

THE NEW LEGAL ORDER FOR AFRICA

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“Government set up overnight, like everything in nature whose growth is forced, lack strong roots and ramifications. So they are destroyed in the first bad spell. This is inevitable unless those who have suddenly become princes are of such prowess that overnight they learn how to preserve what fortune has suddenly tossed in their laps, and unless they can then lay foundations as such as other princes would have already been building on.”

Niccolo Machiavelli

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INTRODUCTION

The new legal order for Africa is both imperative and the adequate remedy to the stabilization and development of the continent. The concept behind this notion means that the supreme interest of the nations must never be traded for personal or groups interests. The core idea is accountability for actions taken by those in power within the framework of domestic and international laws.

To the advised African or foreign observer, generally, Africa looks like a vast body of nations where the respect of law is lacking. Such examination is a sad, shocking, and even revolting reality some forty-five years after the independence of the majority of African countries.

The cause for this absence of respect of the rule of law is one: domestic terrorism. This terror campaign is rooted in the accession to political power of a group of individuals without popular mandate. This act is known as a coup *d'état*. It destroys a pre-established legal order. It is morally and legally wrong. This practice has robbed Africans of their dignity and betrayed the African tradition. Coups makers have institutionalized corruption, fostered the violations of basic human rights, and contributed greatly to the social, political and economic destabilization of Africa.

Who said that the era of military *coups d'état* in Africa was over? Such person does not have a sufficient knowledge of African political realities and the problems that the Judiciary encounters to sanction those who seek power by force directly or indirectly assisted by western powers. In truth, the wave of coups that sweeps the fragile defenses of African civil institutions has deeply affected the social, political, and legal landscape of Africa. Just few years after the

independence, the young continent of Africa became largely militarized to the point that the survival of those democratic regimes brings pride to the whole continent.

Almost half a century since the independence of the majority of African states¹, over fifty military *coups d'état* have occurred, meaning an average of more than one coup per year. If during the 1960s the coup *d'état* rapidly emerged as the most visible and recurrent characteristic of the African political experience, by the late 1970s quasi-permanent military rule had become the norm for much of the continent. Very few are the states that have not been governed by military juntas or rocked by attempted coups or power grasp² by the people in uniform.

The truth is a sad observation that all evil have given themselves appointment at the cross roads of a dying Africa: recession, debt, deficit of balance of payments, corruption, tribalism, border disputes, political assassinations, military coups d'état, ideological fights, structural dependency, political underdevelopment, and the absence of political will³ and of the rule of law. Thus, one can notice that the political health and stability of Africa is in a very bad shape, since only its perpetual deterioration breaks the records⁴ today as forty-five years ago.

Part One

LEGAL REMEDIES OF COUPS D'ETAT IN AFRICA

1. The Action is Illegitimate and Illegal: Overview

The idea sustained this paper is that any unconstitutional change of government through coup is illegitimate, and therefore illegal. A coup *d'état* may be legitimate *ab initio* but not legal. There is not any State constitution that contains a provision stating that staging a *coup d'état* is a legal mean of accession to political power. Thus in this case, legitimacy always precedes legality.

Similarly, there is no African country where the constitution provides that a person or groups of individuals are permitted by law to forcibly confiscate power and rule the country. Almost all military coups that occur in Africa are illegitimate and illegal. Therefore, as a general rule, governments originating from military coup *d'état* are illegitimate since they break a pre-established legitimate constitutional order. On the other hand, as from the moment these governments make themselves accepted, meaning they are listened to, obeyed locally, and are being recognized outside by other states, this illegitimacy little by little loses its strengths and interests. Legitimacy is therefore very important, even capital for the survival of a *de facto* government.

It is undisputable that a long series of illegal seizures of power leads to a decay of the legal and political structures which are needed to produce new governments. However, if there is an established procedure for changing the leadership then all methods other than this come within the range of illegality⁵, no matter the justification. But what if the government is characterized by a general incompetence, mismanagement, unable to secure the rights of its people, tribalism is blatant, the judicial system corrupted, and natural and mineral resources looted with the complicity of foreigners?

And what if a civilian government is unable to prevent widespread violence, or defeat a movement intent upon the destruction of existing democratic institutions? Does not the armed forces responsibility to the nation and the constitution then dictate their intervention? There are also those instances in which popularly elected governments act arbitrarily and illegally as they move toward the abrogation of democratic constitutions. Under these circumstances, if the officers' corps is the only group with the power to remove the civilian governors, should it not force its way into political arena?⁶ Is a military coup justifiable in those circumstances?

Indeed, there is not any legitimacy justifying the military overthrow of a democratically elected government, as a general rule. Hence, the exception is that any democratically elected government that loses its legitimacy may be toppled, as a last resort. Each African State constitution should have provisions on how the legal change of a government must take place.

What would the characteristics of a legitimate coup be in that regard? A legitimate coup is the one initiated by the people, or wished for a long time by the people, and in which occurrence the latter play a major role in toppling the government, establishing or restoring democratic principles and the rule of law.

Further, some democratically elected governments in Africa were toppled and will continue to be so, signs show, for lack of legitimacy. For example, it is believed that General Guei toppled the government of President Bédié in Ivory Coast in 1999 because the latter compromised democratic principles of the government in running the affairs of the State. Likewise, Pierre Buyoya militarily overthrew the government of democratically elected President Ndadaye of Burundi in 1996 for the same reasons. In both cases, their people collectively accused those in power of failing to secure the supremacy of the constitution and to preserve democratic principles. Indeed, from the time that a democratic regime loses legitimacy because of controversies of its policies that have departed from democratic principles, it has *ipso facto* turned itself into an autocratic regime and signed its death sentence.

For instance, it is a well established and accepted rule that democratic regimes do not commit violations of human rights and that in such regimes the rule of law is respected for it is the only respectable rule. It is also well accepted that if such regimes commit such abuses of human rights and where the rule of law is the exception, such regimes are called anything else but democratic regimes. Therefore, a democratically elected government that betrays the

constitution and makes a mock of the rule of law is automatically illegitimate, and may be ousted by the people after the latter have exhausted all necessary, civil and legal means to restore democratic principles, and law and order.

While many readers may wonder how a democratically elected government can be turned into an autocratic one, they are reminded that in the African theater of democratic operations such occurrence is not as rare as in the western hemisphere. African heads of State become easily obsessed with power that they think that they are above the constitution and do not have any account to give to the nation or people who legally put them into office. This obsession leads into apparent and criminal abuses of power that undermines democratic principles and becomes a threat to national and even international peace and security.

A word of caution needs to be said here. When the government violates the constitution, undermines democratic principles of good governance and deliberately sabotages the rule of law, thus putting at high risk national peace and security, and the achievement of any sustainable social and economic growth in the country, such government shall by that sole fact lose all legitimacy to govern the nation, and the people shall always and almost know it. Though such awareness of the masses may originate from interference of a third country, international organization, local organization or political party, it is essential to point out that the people's action in overthrowing their government should not be influenced by either of the above groups, to avoid demagogic manipulations and evil conspiracy often coupled with pre-established agenda unknown to the masses. In fact, it would only be dangerous for the future of the nation that the people give way to such pressures and influences for they have almost always proven destructive in Africa.

Thus to say that in Africa, the people claim their true and fundamental rights directly, without any passage through their assigned or nominated representatives, for the latter have almost and even always shown their allegiance to the government rather than to their constituents. In general, there is no rule of majority vote in Africa to defend the interests of the masses, for the masses defend their own rights because they do not trust their so-called representatives in the House or Senate.

Corrupted representatives can only defend the rights of those who put them into power (the cabinet), often when legislative representation is politically based. In Africa, such have proven to be self-centered and self-serving sacrificing the interests of their people. So, when such a group is corrupted, its majority vote is also corrupted. Likewise is the truth for a political party that manipulates the masses for partisan interests that do not take into account the realities of the conditions of the people.

