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Comfort Women During WWII: Are U.S. Courts a Final Resort for Justice?

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THE OAU AND THE RECOGNITION OF GOVERNMENTS IN AFRICA: ANALYZING ITS PRACTICE AND PROPOSALS FOR THE FUTURE

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INTRODUCTION

One of the consistent features of politics in Africa, since the collapse of the colonial system, is the rarity of constitutional change in governments.¹ Since the first coup d'état in 1952,² a series of military

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1. See *infra* notes 2-3 (discussing the various methods by which different African governments have changed, the majority of which do not include constitutional change).

2. See ERIC CARLTON, *THE STATE AGAINST THE STATE*, 160-71 (1997) (describing the coup that overthrew King Faruq in Egypt on July 23, 1952).

revolts and civil wars have instigated change in the governments of a majority of African states.³ In the wake of this method of political change, more than one political or military faction has claimed to be the government of a particular State at numerous times.⁴ Although the charter of the Organization of African Unity ("OAU") expressly prohibits interference in a Member's internal affairs,⁵ this provision has been ignored on occasion and, as a result, a delegation's claim to be the representative of a state has caused considerable controversy at OAU summit meetings.⁶ Also, in some instances, even though there has been no dispute over who should represent a particular state at OAU meetings, the OAU has still barred representatives from its deliberations.⁷ As demonstrated in this paper, the OAU's reaction to such situations has depended on the interplay of legal, social, and political factors surrounding the delegation's volatility, which shapes its responses to particular situations.

Moreover, the OAU has begun to develop a policy on constitutional change that has as its crux the non-recognition of coups.⁸ This

3. See Adebayo Adedeji, *Comprehending African Conflicts*, in COMPREHENDING AND MASTERING AFRICAN CONFLICTS: THE SEARCH FOR SUSTAINABLE PEACE AND GOOD GOVERNANCE 1, 1-10 (Adebayo Adedeji ed., 1999) [hereinafter COMPREHENDING AND MASTERING AFRICAN CONFLICTS] (examining the violence plaguing the Sub-Saharan African continent, especially as it relates to changes in government). By the end of 1998, thirty-three out of the forty-eight Sub-Saharan countries had undergone periods of "political tumults, violence, and brutalization." *Id.* at 5. Since 1998, there has been a coup in Cote d'Ivoire. *Id.* Only a few countries, including Botswana, Gabon, Mauritius, Sao Tome & Principe, Swaziland, Tanzania, and Zimbabwe, have been spared violent changes of government since their independence. *Id.*

4. See Segun Odunuga, *Nigeria: A Victim of its Own Success*, in COMPREHENDING AND MASTERING CONFLICTS 221, 221-28 (describing the events leading up to a thirty month long Civil War with different factions claiming control of different areas of the country).

5. See OAU CHARTER AND RULES OF PROCEDURE, art. 3, para. 2 [hereinafter OAU CHARTER] (indicating the member states' adherence to the principle of non-interference in the internal affairs of other states).

6. See *infra* notes 12-34 and accompanying text (describing the controversy surrounding the seating of the Ghanaian delegation in the wake of the coup that overthrew Nkrumah).

7. See *infra* notes 56-68 and accompanying text (discussing the OAU's refusal to recognize the new regime of Liberia after a violent coup in 1980).

8. See *infra* Part VII (examining the OAU's recognition practices with regards to coups and other non-democratically initiated changes of government).

coincides with the link between democracy and socio-economic development recently stressed by international organizations⁹ and states.¹⁰ Given Africa's debilitating social and economic problems, if

9. See UNITED NATIONS GENERAL ASSEMBLY, THE CAUSES OF CONFLICT AND THE PROMOTION OF DURABLE PEACE AND SUSTAINABLE DEVELOPMENT IN AFRICA; TEXT PRESENTED TO THE UNITED NATIONS SECURITY COUNCIL BY THE SECRETARY-GENERAL, U.N. Doc. A/52/871-S/1998/318 (1998) (expressing the current UN Secretary-General, Kofi Annan's opinion of the importance of democracy for development). The report states:

Democratic government helps to guarantee political rights, protect economic freedoms, and foster an environment where peace and development can flourish. Today, as never before, countries around the world are seeking to establish pluralistic systems of government in which political leaders are elected by the will of the majority to fixed terms of office and exercise their authority within legal limits. This is a very hopeful trend for Africa's future because in the absence of genuinely democratic institutions contending interests are likely to seek to settle their differences through conflict rather than through accommodation.

Id. at 18. Annan's predecessor as Secretary-General, Boutros Boutros-Ghali, also emphasized the interrelationship between human rights and socio-political stability when he wrote:

Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the Charter. It requires as well a deeper understanding and respect for the rights of minorities and respect for the needs of the more vulnerable groups of society, especially women and children. This is not only a political matter. The social stability needed for productive growth is nurtured by conditions in which people can readily express their will. For this, strong domestic institutions of participation are essential.

BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE, 70-71 (1995).

10. See TONY SMITH, AMERICA'S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY, 85 (1994) (arguing that the foundation for American twentieth century foreign policy, including the belief that democracy is the most peace-loving and only legitimate form of government, and that the United States has a self-interested, as well as moral, obligation to further its prospects abroad, was laid by President Wilson at the beginning of the twentieth century). In particular, a resurgence of Wilson's liberal democratic internationalism in America's foreign policy is evident in the both President Bush I and President Clinton's policies. *Id.* at 312-45; see also Edward N. Muller, *Democracy, Economic Development, and Income Inequality*, 53 AM. SOC. REV. 50 (1988) (demonstrating that scholars, in addition to international organizations and states, note the link between democracy and income inequality by presenting the causal relationship between income inequality and democratic experience within a country); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986) (claiming a close relationship between democracy and political stability); R.J. RUMMEL, POWER KILLS:

the OAU acts constructively on the recognition of democratic governments it can emerge from its current dysfunctional state and start to serve as a tool for the enhancement of economic prosperity and political stability on the continent.¹¹ Notwithstanding its current measures, however, this paper argues that the OAU's policy on recognition does not go far enough and needs to be elaborated further with rules that bind it to adhere to articulated and transparent procedures.

This paper is thus an analysis of the recognition practice of the OAU. Parts I through VI of the paper are case studies of the OAU's recognition policy in practice. These studies examine instances when the OAU has adhered to the international law principle of non-interference in the internal affairs of its members. The case studies also discuss instances when the OAU has departed from its position of non-interference. Insights into domestic and regional politics, the security perceptions of some African states, and the OAU's internal organization are examined to better understand how the OAU policy has evolved. Part VII is an introduction to the OAU's recent declaration on unconstitutional change of governments. Part VIII explores methods to reinforce the substantive and procedural dimensions of the declaration. The conclusion comments on the impact of the OAU's new position on its future significance.

I. GHANA

The OAU's first major recognition problem involved the seating of the Ghanaian delegation sent to the sixth ordinary session of the OAU

DEMOCRACY AS A METHOD OF NONVIOLENCE, 85-89 (1997) (arguing that democracy also contributes to domestic peace within a country).

11. See GEORGE B. AYITTEY, *AFRICA IN CHAOS*, 346 (1998) (describing the irrelevance of the OAU by noting that although the mandate of the OAU includes conflict resolution, the OAU has achieved the "unenviable distinction of being the most useless organization on the African continent"). Ayittey describes the delegates to the OAU as "a den of unrepentant despots" and notes that the organization itself is known for "its glitzy annual jamborees, where rabid autocrats click champagne glasses to celebrate longevity in office." *Id.* In addition, Ayittey argues that they "use the OAU summit to extort aid from the international community instead of taking the initiative to solve the continent's problems themselves." *Id.*

Council of Ministers¹² by the then newly-established military junta in Ghana, the National Liberation Council ("NLC").¹³ Kwame Nkrumah, one of the main architects behind the creation of the OAU,¹⁴ had been overthrown in a coup in 1966.¹⁵ The arrival of the NLC's delegation led to controversy among the OAU Members, some of whom attempted to prevent it from participating in the Council of Ministers' meeting.¹⁶

The deliberations over the NLC's delegation revealed the emergence of two clear positions on the issue of recognition.¹⁷ One group in the Council maintained that as the NLC was now the de facto government of Ghana, there should be no question about seating its delegates at the meeting.¹⁸ Although, ostensibly, this claim was based on the OAU's principle of non-intervention in its Members' internal affairs and the fact that the NLC had secured effective control of Ghana, there was

12. See OAU CHARTER, *supra* note 5, art. 7(2) (creating the Council of Ministers as one of the organs of the OAU).

13. But see A. Bolaji Akinyemi, *The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States*, in 46 THE BRITISH YEARBOOK OF INT'L LAW 391, 399 (1975) (indicating that the issue of recognition of governments actually first arose in 1963 as a result of the overthrow and assassination of President Olympio of Togo). Although this took place before the OAU was established, Togo's delegates were prevented from attending the OAU's inaugural conference because of opposition from some states. *Id.* By July of that year, however, the Togolese delegation was allowed to participate in OAU meetings. See *Costly Claims in Togo*, W. AFR., July 27, 1963, at 832. (noting the recognition by all African states of the new government of Togo).

