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THE SUCCESSION OF FAURE GNASSINGBE  
TO THE TOGOLESE PRESIDENCY  
An International Law Perspective

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# CONTENTS

1. Introduction	5
2. Politico-Constitutional Antecedents of the Recent Developments	7
3. Regional Instruments on Democratic Principles in Africa	11
4. Some Basic Principles of International Law: In a Nutshell	13
5. Faure's Succession: Validity of the Removal of Fambare Ouattara Natchaba from Office	15
6. Faure's Succession and Legality of Constitutional Amendment	16
7. Faure's Succession and the Doctrine of State Necessity	18
8. Faure's Succession and Regional Instruments on Democracy and Good Governance	21
9. Concluding Remarks	28
References	30



*States...must...act in compliance with the law, and in particular with international law...That is the underlying condition for the legitimacy of their action.*<sup>1</sup>

Judge Gilbert Guillaume

## 1. Introduction

In early February 2005 the Republic of Togo, a small Francophone country in the West African sub-region, came into the international spotlight as a result of what some have described as the undemocratic and unconstitutional succession to the country's presidency by Faure Gnassingbe. On 5 February 2005, the President of the country for 38 years, Gnassingbe Eyadema, died suddenly. He had seized power in a military coup in 1967, and for many years he ruled the country dictatorially, until 1991 when international pressure forced him to permit multi-party democracy. He won presidential elections in 1993, 1998, and 2003, albeit in controversial circumstances. His current 5-year tenure was to end in 2008 before his sudden death.<sup>2</sup>

Article 65 of Togo's 1992 Constitution (as amended by Law No. 2002-029 of 31 December 2002)<sup>3</sup> provides that where the office of President of the Republic becomes vacant as a result of the death of a serving President, resignation or definitive incapacity, the presidential functions shall be temporarily exercised by the President of the National Assembly<sup>4</sup> (as acting President) who must conduct a presidential election within 60 days from the day he entered into office. However, on the day President Gnassingbe Eyadema died, Fambare Ouattara Natchaba, the President of the National Assembly,

was overseas and this prompted, or, perhaps, enabled the National Assembly to remove him from office and replace him with Faure Gnassingbe, son of the late President Eyadema, who was a Member of Parliament and Government Minister. Further, the National Assembly amended the Constitution to remove the 60 days mandatory requirement for the conduct of the presidential election, and provided for Faure Gnassingbe to remain in office as acting President until the expiry of his late father's tenure in 2008. Evidence suggested that the country's military top brass, who strongly supported the late President, were behind the political-constitutional developments in Parliament. In fact, it was suggested that these parliamentary actions were done in order to constitutionally legitimize Faure Gnassingbe's succession to the presidency, as the military had allegedly already appointed him President of the Republic of Togo a few hours after his father's demise. In any case, it is noteworthy that in accordance with section 64 of the Togolese Constitution Faure Gnassingbe – the 'appointed President'<sup>5</sup> – was duly sworn into office before the Constitutional Court of the country.

In reaction, opposition groups in Togo and the international community – spear-headed by African countries – rejected the manner of succession as unconstitutional, with some describing it as a military *coup d'état*.<sup>6</sup> Similarly, and more importantly for the present purpose, the Economic Community of West African States (ECOWAS) and the African Union (AU) also concluded that the succession was a military *coup d'état*,<sup>7</sup> charging that it

1. See Gilbert Guillaume, 'Terrorism and International Law' (2004) 53(3) *JCLQ* 537-548, at 548. The author was former President of the International Court of Justice. The article was the text of the 2003 Grotius Lecture delivered by the author at the British Institute of International and Comparative Law on 13 November 2003.

2. For more information on the recent politico-constitutional developments in Togo, see 'Eyadema's demise and succession crisis' (*The Guardian*, 10 February 2005); available online at: <<http://odili.net/news/source/2005/feb/10/30.html>> (accessed 28/03/05).

3. All references in this work to Togo's Constitution relate to this document, except otherwise indicated.

4. The original 1992 Constitution of Togo established a unicameral Parliament (the National Assembly). But the extensive amendments of 2002 added a second chamber (the Senate). However, this chamber had not been constituted before the demise of President Eyadema.

5. This was how some commentators described the interim succession of Faure Gnassingbe to the Togolese presidency.

6. While condemning the manner of succession as unconstitutional and undemocratic, there were also countries which stopped short of describing the succession as a military coup.

7. According to some published accounts, soon after the death of President Eyadema, the Chief of Staff of the Armed Forces of Togo said in a statement on State television that the country's Constitution had been suspended and that Faure

was unconstitutional, undemocratic and a violation of regional-international instruments and political commitments in the field of democracy and good governance of which Togo is a State Party.<sup>1</sup> Based on this perspective, the regional bodies (supporting opposition groups in Togo) insisted that the country should return to the path of constitutionality and democracy or face sanctions.<sup>2</sup> For their part, the *de facto* authorities in Togo insisted that the succession of Faure Gnassingbe to the Togolese presidency and the concomitant constitutional amendment were necessary in order to avoid a power vacuum and to preserve the State of Togo. However, after about two weeks of consultations with officers of the regional organizations and faced with the threat of sanctions, Togolese parliamentarians re-amended the Constitution to the original constitutional provision which obligates an interim President to conduct a presidential election within 60 days of his assumption of office. Even so, Faure Gnassingbe was not required to vacate office – thereby suggesting that the law-makers have effectively and finally replaced Fambare Ouattara Natchaba (the original President of the National Assembly) with him.<sup>3</sup>

However, this did not entirely satisfy African leaders and the regional organizations. While they welcomed the reversion to the original constitutional provision, they insisted that Faure Gnassingbe must vacate office – notwithstanding that he had

announced that he would conduct a presidential election within 60 days – so that Fambare Ouattara Natchaba could succeed the late President and conduct the presidential election within 60 days as provided by the Constitution. As Togo did not heed the demands of the regional organizations after several ultimatums, the organizations independently announced the suspension of Togo from their respective activities and the imposition of sanctions against the country, including a travel ban of the officials of the regime and an arms embargo.<sup>4</sup>

Some non-African countries publicly welcomed the imposition of economic and political sanctions on Togo to force her to comply with the demands of the African governments and regional organizations; and some (such as the United States) also threatened to review their relationships with Togo if the impugned development was not *totally* reversed.<sup>5</sup>

The weight of regional and international pressure on Togo eventually forced Faure Gnassingbe to vacate the office of acting President of the Republic of Togo on 26 February 2005. In his broadcast to the nation he stated tersely: ‘I’ve taken the decision to step down from the office of [acting] President in the interest of Togo...It’s now up to the National Assembly to elect a new head who will be interim [acting] President of the Republic’.<sup>6</sup> Without delay, the Deputy President of the National Assembly, Abass

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Gnassingbe had been appointed Head of State. For his part, the Prime Minister of the country allegedly announced in a radio broadcast the closure of the country’s airports, seaports and land frontiers ‘until further notice’, warning that the armed forces of the country were determined to maintain order. The order of closure allegedly had the effect of shutting out the President of Parliament (the National Assembly) who was outside the country, as he could not return to the country. In a statement issued by ECOWAS after a meeting of ECOWAS leaders held in Niamey, capital of Niger Republic, on the developments in Togo, the organization stated: ‘The heads of state strongly condemn the military intervention which led to Faure Gnassingbe being installed as the successor to the deceased President...They agree that this constitutes a *coup d’état* and they condemn the subsequent manipulation of the constitution by Parliament’.

1. Interestingly, some of the relevant instruments were made in Togo.
2. See ‘Togo: West African leaders condemn coup, demand return to old constitution’ (*IRIN News*, 10 February 2005, <[http://www.irinnews.org/report.asp?ReportID=45485&SelectRegion=West\\_Africa](http://www.irinnews.org/report.asp?ReportID=45485&SelectRegion=West_Africa)>).
3. See ‘Togo’s Assembly reverses self, Faure ready to contest’ (*The Guardian*, 22 February 2005); available online at: <<http://www.guardiannewsngr.com/news/article02>> (accessed 22/02/05); ‘Togo amends constitution, plans elections’ (*Daily Independent Online*, 22 February 2005; available at: <<http://odili.net/news/source/2005/feb/22/428.html>>).

4. See Gabi Menezes, ‘African Group Imposes Sanctions on Togo’ (*VOA News*, 20 February 2005); available online at: <<http://www.voanews.com/english/2005-02-20-voa12.cfm>> (accessed 04/04/05). The Economic Community of West African States was the first to announce the imposition of sanctions on Togo, and this was shortly followed by the African Union (AU). See ‘AU Set to Hold Meeting on Togo’ (*VOA News*, 24 February 2005); available online at: <<http://www.voanews.com/english/2005-02-24-voa7.cfm>> (accessed 04/04/05).
5. See Saxone Akhaine, ‘US, EU back sanctions on Togo, Nigeria rules out war’ (*The Guardian*, 21 February 2005); available online at: <<http://odili.net/news/source/2005/feb/21/11.html>> (visited 23/02/05). The United States also announced that it had ended all military assistance to Togo as part of its reaction to the politico-constitutional development in the country. For its part, the European Union (EU) specifically stated in a press release that ‘in the absence of progress, the EU reserves the right to take measures to support the action of ECOWAS’. See ‘EU threatens sanctions against Togo’ (*The Punch*, 24 February 2005), available online at: <<http://odili.net/news/source/2005/feb/24/521.html>> (accessed 24/02/05).
6. See ‘Togo’s interim leader steps down’ (*BBC News online*, 26 February 2005), available at: <<http://news.bbc.co.uk/2/hi/africa/4299731.stm>>. He also explained that he took the decision to step down in order to ensure the transparency of the presidential election which was due in April, in which he planned to stand as a candidate.

Bonfoh, was elected the new President of the National Assembly, and thus acting President of Togo, who would oversee the conduct of the presidential election scheduled to be held on 24 April 2005.<sup>1</sup>

Interestingly, Faure Gnassingbe eventually became the substantive President of Togo on 4 May 2005 when he was officially sworn into office,<sup>2</sup> after winning the presidential election of 24 April 2005.<sup>3</sup> In any case, some commentators have described the reversal of the constitutional amendment that awarded him three years 'interim presidency' and his eventual stepping down from office as acting President as a 'victory for democracy in Africa'.<sup>4</sup> This may well be so. However, it is important to reflect on some of the international law issues intertwined with the whole episode, particularly as this can provide some insights which might be useful in the conduct of international relations between States – particularly between African States – as well as in

the consolidation of democracy in Africa. This work seeks to briefly consider or reflect on some of the issues as indicated below.

From the foregoing, one of the most important questions that arise is whether the impugned succession was a violation of regional-international instruments in the field of democracy and good governance, as claimed by African leaders and regional organizations. Other important and related questions include: whether the removal of Fambare Ouattara Natchaba from office as President of the Togolese National Assembly was constitutionally valid; whether the first constitutional amendment was valid; whether the constitutional amendment, if unconstitutional, can be justified by the doctrine of state necessity; and whether other countries (particularly African countries) can inquire into these issues without violating fundamental principles of international law. We will attempt to answer these and related questions here, and this will be done against the background of relevant regional-international instruments on democracy and good governance and some other relevant principles of international law – particularly the principles of sovereign equality and non-interference in the internal affairs of a sovereign State. However, for broader analytical reach it is instructive to locate the recent developments in the historical background of Togolese political upheaval and the efforts of the international community to tackle the situation in the past. This will be our point of departure.

## 2. Politico-Constitutional Antecedents of the Recent Developments

The recent politico-constitutional developments in the Republic of Togo can better be appreciated by a brief excursus into the politico-constitutional antecedents of the country. To begin with, the country was at one time a German colony and later became partly a British protectorate and partly a French protectorate.<sup>5</sup> By a French statute of 1955, French Togo

1. See 'Togo: Bonfoh Replaces Faure' (*The Guardian*, 27 February 2005); available online at: <<http://www.guardian-newsng.com/news/article04>> (accessed 27/02/05).

