

COUPS, CONSTITUTIONAL DEMOCRACY, AND THE RULE OF LAW: WHY AFRICANS MUST CARE

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ABSTRACT

The rule of law is the foundation and cornerstone of any legitimate democratic State. The rule of law, at its minimum, requires that the State subject the people and itself to publicly promulgated laws. In addition, the State's legislative function must be made separate from its adjudicative one and the law must be supreme, meaning that all citizens, including those who hold important positions in government, are subject to the law. The rule of law is so important to the practice of democracy that it is virtually impossible to have a constitutional government without it. Adherence to the rule of law is one of the three important elements of modern constitutionalism—the others are the protection of human rights and the effective constraining of the government so that those who serve in it do not engage in self-dealing and other forms of opportunism. A contemporary African State cannot be considered legitimate, especially from the point of view of the majority of its citizens, if it is lacking in any or all of these three characteristics of modern constitutionalism. An action, such as a military or a constitutional coup, not only diminishes the practice of constitutionalism, but can delegitimize the State, especially in the eyes of the majority of citizens. Coups can create conditions that: (1) exacerbate conflicts between subcultures and threaten peaceful coexistence; (2) discourage entrepreneurship and the creation of the wealth needed to confront poverty and inequality; (3) encourage the gross abuse of human rights, particularly those of minority ethnic and religious groups; and (4) destroy prospects for deepening and entrenching democracy and the rule of law. Hence, Africans must find ways to prevent military and constitutional coups. They can do this by providing themselves with a governing process undergirded by constitutional democracy and adherence to the rule of law.

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I. INTRODUCTION

Since gaining independence in the 1950s and 1960s, African countries have struggled to maintain governing processes characterized by the rule of law. *Military intervention in national politics* and *constitutional coups* are among the activities that have threatened and, perhaps, stunted the development and sustenance of governing processes undergirded by constitutional democracy and adherence to the rule of law in many countries that emerged from European colonialism on the continent.¹ Both behaviors have contributed significantly to the state of poor governance, that currently exists on the continent today, and to the inability of many African countries to effectively maintain governance structures that encourage adherence to the rule of law.

During the last several years, leaders of many developing countries have argued that democracy is a luxury that they cannot afford. For example, as Kyrgyzstan was beginning its life as an independent country after separating from the now defunct Union of Soviet Socialist Republics (“USSR”), its “officials [maintained] that democracy is a luxury that their small and largely impoverished state can no longer afford.”² A U.S. Congressional Study Mission to several

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¹ See generally John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT’L COMP., POL’Y & ETHICS L. REV. 77 (2018) (emphasizing constitutional coups as a threat to constitutional development in Africa). See also Mbaku, *Threats to the Rule of Law in Africa*, 48 GA. J. INT’L & COMP. L. 293 (2020) (noting military coups as a major constraint to the rule of law in African countries).

² See Martha Brill Olcott, *The Case for the Luxury of Democracy*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Dec. 12,

African countries in 1965, at a time when the “one-man, one-party rule” was dominant throughout the continent, found that “[a]lthough a one-man, one-party rule is the dominant political system in the countries visited, African leaders feel the system is best suited to their needs. They feel they cannot afford the luxury of opposition forces, as we know them, at this stage of their development. This underscores the importance of American understanding that democracy, as we know it, is not necessarily the most ideal form of government in the new African nations.”³

As late as 1980, several observers in and outside of Africa were still arguing that democracy is not suitable in Africa. Then mayor of Paris and later president of the French Republic, Jacques Chirac, told African leaders that “[m]ulti-partyism is a political error, the type of luxury that developing countries cannot afford”⁴ and that “democracy is a luxury Africa can ill afford.”⁵ Nevertheless, the pro-democracy demonstrations that began in the continent in the late-1980s and early-1990s, show that Africans, particularly the masses, value democracy and democratic institutions.⁶ The Arab Spring, which began in Tunisia with the self-immolation of street vendor Tarek al-Tayeb Mohamed Bouazizi, is further evidence that, despite the opportunistic attitudes of their leaders towards constitutional democracy and the rule of law, the masses throughout the continent yearn for democratic government undergirded by the rule of law.⁷

It has been argued that democracy is a concept that is employed by many, but which is often hard to define. Karl de Schweinitz, Jr., a

2001), <https://carnegieendowment.org/2001/12/12/case-for-luxury-of-democracy-pub-875>. See George Ayittey, *Why Western-style Democracy is Not Suitable for Africa*, CNN: AFRICA VOICES (Aug. 20, 2010), <https://www.cnn.com/2010/OPINION/08/20/ayittey.democracy.africa/index.html> (last visited on June 13, 2020).

³ STAFF OF H. COMM. ON FOREIGN AFFAIRS, 89TH CONG., REP. OF THE SPECIAL STUDY MISSION TO AFRICA 9 (U.S. Gov't Printing Office 1966).

⁴ See JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT* 36 (2013).

⁵ See Howard French, *Chirac Tour Affirms Ties With Africa*, N.Y. TIMES (July 22, 1995), <https://www.nytimes.com/1995/07/22/world/chirac-tour-affirms-ties-with-africa.html> (last visited on June 13, 2020).

⁶ See, e.g., THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (providing a series of essays that examines the transition to democracy that began in many African countries in the mid-1980s and early-1990s).

⁷ See ASAAD AL-SALEH, *VOICES OF THE ARAB SPRING: PERSONAL STORIES FROM THE ARAB REVOLUTIONS* 6 (2015).

scholar of democracy, has argued that “[d]emocracy is one of those troublesome words, which means all things to all people. Like motherhood and patriotism, it is thought to be a noble condition, evoked by politicians, publicists, preachers, and demagogues to prove their unsullied intentions and just claims to popular support.”⁸ Some scholars have argued that “[t]he confusion over democracy derives from how the word is used, notably by leaders of countries that claim [that] they practice democratic governance.”⁹ For example, East Germany, which was part of the Soviet-dominated Eastern Bloc, from 1949–1990, called itself the German Democratic Republic.¹⁰ There is also the Democratic People’s Republic of Korea and the Democratic Republic of Congo. No one familiar with political economy in these countries would classify them as democratic or believe that any of them are practicing, or has practiced, democratic governance.¹¹

American political scientist and commentator, Seymour Martin Lipset, has defined democracy “as a political system which supplies regular constitutional opportunities for changing the governing officials, and a social mechanism which permits the largest possible part of the population to influence major decisions by choosing among

⁸ See KARL DE SCHWEINITZ, JR., *INDUSTRIALIZATION AND DEMOCRACY: ECONOMIC NECESSITIES AND POLITICAL POSSIBILITIES* 12 (1964).

⁹ See John Mbaku, *Corruption and Democratic Institutions in Africa*, 27 *TRANSNAT’L L. & CONTEMP. PROBS.* 310, 331 (2018).

¹⁰ See, e.g., *REMEMBERING THE GERMAN DEMOCRATIC REPUBLIC: DIVIDED MEMORY IN A UNITED GERMANY* (David Clarke & Ute Wölfel eds., 2011) (presenting a series of essays that examines the evolution of the German Democratic Republic).

¹¹ The Democratic Republic of Congo (DRC) gained independence from Belgium in 1960 and in 1965, the country’s elected government was overthrown by a military coup led by Col. Joseph-Désiré Mobutu (who later changed his name to Mobutu Sese Seko). Mobutu went on to maintain a military dictatorship in the DRC that lasted until he was ousted in 1997 by the Alliance of Democratic Forces for the Liberation of Congo-Zaire (*l’Alliance des Forces démocratiques pour la Libération du Congo-Zaire*). See MICHAEL DEIBERT, *THE DEMOCRATIC REPUBLIC OF CONGO: BETWEEN HOPE AND DESPAIR* (2013). As of this writing (2020), the DRC is still struggling to establish a functioning democratic system. See, e.g., Mo Ibrahim & Alan Doss, *Congo’s Election: A Defeat for Democracy, a Disaster for the People*, *THE GUARDIAN* (UK) (Feb. 9, 2019), <https://www.theguardian.com/global-development/2019/feb/09/democratic-republic-of-the-congo-election-a-defeat-for-democracy-disaster-for-people-mo-ibrahim> (noting that the DRC’s 2018 presidential elections did not advance the country’s transition to democracy). Since the end of the Korean War and the creation of the two Koreas, North Korea (i.e., the Democratic People’s Republic of Korea) has taken a political trajectory that placed it squarely in the column of dictatorships. See, e.g., *NEW CHALLENGES FOR MATURING DEMOCRACIES IN KOREA AND TAIWAN* (Larry Diamond & Gi-Wook Shin eds., 2014).

contenders for political office.”¹² In his work on democracy, Professor Lipset emphasized elections as a mechanism that can be used by the people (that is, the governed) to select individuals to serve in government.¹³

In his scholarly monograph published in 1971, in which he elaborates on his theory of democracy, which he called polyarchy, political theorist, Robert A. Dahl, argued that “a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”¹⁴ Of course, in order for the government to “fully and effectively respond to the preferences of citizens, the state must have institutions that provide the people with the tools and mechanisms”¹⁵ that they can use to “effectively articulate their preferences, make known these preferences to both their government and fellow citizens (either through private or collective action), and have the government accord these preferences equal treatment without any prejudice against the individual or group making the request.”¹⁶

Civil society is very important to the maintenance of a democratic system. For example, civil society organizations, such as political parties and the free press, can provide citizens with a forum “within which . . . [they] can articulate their preferences, engage in debate with their neighbors, peacefully resolve their conflicts, and engage in the design and implementation of policies affecting their lives.”¹⁷

The conduct of elections is an essential part of a functioning democratic system. The elections, however, must, at the very minimum, be regular, free, fair, and credible—that is, they must not be pervaded by corruption and fraud. While elections serve as a mechanism that citizens can use to select people to serve in government, they can also be used to discipline recalcitrant and poorly-performing political elites.¹⁸ Dahl has provided three criteria that can be used to determine the extent to which a political system is

¹² See SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 27 (1963).

¹³ *Id.* at 183–297.

¹⁴ See ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971).

¹⁵ See Mbaku, *supra* note 9, at 332.

¹⁶ See John Mukum Mbaku, *Copyright and Democratization in Africa*, 7 *BYU INT'L L. & MGMT. REV.* 51, 76–77 (2011).

¹⁷ See Mbaku, *supra* note 9, at 332.

¹⁸ See JOHN MUKUM MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH* 133 (2018).

democratic.¹⁹ First, in every election, each vote that is cast must be given equal weight—under this system, the laborer’s vote counts equally as that of the head of a major corporation, or the president of the country.²⁰ Second, the electors must be provided information about all of the issues that have to be decided by the election. In the case of Africa’s highly divided societies, where the majority of citizens are not fluent in their countries’ official languages,²¹ information on elections must be provided in a language that the people can understand. In fact, studies show that “inclusive language recognition is linked to higher turnout” for South Africa’s various subcultures.²² By recognizing the languages of its various subcultures and providing them with election information in their own language, the South African government has significantly increased the participation of members of these subcultures in elections and, as a result, in governance generally.²³

Lastly, when the election is completed and the official results are certified by the appropriate authorities, all citizens, including those who lost and their supporters, should accept and respect the results. In addition, the winning candidates should be allowed to assume their positions and the orders of these newly elected officials, should be carried out, a process that should significantly enhance the ability of the new government to perform its functions. Of course, the constitution must provide legal avenues for the losing candidates to seek relief, if they believe that their loss was due to irregularities in

¹⁹ See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 86 (1956) (setting forth criteria to be used to determine the extent to which a political system is democratic).

²⁰ *Id.*

²¹ For example, in African countries that are former British colonies, the official language is English. Unfortunately, the majority of citizens are usually not literate in English. Instead, they communicate primarily or exclusively in the language of their subculture. Thus, low levels of literacy in the country’s official language can make it difficult for the government to provide information to all prospective electors about the issues to be decided in an upcoming election. See, e.g., Taofeek Olanrewaju Alabi, *Democracy in Nigeria: The Language Challenge*, 4 ASIAN J. HUM. & SOC. STUD. (2016) (arguing that the dominance of the English language in Nigeria’s political discourse “may be detrimental to the growth of democracy” in the country).

²² See Eric S. McLaughlin, *Language Policies and Voter Turnout: Evidence from South Africa*, 14 J. AFR. ELECTIONS 130, 130 (2015).

²³ *Id.*

the electoral system, or if they perceive that the process was pervaded by corruption or other irregularities.²⁴

The political theorist, Gerhard Lenski, has argued, however, that while elections are important to the maintenance and practice of democracy, guaranteeing certain political liberties is just as critical.²⁵ If, for example, citizens are “granted the power to freely organize political parties and compete for leadership positions in the government through elections, that freedom can also enhance their ability to more effectively participate in governance.”²⁶ In fact, the political party can provide citizens with the forum they need to articulate their ideas, making them part of the national discourse. It is important to note, however, that the pervasiveness of ethnic-based political parties in many African countries is actually stunting the deepening and institutionalization of democracy. Ethnic political parties contribute to the politicization of ethnocultural divisions and the destabilization of democracy.²⁷ However, recent studies of ethnic political parties in Francophone African countries conclude that “[e]thnic parties’ in the strict sense are virtually absent” in these countries.²⁸

Other scholars of democracy focus, instead, on the existence of a group of political elites who “hold[] a disproportionate degree of political power” within the society.²⁹ As argued by Peter Bachrach, “the exigencies of life in the industrial and nuclear age necessitate key

²⁴ The existence of an effective constitutional or legal process for the resolution of elections-related conflicts can minimize the ethnic-induced violence that has pervaded elections in many African countries in recent years. For example, after the 2017 general elections in Kenya, the opposition, the losers, challenged the results in court. The Supreme Court’s ability to resolve the conflict averted what was expected to be significant levels of post-election violence. See, e.g., *Kenya Presidential Election Cancelled by Supreme Court*, BBC NEWS (Sept. 1, 2017), <https://www.bbc.com/news/world-africa-41123329>. See also Rael Ombuor & Paul Schemm, *Kenya’s Supreme Court Annuls Presidential Election Result for Irregularities, Orders New Vote*, WASH. POST (Sept. 1, 2017), https://www.washingtonpost.com/world/kenya-supreme-court-cancels-presidential-election-result-for-irregularities-orders-new-election/2017/09/01/cccc81d6-8ef4-11e7-84c0-02cc069f2c37_story.html.

²⁵ See GERHARD E. LENSKI, *POWER AND PRIVILEGES* 319 (1966).

²⁶ See Mbaku, *supra* note 9, at 333.

²⁷ See, e.g., Kanchan Chandra, *Ethnic Parties and Democratic Stability*, 3 AMERICAN POLITICAL SCIENCE ASSOCIATION 235, 235 (2005).

²⁸ See Matthias Basedau & Alexander Stroh, *How Ethnic are African Parties Really? Evidence from Four Francophone Countries*, 33 INT’L POL. SCI. REV. 5, 5 (2011).

²⁹ See Kenneth A. Bollen, *Issues in the Comparative Measurement of Political Democracy*, 45 AM. SOC. REV. 370, 372 (1980).

and crucial political decisions in a democracy, as in totalitarian societies, be made by a handful of men.”³⁰ It is usually the case that in any State, including those in Africa, “elites at the center (e.g., president, prime minister, civil servants) usually have more control over public policies and their implementation than do the masses.”³¹ Nevertheless, the center elites usually “do not have access to the critical information necessary to the creation of policies that reflect the interests of various groups, especially those which reside in the rural areas.”³² Kenneth A. Bollen, an expert on how to measure democracy, has noted that “[i]t is these *differences* in the political power held by the elite, relative to the nonelite, that helps identify how democratic a nation is.”³³ Taking these differences into consideration, Bollen defines political democracy as “*the extent to which the political power of the elite is minimized and that of the nonelite is maximized.*”³⁴

Cognizant of the fact that it is often quite difficult to accurately measure or determine political power, Bollen notes that he must use indirect methods to determine the level of political power held by elites and nonelites within each State.³⁵ One such indirect method is to determine whether elections increase the political power of the nonelite, relative to that of the elite. For example, if national elections are fair, free, and credible, and if they “allow some choice from among alternative candidates or policies, and allow a universal franchise,”³⁶ they are more likely to significantly enhance the power of the electors or voters. As argued by Bollen, “[i]n nations where these and other conditions (e.g., the equal weighting of voting) are met, the nonelites have more political power over elites and their policies than in nations where no elections, or only rigged ones, occur.”³⁷

Nevertheless, empowerment of the nonelites through elections is not enough to fully and effectively constrain or guard the nation’s elites. In order for the nonelites to adequately constrain the elites and prevent the latter from acting with impunity, the nonelites must be granted, usually through the constitution, other political liberties. These include various legal tools that can enhance the ability of

³⁰ See PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* 1 (1980).

³¹ See Mbaku, *supra* note 9, at 334.

³² See *id.*

³³ Bollen, *supra* note 29, at 372.

³⁴ *Id.* at 372.

³⁵ See *id.*

³⁶ See *id.*

³⁷ *Id.*

citizens to either “protest or support—freely—government policies or decisions.”³⁸ Among these political liberties are free speech, an independent press, and the freedom of the people to form political organizations, including political parties, to participate in the political system.³⁹

Almost without exception, today’s African countries face a plethora of problems, the most important of which is how to provide themselves with a governing process that can: (1) provide legal mechanisms for and enhance the peaceful coexistence of each country’s ethnocultural groups; (2) provide an enabling environment for entrepreneurship and the creation of the wealth that is needed to deal fully and effectively with poverty; (3) promote the recognition and protection of human rights, especially those of ethnic and religious minorities, as well as, historically marginalized groups (e.g., girls and women); (4) confront and fully resolve urgent threats to peace and security, such as terrorism and extremism, as well as violent and destructive mobilization by subcultures that consider themselves marginalized by public policies; (5) reduce capital flight and brain drain and create an institutional environment that encourages and enhances domestic investment in wealth-creating activities; and (6) generally enhance human development.⁴⁰

The type of governing process described above, one that can, for example, enhance the ability of each African country to maintain peaceful coexistence and create conditions that promote entrepreneurship and wealth creation, is one that is undergirded by separation of powers with effective checks and balances, which include an independent judiciary, a bicameral legislature, with each chamber granted absolute veto over legislation enacted by the other, and an independent and competent executive.⁴¹

Like James Madison and his fellow founders of the United States, the citizens of each African country must be cognizant of the tyranny of the majority (i.e., majoritarian tyranny).⁴² It is important for each African country to understand that if constitutional democracy is used exclusively to impose the will of the majority or push through programs or policies that “benefit exclusively or even primarily the

³⁸ *See id.*

³⁹ *See Bollen, supra* note 29, at 372.

⁴⁰ *See* MBAKU, PROTECTING MINORITY RIGHTS, *supra* note 18, at 153.

⁴¹ *See* Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 385 (2020).

⁴² *See, e.g.,* THE FEDERALIST NO. 51 (James Madison) (noting that the structure of government must provide proper checks and balances between the different branches of government).

majority and marginalize the minority, it is likely that the minority will consider the government illegitimate” and, as it has been illustrated by situations in several African countries (e.g., Nigeria in the immediate post-independence period), the minority may engage in violent and destructive mobilization in order to either capture the government or secede, and form their own sovereign State.⁴³

The rule of law is the foundation of any legitimate democratic State—without it, a country would find it virtually impossible to practice constitutional government. Fidelity to the rule of law is one of the “three essential characteristics of modern constitutionalism.”⁴⁴ The others are the recognition and protection of human rights and the effective guarding of the exercise of government power.⁴⁵

This article provides an overview of the rule of law and its relation to democracy generally and democratic institutions particularly; showcasing how military and constitutional coups affect efforts to institutionalize democracy and the rule of law in Africa; and answering the question: why should Africans care about democratic institutions and the rule of law? In Section II, this article will provide a general overview of the rule of law, its elements, and how they relate to, or affect the multifarious problems that Africans currently face. Section III is devoted to an examination of military and constitutional coups, with specific emphasis on Cameroon, Egypt, and Togo. Specifically, the article examines Faure Gnassingbé’s constitutional coup in Togo; Paul Biya’s constitutional coup in the Republic of Cameroon; the Free Officers’ 1952 military coup in Egypt; Abdel Fattah el-Sisi’s 2013 military coup against the democratically elected government of President Mohamed Morsi; and el-Sisi’s constitutional coup in Egypt in 2019. In Section IV, the article examines the role that international law has played or can play in the prevention of military

⁴³ The Federation of Nigeria faced this situation in 1966 when minority ethnic groups in the then Eastern Region of Nigeria unilaterally seceded and formed the Republic of Biafra. They argued that they had experienced significant levels of marginalization and discrimination by the federal government, which was dominated by groups from the western and northern parts of the country. The secession triggered a civil war that lasted from July 6, 1967 to January 15, 1970. See, e.g., JOHN J. STREMLAU, *THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–1970* (1997) (examining the part played by international actors in the Nigerian civil war). See also PETER BAXTER, *BIAFRA: THE NIGERIAN CIVIL WAR, 1967–1970* (2015) (providing an overview of the events that defined the creation of Biafra and the civil war).

⁴⁴ See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

⁴⁵ *Id.*

coups in Africa. Section V examines the impact that military and constitutional coups have on the rule of law in Africa. In Section VI, the article explores some justifications for the need for Africans to care about the rule of law. The article concludes in Section VII and proceeds to make policy recommendations.

II. THE RULE OF LAW

A. Introduction

Over the years, a lot of legal scholarship has been devoted to examining the rule of law and its role within a functioning legal system.⁴⁶ British constitutional theorist, Albert Venn Dicey, is considered one of the most important modern contributors to the conceptualization of the principle of the rule of law.⁴⁷ Although legal scholars and political scientists have not yet settled on a common definition for the rule of law, they, do however, agree that it is typically contrasted with arbitrariness in the exercise of power.⁴⁸ Despite the fact that there exist many differences in the ways in which “leading judicial and academic authorities” perceive the meaning of the rule of law, they all “subscribe to a common idea of the meaning of the principle” and that “[t]his core meaning is simply that the rule of law requires that individuals be protected from arbitrary government.”⁴⁹

In his “Introduction” to Dicey’s *Introduction to the Study of the Law of the Constitution*, E. C. S. Wade provided a summary of the modern concept of the rule of law:

⁴⁶ See TOM BINGHAM, *THE RULE OF LAW* (2011) (providing a general overview of the rule of law). Tom Bingham is the late Rt. Hon. Lord Bingham of Cornhill KG, House of Lord, a well-respected and distinguished British jurist, legal scholar and a defender of human rights, who passed away in 2010 at age 76 years. Maev Kennedy, *Lord Bingham dies aged 76*, THE GUARDIAN (Sept. 12, 2010, 5:22 EDT), <https://www.theguardian.com/law/2010/sep/12/lord-bingham-death>. See also RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2003) (examining the rule of law, with particular emphasis on its role in the American legal system).

⁴⁷ See A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 183 (The Macmillan Press Ltd. 10th ed., 1959) (providing an overview and definition of the rule of law).

⁴⁸ See Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45 (Gianluigi Palombella & Neil Walker eds., 2009).

⁴⁹ Patrick J. Monahan, *Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government*, 33 OSGOODE HALL L. J. 411, 429 (1995).

The rule of law presupposes the absence of arbitrary power and so gives the assurance that the individual can ascertain with reasonable certainty what legal powers are available to government if there is proposal to affect his private rights. A person who takes the trouble to consult his lawyer ought to be able to ascertain the legal consequences of his own acts and what are the powers of others to interfere with those acts.⁵⁰

In his definition of the rule of law, Dicey has argued that it must embody three important principles, namely, that: (1) the law is supreme; (2) all citizens, regardless of their positions in society, are equal before the law; and (3) the rights of individuals, which are established through court decisions, must be accepted and respected.⁵¹ Since Dicey first articulated and elaborated upon these principles, other legal and constitutional scholars have added significantly to the definition of the rule of law. For example, in delivering the *Sixth Sir David Williams Lecture at the University of Cambridge Centre for Public Law* on November 16, 2006, the Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, stated that “the core of the existing principle” of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.”⁵²

Some legal and constitutional scholars distinguish between *formal* and *substantive* definitions of the rule of law. According to Craig Stern, an American legal scholar with interests in international human rights, “[f]ormal definitions [of the rule of law] speak of civil government constrained by rules and of courts with power to apply these rules to government actors.”⁵³ With respect to substantive definitions, Stern argues that they go beyond the formal and “speak

⁵⁰ See DICEY, *supra* note 47, at x–cxii.

⁵¹ *Id.* at 201–202.

⁵² Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, University of Cambridge Centre for Public Law Sir David Williams Lecture: The Rule of Law (Nov. 16, 2006) (transcript available at <https://www.cpl.law.cam.ac.uk/>). This lecture was later published in book form in 2011 after Lord Bingham’s death. See TOM BINGHAM, *THE RULE OF LAW* (2011).

⁵³ Craig A. Stern, *Human Rights or the Rule of Law—The Choice for East Africa?*, 24 MICH. ST. INT’L L. REV. 45, 47 (2015).

also of the content of the rules, so that the rules embody principles of justice such as human rights.”⁵⁴

A formal definition of the rule of law was provided by the late Anglo-Austrian economist and philosopher, Friedrich August von Hayek, when he stated that:

Nothing distinguishes more clearly conditions in a free country from those in a country under the arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough. While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.⁵⁵

Stern notes that von Hayek’s definition of the rule of law is formal because “it prescribes how law should operate generally rather than prescribing any particular content of law.”⁵⁶ As I have argued elsewhere, according to this formal definition of the rule of law, “there is law formally enacted, and both state custodians (that is, government officials) and citizens are bound by and must abide by the law.”⁵⁷ Professor Robert Stein, former Executive Director and Chief Operating Officer of the American Bar Association, Professor of Law

⁵⁴ *Id.* at 47.

⁵⁵ F. A. HAYEK, *THE ROAD TO SERFDOM* 80–81 (Univ. of Chicago Press ed., 1994).

⁵⁶ Stern, *supra* note 53, at 48.

⁵⁷ John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 287, 370 (2019).

at the University of Minnesota, and an expert on the rule of law, has argued that the heart of the rule of law is that “the law is superior, applies equally, is known and predictable, and is administered through a separation of powers.”⁵⁸

If a country’s institutional arrangements, including its governing process, are undergirded by the rule of law, “no one, including senior civil servants and politicians, is above the law.”⁵⁹ In other words, the law is supreme, and all citizens, “regardless of their economic and political status, are bound by and subject to the law.”⁶⁰ Within such a society, government power is *not* exercised arbitrarily and impunity by both state and non-state actors is minimized.⁶¹

The principle of the rule of law is very important for African countries and their citizens because throughout the continent, some people or groups consider, or have considered, themselves above the law. For example, the white minority under the apartheid system in South Africa, which, for many years, acted above the law and subjected the African majority to a reign of tyranny. Thus, for each African country, adherence or fidelity to the rule of law implies that “one’s ethnic or racial . . . status should not have any bearing on how the law treats them—all persons are subject to the law and all persons are equal before the law.”⁶²

The law must generally be known and understood by, at least, the majority of a country’s citizens and, in addition, “must be that which the people can obey.”⁶³ As argued by U.S. suffragist and human rights advocate, Elizabeth Cady Stanton, “[t]o make laws that man can not and will not obey, serves to bring all law into contempt. It is very important in a republic, that the people should respect the laws, for if

⁵⁸ Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT’L L. 293, 301 (2009).

⁵⁹ Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 57 at 371.

⁶⁰ *Id.*

⁶¹ See, e.g., John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 185 (2019) (noting that “in States with dysfunctional institutional arrangements, . . . the governing process is not undergirded by the rule of law and civil servants and politicians . . . engage in various forms of opportunism . . . to maximize their private interests at the expense of those of the general public.”).

⁶² Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 57.

⁶³ Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 57, at 371.

we throw them to the winds, what becomes of civil government?"⁶⁴ However, in order for the rule of law to function effectively, "there must be available mechanisms and institutions that have the capacity to enforce the legal rules when they are breached, regardless of who breaches them."⁶⁵

Thomas Carothers, a leading authority on human rights, governance, and the rule of law, and the Senior Vice President for Studies at the Carnegie Endowment for International Peace, has contributed to the substantive definition of the rule of law. He states that:

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.⁶⁶

A critical thing to note in Carothers' definition of the rule of law is that he links it to, and emphasizes the recognition and protection of human rights.⁶⁷ When it comes to the rule of law in Africa, each country must make sure that its constitutional law, legislative acts, and customary law are in accord with the provisions of international and regional human rights instruments.⁶⁸ But why should Africans be concerned about making their national constitutions, and other laws,

⁶⁴ Elizabeth Cady Stanton, *Address at the 10th National Women's Rights Convention (May 10–11, 1860)*, in HISTORY OF WOMAN SUFFRAGE 721 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joselyn Gage eds., 2d ed., 1881).

⁶⁵ Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 57, at 371.

⁶⁶ Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 2, 9-6 (1998).

⁶⁷ *See id.*

⁶⁸ *See, e.g.,* T. W. Bennett, *The Compatibility of African Customary Law and Human Rights*, 1991 ACTA JURIDICA 18 (1991).

conform to the provisions of international human rights? It has been argued that “the need to link domestic law to universally accepted human rights principles is made necessary by the fact that throughout history, even civil servants and politicians in dictatorial governmental regimes have justified their impunity by claiming that their behaviors actually adhered to the rule of law.”⁶⁹ For example, consider what Richard Nixon, the former president of the United States of America, said during an interview with Sir David Frost in 1977. He declared as follows: “Well, when the president does it, that means it is not illegal.”⁷⁰

In his work on the rule of law, Professor Stern has argued that “if a legal system fails to meet the standards of the formal version of the rule of law, it fails to meet the standards of the substantive version also.”⁷¹ Nevertheless, it must be noted that even if a country’s national law, particularly its constitution, incorporates “provisions that address human rights and hence, make national laws reflect universally accepted human rights principles, there is no guarantee that such rights would be protected, especially if those who serve in government (civil servants and politicians) do not [voluntarily accept] and respect the law.”⁷² If a country’s governing process is incapable of adequately constraining or guarding the government, civil servants and political elites are likely to “act with impunity even if the constitution incorporates provisions of international human rights instruments.”⁷³ This reflects arguments made by constitutional expert, Professor Judith A. Best, who asserts that parchment barriers alone are not adequate to secure fundamental rights.⁷⁴ Instead, each country must, in addition, provide itself with “a competent and balanced governing process.”⁷⁵

Multilateral organizations, such as the United Nations (“UN”), have also been involved in formulating a definition for the rule of law. In arguing that “[t]he rule of law is an important component of

⁶⁹ Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 57, at 372.

⁷⁰ David Frost, ‘I Have Impeached Myself’: Edited Transcript of David Frost’s Interview with Richard Nixon Broadcast in May 1977, *THE GUARDIAN* (UK) (Sept. 7, 2007) <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1>.

⁷¹ Stern, *supra* note 53, at 52.

⁷² Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 57, at 373.

⁷³ John Mukum Mbaku, *Threats to the Rule of Law*, *supra* note 1.

⁷⁴ Judith A. Best, *Fundamental Rights and the Structure of Government*, in *THE FRAMERS AND FUNDAMENTAL RIGHTS* 37 (Robert A. Kicht ed., 1992).

⁷⁵ *Id.* at 37.

sustaining peace, as advanced by the General Assembly and Security Council in the twin resolutions on the review of the peacebuilding architecture,” and that “[s]ustaining peace requires an integrated and comprehensive approach across the UN system, based on coherence between political, security, development, human rights, gender equality and rule of law activities in support of Member State-led efforts,”⁷⁶ the UN then provided a definition for the rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁷⁷

During the American Revolution, which ultimately led to the birth of the American Republic,⁷⁸ the English-born American political activist and 18th century revolutionary, Thomas Paine, argued that “in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there *ought* to be no other.”⁷⁹ In 1690, John Locke, the English philosopher and physician who is widely regarded as the father of Liberalism and one of the most influential Enlightenment thinkers, made very important remarks about the rule of law when he declared as follows:

Where-ever law ends, tyranny begins, if the law transgressed to another’s harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he

⁷⁶ U.N. Secretary-General, *What is the Rule of Law*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Apr. 30, 2020).

⁷⁷ S.C. Res. 2004/616, ¶ 6, (Aug. 23, 2004).

⁷⁸ That is, the United States of America. *See, e.g.*, ORESTES AUGUSTUS BROWNSON, *THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY* 4 (P. O’Shea ed. 1866) (noting that the United States is also called the American Republic).

⁷⁹ THOMAS PAINE, *COMMON SENSE* 75 (Edward Larkin ed. 2004) (emphasis in original).

has under his command, to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and, acting without authority may be opposed, as any other man, who by force invades the right of another.⁸⁰

America's Founders adopted John Locke's idea of the right of the citizens of a country to remove governors who abuse the power granted to them by the people, and extended it to include "revolution," which they subsequently defined as the "right of the people to dissolve the government and replace it with an entirely new one."⁸¹

Today, many African countries have governing processes undergirded by the separation of powers, with checks and balances. Nevertheless, the rule of law remains elusive and is regularly threatened by the behaviors of state and non-state actors, which include, but are not limited to, military *coups d'état*, constitutional coups, and ethnic- and religiously-induced violence.⁸² In the sub-

⁸⁰ JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT: A NEW EDITION CORRECTED 362, § 202 (London: Printed for Whitmore & Fenn, Charing Cross, 1821).

⁸¹ Best, *supra* note 74, at 39.

⁸² Examples include the military overthrow of the democratically-elected government of Mohamed Morsi in Egypt; the violent activities of extremist groups, such as Boko Haram and al-Shabbab in West Africa and East Africa respectively; and the manipulation of national constitutions in such countries as Burundi, Cameroon, Egypt and Rwanda, to allow incumbent presidents to remain in power indefinitely. See generally David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi Is Taken Into Military Custody*, N.Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html> (noting the military overthrow of the democratically-elected government of President Mohamed Morsi in Egypt); *Burundi Approves Reforms to Extend Presidential Term Limit*, DW NEWS (May 21, 2018), <https://www.dw.com/en/burundi-approves-reforms-to-extend-presidential-term-limit/a-43870394> (noting a 2018 amendment to Burundi's constitution that allows the incumbent president, Pierre Nkurunziza, to potentially remain in office until 2034). Nevertheless, President Nkurunziza passed away in early June 2020. See, e.g., *Burundi President Pierre Nkurunziza Dies of 'Cardiac Arrest' at 55*, BBC NEWS (June 9, 2020), <https://www.bbc.com/news/world-africa-52984119>; Haruna Umar, *50 Nigerian Soldiers Killed in Deadly Boko Haram Ambush*, ABC NEWS (Mar. 24, 2020), <https://abcnews.go.com/International/wireStory/50-nigerian-soldiers-killed-deadly-boko-haram-ambush-69771567> (noting the impact of the continuing violence by Boko Haram on political economy in Nigeria and the region); Eyder Peralta, *In Kenya, A Rise in Attacks by Islamist Al-Shabab Insurgents*, NPR INTERNATIONAL NEWS (Feb. 16, 2020), <https://www.npr.org/2020/02/16/806417331/in-kenya-a-rise-in-attacks-by-islamist-al-shabab-insurgents> (noting the continued violence of extremist group, Al-Shabaab); Andrew Edward Yaw Tchier, *South Sudan: Root Causes of Ongoing Conflict Remain Untouched*, THE CONVERSATION (Mar. 22,

section that follows, this article will briefly examine the elements of the rule of law.

B. The Rule of Law's Elements

In order to fully understand why Africans should care about the rule of law, it is important to closely examine the elements of the rule of law. One of the most important aspects of the rule of law is that “the government must obey the law in its actions.”⁸³ Former U.S. Supreme Court Associate Justice, Anthony M. Kennedy, has argued that “[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials.”⁸⁴ In other words, the *law must be supreme* and hence, the *supremacy of law* is the first element of the rule of law.

It is very difficult for the government to maintain law and order, if the majority of citizens do not voluntarily accept and respect the law. Without fidelity to the law by a majority of citizens, the police, whose job it is to enforce compliance to the law, and maintain law and order, would find it very difficult to perform their functions. As I have argued elsewhere, maintaining law and order in such countries “would be extremely costly and the government would likely be forced to devote a significant portion of national income to compliance activities, a process that can reduce expenditures on important sectors of the economy such as health care and human development.”⁸⁵ Therefore, the second element of the rule of law is that the majority of the citizens in a country must voluntarily accept and respect the law.⁸⁶

Through several of its decisions, the U.S. Supreme Court has significantly contributed to the rule-of-law jurisprudence. For

2020), <https://theconversation.com/south-sudan-root-causes-of-ongoing-conflict-remain-untouched-133542> (noting the failure of South Sudan's feuding parties, Riek Machar and his Nuer-based supporters and Salva Kiir and his Dinka supporters, to bring hostilities to an end and begin state reconstruction and nation-building).

⁸³ Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 JUDGES J. 4, 6 (2007).

⁸⁴ Stein, *supra* note 58, at 299 (quoting Justice Anthony M. Kennedy, *Written Constitutions and the Common Law Tradition*, 20 SULTAN AZLAN SHAH LAW LECTURE IN KUALA LUMPUR, MALAYSIA 11 (Aug. 10, 2006)).

⁸⁵ John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 988 (2013).

⁸⁶ *Id.*

example, in *U.S. v. United Mine Workers*,⁸⁷ Justice Frankfurter concurred in the Court's judgment and held as follows:

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.⁸⁸

The view expressed by the U.S. Supreme Court in *United Mine Workers* is reflected in numerous modern definitions of the rule of law. This is particularly true with regard to the part of the decision that states that “[t]here can be no free society without law administered through an independent judiciary.”⁸⁹ For example, as argued by American constitutional expert, Professor Erwin Chemerinsky, “[a]n independent judiciary is essential to the rule of law.”⁹⁰ The importance of judicial independence in relation to the maintenance of the rule of law, has also been acknowledged by the United Nations, which has stated that “the rule of law is a principle of governance in which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and *independently adjudicated*.”⁹¹ The third element of the rule of law, hence, is *judicial independence*.

In order for the law to function effectively, citizens must be “aware of, understand, and appreciate the law.”⁹² With respect to African countries, this calls for “[r]obust and broad-based educational programs, including especially those targeting heretofore marginalized and deprived groups,”⁹³ which “can help citizens, not only understand the laws, but also appreciate them and the role that they play in their daily lives.”⁹⁴ Of course, these educational programs

⁸⁷ *U.S. v. United Mine Workers*, 330 U.S. 258, 307 (1947).

⁸⁸ *Id.* at 312.

⁸⁹ *Id.*

⁹⁰ Chemerinsky, *supra* note 83, at 6.

⁹¹ U.N. Secretary-General, *supra* note 76 (emphasis added).

⁹² Mbaku, *supra* note 85, at 990.

⁹³ Such groups include women, the urban poor, rural inhabitants, ethnic and religious minorities. See John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 192 n. 648 (2019).

⁹⁴ *Id.* at 192.

must be designed and implemented to supplement, but not replace the full and effective participation of each country's relevant stakeholders in constitutional design and the enacting of post-constitutional laws.⁹⁵

One way to make certain that the process through which the constitution is designed and adopted is participatory is to: (1) have the people develop through a participatory and inclusive process, constitutional principles "that would undergird, inform, and constrain the designers of the constitution;"⁹⁶ (2) use a participatory process (e.g., fair, credible, free and democratic elections) to select individuals to serve on the committee (e.g., Constitutional or Constituent Assembly) to draft the constitution; (3) create effective mechanisms for all citizens to provide the Constitutional Assembly with necessary input during the constitution-design process; (4) enhance the ability of all of the country's relevant stakeholder groups to participate directly in the ratification of the constitution; and (5) provide legal mechanisms to enable citizens to participate in the enactment of post-constitutional laws. It is critical that the entire constitution-making process, as well as the enactment of laws in the post-constitutional period, is open, transparent, and participatory.⁹⁷ Finally, "[t]he application of laws must be predictable and uniform and must not be capricious and arbitrary."⁹⁸ The fourth and fifth elements of the rule of law are therefore, *openness and transparency, and the predictability of the law*, respectively.

The American Bar Association ("ABA") has argued that the rule of law developed in the United States "around the belief that a primary purpose of the rule of law is the protection of certain basic rights."⁹⁹ Many Africans who fought against colonialism and for independence, "believed that independence would provide them with the opportunity to rid themselves of the dysfunctional European institutions and replace them with institutional arrangements designed exclusively by Africans and which would be undergirded by the rule of law."¹⁰⁰ Most Africans who participated in the decolonization project hoped that the "departure of the Europeans would allow them to dismantle colonial institutions and develop and adopt governing processes capable of

⁹⁵ *Id.* at 192–193.

⁹⁶ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 315.

⁹⁷ Mbaku, *Struggle Against Impunity*, *supra* note 93, at 192–93.

⁹⁸ *Id.* at 193.

⁹⁹ Marina Oshana, *Ascriptions of Responsibility Given Commonplace Relations of Power*, in *SOCIAL DIMENSIONS OF MORAL RESPONSIBILITY* 81, 96 (Katrina Hutchison, Catriona MacKenzie & Marina Oshana eds., 2018).

¹⁰⁰ Mbaku, *Struggle Against Impunity*, *supra* note 93, at 192.

adequately constraining the state, minimizing impunity, and guaranteeing the recognition and protection of human rights.”¹⁰¹ Thus, the sixth and final element of the rule of law is the *recognition and protection of human rights*.

Among the plethora of problems that currently plague many countries in Africa, extreme poverty, high levels of inequality in the distribution of income and wealth, as well as a general state of underdevelopment, require urgent attention both by national governments and each country’s private sectors. For example, in the summer of 2018, CNN International, reported that Nigeria, an African country endowed with significant amounts of oil and other natural resources, had overtaken India as the country with the largest number of people living in extreme poverty.¹⁰² It was estimated that in Nigeria, one of Africa’s wealthiest countries, as many as 87 million people or about 50 percent of the country’s population, were living in extreme poverty—measured at less than \$1.90 per day.¹⁰³ The following summer, CNN International reported that South Africa had emerged as the world’s most economically unequal country, even after its twenty-five years of freedom from a racist apartheid regime. Recent research shows that “[t]he gap between the rich and poor is wider in South Africa than any other country where comparable data exist.”¹⁰⁴

While the reasons for the failure of countries, such as Nigeria and South Africa, to deal fully and effectively with poverty and inequality, are complex, it has been determined that the failures of these countries to promote pro-poor economic policies that significantly enhance the ability of poor and marginalized groups, and communities to participate directly in entrepreneurship and the creation of wealth, represent important contributors to poverty and inequality. In Nigeria, bureaucratic and grand corruption have been instrumental in perpetuating poverty in the country.¹⁰⁵ For example, in 2012, former

¹⁰¹ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 316.

¹⁰² See Bukola Adebayo, *Nigeria Overtakes India in Extreme Poverty Ranking*, CNN INTERNATIONAL (June 26, 2018), <https://www.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html>.

¹⁰³ See *id.* at 101.

¹⁰⁴ See Katy Scott, *South Africa is the World’s Most Unequal Country: 25 Years of Freedom Have Failed to Bridge the Divide*, CNN INTERNATIONAL (May 10, 2019), <https://www.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> (last visited on Sept. 9, 2020).

¹⁰⁵ See, e.g., Osariyekemwen Igiebor, *Political Corruption in Nigeria: Implications for Economic Development in the Fourth Republic*, 35 J. DEV. SOC.

World Bank Vice President Dr. Oby Ezekwesili, a co-founder of Transparency International, noted that Nigeria had “lost more than \$400 billion to oil thieves since she attained independence in 1960.”¹⁰⁶

Underdevelopment and poverty in Nigeria do not appear to be related directly to a lack of resources. The problem appears to be related to the fact that, over time, Nigeria’s civil servants and political elites have mismanaged the country’s enormous wealth, that could have been used to invest in projects that alleviate poverty, and advance human development (e.g., pro-poor policies targeting agriculture in the rural areas where most of the country’s poor can be found). According to Antony Goldman:

Nigeria has earned around \$400bn from oil since 1970. A Nigerian friend returning home after 15 years abroad asked where the war had been—so run down and dilapidated had the country become. And yet Nigerians own some of the finest properties in the world’s best cities, and swell some of the world’s biggest bank accounts.¹⁰⁷

A lot of research has been undertaken to determine why many African countries, including Nigeria, that have significant endowments of natural resources, such as oil, remain pervaded by high levels of poverty and underdevelopment. Some of the reasons advanced to explain why these countries have failed to develop include, but are not limited to: (1) the endemic and pervasive nature of bureaucratic and political corruption; (2) the failure or inability of many countries in the continent to effectively manage diversity, which has enhanced the ability of a majority faction¹⁰⁸ to tyrannize ethnic and religious minorities within their borders; (3) the decision by groups that are marginalized or perceive that they are marginalized by

493, 493 (2019) (finding that “corruption in Nigeria has negatively affected the country’s economic development.”).

¹⁰⁶ See Ikechukwu Nnochiri, *Nigeria Loses \$400 Bn to Oil Thieves—Ezekwesili*, VANGUARD (Aug. 28, 2012), <https://www.vanguardngr.com/2012/08/nigeria-loses-400bn-to-oil-thieves-ezekwesili/>.

¹⁰⁷ See Antony Goldman, *Who Benefits from Africa’s Oil?*, BBC NEWS (Mar. 9, 2004), <http://news.bbc.co.uk/2/hi/africa/3542901.stm>.

¹⁰⁸ Throughout the continent, these majority factions are usually made up of “one or more ethnocultural groups that monopolize and control the political system, as well as major sectors of the economy.” See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 297–98. Such a majority faction usually controls and dominates the political and economic systems and in the process, forces the minority to eke out a living on the economic margins. See *id.* at n. 15.

the policies of their governments to engage in violent and destructive mobilization, in an effort to minimize their marginalization; (4) military intervention in national politics; and (5) the manipulation of national constitutions by incumbent presidents to remain in power indefinitely.¹⁰⁹

Other researchers have argued that “pervasive poverty in the continent is due either to mistakes made by well-intentioned policymakers or to the ineptitude and incompetence of poorly educated and unskilled civil servants and politicians.”¹¹⁰ Based on the foregoing argument, it has been suggested that African countries should emphasize “the recruitment into [their] public services . . . of new leaders who are better trained and educated, have higher skills, and are more honest and disciplined, and have higher levels of integrity.”¹¹¹

Nevertheless, research completed during the last several decades has revealed that “the so-called policy mistakes committed in the African countries during the last several years, were actually deliberate programs designed and advanced by opportunistic—but not necessarily poorly informed or unskilled—politicians and civil servants seeking ways to enrich themselves at the expense of the rest of society.”¹¹² In some African countries, “civil servants actually intentionally and deliberately impose various bottlenecks where none existed before with the expectation that entrepreneurs, afraid that these bottlenecks would increase their transaction costs, would be willing to bribe the regulators to have them removed.”¹¹³

As argued by B. Osei-Hwedie and K. Osei-Hwedie, “when bottlenecks are created in the administration [i.e., government] within the sectors dealing with the public, they become a source of corruption,”¹¹⁴ which are used by the country’s bureaucrats to extort money from citizens, particularly entrepreneurs who seek public services, for themselves. Through this process, civil servants stunt

¹⁰⁹ See, e.g., JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 236–240 (2004).

¹¹⁰ *Id.* at 236.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See John Mukum Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT’L & COMP. L. 661, 680 n.94 (2016).

¹¹⁴ See Bertha Z. Osei-Hwedie & Kwaku Osei-Hwedie, *The Political, Economic, and Cultural Basis of Corruption in Africa*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 40, 44 (Kempe R. Hope, Sr. & Bornwell C. Chikulo eds., 2000).

entrepreneurial activities, and the creation of the wealth that might be used to confront poverty and improve the living conditions of the poor, especially historically marginalized groups, such as women, youth, and religious and ethnic minorities.¹¹⁵

But, how are these public officials able to successfully engage in corruption and undertake perverse economic policies that hurt certain groups within the country without any pushback from civil society and its organizations? First, since gaining independence from European colonialism, many countries in Africa have not been able to provide themselves with the governing processes that adequately constrain civil servants and political elites, preventing them from engaging in various forms of political opportunism, including corruption and rent seeking.¹¹⁶ In fact, the institutional arrangements that many African countries had adopted upon independence or shortly thereafter, “actually created imperial presidencies and empowered many politicians and civil servants with significant levels of discretion, which they used to plunder national resources for their own benefit and that of their supporters, the majority of whom are usually members of the subculture to which the politician or civil servant belongs.”¹¹⁷

Second, in many countries throughout Africa, military elites have intervened in national politics, and in doing so, have claimed that they were either responding to the popular will or acting to save their countries from incompetent, capricious, and opportunistic civilian leaders.¹¹⁸ For example, when the military overthrew the democratically-elected government of Mohamed Morsi in Egypt, it justified its unconstitutional actions by claiming that “it was acting on popular will because millions of people had taken to the streets to demand his resignation.”¹¹⁹ In fact, since Africa’s first post-independence military coup took place in Egypt in 1952,¹²⁰ military

¹¹⁵ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 299.

¹¹⁶ See generally John Mukum Mbaku, *Bureaucratic Corruption in Africa: The Futility of Cleanups*, 16 CATO J. 99, 100 (Spring/Summer 1996).

¹¹⁷ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 300.

¹¹⁸ See, e.g., Victor T. Le Vine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181 (1997) (examining, inter alia, the impact of military coups on the political economy in West Africa).

¹¹⁹ See Yasmine Saleh & Tom Perry, *Egypt Showered With Gulf Billions in Show of Support for Army*, REUTERS WORLD NEWS (July 8, 2013), <https://www.reuters.com/article/us-egypt-protests/egypt-showered-with-gulf-billions-in-show-of-support-for-army-idUSBRE95Q0NO20130709> (last visited on May 1, 2020).

¹²⁰ On July 23, 1952, the government of King Farouk was overthrown by the Young Officers Corps. See, e.g., STEPHEN P. COHEN, *BEYOND AMERICA’S GRASP*:

officers have intervened in many other African countries, giving similar justifications for their actions.

For example, in 1966, Major C. Kaduna Nzeogwu, one of the military officers that were responsible for overthrowing the government of Nigeria's First Republic claimed that he and his fellow coup makers had acted to save Nigerians and their hard-fought independence from the "tribalists" and "nepotists" and corrupt politicians, who had failed to develop the country.¹²¹ Nigeria's coup leaders, including those who were involved in the coups that came after 1966, as was the case with their counterparts in other countries throughout the continent, failed to keep their promises. Instead, as I have argued elsewhere, these military elites "plundered their economies for their personal benefit, abused the rights of their fellow citizens, and promoted policies that stunted economic growth and development, as well as any efforts to institutionalize the rule of law and constitutional government."¹²² In Nigeria, the military, which ruled the country during most of the period from 1966 to 1999, "committed many atrocities against their fellow citizens"¹²³ and destroyed the country's economic capacity and its ability to promote human development.¹²⁴

A CENTURY OF FAILED DIPLOMACY IN THE MIDDLE EAST 35 (2009). Given as the failings of the Farouk government were that he had failed to rid the country of continued British influence and interference in local politics and that he had not implemented necessary reforms to improve the system of access to land, as well as to alleviate pervasive poverty among Egyptian peasants. *See id.* While British influence in the country eventually lessened in the years after the coup, the military has failed to bring about the types of economic transformations that many Egyptians believed would occur in the absence of the monarchy. *See, e.g.,* Robert Springborg, *The Rewards of Failure: Persisting Military Rule in Egypt*, 44 BRIT. J. MID. EAST. STUD. 478 (2017) (noting, *inter alia*, that more than half a century since it first came to power in 1952, "the military is even more firmly in control of Egypt" but has failed to significantly improve economic conditions for most Egyptians).

¹²¹ *See* Major Chukwuma Kaduna Nzeogwu, *Radio Broadcast by Major Chukwuma Kaduna Nzeogwu: Announcing Nigeria's First Military Coup on Radio Nigeria on January 15, 1966*, reprinted in VANGUARD (Nigeria) (Sept. 30, 2010), <https://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-%E2%80%93announcing-nigeria%E2%80%99s-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966/>.

¹²² *See* Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 300.

¹²³ *See id.*

¹²⁴ *See* Iheanacho Nwosu, *Military Rule Ruined Nigeria—Ezeife*, THE SUN (October 28, 2018), <https://www.sunnewsonline.com/military-rule-ruined-nigeria-ezeife/> (reporting an interview with Dr. Chukwuemeka Ezeife, former governor of Anambra States who opined that "the military ruled Nigeria and ruined Nigeria).

Although the Nigerian military claimed that their culture of discipline would make them more effective governors, the period they spent as administrators of Nigerian political economy was characterized by extremely high levels of corruption and self-dealing, abuse of human rights, and significant levels of tyranny directed at citizens.¹²⁵

By the early-to-mid-1990s, “especially after South Africa’s successful transition from the racially-based apartheid system to a multi-racial and democratic political dispensation, many Africans came to see multiparty democracy and constitutionalism as the only legitimate way to change government, as well as to enhance and ensure peaceful coexistence and minimize sectarian conflict.”¹²⁶ Nevertheless, as evident by the overthrow of the democratically elected government of Mohamed Morsi in Egypt on July 3, 2013,¹²⁷ and the ousting of Robert Gabriel Mugabe’s government in Zimbabwe in 2017, the military remains a major threat to democracy and the rule of law in Africa.¹²⁸

During the last several decades, a new type of coup, called the *constitutional coup*, has emerged as an important form of unconstitutional government change in Africa.¹²⁹ A constitutional coup usually involves “the amending or revising of the constitution to eliminate presidential term limits, and allows the incumbent to extend his mandate.”¹³⁰ In an earlier study, I noted that the constitutional coup has the effect of not only extending the incumbent president’s mandate, but also has the potential of: “(1) eliminating opponents to the regime and their organizations; (2) silencing regime critics; (3) minimizing political competition; and (4) generally supporting regime impunity.”¹³¹ I also extended the definition of the constitutional coup to include: (1) the elimination of presidential term limits; (2) elimination of presidential age limits; (3) the changing of citizenship

¹²⁵ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 301.

¹²⁶ See John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT’L COMP., POL’Y & ETHICS L. REV. 77, 90 (2018).

¹²⁷ See, e.g., David D. Kirkpatrick, *Army Ousts Egypt’s President; Morsi is Taken into Military Custody*, N.Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

¹²⁸ Eliza Mackintosh, *Zimbabwe’s Military Takeover was the World Strangest Coup*, CNN INTERNATIONAL (Nov. 21, 2017), <https://www.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-coup/index.html> (last visited on Sept. 10, 2020).

¹²⁹ Mbaku, *Constitutional Coups*, *supra* note 126.

¹³⁰ *Id.* at 141–142.

¹³¹ *Id.* at 142.

requirements for individuals standing for the position of president—usually, this change is designed to invalidate the eligibility of opposition candidates; (4) changing the residency requirements for candidates running for the presidency; and (5) the granting of incumbent presidents immunity from prosecution for crimes committed while in office.¹³²

Other behaviors associated with constitutional coups also include: “(1) manipulating the interpretation of constitutional provisions to postpone elections indefinitely and allow the incumbent whose mandate has expired to unconstitutionally stay in power; (2) manipulating electoral and other laws in order to disqualify political opponents and extend the incumbent’s mandate or ensure an electoral win for the incumbent; and (3) changing the electoral laws to disqualify other candidates.”¹³³

In the next section, this Article will examine both military and constitutional coups in a number of African countries to show how they have contributed to the stunting of democracy and the rule of law in the continent.

III. CONSTITUTIONAL AND MILITARY COUPS AND THE STRUGGLE TO ENTRENCH DEMOCRACY AND THE RULE OF LAW IN AFRICAN COUNTRIES

A. Introduction

The 1952 overthrow of the government of King Farouk in Egypt by the Free Officers Movement represented the first military coup in an independent African country.¹³⁴ General Muhammad Naguib, who emerged as the prime minister of Egypt after the overthrow of King Farouk in 1952, was ousted on February 28, 1954.¹³⁵ These two military coups appear to have paved the way for the military coup d’état to emerge as a major method of unconstitutional change of government in many African countries. Years later, on November 17, 1958, General Ibrahim Abboud overthrew the first elected government of the Republic of Sudan and subsequently became the country’s first

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Mbaku, *Threats to the Rule of Law*, *supra* note 1.

¹³⁵ JOEL GORDON, *NASSER’S BLESSED MOVEMENT: EGYPT’S FREE OFFICERS AND THE JULY REVOLUTION* 4 (1992).

post-independence president.¹³⁶ In fact, many African countries that had emerged from colonialism in the early-1960s, were to see their hopes for the development of democratic governments, undergirded by the rule of law, destroyed by opportunistic military officers who were determined to maximize their own self-interests at the expense of building viable developmental states and dealing with pervasive poverty.¹³⁷ The latest military coup in Africa took place on April 10, 2019, when the Sudanese Armed Forces overthrew the government of Omar Hassan Ahmed al-Bashir.¹³⁸

In an effort to determine the extent to which military and constitutional coups have impeded the deepening of democracy and institutionalization of the rule of law in Africa, this Article will proceed by taking a look at constitutional manipulations in Togo by Faure Gnassingbé, who became the President of the Republic of Togo after the death of his father, dictator Gnassingbé Eyadéma, on February 5, 2005.¹³⁹

B. Faure Gnassingbé's Constitutional Coup in Togo

Gnassingbé (born Étienne) Eyadéma became president of the Republic of Togo in April 1967 after participating in two military coups.¹⁴⁰ Eyadéma was one of the leaders of a group of disgruntled soldiers who overthrew the government of Togo's first president, Sylvanus Olympio, on January 13, 1963.¹⁴¹ Shortly after the coup, the

¹³⁶ MAWUT ACHIECQUE MACH GUARAK, *INTEGRATION AND FRAGMENTATION OF THE SUDAN: AN AFRICAN RENAISSANCE* 149 (2011).

¹³⁷ See, e.g., Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 189 (1997) (noting military coups in several countries in West Africa during the 1960s and 1970s).