14. See DAVID ROONEY, KWAME NKRUMAH: THE POLITICAL KINGDOM IN THE THIRD WORLD, 203-36 (1988) (describing the role Nkrumah played in the creation of the OAU).

15. See *President Nkrumah Deposed by the Armed Forces and Police*, 3 AFR. RES. BULL. 462, 465 (1966) (reporting about the coup d'état by the Armed Forces and an instance in which the police overthrew Nkrumah).

16. See C. O. C. AMATE, INSIDE THE OAU: PAN-AFRICANISM IN PRACTICE, 423 (1986) (describing the events surrounding the NLC delegation's arrival to the sixth ordinary session of the OAU Council of Ministers).

17. See *id.* at 424 (describing the difference between the opposing sides of the debate over the validity of the NLC delegation); see also *infra* notes 31-39 (analyzing the arguments of each side of the debate over the NLC delegation).

18. See *id.* at 423 (describing the states that recognized the NLC as the de facto government).

probably a subtler underlying factor.¹⁹ Nkrumah had been accused of supporting attempts to overthrow certain African regimes²⁰ as a means of gaining influence and shaping the course of African unity on lines he deemed appropriate.²¹ Hence, his demise was seen by some of the Members as an event that would improve their prospects of survival.²²

On the other hand, other OAU Members²³ tried to prevent the NLC's delegation from taking its seat.²⁴ These Members argued that foreign governments, bent on eliminating Nkrumah because of his ideological position and his radical Pan-Africanism, backed the NLC's coup.²⁵ The opposition members therefore believed that the NLC's delegation represented a puppet regime whose existence was at odds with the aspirations of the OAU, as articulated in its preamble.²⁶ The argument, therefore, was not that the NLC had not yet exercised effective control over Ghana.²⁷ Instead, the challenge to the NLC's delegation was based

19. See *id.* (noting that the same states that recognized the NLC as the de facto government of Ghana were also the states that in the past had accused the ousted Ghanaian leader of masterminding subversive efforts against their governments).

20. See *African Unity and Political Alignments*, 2 AFR. RES. BULL. 311 (1965) (describing some of the allegations of subversion measured against Ghana).

21. See KWAME NKRUMAH, AFRICA MUST UNITE, 216-23 (1985) (arguing for a continental government for Africa). Nkrumah believed in a surrender of state sovereignty with economic planning on a continent-wide basis. *Id.* In addition, he argued for a unified military and defense strategy capable of defending Africa from an external attack as well as a unified foreign policy. *Id.* He was also a proponent of a continental constitution implying a single government for all of Africa. *Id.*

22. See Amate, *supra* note 16, at 423 (stating that the coup in Ghana ended the dispute between Ghana and those countries that had been accusing Ghana of subversive efforts against them).

23. See *The Seating of Ghana*, W. AFR., Mar. 5, 1966, at 281 (naming Guinea, Mali, and Tanzania as the main advocates for non-recognition of the credentials of the NLC's delegation).

24. See *id.* (reporting about the heated debate over the recognition of the NLC delegation).

25. See Amate, *supra* note 16, at 423 (describing that the opponents to the recognition of the NLC delegation believed that the overthrow of Nkrumah was the work of international imperialism, which they condemned).

26. See OAU CHARTER, *supra* note 5, pmbl. (stating that the member-states of the OAU are committees, among other things, to fight against neo-colonialism in all its forms).

27. See JOSEPH G. AMAMOO, THE GHANAIAAN REVOLUTION, 45-46, (1988) (noting that by the time the OAU Council of Ministers meeting had begun, the

on perceptions of neo-colonialism, considerations of Pan-Africanism, and Nkrumah's role in the struggle to dismantle the colonial system.²⁸ At the end of the discussions, the faction that supported the NLC prevailed and the Council decided to seat the Ghanaian delegation.²⁹ In response, some of the anti-NLC delegation withdrew from the meeting in protest.³⁰

The reaction to the coup in Ghana and the seating of the NLC delegation amounted to a triumph of legalism in the OAU. It was obvious, that at this stage, the OAU had accepted the international law principle of effective control as one of the primary conditions for recognition of governments. Also, the seating of the Ghanaian delegation was indicative of the OAU's reaffirmation of the principles of Article 3(2) of its Charter on non-interference.³¹

In addition, apart from the commitment to legalism, a number of political factors influenced the OAU's decision to accept the new Ghanaian delegation. First, the anti-colonial tenets and utterances,

effective control of the NLC was not in doubt since all resistance to the coup ended on the same day it was executed).

28. See Amate, *supra* note 16, at 423-24 (discussing the arguments for and against the recognition of the NLC delegation).

29. See AMAMOO, *supra* note 27, at 48 (describing the events surrounding Nkrumah's Foreign Minister's failure to appear at the summit). Nkrumah thus lost the opportunity to persuade the Council of Ministers to bar the NLC's delegation from the meeting. *Id.* Perhaps the absence of Nkrumah's foreign minister tilted the majority opinion in the Council towards the NLC. See also *The Seating of Ghana*, *supra* note 23, at 281. In handling this dispute, the OAU may have taken guidance from the United Nations. See *Recognition by the United Nations of the Representation of a Member State*, G.A. Res. 396(V), U.N. GAOR, 5th Sess., Supp. No. 20 at 24, U.N. Doc. A/1775 (1950) (adopting a resolution that asserted that whenever there is a dispute between more than one authority claiming to represent a government in the UN that becomes a subject of controversy, the issue should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case). Even if the UN model, which presupposes competing claims, was used for guidance in this case, the OAU has demonstrated its willingness to expel a delegation without hearing claims of a rival faction claiming to be the government of a given state. See *infra* notes 54-68 and accompanying text (discussing the case of Liberia in 1980).

30. See Amate, *supra* note 16, at 424 (identifying Algeria, Egypt, Guinea, Kenya, Mali, Tanzania, and Somalia as the countries that left the OAU meeting in protest).

31. See OAU CHARTER, *supra* note 5, art. 3(2) (indicating the member states' adherence to the principle of non-interference in the internal affairs of other states).

typical of the OAU in its beginning, were no longer influential because 1966 marked the end of the dynamic period of the OAU's first two years. The small group of so-called radical states,³² such as Algeria, Egypt, Ghana, Guinea, Mali, Tanzania, and Uganda, which had considerable influence when the OAU was established, saw its fortunes decline when two of its leaders, Ben Bella of Algeria,³³ and Nkrumah were overthrown.³⁴ By 1966, the moderates, with their focus on economic cooperation, dominated the debates and shaped opinion in the OAU.³⁵ With the moderates in control, the radical's justification for expulsion—that the government had been unstable with the aid of imperialist powers—was not going to win much support.³⁶

Second, the founders of the OAU had deliberately created a weak

32. See Zdenek Cervenka, *Major Policy Shifts in the Organization of African Unity, 1963-1973*, in *FOREIGN RELATIONS OF AFRICAN STATES* 323, 333 (K. Ingham ed., 1974) (identifying the radical states that dominated the OAU during its first couple of years).

33. See *id.* (stating that the radical group of the OAU lost one of its major leaders with the death of Ben Bella); see also ARSLAN HUMBARACI, *ALGERIA: A REVOLUTION THAT FAILED*, 263 (1966) (quoting a member of the military junta that ousted Bella as saying, "The era of noisy speeches, of vulgar catchwords and of impulsive frenzy is over," indicating Algeria's more sober foreign policy). Ben Bella was overthrown in a coup in 1965. See *A Person Again*, *ECONOMIST*, Nov. 8, 1980, at 42. His replacement as head of state, Houari Boumedienne, shifted from Ben Bella's fiery radicalism to a more practical approach. See Humbaraci, *supra* at 263. Although the new government continued to support "radical African causes" such as aid for guerrilla movements seeking to topple colonial regimes, the amount of aid was limited to a smaller number of groups and was given with much less brassiness than was the case under Ben Bella. *Id.*

34. See Cervenka, *supra* note 32 at, 333 (describing the loss of the radical group's leadership). The radicals' cause was further damaged when the NLC restored links with Britain, which had been broken by Nkrumah in the wake of the Rhodesia affair. See ANTON BEBLER, *MILITARY RULE IN AFRICA: DAHOMEY, GHANA, SIERRA LEONE AND MALI*, 40-41 (1973). The NLC also consolidated links with other Western countries such as the United States. *Id.* In addition, the NLC made a point of shutting down camps established by Nkrumah to train freedom fighters. See KWAME NKUMAH, *DARK DAYS IN GHANA*, 139-40 (1968).

35. See Cervenka, *supra* note 32, at 333 (discussing the influence wielded by the moderate states in the OAU since 1966 and their focus on economic cooperation); see also JON WORONOFF, *ORGANIZING AFRICAN UNITY*, 592-97 (1970) (detailing the rise of the moderates in the OAU).