2. It will be recalled that he was first sworn in as acting President of Togo in February 2005. See 'Togo president, Faure Gnassingbe, sworn in – again', <<http://naijanet.com/news/source/2005/may/4/1009.html>>. Prodded by African leaders, particularly President Obasanjo of Nigeria, to form a government of national unity in order to soothe angry opponents and thereby ensure peace and unity in the country, the new President spent some weeks negotiating with the opposition parties in the country. At the end, however, not much was achieved. Among others, the new President appointed his brother, Kpatcha Gnassingbe, as Minister of Defence and Edem Kodjo (former Prime Minister under President Gnassingbe Eyadema) as Prime Minister. See 'Togo: Hard-line Gnassingbe Loyalists and Opposition Defectors Dominate New Government', <<http://allafrica.com/stories/printable/200506210700.html>> (accessed 22/06/05).

3. The presidential election of 24 April 2005 was contested by four candidates, including Faure Gnassingbe (presidential candidate of the ruling party – Rally of Togolese People (RPT)), whose main opponent was the candidate of a coalition of some opposition political parties, Emmanuel Bob-Akitani. The final results, as confirmed by the country's Constitutional Court, showed that Faure Gnassingbe won the election with 60 per cent of the votes cast while his closet rival, Emmanuel Bob-Akitani, won 38 per cent. In certifying the provisional result released by the electoral commission of Togo, the Constitutional Court of Togo dismissed an appeal against the result filed by Emmanuel Bob-Akitani as lacking 'substance, evidence and merit'. More specifically, the court noted that 'according to the Constitution [of Togo], the candidate with the majority of votes must be declared President', and accordingly declared Faure Gnassingbe as the 'legally elected new President of Togo'. For information on the facts stated here, see 'Court upholds Togo election results', <<http://naijanet.com/news/source/2005/may/4/1004.html>> (accessed 11/05/05).

4. See report in 'Togo: Bonfoh Replaces Faure' (*The Guardian*, 27 February 2005), *supra*.

5. By an 1884 treaty signed in Togoville Germany proclaimed a protectorate over a stretch of territory which includes the present Republic of Togo. During World War I, German Togoland (as the territory was called) was invaded by French and British forces and taken over. At the end of World War I Togoland became a League of Nations mandate divided for administrative purposes between France and Britain. Later, at the end of World War II, the mandate became a United Nations trust territory administered separately by Britain and France – specifically, the west was under British administrative control from the Gold Coast (Ghana) and the east

became an autonomous republic within the French Union, and in 1957 British Togoland voted to join the Gold Coast as part of Ghana. On 27 April 1960, French Togoland became an independent country as the Republic of Togo.

Since becoming independent, the country has experienced political upheaval. The independent Constitution established an executive President, elected for seven years by universal adult suffrage, and a National Assembly (Parliament). Importantly, the Constitution provided for a multi-party political system. However, exclusionary politics which, as shall be seen below, came to characterize elections in the country, started early, as the political party (*Parti Togolaise du Progres*) led by Nicolas Grunitzky (who was the leader of the country between 1956 and 1958) was disqualified from participating in the elections held to usher in independence in Togo. In the event, Sylvanus Olympio's party, being unopposed, won all 51 National Assembly seats, and he became the first executive President of independent Togo. Thus, Togo was effectively a one-party State and this, coupled with austere economic policies and the anti-military sentiments of President Olympio,<sup>1</sup> set the background for the first military coup in Africa, which occurred in the country in January 1963, when the country's non-commissioned army officers, led by Lt. Co. Etienne Eyadema (later known as Gnassingbe Eyadema), assassinated President Olympio.

After the coup, the coupists restored Nicolas Grunitzky to power. Having regard to the political developments in the country and the need to tackle the problems thereby generated and unite the country, the new President formed a government in which all political parties were represented. Unfortunately, his second period in power was marred by political cleavages and economic problems, both of which resulted in popular resentment of his government and popular demonstrations. Not surprisingly,

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(corresponding to the present-day Togo) was under French administrative control as French Togoland.

1. The President refused to allow Eyadema and other Togolese soldiers, mostly from the northern part of the country, who returned from the war of independence in Algeria, entry into the Togolese army on the grounds that their participation in the war, alongside French soldiers, against Algerian independence fighters, was a betrayal of the African liberation movement. Remarkably, it was commonly perceived that the ban was because the soldiers came from the minority ethnic groups in northern Togo, and this probably explains why the coup was led by northern soldiers.

on 13 January 1967 (after four years in office) he was ousted by Lt. Co. Etienne Eyadema in a bloodless military coup,<sup>2</sup> and a military government was established – headed by Eyadema. With this development, all political parties were banned and all constitutional processes suspended. Thus began Eyadema's 38 successive years in power.

In 1969, Eyadema began to move towards entrenching himself as the permanent leader of the country and towards wearing the toga of a legitimate leader. He created a single national party (called *Rassemblement du Peuple Togolais*<sup>3</sup> (RPT)), and was elected its President. In 1979, he proclaimed the country's Third Republic and announced a transition to increased civilian rule. Even so, he continued to rule the country autocratically. However, from the early 1990s, following international political developments,<sup>4</sup> internal and external pressures (including economic sanctions – suspension of development aid) to democratize, Eyadema was forced to take some steps towards the democratization of Togo.

The movement towards democratization started with discussions between the Togolese government and opposition groups in the country on the way forward, and the parties reached an agreement on 12 June 1991 to convene a national conference on the political and constitutional future of the country. The conference, held on 26 June 1991, elected Joseph Kokou Koffigoh as Prime Minister and planned elections for June 1992. Notably, while Koffigoh enjoyed popular support and international recognition, he was, however, criticised for nepotism and corrupt practices.<sup>5</sup> More importantly, although the convocation of the conference was a big gain for the opposition groups in Togo, as Eyadema was stripped of virtually all his erstwhile political powers

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2. Many commentators suggest that his leadership style, which brought political problems and economic woes to the country, provided justification for the coup.

3. The English translation of this French name is Rally of Togolese People (RPT).

4. Before the 1990s most African countries were under dictatorial regimes – military governments or one-party governments – and were mostly sustained by USSR during the cold-war between the West and the East. One of the most important international political developments of the early 1990s was the fall of communism and the concomitant decline in the geo-strategic importance of African countries. Importantly, this largely contributed to the wind of democracy which began to sweep through African countries from the early 1990s.

5. In an effort to secure his power base, he appointed people from his home region to head State enterprises.

as Head of State of Togo, the radical approach of the (opposition) delegates in declaring the conference sovereign, trying to change political structures by decree, and keeping the (powerful) armed forces of the country out of the negotiating process, worked against achieving genuine national support for that significant development, and provided grounds for military action against Prime Minister Koffigoh. His house was bombed by the army and he was arrested. Other opposition politicians were also hunted by the army (it is notable that the Togolese army was made up largely of people from Eyadema's region and ethnic group and had unflinching personal loyalty to Eyadema),<sup>1</sup> which actively supported Eyadema's regime. Some of these political developments were well summarized by a commentator as follows:

In June 1991, a national conference modelled on one that had just taken place in Benin was convened. It resulted in a new government headed by Joseph Koffigoh and planned fresh elections for 1992. Eyadema had been effectively stripped of most of his power, though his grip on the army, which he had built up since 1963 with members of his own ethnic group, the Kabye, remained strong. It took only months before the fragile power of the new government and the military might of the Eyadema-controlled army resulted in a series of so-called spontaneous uprisings in October 1991 by the army that included assaults on the Prime Minister's residence, bombings against democratic leaders, and destruction of electoral material.<sup>2</sup>

In consequence of all of this, Eyadema regained his political power and the upper hand in the country's power struggle. Apart from this, the military campaigns disrupted the progress of the conference and the elections planned for June 1992 could not be held.<sup>3</sup> Significantly, a new Constitution was overwhelmingly approved in a nationwide referendum in September 1992.<sup>4</sup> Importantly, this Constitution provides for a multi-party political system, thereby legally ending more than 20 years of one-party rule by the RPT. Additionally, it created a system of checks and balances among the various arms of

government and limited the presidential mandate to two five-year terms.

Notwithstanding the making of the new Constitution, the Togolese military continued to disturb the march towards democracy by brutalizing and killing people – particularly opposition supporters. According to one account, the reign of terror continued well into 1992, including an assassination attempt on Gilchrist Olympio, who was Eyadema's foremost rival and long-time foe, as well as members of Koffigoh's Cabinet, who fled the country in droves with their supporters to seek refuge abroad.<sup>5</sup> In demonstration of anger at the turn of events, the Togolese population staged a mass general strike from mid-November 1992 to protest the stalled democratization, and this lasted for six months.<sup>6</sup> Even so, the reign of terror did not abate, causing more people to flee from Togo to neighbouring Ghana and Benin.

In January 1993, France and Germany attempted a joint intervention/mediation to resolve the political impasse by sending their Ministers of Cooperation to Togo, but this failed as the Togolese army opened fire on a large crowd that had gathered to welcome the Ministers, as a result of which the Ministers were forced to flee the country.<sup>7</sup> In all these circumstances, it was obvious that no meaningful and credible elections could be held. However, as it happened, notwithstanding that many eligible voters had fled the country a presidential election was held in August 1993 in which Eyadema was the only candidate, as the main opposition challenger, Gilchrist Olympio, was not allowed to contest and other opposition presidential candidates (including Edem Kojo and Yao Agboyibor) boycotted the election.<sup>8</sup> In fact, from all indications, it was clear that Eyadema was desperate to cling to political power and was responsible for the actions of the military. The unacceptable political developments led the international community, particularly the European

1. As reported by many international newspapers and human rights NGOs, on 11 April 1991 Togolese soldiers pushed a number of pro-democracy demonstrators into the *Be lagoon* of Lome, where they drowned.

2. Joshua Walker, 'Sanctioning Politics and the Politics of Sanctions: The EU, France and Development Aid in Togo' (2003); available online at: <[http://www.uwc.ac.za/ECSA-SA/docs/walker\\_final.doc](http://www.uwc.ac.za/ECSA-SA/docs/walker_final.doc)> (accessed 29/06/05).

3. Ibid.

4. The Constitution was approved by 84 per cent of Togolese voters.

5. See Morten Hagen and Michelle Spearing, 'Togo: Stalled Democratic Transition' (Centre for Democracy & Development, 2000); available online at: <<http://www.diastode.org/Droits/cdd.html>> (accessed 27/06/05).

6. See Kodjo Koffi, 'Togo: les deux ruptures de la coopération (1993 et 1998)', *Afrique Contemporaine*, Jan-Mar 1999 (189), 63-76.

7. See Joseph Walker, 'Sanctioning Politics and the Politics of Sanctions: The EU, France and Development Aid in Togo', *supra*.

8. See Associated Press, 'France, IMF, Renew Aid to Togo Military Dictatorship' (18 September 1994).

Union (EU) and member countries, to apply more economic sanctions on Togo in order to force Eyadema to democratize.<sup>1</sup>

Having won the 1993 presidential election in such illegitimate circumstances,<sup>2</sup> Eyadema continued his dictatorial rule of Togo and embarked on widespread human rights abuses to sustain his rule. Remarkably, the opposition parties, though uncoordinated and disunited, continued to challenge his political dominance. In the 1994 parliamentary elections, which followed the presidential election of 1993, the opposition was successful in winning a majority of seats. Encouraged by this gain, the opposition parties actively participated in another presidential election held in 1998. The election was under the management of an independent electoral commission and the EU deployed several observers throughout the country. Everything seemed to have gone well with the election, which appeared to have taken place according to international norms. However, before the conclusion of the counting process the government reportedly dismissed the electoral commission and declared that Eyadema has won re-election with 52 per cent of the vote. Contrary to this, it was widely believed by the opposition parties and the international community that the election was won by Gilchrist Olympio, the presidential candidate of *Union des Forces de Changement* (UFC) and son of the first President of Independent Togo who was assassinated in 1963.<sup>3</sup>

The disputed election result naturally caused a lot of tension in the country, and the international community once again moved to normalize the political climate. Following internationally facilitated negotiations, Eyadema and six opposition leaders signed the *Accord Cadre de Lome* (ACL) in July 1999 – The Lome Framework Agreement – which created

structures and processes for resolving the country's political problems and the lifting of international (economic and political) sanctions. Among other things, the Accord called for a consensus-based electoral code and the creation of a new independent national election commission, with equal representation between government and opposition parties. Apparently in the spirit of the new Accord, Eyadema, in the presence of French President Chirac, publicly declared that he would retire in 2003. In essence, he vowed that he would not contest the next presidential election due in 2003, and repeated this several times up until 2001.<sup>4</sup> Importantly, this was a declaration of intent to respect the constitutional provision which limits a President to two five-year terms.