In Africa, when the masses speak as one and rise up to protect their rights, even those who died defending such rights join them in chorus and begin a long and restless walk to freedom. However, a political party or organization may have the same aspiration as the masses, in which case it may help in channeling the latter's grievances and play a role of guide for they share the same common goal in establishing or restoring the democratic values and the rule of law.

Thus, when the people manifest their will and declare that the government has lost all legitimacy to conduct the affairs of the State and that such government must therefore resign, such will shall be respected for they will always be forerunner signs. But, alas, in Africa, the above argument is only the exception. For, had it been the general rule, individuals like Mobutu, Eyadema, Bongo, Museveni, and many others would have relinquished power decades ago.

That is why the masses should apply the legal remedies discussed below whenever there is exercise of illegitimate power in the hands of those in command of the affairs of the nation.

These remedies have proven efficient and effective in the history of mankind, starting with the French Revolution of the eighteenth-century.

2. Action at the Local Level

2.1. The Supreme Law of the Land

In any civil State, the Constitution is to be the Supreme law of the country as a whole. It should not be only the law of the powerless and oppressed masses, as observed in African autocratic regimes. African constitutions should guarantee the rights of both the majority and minority of their populations. Besides from the Bills of rights and of the citizens enacted pursuant to international legal rules and treaties which are supposed to be included as constitutional provisions, the constitution should state that accession to power by any other means than a fair and free elections is criminal and illegal, and therefore punishable in accordance to both domestic and internal law.

The constitution must also clearly stipulate that nobody, regardless of race, gender, religion or creed, social, civil or military status and affiliation or the like, has the right to stage a coup or overthrow the government or associate with any person who plans to or commits such criminal act against any government. In addition, the constitution should declare that no person or a group of persons has the license to amend or abolish the constitution at will without any express mandate of the citizens of the State already manifested through their legally elected representatives in Parliament or Senate, or such other mandate from the legislative body empowered with that mission, inasmuch as the latter act in good faith in protecting the supreme

interests of the nation. The constitution should specify that acting against such legal rules is criminal and illegal and punishable by law.

Further, African constitutions should state that no person may and can proclaim himself or herself State President or Chief Executive or the like, without any established free and fair electoral process or other legal process as contained in the constitution. Acting to the contrary should be a criminal offense and an act of high treason that is likely to undermine national and international peace and security, and therefore a danger to national sovereignty and a blatant mockery to the rule of law.

Finally, in each State, the Constitution [must] outline the principles, structures, responsibilities and relationships which are necessary to secure democratic civil-military relations. Civil-military relations refer to the hierarchy of authority between the Executive, Parliament and the armed forces, and to civil supremacy over these forces.⁷

2.2. Empowering the Judiciary

Lawyers lead the judicial system. These individuals are trained to uphold the rules of the law and act ethically in fulfilling their duties. Indeed, the strength of a government and its domestic and international respect are tested by the way the judiciary performs its mission of preserving the constitution for the welfare of the nation.

Whereas, judicial officials have recourse to the laws to sanction a failed coup, they become powerless and overwhelmed after a successful coup in Africa, not knowing how to act though the constitution may provide that a coup is a crime and must be dealt with accordingly. The reason for this uncertainty is the fact that historically, judicial officials who opposed the coup leaders are executed, jailed or forced into exile by the latter. Coup leaders act this way for they see an enemy in the person who opposes their action.

If African judicial officials failed to protect the constitution in the event of a successful military coup it is because they act either in isolation or the new masters corrupt some of them. Sole a mass protest, boycott and a threat to mass resignation may produce the best results in this situation. Being knitted in mind and action can possibly defy the action of the coups plotters at the local level. Judicial officials should be brave enough to declare the coup a criminal and illegal act *ab initio*, and therefore unconstitutional.

2.3. Criminal Prosecution

It is easy to sanction a failed coup attempt than to try to do the same with a successful one. Those involved in coups attempts in Africa have been killed without any due process of the law and buried in mass graves, given to crocodiles for food, or jailed for life after a sentence by kangaroo martial courts or forced to live in exile with their family members sometimes for the rest of their lives. In April 2004, and for the very first time in the history of Burkina Faso, the authors of the failed putsch were tried in a country whereas the previous four State Presidents came to power through unconstitutional means.⁸

Criminal prosecution of a successful military coup is almost always an impossible act in Africa for reasons already discussed. However, if a military coup is presumed and condemned by the constitution, only the determination of judicial officials, the Chief Justice or President of the Supreme Court and his associates in the frontlines, may reverse the equation. But if the judiciary machine is halted and tossed by the takeovers, the whole state machinery will be amputated and the coup leaders shall escape all liabilities.

For this judicial action to be sustainable, the legislative body should assist the judiciary in the process in recalling to the coup makers to hand back power immediately over to the

democratically elected government and, that as the democratically elected representatives of such country, they do not recognize the new comers and usurpers of political power.

2.4. Legal Education of the Masses

It is South African President, Thabo Mbeki, who declared in an address in 2000 at the Nigerian Institute of International Affairs in Abuja that:

Today, many countries have gone through more than one multi-party election since 1990. The movement towards the consolidation and deepening of this democracy continues apace, whatever the interruptions and occasional setbacks. Critical to this democratic renaissance in many parts of Africa has been the role of the masses of our people, acting through their formations, who have fought to end destructive and undemocratic systems of government.

Through their heroic struggles, these masses have ensured that Africa experiences her second liberation in decades, while at the same time creating the possibility for the establishment of stable democratic systems of governments, political accountability and respect for human rights. Clearly, it is important that all us should strengthen this movement towards a democratic continent and through our daily actions make certain that the democratic wave becomes an unstoppable and irreversible tide. In this regard and among other things, we need to energise the masses to reinforce the positions taken by Africa's leaders to banish from the OAU, those who assume power through coups *d'etat*.⁹

Africa is one of the last continents where education is still a luxury. Mass education of the populations as a whole is inexistent. Or if and where it exists, it is most of the time solely done to protect and fortify the regime in power than to educate positively and constructively the people about their rights. In this case, mass education serves as a propaganda tool for the benefit of the government with nothing substantially productive for the general welfare of the African

masses. Interestingly, even in some so-called democratic governments in Africa, autocratic propaganda of the kind of monopartism regimes are still some how realities.

What good purpose does it serve if one person builds a house for his or her children, but deliberately refuse to give it to them or explain to them in plain terms their rights and obligations in regard to it? Nothing is served here than personal satisfaction. Likewise, it is not good to declare in the constitution that people are equal in regards to the law and should freely enjoy their rights to life and liberties if no State mechanisms are put into place to ensure that the majority of the populations wherever they live do truly understand the real meaning of those legal provisions.

African leaders must make of the education of the masses a priority. People who generally know and understand their rights and obligations are vocal when it comes to defending such, whether individually, through their community-based organizations, or through their elected officials at local, provincial and national levels. They are not afraid of bullets for they know that the unauthorized use of such lethal force during peaceful demonstrations is illegal, either are they intimidated by one person threats of crushing their unarmed protests. They know that their rights are internationally recognized and guaranteed as stipulated in the UN Universal Declaration of Human Rights in these solemn terms: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers . . . Everyone has the right to freedom of peaceful assembly and association . . .¹⁰

African masses must be taught the different techniques of non-violent actions and civil disobedience, peaceful demonstrations' notions and the like. The most fundamental prerequisite is to expand domestic political participation and give people a sense of control over their destiny.

Conduct of the affairs of State should be collective. It is crucial to educate large segments of the population such that they become invested in the legitimacy of the system and process and thus see it as inseparable from the very basis of their sense of well-being. This will be assisted to a great extent by enforcing the rule of law and basic principles of fairness in a predictable and consistent manner. Complementary to the nurturing of a fanatically loyal segment of the electorate, such a belief system helps to set the stage for a spontaneous act of sustained civil disobedience in the event of a coup attempt (as has happened in Serbia, Cote d'Ivoire and Venezuela). Such politicization can render would-be coup-plotters at a psychological disadvantage. Since non-commissioned officers and other ranks of the military are a product of society, illegal orders may be harder to enforce.¹¹

As long as African masses shall be deprived of this public education necessary to help them understand and defend the interests of their nations, they shall remain very passive in the face of threat of or occurrence of coups. The government in each African State should be in the obligation to facilitate such education and the people must reclaim it as their right to education. Without such awareness, it would indeed be impossible for the people to freely and fairly exercise their rights in general. This condition is likely to lead to furthering the underdevelopment of the masses and will unavoidably continue to impede the prosperity of the nations.