¹³⁸ See BBC, *Sudan Coup: Why Omar al-Bashir was Overthrown*, BBC NEWS (Apr. 15, 2019), <https://www.bbc.com/news/world-africa-47852496>.

¹³⁹ See *President Eyadema Dies After 38 Years in Office, Frontiers Closed*, THE NEW HUMANITARIAN (Feb. 5, 2005), <http://www.thenewhumanitarian.org/news/2005/02/05/president-eyadema-dies-after-38-years-office-frontiers-closed>. See also *G. Eyadema, Togo's Ruler, Dies at 69*, N.Y. TIMES (Feb. 6, 2005), <https://www.nytimes.com/2005/02/06/obituaries/g-eyadema-togos-ruler-dies-at-69.html>.

¹⁴⁰ See, e.g., MICHAEL THOMAS FORTNER, *GREETINGS FROM JUNGLELAND: A MEMOIR BY MICHAEL FORTNER* 121 (2010) (noting, inter alia, the participation of Eyadéma in two military coups in Togo in 1963 and 1967).

¹⁴¹ *Id.* at 121. Although Eyadéma and other leaders of the 1963 Togolese coup claimed that they had acted in order "to save Togo from economic ruin, ethnic discord, and the disastrous policies of the Sylvanus Olympio regime," scholars have argued that the coup did not have anything to do with the economy and public policy

military “appointed Nicholas Grunitzky (son of a Polish father and an Atakpame mother) as interim president with Antoine Meatchi (a Northerner) as vice president.”¹⁴² Professor Chuka Onwumechili, who researches military coups and democratization in Africa, has noted that the appointments of Grunitzky and Meatchi were later “ratified in a May 1963 election,” which, however, excluded participation by “the Ewes, who dominated Togolese education and economy.”¹⁴³ In addition to refusing to accept the new political arrangement, the Ewes demanded that Eyadéma and the other coup leaders be prosecuted for the assassination of President Olympio.¹⁴⁴

The Grunitzky-Meatchi government eventually began to disintegrate, as the two leaders openly hurled words against each other.¹⁴⁵ Frustrated by the government’s ineffectiveness, the people took to the streets to protest and, taking advantage of the mass demonstrations, Eyadéma overthrew the government on January 13, 1967.¹⁴⁶ He subsequently assumed the office of President of the Republic of Togo on April 14, 1967 and remained in that position until his death in 2005.¹⁴⁷ After Eyadéma’s death, the Togolese military “ordered the parliament to amend the constitution so that his son, Faure Gnassingbé, could assume the presidency instead of the speaker of parliament” as mandated by the country’s constitution.¹⁴⁸

in Togo. Instead, it has been argued, the coup was retaliation against Olympio for refusing to integrate Eyadéma and the other “three hundred demobilized Kabré [Kabyé] veterans of France’s colonial army into Togo’s small (250-man) army.” See VICTOR T. LE VINE, *POLITICS IN FRANCOPHONE AFRICA* 282 (2004). See also *id.* at 53 (noting that the military coup that overthrew the first president of Togo took place on January 13, 1963).

¹⁴² See CHUKA ONWUMECHILI, *AFRICAN DEMOCRATIZATION AND MILITARY COUPS* 53 (1998).

¹⁴³ *Id.* at 53.

¹⁴⁴ *Id.* Olympio was a Mina from southern Togo, while Eyadéma and other coup leaders were Kabyé from northern Togo. Olympio’s government was accused of favoring the Mina and Ewé from the south and ignoring the needs of the northern Kabyé (Kabrés). The Ewe (also Ewé) and the Mina (also Gen) are two of the largest ethnic groups in southern Togo, while the Kabyé, the country’s second largest ethnic group, after the Ewé, are found in the north central mountains of Togo. See, e.g., FORTNER, *supra* note 140, at 120–121.

¹⁴⁵ ONWUMECHILI, *supra* note 142, at 53.

¹⁴⁶ *Id.*

¹⁴⁷ See BONA UDEZE, *WHY AFRICA? A CONTINENT IN A DILEMMA OF UNANSWERED QUESTIONS* 296 (2009).

¹⁴⁸ See DAWN BRANCATI, *DEMOCRACY PROTESTS: ORIGINS, FEATURES, AND SIGNIFICANCE* 34 (2016).

Gnassingbé Eyadéma died on February 5, 2005¹⁴⁹ and the army immediately installed Faure Gnassingbé, the late dictator's son, as the president, even though the country's constitution clearly stated that "[i]n case of a vacancy in the Presidency of the Republic by death, resignation or permanent incapacity, the presidential function shall be exercised provisionally by the President of the National Assembly."¹⁵⁰ Hence, Gnassingbé's ascension to the presidency of the Republic of Togo had no basis in law.¹⁵¹

After Gnassingbé's installation by the military, "[p]rotests erupted in the capital Lomé, with opposition groups, youths, and civil society organizations expressing their discontent about the unconstitutional transfer of power."¹⁵² However, "the ruling party closed its ranks in favor of the transition" and, in addition, "the cadres of the old regime stood up 'like one man.'"¹⁵³ Anja Osei, a German-based expert on democratization in West Africa, argues that this "high degree of elite cohesion cannot be taken for granted because personalized authoritarian regimes with highly centralized power structures are vulnerable to collapse due to succession crises."¹⁵⁴ This type of regime, it has been argued, is less likely to democratize or engage in the creation of democratic institutions.¹⁵⁵

Eyadéma's rule, which lasted from 1967 until 2005, "rested on repression, patronage, and a bizarre leadership cult" and his son, Gnassingbé, has "adapted and reformulated these strategies" and is

¹⁴⁹ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2005 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT (fifth rep.) 116 (2005) (noting, *inter alia*, that President Gnassingbé died in office on February 5, 2005 and the military moved swiftly to install his son, Faure Gnassingbé as president) (hereinafter Trade Representative).

¹⁵⁰ CONSTITUTION OF THE REPUBLIC OF TOGO 1992 [CONSTITUTION] Dec. 31, 2002, art. 65. The French version is: « En cas de vacance de la présidence de la République par décès, démission ou empêchement définitif, la fonction présidentielle est exercée provisoirement par le Président de l'Assemblée nationale. » République Togolaise: La Constitution de la IV^e République, Promulguée le 14 octobre 1992, Révisée par la loi n° 2002-029 du 31 décembre 2002.

¹⁵¹ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 149, at 116.

¹⁵² See Anja Osei, *Life Father, Like Son? Power and Influence Across Two Gnassingbé Presidencies in Togo*, 25 DEMOCRATIZATION 1460, 1460 (2018).

¹⁵³ *Id.* at 1460.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

using them to remain in power indefinitely.¹⁵⁶ Shortly after the army installed Gnassingbé as president, many domestic and regional groups, which considered the succession unconstitutional, began to put pressure on the new president to resign. Because President Gnassingbé refused to resign, the Economic Community of West African States (“ECOWAS”) imposed “an arms embargo, a diplomatic freeze and a travel ban on the Togolese government” and shortly thereafter, “[t]he African Union announced it was joining in the sanctions and suspended the country from all AU activities.”¹⁵⁷

Initially, the Togolese army had argued that Gnassingbé should serve out the rest of his father’s presidential mandate, which meant that he could remain in office until 2008.¹⁵⁸ Nevertheless, on February 18, 2005, Gnassingbé announced that he would follow the stipulations of Article 65 of the Constitution of the Republic of Togo, 1992 (as amended by Law No. 2002–029 of December 31, 2002), which mandates that, where there is vacancy in the presidency, as the result of the death of a serving president, resignation or definitive incapacity, “the presidential functions shall be temporarily exercised by the President of the National Assembly (as acting President) who must conduct a presidential election within 60 days from the day he entered into office.”¹⁵⁹

In addition to denying the then President of the National Assembly, Fambare Ouattara Natchaba, the right to take over as the interim president as prescribed by the Constitution, the National Assembly also amended the Constitution “to remove the 60 days mandatory requirement for the conduct of the presidential election, and provided for Faure Gnassingbé to remain in office as acting

¹⁵⁶ *Id.*

¹⁵⁷ See *Mounting Pressure Prompts Togo President to Resign*, MSNBC NEWS (Feb. 2, 2005), http://www.nbcnews.com/id/7032769/ns/world_news/t/mounting-pressure-prompts-togo-president-resign/#.Xl1Uw0VKhBw. In fact, ECOWAS and the African Union concluded that post-Eyadéma succession was a military coup d’état, “charging that it was unconstitutional, undemocratic and a violation of regional-international instruments and political commitments in the field of democracy and good governance of which Togo is a State Party.” See Ebeku, *infra* note 159, at 5–6.

¹⁵⁸ *Mounting Pressure*, *supra* note 157.

¹⁵⁹ See KANIYE S. A. EBOKU, THE SUCCESSION OF FAURE GNASSINGBÉ TO THE TOGOLESE PRESIDENCY: AN INTERNATIONAL LAW PERSPECTIVE 5 (2005) (Specifically, the Constitution states as follows: « Le gouvernement convoque le corps électoral dans les soixante (60) jours de l’ouverture de la vacance pour l’élection d’un nouveau président de la République. »).

President until the expiry of his late father's tenure in 2008.”¹⁶⁰ It has been suggested that Togolese military elites, who were strong supporters of the late President Eyadéma, were the architects of the post-Eyadéma political and constitutional manipulations, which installed Faure Gnassingbé as president.¹⁶¹

In response, regional bodies, which included ECOWAS and the AU, pleaded that “[Togo] should return to the path of constitutionality and democracy or face sanctions”; however, the “de facto authorities in Togo insisted that the succession of Faure Gnassingbé to the Togolese presidency . . . [was] necessary in order to avoid a power vacuum and to preserve the State of Togo.”¹⁶² After several days of consultations with various regional organizations, particularly ECOWAS, though faced with the threat of sanctions from ECOWAS and the AU, parliamentarians in Togo “re-amended the Constitution to the original constitutional provision which obligates an interim President to conduct a presidential election within sixty days of his assumption of office.”¹⁶³ Nevertheless, Faure Gnassingbé was allowed to retain his position as president.¹⁶⁴

Although the leaders of ECOWAS and the AU had welcomed the decision by the Togolese National Assembly to revert to the original constitutional provision, they “insisted that Faure Gnassingbé must vacate office—notwithstanding that he had announced that he would conduct a presidential election within sixty days—so that Fambaré Ouattara Natchaba could succeed the late President and conduct the

¹⁶⁰ Ebeku, *supra* note 159, at 5. The Togolese army actually cajoled the National Assembly into electing Faure Gnassingbé as the President of the National Assembly, effectively replacing Fambaré Natchaba. As the President of the National Assembly, Gnassingbé could now assume the position of President without supposedly violating the Constitution. See Duodu, *infra* note 167. In carrying out these constitutional amendments, Parliament acted unconstitutionally for at least two reasons. First, Article 76 states that “[t]he functions of a member of the Government are incompatible with the exercise of any parliamentary mandate.” At the time Eyadéma died in 2005, creating a vacancy in the presidency, his son, Faure Gnassingbé was a member of his father's cabinet, serving as Minister of Equipment, Mines, Posts, and Telecommunications. Pursuant to Article 76, Parliament acted when it made Gnassingbé the president of the National Assembly and hence, the interim president. Second, Parliament violated the spirit of Article 144, which states that “[n]o procedure of revision may be engaged or pursued in a period of interim or of vacancy or when the integrity of the territory is infringed.” CONSTITUTION OF THE REPUBLIC OF TOGO 1992 [CONSTITUTION] Dec. 31, 2002, art. 144.

¹⁶¹ EBEKU, *supra* note 159, at 5.

¹⁶² *Id.* at 6.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

presidential election within sixty days as provided by the Constitution.”¹⁶⁵ Since Togolese authorities did not heed the admonitions of ECOWAS and the AU, these regional and sub-regional organizations “independently announced the suspension of Togo from their respective activities and the imposition of sanctions against the country, including a travel ban of the officials of the regime and an arms embargo.”¹⁶⁶ In response to continuing pressure from international and regional groups, Faure Gnassingbé resigned and vacated the position of interim President of the Republic of Togo on February 26, 2005.¹⁶⁷

Shortly after Gnassingbé resigned, the Deputy President of the National Assembly, Abass Bonfoh, was selected as the new President of the National Assembly and, as a consequence, Bonfoh would become the interim President of Togo, whose job it was to oversee presidential elections that had been scheduled for April 24, 2005.¹⁶⁸ The main candidates for the April 24, 2005 presidential elections were former President Eyadéma’s son, Faure Gnassingbé, who was representing the Rally of the Togolese People, the political party founded by his father (*Rassemblement du Peuple togolais*) (“RPT”),¹⁶⁹ and opposition leader, Emmanuel Bob-Akitani, of the Union of Forces for Change (*Union des Forces du Changement*) (“UFC”).¹⁷⁰

¹⁶⁵ *Id.*

¹⁶⁶ EBEKU, *supra* note 159, at 5. See also *African Group Imposes Sanctions on Togo*, VOA NEWS (Oct. 29, 2009), <https://www.voanews.com/archive/african-group-imposes-sanctions-togo>. See also *Sanctions Imposed on Togo*, NEWS24 (Feb. 19, 2005), <https://www.news24.com/Africa/News/Sanctions-imposed-on-Togo-20050219>; Press Release, U.S. Dep’t of State, Togo: Imposition of Sanctions by the Economic Community of West African States (Feb. 19, 2005), <https://2001-2009.state.gov/r/pa/prs/ps/2005/42493.htm>.

¹⁶⁷ See Cameron Duodu, *Togo’s New Dictator is Forced to Step Down*, THE GUARDIAN (Feb. 26, 2005), <https://www.theguardian.com/world/2005/feb/27/theobserver1>. See also Lydia Polgreen, *Togo Ruler, Surrendering to Pressure, Steps Down*, N. Y. TIMES, Feb. 26, 2005, <https://www.nytimes.com/2005/02/26/world/africa/togo-ruler-surrendering-to-pressure-steps-down.html>.

¹⁶⁸ See *Togo President Steps Down*, ALJAZEERA (Feb. 25, 2005), <https://www.aljazeera.com/archive/2005/02/20084914836449523.html>. See also Adewale Banjo, *Constitutional and Succession Crisis in West Africa: The Case of Togo*, 2 AFR. J. LEGAL STUD. 147, 155 (2008).

¹⁶⁹ Faure Gnassingbé replaced the RPT with a new political party called the Union for the Republic (*Union pour la République*) (“UNIR”).

¹⁷⁰ See *Opposition Choose Septuagenarian Bob-Akitani as Candidate for April Election*, NEW HUMANITARIAN (Mar. 15, 2005), <http://www.thenewhumanitarian.org/fr/node/221018> (noting, inter alia, the selection of Bob-Akitani as the candidate for the opposition candidate for the April

In the period leading up to the April 24, 2005 presidential election in Togo, “street violence and politically motivated killings were reported in many parts of the country . . . especially in the south, the stronghold of the opposition.”¹⁷¹ In addition, notes Banjo, “[t]he campaign period saw the escalation of violent confrontations between the ruling elites, led by Faure, and the opposition, led by Bob-Akitani.”¹⁷² When provisional results of the elections were announced on April 26, 2005, Gnassingbé had captured 60.22 percent of the vote to Bob-Akitani’s 38.6 percent.¹⁷³ On May 3, 2005, when the official results were released, the country’s Constitutional Court (*Cour constitutionnelle*) (“CC”) confirmed Gnassingbé’s victory.¹⁷⁴

The opposition refused to accept the official results and its leader, Bob-Akitani, later “declared himself president and called for an armed insurrection against the RPT government.”¹⁷⁵ The announcement of the official results, the confirmation of Gnassingbé as the winner by the CC, and Bob-Akitani’s declaration, produced significant levels of post-election violence in the capital city, Lomé, and in other parts of the country with significant opposition support.¹⁷⁶ As reported by *The Guardian*, “Togo slid deeper into civil conflict yesterday when at least six people were killed and dozens injured in clashes sparked by rival

24, 2005 presidential election in Togo). *See also* Banjo, *supra* note 168, at 157–158 (noting, inter alia, that Emmanuel Bob-Akitani, the opposition candidate for the April 24, 2005 election, was a member of the Mina ethnic group from southern Togo and a well-established opposition leader in Togolese politics).

¹⁷¹ Banjo, *supra* note 168, at 158.

¹⁷² *Id.* at 158. *See also* 1 U.S. DEP’T OF STATE, 26464PDF, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005 570 (2006) (noting that the April 24, 2005 presidential election in Togo was “marred by severe irregularities” and that “[t]he civilian authorities generally did not maintain effective control of the security forces.”).

¹⁷³ *See* Banjo, *supra* note 168, at 158.

¹⁷⁴ *See id.* at 158–59. *See also* FREEDOM HOUSE, Togo Report, in FREEDOM IN THE WORLD 805, 806 (2007) (Arch Puddington, Aili Piano, Camille Eiss & Tyler Roylance, eds., 2007) (noting that Gnassingbé was declared the winner of Togo’s 2005 presidential election with sixty percent of the vote).

¹⁷⁵ Banjo, *supra* note 168, at 159. *See also* Michael Kamber, *World Briefing Africa: Togo: Loser Declares Himself President*, N. Y. TIMES (Apr. 28, 2005), <https://www.nytimes.com/2005/04/28/world/world-briefing-africa-togo-loser-declares-himself-president.html>. *See also* Andrew Meldrum, *Six Die as Togo Clashes Intensify*, THE GUARDIAN (Apr. 28, 2005), <https://www.theguardian.com/world/2005/apr/28/westafrica.andrewmeldrum> (noting that opposition leader Bob-Akitani had denounced the official results of the 2005 Togolese presidential election and declared himself president).

¹⁷⁶ *See* Banjo, *supra* note 168, at 159.

claims of victory in the weekend presidential elections.”¹⁷⁷ In addition, *The Guardian* noted that “[o]pposition supporters wielded machetes against security forces in the capital, Lomé, as their leader, Emmanuel Akitani-Bob, denounced the poll as fraudulent and declared himself president of the tiny west African country.”¹⁷⁸ The Togolese League of Human Rights subsequently reported that as many 790 people had been killed and 4,345 were hurt because of the post-election violence.¹⁷⁹

Despite the fact that both the African Union and ECOWAS had “stood firmly against an attempt to foist Eyadéma’s son on the [Togolese] people” and that this had been recognized by the international community as “one of the most important victories of the African leaders against dictatorship on the continent,”¹⁸⁰ leaders of these regional organizations virtually ignored the brutal persecution of the Togolese opposition both during and after the election.¹⁸¹ As noted by Banjo, Nigeria’s Foreign Affairs Minister rejected any efforts by the opposition to ignore the results of the election.¹⁸²

Speaking with respect to the Togolese opposition’s refusal to recognize and accept the official results of the April 24, 2005 presidential election, Nigerian Federal Minister of Foreign Affairs, Oluyemi Adeniji, stated that “[i]t cannot stand . . . because an election has been held and someone has been declared winner.”¹⁸³ The Togolese League of Human Rights declared that as many as 790 people had been killed and 4,345 people were hurt in the country’s post-election violence.¹⁸⁴ While the European Parliament passed a

¹⁷⁷ Meldrum, *supra* note 175.

¹⁷⁸ *Id.* See also *Togo’s Election Brings Strife, Not Calm*, THE GUARDIAN (May 2, 2005), <https://www.theguardian.com/world/2005/may/02/westafrica.theeditorpressreview> (noting that riots had broken out in Togo after the son of former dictator, Eyadéma, had been declared winner of the April 24, 2005 presidential election).

¹⁷⁹ U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, *infra* note 184.

¹⁸⁰ *Togo’s Election Brings Strife, Not Calm*, *supra* note 178.

¹⁸¹ See Adewale Banjo, *The Politics of Succession Crisis in West Africa: The Case of Togo*, 25 INT’L J. WORLD PEACE 33, 42 (2008) (noting that the African Union and ECOWAS had declared that the imposition of Faure Gnassingbé on the Togolese people was essentially a coup d’état).

¹⁸² See Banjo, *supra* note 168, at 159.

¹⁸³ *Id.*

¹⁸⁴ *Togo: Human Rights Group Says 790 Killed, 4,345 Hurt in Election Violence*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (May 13, 2005), <https://reliefweb.int/report/togo/togo-human-rights-group-says-790-killed-4345-hurt-election-violence>. See also *Human Rights Group Says 790 Killed in*

resolution condemning the brutal persecution and suffocation of the opposition, both “France and the Economic Community of West African States . . . described the [April 24, 2005] vote as basically fair, while conceding [that there had] been some irregularities.”¹⁸⁵

Gnassingbé was elected to serve a five-year term as president. He was re-elected in 2010 and 2015. On May 9, 2019, the Togolese parliament approved a constitutional amendment allowing President Faure Gnassingbé to “potentially stay in office until 2030, despite widespread protests calling for the end of his family’s decades-long grip on power.”¹⁸⁶ The new constitutional amendment limited presidential terms to two five-year terms. However, because it did not apply retrospectively, Gnassingbé was eligible to stand as a candidate for the presidency in 2020 and 2025.¹⁸⁷ In presidential elections held on February 22, 2020, Gnassingbé captured 72 percent of the vote and the opposition candidate, Agbéyomé Kodjo of the Patriotic Movement for Democracy and Development (*Mouvement pour la démocratie et le développement*), (“MPDD”), received eighteen percent of the vote.¹⁸⁸

Election Violence, NEW HUMANITARIAN (May 15, 2005), <http://www.thenewhumanitarian.org/news/2005/05/13/human-rights-group-says-790-killed-election-violence>.

¹⁸⁵ *Id.*

¹⁸⁶ *Togo Changes Law to Let President Stand for Two More Terms*, ALJAZEERA (May 9, 2019), <https://www.aljazeera.com/news/2019/05/togo-law-president-stand-terms-190509180859448.html>.

¹⁸⁷ This is the new constitutional provision: “Le Président de la République est élu au suffrage universel, libre, direct, égal et secret pour un mandat de cinq (05) ans renouvelable une seule fois” [“The President of the Republic is elected by universal, free, direct, equal and secret suffrage for a term of five (05) years renewable only once”]. CONSTITUTION TOGOLAISE DE LA IV^E RÉPUBLIQUE [CONSTITUTION] May 15, 2019, art. 59 (Togo). Since the constitutional amendment was not applied retroactively, Gnassingbé was eligible to stand for a new five-year term in Togolese presidential election that was scheduled for February 20, 2020. *See Togo Changes Law to Let President Stand for Two More Terms*, DAILY MAIL (May 9, 2019), <https://www.dailymail.co.uk/wires/afp/article-7010165/Togo-changes-law-let-president-stand-two-terms.html>.

¹⁸⁸ *See News Wires, Togo’s President Faure Gnassingbé Wins Fourth Term*, FRANCE24 (Feb. 24, 2020), <https://www.france24.com/en/20200224-togo-president-faure-gnassingbe-wins-fourth-term-according-to-provisional-results>. *See also Togo President Gnassingbé Wins Re-Election*, DW AKADEMIE (Feb. 24, 2020), <https://www.dw.com/en/togo-president-gnassingb%C3%A9-wins-re-election/a-52494760>; Sally Hayden, *Togo’s President Takes Fourth Term in Power*, IRISH TIMES, Feb. 24, 2020, <https://www.irishtimes.com/news/world/africa/togo-s-president-takes-fourth-term-in-power-1.4183597>.

Since the 2019 constitutional amendment cleared the way for Gnassingbé to run for two more terms in office, he was able to win the presidential election in 2020, and will most likely do so in 2025, effectively remaining in office through 2030. Given the fact that Gnassingbé's party, the UNIR, dominates the National Assembly, the latter is likely to change the constitution again to allow Gnassingbé to stay in power past 2030.¹⁸⁹ The amendment also grants the president immunity from prosecution for any crimes committed while in office.¹⁹⁰

Gnassingbé's constitutional manipulation to stay in power indefinitely is referred to as a *constitutional coup*. The term is defined as "the amending or revising of the constitution to eliminate presidential term limits," allowing the incumbent president to remain in power indefinitely.¹⁹¹ As I have argued elsewhere, constitutional coups also include constitutional changes designed to: (1) frustrate the efforts of opposition parties to participate in national elections; (2) silence the regime's critics; (3) minimize political competition; and (4) generally enhance the ability of the incumbent government to act with impunity.¹⁹²

Since he came to power in 2005, Gnassingbé's activities in Togo following the death of his father, including the various constitutional manipulations, have directly impeded the deepening and institutionalization of democracy in the country and threatened the rule of law. His willingness to place himself above the law does not augur well for the rule of law in Togo. For example, when the U.S. Department of State issued its 2018 report on the human rights

¹⁸⁹ During the 2018 parliamentary elections in Togo, the UNIR captured fifty-nine of the ninety-one seats in the National Assembly. *See generally* Agence France-Presse, *Togo President's Party Wins Majority in Parliament*, VOA NEWS (Dec. 24, 2018), <https://www.voanews.com/africa/togo-presidents-party-wins-majority-parliament>.

¹⁹⁰ Article 75 states as follows: "Les anciens Présidents de la République sont, de plein droit, membres à vie du Sénat. Ils ne peuvent être ni poursuivis, ni arrêtés, ni détenus, ni jugés pour les actes posés pendant leurs mandats présidentiels" ["Former Presidents of the Republic are, as of right, life members of the Senate. They cannot be prosecuted, arrested, detained or tried for acts committed during their presidential terms"]. CONSTITUTION TOGOLAISE DE LA IV^e RÉPUBLIQUE, May 15, 2019, art. 75 (Togo), <https://www.idea.int/sites/default/files/publications/guide-to-risk-factors-for-elections-g5-sahel-external.pdf> (last visited on Sept. 30, 2020).

¹⁹¹ John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 CARDOZO INT'L COMP., POL'Y & ETHICS L. REV. 77, 141–142 (2018).

¹⁹² *Id.* at 142.

situation in Togo, it noted the pervasiveness of government impunity in the country. In addition to the discovery that prison guards at the Kpalime Civil Prison had beaten a detainee to death, the U.S. Department of State report also noted that government officials had “employed cruel, inhuman, or degrading treatment” and that the government “did not always respect judicial independence and impartiality.”¹⁹³ Perhaps, more importantly, it was determined that “[t]he executive branch exerted control over the judiciary, and judicial corruption was a problem” and, in addition, “[t]here was a widespread perception [that] lawyers bribed judges to influence the outcome of cases,” a process that effectively limited justice only to defendants who were rich enough to pay the necessary bribes.¹⁹⁴

As will be examined later in this article, Gnassingbé’s constitutional coup and other activities of his government in Togo, directly violate various provisions of the African Union’s African Charter on Democracy, Elections and Governance, of which Togo is a State Party.¹⁹⁵ In enacting the African Democracy Charter, the Member States of the African Union noted that they were committed to the promotion of “the universal values and principles of democracy, good governance, human rights and the right to development.”¹⁹⁶ In addition, Member States argued that they were “[c]oncerned about the *unconstitutional changes of government* that are one of the essential causes of insecurity, instability and violent conflict in Africa.”¹⁹⁷ The actions of both the Togolese military and the National Assembly, following the death of Eyadéma on February 5, 2005, were designed to bypass the constitutional process and install Gnassingbé as president. The change in the regime, as well as the 2019 constitutional amendments, provided Gnassingbé with the legal basis to potentially stay in power until 2030. These actions constituted instances of unconstitutional changes of government and are major obstacles to the entrenching of democratic governance and the rule of law in Togo.

¹⁹³ See U.S. Department of State, *infra* note 194.

¹⁹⁴ U.S. Department of State, *2018 Country Reports on Human Rights Practices: Togo* (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/togo/>.

¹⁹⁵ Togo signed the African Charter on Democracy, Elections and Governance on October 30, 2007 and ratified it on January 24, 2012. See African Union, *African Charter on Democracy, Elections and Governance, adopted on January 30, 2007, entered into force on February 15, 2012*, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> (last visited on Mar. 4, 2020); See also *infra* note 606.

¹⁹⁶ *Id.* at pmbl.

¹⁹⁷ *Id.* Emphasis added.

C. Paul Biya's Constitutional Coup in Cameroon

On November 4, 1982, Ahmadou Ahidjo, Cameroon's first president, announced his resignation and nominated his prime minister, Paul Biya, as his successor.¹⁹⁸ Two days later, on November 6, 1982, Paul Biya was installed as Ahidjo's constitutional successor. Although Biya had promised Cameroonians when he took office as president of Cameroon in 1982, that he would undertake institutional reforms to improve governance in the country, he was nevertheless "determined to maintain the political structure that he had inherited [from Ahidjo] and to remain the ultimate source of power in Cameroon."¹⁹⁹ The only real change that he made at this time was to replace the name of the country's only legally recognized political party, the Cameroon National Union (*Union nationale camerounaise*), with the Cameroon People's Democratic Movement ("CPDM").²⁰⁰ It has been noted that the word "democratic" in the CPDM was "supposed to signify that the party would henceforth be more democratic."²⁰¹ The reality, however, was that the country's political system remained as undemocratic as it had been during the period between 1961–1982, when Ahidjo was president. As argued by Professor Joseph Takougang, an expert on Cameroon political history, "Biya did not dismantle the repressive structures and institutions bequeathed him by his predecessor" and which "he had used effectively to enable him to remain in power for over two decades."²⁰²

Cameroon, however, was not immune to the so-called third wave of democratization that was sweeping the continent in the early-1990s.²⁰³ On May 26, 1990, the Anglophone political activist, John Fru Ndi, formed the Social Democratic Party ("SDF"), the first

¹⁹⁸ Joseph Takougang, *The Nature of Politics in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 67, 78 (John Mukum Mbaku & Joseph Takougang eds., 2004).

¹⁹⁹ *Id.* at 78–79.

²⁰⁰ *Id.* at 79.

²⁰¹ *Id.*

²⁰² *Id.* As of this writing (2020), Biya remains the President of the Republic of Cameroon, having held this position without interruption since 1982.

²⁰³ See John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the 'New' Global Era*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 1* (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (noting, inter alia, Africa's participation in the global democratic transition that began in the early-1990s). See also Julius O. Ihonvbere, *Where Is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy*, 43 *AFR. TODAY* 343 (1996) (examining Africa's participation in the third wave of democratization).

opposition political party in Cameroon since multiparty competition was outlawed in the country in 1966.²⁰⁴ Although Biya and his government were staunchly opposed to any efforts to re-introduce multiparty political competition in the country, he was eventually forced by domestic and external pressure, particularly from the country's main benefactor, France, to democratize the country's politics. In response to these pressures, "Biya's government finally agreed to open national political spaces for competition and allow the formation of opposition political parties."²⁰⁵ Thus, "in December 1990, Biya officially announced the return of multiparty politics to the country and, in doing so, he also provided Cameroonians with a certain degree of freedom of expression including the right of individuals to freely assembly, as well as for independent media to function."²⁰⁶

The limited political liberalization provided opportunities for the emergence of "several political parties, civil society organizations, and private newspapers."²⁰⁷ Among the political parties that emerged in Cameroon in the aftermath of the post-1990s political liberalization, was the SDF, which would become the country's most important opposition to the dominant and ruling CPDM. However, despite increased political competition in the country, Biya and the CPDM continued to control and dominate virtually all political spaces in the country.²⁰⁸ The first presidential elections after the legalization of

²⁰⁴ Takougang notes that "by September 1966, [President Ahidjo] had succeeded in coercing political leaders in West Cameroon to accept the idea of a de facto one party state." See Joseph Takougang, *Democracy and Democratization in Cameroon: Living with the Dual Heritage*, in MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA 203, 209 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2006). West Cameroon was one of the two States that formed the Federal Republic of Cameroon, which was formed in 1961 through merger of the *République du Cameroun* (i.e., the former UN Trust Territory of Cameroons under French administration which gained independence on January 1, 1960 and took the name *République du Cameroun*) and the UN Trust Territory of Southern Cameroons under British administration (or British Southern Cameroons), which gained independence on October 1, 1961. In the federation, which was called the Federal Republic of Cameroon, the *République du Cameroun* took the name East Cameroon and British Southern Cameroons became known as West Cameroon.

²⁰⁵ John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1, 44 (2019).

²⁰⁶ *Id.* at 44.

²⁰⁷ *Id.*

²⁰⁸ See MILTON KRIEGER, CAMEROON'S SOCIAL DEMOCRATIC FRONT: ITS HISTORY & PROSPECTS AS AN OPPOSITION POLITICAL PARTY (1990–2011) (2008) (examining the emergence of the SDF as the main political opposition in Cameroon).

multi-party politics in Cameroon took place on October 11, 1992 and Biya and the CPDM won with 40 percent of the vote. Opposition candidate, John Fru Ndi and the SDF came in second with 36 percent of the vote.²⁰⁹

Cameroon held its next presidential election on October 12, 1997. These elections were boycotted by most of the opposition parties and Biya and the CPDM emerged victorious with 92.6 percent of the vote.²¹⁰ In 1996, Cameroon amended its constitution and, for the first time, introduced the separation of powers, with what was supposed to be an independent judiciary.²¹¹ Of importance to this article is the fact that the 1996 constitutional amendment introduced term limits and extended the presidential term from five to seven years—the president was limited to two seven-year terms. According to Article 6, “[t]he President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once.”²¹² After the constitutional amendment, Biya, who was still serving the presidential term that he had won in 1992, subsequently won presidential elections in 1997 and 2004.²¹³

In anticipation of the 2011 presidential election, Biya was barred by the Constitution from standing for another term in office. However, in 2008, he had the constitution changed to remove the limit of two seven-year terms for presidents.²¹⁴ This constitutional coup allowed

²⁰⁹ ELECTIONS IN AFRICA: A DATA HANDBOOK 183 (Dieter Nohlen, Michael Krennerich & Bernhard Thibaut eds., 1999) (Table 2.9 Presidential Elections [Cameroon] 1965–1997).

²¹⁰ *Id.* at 183.

²¹¹ Constitutional expert, Professor Charles Manga Fombad, argues that “the 1996 [constitutional] amendment did not add anything substantive to the pre-existing practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon.” Charles M. Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 234, 247 (2000). The amended constitution was officially known as *Law No. 96–06 of 18 January 1996 to amend the Constitution of 2 June 1972*.

²¹² CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION] (*Law No. 96–06 of 18 January 1996 to amend the Constitution of 2 June 1972*), SR 996, art. 6(2).

²¹³ *Cameroon*, in FREEDOM IN THE WORLD 2011: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 127, 127 (Arch Paddington & Aili Piano eds., 2011).

²¹⁴ See *id.* at 127. See also *Cameroon Parliament Extends Biya’s Term Limit*, FRANCE24 (Nov. 4, 2008), <https://www.france24.com/en/20080411-cameroon-parliament-paul-biya-term-limit-extension>.

Biya to remain in power indefinitely.²¹⁵ For purposes of the present article, the most important provisions are contained in Article 6(2), which replaces the same article in the 1996 version of the Constitution. The new article states as follows: “The President of the Republic shall be elected for a term of office of 7 (seven) years. *He shall be eligible for re-election.*”²¹⁶ Comparing the statement “*He shall be eligible for re-election*” in the amended constitution to “*He shall be eligible for re-election once*” in the 1996 version of the Constitution, it can be seen that the 2008 amendment effectively allowed Biya to stand for re-election for as many times as he desired.²¹⁷

The 2008 constitutional amendment also granted the president immunity from all crimes committed while in office. Article 53(3) states as follows: “Acts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions.”²¹⁸ Most Cameroonians thought that Biya would retire in 2018, after having been in office as president for thirty-six years. However, as 2018 approached, he announced that he would participate in the upcoming presidential elections as a candidate for the position of President of the Republic of Cameroon.²¹⁹

²¹⁵ The constitution that was amended in 2008 was the Constitution of Cameroon, 1996, whose official name is *Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972* [hereinafter “Constitution of Cameroon, 1996”]. The relevant provision of the Constitution of Cameroon, 1996, which was the subject of the amendment, is Article 6(2), which states as follows: “The President of the Republic shall be elected for a term of 7 (seven) years. He shall be eligible for re-election once.” The amended constitution is officially known as *Law No. 2008-1 of 14 April 2008 to Amend and Supplement some Provisions of Law No. 96-6 of 18 January 1996 to amend the constitution of 2 June 1972 (Loi n° 2008-1 du 14 avril 2008 modifiant et complétant certaines dispositions de la loi n° 96-6 du 18 janvier 1996 portant révision de la Constitution du 2 juin 1972)* [hereinafter “Constitution of Cameroon, 1996 (rev. 2008)”]. After the constitution was amended, Article 6(2) read as follows: “The President of the Republic shall be elected for a term of seven (7) years. He shall be eligible for re-election.” Note that the amendment removed the word “once,” effectively allowing the president to run for re-election multiple times. See Constitution of Cameroon, 1996 (rev. 2008), art. 6(2).

²¹⁶ *Id.* at art. 6(2). Emphasis added.

²¹⁷ CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION], 1996 (as amended through 2008).

²¹⁸ CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION] 1996 (as amended through 2008), art. 53(3).

²¹⁹ See Moki Edwin Kindzeka, *Reaction Mixed as Cameroon's Biya Prepares to Run Again*, VOA NEWS (July 16, 2018), <https://www.voanews.com/africa/reaction-mixed-cameroons-biya-prepares-run-again>.

Writing about Paul Biya's constitutional coup in Cameroon, scholars have noted that it is not an "accident that Paul Biya is the second-longest-ruling head of state in the world who isn't a monarch. Nor that Cameroon's constitutional council confirmed today that Biya, who has been in power for 36 years, has won a seventh term in office and is set to lead the country until 2025."²²⁰ These statements were made in reference to the October 7, 2018 presidential election in Cameroon, which was adjudged by domestic and international observers to be marred with many irregularities.²²¹ For example, there was virtually no credible participation in three of the country's ten regions because of an extremely harsh crackdown by central government forces on "an emerging secessionist movement"²²² in the country's two Anglophone Regions (North West and South West Regions)²²³ and parts of the north, where peace was being threatened by the extremist group, Boko Haram.²²⁴

Although there are many ways to illustrate the extent to which Biya has destroyed and retarded the entrenching of democracy and constitutional government in Cameroon, there is no better example, than his government's response to the peaceful demonstrations that started in the Anglophone Regions in late 2016. On October 16, 2016, lawyers in Cameroon's Anglophone Regions²²⁵ "went on a peaceful strike to protest the government's refusal to address their grievances."²²⁶ Earlier, the Anglophone lawyers had requested that the "adjudication of court cases in the Anglophone Regions be undertaken

²²⁰ See Jefcoate O'Donnell and Robbie Gramer, *Cameroon's Paul Biya Gives a Master Class in Fake Democracy*, FOREIGN POLICY (Oct. 22, 2018), <https://foreignpolicy.com/2018/10/22/cameroons-paul-biya-gives-a-master-class-in-fake-democracy/>.

²²¹ *Id.*

²²² O'Donnell and Gramer, *supra* note 220.

²²³ See Daniel Finnan, *Cameroon Elections Hit by Violence in Anglophone Regions, Calm and Quiet in Douala*, RFI (Oct. 8, 2018), <http://www.rfi.fr/en/africa/20181008-cameroon-elections-hit-violence-anglophone-regions-calm-and-quiet-douala>.

²²⁴ Landry Signé, *Cameroon's Contentious Elections Come at a Precarious Time in the Country's History*, THE BROOKINGS INSTITUTION (Oct. 6, 2018), <https://www.brookings.edu/opinions/cameroons-contentious-elections-come-at-a-precarious-time-in-the-countrys-history/>.

²²⁵ Cameroon is currently divided into 10 administrative units called "Regions." The Anglophone section of the country consists of two regions—the North West Region and the South West Region. See PETER TSE ANGWAFO, CAMEROON'S PREDICAMENTS 156 (2014) (noting that Cameroon is currently divided into ten regions).

²²⁶ Mbaku, *International Law and the Anglophone Problem*, *supra* note 205, at 1.

only in English and based on common law” and that the government should return the country to the two-state federation that “had been established by the Federal Constitution of 1961 as a way to guarantee the equality of English and French, as well as the peaceful coexistence of both legal systems.”²²⁷ Anglophone teachers also joined the protests, arguing that by mandating the French language in their schools, as well as implementing the French Civil law system instead of the Anglophone common law-based legal system, the Francophone-dominated central government would effectively destroy the Anglophone identity in Cameroon.²²⁸

Since unification between the UN Trust Territory of Southern Cameroons and the *République du Cameroun* in 1961 to found what is now the Republic of Cameroon, Anglophones have been subjected to significant levels of political and economic exploitation by the Francophone-dominated government in Yaoundé.²²⁹ Specifically, Anglophone teachers were frustrated because the central government was sending French-speaking teachers, “with relatively poor English language skills, to teach subjects other than French language and literature in Anglophone schools.”²³⁰ The results, cried Anglophone teachers, “was extremely poor performance by students who were receiving instruction from teachers who were not fluent in the English language.”²³¹ As the strike action progressed, many citizens joined in order to “decry, inter alia, the failure of the central government to provide them with basic services, including institutional environments conducive to job creation, economic growth, and development.”²³²

Instead of seeking to engage in a dialogue with the protesting Anglophones, many of whom were arguing that the policies of the central government prevented them from exercising their right to internal self-determination, the government dispatched “security forces [who] used live bullets and tear gas to disperse” the protesters, killing many of them.²³³ Despite condemnation by many international

²²⁷ *Id.* at 2.

²²⁸ *Id.*

²²⁹ See, e.g., MUFOR ATANGA, THE ANGLOPHONE CAMEROON PREDICAMENT (2011) (examining, inter alia, the marginalization of Anglophones in the Republic of Cameroon).

²³⁰ Mbaku, *International Law and the Anglophone Problem*, *supra* note 205, at 3.

²³¹ *Id.*

²³² *Id.*

²³³ See Conor Gaffey, *Understanding Cameroon's Anglophone Protests*, NEWSWEEK (Feb. 13, 2017), <https://www.newsweek.com/cameroon-anglophone-problem-paul-biya-556151>; see also Siobhán O'Grady, *Divided by Language: Cameroon's Crackdown on Its English-speaking Minority is Fueling*

actors, including Amnesty International,²³⁴ Cameroon's military and other security forces, "continued to brutally suppress any attempts by citizens to peacefully protest perceived or actual government injustices."²³⁵ In fact, as part of the central government's response to the peaceful strikes by Anglophones, the government banned internet access in the two Anglophone Regions and effectively cut off 20 percent of the population from the rest of the country, and the world.²³⁶ By the summer of 2018, the international press was reporting that as many as 2,000 people had been killed and 170 Anglophone villages had been burned down, effectively destroying valuable farmland and homes.²³⁷ In addition, the UN reported that a humanitarian crisis had materialized, as is evidenced by the fact that as many as 160,000 people were internally displaced, and 21,000 were forced to flee to neighboring countries.²³⁸ Some international observers referred to the conflict in the Anglophone Regions of Cameroon as a genocide.²³⁹

President Biya's decision to respond violently, and with extremely repressive measures, to the peaceful Anglophone protestors against their continued political and economic marginalization, and their inability to exercise their right to internal self-determination, not only further destroyed any prospects for the deepening and institutionalization of democracy in Cameroon, but has actually created a situation in which the country is likely to disintegrate. In fact, on October 1, 2017, radical Anglophone activists, known to the central government as "separatists," declared the independent Federal Republic of Ambazonia, consisting of two the Anglophone Regions of

Support for a Secessionist Movement, WASH. POST (Feb. 19, 2019), <https://www.washingtonpost.com/graphics/2019/world/cameroon-anglophone-crisis/>.

²³⁴ See, e.g., *Cameroon: A Turn for the Worse: Violence and Human Rights Violations in Anglophone Cameroon*, AMNESTY INTERNATIONAL (June 12, 2018), <https://www.amnesty.org/en/documents/afr17/8481/2018/en/>.

²³⁵ Mbaku, *International Law and the Anglophone Problem*, *supra* note 205, at 4.

²³⁶ *Id.*

²³⁷ See Samuel Smith, *Cameroon: Over 2,000 Killed, 170 Villages Burned as Military Seizes Churches*, CHRISTIAN POST (Aug. 11, 2018), <https://www.christianpost.com/news/cameroon-over-2000-killed-170-villages-burned-churches-taken-over-as-military-bases-226739/>.

²³⁸ *Id.*

²³⁹ See Peter Zongo, *'This is a Genocide': Villages Burn as War Rages in Blood-soaked Cameroon*, THE GUARDIAN (May 30, 2018), <https://www.theguardian.com/global-development/2018/may/30/cameroon-killings-escalate-anglophone-crisis>.

Cameroon.²⁴⁰ The central government's response to the unilateral and symbolic declaration by the Anglophone separatists was more indiscriminate killings of Anglophones and the continued destruction of their villages.²⁴¹

D. Military Coups in Egypt: 1952 & 2013

On July 23, 1952, young soldiers, all members of the Free Officers Movement ("FOM"), overthrew the government of King Farouk I.²⁴² The FOM was led by Gamel Abdel Nasser Hussein (generally known as Gamel Abdel Nasser) and General Muhammad Naguib. While Nasser was the brains behind the coup, it was General Muhammad Naguib who emerged to take control of the post-coup government. Nasser feared that he and his fellow soldiers might not be taken seriously because of their youth.²⁴³ Nevertheless, two years later in February 1954 Nasser forced Naguib to resign.²⁴⁴ However, the presidency of Egypt remained vacant until "Nasser was elected president of the young republic by a referendum on June 23, 1956."²⁴⁵ The coup was also referred to as the July Revolution. Although the initial aim of Nasser and other coup makers was simply to oust King Farouk I, the military action eventually evolved into a movement with more broader objectives, which included "the abolition of the constitutional monarchy, establishment of a republic, putting an end to British occupation of the country, and seeking the independence of Sudan, which had been governed as an Anglo-Egyptian condominium."²⁴⁶ Nasser's post-coup government was a

²⁴⁰ See, e.g., Azad Essa, *Cameroon's English-speakers call for Independence*, ALJAZEERA (Oct. 1, 2017), <https://www.aljazeera.com/news/2017/10/171001123925310.html>.

²⁴¹ See Amindeh Blaise Atabong, *Cameroon Armed Forces and Separatists have the Anglophone Region on Lockdown ahead of Elections*, QUARTZ AFRICA (Oct. 2, 2018), <https://qz.com/africa/1410357/cameroon-army-anglophone-separatists-have-ambazonia-region-on-lockdown/>.

²⁴² See JOEL GORDON, *NASSER'S BLESSED MOVEMENT: EGYPT'S FREE OFFICERS AND THE JULY REVOLUTION* 4 (1992) (examining the Egyptian military coup of 1952 that overthrew the government of King Farouk).

²⁴³ *Id.* at 59.

²⁴⁴ See COOK, *infra* note 247, at 56.

²⁴⁵ THE PRINCETON ENCYCLOPEDIA OF ISLAMIC THOUGHT 385 (Gerhard Bowering ed., 2013).

²⁴⁶ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 333, n. 231.

revolutionary one that embraced Arab nationalism and opposed imperialism.²⁴⁷

Egypt's 1952 "revolution" put the military in a position to dominate Egyptian politics for many years thereafter. The position of "president" was created after the Revolution of 1952 and "following the establishment of the Egyptian Republic on June 18, 1953," General Mohammed Naguib, one of the leaders of the military coup that overthrew the monarchy of King Farouk I, became the first president of Egypt.²⁴⁸ Following an attempt to assassinate Nasser by the Muslim Brotherhood, Naguib, who was said to have had connections with the Brotherhood, "was ousted as president on November 14, 1954" and "placed under house arrest at his home outside of Cairo."²⁴⁹ He was eventually released by President Anwar al-Sadat in 1971, following Nasser's death the previous year.²⁵⁰

After replacing Naguib, first as prime minister, and then as president in 1954, Nasser, himself a military officer, and part of the leadership that overthrew King Faouk I, proceeded to launch "an ambitious agenda that included economic and military expansions of Egypt and pan-Arab nationalism led by Egypt."²⁵¹ Nasser's vision, especially that which included creating a geopolitical community of Arab nations, "put him at odds with Britain and France, the long-standing colonial powers in the region. In July 1956, Nasser nationalized the Suez Canal."²⁵² When Nasser died in 1970,²⁵³ he was succeeded by his vice president and constitutional successor, Anwar al-Sadat.²⁵⁴ Seen by many Egyptians, particularly Nasserites, as a "political lightweight," Sadat was expected to remain in power only temporarily.²⁵⁵ It has been argued that "[t]he new Nasserites were pro-USSR, authoritarian in their governing style, and hostile to peace with Israel," and that although "[t]hey accepted Sadat's nomination by the

²⁴⁷ See STEVEN A. COOK, *THE STRUGGLE FOR EGYPT: FROM NASSER TO TAHRIR SQUARE* 56 (2012).

²⁴⁸ See HARRIS M. LENTZ, *HEADS OF STATES AND GOVERNMENTS: A WORLDWIDE ENCYCLOPEDIA OF OVER 2,300 LEADERS, 1945 THROUGH 1992*, 242 (2013).

²⁴⁹ LENTZ, *supra* note 248, at 242.

²⁵⁰ *Id.*

²⁵¹ ROBERT P. GRAWTHWOL AND DONITA M. MOORHUS, *BRICKS, SAND, AND MARBLE: U.S. ARMY CORPS OF ENGINEERS CONSTRUCTION IN THE MEDITERRANEAN AND MIDDLE EAST, 1947–1991*, 95 (2009).

²⁵² *Id.* at 96.

²⁵³ DEREK VARBLE, *THE SUEZ CRISIS* 82 (2009).

²⁵⁴ ARTHUR GOLDSCHMIDT, JR., *A BRIEF HISTORY OF EGYPT* 185 (2008).

²⁵⁵ *Id.*

National Assembly and approval by the ASU²⁵⁶ and the Egyptian people for the presidency, in accordance with the 1964 Constitution,” they believed that given their control of the “secret police, the main ministries, and the information network (their centers of power), they would ease Sadat out and carry out Nasser’s program.”²⁵⁷ However, in 1971, “apprised of his foes’ plot [against him], Sadat took over the army and dismissed all the Nasserites” and in doing so, he effectively “confirmed his hold on the presidency and began dismantling his predecessor’s regime.”²⁵⁸

Given the fact that Anwar al-Sadat was a senior member of the Free Officers who overthrew King Farouk I in the Egyptian Revolution of 1952, the Egyptian government, under Naguib, Nasser, and Sadat, remained essentially under the control of the military.²⁵⁹ At the time Sadat became president of Egypt in 1970, Israel occupied the Suez Canal Zone.²⁶⁰ After failing to regain control of the Canal Zone through diplomatic means, and while noting that the presence of the U.S.S.R. in Egypt was a contributing factor, Sadat expelled the Soviets and began a major effort to rebuild the Egyptian military.²⁶¹ On October 6, 1973, Egyptian and Syrian armies, armed “with advanced Soviet weapons, launched a two-front offensive on Israel, from the north and the south.”²⁶² The Egyptian Army, with support from the country’s air force, which was led by General Hosni Mubarak, took control of the Suez Canal and pushed out the Israelis. Israel had been occupying the Sinai Peninsula, which included the east bank of the Suez Canal, since the end of the 1967 Six-Day War. After the Egyptian

²⁵⁶ The ASU was the Arab Socialist Union, which was founded by Gamal Abdel Nasser in December 1962 as Egypt’s sole political party. This political party grew out of the Free Officers Movement of the Egyptian Revolution of 1952. *See, e.g.,* RAMI GINAT, EGYPT’S INCOMPLETE REVOLUTION: LUFTI AL-KHULI AND NASSER’S SOCIALISM IN THE 1960S, 149 (1st ed. 1997).

²⁵⁷ GOLDSCHMIDT, JR., *supra* note 254, at 185.

²⁵⁸ *Id.*

²⁵⁹ MAGDALENA ALAGNA, MIDDLE EAST LEADERS: ANWAR SADAT 30 (2004) (noting, *inter alia*, that “[i]n 1939, Sadat and Nasser formed a revolutionary group called the Free Officers Organization.”).

²⁶⁰ JAN B. YOUNG, THE ASSASSINS: FORTY-SIX STORIES OF FAMOUS AND INFAMOUS ASSASSINATIONS AROUND THE WORLD AND THROUGH TIME 164 (2010).

²⁶¹ *See* YOUNG, *supra* note 260, at 164.

²⁶² *See The October Arab-Israeli War of 1973: What Happened?*, AL JAZEERA (Oct. 8, 2018), <https://www.aljazeera.com/indepth/features/2017/10/arab-israeli-war-of-1973-what-happened-171005105247349.html> (noting that, to Israelis, the war was known as the Yom Kippur War because it started on Israel’s Yom Kippur religious holiday and to Egyptians and other Arab States, the war was called the October War). *See id.*

Army crossed into the Israeli-occupied Sinai in 1973, the Israelis counterattacked three days later. The Israelis successfully crossed the canal and “came within a hundred kilometers of Cairo,” the capital of Egypt.²⁶³ The Camp David Accords, an agreement between Israel and Egypt that was negotiated with the help of U.S. president Jimmy Carter, resulted in Israel ceding Sinai back to Egypt. Egyptians could therefore argue that they had actually won the war and had effectively retrieved their property—the Suez Canal.²⁶⁴

On October 6, 1981, Sadat was assassinated by four military officers, including Lt. Khalid al-Islambouli of the Islamic group known as Al-Jihad, during a military parade held in Cairo to commemorate the crossing of the Suez Canal, and the subsequent occupation of part of the Sinai Peninsula at the beginning of the October War against Israel in 1973.²⁶⁵ Since the killing of Sadat, parties have disagreed as to the reason for the assassination of the Egyptian leader. It has been argued that Sadat’s decision to sign a peace agreement with Israel, “angered many Egyptians and led to violent demonstrations against him” throughout the country.²⁶⁶ According to then U.S. Secretary of State Alexander M. Haig, Sadat was killed by “Islamic fundamentalists” inside “the Egyptian Army” who were discontent “with the peace treaty that Mr. Sadat [had] signed with Israel.”²⁶⁷ Nevertheless, some scholars have argued that the main

²⁶³ Wendell Steavenson, *Egypt: Remembering the 6th of October*, THE NEW YORKER, (Oct. 6, 2011) <https://www.newyorker.com/news/wendell-steavenson/egypt-remembering-the-6th-of-october>.

²⁶⁴ See Steavenson, *supra* note 263; see also Asaf Siniver, *Introduction*, in THE YOM KIPPUR WAR: POLITICS, LEGACY, DIPLOMACY 1, 1–10 (Asaf Siniver ed., 2013) (noting that the peace treaty, usually referred to as the Camp David Accords, was mediated by Jimmy Carter and signed on September 17, 1978); see, e.g., DARRAJ, *infra* note 267, at 53.

²⁶⁵ See Dan Gundersman, *A Deep Look at the Shrewd and Complex Egyptian President, Anwar Sadat, Who was Assassinated in Cairo 35 Years Ago*, NEW YORK DAILY NEWS (Oct. 7, 2016), <https://www.nydailynews.com/news/world/deep-anwar-sadat-killed-cairo-35-years-article-1.2821724>; See also Mohammed Fadel Fahmy, *30 Years Later, Questions Remain Over Sadat Killing, Peace with Israel*, CNN (Oct 6, 2011), <https://www.cnn.com/2011/10/06/world/meast/egypt-sadat-assassination/index.html>.

²⁶⁶ *The Assassination of Egypt’s President Sadat*, BBC (Oct. 7, 2015), <https://www.bbc.com/news/av/world-radio-and-tv-34424880/the-assassination-of-egypt-s-president-sadat>.

²⁶⁷ See *Who Murdered President Sadat*, N.Y. TIMES (Oct. 7, 1981), <https://www.nytimes.com/1981/10/07/world/who-murdered-president-sadat.html> (noting that it is said that al-Islambouli (also spelled “al-Islambuli”) had declared publicly that “I am guilty of killing Sadat and I admit that. I am proud of it

reason for the assassination of Anwar al-Sadat, was the apex of the struggle between extreme Islam and modern statehood in Egypt.²⁶⁸

Susan Muaddi Darraj, a prolific writer on Arab issues, has argued that while the West, especially the United States, hailed Sadat as a “hero who bravely took on the challenge of making peace with Israel, an avant-garde leader with a broad vision, [t]he Arab World generally felt that Sadat had betrayed them in signing a peace treaty with Israel that did not comprehensively address Arab and Palestinian grievances with the Jewish state.”²⁶⁹ On October 13, 1981, Hosni Mubarak, the former Egyptian air force officer who had been appointed as Vice President by Sadat in 1975, “was proclaimed [by referendum] President of the Arab Republic of Egypt” holding this position until he was forced by a popular revolution, to step down on February 11, 2011.²⁷⁰ Thus, from 1952 to 2011, the Egyptian state remained under the control of the military and made virtually no inroads towards democratic governance.

Widespread protests, a feature of the Arab Spring, began against the government of Hosni Mubarak on January 25, 2011.²⁷¹ The Arab Spring began with the “self-immolation” of the Tunisian fruit vendor, Tarek el-Tayeb Mohamed Bouazizi on December 17, 2010. That day, city officials had confiscated Bouazizi’s goods “during a minor altercation over paperwork.”²⁷² As a result of the “humiliation and frustration,” which Bouazizi felt was the “latest in a long line of incidents of petty harassment,” he “set himself on fire later that day in

because the cause of religion was at stake.”); SUSAN MUADDI DARRAJ, HOSNI MUBARAK 58 (2007).

²⁶⁸ Ephraim Kahana & Sagit Stivi-Kerbis, *The Assassination of Anwar al-Sadat: An Intelligence Failure*, 27 INT’L J. OF INTELLIGENCE & COUNTERINTELLIGENCE 178, 178 (2014).

²⁶⁹ DARRAJ, *supra* note 267, at 58.

²⁷⁰ NAEL SHAMA, EGYPTIAN FOREIGN POLICY FROM MUBARAK TO MORSI: AGAINST THE NATIONAL INTEREST 62 (2014).