Unfortunately, the Lome Accord was not respected by Eyadema and his cronies nor, as will be seen, did he keep his vow to retire in 2003. In October 2002 parliamentary elections – which had been delayed several times – were held, boycotted by the traditional opposition parties which were frustrated by the way the government had violated the Lome Accord (among other things, by unilaterally amending the electoral code and the composition of the Independent National Electoral Commission). Regrettably, the boycott enabled Eyadema's RPT to record a 'resounding victory' at the polls – being 'challenged' only by newly formed, government-sponsored opposition parties. With this 'victory', the RPT-dominated National Assembly began to make significant changes to the 1992 Constitution. For example, in December 2002 it revoked the two-term limit rule on the presidency, apparently to provide room for Eyadema to run again in 2003.<sup>5</sup> Moreover, a 12 months residency requirement for presidential candidates was added to the Constitution (Article 62), with the practical effect of barring opposition leader Gilchrist Olympio (who has lived in exile since barely surviving an assassination attempt in 1992) from contesting.<sup>6</sup> The US-based National Democratic Institute for International Affairs (NDI) has rightly observed that 'the speed with which the National Assembly developed, debated, and approved the...constitutional changes caught

1. See Joseph Walker, 'Sanctioning Politics and the Politics of Sanctions: The EU, France and Development Aid in Togo', *supra*.

2. Notable foreign observers, including former United States President Jimmy Carter, decided against observing the 1993 elections, citing lack of significant opposition participation and inadequate preparation for a meaningful election. See <[http://www.accessdemocracy.org/library/831\\_tg\\_statements\\_090193.pdf](http://www.accessdemocracy.org/library/831_tg_statements_090193.pdf)>.

3. See National Democratic Institute for International Affairs (NDI), 'Togo Political Assessment Mission' (NDI, 2–9 December 2002). This is an important and interesting document and can be found online at: <[http://www.accessdemocracy.org/NDI/library/1553\\_tg\\_assessment\\_120902.pdf](http://www.accessdemocracy.org/NDI/library/1553_tg_assessment_120902.pdf)> See also Joseph Walker, 'Sanctioning Politics and the Politics of Sanctions: The EU, France and Development Aid in Togo', *supra*.

4. See his interview with Agence France-Presse, July 2001.

5. See Constitution of the Republic of Togo 1992, Article 59 (as amended by Law No. 2002-029 of 31 December 2002).

6. There was also a change to the presidential election system in a way that was favourable to Eyadema (Article 60).

the opposition – and many other Togolese and international observers – by surprise'.<sup>1</sup>

As already indicated above, notwithstanding his public declaration to retire in 2003, Eyadema contested the 2003 presidential election and won amid widespread allegations of electoral malpractices (including vote rigging). Specifically, opposition supporters declared that Emmanuel Bob-Akitani (designated by Gilchrist Olympio who could not run because of the 12 months residency requirement) had won the election.<sup>2</sup> As stated above, Eyadema died about two years into this third-term tenure. Importantly, the position of opposition groups in Togo, ECOWAS, AU, African countries and the general international community on the recent developments in Togo (as stated above) can partly be explained against the background of these antecedents and partly by the provisions of regional instruments in the field of democracy and good governance (see below).<sup>3</sup>

### 3. Regional Instruments on Democratic Principles in Africa

By several recent instruments – statements of principles, declarations, and agreements – African countries have committed themselves to the practice of democratic governance. A few examples will suffice to illustrate this point.<sup>4</sup> Firstly, under the New African Initiative (now referred to as New Partnership for Africa's Development (NEPAD))<sup>5</sup> African leaders undertook (through the Declaration on Democ-

racy and Good Political Governance)<sup>6</sup> to promote democracy and its core values as well as the respect for human rights in their respective countries. Importantly, this instrument commits the whole of Africa to respect the global standards of democracy, the core components of which include political pluralism and fair, open and democratic elections periodically organized to enable the people to choose their leaders freely. More specifically, it commits African leaders to take joint responsibility 'to promote and protect democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participative governance at the national and sub-national levels'.<sup>7</sup> In pursuance of this, the leaders agreed to 'enforce strict adherence to the position of the African Union on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security'.<sup>8</sup> On the whole, the instrument lays emphasis on the promotion of human rights 'in conformity with the constitution'.<sup>9</sup>

Secondly, in the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, African Heads of State and Government also stated their commitment to the practice and pursuit of democracy.<sup>10</sup> In the preamble of this Declaration, they noted that they 'have undertaken a review of the political developments on the continent and in particular the state of consolidat-

conceived as 'a Vision and Strategic Framework for Africa's renewal'.

1. See National Democratic Institute for International Affairs (NDI), 'Togo Political Assessment Mission', supra. See also Pascal Dotchevi, 'Togo: The Catholic Church's moment of truth'; <<http://www.africafiles.org/printableversion.asp?id=1925>> (accessed 03/07/05). This was a message issued on 19 March 2003 by the Bishops' Conference of Togo, before the presidential elections scheduled to be held on 1 June 2003.

2. See National Democratic Institute for International Affairs (NDI), 'Togo Political Assessment Mission', supra, and sources cited therein.

3. The position of African countries and African regional organizations on the recent Togolese politico-constitutional situation can also be explained in security terms – the desire to avoid the experience of Liberia, Sierra Leone and Côte d'Ivoire, where political crises had led to the outbreak of civil wars that affected neighbouring States and later threatened regional security and necessitated regional intervention to ensure the return of peace.

4. For more information, see the official documents of the African Union at: <<http://www.africa-union.org/home/Welcome.htm>>.

5. Adopted by the Assembly of African Heads of State and Government in Lusaka, Zambia, in July 2001. NEPAD was

6. See *Declaration on Democracy, Political, Economic and Corporate Governance* (AHG 235 (XXXVIII) Annex I); adopted by the Participating Heads of State and Government of the Member States of the African Union at the inaugural meeting of the Assembly of the African Union in Durban, South Africa, 9–10 July 2002 – available online at: <<http://nepad.org/documents/41.pdf>>.

7. Ibid. This commitment was acknowledged in the preamble to the *Declaration on the Principles Governing Democratic Elections in Africa* (made by the Assembly of Heads of State and Government, 38<sup>th</sup> Ord. Sess., OAU Doc. AHG/Decl. 1(XXXVIII), Durban, South Africa (2002), para. II (4) (a) and (b)); available online at: <[http://www.au2002.gov.za/docs/summit\\_council/oaudec2.htm](http://www.au2002.gov.za/docs/summit_council/oaudec2.htm)>.

8. Ibid. (Declaration on Democracy, Political, Economic and Corporate Governance).

9. Ibid.

10. See Organisation of African Unity (OAU), *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* (made by the Assembly of Heads of State and Government, 36<sup>th</sup> Ord. Sess., OAU Doc. AHG/Decl.5 (XXXVI), Lome, Togo (2000), available online at: <[http://www.au2002.gov.za/docs/summit\\_council/lome2.htm](http://www.au2002.gov.za/docs/summit_council/lome2.htm)>.

ing democracy in Africa', and expressed their 'grave concern about the resurgence of *coup d'état* in Africa'. Importantly, they 'recognize that these developments are a threat to the peace and security of the continent and they constitute a very disturbing trend and serious setback to the on-going process of democratisation in the continent'.<sup>1</sup>

Substantively, this Declaration proclaims a continent-wide commitment to democracy and proceeds to give substance to that commitment by setting out 'common values and principles for democratic governance' in African countries, including respect for the constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament; promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process; the principle of democratic change and recognition of a role for the opposition; and the organization of free and regular elections, in conformity with existing texts. Recalling OAU Decision AHG/Dec. 141(XXXV) adopted during the Thirty-Fifth Ordinary Session of the Assembly of the OAU,<sup>2</sup> this Declaration unequivocally and unanimously rejects any unconstitutional change in government as an 'unacceptable and anachronistic act' and a contradiction of Africa's commitment 'to promote democratic principles and conditions'.<sup>3</sup>

Similarly, in the Protocol of the Economic Community of West African States (ECOWAS) on De-

mocracy and Good Governance<sup>4</sup> the Heads of State and Government of the Member States declared – as part of the 'constitutional convergence principles' of all Member States – that 'every accession to power must be made through free, fair and transparent elections'.<sup>5</sup> To complement this, they declared their commitment to 'zero tolerance for power obtained or maintained by unconstitutional means'.<sup>6</sup>

Furthermore, the commitment of African leaders (and their peoples) to promote and practise democracy can also be found in the Constitutive Act of the African Union.<sup>7</sup> The preamble to this document expressed the determination of the African leaders to 'consolidate democratic institutions and culture and to ensure good governance and the rule of law'. Accordingly, one of the declared objectives of the new organisation (which recently replaced the Organisation of African Unity (OAU)) is the 'promotion of democratic principles and institutions, popular participation and good governance' (Article 3(g)). In unequivocal terms, the leaders agreed that 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union' (Article 30).

More recently, African Heads of State and Government have made further commitments to practise democracy in an instrument called Declaration on the Principles Governing Democratic Elections in Africa,<sup>8</sup> which reaffirms the principles of democratic governance in earlier instruments and asserts, *inter alia*, that 'democratic elections should be conducted: (a) freely and fairly; (b) under democratic constitutions and in compliance with supportive le-

1. Ibid.

2. Adopted by the Thirty-Fifth Ordinary Session of the Assembly of OAU Heads of State and Government in Algiers, 12–14 July 1999. See also Decision AHG/Dec. 142(XXXV) adopted at the same Session. Note that both Decisions are against 'unconstitutional change of government'.

3. Remarkably, the *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* is in accord with section 1(2) of Nigeria's current (1999) Constitution, which provides that 'the Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution'. In the *Lome Declaration*, adopted by the Assembly of Heads of State and Government at the 36<sup>th</sup> Ord. Session of the Assembly of the OAU on 12 July 2000 in Lome, Togo, African leaders reiterated their 'determination to continue to promote respect and protection of human rights and fundamental freedoms, democracy, rule of law and good governance' in African countries. For the full text of this democracy-related instrument, see OAU Doc. AHG/Decl.2 (XXXVI) available online at: <[http://www.au2002.gov.za/docs/summit\\_council/lome2.htm](http://www.au2002.gov.za/docs/summit_council/lome2.htm)>.

4. *Protocol A/SP1/12/01* (done at Dakar 21 December 2001).

Note that this is a Supplementary Protocol to the *Protocol on the Mechanism for Conflict Prevention, Management and Resolution* (done at Lome, Togo, 10 December 1999). See also the *Declaration of the Political Principles of ECOWAS* (Declaration A/DCL.1/7/91), made at the 14<sup>th</sup> Session of the Authority of Heads of State and Government, Abuja, 4–6 July 1991.

5. Article 1(b).

6. Article 1(c).

7. African Union, *Constitutive Act of the African Union*, July 2000, CAB/LEG/23.15 (entered into force on 26 May 2002) available online at: <[http://www.au2002.gov.za/docs/key\\_oau/au\\_act.pdf](http://www.au2002.gov.za/docs/key_oau/au_act.pdf)>. The Act was adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government on 11 July 2000, in Lome, Togo.