36. See *The Seating of Ghana*, *supra* note 23 (reporting that the radical's argument lost its force and the Ghana delegation was seated without further questioning of their credentials).

organization.³⁷ The Charter forbade member states from interfering in the affairs of the other member states and declared sovereign equality of all members.³⁸ Hence, the very thinking of its Members, coupled with the powers given to it, made the OAU virtually powerless to deal with coups, even if they resulted in the overthrow of governments that were staunchly committed to its goals.³⁹

The emergence of differences among the Members and the role of rival African organizations further diluted the OAU's effectiveness. The OAU had to confront rival African organizations, some of which had similar goals and were capable of attracting a lot of its Members.⁴⁰ Thus, this contest for dominance on the continent made any radical decisions about Article 3(2) virtually impossible. If the OAU was seen as asserting too much influence this could have easily set off a defection by some of its Members to rival African organizations.⁴¹

Moreover, the Members of the OAU may have based their decision to seat the Ghanaian delegation after a cost-benefit analysis. Continuing to seat delegates of ousted regimes would probably be too burdensome for it in its formative years. After all, what role would the outside regime play since they would not be in a position to implement OAU resolutions or the provisions of the Charter? Would such a move result in a situation where the majority of OAU Members were governments-in-exile?⁴² In addition, how could the OAU collect

37. See Woronoff, *supra* note 35, at 331 (stating that the OAU charter was strangely silent on ways and means for the organization to maintain order in Africa).

38. See OAU CHARTER, *supra* note 5, art. 3(1) and (2) (declaring each member-state's adherence to the principle of sovereign equality and non-interference in the internal affairs of states).

39. See Woronoff, *supra* note 35, at 331-33 (discussing the OAU's difficulty in resolving disputes between member-states, and especially within member-states).

40. See BOUTROS BOUTROS-GHALI, THE ADDIS ABABA CHARTER 50 (1964) (questioning whether the larger grouping of African nations provided by the OAU will help in unification, or whether smaller focused regional organizations will be more effective on the African continent).

41. See *id.* (presenting the issues associated with the competition between the OAU as a single continental organization and smaller, regional associations of states in terms of reaching African unification).

42. See *supra* notes 1-3 and accompanying text (discussing the frequency of violent governmental change). The possibility of an organization consisting in a majority of governments-in-exile's delegations was quite possible given the

contributions from non-recognized regimes and what implications would this have for its financial health and survival? Hence, the decision taken to accept coups (and other forms of unconstitutional political change), as a *fait accompli* was most likely based on institutional self-interest as well as legal and political considerations.

II. UGANDA

The issue of the recognition of a new military regime again became a matter of intra-OAU controversy when Idi Amin overthrew the government of Milton Obote in Uganda in 1971.⁴³ Amin and the deposed government sent rival delegations to the OAU's sixteenth session of the Council of Ministers. Again this clash of factions resulted in the polarization of opinions on recognition.⁴⁴ The faction opposing Amin's delegation argued that it was not certain whether the new junta had effective control over Uganda.⁴⁵ Opposition to Amin's delegation probably stemmed from his declaration that he intended to remain in the British Commonwealth, notwithstanding Britain's sale of arms to South Africa, while Obote had indicated his inclination to withdraw Uganda from the organization on this issue.⁴⁶ Amin's position was thus unacceptable to some of the OAU's Members. Other factors adding grist to the mill of the pro-Obote faction included the participation of six Israeli advisors in Amin's delegation and some African countries growing animosity toward Israel.⁴⁷

number of coups that had already occurred and the likelihood of more to come. *Id.*

43. See *Uganda: Coup d'état*, 8 AFR. RES. BULL. 1993 (1971) (describing the coup d'état against the government of Milton Obote).

44. See *Session Postponed*, W. AFR., Mar. 12, 1971, at 290 (stating that support for Obote's regime principally came from Guinea, Somalia, Sudan, Tanzania, and Zambia, while Members such as Ghana, Liberia, and Nigeria supported the seating of Amin's delegation).

45. See *id.* (citing no clear indications that Amin controlled the entire country).

46. See James H. Mittleman, *The Anatomy of a Coup: Uganda, 1971*, XI AFR. QUARTERLY 184, 187 (1971) (detailing the circumstances surrounding Obote's threat and his role in refusing student protests). Obote's threat to withdraw the Commonwealth over British arms sales to South Africa in 1971, the very month in which Amin overthrew his government, was surprising, since he had been criticized in October of 1970 for refusing to permit students to march to the British High Commission in Kampala in protest against the arms to South Africa policy.

47. See JOEL PETERS, ISRAEL AND AFRICA: THE PROBLEMATIC FRIENDSHIP 51-54 (1992) (surveying the deterioration of the relationship between Israel and

The group that supported the seating of Amin's delegation noted that delegates from the new government had already participated in a meeting of the United Nations Economic Commission for Africa.⁴⁸ Thus, in effect, the new regime had already been "recognized" as the government of Uganda. In addition, as was the case with the overthrow of Nkrumah, a number of African governments saw Uganda under Obote as a threat to their security.⁴⁹ His removal therefore meant there was one less subversive state to worry about.

The impasse at the OAU continued and neither delegation was seated.⁵⁰ This was due to the role played by Members in key positions within the OAU at the time.⁵¹ These States provided the necessary support for Tanzania's concerns about the coup and, consequently, made it possible to prevent the seating of Amin's delegation.⁵² However, at the Council's session in June of that same year, Amin's delegation was seated without any controversy.⁵³

III. LIBERIA 1980

Another recognition controversy at the OAU arose as a result of the 1980 coup in Liberia.⁵⁴ Measures adopted by some OAU Members and

African countries).

48. *See Session Postponed*, supra note 44, at 290 (stating that Ghana's delegation pointed out the pro-Amin delegation's participation).

49. *See id.* (explaining that although there was support for the seating of Amin's delegation, the countries that opposed the seating focused on the confusion and uncertainty facing Uganda as the reasons for insecurity).

50. *See* Amadu Sesay, *The OAU and Regime Recognition: Politics of Discord and Collaboration in Africa*, 4 SCANDINAVIAN J. OF DEV. ALTERNATIVES 25 (1985) (describing the sequence of events that prevented either delegation from being seated).

51. *See id.* at 33 (identifying that Guinea, Somalia and Zambia, all regarded as radicals and close to Obote, held the positions of OAU Secretary-General, Chairman of the Council of Ministers, and Chairman of the OAU, respectively.).

52. *Id.*

53. *See id.* (explaining how Zambia and Somalia's loss of their positions equated to the removal of an obstacle which allowed Amin's delegation to be seated).

54. *See Liberia: Coup Topples Tolbert*, 17 AFR. RES. BULL. 5645, 5645-50 (1980) (including the assassination of the President William Tolbert and the execution of thirteen of his senior government officials as consequences of the military coup).

implicitly supported by the others amounted to the non-recognition of the new Liberian regime. Nigeria, for example, refused permission for Liberia's new Foreign Minister to attend the OAU economic summit in Lagos.⁵⁵

Although this measure was a unilateral decision, it received the tacit approval of the summit's participants.⁵⁶ This decision was later justified by the OAU on the ground that since the summit was exclusively for heads of state, a mere foreign minister could not attend.⁵⁷ Another theory suggests that the real basis for the OAU's concern was that it had scheduled an extraordinary summit in Nigeria on the economic problems of Africa during which Tolbert, in his capacity as the OAU Chairman, would preside.⁵⁸ Consequently, Tolbert's death raised the issue of whether Samuel Doe, the coup leader, would assume the chairmanship of the OAU and preside over the meeting.⁵⁹

These factors alone, however, do not explain the OAU's reaction. They were probably secondary and possibly irrelevant considerations that merely cloaked the OAU Members' underlying fears. The real concern lay in the composition of the forces that had deposed Tolbert's administration. The coup had been planned and executed by Non-Commissioned Officers ("NCOs") in the Liberian army.⁶⁰ The conspirator with the highest rank was Doe himself; he was a master sergeant.⁶¹ The fear now was that a new class of coup-makers had burst

55. *Id.* at 5650.

56. *See id.* (noting no dissent among representatives of the fifty-member organization).

57. *See id.* (undermining this explanation was the fact that only half of the OAU heads of states attended and that numerous foreign ministers also participated).

58. *See* Edward Kannyo, *The Banjul Charter on Human and People's Rights: Genesis and Political Background*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 128, 135-36 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984) (forcing the OAU to confront the issue of succession to power in Liberia).

59. *Id.* at 136.

60. *Liberia: Coup Topples Tolbert*, *supra* note 54, at 5645 (1980).