²⁷¹ DAVID D. KIRKPATRICK, INTO THE HANDS OF THE SOLDIERS: FREEDOM AND CHAOS IN EGYPT AND THE MIDDLE EAST 30 (2019) (noting that January 25 was Police Day in Egypt, “the annual holiday that commemorated the massacre of fifty policemen who had resisted the British army in 1952.”).

²⁷² See David McMurray & Amanda Ufheil-Somers, *Part One: Tunisia*, in THE ARAB REVOLTS: DISPATCHES ON MILITANT DEMOCRACY IN THE MIDDLE EAST 13, 13 (David McMurray & Amanda Ulheil-Somers eds., 2013). See also Simanti Lahiri, SUICIDE PROTEST IN SOUTH ASIA: CONSUMED BY COMMITMENT 136 (2014) (noting the self-immolation of Bouazizi, which served “as the impetus for the ‘Arab Spring’”); Jonathan Smolin, MOROCCAN NOIR: POLICE, CRIME, AND POLITICS IN POPULAR CULTURE 1 (2013) (noting the December 17, 2010 self-immolation of Tunisian vegetable seller, Mohamed Bouazizi).

front of the local police station.”²⁷³ Subsequently, reports of Bouazizi’s self-immolation “spread quickly across the country and proved the catalyst that launched demonstrations throughout Tunisia and eventually across the Arab world.”²⁷⁴

The fall of the Tunisian government on January 24, 2011, and President Zine el-Abidine Ali’s subsequent flight into exile, energized Egyptians, who soon filled “public spaces in Cairo, Port Said, Alexandria and smaller cities.”²⁷⁵ The Egyptians eventually brought down the regime of Mubarak on February 11, 2011.²⁷⁶ The Arab Spring appeared to have opened a window for reforms to transition countries, such as Egypt and Tunisia, to democratic governance. Following Mubarak’s ouster, the Egyptian military took over control of the apparatus of government. Mohamed Hussein Tantawi, Chairman of the Supreme Council of the Armed Forces, assumed the position of de facto interim head of state.²⁷⁷ After a March 19, 2011 referendum in which 77 percent of the voters favored changes to the 1971 constitution, “Tantawi was mandated to oversee the preparation and conduct of fresh parliamentary and presidential elections.”²⁷⁸

However, as time passed, the country’s prodemocracy activists began to demand that Tantawi and the military proceed, without delay, to transfer the government to a civilian administration. Meanwhile, violent clashes between security forces and protesters intensified in Cairo and many other cities around Egypt. Ignoring the worsening political, economic, and social conditions in the country, the military proceeded “with its schedule for national parliamentary elections in stages from Nov. 2011 to Jan. 2012.”²⁷⁹ As preparations for the elections proceeded, “[m]oderate Islamists aligned to the Muslim Brotherhood’s Freedom and Justice Party emerged as the strongest political force in the elections and were predominant in the new parliament that held its inaugural session on 23 Jan. [2012].”²⁸⁰

²⁷³ *Id.*

²⁷⁴ See David McMurray & Amanda Ufheil-Somers, *Part One: Tunisia*, in *THE ARAB REVOLTS: DISPATCHES ON MILITANT DEMOCRACY IN THE MIDDLE EAST* 13, 13 (David McMurray & Amanda Ufheil-Somers eds., 2013).

²⁷⁵ See McMurray and Ufheil-Somers, *supra* note 272.

²⁷⁶ *Id.* at 1.

²⁷⁷ See *Egypt*, in *THE STATESMAN’S YEARBOOK 2013: THE POLITICS, CULTURES AND ECONOMIES OF THE WORLD* 423, 425 (Barry Turner ed., 2012).

²⁷⁸ *Id.* at 425.

²⁷⁹ *Id.*

²⁸⁰ *Egypt*, *supra* note 277, at 425; see also Jeffrey Fleishman & Amro Hassan, *Egypt’s New Parliament Holds Inaugural Session*, LOS ANGELES

On February 13, 2011, the Egyptian military “dissolved parliament and suspended the constitution, . . . meeting two key demands of protesters who [had] been keeping up pressure for immediate steps to transition to democratic, civilian rule after forcing Hosni Mubarak out of power.”²⁸¹ After Mubarak’s ouster, the Supreme Council of the Armed Forces (“SCAF”), which emerged as the ruling body, appointed a committee of jurists and tasked it with drafting proposed constitutional amendments.²⁸² After the constitutional changes were approved by referendum on March 19, 2011, the road was cleared for parliamentary and then presidential elections. In the parliamentary elections, the voters were expected to select “498 members of the People’s Assembly.”²⁸³ Official results showed that the Muslim Brotherhood’s Freedom and Justice Party (“FJP”) had “won the largest number of seats under Egypt’s complex electoral system.”²⁸⁴

Egypt’s 2012 presidential election was conducted in two rounds: the first round took place during May 23–24, 2012, and the second one was carried out from June 16 to June 17, 2012.²⁸⁵ This was the second presidential election in Egypt’s political history, in which more than one candidate was competing for the position of president. The electoral commission officially declared that Mohamed Morsi “had

TIMES, (Jan. 23, 2012) <https://www.latimes.com/archives/la-xpm-2012-jan-23-la-fg-egypt-parliament-20120124-story.html>.

²⁸¹ See *Egypt Army Dissolves Parliament, Suspends Constitution*, THE JERUSALEM POST (Feb. 13, 2011), <https://www.jpost.com/Middle-East/Egypt-army-dissolves-parliament-suspends-constitution>.

²⁸² Marty Harris, *The Egyptian Constitutional Referendum of March 2011: A New Beginning?*, PARLIAMENT OF AUSTRALIA: FLAGPOST (Mar. 29, 2011), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2011/March/The_Egyptian_constitutional_referendum_of_March_2011_a_new_beginning.

²⁸³ *Egypt’s Islamist Parties Win Elections to Parliament*, BBC (Jan. 21, 2012), <https://www.bbc.com/news/world-middle-east-16665748>.

²⁸⁴ *Egypt’s Islamist Parties Win Elections to Parliament*, *supra* note 283; see also Uzi Rabi, *The Obama Administration’s Middle East Policy: Changing Priorities*, in *THE ARAB SPRING: WILL IT LEAD TO DEMOCRATIC TRANSITIONS?* 241, 248 (Clement Henry & Jang Ji-Hyang eds., 2012) (noting that “[i]n the final stages of the elections to the Lower House of Parliament it is the Islamist parties, namely the Muslim Brotherhood’s Freedom and Justice Party and the ultraconservative Al-Nur Party, that have emerged as the main visitors of Egypt’s parliamentary elections.”).

²⁸⁵ MOHAMMED EL-NAWAWY & MOHAMAD HAMAS EL-MASRY, *REVOLUTIONARY EGYPT IN THE EYES OF THE MUSLIM BROTHERHOOD: A FRAMING ANALYSIS OF IKHWANWEB* 18 (2018) (noting that Egypt’s 2012 Presidential Elections took place in two rounds which were held on “May 23–24, 2012, and June 16–17, 2012.”).

won the election run-off, in which he secured 51.7 percent of the vote to become Egypt's fifth president."²⁸⁶ Shortly after he was declared the winner, and Egypt's president-elect, Morsi addressed the Egyptian people and promised that he would "restore their rights."²⁸⁷ Morsi also told the people that he had resigned his membership in the Muslim Brotherhood, as well as the Freedom and Justice Party.²⁸⁸ Perhaps, more importantly, he promised the Egyptian people that his presidency would be a presidency for all Egyptians.²⁸⁹

In winning the 2012 presidential election, Morsi became the first Islamist to ascend to the presidency of Egypt, the country's first democratically-elected president, and the first non-military person to hold this high office since the government of King Farouk I was overthrown in the Egyptian Revolution.²⁹⁰ Shortly after taking office, Morsi "reversed earlier SCAF constitutional decrees, to the delight of Egypt's revolutionary forces."²⁹¹ It appeared that the Egyptian revolution of 2011 had created an environment in which the country could finally begin a viable transition to real democratic governance.

On June 30, 2012, Mohamed Morsi was sworn in at the Supreme Constitutional Court as the first democratically elected civilian president of Egypt.²⁹² However, on July 3, 2013, after just one year in power, Morsi's government was ousted by a military coup. General Abdel Fattah el-Sisi, the leader of the coup that overthrew Morsi's government, repeated a claim that has been made by many other African military leaders who have overthrown their governments—the military had acted to prevent "the collapse of the state."²⁹³ Shortly after the military took control of the government, it implemented an extremely aggressive program to suppress the Muslim Brotherhood ("MB") and, in addition to the arrest of many of the organization's members, the country's interim cabinet officially declared the MB a terrorist group on December 25, 2013.²⁹⁴

²⁸⁶ *Id.* at 18.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See SELMA BOTMAN, EGYPT: FROM INDEPENDENCE TO REVOLUTION, 1919–1952, 54, 154 (1991).

²⁹¹ EL-NAWAWY AND EL-MASRY, *supra* note 285, at 18.

²⁹² See KENNETH GOOD, TRUST IN THE CAPACITIES OF THE PEOPLE, DISTRUST IN ELITES 176 (2014).

²⁹³ DAVID D. KIRKPATRICK, INTO THE HANDS OF SOLDIERS: FREEDOM AND CHAOS IN EGYPT AND THE MIDDLE EAST 305 (2018).

²⁹⁴ See *Egypt Declares Muslim Brotherhood a Terrorist Group*, THE GUARDIAN (UK) (Dec. 25, 2013), <https://www.theguardian.com/world/2013/dec/25/egypt->

But, how could the MB, which had come into power through a people-led democratic revolution, won all its democratically-conducted elections, and was expected by Egyptians to lead the post-Arab Spring transition to democratic governance, have failed so woefully at deepening and institutionalizing democracy in the country? Members and supporters of the MB argued that “the failure of Morsi’s year-long rule came as a result of what the MB leaders describe as Egypt’s ‘deep state’ which includes the military, security services, bureaucracy, media, and judiciary” and that the country’s deep state had “sought to resurrect the military dictatorship that Egyptians overthrew after the January 25th Uprising” which led to the ouster of Mubarak.²⁹⁵

The deep state, argued that supporters of the MB, had “conspired against [President Morsi] by undermining the overall quality of Egyptian life in order to prepare for the coup” and by advancing this narrative, the MB and its supporters, argues Mahmoud Jaraba, a scholar of the Egyptian Muslim Brotherhood, were trying “to define the conflict as being between the remnants of the old regime and the ‘25th of January Revolution.’”²⁹⁶ While it is true that the military and the Egyptian deep state had a role to play in the overthrow of the Morsi government, it is important to note that in advancing such a narrative, the MB, argues Jaraba, has sought to accomplish three important goals, namely, “1) to appear as the innocent victim of state aggression, 2) to avoid blame and accountability, and 3) to convince a large part of the Egyptian people and its supporters that the coup had been unavoidable.”²⁹⁷

Missing from the narrative presented by the MB and its supporters about the military coup against Morsi’s government, are

declares-muslim-brotherhood-terrorist-group. See also Mohannad Sabry, *Egypt Declares Muslim Brotherhood Terrorist Group*, AL-MONITOR (Dec. 26, 2013), <https://www.al-monitor.com/pulse/originals/2013/12/egypt-brotherhood-terrorist-organization-cabinet.html>.

²⁹⁵ Mahmoud Jaraba, *Why Did the Egyptian Muslim Brotherhood Year-Long Rule Fall?*, 61 Zeitschrift für Politik 61, 61 (2014). The January 25, 2011 Revolution was part of the activities of the Arab Spring that started in Tunisia and then spread to Egypt. In Egypt, the revolution led to the ouster of long-time ruler, Hosni Mubarak. See *Egypt Revolution: 18 Days of People Power*, ALJAZEERA (Jan. 24, 2016), <https://www.aljazeera.com/indepth/inpictures/2016/01/egypt-revolution-160124191716737.html>. See also GALAL AMIN, *WHATEVER HAPPENED TO THE EGYPTIAN REVOLUTION?* 104 (Jonathan Wright trans., 2013) (noting, inter alia, that on January 25, 2011, Egyptians came out in large numbers to express their anger at what they argued was continued oppression by their government).

²⁹⁶ Jaraba, *supra* note 295, at 61–62.

²⁹⁷ *Id.* at 62.

the political “miscalculations and strategic choices” and governing blunders of Morsi’s government during the one year in which he was in power.²⁹⁸ When Morsi and the MB came into power in the summer of 2012, the majority of Egyptians were in support of this new and democratically-elected regime. As noted by Ibrahim el-Houdaiby, a former member of the MB, “the public did not oppose the Muslim Brotherhood or sought their failure from day one. Yes, some did, but, for example, the first call for a million-man march against Morsi in August 2012 by Mohamed Abu Hamed had little resonance, with no more than 1,500 people showing up.”²⁹⁹

It has been argued that the Muslim Brotherhood’s governance mistakes can be traced to the period immediately following the ouster of Hosni Mubarak. At that time, and before Morsi was elected, the MB made no attempt or effort to build “consensus within Egypt’s political system” and “unite the various ideological and religious divisions in the country.”³⁰⁰ Instead, the MB’s main interest was in creating a “political network” that would significantly enhance its ability to “assert control over the [Egyptian] state and its bureaucracy,” so that it and its members could “dominate the other sources of power (economic, military and ideological).”³⁰¹

As a consequence, the MB took sides with the Supreme Council of the Armed Forces (“SCAF”) when the latter decided to hold parliamentary elections before a new constitution had been drafted and adopted. Those Egyptians who participated in the January 25 Revolution believed that before the parliamentary elections could be carried out, it was necessary that the post-Mubarak country provide itself with a new constitution. As argued by Dalia Fahmy, “Egyptians seemed divided over the timing of the elections. . . . The secularists . . . wanted to hold off on the parliamentary elections until a constitution was written, fearing that an Islamist-dominated parliament would lead to an Islamist-dominated constitutional

²⁹⁸ *Id.*

²⁹⁹ Ibrahim el-Houdiby, *Egypt: Nothing was Inevitable*, AHARAMONLINE (Sep. 13, 2013), <http://english.ahram.org.eg/NewsContentP/4/81424/Opinion/Egypt—Nothing-was-inevitable.aspx>. In fact, as many as “13.2 million Egyptian voters elected the Muslim Brotherhood politician . . . in June 2012.” In addition, he “triumphed in a runoff against Ahmed Shafik, ousted President Hosni Mubarak’s final prime minister.” See Jonathan Guyer, *Mohamed Morsi: A Postscript*, THE AMERICAN PROSPECT (June 19, 2020), <https://prospect.org/world/mohamed-morsi-postscript/>.

³⁰⁰ Jaraba, *supra* note 295, at 62.

³⁰¹ *Id.*

assembly responsible for drafting Egypt's postrevolutionary constitution."³⁰²

Perhaps, more importantly is the role that Morsi and other senior members of the MB played in the drafting and adopting of the post-Mubarak constitution. As noted by Thanassis Cambanis, who has been writing about Egypt and the Middle East for several years, Morsi and the MB "rammed through unpopular laws and wrote a new constitution that was anathema to liberal and secular Egyptians. There was no consensus, no consultation. Morsi tried to place his own decision making beyond any accountability or oversight, like every other dictator and tyrant in Egypt's history."³⁰³

As I have argued elsewhere, "[i]nstead of working to bring about the objectives and values of the [Egyptian Revolution], Morsi and his Muslim Brotherhood reverted to some of the extra-constitutional practices that had been the hallmark of the Mubarak regime."³⁰⁴ For example, on November 22, 2013, "Morsi issued a decree that placed himself above the law—the decree effectively granted his actions immunity from judicial review or oversight."³⁰⁵ Many Egyptians considered Morsi's decree, which stated that "the president's decisions cannot be revoked by any authority," a "coup against legitimacy," and called for mass protests against the president and his government.³⁰⁶

The post-Mubarak constitution, which was drafted almost entirely by Morsi and his supporters, "failed to adequately constrain the state and instead, created an imperial presidency."³⁰⁷ As I have argued elsewhere, "[w]hile supporters of the Morsi regime have

³⁰² DALIA FAHMY, *The Muslim Brotherhood: Between Opposition and Power*, EGYPT AND TAHRIR SQUARE 76, 86 (Bessma Momani & Eid Mohamed eds., 2016).

³⁰³ Thanassis Cambanis, *Egypt's Only Democratic Leader Helped Kill Its Democracy*, THE ATLANTIC—GLOBAL (June 18, 2019), <https://www.theatlantic.com/international/archive/2019/06/mohammed-morsi-hope-flaws-egypt-revolution/591928/>.

³⁰⁴ See JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 59 (2018).

³⁰⁵ See *id.* at 59. See also David D. Kirkpatrick & M. el-Sheik, *Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial*, N. Y. TIMES (Nov. 22, 2012), <https://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html>. See also Michael Birnbaum, *Egypt's Morsi Takes Sweeping New Powers*, WASH. POST (Nov. 22, 2012), <https://www.washingtonpost.com/>.

³⁰⁶ *Egypt Fury Over Mohammed Mursi 'coup against legitimacy'*, BBC News, <https://www.bbc.com/news/world-middle-east-20457058> (last visited on March 29, 2020).

³⁰⁷ MBAKU, *supra* note 304, at 59–60.

argued that the 2012 Constitution did not create a theocratic state and that only seven of the 236 articles deal expressly with religion and that only three of those refer specifically to Islam, it is important to note that the process through which the constitution is written and adopted is quite critical to its legitimacy.”³⁰⁸ For one thing, the constitution-design process was dominated and controlled by Morsi and his supporters, with most Egyptians, including especially secular and revolutionary forces, not allowed to participate.³⁰⁹

As noted by Jonathan Guyer, who writes about the politics of art and literature in the Middle East, in his position as President of the Republic of Egypt, “Morsi failed to rally that nation around a reckoning with the Mubarak regime’s crimes against the Egyptian people. He also failed to re-institute law and order.”³¹⁰ Guyer notes further that the Morsi government had essentially failed to reform and restructure Egypt’s dysfunctional political system and create institutions that “would ensure social justice, which had been a rallying cry of the Tahrir Square protesters” and that “his economic policies” were incapable of stemming “skyrocketing inflation or poverty” or dealing effectively with rising terrorism.³¹¹

Morsi, it has been argued, was not a democrat. He led an administration that “used a flawed referendum to push through a constitution that had illiberal elements: Freedom of religion was reserved for monotheistic faiths only, there were few protections for economic rights, and women’s rights were not inscribed therein.”³¹²

Writing about Morsi’s legacy, Cambanis noted that by the time the Egyptian dictator died on June 17, 2019, “all but his most doctrinaire supporters [had] turned against him.”³¹³ In the aftermath of the election of Morsi, many Egyptians had believed that they would be safe from the pro-Mubarak elements that had killed Egyptians with impunity. Asked about Morsi’s election, a former member of the Muslim Brotherhood made the following statement: “At least he won’t shoot us in the streets,” a reference to the impunity of Mubarak’s security forces.³¹⁴ This optimism, however, was short-lived, as Morsi and the MB were to unleash a reign of terror on the Egyptian people

³⁰⁸ *Id.* at 60.

³⁰⁹ See Cambanis, *supra* note 303.

³¹⁰ Guyer, *supra* note 299.

³¹¹ *Id.*

³¹² *Id.*

³¹³ See Cambanis, *supra* note 303.

³¹⁴ *Id.*

that was as brutal as that which Egyptians had been submitted to under Mubarak. For example, in the fall of 2012, noted Cambanis, “thuggish Morsi supporters tortured anti-Morsi protesters on the grounds of the presidential palace, proving even that minimal hope unrealistic.”³¹⁵

While Morsi was considered extremely “incompetent and polarizing” and a leader who managed to “alienate nearly everyone outside the [Muslim] Brotherhood,” he, nevertheless, “was not a fascist or a new pharaoh, as his opponents liked to claim.”³¹⁶ Despite his political ineptness, it has been argued that although Egyptians may have witnessed “unprecedented polarization, fear, and uncertainty” during the one year that Morsi was in power, the country was “the freest, in relative terms, than it had been since its independence in 1952” as witnessed by the fact that “Egyptians were shouting, protesting, striking, and hoping, both for and against Morsi.”³¹⁷ This “sense of openness” which contributed significantly to a “freewheeling intellectual combat, the seemingly endless sparring of ideas” was, of course, not caused by Morsi or on his behalf, “but because Egypt—with the help of millions of Egyptians—was trying to become a democracy, albeit a flawed one.”³¹⁸ Morsi, himself a flawed person, could not have been expected to successfully lead this flawed transition to democratic governance.

The military regime that was established shortly after the overthrow of Morsi on July 3, 2013, proved to be just as opportunistic as, but perhaps more brutal than, the Muslim Brotherhood-backed Morsi government. The coup that led to the downfall of Morsi was led by then Egyptian armed forces chief, Field Marshall Abdel Fattah el-Sisi.³¹⁹ It did not take long for the new government to display the level of its brutality. After el-Sisi had consolidated power as the new President of the Republic of Egypt, “anti-coup demonstrations grew across the nation, posing a Tianamen-sized conundrum for the military.”³²⁰ In response, the el-Sisi military government “killed over

³¹⁵ *Id.*

³¹⁶ Shadi Hamid, *The Tragedy of Egypt's Mohamed Morsi*, THE BROOKINGS INSTITUTION (June 19, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/06/19/the-tragedy-of-egypts-mohamed-morsi/>.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See Patrick Kingsley, *How Mohamed Morsi, Egypt's First Elected President, Ended Up on Death Row*, THE GUARDIAN (UK) (June 1, 2015), <https://www.theguardian.com/world/2015/jun/01/mohamed-morsi-execution-death-sentence-egypt>.

³²⁰ See Guyer, *supra* note 299.

1,150 protesters, many of whom were pro-Morsi activists and Muslim Brotherhood supporters, in five different encampments” and “used every measure—legal and extralegal—to disband the Muslim Brotherhood.”³²¹

Morsi’s death in captivity was, as argued by one observer, “the grim consequence of [the military’s] acts of dehumanization. The Egyptian state had not ensured that [Morsi] had been provided adequate food, medicine, and health care. He had been held in solitary confinement, 23 hours a day for six years” and during this time, “had only been allowed three meetings with his family.”³²² It appears that contempt towards President Morsi by the Egyptian military showed, not only their disdain for him, but also for democracy and democratic institutions in general, as evident by the harsh treatment meted out to Egyptians fighting for freedom and democracy in the country.³²³

A wave of mass protests, which was partly a response to *Tamarod*,³²⁴ swept the Egyptian streets in the summer of 2013 and cumulated with the June 30th mass protests.³²⁵ Large numbers of protesters took to Egyptian streets to demand that Morsi resign the

³²¹ *Id.*

³²² *Id.* Coverage of his death, noted ALJAZEERA NEWS, was “relegated to inside pages with no mention of [the] former leader’s title.” In fact, his successor and President of Egypt at the time of Morsi’s death, Abdel Fattah el-Sisi, did not issue any official statement regarding the death of the country’s only democratically elected president. See *How Did Egyptian Newspapers Report Mohamed Morsi’s Death?*, AL JAZEERA (June 18, 2019), <https://www.aljazeera.com/news/2019/06/egyptian-newspapers-report-mohamed-morsi-death-190618183512613.html>.

³²³ *One Protester’s Story: Paying the Price for Seeking Freedom in Egypt*, BBC NEWS (Jan. 25, 2017), <https://www.bbc.com/news/world-middle-east-38730565> (narrating the story Mahmoud Mohammed Hussein, a pro-democracy activist who was locked-up for nearly 800 days by the post-Morsi government of Abdul Fattah el-Sisi).

³²⁴ Tamarod (or revolt) is a grassroots protest movement that had been organized to demand that Morsi resign and new elections be held to choose an alternative group of leaders. See *Profile: Egypt’s Tamarod Protest Movement* (July 1, 2013), BBC NEWS, <https://www.bbc.com/news/world-middle-east-23131953>.

³²⁵ See, e.g., Patrick Kingsley, *Protesters Across Egypt Call for Mohamed Morsi to Go*, THE GUARDIAN (UK) (June 30, 2013), <https://www.theguardian.com/world/2013/jun/30/mohamed-morsi-egypt-protests> (noting, inter alia, Egypt’s Sunday June 30, 2013 protests). The protests, however, stated seven months earlier, when Morsi’s government issued a constitutional declaration that granted him unlimited power. See *Morsy Issues New Constitutional Declaration*, EGYPT INDEPENDENT (Nov. 22, 2012), <https://www.egyptindependent.com/morsy-issues-new-constitutional-declaration/>.

presidency.³²⁶ June 30 was considered important because it was the one-year anniversary of Morsi's inauguration as the first democratically-elected President of Egypt.³²⁷ The protestors accused Morsi and his government of increasingly becoming authoritarian and imposing on Egyptians an Islamist public policy agenda that was ignoring either the rule of law or the nation's secular opposition.³²⁸

On July 1, 2013, as the protests deepened, the Egyptian military appeared on nationwide television and radio and gave both the government and the opposition a 48-hour ultimatum "to fulfil the people's demands" or force the armed forces to intervene.³²⁹ The statement issued by the military read, in part, as follows: "The Egyptian Armed Forces will not become involved in politics or administration; it is satisfied with its role as is spelt out in line with democratic norms."³³⁰ It nevertheless, stated that since the country's security was being threatened by the conflict between the government and the protesters, the armed forces had the responsibility to step in, if necessary, to restore peace and security.³³¹

By demanding that the government meet the demands of the opposition within forty-eight hours or face its ouster, argue some

³²⁶ *Profile: Egypt's Tamarod Protest Movement*, *supra* note 324. The word "Tamarod" means "revolt" in Arabic and the Tamarod movement claimed at the time of the mass protests that it had collected millions of signatures "for a petition demanding Mr. Morsi step down and allow fresh elections to be held." *See id.*

³²⁷ *See* David D. Kirkpatrick, *Power Struggle Begins as Egypt's President is Formally Sworn In*, N.Y. TIMES (June 30, 2012), <https://www.nytimes.com/2012/07/01/world/middleeast/morsi-is-sworn-in-as-president-of-egypt.html> (noting Mohamed Morsi was "formally sworn in on Saturday [June 30, 2012] as the first democratically elected president of Egypt.").

³²⁸ *See, e.g.,* Kingsley, *supra* note 319. *See also* Hamza Hendawi, *Egypt Protests: Thousands Gather at Tahrir Square to Demand Morsi's Ouster*, THE [TORONTO] STAR (June 30, 2013), https://www.thestar.com/news/world/2013/06/30/egypt_protests_thousands_gather_at_tahrir_square_to_demand_morsis_ouster.html & Richard Spencer, *Egypt Protests: Army Issues 48-Hour Ultimatum for Agreement Amid Clashes*, THE DAILY TELEGRAPH (UK) (July 1, 2013), <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10152780/Egypt-protests-Army-issues-48-hour-ultimatum-for-agreement-amid-clashes.html>.

³²⁹ *See Egyptian Military Gives 48 Hour Ultimatum to Brotherhood, Political Forces*, AHARAMONLINE (July 1, 2013), <http://english.ahram.org.eg/News/75414.aspx>.

³³⁰ *Id.*

³³¹ *Id.*; *See also* Salma Abdelaziz, Reza Sayah & Ben Wedeman, *Egypt's Military Gives Morsy Ultimatum*, CNN NEWS (July 2, 2013), http://edition.cnn.com/2013/07/01/world/meast/egypt-protests/index.html?hpt=hp_t1.

observers, the Egyptian military was actually siding with the opposition and effectively engineering a coup.³³² Military leaders argued, however, that they were aware of the fact that the military had dominated the country's politics for decades but that, this time, they did not intend to be part of "the political or ruling circles."³³³ Despite the reassurances given by the military that it was not seeking for ways to overthrow the government, and that it had no interest in national politics, it appeared to be directly interfering with the functioning of Morsi's government and creating the conditions that would enhance its ability to intervene and take control of the government.³³⁴ This was especially troubling, given the fact that Morsi's was a democratically elected government and hence, represented the will of the Egyptian people, while the military had no such mandate to act on behalf of the people of Egypt.³³⁵

Despite assurances that they were not interested in politics, the military, nevertheless, ousted the country's democratically elected government and proceeded to hand-pick a care-taker president in the name of Adly Mansour, who at the time, was the head of the Supreme Constitutional Court. On the night of July 3, 2013, the then head of the Egyptian Armed Forces, Field Marshall Abdel Fattah el-Sisi, addressed the Egyptian people through television and announced that the military had ousted President Morsi and his government.³³⁶ Additionally, he told the Egyptian people that the constitution had been suspended and that the Chief Justice of the Supreme Constitutional Court, Adly Mansour, would take over as interim president.³³⁷ Finally, he told his fellow citizens that new parliamentary and presidential elections would be held under the interim government.³³⁸

The military's decision to place Morsi and several members of his government under arrest and to designate the Muslim Brotherhood

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ Morsi swept into office as the first democratically elected president of Egypt after winning the runoff election with 51.7 percent of the vote. See David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N. Y. TIMES (June 24, 2012), <https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html>.

³³⁶ See David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken Into Military Custody*, N. Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

³³⁷ *Id.*

³³⁸ *Id.*

as a terrorist organization, elicited a lot of anger among his supporters, many of whom were Islamists. The harsh treatment of the Muslim Brotherhood by the military was supposedly in response to the December 24, 2013 bombing in the Nile Delta city of Mansoura.³³⁹ The Muslim Brotherhood was blamed for the suicide bombing at Mansoura, even though the Egyptian-based jihadist extremist militant group Ansaar Bait al-Maqdis, had claimed responsibility for the attack.³⁴⁰ Subsequently, on July 4, 2013, Chief Justice Adly Mansour was sworn in as the country's acting president to preside over a new government.³⁴¹ The new government then proceeded to crack down on the Muslim Brotherhood and its supporters, sending many of them to jail, forcefully dispersing any protests in support of the deposed president, and eventually sentencing many Brotherhood leaders either to death, or to long prison sentences.³⁴²

³³⁹ See Erin Cunningham, *Car Bomb Kills 15 at Egyptian Security Headquarters North of Cairo*, WASH. POST (Dec. 24, 2013), https://www.washingtonpost.com/world/car-bomb-kills-12-at-egyptian-security-headquarters-north-of-cairo/2013/12/24/4b19dd80-6c87-11e3-a523-fe73f0ff6b8d_story.html (noting that "[a] car packed with explosives detonated outside a security headquarters building in [Mansoura] early Tuesday [December 24, 2013], killing 15 people and wounding more than 130 in one of the deadliest militant attacks in Egypt in years.").

³⁴⁰ See *Sinai's Ansar Beit Al-Maqdis claim responsibility for Egypt's Mansoura Blast*, AHARAMONLINE (Dec. 25, 2013), <http://english.ahram.org.eg/NewsContent/1/64/89992/Egypt/Politics-/Sinai-Ansar-Beit-AlMaqdis-claim-responsibility-fo.aspx>. See also Kareem Fahim, *Egypt, Dealing a Blow to the Muslim Brotherhood, Deems It a Terrorist Group*, N. Y. TIMES (Dec. 25, 2013), <https://www.nytimes.com/2013/12/26/world/middleeast/egypt-calls-muslim-brotherhood-a-terrorist-group.html>. See also Kareem Fahim & Mayy el-Sheikh, *Egyptian Officials Point at Islamist Group After Blast at Police Building*, N. Y. TIMES (Dec. 24, 2013), <https://www.nytimes.com/2013/12/25/world/middleeast/egypt-car-bomb.html>.

³⁴¹ See Freya Petersen, *Egypt: Adly Mansour Sworn in as Interim President After Mohamed Morsi's Ouster*, PRI INTERNATIONAL (July 4, 2013), <https://www.pri.org/stories/2013-07-04/egypt-adly-mansour-sworn-interim-president-after-mohamed-morsis-ouster>.

³⁴² See Kareem Fahim and Mayy el-Sheik, *Crackdown in Egypt Kills Islamists as They Protest*, N. Y. TIMES (July 27, 2013), <https://www.nytimes.com/2013/07/28/world/middleeast/egypt.html>. See also David D. Kirkpatrick, *Hundreds Die as Egyptian Forces Attack Islamist Protesters*, N. Y. TIMES (Aug. 14, 2013), <https://www.nytimes.com/2013/08/15/world/middleeast/egypt.html> & Hamza Hendawi, *Abuse Claims Rife as Egypt Admit Jailing 16,000 Islamists in Eight Months*, INDEPENDENT (UK) (Mar. 16, 2014), <https://www.independent.co.uk/news/world/africa/abuse-claims-rife-as-egypt-admits-jailing-16000-islamists-in-eight-months-9195824.html>.

On August 14, 2013, the Egyptian armed forces, under the leadership of Field Marshall Abdel Fattah el-Sisi, raided two camps of protesters in Cairo, one at al-Nahda Square³⁴³ and the other, a much larger one, at Rabaa al-Adawiya.³⁴⁴ Human Rights Watch, which investigated the incidents at Rabaa and the al-Nahda Square, described them as “[t]he indiscriminate and deliberate use of lethal force,” which “resulted in one of the world’s largest killings of demonstrators in a single day in recent history.”³⁴⁵ Human Rights Watch noted that “[b]y the end of that day [August 14, 2013], the police in concert with the army had killed at least 904 people during the dispersals, at least 817 from Rab’a and 87 from al-Nahda, including women and children.”³⁴⁶

On January 18, 2014, Egypt’s interim government instituted a new constitution, which was passed by referendum in January 2014.³⁴⁷ Members of the Muslim Brotherhood, who constituted an important part of Morsi’s base of support, boycotted the constitutional referendum, which passed with 98.1 percent of those voting.³⁴⁸ On March 26, 2014, el-Sisi,³⁴⁹ who was now the country’s defense minister and head of the Egyptian armed forces, retired from the military and announced his intention to stand as a candidate for the

³⁴³ See Yasmine el-Rashidi, *Scenes from a Crackdown: What Really Happened in Cairo?*, THE NEW YORK REVIEW OF BOOKS (Sep. 11, 2013), <https://www.nybooks.com/daily/2013/09/11/scenes-from-crackdown-what-happened-cairo/> (noting that the pro-Morsi protesters who gathered at the two sites were peaceful).

³⁴⁴ See Human Rights Watch, *All According to Plan: The Rab’a Massacre and Mass Killings of Protesters in Egypt*, HUMAN RIGHTS WATCH (Aug. 12, 2014), <https://www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt>.

³⁴⁵ *Id.*

³⁴⁶ *Id.* The protesters had been occupying these two encampments since June 30, 2013 and were “unarmed and peaceful.” See el-Rashidi, *supra* note 343. June 30 is now generally referred to as the June 30 Revolution or Egypt’s Second Revolution. See Patrick Kingsley and Martin Chulov, *Mohamed Morsi Ousted in Egypt’s Second Revolution in Two Years*, THE GUARDIAN (UK) (July 4, 2013), <https://www.theguardian.com/world/2013/jul/03/mohamed-morsi-egypt-second-revolution>.

³⁴⁷ See Reza Sayah and Mohammed Tawfeeq, *Egypt Passes a New Constitution*, CNN INTERNATIONAL (Jan. 18, 2014), <https://www.cnn.com/2014/01/18/world/africa/egypt-constitution/index.html>.

³⁴⁸ *Id.*

³⁴⁹ See BBC, *Egypt’s Military Chief Sisi Quits to Run for Presidency*, BBC NEWS (Mar. 27, 2014), <https://www.bbc.com/news/world-middle-east-26747101>. See also Patrick Kingsley, *Abdel Fatah al-Sisi Resigns from Egypt Military to Run for Presidency*, THE GUARDIAN (UK) (Mar. 26, 2014), <https://www.theguardian.com/world/2014/mar/26/sisi-resigns-egypt-military-run-for-presidency>.

presidency of Egypt in elections that were to take place between May 26–28, 2014.³⁵⁰ When the results of the elections were announced, el-Sisi was declared the winner with 96.1 percent of the votes cast, with a turn-out of 47.5 percent of Egypt's 53 million eligible voters.³⁵¹

On June 8, 2014, el-Sisi was sworn in as president of Egypt, effectively bringing to an end the Egyptian revolution, which had started in 2011 as part of the Arab Spring, as well as of the country's flirtation with democracy.³⁵² Perhaps, more importantly, is the fact that el-Sisi's assumption of the presidency of Egypt returned to power, the military, which had dominated governance in the country since the Free Officers Movement-led to the overthrow of King Farouk I in July 1952.³⁵³ In December 2015, parliamentary elections were held and pro-el-Sisi political parties captured a strong majority, allowing them to control the newly-formed House of Representatives.³⁵⁴ In the presidential elections held between March 26–28, 2018, Abdel Fattah el-Sisi was re-elected president of the Republic of Egypt, capturing 97 percent of votes cast.³⁵⁵

E. The Military Coup of 2013 and Democracy in Egypt

In addition to the fact that the military overthrow of the democratically-elected government of Mohamed Morsi "essentially

³⁵⁰ See Patrick Kingsley, *Abdel Fatah al-Sisi Won 96.1% of Vote in Egypt Presidential Election, Says Officials*, THE GUARDIAN (UK) (June 3, 2014), <https://www.theguardian.com/world/2014/jun/03/abdel-fatah-al-sisi-presidential-election-vote-egypt>.

³⁵¹ *Id.* See also Patrick Kingsley, *Abdel Fatah al-Sisi Sweeps to Victory in Egyptian Presidential Election*, THE GUARDIAN (May 29, 2014), <https://www.theguardian.com/world/2014/may/29/abdel-fatah-al-sisi-sweeps-victory-egyptian-election>.

³⁵² See Patrick Kingsley, *Egypt's Sisi Sworn in as President*, THE GUARDIAN (UK) (June 8, 2014), <https://www.theguardian.com/world/2014/jun/08/egypt-sisi-sworn-in-president>.

³⁵³ See, e.g., Emin Poljarevic, *Egypt, Revolution of 1952*, in INTERNATIONAL ENCYCLOPEDIA OF REVOLUTION AND PROTEST 1076 (Immanuel Ness ed., 2009).

³⁵⁴ See, e.g., Serap Gur, *The 2015 Parliamentary Elections in Egypt*, 44 ELECTION STUD. 445 (2016) (providing an analysis of the parliamentary elections in Egypt). See also Paulami Sanyal, *Parliamentary Elections in Egypt, 2015*, 3 ELECTION WATCH 445 (2016) (providing an analysis of Egypt's 2015 parliamentary elections).

³⁵⁵ See *Egypt's President Abdel-Fattah el-Sissi wins re-election with 97% of Vote*, USA TODAY NEWS (Apr. 2, 2018), <https://www.usatoday.com/story/news/world/2018/04/02/egypt-president-wins-re-election/478642002/>. See also *Sisi Wins Second Term as Egyptian President After Purge of Challengers*, THE GUARDIAN (Mar. 29, 2018), <https://www.theguardian.com/world/2018/mar/29/egyptian-president-wins-second-term-after-purge-of-challengers>.

put the military back in control of Egypt after the great move forward propelled by the Arab Spring,” it also created, within the country, an environment that was not conducive to the promotion of democratic values and the sustaining of a governance process based on the rule of law.³⁵⁶ Shortly after taking control of the apparatus of state in Egypt in 2013, “the new military leadership decided to stamp out the Muslim Brotherhood, the most significant organization opposing Egypt’s heretofore unbroken and oppressive military rule since the Officers’ Revolt in 1952.”³⁵⁷

Of note is the fact that the oppression of the Muslim Brotherhood (“the Brotherhood”), a significant part of the Egyptian electorate, was methodological and well-laid out. First, the Egyptian Supreme Judicial Court, “a Mubarak-appointed court,”³⁵⁸ took several actions against the Brotherhood, which included: (i) dissolving the organization; (ii) banning the Brotherhood’s political party—the Freedom and Justice Party; and (iii) ordering its property confiscated.³⁵⁹ Second, despite the fact that the Brotherhood had “renounced violence in the 1970s”³⁶⁰ under Anwar Sadat’s regime and in 1995, had “formally adopted a mandate of democracy,”³⁶¹ and “had generally abided by that

³⁵⁶ Thomas Michael McDonnell, *The Egyptian Coup, the United States, and a Call to Strengthen the Rule of Law and Diplomacy Rather Than Military Counter-Terrorism*, 41 N. C. J. INT’L L. 325, 366 (2016). Note that, by forcefully removing a democratically-elected president, the military annulled the people’s will and in doing so, it acted arbitrarily and created the type of legal uncertainty in Egypt that does not augur well for the maintenance of a governance system undergirded by the rule of law. Why, for example, would any Egyptian willingly participate in an election in the future, given the fact that the military may, if it is not satisfied with the results (that is, with the successful candidates, as it was with Morsi), simply intervene and oust the winners? See, e.g., DICEY, *supra* note 47, at x–cxi (noting, inter alia, that “[t]he rule of law presupposes the absence of arbitrary power and so gives the assurance that the individual can ascertain with reasonable certainty what legal powers are available to government if there is proposal to affect his private rights.”).

³⁵⁷ McDonnell, *supra* note 356, at 366. See also BBC, *Profile: Egypt’s Muslim Brotherhood*, BBC NEWS (Dec. 25, 2013), <https://www.bbc.com/news/world-middle-east-12313405>.

³⁵⁸ McDonnell, *supra* note 356, at 366.

³⁵⁹ *Id.*

³⁶⁰ Zachary Laub, *Egypt’s Muslim Brotherhood*, COUNCIL ON FOREIGN RELATIONS (Aug. 15, 2019), <https://www.cfr.org/backgrounder/egypts-muslim-brotherhood> (noting that the “Muslim Brotherhood, once Egypt’s largest opposition movement and a standard-bearer for Islamist groups around the world, has been once again driven underground as Abdel Fatah al-Sisi has consolidated power.”).

³⁶¹ See *What is the Muslim Brotherhood?*, ALJAZEERA (June 18, 2017), <https://www.aljazeera.com/indepth/features/2017/06/muslim-brotherhood-explained-170608091709865.html> (noting that the Muslim Brotherhood “officially

pledge,”³⁶² the new government imposed on Egyptians by the military in the aftermath of the coup against President Morsi, still saw it fit to declare the Brotherhood a terrorist organization and then proceeded to officially ban it.³⁶³

Third, despite the atrocities committed against the Egyptian democracy—the overthrow of the democratically-elected president and the banning of legitimate political organizations—the military proceeded to arrest and imprison “virtually all the Brotherhood’s leaders, including President [Mohamed] Morsi and the Brotherhood’s highest spiritual leader [Mohammed] Badie.”³⁶⁴ After his arrest, President Morsi was initially charged with the “capital offense [of] allegedly inciting violence” and eventually sentenced to “twenty years in a maximum security prison.”³⁶⁵ The Brotherhood’s spiritual leader, Badie, was sentenced to death following a mass trial and a large number of other Egyptians, primarily members of the Brotherhood, were also sentenced to death.³⁶⁶ In an article in *The New York Times*, Jonathan Weisman noted that “an Egyptian court [had] sentenced the top spiritual leader of the Muslim Brotherhood along with more than 680 others to death in connection with the killing of a single police officer during a riot last summer.”³⁶⁷

renounced violence in the 1970s during the rule of Egyptian President Anwar el-Sadat” and that “they formally adopted a mandate of democracy in 1995.”).

³⁶² McDonnell, *supra* note 356, at 367.

³⁶³ *Id.* See also BBC, *Egypt’s Muslim Brotherhood Declared ‘Terrorist Group,’* BBC NEWS (Dec. 25, 2013), <https://www.bbc.com/news/world-middle-east-25515932>; BBC, *Egypt Court Bans Muslim Brotherhood’s Political Wing,* BBC NEWS (Aug. 9, 2014) <https://www.bbc.com/news/world-middle-east-28722935>; Barbara Zollner, *Surviving Repression: How Egypt’s Muslim Brotherhood has Carried On*, CARNEGIE MIDDLE EAST CENTER (Mar. 11, 2019) <https://carnegie-mec.org/2019/03/11/surviving-repression-how-egypt-s-muslim-brotherhood-has-carried-on-pub-78552> (noting the “systematic repression of the Muslim Brotherhood” by the regime of President Abdel Fattah el-Sisi).

³⁶⁴ McDonnell, *supra* note 356, at 367.

³⁶⁵ *Id.* at 368. See also David D. Kirkpatrick & Merna Thomas, *Egyptian Court Sentences Mohamed Morsi to 20 Years in Prison*, N. Y. TIMES (Apr. 21, 2015), <https://www.nytimes.com/2015/04/22/world/middleeast/egypt-mohamed-morsi-sentenced.html>; Bill Chappell, *Egypt’s Former President Morsi Sentenced to 20 Years in Prison*, NPR INTERNATIONAL (Apr. 21, 2015), <https://www.npr.org/sections/thetwo-way/2015/04/21/401195647/egypts-former-president-morsi-sentenced-to-20-years-in-prison>.

³⁶⁶ McDonnell, *supra* note 356, at 367. See also BBC, *Egypt Brotherhood Chief Mohammed Badie Sentenced to Death*, BBC NEWS (Apr. 11, 2015), <https://www.bbc.com/news/world-middle-east-32263804>.

³⁶⁷ Jonathan Weisman, *Military Aid for Egyptians Loses Support in the Senate*, N. Y. TIMES (Apr. 29, 2014), <https://www.nytimes.com/2014/04/30/us/politics/egypt.html>.

Fourth, it is argued that the fact that the Security Forces, in an effort to disperse civilian protesters, usually shot many of them in “the head or the chest,” suggests that their intention was to kill these people and not to peacefully disperse them.³⁶⁸ As reported by Amnesty International (“AI”) in 2014, over 1,400 people had been killed “in protests and political violence in the last year alone,” and that “torture and other ill-treatment [were] rife in prisons and police stations.”³⁶⁹ AI also noted that “[w]hile the security forces have enjoyed near-total impunity for such human rights violations, government opponents, activists and journalists have been jailed for criticizing the authorities or challenging their narrative of events since the ousting of President Mohamed Morsi.”³⁷⁰

Finally, the post-Morsi government has “shackled the press and generally denied the freedom of expression.”³⁷¹ Examples of the government’s efforts to muzzle the press include the conviction and subsequent sentencing of three Aljazeera reporters “to seven to ten years in prison for publishing” what the government referred to as “fake news.”³⁷² The harsh prison sentences given to the Aljazeera journalists generated a lot of international condemnation³⁷³ and

³⁶⁸ Kareem Fahim and Mayy el-Sheikh, *Crackdown in Egypt Kills Islamists as They Protest*, N. Y. TIMES (July 27, 2013), <https://www.nytimes.com/2013/07/28/world/middleeast/egypt.html>.

³⁶⁹ *Egypt: Human Rights in Crisis: Systemic Violations and Impunity*, AMNESTY INTERNATIONAL at 2, 6 (2014), <https://www.amnesty.org/download/Documents/8000/mde120342014en.pdf>.

³⁷⁰ *Id.*

³⁷¹ McDonnell, *supra* note 356, at 373.

³⁷² *Id.* at 373. See also Patrick Kingsley, *Al-Jazeera Journalists Jailed for Seven Years in Egypt*, THE GUARDIAN (UK) (June 23, 2014), <https://www.theguardian.com/world/2014/jun/23/al-jazeera-journalists-jailed-seven-years-egypt>. See also Tamer el-Ghobashy & Amina Ismail, *Egypt Sentences Al Jazeera Journalists to Harsh Prison Terms*, THE WALL STREET JOURNAL (June 23, 2014), <https://www.wsj.com/articles/al-jazeera-english-journalists-sentenced-to-seven-years-1403516568>. These reporters were Mohamed Fahmy, Baher Mohamed and Peter Greste. See Jared Malsin, *Al-Jazeera Journalists Sentenced to Three Years in Prison by Egyptian Court*, THE GUARDIAN (UK) (August 29, 2015), <https://www.theguardian.com/world/2015/aug/29/egyptian-court-sentences-3-al-jazeera-english-journalists-to-3-years-in-prison>. These reporters were Mohamed Fahmy, Baher Mohamed and Peter Greste. See Jared Malsin, *Al-Jazeera Journalists Sentenced to Three Years in Prison by Egyptian Court*, THE GUARDIAN (UK) (Aug. 29, 2015), <https://www.theguardian.com/world/2015/aug/29/egyptian-court-sentences-3-al-jazeera-english-journalists-to-3-years-in-prison>.

³⁷³ Patrick Kingsley, *Al-Jazeera Journalists’ Stiff Sentences Prompt International Outrage at Egypt*, THE GUARDIAN (UK) (June 23, 2014), <https://www.theguardian.com/world/2014/jun/23/al-jazeera-journalists-sentences->

subsequently, the Court of Cassation of Egypt ordered that the case be retried.³⁷⁴ In August 2015, the three journalists—Peter Greste, Mohamed Fahmy and Baher Mohamed—were found guilty of “operating without [a] press license and broadcasting material harmful to Egypt.”³⁷⁵ They were subsequently sentenced to “three years in prison . . . in connection with their work for al-Jazeera.”³⁷⁶ The verdict was condemned and “denounced by rights groups and news organizations as an assault on press freedom.”³⁷⁷ The journalists were subsequently pardoned by President Abdel Fattah el-Sisi on September 23, 2015.³⁷⁸

In August 2015, President Abdel Fattah el-Sisi “approved stringent new counter-terrorism laws,”³⁷⁹ which were considered anti-democratic and likely to significantly increase the government’s ability to suppress its opponents.³⁸⁰ In fact, speaking of the new counter-terrorism law, the Deputy Middle East and North Africa Director for Human Rights Watch declared as follows:

With this sweeping new decree, Egypt’s president has taken a big step toward enshrining a permanent state of emergency as the law of the land. The government has equipped itself

international-condemnation-egypt (noting international outrage at the harsh prison sentences handed out to three Aljazeera journalists).

³⁷⁴ Maggie Michael, *New Trial Ordered for Canadian-Egyptian Journalist Mohamed Fahmy*, THE GLOBE & MAIL (Jan. 1, 2015), <https://www.theglobeandmail.com/news/world/appeals-court-in-egypt-orders-retrial-for-fahmy/article22262519/>; See also Eyder Peralta, *Egyptian Court Orders Retrial of Al-Jazeera Journalists*, NPR INTERNATIONAL (Jan. 1, 2015), <https://www.npr.org/sections/thetwo-way/2015/01/01/374343758/egyptian-court-orders-retrial-of-al-jazeera-journalists>.

³⁷⁵ Jared Malsin, *Al-Jazeera Journalists Sentenced to Three Years in Prison by Egyptian Court*, THE GUARDIAN (UK) (Sept. 29, 2015), <https://www.theguardian.com/world/2015/aug/29/egyptian-court-sentences-3-al-jazeera-english-journalists-to-3-years-in-prison>. Peter Greste was convicted in absentia. See *id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ See *Egypt’s Sisi Pardons 100 Prisoners, Including Jazeera Journalists*, REUTERS WORLD NEWS (Sept. 23, 2015), <https://www.reuters.com/article/us-egypt-pardon/egypts-sisi-pardons-100-prisoners-including-jazeera-journalists-idUSKCN0RN1AH20150923>.

³⁷⁹ *Egypt’s al-Sisi Imposes Strict Anti-Terrorism Laws*, BBC NEWS (Aug. 17, 2015), <https://www.bbc.com/news/world-middle-east-33955894>.

³⁸⁰ Human Rights Watch, *Egypt: Counterterrorism Law Erodes Basic Rights*, HUMAN RIGHTS WATCH (Aug. 19, 2015), <https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights#>.

with even greater powers to continue stamping out its critics and opponents under its vague and ever-expanding war on terrorism.³⁸¹

On Saturday June 2, 2018, President Abdel Fattah el-Sisi took the oath of office to begin serving his second term as President of Egypt.³⁸² He had won more than 97 percent of the March 2018 presidential election, “which international and Egyptian rights organisations [sic] denounced as ‘farcical’ after five opposition candidates were barred from running.”³⁸³ By the beginning of 2019, as el-Sisi was completing the first year of his second term, the world was commenting about the brutality of his regime and noting that his “autocratic government [was] worse than any before it” and that after just “30 months” after “Egyptians of all faiths and ages and backgrounds, united by a desire for freedom, [had] gathered in Tahrir Square to bring 30 years of tyranny to an end,” their “dream” for justice and freedom had turned into “a nightmare.”³⁸⁴

Some commentators have noted that allowing the military to lead or become actively involved in the transition to democratic governance is perhaps, Egypt’s most serious political mistake.³⁸⁵ Between 1952 and 2011, the military was an integral part of successive Egyptian governments, characterized by “corruption and autocratic governance” and economies that were pervaded by extreme poverty and high rates of unemployment.³⁸⁶ Those Egyptians who participated

³⁸¹ *Id.*

³⁸² See *Egyptian President Sisi Sworn in For Second Term*, THE NATIONAL (WORLD) (June 2, 2018), <https://www.thenational.ae/world/mena/egyptian-president-sisi-sworn-in-for-second-term-1.736196>; See also Ruth Michaelson, *Egypt’s Sisi is Sworn in for a Second Term, Amid Crackdown on Dissent*, THE GUARDIAN (UK) (June 2, 2018), <https://www.theguardian.com/world/2018/jun/02/egypt-abdel-fatah-al-sisi-sworn-in-second-term-amid-crackdown-on-dissent>.

³⁸³ Ruth Michaelson, *Egypt’s Sisi is Sworn in for a Second Term, Amid Crackdown on Dissent*, THE GUARDIAN (UK) (June 2, 2018), <https://www.theguardian.com/world/2018/jun/02/egypt-abdel-fatah-al-sisi-sworn-in-second-term-amid-crackdown-on-dissent>. See *id.*

³⁸⁴ Amr Darrag, *If Sisi’s Brutality in Egypt Continues, the Results Could be Dire for Europe*, THE GUARDIAN (UK) (Feb. 11, 2019), <https://www.theguardian.com/commentisfree/2019/feb/11/sisi-egypt-brutality-europe>.

³⁸⁵ *Id.*

³⁸⁶ See *Egypt Revolution: 18 Days of People Power*, ALJAZEERA (Jan. 24, 2016), <https://www.aljazeera.com/indepth/inpictures/2016/01/egypt-revolution-160124191716737.html>.

in the events that came to be known as the January 25, 2011 Revolution, hoped to rid their country, not just of the autocratic Hosni Mubarak, but also of the anachronistic institutions that had contributed significantly to government impunity.³⁸⁷ Among the demands of the protesters at Tahrir Square in early 2011 were: (i) the ousting of Hosni Mubarak; (ii) dissolving of the national assembly and senate; (iii) drafting of a new constitution that guarantees the principles of freedom and social justice; (iv) prosecution of the people responsible for killing protesters at Tahrir Square; and (v) the immediate release of detainees.³⁸⁸

Specifically, the Tahrir Square protesters sought to establish a new political order in Egypt—one undergirded by the principles of freedom and justice.³⁸⁹ The presidential elections of 2012, the first free, fair, and credible democratic elections in Egypt's post-independence history, were expected to usher in the country's transition to democracy and the rule of law. Unfortunately, the military did not allow the transition to progress—it removed the country's democratically-elected president from office, inserted itself into the political process, and effectively destroyed prospects for democratic transition in the country.³⁹⁰ In fact, some commentators have argued that President Fattah el-Sisi is actually more “Mubarak than Mubarak.”³⁹¹ They note that “[t]he detention of the former army chief of staff, Sami Anan; the replacement of the once-powerful head of the Egyptian intelligence service, Khaled Fawzi, with a Sisi ally, and the appointment of Sisi's sons—Mahmoud and Hassan—to key positions within the general intelligence directorate are all clear signs of Sisi's intention to out-Mubarak Mubarak, transforming his presidency into a full-blown dictatorship.”³⁹²

³⁸⁷ Global Nonviolent Action Database, *Egyptians Bring Down Dictatorship of Hosni Mubarak, 2011*, GLOBAL NONVIOLENT ACTION DATABASE, <https://nvdatabase.swarthmore.edu/content/egyptians-bring-down-dictatorship-hosni-mubarak-2011>.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ See Scott Lucas & Giovanni Piazzese, *Egypt: Hopes for Democratic Future Die as al-Sisi Matches Country Towards Dictatorship—With Parliament's Blessing*, CONVERSATION (Mar. 13, 2019 6:52 AM), <https://theconversation.com/egypt-hopes-for-democratic-future-die-as-al-sisi-marches-country-towards-dictatorship-with-parliaments-blessing-113491>.

³⁹¹ *Id.*

³⁹² *Id.*

F. Was the 2013 Overthrow of Mohamed Morsi a Military Coup d'État?

Since the military overthrew the democratically-elected government of Egypt on July 3, 2013, at least one scholar has argued that the military action was not a coup but a people-driven and grassroots effort to rid the country of a tyrannical regime whose foundations were that of *religious fascism*.³⁹³ Was the military overthrow of Morsi's regime a new Egyptian people-driven revolution or was it simply a coup designed to restore military control of the country's political institutions? Adel Abdel Ghafar argues that Egypt "remains strongly polarized, and increasingly the population is forced to take a stand for, or against this [military] intervention, with minimal space for anyone to stand on a middle ground. Both sides' narratives are built around words such as 'legitimacy,' 'popular will' and 'people's uprising.'"³⁹⁴

Here is what Robert Fisk, a multi-award-winning Middle East correspondent, based in Beirut, Lebanon, had to say about the July 3, 2013 coup in Egypt:

For the first time in the history of the world, a coup is not a coup. The army take over, depose and imprison the democratically elected president, suspend the constitution, arrest the usual suspects, close down television stations and mass their armour in the streets of the capital. But the word 'coup' does not—and cannot—cross the lips of the Blessed Barack Obama. Nor does the hopeless UN secretary general Ban Ki-moon dare to utter such an offensive word. It's not as if Obama doesn't know what's going on. Snipers in Cairo killed 15 Egyptians this week from a rooftop of the very university in which Obama made his 'reach-out' speech to the Muslim world in 2009. Is this reticence because millions of Egyptians demanded just such a coup—they didn't call it that, of course—and thus became the first massed people in

³⁹³ See Arafat, *infra* note 396, at 862.