8. See OAU/AU, *Declaration on the Principles Governing Democratic Elections in Africa* (made by the Assembly of Heads of State and Government, 38<sup>th</sup> Ord. Sess., OAU Doc. AHG/Decl 1 (XXXVIII), Durban, South Africa (2002), available online at: <<http://www1.umn.edu/humanrts/africa/ahg171-184.html>>.

gal instruments; (c) under a system of separation of powers that ensures in particular, the independence of the judiciary; (d) at regular intervals, as provided in national constitutions; and (e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics' (Para. II (4)).

Although Declarations are regarded as 'soft-law' (not legally binding), and not 'hard-law' (treaties or conventions, which are legally binding), it is arguable that the consistency of the Declarations indicates a clear intention to be bound by them. In fact, the intention to be bound was clearly stated in the Declaration on Democracy, Political, Economic and Corporate Governance.<sup>1</sup> Moreover, it is now well-established that Declarations of the principal organs of an international organization (such as the United Nations (UN) General Assembly or the Assembly of the OAU/AU) are one of several ways to indicate State practice, as evidence of customary international law – in this case, for the countries of the African continent. In any case, the Declarations would appear to have received hard-law expression or adoption in the Constitutive Act of the AU, as seen above. Importantly, it is also specifically provided under article 23 of the Act that 'any Member State that fails to comply with the *decisions and policies* of the Union may be subjected to... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'.

Finally, it is noteworthy that the Republic of Togo is a State Party to all the foregoing instruments and, in fact, played important parts in the formulation of some of them.<sup>2</sup>

#### 4. Some Basic Principles of International Law: In a Nutshell

The 1945 Charter of the United Nations (UN) is the Constitution of this international organization. Among other things, it sets out the purposes and operational principles of the organization as well

as the rights and obligations of Member States. In other words, it is the primary source of the principles of international law; the reference point for the conduct of international relations between the subjects of international law – particularly States. Unfortunately, however, although it is now 60 years since its adoption, there is yet no agreement on the meaning or interpretation of some of its provisions. For instance, there is no unanimity on the interpretation of Article 51 of the Charter dealing with the issue of when force can lawfully be used. By implication, some areas of international law do not yet have settled principles. In any case, some basic principles of international law (derived from the UN Charter) can be found in the Declaration on Principles of International Law Concerning Friendly Relations, adopted consensually by Member States of the UN in 1970.<sup>3</sup> This Declaration contains among other things, the principles of 'sovereign equality' and 'non-interference in the internal affairs of a sovereign State'. On the principle of sovereign equality of States, it was declared:

All States enjoy sovereign equality. They have rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:

- a. States are judicially equal;
- b. Each State enjoys the rights inherent in full sovereignty;
- c. Each State has the duty to respect the personality of other States;
- d. The territorial integrity and political independence of the State are inviolable;
- e. Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- f. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

1. See *Declaration on Democracy, Political, Economic and Corporate Governance* (AHG 235 (XXXVIII) Annex I), para. 3 of the preamble thereto.

2. Togo also played an historically important role in the formation of the regional organizations, particularly ECOWAS. For information, see the profile of the Economic Community of West African States (ECOWAS) at: <[http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/ecowasprof.htm](http://www.iss.co.za/AF/RegOrg/unity_to_union/ecowasprof.htm)>.

3. See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (UNGA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1971) – adopted by consensus on 24 October 1970.

Relating to the principle concerning the duty not to intervene in matters within the domestic jurisdiction (internal affairs) of any State, this Declaration states:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

Other relevant and related principles of international law stated in the Declaration include the following:

1. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.
2. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.
3. Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international disputes.

Similar principles can be found in Article 4 of the Constitutive Act of the African Union, which states the principles according to which the organization is to function, including the following:

- a. Sovereign equality and interdependence among Member States of the Union;
- b. Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;

- c. Prohibition of the use of force or threat to use force among Member States of the Union;
- d. Non-interference by any Member State in the internal affairs of another;
- e. 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;
- f. Peaceful co-existence of Member States and their right to live in peace and security;
- g. Respect for democratic principles, human rights, the rule of law and good governance;
- h. Condemnation and rejection of unconstitutional changes of governments.

Moreover, Article 4 of the *Protocol Relating to the Establishment of the Peace and Security Council* (PSC) of the AU<sup>1</sup> – an institution/organ of the AU established to provide an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention as well as peace-building and post-conflict reconstruction<sup>2</sup> – provides that the PSC shall be ‘guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights’, particularly the principles of ‘respect for the sovereignty and territorial integrity of Member States’, ‘non-interference by any Member State in the internal affairs of another’ and ‘sovereign equality’, among others.

It should be noted that the principles of sovereign equality and non-interference in the ‘domestic/internal affairs’ of a sovereign State can be said to be fundamental principles of international law. In fact, most other principles of international law are based on the recognition of these principles, the latter of

1. The Protocol was made pursuant to Article 8 of the Constitutive Act of the African Union.

2. See *Protocol Relating to the Establishment of the Peace and Security Council* (PSC) of the African Union (preamble). The Peace and Security Council (PSC) was established pursuant to Article 5(2) of the Constitutive Act of the AU. The full text of this Protocol, which was adopted by the 1<sup>st</sup> Ordinary Session of the Assembly of the African Union in Durban, 9 July 2002, can be found online at: <[http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Protocol\\_peace%20and%20security.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol_peace%20and%20security.pdf)>. It is important to mention that one of the objectives of the PSC is the promotion and encouragement of democratic practices, good governance and the rule of law (Article 3(f)).

which is often regarded as a manifestation of the former. However, as seen above, States are increasingly making regional-international commitments which impinge on their sovereignty. In this context, the crucial question is: What is the effect of such regional-international commitments on the principles of sovereign equality and non-interference in the domestic/internal affairs of a sovereign State? Some authors have suggested that such commitments have the effect of watering down these principles. For instance, Schrijver states that:

...State sovereignty equated as it is with non-interference with domestic jurisdiction and discretion in the legal sphere has become increasingly qualified. Legally, our planet may be split up into almost 200 sovereign States (apart from some international areas, such as the high seas, the deep sea-bed and perhaps Antarctica), but in practice the world is now recognized as being interdependent on many different levels...*States are intertwined in a network of treaties and other forms of international co-operation, which qualify the range of matters that according to Article 2.7 of the UN Charter are 'essentially within the domestic jurisdiction of the State.'*<sup>1</sup> (Italics added.)

A similar view has also been expressed in the 7<sup>th</sup> edition of Akehurst's seminal book on international law, to the effect that the doctrine of State sovereignty is losing much ground in view of increasing international interdependence.<sup>2</sup>

In the present context, the implication of the above views would appear to be that Togo's regional-international commitments in the field of democracy and good governance could justify interference or intervention in her domestic affairs. Even so, the question that arises is whether the basic and long-established principles of sovereign equality and non-interference in the domestic affairs of a sovereign State are thereby devoid of any validity or effect. If not, to what extent can they be said to have been justifiably affected? This work will attempt to answer some of these questions as we seek to address the earlier ones stated above.

## 5. Faure's Succession: Validity of the Removal of Fambare Ouattara Natchaba from Office

One important question that arises from the recent events in Togo is whether the removal of Fambare

Ouattara Natchaba from office as the President of the Togolese National Assembly and his replacement with Faure Gnassingbe was constitutionally valid. Although many critics, particularly ECOWAS and AU officials and Member States of these organizations, have described the removal as unconstitutional, nobody contends that the National Assembly did not have the constitutional or inherent right to remove its leader from office (to be sure, such a contention would not only be otiose, it would also be offensive to the tenets of democracy). In fact, Article 54 of the Togolese Constitution provides that the President of the National Assembly shall be elected by members of the Assembly (called Deputies) for the duration of the legislature on 'the conditions set by the internal regulation' of the Assembly. More importantly, it provides that where a vacancy occurs in the office of the President of the National Assembly 'due to death, resignation or *any other cause* [which undoubtedly includes when the President is removed from office by the Deputies]', the Assembly 'shall elect a new President within fifteen (15) days following the vacancy, if it is in session; otherwise, it shall meet as of right under the conditions set out by its internal regulation'.

Democratically speaking, although it is legitimate to insist that such a removal can only be for a good cause and in compliance with constitutional and/or statutory provisions, even so, from the experience of some African countries, it is doubtful – without a specific constitutional or statutory provision (as is the case in Togo) – if the national courts can intervene in a case of alleged wrongful removal. For instance, in Nigeria the removal of the Speaker/President of a legislative arm of government, whether at the national or state level, is regarded as a matter within the domestic jurisdiction of the legislature concerned in which neither the court nor the executive can interfere. According to section 50(2)(c) of the 1999 Constitution of Nigeria, 'the President or Deputy President of the Senate or the Speaker or Deputy Speaker of the House of Representatives (Nigeria's National Assembly is composed of a bicameral legislature – namely, the Senate and the House of Representatives) shall vacate his office 'if he is removed from office by a resolution of the Senate or of the House of Representatives, as the case may be, by the votes of not less than a two-thirds

1. Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997), p. 2.

2. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> ed. (London: Routledge, 1997), p. 18.

majority of the members of that House'.<sup>1</sup> Perhaps it is in recognition of the fact that the issue is one exclusively within the internal domain of the legislature concerned that the Constitution did not stipulate any grounds for such removal.<sup>2</sup> Notably, between 1999 and 2005 several Presidents/Speakers of Nigeria's legislative houses have been removed from office (impeached) without any interference by either the court or the executive arm of government,<sup>3</sup> notwithstanding that some of the removals were allegedly without any reasonable basis.

Importantly, even after Faure Gnassingbe had stepped down from office and Abass Bonfoh was elected as the new President of the National Assembly, ECOWAS, AU and some African States initially refused to recognize Abass Bonfoh, insisting that Fambare Quattara Natchaba has not been properly removed from office and urging that he should be restored to office. Crucially, it may be asked whether this does not amount to interference in the domestic jurisdiction (internal affairs) of the Republic of Togo. Apparently, the removal of Fambare Quattara Natchaba from office might have been done in order to facilitate the accession of Faure Gnassingbe to

the presidency and also constitutionally legitimize it. In other words, the impugned removal from office or impeachment might well have been perverse. Even so, the critical question is whether it is legally/constitutionally open to anybody in the country, let alone the international community, to challenge it?

To be sure, there is no specific legal provision in any Togolese law nor is there any in any international or regional instrument on which such challenge can be based. More specifically, none of the regional-international instruments in the field of democracy and good governance can be invoked to support such challenge. Accordingly, it is contended that the challenge of ECOWAS, AU and some African States of the removal of Fambare Quattara Natchaba from office was a violation of international law, particularly the principles of sovereign equality and non-interference in the domestic affairs of a sovereign State. Perhaps it was in recognition of this fact that the regional organizations and the countries that initially opposed his removal eventually came to recognize it as valid, and accepted Abass Bonfoh as a replacement for Faure Gnassingbe. In a press release issued on the matter, ECOWAS specifically stated its acknowledgment of the validity of the removal of Fambare Quattara Natchaba, thus:

The subsequent election of Mr. Abass Bonfoh as Speaker [President] of the National Assembly and interim [acting] President of Togo is a positive development which ensures the full return to constitutional legality.<sup>4</sup>

1. Equivalent provision is made under section 92(2)(c) for the removal of the Speaker/Deputy Speaker of a State House of Assembly.
2. Compare sections 143 and 188 dealing with the removal of the President/Vice President of the federation and Governor/Deputy Governor of a state of the federation.
3. This position is similar to the removal of the President/Vice President of the Federation or Governor/Deputy Governor of a state from office. In this case, with regard to states, section 188(10) of the 1999 Constitution of Nigeria specifically ousts the jurisdiction of the courts on such issues thus: 'No proceedings or determination of the...House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court [of law]'. For similar provision dealing with the removal of the President/Vice President, see section 143(10). Between 1999 and 2005, the Deputy Governors of Lagos State, Abia State, Anambra State, among others, have been removed from office by the State House of Assembly. More recently – specifically on 23 June 2005 – the Akwa Ibom State Deputy Governor was removed from office. See 'Akwa Ibom Assembly removes deputy governor, Ekpenyong' (*The Guardian*, 24 June 2005); available online at: <<http://guardiannewsngr.com/news/article01>> (accessed 24/06/05). Interestingly, a move by the national leadership of the People's Democratic Party (PDP), which controls Akwa Ibom state, to nullify the removal was rebuffed by the Assembly which rightly declared in a press statement that it is the 'exclusive prerogative [of the Assembly] rather than the PDP to impeach the Deputy Governor' and that there was 'no constitutional or legal means that could void' the removal of the Deputy Governor from office. See PDP, 'Akwa Ibom lawmakers spoil for showdown' (*Sunday Champion*, 26 June 2005); available online at: <[http://www.champion-newspapers.com/news/teasers/article\\_1](http://www.champion-newspapers.com/news/teasers/article_1)> (accessed 26/06/05).