61. *Liberia: PRC Members Named*, 17 AFR. RES. BULL. 5637 (1980) (listing other members of the People's Redemption Council, the military junta established after the coup, which included two staff sergeants, four sergeants, eight corporals, and one soldier first-class).

onto the scene in Africa. The loyalty and control of the relatively small number of majors and generals no longer sufficiently guaranteed the survival of a regime; the larger mass of NCOs also had to be contended with. This further jeopardized the already precarious security situation existing in almost all African countries. Therefore, if only to deter other NCO's, condemnation of Doe's coup was necessary. The reaction of some African states in the past illustrates this point. For example, in 1979 reaction to events in Ghana in which junior officers of the armed forces seized power,⁶² with the overwhelming support of NCOs demonstrates fear of coups.⁶³ They established a junta with NCOs making up half of the membership⁶⁴ and proceeded to execute eight senior officers of the armed forces. Nigeria's reaction resulted from its concern that their junior officers and NCOs would follow suit.⁶⁵

Consequently, the actual execution of Tolbert and other members of his government did not constitute the real source of the OAU's outrage; the identity of those that had not only planned but performed the killings truly fueled the OAU's outrage.⁶⁶ However, once the Doe administration indicated that executions would cease,⁶⁷ his government was seated at the next OAU annual summit.⁶⁸ The implication of the

62. See *Ghana: Military Coup*, 16 AFR. RES. BULL. 5306 (1979) (following fighting on June 4, 1979, a new military administration called the Armed Forces Revolutionary Council seized power in Ghana).

63. See Amamoo, *supra* note 27, at 190 (depicting the massive support of NCO's).

64. See *Ghana: Military Coup*, *supra* note 62, at 5306 (1979) (including a warrant officer, private, corporal, lance corporal, and staff sergeant). The new ten-member military administration was called the Armed Forces Revolutionary Council. It included a Warrant Officer, Private, Corporal, Lance Corporal and Staff Sergeant. *Id.*

65. See BARBARA E. OKEKE, 4 JUNE: A REVOLUTION BETRAYED 55, 55-56 (1982) (stating that Rawling's popularity and the approval of the objectives of the Ghanaian revolution constituted threats to all corrupt governments, including Nigeria).

66. See *Liberia: Coup Topples Tolbert*, *supra* note 54, at 5648-49 (pronouncing the feelings of the OAU in light of the upcoming summit conference).

67. See *id.* at 5650 (announcing that Liberia would halt the execution of political prisoners on April 29, 1980).

68. See *OAU: Summit Conference*, 17 AFR. RES. BULL. 5730 (1980) (describing the seventeenth summit conference of the OAU, which occurred in July 1980). Doe's delegation was seated at the OAU's Seventeenth Annual Summit. *Id.*

Liberia controversy for the OAU was that legalism, so clearly upheld in the question over the seating of the NLC delegation from Ghana, had been ignored, albeit temporarily. This also demonstrated that under certain circumstances legalism would have to yield to political expediency and/or moral outrage.

IV. CHAD

In 1982, two delegations claiming to represent Chad arrived at the OAU's meeting of Foreign Ministers in Libya.⁶⁹ One delegation, representing the faction led by Hussein Habre, insisted on participating in the meeting since it was in effective control of Chad.⁷⁰ This claim was correct. As a result of a civil war, Habre had overthrown President Goukhouni Oueddei earlier in the year⁷¹ and meaningful resistance ended when Oueddei fled to Cameroon.⁷² However, another delegation representing Oueddei arrived at the meeting also demanding to be seated as the official Chadian delegation.⁷³ Libya, the host government, led the countries that supported this delegation's claim.⁷⁴

Libya argued that Habre's government was not the true representative government of Chad.⁷⁵ This was based on the claim that

69. See Eddie Momoh, *A Time for Compromise*, W. AFR., Nov. 22, 1982, at 3006 (documenting the disagreement among OAU Foreign Ministers as to which delegation should be recognized as the legitimate representatives of Chad).

70. See *id.* (stating that the moderate countries supported this contention).

71. *Chad: Habre Comes Back*, 19 AFR. RES. BULL. 6489 (1982).

72. *Id.*

73. Momoh, *supra* note 69, at 3006.

74. *Id.*; see Mario J. Azevedo & Emmanuel U. Nnadozie, CHAD: A NATION IN SEARCH OF ITS FUTURE 114-24 (1998) (analyzing the factors influencing Libya's anxiety about the regime in control of Chad, such as Libya's territorial claims to the Chad's Aouzou Strip, as well as Colonel Gadaffi's view that Libya should unite the Arab states since he had always viewed Chad as an Arab country); see also Sam Nolutshungu, LIMITS OF ANARCHY: INTERVENTION AND STATE-FORMATION IN CHAD 147 (1996) (concluding that Gadaffi also wanted to avoid a situation whereby Chad's government would have close links with foreign powers opposing him, like France, and that Habre posed such a threat since he had long declared himself an enemy of Libya and an alliance between him, France, and Sudan was viewed as a threat).

75. See Momoh, *supra* note 69, at 3006 (claiming that Habre represents only a fraction of Chad, not the entire country).

Oueddei was organizing resistance to Habre in Chad's northern radical region and, therefore, Habre lacked popular support.⁷⁶ Moreover, if the OAU gave its support to Habre's delegation by seating it, rebels could construe this to mean that it supported the overthrow of its Members.⁷⁷ In Libya's view, the OAU should demonstrate its support for ex-president Oueddei, as a number of African countries faced similar civil rebellions.⁷⁸ Libya also alleged that Habre's government would serve as a pawn for imperialist powers in Africa by turning Chad into an "imperialist base," with the possibility that Chad would become the source of instability not only in Africa, but particularly in the six countries on its borders.⁷⁹

Libya's contention was wrong. If the claim that Habre's government lacked a popular base were to apply to all delegations sent to the OAU, virtually all of them would be denied the right to participate in that organization's meetings. By 1982, few truly representative governments existed in Africa. Military dictators or civilian presidents-for-life ruled the overwhelming number of OAU member states.⁸⁰ Assumption of power and change of government through the ballot box was an extremely rare occurrence.⁸¹ Nevertheless, these unrepresentative governments participated freely in OAU meetings. Thus, the Libyan claim concerning the representative nature of Habre's

76. *Id.*

77. *See OAU: Second Summit Failure*, 19 AFR. RES. BULL. 6640, 6641 (1982) ("if we were to recognize the usurpation of authority in N'Djamena, then we would have to recognize all those usurpations . . . It would be a serious precedent to recognize a rebel minister of defense.") (quoting Colonel Gadaffi's perspective on Chad).

78. *Id.*

79. *See id.* (quoting Colonel Gadaffi as saying, "All the African states neighboring Chad will pay the price of their recognition of Habre when Chad turns into an imperialist base. We can never allow a regime in the heart of Africa to become an imperialist base.")

80. *See generally* Yusuf Bangura, *Authoritarian Rule and Democracy in Africa: A Theoretical Discussion* 1991 UN Res. Inst. for Soc. Dev. § 2.3 (explaining that military and one-party regimes eventually came under pressure to adopt programs to shift the countries to multi-party rule).

81. *See generally id.* at § 2 (reflecting that the attitudes of Africa's ruling elite toward the multi-party system of government and free elections became clear as soon as they won independence because the general consensus was that Africa could not afford the socio-political cost of such a system).

delegation could not be supported in light of the OAU's practice. Even if the Libyan position stated that the consent of the people meant their acquiescence to the new government and not necessarily their enthusiastic and voluntary support,⁸² neither the facts, nor an analysis of the OAU charter, would support this argument. As noted above, Oueddei had been defeated and had fled the country. As a result, all meaningful resistance to the rebellion had ended. Therefore, that crucial act of acquiescence had occurred in the minds of the bulk of Chadians. Moreover, even if the later attempts by Oueddei to establish a foothold in the northern part of Chad were significant, Habre's administration did not have any ground for non-recognition of because of a lack of acquiescence. Prior to the Chad recognition controversy, some well-established African governments, such as Angola and Mozambique, in effective control of a greater part of their territories, faced rebel uprisings. However, these rebel uprisings had never been used to question their claim to represent their states at OAU meetings.

Moreover, the OAU has never claimed seating delegations from usurpers implicitly supported such means of political change in Africa. The OAU believes that the change of government is an internal affair.⁸³ As noted above, attempts to prevent participation by rebel governments from Ghana and Liberia in OAU meetings represented a departure, albeit a failed one in the long run, from the norm. The change of government falls within the scope of Article 3(2) of the OAU's

82. Policy makers have found that in many coups the concept of actual consent expressed through popular support for the overthrow of a government is meaningless. As one US State Department memorandum noted:

Most coups occur in less developed countries which have predominantly illiterate and politically dormant populations. The coup is usually quick, bloodless, and effective. Moreover, such changes in government usually occur in one-party states, and take the form of one elite replacing another elite, political, or military. In such circumstances the popular will remains largely irrelevant. In the absence of popular revolution or a clear division of allegiance within the country, the consent or acquiescence of the population must, as a practical matter, be taken for granted.

See L. Thomas Galloway, *Recognizing Foreign Governments: The Practice of the United States* 7 (1978) (quoting Memorandum dated June 1, 1971, from the US Department of State, Office of the Legal Adviser).

83. See OAU CHARTER, *supra* note 5, art. 3(3) (demanding respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence).