3. Action at the Regional and International Levels

For coups *d'état* to be held unconstitutional and have the null and void legal effects that the African people so desired, their leaders must totally support this new trend exhibited both by the AU and the NEPAD and live up to their commitment. For instance, the AU Charter provides the following on this matter that the African Union shall function in accordance with the

following principles: respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; condemnation and rejection of unconstitutional changes of governments.

Indeed, the contents of both the Constitutive Act of the African Union (AU) and of the New Partnership for Africa Development (NEPAD) put together a set of legal rules necessary for the stability of Africa and the development of its oppressed people. These two documents strongly encourage the establishment of democratic principles of government in Africa supported by the application and respect of the rule of law.

For instance, African heads of State have condemned and rejected unconstitutional changes of government. Governments that come to power through unconstitutional means will not be allowed to participate in the activities of the African Union. Leaders agreed on the following as constituting unconstitutional change of government: a. Military coups *d'état* against a democratically elected government; b. Intervention by mercenaries to replace a democratically elected government; c. Replacement of democratically elected governments by armed dissident groups and rebel movements; d. The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

Whenever an unconstitutional [power] change takes place, leaders have agreed that the OAU should immediately and publicly condemn such a change and urge the speedy return to constitutional order. Thereafter the government concerned will be suspended from participating in the decision-making structures of the OAU while African leaders and personalities will seek to bring 'discreet moral pressure' to bear for an initial period of six months. Thereafter a range of limited and targeted sanctions against the regime would be instituted. This could include visa denials, restrictions of government-to-government contacts, trade restrictions, etc. A Central

Organ sanctions sub-committee of five members, chosen on the basis of regional representation, is to monitor compliance with decisions taken on situations of unconstitutional changes and recommend appropriate review measures to the OAU.¹²

Some concerns need to be raised here. First, the intention of the drafters of these documents are good, but its enforcement shall be very difficult for a good number of African leaders and heads of States came to power through the means that are herein subjects to enforcement. Second, why should a cautious approach be taken towards a group of individuals who have arbitrarily decided to change the constitutional order in a given country? That attitude weakens African legal norms. Why in the world should a court of law give the impression of negotiating the sentence with a convicted criminal?

In this case, a country where the military takes power should automatically be suspended from the international arena, rather than give the opportunity to the coup makers to market their ideology and seek acceptance. That is exactly the problem with African governments. They like to follow unnecessary and useless bureaucracy that has already cost the lives of thousands of innocents' people. Third, it is hilarious and there is no moral or legal justification whatever to let a group of individuals who take power through unconstitutional means to remain in such position for six months before sanctions, though limited, are imposed on them. Such a remedy can only facilitate this criminal band of outlaws to consolidate their power.

For the record, an unconstitutional change of power is a rapid and often brutal way of taking control of a country and therefore the counter-attack in such circumstance must be decisive, precise and prompt. For example, when a coup occurs, the authors of such uncivil and criminal act should be given only few hours to retain power to the democratically elected government or face immediate and serious consequences. This open widow must never be over

of six hours. This is the only time that diplomacy can take place. During the same time period, sanctions and boycotts must immediately enter into effects, while the situation is still confused on the ground and whereas the putschists are trying to organize and position themselves.

Assume that the cowards who overthrow the government of said State are linked to international terrorism or engage themselves in a systematic ethnic leasing or the commission of any other gross violations of human rights, can one permit them to go on that way even for weeks without taking some reasonable and military action? In fact, Article 4 of the African Union on Principles state that: The Union shall function in accordance with the following principles: (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;(j) the right of Member States to request intervention from the Union in order to restore peace and security.¹³

What the African Union needs to have is a special and mobilized task force which shall be ready to intervene wherever and whenever threat to national and international peace and security is at stake. The mobility and military apparatus of said armed forces must allow them to intervene in hot spots of the African continent within the next twenty-four hours following a coup, for instance. Unconstitutional change of governments is one of those occasions where such task force should display its might by forcing the military junta to return power to the democratically elected government or the like. Such a force may have a dissuasive effect on future perpetrators of coups in Africa. The AU must ensure that such force is not only operational, but also effectively and smartly functional.

On the other hand, in regard to “action with respect to threats to the peace, breaches of the peace” and acting under Chapter VII of the United Nations Charter, the Security Council may

decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.¹⁴ Further, Should the Security Council consider that measures provided for . . . would be inadequate or have prove to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members.¹⁵

However, given that Africa is the sole continent where the UN Security Council either intervened too late, with too little assistance, or not all; and seeing that there is no other region in the world where such threat to international peace and security is more vulnerable than in Africa; convinced that the UN Security Council has deliberately and totally failed to defend African nations and protect their people from “action with respect to threats to the peace, breaches of the peace”, African leaders and their people must not leave any stone unturned in order to assure their own security and sanction hardly those acceding to power through force than through fair and free elections.

In the same context, military treaties and pacts must be entered into at the regional and international levels with the aim of assisting a democratic government facing military overthrow. For example in September 19, 2003, a mutiny/coup attempt from some hundreds of soldiers caused the Ivorian government of President Laurent Gbagbo to seek assistance from the regional international body ECOWAS to crush the uprising. The opening statements by ECOWAS Chairman, President Abdoulaye Wade of Senegal, who advocated the recourse to dialogue in the bid to resolve the problem, and those of President Olusegun Obasanjo of Nigeria who preferred

the use of collective military force to crush the rebels were very contrasting. But collectively, it showed that the resort to unconstitutional means to stake a claim to political power on the African continent is outmoded, unjustifiable and therefore unacceptable now. Indeed, such disruptions to the constitutional order, many believe, must be rejected because it is in the supreme interest of the continent and its peoples to do so, particularly within the context of the globalisation that Africa is functioning.¹⁶

African States must strengthen their regional cooperation ties with each other to win this war against those who think that their military status grant them the right to confiscate power or to challenge the legitimate authority in the State. For, if such a relationship with each other is not nourished and therefore does not flourish to the benefit of the African masses, recourse to military force by some will continue to mushroom and shall frustrate the hard work of many willing Head of States to terminate this evil practice of unconstitutional change of governments on the African continent. Retired Colonel Lucio Gutiérrez of Ecuador who was once orchestrated a coup *d'état* in that country was right to claim that if you support military coups -- rather than ousting corrupt governments through constitutional means, such as congressional impeachments -- you are setting a dangerous precedent for . . . the rest of [the African continent],¹⁷ and the world at large.

It is therefore essential to note here that NEPAD advocates the building of a culture of democracy, respect for human rights and the rule of law as essential conditions for creating stable conditions for sustainable development . . . Both the Algiers Declaration of the African Union which was affirmed at the Lome Summit of 1999 and the ECOWAS Protocol on Democracy and Good Governance are emphatic that there will be no recognition for any government which comes to power by unconstitutional means. Dr Chambas* advocates for zero

tolerance for coups and military interventions that Africa must remain steadfast in defending the principle as a demonstration of commitment to build democracy and good governance in the respective countries. We must send a clear and unambiguous message out, not only to the rebellious troops, but also, to all the armed forces of our sub-region that the days of coup *d'états* are gone.¹⁸

African heads of States must learn to act quickly and appropriately avoiding all lethargy, bureaucracy and foot-dragging particularly characteristic of all UN interventions in Africa. They must make it a custom and a primary nature to always think for the best of their people, a reminder of the official oath they pledged to when they took office. Alas, many African leaders, whether they acceded to power democratically or the other “notorious” way have also demonstrated a hypocritical attitude and support to each other to the point of sacrificing and betraying their people. This attitude is the other real challenge to the strict enforcement of the texts of the UA and NEPAD. The reason of this conduct, besides the fact these leaders act for personal interests, is the reality that in Africa political alliances are made and broken without due respect either to moral and personal values or the rule of law. This leads to the weakness of the State apparatus, and thus exposing its vulnerability, which makes it more manipulable by foreign forces.