³⁹⁴ Adel Abdel Ghafar, *Egypt's Framing Wars of June 30th*, OPEN DEMOCRACY (Aug. 7, 2013), <https://www.opendemocracy.net/en/egypts-framing-wars-of-june-30th/>. At the time this piece was released, Ghafar was a doctoral researcher at the Australian National University and a Visiting Fellow at the American University in Cairo, Egypt.

the world to demand a coup prior to the actual coup taking place?³⁹⁵

Professor Mohamed A. Arafa, an expert on Egyptian constitutional law and a professor of law at Egypt's Alexandria University, argues that the July 3, 2013 overthrow of what he refers to as "the Muslim Brotherhood's President Morsi, cannot be considered a coup d'état because the Egyptian military sided with the will of more than thirty million Egyptians by compelling Morsi to step down, leaving everything to a civilian government, and installing Chief Justice of the Supreme Constitutional Court Adly Mansour to act as the interim President."³⁹⁶ It is important to note that just because coup makers state at the time of the coup that they would not take control of the government or become involved in political activities in the post-coup period, does not mean that their actions do not constitute an unconstitutional regime change. Speaking of el-Sisi's decision to run for the presidency of Egypt in 2014, the BBC noted that he "had denied he had any political ambitions when he ousted President Morsi and launched a crackdown on the Brotherhood last year."³⁹⁷ Granted, after the democratically-elected government of Mohamed Morsi was ousted, a civilian, Justice Mansour of the Supreme Constitutional Court, was installed as the interim President. However, the military did not really leave the Egyptian political scene. In addition to the fact that the armed forces provided the wherewithal for the interim government to brutally crackdown on the Muslim Brotherhood and its Islamist supporters, the same person who had led the coup against Morsi, Gen. el-Sisi, became president of Egypt just one year after the coup. Of course, one can argue that el-Sisi ascended to the presidency of Egypt through an election, which he won by 97 percent of the vote.³⁹⁸

³⁹⁵ Robert Fisk, *When is a Military Coup not a Military Coup? When It Happens in Egypt, Apparently*, INDEPENDENT (Jul. 4, 2013), <https://www.independent.co.uk/voices/comment/when-is-a-military-coup-not-a-military-coup-when-it-happens-in-egypt-apparently-8688000.html>.

³⁹⁶ Mohamed A. Arafa, *Wither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup d'État?*, 24 IND. INT'L & COMP. L. REV. 859, 862 (2014).

³⁹⁷ *Egypt's Sisi Vows Muslim Brotherhood 'Will Not Exist'*, BBC NEWS (May 6, 2014), <https://www.bbc.com/news/world-middle-east-27285846>.

³⁹⁸ John Davison & Ahmed Tolba, *Egypt's Sisi Wins 97 Percent in Election With No Real Opposition*, REUTERS (Apr. 2, 2018), <https://www.reuters.com/article/us-egypt-election-result/egypts-sisi-wins-97-percent-in-election-with-no-real-opposition-idUSKCN1H916A>.

Unfortunately, Egypt's 2014 post-Morsi presidential election cannot be considered fair, credible or free. For one thing, the election had "only one other candidate—himself an ardent Sisi supporter—after all serious opposition contenders halted their campaigns in January."³⁹⁹ In addition, "[t]he main challenger was arrested and his campaign manager beaten up, while other presidential hopefuls pulled out, citing intimidation."⁴⁰⁰ Perhaps, more importantly is the fact that the post-Morsi crackdown on the Muslim Brotherhood and other Islamists forced many of these Egyptians (i.e., MB members and other Islamists) to either boycott the vote or find themselves in a position in which they could not safely participate in the electoral exercise.⁴⁰¹ In fact, during the campaign for the 2014 presidential election, el-Sisi vowed to extinguish the Muslim Brotherhood should he win.⁴⁰² By this time, "mass protester killings" by the military and other security services were already underway in Egypt and many of these demonstrators were members of the Muslim Brotherhood and other pro-Morsi supporters.⁴⁰³

The military coup has been defined as "events in which existing régimes are suddenly and illegally displaced by the action of relatively small groups, in which members of the military, police, or security forces of the state play a key role, either on their own or in conjunction with a number of civil servants or politicians."⁴⁰⁴ According to this definition, the ouster of Morsi and his government, by the Egyptian military, was a military coup, regardless of arguments to the contrary

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ See *Egypt's Sisi Vows Muslim Brotherhood 'Will Not Exist*, *supra* note 397.

⁴⁰² *Egypt's Sisi Vows Muslim Brotherhood 'Will Not Exist*, *supra* note 397. Specifically, a reporter had asked el-Sisi "whether the Brotherhood would cease to exist if he should gain the presidency," and he said: "Yes. That's right." See *id.*

⁴⁰³ Human Rights Watch, *All According to Plan: The Rab'a Massacre and Mass Killings of Protesters in Egypt*, HUMAN RIGHTS WATCH (Aug. 12, 2014), <https://www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt> (noting the military massacres of pro-Morsi protesters at Rab'a al-Adawiy Square and Nasr City district of eastern Cairo on August 14, 2013). See also Human Rights Watch, *Egypt: Rab'a Killings Likely Crimes Against Humanity*, HUMAN RIGHTS WATCH (Aug. 12, 2014), <https://www.hrw.org/news/2014/08/12/egypt-raba-killings-likely-crimes-against-humanity> (arguing that the Rab'a killings may be considered crimes against humanity).

⁴⁰⁴ Pat McGowan & Thomas H. Johnston, *African Military Coups d'État and Underdevelopment: A Quantitative Historical Analysis*, 22 J. MOD. AFR. STUD. 633, 634–635 (1984).

by scholars, such as Professor Arafa.⁴⁰⁵ The latter has argued that the July 3, 2013 overthrow of the government of Morsi was not a military coup because “the Egyptian military sided with the will of more than thirty million Egyptians.”⁴⁰⁶ Many scholars have argued that “popularity among the masses” does not “disqualify the event as a coup.”⁴⁰⁷ For example, Powell and Chacha argue that although “thousands may have celebrated Mugabe’s ouster in the streets of Harare, popular support does not change the manner in which the incumbent was removed.”⁴⁰⁸

Arguments or statements by military elites that they would stay out of politics in the post-coup period are not unique to the Egyptian military. For example, when Idi Amin overthrew the government of Milton Obote in Uganda in 1971, he stated that he was “not a politician, but a professional soldier” and that his would “be purely a caretaker administration, pending an early return to civilian rule.”⁴⁰⁹ Nevertheless, within a couple of days, Amin had “backtracked on his promise” and eventually established “himself as president” and went on to oversee an extremely dysfunctional and brutal regime that lasted for eight years.⁴¹⁰ Like Amin, it did not take el-Sisi long to reveal his political ambitions—in fact, President Morsi was ousted by the military on July 3, 2013 and less than a year later, Gen. Abdel Fattah el-Sisi had assumed the office previously held by Morsi.⁴¹¹

There are several reasons why popular support should not be used to judge whether the military removal of a government qualifies as a coup. One of them is that when soldiers are involved, especially in a country such as Egypt where the military has, over the years, wielded virtually unlimited power and has used such power to oppress the people, it is very difficult to determine if popular support for its actions is freely given. Hence, despite the fact that millions of people supported and actually demanded the ouster of the Morsi regime, it is difficult, especially given the political climate in the country, to

⁴⁰⁵ See Arafa, *supra* note 396, at 862.

⁴⁰⁶ See *id.*

⁴⁰⁷ See Jonathan Powell & Mwita Chacha, *Closing the Book on Africa’s First Generation Coups*, 18 AFR. STUD. Q. 87, 89 (2019).

⁴⁰⁸ See *id.* at 89.

⁴⁰⁹ See *id.* at 88–89.

⁴¹⁰ See *id.* at 89.

⁴¹¹ Abdel Fattah el-Sisi assumed the office of the President of Egypt on June 8, 2014. See Patrick Kingsley, *Egypt’s Sisi Sworn in as President*, THE GUARDIAN (June 8, 2014), <https://www.theguardian.com/world/2014/jun/08/egypt-sisi-sworn-in-president>.

determine if such so-called “popular support” was freely offered.⁴¹² Even if the people freely granted their support to the military to oust the democratically-elected government of President Morsi, that action in itself would still constitute a military coup.

In addition, removing a democratically-elected president before he has completed his constitutionally-granted mandate simply because the majority of citizens are dissatisfied with him implicates what James Madison and his contemporaries feared about majoritarian democracy—majoritarian tyranny or tyranny of the majority.⁴¹³ In *Federalist Number 10*, Madison noted that there had been complaints from “our most considerate and virtuous citizens, . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”⁴¹⁴

The political problem commonly referred to as the “tyranny of the majority” or “majoritarian tyranny” has been recognized by several scholars of constitutional law and democracy.⁴¹⁵ Dominant political factions, often with the help of important state institutions (e.g., the military), can manipulate both the constitution and the electoral system and remain in power indefinitely, pushing the minority to the political margins. Egypt’s so-called “democratic (popular) coup” or “popular impeachment”⁴¹⁶ is an example of Madison’s concept of the tyranny of the majority.⁴¹⁷

Professor Charles Manga Fombad, a specialist on constitutional law in Africa, argues that one of the most important challenges facing governance in Africa today is “the problem of countering the resurgence of majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to practice their dictatorship” and that this “democratic majoritarianism [risks] descending into the tyranny of the majority.”⁴¹⁸ While Madison

⁴¹² See Arafá, *supra* note 396, at 862.

⁴¹³ See JAMES MADISON, THE FEDERALIST NO. 10. This is was James Madison’s first essay and it was originally published in the *Daily Advertiser*, Thursday, November 22, 1787.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ See Arafá, *supra* note 396, at 876–77.

⁴¹⁷ See, e.g., Madison, *supra* note 413.

⁴¹⁸ Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1007, 1035–36 (2011).

suggested the republican system of government—specifically separation of powers with checks and balances—as a way to deal with majoritarian tyranny, Fombad calls for African countries to “entrench constitutionalism and the rule of law.”⁴¹⁹

Constitutionalism, it is argued, encompasses “the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations.”⁴²⁰ He goes on to argue that “the modern concept of constitutionalism rests on the following core elements: (i) the recognition and protection of fundamental rights and freedoms; (ii) the separation of powers; (iii) an independent judiciary; (iv) the review of the constitutionality of laws; (iv) the control of the amendment of the constitution; and (v) institutions that support democracy.”⁴²¹ What happened in Egypt on July 3, 2013 and since then, including the election and ascension of Gen. Abdel Fattah el-Sisi to the presidency of Egypt, does not reflect any of these core elements of constitutionalism.

The July 3, 2013 overthrow of Morsi’s government in Egypt was a military coup and, as the evidence has since shown, the military’s actions were not designed to deepen and institutionalize Egyptian democracy. The military simply took advantage of mass dissatisfaction with the Morsi government, which had been given a mandate, through free, fair, and credible elections, to take the Egyptian Revolution of 2011 to the next step, and help the country deepen and institutionalize what was, at the time, an embryonic democracy.⁴²² This revolution was part of the Arab Spring and had resulted in the ouster of the government of Hosni Mubarak,⁴²³ paving the way for the

⁴¹⁹ See MADISON, *supra* note 413; Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1036 (2011).

⁴²⁰ Fombad, *supra* note 419, at 1013–14.

⁴²¹ *Id.* at 1014.

⁴²² See, e.g., *Egypt Revolution: 18 Days of People Power*, ALJAZEERA (Jan. 24, 2016), <https://www.aljazeera.com/indepth/inpictures/2016/01/egypt-revolution-160124191716737.html>. See also Yolande Knell, *Egypt’s Revolution: 18 Days in Tahrir Square*, BBC NEWS (Jan. 25, 2012), <https://www.bbc.com/news/world-middle-east-16716089>.

⁴²³ See David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N. Y. TIMES (Feb. 11, 2011), <https://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html>.

democratic elections that brought Morsi to power.⁴²⁴ Instead of fulfilling this popular desire for democracy and democratic institutions, Morsi and his government betrayed their mandate and promoted policies that frustrated many of the more than 13 million people who had voted for him.⁴²⁵ As argued by one commentator, Morsi “treated his Muslim Brotherhood mates as masters rather than servants of the people, showed no interest in protecting Egypt’s Christian minority, and then enraged the Egyptian army by attending a Brotherhood meeting at which Egyptians were asked to join the holy war in Syria to kill Shiites and overthrow Bashar al-Assad’s regime.”⁴²⁶

In April 2013, a “repeal campaign” called *Tamarod* began in Egypt.⁴²⁷ The main purpose of the campaign was to secure enough signatures to oust President Morsi from office.⁴²⁸ At the same time, “pro-Morsi groups calling for support of the President and his constitutional and legal legitimacy started demonstrations at multiple places and numerous districts.”⁴²⁹ On June 30, 2013, the one-year anniversary of Morsi’s inauguration as president, mass protests against the Morsi government were held throughout the country. Specifically, Egyptians protested at Tahrir Square and in front of the Presidential Palace and in doing so, they demanded that Morsi resign his position as President of Egypt.⁴³⁰ In response to these protests, the military issued a “48-hour ultimatum” to the government and the head of the Egyptian army at the time, Gen. Abdel Fattah el-Sisi, informed “political forces” that they had 48 hours “to meet the ‘people’s demands’ or else the army would impose a road map for the national

⁴²⁴ See Matt Bradley, *Morsi Takes Office, Praises Egyptian Military*, THE WALL STREET JOURNAL (June 30, 2012), <https://www.wsj.com/articles/SB10001424052702304058404577498384052282866>.

⁴²⁵ CNN Wire Staff, *Muslim Brotherhood’s Morsi Urges ‘Unity’ in First Speech as Egypt’s President-Elect*, CNN INT’L (June 24, 2012), <https://www.cnn.com/2012/06/24/world/africa/egypt-politics/index.html> (noting, *inter alia*, that more than 13 million Egyptians voted for Mohamed Morsi).

⁴²⁶ Fisk, *supra* note 395.

⁴²⁷ Patrick Kingsley, *Tamarod Campaign Gathers Momentum Among Egypt’s Opposition*, THE GUARDIAN (June 27, 2013), <https://www.theguardian.com/world/2013/jun/27/tamarod-egypt-morsi-campaign-opposition-resignation>.

⁴²⁸ See *id.*

⁴²⁹ See Arafa, *supra* note 396, at 866.

⁴³⁰ *Egypt Crisis: Mass Protests Over Morsi Grip Cities*, BBC NEWS (July 1, 2013), <https://www.bbc.com/news/world-middle-east-23115821> (noting the mass protests across Egypt demanding for the ouster of President Morsi).

politics.”⁴³¹ Since Morsi’s government was unable to meet the demands of the mobs that had descended on Tahrir Square and the Presidential Palace, the army intervened on July 3, 2013 and removed the country’s first democratically-elected president from office.

Writing about this military action, Arafa argues that “[t]he Army made it obvious that they were dispassionate in taking over political power, only wanting to make sure that Egypt and its people remain stable and safe and that those involved in the political arena find an agreed political solution which satisfies the needs and wishes of the Egyptians.”⁴³² First, President Morsi was the country’s legitimate head of state. Unlike the military officers who were giving him ultimatums, he was elected by the people in an election that was free, fair and very competitive—he won 51.7 percent of the votes cast in the runoff presidential election.⁴³³ The results of the runoff election showed that Mohamed Morsi had captured 51.7 percent of the vote to Ahmed Shafik’s 48.3 percent, with a turnout of 52 percent. This, obviously, was a very competitive election.⁴³⁴

Second, the Egyptian army had no legal authority to remove a duly elected head of state and its actions on July 3, 2013, supposedly in response to the so-called wishes of the Egyptian people, were nothing but mob rule, majoritarian tyranny. Morsi, a first-time president in a country with a long history of authoritarianism and without well-established and functioning democratic institutions, was due to make policy mistakes, some of them quite serious. Nevertheless, he should have been given the opportunity to learn on the job and work through these problems, especially given the fact that, as a result of the political opening made possible by the events surrounding the ouster of dictator Hosni Mubarak, Egyptians were, at this time, now in a much better position to petition their government for relief of their grievances. This is evident by the mass protests against Morsi’s government that took place in the summer of 2013.

⁴³¹ Matthew Weaver, Paul Owen & Tom McCarthy, *Egypt Protests: Army Issues 48-Hour Ultimatum—As It Happened*, THE GUARDIAN (July 1, 2013), <https://www.theguardian.com/world/middle-east-live/2013/jul/01/egypt-stanoff-millions-protest>.

⁴³² See Arafa, *supra* note 396, at 872.

⁴³³ Matthew Weaver, Paul Owen & Tom McCarthy, *Egypt Protests: Army Issues 48-Hour Ultimatum—As It Happened*, THE GUARDIAN (July 1, 2013), <https://www.theguardian.com/world/middle-east-live/2013/jul/01/egypt-stanoff-millions-protest>.

⁴³⁴ See *Celebration in Egypt as Morsi Declared Winner*, ALJAZEERA (June 24, 2012), <https://www.aljazeera.com/news/middleeast/2012/06/201262412445190400.html>.

Rather than give his government forty-eight hours to deal with these issues, the military should have resisted the urge to intervene and allowed these issues to be resolved through the democratic process.

When Egyptians took to the streets in 2011 in an effort to end “the 30-year rule of autocratic President Hosni Mubarak,” they also expected to achieve other goals and these included what protesters referred to as “bread, freedom and social justice.”⁴³⁵ Some protesters noted that “[t]he [2011] revolution was merely a stepping-stone towards a better future” and that “the anti-Mubarak uprising was a work in progress,” which, “like all revolutions, must go through several stages.”⁴³⁶ The result of the revolution was the establishment of a democratic system, which when Morsi came to power, was still in its embryonic stages. Rather than allow it to grow and mature, Egyptians, with the help of the military, killed it. Thus, pro-democracy Egyptians never had a chance to deepen and institutionalize the democracy made possible by the January 25, 2011 Revolution.⁴³⁷

In an editorial on July 3, 2013, the *USA Today* newspaper argued that what had happened on July 3, 2013 was “mob rule, abetted by military coup, to depose a government elected barely a year ago.”⁴³⁸ Egyptians repudiated their democracy through mass action and a military-led coup d’état and entrusted their future into the hands of a former military officer—Gen. (Ret.) Abdel Fattah el-Sisi.⁴³⁹ After Morsi was ousted, the military, under the leadership of el-Sisi, promised “a swift democratic reset.”⁴⁴⁰ The hope was that “[a] broad-based group [would] write a new constitution, replacing the Islamist-flavored one” that was in place at the time of the military coup.⁴⁴¹ Then, free and fair elections would be held to choose a new president.

⁴³⁵ *Activists: Egypt’s 2011 Uprising Failed to Achieve Goals*, DAILY SABAH (Jan. 26, 2016), <https://www.dailysabah.com/mideast/2016/01/26/activists-egypts-2011-uprising-failed-to-achieve-goals>.

⁴³⁶ *Id.*

⁴³⁷ See *The Revolution of 25 January 2011*, FANACK CHRONICLE (Nov. 15, 2012), <https://fanack.com/egypt/history-past-to-present/the-revolution-of-25-january-2011/>.

⁴³⁸ The Editorial Board, *In Egypt, Mob Rule is No Democracy: Our View*, USA TODAY (July 3, 2013), <https://www.usatoday.com/story/opinion/2013/07/03/egypt-mohammed-morsi-democracy-military-editorials-debates/2488207/>.

⁴³⁹ See *Egypt’s Sisi Quits Army to Run for President*, ALJAZEERA (Mar. 27, 2014), <https://www.aljazeera.com/news/middleeast/2014/03/egypt-sisi-resigns-as-defence-minister-2014326183926915155.html> (noting that Gen. Abdel Fattah el-Sisi had resigned his position in the army in order to run for the position of President of Egypt).

⁴⁴⁰ *Mob Rule*, *supra* note 438.

⁴⁴¹ *Id.*

Gen. el-Sisi, however, did not turn out to be the democratic messiah that the millions of Egyptians who put him in office thought he would be. In addition to shutting down “news media outlets [that] he didn’t like,” he also arrested and detained Muslim Brotherhood leaders, as well as the deposed president Mohamed Morsi, who eventually died in custody.⁴⁴² Some commentators have wondered whether “democracy can ever take root in such an environment.”⁴⁴³ Perhaps, the more relevant question to ask is: “If elections can be negated so easily, how can contesting factions trust them as a means of peacefully attaining their goals?”⁴⁴⁴

It is true that the Muslim Brotherhood, which remains Egypt’s “best-organized political force,” made a lot of mistakes during its one year in power.⁴⁴⁵ Their failure to build national consensus was one of their most important political failures and one that most likely contributed to their downfall. While economic conditions deteriorated and criminal activities skyrocketed, Morsi and his Brotherhood-dominated government concentrated on meeting their religious goals, which included turning the country into an Islamist state.⁴⁴⁶ Nevertheless, had the Egyptian electorate simply waited and ousted Morsi and the Muslim Brotherhood through a democratic election, “the Arab world would have had a valuable democratic model: a public repudiation of an Islamist government.”⁴⁴⁷ Instead, argues the *USA Today* editorial team, the message that the July 3, 2013 coup against Morsi and the Muslim Brotherhood sent was that “democracy is fine only as long as the military says it is.”⁴⁴⁸ The Brotherhood, it appears, is “likely to once again be isolated from power, as it has repeatedly been for 80 years. It’s an invitation to violence, even civil war.”⁴⁴⁹

Democracies, it has been argued, are deepened through elections and not mobs.⁴⁵⁰ In other words, mob rule is not the appropriate way to institutionalize democracy. Nevertheless, elections are not likely to

⁴⁴² *Id.*; see also *Egypt’s Ousted President Mohammed Morsi Dies During Trial*, BBC NEWS (June 17, 2019), <https://www.bbc.com/news/world-middle-east-48668941>.

⁴⁴³ *Mob Rule*, *supra* note 438.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Mob Rule*, *supra* note 438.

⁴⁵⁰ See *id.*

contribute positively to a country's transition to democratic governance and the building and sustaining of democratic institutions if elected officials are easily removed from office by the military in response to mass demonstrations.⁴⁵¹

G. Abdel Fattah el-Sisi's Constitutional Coup in Egypt

Former military officer and now president of the Republic of Egypt, el-Sisi, came to power under Egypt's post-Morsi constitution—that is the Constitution of Egypt, 2014.⁴⁵² That constitution limited the president to two, four-year terms.⁴⁵³ Hence, when el-Sisi was re-elected to another four-year term in 2018, he was supposed to leave office in 2022 and become ineligible to run for another term in office. Nevertheless, in early 2019, while he was completing the first year of his second term, el-Sisi and his supporters in the Egyptian parliament began efforts to carry out another coup; this time, a *constitutional coup* benefitting el-Sisi. As many as 485 of the 596 members of parliament voted on February 13, 2019 to increase the presidential term of office from four to six years and allow el-Sisi to serve another two terms after 2022.⁴⁵⁴ Some of the suggested constitutional changes were to be made to Article 140 of the post-Morsi Egyptian Constitution of 2014. Article 140 of the 2014 Constitution of Egypt reads: “The President of the Republic is elected for a period of four calendar years, commencing on the day the term of his predecessor ends. The President may only be reelected once.”⁴⁵⁵

According to the amended constitution, “The president shall be elected for a period of six calendar years, commencing from the day

⁴⁵¹ See *id.*

⁴⁵² See, e.g., *A Timeline of Key Events in Egypt Since the 2011 Uprising*, THE ASSOCIATED PRESS (March 25, 2018), <https://apnews.com/article/9d6a051ba57b4ca8b0633dd8e1bcb81f> (last visited on October 2, 2020) (providing a timeline of key events in Egypt since the 2011 uprising).

⁴⁵³ *Id.* at art. 140.

⁴⁵⁴ Merrit Kennedy, *With Constitution Changes, Egypt's President Could Stay In Power Until 2034*, NPR (Feb. 14, 2019), <https://www.npr.org/2019/02/14/694675332/with-constitution-changes-egypts-president-could-stay-in-power-until-2034>; See also *Egypt: Constitutional Amendments Entrench Repression*, HUMAN RIGHTS WATCH (Apr. 20, 2019), <https://www.hrw.org/news/2019/04/20/egypt-constitutional-amendments-entrench-repression>. (arguing, inter alia, that “the Egyptian government should withdraw proposed constitutional amendments that will consolidate authoritarian rule.”).

⁴⁵⁵ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION] Jan. 18, 2014, art. 140.

following the termination of the term of his predecessor. The president may not hold office for more than two consecutive terms.”⁴⁵⁶ In addition, Article (241 bis) of the amended constitution states that “[t]he current presidential term, as per the proposed amendments, shall end six years after the announcement of the presidential elections in 2018” and that “[t]he current president shall have the right to be reelected once.”⁴⁵⁷

The constitutional changes would also create a “Supreme Council for the Judicial Bodies,” which would be chaired by the President of the Republic of Egypt and be charged with managing all common matters related to the judiciary.⁴⁵⁸ In addition, the President would be empowered to “choose the Supreme Constitutional Court’s (SCC) President and its new members, chairs of all other judicial authorities, and the Public Prosecutor.”⁴⁵⁹

Human Rights Watch notes that:

[u]nder amended article 185, the president will have the authority to appoint the heads of judicial bodies and authorities from among seven of the most senior deputies nominated by judicial councils. The president or, in his absence, the justice minister will be the head of the Supreme Council for Judicial Bodies and Authorities, which will supervise the judiciary and whose independence is vital to preserve judicial independence.⁴⁶⁰

Although the proposed constitutional amendments “give the Supreme Council the authority to determine the conditions of appointment, promotion, and discipline for members of judicial

⁴⁵⁶ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION] Jan. 18, 2014 (*as amended* through Apr. 23, 2019), art. 140.

⁴⁵⁷ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION] Jan. 18, 2014 (*as amended* through Apr. 23, 2019), art. 241 bis. Egypt held presidential elections in March 2018 and incumbent president Abdel Fattah el-Sisi, running as an independent, emerged victorious, having captured 97 percent of the vote. See Ruth Michaelson, *Sisi Wins Landslide Victory in Egypt Election*, THE GUARDIAN (Apr. 2, 2018), <https://www.theguardian.com/world/2018/apr/02/sisi-poised-to-declare-landslide-victory-in-egypt-election>.

⁴⁵⁸ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION] Jan. 18, 2014 (*as amended* through Apr. 23, 2019), art. 185.

⁴⁵⁹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION] Jan. 18, 2014 (*as amended* through Apr. 23, 2019), arts. 185, 189, and 193.

⁴⁶⁰ HUMAN RIGHTS WATCH, *supra* note 454; see also CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION] Jan. 18, 2014 (*as amended* through Apr. 23, 2019), art. 185.

bodies, as well as a consultative role on draft laws organizing the affairs of judicial bodies and authorities,” the “president will have veto power in the Supreme Council.”⁴⁶¹ Amendments to both articles 189 and 193 grant the president additional powers to undermine judicial independence.⁴⁶² On April 16, 2019, the Egyptian parliament approved the constitutional changes, paving the way for el-Sisi to remain in power until 2030.⁴⁶³

The Egyptian government did not make any effort to engage in nation-wide discussion of the proposed amendments. In fact, the government only published the official draft amendments in the official Gazette on April 18, 2019, with a public referendum slated for April 19–22, 2019.⁴⁶⁴ Human Rights Watch noted that “[g]iven the ongoing repression, and that the political opposition in Egypt has dwindled to a nominal presence, a free and fair vote will be impossible.”⁴⁶⁵ The non-governmental organization also noted that Egypt’s “596-seat Parliament, which is dominated by members loyal to President Abdel Fattah al-Sisi and which routinely rubber-stamps government decisions, passed the [constitutional] amendments by a vote of 531 to 22” and in addition, “[d]uring Parliament’s ‘societal dialogue’ sessions, few critics were allowed to take part in the discussions about the amendments.”⁴⁶⁶ As argued by Said Benarbia, Middle East and North Africa Regional Director for the International Commission of Jurists, “[t]he amendments are a flagrant assault on the rule of law and independence of the judiciary in Egypt. If adopted, they will effectively place the military above the law and the Constitution and cement the executive’s subordination of judicial and prosecutorial authorities.”⁴⁶⁷

⁴⁶¹ HUMAN RIGHTS WATCH, *supra* note 454.

⁴⁶² *Id.*

⁴⁶³ Salma Islam, *Egypt parliament Oks constitutional changes to extend President Sisi’s power*, L.A. TIMES (Apr. 16, 2019), <https://www.latimes.com/world/la-fg-egypt-parliament-constitution-sisi-power-20190416-story.html>.

⁴⁶⁴ HUMAN RIGHTS WATCH, *supra* note 454.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* The International Commission of Jurists (ICJ) also expressed its disapproval of el-Sisi’s constitutional coup, noting that Egypt’s “constitutional amendments to extend the President’s term and powers over the judiciary must be rejected.” See *Egypt: Constitutional Amendments to Extend the President’s Term and Powers Over the Judiciary Must be Rejected*, ICJ, (Feb. 6, 2019), <https://www.icj.org/wp-content/uploads/2019/02/Egypt-Constitution-Statement-News-2019-ENG.pdf>. See also The Tahrir Institute for Middle East Policy (TIMEP), *Timep Brief: Draft Constitutional Amendments* (July 2, 2019), <https://timep.org/reports-briefings/timep-brief-draft-constitutional-amendments/>

During the April 19–22, 2019 constitutional referendum, the constitutional amendments were approved by 88.83 percent of the 44.33 percent of eligible voters participating in the exercise.⁴⁶⁸ In addition to the fact that the amendments would allow el-Sisi to possibly remain in office until 2030, they also significantly expand: (1) the powers of the executive branch of government, specifically those of the president; (2) the authority of the armed forces; and (3) the ability of the president to interfere with and exercise control over the judicial and legislative branches.⁴⁶⁹ As noted by Salma Islam, “[a]mendments introduced in February could have extended Sisi’s rule until 2034 but were rejected by a parliamentary committee.”⁴⁷⁰

IV. INTERNATIONAL LAW AND MILITARY COUPS

A. Introduction

On September 29, 1991, the Haitian military overthrew the country’s first freely elected President, Jean-Bertrand Aristide.⁴⁷¹ At its thirty-first plenary meeting on October 11, 1991, the UN General Assembly strongly condemned the military coup d’état and asked the UN Secretary-General to support the Organization of American States in its mission to diplomatically isolate any post-coup government in

(noting, inter alia, that the proposed constitutional amendments will extend the president’s mandate, expand the role of the armed forces in the country’s political economy, enhance the ability of the president to interfere with judicial independence, and seriously weaken the power of the legislative branch).

⁴⁶⁸ *Egypt’s constitutional changes approved in referendum*, DW (Apr. 23, 2019), <https://www.dw.com/en/egypts-constitutional-changes-approved-in-referendum/a-48452398>; See also *Egyptian voters back constitutional changes giving more power to President Sisi*, REUTERS (Apr. 23, 2019, 2:00 PM), <https://www.reuters.com/article/us-egypt-election/egyptian-voters-back-constitutional-changes-giving-more-power-to-president-sisi-idUSKCN1RZ229> (noting “the announced 44 percent turnout is more likely an attempt to portray this as the most legitimate constitutional referendum, as it has the highest turnout ever reported.”).

⁴⁶⁹ See, e.g., Mai el-Sadany, *Egypt’s Constitutional Amendments Further the Decay of State Institutions*, LAWFARE (June 17, 2019, 8:56 AM), <https://www.lawfareblog.com/egypts-constitutional-amendments-further-decay-state-institutions>.

⁴⁷⁰ Salma Islam, *Egypt Parliament Oks Constitutional Changes to Extend President Sisi’s Power*, L. A. TIMES (Apr. 16, 2019), <https://www.latimes.com/world/la-fg-egypt-parliament-constitution-sisi-power-20190416-story.html>.

⁴⁷¹ *Haiti’s Military Assumes Power After Troops Arrest the President*, N.Y. TIMES (Sept. 30, 1991), <https://www.nytimes.com/1991/10/01/us/haite-s-military-assumes-power-after-troops-arrest-the-president.html>.

Haiti.⁴⁷² Specifically, the UN General Assembly stated that it strongly condemned:

“the attempted illegal replacement of the constitutional President of Haiti, the use of violence and military coercion and the violation of human rights in . . . [Haiti]” and affirmed as “unacceptable any entity resulting from that illegal situation and [demanded] the immediate restoration of the legitimate Government of President Jean-Bertrand Aristide, together with the full application of the National Constitution and hence the full observance of human rights in Haiti.”⁴⁷³

A week earlier, the Organization of American States (“OAS”) had agreed “on a resolution to impose sanctions against the military junta in Haiti and to demand the immediate restoration of democratic rule in that country.”⁴⁷⁴ Specifically, the OAS had recommended that Member States take “action to bring about the diplomatic isolation of those who hold power illegally in Haiti.”⁴⁷⁵ With respect to the coup in Haiti, the international community made clear that “*only* democracy validates governance.”⁴⁷⁶ In the Preamble to the OAS Resolution on Haiti,⁴⁷⁷ the OAS noted that “the solidarity of the American states and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy.”⁴⁷⁸ Professor Thomas M. Franck, former professor of law at New York University and an expert on international law, noted that following events in Haiti and the Soviet Union in 1991,⁴⁷⁹ “a new legal entitlement is being created, based in

⁴⁷² G.A. Res. 46/7, ¶ 1–4 (Oct. 11, 1991).

⁴⁷³ *Id.* at ¶ 1–2.

⁴⁷⁴ Ron Howell, *Sanctions Backed After Aristide Plea, OAS, EC Agree to Isolate Junta in Haiti*, *NEWSDAY* (Oct. 3, 1991), <file:///Users/jmbaku/Downloads/ProQuestDocuments-2020-10-02.pdf>.

⁴⁷⁵ Organization of American States [OAS] Res. 1/91, at 2 (Oct. 9, 1991).

⁴⁷⁶ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 47 (1992).

⁴⁷⁷ Howell, *supra* note 474.

⁴⁷⁸ *Id.* at pmb.

⁴⁷⁹ There was a military coup in Haiti on September 29, 1991. During the period August 19–22, 1991, there was a failed attempt to overthrow the government of Mikhail Gorbachev in the Soviet Union. *See, e.g., What Motives Lay Behind the 1991 Soviet Coup?*, *VOA NEWS* (Oct. 26, 2009), <https://www.voanews.com/archive/what-motives-lay-behind-1991-soviet-coup>. *See also* Bridget Kendall, *New Light Shed on 1991 Anti-Gorbachev*

part on custom and in part on the collective interpretation of treaties.”⁴⁸⁰

The emerging law, which came to be referred to as the “democratic entitlement school” or the “democratic entitlement theory,”⁴⁸¹ and which Franck argued, “requires democracy to validate governance,” must not be considered as “the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance.”⁴⁸² That theory, however, argued Franck, “is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations.”⁴⁸³ This relatively radical transformation “of the democratic entitlement from moral prescription to international legal obligation,” argued Franck, “has evolved gradually.”⁴⁸⁴

However, in the early-1990s, this political transformation accelerated and began to move at a relatively rapid rate, as many governments, including those in Africa, began to recognize the fact that “government cannot govern by force alone” and that each regime needs “to be validated by being seen to comply with global standards for free and open elections.”⁴⁸⁵ In other words, “the legitimacy of governments is no longer confined to an appraisal through purely national criteria; rather, it must be evaluated through the universal criterion of democracy.”⁴⁸⁶ This global political awakening implicates the need for countries, especially African countries, to transition their governance processes to those undergirded by the rule of law.⁴⁸⁷

As will be argued later in this Article, in a country where there is fidelity to the rule of law, there is less likely to be political interference

Coup, BBC NEWS (Aug. 18, 2011), <https://www.bbc.com/news/world-europe-14560280>.

⁴⁸⁰ Franck, *supra* note 476, at 47.

⁴⁸¹ See, e.g., Jean d’Aspremont, *Responsibility for Coups d’État in International Law*, 18 TULANE J. INT’L & COMP. L. 451, 453 (2010).

⁴⁸² Franck, *supra* note 476, at 47.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 48.

⁴⁸⁶ See d’Aspremont, *supra* note 481, at 453.

⁴⁸⁷ Within governing processes undergirded by the rule of law, the law is supreme and no one, including even high-ranking government officials (e.g., the president or prime minister) is above the law. In addition, there is separation of powers with checks and balances, with one of those checks being the existence of an independent judiciary. See, e.g., Mbaku, *Threats to the Rule of Law*, *supra* note 1 (examining, inter alia, threats to the rule of law in African countries).

with the judiciary, which would allow the judiciary to function in “a fair, rational, objective and predictable manner” and in doing so, can serve to significantly enhance the legitimacy of government.⁴⁸⁸ However, in a country in which judicial decisions are influenced significantly by political considerations, individuals and groups that are not politically-connected and hence, do not have the opportunity or wherewithal to influence the judicial system regarding issues that are important to them, are likely to consider the government illegitimate, and themselves marginalized and perhaps, even tyrannized. Such groups could resort to violent mobilization in an attempt to either capture the government or minimize their marginalization, setting in motion a series of events that can significantly threaten the legitimacy of the national government.⁴⁸⁹ Adherence to the rule of law, however, is part of the national criteria for judging the legitimacy of the government. Nevertheless, as made clear by the United Nations, “constitutional limits on power, a key feature of democracy, require adherence to the rule of law.”⁴⁹⁰

This political transformation, which came to characterize and inform the pro-democracy movements of the early-1990s, also implicates the beliefs of the Founders of the American Republic, who argued that government had to “stand on the original and *ongoing* consent of the governed.”⁴⁹¹ This was the Founders’ concept of the “republican government,” which was based on an idea borrowed from the 17th Century English philosopher and physician, John Locke.⁴⁹² Judith A. Best notes that “[t]he Lockean principle requiring not only original but also ongoing consent reflects the motive for consent—to

⁴⁸⁸ Charles Manga Fombad, *Judicial Power in Cameroon’s Amended Constitution of 18 January 1996*, JURDIS INFO: REVUE DE LÉGISLATION ET DE JURISPRUDENCE CAMEROUNAISES 54, 68 (1998).

⁴⁸⁹ See JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 3 (2018) (noting that in many African countries, “ethnocultural groups, which consider themselves marginalized economically and politically, continue to opt for violent and destructive mobilization in order to improve their levels of participation in economic and political markets and minimize their further marginalization.”).

⁴⁹⁰ See Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, UN CHRONICLE: THE MAGAZINE OF THE UNITED NATIONS, Vol. XLIX, No. 4 (December 2012).

⁴⁹¹ Judith A. Best, *Fundamental Rights and the Structure of Government*, in THE FRAMERS AND FUNDAMENTAL RIGHTS, 37, 39 (Robert A. Licht ed., 1992). Emphasis in original.

⁴⁹² See, e.g., JOHN LOCKE, TWO TREATIES OF GOVERNMENT 302 (Whitmore and Fenn, and C. Brown, 1821).

preserve and enlarge freedom.”⁴⁹³ She goes on to argue that “[a] rational man will consent to be governed to his benefit, and no rational man may consent to the destruction of his unalienable natural rights—his fundamental rights.”⁴⁹⁴

As asserted by several scholars, people form governments to protect their rights.⁴⁹⁵ Hence, people intentionally and purposefully create governments and empower them to guard or protect their fundamental rights. The question that the Founders of the American Republic had to answer was: Who will guard the governors or guardians? As noted by Judith A. Best, “[t]he Lockean answer is that the people shall guard the guardians. The people shall judge the government. This is the ongoing consent that may be withdrawn at any time by a deliberate and solemn act of a majority of the incorporated people, of society itself.”⁴⁹⁶ However, the republican version of government developed by the Founders of the American Republic took Locke’s idea of “ongoing consent” further to include revolution or the “right of the people to dissolve the government and replace it with an entirely new one.”⁴⁹⁷

The republican government is defined by James Madison in *The Federalist No. 39* as follows:

a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as

⁴⁹³ Best, *supra* note 491, at 39.

⁴⁹⁴ *Id.*

⁴⁹⁵ See, e.g., MBAKU, *supra* note 489, at 128. See also JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 185 (1997).

⁴⁹⁶ Best, *supra* note 491, at 39.

⁴⁹⁷ *Id.*

every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.⁴⁹⁸

One consequence of a government that derives its powers and legitimacy to govern from the “great body of the society” is that the “governors” are “kept dependent upon the people themselves and not on some specially favored class.”⁴⁹⁹ As I have argued elsewhere, “[t]he people, in designing the constitution and setting up the government, reserve to themselves the right to judge and discipline, if necessary, their governors.”⁵⁰⁰ The people may, for example, provide, through the national constitution, various ways or mechanisms that they can use to discipline poorly performing or recalcitrant civil servants and political elites.⁵⁰¹ Such constitutional mechanisms can include, for example, regular free and fair elections, more robust procedures for amending the constitution (in order to minimize constitutional coups), and effective processes to impeach the president and other high-ranking government officials (e.g., judicial officers).⁵⁰² As argued by Franck, Western democracies have been able to achieve legitimacy “by subjecting [their] political process[es] to rules, often immutably entrenched in an intrepid constitution.”⁵⁰³ Specifically, these countries have developed a “system of autochthonous validation,” which consists of “national electoral commissions, judges, an inquisitive press and, above all, the citizenry acting at the ballot box.”⁵⁰⁴

Unfortunately, throughout Africa, autochthonous systems of validating the process through which the people choose their governors, as well as discipline them, have not yet been developed in many countries. As a consequence, it is difficult for those who govern many African countries to “demonstrate that they have fulfilled the requirements of the democratic entitlement, even if they purport to recognize that entitlement.”⁵⁰⁵ For example, in Cameroon, which officially adopted multiparty democracy, with a universal franchise

⁴⁹⁸ THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

⁴⁹⁹ Best, *supra* note 491, at 39.

⁵⁰⁰ MBAKU, *supra* note 489, at 132.

⁵⁰¹ See, e.g., *id.* at 133.

⁵⁰² See generally MBAKU, *supra* note 489, at 132. See also Best, *supra* note 491, at 39.

⁵⁰³ Franck, *supra* note 476, at 50.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

and a secret ballot in 1990,⁵⁰⁶ local and parliamentary elections were held on Sunday February 9, 2020. Nevertheless, the opposition claimed that the voting was “marred by violence,” as well as, “ballot stuffing” and “fraud committed by the ruling party”—the Cameroon People’s Democratic Movement.⁵⁰⁷ Similar arguments were made by the opposition after the presidential elections that took place on October 9, 2011—specifically, opposition candidates “accused election officials of fraud and voting irregularities.”⁵⁰⁸ Thus, even though many African countries, including Cameroon, do have legal mechanisms that are supposed to provide citizens with the wherewithal to hold their governors accountable and hence, determine or perhaps, demonstrate, the legitimacy of the regime, many of these mechanisms do not function effectively. This is due to, *inter alia*, the fact that these countries have not yet provided themselves with governing processes undergirded by the rule of law.⁵⁰⁹

⁵⁰⁶ See John Mukum Mbaku, *The State and Cameroon’s Stalled Transition to Democratic Governance*, in RECONSTRUCTING THE AUTHORITARIAN STATE IN AFRICA 18, 32 (2014).

⁵⁰⁷ See Moki Edwin Kindzeka, *Cameroon Opposition Alleges Ballot-Stuffing as Elections Marred by Violence*, VOA NEWS (Feb. 11, 2020), <https://www.voanews.com/africa/cameroon-opposition-alleges-ballot-stuffing-elections-marred-violence>. Speaking about the same election, the U.S. ambassador to Cameroon, Robert Jackson, noted that he had observed “inconsistencies and irregularities in and between almost all polling stations as well as technical difficulties on the part of ELECAM in administering the election.” See *Cameroon Election Deeply Flawed, Says US Envoy*, FRANCE 24 (Oct. 20, 2011), <https://www.france24.com/en/20111020-cameroon-election-deeply-flawed-says-biya-jackson-us-ambassador>.

⁵⁰⁸ Tapang Ivo Taku, *Charges of Fraud in Cameroon Election*, CNN INTERNATIONAL (Oct. 10, 2011), <https://www.cnn.com/2011/10/10/world/africa/cameroon-elections/index.html>.

⁵⁰⁹ For example, even though Cameroon introduced a governing process undergirded by separation of powers, with checks and balances, through constitutional amendments implemented in 1996, legal and constitutional scholars have determined that the system, as designed, does not actually work. For example, the president and many of the country’s high-ranking officials are still able to act above the law and as a result, impunity remains a major problem in the country. See, e.g., John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 95 (2019). According to Professor Charles Manga Fombad, an expert on Cameroon constitutional law, “the 1996 [constitutional] amendment [which introduced the concept of separation of powers] did not add anything substantive to the pre-existing practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon.” See Charles Manga Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 234, 247 (2000).

The global move towards government based on the “original and ongoing consent” of the governed, which began in the early-1990s, also affected many countries in Africa. In fact, by the mid-1990s, many previously authoritarian governments, as well as one-party political systems in Africa, had collapsed and were replaced by regimes that were either democratic or seeking to transition to democratic governance.⁵¹⁰ The political, economic, and social awakening, which began in Tunisia after the self-immolation of street vendor, Tarek al-Tayeb Mohamed Bouazizi, and came to be known as the Arab Spring, was part of the grassroots pro-democracy demonstrations that had started in many other African countries in the late-1980s and early-1990s.⁵¹¹

During this period, “especially after South Africa’s successful transition from the racially-based apartheid system to a multi-racial and democratic political dispensation, many Africans came to see multiparty democracy and constitutionalism as the only legitimate way to change government, as well as to enhance and ensure peaceful coexistence and minimize sectarian conflict.”⁵¹² It was hoped that the coup, particularly the military coup d’état, would give way to constitutional means of regime change, such as elections and where necessary, impeachment. Nevertheless, military and constitutional coups—all of which are unconstitutional methods of government change—have continued to maintain a presence in African political economy, as evidenced by recent military coups in Egypt (2013),⁵¹³

⁵¹⁰ See, e.g., POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003) (presenting a series of essays that examines transition to democracy in several African countries during the early-1990s. This transition also included the demise of the racially-based apartheid system in South Africa and the introduction of a non-racial democratic system in the country). See generally LIZ SONNEBORN, THE END OF APARTHEID IN SOUTH AFRICA (2010) (examining the rise of demise of apartheid in South Africa).

⁵¹¹ John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT’L L. 959, 1041 (2013). See also THE ARAB SPRING: NEW PATTERNS FOR DEMOCRACY AND INTERNATIONAL LAW (Carlo Panara & Gary Wilson eds., 2013) (presenting a series of essays that examines the evolution of the Arab Spring and its impact on democracy in North Africa and parts of the Middle East).

⁵¹² John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 CARDOZO INT’L COMP., POL’Y & ETHICS L. REV. 77, 90 (2018).

⁵¹³ See David D. Kirkpatrick, *Army Oust Egypt’s President; Morsi is Taken into Military Custody*, N.Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

Zimbabwe (2017),⁵¹⁴ and Sudan (2019),⁵¹⁵ as well as constitutional coups in Egypt (2019),⁵¹⁶ Burundi (2018),⁵¹⁷ Comoros (2018),⁵¹⁸ Rwanda (2015),⁵¹⁹ Togo (2019),⁵²⁰ and Uganda (2017).⁵²¹

During the last several decades, beginning with the world-wide efforts to transition to democratic governance, there has been a gradual movement towards the use of international law, particularly international human rights law, to judge the legitimacy of a national governmental regime. In his 1992 article, Franck argued that there was already emerging a “new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement.”⁵²² In addition to the fact that “the international community has increasingly condemned military coups d’état against democratic governments,” there has been evolving a “norm of customary international law rendering such overthrows unlawful.”⁵²³

⁵¹⁴ See Eliza Mackintosh, *Zimbabwe’s Military Takeover Was the World’s Strangest Coup*, CNN INTERNATIONAL (Nov. 21, 2017), <https://www.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-coup/index.html>.

⁵¹⁵ See BBC, *Sudan Coup: Why Omar al-Bashir was Overthrown*, BBC NEWS (Apr. 15, 2019), <https://www.bbc.com/news/world-africa-47852496>.

⁵¹⁶ See Salma Islam, *Egypt Parliament Oks Constitutional Changes to Extend President Sisi’s Power*, L.A. TIMES (Apr. 16, 2019), <https://www.latimes.com/world/la-fg-egypt-parliament-constitution-sisi-power-20190416-story.html>.

⁵¹⁷ See *Burundi Backs New Constitution Extending Presidential Term Limits*, ALJAZEERA (May 22, 2018), <https://www.aljazeera.com/news/africa/2018/05/burundi-backs-constitution-extending-presidential-term-limits-180521134736408.html>.

⁵¹⁸ See *Another Power Grab in the Comoros*, THE ECONOMIST (July 26, 2018), <https://www.economist.com/middle-east-and-africa/2018/07/26/another-power-grab-in-the-comoros>.

⁵¹⁹ See Tracy McVeigh, *Rwanda Votes to Give President Paul Kagame Right to Rule Until 2034*, THE GUARDIAN (Dec. 19, 2015), <https://www.theguardian.com/world/2015/dec/20/rwanda-vote-gives-president-paul-kagame-extended-powers>. See also Claudine Vidal, *Rwanda: Paul Kagame is in Line to Stay in Office Until 2034*, CONVERSATION (Jan. 18, 2016), <https://theconversation.com/rwanda-paul-kagame-is-in-line-to-stay-in-office-until-2034-53257>.

⁵²⁰ See *Togo Changes Law to Let President Stand for Two More Terms*, ALJAZEERA (May 9, 2019), <https://www.aljazeera.com/news/2019/05/togo-law-president-stand-terms-190509180859448.html>.

⁵²¹ Moses Khisa, *How Museveni has Twisted Uganda’s Constitution to Cling to Power*, CONVERSATION (June 20, 2019), <https://theconversation.com/how-museveni-has-twisted-ugandas-constitution-to-cling-to-power-118933>.

⁵²² Franck, *supra* note 476, at 50.

⁵²³ McDonnell, *supra* note 356, at 375.

On several occasions, many states and multilateral and regional organizations (e.g., the United States; ECOWAS; United Nations) have not only condemned military coups against democratically-elected governments, but have also refused to recognize governments that have come to power through such an unconstitutional method. On May 25, 1997, the military overthrew the government of President Ahmed Tejan Kabbah of Sierra Leone, who had been elected in March 1996 in the country's first multi-party elections in nearly three decades.⁵²⁴ The coup was conducted by a group of soldiers from the Sierra Leone Army ("SLA") who formed the Armed Forces Revolutionary Council ("AFRC") and had allied themselves with the rebel Revolutionary United Front ("RUF").⁵²⁵ Shortly after the coup, a government consisting of members of the AFRC and the RUF proceeded to rule the country.⁵²⁶ In addition to condemning the coup, the international community demanded that the soldiers hand over government to the country's democratically-elected president whom they had ousted.⁵²⁷ Specifically, the regional organization, the Economic Community of West African States ("ECOWAS"), of which Sierra Leone is a member, actually sent troops to Freetown, Sierra Leone's capital, to return President Kabbah to power.⁵²⁸

After the September 29, 1991 military overthrow of Jean-Bertrand Aristide, Haiti's first democratically-elected president, the UN General Assembly adopted a resolution in which the world-body strongly condemned the unconstitutional government change.⁵²⁹ Specifically, the UN "[s]trongly condemn[ed] the overthrow of the constitutionally elected President, Jean-Bertrand Aristide, and the use

⁵²⁴ See Lansana Gberie, *The May 25 Coup d'État in Sierra Leone: A Militarist Revolt?*, 22 AFR. DEV. 149 (1997).

⁵²⁵ *Id.* at 150.

⁵²⁶ *See id.* at 150.

⁵²⁷ Press Release, Security Council, ECOWAS Asks Security Council to Send 'Unequivocal Message' to Sierra Leone Regime to Return Legitimate Government of President Kabbah to Power (July 11, 1997).

⁵²⁸ Resource Information Center, *Sierra Leone: Information on the 1997 Coup d'État, ECOMOG Harassment of Civilians, and the Current Situation in Sierra Leone*, U.S. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 5, 2000), <https://www.refworld.org/docid/3df0dba62.html>. "ECOMOG" is the Economic Community of West African States Monitoring Group, a multilateral armed force that was established by ECOWAS and has participated in several peace missions in the region. *See, e.g.,* Cyril Obi, *Economic Community of West African States on the Ground: Comparing Peacekeeping in Liberia, Sierra Leone, Guinea-Bissau, and Côte d'Ivoire*, 2 AFR. SECURITY 119 (2009) (analyzing ECOMOG's peacekeeping activities in Liberia, Sierra Leone, Guinea-Bissau and Côte d'Ivoire).

⁵²⁹ G.A. Res. 46/138 (Dec. 17, 1991).

of violence and military coercion and the subsequent violation of human rights in that country.”⁵³⁰ With respect to the government that had been formed after Aristide’s overthrow, the UN General Assembly condemned what it referred to as:

fragrant human rights violations committed under the illegal Government set up following the coup of 29 September 1991, particularly summary executions, arbitrary arrests and detentions, torture, searches without warrants, rape, ransacking of private and public buildings, restrictions on the freedoms of movement, expression, assembly and association and the repression of popular demonstrations calling for the return of President Jean-Bertrand Aristide.⁵³¹

In fact, the UN Security Council (“UNSC”) recommended the use of direct legal action against the Haitian coup makers and favored the restoration of the country’s democratically-elected president. Specifically, the UNSC authorized the formation of “a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti.”⁵³² The United States and the Organization of American States (“OAS”) also condemned the coup and sought ways to return President Aristide to power.⁵³³ Some countries, such as the United States, have laws that prohibit them from providing aid to governments that come into being through unconstitutional means. For example, the U.S. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996 deals specifically with military coups. Section 508 of the Act provides that:

⁵³⁰ *Id.* ¶ 2.

⁵³¹ *Id.* ¶ 3. In a situation such as this, where the United Nations has condemned the coup, the organization has refused to grant permission to the government that came into being as a result of the coup the right to occupy the country’s seat at the UN. *See id.*

⁵³² S.C. Res. 940, ¶ 4 (July 31, 1994).

⁵³³ *See, e.g., U.S. and OAS Condemn Coup d’État in Haiti, Seek Return of President Aristide*, 2 FOREIGN POL’Y BULL. 61 (2009). *See also* Thomas L. Friedman, *U.S. Suspends Assistance to Haiti and Refuses to Recognize Junta*, N.Y. (Oct. 2, 1991), <https://www.nytimes.com/1991/10/02/world/us-suspends-assistance-to-haiti-and-refuses-to-recognize-junta.html>; 95602F, *HAITI: EFFORTS TO RESTORE PRESIDENT ARISTIDE, 1991–1994*, CONG. RESEARCH SERV. (May 11, 1995), <https://www.everycrsreport.com/reports/95-602.html>.

None of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to finance directly any assistance to any country whose duly elected Head of Government is deposed by military coup or decree: *Provided*, That assistance may be resumed to such country if the [U.S] President determines and reports to the [Congressional] Committees on Appropriations that subsequent to the termination of assistance a democratically elected government has taken office.⁵³⁴

Nevertheless, this law was not applied to Egypt when the democratically-elected government of Mohamed Morsi was overthrown by the military under the leadership of Field Marshall Abdel Fattah el-Sisi on July 3, 2013.⁵³⁵ First, at the time, John Kerry, President Obama's Secretary of State, "argued that Morsi's removal was not, in fact, a coup" and that "Sisi was bowing to the public will and acting to save Egypt."⁵³⁶ Although the Obama administration cancelled "a joint military exercise between the U.S. and Egypt called Bright Star, a tradition stemming from the 1978 Camp David Accords," it did not cancel the "\$1.3 billion the U.S. sends in aid to the Egyptian government, which includes such items as jet fighters."⁵³⁷

According to the democratic entitlement theory, the legitimacy of a government that has come to power through a military coup cannot be "reconciled with any democratic standard."⁵³⁸ Throughout many parts of the world, including Africa, "numerous authors have also embraced the idea that the legitimacy of governments is no longer a purely internal matter and ought to be gauged according to the

⁵³⁴ Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1996, Pub. L. No. 104-07, § 508 (1996).

⁵³⁵ David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken into Military Custody*, N.Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

⁵³⁶ David D. Kirkpatrick, *That Time Obama Wouldn't Call a Coup a Coup: A Very Short Book Excerpt*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/obama-egypt-coup/565733/>. (last visited on May 13, 2020).

⁵³⁷ Brian Resnick & National Journal, *Obama Condemns Morsi, Interim Egyptian Government But Makes No Mention of U.S. Aid*, ATLANTIC (Aug. 15, 2013), <https://www.theatlantic.com/politics/archive/2013/08/obama-condemns-morsi-interim-egyptian-government-but-makes-no-mention-of-us-aid/454437/>.

⁵³⁸ See Jean d'Aspremont, *Responsibility for Coups d'État in International Law*, 18 TUL. J. INT'L L. & COMP. L. 451, 454 (2010).

criterion of democracy.”⁵³⁹ In addition, some of these authors “have expressly inferred, from the emergence of a principle of democracy, that coups d’état have become *illegal*.”⁵⁴⁰

B. International Law and the Emergence of the Illegality of Military Coups

Even before the emergence of international concern for democracy, coups were condemned as an unconstitutional change of government. In fact, “states have long agreed to protect themselves against unconstitutional usurpations of power for this can be understood as a reflex of self-protection that is almost instinctive.”⁵⁴¹ Although coups were often tolerated during the Cold War,⁵⁴² they became less popular in the post-Cold War period as many countries began to see coups as undemocratic.⁵⁴³ As noted by Professor Jean

⁵³⁹ See *id.* at 454.

⁵⁴⁰ See *id.* at 454. Emphasis added.

⁵⁴¹ See *id.* at 455.