Charter.⁸⁴

It is unclear whether Habre became a puppet of imperialism and therefore lent his active support to external forces bent on destabilizing Africa. However, it did not provide a good reason for excluding a delegation from an OAU meeting. Although the OAU's Charter mentions the defeat of colonialism as an objective,⁸⁵ being a tool of imperialism has never been a barrier to membership. The OAU membership rules clearly state that the organization invites the participation of independent, sovereign African States.⁸⁶ Nothing in the OAU's charter precludes a government of a Member State from participating in OAU summits because of its foreign relations.

Furthermore, the Members of the OAU finally agreed on a compromise solution on the issue of Chad's representation.⁸⁷ This agreement recognized the right of Habre's delegation to participate in the summit meeting over Oueddei's claims.⁸⁸ However, the concession requested, but not granted was that Habre himself voluntarily stay away from the Summit.⁸⁹

The de facto amendment to the OAU Charter frustrated the Habre delegation. This amendment created the position of OAU Chairman, even though the OAU Charter itself does not provide for such position.⁹⁰ A merely ceremonial position, the Chairman lacks any

84. See OAU CHARTER, *supra* note 5, art. 3(2) (making it an intention of the OAU to refrain from interfering in the internal affairs of member states).

85. See OAU CHARTER, *supra* note 5, art. 2(1)(d) ("To eradicate all forms of colonialism from Africa").

86. See OAU CHARTER, *supra* note 5, art. 4 ("Each independent sovereign African State shall be entitled to become a Member of the Organization").

87. See *OAU: Second Summit Failure*, 19 AFR. RES. BULL. 6640, 6641 (1982) (explaining that the members of the OAU formulated a compromise, but it was rejected by the Chadian Foreign Minister).

88. See *id.* (pointing out that the compromise allowed for the recognition of Habre's delegation, but called for him to voluntarily abstain from being seated at the summit).

89. See *id.* (recognizing that the compromise suggested that Habre refrain from attending the summit, therefore, leaving the Chad seat empty and preventing the required thirty-one members for a quorum to hold an effective meeting).

90. See GINO J. NALDI, *THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE* 14 (1989) (providing for practices and procedures that are not actually outlined in the OAU Charter).

executive powers. However, over the years the position has gained prestige⁹¹ as the Chairman emerged as the official spokesman of the OAU. The parties exploited this role and the influence surrounding it during the negotiations on the representation of Chad.

V. LIBERIA 1990

In 1989 a rebel army, the National Patriotic Front of Liberia ("NPFL") took up arms against the regime of Samuel Doe.⁹² The NPFL effectively destroyed the Doe administration and by June of 1990, it had nearly eradicated all meaningful resistance by government forces to its military offensive.⁹³ The Economic Community of West African States ("ECOWAS") decided to intervene in the Liberian conflict at this late stage.⁹⁴ ECOWAS' measures made it possible to create Liberia's Interim Government of National Unity ("IGNU").⁹⁵ The IGNU was installed in the capital, Monrovia, under the protection of the ECOWAS expeditionary force, the ECOWAS Ceasefire Monitoring Group ("ECOMOG").⁹⁶ For the three years that it existed the IGNU had no army or police force of its own and ECOMOG was responsible for its safety.⁹⁷ Moreover, the ECOWAS-IGNU alliance never controlled any territory beyond Monrovia, and its immediate

91. See *id.* (institutionalizing the practice of placing the host Head of State as chairman of OAU until subsequent summit).

92. See ABIODUN ALAO, ET AL., *PEACEKEEPERS, POLITICANS, AND WARLORDS: THE LIBERIAN PEACE PROCESS 20-24* (1999) (explaining the event that started the Liberian civil war).

93. See ABIODUN ALAO, *THE BURDEN OF COLLECTIVE GOODWILL* (1998) (providing a general history of the Liberian civil war).

94. See ALAO, *supra* note 92, at 28 (citing inaction by the United States and the international community as the reason why the ECOWAS chose to intervene in the Liberian civil war).

95. See Peter da Costa, *Interim Leaders Emerge*, W. AFR., Sept. 10, 1990, at 2438 (reporting that in Gambia, in August 1990, ECOWAS organized a conference, attended by over fifty delegates from Liberian political parties, interest groups, and concerned citizens, after the election of Amos Sawyer, President of Liberia). The assembly also agreed on an interim national legislative assembly consisting of thirty-five members. *Id.*

96. See ALAO, *supra* note 93, at 65-66 (1998) (discussing the success of ECOMOG's mission for peace in Liberia).

97. *Id.*

outskirts.⁹⁸

Thus, the important question is why did the OAU seat the IGNU? The OAU's recognition of IGNU is particularly perplexing because the IGNU was not the de jure government of Liberia when the NPFL launched its uprising. If the IGNU had been the de jure government it could have argued for the presumption of recognition until the NPFL dealt the coup de grace.⁹⁹ However, as noted above, the IGNU was installed and was being protected by a foreign force-ECOMOG. In effect, the IGNU was a rebel faction in the conflict relying on an outside force to help it assert its claims. Its status as a rebel faction is supported by the fact that it too, like the NPFL, laid a claim to power when Doe and the rump of his government still occupied the presidential mansion.¹⁰⁰ Hence, consistent with the rule of international law that hasty recognition of rebels should be avoided until they have consolidated their hold over a State, the OAU's recognition of IGNU was obviously wrong.¹⁰¹

Therefore, the answer to why the OAU recognized IGNU as the government of Liberia lies, arguably, in an examination of the political interests of key players in the Liberian crisis. Most Members of ECOWAS wanted to see the NPFL's rebellion fail. If the rebels, essentially a civilian army, had succeeded in their undertaking this could provoke similar uprisings in the other West African countries.¹⁰²

98. See Kofi Oteng Kufuor, *Developments in the Resolution of the Liberian Conflict*, 10 AM. U.J. INT'L L. & POL'Y 373, 374 (1994) (providing the boundaries of territory controlled by the ECOWAS-IGNU alliance). Although ECOMOG did succeed in pushing the NPFL out of Monrovia, the only real threat to the NPFL's power came from the numerous guerilla movements that sprang up over Liberia during the conflict.

99. See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, 93-94 (Cambridge, University Press, 1947).

100. See da Costa, *supra* note 95, at 2438 (reporting that NPFL occupied Monrovia but failed to occupy the presidential mansion).

101. See Lauterpacht, *supra* note 99, at 92 (claiming that premature recognition of a rebellious group is essentially a tort committed against the lawful government).

102. See Gilbert da Costa, *Fresh Impetus for Peace*, W. AFR., Nov. 16, 1992, at 1968 (reporting the events of a meeting in Nigeria on the Liberian crisis). At a meeting of ECOWAS President Babangida and the Nigerian Head of State emphasized the self-defense aspect of the intervention when they asserted possible future effects of Taylor's uprising, stating, "Today it is Liberia; tomorrow it could

In effect, African leaders' concerns regarding the 1980 Liberian recognition question were played out as civilian armies were compromising regional security. The OAU obviously bowed to pressure from ECOWAS when it accepted the IGNU as the delegation from Liberia. It was clear that the OAU sacrificed the rule of law in order to assuage the misgivings of some of its members.

VI. SIERRA LEONE

The recognition practice of the OAU underwent a radical transformation in the wake of events in Sierra Leone during 1997. Army officers overthrew the democratically elected civilian government of Sierra Leone, with Tejan Kabbah as president, after it had been in power for approximately a year.¹⁰³ The OAU condemned the coup and refused to recognize the Armed Forces Revolutionary Council ("AFRC") as the de facto government of Sierra Leone. The OAU justified its position on the basis of Kabbah being a popularly elected president.¹⁰⁴ Although preserving democracy in Africa had never been a *raison d'être* for non-recognition of a revolutionary government, the AFRC coup occurred at a time when elected civilian governments were starting to re-emerge as the norm.¹⁰⁵ In effect, this was the beginning of the OAU's policy of not recognizing regimes that overthrow constitutional democracies.

be any one of the countries represented here. Indeed the canker we are fighting against is already showing itself in Sierra Leone and in other parts of the sub-region." *Id.*

103. See *Sierra Leone: A New Democratic Era*, 33 AFR. RES. BULL. 12,191 (1996) (reporting the election results and potential conflicts resulting from those results). Sierra Leone elected Tejan Kabbah president in March 1996. See *Sierra Leone: A Coup in Freetown?*, W. AFR., June 2, 1997, at 887 (describing the coup that attempted to bring military rule back to Sierra Leone after a year of civilian rule).

104. See *Sierra Leone: A New Democratic Era*, *supra* note 103 (providing that Kabbah was elected with 60% of the vote and his party will have a controlling interest in the National Assembly, holding 51 of 80 seats).

105. See generally JOHN A. WISEMAN, *THE NEW STRUGGLE FOR DEMOCRACY IN AFRICA* (Ashgate Publishing Company, Avery 1996) (discussing the movement towards democracy in Africa). But see Richard Joseph, *Africa, 1990-1997: From Arbetura to Closure*, 9 J. OF DEMOCRACY, 1998, at 3-17; Letitia Lawson, *External Democracy Promotion in Africa: Another False Start?* 37 COMMONWEALTH & COMP. POL., 1-30 (1999) (arguing that the transition to democracy has not been that successful).

