn of the century. United Nations General Assembly Resolutions, Organization of American States Resolutions and Amendments, and Documents by the Conference on Security and Cooperation in Europe especially the Copenhagen Document all articulated that governmental legitimacy emanates from the will of the governed and those who usurp the source of legitimacy should be subject to scrutiny by the international community.

Building on the claim that the right to democratic governance should attain international as well as regional legitimacy and for the violation of which should attract responsibility, the thesis argued that the international community of states should intervene militarily in blatant situations and if other mechanisms fail or are ineffective to ensure the right of citizens to democratic governance. The AU, through its Amendment to the Act, took a bold step towards ensuring will of the people is the only source of legitimacy for governments in Africa thus transforming decades of moral and customary commitments internationally into hard law in the form of treaty. It is a laudable step! But the Union has to make sure that it will live up to its promises building on the lessons of its predecessor.

The principle of intervention articulated in Article 4 (h) of the Amendment to the Constitutive Act is so sweeping that it allows the Union to intervene, including military intervention, upon the recommendation of the Peace and Security Council and the decision of the Assembly of the Heads of States and Governments of the Union. Members of the Union in adopting the Constitutive Act considered suspension from membership in case where the government of the member state under consideration comes to power through unconstitutional means would suffice to advance its proclaimed principle of promoting and protecting democracy and solve the perennial problem in Africa since independence.

It is upon second thought that the members ventured on revisiting an appropriate mechanism to defending the right to democratic governance and came with an amendment to the Constitutive Act to elevate the measures equivalent to war crimes, crimes against humanity, and genocide and allow intervention when ever there is a serious threat to ‘legitimate order.’ The intervention can be in various ways such sanctions, but the aim of this thesis is to deal with the issue of intervention in the form of the use of force, i.e., military intervention.

Thus, military intervention for the cause of democracy is transformed in to binding international law through a treaty, a status unparalleled in neither the UN system nor other regional instruments. Though military intervention is argued to exist as a resort for the cause of democracy, none exists in a binding treaty but in the forms of UN Security Council authorizations, General Assembly Resolutions, unilateral actions, regional body resolutions, and Documents.

Despite the right to military intervention, the Union intervened so far in only one situation though a number of situations would have been considered as unconstitutional changes of governments. The apparent failure to intervene or even condemn on the other grounds of unconstitutional change of governments, does not squarely rebuff the steps the Union took first in establishing a norm of intervention and then actually testing it in practice in other situations. True that it would have been good to boldly apply intervention principles to all grounds of unconstitutional change of governments, taking the grounds one by one by developing concrete rules and developing consensus on common grounds of the member states on the treatment of free and fair elections.

The military intervention in the Act does not require the approval of the UN Security Council neither does the Union sought UN Security Council authorization when it actually intervened in the Comoros thus raising the familiar concern in its compatibility with Article 2 (4) of the UN Charters that prohibits the use of force without the Security Council's approval. Though at face value there seems to be incompatibility with the two provisions, none actually exist when analyzed with the elements of prohibition in the charter. Unilateral military intervention, in case of the AU regional, to defend and protect the will of the people when threatened is a legitimate cause that advances the whole tenet of the purpose of the Charter. Hence, the regional intervention envisaged under the AU Constitutive Act does not abridge the elements in Article 2 (4), namely, territorial integrity, political independence, and other purposes of the UN Charter.

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