## 6. Faure's Succession and Legality of Constitutional Amendment

As stated above, the Togolese Parliament (National Assembly) amended the country's Constitution to allow Faure Gnassingbe to serve the remainder (3 years) of his late father's five-year term. African regional organizations, especially ECOWAS and AU, as well as some African and other countries regarded this constitutional amendment to be invalid. According to the South African President, Thabo Mbeki, the constitutional amendment was an 'unconstitutional charade'.<sup>5</sup> Importantly, the right of

4. See ECOWAS, Press Release No. 15, 26 February 2005 entitled 'Faure Gnassingbe Steps Down ECOWAS Lifts Sanctions'. This press release can be found online at the web-site of ECOWAS at: <<http://www.sec.ecowas.int/presse/en/presseshow.php?nb=15&lang=en&annee=2005>>.

5. See the Address of the President of South Africa, Thabo Mbeki, at the Second Joint Sitting of the Third Democratic Parliament, Cape Town, 11 February 2005; available online at:

the Togolese National Assembly to amend the country's Constitution was not questioned. Nor was it contended that the amendment was not in compliance with constitutional procedures for amendment. On the contrary, what was challenged appears to be the 'motive' of the amendment. Obviously, the impugned constitutional amendment recalls a similar exercise in 2002 (see above). Yet, while lampooning the amendment, no one suggested that 'motive' is a legal ground for challenging a constitutional amendment in Togo. More importantly, it should be underscored that challenging the manner of Faure's interim succession by reference to the provisions of the Constitution constitutes, at least, an implicit acceptance and recognition of the legitimacy of the Constitution of Togo, notwithstanding its antecedents.<sup>1</sup>

Remarkably, although opposition groups in Togo were very vocal in condemning what they alleged was an 'unconstitutional amendment' (and 'unconstitutional succession'), none brought any action in the Togolese courts or in the ECOWAS Community Court of Justice in Abuja, Nigeria (which has jurisdiction to hear complaints from individuals (citizens of Member States) on human rights and related issues against a Member State)<sup>2</sup> to challenge the constitutionality of the actions. Surprisingly, no international player (organization or country) suggested to the opposition elements to go to court to test the validity of the constitutional amendment – a suggestion which would have been consistent with the requirements of constitutional

democracy and the rule of law.<sup>3</sup> In contrast, it will be recalled that when Nigeria's opposition parties as well as international monitors of Nigeria's 2003 elections charged that the elections were marred by electoral malpractices, the US Department of State, for instance, urged the opposition parties to 'present their evidence to the competent tribunals [courts]'.<sup>4</sup> To say the least, it is difficult to appreciate why the same approach was not adopted with regard to the case of Togo. In any case, it is contended that even if the constitutionality of the amendment was challenged in court, it could not rightly have been on the ground of 'ill-motive', as there is no provision in the Togolese Constitution for any inquiry into the 'motive' behind the adoption of 'any legislative measure' – particularly, a legislative measure designed to amend the Constitution.

Notably, similar constitutional changes are currently taking place in Uganda. Already, the members of the Ugandan Parliament have voted overwhelmingly to start a constitutional process to amend the 1995 Constitution of Uganda to remove the presidential term limit of two terms and thereby make way for President Yoweri Museveni whose second term in office ends in 2006 to contest another presidential election and serve a third term if he wins.<sup>5</sup> Perhaps adopting the same reasoning as Togolese pro-Eyadema parliamentarians, supporters of President Yoweri Museveni argued that 'the term limits unfairly deny citizens the opportunity to choose a leader of their choice who could have served beyond the two terms currently provided for in the Constitution'.<sup>6</sup> Importantly, no African country or regional organization has as yet criticized this move, and this clearly suggests that African countries recognize that such issues are within the internal affairs of the country and other countries should not interfere.<sup>7</sup>

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<<http://www.info.gov.za/speeches/2005/05021110501001.htm>> (full text).

1. Although the legitimacy of the Togolese Constitution is part of the contentious politico-constitutional issues in the country, this work proceeds on the basis that the Constitution has been accepted (at least implicitly) by all concerned as legitimate and therefore the reference point for the consideration of the concern of this present work.

2. ECOWAS community citizens were granted direct access to the Community Court by an amendment of Article 9 of the 1991 Protocol which established the court. The amendment was adopted in December 2004 and came into force in January 2005. A Nigerian federal legislator recently brought an action before the court and obtained an interim order which prevented his rival from being sworn in to replace him in the legislature. See 'Ecowas court stops swearing in of Anambra rep, Olujinmi backs ruling' (*BNW News & Archives*, 3 June 2005). See also 'Why I went to ECOWAS Court, by Ugokwe' (*The Guardian*, 30 June 2005), available online at: <[http://www.guardiannewsngr.com/policy\\_politics/article01](http://www.guardiannewsngr.com/policy_politics/article01)> (accessed 30/06/05).

3. ECOWAS Member States also did not think of the need to challenge the alleged unconstitutional succession in the ECOWAS Court of Justice.

4. See 'Poll: Go to tribunal, US tells aggrieved parties' (*The Punch*, 24 April 2003).

5. See 'House Votes for 3<sup>rd</sup> Term' (*New Vision*, 29 June 2005), available online at: <<http://allafrica.com/stories/printable/200506290759.html>> (accessed 30/06/05). The parliamentarians voted 232 for and 51 against the motion for the constitutional amendment.

6. See 'Kisanja Passes 1<sup>st</sup> Vote' (*The Monitor*, 28 June 2005), available online at: <<http://allafrica.com/stories/printable/200506290067.html>> (accessed 30/06/05).

7. On the contrary, the British Prime Minister, Tony Blair, has warned against the plan to permit Yoweri Museveni to serve a third term, saying that 'Uganda should forget about Brit-

More importantly in the present context, it is arguable that challenging the amendment of the Togolese Constitution by the competent authority – the Togolese National Assembly (Parliament) – specifically violates the provisions of the Declaration on the Framework of an OAU Response to Unconstitutional Changes of Government which identifies ‘adherence to the provisions of the law and other legislative enactments adopted by Parliament’ as one of the ‘common values and principles for democratic governance’ in Africa (see above). To be sure, this is consistent with the familiar concept of presuming the regularity of any legislative enactment and, more importantly, implicitly recognizes the principles of State sovereignty/sovereign equality and non-interference in the internal affairs of a sovereign state. In its result, the ECOWAS/AU challenge of the validity of the Togolese constitutional amendment was a blatant interference in the internal affairs of the Republic of Togo.

Perhaps the challenge of ECOWAS and AU (and others) to the validity of the constitutional amendment may be justified on the basis that it violates the ‘spirit’ of the relevant instruments. More specifically, the constitutional amendment can be seen as inconsistent with the instruments which provide that State Parties should respect their national Constitution and that any change of government should only be in accordance with the Constitution. The contention could be that allowing Faure Gnassingbe to serve three years as acting President of Togo would amount to a change of government by unconstitutional means. While this might look like an ingenious argument, its weakness lies in the fact that the Constitution was duly amended by the competent authority and, as earlier stated, the challenging of the validity of the amendment by external bodies/States without any legal ground amounts to interference in the internal affairs of a sovereign State.

## 7. Faure’s Succession and the Doctrine of State Necessity

In responding to the challenge to Faure’s manner of interim succession to the Togolese presidency and the concomitant constitutional amendment as described above, Togolese government officials stated that the action was taken in order to ‘prevent a dan-

gerous power vacuum’ and to preserve the State of Togo. The Foreign Minister of the country, Kokou Tozoun, asked rhetorically whether Togo could be ‘without a president for 60 days’, adding: ‘We prefer to have sanctions and be in peace and stability than descending towards civil war’.<sup>1</sup> The implication of this is that Faure’s interim succession and the constitutional amendment were, at least, justified on the ground of ‘state necessity’ – the need to ensure the ‘continuity of the State’, as further elaborated by Faure Gnassingbe.<sup>2</sup>

Some constitutional theorists have argued that the ‘doctrine of state necessity’ is an implied provision of every written constitution. In effect, it justifies an otherwise unconstitutional act on the basis of *salus populi suprema lex* (the interest of the state is the supreme law). This doctrine is usually contrasted with the theory of ‘revolutionary legality’ propounded by Hans Kelsen.<sup>3</sup> Crucially, the legal consequences of a revolution are radically different from those related to the doctrine of state necessity. Briefly, while a revolutionary government begets its legality, and cannot be judged with reference to the pre-existing Constitution, the doctrine of state necessity recognizes the existence and continuing validity of the Constitution of the country and only absolves unconstitutional/extra-constitutional actions as long as they are necessary in the prevailing circumstances. Significantly, this doctrine has been invoked successfully in some commonwealth countries, including African countries, to justify unconstitutional actions. A few examples, taken from judicially decided cases, will illustrate this point.

In the Nigerian case of *Lakanmi v. Attorney-General (Western State)*,<sup>4</sup> the Supreme Court of Nigeria was faced with the question whether the 1963 Constitution of the country had been abrogated by the

ish aid if it strays from constitutional governance’. See ‘Blair Warns Uganda’ (*The Monitor*, 28 June 2005), available online at: <<http://allafrica.com/stories/printable/200506290057.html>> (accessed 30/06/05).

1. See ‘Togo’s MPs debate ending “coup”’ (BBC News, 21 February 2005); available online at: <<http://odili.net/news/source/2005/feb/21/27.html>> (accessed 30/03/05).

2. See ‘Togo: Lawmakers back Gnassingbe on call for election’ (*The Guardian*, 22 February 2005).

3. See Hans Kelsen, *General Theory of Law and State* (translated by Anders Wedberg) (Cambridge: Mass: Harvard University Press 1949). For cases which had adopted or considered the theory, see, for example, *The State v. Dosso* [1958] 2 P.S.C.R. 180; *Uganda v. Commissioner of Prisons, ex parte Matovu* [1966] E.A. 514; *Madzimbamuto v. Lardner-Burke* [1968] 3 All ER 561; *Ndhlovu v. The Queen* [1968] 4 S.A.L.R. 515; *Mitchell v. D.P.P* [1986] LRC (Const) 35; *Mokotso v. Moshoeshoe* [1989] LRC (Const.) 24; *Republic of Fiji v. Prasad* [2001] 2 LRC 743.