Further, it was doubtful if the AFRC could claim that the bulk of the population had consented to its assumption of power.¹⁰⁶ Moreover, the AFRC did not have effective control over Sierra Leone as ECOMOG, and the Kamajors, a militia loyal to the ousted president, competed with it for control of the country.¹⁰⁷ ECOMOG's role was also driven by Nigeria's desire to expand its importance in West Africa¹⁰⁸ and to cloak its then military government, seen by the international community as a pariah regime, with some form of legitimacy.¹⁰⁹ This would have enabled the Nigerian junta to justify its claim, though patently spurious, that it was committed to liberal democracy.¹¹⁰

VII. THE OAU DECLARATION ON THE RECOGNITION OF GOVERNMENTS

The above analysis demonstrates that illegality, inconsistency, and a lack of transparency characterize the OAU's recognition process. This lack of transparency is visible in a number of ways. First, the OAU recognition deliberations are not open to the public and recorded minutes for such deliberations are unavailable.¹¹¹ Second, the OAU's Charter makes no provision for the recognition of governments.¹¹² It also does not permit the suspension or expulsion of governments.¹¹³ Article 3(2) further prohibits the OAU from interfering in the internal affairs of its Members, and yet the recognition controversies have

106. See John Bankole, *A Country on Trial*, W. AFR., July 6, 1998, at 576; *Sierra Leone: Koroma Pleads*, W. AFR., June 16, 1997, at 952 (reporting on popular resistance to the AFRC by civilians in Sierra Leone).

107. See Yusef Bangura, *Security in ECOWAS*, W. AFR., June 30, 1997, at 1038 (reporting on the popular resistance to the AFRC by civilians in Sierra Leone); see also *Sierra Leone: Nigerian Intervention Fails*, 34 AFR. RES. BULL. 12,711, 12,735 (1997) (reporting that the Kamajors controlled most of the south and east of the country in 1997).

108. See generally http://news1.thdo.bbc.co.uk/hi/english/world/analysis/newsid_55000/55993.stm (last visited May 13, 2001).

109. *Id.*

110. *Id.*

111. See generally OAU CHARTER, *supra* note 5 (providing no requirements for the recording of deliberations).

112. See *id.* (making no mention of new government recognition).

113. *Id.* (requiring respect for the independence of each nation).

amounted to a disregard for Article 3(2). Also, effective control has not always been a deciding factor in the seating of delegations at OAU meetings.¹¹⁴

Third, recognition has been swayed by the influence of various OAU chairmen or regional powers. Thus, as we have seen, in the wake of the overthrow of Milton Obote, Goukhouni Oueddei, and William Tolbert, the OAU chairman, host countries managed to exert considerable influence on deliberations over recognition.¹¹⁵ In effect, the process has been more the rule of personality than the rule of law and each incident has seen the OAU lurch from one position to another.¹¹⁶ Consequently, this lack of consistency has produced a situation where the OAU refused to recognize the AFRC as the government of Sierra Leone, while welcoming Denis Sassou-Nguesso at OAU meetings after he had subverted democracy in Congo Brazzaville.¹¹⁷

As noted above, however, the OAU has placed the question of recognition of governments on its agenda. At the OAU Summit in Algiers a decision was taken to reactivate the OAU sub-committee on unconstitutional change in order to finalize work with regard to the overthrow of elected regimes in its Member states.¹¹⁸ An OAU

114. See *supra* notes 43-47 (discussing the matter of effective control with regard to the recognition of a delegation from Uganda); see also *supra* notes 75-80 (reiterating the controversy surrounding the seating of the delegation from Chad, where effective control did not result in automatic acceptance by the OAU).

115. See OAU CHARTER, *supra* note 5, art. 3(2) (pointing out that this influence violates the Charter because it demands that the OAU refrain from interfering in internal affairs of its Member States).

116. See *supra*, note 43 (discussing the politics behind the non-recognition of the Ugandan coup).

117. See *The Congo: Fighting Breaks Out*, W. AFR., June 16, 1997, at 953 (reporting clashes between supporters of Sassou-Nguesso and supporters of Lissouba); *Congo Brazzaville*, W. AFR., Oct. 20, 1997, at 1655 (announcing the planned swearing in of Sassou-Nguesso). In 1997, Denis Sassou-Nguesso challenged the authority of the elected president of Congo-Brazzaville, Pascal Lissouba. For thirteen years Congo-Brazzaville had been a one-party state under Sassou-Nguesso. However, bending to pressure for political change, Sassou-Nguesso agreed to multiparty elections. This resulted in his defeat by Lissouba in 1992. However, rivalry between the two led to a civil war in June of 1997 and the victory of Sassou-Nguesso's forces in October of that year. Given the zeal with which the OAU supported Kabbah in Sierra Leone, it was surprising that the OAU never condemned Sassou-Nguesso. *Id.*

118. See Joe Branford Nyinah, *Coups Out, Democracy In*, W. AFR., July 24,

Declaration adopted after a meeting in Lome followed this decision.¹¹⁹ The Lome Declaration noted that coups were a disturbing trend and contributed to the erosion of democracy in Africa.¹²⁰ The OAU Members also agreed on a set of principles as the basis for the articulation of common values and principles for democratic governance. Included in these principles are respect for the constitution of a Member,¹²¹ democratic change, the recognition of a role for the opposition,¹²² and the organization of free and regular elections.¹²³

The Declaration considers unconstitutional change of government to occur where a democratically elected government is overthrown either through a coup d'etat,¹²⁴ by mercenaries,¹²⁵ by armed dissident groups and rebel movements,¹²⁶ or when there is the refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections.¹²⁷ The Declaration also states that illegal regimes will be given six months to restore constitutional order.¹²⁸ After the expiration of this six-month period, during which the illegal regime will be suspended from the policy-making organs of the OAU,¹²⁹ a range of sanctions will be instituted against it.¹³⁰ Sanctions could include denial of visas for members of the government in question, restriction of government-to-government contacts, or trade

2000, at 12 (focusing on the OAU's attempt to maintain more influence over unconstitutional changes in control in its member countries).

119. See DECLARATION OF THE FRAMEWORK FOR AN OAU RESPONSE TO UNCONSTITUTIONAL CHANGES OF GOVERNMENT, AHG/DECL.5 (XXXVI) (July 2000) [hereinafter DECLARATION] (condemning any unconstitutional change of government in OAU states).

120. See *id.* at pmb1. (expressing concerns about recent coups in Africa).

121. *Id.* at 3.

122. *Id.* at 4.

123. *Id.* at 4.

124. DECLARATION, *supra* note 119, at 4.

125. *Id.*

126. *Id.*

127. *Id.* at 5.

128. *Id.* at 5-6.

129. DECLARATION, *supra* note 119, at 5.

130. *Id.* at 6-7.

restrictions.¹³¹

The Declaration gives the Secretary-General the duty of gathering facts relevant to an unconstitutional change of government.¹³² The Secretary-General should also establish appropriate contacts with the perpetrators in order to ascertain their intentions with regard to restoring constitutional rule.¹³³ African leaders and personalities may also be consulted by the Secretary-General in the discharge of his duties under the Declaration.¹³⁴ African leaders and personalities should be asked to help put pressure on the perpetrators to cooperate with the OAU.

In order to give effect to the Declaration, the OAU has decided that existing OAU mechanisms, particularly the Central Organ of the OAU Mechanism for Conflict Prevention, Management, and Resolution ("the Central Organ")¹³⁵ will be the instrument for its implementation.¹³⁶ The Secretary-General should determine the best way to enhance the role of the Central Organ to enable it to implement the Declaration.¹³⁷ The OAU's Members agreed to establish a Central Organ sanctions sub-committee responsible for monitoring compliance with decisions with respect to situations of unconstitutional changes.¹³⁸ The sub-committee should also recommend appropriate review measures to the OAU's Policy Organs.¹³⁹

On its face, the Declaration is a meaningful step towards promoting

131. *Id.*

132. *Id.* at 6.

133. *Id.*

134. See DECLARATION, *supra* note 119, at 6.

135. See *Mechanism for Conflict Prevention, Management and Resolution*, 6 AFR. J. INT'L & COMP. L. 149, 158-160 (1994) (establishing the Mechanism for Conflict Prevention, Management and Resolution as a means of anticipating and preventing conflicts in Africa). The Mechanism is "built around the Central Organ with the Secretary General and the Secretariat serving as its operational arm." *Id.* at 160. The Central Organ is "composed of the States members of the Bureau of the Assembly of Heads of State and Government." *Id.*

136. See DECLARATION, *supra* note 119, at 7 (giving the Central Organ the authority to implement OAU responses to unconstitutional changes in Africa.)