⁵⁴² The Cold War protagonists—the Soviet Union and its allies (the Eastern Bloc) and the United States and its allies (the Western Bloc) supported military coups that introduced government regimes that supported their geopolitical interests. For example, when Mobutu seized power through a military coup in the Democratic Republic of Congo in 1965, the U.S. French and Belgian governments provided him significant military, diplomatic and economic support, supposedly because of his government’s anti-communist stance. In fact, during the early years of Mobutu’s government, then President of the United States, Lyndon Johnson, “sent three American C–130 transport planes and other supplies and support to Mobutu to help crush [an] uprising” against his government mounted by the Congolese National Army (*Armée nationale congolaise*, ANC), which was trying to restore the former prime minister, Moïse Tshombé, to power. See, e.g., DAVID F. SCHMITZ, *THE UNITED STATES AND RIGHT-WING DICTATORSHIPS, 1965–1989*, 31 (2006). See also NAOMI CHAZAN ET AL., *POLITICS AND SOCIETY IN CONTEMPORARY AFRICA* (1999) (noting that “[d]espite incontrovertible evidence of human rights abuses and economic mismanagement, the U.S. supported Mobutu’s regime until his overthrow by Laurent Kabila, hailing him as a ‘good friend’ and wise leader for whom U.S. officials professed ‘a warm spot in our hearts’”). On October 21, 1969, far-left military officers of the Supreme Revolutionary Council, led by Siad Barre, overthrew the government of President Sheik Mukhtar Mohamed Hussein and Prime Minister Mohammad Egal in Somalia. Although the new government alienated the United States and its allies, it attracted support from the Soviet Union. In fact, only three days after the coup, Moscow welcomed the coup and *Pravda*, the official newspaper of the Communist Party of the Soviet Union, officially “welcomed the new Somali government and compared it with the revolutionary regimes in Sudan and Libya.” See ROBERT G. PATMAN, *THE SOVIET UNION IN THE HORN OF AFRICA: THE DIPLOMACY OF INTERVENTION AND DISENGAGEMENT* 94 (1990).

⁵⁴³ See, e.g., DAVID HEBDITCH AND KEN CONNOR, *HOW TO STAGE A MILITARY COUP: FROM PLANNING TO EXECUTION* 10 (2009) (noting that “[c]oups are generally considered to be fundamentally undemocratic.”).

d'Aspremont, an expert on international law, after the Cold War, "it became rare for states to remain indifferent toward such a schism in the political and juridical order of another state, especially when it led to the overthrow of a democratic government."⁵⁴⁴

Since the end of the Cold War, the legitimacy of governments has been premised on "the *democratic* origin of power"—how the regime came to power: whether through democratic elections or through a military coup or some other unconstitutional method.⁵⁴⁵ The democratic origin of the power theory explains why nations and international organizations condemn military coups d'état against democratic governments and deny recognition to putschists.⁵⁴⁶ Scholars have noted that a distinction must be made between the condemnation of coups by two distinct groups of actors—States and international organizations.⁵⁴⁷

1. *Condemnation of Coups: States*

Noting that democracy is an "irreversible process," States have usually considered the overthrow of a democratic government by military coup d'état as unacceptable behavior.⁵⁴⁸ In the post-coup period, States usually express their disapproval of the actions of the coup makers as representing an "infringement of the principal of democracy."⁵⁴⁹ When the democratically elected president of Sierra Leone, Ahmed Tejan Kabbah, was overthrown in a military coup, on May 25, 1997, the Government of Nigeria immediately condemned the coup and "dispatched two frigates with troops to reinforce a small contingent in the capital Freetown."⁵⁵⁰ In addition, the Nigerian government gave "a 24-hour ultimatum to the coup leaders [in Sierra Leone] to relinquish power."⁵⁵¹

On May 13, 2015, soldiers under the leadership of Gen. Godefroid Niyombare, attempted to overthrow the government of

⁵⁴⁴ See Jean d'Aspremont, *Responsibility for Coups d'État in International Law*, 18 TUL.J. INT'L L. & COMP. L. 451, 455 (2010).

⁵⁴⁵ *Id.* at 455. Emphasis added.

⁵⁴⁶ *Id.* at 455–56.

⁵⁴⁷ *Id.* at 456.

⁵⁴⁸ *Id.* at 456.

⁵⁴⁹ *Id.* at 456.

⁵⁵⁰ See Moyiga Nduru, *Sierra Leone: Chaos in Freetown Concerns and Distracts OAU*, INTER PRESS SERVICE NEWS AGENCY (May 30, 1997), <http://www.ipsnews.net/1997/05/sierra-leone-chaos-in-freetown-concerns-and-distracts-oau/>.

⁵⁵¹ *Id.*

President Pierre Nkurunziza of Burundi.⁵⁵² At the time, President Nkurunziza was attending the 13th Extraordinary Summit of the East African Community Heads of State at Dar es Salaam (Tanzania). The meeting was designed to discuss the political crisis in Burundi.⁵⁵³ In response to the coup action, Tanzanian President Jakaya Kikwete indicated that all the Heads of State at the Dar es Salaam summit “had condemned the coup” and added that “[t]he region will not accept, nor will the region stand by, if violence does not stop or escalates in Burundi.”⁵⁵⁴

In addition to condemning them for infringing the principle of democracy, coups d'état were also condemned for violating the “constitutional order of the particular state that they produce.”⁵⁵⁵ After President Zeyala of Honduras was ousted by military coup in 2009, several countries condemned the coup and expressed outrage at “violating the constitutional order of the country.”⁵⁵⁶ For example, Jorge Valero of Venezuela, who was representing the Bolivarian Alliance (“BA”) for the Americas, “rejected and condemned the coup d'état against President Jose Manuel Zeyala, the constitutional President of Honduras, launched by the armed forces in connivance with reactionary forces” and “demanded the immediate return of the rule of law and restoration of the President’s functions.”⁵⁵⁷ He then added that the countries that the BA represented “did not—and would not—recognize any Government that was not the democratically elected Government of President Zeyala, and he urged that the

⁵⁵² See Senior Burundi Army Officer Says Dismisses President Nkurunziza, REUTERS (May 13, 2015), <https://af.reuters.com/article/burundiNews/idAFL5N0Y43MN20150513>.

⁵⁵³ WILLY PETER NINDORERA, CENTRAL AFRICA REPORT: THE EAST AFRICAN COMMUNITY TAKES ON THE BURUNDI CRISIS I (2016).

⁵⁵⁴ *Burundi Coup Bid: President Nkurunziza's Return 'Thwarted'*, BBC NEWS (May 14, 2015), <https://www.bbc.com/news/world-africa-32731554>.

⁵⁵⁵ Jean d'Aspremont, *Responsibility for Coups d'État in International Law*, 18 TUL. J. INT'L & COMP. L. 451, 457 (2010).

⁵⁵⁶ Press Release, UN General Assembly, *General Assembly President Expresses Outrage at Coup d'État in Honduras, Says Crucial for World Community to 'Stand as One' in Condemnation* (June 29, 2009), <https://www.un.org/press/en/2009/ga10840.doc.htm>.

⁵⁵⁷ *Id.* The Bolivarian Alliance of the Americas was founded by Cuba and Venezuela as an alternative to the U.S.-led Free Trade Area of the Americas. Member States are Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, Saint Lucia, Saint Vincent and the Grenadines, and Venezuela. See generally ASA K. CUSACK, VENEZUELA, ALBA, AND THE LIMITS OF POSTNEOLIBERAL REGIONALISM IN LATIN AMERICA AND THE CARIBBEAN (2019) (examining the challenges facing the Bolivarian Alliance of the Americas, which is also referred to as ALBA (Bolivarian Alliance for the Peoples of Our America)).

international community not recognize any other Government in Honduras.”⁵⁵⁸

Claude Heller of Mexico, speaking as a representative of the Rio Group,⁵⁵⁹ “said that the coup had breached the democratic order of Honduras” and that his group of countries had “rejected the use of the armed forces and the arbitrary detention of the head of the Government.”⁵⁶⁰ Heller went on to note that “[t]his breach was unacceptable and inadmissible and was a practice that the countries of the region had categorically rejected.”⁵⁶¹ Other countries also condemned the Honduran coup. For example, Enriquillo A. del Rosario Ceballos of the Dominican Republic stated that he had “reiterated the unambiguous opinion that rejected the coup in Honduras against the legitimate Government headed by Manuel Zelaya.”⁵⁶² He argued further that the Dominican Republic was of the opinion that the “coup d’état was a step backward and was a violation of the Charter of the Organization of American States (“OAS”) and that his country had demanded that “the Zelayan Government, chosen by the Honduran people, be returned.”⁵⁶³

The U.S. Government, under President Barrack Obama, also condemned the coup and “cut off millions of dollars of aid and suspended the U.S. visas of Honduran officials.”⁵⁶⁴ In addition, then Secretary of State, Hillary Rodham Clinton, “helped organize negotiations, led by Costa Rican President Oscar Arias, that produced

⁵⁵⁸ Press Release, UN General Assembly, *General Assembly President Expresses Outrage at Coup d’État in Honduras, Says Crucial for World Community to ‘Stand as One’ in Condemnation* (June 29, 2009), <https://www.un.org/press/en/2009/ga10840.doc.htm>.

⁵⁵⁹ The Rio Group was a political association consisting of Latin American and Caribbean countries. It was created in Rio de Janeiro, Brazil on December 18, 1986. It was, however, succeeded by the Community of Latin American and Caribbean States (CELAC). The CELAC consists of 33 sovereign countries in Latin America and the Caribbean. See JOHN E. SPILLAN, NICHOLAS VIRZI & MAURICIO GARITA, *DOING BUSINESS IN LATIN AMERICA: CHALLENGES AND OPPORTUNITIES* 151 (2014).

⁵⁶⁰ Press Release, UN General Assembly, *General Assembly President Expresses Outrage at Coup d’État in Honduras, Says Crucial for World Community to ‘Stand as One’ in Condemnation* (June 29, 2009), <https://www.un.org/press/en/2009/ga10840.doc.htm>.

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ Mary Beth Sheridan, *Kerry-DeMint Clash Over Honduras Trip Highlights Policy Feud*, WASH. POST (Oct. 2, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/10/01/AR2009100105015.html>.

a plan to allow ousted president Manuel Zelaya to return to his post temporarily, with limited powers.”⁵⁶⁵

Nevertheless, when the military overthrew the democratically-elected government of Mohamed Morsi in Egypt, such robust response was not forthcoming from the U.S. government, which was still under the leadership of President Obama. Although the U.S. president called upon the Egyptian military to “hand back control to a democratic, civilian government without delay,” it “stopped short of calling the downfall of Mohamed Morsi a coup.”⁵⁶⁶

Similar timid and non-committal responses also came from other major governments around the world. Furthermore, President Obama remarked as follows:

We never support in countries the intervention by the military, *but what needs to happen now in Egypt is for democracy to flourish and for a genuine democratic transition to take place.* All parties need to be involved in that, and that’s what Britain and our allies will be saying very clearly to the Egyptians.⁵⁶⁷

Like President Obama, Prime Minister Cameron avoided calling the ouster of Morsi what it was, a military coup. Morsi came to power through a democratic election, which was the outcome of the January 25, 2011 Egyptian Revolution.⁵⁶⁸ This was the continuation of Egypt’s transition to democracy, a process that was cut short by military intervention. One wonders why Cameron did not see that democracy *could not flourish* under the conditions made possible by military

⁵⁶⁵ *Id.*

⁵⁶⁶ Dan Roberts, *US in Bind over Egypt after Supporting Morsi but Encouraging Protesters*, THE GUARDIAN (July 3, 2013), <https://www.theguardian.com/world/2013/jul/03/egypt-obama-us-mohamed-morsi-crisis>.

⁵⁶⁷ *World Reaction to the Ousting of Egypt’s Mohammed Morsi*, BBC NEWS (July 4, 2013), <https://www.bbc.com/news/world-middle-east-23175379> (emphasis added).

⁵⁶⁸ See generally *Egypt Revolution: 18 Days of People Power*, ALJAZEERA (Jan. 25, 2016), <https://www.aljazeera.com/indepth/inpictures/2016/01/egypt-revolution-160124191716737.html>. See also Jack Shenker, *Cairo Protesters in Violent Clashes with Police*, THE GUARDIAN (Jan. 25, 2011), <https://www.theguardian.com/world/2011/jan/25/egypt-protests-mubarak>.

intervention and that *a democratic transition* had already taken place but had been thwarted by the military.⁵⁶⁹

Reactions from Chancellor Angela Merkel of Germany were similarly timid. Like Obama and Cameron, Merkel did not demand the restoration of Morsi's government. Instead, she called on "all parties involved not to use any violence" and noted that "[t]he country's problems can only be solved if Egypt enters a political process as quickly as possible and democratic and rule of law will be established as soon as possible."⁵⁷⁰ Egypt had, through the election of Morsi, already entered the *political process* that the Chancellor was making reference to—that is, one that would allow the country to entrench democracy and the rule of law. Why did she not demand that the military restore Morsi's government, leave politics and return to the barracks and allow the country's transition to democracy to proceed?

Then president of the French Republic, François Hollande, made similarly vague pronouncements when he stated that "[t]he democratic process has stopped and must return."⁵⁷¹ It is not clear what he meant when he said the democratic process must return—did he mean that the military should restore Morsi's government or that new elections should be held to select a new civilian government? He appears to answer that question when he stated further that "[w]hat really matters is to organize irreproachable elections as soon as possible, as the army took the responsibility of toppling the president and asked the constitutional court president to fulfil this function."⁵⁷² Who would be allowed to participate in these so-called "irreproachable elections"? Why would Egyptians trust any elections, regardless of how "irreproachable" they are, considering the ease with which the military was able to cut short the mandate of a president who had been elected through a fair, free and credible election?

Reactions from the Government of Turkey were more emphatic and definitive and directly addressed the issue of whether the action was a military coup or not—Foreign Minister Ahmet Davutoglu spoke as follows: "It is unacceptable for a government, which has come to power through democratic elections, to be toppled through illicit means and, even more, a military coup."⁵⁷³ Other countries in the

⁵⁶⁹ See *World Reaction to the Ousting of Egypt's Mohammed Morsi*, *supra* note 567.

⁵⁷⁰ See *id.*

⁵⁷¹ See *id.*

⁵⁷² See *id.*

⁵⁷³ See *id.*

region seemed to support the military action because of their opposition either to Morsi and the Muslim Brotherhood or their policies. For example, President Bashar al-Assad of Syria stated that “[w]hat is happening in Egypt is the fall of so-called political Islam. This is the fate of anyone in the world who tries to use religion for political or factional interests.”⁵⁷⁴

King Abdullah of Saudi Arabia congratulated the new post-Morsi leadership in Egypt: “In the name of the people of Saudi Arabia and on my behalf, we congratulate your leadership of Egypt in this critical period of its history.”⁵⁷⁵ President Mahmoud Abbas of the Palestinian Authority congratulated the interim president—former Chief Justice of the Supreme Constitutional Court, Adly Mahmoud Mansour, who had been selected by the military to serve as interim president after Morsi was ousted from power. President Abbas declared as follows: “In the name of the Palestinian people and its leaders, I am honored to congratulate you (Mr. Mansour) on assuming the leadership of the Arab Republic of Egypt in this transitory phase in its history.”⁵⁷⁶ Nevertheless, the government of neighboring Tunisia joined Turkey in condemning the coup—*Ennahda*, the self-described ruling Muslim democratic party of Tunisia, stated as follows: “Ennahda rejects what happened and believes legitimacy is represented by President Mohammed Morsi, and no one else.”⁵⁷⁷

2. *Condemnation of Coups: International Organizations*

When Honduran President Manuel Zelaya was ousted by the army on June 28, 2009, the UN General Assembly (“UNGA”) adopted a resolution condemning the coup d’état.⁵⁷⁸ Here is how the resolution read: the UNGA “[c]ondemns the coup d’état in the Republic of Honduras that has interrupted the democratic and constitutional order and the legitimate exercise of power in Honduras, and resulted in the removal of the democratically elected President of that country, Mr. José Manuel Zelaya Rosales.”⁵⁷⁹ The UNGA then demanded “the immediate and unconditional restoration of the legitimate and Constitutional Government of the President of the Republic of

⁵⁷⁴ See *id.*

⁵⁷⁵ See *World Reaction to the Ousting of Egypt’s Mohammed Morsi*, *supra* note 567.

⁵⁷⁶ See *id.*

⁵⁷⁷ See *id.*

⁵⁷⁸ G.A. Res. 63/301, (July 1, 2009).

⁵⁷⁹ *Id.* ¶ 1.

Honduras, Mr. José Manuel Zelaya Rosales, and of the legally constituted authority in Honduras, so that he may fulfil the mandate for which he was democratically elected by the Honduran people.”⁵⁸⁰

On June 29, 2009, the day after the military ousted President Zelaya, the Association of Caribbean States (“ACS”) issued a press release in which it strongly condemned “the military coup d’état that took place early Sunday morning in the Republic of Honduras against the legal, constitutional and democratically elected President José Manuel Zelaya Rosales.”⁵⁸¹ The ACS then went on to note that it considered as unacceptable what it referred to as “[t]his rupture of the constitutional order” and demanded that the military immediately effect the “restitution [of Zelaya] as President of the Republic [of Honduras].”⁵⁸²

Brazil and the Bolivarian Alliance for the Americas (“ALBA”) “announced the removal of their ambassadors to Honduras” and declared that “they would never recognize the de facto Honduran government, and called for the immediate and ‘unconditional’ reinstatement of Mr. Zelaya.”⁵⁸³ On July 1, 2009, two days after the military action, the Organization of American States (“OAS”) passed a resolution condemning the coup and called for “diplomatic initiatives aimed at restoring democracy and the rule of law and the reinstatement’ of Zelaya’s government.”⁵⁸⁴ The OAS then went on to say that “it would suspend Honduras’ membership in the hemispheric group if Zelaya isn’t restored to power within three days.”⁵⁸⁵ On July 5, 2009, the Special General Assembly of the Organization of American States resolved “to suspend immediately the right to participate in the institution of Honduras following the coup d’état that

⁵⁸⁰ *Id.*

⁵⁸¹ Association of Caribbean States (ACS), *Declaration of the ACS on the Situation in Honduras* (June 29, 2009), http://www.acs-aec.org/PressCenter/NewsReleases/2009/nr142009_en.ht; see also Tim Rogers, *Latin Leaders Unite Against Junta in Honduras*, THE CHRISTIAN SCIENCE MONITOR (June 30, 2009), <https://www.csmonitor.com/World/Americas/2009/0630/p06s04-woam.html>.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ See *OAS Condemns Honduran Coup*, UPI NEWS (July 1, 2009, 7:33 AM), https://www.upi.com/Top_News/2009/07/01/OAS-condemns-Honduran-coup/48971246447995/?ur3=1.

⁵⁸⁵ See *id.*

expelled President José Manuel Zelaya from power.”⁵⁸⁶ Nevertheless, at a special meeting of the OAS called in June 2011 to consider the matter of Honduras’ suspension, delegates voted “32 to one to readmit Honduras.”⁵⁸⁷ Ecuador’s ambassador to the OAS, Maria Isabel Salvador, noted that her “country could not support the readmission because of the ongoing violations” of human rights, arguing that “[d]emocracy, the rule of law, due process of law, human rights and saying no to impunity—that’s why we cannot agree with the other members of the organization.”⁵⁸⁸

When the military ousted Mohamed Morsi in Egypt, the issue of whether the military action was a coup, “a popular democratic uprising, or some hybrid of the two” was hotly debated and contested.⁵⁸⁹ As president, Mohamed Morsi had presided over an extremely dysfunctional government and experts have noted that “there was no doubt that the demonstrations against his growing arbitrariness reflected a very strong and popular current in Egyptian politics.”⁵⁹⁰ Nevertheless, it is important to recognize the fact that the Muslim Brotherhood won the 2012 elections, which were adjudged to be fair, free and credible and which represented the first democratic elections in Egypt’s political history. As has been argued by some scholars, “a year of misrule will not have eliminated [the Muslim Brotherhood’s] support base.”⁵⁹¹ Perhaps, more important is the fact that the military intervention to annul the will of the Egyptian people, expressed through a legitimate election, did not augur well for the development and deepening of democracy in the country. Why would any other Egyptian citizen trust the electoral system as a way to select individuals to serve in government, given the fact that the military coup makers, either acting unilaterally (for their own corporate interests) or in response to mass protests, could simply intervene and annul the outcome of a legitimate election?

⁵⁸⁶ *OAS Suspends Membership of Honduras*, ORGANIZATION OF AMERICAN STATES (July 5, 2009), https://www.oas.org/en/media_center/press_release.asp?sCodigo=e-219/09.

⁵⁸⁷ See Deborah Charles, *Honduras Readmitted to OAS After Coup*, REUTERS (June 1, 2011), <https://www.reuters.com/article/us-honduras-oas-idUSTRE75063P20110601>.

⁵⁸⁸ See Charles, *supra* note 587.

⁵⁸⁹ Alex de Waal, *The African Union’s Principled Stand on Egypt*, WORLD PEACE FOUNDATION (July 9, 2013), <https://sites.tufts.edu/reinventingpeace/2013/07/09/the-au-stand-on-egypt/>.

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*

The statement of the United Nations regarding the military overthrow of President Morsi was vague and failed to address the unconstitutional and illegal military action. Then UN Secretary-General, Ban Ki-moon, stated that “[a]t this moment of continued high tension and uncertainty in the country, the secretary-general reiterates his appeals for calm, non-violence, dialogue and restraint.”⁵⁹² In addition, noted the UN Secretary-General, “military interference in the affairs of any state is of concern. Therefore, it will be crucial to quickly reinforce civilian rule in accordance with *principles of democracy*.”⁵⁹³ It should have been obvious, even to Ban Ki-moon, that the principles of democracy had already been violated through the military’s decision to oust a democratically elected president and that the only way to restore the principles of democracy in Egypt was the immediate restoration of Morsi’s government, regardless of how dysfunctional it might have been. The Secretary-General should have called for the military to leave politics and restore Morsi’s legitimate role as the democratically elected President of Egypt.

The European Union’s foreign policy chief, Catherine Ashton, urged “all sides to rapidly return to the democratic process, including the holding of free and fair presidential and parliamentary elections and the approval of a constitution, to be done in a fully inclusive manner, so as to permit the country to resume and complete its democratic transition.”⁵⁹⁴ The simplest and most appropriate way for Egypt to return to the democratic process, as suggested by the EU’s foreign policy chief, was for the military to restore Morsi’s mandate and allow him to serve in the position that he had legally earned through a democratic election. What was the point of asking Egyptians to hold “free and fair presidential and parliamentary elections” when they had already done so in two rounds in 2012 and Morsi and the Muslim Brotherhood had been declared the winners?⁵⁹⁵ The July 3,

⁵⁹² See *World Reaction to the Ousting of Egypt’s Mohammed Morsi*, *supra* note 567.

⁵⁹³ See *id.* (emphasis added).

⁵⁹⁴ See *id.*

⁵⁹⁵ The election was conducted in two rounds, the first on May 23-24, 2012 and the second round took place on June 16-17, 2012. See *Islamist Claims Victory in Egypt President Vote*, CBS NEWS (June 18, 2012), <https://www.cbsnews.com/news/islamist-claims-victory-in-egypt-president-vote/>; see also David D. Kirkpatrick, *Named Egypt’s Winner, Islamist Makes History*, N.Y. TIMES (June 24, 2012), <https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html>.

2013 military coup⁵⁹⁶ effectively and unconstitutionally annulled the results of that election. Why were Egyptians expected to believe that the military would not act similarly and annul another election if one were to be conducted in the post-coup period and, either the military disagreed with the winner and his government or there were mass protests against the government's policies?

Unlike the UN and the EU, the African Union ("AU") had a more principled and robust response to the Egyptian coup of July 3, 2013. As noted by Professor Alex de Waal of the Fletcher School of Law and Diplomacy and an expert on African politics, "[t]he one international organization that has responded in a principled, decisive and prompt manner is the African Union, which suspended Egypt on July 4[, 2013]."⁵⁹⁷ As noted by Professor de Waal, the African Union acted in accordance with its Constitutive Act, which "prohibits any member state, in which there is an unconstitutional transfer of power, from participating in the activities of the Union."⁵⁹⁸ He goes on to note that the AU provision was "born in 1997 as a measure to prohibit military coups, or more precisely, a measure to try to ostracize putschists and compel them to hand over power to elected governments as soon as possible."⁵⁹⁹ However, in 2000, when the AU's Constitutive Act was drafted in preparation for the transition from the Organization of African Unity to the African Union, the provision against military coups was expanded to include "all unconstitutional means of taking power."⁶⁰⁰

Below, this Article will provide a more in-depth examination of the experiences of the Organization of African Unity and its successor organization, the African Union, with military coups.

C. The Legal Basis of the African Union's Response to Military Coups

The Organization of African Unity ("OAU") came into being on May 23, 1963 in Addis Ababa, Ethiopia.⁶⁰¹ Although the OAU was

⁵⁹⁶ See David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken into Custody*, N. Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

⁵⁹⁷ See de Waal, *supra* note 589.

⁵⁹⁸ See *id.*

⁵⁹⁹ See *id.*

⁶⁰⁰ See *id.*

⁶⁰¹ See GORDON HARRIS, THE ORGANIZATION OF AFRICAN UNITY: INTERNATIONAL ORGANIZATIONS SERIES, SELECTIVE, CRITICAL, ANNOTATED BIBLIOGRAPHIES, VOL. 7, 8 (1994).

“[c]onscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,”⁶⁰² the organization’s Charter did not specifically make as one of its objectives, the promotion of democracy, good governance and the rule of law.⁶⁰³ The OAU Charter, on the other hand, asked Member States to “solemnly affirm and declare their adherence” to certain principles, including “[t]he sovereign equality of all Member States,”; “[n]on-interference in the internal affairs of States,”; and “[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”⁶⁰⁴

Based on these principles, it is obvious that the OAU was not empowered to intervene in the internal affairs of any Member State to prevent military coups or restore democratic governance, once a government had been ousted by military coup or other unconstitutional means. The legal basis of OAU policy towards military coups and, indeed, that of its successor organization, the AU, can be found in three important documents. These are the (1) *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* (“Lomé Declaration”);⁶⁰⁵ (2) *African Charter on Democracy, Elections and Governance*

⁶⁰² Organization of African Unity (OAU), *Charter of the Organization of African Unity*, Addis Ababa May 25, 1963, AFRICAN UNION, <https://au.int/en/treaties/oau-charter-addis-ababa-25-may-1963> (last visited on May 18, 2020), at pmb.

⁶⁰³ The purposes of the OAU are listed in Article II (1) of the OAU Charter: “The Organization shall have the following purposes: (a) To promote the unity and solidarity of the African States; (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; (c) To defend their sovereignty, their territorial integrity and independence; (d) To eradicate all forms of colonialism from Africa; and (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.” See also John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 CARDOZO INT’L COMP., POL’Y & ETHICS L. REV. 77, 83 (2018).

⁶⁰⁴ OAU Charter, *supra* note 602, at art. III (1–3).

⁶⁰⁵ OAU, *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc. AHG/Decl. 5 (XXXVI) (2000) <https://www.peaceau.org/uploads/ahg-decl-5-xxxvi-e.pdf> (last visited on October 2, 2020) [hereinafter Lomé Declaration].

("African Democracy Charter");⁶⁰⁶ and (3) *Constitutive Act of the African Union* ("Constitutive Act").⁶⁰⁷

1. *The Lomé Declaration*

The Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government came out of a meeting at the Thirty-Sixth Ordinary Session of the Assembly of the Heads of State and Government of the Organization of African Unity, from July 10–12, 2000 in Lomé, Togo. At the meeting, delegates expressed the "grave concern about the resurgence of coup d'état in Africa" and noted that they had recognized "that these developments are a threat to peace and security of the Continent" and that coups d'état "constitute a very disturbing trend and serious setback to the ongoing process of democratization in the Continent."⁶⁰⁸

The OAU delegates at Lomé in July 2000, also noted that "the phenomenon of coup d'état has resulted in fragrant violations of the basic principles of our Continental Organization and of the United Nations" and that the coup d'état also "contradicts and contravenes the position taken by our Organization in Harare in 1997 following the coup d'état in Sierra Leone, in which we unequivocally condemned and rejected any unconstitutional change of government."⁶⁰⁹ Noting that coups are "sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect of the rule of law based on peoples['] will expressed through the ballot and not the bullet," the delegates to the Lomé Assembly "agreed on the following elements of a Framework for an OAU response to Unconstitutional Changes of Government:"⁶¹⁰

- a) a set of common values and principles for democratic governance;
- b) a definition of what constitutes an unconstitutional change; and
- c) measures and actions that the OAU would progressively take to respond to an Unconstitutional Change of Government; and

⁶⁰⁶ OAU, *African Charter on Democracy, Elections and Governance*, OAU Doc. Assembly/AU/Dec. 47 (VIII) (2007) <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> (last visited on October 2, 2020)) [hereinafter *African Democracy Charter*].

⁶⁰⁷ Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

⁶⁰⁸ Lomé Declaration, *supra* note 605.

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

d) an implementation Mechanism.”⁶¹¹

The delegates at the Lomé Assembly then agreed on principles that they argued formed “a basis for the articulation of common values and principles for democratic governance in [the continent].”⁶¹² These principles included “adoption of a democratic Constitution”; “respect of the Constitution and adherence to the provisions of the law and other legislative enactments”; “separation of powers and independence of the judiciary”; “promotion of political pluralism or any other form of participatory democracy”; “organization of free and regular elections”; “guarantee of freedom of expression and freedom of the press, including guaranteeing access to the media for all political stake-holders”; “constitutional guarantee of fundamental rights and freedoms in conformity with the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples’ Rights of 1981”; and the “guarantee and promotion of human rights.”⁶¹³

In order to give effect to these principles, the delegates to the Lomé Assembly agreed on definitions of “situations that could be considered as situations of unconstitutional change of government.”⁶¹⁴ These are:

- (1) a military coup d’état against a democratically elected government;
- (2) intervention by mercenaries to replace a democratically elected Government;
- (3) the replacement of democratically elected Governments by armed dissident groups and rebel movements; and
- (4) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁶¹⁵

2. *The African Democracy Charter*

The African Charter on Democracy, Elections and Governance (“African Democracy Charter”) was adopted on January 30, 2007 and entered into force on February 15, 2012.⁶¹⁶ In the Preamble to the African Democracy Charter, the Member States of the African Union

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ Lomé Declaration, *supra* note 605.

⁶¹⁵ *Id.*

⁶¹⁶ African Democracy Charter, *supra* note 606.

noted that they were “[i]nspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasize the significance of good governance, popular participation, the rule of law and human rights.”⁶¹⁷ Noting that they were committed to promoting “the universal values and principles of democracy, good governance, human rights and the right to development,” Member States of the African Union stated that they were determined “to promote and strengthen good governance through the institutionalization of transparency, accountability and participatory democracy.”⁶¹⁸

Chapter 8 of the African Democracy Charter provides for “[s]anctions in Cases of Unconstitutional Changes of Government.”⁶¹⁹ The first article in Chapter 8 is Article 23, in which “State[s] Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union.”⁶²⁰ These are:

1. Any putsch or coup d’état against a democratically elected government.
2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.⁶²¹

It is important to note that the African Democracy Charter provides a list of situations that the African Union has agreed can produce an unconstitutional change of government that is exactly equal to that provided by the Lomé Declaration, but with one exception. The African Democracy Charter provides for a fifth

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

⁶¹⁹ *Id.* at ch. 8.

⁶²⁰ *Id.* at art. 23.

⁶²¹ *Id.* at art. 23 (1–5).

situation, which addresses what has come to be referred to as the constitutional coup—changing the constitution to extend the incumbent president’s mandate in office.⁶²²

As used in this Article, a *military coup d’état* is “an irregular transfer of a state’s chief executive by the regular armed forces or internal security forces through the use (or threat) of force,” which specifically excludes “nonmilitary irregular transfers such as cabinet reshufflings and palace coups that lack military participation.”⁶²³

3. *The Constitutive Act of the African Union*

The Constitutive Act of the African Union was adopted on November 7, 2000 and entered into force on May 26, 2001.⁶²⁴ The African Union (“AU”) was officially launched as a replacement for the OAU during “the 38th and final summit of the OAU” held in Durban, South Africa, from July 9–10, 2002.⁶²⁵ In addition to a provision establishing the African Union,⁶²⁶ the Constitutive Act also condemned and rejected “unconstitutional changes of governments.”⁶²⁷ Article 30 deals with the suspension of governments which have come into power through unconstitutional means.⁶²⁸

D. *The OAU and African Union Responses to Military Coups in Africa*

The Organization of African Unity was officially disbanded on July 9, 2002 in Durban, South Africa and replaced by the African Union.⁶²⁹ Both the Lomé Declaration and the African Democracy Charter elaborate a framework that the African Union can use to respond to and deal with military coups.⁶³⁰ During their Assembly in

⁶²² This situation is defined in Article 23(5) as follows: “Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.” See *id.* art. 23(5).

⁶²³ See J. Craig Jenkins & Augustine J. Kposowa, *Explaining Military Coups d’État: Black Africa, 1957–1984*, 55 AM. SOC. REV. 861 (Dec. 1990).

⁶²⁴ Constitutive Act, *supra* note 607.

⁶²⁵ See SAID ADEJUMOBI AND ADEBAYO OLUKOSHI, *THE AFRICAN UNION AND NEW STRATEGIES FOR DEVELOPMENT IN AFRICA* 48 (2008).

⁶²⁶ Constitutive Act, *supra* note 607, art. 2.

⁶²⁷ *Id.* at art. 4(p).

⁶²⁸ *Id.* at art. 30.

⁶²⁹ See *OAU Holds Last Meeting—2002–07–08*, VOA NEWS (October 30, 2009), <https://www.voanews.com/archive/oau-holds-last-meeting-2002-07-08>.

⁶³⁰ See Lomé Declaration, *supra* note 605. See also the African Democracy Charter, *supra* note 606.

Lomé (Togo) in July 2000, the delegates—African Heads of State and Government—“unanimously rejected any unconstitutional change as an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions.”⁶³¹ The Lomé Declaration provides a procedure that the OAU/AU can use to respond “to an unconstitutional change of government as provided for in the definition of unconstitutional change,” which is found in the Declaration.⁶³²

Whenever an unconstitutional change of government takes place in any Member State of the African Union, the Lomé Declaration prescribes that the following steps should be taken: First, the “Current Chairman of the OAU” and its “Secretary-General, on behalf of our Organization, should immediately and publicly condemn such a change and urge for the speedy return to constitutional order.”⁶³³ In publicly condemning the unconstitutional change of government, the Lomé Declaration also requires that both the current Chairman and the Secretary-General/Chairman of the African Union Commission “should also convey a clear and unequivocal warning to the perpetrators of the unconstitutional change and that, under no circumstances, will their illegal action be tolerated or recognized by the OAU [/AU].”⁶³⁴

Second and following the “initial response of condemning the unconstitutional change by the Central Organ”⁶³⁵—which in the case of the African Union is the AU Commission:

(a) A period of up to six months should be given to the perpetrators of the unconstitutional change to restore constitutional order. During the six month period, *the government concerned should be suspended from participating in the Policy Organs of the OAU*. Apart from the sanctions provided for under Article 115 of the OAU Financial Rules and Regulations, the governments concerned should not participate in meetings of the Central Organ and

⁶³¹ See Lomé Declaration, *supra* note 605.

⁶³² See *id.*

⁶³³ See *id.* Note that when the African Union came into effect in July 2002, the position of Secretary-General was replaced by that of a Chairman of the African Union Commission (AUC). The AUC is the African Union’s executive/administrative branch or secretariat and is located in Addis Ababa, Ethiopia. See AU, *The Commission*, <https://au.int/en/auc> (last visited on May 18, 2020).

⁶³⁴ See Lomé Declaration, *supra* note 605.

⁶³⁵ See *id.*

Sessions of the Council of Ministers and the Assembly of Heads of State and Government. Its exclusion from participating in the OAU Policy Organs should not affect the country's membership in the OAU and therefore will not preclude it from honoring its basic obligations towards the Organization including financial contributions to the OAU regular budget;

(b) The Secretary-General should, during this period gather facts relevant to the unconstitutional change of Government and establish appropriate contacts with the perpetrators with a view to ascertaining their intentions regarding the restoration of constitutional order in the country; the Secretary-General should seek the contributions of African leaders and personalities in the form of discreet moral pressure on the perpetrators of the unconstitutional change in order to get them to cooperate with the OAU and facilitate the restoration of constitutional order in the Member State concerned; the Secretary-General should speedily enlist the collaboration of the Regional Grouping to which the "country in crisis" belongs. *At the expiration of the six months suspension period, a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted, in addition to the suspension from participation in the OAU Policy Organs.* This could include visa denials for the perpetrators of an unconstitutional change, restrictions of government-to-government contacts, trade restrictions, etc. In implementing a sanctions regime, the OAU should enlist the cooperation of Member States, Regional Groupings and the wider International/Donor Communities. Careful attention should be exercised to ensure that the ordinary citizens of the concerned country do not suffer disproportionately on account of the enforcement of sanctions.⁶³⁶

Chapter 8 of the African Democracy Charter prescribes similar sanctions that should be imposed on Member States that have been subjected to unconstitutional government change and the unconstitutional regimes that are established by such changes—these sanctions are similar to those provided in the Lomé Declaration.⁶³⁷ Article 25 of the African Democracy Charter establishes the sanctions

⁶³⁶ See *id.*

⁶³⁷ See *id.*

that must be imposed when the African Union Peace and Security Council has determined that there has been an unconstitutional change of government in a State Party.”⁶³⁸ Here are the relevant provisions:

1. When the Peace and Security Council observes that there has been an unconstitutional change of government in a State Party, and that diplomatic initiatives have failed, it shall suspend the said State Party from the exercise of its right to participate in the activities of the Union in accordance with the provisions of articles 30 of the Constitutive Act and 7 (g) of the Protocol. The suspension shall take effect immediately.
2. However, the suspended State Party shall continue to fulfill its obligations to the Union, in particular with regard to those relating to respect of human rights.
3. Notwithstanding the suspension of the State Party, the Union shall maintain diplomatic contacts and take any initiatives to restore democracy in that State Party.
4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.
5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.
6. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act.
7. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.

⁶³⁸ See African Democracy Charter, *supra* note 606, art. 25(1).

8. State Parties shall not harbor or give sanctuary to perpetrators of unconstitutional changes of government.
9. State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition.
10. State Parties shall encourage conclusion of bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance.⁶³⁹

The African Democracy Charter mandates that after the AU's Peace and Security Council ("PSC") has determined that there has occurred an unconstitutional change of government in a Member State, "diplomatic initiatives" are supposed to be undertaken to resolve the political situation and "restore democracy in that State Party."⁶⁴⁰ It is only after those initiatives have failed to resolve the problem and restore democracy that the PSC shall "suspend the said State Party from the exercise of its right to participate in the activities of the Union."⁶⁴¹ Such suspension is expected to be carried out "in accordance with the provisions of articles 30 of the Constitutive Act and 7(g) of the Protocol."⁶⁴²

With respect to the architects of the unconstitutional government change in a State Party, they "shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State."⁶⁴³ Such individuals "may also be tried before the competent court of the

⁶³⁹ *Id.* at art. 25(1–10).

⁶⁴⁰ African Democracy Charter, *supra* note 606, art. 25(1, 3).

⁶⁴¹ *Id.* at art. 25(1).

⁶⁴² Article 30 of the Constitutive Act, which deals with "suspension" of Member States, states as follows: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union." See Constitutive Act, *supra* note 607, at art. 30. Article 7(1)(g) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union states that "[i]n conjunction with the Chairperson of the Commission, the Peace and Security Council shall: g. institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration." See *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (July 9, 2002), <https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union>.

⁶⁴³ African Democracy Charter, *supra* note 606, art. 25(4).

Union.”⁶⁴⁴ Other sanctions are also prescribed for Member States and perpetrators of unconstitutional change of government. For example, according to Article 25(7), “[t]he Assembly [of Heads of State and Government of the AU] may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.”⁶⁴⁵

Below, this Article will revisit the July 3, 2013 military coup in Egypt to see the extent to which the AU succeeded or failed in carrying out its policy against unconstitutional change of government as prescribed in the three documents described earlier—the Constitutive Act, the Lomé Declaration, and the African Democracy Charter.⁶⁴⁶

1. *The AU and the 2013 Military Coup in Egypt*

When the Egyptian armed forces under the leadership of Field Marshall Abdel Fattah el-Sisi overthrew the democratically elected government of President Mohamed Morsi on July 3, 2013, the African Union initially condemned the coup as an unconstitutional change of government and the Secretary of the Peace and Security Council (“PSC”), Admore Kambudzi, declared that: “As mandated by the relevant AU instruments, the African Union Peace and Security Council decides to suspend the participation of Egypt in AU activities until the restoration of constitutional order.”⁶⁴⁷

On July 4, 2013, a day after the overthrow of President Morsi, then Chairperson of the Commission of the AU, Dr. Nkosazana Dlamini-Zuma, issued a press statement in which she noted that she was continuing “to follow closely the evolution of the situation in Egypt, which last night witnessed the *overthrow of the elected President Mohammed Morsi by the Army*, and the appointment and swearing in of a caretaker Head of State.”⁶⁴⁸ After “recognizing the

⁶⁴⁴ *Id.* at art. 25(5).

⁶⁴⁵ *Id.* at art. 25(7).

⁶⁴⁶ *Id.*; Constitutive Act, *supra* note 607; Lomé Declaration, *supra* note 605.

⁶⁴⁷ Aaron Massho, *African Union Suspends Egypt*, REUTERS (July 5, 2013), <https://www.reuters.com/article/us-egypt-protests-africa/african-union-suspends-egypt-idUSBRE9640EP20130705>. In condemning what it referred to as “an unconstitutional change of government,” the AU did not specifically identify which of the four forms of unconstitutional change of government provided in the Lomé Declaration applied to the Egyptian case. See Lomé Declaration, *supra* note 605.

⁶⁴⁸ AU, *Press Release: The AU Reiterates Its Readiness to Assist Egypt to Build Consensus on the Challenges Facing It and on Early Restoration of Constitutional Order, Addis Ababa (Ethiopia)* (July 4, 2013), <http://www.peaceau.org/uploads/auc-com-egypt-4-07-2013.pdf> (Emphasis added). It is important to note that, although Dr. Dlamini-Zuma, in her capacity as the Chair of the AU Commission, did not

tremendous challenges that faced the Egyptian people over the past year and the growing frustration of many of them over the management of the country, marked by cumulative economic difficulties, rising and widespread insecurity, political and social polarization, as well as the lack of consensus on the way forward,” Dr. Dlamini-Zuma observed that “the removal of President Mohammed Morsi was in violation of the provisions of the Egyptian Constitution and falls under the AU doctrine on unconstitutional changes of Government.”⁶⁴⁹

While it is true that Egyptians, at this time, were frustrated with the inability or unwillingness of their government to effectively confront widespread poverty and other political, economic and social ills, a military coup should not and cannot be the first policy option that people should think of if they are frustrated with their duly elected leaders. This is not the appropriate way to build, deepen, and institutionalize democracy, nor is it the right way to institutionalize the rule of law. In her July 4, 2013 statement, the Chairperson of the African Union Commission, Dr. Dlamini-Zuma, reiterated her call to “all Egyptian stakeholders to embrace the spirit of dialogue and mutual accommodation and to eschew violence and acts of revenge and retribution, in order to find a consensual solution to the current crisis and consolidate the gains made in the ongoing democratic process in their country.”⁶⁵⁰ It is unfortunate that Dr. Dlamini-Zuma and the AU had failed to remind Egyptians that the coming to power of President Mohamed Morsi, through democratic elections, had been an important transformative event in the history of modern Egypt and which had offered Egyptians the opportunity to begin developing their democratic institutions and eventually institutionalizing the rule of law. Unfortunately, the military coup interrupted the transition, and the African Union should have insisted that the Egyptian military should reinstate President Morsi and his government and allow the democratization process to proceed.

Although Morsi has been described as “inept and majoritarian,” he, nevertheless, “was no more autocratic than a typical transitional leader and was more democratic than other leaders during societal

specifically call it a coup d'état, she, nevertheless, recognized what happened in Egypt on July 3, 2013 as a military overthrow of the democratically-elected government of President Morsi.

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.*

transitions.”⁶⁵¹ In fact, some scholars of Egyptian political economy have argued that Morsi’s year in office as president, “may have witnessed unprecedented polarization, fear, and uncertainty, *but for that time Egypt was the freest, in relative terms, tha[n] it had been since its independence in 1952.*”⁶⁵² In addition, argues Shadi Hamid, a senior fellow at The Brookings Institution and a specialist on Egyptian political economy, during the Morsi year, “Egyptians were shouting, protesting, striking, and hoping, both for and against Morsi. This, of course, is also what made the year frightening: the freewheeling intellectual combat, the seemingly endless sparring of ideas and individuals, but also the sheer sense of openness (and the insecurity that came with it). No other period, or even year, comes close. This was not *because* of Morsi, but because Egypt—with the help of millions of Egyptians—was trying to become a democracy, albeit a flawed one.”⁶⁵³ The question to ask here is: *Who brought an end to Egypt’s embryonic democracy, the Egyptian military or the flawed and perhaps, inept President Morsi?*

Despite all his faults, Morsi was the country’s democratically elected president, and he should have been allowed to complete his mandate and then be pushed out, if necessary, through the next election. The January 25, 2011 Revolution had introduced a level of openness that Egyptians had never known. It is possible that given time, Morsi and his government would eventually have been awakened from their dysfunctional slumber by the cries of millions of Egyptians who were now using the new-found openness to strike, protest, shout, and express their frustrations at the government’s inability or unwillingness to provide the leadership for the resolution of their multifarious problems. We would never know if, allowed to complete his mandate, Morsi would have eventually learned on the job and become a more effective and less autocratic leader. By cutting short Morsi’s, albeit flawed, presidency, the Egyptian military must be held responsible for putting an end to Egypt’s democratic experiment.⁶⁵⁴

⁶⁵¹ Shadi Hamid, *The Tragedy of Egypt’s Mohamed Morsi*, ATLANTIC (June 18, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/mohamed-morsi-and-end-egyptian-democracy/591982/>.

⁶⁵² *Id.* (emphasis added).

⁶⁵³ *Id.* (emphasis in original).

⁶⁵⁴ It is important to note that after coming to power, Morsi had “driven back the biggest challenge to civilian rule by dismissing top generals and tearing up their legal attempt to curb his power in a bold bid to end 60 years of military leadership.” See Edmund Blair, *Egypt President Sweeps Out Army Rulers*, REUTERS (Aug. 13,

On July 5, 2013, the Peace and Security Council (PSC) of the African Union, after its 384th meeting, issued a Communiqué.⁶⁵⁵ The Communiqué noted that “while significant progress has been made in the transition, notably with the election, in June 2012, of a President of the Republic, Egypt continues to face serious challenges, marked by the growing frustration of many Egyptians over the management of the country, cumulative economic difficulties, deteriorating security, political and social polarization and lack of consensus on the best way forward.”⁶⁵⁶ The PSC further noted “the escalation of the situation [in Egypt] over the past few days, which led to the overthrow of the elected President Mohamed Morsi, the suspension of the Constitution adopted by referendum in December 2012, and the appointment and swearing in of a caretaker Head of State.”⁶⁵⁷

The PSC then went on to recall the “relevant AU instruments on unconstitutional changes of Government, notably the Lomé Declaration of July 2000 and the African Charter on Democracy, Elections and Governance of January 2007, which provide for the automatic implementation of specific measures whenever an unconstitutional change of Government occurs, and reiterates AU’s condemnation and rejection of any illegal seizure of power.”⁶⁵⁸ The PSC then announced Egypt’s suspension from participating in the AU’s activities:

... the overthrow of the democratically elected President does not conform to the relevant provisions of the Egyptian Constitution and, therefore, falls under the definition of an unconstitutional change of Government as provided for in the instruments mentioned in paragraph 5 above. Accordingly, and as mandated by the relevant AU instruments, [the PSC]

2012), <https://www.reuters.com/article/us-egypt-army/egypt-president-sweeps-out-army-rulers-idUSBRE87B0EL20120813>. Even though the armed forces, “which had supplied Egypt’s presidents for six decades after ousting the monarchy,” had not directly challenged Morsi’s actions against high-ranking military officials, including Field Marshal Hussein Tantawi, the military coup of July 3, 2013 appears to have been the military’s retaliation against an individual they believed was usurping their monopoly on power. *See id.*

⁶⁵⁵ *Communiqué*, PSC/PR/COMM. (CCCLXXXIV) AU PEACE AND SECURITY COUNCIL, ADDIS ABABA (July 5, 2015), <http://www.peaceau.org/uploads/psc-384-com-egypt-05-07-2013.pdf> (Ethiopia).

⁶⁵⁶ *Id.* ¶ 3.

⁶⁵⁷ *Id.* ¶ 4.

⁶⁵⁸ *Id.* ¶ 5.

decides to suspend the participation of Egypt in the AU's activities until the *restoration of constitutional order*.⁶⁵⁹

At this point, the AU should have elaborated what it meant by “restoration of constitutional order” and that should have included, at the very least, the reinstatement of the Morsi presidency. Instead, the AU urged “the new Egyptian authorities to engage, without delay, in inclusive consultations towards the adoption of a consensual timeframe for the organization of free, fair and transparent elections.”⁶⁶⁰ In addition to the fact that this advice completely skirted the issue of the brutal suppression of the democratic process in Egypt by the country's military,⁶⁶¹ it did not address the fact that the post-Morsi government had engaged in a systematic suppression of an important part of the Egyptian electorate—members and sympathizers of the Muslim Brotherhood.⁶⁶² How could the AU urge the post-Morsi government to engage the people in “free, fair and transparent elections” when that government was engaged in a systematic suppression and massacre of members of the Muslim Brotherhood and other Morsi supporters?⁶⁶³ Was the AU indirectly supporting democracy in Egypt, as long as it excluded the participation of the Muslim Brotherhood and its supporters?

While the decision to condemn the military coup in Egypt and suspend the country from participating in AU activities was decisive and timely, the advice that Egyptians work to effect a transition that

⁶⁵⁹ *Id.* ¶ 6.

⁶⁶⁰ See *Communiqué*, *supra* note 655, para. 8. Essentially, the AU was telling Egyptians and other Africans that it is alright to oust a democratically elected government through a military coup as long as the coup leaders proceed to hold democratic elections in the immediate post-coup period.

⁶⁶¹ This is in reference to the July 3, 2013 military coup that overthrew the democratically elected government of President Morsi.

⁶⁶² See, e.g., Barbara Zollner, *Surviving Repression: How Egypt's Muslim Brotherhood has Carried On*, CARNEGIE MIDDLE EAST CENTER (Mar. 11, 2019), <https://carnegie-mec.org/2019/03/11/surviving-repression-how-egypt-s-muslim-brotherhood-has-carried-on-pub-78552> (elaborating the suppression of the Muslim Brotherhood in Egypt).

⁶⁶³ See Ian Black & Patrick Kingsley, ‘Massacre’ of Morsi Supporters Leaves Egypt Braced for New Violence, *THE GUARDIAN* (July 9, 2013), <https://www.theguardian.com/world/2013/jul/08/egypt-braced-violence-morsi-supporters> (noting the massacre of 51 supporters of the deposed President Mohamed Morsi). See also Patrick Kingsley and Peter Beaumont, *Egypt: Scores Killed as Army Launches Offensive Against Muslim Brotherhood*, *THE GUARDIAN* (July 27, 2013), <https://www.theguardian.com/world/2013/jul/27/egypt-muslim-brotherhood-morsi-supporters-killed> (noting the killing of Morsi supporters by Egyptian security forces and armed men in plain clothes).

would lead to the “early restoration of the constitutional order”⁶⁶⁴ was vague and not designed to enhance the restoration of the transition to democratic governance in the country. Why did the AU not insist on a restoration of the democratically elected government of President Morsi as it did in 1997 after the coup in Sierra Leone?⁶⁶⁵

As part of the post-war reconstruction of Sierra Leone, Ahmad Tejan Kabbah was elected president through multiparty elections which were held from February 26–27, 1996.⁶⁶⁶ On March 29, 1996, Ahmad Kabbah was sworn in as Sierra Leone’s freely elected post-war president.⁶⁶⁷ Nevertheless, Kabbah’s mandate was cut short by a military coup led by Major Johnny Paul Koroma on May 25, 1997.⁶⁶⁸ When the Organization of African Unity (“OAU”) Assembly of Heads of State and Government met in Harare, Zimbabwe from May 28–31, 1997, delegates took up the matter of the military coup in Sierra Leone.⁶⁶⁹ The Council of Ministers of the OAU “strongly and unequivocally [condemned] the coup d’état which took place in Sierra Leone on 25 May, 1997” and called “for immediate restoration of constitutional order.”⁶⁷⁰ This declaration was, of course, similar to that made by the AU after the military coup in Egypt. However, the OAU went further than the AU and called on “all African countries, and the International Community at large, *to refrain from recognizing the new regime and lending support in any form whatsoever to the*

⁶⁶⁴ See *Communiqué*, *supra* note 655, para. 9.

⁶⁶⁵ The situation in Sierra Leone was actually managed by the AU’s predecessor—the Organization of African Unity (OAU). See, e.g., John Mukum Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 375.

⁶⁶⁶ During the February 26–27, 1996 presidential elections, no candidate had secured the 55 percent majority that was required to avoid a run-off. The two top candidates, Ahmad Tejan Kabbah emerged first with 35.8 percent of the vote and Dr. John Karefa-Smart came in second with 22.19 percent of the vote. See Jimmy D. Kandeh, *Transition Without Rupture: Sierra Leone’s Transfer Election of 1996*, 41 AFR. STUD. REV. 91, 103 (1998). A run-off election was, accordingly, scheduled for March 15, 1996. In the run-off, Kabbah captured 59.49 percent of the vote to Karefa-Smart’s 40.51 percent. See *African Elections Database*, <http://africanelections.tripod.com/sl.html> (last visited on May 22, 2020).

⁶⁶⁷ See ELECTIONS IN AFRICA: A DATA HANDBOOK 801 (Table 2.10) (Dieter Nohlen, Michael Krennerich & Bernhard Thibaut eds., 1999).

⁶⁶⁸ See ZUBAIRU WAI, EPISTEMOLOGIES OF AFRICAN CONFLICTS: VIOLENCE, EVOLUTIONISM, AND THE WAR IN SIERRA LEONE 108 (2012).

⁶⁶⁹ OAU, *Organization of African Unity Council of Ministers, Decisions Adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers*, DOC. CM/2004 (LXVI)-C (May 28–31, 1997, https://au.int/sites/default/files/decisions/9622-council_en_28_31_may_1997_council_ministers_sixty_sixth_ordinary_session.pdf).

⁶⁷⁰ *Id.*

perpetrators of the coup d'état."⁶⁷¹ Instead, the AU's advice to the "new Egyptian authorities," emphasized "the solidarity of the AU with the people of Egypt and its commitment to assist in whatever way possible the process aimed at speedily returning the country to constitutional order."⁶⁷² This advice ignored or was unaware of the fact that while there was indeed an interim civilian government at this time in Egypt, the military remained in total control of governance in the country.⁶⁷³

In its July 5, 2013 Communiqué, the AU's PSC also supported the plan of the Chairperson of the AU Commission "to dispatch a team of high-level personalities to Egypt to interact with the *ruling authorities* and other Egyptian stakeholders, as they work towards a transition that would lead to an early return to constitutional order."⁶⁷⁴ Although not specifically mentioned, these "ruling authorities" had to include Field Marshall Abdel Fattah el-Sisi and other high-ranking military elites, who had led and directed the coup that ousted the country's first democratically elected president. In fact, shortly after the coup, el-Sisi was appointed part of the post-Morsi cabinet, assuming the position of Deputy Prime Minister. Why did the AU not insist, as its predecessor, the OAU, had done in the case of the 1997 coup in Sierra Leone, that ousted President Morsi's presidency be

⁶⁷¹ *Id.* at 29 (Emphasis added).

⁶⁷² *Communiqué*, *supra* note 655, para. 9. The post-Morsi interim civilian government was headed by Justice Adly Mansour, who, before his appointment, was the Chief Justice of Egypt's Supreme Constitutional Court. *See, e.g.*, Simone Foxmand & Gideon Lichfield, *Meet Egypt's New Interim President: Adly Mansour*, QUARTZ NEWS (July 3, 2013), <https://qz.com/100649/meet-egypts-new-interim-president-adly-mansour/>.

⁶⁷³ Adly Mansour was not elected by the people of Egypt. He was imposed on the people through a military decree. At the same time, the army took complete control of the media, blacked out national television stations operated by the Muslim Brotherhood and arrested several senior members of the Brotherhood. *See, e.g.*, *Egypt Swears in Supreme Court Chief Justice Adly Mansour as Interim President after Mohammed Morsi Removed by Military*, CBS NEWS (July 4, 2013), <https://www.cbsnews.com/news/egypt-swears-in-supreme-court-chief-justice-adly-mansour-as-interim-president-after-mohammed-morsi-removed-by-military/>. In addition to the fact that coup leader, el-Sisi, remained Egypt's Defense Minister, he also assumed the role of the country's First Deputy Prime Minister. *See, e.g.*, *Presidential Elections Monitoring: Egypt Votes 2014: Abdel Fattah El-Sisi*, THE TAHRIR INSTITUTE FOR MIDDLE EAST POLICY, <https://timep.org/presidential-elections-monitoring/candidate-bios/el-sisi/> (last visited May 24, 2020). *See also* *Egypt Swears in First Cabinet Since Morsi Ouster, Army Chief al-Sisi Appointed Deputy PM*, HÜRRIYET DAILY NEWS (Istanbul) (July 16, 2013), <https://www.hurriyetdailynews.com/egypt-swears-in-first-cabinet-since-morsi-ouster-army-chief-al-sisi-appointed-deputy-pm-50858>.