4. (1971) 1 U.I.L.R. (Pt. 2) 201.

mutinous acts of the country's army and whether the elected officers of government at the time had been permanently and legally replaced in their political offices by unelected military officers. The question arose from an event on 15 January 1966 when a section of the army moved to forcefully seize power from a democratically elected government, but ultimately failed to succeed after abducting and killing the Prime Minister, some Ministers and other top politicians and military officers. Nevertheless, a top military officer, General Aguiyi-Ironsi, who survived the onslaught on top military officers by the coupists, took over the reins of government on the claim that the remaining members of the federal cabinet had invited the military to take over the government in the interim in order to normalize the situation in the country (the incident had generated a sense of uncertainty and insecurity in the country). Importantly, the Constitution did not recognize such an invitation as a way to change the government of the country. Yet, the Nigerian Supreme Court held that the action was justified on the ground of state necessity.<sup>1</sup>

Similarly, in *Attorney-General of Cyprus v. Mustapha Ibrahim*<sup>2</sup> Greek Cypriot judges invoked the doctrine of state necessity to support the validity of a legislation which had been passed in breach of the provisions of the 1960 Constitution of the Republic of Cyprus. In 1963, violence broke out between the Greek and Turkish communities of the country, as a result of which Turkish-Cypriots withdrew from the legislative, executive and judicial organs of government. According to the country's Constitution, a legislation can only be validly passed with the requisite majority of Greek-Cypriot Members of Parliament and Turkish-Cypriot Members of Parliament respectively. The result of this was that with the withdrawal of Turkish-Cypriots from Parliament no legislation could be validly passed in terms of the Constitution.<sup>3</sup> Nevertheless, the remaining Greek-Cypriot Members of Parliament passed a law to

ensure the continuity of the administration of justice and avoid a breakdown of law and order which might threaten the survival of the State. This case raised the issue of the constitutionality of the law so made. The judges who heard the case held that although the impugned law was not made in accordance with the strict letter of the Constitution it was nonetheless saved by the doctrine of state necessity.<sup>4</sup> In his judgment, Vassiliades J stated:

This court now, in its all-important and responsible function of transforming legal theory into living law applied to the facts of daily life for the preservation of social order is faced with the question whether the legal doctrine of necessity...should or should not be read [into] the provision of the written Constitution of the Republic of Cyprus. Our unanimous view, and unhesitating answer to this question, is in the affirmative.<sup>5</sup>

For his part, Josephides J pointedly stated, *inter alia*, as follows:

In the light of the principles of the law of necessity as applied in other countries...I interpret our Constitution to include the doctrine of necessity in exceptional circumstances which is an implied exception to particular provisions of the Constitution; and this is to ensure the very existence of the State...<sup>6</sup>

Lastly, in the famous Pakistani case of *Asma Jilani v. The Government of Punjab*,<sup>7</sup> Hamoodur Rahman CJ, considering the constitutionality of President Ayub Khan's action in handing over the presidency of Pakistan to the Armed Forces, declared that he had no such power and that, accordingly, the assumption of office by Agha Mohammed Yahya Khan as Chief Martial Law Administrator and later as President was unconstitutional – being an act of usurpation. While rejecting the Kelsenite doctrine of revolutionary legality accepted by his predecessor, Mohammed Munir CJ, in *The State v. Dosso*<sup>8</sup> in similar circumstances,<sup>9</sup> the judge was willing to apply the doctrine of state necessity, of which he stated:

1. This conclusion was reached against the contention of the Attorney-General of Western State that the event of 15 January 1966 was a revolution – an abrupt or precipitate change of government outside the contemplation of the Constitution; a forcible substitution of a new ruler or form of government.  
2. (1964) CLR 195.  
3. One commentator has described the development as 'anomalous'. See P.N. Kourtellos, 'Constitutional Law' in Campbell (ed.), *Introduction to Cyprus Law* (New York: Yorkhill Law Publishing, 2000) 15, at 39.

4. See generally, A. Efthymiou, 'The Law of Necessity in Cyprus' (1985) 3(12) *Cyprus Law Review* 1951–1956.  
5. *Attorney-General of Cyprus v. Mustapha Ibrahim*, at 214.  
6. *Ibid*, at 264–265.  
7. (1972) 197 SC 139.  
8. (1958) 2 P.S.C.R. 180.  
9. The judge argued that the view of Hans Kelsen on his theory of revolutionary legality cannot be considered as a generally accepted doctrine of modern jurisprudence. Moreover, he maintained that the principle enunciated by him is wholly unsustainable.

*I...am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself; but I respectfully beg to disagree with the view that it is a doctrine for validating the illegal acts of usurpers. I would call this a principle of condonation and not legitimization. (Italics added.)*

As stated above, on the day President Gnassingbe Eyadema of Togo died the President of the National Assembly<sup>1</sup> – the constitutionally prescribed successor in such circumstance – was out of the country. This was not the making of anybody in Togo. Had he been in the country, he would have been constitutionally entitled to take the constitutionally stipulated oath of office as acting President of the Republic (see Article 64), with the obligation to conduct a presidential election within 60 days from that date. Importantly, without taking the oath of office he could not properly take up the duties of the office of President of the Republic. In other words, Article 65 of the Togolese Constitution which provides for an acting President is not self-executing. As a result, the death of President Eyadema and the absence of Fambare Quattara Natchaba (President of the National Assembly at the material time) from the country created a leadership vacuum which no country could afford. Notably, such a leadership vacuum can precipitate political and other problems which can threaten the survival of the State, particularly in the peculiar circumstances of Togo which had been ruled by the late President for 38 successive years. As already stated, Togolese government officials claimed that it was ensuring the continuity of the State that informed the removal from office (impeachment) of Fambare Quattara Natchaba and his replacement with Faure Gnassingbe. However, some have alleged that the Togolese borders were closed, including the air space, in order to prevent Fambare Quattara Natchaba from re-entering the country. It is not clear how soon this happened after the demise of President Eyadema. In any case, it is possible that this measure was taken as part of a corporate plan to prevent the breakdown of law and order in the country following the death of long-serving President Eyadema and the absence of Fambare Quattara Natchaba to take over as acting President.

1. As earlier stated in the text above, Fambare Quattara Natchaba was the President of the National Assembly at the material time.

On this view of the recent developments in Togo, it seems possible to argue that the succession issue, being within the internal affairs of the country, the insistence on the strict compliance with constitutional provisions – with particular regard to the impeachment of Fambare Quattara Natchaba and his replacement with Faure Gnassingbe – constituted an unjustified interference in the internal affairs of a sovereign State and, therefore, a violation of international law

However, it might be asked whether the doctrine of state necessity can also be used to support the amendment of the Constitution to remove the 60 days prescribed for an acting President to conduct a presidential election and to enable Faure Gnassingbe to serve his father's (President Eyadema's) remaining term that was to end in three years time (2005–2008). Conceptually, the doctrine of state necessity, as indicated above, only supports situations of extreme emergency (as is the case with dealing with the need to avoid a vacuum in political leadership of the country at the highest level); it does not go beyond this. Josephides J in the *Mustapha Ibrahim* case set out the conditions for its application thus:

- a. an imperative and inevitable necessity of exceptional...circumstances;
- b. no other remedy can apply;
- c. the measure taken must be proportionate to the necessity;
- d. it must be of a temporary character limited to the duration...of the exceptional circumstances.<sup>2</sup>

The constitutional amendment which removed the 60 days requirement for the conduct of a presidential election by an acting President in order to allow Faure Gnassingbe to stay for three years cannot be said to have satisfied any of these conditions: it was not an inevitable necessity (there is no evidence to support any claim that it was); nor was it the case that no other remedy could apply; nor was it proportionate in the circumstances; nor can it be said to be of a temporary character. As a result, the constitutional amendment cannot be supported by the doctrine of state necessity. But does this entitle ECOWAS, AU and other countries to insist that the amendment should be undone? It has already been argued that there was no suggestion that the amendment was not in accordance with constitutional

2. *Attorney-General of Cyprus v. Mustapha Ibrahim*, at 264–265.

provisions. Moreover, the motive of amendment is immaterial to the question of the constitutionality of the amendment. More importantly, there is no specific legal provision in the relevant instruments upon which to base an argument that it should be undone. Hence, though the amendment cannot be based on the need to preserve the Togolese State, it was legally unjustifiable and amounts to interference in the internal affairs of Togo for external bodies, organizations or other States to insist that it should be undone, except that the insistence is seen as way of enforcing the spirit of the relevant instruments.<sup>1</sup>

Finally, it should be remarked that although Faure Gnassingbe agreed to hold the election within 60 days following criticisms of the manner of his accession to the presidency, ECOWAS, AU and some African countries were not satisfied, arguing that his accession being allegedly unconstitutional he was incompetent to conduct any election and insisted that he should step down from office. As already stated, the weight of regional-international pressure forced Faure Gnassingbe to step down, announcing his decision to contest the presidential poll as the presidential candidate of the ruling party.<sup>2</sup> It should be emphasized that the regional organizations based their position largely on the regional instruments in the field of democracy and good governance of which Togo is a State Party. Having met the demands of the regional organizations, the economic sanctions imposed on Togo were lifted. Nevertheless, it is important to determine whether the regional-international pressure that brought about this ultimate result was entirely consistent with relevant regional instruments as briefly outlined above. The following section addresses this question more specifically and in more detail than has been done above.

### **8. Faure's Succession and Regional Instruments on Democracy and Good Governance**

Granted that Togo is a State Party to a number of African regional instruments in the field of democracy and good governance – which instruments could be

invoked to justify interference with the domestic/internal affairs of the country – the crucial question is whether the pressure mounted on Togo as described above (including the sanctions imposed on her) were consistent with all or any of the instruments. This section will examine this question in relation to the provisions of some of the instruments as outlined above, and against the background of the basic principles of international law (see above).

As stated above, in the Democracy and Good Political Governance Declaration made under NEPAD African leaders committed themselves to take 'joint responsibility' 'to promote and protect democracy and human rights in their respective countries and regions'. Furthermore, they agreed to 'enforce strict adherence to the position of the African Union on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security'. Importantly, the implication of these is that African countries agreed to 'act collectively' against any erring member country, and not unilaterally. More specifically, it means that before any action is taken against an erring Member State of AU – such as the mounting of political pressure and/or the imposition of economic sanctions – the alleged unconstitutional change in government must first be considered by the continental/regional organization and a 'position' taken or 'decision' made. It is then and only then that member countries can proceed collectively and/or individually to enforce the position or decision. This argument is reinforced by the provisions of the Constitutive Act of the African Union, as explained below. By implication, any action taken unilaterally before such a position is taken or decision made constitutes interference in the domestic/internal affairs of a sovereign State which, in this case, is unjustified in international law.

Importantly, adherence to the procedural prescriptions is consistent, not only with the universal concept of the rule of law, but, more importantly, with 'respect for the rule of law' which is one of the key operational principles of the AU as contained in Article 4(g) of its Constitutive Act. On the contrary, assuming, for the purposes of argument, that the laid down procedure was not followed, the result would be a breach of international law – specifically, the principle of non-interference in the internal affairs of a sovereign State, as stated above. This shows that the principles of sovereign equality and non-in-

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1. To allow Faure Gnassingbe to remain in office for three years on the basis of the constitutional amendment is arguably inconsistent with the spirit of the relevant instruments which, among other things, provide that State Parties should respect their Constitution and that a change of government should be in accordance with the Constitution.

2. Shortly before he announced that he was stepping down, he was elected the leader and presidential candidate of the ruling party – the Rally of the Togolese People (RPT).

terference in the internal affairs of a sovereign State are not altogether devoid of validity where a State enters into regional-international commitments that impinge on its sovereignty, as Togo has done in being a State Party to a number of regional instruments in the field of democracy and good governance. The chronicle of actions taken by ECOWAS, AU and African and other countries in the international community in reaction to the recent politico-constitutional development in Togo are briefly summarized below as a basis for the proposed analysis here.

It has already been stated above that ECOWAS, AU and African countries were quick to condemn the manner of Faure Gnassingbe's succession to the Togolese presidency. Within a few days of the development in Togo, ECOWAS had an emergency meeting in Niamey, the capital of Niger Republic,<sup>1</sup> to consider the development,<sup>2</sup> at the end of which it took the position that the succession was a military coup and resolved to send a delegation to Togo 'to persuade the authorities to allow the succession to take place in accordance with the Constitution as it existed before [President] Eyadema died'. Importantly, the organization threatened that it would impose sanctions against Togo should it fail to comply with its position.<sup>3</sup> In the case of the AU, although it did not meet immediately on the developments in Togo, its Chairperson, President Obasanjo of Nigeria, also declared the succession of Faure Gnassingbe to the Togolese presidency to be a military coup and maintained that the African Union would not accept it. This position was later supported by the Peace and Security Council (PSC) of the AU.<sup>4</sup>

1. The meeting was summoned by ECOWAS Chairman, President Mamadu Tanja of Niger Republic.

2. See 'ECOWAS Emergency Meeting on Togo Underway' (*Ghana's General News*, 9 February 2005) at: <<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=74989&nav=previous>>

3. See 'Togo: ECOWAS leaders head for talks with Gnassingbe as police tear-gas protesters in Lome' <[http://www.irinnews.org/report.asp?ReportID=45507&SelectRegion=West\\_Africa&SelectCountry=TOGO](http://www.irinnews.org/report.asp?ReportID=45507&SelectRegion=West_Africa&SelectCountry=TOGO)>. This was a report in *IRIN News* of 11 February 2005.