137. *Id.*

138. *Id.*

139. *Id.*

constitutional democracy and the rule of law in Africa. However, the Declaration's underlying theme should be reinforced by expanding on the preconditions for the non-recognition of an unconstitutional regime. To achieve its objective, the OAU should set basic rules with regard to non-recognition of governments that come to power by overthrowing constitutional regimes.

VIII. PROPOSALS FOR THE REFORM OF THE LAW RELATING TO THE RECOGNITION OF UNCONSTITUTIONAL REGIMES

First, as noted above, a government that has been installed as a result of a free and fair election and that respects its citizens' fundamental human rights will be recognized by the OAU as the government of its country, even if it is overthrown by armed forces and the new regime is in effective control.¹⁴⁰ It is interesting to note that the Declaration has guarded against so-called illiberal democracies exploiting the OAU's new position to entrench themselves in power.¹⁴¹ An illiberal democracy occurs in a situation in which elected democratic regimes regularly disregard the constitutional restraints on their authority and, as a consequence, violate their citizens' fundamental human rights.¹⁴² This is the case in many states that have supposedly swung from totalitarianism and authoritarianism towards constitutional rule and liberal democracy.¹⁴³

Realizing this potential problem, the Declaration lists a number of values and principles deemed to underpin democratic government in

140. *See id.* at 2-5 (outlining the situations that could be considered unconstitutional change of government and the actions the OAU will take in response to those unconstitutional changes).

141. *See id.* at 1-4 (introducing values and principles to promote democratic institutions and reduce risks of unconstitutional change).

142. *See* Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22, 22 (1997) (observing a growing phenomenon of illiberal democracies around the world).

143. *See id.* at 28 (introducing examples of countries in Africa, Asia, and Latin America where rapid democratisation without liberal governance have lead to illiberal regimes).

Africa.¹⁴⁴ The values include the adoption of a democratic constitution; respect for the Constitution and parliamentary legislation; the separation of powers and judicial independence; the promotion of political pluralism and acknowledging the role of civil society; the principle of democratic change with a clear role of political opposition; free and regular elections; freedom of expression and freedom of the press; constitutional recognition of fundamental human rights in conformity with the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights (the Banjul Charter); and the guarantee and promotion of human rights.¹⁴⁵

Implicitly, reference to the Banjul Charter indicates that to enjoy recognition as the legitimate government, an ousted administration should have a consistent record of respect for, and compliance with, decisions of its domestic courts.¹⁴⁶ In addition, the government should also have demonstrated its commitment to the protection of the rights of its citizens. Thus, for example, it should not just be a party to the Banjul Charter, as envisaged in the Declaration.¹⁴⁷ Rather, the government claiming legitimacy from the OAU should have regularly complied with the Charter's provisions on the submission of periodic reports to the African Commission on Human and Peoples' Rights.¹⁴⁸ It should also have accepted in good faith the determinations of the African Commission regarding communications filed before it.

In addition, the OAU should stress that under no circumstances should the overthrown government have denied access to a human rights fact-finding mission or on-site study by the African Commission, United Nations, or where applicable, the Commonwealth or a similar

144. See DECLARATION, *supra* note 119, at 3-4.

145. *Id.*

146. The African Charter on Human and Peoples' Rights, OAU DOC. CAB/LEG/67/3 REV. 5 (1981), *reprinted in* 21 I.L.M. 58 (1982).

147. DECLARATION, *supra* note 119, at 4.

148. See African Charter on Human and Peoples' Rights, *supra* note 146, at 63, 68 (establishing that under Articles 30 and 62 each state party must submit a report every two years that consists of legislative or other material that "give effect to the rights and freedoms recognized and guaranteed by the present Charter" to the African Commission on Human and Peoples' Rights). *But see* EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES, 108-09 (1996) (discussing the problems of non-compliance in the submission of reports and overdue reports).

inter-governmental organization.¹⁴⁹ Also, the regime should ratify or accede to the newly established African Court on Human and Peoples' Rights,¹⁵⁰ and through a declaration, it should accept the competence of the Court to receive non-state petitions.

The OAU's new policy applies only to democratically elected governments.¹⁵¹ This principle should be extended to current undemocratic regimes. There are still a number of countries where the government is not accountable to its people through periodic elections. If there is a coup d'état or successful civil war in such a country, the OAU's policy on recognition should come into play. Here, the OAU should grant provisional recognition to the new regime and insist on a transfer of power to an elected civilian administration within a time frame acceptable to the OAU.¹⁵² However, if any member of the new military administration wins the presidency while the junta still holds office, then the OAU policy should be that unless the electoral process is declared to be fair by international observers it will not grant recognition to the new government because it would be a continuation of the military junta.¹⁵³

149. See Ankumah, *id.* at 114-15 (describing the difficulties of the African Commission in conducting fact-finding missions due to obstacles erected by African governments such as Malawi under president Banda and Zaire under Mobutu).

150. See Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *reprinted in* 9 AFR. J. OF INT'L & COMP. L. 593 (1997) (memorializing an agreement between African nations to protect the human rights of their citizens).

151. See Declaration, *supra* note 119, at 1-7 (setting forth the principals on democratic governance).

152. On many occasions military regimes have drawn out the return to constitutional rule. For instance Nigeria's transition to democracy after the coup of 1983 dragged on until 1999.

153. The tendency of incumbent coup-makers to contest or try to contest elections is well known in Africa. See Ronald Allen, *Strasser Ousted in Palace Coup*, W. AFR., Jan. 22, 1996, at 102 (describing the removal of Captain Valentine Strasser due to "his attempt to impede the democratic process" in Sierra Leone); *Gambia: Jammeh Elected President*, W. AFR., Sept. 30, 1996, at 1540 (reporting the opposition leader, Ousainou Darboe's flight to take refuge in the Senegalese Embassy in order to avoid the unrest following the elections). This practice is not limited to the 1980's and 1990's. See *Ghana: General Ankrah's Resignation*, 6 AFR. RES. BULL. 1376 (1969) (describing General Ankrah's resignation resulting from the collection of illegal funds).

The OAU's criteria should also be procedurally transparent, especially in the instance of a coup leader seeking recognition after the overthrow of a supposedly democratic government. As we have seen, OAU deliberations on recognition have been held in camera.¹⁵⁴ Thus, there should also be a provision for oral statements and any counter-claims by organizations with observer status at the OAU, the deposed regime, or the new government seeking recognition. The OAU should also be obliged to consider the reports of the African Commission on Human and Peoples' Rights concerning any state-sponsored human rights abuses by the ousted applicant-government. Reports on the government's compliance with judgments of the African Court (whenever it becomes operative) should also be considered in deciding whether to withhold or grant recognition.

During the Chad controversy, an attempt to create a credentials committee to deal with the question of competing delegations failed.¹⁵⁵ The rules of procedure of the Council of Ministers state that each Member must provide a list of its accredited delegates in advance of a Council meeting.¹⁵⁶ The rules, however, fail to state what should happen if there is more than one list due to rival claims from different factions. Accordingly, a credentials committee should be empowered to make recommendations to the OAU on the issue of recognition. The Council of Ministers or the Assembly of Heads of State and Government¹⁵⁷ should act on the report submitted by the credentials committee. A two-thirds majority vote should be required if either of these institutions chooses to ignore the credentials committee's report. The report of the credentials committee and the reasons for any rejection of a claim by the AHSG or Council of Ministers should be made public.

Furthermore, the credentials committee should be able to consult any

154. See OAU CHARTER, *supra* note 5, arts. 7, 9 (stating that the Council of Ministers and the Assembly of Heads of State and Government deliberations are to be held in camera).

155. See *Twelve Days that Shook the OAU*, W. AFR., Dec. 6, 1982, at 3127 (detailing the events that led to the attempt and failure of the credentials committee during the Nineteenth summit of the OAU).

156. See OAU CHARTER, *supra* note 5, rule 5 (providing that each Member State communicate to the Council of Ministers a list of its duly accredited delegation).

157. See OAU CHARTER, *supra* note 5, art. 7 (setting forth the principal institutions of the OAU including the Assembly of Heads of State).

individual, national organization, government, as well as any regional or international organizations as part of its recommendation process. The power of consultation, therefore, should not be left to the OAU Secretary-General as provided for in the Declaration.¹⁵⁸ When necessary, the credentials committee should also have the power to conduct a fact-finding mission on its own volition to help it arrive at a fair and impartial determination on recognition. Additionally, the importance of the Chairman of the OAU or Council of Ministers should be diminished. As we have seen in the case of Chad, the Chairman can exert considerable influence on the recognition of a delegation.¹⁵⁹ Therefore, reducing the role of the Chairman of both institutions in specific relation to the issue of recognition could result in a more equitable conclusion by the credentials committee.¹⁶⁰

Thomas Franck argues that the entitlement to democracy in international law has undergone a normative and customary evolution.¹⁶¹ It has evolved both as a system of rules in the practice of States and organizations.¹⁶² Franck identifies three distinct phases of change.¹⁶³ The first stage had as its essence the normative entitlement to self-determination.¹⁶⁴ The normative entitlement to free expression as a human right marked the second stage.¹⁶⁵ Franck argues that the advent of a normative right to a participatory electoral process is the

158. *But see* Declaration, *supra* note 119, at 6 (providing that the Secretary-General should obtain the contribution of African leaders and personalities as part of the process of pressurizing the illegitimate government to restore constitutional order).