⁶⁷⁴ *See Communiqué*, *supra* note 655, para. 9 (emphasis added).

restored as part of the effort to restore constitutional order? After all, from a democratic and rule of law perspective, Morsi, who had attained power through a democratic process,⁶⁷⁵ deserved more consideration in the process of reconstructing the Egyptian State and restoring constitutional government and constitutionalism, than the military which had unilaterally and unconstitutionally inserted itself into the country's politics.⁶⁷⁶

The OAU, at its meeting in Zimbabwe, also appealed "to the leaders of ECOWAS to assist the people of Sierra Leone to restore constitutional order to the country,"⁶⁷⁷ as well as for "the support of other African countries and the International Community at large, in

⁶⁷⁵ The election that brought Mohamed Morsi and the Muslim Brotherhood to government in Egypt was considered free, fair and democratic, although somewhat polarizing. It was also extremely competitive, as evidenced by the fact that it took two rounds of intense competition for Morsi to emerge a winner. *See, e.g., Ayodele Akenroye, Egypt's 2012 Election: Free, Fair, and Polarizing*, IPI GLOBAL OBSERVATORY (June 8, 2012), <https://theglobalobservatory.org/2012/06/outcome-of-the-egypt-election-2012/>.

⁶⁷⁶ Like militaries in other countries, the Egyptian military is not an elected body. President Mohamed Morsi and his political organization, however, were elected to government through democratic elections, the first in the country's history, in 2012. Mr. Morsi captured 51.7 percent of the votes cast in the run-off election, an election that was, as the results showed, quite competitive. *See, e.g., David D. Kirkpatrick, Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES (June 24, 2012), <https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html>. In the first round of the presidential elections, which took place during the period May 23–24, 2012, Mohamed Morsi and his Muslim Brotherhood organization captured 5,553,097 votes to Mubarak-era prime minister, Ahmed Shafiq's 5,210,978 votes. Egypt's socialist candidate, Hamdeen Sabbahi, came in third, with 4,739,983 votes. Another candidate, considered a moderate Islamist, Abdel-Moneim Abul-Fotouh, came in fourth, with 2,407,837 votes. There were eight other candidates who received a negligible number of votes. Voter turn-out was said to be 43.4 percent of nearly 50 million registered voters. Given the fact that this was the first democratic election in the country's tumultuous history, such a turnout was quite impressive. *See Sherif Tarek, Runoffs Between Brotherhood's Morsi and Mubarak Regime's Shafiq have Egypt in a Bind*, AHARAMONLINE (May 25, 2012), <http://english.ahram.org.eg/NewsContent/36/122/42896/Presidential-elections-/Presidential-elections-news/MursiShafiq-presidential-showdown-puts-Egypt-revol.aspx> (last visited May 24, 2020). Since none of the candidates had secured the required 50 percent majority to win the election outright, a runoff election was scheduled for June 16–17, 2012 between the top two vote getters—Mohamed Morsi of the Muslim Brotherhood's Freedom and Justice Party and former Mubarak prime minister, Ahmed Shafiq. During the runoff, Morsi narrowly defeated challenger Ahmed Shafiq by capturing 51.7 percent of the votes to Shafiq's 48.2 percent. *See, e.g., Islamist Morsi Wins Egyptian Presidential Election*, DW NEWS (June 24, 2012), <https://www.dw.com/en/islamist-morsi-wins-egyptian-presidential-election/a-16047085>.

⁶⁷⁷ *Id.*

that regard.”⁶⁷⁸ Finally, the delegates at the Zimbabwe Assembly emphasized “the imperative need to implement the Abidjan Agreement⁶⁷⁹ which,” the OAU argued, continued to “serve as a viable framework for peace, stability and reconciliation in Sierra Leone.”⁶⁸⁰

The performance of the OAU after the overthrow of President Kabbah in Sierra Leone was completely different from that of the AU in Egypt after the overthrow of President Mohamed Morsi. Both were democratically elected presidents, and both were ousted by soldiers. However, in the case of Sierra Leone, the OAU, working with the regional organization, the Economic Community of West African States (“ECOWAS”) and the latter’s military arm—Economic Community of West African States Monitoring Group (“ECOMOG”), successfully ousted the post-Kabbah military government of Johnny Paul Koroma on February 13, 1998.⁶⁸¹ The OAU subsequently restored the presidency of Ahmed Tejan Kabbah and constitutional order in Sierra Leone.⁶⁸²

In fact, delegates at the Lomé Assembly, where the Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government was formulated and adopted, made reference to the position taken by the OAU in Harare (Zimbabwe) in 1997 regarding the coup in Sierra Leone.⁶⁸³ The Lomé Declaration noted that delegates at the Harare Assembly “unequivocally condemned and rejected any unconstitutional change” and reaffirmed that “coups are sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect the rule of law based on peoples['] will

⁶⁷⁸ *Id.*

⁶⁷⁹ This was the agreement that was signed between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) to end the country’s civil war. For example, Article 1 states as follows: “The armed conflict between the Government of Sierra Leone and the RUF/SL is hereby ended with immediate effect. Accordingly, the two sides will ensure that a total cessation of hostilities is observed forthwith.” UN S. C. *Letter Dated 11 December 1996 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the Secretary-General & Annex*, 1996/1034 (Dec. 11, 1996), art. 1.

⁶⁸⁰ *Id.*

⁶⁸¹ See TANJA SCHÜMER, *NEW HUMANITARIANISM: BRITAIN AND SIERRA LEONE*, 1997–2003 58 (2008).

⁶⁸² See James Rupert, *Sierra Leone’s President Reinstalled*, WASH. POST (Mar. 11, 1998), <https://www.washingtonpost.com/archive/politics/1998/03/11/sierra-leones-president-reinstalled/d2283cea-c88e-4b6e-82a3-fde79940e649/>.

⁶⁸³ Lomé Declaration, *supra* note 605.

expressed through the ballot and not the bullet.”⁶⁸⁴ Through the democratic election that brought Mohamed Morsi to office as president, the Egyptian people had demonstrated their commitment to respect for the rule of law and in doing so, they had chosen to express their will through the ballot box. Hence, when the military, under the leadership of Abdel Fattah el-Sisi, usurped that commitment, the AU should have not just condemned that action, but should have insisted on a reinstatement of the Morsi government and a return of the military to the barracks and out of politics.

In addition, the Lomé Declaration also mandates that in the case of a coup, the “Current Chairman and the Secretary-General [of the OAU] should also convey a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized by the OAU.”⁶⁸⁵ The AU’s actions after the July 3, 2013 military coup did not reflect such a “clear and unequivocal warning to the perpetrators” of the coup. Granted, the AU suspended Egypt’s participation in its activities. Nevertheless, there were no efforts to directly target and punish (e.g., through denial of visas for travel or trial by a competent court the African Union as mandated by Art. 25(5) of the Constitutive Act) those individuals, including el-Sisi, who had been involved in the coup.

2. *The Election of Abdel Fatah el-Sisi as President of Egypt: A Challenge to AU Principles*

In 2014, as Egypt was engaged in post-coup reconstruction efforts to restore constitutional order, as mandated by the African Union, army chief, Field Marshal Abdel Fattah el-Sisi, who was also the architect of the military coup that had ousted President Morsi, announced his resignation from the military in order to pave the way for his participation, as a candidate for the presidency, in presidential elections scheduled for May 26–28, 2014.⁶⁸⁶ In formally indicating his intention to run for the presidency of Egypt, el-Sisi made the following announcement: “I am here before you humbly stating my intention to

⁶⁸⁴ *Id.*

⁶⁸⁵ *Id.*

⁶⁸⁶ See Patrick Kingsley, *Abdel Fatah al-Sisi Resigns from Egypt Military to Run for Presidency*, THE GUARDIAN (Mar. 26, 2014), <https://www.theguardian.com/world/2014/mar/26/sisi-resigns-egypt-military-run-for-presidency>.

run for the presidency of the Arab Republic of Egypt.”⁶⁸⁷ He added further that “[o]nly your support will grant me this great honour.”⁶⁸⁸

The AU should have challenged el-Sisi’s decision to present himself as a candidate for the presidency of Egypt since it violated at least, one of the principles of the Lomé Declaration and the African Democracy Charter. According to Article 25(4) of the African Democracy Charter, for example, “[t]he perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.”⁶⁸⁹ According to this principle, el-Sisi and all the other high-ranking military officers who were involved in the overthrow of the democratically elected government of President Morsi, should not have been allowed to participate in the 2014 elections, which were designed to restore constitutional order in post-Morsi Egypt. In addition to being the Defense Minister, el-Sisi was also the Deputy Prime Minister in the post-Morsi government and, as such, was already involved in the process to return Egypt to “constitutional order,” a direct breach of the AU principle against the participation of perpetrators of unconstitutional government change in such activities or the holding of “any position of responsibility in political institutions of the State.”⁶⁹⁰ El-Sisi’s decision to participate in the presidential election as a candidate for the presidency violated the part of the principle dealing with elections, but it was also likely to violate the second part of the principle contained in art. 25(4), if he won the election—as president, he would be holding a “position of responsibility in political institutions” of the Egyptian State, contrary to the principles in Article 25(4).⁶⁹¹

In the 2014 presidential election in Egypt, there were only two candidates, Egypt’s former Defense Minister, Abdel Fattah el-Sisi and Hamdeen Sabahi of the Egyptian Popular Current.⁶⁹² In this first post-Morsi election, Egyptian electoral officials announced that “just under 47.5% of [the country’s] 53 million eligible voters [had] participated”

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.*

⁶⁸⁹ African Democracy Charter, *supra* note 606, art. 25(4).

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.*

⁶⁹² See Patrick Kingsley, *Sisi’s Only Rival To Be President of Egypt Vows He Will Fight on Despite Odds*, THE GUARDIAN (May 24, 2014), <https://www.theguardian.com/world/2014/may/24/sisi-president-elections-hamdeen-sabahi>.

and that el-Sisi “had won 96.1%” of the votes cast to emerge as the country’s next president.⁶⁹³ El-Sisi was subsequently sworn in as the President of Egypt on June 8, 2014.⁶⁹⁴

According to the AU’s African Charter on Democracy, Elections and Governance,⁶⁹⁵ “[a]ny putsch or coup d’état against a democratically elected government” is an “illegal means of accessing or maintaining power” and constitutes “an unconstitutional change of government and shall draw appropriate sanctions by the Union.”⁶⁹⁶ On July 3, 2013, the Egyptian military overthrew the democratically elected government of Mohamed Morsi. Even though the AU did not call the action by the Egyptian military a *coup d’état*, the continental organization did refer to it as “an unconstitutional change of government.”⁶⁹⁷ In fact, shortly after the coup, the AU issued a Communiqué in which it stated that “the overthrow of the democratically elected President [of Egypt] . . . falls under the definition of an unconstitutional change of Government as provided for in . . . the Lomé Declaration of July 2000 and the African Charter on Democracy, Elections and Governance of January 2007.”⁶⁹⁸

Since, even by the AU’s standards, the July 3, 2013 coup in Egypt qualified as “an unconstitutional change of government,”⁶⁹⁹ the State Party and the perpetrators should have been subjected to the sanctions provided in Chapter 8 of the African Democracy Charter.⁷⁰⁰ Egypt was, of course, sanctioned—the AU’s PSC suspended Egypt’s participation in the “AU’s activities until the restoration of constitutional order” as required by Article 25(1) of the African Democracy Charter.⁷⁰¹ However, the perpetrators of the

⁶⁹³ Patrick Kingsley, *Abdel Fatah al-Sisi won 96.1% of Vote in Egypt Presidential Election, Say Officials*, THE GUARDIAN (June 3, 2014), <https://www.theguardian.com/world/2014/jun/03/abdel-fatah-al-sisi-presidential-election-vote-egypt>.

⁶⁹⁴ Matt Bradley and Amina Ismail, *With New Vows, Egypt Leader Takes Office*, WALL ST. J. (June 8, 2014), <https://www.wsj.com/articles/sisi-sworn-in-as-egypts-president-1402219237>. See also *Sisi Takes Power in Egypt*, ALJAZEERA (June 8, 2014), <https://www.aljazeera.com/news/middleeast/2014/06/sisi-be-sworn-as-egypt-president-20146843619902534.html>.

⁶⁹⁵ African Democracy Charter, *supra* note 606.

⁶⁹⁶ *Id.* art. 23(1).

⁶⁹⁷ See Communiqué, Peace and Security Council, *supra* note 655, para. 6.

⁶⁹⁸ See *id.* at paras. 5–6.

⁶⁹⁹ African Democracy Charter, *supra* note 606, Chapter 8.

⁷⁰⁰ Chapter 8 is titled “Sanctions in Cases of Unconstitutional Changes of Government.” See African Democracy Charter, *supra* note 606, chap. 8.

⁷⁰¹ See Communiqué, Peace and Security Council, *supra* note 655, para. 6.

unconstitutional change of government, including its leader, Abdel Fattah el-Sisi, were not subjected to the sanctions prescribed by the AU's democracy instruments.⁷⁰²

Article 25 of the African Democracy Charter states as follows:

4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of the state.

5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.⁷⁰³

El-Sisi, a key figure in the coup against President Morsi, was definitely a perpetrator. Yet, the AU did not sanction, first, his participation as a high-ranking official in the post-coup government,⁷⁰⁴ and subsequently, his participation as a candidate for the presidency in elections that were designed "to restore the democratic order" in Egypt.⁷⁰⁵ I am not aware that the AU has brought any of the perpetrators of the Egyptian coup to trial before any competent court of the African Union, as mandated by Article 25(5) of the African Democracy Charter.⁷⁰⁶ Thus, in the case of the unconstitutional change of government in Egypt, the AU failed to follow its own rules.

The provision in Article 25(4) of the African Democracy Charter, which seeks to prevent perpetrators of unconstitutional change of government from participating in elections to restore a constitutional order in the State Party where the illegal activity took place, is designed to prevent a perpetrator from legitimizing his or her unconstitutional behavior through elections. The failure of the AU to apply this rule to el-Sisi allowed the latter to legitimize his unconstitutional actions and those of his fellow coup makers through the 2014 presidential elections.

Having failed to sanction el-Sisi and other senior coup makers, the AU should have, at the very least, continued Egypt's suspension

⁷⁰² African Democracy Charter, *supra* note 606, art. 25(4)–(5).

⁷⁰³ *Id.*

⁷⁰⁴ He had been appointed as a First Deputy Prime Minister. See Kayla Ruble, *Abdel-Fattah el-Sisi Is Sworn in as Egypt's New President*, PBS NEWS (June 8, 2014), <https://www.pbs.org/newshour/world/el-sissi-sworn-egypts-new-president>.

⁷⁰⁵ African Democracy Charter, *supra* note 606, art. 25(4) – (5).

⁷⁰⁶ *Id.* at art. 25(5).

until such a time that Egyptian politics had rid itself of those responsible for terminating the country's democratic transition. The AU's failure in the case of the coup in Egypt has significantly weakened the rule that bans the legitimization of unconstitutional change of government through elections. In fact, the AU may have lost the "moral and political credibility for its future application of [the] rule" against legitimizing unconstitutional change of government through elections.⁷⁰⁷

On May 16, 2014, the African Union Election Observation Mission arrived in Egypt to observe the country's post-Morsi presidential elections in which coup-maker el-Sisi was a candidate for the presidency.⁷⁰⁸ In fact, the AU had accepted an invitation from Adly Mansour's interim government to observe the elections, despite the fact that Egypt was still under AU sanctions.⁷⁰⁹ By sending its elections observers to monitor Egypt's post-Morsi presidential elections, the AU may have been, at the very minimum, implicitly "recognizing and legitimizing the candidacy of El-Sisi," a known perpetrator of the coup that forcefully brought down the democratically elected government of Mohamed Morsi.⁷¹⁰

During the nearly one-year suspension, Egyptian authorities engaged in various diplomatic efforts to regain the right to participate in AU activities. In addition to arguing that the "AU had failed to understand the situation in Egypt and had taken a misguided decision, . . . the military-dominated interim authorities continued to argue that the events of July 3 were the result of a popular uprising, pure and simple, and therefore did not amount to an unconstitutional change of

⁷⁰⁷ Solomon A. Dersso, *AU Will Break Norms & Welcome Egypt Back after "Coup"*, AFRICAN ARGUMENTS (June 4, 2014), <https://africanarguments.org/2014/06/04/au-will-break-norms-welcome-egypt-back-after-coup-by-solomon-a-dersso/>.

⁷⁰⁸ POMED, *Egypt Daily Update—May 16: AU Election Monitors Arrive Ahead of Presidential Contest; Out-of-Country Voting Exceeds 100,000*, PROJECT ON MIDDLE EAST DEMOCRACY (May 16, 2014), <https://pomed.org/egypt-daily-update-may-16-au-election-monitors-arrive-ahead-of-presidential-contest-out-of-country-voting-exceeds-100000/>.

⁷⁰⁹ See Joel Gulhane, *African Union Election Observation Mission Arrives in Cairo*, DAILY NEWS (May 21, 2014), <https://dailynewsegypt.com/2014/05/21/african-union-election-observation-mission-arrives-cairo/>.

⁷¹⁰ See Solomon Dersso, *AU Will Break Norms & Welcome Egypt Back After Coup*, AFRICAN ARGUMENTS (June 2014), <https://africanarguments.org/2014/06/04/au-will-break-norms-welcome-egypt-back-after-coup-by-solomon-a-dersso/>.

government.”⁷¹¹ Despite the fact that Egyptian authorities had refused to admit that the ousting of the government of President Morsi was a military coup d'état and hence, an unconstitutional change of government, the AU still bowed to the pressure of Egyptian diplomats and decided to void the suspension and reinstate the country. The reinstatement, argued some observers, “has detracted from the [AU’s] stance of standing up to an important—read “powerful”—AU member state”⁷¹² and that “[i]n contrast to its original suspension, which illustrated an even-handed application of its rules to nations big and small, the reinstatement brought the future application of AU rules on unconstitutional governmental changes—and the ability of the AU to enforce its rules—into question.”⁷¹³

The official lifting of Egypt’s suspension was contained in a *Communiqué* issued by the PSC on June 17, 2014.⁷¹⁴ In the *Communiqué*, the PSC noted “the steps taken in the implementation of the Roadmap announced by the Egyptian interim authorities on 3 July 2013, including the holding of presidential elections on 25, 26, and 27 May 2014, as well as the preliminary statement issued by the AU Elections Observer Mission.”⁷¹⁵ The PSC then decided “to lift the suspension of the participation of Egypt in AU’s activities, as contained in paragraph 6 of communiqué PSC/PR/COMM.(CCCLXXXIV)”⁷¹⁶ and invited “Egypt to immediately resume its participation in the activities of the AU.”⁷¹⁷

Justifying its decision to lift the sanctions against Egypt, the AU argued that it had done so because of:

- (i) the progress made and steps taken by the Egyptian authorities to formally restore constitutional order in Egypt,

⁷¹¹ Solomon Dersso, *Egypt vs African Union: A Mutually Unhappy Ending?*, ALJAZEERA (July 4, 2014), <https://www.aljazeera.com/indepth/opinion/2014/07/egypt-vs-african-union-mutually-u-2014714687899839.html>.

⁷¹² *Id.*

⁷¹³ *Id.*

⁷¹⁴ AU Peace and Security Council, *Communiqué*, PSC/PR/COMM. 2 (CDXLII), June 17, 2014, Addis Ababa (Ethiopia), <http://www.peaceau.org/uploads/psc-com-442-egypt-17-06-2014.pdf>.

⁷¹⁵ Communiqué, Peace and Security Council, *supra* note 714, at para. 6.

⁷¹⁶ Peace and Security Council, A.U. Communiqué PSC/PR/COMM.(CCCLXXXIV) para. 6 (July 5, 2013), <https://www.peaceau.org/uploads/psc-384-com-egypt-05-07-2013.pdf> (announcing the suspension of Egypt from participation in AU activities).

⁷¹⁷ Communiqué, Peace and Security Council, *supra* note 714, at para. 8.

- (ii) the fact that the suspension of Egypt for almost one year had sent a strong signal to the Egyptian stakeholders about the AU's attachment to its principles and instruments and
- (iii) the need for the AU to remain engaged with Egypt and to accompany the efforts of the Egyptian authorities for the full implementation of the roadmap to restore full democracy.⁷¹⁸

The AU also “underscored that [its decision to lift Egypt’s suspension and reinstate its participation in AU activities] should not be a precedent in terms of adherence to Article 25 of the [African Democracy Charter], but ‘should only be viewed in light of the *unique set of circumstances*.’”⁷¹⁹ The AU, however, did not define what it meant by “unique set of circumstances” and how, in future cases, the PSC could determine if perpetrators of an unconstitutional change of government and the State Party in which these activities took place possessed the “unique set of circumstances” to be granted the type of differential treatment that had been afforded to Egypt and its coup-makers. After nearly a year of suspension, Egypt was invited to participate in the activities of the AU at its 23rd Ordinary Session held in Malabo, Equatorial Guinea, from June 26–27, 2014.⁷²⁰

If the African Union believed that the coming to power of former Egyptian armed forces chief and first deputy prime minister, Field Marshal Abdel Fattah el-Sisi, in the 2014 elections constituted a return to constitutional order in Egypt, they were wrong. Contrary to the expectations of the African Union, the el-Sisi government has not introduced into Egypt an institutional environment that enhances the deepening and institutionalization of democracy and the rule of law. Instead, “[l]evels of repression in Egypt have exceeded those seen under Mubarak,” and, “[a]ccording to some estimates, over 40,000 political dissidents were detained in the first year after the coup, compared to 14,000, at most, before the revolution.”⁷²¹ In addition, “[t]he regime has threatened and employed sexual violence against

⁷¹⁸ See KRIANGSAK KITTICHAISAREE, INTERNATIONAL HUMAN RIGHTS LAW AND DIPLOMACY 43 (2020).

⁷¹⁹ *Id.* (emphasis added).

⁷²⁰ See *The 23rd Ordinary Session of the African Union Ends in Malabo*, AFR. UNION (June 30, 2014), <https://au.int/en/newsevents/29258/23rd-ordinary-session-african-union-ends-malabo>. See also Dersso, *Egypt vs African Union: A Mutually Unhappy Ending?*, *supra* note 711.

⁷²¹ Rory Truex & Daniel L. Tavana, *Implicit Attitudes Toward an Authoritarian Regime*, 81 J. POLITICS 1014, 1018 (2019).

detainees, conducted forced disappearances with impunity, and issued execution orders for thousands of political dissidents affiliated with the Muslim Brotherhood.”⁷²²

On April 16, 2019, el-Sisi successfully carried out his second coup—this time, it was a *constitutional coup*.⁷²³ At the request of el-Sisi, the Egyptian parliament changed the constitution to allow him to remain in power as president until at least 2030.⁷²⁴ President el-Sisi and the Egyptian parliament’s decision to change the constitution in order to allow el-Sisi to extend his presidential mandate was a direct violation of Article 23(5) of the African Democratic Charter,⁷²⁵ which states that “[a]ny amendment or revision of the constitution or legal instruments, which is an *infringement on the principles of democratic change of government*,” qualifies as an unconstitutional change of government.⁷²⁶ Changing the constitution specifically to allow President Abdel Fattah el-Sisi to extend his mandate in office established an extremely fluid, less predictable, and definitely, not a democratic, system of government in Egypt. The action of the Egyptian parliament did not only qualify as a constitutional coup, but it was “an infringement on the principles of democratic change of government.”⁷²⁷

Regardless of how one feels about the constitutional coup, the act of manipulating national constitutions, whether in Egypt, Cameroon, or Togo, to allow the president to extend his or her mandate and likely stay in power indefinitely, does not contribute positively to, or enhance the maintenance of, constitutional government and the rule of law. In other words, such activities do not enhance the development of a democratic culture in a country.

⁷²² *Id.*

⁷²³ A constitutional coup is defined as “the amending or revising of the constitution to eliminate presidential term limits, and allows the incumbent to extend his mandate.” John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 CARDOZO INT’L COMP., POL’Y & ETHICS L. REV. 77, 141–142 (2018).

⁷²⁴ See *Egypt Constitutional Changes Could Mean Sisi Rule Until 2030*, BBC NEWS, (Apr. 16, 2019), <https://www.bbc.com/news/world-middle-east-47947035>. See also Ruth Michaelson, *Sisi Could Rule Egypt Until 2030 Under Constitutional Changes*, THE GUARDIAN (Apr. 15, 2019), <https://www.theguardian.com/world/2019/apr/15/sisi-rule-could-extend-to-2030-after-sweeping-constitutional-reforms> (last visited Oct. 2, 2020).

⁷²⁵ African Democracy Charter, *supra* note 606.

⁷²⁶ *Id.* art. 23(5) (emphasis added).

⁷²⁷ *Id.*

V. COUPS AND THE RULE OF LAW IN AFRICA

This article has examined two distinct types of unconstitutional change of government in Africa—the military coup d'état and the constitutional coup. The article examined military coups in Egypt (1952, 2013)⁷²⁸ and constitutional coups in Cameroon (Paul Biya);⁷²⁹ Togo (Faure Gnassingbé)⁷³⁰ and Egypt (Abdel Fattah el-Sisi).⁷³¹ In this section, the article will examine the impact that these coups—both military and constitutional—have on the rule of law in Africa.

A. *Military Coups and the Rule of Law in Africa*

A military coup involves the removal, from office, of an elected president or head of state, usually through the use or threat of force.⁷³² The first military coup in post-independence Africa took place in Egypt in 1952 and ushered in an era of military intervention in politics that has lasted into the twenty-first century.⁷³³ Despite the fact that

⁷²⁸ See JOEL GORDON, *NASSER'S BLESSED MOVEMENT: EGYPT'S FREE OFFICERS AND THE JULY REVOLUTION* (1992) (examining the overthrow of King Farouk by Egypt's Free Officers).

⁷²⁹ See Isaac Mufumba, *Presidents Who Amended Constitution to Stay in Power*, DAILY MONITOR (Sept. 18, 2017), <https://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html>. See also DAVID D. KIRKPATRICK, *INTO THE HANDS OF THE SOLDIERS: FREEDOM AND CHAOS IN EGYPT AND THE MIDDLE EAST* 241 (2018) (examining the military overthrow of the government of President Mohamed Morsi in Egypt in July 2013).

⁷³⁰ See *Togo Term Limit Law Allows President 10 More Years of Rule*, REUTERS (May 9, 2019), <https://af.reuters.com/article/topNews/idAFKCN1SF1QL-OZATP>. See also *Togo Changes Law to Let President Stand for Two More Terms*, ALJAZEERA (May 9, 2019), <https://www.aljazeera.com/news/2019/05/togo-law-president-stand-terms-190509180859448.html>.

⁷³¹ See *Egypt Constitutional Changes Could Mean Sisi Rule Until 2030*, BBC NEWS (Apr. 16, 2019), <https://www.bbc.com/news/world-middle-east-47947035>. See also Merrit Kennedy, *Egypt Approves Constitutional Changes That Could Keep Sisi in Office Until 2030*, NPR NEWS (Apr. 23, 2019), <https://www.npr.org/2019/04/23/716408260/egypt-approves-constitutional-changes-that-could-keep-el-sissi-in-office-until-2>.

⁷³² See, e.g., NAUNIHAL SINGH, *SEIZING POWER: THE STRATEGIC LOGIC OF MILITARY COUPS* (2014) (examining the importance and dynamics of military coups d'état). See also MAX STOLLUN, *OIL, POLITICS AND VIOLENCE: NIGERIA'S MILITARY COUP CULTURE (1966–1976)* (2009) (examining military coups in Nigeria, which began with the overthrow of the First Republic in 1966).

⁷³³ Africa's latest coup was the overthrow of the government of Omar al-Bashir in the Republic of Egypt on April 11, 2019. See *Sudan Coup: Why Omar al-Bashir was Overthrown*, BBC NEWS (Apr. 15, 2019), <https://www.bbc.com/news/world-africa-47852496>.

military coups and attempted coups in Africa have been declining in frequency since the turn of the century,⁷³⁴ they are still a clear and present threat to democratic consolidation in many countries throughout Africa.⁷³⁵

The supremacy of law is the first element of the rule of law. As argued by former U.S. Supreme Court Associate Justice Anthony M. Kennedy, “the Law is superior to, and thus binds, the government and all of its officials.”⁷³⁶ In his definition of the rule of law, Dicey noted that supremacy of law implies that all citizens, regardless of their position in society, are equal before the law.⁷³⁷ In his lecture on the rule of law, the late Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, argued that the heart of the rule of law is found in the principle that “all persons and authorities within the state, whether public or private, should be bound by . . . laws publicly and prospectively promulgated and publicly administered in the courts.”⁷³⁸ Professor Stein also noted that in a country where the rule of law is guaranteed, “[t]he law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.”⁷³⁹

Coup makers are usually individuals who want to effect a change of government either by taking over control of the government or installing individuals whom they can control. However, they do not seek to change the government through constitutional means (e.g., through elections). Instead, they use unconstitutional means to force a change in the government. By doing so, coup makers place themselves above the law. As argued by Michel Rosenfeld, an expert on human rights and the rule of law, “[t]he rule of law is a cornerstone of contemporary constitutional democracy” and is one of “the three essential characteristics of modern constitutionalism.”⁷⁴⁰ Hence, when soldiers by-pass constitutional processes for changing the government and subsequently engage in unconstitutional behaviors, they are not only acting above the law but are also contributing to the destruction

⁷³⁴ See Christopher Giles, *Sudan Coup: Are Military Takeovers on the Rise in Africa?*, BBC NEWS (Apr. 11, 2019), <https://www.bbc.com/news/world-africa-46783600>.

⁷³⁵ See, e.g., Mbaku, *Threats to the Rule of Law*, *supra* note 1.

⁷³⁶ Stein, *supra* note 58, at 299 (quoting).

⁷³⁷ See DICEY, *supra* note 47, at xxii.

⁷³⁸ Lord Bingham, *supra* note 52.

⁷³⁹ See Stein, *supra* note 58, at 302.

⁷⁴⁰ Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

of their country's *constitutional democracy* and *democratic institutions*.

A government that comes into being through a military coup cannot be considered constitutionally legitimate, even if attempts are made to legitimize the state through elections. This is what Abdel Fattah el-Sisi did in Egypt. First, he, with the help of the armed forces, overthrew the democratically elected government of Mohamed Morsi. Second, he handed the government to a caretaker in the name of former Supreme Constitutional Court Justice Adly Mansour. Third, he and the care-taker government scheduled elections to select a permanent government. Fourth, el-Sisi resigned his military commission and announced his intention to participate in the scheduled presidential elections as a candidate for the presidency. Finally, he participated in the 2014 presidential elections in Egypt and captured 96.1 percent of the votes cast and was eventually sworn in as the country's post-Morsi president.⁷⁴¹

Through the electoral process and the writing of a new constitution, el-Sisi and the other Egyptian coup makers, attempted to legitimize their unconstitutional behaviors. Despite the fact that he and other members of his government were now considered Egypt's legal political leaders, the fact that they acquired their positions through unconstitutional means did not augur well for the building and restoration of the constitutional democratic order in the country. Africans must care about the ways through which their leaders come to office—leaders who come to power through unconstitutional means do not contribute positively to the restoration or deepening of the constitutional order. On the contrary, their activities remain a major threat to the strengthening of democracy and the maintenance of the rule of law in many countries throughout the continent. To reiterate, this is due, at the very minimum, to the fact that coup makers are individuals who act above the law and anyone who acts above the law cannot be said to be contributing positively to the building and sustaining of democratic institutions. Thus, the continent's supporters of democracy and democratic institutions must stand up against leaders that come to power through military coups, even if these individuals try, as occurred in Egypt, to legitimize their actions through elections.

⁷⁴¹ See Patrick Kingsley, *Abdel Fatah al-Sisi won 96.1% of Vote in Egypt Presidential Election, Say Officials*, THE GUARDIAN (June 3, 2014), <https://www.theguardian.com/world/2014/jun/03/abdel-fatah-al-sisi-presidential-election-vote-egypt>.

The second element of the rule of law is that the majority of citizens in a country must voluntarily accept and obey the law. As argued by the American Bar Association (“ABA”), “[t]he rule of law functions because most of us agree that it is important to observe the law, even if a police officer is not present to enforce it.”⁷⁴² In a country where the majority of citizens do not voluntarily accept and obey the law, it is likely the case that law-enforcement agencies, including the courts, will find it very difficult and costly to maintain law and order.⁷⁴³ Under such circumstances, the “government would likely be forced to devote a significant portion of national income to compliance activities, a process that can reduce expenditures on important sectors of the economy such as health care and human capital development.”⁷⁴⁴ Thus, the failure of the majority of citizens to voluntarily accept and obey the law can have a significantly negative impact on efforts to maintain law and order, frustrate government efforts to promote human development, and generally stunt the entrenchment and institutionalization of democracy.

Coup makers, by their behavior, show a contempt for the law—they do not accept and/or respect the law. Perhaps, more important is the fact that they also contribute to the emergence, within the country, of a culture of disrespect for the law—particularly one in which it is unlikely that a majority of the people will voluntarily accept and obey the law. By creating conditions that make it difficult for citizens to voluntarily respect and obey the law, coup makers are contributing to the stunting of the democratic transition in many countries in Africa. Hence, anyone interested in democracy in Africa must not support any coup maker, including even those who later on use elections to “democratize” themselves and their regimes.

In fact, despite the lofty promises made to the populace by military elites who overthrow their democratically elected governments, most of them have usually gone on to maintain regimes that have proven to be more corrupt, violent, and brutal than the ones that they replaced. In addition to the fact that these military regimes have rarely, if ever, adhered to the rule of law or constitutionalism, they have tended to perpetuate themselves in government for many

⁷⁴² See *What is the Rule of Law?*, AM. BAR. ASSOC., https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law (last visited May 27, 2020).

⁷⁴³ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 314.

⁷⁴⁴ See John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 988 (2013).

years. For example, Mobutu Sese Seko carried out two military coups in the Democratic Republic of Congo, one in 1960⁷⁴⁵ against the democratically elected government of Prime Minister Patrice Lumumba, and a second one in 1965⁷⁴⁶ and went on to maintain a military dictatorship that lasted from 1965 to 1997.⁷⁴⁷

As argued by the late Professor Victor T. LeVine, who was an expert on military coups and constitutionalism in Africa, “[e]ven when the armed forces intervened ostensibly to ‘save’ or ‘uphold’ a constitution—as in Ghana in 1966, or in Nigeria in 1975/76—their own vision tended to be strictly utilitarian; that is, seeing constitutions as conditional charters to ‘clean’ and ‘sanitize’ civilian régimes.”⁷⁴⁸ Other scholars of African political economy have argued that Africa’s military coup makers, by their actions, “place [themselves] outside the law and . . . show contempt for institutions or authorities.”⁷⁴⁹

As was seen in Egypt after the July 2013 coup and the subsequent ousting of the government of Mohamed Morsi, “[w]ith few exceptions, military coups in Africa [have been] met with press and

⁷⁴⁵ Congo’s first prime minister, Patrice Lumumba, was ousted by Colonel Joseph Mobutu, who at the time was head of the country’s armed forces in September 1960. Mobutu, who is generally believed to have orchestrated the assassination of Lumumba, went on “to become one of Africa’s most enduring and venal leaders.” Stephen R. Weissman, *What Really Happened in Congo: The CIA, the Murder of Lumumba and the Rise of Mobutu*, 93 FOREIGN AFF. 14, 14–15 (2014).

⁷⁴⁶ On November 25, 1965, Joseph Mobutu, who was now a Major General in the Congolese army, overthrew President Joseph Kasavubu in a bloodless military coup. Mobutu was later installed as head of a military-led government. *Kasavubu Regime Ousted by Army Coup in Congo*, REUTERS (Nov. 25, 1965), <https://archive.nytimes.com/www.nytimes.com/library/world/africa/651125kasavubu.html>. Mobutu ruled the Democratic Republic of Congo from 1965 to 1997. After fleeing the DRC on May 16, 1997 as rebels, led by Laurent-Désiré Kabila, swept into the capital, Kinshasa, Mobutu later died in exile in Morocco. John Daniszewski & Ann M. Simmons, *Mobutu, Zairian Dictator for 32 Years, Dies in Exile*, LOS ANGELES TIMES (Sep. 8, 1997), <https://www.latimes.com/archives/la-xpm-1997-sep-08-mn-30058-story.html>.

⁷⁴⁷ See HUBERT KABASU BABU KATULONDI, *DEMOCRATISATION IN THE DR CONGO: FROM JOSEPH MOBUTU TO JOSEPH KABILA: A MODELLED EXPLORATION* (2019) (examining, inter alia, Mobutu’s dictatorship in Zaire/Democratic Republic of Congo). See also GEORGES NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE’S HISTORY* (2013) (noting the brutal dictatorship unleashed on the Congolese people by Mobutu’s government).

⁷⁴⁸ See Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFRI. STUD. 181, 190 (1997).

⁷⁴⁹ See ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET, TYRANT* 59 (1982).

popular support.”⁷⁵⁰ In addition, “[c]oup announcements typically engender widespread jubilation on the streets and fawning editorials in newspapers.”⁷⁵¹ The main reason for this state of affairs, argues Professor Minabere Ibelema, an expert on journalism and the press in Africa, “is that when people are in economic distress or under political turmoil, the natural tendency is to seek a messiah to deliver them.”⁷⁵² In July 2013, after General Abdel Fattah el-Sisi announced that the military had ousted President Morsi and taken control of the government, “Tahrir Square erupted in euphoric celebration” with the masses shouting slogans such as: “Finally we have our country back.”⁷⁵³

When Gamal Abdel Nasser and the Free Officers overthrew the government of King Farouk on July 23, 1952, the argument was made that they acted to liberate Egypt from foreign occupation and influence, cleansing the “former autocratic political system” and creating “a modern and democratic one,” as well as, transforming the economy from one controlled by a “landowning elite” into a “socialist economy.”⁷⁵⁴ However, the Egyptian military never created the “modern and democratic political system” that they claimed they would create in Egypt after they took the control of the government in 1952. Instead, the military has dominated the political economy in

⁷⁵⁰ See MINABERE IBELEMA, *THE AFRICAN PRESS, CIVIC CYNICISM, AND DEMOCRACY* 130 (2008).

⁷⁵¹ See *id.* at 130.

⁷⁵² See *id.* As a reporter for *DW News*, the global English-language news and information channel for Germany’s public international broadcaster *Deutsche Welle* (DW), noted in 2012, “Cairo’s iconic Tahrir Square brimmed with Egyptians rejoicing at the election of President Mohammed Morsi and [expected] him to deliver on his promises.” Kristen McTighe, *Egypt Goes from the Frying Pan into the Fire*, DW NEWS (July 2, 2013), <https://www.dw.com/en/egypt-goes-from-the-frying-pan-into-the-fire/a-16922134>. One year after Morsi had been installed as the country’s first democratically elected president, the same Egyptians who rejoiced at his election, were now demanding his resignation or removal, even though he had not yet completed his constitutional mandate. As economic conditions continued to worsen, with many Egyptians unable to meet their daily basic needs and with food prices continuing to rise, “millions of disillusioned and angered Egyptians [took] to the streets to call for Morsi to step down and the military [subsequently] threatened to intervene.” *Id.*

⁷⁵³ See Kristen McTighe, ‘Finally we Have Our Country Back,’ DW (July 4, 2013), <https://www.dw.com/en/finally-we-have-our-country-back/a-16929061>.

⁷⁵⁴ See THE PRINCETON ENCYCLOPEDIA OF ISLAMIC POLITICAL THOUGHT 385 (Gerhard Bowering ed., 2013).

Egypt to this day.⁷⁵⁵ In fact, research shows that over the years, the military has not only come to control Egypt's political system but also its economy as well. As noted by Yezid Sayigh, a Middle Eastern expert at the Carnegie Middle East Center in Beirut, Lebanon,

[s]ince 2013, when the military took power, the military economy has transformed. This is because President Abdel Fattah el-Sisi, a former general who became president in 2014, has relied on the military to take over major management roles in the civilian economy. [The military] has effectively replaced the government in awarding contracts and managing the crash program of civilian housing and public infrastructure that the government has been funding for the past four or five years.⁷⁵⁶

Weaving the military into every part of the economy of Egypt has not only stunted entrepreneurship but, has also seriously weakened public civilian agencies whose job it is to perform the tasks that are now being performed by the military; these include the provision of infrastructure and other social services.⁷⁵⁷ This undermines the government's ability to create and sustain an effective and productive bureaucracy, as well as, a private sector capable of meeting the needs of the people for creating the wealth that they need to confront poverty and improve their living standards.⁷⁵⁸

One more example: When the military overthrew the government of Nigeria's First Republic in 1966, the coup leaders claimed that they had done so to rid the country of the tribalism and nepotism that characterized the country's civilian government.⁷⁵⁹ Tribalism and

⁷⁵⁵ See, e.g., Robert Springborg, *The Rewards of Failure: Persisting Military Rule in Egypt*, 44 BRITISH J. MID. E. STUD. 478, 479, 483 (2017) (examining the persistence of military rule in Egypt).

⁷⁵⁶ See Yezid Sayigh, *Egypt's Military Now Controls Much of Its Economy: Is this Wise?*, CARNEGIE MIDDLE EAST CENTER (Nov. 25, 2019), <https://carnegie-mec.org/2019/11/25/egypt-s-military-now-controls-much-of-its-economy.-is-this-wise-pub-80281>.

⁷⁵⁷ See *id.*

⁷⁵⁸ See Yezid Sayigh, *Egypt's Army Controls Much of the Economy: Is This Wise?*, MIDDLE EAST EYE (Nov. 28, 2019), <https://www.middleeasteye.net/opinion/how-egyptian-military-controls-countrys-economy> (stating that the increasing involvement of the military in the Egyptian economy is negatively affecting the private sector's ability to promote economic growth).

⁷⁵⁹ See *Radio broadcast by Major Chukwuma Kaduna Nzeogwu – announcing Nigeria's first military coup* (Radio Nigeria Jan. 15, 1966).

nepotism, the coup makers argued, had squandered the country's development potential through corruption and subjected the people to varying levels of oppression.⁷⁶⁰ In 1966, the Nigerian military officers who ousted the country's elected government told the people that their intention was not to rule the country but, to eliminate corruption and opportunistic politicians, restore respectability to the civil service, and go back to the barracks.⁷⁶¹ Despite the military's claim that "their more disciplined training would make them more effective governors, their reign was marked by extremely high levels of self-dealing, public financial malpractices, abuse of fundamental rights, and a significant level of tyranny directed at civilians."⁷⁶² As was the case with coup makers in other African countries, Nigeria's military did not keep its promise but went on to unleash on the Nigerian people a reign of terror characterized by massive abuse of human rights, including murder.⁷⁶³

Another element of the rule of law is judicial independence, which is critical to the maintenance of constitutional government. However, one of the first things that military coup makers do is interfere with the independence of the judiciary and render it incapable of performing its constitutional functions.⁷⁶⁴ For example, during the period 1966–1999, successive military governments in Nigeria effectively removed the judiciary from one of its most important roles—that of serving as the custodian “of legal and constitutional rights,” as well as “the final arbiter in disputes between citizens and

⁷⁶⁰ For example, Nigerian political theorist, Olayiwola Abegunrin, notes that in thirty-nine years of rule, the military had compressed “what was a federal republic into an authoritarian centralized state. In particular, under the military regimes of Generals Babangida and Abacha, billions of dollars were looted from the government treasury and stashed in foreign banks in Europe, North America, and Arab countries, and particularly Switzerland.” See OLAYIWOLA ABEGUNRIN, *NIGERIAN FOREIGN POLICY UNDER MILITARY RULE, 1966–1999*, 163 (2003).

⁷⁶¹ See Pita Ogaba Agbese, *With Fingers on the Trigger: The Military as a Custodian of Democracy in Nigeria*, 9 J. THIRD WORLD STUD. 220, 221–23 (1992).

⁷⁶² See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 301.

⁷⁶³ No event more effectively illustrates the recklessness of the Nigerian military during the period 1966–1999 than the brutal execution of human rights activist, Ken Saro Wiwa, and eight other Ogoni activists. See, e.g., Ifeanyi I. Onwuazombe, *Human Rights Abuse and Violations in Nigeria: A Case Study of Oil-Producing Communities in the Niger Delta Region*, 22 ANN. SURV. INT'L & COMP. L. 115, 123 (2017).

⁷⁶⁴ See Mbaku, *Threats to the Rule of Law in Africa*, *supra* note 1, at 316 (noting that without the rule of law, “it would be impossible to have constitutional government.”).

the government on the one hand and, between governments on the other.”⁷⁶⁵

As argued by Nigerian lawyer and constitutional scholar, P. Ehi Oshio, who has written extensively on the impact of military rule on the rule of law in Nigeria, especially on the country’s courts, the military destroyed many of the judiciary’s constitutional guarantees. First, under military rule, judicial independence now existed only in theory and it was now “submerged in the absolute supremacy of the Federal Military Government, and judges [were now] removable from office at will.”⁷⁶⁶ Second, the concept of separation of powers with checks and balances, which had been entrenched in the Constitution of Federal Republic of Nigeria, 1979, was no longer in effect as the Federal Military Government had assumed the roles traditionally reserved to the executive and legislative branches.⁷⁶⁷ According to Military Decree No. 13, which was signed into law on May 17, 1984 by Maj. Gen. M. Buhari, then Head of the Federal Military Government,⁷⁶⁸ “the Constitution (Suspension and Modification) Decree 1984”⁷⁶⁹ had established a new government known as the “Federal Military Government” with absolute “power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.”⁷⁷⁰

Buhari’s Military Decree No. 13 (Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984) also noted that “[n]o question as to the validity of any Decree or any Edict . . . shall be entertained by any court of law in Nigeria.”⁷⁷¹ The Buhari Decree also declared that “no civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any such proceedings are instituted before, on or after the

⁷⁶⁵ See P. Ehi Oshio, *Rule of Law, Military Government and Dilemma of Nigerian Courts*, 30 J. INDIAN L. INST. 456, 465 (1988).

⁷⁶⁶ *Id.* at 465.

⁷⁶⁷ See Federal Military Government (Supremacy and Enforcement of Powers) Decree No. (13) (1984) (Nigeria).

⁷⁶⁸ *Id.*

⁷⁶⁹ This is the decree that suspended parts of the country’s constitution and modified others. See CONSTITUTION (Suspension and Modification of the Provisions of the 1979 Constitution) DECREE 1984 Decree No. (1) (1984) (Nigeria).

<https://gazettes.africa/archive/ng/1984/ng-government-gazette-supplement-dated-1984-02-13-no-8-part-a.pdf>.

⁷⁷⁰ *Id.* at para. 2-1.

⁷⁷¹ *Id.* at para. 5.

commencement of this Decree the proceedings shall abate, be discharged and made void.”⁷⁷²

Third, the Federal Military Government (of Nigeria) exhibited “a clear official distrust of the judiciary by resorting to special military tribunals instead of the regular courts for serious trials.”⁷⁷³ Oshio also noted that “[o]ne frightening feature of these tribunals is that armed forces personnel are in the majority in each tribunal” and that “the independence and impartiality of the tribunals cannot be guaranteed, since these personnel in the majority can yield to subtle pressures from their superiors in government because of the hierarchical command structure of the armed forces.”⁷⁷⁴ Perhaps, more important is the fact that the transfer of judicial powers from the constitutional judiciary to the military tribunals “was a deliberate device by the military government to assume a direct control of a part of the judex order and nothing could be more violative of the rule.”⁷⁷⁵

Similarly, after the military ousted President Morsi in Egypt, it directed the development of a new constitution that empowered the new president, Abdel Fattah el-Sisi, to control the judiciary. The new constitution created a “Supreme Council for Judicial Bodies,” to be chaired by the President of the Republic of Egypt and empowered it to manage all matters related to the judiciary.⁷⁷⁶ In addition, the new constitution also empowered the president to “choose the Supreme Constitutional Court’s (SCC) President and its new members,” as well as, chair all “other judicial authorities, and the Public Prosecutor.”⁷⁷⁷ As argued by Human Rights Watch, the new constitution will grant the president the authority to effectively control the judiciary.⁷⁷⁸ This is evident by the fact that the Supreme Council for Judicial Bodies and

⁷⁷² Federal Military Government (Supremacy and Enforcement of Powers) Decree No. (13) (1984) §1(2)(b)(i) (Nigeria).

⁷⁷³ See Oshio, *supra* note 765, at 465–66.

⁷⁷⁴ *Id.* at 467.

⁷⁷⁵ *Id.*

⁷⁷⁶ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION], Jan. 18, 2014 (*as amended* through 2019), art. 185.

⁷⁷⁷ See Said Benarbia, *Constitutional Amendments to Extend the President’s Term and Powers Over the Judiciary Must be Rejected*, ICJ (Feb. 6, 2019), <https://www.icj.org/wp-content/uploads/2019/02/Egypt-Constitution-Statement-News-2019-ENG.pdf>. <https://www.icj.org/wp-content/uploads/2019/02/Egypt-Constitution-Statement-News-2019-ENG.pdf>. In post-Morsi Egypt, judicial independence is affected by articles 185, 189 and 193 of the Constitution—that is, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT [CONSTITUTION], Jan. 18, 2014 (*as amended* through 2019).

⁷⁷⁸ HUMAN RIGHTS WATCH, *supra* note 454.

Authorities, which is to be chaired by the president, will have “the authority to determine the conditions of appointment, promotion, and discipline for members of judicial bodies, as well as consultative role on draft laws organizing the affairs of judicial bodies and authorities.”⁷⁷⁹ In addition, the “president will have veto power in the Supreme Council.”⁷⁸⁰

The World Justice Project (“WJP”), which studies the rule of law around the world and produces, on an annual basis, a *Rule of Law Index*,⁷⁸¹ has recognized the importance of clarity and stability of the law to citizens of a country. The WJP notes that there are four universal principles of the rule of law and these are: (i) accountability; (ii) just laws; (iii) open government; and (iv) accessible and impartial dispute resolution.⁷⁸² Our interest is on the principle of “just laws,” which implies that “[t]he laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights.”⁷⁸³ During the period in which the military ruled Nigeria (1966–1979; 1983–1999), it was notorious for the gross violations of human rights.⁷⁸⁴ Even after the military handed control of the government to civilians in 1999, Nigerians have not yet been able to provide themselves with a governing process that can effectively discipline and guard the military against impunity. As noted by Adeakin, “[i]n responding to Boko Haram, Nigerian government security forces have been implicated in grave violations of human rights and international humanitarian law, including the incommunicado detention of Boko Haram suspects without charge or trial, and extrajudicial killings.”⁷⁸⁵

Two other elements of the rule of law are *openness and transparency*, as well as *predictability*. John Gerring and Strom C. Thacker argue that openness and transparency, as they relate to government and governance, are understood as “the availability and accessibility of relevant information about the functioning of the

⁷⁷⁹ *Id.*

⁷⁸⁰ *Id.*

⁷⁸¹ WORLD JUSTICE PROJECT (WJP), RULE OF LAW INDEX 2020 (2020).

⁷⁸² *Id.* at 10.

⁷⁸³ *Id.*

⁷⁸⁴ See Ibikunle Adeakin, *The Military and Human Rights Violations in Post-1999 Nigeria: Assessing the Problems and Prospects of Effective Internal Enforcement in an Era of Insecurity*, 25 AFR. SECURITY REV. 129 (2016).

⁷⁸⁵ *Id.* at 130.

polity.”⁷⁸⁶ While openness and transparency are very important to the maintenance of a democratic system, military regimes are not known to promote transparency or openness in their activities as governors. In a recent study of the abuse of power by the Egyptian military, Transparency International (“TI”) has made reference to a statement made by Egyptian president, Abdel Fattah el-Sisi, regarding freedom of opinion, when he said: “If someone insults the army or police ‘they’re defaming all Egyptians and that’s not freedom of opinion.’”⁷⁸⁷ The TI report also noted that “[t]he operation of an institution as large and powerful as the Egyptian military without even basic provisions of transparency and accountability is presenting a significant security risk to the country—arguably as profound as the forces of radical extremism it is supposed to be there to contain.”⁷⁸⁸ In addition, argues TI, “[t]he complete absence of independent scrutiny leads to critically high corruption risks, and enables the abuse of power. The armed forces, purposed towards creating wealth and maintaining a complex patronage network, lack the capacity and competence to fulfil their main purpose, and become unable to respond to security threats, while the underlying resentment that underpinned the protests of 2011 remains just as strong.”⁷⁸⁹

Since he came to power in 2014, President el-Sisi and his government, like other Egyptian regimes before him, have considered transparency a weakness and have “guarded information as though it were a national security threat.”⁷⁹⁰ Opacity in government communications has become especially problematic as Egyptians battle the COVID-19 pandemic.⁷⁹¹ Foreign reporters who have attempted to keep Egyptians informed on the spread of the coronavirus have been expelled from the country.⁷⁹² Trust in one’s government, it

⁷⁸⁶ John Gerring & Strom C. Thacker, *Political institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 BRIT. J. POL. SCI. 295, 316 (2004).

⁷⁸⁷ TRANSPARENCY INTERNATIONAL, *THE OFFICERS’ REPUBLIC: THE EGYPTIAN MILITARY AND ABUSE OF POWER* 20 (2018).

⁷⁸⁸ *Id.* at 20.

⁷⁸⁹ *Id.*

⁷⁹⁰ See Timothy E. Kaldas, *Egypt’s Disdain for Transparency Will Backfire in this Coronavirus Crisis*, THE GUARDIAN (Mar. 31, 2020), <https://www.theguardian.com/commentisfree/2020/mar/31/egypt-coronavirus-transparency-sisi-crackdown#maincontent>.

⁷⁹¹ *Id.*

⁷⁹² For example, British reporter, Ruth Michaelson, writing for *The Guardian* newspaper, was ordered deported from Egypt after she published an article that focused on “mathematical modelling that indicated Egypt’s number of actual infections may be far higher than the official figures.” Kaldas, *supra* note 790. See

has been argued, “depends on transparency” and if the government is perceived to be “concealing the truth, or withholding information, [its] credibility can quickly crumble.”⁷⁹³

Stability and predictability of the law are very important elements of peaceful coexistence, as well as, entrepreneurship and the creation of wealth. If the law is not stable, it has the potential to create a less predictable legal environment for the development of various relationships, including those, such as investment and trade contracts, that are critical to the creation of wealth and economic growth.⁷⁹⁴ The legal, economic, and development literature has recognized “the importance of a stable legal and political structure for an investment environment.”⁷⁹⁵ Several scholars have argued that “[l]egal stability is almost a prerequisite for investment decisions in long-term projects” and this is “why foreign investors seek countries that minimize the risks associated with unpredictable changes in their legislation.”⁷⁹⁶ Alvaro Pereira, a legal scholar who studies legal stability contracts, argues that “although the threat [of legal and political instability] is higher in undeveloped economies, legal stability is a shared concern for all countries intending to attract FDI.”⁷⁹⁷

For a very long time, foreign investors have “experienced the threat of political and legal instability,” even before the issue became a consideration for “states and even before FDI was an accepted development tool.”⁷⁹⁸ During the 1960s and 1970s, many developing countries engaged in the nationalization of the assets of multinational companies (MNCs), particularly those engaged in extractive industries (e.g., oil and gas), forcing many of these MNCs to seek legal ways to protect themselves from “legal reforms annulling or limiting their rights.”⁷⁹⁹ MNCs demanded what came to be known as “stability clauses” in their contracts with the countries receiving their investments as a way to address “the threat that legal instability

also Ruth Michaelson, *Egypt: Rate of Coronavirus Cases 'Likely to be Higher than Figures Suggest,'* THE GUARDIAN (Mar. 15, 2020), <https://www.theguardian.com/world/2020/mar/15/egypt-rate-coronavirus-cases-higher-than-figures-suggest>.

⁷⁹³ See Kaldas, *supra* note 790.

⁷⁹⁴ See, e.g., Alvaro Pereira, *Legal Stability Contracts in Colombia: An Appropriate Incentive for Investments? Historical Causes and Impact Analysis of Law 963 to 2005*, 12 RICH. J. GLOBAL L. & BUS. 237 (2013).

⁷⁹⁵ See *id.* at 250.

⁷⁹⁶ *Id.* at 252.

⁷⁹⁷ *Id.*

⁷⁹⁸ *Id.*

⁷⁹⁹ *Id.* at 252–53.

presents for their profits.”⁸⁰⁰ Developing countries, the majority of whose legal and political systems were characterized by significant levels of instability, came to see stabilization mechanisms as a way to improve the domestic investment environment and enhance the inflow of foreign investment resources.⁸⁰¹

As argued by Brunnée and Toope, “[l]aw is commonly associated with order, predictability, certainty and, by extension, stability.”⁸⁰² Order, predictability, and stability in the law enhance citizens’ ability to know what the law is and how they can use it to organize their private lives, for example, “to engage in entrepreneurial activities to increase their wealth; to get married and raise a family; and to protect themselves from either government-imposed tyranny or infringements on their rights by non-state actors.”⁸⁰³ In each country, the constitution is “the source of virtually all the laws that help citizens organize and order their private lives,” for example, “contract law, which regulates business relationships—from simple transactions involving the purchase of a ticket to the movie at a local cinema theater to extremely complex mergers and acquisitions deals affecting large corporations and worth billions of dollars.”⁸⁰⁴

Unfortunately, military coup makers are prone to making the law unstable and unpredictable through either discarding, suspending, or modifying it. For example, when the military overthrew the democratically elected government of President Shehu Shagari in Nigeria on December 31, 1983, the post-coup regime, which was named the Federal Military Government, “effectively abrogated the whole pre-existing legal order in Nigeria except what [had] been preserved under the Constitution (Suspension and Modification) Decree 1984.”⁸⁰⁵ The Federal Military Government (Nigeria) under Gen. Muhammadu Buhari, then proceeded to rule by decree.⁸⁰⁶

After Abdel Fattah el-Sisi came to power in Egypt, following the overthrow of President Mohamed Morsi, the Egyptian Constitution of

⁸⁰⁰ See Pererira, *supra* note 794, at 252.

⁸⁰¹ See *id.* at 254.