4. See *Communiqué of the Twenty-Fifth Meeting of the Peace and Security Council (PSC/PR/Comm (XXV))*. The meeting, held on 25 February 2005, among other things, 'reiterates AU's strong condemnation of the military *coup d'état* which took place in Togo and the unconstitutional modifications intended to legally window dress the *coup d'état*, as well as its rejection of any election that would be organized under the conditions enunciated by the *de facto* authorities in Togo'; 'demands the return to constitutional legality, which entails the resignation of Faure Gnassingbe and the respect

Apart from the regional organizations, the development in Togo also received widespread condemnation from African leaders, such as the Presidents of South Africa and Nigeria, and from European and North American leaders. Importantly, as already stated, the reactions of the African regional organizations were based on the regional instruments in the field of democracy and good governance. The crucial question at this juncture is whether the procedural prescriptions as well as the general substantive provisions of the relevant regional instruments were duly complied with in the handling of the recent situation in Togo.<sup>5</sup>

The Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government enjoins OAU/AU Member States to respect the country's Constitution and rejects any unconstitutional change in government as an anachronism and a contradiction of Africa's commitment 'to promote democratic principles and conditions'. In the same vein, as seen above, the Protocol of the Economic Community of West African States (ECOWAS) on Democracy and Good Governance expressly states that 'every accession to power must be made through free, fair and transparent elections' and proclaims 'zero tolerance for power obtained or maintained by unconstitutional means'. In the context of the present inquiry, the question that arises is whether the brief succession of Faure Gnassingbe to the Togolese presidency was in accordance with the Constitution of Togo. Put in other words, did Faure Gnassingbe obtain the Togolese interim presidency by unconstitutional means?

It has been shown above that the Togolese National Assembly was constitutionally entitled to remove its President and replace him with another person and this properly enabled Faure Gnassingbe to accede temporarily to the presidency. Moreover, it has been argued above that the constitutional amendment which revoked the 60 days requirement for an acting President of the Republic of Togo to

of the provisions of the Togolese Constitution regarding the succession of power'; confirms the suspension of the *de facto* authorities in Togo and their representatives from participation in the activities of all the organs of the AU until the restoration of constitutional legality; and endorses the sanctions imposed by ECOWAS on Togo.

5. It should be noted that both the procedural prescriptions and the general provisions (my description) are substantive provisions of the relevant instruments, including the Rules of Procedure of the Assembly of the AU referred to hereafter.

hold a presidential election has not been validly challenged and, therefore, was arguably valid. To be sure, it would be different if the Constitution was not amended at all, and actions were taken inconsistent with it (except if justifiable by the doctrine of state necessity). Importantly, having regard to the explanation given by Togo's *de facto* officials that the actions were taken in order to preserve the State – a situation which they alone could properly judge – it is difficult to suggest that the country did not 'comply fully and in good faith with its international [regional] obligations', as required by the 1970 Declaration on Principles of International Law Concerning Friendly Relations. As a result, since there was no legal ground for challenging the constitutionality of the removal of Fambare Ouattara Natchaba as President of the National Assembly and his replacement with Faure Gnassingbe as well as the concomitant constitutional amendment, to insist that the actions were a sham is to base unconstitutionality on moral, and not legal, grounds. Importantly, to use this moral basis to compel Faure Gnassingbe to step down from office as acting President and bring about the reversal of the constitutional amendment apparently smacks of an unwarranted intrusion in the domestic/internal affairs of a sovereign State in violation of international law. To be sure, this is still the case even if one accepts the claim that the pressure that resulted in the reversal of the constitutional amendment was consistent with the spirit of the relevant democracy-instruments and, therefore, valid in international law (see above), as it is not possible to justify the pressure that forced Faure Gnassingbe to step down from office as acting President of Togo – particularly after he had declared his intention to hold a presidential election within 60 days.

Furthermore, such unwarranted interference is not only outside the purview of the relevant instruments and, therefore, a violation of international law, it further constitutes a bad precedent which might adversely affect the good intentions of the instruments in the future. The case of Togo was easy to accomplish because of the small size and economic weakness of the country.<sup>1</sup> The position may be quite different if the erring member is a country such as Nigeria, South Africa or Ghana, which are large and generally stable economically. In this situation, any

1. The population of Togo is just about five million people, which is far below Nigeria's current population of over 130 million and Ghana's current population of over 20 million.

attempt to follow the Togo precedent might well create conflicts in the continent. This is why the pressure that resulted in the stepping aside of Faure Gnassingbe must, in this regard, be condemned, notwithstanding that its ultimate result gives the semblance of victory for democracy in Africa. Its problem was not the outcome – which is good – but the illegal approach towards the outcome.<sup>2</sup>

It is indeed ironic that Nigeria, whose 2003 elections were very much akin to the Togolese situation, was the leader of the opposition to the latter's case.<sup>3</sup> As the US Department of State noted in a recent report on human rights practices in Nigeria:

The 2003 legislative elections were marred by widespread fraud. [The]... 2003 presidential and gubernatorial elections...were also marred by widespread fraud. ...The European Union observer mission categorized the presidential elections as extremely poor, stating that in the worst six states, elections effectively were not held, and in the rest of the country the elections were seriously marred. All major independent observer groups, international and domestic, had negative statements about the fairness of elections and cited problems throughout the country. Problems included ballot stuffing, intentional miscounting, underage voting, multiple voting, intimidation, and violence, including political killings...Although all parties participated in the mis-

2. Togo was in practice bullied by President Obasanjo of Nigeria to comply with the position of ECOWAS/AU, and with his domineering influence in Africa he seemed to enjoy the support of most African countries as well as some western countries. To be sure, there is nothing in the 'democracy instruments' of African countries to suggest that they adopt the Machiavellian principle of 'the end justifies the means'!
3. Apart from the condemnations of President Obasanjo (who was acting in a dual capacity – as Nigeria's President and AU Chairperson), Nigeria's National Assembly (Parliament) also condemned the Togolese change of government and even called on Nigeria's federal government to employ force to compel Togo to kowtow to the position of ECOWAS and AU, notwithstanding that this suggestion is against Article 4 of the Constitutive Act of the AU. Furthermore, even the impotent Nigerian Human Rights Commission, which hardly ever speaks on human rights violations in Nigeria and did not comment on the human rights violations occasioned by the 2003 and 2004 elections in the country, issued a statement: 'The National Human Rights Commission has condemned in strong terms the recent unconstitutional and illegal act of the military authorities in Togo by illegally causing the amendment of the Constitution of the country to pave the way for the succession of the son of the late President Eyadema, Mr Faure, as President to Togo [sic]. This illegal act is akin to a *coup d'état* which should not be recognized by the Economic Community of West African States (ECOWAS), the African Union (AU), the European Union (EU) and the United Nations (UN)' – (reproduced in 'Govt. Recalls Envoy from Togo' (*The Guardian*, 12 February 2005)). To say the least, this statement was not only the act of a busybody but also amounts to an unwarranted intrusion in the internal affairs of a sovereign State.

conduct, observers cited violations by the ruling PDP significantly more than others. Some election tribunal cases related to the flawed 2003 elections were still ongoing at year's end [2004]. More than 90 percent of the cases that had been decided by year's end were simply dismissed on technicalities... On December 20 [2004], an election tribunal voided part of the 2003 presidential election results, including the entire result of Ogun State, President Obasanjo's home state, and found that there was significant rigging but, by a 3-1 vote, declined to overturn the election [apparently on the need to avoid possible politico-constitutional problems that might threaten the survival of the State, which might follow outright cancellation of the entire result nearly two years after it was announced].<sup>1</sup>

In summary, the report condemns the 2003 elections as a violation of the citizens' constitutional right to change their government.<sup>2</sup> For the present purposes, the point is that the 2003 elections in Nigeria, by

which the present officers of government at the state and federal levels are in government, amounted to an 'unconstitutional change of government' within the contemplation of the regional-international instruments of which Nigeria is a State Party.<sup>3</sup> Interestingly, Nigerian authorities interpreted the publication of the report as interference in the internal affairs of Nigeria.<sup>4</sup>

On what happens to an erring member of the AU, Article 23(2) of the Constitutive Act of the AU specifically provides that 'any Member State that fails to comply with the *decisions* and *policies* of the Union may be subjected to... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'. Additionally, and more importantly in the present context, Article 30 of the Act provides that 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'. Importantly, Article 23(2) supports the earlier argument here that a prior decision is required before any action, such as political pressure or economic sanction, is taken against an erring Member State.

More specifically, the expression 'fails to comply with the *decisions* and *policies* of the Union' presupposes that a decision must have been taken after due consideration of any alleged unconstitutional change of government and the same communicated to the erring Member State with a stated time frame to comply. In fact, this is specifically provided for in Rule 36(3) of the Rules of Procedure of the Assembly of the African Union,<sup>5</sup> which states that when taking any decision to impose sanctions on a Member

1. See US Department of State, 'Nigeria: Country Reports on Human Rights Practices – 2004' (released 28 February 2005 by the Bureau of Democracy, Human Rights, and Labour); available online at: <<http://www.state.gov/g/drl/rls/hrrpt/2004/41620.htm>>. For a more in-depth report on the systematic violation of human rights and the rape of democracy committed during the 2003 (and 2004) elections in Nigeria, see Human Rights Watch, 'Nigeria's 2003 Elections: The Unacknowledged Violence' at: <<http://hrw.org/reports/2004/nigeria0604/>>. See also 'US Report scores Nigeria low on electoral system, human rights' (*The Guardian*, 3 March 2005; <<http://odili.net/news/source/2005/mar/3/4.html>> (accessed 25/04/05)). The US State Department Report (authorized by the US Congress) also noted that 'INEC [Independent National Electoral Commission]...refused to provide the presidential election tribunal with subpoenaed official documents such as the 2003 election National Register of Voters, which is legally required before any valid general election can be held. INEC also refused to provide candidate lists and voter tally sheets and refused a new request for some states' official 2003 election returns'. In his dissenting judgment in the case, cancelling the entire presidential election, Sylvester Nsofor JA rightly held that 'the refusal of INEC to produce in court the certified true copy of election results showed that the results were falsified', describing the intimidation of voters and other violence committed by the ruling party's agents as a 'serious threat to our democracy and democratic ideal'. This is somewhat in agreement with the majority judgment in the case, which nullified the result of the presidential election in Ogun state on the ground that it was 'manipulated'. See 'Opposition in fresh attack...as court cancels Obasanjo's votes in Ogun' (*The Punch*, 21 December 2004; <<http://odili.net/news/source/2004/dec/21/513.html>> – accessed 20/04/05).

2. The 2004 local government election in the country was similarly condemned by the report. Note that the Nigerian Supreme Court recently decided that the 2003 presidential election was conducted in its entirety substantially in accordance with Nigeria's electoral law. Yet, this cannot change the conclusion of the international observers and majority of Nigerians who condemn that election for not being free and fair. If anything, the decision will lower the respect of the court in their eyes.

3. See Kaniye S.A. Ebeku, 'Nigeria: Can Election Tribunals Satisfactorily Resolve the Disputes Arising out of the 2003 Elections?' *Journal of African Elections* (2003) 2(2) 41–69. The inaction of ECOWAS, AU and the international community in relation to Nigeria's case eloquently illustrates the suggestion made in the text above that the reaction of the regional bodies might well depend on the economic and political importance of an erring Member State. Importantly, this discriminatory approach cannot augur well for the goal of promoting and consolidating democracy in Africa.