For instance, despite those well-written and express provisions contained in the AU and NEPAD documents condemning not only the occurrence of unconstitutional changes of governments in Africa, but as well as the firm abstinence from any African government to encourage or assist a group of individuals of any country to pose such illegal acts, which provisions African leaders pledged and declared to the face of the world that they desire to follow, their daily conduct in the matter at hand is almost always the opposite of what they

uphold on the international arena. In truth, African leaders believe in and sustain the principle of “back scratching” or political “prostitution”.

Thus, it is less surprising to notice that in Africa, it is customary for a democratically elected government to give moral and/or material support to the authors of a military coup in a neighboring country, regardless of the origin of the government to be toppled. Or, simply some African leaders and head of States will not react with dismay at the overthrow of a sister government, waiting first to hear the reactions of almost always a divided international community on the issue. By so doing, these leaders simply forget that there is an amount of regional and sub-regional bodies capable of functioning efficiently if these get enough support from said leaders to restore democracy.

For instance, to illustrate the above, Ghana’s record of response to the overthrow of democratically-elected governments has been mixed. For most of the Rawlings years, Ghana was less willing to unilaterally condemn military takeovers but nevertheless worked through regional institutions to promote reconciliation and a return to constitutional rule. In the case of the April 1999 coup in Niger, for instance, the Ghanaian government did not strongly condemn the overthrow of the democratically-elected government of Ibrahim Bare Mainassara. This was partly because Jerry Rawlings (himself a three-time coup maker whose recent stint in office began with the overthrow of democratically-elected government of President Hilla Limann), was not in a strong moral position to condemn the overthrow of democratically-elected regimes elsewhere.¹⁹

Private, familial and personal relationships among some head of States have always worked against any balanced strategy on combating the evil of unconstitutional change of governments in Africa. A government whose State president is tied to the other by such bonds is

likely to support the other and vice-versa in case of attempt coups. But, the contrary is also true. In Africa, a head of government who holds such ties with the leader of the putschists in the other country is likely to support the latter to confiscate power, for family and friendship relationship almost always, whatever comes first.

Elaborating on the relationship between Ghana and Ivory Coast, it is recorded that personal friendships were an important aspect of foreign relations under Rawlings. In the case of the Cote d'Ivoire coup (1999) for instance, ousted President Bedie, a personal friend of Mr. Rawlings, paid a visit to Ghana to enlist the support for his return to power. The Rawlings government condemned the coup and declared that the Ivorian junta would not enjoy any support from Ghana. The government, however, refrained from applying any unilateral measures to force the coup leader, General Robert Guei, out of office and instead limited its involvement to an ECOWAS mediation plan that eventually persuaded General Guei to hold elections in October 2000. Rawlings supported the return of Bedie (who was the guest of honor at Ghana's 40th independence anniversary in 1997) in spite of the fact that he was widely believed to have rigged the October 1995 elections that confirmed him in power. [But] Since becoming President, Kufour has also fostered a close relationship with neighboring leaders such as Bedie's successor, Laurent Gbagbo. The Kufour regime therefore responded to the recent coup attempt against Mr. Gbagbo (September 2002) with an immediate and strong condemnation of the coup plotters. Ghana has since hosted an ECOWAS summit on the reconciliation process in Cote d'Ivoire and has promised to send troops as part of any ECOWAS peacekeeping presence.²⁰

In all respect, instead of a political "prostitution" and the like, African leaders should help in the arrest, prosecution and/or extradition of the coups plotters pursuant to international legal

norms. Since it has been established that military coup is a criminal and illegal act, those African leaders who directly or indirectly assist the authors of the coup to take power or escape justice are simply accomplices in and partakers of such act and must be dealt with accordingly.

4. Legal Education of African Military: The Case of South Africa

From day one at the boot and training camps, military academies or other institution where they received their moral, intellectual and physical training, military personnel must be taught that their is a career of peace and for peace. They must know that there can in no wise aspire to politics inasmuch as they remain in the armed forces, and therefore cannot be head of States in such circumstances. Military codes and the constitutions should make it clear that any attempt to take power by any mean but through fair and free elections is criminal and illegal.

Though there has never been as such a military coup in South Africa, this country presents today one of the best African models of constitutionality that needs emulation by other African States. The South African Constitution outlines the principles, structures, responsibilities and relationships which are necessary to secure democratic civil-military relations. Civil-military relations refer to the hierarchy of authority between the Executive, Parliament and the armed forces, and to civil supremacy over these forces.²¹ It is an excellent safeguard of democratic principles and guaranty for the strict application of the rule of law that provisions outlining the duties and obligations of military personnel be embodied in the constitution of the country.

The South African Constitution outlines a clear hierarchy of authority on defense matters: the Chief of the SANDF enjoys executive military command of the armed forces; this command is exercised under the direction of the Minister of Defence in times of peace and under the direction of the President during a state of national defence; and the Minister is in turn accountable to Parliament and Cabinet.²² This enables each citizen to understand the rapport of

powers and authority between the military, the Executive led by the State President and the Legislative or Parliament. As such, there is no confusion as to who is who and as to who does what, why and when since the tasks are well defined in the constitution.

The South African model shows the kind of relationship that should exist between the military and civilians. Whereas the State president is the command in chief of all the armed forces in the country, the military powers are subjected to the civil authority or the Minister of Defense, as the case may be whether the command is given in time of peace or war. This control of the military by the Executive branch led by the President is very capital to achieving stability, peace and harmony in the nation. But above all, Stable civil-military relations depend to a great extent on the professionalism of the armed forces. The challenge is to define and promote an approach to military professionalism which is consistent with democracy, the Constitution and international standards.²³ In fact, this idea is well supported in the Code of Conduct for Armed and Security Forces in Africa that the armed and security forces shall be at the disposal of the constitutionally established political authority.²⁴

In truth professionalism is the key and the whole issue on which rests everything else. African military in general lacks professionalism, a vital ingredient that characterizes each modern armed force in the world, and without which a nation's destruction stands at its door. This professionalism means as stipulated in below:

First, Acceptance by military personnel of the principle of civil supremacy over the armed forces, and adherence to this principle. Second, The maintenance of technical, managerial and organisational skills and resources which enable the armed forces to perform their primary and secondary functions efficiently and effectively. Third, Strict adherence to the Constitution, national legislation and international law and treaties. Fourth, Respect for the democratic

political process, human rights and cultural diversity. Fifth, The operation of the Defence Force according to established policies, procedures and rules in times of war and peace. Sixth, A commitment to public service, chiefly in defence of the state and its citizens. Seventh, Non-partisanship in relation to party politics. Eighth, The building of a South African military ethic based on international standards of officership, loyalty and pride in the organisation. This will serve as a basic unifying force which transcends cultural, racial and other potentially divisive factors.²⁵

The above values and principles must form the true ethos of the military and should be taught at each military training school or academy. Therefore, in such case education and training will also play an essential role in developing the political and ethical dimensions of military professionalism. To this end, the Minister will oversee the design and implementation of a civic education programme on “defence in a democracy”. The Minister has established a work group for this purpose. . . The mission of the civic education programme is to instill respect amongst military personnel and other members of the DOD for the core values of a democratic South Africa through appropriate education and training. These values derive principally from the Constitution. They include respect for human rights, the rights and duties of soldiers, the rule of law, international law, non-partisanship, non-discrimination, and civil supremacy over the armed forces. The programme will cover the following subjects: the key elements of the political process in a democracy; the constitutional provisions on fundamental rights and defence; the significance of the Constitution as supreme law; the principles of democratic civil-military relations; international law on armed conflict; respect for multi-cultural diversity and gender equality; and the normative dimensions of military professionalism.²⁶

In the light of the above, the personnel of armed and security forces shall receive specific

education and training in international humanitarian law, human rights, rules, conventions, and instruments that regulate armed conflicts. The personnel of armed and security forces shall assume responsibility for individual acts that violate international humanitarian law and human rights. The personnel of armed and security forces shall be disciplined and loyal to the State at all times and shall show obedience and devotion to the constitutional authority.²⁷ Indeed, such education on international law and the principles of democracy should be enlightening the military to accept responsibilities in case of violations of such laws.