⁸⁰² See Junta Brunnée and Stephen J. Toope, *International Law and the Practice of Legality: Stability and Change*, 49 VICTORIA UN. WELLINGTON L. REV. 429, 430 (2018).

⁸⁰³ See JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 106 (2018).

⁸⁰⁴ *Id.* at 108.

⁸⁰⁵ See FEDERAL MILITARY GOVERNMENT (NIGERIA) (SUPREMACY AND ENFORCEMENT OF POWERS) DECREE NO. 13, PARA 1 (May 17, 1984).

⁸⁰⁶ See CONSTITUTION (SUSPENSION AND MODIFICATION) DECREE 1984 (DECREE NO. 1) (February 13, 1984) (Nigeria).

2012—which had been approved by 63.8 percent of Egyptians in a two-part referendum—was abandoned and replaced.⁸⁰⁷ The new constitution, called the *Constitution of The Arab Republic of Egypt 2014*, which was approved through a referendum,⁸⁰⁸ created a very powerful presidency, and granted it significant control over the legislature and the judiciary.⁸⁰⁹ That constitution, however, was amended in 2019, significantly increasing the president’s powers over the other branches of government. Human Rights Watch notes that the amendments will “undermine judicial and prosecutorial independence,” since they grant the president “broad and unchecked supervisory powers over the judiciary and the public prosecutor, in contravention of the fundamental rule of law principles concerning the separation of powers, the independence of the judiciary, and the right to a fair trial by a competent, independent, and impartial tribunal.”⁸¹⁰ Control of the judiciary by the president is most likely to create instability in the law and make it much more difficult for Egyptians to “understand and appreciate the law and what role it plays in their daily lives.”⁸¹¹

⁸⁰⁷ See, e.g., Peter Beaumont, *Mohamed Morsi Signs Egypt’s New Constitution into Law*, THE GUARDIAN (Dec. 26, 2012), <https://www.theguardian.com/world/2012/dec/26/mohamed-morsi-egypt-constitution-law>. See also Egypt’s Constitution of 2012, https://www.constituteproject.org/constitution/Egypt_2012.pdf?lang=en. Of course, this constitution was produced through a highly flawed process that was dominated and controlled by the Muslim Brotherhood. The Supreme Constitutional Court, the country’s highest court, later ruled that “the Constituent Assembly, which [had] drafted the Constitution, and Egypt’s upper parliamentary chamber, the Shura Council, were unlawful on the basis that the electoral law violated the principles of equality and non-discrimination.” *Egypt’s Judiciary: A Tool of Repression: Lack of Effective Guarantees of Independence and Accountability*, ICJ at 4 (Sep. 2016), <https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>.

⁸⁰⁸ See Reza Sayah and Mohammed Tawfeeq, *Egypt Passes a New Constitution*, CNN INTERNATIONAL (Jan. 18, 2014), <https://www.cnn.com/2014/01/18/world/africa/egypt-constitution/index.html>.

⁸⁰⁹ See, e.g., Constitution of The Arab Republic of Egypt 2014, <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg060en.pdf>. This new constitution, argues the ICJ, was also produced through a flawed process, made possible by decrees passed by interim president Adly Mansour. See *Egypt’s Judiciary: A Tool of Repression: Lack of Effective Guarantees of Independence and Accountability*, *supra* note 807, at 4.

⁸¹⁰ *Egypt: Constitutional Amendments Entrench Repression*, HUMAN RIGHTS WATCH (Apr. 20, 2019), <https://www.hrw.org/news/2019/04/20/egypt-constitutional-amendments-entrench-repression#>.

⁸¹¹ See JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 107 (2018).

In a recent study, the International Commission of Jurists (“ICJ”) lamented the deteriorating situation with respect to judicial independence in Egypt. The ICJ noted that Egypt under Abdel Fattah el-Sisi is in a crisis and that “one of the last lines of defense, the judiciary, is failing in its essential task of upholding the Rule of Law and protecting human rights.”⁸¹² According to the report, “longstanding interference by the executive power in the judicial system in Egypt and legal provisions that bolster such interference have undermined the judiciary’s ability to act as independent and impartial arbiters of justice, upholding human rights.”⁸¹³

Coup makers are, by definition, law-breakers. The regimes that they establish usually try to manipulate the law in their favor and hence, it is often the case that after a successful military coup, the constitution is either suspended or modified to enhance the ability of the new leaders to crackdown on their opponents, consolidate their monopoly on power and proceed to rule by decrees. This process undermines legal stability and negatively affects peaceful coexistence, entrepreneurial activities and wealth creation.⁸¹⁴ The message that military coup makers, such as Field Marshal Abdel Fattah el-Sisi, send to their fellow citizens is that while citizens must obey the law, military elites and other high-ranking government officials do not have to abide by the “country’s settled law; if the law stands in the way of [their] personal ambitions, [they] can simply change the law to provide [them] with the wherewithal to achieve those objectives.”⁸¹⁵ Such behaviors on behalf of military elites and other government officials do not augur well for the deepening of democracy and the institutionalization of the rule of law.⁸¹⁶

The final element of the rule of law is the recognition and protection of human rights. The protection of human rights is one of the three essential characteristics of modern constitutionalism. The others are fidelity to the rule of law and the guarding of the exercise

⁸¹² *Egypt’s Judiciary: A Tool of Repression: Lack of Effective Guarantees of Independence and Accountability*, *supra* note 807, at 4.

⁸¹³ *Id.* at 4.

⁸¹⁴ See, e.g., John Mukum Mbaku, *Burkina Faso Protests Extending Presidential Term Limits*, THE BROOKINGS INSTITUTION (Oct. 30, 2014), <https://www.brookings.edu/blog/africa-in-focus/2014/10/30/burkina-faso-protests-extending-presidential-term-limits/>.

⁸¹⁵ See John Mukum Mbaku, *Burkina Faso Protests Extending Presidential Term Limits*, BROOKINGS INST. (Oct. 30, 2014), <https://www.brookings.edu/blog/africa-in-focus/2014/10/30/burkina-faso-protests-extending-presidential-term-limits/>.

⁸¹⁶ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 369, n. 486, 377 (2020).

of government power.⁸¹⁷ As reported by Human Rights Watch (“HRW”), the Egyptian armed forces and other state security agents engaged in the killing of many people who were protesting the overthrow of the democratically elected government of Mohamed Morsi in July 2013.⁸¹⁸ HRW has argued that “[t]he gravest incident of mass protester killings [in Egypt] occurred on August 14 [, 2014], when security forces crushed the major pro-Morsi sit-in in Rab’a al-Adawiya Square in the Nasr City district of eastern Cairo.”⁸¹⁹ According to the HRW, “at least 817 and likely more than 1,000” were killed in the Nasr City district.⁸²⁰

There were also other mass killings by the military in post-Morsi Egypt. HRW has determined that “[s]ince January 2011, Egyptian security forces [have] repeatedly used excessive lethal force to disperse protesters, killing well over 2,000 protesters” and that “[b]etween January 25 and February 11, 2011, during the course of the 18-days of mass protests across Egypt calling for the end of the Mubarak government, government, police killed at least 846 demonstrators in squares and near police stations in Cairo, Alexandria, Suez, and other cities.”⁸²¹

As research from the World Justice Project shows, “[e]ffective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of justice, opportunity, and peace—underpinning development, accountable government, and respect for fundamental rights.”⁸²² Fidelity to the rule of law is important to entrepreneurship, the creation of wealth and economic growth. For example, a prospective investor is likely to “think twice before investing in a country where corruption is rampant, property rights are ill-defined, and contracts are difficult to enforce.”⁸²³ In fact, in a country where there is “[u]neven enforcement of regulations, corruption, insecure property rights, and ineffective means to settle disputes,” there is a

⁸¹⁷ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 316.

⁸¹⁸ See *All According to Plan: The Rab’a Massacre and Mass Killings of Protesters in Egypt*, HUMAN RIGHTS WATCH (Aug. 12, 2014), <https://www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt>.

⁸¹⁹ *Id.*

⁸²⁰ *Id.*

⁸²¹ *Id.*

⁸²² See WJP, *supra* note 781, at 9.

⁸²³ *Id.*

stunting of “legitimate business” and the deterrence of “both domestic and foreign investment.”⁸²⁴

Nigeria’s 1979 Constitution specifically prohibited the “forcible assumption of power by any person or group of persons.”⁸²⁵ According to § 1(2) of that constitution: “The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of the Constitution.”⁸²⁶ Nevertheless, on December 31, 1983, the Nigerian armed forces, in contravention of this constitutional provision, overthrew the democratically elected government of Alhaji Shehu Shagari, and set up a government named the Federal Military Government.⁸²⁷ The military justified its decision to overthrow Shagari’s government on its belief that “the constitutional machinery for the change of government through electoral process had been brazenly violated.”⁸²⁸ Military authorities then cited, as proof of the violation of constitutional rules for change of government, to the 1983 General Elections in Nigeria, which the military argued had been “openly rigged by the ruling National Party of Nigeria” because Shagari’s government had become so unpopular that there was no chance that it would win a fair, free and credible election.⁸²⁹ The military also argued that, at this time, Nigeria was facing economic collapse as a result of the “reckless management of the economy by those in government who [had] decided to remain in power against the democratic wishes of the people.”⁸³⁰

The spurious argument by the Nigerian military that the rigging of the 1983 general elections by the ruling party resulted in the destruction of the constitutional machinery and hence, necessitated their decision to intervene cannot be justified. Granted, the elections may have been rigged; nevertheless, the solution did not lie in military intervention. In addition, after taking over control of the government, the military did not commit itself to the rule of law, nor did it make any efforts to democratic and constitutional government in the country. As a consequence, during the nearly thirty years of ruling

⁸²⁴ *Id.*

⁸²⁵ See Oshio, *supra* note 765, at 461.

⁸²⁶ THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA [CONSTITUTION], 1979.

⁸²⁷ See Oshio, *supra* note 765, at 461.

⁸²⁸ *Id.* at 462.

⁸²⁹ *Id.* at 462.

⁸³⁰ *Id.* at 462.

Nigeria, the military made no effort to promote democracy and the rule of law. In fact, successive military regimes oppressed citizens and engaged in gross violations of human rights; destroyed the country's democratic institutions and maintained a dictatorship that killed a lot of people, especially minorities in the Niger Delta.⁸³¹

It was not only in Nigeria that military intervention in politics destroyed prospects for the development of democratic institutions in the post-independence period. Today, the military, whether in Egypt or Nigeria, remains an important obstacle to democratic consolidation and entrenchment. The key is for each African country to provide itself with a military that is “apolitical, accountable, capable, and affordable.”⁸³² Unless each African country can provide itself with a governing process that significantly minimizes military overthrow of the government, the military will remain a major threat to democracy, constitutional government and the rule of law.⁸³³

B. *Constitutional Coups and the Rule of Law in Africa*

Earlier, this article examined constitutional coups in Cameroon (2008), Egypt (2019), and Togo (2019). In 2008, Cameroon's President Paul Biya, who had been in office since 1982 and was prohibited by the country's Constitution⁸³⁴ from running for another term in office, changed the constitution, with the help of a compliant National Assembly, to allow him to remain in office indefinitely.⁸³⁵ In

⁸³¹ See Onwuazombe, *supra* note 763.

⁸³² Emile Ouédraogo, *Advancing Military Professionalism in Africa*, AFRICA CENTER FOR STRATEGIC STUDIES 33 (July 2014), <https://africacenter.org/wp-content/uploads/2016/06/ARP06EN-Advancing-Military-Professionalism-in-Africa.pdf>.

⁸³³ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 368 (noting that military coups remain an important threat to constitutional government and the rule of law in Africa).

⁸³⁴ CONSTITUTION OF THE REPUBLIC OF CAMEROON, Jan. 18, 1996, Law No. 96–06. The relevant section is art. 6(2), which reads: “The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once.” In the amended constitution, art. 6(2) was changed to: “The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election.” The word “once” was taken out to allow the president to run for president multiple times and possibly remain in office indefinitely. See *Law N° 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law N° 96/6 of 18 January 1996 to Amend the Constitution of 2 June 1972*. This is the amended constitution.

⁸³⁵ See, e.g., Tansa Musa, *Cameroon's Biya Signs Law Allowing Third Term Bid*, REUTERS (Apr. 15, 2008), <https://uk.reuters.com/article/cameroon-constitution-idUKL1529602420080415>. See also *Cameroon's Parliament Lifts Presidential*

2019, the Togolese parliament changed the constitution to allow incumbent president Faure Gnassingbé to stand for two more terms in office.⁸³⁶ Also, in 2019, Egyptians amended their constitution to allow President Abdel Fattah el-Sisi to run for two additional terms and remain in office up until 2030 or beyond.⁸³⁷

As I have argued elsewhere, “[w]ell-governed and progressive societies are built on principles of constitutional government and constitutionalism.”⁸³⁸ In addition, “[a]dherence or fidelity to the rule of law is central to governance. The problem in many African countries today is not the absence of constitutions, but rather that many of these constitutions can easily be changed or manipulated by political leaders to their advantage.”⁸³⁹ A constitutional coup, such as that which occurred in the Republic of Cameroon in 2008 and in Togo and Egypt in 2019, violates or offends both the substantive and formal definitions⁸⁴⁰ of the rule of law. Friedrich August von Hayek provided a formal definition of the rule of law in which he stated that where the rule of law exists, “government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s affairs on the basis of this knowledge.”⁸⁴¹

Von Hayek’s definition of the rule of law makes clear that the law must be “fixed and announced beforehand”; the law must be stable so that citizens can “foresee with fair certainty” what the law is and how

Term *Limit,* VOA NEWS (Nov. 1, 2009),
<https://www.voanews.com/archive/camerouns-parliament-lifts-presidential-term-limit>.

⁸³⁶ See, e.g., *Togo Changes Law to Let President Stand for Two More Terms*, ALJAZEERA (May 9, 2019), <https://www.aljazeera.com/news/2019/05/togo-law-president-stand-terms-190509180859448.html>; see also CGTN Africa, *Togo Lawmakers give Gnassingbe the Option of Ten More Years in Power*, CGTN AFRICA (May 9, 2019), <https://africa.cgtn.com/2019/05/09/togo-lawmakers-give-gnassingbe-the-option-of-ten-more-years-in-power/>.

⁸³⁷ See, e.g., Merrit Kennedy, *With Constitution Changes, Egypt’s President Could Stay in Power Until 2034*, NPR NEWS (Feb. 14, 2019), <https://www.npr.org/2019/02/14/694675332/with-constitution-changes-egypts-president-could-stay-in-power-until-2034>; see also *Egypt Lawmakers OK Amendments that Could Let Sisi Stay in Power Until 2030*, VOA NEWS (Apr. 16, 2019), <https://www.voanews.com/middle-east/egypt-lawmakers-ok-amendments-could-let-sissi-stay-power-until-2030>.

⁸³⁸ See Mbaku, *supra* note 126, at 158.

⁸³⁹ *Id.*

⁸⁴⁰ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 308–09 (distinguishing between formal and substantive definitions of the rule of law).

⁸⁴¹ See F. A. HAYEK, *THE ROAD TO SERFDOM* 80–81 (Bruce Caldwell, ed., 1994).

it would be used by the government to regulate citizens' socio-political interaction, and how they can use the law to organize their private lives.⁸⁴² A constitutional coup usually has only one objective: to change the law to benefit the incumbent president, his political party and in the case of many African countries, the ethnocultural group, of which the president is a member. Such a process not only makes the law unstable but it also places the president, his political organization and his benefactors (who are usually members of his subculture) above the law.

These opportunistic constitutional amendments are not designed to improve the quality of the constitution and enhance constitutional government and constitutionalism. Instead, they serve to make constitutional government untenable and, in addition, create distrust of the government, especially among those individuals and groups that are not part of the president's base of support—these people, in countries such as Cameroon, are ethnocultural groups that are not part of the president's ruling coalition.⁸⁴³ Perhaps, more important is the fact that these constitutional manipulations have sent a signal to Cameroonians that some individuals within the country are not subject to the law—when these individuals do not like a law, they can simply change it and have one that serves their interests. Among Cameroonians, these people, who include the president, are referred to as “untouchables.” These individuals are usually granted “special protection in the form of immunities which defy exact legal rationalization.”⁸⁴⁴ For example, the Minister of Justice is granted the power to intervene at any stage of the prosecution of an “untouchable” and effectively “stop the proceedings.”⁸⁴⁵ Professor Charles Manga Fombad, an expert on Cameroon constitutional law, also notes that “some specified categories of civil servants . . . can only be prosecuted

⁸⁴² *Id.* at 80–81.

⁸⁴³ Since Paul Biya became president of the Republic of Cameroon in 1982, members of his Beti ethnocultural group “have become pervasive throughout the higher echelons of public administration, as well as various sectors of the economy.” John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1, 42 (2019). Under this political economy model, groups, such as the Anglophones of the South West and North West Regions of Cameroon, have not benefited from Biya's corrupt approach to resource allocation and governance. *Id.*

⁸⁴⁴ Charles M. Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 234, 252 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000).

⁸⁴⁵ *Id.* at 252.

with the fiat of their ministers.”⁸⁴⁶ Of significance is the fact that “complaints against the police, gendarmes, or the military forces, . . . must be made to their superior officers who have an absolute discretion on whether to allow the culprit to be prosecuted.”⁸⁴⁷

It is no doubt that many Cameroonians, especially those who are not part of the ruling coalition, “do not trust their legal and judicial systems” or have any interest in voluntarily accepting and obeying the law.⁸⁴⁸ It has been noted that “[t]he culture of impunity that has become pervasive in Cameroon starts from the top—the President of the Republic, Paul Biya, can be considered the chief priest of this insidious culture of impunity.”⁸⁴⁹ During the 2008 constitutional amendments, Cameroon’s Parliament *formally* placed the President of the Republic above the law—according to Article 53(3) of the amended constitution, “[a]cts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his function.”⁸⁵⁰ This constitutional immunity does not provide an exemption for serious offenses, “such as war crimes, crimes against humanity, ethnic cleansing, and genocide.”⁸⁵¹ Through this constitutional amendment, the Cameroon legal system will not be able to hold Biya accountable for the atrocities that his security forces have committed and continue to commit against the Anglophone people of the country.⁸⁵² Thus, what Biya’s constitutional coup has done in Cameroon has not only been to formally place him above the law but it has also severely damaged the transition to democracy, constitutional government and constitutionalism that began in the early-1990s.

With respect to the substantive definition of the rule of law, Thomas Carothers notes that the rule of law is “a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.”⁸⁵³ The president’s manipulations of the constitution to

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

⁸⁴⁸ John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 186 (2019).

⁸⁴⁹ *Id.* at 96.

⁸⁵⁰ Law No 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972 (also referred to as Constitution of the Republic of Cameroon 1972) (as amended through 2008), art. 53(3), <https://www.prc.cm/en/cameroon/constitution>.

⁸⁵¹ Mbaku, *supra* note 848, at 96.

⁸⁵² *See generally id.*

⁸⁵³ *See* Carothers, *supra* note 66, at 95–6.

allow him to stay in office indefinitely show that the laws do not “apply equally” to all Cameroonians—some citizens, like the president, are above the law. In addition, argues Carothers, “[t]he central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation.”⁸⁵⁴ Finally, as argued by Carothers, government officials “accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.”⁸⁵⁵

In a 2018 report on human rights in Cameroon, the U.S. Department of State noted that “[d]espite the [Cameroon] judiciary’s partial independence from the executive and legislative branches, the president [of the Republic of Cameroon] appoints all members of the bench and legal department of the judicial branch, including the president of the Supreme Court, and may dismiss them at will.”⁸⁵⁶ The U.S. Department of State report also noted that Cameroon’s “court system is subordinate to the Ministry of Justice, which in turn is under the president” and that “[t]he constitution designates the president as ‘first magistrate,’ thus ‘chief’ of the judiciary, making him the legal arbiter of any sanctions against the judiciary.”⁸⁵⁷ Finally, the report notes that in many cases that come before the courts, judges are “subordinate to the minister of justice or to the minister in charge of military justice.”⁸⁵⁸ For example, the U.S. Department of State notes that “[w]ith approval from the minister of justice, the Special Criminal Court may drop charges against a defendant who offers to pay back the money he is accused of having embezzled, which essentially renders the act of corruption free of sanctions.”⁸⁵⁹

Étienne Gnassingbé Eyadéma became president of Togo on April 14, 1967, after a military coup d’état against President Nicolas Grunitzky. He went on to maintain a brutal dictatorship in the country for thirty-eight years, which was characterized by “repression, patronage, and a bizarre leadership cult”⁸⁶⁰ He died in office on

⁸⁵⁴ *Id.*

⁸⁵⁵ See Carothers, *supra* note 66, at 95-6.

⁸⁵⁶ 2018 Country Reports on Human Rights Practices: Cameroon, U.S. DEP’T OF STATE (2018), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/cameroon/>.

⁸⁵⁷ *Id.*

⁸⁵⁸ *Id.*

⁸⁵⁹ *Id.*

⁸⁶⁰ Osei, *supra* note 152, at 1460.

February 5, 2005.⁸⁶¹ After Eyadéma's death, the Togolese armed forces manipulated the law to install his son, Faure Gnassingbé, as the successor to his father. Faure, as he is generally referred to in Togo, subsequently won the Togolese presidential elections that were held on April 24, 2005.⁸⁶² He was elected to serve a five-year term of office as president. He was subsequently re-elected in 2010⁸⁶³ and 2015.⁸⁶⁴ Amid widespread protests against what many Togolese argued was an attempt by Faure to keep the government of Togo in the hands of his family indefinitely, Togo's parliament approved a constitutional amendment allowing Faure to "potentially stay in office until 2030."⁸⁶⁵

Given the fact that the 2019 constitutional amendments in Togo, which limited the presidential term to two five-year terms, did not apply retrospectively, Faure was able to stand as a candidate for the presidency in the Togolese presidential elections of February 22, 2020. He won a fourth term⁸⁶⁶ and was sworn into office on May 3,

⁸⁶¹ Kaye Whiteman, *Gnassingbe Eyadema: Dinosaur Dictator Who Ruled Togo for 38 Brutal and Fearful Years*, THE GUARDIAN (Feb. 6, 2005), <https://www.theguardian.com/news/2005/feb/07/guardianobituaries>. See also *Togolese President Dies, Son Put in Power*, VOA NEWS (Oct. 29, 2009), <https://www.voanews.com/archive/togolese-president-dies-son-put-power>.

⁸⁶² See BONA UDEZE, WHY AFRICA? A CONTINENT IN A DILEMMA OF UNANSWERED QUESTIONS 330 (noting, inter alia, that Faure Gnassingbé won the April 24, 2005 presidential election "amidst massive fraud and election rigging.").

⁸⁶³ See Scott Stearns, *Electoral Commission Says Togo's President Wins Re-Election*, VOA NEWS (Mar. 5, 2010), <https://www.voanews.com/africa/electoral-commission-says-togos-president-wins-re-election>. See also John Zodzi, *Togo Leader Gnassingbe Re-Elected in Disputed Poll*, REUTERS (Mar. 6, 2010), <https://www.reuters.com/article/us-togo/togo-leader-gnassingbe-re-elected-in-disputed-poll-idUSTRE62520G20100306>.

⁸⁶⁴ See *Togo's Faure Gnassingbe Wins Third Term as President*, BBC NEWS (Apr. 29, 2015), <https://www.bbc.com/news/world-africa-32512615>. See also VOA, *Incumbent Gnassingbe Declared Provisional Winner of Togo Vote*, VOA NEWS (Apr. 29, 2015), <https://www.voanews.com/africa/incumbent-gnassingbe-declared-provisional-winner-togo-vote>.

⁸⁶⁵ See *Togo Changes Law to Let President Stand for Two More Terms*, ALJAZEERA (May 9, 2019), <https://www.aljazeera.com/news/2019/05/togo-law-president-stand-terms-190509180859448.html>. See also *Togo Passes Constitutional Amendment on Presidential Term Limits that Permits Current President to Remain in Power Until 2030*, CONSTITUTIONNET (May 9, 2019), (last visited on May 31, 2020), <http://constitutionnet.org/news/togo-passes-constitutional-amendment-presidential-term-limits-permits-current-president-remain>.

⁸⁶⁶ See *Togo President Gnassingbé Wins Re-Election*, DW NEWS (Feb. 24, 2020), <https://www.dw.com/en/togo-president-gnassingb%C3%A9-wins-re-election/a-52494760>. See also *Togo President Faure Gnassingbe Wins Fourth Term in Landslide*, ALJAZEERA (Feb. 24, 2020), https://www.youtube.com/watch?v=WxhWH80N_9I.

2020.⁸⁶⁷ The relevant provision in the amended constitution (i.e., Togolese Constitution of the Fourth Republic (May 15, 2019)) is found in Article 59, which states that “The President of the Republic is elected by universal, free, direct, equal and secret suffrage for a five-year term, which is renewable only once. This provision can only be modified by referendum.”⁸⁶⁸

Under the new constitutional provision, Faure, who has been in office as President of the Republic of Togo since 2005, won the February 2020 presidential elections and was subsequently installed as president to serve another five-year term, which will end in 2025.⁸⁶⁹ Given the fact that Faure is most likely to run for re-election in 2025 and that he has a very good chance of winning, he would, in 2030, have been in office as President of the Republic of Togo for twenty-five years, thirteen years short of his father’s record thirty-eight years in power.⁸⁷⁰ Given the “stacked system that he and his father [have] built [in Togo], Faure is likely to rule until 2030 and beyond.”⁸⁷¹ Since he has already carried out one successful constitutional coup, there is

⁸⁶⁷ See *Faure Gnassingbé to be Sworn into Office on May 3, 2020*, TOGO FIRST (Apr. 29, 2020), <https://www.togofirst.com/en/politics/2904-5433-faure-gnassingbe-to-be-sworn-into-office-on-may-3-2020>. See also *Togo President Takes Oath of Office for Fourth Straight Term*, VANGUARD (Nigeria) (May 5, 2020), <https://www.vanguardngr.com/2020/05/togo-president-takes-oath-of-office-for-fourth-straight-term/>.

⁸⁶⁸ This is the author’s translation from the French version of the constitutional text, which is the authoritative one: “Le Président de la République est élu au suffrage universel, libre, direct, égal et secret pour un mandat de cinq (05) ans renouvelable une seule fois. Cette disposition ne peut être modifiée que par voie référendaire.” See *Constitution togolaise de la IV^e République (version consolidée, à jour de la loi constitutionnelle du 15 mai 2019 et de toutes les révisions constitutionnelles antérieures)*, <http://extwprlegs1.fao.org/docs/pdf/tog128398.pdf>, art. 59. The translated name of the amended constitution is: *Togolese Constitution of the Fourth Republic (consolidated version, up to date with constitutional law of May 15, 2019 and all previous constitutional revisions)*. The French version of this constitution can be found at <http://togolex.com/2019/06/constitution-togolaise-de-la-ive-republique-version-consolidee-a-jour-de-la-loi-constitutionnelle-du-15-mai-2019-et-de-toutes-les-re> (last visited on October 2, 2020).

⁸⁶⁹ See *Togo’s President Faure Gnassingbé Elected to Fourth Term*, DW NEWS (Feb. 24, 2020), <https://www.dw.com/en/togos-president-faure-gnassingb%C3%A9-elected-to-fourth-term/av-52514788>.

⁸⁷⁰ Faure Gnassingbé is the son of former Togolese dictator and coup maker, Gnassingbé Eyadéma. See *Togo President Dies; Son Named Successor*, THE WALL STREET JOURNAL, (Feb. 5, 2005), <https://www.wsj.com/articles/SB110764825295646881>.

⁸⁷¹ See Noyes and Shurkin, *infra* note 873.

no reason to believe that he will not do the same thing to allow him to stay in office beyond 2030.⁸⁷²

In a study of Faure's February 2020 re-election for a fourth term, political scientists Alexander H. Noyes and Michael Shurkin of the Rand Corporation, argue that "[d]espite a lighter touch than his notoriously brutal father, Faure has effectively hollowed out ostensibly democratic processes like elections to perpetuate his family's long reign."⁸⁷³ In the February 22, 2020 presidential election, Faure captured 70 percent of the votes cast to opposition candidate Agbeyome Kodjo's 19 percent.⁸⁷⁴

In addition to the constitution, Faure has also manipulated the electoral process to ensure that he wins every election in which he is a candidate. For example, during the 2020 presidential elections, "both local and international election observers were barred from doing their jobs, including some who were expelled from the country."⁸⁷⁵ In addition, "[o]n Election Day, the internet was shut down, a growing trend among autocrats in Africa and around the world."⁸⁷⁶ He, like his father, has also relied on the support of the military to stay in power. That support, by the armed forces of Togo, was evident shortly after Faure's father died in 2005—"[t]he Gnassingbé family, with the army's support, pressured lawmakers to replace the [National Assembly's] president with Faure" in an effort to by-pass the constitutional requirement that in case of the death of the President of the Republic, the president of the National Assembly is to assume the position of Interim President of the Republic.⁸⁷⁷

The four elections that Faure has participated in as a candidate for the presidency of Togo have been marred with allegations of fraud and violent protests, as well as suffocation of the opposition.⁸⁷⁸ In their analysis, Noyes and Shurkin note that the highly-educated Faure, unlike his essentially illiterate father, has undertaken structural

⁸⁷² According to Article 59 of Togo's amended Constitution, Faure, who was re-elected president in 2020, can serve only two-five year term and is not eligible to run again for the position of President of the Republic of Togo, unless, of course, he changes the constitution as he did in 2019. See *Constitution togolaise de la IV^e*.

⁸⁷³ See Alexander Noyes & Michael Shurkin, *It Will Take More Than an Election to Oust Faure Gnassingbe in Togo*, WORLD POLITICS REVIEW (Mar. 6, 2020), <https://www.worldpoliticsreview.com/articles/28582/it-will-take-more-than-an-election-to-oust-faure-gnassingbe-in-togo>.

⁸⁷⁴ *Id.*

⁸⁷⁵ *Id.*

⁸⁷⁶ *Id.*

⁸⁷⁷ *Id.*

⁸⁷⁸ *Id.*

reforms that have significantly improved economic growth in Togo, although Faure's family continues to dominate the national economy, using the resources extracted to "curry favor through patronage networks and coopt potential opponents."⁸⁷⁹ In addition, Faure has adopted methods similar to those used by his father to coerce and co-opt his political opponents. In fact, when Faure conceded amidst nation-wide protests in 2019, to the re-establishment of the two-term limit for presidents, he, nevertheless, "outfox[ed] his opponents by requiring that the limits not apply retroactively, making him eligible for [the February 2020] election."⁸⁸⁰

Noyes and Shurkin conclude their analysis by noting that "[t]he recent accusations of election rigging [in Togo] suggest that the family is not about to let itself be voted out of office. Even if the allegations prove false, the fact remains that a family as wealthy and as entrenched as the Gnassingbé clan probably does not need to stoop to stuffing ballots; cooptation, intimidation and manipulation is enough."⁸⁸¹ While the amended constitution has limited Faure to two more terms, this does not appear to be an adequate check, especially given the events of 2019—that is, the constitutional amendment that made it possible for Faure to stand for election in 2020.⁸⁸²

Like his father, Faure has made no effort to develop his country's democratic institutions. Instead, he has maintained what is essentially, a "semi-democratic system"—characterized primarily by elections, which are usually rigged in favor of Faure's ruling coalition—and which are "stacked against the opposition."⁸⁸³ Through "carefully measured concessions [granted to the opposition in order] to satisfy outside critics," Faure has managed to remain in power and is likely to do so beyond 2030. But, has Faure not contributed substantively to the establishment of constitutional government and constitutionalism in Togo?

As already examined in this article, presidents who engage in opportunistic constitutional modifications—that is, presidents who undertake constitutional coups—place themselves above the law, a process that does not augur well for a governing process undergirded

⁸⁷⁹ See Noyes and Shurkin, *supra* note 873. Kodjo was a former prime minister of Togo.

⁸⁸⁰ *Id.*

⁸⁸¹ *Id.*

⁸⁸² See Brian K. Sibanda, *Togo Changes Law to Let President Stand for Two More Terms*, HEAD TOPICS (South Africa) (May 9, 2019), <https://headtopics.com/za/togo-changes-law-to-let-president-stand-for-two-more-terms-5776100>.

⁸⁸³ See Noyes and Shurkin, *supra* note 873.

by the rule of law. For, where the rule of law is respected, the law is supreme and everyone, including even those in high-level political positions, such as civil servants and political elites, is subject to the law. According to the U.S. Department of State report on human rights in Togo for 2018, since he took office in 2005, Faure has not significantly improved the human rights situation in the country. As noted by the U.S. Department of State report, in Togo, “[h]uman rights issues included harsh and life-threatening conditions in prisons and detention centers; criminal libel; interference with freedoms of peaceful assembly and association; violence against women and inadequate efforts to investigate, prosecute, or otherwise hold perpetrators accountable; criminalization of consensual same-sex conduct; trafficking in persons; and forced child labor.”⁸⁸⁴

Although the Constitution of the Republic of Togo prohibits torture and other cruel, inhuman, or degrading punishment,⁸⁸⁵ it was reported that government officials had “employed cruel, inhuman, or degrading treatment” and that in Lomé, the capital city, “police units [had] detained dozens of protesters . . . and chained them together in a field next to a police station . . . without shelter overnight before releasing them.”⁸⁸⁶ Additionally, in prisons, “[m]edical facilities, food, sanitation, ventilation, and lighting were inadequate or nonexistent, prisoners did not have access to potable water, and disease was widespread.”⁸⁸⁷

The constitution also prohibits arbitrary arrest or detention.⁸⁸⁸ Nevertheless, the U.S. Department of State noted that Togolese government officials did not always observe or adhere to these constitutional provisions.⁸⁸⁹ In addition, the country’s “[c]ivilian authorities did not always maintain effective control over the armed forces, gendarmerie, and police, and government mechanisms to investigate and punish abuse were often not effective.”⁸⁹⁰ Further, “[c]orruption and inefficiency were endemic among police, and impunity was a problem” and the “government generally neither investigated nor punished effectively those who committed abuses.”⁸⁹¹

⁸⁸⁴ See 2018 Country Reports on Human Rights Practices: Togo, *supra* note 194.

⁸⁸⁵ See Constitution togolaise de la IV^e République, art. 21, *supra* note 150,

⁸⁸⁶ 2018 Country Reports on Human Rights Practices: Togo, *supra* note 194.

⁸⁸⁷ *Id.*

⁸⁸⁸ See Constitution togolaise de la IV^e République, art. 15., *supra* note 150.

⁸⁸⁹ See 2018 Country Reports on Human Rights Practices: Togo, *supra* note 194.

⁸⁹⁰ *Id.*

⁸⁹¹ *Id.*

Although Togo's constitution provides for independence of the judiciary, "the government did not always respect judicial independence and impartiality."⁸⁹² Instead, the "executive branch exerted control over the judiciary, and judicial corruption was a problem. There was a widespread perception [that] lawyers bribed judges to influence the outcome of cases."⁸⁹³ The Togolese government engaged in other activities (e.g., restriction of the freedom of expression and of the press) and arrested and detained many young people for "offenses" such as "spreading false news," and "insulting authorities."⁸⁹⁴ In general then, the Faure regime, like that of his father before him, has not significantly improved the country's transition to democracy, constitutional government and constitutionalism. Instead, led by Faure, the government has devoted most of its efforts to survival and the perpetuation of itself. As a consequence, little has been done to create a governing process undergirded by adherence to the rule of law.

This article has already examined Abdel Fattah el-Sisi's constitutional coup in Egypt, which took place in 2019, when the parliament amended the constitution to allow him to potentially remain in office until 2030 and beyond. In its 2018 report on human rights in Egypt, the U.S. Department of State noted that major human rights issues in 2018 included:

unlawful or arbitrary killings by the government or its agents and terrorist groups; forced disappearances; torture; arbitrary detention; harsh and life-threatening prison conditions; arbitrary arrest and detention; political prisoners; arbitrary or unlawful interference with privacy; undue restrictions on free expression, the press, and the internet, including censorship, site blocking, and criminal libel; substantial interference with the rights of peaceful assembly and freedom of association, including government control over registration and financing of nongovernmental organizations (NGOs); restrictions on political participation; use of the law to arbitrarily arrest and prosecute lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons; violence targeting LGBTI persons and

⁸⁹² *Id.*

⁸⁹³ *Id.*

⁸⁹⁴ *Id.*

members of other minority groups, and use of forced or compulsory child labor.⁸⁹⁵

These behaviors, on the part of the government, are not behaviors that are associated with the rule of law or that can be found in countries that practice constitutional government or constitutionalism or generally adhere to the rule of law. This article has shown that the behaviors of the three African presidents—Gnassingbé of Togo, Biya of Cameroon and el-Sisi of Egypt—that have been examined have actually stunted (and are likely to continue to stunt) the development of democratic and rule of law systems in their respective countries.

VI. WHY AFRICANS MUST CARE ABOUT THE RULE OF LAW

A. Introduction

This article has examined military and constitutional coups in Cameroon, Egypt, and Togo. Coups have had and will continue to have a stunting effect on the development of a fully functioning and effective governing process in each of these and other African countries. Such a governing process is one that, at the minimum, is capable of preventing the control and abuse of government power by factions. This of course calls for the provision in each country of a strong system of checks and balances.⁸⁹⁶ James Madison, who is considered the Father of the American Constitution, considered factions (e.g., informal groups and organized political parties)⁸⁹⁷ to be

⁸⁹⁵ 2018 Country Reports on Human Rights Practices: Egypt, U.S. DEP'T OF STATE, <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/egypt/> (last visited Oct. 13, 2020).

⁸⁹⁶ See, e.g., THE FEDERALIST NO. 10 (JAMES MADISON).

⁸⁹⁷ In the case of African countries, factions include ethnic organizations and political parties. In several African countries, many political parties are actually coalitions of ethnic groups and hence, their agendas represent only the interests of the ethnocultural groups represented in the party and not those of the country as a whole. For example, the first political parties formed in post-independence Kenya were the Kenya Africa National Union (KANU), which was an alliance of the Kikuyu and Luo and the Kenya African Democratic Union (KADU), which “comprised of other small tribes who feared domination by KANU). See Zipporah Nyambura, *In Kenya, Politics Split on Ethnic Divide*, DW NEWS (Oct. 26, 2017), <https://www.dw.com/en/in-kenya-politics-split-on-ethnic-divide/a-37442394>.

Despite the fact that Kenya has progressed significantly in terms of its transition to democracy, the country has not yet overcome the tendency for political parties to be essentially ethnic-based and Kenyan voters continue to vote only for candidates who are members of their own subculture. See, e.g., Hamza Mohamed, *Kenya Elections: The Ethnicity Factor*, ALJAZEERA (Aug. 6, 2017),

very dangerous to the survival of an effective governing process. First, Madison defined what he meant by *a faction*: In *The Federalist No. 10*, Madison stated as follows:

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁸⁹⁸

Second, Madison noted that “[t]he instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished.”⁸⁹⁹ Despite their misgivings about political parties, the Founders of the American Republic, who included James Madison, as well as other thinkers of the period, came to believe that the existence of independent and competitive political parties was “an elementary standard that every democracy must meet.”⁹⁰⁰ Madison and his fellow Founders considered tyranny by factions or what they referred to as majoritarian tyranny to be a major obstacle to minority interests and the functioning of the government of the new country. Hence, they sought ways to place constraints or guards on the exercise of power by the majority.⁹⁰¹

The constitutional constraints which Madison referred to as “parchment barriers against the encroaching spirit of power,”⁹⁰² were a necessary but, an insufficient condition for the effective and full protection of minority rights in particular and fundamental rights in general, as well as the minimization of majoritarian tyranny. As argued by various constitutional scholars, “[a] constitution is, after all, a piece of paper, and ‘parchment barriers’ are never much use against lead and steel and chains and guns.”⁹⁰³ In one of his letters to Thomas

<https://www.aljazeera.com/indepth/features/2017/08/kenyan-elections-ethnicity-factor-170806081143385.html> (noting that “[v]oters from Kenya’s various tribes say they will vote for candidate of their own ethnic group because they trust him”—this was in relation to the 2017 general elections).

⁸⁹⁸ See THE FEDERALIST NO. 10 (James Madison).

⁸⁹⁹ *Id.*

⁹⁰⁰ See, e.g., *Democracy: Democratic Institutions*, ENCYCLOPEDIA BRITANNICA.

⁹⁰¹ See, e.g., THE FEDERALIST NO. 48 (James Madison).

⁹⁰² *Id.*

⁹⁰³ See Benjamin R. Barber, *Constitutional Rights—Democratic Instrument or Democratic Obstacle?*, in THE FRAMERS AND FUNDAMENTAL RIGHTS 23, 30 (Robert A. Litch ed., 1991).

Jefferson, Madison argued that “experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”⁹⁰⁴ In *The Federalist No. 51*, Madison argued that “[i]f a majority be united by a common interest, the rights of the minority will be insecure.”⁹⁰⁵ He then went on to prescribe a solution to cure this “evil”:⁹⁰⁶

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole improbable, if not impracticable.⁹⁰⁷

Madison’s argument was that unless the country provided itself with robust, fully-functioning and effective supporting institutions, the rights elaborated in the Constitution would only be parchment barriers to majoritarian tyranny.⁹⁰⁸ Thus, majoritarian tyranny is prevented, and fundamental rights are secured by, “a competent and balanced governing process.”⁹⁰⁹ But, is there a relationship between constitutional democracy and the rule of law? First, as has been seen in many African countries, including Cameroon, Egypt and Togo, if constitutional democracy is used to promote public policies that “benefit exclusively or even primarily the majority and marginalize the minority, it is likely the case that the minority will consider the government illegitimate.”⁹¹⁰

⁹⁰⁴ ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 97 (1997) (quoting Madison to Jefferson (October 17, 1788)).

⁹⁰⁵ THE FEDERALIST NO. 51 (James Madison).

⁹⁰⁶ *Id.*

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.* See also Benjamin R. Barber, *Democratic Instrument or Democratic Obstacle?*, in THE FRAMERS AND FUNDAMENTAL RIGHTS 23, 27 (Robert A. Licht ed., 1992).

⁹⁰⁹ Judith A. Best, *Fundamental Rights and the Structure of the Government*, in THE FRAMERS AND FUNDAMENTAL RIGHTS 37, 37 (Robert A. Licht ed., 1992).

⁹¹⁰ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 325. For example, in Cameroon, since constitutional democracy returned to the country in 1990, the majority Francophones have used elections to remain in power indefinitely and marginalize the minority Anglophones, effectively pushing the latter to the economic and political margins. See, e.g., John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status*

Pushed to the economic and political margins, the minority, as has been seen in several African countries, can opt for “violent and destructive mobilization in an effort either to capture the government or secede and form their own State.”⁹¹¹ Thus, if as feared by Madison and other Founders of the American Republic, constitutional democracy turns into a mechanism or tool used by the majority to tyrannize the minority, the minority may resort to revolution to minimize its continued oppression. To resolve this problem, America’s Founders borrowed John Locke’s idea of revolution, which they defined as the “right of the people to dissolve the government and to replace it with an entirely new one.”⁹¹² Thus, to minimize the chances that the majority will abuse government power and tyrannize the minority creating conditions that will force the minority to opt for violent mobilization, it is necessary to guard the majority faction—this calls for the establishment of a governing process undergirded by the rule of law. Such a governing process is not only the key to the minimization of majoritarian tyranny but, it is also the foundation on which a democracy is built.⁹¹³

A governing process that guarantees the rule of law is also “one that effectively constrains the state and guards against government impunity, majoritarian tyranny, and other forms of political opportunism that have exacerbated inter-ethnic conflict and stunted human development in many African countries.”⁹¹⁴ This governing process is undergirded by the separation of powers with checks and

Quo?, 42 SUFFOLK TRANSNAT’L L. REV. 1 (2019) (examining, inter alia, the oppression of the Anglophones by the Francophone-dominated government). Meanwhile, in Egypt, since his election and re-election, Abdel Fattah el-Sisi has set out to wipe out the country’s Islamist opposition, as embodied in the Islamic Brotherhood. In addition, el-Sisi has “built on a foundation of policies that trample dissent and created a set of draconian new laws that criminalize anything his regime calls disinformation,” effectively stunting the ability of Egyptians to engage in political dialogue. See Ruth Margalit, *Sisi’s Crusade*, COL. J. REV. (Fall 2019), https://www.cjr.org/special_report/sisi-crusade-egypt.php.

⁹¹¹ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 325-6. Examples include the decision by various ethnocultural groups in the then Eastern Region of Nigeria, to secede from the Federation of Nigeria and form their own country and the Anglophones of Cameroon, who in recent years, have launched efforts to secede from the Republic of Cameroon and form a new country called the Republic of Ambazonia. See PETER BAXTER, *BIAFRA: THE NIGERIAN CIVIL WAR, 1967–1970* (2015) (examining efforts by the Igbos and various minority groups in Nigeria’s Eastern Region to secede and form the Republic of Biafra).

⁹¹² Best, *supra* note 909 at 39.

⁹¹³ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 326.

⁹¹⁴ *Id.* at 305. This is James Madison’s concept of the republic. See THE FEDERALIST NO. 10 (James Madison).

balances. Some of these checks and balances include an independent judiciary; a bicameral legislature, with each chamber empowered to exercise an absolute veto over legislation passed by the other; an independent and competent executive; a robust civil society; and a guarantee of freedom of the press—it has been determined that a country in which civil society “possesses free speech, a free press, and freedom of opposition, has a greater potential for influencing the decisions of the elites than does a country where these liberties do not exist.”⁹¹⁵

As the discussion in this article has shown, coups, whether military or constitutional, are antithetical to an effective governing process—one that is capable of adequately constraining the majority and minimizing tyranny directed at the minority. Coups, when they occur, usually interrupt efforts to build and sustain democratic institutions, as well as enhance adherence to the rule of law. Regardless of the claims made, coup makers are usually not individuals who are interested in deepening and institutionalizing democracy or promoting fidelity to the rule of law. This is evidenced, of course, by the fact that their unconstitutional activities place them outside the law, violating most of the elements of the rule of law, particularly the supremacy of law.

B. What Should Africans do About Coups?

Since coups—whether military or constitutional—destroy prospects for institutionalizing democracy and the rule of law, each African country must find ways to minimize or prevent military intervention in politics. First, each African country must develop a culture of civilian control of the military—scholars argue, for example, that a military coup is unlikely to take place in the United States because of the country’s “ingrained legitimacy of the civilian commander-in-chief, to whom the U.S. military has been subordinate for 250 years.”⁹¹⁶ Second, each African country should make certain that the military takes an oath to support and defend the constitution. Through such a process, the military is made accountable to the constitution and the people and not to the president. Third, given the

⁹¹⁵ See Kenneth A. Bollen, *Issues in the Comparative Measurement of Political Democracy*, 45 AM. SOC. REV. 370, 372 (1980).

⁹¹⁶ See Luke Foster Middup, *Thinking the Unthinkable: Could There be a Military Coup in the US?*, THE CONVERSATION (Sept. 7, 2017), <https://theconversation.com/thinking-the-unthinkable-could-there-be-a-military-coup-in-the-us-82403>.

fact that “the rule of law is the cornerstone of any legitimate democratic State,”⁹¹⁷ each African country must, as is required by the rule of law, “subject the citizenry” and *the government* “to publicly promulgated laws.”⁹¹⁸ In addition, “the state’s legislative function [must] be separate from the adjudicative function” and “no one within the polity [must] be above the law,” regardless of the person’s ethnocultural affiliation, or economic, social, and political status.⁹¹⁹

Within such a governing process, there exists an independent judiciary that can nullify any efforts by military elites who have overthrown the government to legitimize the coup and the government that they subsequently form through elections. The protection of human rights, the guarding or constraining of the exercise of government power, and *adherence or fidelity to the rule of law* are the three essential characteristics of modern constitutionalism. Therefore, the practice of constitutional government and constitutionalism in each African country should make it much more difficult for the military to successfully intervene in government.

Throughout the 1960s and 1970s, African militaries justified their decisions to intervene in politics “by arguing that their duty as soldiers included an obligation to protect the state during periods of political unrest.”⁹²⁰ In fact, military coups in Ghana and Nigeria in the 1970s and 1980s “were heralded as necessary to restore order after periods of constitutional breakdown.”⁹²¹ Unfortunately, the military elites who conducted these coups rarely, if ever, engaged in activities to restore constitutional order. If and when they did, it usually involved situations where the coup makers used elections to legitimize their actions, effectively transforming themselves into “civilian” leaders. Examples include Ghana Air Force Flight Lt. Jerry Rawlings, who overthrew the government on December 31, 1981 and then in 1992, he resigned from the military, founded a political party called the National Democratic Congress (“NDC”) and competed in and won presidential elections held on November 3, 1992. He went on to become the first President of Ghana’s Fourth Republic after his

⁹¹⁷ Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 316.

⁹¹⁸ See Michael Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

⁹¹⁹ *Id.*

⁹²⁰ Frederick Cowell, *Preventing Coups in Africa: Attempts at the Protection of Human Rights and Constitutions*, 15 INT’L J. HUMAN RTS. 749, 751 (2011).

⁹²¹ *Id.*

inauguration on January 7, 1993.⁹²² Similarly, after leading the military coup that ousted the democratically elected government of Mohamed Morsi in Egypt on July 3, 2013, Abdel Fattah el-Sisi subsequently resigned his military commission and then participated in Egypt's May 26–28 presidential elections—he won the elections and was subsequently installed as President of Egypt.⁹²³

Fourth, some researchers have suggested that another way to prevent coups in Africa is to “counter-balance” each country's military with other security forces.⁹²⁴ Research, however, has determined that “counterbalancing is not associated with fewer coup attempts” since the “creation of a new security force increases the odds of a coup attempt the following year.”⁹²⁵ It is argued that establishing a *civilian militia*, for example, can serve as an important strategy that each African country can use to prevent military coups. However, given the fact that ethnicity and religion remain important and critical factors in political economy in most African countries, one must approach this strategy with extreme caution. For one thing, any civilian militia that is established in an African country can be

⁹²² See, e.g., LE GHANA DE J. J. RAWLINGS: RESTAURATION DE L'ÉTAT DU POLITIQUE (Comi M. Toulabor ed., 2000) (presenting a series of essays that examines Ghana under Jerry Rawlings). Many working-class Ghanaians who lived through Rawlings' military rule and his two terms as elected president of Ghana, have argued that he and the late Kwame Nkrumah, the country's first president, are, by far, Ghana's most effective leaders. Rawlings' critics, however, point to the mass executions that were carried out by the Armed Forces Revolutionary Council (under Rawlings' leadership) as representing a terrible period in the country's political history. Among those executed were eight senior military officers, including three former heads of state. See, e.g., John L. Adedeji, *The Legacy of J. J. Rawlings in Ghanaian Politics, 1979–2000*, 5 AFR. STUD. Q. 1 (2001).

⁹²³ See Patrick Kingsley, *Abdel Fatah al-Sisi Won 96.1% of Vote in Egypt Presidential Election, Say Officials*, THE GUARDIAN (June 3, 2014), <https://www.theguardian.com/world/2014/jun/03/abdel-fatah-al-sisi-presidential-election-vote-egypt>. Another African military coup maker who went on to participate in elections to restore constitutional orders in his country is Yahya Jammeh, who overthrew the government of Sir Dawda Jawara in The Gambia in July 1994. Jammeh, who installed himself as leader of the military junta that ruled The Gambia from 1994–1996, was later elected president in 1996. He remained in power until January 2017, when he was ousted by forces belonging to the regional organization, Economic Community of West African States (ECOWAS). See generally BABA GALLEH JALLOW, *DEFYING DICTATORSHIP: ESSAYS ON GAMBIA POLITICS, 2012–2017* (2017); see also Mohamed S. Helal, *The ECOWAS Intervention in The Gambia—2016*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 912 (Tom Ruys & Olivier Corten eds., 2018).

⁹²⁴ Erica de Bruin, *Preventing Coups d'État: How Counterbalancing Works*, 62 J. CONFLICT RES. 1433, 1433 (2017).

⁹²⁵ *Id.*

converted by the incumbent president into a tool for his ethnocultural group to use to oppress and tyrannize other groups, especially those who are not part of the ruling coalition. The president can achieve this objective by purging the militia of members of other subcultures and making certain that his group dominates and controls the militia. Alternatively, the incumbent president can take advantage of the law permitting the formation of militias to provide financial and other resources to his ethnic group to form a militia, which can later be used to support his regime and tyrannize other subcultures.

For example, the Interahamwe, a far-right Hutu paramilitary organization, that was founded in 1990 as the youth wing of the Hutu-dominated ruling National Republican Movement for Democracy and Development (*Mouvement républicain national pour la Démocratie et le Développement*) in Rwanda, masterminded and carried out the Rwandan Genocide, which resulted in the massacre of an estimated 500,000 to 1,000,000 Tutsi, Twa and moderate Hutus during the Spring and Summer of 1994.⁹²⁶ In a 2004 report, Human Rights Watch noted that the Government of Sudan and the civilian Janjaweed militias “have killed thousands of Fur, Masalit, and Zaghawa—often in cold blood, raped women, and destroyed villages, food stocks and other supplies essential to the civilian population” and have “driven more than one million civilians, mostly farmers, into camps and settlements in Darfur where they live on the very edge of survival, hostage to Janjaweed abuses.”⁹²⁷

In the Central African Republic, François Bozizé seized control of the government in a military coup with the help and general support from the *anti-Balaka*, a collection of Christian militias. In this struggle, the *anti-Balaka* were pitted against the *Séléka*, a collection of predominantly Muslim militias, who supported Michel Djotodia,

⁹²⁶ See generally LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (2004) (noting, inter alia, the role played by the Interahamwe in the Rwandan Genocide); SCOTT STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA (2006) (discussing the role of the Interahamwe in the Rwandan Genocide); ZOE LOWERY & FRANK SPALDING, THE RWANDAN GENOCIDE (2017) (examining Rwanda’s Genocide and the role played by the Interahamwe).

⁹²⁷ Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, HUMAN RIGHTS WATCH (May 6, 2004), <https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan>. See also GÉRALD PRUNIER, DARFUR: THE AMBIGUOUS GENOCIDE (2005) (examining the role of the Government of the Republic of Sudan and the civilian Janjaweed militia in the Genocide in Western Sudan’s Darfur).

who was President of the Central African Republic from 2013 to 2014.⁹²⁸

Another type of security force, which some scholars have argued, can be used to counter-balance the military and prevent or minimize, at the very least, military-directed coups d'état is a republican guard regiment. Many Francophone countries in Africa have such guard regiments, which are usually referred to as *Garde républicaine* (Republican Guard) or *Garde présidentielle* (Presidential Guard). These guard regiments are often directly subordinated to the President of the Republic and not to the constitution.⁹²⁹ Niagalé Bagayoko has argued that “[p]residential guards are common practice in Francophone African countries” and that, “[o]fficially, the mission of the presidential guard is to protect the head of state when he travels abroad or within the country and the presidential residences.”⁹³⁰

Bagayoko has also noted that in many of Africa’s Francophone countries, those who serve in the Republican Guard “are usually appointed on the basis of their loyalty towards the president and recruited according to ethnic criteria” and that even if these soldiers are “formally integrated into the armed forces’ chain of command, these presidential guards are not accountable to the chief of staff or to the ministry of defense: they are accountable to virtually no one but the president.”⁹³¹ In many of Africa’s Francophone countries, “[t]he presidential guards are one of the major manifestations of the system of competing security agencies and parallel chains of command that characterizes the military” in these countries.⁹³²

However, if the Republican Guard unit is to serve as a counter-balancing force, one cannot ignore the ethnic or religious dimension. For example, when François Bozizé was President of the Central African Republic, the Presidential or Republican Guard consisted largely of members of the president’s tribe—in fact, the leader of the country’s Republican Guard unit was Lt. Eugène Ngaïkoïssé, who was

⁹²⁸ See, e.g., MAKING SENSE OF THE CENTRAL AFRICAN REPUBLIC (Tatiana Carayannis & Louisa Lombard eds., 2015).

⁹²⁹ See, e.g., Niagalé Bagayoko, *Peace Operations and Security Sector Reform (SSR) in Francophone Africa*, in PEACE OPERATIONS IN THE FRANCOPHONE WORLD: GLOBAL GOVERNANCE MEETS POST-COLONIALISM 71, 77 (Bruno Charbonneau & Tony Chafer eds., 2014).

⁹³⁰ See *id.* at 77.

⁹³¹ *Id.*

⁹³² *Id.* at 77-8.

President Bozizé's nephew.⁹³³ In addition to the fact that the guard helped General François Bozizé carry out the 2003 coup d'état that ousted then President Ange-Félix Patassé, soldiers in this military regiment also helped Bozizé exact retribution against his perceived "enemies" once he had taken over as President of the Central African Republic—these enemies were mostly members of other ethnic and religious groups (e.g., Muslims).⁹³⁴

When Ahmadou Ahidjo was President of the Republic of Cameroon (1961–1982), the Republican Guard was made up primarily of individuals from his "Northern Province."⁹³⁵ Nevertheless, after Ahidjo resigned his position and handed the apparatus of government to his prime minister, Paul Biya, in November 1982, Biya moved quickly to sack most of the officers of the Republican Guard, who were from Ahidjo's ethnocultural group and replace them with officers from his own ethnic group.⁹³⁶

It is important to note, then, that if an African country plans to create a guard regiment as a counter-acting force, its leaders must make certain that membership in the guard reflects the country's ethnocultural diversity. In addition, the guard must be well-trained and structured in a way that ensures that it is accountable to the constitution and the people and not to the president of the country. In addition, the president must not be allowed to turn the guard into an "ethnic militia," whose only function is to serve him and members of his ethnocultural group. If members of the presidential guard come primarily from the president's ethnic group and swear allegiance to him and not, like other military units, to the constitution, the incumbent president can use such a regiment to carry out a constitutional coup. For example, when an incumbent president has served his constitutionally-mandated terms in office, and an election

⁹³³ See AFRICA YEARBOOK, VOL. 3: POLITICS, ECONOMY AND SOCIETY SOUTH OF THE SAHARA IN 2006, 208 (Andreas Mehler, Henning Melber & Klaas van Walraven eds., 2007).