159. *See supra* part IV (discussing the case of Chad and the seating of their delegation).

160. *But see* Declaration, *supra* note 119, at 5 (empowering the Current Chairman of the OAU and the Secretary General to condemn any unconstitutional change of government, warn perpetrators that such change is unacceptable, and request a meeting of the Central Organ to consider situations that could be construed as an unconstitutional change of government).

161. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (explaining that while the ideas that seemed radical at the time of signing the Declaration of Independence in this country remain radical notions at the international level, they are quickly becoming more normative).

162. *Id.*

163. *Id.* at 90.

164. *Id.*

165. *Id.*

pillar of the third stage.¹⁶⁶ African organizations have in recent times acknowledged this entitlement.¹⁶⁷ Hence, in 1990 the OAU issued a Declaration entitled "The Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World."¹⁶⁸ This Declaration acknowledged the importance of democracy and its link with development,¹⁶⁹ attaching the proviso, however, that African countries were entitled to determine their own systems of democracy based on their socio-cultural values.¹⁷⁰

In addition, other African regional organizations have issued declarations on democracy. In a series of resolutions, the African Commission on Human and Peoples' Rights asserted that the right to democratic governance applies to Africa. The Commission issued further resolutions on the Military,¹⁷¹ Nigeria,¹⁷² Gambia,¹⁷³ and the Human Rights Situation in Africa, stating that the military overthrow of an elected government threatens human rights and the rule of law in Africa.¹⁷⁴

166. *Id.*

167. *See Organization of African Unity: Annual Summit (Addis Ababa)*, 27 AFR. RES. BULL. 9747 (1990) (stating the recognition of the relationship between democracy and development amongst heads of state and government participating the 26th OAU Summit).

168. *Id.*

169. *Id.*

170. *Id.* at 9748.

171. *See* Sixteenth Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 83 (1994) (stating in the Preamble the declarations of the Commission regarding governments of African countries). The Commission encourages military governments to instill power in the hands of a democratic government. *Id.*

172. *See id.* at 84-85 (calling upon the Nigerian military government to respect the right of free participation in government and the right to self-determination and hand over the government to duly elected representatives of the people without unnecessary delay).

173. *See id.* at 86-87 (resolving that the military coup in Gambia is a flagrant and grave violation of the right of the Gambian people to freely choose their government and requesting the Armed Forces Provisional Ruling Council to transfer power to freely elected representatives of the people).

174. *See id.* at 87-88 (stating that the Commission condemns the planning or execution of Coups d'Etat and any attempt to seize power by undemocratic means, and calls upon all African governments to ensure that elections and electoral processes are transparent and fair).

The OAU's emerging practice is consistent with historical and contemporary trends regarding the recognition of governments. Although constitutional legitimacy of a government is not a condition for recognition,¹⁷⁵ as noted in the Tinoco Arbitration, recent and past practice of states point to the fact that the right of rebellion has never been fully accepted. The Conference on Security and Co-operation in Europe's support for democracy at its Copenhagen Meeting in 1990 and the Tobar Doctrine are examples of states committing themselves to actively work towards the support and protection of liberal democratic regimes.¹⁷⁶ Further, it shows that such regimes deny recognition to extra-constitutional governments.¹⁷⁷ The United Nations support for the restoration of Jean Bertrand Aristede to power in Haiti after the overthrow of his constitutional regime by the armed forces is another indication of the fact that constitutional legitimacy is emerging as an important pre-condition for recognition.¹⁷⁸

175. See Convention Between the British Government and the Government of Cost Rica for the Submission to Arbitration of Certain Claims Against the Government of Costa Rica, Jan. 12, 1922, 1 REP. INT'L. ARB. AWARDS 371, 381 (arguing that a de facto government should be recognized if it "maintains a peaceful administration, with the acquiescence of the people for a substantial period of time. . ." and should not have to follow the previous constitution).

176. See generally Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference of the Human Dimension, 29 I.L.M. 1305-21 (1990) [hereinafter Copenhagen Document] (laying out the participating States' commitment and recognition of democracy and political pluralism).

177. See generally Additional Treaty to the Treaty of Peace Concluded at the Central American Conference, Dec. 20, 1907, S. Treaty Doc. No. 357 (1776-1909) (rejecting any government that comes into power through a coup d'etat or a revolution against the recognized government). After a period of serious instability in Central America, the Central American nations adopted in 1907 an agreement, among others, in which they agree not to recognize new unconstitutional regimes in Central America. The signatories to this agreement stated that before recognition is granted there should be a collective or multilateral appraisal of the constitutional validity of a new regime. This doctrine, called the Tobar Doctrine, named for Carlos R. Tobar, a former foreign minister of Ecuador introduced a principle of collective recognition. See Donald Marquand Dozer, *Recognition in Contemporary Inter-American Relations*, 8 J. INTER-AM. STUD. 318, 321 (1966) (explaining the origins of the Tobar doctrine).

178. See generally S. Res. 875, U.N. SCOR, 3293th Sess., U.N. Doc. S/RES 875; S. Res. 917, U.N. SCOR, 3376th Sess., U.N. Doc. S/RES 917; S. Res. 940, U.N. SCOR, 3413th Sess., U.N. Doc. S/RES 940 (setting forth the United Nation's stance on the illegal de facto regime in Haiti and the goal in restoring democracy in

Some observers might argue that the OAU cannot act decisively on the recognition of democratic governments, as most of its Members are either undemocratic (i.e. they have not been elected through universal adult suffrage in the context of a multi-party system) or the government's commitment to democracy is spurious. While this observation may be true, it is also a fact that recent political change in Africa has resulted in a situation in which, as noted above, a number of genuine democracies are emerging as a result of democratic elections. Thus countries such as Benin¹⁷⁹ and Madagascar¹⁸⁰ are joining the already established democracies of Mauritius and Botswana. These states can form the core of a group within the OAU committed to the promotion of democracy and the non-recognition of governments that overthrow elected regimes.

Also, the non-recognition of governments could result in the OAU becoming an organization that is dominated by governments-in-exile. If, however, the OAU is firm on its policy of recognition, this could serve as a deterrent to future coup makers and thus eliminate the fear of the OAU becoming an organization with Members that are not de facto governments. Moreover, to encourage liberal democratic regimes, it should be possible for international organizations and States that have insisted on democracy in Africa to compensate the OAU for any income lost as a result of the continued recognition of an ousted democratic regime.

CONCLUSION

The recent coup attempt in Burundi,¹⁸¹ the overthrow of Pascal Lissouba's government in Congo Brazzaville, and the coup that

Haiti by returning the legitimately elected President, Jean-Bertrand Aristid).

179. See Themon Djaksam, *Kérékou is Back*, W. AFR., Apr. 15, 1996, at 584 (detailing democratic practice in Benin under the leadership of President Mathieu Kérékou); Kate Whiteman, *The Chameleon Returns*, W. AFR., Apr. 1, 1996, at 498 (reporting the return of Mathieu Kérékou as President of Benin).

180. See *Madagascar: Ratsirika Comeback*, 34 AFR. RES. BULL. 12,559 (1977) (describing the outcome of the national elections and Admiral Didier Ratsiraka's victory as President).

181. See <http://www.cnn.com/2001/WORLD/africa/04/18/burundi.unrest.o2/> (last visited May 13, 2001).

deposed Henri Bedie's regime in Côte d'Ivoire¹⁸² are indicative of the fact that the phenomenon of coups, something observers of African politics thought had ended, is still a feature of that continent's political landscape.¹⁸³ Moreover, there was no response by the OAU to the overthrow of Lissouba and so far only a condemnation of the coup in Côte d'Ivoire.¹⁸⁴

The analysis and proposals in this paper seek to contribute to the discussion on how the OAU can deal with the overthrow of constitutional regimes. For the OAU to be a meaningful institution that contributes to political stability and development in Africa, and thus help to arrest the progressively debilitating conditions on the continent, it must be an engine of democracy on the continent. It can be that engine if it adheres to and constructively reinforces its emerging position on the recognition of governments.

182. See *Côte D'Ivoire: Is it Africa's 'Good Coup'?*, NEW AFR., Feb. 2000, at 10 (commentating on the OAU's reaction to the coup in Côte D'Ivoire after making the recent announcement of outlawing all coups); see also *Côte D'Ivoire: Ecowas' Somersault*, NEW AFR., Feb. 2000, at 13 (reporting on ECOWAS' justifications in its failure to act as it had done in Sierra Leone in 1997 on the grounds that forcibly reinstating the government would have been unpopular with Ivorians).

183. See *Banjul, Gambia*, W. AFR., Jan. 24, 2000, at 37 (describing efforts of the Gambia government to squash a planned coup by the Gambia state guards).

184. See *supra* note 182.