Furthermore, military personnel have rights like any citizen of any given State *mutatis mutandis*. Hence, because of their unique position in society, the exercise of such rights may differ from the ordinary order of things. In South Africa, for instance, Members of the SANDF are citizens and therefore enjoy the same fundamental rights as civilians. Certain exceptions to this principle will be necessary because of the unique nature of armed forces and military service. The exceptions will be limited and specific, and will be covered in defence legislation.²⁸ Similarly, Article 8 of the Code of Conduct for Armed and Security Forces in Africa specifies that in the exercise of their duties, the personnel of armed and security forces shall enjoy, within the limits of national law, their fundamental rights and freedoms as defined by the Constitution.²⁹

Outlining their rights and duties as military personnel, the South African White Paper indicates that the Constitution provides that a member of the SANDF shall be obliged to comply with all lawful orders but shall be entitled to refuse to execute any order if the execution of such order would constitute an offence or would breach international law on armed conflict binding on the Republic [Section 226(7)]. Military personnel shall be obliged to report unlawful orders and actions to an appropriate military authority. The constitutional provision stated above will be applied strictly and its implications for military operations will be conveyed to all officers,

warrant-officers and other ranks in the course of their training and education.³⁰

Likewise, the Code of Conduct for Armed and Security Forces in Africa provides that in the conduct of defence and security affairs, the behaviour of armed and security personnel shall show respect for international humanitarian law, human rights and pertinent national laws. In the exercise of command, no order which is at variance with international humanitarian law, human rights and pertinent national law shall be given to or executed by armed and security personnel.³¹

The officers who organized a military coup need the support of soldiers who, most of the times, are under their command. In the night of 11-12 June 2004, a certain Major named Eric Lengue and twenty others from the GSSP (Special Group of Presidential Security), which is the Congolese Presidential Guard³², seized the National Radio and announced the suspension of the government. These officers and soldiers, under these circumstances, acted illegally for their acts were unconstitutional and in blatant breach of international laws. These officers and soldiers were free to refuse the execution of such orders for they knew or should have known that they were against established rules of law and military code of conduct but they elected not to do so.

African military training centers, academies and other school so established to train military personnel must educate the students about the appearance of manipulations and real manipulations by their superiors to participate in a coup, for such act is unconstitutional. Indeed, in accordance with the pertinent decisions of the Organisation of African Unity/African Union [AHG/Dec. 141 (XXXV) adopted in Algiers and AHG/Dec. 150 (XXXVI) adopted in Lome], the OAU Declaration on the framework for an OAU Response to an Unconstitutional Change in Africa, as well as the Solemn Declaration of the Conference held in Lome on Security, Stability, Development and Co-operation in Africa (SSDCA), any action or behaviour that undermines or seeks to overthrow the Constitution of the State is illegal and strictly forbidden.³³ It is therefore

essential that in Africa, the rules of military conduct explicitly state that army personnel and persons in the security services should not follow commands that are in breach of national and international laws.

Finally, the military will generally do a poor job if the government or the civil authority does not or is not ready to assist in the implementation of change in the conduct of military affairs. The government must furnish the necessities to help the military performs its duties. Military training and schools must be well equipped, and the government must provide to the military what reflects their mission of defending the nation. Civilians must look at the military service as a noble career, so when they embrace it, their mind and body become one in protecting and defending the nation, rather than being the very source of divisions in the country by performing unconstitutional acts of the magnitude of overthrowing the government and the like. Thus, the South African case ought and is worth to be emulated by other African States.

Part Two

CRIMINALIZATION OF ASSASSINATION

1. Legal Considerations: Overview

Assassination is a crime under the laws of nations. Whereas during an armed conflict those who command the armed forces, the soldiers and/or alike armed people who execute orders are considered as enemies combatants under international law and therefore can be targeted, during peace time in the contrary, there is neither a legal nor moral justification to kill such leaders or persons. Indeed, pursuant to international legal norms, an individual who threatens domestic and/or world peace and security should be prosecuted, arrested and tried in a competent penal tribunal according to the laws of the forum and with respect to international law and

international treaties. To do otherwise violates simply democratic values, human rights and humanitarian laws.

Assassination is the act of deliberately killing someone, especially a public figure, usually for hire or political reasons.³⁴ What characterizes assassination is thus its political nature, which therefore distinguishes assassination from a simple murder. In other words, assassination is viewed as the killing of a public figure (not necessary a civilian) for political reasons. Further, the underlining legal principle is the fact that the killing of an individual of such public status is murder unless committed during wartime by enemy combatants, and it is thus illegal.

So, generally, assassinations are considered by international law experts as the murder of a targeted individual for political purposes, usually involving circumstances of a covert or "treacherous" nature. Whether the intended killing of an individual counts as an assassination or as a generally acceptable military operation depends on whether the relevant countries are at peace or war, the forces carrying out the killing, and the means by which the killing is carried out. Thus, during peacetime, the targeted killing of any individual, whether a combatant or not, is generally considered an assassination and is not permitted³⁵.

And yet, some nations have legalized the assassination of foreign leaders in time of peace for, say they, national security reasons. When the military of a given country topples its government, its aim is of course to change the legal order in the State. To achieve such mission, it is essential for the military to physically neutralize the official members of the government, namely the State president or Prime minister, either by killing or arresting them. In fact in most cases, the President or Prime minister is assassinated in Africa.

At least in principle, there is manifest evidence to suggest that peacetime assassination has been illegal since the Middle Ages. A vast body of domestic and international law clearly

states that the killing of any person is prohibited, regardless of underlying political motivations. Murder has been criminalized in all of the world's major domestic legal systems, and a sea of human rights accords speak to the value and sanctity accorded to human life in international law. The severity of murder as a criminal offence is especially evident in its inclusion as a prominent offense in each of the major international extradition treaties.³⁶

The Universal Declaration of Human Rights of 10 December 1948 provides:

Article 3.

Everyone has the right to life, liberty and security of person.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Pursuant to the UN International Covenant on Political and Civil and Political Rights:

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
1. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
2. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
3. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
4. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 4 of the African Union Charter provides on the matter of Principles that:

The Union shall function in accordance with the following principles:

- (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;

(p) condemnation and rejection of unconstitutional changes of governments.

Although the indications are overwhelming that international law condemns the practice of assassination in principle, beyond the domestic criminalization of murder there is little concrete international law that specifically forbids it. Only the Organization of African Unity (OAU) Charter outlaws assassination by name, [as stated herein above] while the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (New York Convention) protects against it under limited circumstances. This Convention, which was ratified by nearly half the world's nations and most major powers, criminalizes "the international commission of. . . murder, kidnapping, or other attack upon the person or liberty of an internationally protected person." However, it only accords protection to figures travelling abroad, and not in their home states.³⁷

2. Action at the Local Level

The criminalization of assassination is a legal discussion that needs to be tackled seriously at the domestic level in each African State. Indeed, in-depth judicial reform is necessary in African States to achieve this process. The constitution of each African State should states, in unambiguous and strong terms that the overthrow or any such unconstitutional change of the government is a criminal act, which violates both the spirit and letter said constitution, as well as international laws and treaties. In addition, the constitution must provides that such criminal act is therefore illegal and immoral and shall be prosecuted to the fullest degree of said State penal laws according to international legal norms.

The insertion of such legal provisions in the constitution of any given State shall revolutionize the judiciary in this sense that it shall break with an old and shameful practice of rendering the judicial system powerless at the occurrence of coups in Africa.