⁹³⁴ Bozizé was supported by a collection of Christian militias called the anti-Balaka and the Séléka, a collection of Muslim militias, were considered the enemy. See generally MAKING SENSE OF THE CENTRAL AFRICAN REPUBLIC (Tatiana Carayannis & Louisa Lombard eds., 2015) (examining, inter alia, the failure to maintain peace and achieve peaceful coexistence in the Central African Republic); LOUISA LOMBARD, STATE OF REBELLION: VIOLENCE AND INTERVENTION IN THE CENTRAL AFRICAN REPUBLIC (2016) (examining, inter alia, the spread of ethnic-induced violence in the Central African Republic).

⁹³⁵ See EMMANUEL FRU DOH, AFRICA'S POLITICAL WASTELANDS: THE BASTARDIZATION OF CAMEROON 33 (2008).

⁹³⁶ *Id.*

is conducted to choose his successor, that individual may refuse to leave office and allow the president-elect to assume the position of president. In doing so, the outgoing president can use the ethnicized presidential guard to shield himself from being forced out of office.⁹³⁷

It has also been suggested that a “militarized police force” can be used as another counter-balancing force. Many Francophone African countries already have the *Gendarmerie nationale*—which is a military force with law enforcement duties within the civilian population.⁹³⁸ With respect to policing in Burkina Faso, for example, “the police and gendarmerie have competence over all of the national territory to conduct policing activities. However the gendarmerie carries out its functions mainly in the hinterland and on major road axes, while the police operate mainly in urban areas.”⁹³⁹ The gendarmerie are said to “receive training as soldiers and police officers by attending both traditional military training and courses on internal laws and domestic matters.”⁹⁴⁰ The fact that gendarmes “have the authority to arrest members of the military and the police,” implies that the gendarmerie can serve as a counter-acting force to the traditional military in the case of a military coup.⁹⁴¹

The idea of a counter-acting force is that its officers will defend the incumbent and the country’s democratic institutions in the case where the army decides to intervene and take over control of the government. Horowitz has noted that throughout history, “many regimes have taken pains to structure their armed forces so as to reduce the likelihood of coups.”⁹⁴² He goes on to note that “compositional techniques are overwhelmingly the most widely used strategies for coup-proofing.”⁹⁴³ He notes that in the post-independence period in

⁹³⁷ Although Bozizé did not use the Central African Republic’s “ethnicized” guard to defy the results of a democratic election, he, nevertheless, used it to help him gain power through a military coup. See generally *Rebel Leader Seizes Power, Suspends Constitution*, THE NEW HUMANITARIAN (Mar. 17, 2003), <https://www.thenewhumanitarian.org/news/2003/03/17/rebel-leader-seizes-power-suspends-constitution>.

⁹³⁸ Clive Emsley, *Gendarmerie Policing*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* (Gerben Bruinsma & David Weisburd eds., 2018).

⁹³⁹ See Jean-Pierre Bayala, *Burkina Faso*, in *SECURITY SECTOR GOVERNANCE IN FRANCOPHONE WEST AFRICA: REALITIES AND OPPORTUNITIES* 45, 57 (Alan Bryden & Boubacar N’Diaye eds., 2011).

⁹⁴⁰ See MAGGIE DWYER, *SOLDIERS IN REVOLT: ARMY MUTINIES IN AFRICA* 166 (2017).

⁹⁴¹ *Id.*

⁹⁴² See DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 552 (2000).

⁹⁴³ *Id.*

Kenya, for example, then President Jomo Kenyatta, packed the upper echelons of the military, police, intelligence, and criminal investigations with members of his Kikuyu ethnocultural group.⁹⁴⁴ In addition to granting “fast promotions to Kikuyu officers in the army and the police,” President Kenyatta also “retained many British advisers and officers within these bodies” and “[o]n top of this, [he] ‘sacked most Luo officers in key security jobs’ and ‘moved to strengthen the highly mobile para-military force of the police, the General Service Unit, which is now almost entirely Kikuyu-dominated.’”⁹⁴⁵

The problem with these approaches to preventing coups is that they can allow the incumbent to use the security forces dominated by his ethnic group to remain in power indefinitely and promote opportunistic policies that benefit him and members of his subculture but push members of other groups to the economic and political margins. This is most likely what happened in Kenya under the rule of Jomo Kenyatta (1964–1978)⁹⁴⁶ and Daniel arap Moi (1978–2002).⁹⁴⁷ Other groups, feeling permanently marginalized or shut out of the political and economic systems, can resort to violent and destructive mobilization, a process that can lead to ethnic-induced civil war.

James Quinlivan has analyzed how governmental regimes can be rendered “coup-proof,” with specific emphasis on Saudi Arabia, Iraq and Syria.⁹⁴⁸ He defines “coup-proofing” “as the set of actions a regime takes to prevent a military coup”⁹⁴⁹ and identifies what he believes are the “common characteristics” of coup-proofing strategies. These are:

⁹⁴⁴ *Id.*

⁹⁴⁵ *Id.*

⁹⁴⁶ See William R. Ochieng’, *Structural and Political Changes, in* DECOLONIZATION & INDEPENDENCE IN KENYA, 1940–94, 83, 102 (B. A. Ogot & W. R. Ochieng’ eds., 1995) (noting that during his time as President of Kenya, Kenyatta created security forces, including the army, that were dominated by members of his ethnic group—the Kikuyu. Kenyatta was an ethnic Kikuyu and arap Moi was an ethnic Kalenjin).

⁹⁴⁷ See A. B. ASSENSOH AND YVETTE M. ALEX-ASSENSOH, *AFRICAN MILITARY HISTORY AND POLITICS: COUPS AND IDEOLOGICAL INCURSIONS, 1900–PRESENT* 101 (2001) (noting that while President of Kenya, arap Moi packed the officer-corps of Kenya’s security forces, including the army, with members of his ethnic group, the Kalenjin).

⁹⁴⁸ James T. Quinlivan, *Coup-Proofing: Its Practice and Consequences in the Middle East*, 24 INT’L SEC. 131, 131 (1999).

⁹⁴⁹ *Id.* at 133.

- (1) the effective exploitation of family, ethnic, and religious loyalties for coup-critical positions balanced with wider participation and less restrictive loyalty standards for the regime as a whole;
- (2) the creation of an armed force parallel to the regular military;
- (3) the development of multiple internal security agencies with overlapping jurisdiction that constantly monitor the loyalty of the military and one another with independent paths of communication to critical leaders;
- (4) the fostering of expertness in the regular military; and
- (5) the financing of such measures.⁹⁵⁰

Quinlivan argues that since the main objective of “a parallel military is to protect the regime, [the parallel military so created] must be bound to the regime through special loyalties and social relationships.”⁹⁵¹ Such parallel militaries are not unlike the ethnic-dominated Republican or Presidential Guard regiments that have been created in some African countries by incumbent presidents.⁹⁵² As argued by Quinlivan, the parallel military “must be stationed in the immediate vicinity of the leadership” (e.g., the President) that it is expected to protect.⁹⁵³ While the parallel military need not “be as large as the regular armed forces, nor does it need to be able to defeat the regular army in a full-scale civil war,” nevertheless, “it must be large enough, loyal enough, and deployed so that it can engage and perhaps defeat any disloyal forces in the immediate vicinity of the critical points of the regime.”⁹⁵⁴

With respect to Saudi Arabia, Iraq and Syria, Qunlivan argues that although coup-proofing has reduced the threat of military coups in these countries, parallel militaries, nevertheless, have impeded “the effective application of military power.”⁹⁵⁵ Faced with resource scarcity, regimes are more likely to devote most of the military budget to the parallel military unit that protects the president against his perceived and actual enemies, including those who threaten his

⁹⁵⁰ *Id.*

⁹⁵¹ *Id.* at 141.

⁹⁵² *See, e.g.,* PHILIP BRIGGS, GHANA 21 (2014) (noting, for example, Ghana’s Presidential Guard, which was used by the country’s first President Kwame Nkrumah, to oppress his political opponents).

⁹⁵³ *See* Quinlivan, *supra* note 948, at 141.

⁹⁵⁴ *Id.*

⁹⁵⁵ *Id.* at 155.

government and even his life.⁹⁵⁶ Through this process, expenditures on other areas critical to human development (e.g., education, especially at the primary and secondary levels; healthcare, including dispensaries and health clinics in the rural areas; clean water; nutrition, especially for children; and basic law and order) are reduced in favor of allocations to the protective services.

But, can parallel militaries curb military intervention in the politics of African countries? Many countries in Africa have parallel militaries in the form of Presidential or Republican Guard regiments, many of which are usually the most trained and funded security institutions in these countries. Yet, over the years, many of these countries have not been able to prevent military overthrow of their governments. For example, after Ghana gained independence from Great Britain in 1957, its new president, Kwame Nkrumah, formed the President's Own Guard Regiment ("POGR") as an essentially ceremonial unit. However, after an attempt was made to assassinate President Nkrumah, he expanded and significantly reinforced the POGR—it was better trained, paid and clothed than Ghana's regular army.⁹⁵⁷ Yet, despite the existence of this highly-trained and equipped parallel military force, the country's regular army was still able to successfully overthrow Nkrumah's government on February 24, 1966 when he and several of his ministers were in China on an official visit.⁹⁵⁸ Similarly, there were successful military coups in many other African countries that had established parallel militaries, primarily in the form of Presidential or Republican Guard regiments.⁹⁵⁹

It is important to note that if a country has a parallel military to protect the president from coups, then a coup can only succeed if the military (i.e., the coup makers) is able to (i) directly engage with and

⁹⁵⁶ *Id.*

⁹⁵⁷ See AMA BINEY, THE POLITICAL AND SOCIAL THOUGHT OF KWAME NKUMAH 89–95 (2011).

⁹⁵⁸ See generally Dennis Austin, *The Ghana Coup d'État*, 8 SURVIVAL 166, 166 (1966). See also *id.* at 2.

⁹⁵⁹ See, e.g., Niagalé Bagayoko, Peace Operations and Security Sector Reform (SSR) in Francophone Africa, in *Peace Operations in the Francophone World: Global Governance Meets Post-colonialism* 71, 77 (Bruno Charbonneau & Tony Chafer eds., 2014) (noting that Presidential or Republican Guard regiments are "common practice in Francophone African countries" and that these guard regiments' mission is "to protect the head of state when he travels abroad or within the country and the presidential residences"). Yet, many of these countries have suffered multiple military coups. See, e.g., Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181 (1997) (providing an overview of military coup activity in West Africa in the post-independence period).

remove the “parallel military forces within the immediate vicinity of the capital and key population centers” and (ii) severely undermine “the regime’s political structure by providing a survivable exit strategy for key factions controlling the state apparatus.”⁹⁶⁰ In many African countries which have parallel militaries, such as Presidential or Republican Guard regiments, these institutions are usually *ethnicized*—that is, their membership is made up primarily of the president’s fellow ethnics or members of the president’s subculture. In addition, key positions in the government, especially in areas such as the security services, as well as, public finance, are most likely to be occupied by members of the president’s ethnocultural group. These entrenched interests represent an important obstacle to the successful establishment of a post-coup government.⁹⁶¹ In a 1994 report on human rights in Cameroon by the U.S. Department of State, it was determined that “[t]here are frequent and credible allegations of discrimination among Cameroon’s more than 200 ethnic groups.”⁹⁶² The report goes on to note that “President Biya’s Beti ethnic group receives special preferences in all sectors affected by the Government. As a result, Betis hold a preponderance of key positions in Government, the security forces, and the military.”⁹⁶³

In African countries, the presidency is considered the property of the president’s sub-culture. Hence, any attempt to oust the president will be considered by members of his subculture as an assault on the group. Thus, a successful military coup can lead to civil war as members of the newly-installed ruling coalition fight to keep the position that they have captured and the ousted president and his group wage war to recapture what they had lost through the coup.⁹⁶⁴

Counter-acting forces, such as civilian militias and parallel militaries in the African countries are likely to be used by the incumbent president to tyrannize his opponents. This is especially true because these military regiments are usually dominated and controlled by members of the president’s ethnocultural group. Civilian militias,

⁹⁶⁰ See Quinlivan, *supra* note 948, at 162.

⁹⁶¹ Scholars of Cameroon politics have noted that “the Betis [Biya’s ethnocultural group] have formed a bloc around the president of the republic and they are frustrating all attempts made by the opposition to unseat him.” See FRANCIS B. NYAMJOH, *MASS MEDIA AND DEMOCRATISATION IN CAMEROON IN THE EARLY 1990s* 152 (2011).

⁹⁶² *Country Report on Human Rights Practices: Cameroon*, U.S. DEP’T OF STATE (1994), <https://www.refworld.org/docid/3ae6aa4314.html>.

⁹⁶³ *Id.*

⁹⁶⁴ *Id.*

such as the Janjaweed in Sudan and the Interahamwe in Rwanda, have been used by incumbents to commit genocide on their fellow citizens.⁹⁶⁵ Presidential or Republican Guard regiments have also been ethnicized and used to oppress other groups within the country and have not been very effective tools to fight military intervention in politics.⁹⁶⁶

Given that civilian militias, guard regiments, militarized police units and parallel militaries are not likely to function as effective tools to prevent military coups in Africa, each African country must find a different way to prevent military intervention in national politics. That coup-proofing mechanism can be found in the practice of constitutional government and constitutionalism. As mentioned earlier in this article, modern constitutionalism is characterized by (1) adherence to the rule of law; (2) protection of human rights; and (3) effective constraining or guarding of the exercise of government power. Where the rule of law functions effectively, the law is supreme and the State must subject itself and the people to “publicly promulgated laws” and there must be a separation of the legislative and adjudicative functions. In addition, supremacy of law means that no one, even those individuals who hold high-level positions in government, including the president or prime minister, as well as, military elites, is above the law. Hence, military elites must subject themselves to the law.⁹⁶⁷

For each African country, the key to coup-proofing their governments lies in the practice of constitutional government and constitutionalism and not in providing themselves with counter-acting institutions, such as civilian militias and Republican Guard regiments. The practice of constitutionalism, for example, will make certain that

⁹⁶⁵ See, e.g., *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, HUMAN RIGHTS WATCH (May 6, 2004), <https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan> (noting the role of the Janjaweed militia in the Genocide in the Darfur Region of Sudan). See also *Rwanda: Information on the Role of the Interhamwe [also Interahamwe] Militia and the Use of Roadblocks During the 1994 Rwandan Genocide*, U.S. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES (Aug. 14, 2002), <https://www.refworld.org/docid/3decf4b24.html> (noting the role of the civilian militia group, Interahamwe, in the Rwandan Genocide).

⁹⁶⁶ See, e.g., Martin Ziguélé, *Politics and Security in the Central African Republic*, CHATHAM HOUSE, <https://www.chathamhouse.org/sites/default/files/public/Research/Africa/280306ziguiele.pdf> (last visited June 7, 2020) (noting the use of the Republican Guard to oppress the president’s opponents).

⁹⁶⁷ See, e.g., Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 316 (2020).

individuals and the various groups that inhabit each African country will look to the law as the main tool for the resolution of their conflicts. For example, an individual who believes that his loss of an election to public office is due to fraud and vote rigging committed by his opponent, will not encourage his supporters to resort to post-election violence but will seek justice in the courts.⁹⁶⁸

It has been argued that constitutional government “must provide a solid basis for the respect of the rule of law to exist” but that “constitutionalism is safeguarded by the rule of law and without the rule of law there can be no constitutionalism.”⁹⁶⁹ However, “constitutional democracy under the rule of law” may not always be “the best alternative” and that in some situations it may be “superfluous and undesirable.”⁹⁷⁰ As argued by Rosenfeld, “in a close knit homogenous society that is deeply religious and ruled by revered leaders who are widely believed to have direct access to divine commands, a theocracy would plainly seem more appropriate than a constitutional democracy”⁹⁷¹ and that “instructions and directions imparted by the religious leaders would be paramount, leaving little, if any, room for the rule of law.”⁹⁷²

However, in divided societies, such as those in Africa, which are populated by various ethnic and religious groups, “various competing

⁹⁶⁸ For example, after he lost the 2017 presidential election in Kenya, opposition candidate, Raila Odinga, did not resort to violence, instead, he took his case to the Supreme Court of Kenya and encouraged his followers to respect the law and remain peaceful. Although there were pockets of violence, some of it committed by his supporters, it was not the type of organized and well-synchronized violence that had accompanied the presidential election of 2007. *See, e.g., Kenyan Opposition Leader to Challenge Election Result in Court*, THE GUARDIAN (Aug. 16, 2017), <https://www.theguardian.com/world/2017/aug/16/kenyan-opposition-leader-to-challenge-election-result-in-court>. *See also* Abdi Latif Dahir, *Kenya's Opposition is Heading to Court to Contest the Election Result*, QUARTZ AFRICA (Aug. 16, 2017), <https://qz.com/africa/1053878/election-in-kenya-2017-raila-odinga-heads-to-supreme-court-to-contest-the-election-results/>. Similarly, during the 2012 presidential election in Ghana, opposition candidate, Nana Akufo-Addo, who lost the election, capturing 47.7 percent of the vote to the incumbent president's 50.7 percent, did not ask his supporters to engage in violent protest. Instead, he followed the law and took his case to the country's Supreme Court. *See, e.g., Ghana Election: NPP Challenges John Mahama's Victory*, BBC NEWS (Dec. 28, 2012), <https://www.bbc.com/news/world-africa-20859813>.

⁹⁶⁹ *See* Charles Manga Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 8 (2007).

⁹⁷⁰ *See* Michael Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1310 (2001).

⁹⁷¹ *Id.* at 1310.

⁹⁷² *Id.*

conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression.”⁹⁷³ Most countries in Africa comprise of different subcultures or ethnocultural groups “that usually do not share the same culture, customs, traditions, and values. It is possible that these different groups do not share the ‘same conceptions of the good.’”⁹⁷⁴ Even if a society is homogeneous, it can still be “pluralistic-in-fact” if “every person is viewed as entitled to pursue his or her own individual good.”⁹⁷⁵

If society is “pluralistic-in-fact,” groups or individuals within that society usually do not share or have the same values and, as a consequence, the legitimacy of the country’s “fundamental institutions” will “ultimately depend[] on some kind of consent among all those who are subjected to such institutions.”⁹⁷⁶ It has been argued that “[t]his tradition ties the legitimacy of the state and governing institutions to the consent of the governed (i.e., the sovereign) and can be traced to the ideas of the Founders of the American Republic, such as James Madison, as well as those of Thomas Hobbes and John Locke.”⁹⁷⁷ If the legitimacy of the State and its governing institutions depends on the people and their consent, then, where there is a successful military coup, the people can withhold their consent from any post-coup government and effectively prevent it from establishing itself.

One can argue, of course, that the military, which has a comparative advantage in the employment of violence, can force the people into compliance with its orders. Nevertheless, it is important to note that an economy characterized by that level of violence will not be able to generate the wealth that the new military governors need to fund the various activities that will help keep them in power. This is especially problematic in Africa where ethnicity and religion often play very important roles in governance issues. For example, if leaders of the military coup are individuals from ethnocultural group X and the ousted president hails from ethnocultural group Y, then members of group Y are likely to see the intervention as an attack on them. Even if the coup was planned and carried out by the national military, it

⁹⁷³ *Id.*

⁹⁷⁴ *Id.* at 1311.

⁹⁷⁵ *Id.*

⁹⁷⁶ Michael Rosenfeld, *supra* note 970, at 1311.

⁹⁷⁷ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 318 (internal citations omitted).

would not be perceived as such by group Y if the leaders, and hence, the individuals who will form the post-coup government, are members of group X—the coup will be rechristened by members of group Y as a “group-X coup” and members of group Y will make every effort to try to frustrate the activities of the post-coup government. Such efforts may include attempts to recapture the presidency and restore their ousted fellow ethnics.

The 1966 military coup in Nigeria was led by Majors Chukwuma Kaduna Nzeogwu, Timothy Onwuaturuegwu, and Emmanuel Arinze Ifeajuna (all Igbos)⁹⁷⁸—the coup overthrew the government of Prime Minister Abubakar Tafawa Balewa (a Gere/Gera and Muslim from Bauchi State).⁹⁷⁹ Since the immediate post-coup government was led by General Aguiyi-Ironsi (an Igbo from Umuahia), other subcultures in Nigeria saw the coup as a conspiracy by Igbo military officers to pave the way for Gen. Aguiyi-Aronsi and the Igbos to seize power from the country’s elected prime minister, who was seen by many groups in the northern part of the country, particularly Muslims, as one of them. One scholar argues that “[a]fter it was unequivocal that no single Igbo political leader was killed in the bloody coup and Major Chukwuma Kaduna Nzeogwu ignorantly aborted his revolutionary stunt and handed over his military political revolution to a man who was not a mastermind in the coup, the general office commanding (GOC) the Nigerian Army, Major General Ironsi, it then stands to reason that the coup was a premeditated Igbo coup to perpetuate Igbo domination of Nigeria.”⁹⁸⁰

Some scholars have argued that the 1966 coup was not an Igbo coup because “[t]he ethnic composition of the officers that carried out the coup is incompatible with a grand Igbo design.”⁹⁸¹

This, it is argued, is due to the fact that “[s]everal of the soldiers executing the coup were Yoruba (including Major Ademoyega, Captain Adeleke and Lieutenants Fola Oyewole, Olafimihan).”⁹⁸² In addition, “[t]he ‘Igbo coup’ tag attached to the Majors’ assault ignores the fact that scores of Northern soldiers took part in the Lagos

⁹⁷⁸ See MAX SIOLLUN, OIL, POLITICS AND VIOLENCE: NIGERIA’S MILITARY COUP CULTURE (1966–1976) 140 (2009).

⁹⁷⁹ See MICHAEL NEWTON, FAMOUS ASSASSINATIONS IN WORLD HISTORY: AN ENCYCLOPEDIA, VOLUME 1: A–P 31 (2014).

⁹⁸⁰ See OBI N. IGNATIUS EBBE, BROKEN BACK AXLE: UNSPEAKABLE EVENTS IN BIAFRA 18 (2010).

⁹⁸¹ See SIOLLUN, *supra* note 978, at 141.

⁹⁸² *Id.*

operations,⁹⁸³ and even assisted Nzeogwu when he stormed the Sardauna's residence."⁹⁸⁴ In fact, there is evidence that Gen. Ironsi, himself an Igbo, was among the leaders that the coup makers had actually planned to kill.⁹⁸⁵ What is important to note here, however, is that Nigeria's northern groups, which were also mostly Muslim, saw the coup as an attempt by Igbo "Majors" to impose themselves on the rest of the country, particularly on Muslims and the North.⁹⁸⁶ As a consequence, there were retaliatory attacks against Igbo soldiers, including individuals who had not taken part in the coup.⁹⁸⁷

When the Founders of the American Republic were designing the U.S. Constitution, they argued that a government had to "stand on the *original and ongoing consent* of the governed" (i.e., the people).⁹⁸⁸ If, in an African country, the government stands on the ongoing consent of the people, then if there is a military coup, the people can deny the post-coup government their "ongoing consent" and declare it illegitimate. The judiciary and other national institutions (e.g., the legislature) can officially declare the post-coup government illegitimate through court decisions (the judiciary) and legislation (the legislature) and hence, not fit to govern.

Of course, after a successful military coup, the post-coup military government is most likely to suspend the constitution, abolish national institutions, such as the courts and the legislature, and establish new

⁹⁸³ Operations regarding the coup were carried out in several locations throughout the country, including Kaduna, Lagos, and Abeokuta. See ROBIN LUCKHAM, *THE NIGERIAN MILITARY: A SOCIOLOGICAL ANALYSIS OF AUTHORITY AND REVOLT 1960–67*, 28 (1975).

⁹⁸⁴ See SIOLLUN, *supra* note 978, at 141.

⁹⁸⁵ See HENRY CHUKWUDI OKEKE, *THE SPIRITUALITY OF THE IGBO PEOPLE OF NIGERIA AS AN EXAMPLE OF RELIGIOUS MODERNIZATION IN A GLOBAL WORLD* 190 (2019).

⁹⁸⁶ See *ENCYCLOPEDIA OF AFRICAN HISTORY, VOLUME 1: A–G* 1114 (Kevin Sillington ed., 2005) (noting that the 1966 coup, which was "aimed at rescuing the country from disintegration, was interpreted as an Igbo subterfuge to dominate Nigeria").

⁹⁸⁷ See, e.g., GODFREY MWAKIKAGILE, *REMEMBERING THE SIXTIES: A LOOK AT AFRICA* 36 (2014) (noting that Nigeria's second military coup, which took place in July 1966 and resulted in the killing of many Igbo soldiers (including Gen. Aguiyi-Ironsi), was orchestrated and led by "northern army officers—Hausa-Fulani and others—in retaliation against the Igbos for launching the first one and for killing Northern Nigerian leaders and army officers, including the premier of Northern Nigeria and the prime minister of the Nigerian Federation who was also a northerner". The coup was actually led by Lieutenant-Colonel Murtala Muhammed who was the inspector of signals in the federal army).

⁹⁸⁸ See Best, *supra* note 909, at 39 (emphasis in original).

governing institutions led and controlled by the military.⁹⁸⁹ For example, after the military overthrew the democratically elected government of Nigeria's President Shagari on December 31, 1983, it proceeded to abolish the constitution, eliminated many of the judiciary's constitutional guarantees, and rid the country of the concept of separation of powers, which had been entrenched in the Constitution of the Federal Republic of Nigeria, 1979.⁹⁹⁰ The military then proceeded to establish, through decree, a Federal Military Government ("FMG") with absolute powers to play the roles that had previously been the purview of the executive and the legislative branches of government.⁹⁹¹

With the courts and the legislature compromised, it was now left to the people to withhold their consent from the FGM and force it to return the country to constitutional order. Although it took Nigerians more than ten years to do so, the people were eventually able to force the military out of government and restore the country's democratic order.⁹⁹² Hence, in the absence of necessary institutions to declare unconstitutional change of government illegal, as well as invalidate post-coup governments, the people can fill the void and prevent regimes that come to power through military coups from legitimizing themselves through elections and other schemes. The key to the prevention of military coups in Africa, then, should lie in the establishment in each African country, of "a competent and balanced governing process,"⁹⁹³ one whose legitimacy is derived from the original and ongoing consent of the people.

Such a governing process is undergirded by the separation of powers with effective checks and balances—(1) an independent judiciary; (2) a bicameral legislature, with each chamber allowed to exercise an absolute veto over legislation passed by the other; (3) an independent and competent executive; (4) a robust and politically active civil society; and (5) a free and vibrant press. Implicit in this

⁹⁸⁹ This is exactly happened in Nigeria after the 1983 military coup in Nigeria. For

⁹⁹⁰ See, e.g., CONSTITUTION (SUSPENSION AND MODIFICATION) DECREE 1984, No. 1 (Nigeria).

⁹⁹¹ *Id.*

⁹⁹² See, e.g., IFEOKA AZIKIWE, NIGERIA: ECHOES OF A CENTURY, 1999–2014, VOL. 2 56 (2013). See also Sylvester Odion Akhaine, *The Government, Human Rights, and the Rule of Law, in NIGERIA'S DEMOCRATIC EXPERIENCE IN THE FOURTH REPUBLIC SINCE 1999: POLICIES AND POLITICS* 451, 451 (A. Sat Obiyan & Kunle Amuwo eds., 2013).

⁹⁹³ See Judith A. Best, *Fundamental Rights and the Structure of Government, in THE FRAMERS AND FUNDAMENTAL RIGHTS*, 37, 37 (Robert A. Licht ed., 1992).

institutional set-up is that civil servants and political elites will be well-constrained by the law, minimizing such government behaviors as corruption and impunity. In addition to the fact that lower levels of corruption, for example, will enhance entrepreneurship and the creation of wealth, it will also minimize tyranny directed at some groups (e.g., minority ethnic and religious groups) by the government. Minimizing majoritarian tyranny can go a long way to minimizing the type of sectarian conflict that can trigger coups d'état.

Of great importance is the fact that within such a governing process, law is supreme and all citizens, regardless of their economic, political and social standing—and this includes the president—are subject to the law. Within such an institutional system, an individual who engages in unconstitutional behavior is subject to censorship by the appropriate authorities, which include the courts. Hence, if a group of military officers overthrows the government, not only would they be subject to prosecution by the courts, but the government that they subsequently form would be rejected by both the people⁹⁹⁴ and the country's institutions, which include the courts. In addition to the fact that the people can withhold their consent from the post-coup government, effectively denying it the legitimacy that it needs to govern, the court can also declare such a government illegitimate.

C. *Coups in Africa: A Role for Regional and International Organizations*

After Abdel Fatah el-Sisi, the architect of the military coup that overthrew the government of Mohamed Morsi, announced that he had resigned his military commission in order to stand for the presidency of a post-coup civilian government, the African Union should have challenged that decision because it went contrary to and constituted a breach of the AU principle against the participation of perpetrators of

⁹⁹⁴ In addition to withholding their consent, the people can also refuse to participate in any elections, as occurred in Egypt in 2014, to legitimize the post-coup government. After Field Marshall Abdel Fatah el-Sisi masterminded the coup that overthrew the democratically elected government of Mohamed Morsi in Egypt, he then resigned his commission and declared his candidacy for the presidency of Egypt. He went on to win the 2014 presidential election and effectively legitimized the coup and the post-coup government. See, e.g., Patrick Kingsley, *Abdel Fatah al-Sisi won 96.1% of Vote in Egypt Presidential Election, Say Officials*, THE GUARDIAN (June 3, 2014), <https://www.theguardian.com/world/2014/jun/03/abdel-fatah-al-sisi-presidential-election-vote-egypt>. See also Mayy el-Sheik, *Egypt: Sisi Wins With 97 Percent*, N.Y. TIMES (June 4, 2014), <https://www.nytimes.com/2014/06/04/world/middleeast/egypt-sisi-wins-with-97-percent.html>.

unconstitutional change of government in any efforts to restore the constitutional order.⁹⁹⁵ Specifically, Article 25(4) states that “[t]he perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.”⁹⁹⁶

Although the AU sanctioned Egypt—the country’s participation in the activities of the AU was suspended for one year,⁹⁹⁷ the continental organization did not impose any sanctions on el-Sisi and the other coup makers. The AU’s failure to sanction el-Sisi significantly weakened the rule that bans the legitimization of unconstitutional change of government through elections. Had the AU acted according to its principles and imposed sanctions on el-Sisi and other coup makers, that would have sent an important message to other prospective coup makers of the fate that awaits them should they participate in such activities. In fact, not only did the AU fail to sanction el-Sisi as provided for in its principles, it also allowed him to participate in the organization’s activities, including being elected to serve as its Chairperson.⁹⁹⁸ This full embrace of el-Sisi and his government did not augur well for the deepening and institutionalization of democracy and the rule of law in Egypt and other parts of Africa.

To help minimize coups—military and constitutional—and promote the maintenance of governing processes undergirded by the rule of law, the African Union must function according to the principles elaborated in the legal instruments that it has put in place to promote democracy and the rule of law in the continent.⁹⁹⁹ By doing

⁹⁹⁵ See African Charter Democracy, *supra* note 606, at art. 25(4).

⁹⁹⁶ See African Democracy Charter, *supra* note 606, art. 25(4). Abdel Fattah el-Sisi was a perpetrator of the coup and hence, under the principle elaborated in Article 25(4), the African Union should have sanctioned him for breaching this principle. See *id.*

⁹⁹⁷ See Communiqué, *supra* note 716, para. 6.

⁹⁹⁸ Abdel Fattah el-Sisi served as the Chairperson of the African Union from February 10, 2019 to February 10, 2020. See, e.g., *Egypt President Abdel Fattah el-Sisi Takes Over Chair of African Union*, DW NEWS (Feb. 10, 2019), <https://www.dw.com/en/egypt-president-abdel-fattah-el-sissi-takes-over-chair-of-african-union/a-47444831>. See Hamza Mohamed, *Egypt’s Sisi Takes Over as New Head of African Union*, ALJAZEERA (Feb. 10, 2019), <https://www.aljazeera.com/news/2019/02/egypt-sisi-takes-head-african-union-190210140131428.html>.

⁹⁹⁹ These include the Constitutive Act, the African Democracy Charter, and the Lomé Declaration *supra* notes 606 and 605 respectively. See generally AU, *Declaration on the Framework for an OAU Response to Unconstitutional Changes*

so, the AU would be supporting the activities of various civil society groups in the African countries that are fighting to defend their democratic institutions against derogation by opportunistic political elites and coup-making military officers.

The international community also has a role to play in preventing military and other types of coups in Africa. Unfortunately, when the military overthrew the government of Mohamed Morsi in Egypt, the world's major governments either did not condemn the action or were simply ambivalent in their responses. Then President of the United States, Barack Obama, did not condemn the military coup. Instead, he advised "the Egyptian military to move quickly and responsibly to return full authority back to a democratically elected civilian government as soon as possible through an inclusive and transparent process."¹⁰⁰⁰ The U.S. President, however, did not address the fact that the military had overthrown a democratically elected government and in doing so, it had effectively aborted Egypt's January 25 [2011] Revolution.¹⁰⁰¹

Then Prime Minister of the United Kingdom (UK), David Cameron, like his U.S. counterpart, did not specifically condemn the coup but, instead, declared that "what needs to happen now in Egypt is for democracy to flourish and for a genuine transition to take place."¹⁰⁰² There, however, was no mention of the fact that what the military had done was to put an end to the transition to democracy that had started in 2011. Other European governments issued similar statements, calling all Egyptians to work together to restore democracy and the rule of law.¹⁰⁰³

The ruling political party in Tunisia, *Ennahda*, was among the few countries that condemned the coup as an affront on the

of Government, AHG/DECL. 5 (XXXVI) (July 2000), https://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm; AU, *Constitutive Act of African Union* (Nov. 7, 2000), <https://au.int/en/treaties/constitutive-act-african-union>; African Democracy Charter, *supra* note 606.

¹⁰⁰⁰ See *World Reaction to the Ousting of Egypt's Mohammed Morsi*, BBC NEWS (July 4, 2013), <https://www.bbc.com/news/world-middle-east-23175379>.

¹⁰⁰¹ The Egyptian Revolution began on January 25, 2011 and resulted in the ouster of the regime of Hosni Mubarak. See, e.g., *Timeline: Egypt's Revolution: A Chronicle of the Revolution that Ended the Three-Decade-Long Presidency of Hosni Mubarak*, ALJAZEERA (Feb. 14, 2011), <https://www.aljazeera.com/news/middleeast/2011/01/20112515334871490.html>.

¹⁰⁰² See *World Reaction to the Ousting of Egypt's Mohammed Morsi*, *supra* note 1000.

¹⁰⁰³ *Id.*

constitutional and democratic order in Egypt.¹⁰⁰⁴ Several Gulf States actually supported the coup. For example, Sheikh Abdullah of the United Arab Emirates issued a statement to the effect that “the great Egyptian army was able to prove again that they are the fence of Egypt and that they are the protector and strong shield that guarantee Egypt will remain a state of institutions and law.”¹⁰⁰⁵ It is ironic that the statement implies that the military had acted to ensure that Egypt remains “a state of institutions and law” when the coup was actually an affront to the country’s institutions and a breach of its laws.¹⁰⁰⁶

Kenya’s President Uhuru Kenyatta made reference to the fact that the AU’s policy on coups d’état is very clear and that since Egypt had “an elected government elected through a due democratic process,” the coup was “a matter of grave concern, not just to us in Africa” but should also be a “matter of grave concern to any true believer of a democratic process.”¹⁰⁰⁷ Thus, Kenya was one of only a small number of countries, especially in Africa, that condemned the coup and saw it as an affront to the democratic order.¹⁰⁰⁸

The European Union’s Foreign Policy Chief, Catherine Ashton, issued a statement in which she urged “all sides to rapidly return to the democratic process, including the holding of free and fair presidential and parliamentary elections and the approval of a constitution, to be done in a fully inclusive manner, so as to permit the country to resume and complete its democratic transition.”¹⁰⁰⁹ The statement issued by Catherine Ashton on behalf of the EU totally ignored the fact that Egyptians had, since the January 25, 2011 revolution, undertaken the democratic process and had held fair, free, inclusive and credible presidential and parliamentary elections. Those democratic elections had produced a government, led by Mohamed Morsi. It was this government that the military had overthrown and in doing so, it had destroyed the country’s embryonic democratic process.

Then U.N. Secretary-General, Ban Ki-moon, issued a statement on behalf of the United Nations. While acknowledging that “military interference in the affairs of any state is of concern,” Ban went on to state that it was “crucial to quickly reinforce civilian rule in

¹⁰⁰⁴ *Id.*

¹⁰⁰⁵ *Id.*

¹⁰⁰⁶ *Id.*

¹⁰⁰⁷ *Id.*

¹⁰⁰⁸ See *World Reaction to the Ousting of Egypt’s Mohammed Morsi*, *supra* note 1000.

¹⁰⁰⁹ *Id.*

accordance with principles of democracy.”¹⁰¹⁰ How could the military, which had just violated the “principles of democracy” and ousted a democratically elected civilian government, be expected to lead the restoration of democracy in Egypt?

In 2003, when General François Bozizé overthrew the government of President Ange-Félix Patassé in the Central African Republic, the UN Security Council strongly condemned the action.¹⁰¹¹ Why then did the UN Security Council fail to apply the same wisdom to the situation in Egypt in 2013? Why did it not condemn the overthrow of the country’s democratically elected president? Could it be that Egypt and its military were spared because, unlike the Central African Republic, they are considered by the United States and its Western allies as strategic partners in the fight against transnational terrorism?¹⁰¹²

Africa’s judiciaries, civil societies and their organizations, cannot stop military coups on their own. They need the help of regional organizations, such as the African Union, and international organizations, such as the United Nations, to prevent coup makers from legitimizing any post-coup government. In addition, the support of individual African countries, as well as countries outside the continent, is also critical. Whenever a democratically elected African government is overthrown through a coup, international organizations, the African Union, the governments of countries in and outside the continent that support democracy and the rule of law should condemn the coup, deny recognition of the post-coup government, and sanction the coup makers.

Military coups not only threaten peace and security in Africa but, can also create situations and conditions that enhance the growth of extremist groups.¹⁰¹³ Hence, it is in the interest of the international

¹⁰¹⁰ *Id.*

¹⁰¹¹ *Security Council Strongly Condemns Military Coup in Central African Republic*, UN NEWS (Mar. 20, 2003), <https://news.un.org/en/story/2003/03/62652-security-council-strongly-condemns-military-coup-central-african-republic>.

¹⁰¹² See Charles W. Dunne, *The U.S.-Egypt Political-Military Relationship: A Critical Assessment*, ARAB CENTER (Mar. 13, 2019), http://arabcenterdc.org/policy_analyses/the-us-egypt-political-military-relationship-a-critical-assessment/.

¹⁰¹³ For example, the emergence and growth of groups, such as the *anti-Balaka* and *Séléka* occurred around the various military coups that took place in the Central African Republic in 2003 and 2013. See *Central African Republic: A Popular Coup*, THE ECONOMIST (Mar. 20, 2003), <https://www.economist.com/middle-east-and-africa/2003/03/20/a-popular-coup> (noting the overthrow of President Ange-Félix Patassé on March 15, 2003 with the help of the *anti-Balaka*, a group of Christian

community and organizations that support democracy and the rule of law, as well as the protection of human rights, to condemn coups, deny recognition to post-coup governments formed by coup makers, and effectively ostracize and isolate the coup leaders. If coup makers are allowed to go unpunished, they can create the type of political instability that characterized many countries in the period shortly after independence in the 1960s and lasted until the late-1980s.¹⁰¹⁴

In countries such as Liberia and Sierra Leone, military intervention produced civil wars that did not only kill a lot of people in their most productive years, but effectively destroyed these countries' infrastructure and other productive capacity. Military coups in countries such as Benin Republic, Burkina Faso, Burundi, Central African Republic, Chad, Republic of Congo, Democratic Republic of Congo, and several others, destroyed prospects for peaceful coexistence and economic growth in these countries. For example, the Nigerian military, which took control of the government in 1966 and remained in power until 1999, did not only destroy prospects for the development of democratic institutions, but also oversaw a severe decline of the country's economy. Instead of developing effective economic and political institutions, the military regimes "presided over the further entrenchment of official and everyday corruption" in the country.¹⁰¹⁵

Military coups have become a threat to peace and security, as well as economic and human development, not just in Africa but also in the rest of the world. In fact, the growth of extremism in West Africa, the Maghreb, and the Horn of Africa has become a major threat to global peace and security. In addition, extreme poverty made possible by poor economic performance, which is an outcome of poor governance, has forced many young people to seek refuge in the developed industrial countries, including the countries of the European Union, creating a refugee problem that has threatened economic and political stability in these countries. In Africa, countries such as Cameroon,

militias); see also Lydia Polgreen, *Leader of Central African Republic Fled to Cameroon, Official Says*, N.Y. TIMES (Mar. 25, 2013), <https://www.nytimes.com/2013/03/26/world/africa/leader-of-central-african-republic-francois-bozize-is-in-cameroon.html> (noting, inter alia, the overthrow of President François Bozizé of the Central African Republic). Bozizé's government was overthrown with the help of *Séléka*, a group of Muslim militias. See also BBC, *Central African Republic: President Bozizé Flees Bangui*, BBC NEWS (Mar. 24, 2013), <https://www.bbc.com/news/world-africa-21915901>.

¹⁰¹⁴ See, e.g., TOYIN FALOLA AND MATTHEW M. HEATON, A HISTORY OF NIGERIA 209 (2008).

¹⁰¹⁵ See *id.* at 209.

Ghana, Nigeria, and Kenya are forced to deal with throngs of refugees fleeing military-induced violence in neighboring countries.¹⁰¹⁶ Hence, it is beneficial, not just to African countries to discourage coups and other unconstitutional change of government, but to the global community. Military and constitutional coups, regardless of where they occur, are a threat to democracy and the rule of law in Africa and around the world. Thus, their prevention must be a top priority for the global community.

VII. SUMMARY AND CONCLUSION

The rule of law is the foundation and cornerstone of any legitimate democratic State. At the very minimum, the rule of law requires that the State subject both itself and the people to “publicly promulgated laws.”¹⁰¹⁷ Additionally, the legislative function of the State must be made separate from its adjudicative one. In addition, the law must be supreme, implying that every citizen, including those who hold important positions in government and business, must be subject to the law.

The rule of law is so critical and important to the practice of constitutional democracy that, “it would be impossible to have constitutional government” without it.¹⁰¹⁸ Fidelity to the rule of law is one of three important elements of modern constitutionalism; the others are protection of human rights and the effective constraining of the government so that those who serve in it cannot engage in self-dealing and other opportunistic behaviors (e.g., corruption).

A contemporary African State cannot be considered legitimate, especially from the point of view of the majority of its citizens, if it is lacking any or all of the three elements or characteristics of modern constitutionalism. Any action, such as a military or constitutional coup that causes an attenuation or even derogation of any of the three

¹⁰¹⁶ See Moki Edwin Kindzeka, *Hundreds of Cameroon's Central African Republic Refugees Voluntarily Repatriate*, VOA NEWS (Oct. 24, 2019), <https://www.voanews.com/africa/hundreds-cameroons-central-african-republic-refugees-voluntarily-repatriate>; Veronique Barbelet, *Supporting Central African Refugees in Cameroon: Policy and Practice in Response to Protracted Displacement*, OVERSEAS DEVELOPMENT INSTITUTE/HPG WORKING PAPER (Aug. 2017), <https://www.refworld.org/docid/5a2a641c4.html>; Adrienne Surprenant, *Refugees Fleeing CAR Violence Struggle in Cameroon*, ALJAZEERA (July 17, 2018), <https://www.aljazeera.com/indepth/inpictures/refugees-fleeing-car-violence-struggle-cameroon-180709095545568.html>.

¹⁰¹⁷ See Michael Rosenfeld, *supra* note 970, at 1307.

¹⁰¹⁸ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 316.

characteristics of constitutionalism, cannot only diminish the practice of constitutional government but can delegitimize the State, especially in the eyes of minority ethnic and religious groups. This is particularly true for groups, which historically, have been exploited and pushed to the political and economic margins by the governing majority.¹⁰¹⁹

But, why should anyone in Africa, whether an ordinary citizen or a high-ranking official, care about constitutional democracy and the rule of law? First, the practice of constitutional democracy and adherence to the rule of law will ensure that: (i) the majority of citizens accept and respect the law and will obey it, minimizing the need to devote a significant part of the national output to compliance activities;¹⁰²⁰ and (ii) the national constitution will not be seen, especially by the country's political elites, as "another instrument of rule," which they can simply discard when doing so will help maximize their personal interests.¹⁰²¹ Second, as argued by constitutional law professor and expert on constitutionalism in Africa, Charles Manga Fombad, constitutional government can and "must provide a solid basis for the respect of the rule of law, democracy, and good governance."¹⁰²² It is important to note, however, that constitutionalism can and has been distinguished from democracy and the rule of law. Although "many of the core elements of constitutionalism . . . are also necessary for the rule of law to exist, . . . the latter concept [i.e., the rule of law] is slightly narrow in scope."¹⁰²³

¹⁰¹⁹ An example can be found in the Anglophones of the Republic of Cameroon, who since 1961, have suffered significant levels of political and economic marginalization at the hands of the Francophone-dominated government. In Cameroon, Francophones make up 80 percent of the country's population. See generally John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1 (2019).

¹⁰²⁰ As used here, compliance refers to "compliance to the law" and involves resources devoted to law and order.

¹⁰²¹ See Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 188 (1997). As argued by political scientist and expert on African political economy, the late Professor LeVine, many post-independence leaders treated their national constitutions in purely "utilitarian fashion either as documents that could provide a fig leaf of popular legitimation for illegally-acquired power, or as symbols of the political authenticity and uniqueness of particular régimes." *Id.* at 188.

¹⁰²² See Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1007, 1015 (2011).

¹⁰²³ See Charles Manga Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 8 (2007).

While adherence to and “[r]espect for the rule of law on its own may not necessarily lead to the existence of constitutionalism,” it is important to understand that “constitutionalism is safeguarded by the rule of law and without the rule of law there can be no constitutionalism.”¹⁰²⁴

Scholars have argued that “constitutional democracy under the rule of law” may, under certain circumstances, not be “the best alternative.”¹⁰²⁵ Nevertheless, in States inhabited by diverse groups of people, such as those in Africa, and which face “various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression.”¹⁰²⁶ Today’s African countries are “divided societies” with each one of them consisting of “different subcultures or ethnocultural groups that usually do not share the same culture, customs, traditions, and values.”¹⁰²⁷ Quite often, these diverse groups do not share the “same conceptions of the good.”¹⁰²⁸ It has also been argued that even if a society is homogenous, it is still possible for it to be “pluralistic-in-fact” if “every person is viewed as entitled to pursue his or her own individual good.”¹⁰²⁹

In States that are pluralistic-in-fact, issues regarding the legitimacy of the State and its “fundamental political institutions” will “ultimately depend[] on some kind of consent among all those who are subjected to such institutions.”¹⁰³⁰ Under this principle, the legitimacy of the State and its governing institutions are dependent on the consent of the governed (i.e., the various subcultures that exist in each country).¹⁰³¹ In Africa’s highly pluralistic societies, the consent of the people to governance is not only important to the legitimacy of the government but it is also the foundation on which to build constitutionalism and the rule of law. As a result of the ethnicization of public life in Africa, any individual holding a position in government is usually viewed through two lenses: (i) by members of the individual’s subculture as their “son” or “daughter” and hence, beholden to them—such a person is expected to use his or her government position to benefit the group and its members; and (ii) by

¹⁰²⁴ *Id.* at 8.

¹⁰²⁵ See Michael Rosenfeld, *supra* note 970, at 1310.

¹⁰²⁶ *Id.*

¹⁰²⁷ See Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 318.

¹⁰²⁸ See Rosenfeld, *supra* note 970, at 1311.

¹⁰²⁹ See *id.*

¹⁰³⁰ See *id.* at 1311.

¹⁰³¹ See, e.g., Mbaku, *Threats to the Rule of Law*, *supra* note 1, at 318.

members of other subcultures as an enemy who is likely to support policies that exploit and marginalize them.¹⁰³²

A military or constitutional coup, which is a direct threat to constitutional democracy and the rule of law, will also be judged in a similar manner—members of the subculture to whom the coup makers belong to will see the coup as a positive development, regardless of the damage that such unconstitutional change of government will inflict on the country's democratic institutions and its efforts to adhere to the rule of law. While members of the coup makers' subculture will welcome the post-coup government and expect to benefit significantly from its policies, other subcultures will condemn the coup and seek to expose its damaging effects on governance generally and on them in particular. Hence, the third reason why Africans should care about constitutional democracy and the rule of law is that these two principles provide for a governing process that enhances peaceful coexistence and provides all subcultures the legal mechanisms to maximize their interests without preventing others from acting similarly.¹⁰³³

Of course, the practice of constitutional democracy and adherence to the rule of law should minimize both military and constitutional coups. Even if, for example, military officers ignore their constitutional obligations and intervene in national politics and overthrow the government, the courts will declare the coup and any government formed by or at the bequest of the coup makers, to be illegitimate and illegal; and the people will withhold their consent and refuse to grant legitimacy to the post-coup government. Where the president attempts to change the constitution to extend his constitutional mandate, or where an incumbent president loses an election and refuses to leave office, both the courts and the people can prevent the success of such unconstitutional behavior—the courts can declare the president's action illegitimate and the people can refuse to

¹⁰³² For example, in Kenya, political decisions, especially those associated with voting for candidates to public office, are usually made based on ethnicity. *See, e.g.,* Zipporah Nyambura, *In Kenya, Politics Split on Ethnic Divide*, DW NEWS (Oct. 26, 2017), <https://www.dw.com/en/in-kenya-politics-split-on-ethnic-divide/a-37442394>. *See also* Hamza Mohamed, *Kenyan Elections: The Ethnicity Factor*, ALJAZEERA (Aug. 6, 2017), <https://www.aljazeera.com/indepth/features/2017/08/kenyan-elections-ethnicity-factor-170806081143385.html>.

¹⁰³³ *See* JOHN MUKUM MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH* 69 (2018).

grant their consent to a regime headed by such an opportunistic individual.

Extreme poverty is a major problem in many African countries. The most effective way to deal with poverty is to create wealth. The latter can only be undertaken successfully in societies where peace and security are secured. Coups threaten peace and security and create conditions that are not conducive to entrepreneurship and the creation of wealth. Hence, for each African country to enhance the creation of the wealth that it needs to confront poverty, it must ensure peace and security. A governing process based on or undergirded by constitutional democracy and the rule of law is most likely to guarantee peace and security than one that is characterized by rampant or even occasional military intervention in politics or frequent constitutional changes to allow the incumbent president to stay in power indefinitely. Hence, a fourth reason why Africans should respect constitutional democracy and the rule of law is that a governing process undergirded by these principles is better suited than any other to minimize the behaviors, such as coups, that stunt entrepreneurship and the creation of wealth.

The recognition of and respect for human rights is very important to Africans. In fact, it was this recognition in and commitment to the promotion of human rights that led the Organization of African Unity (“OAU”) to adopt the African (Banjul) Charter on Human and Peoples’ Rights on June 27, 1981 at Banjul, The Gambia.¹⁰³⁴ In the Preamble, the African States Members of the Organization of African Unity¹⁰³⁵ noted that they were “[f]irmly convinced of their duty to promote and protect human and peoples’ rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.”¹⁰³⁶

Governments that come into being through military coups are more likely than democratically elected ones to engage in practices that violate human rights. While there are many examples of the gross violations of human rights by African leaders who came to power

¹⁰³⁴ See OAU/African Union, *African (Banjul) Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986.

¹⁰³⁵ The OAU, which lasted from 1963 to 1999, was replaced by the African Union in 2002. See *From the Organization of African Unity (OAU) to the African Union (AU): The 50-Year Path Towards African Unity*, AFRICAN UNION (May 28, 2013), <https://africa-eu-partnership.org/en/stay-informed/news/organisation-african-unity-oau-african-union-au-50-year-path-towards-african>.

¹⁰³⁶ See OAU/African Union, *supra* note 1034, at pmbl.

through military coups, we shall take a brief look at only three of them: Omar al-Bashir of Sudan, the late Mobutu Sese Seko of the Democratic Republic of Congo, and Abdel Fattah el-Sisi of Egypt. On June 30, 1989, Col. Omar al-Bashir led a group of soldiers that overthrew the government of Prime Minister Sadiq el-Mahdi.¹⁰³⁷ He then presided over a regime that lasted until 2019 and which was notorious for the gross violations of human rights.¹⁰³⁸ Some observers have noted that Omar al-Bashir, who was deposed by military coup in 2019, “played a central role in some of the worst atrocities of the past century and left a legacy of human suffering.”¹⁰³⁹

Mobutu Sese Seko overthrew the government of President Joseph Kasavubu in the Democratic Republic of Congo on November 25, 1965 and went on to unleash on the Congolese people a military dictatorship that lasted until he was ousted in 1997.¹⁰⁴⁰ His reign was pervaded by corruption and the gross abuse of human rights and in recent years, many of his victims have described his government as a “long reign of torture.”¹⁰⁴¹

On July 3, 2013, the Egyptian armed forces, under the leadership of Field Marshall Abdel Fattah el-Sisi, overthrew the democratically elected government of President Mohamed Morsi.¹⁰⁴² In a study of the

¹⁰³⁷ See ALI A. MAZRUI, *AFRICAN THOUGHT IN COMPARATIVE PERSPECTIVE* 130 (Ramzi Badran, Suifudein Adem & Patrick Dikiir eds., 2014).

¹⁰³⁸ In fact, al-Bashir was indicted by the International Criminal Court (ICC) on charges of war crimes and genocide associated the government’s activities in the country’s Darfur Region. See generally James Reini, *ICC Prosecutor: Omar al-Bashir Must Answer for Darfur Abuses Now*, ALJAZEERA (June 19, 2019), <https://www.aljazeera.com/news/2019/06/icc-prosecutor-omar-al-bashir-answer-darfur-abuses-190619155025202.html>. See also Eric Schewe, *Sudan’s Revolution and the Geopolitics of Human Rights*, JSTOR DAILY (Apr. 19, 2019), <https://daily.jstor.org/sudans-revolution-and-the-geopolitics-of-human-rights/>.

¹⁰³⁹ See Nick Robins-Early, *Sudan’s Omar al-Bashir Leaves Behind a Horrific Legacy of Human Rights Abuse*, HUFF. POST (Dec. 4, 2019), https://www.huffpost.com/entry/bashir-sudan-human-rights-abuse-darfur_n_5cb0ff25e4b098b9a2d3cd47.

¹⁰⁴⁰ See, e.g., *Kasavubu Regime Ousted by Army Coup in Congo*, N.Y. TIMES (Nov. 25, 1965), <https://archive.nytimes.com/www.nytimes.com/library/world/africa/651125kasavubu.html>.

¹⁰⁴¹ See Hugh Dellios, *Victims Describe Mobutu’s Long Reign of Torture*, CHIC. TRIBUNE (Apr. 29, 1997), <https://www.chicagotribune.com/news/ct-xpm-1997-04-29-9704290128-story.html>.

¹⁰⁴² See, e.g., *President Morsi Overthrown in Egypt*, ALJAZEERA (July 4, 2013), <https://www.aljazeera.com/news/middleeast/2013/07/20137319828176718.html>. See also David D. Kirkpatrick, *Army Ousts Egypt’s President; Morsi is Taken into Military Custody*, N.Y. TIMES (July 3, 2013), <https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

post-Morsi situation in Egypt released in 2015, Human Rights Watch (“HRW”) determined that Abdel Fattah el-Sisi “has presided over the flagrant abuse of human rights since taking office [in 2014] pledging to restore stability.”¹⁰⁴³ In addition, the HRW reported that since el-Sisi took office as president of Egypt, “[v]iolence by armed groups and the government has escalated.”¹⁰⁴⁴

While governmental regimes undergirded by constitutional democracy and the rule of law are more conducive to the recognition and protection of human rights, governments that came to power through military coups tend to be major abusers of rights. Since coup makers are by definition, individuals who have placed themselves above the law, it is not likely that when they come to power, they would voluntarily subject themselves to the law or desist from behaviors that violate the constitution. Thus, it is not surprising that coup makers who gain power often engage in practices that violate human rights.¹⁰⁴⁵

For these and other reasons, Africans should choose constitutional democracy and the rule of law over regimes that are made possible through military and constitutional coups. A governing process undergirded by constitutional democracy and adherence to the rule of law will enhance peaceful coexistence, provide the enabling environment for entrepreneurship and the creation of the wealth needed to deal with poverty and improve living standards for all citizens; and minimize coups and other forms of unconstitutional change of government.

¹⁰⁴³ See *Egypt: Year of Abuses under al-Sisi*, HUMAN RIGHTS WATCH (June 8, 2015), <https://www.hrw.org/news/2015/06/08/egypt-year-abuses-under-al-sisi>.

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ Other African leaders who came to power through military coups and went on to preside over regimes that were notorious for the violation of human rights, include Samuel K. Doe (Liberia) and Johnny Paul Koroma, who overthrew the elected government of President Ahmed Tejan Kabbah of Sierra Leone on May 25, 1997. See generally Carla Hall, *The Rule of Samuel K. Doe*, WASH. POST (Aug. 19, 1982), <https://www.washingtonpost.com/archive/lifestyle/1982/08/19/the-rule-of-samuel-k-doe/133d4979-671f-4c53-82f7-bb2975ca99d1/> (announcing the ousting and subsequent assassination of President William Tolbert of Liberia and several of his cabinet members by Sargent Doe in April 1980); Lansana Gberie, *The May 25 Coup d'État in Sierra Leone: A Militarist Revolt?*, 22 AFR. DEVELOP. 149 (1997) (noting the May 25, 1997 coup in Sierra Leone). These coup makers went on to preside over brutal dictatorships that oppressed and exploited their fellow citizens.