Further, such provisions shall have a deterrent effect on potential coups makers and dressers in Africa. However, this does not mean that some outlaws military officers shall not surprise Africans living in any given State one morning when they shall overthrow the government and proclaim themselves, without any legal mandate, as the new rulers of the nation. Nevertheless, it is a simple thing to think that the absence of such written laws in the constitution is quite hard to defend at the occurrence of a military coup.

One will also agree that it is wise to embody in the constitution that this supreme law of the country is not the effort of one individual or group of persons, but rather the express will of the citizens of such given State, and as such, nobody, not even a group of persons shall have the right to amend or abolish the constitution without the express consent of the citizens of such given State, which consent shall be manifested through proper and legal channels in the hands of their representatives assembled either in Senate and/or Parliament, inasmuch the latter's act is not to defend partisan interests.

Furthermore, the constitution in each African country should state that any intimidating, fraudulent and coerced action by an individual or group of persons to amend or abrogate said constitution without proper legislative review and approval shall be deemed null and void, and therefore illegal and the authors of such act prosecuted for high treason, for threatening internal peace and security, and undermining the independence and territorial integrity of the nation.

Lastly, the constitution of each African State must provide that at no time such State shall be ruled by decrees, neither in time of peace or war, but that relevant provisions are enclosed in said constitution to manage the affairs of the State and defend the country in case of national emergency, internal or external war or the like. The constitution must also state that any attempt by any one to do otherwise shall be criminal and therefore illegal and shall

constitutes an act of high treason threatening the internal peace and security, and undermining the independence of the nation, and shall thus be punishable to the fullest extent of the national penal code and international laws.

The constitution of each African State must clearly and unequivocally states that assassination for whatever reason is wrong, immoral and criminal and therefore unjustifiable. The constitution must provide that such criminal act violates national and international legal norms and shall not go unpunished. The constitution shall outline the inviolability of a human life without any due process of the law and shall affirm that the killing of another human being be he a national or foreigner in time of peace without an independent and fair judicial process is illegal, and that in time of war, only combatant enemies can be targeted pursuant to international law and treaties, and that any person acting against such provisions is simply a murderer and shall not escape national and/or international justice.

Africa has come to the era of its legal clean up. African people have been hostages and savagely used as human shields for decades, even centuries with totalitarian and autocratic regimes succeeding one another first during colonialism, then neo-colonialism and the rise to power of military gangsters after the independence of States. These outlaws have disturbed the peace of the nations and security of their brothers and sisters, most of the time with imperial mandates, but sometimes acting alone to defend some egocentric and criminal interests. To accomplish their fates these criminal bands (at different historical periods) have hijacked and destroyed any tissue of national life producing, encouraging or defending human life and fundamental human rights principles. Some of these gangsters are still hanging forcibly and shamelessly on to power.

That is why the constitutions of African States must provide that any citizen of a State or foreign State living within the jurisdictions of its State, who had conspired in the commission, attempted to or committed an assassination or coup *d'état*, or who had been directly or indirectly involved in such criminal act, shall be subject to arrest, prosecution locally and/or extradited to such foreign State or any other third State having jurisdiction on the matter, pursuant to both domestic and international laws, and bilateral, regional and/or international treaties with such foreign State, to stand trial in the courts of such foreign State or third State, inasmuch as such foreign court or third State tribunal is independent and fair, and respect international human rights and humanitarian laws.

The constitutional bans on military overthrow of governments and assassinations in Africa are aimed at achieving the real, sustainable and permanent establishment of democratic principles, good and right governance, and the strict observance of the rule of law from which shall flow social and economic development of the masses as well as peace and political stability. Arguing otherwise is an error and a waste of another golden opportunity as it occurred at the independence of African States.

3. Action at the Regional Level

There is no continent on this earth where political and military leaders act foolishly and complaisantly just to make alliances or betray some, pay tribute to some others or fight to death to satisfy personal and clientele passions than in Africa. Likewise, there is nowhere on this planet earth where such leaders cruelly deny their citizens of basic human rights and the protection of the rule of law than in Africa. In addition, it is mostly in Africa where one can find so-called leaders who are not afraid to take stance against the same rules of law embodied either in their

local or regional constitutions, thus betraying such constitutions solely to defend their “seats” or power.

It is indeed particularly in Africa where the real game of “back scratching” takes place as observed in any development of unconstitutional changes or armed conflicts. For instance, how many African leaders stood up and vow sanctions and the like to the authors of coups happening either next door or just in the region? Almost none and those who raise their voices do it within the corridors of diplomatic walls for they are afraid of missing a back scratching opportunity down the road. However, if these leaders would have put the simplest interests of their own citizens above their own, they cannot stand idly looking on when a democracy next door or within the region is being overthrown by a band of gangsters.

If African leaders cannot unite to fight for the common interests of their brothers and sisters, imperial predators will continue to destabilize Africa with the continued complicity and support of some of these leaders. There will always be more Mobutus, Idi Amins, Savimbis, Kagames, Musevenis, Gueis, and the like, but very few of the Lumumbas and Mandelas on African soil. African leaders’ lack of discipline and political maturity is obvious and revolting for a continent potentially rich but whose people are the poorest on the earth.

As stated above, the Charter of the African Union provides, *inter alia*, that the Union shall preserve the “respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities”; and, shall stand for the “condemnation and rejection of unconstitutional changes of governments”. The difference between these provisions and its application lies in the political will of their actors, meaning the African leaders. Whether they strongly believe in them or would like to play the “back scratching” game is not a magic formula to discover. Indeed, the true question is whether, since

the adoption of these provisions, and of the African Charter as a whole, political assassinations and unconstitutional changes of governments have occurred? The answer is certainly and undeniably in the affirmative.

Further, whether sustainable, courageous and unified efforts were collectively undertaken to condemn, punish the authors of such violations of the African Charter and international laws and restore to power the overthrown regime? The answer is in the negative. In truth, people were and will be assassinated, and governments were and will be toppled in Africa because many of these African leaders quarrel with each other either to save their own power or save an ally within the African family of nations rather than scrutinize the present and have a real vision of Africa five, ten, fifteen, twenty or fifty years from now.

Point III of the New African Initiative of 2001³⁸, in the matter of the New Political Will of African Leaders, provides among others that:

Democracy and state legitimacy have been redefined to include accountable government, a culture of human rights and popular participation as central elements.

To achieve these objectives, African leaders will take joint responsibility for the following:

- To strengthen mechanisms for conflict prevention, management and resolution at the regional and continental levels, and to ensure that these mechanisms are used to restore and maintain peace;
- To promote and protect democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels; . . .
- To build the capacity of the states in Africa to set and enforce the legal framework, as well as maintain law and order

There is no doubt that Africa has both the will and the potentiality to rise up and defy the world in promoting respect to human rights and the rule of law. But as discussed in the above section, this initiative at the regional level requires both political will and courage. For, one will agree that it is indeed useless to strive to keep its own house and yard clean whereas the neighbor's house and yard is a potential condemned area. The essence of the provisions contained in the African Union and the New Partnership for Africa's Development (NEPAD) simply means that African forces must join together to face the real challenges of African people.

It truly means that assassinations and coups cannot be tolerated any more and that each State must ensure that regional relationship is strengthened to the level of generating mutual trust and general climate of peace and security. It also implies that no African State must assist an individual or a group of individuals to use its territory for criminal acts, which violate its own constitution and international laws and treaties. This action indeed connotes that coups plotters and authors are not welcome in Africa and shall face both domestic and/or international prosecution for their criminal acts.

Regional cooperation in Africa should not be the privilege of State presidents or Prime ministers, to be effective. Regional bodies of the caliber of the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) must be given as much latitude and independence as possible to be able to act in cases of breach to peace and threat to security of a member State by other State(s).

4. Action at the International Level

Three States have made history and excelled in records about the institutionalization of assassination in the past century: Israel, the Apartheid South Africa and the United States of America. Whereas in the second case this evil policy ended with the abolition of the apartheid

constitution, the first and third countries are still practicing this policy in this Twenty First century. It is just logical that a country that practices this shameful and evil policy in time of peace will also support the overthrow of foreign governments in the world be they democratic or not.

Assassinations and military coups *d'état* are almost always linked together. In fact, most of the assassinations in Africa occurred during or following³⁹ military coups. That knowledge should be sufficient to warn and raise red flags on the following facts: first, that assassination is not a permanent solution to a given problem; and second, that such practice is in total violations of the laws of nations and international treaties when committed in times of peace. The U.S. has never been at war with any African State; alas, the U.S. has sponsored the overthrow of African governments and the assassinations of their leaders in overt or covert operations. The case of the overthrow of the democratically elected government of Prime Minister Emery Patrice Lumumba of the Democratic Republic of Congo by Mobutu and his assassination is an illustrative one.

In a more general sense, Article 4 of the U.N. Charter establishes a right to be free from aggression and the use of international armed force. This has been interpreted to provide that citizens of a nation have a right to be immune from international acts of violence by citizens or military forces of other nations. Article 2(4) states that all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. This statement of high moral principle has been accepted as customary international law, as suggested by the International Court of Justice in *Nicaragua v. United States*. The court found, quoting from the work of the International Law Commission, that Article 2(4) is a “conspicuous example of a rule in international law having the character of *jus cogens*.” The

assassination of a foreign leader in peacetime with no provocation would therefore be a *prima facie* violation of basic international law, as well as murder under the applicable domestic criminal statute.

There are, however, two established scenarios in which the Article 2(4) protections against the use of force would be suspended. The first is a military action sanctioned by the U.N. Security Council under Chapter VII of the U.N. Charter, and the second is an attack made by a victim state in self-defense. The right to self-defense is provided to all states in Article 51 of the Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.” When a nation makes use of Article 51 to justify a use of force in its own defense, or the defense of another state, the laws of war control as they would in any formally declared conflict. Therefore, under an Article 51 action, any state-sanctioned killing by a victim state would not be an assassination so long as it is not accomplished by treachery or outlawry.⁴⁰

The U.S. assassination practice of foreign leaders needs some attention, as a highly illustrative case. Officially, the United States does not conduct or permit assassinations. However, this policy is not codified in law, but in an executive order (EO 12333) that the President can change at will and without public notice of the change. In addition, this policy does not define what an assassination is, and the United States has long distinguished assassinations as separate from military operations directed against enemy leaders in the course of self-defense.⁴¹ The famous Executive Order 12333 of Dec. 4, 1981 on intelligence activities prohibits assassination in these solemn terms:

2.11 *Prohibition on Assassination.* No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2.12 *Indirect Participation.* No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.

Without getting into an unnecessary and rhetorical discussion on the subject, it is worth to mention that in a public memorandum of law, senior military lawyers came to a . . . finding that Executive Order 12333 does not limit action in wartime or restrict self-defense action during peacetime against legitimate threats to the national security of the United States. Therefore, the Order should not be viewed as a practical ban, but instead as a preventive measure to stop unilateral actions by officials within the government and a guarantee that the authority to order assassinations lies with the President alone.⁴²

The U.S. position is that the stated provisions of Executive Order 12333 do not legally ban the practice of assassinations of foreign leaders either in wartime or in case of self-defense, but just the uncontrolled or the unaccounted and unauthorized use of such practice by the members of the intelligence community without prior approval by the President, who is the chief Executive. Further, Article 51 of the UN Charter actually gives the right to any Member of the UN to self-defense from outside threat during peacetime. Thus any assassination of a leader of such targeted foreign country would fall in the scope of self-defense. And the U.S. has a body of cases on the matter.

For instance, on 15 April 1986, the United States launched air strikes against specific targets in Libya as a military reaction against the bombings of a German restaurant where American life was lost, and which act was linked to terrorist elements from Libya. The U.S. also targeted some chemical factories in Sudan with cruise missiles after the terrorist attack of the *USS*

Cole (DDG 67) in Aden, Yemen, October 12, 2000, in which 17 Sailors were killed and 39 were injured.

More use of this Executive Order came after 11 September 2001 attack on the World Trade Center in New York where an estimated 3,000 lives were lost. In the wake of September 11, 2001, terrorist attack on the New York World Trade Center and the Pentagon, some attention has been focused upon the assassination ban contained in Executive Order (E.O.) 12333, Section 2.11, and whether it will prohibit the United States from responding to the attacks by targeting those who orchestrated these acts of terrorism.⁴³

In the aftermath, the U.S. Administration systematically applied Article 51 of the UN Charter and the modified Executive Order 12333, by both President Bill Clinton and George W. Bush, to destroy human and physical Al Qaeda military capacities and facilities in Afghanistan. Indeed, in Mid-September of 2001, President Bush, supported by a Joint Resolution of Congress authorizing him to employ “all necessary and appropriate force,” issued an intelligence finding—an order dictating the use of funds appropriated for covert actions.⁴⁴

Whenever there is direct evidence allowing to act so, a country, be it big or small, military superpower or not, economically strong or not, whatever its status and political orientation, has a legitimate right to defend itself against any threat to peace and security pursuant to international rules of law and within the parameters set by international laws and treaties. Whether the United States of America had the legitimate right to defend itself in the cases mentioned in the above paragraphs is indisputable. Experts said that there were enough circumstantial and direct evidences linking al-Qadae to those terrorist acts against U.S. interests.

Now, what U.S. interests did Prime Minister Patrice Emery Lumumba threaten that led to his sponsored government overthrow and assassination by the CIA? To this day, neither the CIA

nor any U.S. Administration had been able to reasonably substantiate the motives behind that criminal act. What is known is the fact that a group of American citizens took advantage of their public offices and prerogatives to pose an act that was illegal both in nature and substance. They acted for personal economic interests and greed, for various records show that Lumumba was not a threat to the U.S., and therefore no American national interests were at risk.

In fact, logic demonstrates that so far in the history of the Congolese nation, the time that American interests were more at risk was during Mobutu's era. By his criminal conduct and the total support he received from Washington, Mobutu manifested to the Congolese people that the U.S. administration was the real cause of their misery and tragedies. The U.S. government gave total support to Mobutu to overthrow the democratically elected government of Lumumba; Mobutu took power and reigned as a tyrant for over three decades, destroying all political, social and economic infrastructures in the country, and making a mock of the rule of law. Today, the DR Congo is only living the repercussions of Mobutu's rule.

CONCLUSION

Africa is what it is because of a blatant lack of discipline and accountability from State officials in the commission of private and public acts. The main source of this *modus vivendi* is the establishment of governments originating from coups *d'état*, in particular military coups. To reverse this situation, it is more than time that Africa subscribes to a new legal order.

The conquest of power by extra-constitutional means is immoral and illegal. It is immoral because such act is purely against any established societal policy in any given organized civil nation. It is illegal, as a general rule, given that it is not prescribed by any State constitution in this world. It is indeed an act of high treason in many States.

It is no secret that Western powers have pursued a selfish and destructive policy in Africa as they directly or indirectly assist in the military overthrow of African governments. This evil policy that characterized their African foreign affairs during the Cold War is still of action today. These powers battle for leadership and economic interests in Africa and encourage and/or facilitate the toppling of “embarrassing” governments, which are seen as obstacles in the accomplishment of their imperial hegemony. Given the fact that such foreign military intervention occurs regardless of the type of government aimed at for overthrow, it is evidenced for the destruction of democracy, and it is therefore the main stumbling block for the restoration of the rule of law in African States.

In the spirit of the new debate on the establishment of the rule of law in Africa, it is agreed that a coup *d'état* is illegitimate and illegal when it destroys a pre-established democratic regime, when the action is not substantially aimed at and essentially proven to restoring democracy and the rule of law, and finally the action fails totally to meet the general and uncorrupted will of the masses. It is plainly emphasized that in Africa the constitution is and should remain the Supreme Law of the nation, and that judicial officers must be empowered to legally declared null and void any other mean of accession to political power than through a fair and free elections according to the rules set by the constitution and international laws and treaties.

Thus, for an individual or group of persons to act otherwise is illegal and contrary to the wish of the ordinary people. Further, in such occurrence, the masses have the legal right to defeat the usurpers of political power through the exercise of their fundamental rights and other legal procedures pursuant to international laws.

However, the full exercise of such rights requires that the people be informed of or be aware of the existence of said rights first. To facilitate the use such rights, each African government should not leave any stone unturned to educate the masses about the Bills of rights and other fundamental rights as provided in the constitution and international law and treaties. It is undisputed that had the African masses be aware of their rights, they would not have hesitated to exercise them in cases of unconstitutional changes of government and/or like. Such education, it is logically understood, would have helped in the courageous fight of the establishment of democracy and the rule of law in Africa.

African States members, the international community, the recognized regional and international organizations have the moral and legal obligations in assuring the unbiased implementation of democratic principles in an given State and similarly ensuring that no individual or group of persons conspire to or overthrow a democracy in Africa when such action is illegitimate and illegal *ab initio*. Further, in the occurrence of such act, the AU, the UN and the international community must pressure the coup leaders to return power to the democratically elected government immediately and without conditions or face serious and unforgettable consequences. To this end, it is unambiguously outlined that regional and international logistic, military and legal mechanisms should be put into place to facilitate an immediate response to unconstitutional change of governments in Africa.

The imperative of enabling the military to gain a legal perception of their status in society and relationship vis-à-vis of the masses is clearly stated. Taking the example of South Africa, it is shown that the military must always and all time be subject to civil control, namely of the Minister of Defense in time of peace and the State President in time of war or armed conflict. It is pointed out that military personnel and other security services members must be taught that

unconstitutional change of government is morally and legally wrong and shall be punished to the fullest extent of the law. In addition, the soldiers or those who receive such instructions as to threaten internal peace and security, and undermine the territorial integrity and national sovereignty, have to refuse said orders and immediately report such to competent authorities.

Finally, it is emphasized that assassinations, which in many instances are one of the consequences of military overthrow of governments, is illegal, unless there are the fruits of armed conflicts and perpetrated against those in command, and strictly within the parameters of international legal norms and treaties, rather than as interpreted by the acting State. To this fact, it outlined that the criminalization of assassination in time of peace is essential to achieve the needed local, regional and international legal balance, which is a key to international peace and security.

There is no doubt that the era of military coups *d'état* is far from over in Africa. But the question is how to legally help this strategic continent to stabilize in order to ensure the respect of the rule of law, prosperity and human development, and spare it from becoming a terrorist trade market?

ENDNOTES

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- ¹ The majority of Black African states became independent in the early sixties.
- ² Samuel Decalo, *Coups & Army in Africa*. New Haven & London: Yale University Press, 1990, p.1
- ³ Ndesho and Al., *The Anti-Drift of Africa in Dismay*. Zairean University Press, 1985, p.35
- ⁴ Toussaint M. Mbakata, *The Opposition Movements in Independent Black Africa*. Dissertation. University of Kinshasa, 1987, p.6
- ⁵ Edward Luttwak, *Coup d'Etat*, Cambridge: Harvard University Press, 1968.
- ⁶ A.C. Roos, *Ethical Coups d'Etat in Africa, A Contradiction?*
<http://www.mil.za/CSANDF/CJSupp/TrainingFormation/DefenceCollege/ResearchPapers1999/roos.htm>
Roos is a Colonel in the South African National Defense Force (SANDF).
- ⁷ *Defence in a Democracy*, White Paper on National Defence for the Republic of South Africa, Chapter 3: Civil-Military Relations, May 1996.
- ⁸ See *Abidjan et Lomé au banc des accusés*, by Elimane Fall et Alpha Barry, in JeuneAfrique Magazine
http://www.jeuneafrique.com/gabarits/articleJAI_online.asp?art_cle=LIN18044abidjssucca0
See also *Procès du putsch: multiples entraves à la "manifestation de la vérité" (opposition)*
http://www.jeuneafrique.com/gabarits/articleAFP_online.asp?art_cle=AFP60754procsnoitis0
- ⁹ Thabo Mbeki, *Address at the Nigerian Institute of International Affairs*, Abuja, 3 October 2000.
<http://www.anc.org.za/ancdocs/history/mbeki/2000/tm1003.html>
- ¹⁰ UN Universal Declaration of Human Rights, Articles 19 and 20(1).
- ¹¹ Nowa Omoigui, *Preventing Coups in Nigeria* (Part 1)
<http://www.gamji.com/nowa21.htm>
- ¹² *Democracy cluster*, The South African Institute of International Affairs.
<http://www.africanreview.org/clgov.htm>
- ¹³ *Constitutive Act of the African Union*, Adopted in July 11, 2000, Lomé/Togo.
<http://www.africa-union.org/home/Welcome.htm>
- ¹⁴ Charter of the United Nations, Chapter VII, Article 41.
- ¹⁵ *Ibid.*, Article 42.
- ¹⁶ Sam Sarpong, Côte d'Ivoire, *Problem tests africa's resolve*, October 2002.
http://www.peacelink.it/afrinews/79_issue/p7.html
- ¹⁷ The oppenheimer Report, Ecuadorean candidate vows to pursue harmony and democracy, Thursday, Oct. 31, 2002.
<http://www.miami.com/mld/miamiherald/news/world/americas/4408550.htm>
- ¹⁸ Sam Sarpong, *ibid.*
- * Dr Mohammed Ibn Chambas is the Executive Secretary of ECOWAS.
- ¹⁹ Ghana, *Defending Democracy: A Global Survey of Foreign Policy Trends 1992-2002*
www.demcoalition.org/pdf/Ghana.pdf
- ²⁰ *Ibid.*
- ²¹ *Defence in a Democracy*, *ibid.* §1.
- ²² *Ibid.*, §3.
- ²³ *Ibid.*, §29.
- ²⁴ Experts' Workshop on Validating the Code of Conduct for Armed and Security Forces in Africa, 27-29 May 2002, Lomé, Togo, Art.2.
- ²⁵ *Defence in a Democracy*, §30.
- ²⁶ *Ibid.*, §§35-37
- ²⁷ Experts'Workshop, *ibid.*, Art. 4-6.
- ²⁸ *Defence in a Democracy*, §44.
- ²⁹ Experts'Workshop, *ibid.*, Art.8.
- ³⁰ *Defence in a Democracy*, §§48-49.
- ³¹ Experts'Workshop, *ibid.*, Art.9-10.
- ³² For the records, on 16 January 2001, a bodyguard from this same Praetorian Guard killed President Laurent D. Kabila, father of the current President Joseph Kabila, in his official residence.

³³ Experts' Workshop, *ibid.*, Art. 14.

³⁴ Bryan A. Garner, *Black's Law Dictionary*, Seven Edition, West Group, St. Paul, Minn., 1999, p.109.

³⁵ *Assassinations*

<http://www.newsalc.com/ftvww65n.html>

³⁶ Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*

http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/01_TXT.htm

³⁷ Nathan Canestaro, *ibid.*

³⁸ *The New African Initiative*, A Merger of the Millennium African Renaissance Partnership Programme (MAP) and the OMEGA Plan, *Revised document with the amendments to the Lusaka Summit*, §43, 47 July 2001.

³⁹ It should be understood without hypocrisy that an assassination that occurs two, five or ten years after a military coup while military ruling is still in power falls within this ambit.

⁴⁰ Nathan Canestaro, *ibid.*

⁴¹ *Assassinations*, *ibid.*

⁴² *Ibid.*

⁴³ Elizabeth B. Barzan, *Assassination Ban and E.O. 12333: A Brief Summary*, CRS Report for Congress, Order Code RS21037, Updated January 4, 2002.

⁴⁴ *Ibid.*

Note: The above are excerpts of the author's book "The Illegality of Military Coups & the U.S. Imbroglia in Africa" to be published by Authorhouse in the summer of 2005.