4. See 'Presidency Rejects US Reports on Nigeria's Rights Record' (*The Guardian*, 9 March 2005); available online at: <<http://odili.net/news/source/2005/mar/9/21.html>> (accessed 25/04/05). See also 'Human Rights Violations in Nigeria' (*The Guardian*, 13 March 2005); available online at: <<http://odili.net/news/source/2005/mar/13/17.html>> (accessed 25/04/05).

5. Adopted by the Assembly of the African Union, First Ordinary Session, 9–10 July 2002, Durban, South Africa.

State pursuant to Article 23(2) of the Constitutive Act of the AU, 'the Assembly shall stipulate the time frame for compliance and indicate when the failure to comply with that decision will trigger the sanctions regime...'.<sup>1</sup> As can be seen from these provisions, it is only when there is 'failure to comply' with the decision of the organization that the Member State 'may be subjected to sanctions'. Even if '*decisions* and *policies* of the Union' are read disjunctively, so that '*policies*' stand on their own, it is submitted that a prior consideration is required to determine whether a Member State is actually in breach of any policy of the organization. A contrary construction would lead to the unsavoury situation where actions may be taken at whim and unilaterally. This would not only be against the AU operational principle of respect for the rule of law, but would also stand the whole idea of 'collective responsibility' promoted by the AU on its head.

However, under the Rules of Procedure of the Assembly of the African Union, there are three situations when sanctions may be imposed on a Member State, although only two of them are important in the present context, namely: (1) sanctions for non-compliance with Decisions and Policies of the AU (Rule 36); and (2) sanctions for unconstitutional Changes of Government (Rule 37).<sup>2</sup> Importantly, it would seem that while the first category of situations would require compliance with the procedure stated above, the second category would not require this. In the first case, 'the Assembly shall approve, upon the recommendation of the Executive Council, the imposition of sanctions under Article 23(2) of the Constitutive Act on a Member State that fails, without good and reasonable cause, to comply with the decisions and policies of the Union' (Rule 36(1)). An indication of the kind of sanctions is given under Rule 36(2) and under Rule 36(3), as stated above, the sanctions regime would only apply upon failure to comply with the decision within the stipulated time frame.

With regards to sanctions for unconstitutional changes of government, Rule 37 provides in part as follows:

1. Remarkably, imposition of sanctions under Article 23(2) is in line with the declared operational principle of the AU under Article 4 of its Constitutive Act, to wit, 'condemnation and rejection of unconstitutional changes of governments'.
2. The third situation deals with sanctions against any Member State that defaults in the payment of its financial contributions to the AU.

1. Pursuant to Article 30 of the Constitutive Act, the Member States in which governments accede to power by unconstitutional means shall be suspended and shall not participate in the activities of the Union.
2. In conformity with the Declaration on the framework for an OAU Response to Unconstitutional Changes of Government, the situations which are to be considered as unconstitutional change shall be, among others:
  - a. military and other *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 dissent groups and rebel movements; and
  - d. refusal by an incumbent government to relinquish power to the winning party after a free and fair election.
3. The overthrow and replacement of a democratically elected government by elements assisted by mercenaries shall also be considered as an unconstitutional change of government.

This Rule also provides for the actions to be taken 'whenever an unconstitutional change of government takes place'. According to sub-Rule 4 (Rule 37(4)), in such a situation the Chairperson of the Assembly of the AU and the Chairperson of the African Commission (the Assembly and the Commission are important organs of the AU) shall:

- a. immediately, on behalf of the Union, condemn such a change and urge the speedy return to constitutional order;
- b. convey a clear and unequivocal warning that such an illegal change shall not be tolerated or recognized by the Union;
- c. ensure consistency of action at the bilateral, interstate, sub-regional and international levels;
- d. request the PSC [Peace and Security Council of the AU] to convene in order to discuss the matter; and
- e. immediately suspend the Member State from the Union and from participating in the organs of the Union, provided that exclusion from participating in the organs of the Union shall

not affect that State's membership of the Union and its obligations towards the Union.

From the foregoing, it seems President Obasanjo's actions in condemning the manner of the interim succession of Faure Gnassingbe to the Togolese presidency and in insisting that the AU would not accept the succession were taken pursuant to the relevant regional law – i.e. the Rules of Procedure of the Assembly of the African Union, since he is the current AU Chairperson. Notably, Rule 37(4) is in accord with Rule 16(3) which provides that in between the sessions of the Assembly of the AU,<sup>1</sup> the Chairperson of the Assembly, in consultation with the Chairperson of the Commission, shall represent the AU 'in conformity with the fundamental objectives and principles enshrined in the Constitutive Act'. In any case, it is crucial to point out that there seems to be some conflict between the Constitutive Act of the AU and the Rules of Procedure of the Assembly of the African Union. Specifically, unlike the position with regard to the former, it would appear that under the latter there are no procedural requirements, in the case of unconstitutional changes of government, before actions can be taken against an allegedly erring Member State. This is confusing and should therefore be streamlined to avoid confusion and possible difficulties in the future.

Furthermore, it is provided under Rule 37(5) that the Assembly shall immediately apply sanctions against the regime that *refuses* to restore constitutional order, including the sanctions provided for in Article 23(2) of the Constitutive Act of the AU. Again, this implies that a time frame must have been set for the restoration of constitutional order and there has been a failure – *refusal* – to comply accordingly. Similarly, the Peace and Security Council (PSC) – to which the Assembly may delegate its powers and functions under Article 9(2) of the Constitutive Act of the AU – has power under Article 7(g) of the *Protocol Relating to the Establishment of the Peace and Security Council of the AU* to 'institute sanctions whenever an unconstitutional change of government takes place in a Member State'. Here, although there is no indication as to at what stage this can be done, it seems clear from the 'operational

principles'<sup>2</sup> of this body that the 'institution of sanctions' can only come after opportunity has been given to the erring Member State to return to the path of constitutionality and there has been failure to comply within a reasonable time frame. In fact, it was the PSC that imposed the AU sanctions regime on Togo, and only upon the failure of Togolese authorities to comply with the ultimatum of AU (and ECOWAS) to return to the path of constitutionality as indicated above.<sup>3</sup> Again, the provisions for the imposition of sanctions under these different instruments can generate confusion and difficulties in the future, unless they are streamlined.<sup>4</sup>

Another critical question is whether, from the provisions of Rule 37(2) and (3), the interim succession of Faure Gnassingbe to the Togolese presidency can properly be described as an unconstitutional change of government – a *coup d'état*, military or otherwise. Generally, since, as earlier argued, his election to replace Fambare Ouattara Natchaba as the President of the Togolese National Assembly was constitutionally valid (even assuming, without conceding, that the concomitant constitutional amendment was invalid), his interim succession to the Togolese presidency cannot be regarded on this ground as an unconstitutional change of government. With regard to the definition of 'unconstitutional change of government' under the relevant regional instrument, it is obvious that it did not come under any of the sub-paragraphs of Rule 37(2); nor did it come under Rule 37(3). However, from the language of Rule 37(2) it is clear that it does not provide an exhaustive list of situations which may be considered as unconstitutional change of government. This raises the question of interpretation as well as the issue of who has the right to make such interpretation – the Assembly of the AU or the Chairperson of the AU? Perhaps a better question is whether the AU chairperson is competent to determine, without recourse to the AU, whether a situation can be regarded as coming under Rule 37(2) where such a situation is not one of the specifically identified ones. It would seem that the answer is in

1. For provisions relating to the ordinary and extraordinary sessions of the AU, see Rules 5–14.

2. See the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, Article 4.

3. See *Communiqué of the Twenty-Fifth Meeting of the Peace and Security Council*, issued 25 February 2005 (PSC/PR/Comm (XXV)).

4. Confusion and difficulties may arise from the fact that the PSC has power independently of the AU Assembly to impose sanctions in appropriate circumstances.

the affirmative, having regard to Rule 16(3) stated above.

However, more importantly, what will be the guiding principle for such determination?<sup>1</sup> The relevant instruments have no answer to this and this might well present some difficulties from time to time. In the case of Togo, however, because of the congruence of view among major African countries, ECOWAS and AU, no difficulty arose. In any case, the (opposition) view runs counter to the position of Togolese authorities and the view taken by this author that the impugned interim succession was, after all, competent and valid. Importantly, at issue here is the principle of non-interference in the internal affairs of a sovereign State. Given that this principle can be compromised under relevant regional instruments outlined above, it is doubtful, to say the least, that such compromise is justifiable in the circumstances of the Togolese situation. In fact, it is contended that to interpret the interim succession of Faure Gnassingbe to the Togolese presidency and the concomitant constitutional amendment as unconstitutional or describe them as constituting a *coup d'état* is to interfere in the internal affairs of the country; except, perhaps, if one relies on the nebulous concept of the 'spirit of the law', as a justification.<sup>2</sup>

As one European diplomat in Togo rightly observed in an interview with Reuters, 'it is a political manoeuvre that has not violated the Constitution. One might feel manipulated but it is in within the lines of the Constitution'.<sup>3</sup> As earlier argued, it would have been different had the Constitution not been validly amended. To be sure, it is immaterial that

the amendment was allegedly procured by military influence. After all, constitutional amendments the world over are not always procured by legitimate ways. On the contrary, a country's Constitution and laws very often reflect the views and interests of powerful persons or groups within the country. As Peter Johnson put it:

It is also important to emphasize that the laws that judges "interpret" do not materialize out of thin air either - including the US Constitution. Laws are the product of definite material conditions, and almost always represent the interests of the *propertied classes*<sup>4</sup> [powerful elements/groups in a country]. In fact, most laws on the books today are related to property in one form or another. *As Solon the Great, the drafter of the Athenian Constitution explained, the law is like a giant spider web - the weak get trapped in it, and the mighty simply tear it up and re-make it to suit their interests.*<sup>5</sup>

Togo's case cannot be different. In fact, any attempt to question the influence that resulted in constitutional amendment in any country will obviously amount to interference in the internal affairs of a sovereign State (as African countries seem to acknowledge with regard to the unfolding scenario in Uganda – see above). However, it is possible that this statement may not be accurate, as it could provide easy access to getting around the relevant democracy-related instruments. Even so, in the case of Togo, one may argue that since there was no evidence of any protest by the parliamentarians (Deputies) – no complaint of undue influence or pressure by the country's military as alleged by outside observers – and having regard to the fact that Faure Gnassingbe was duly sworn into office before the country's Constitutional Court (whose independence has not seriously been called into question) in accordance with Article 64 of the Constitution, the challenge of ECOWAS and AU still amounts to unwarranted interference in the internal affairs of a sovereign State – specifically, the Republic of Togo.<sup>6</sup>

4. Emphasis added.

5. See 'Is the US Supreme Court Impartial' (2001), <[http://www.marxist.com/usa/us\\_supreme\\_court.html](http://www.marxist.com/usa/us_supreme_court.html)> (emphasis added).

6. The lack of protest by the Deputies may be explained by the fact that the National Assembly is currently dominated by RPT members, largely as result of the boycott of the 2002 parliamentary elections by the traditional opposition parties, and the fact that they are in alliance with the Togolese army. On this view, it could be argued that the non-protest of the Deputies was not genuine and therefore could not prevent any interference which is within the purview – specifically, the spirit – of the relevant instruments. However,

1. In domestic law, the *ejusdem generis* rule applies to cover things of the same genus, species or type. Specifically, where general words follow specific words in a statutory enumeration, the general words are construed as being limited to persons or things within the class outlined by the particular words. As Keenan explains 'in a reference to "dogs, cats, and other animals", the last three words would be limited in their application to animals of the domestic type, and would not be extended to cover animals such as elephants and camels which are not domestic animals in the UK...'. See Denis Keenan, *Smith & Keenan's English Law*, 13<sup>th</sup> ed. (London: Longman, 2001) 164.

2. Some might insist that what happened – the succession of the son of the late President Eyadema (Faure Gnassingbe) as acting President of Togo and the constitutional amendment allowing him to remain in office for three years instead of 60 days – amounted to exactly the mischief which the relevant instruments aimed to avoid or prevent.

3. Quoted in 'Togo: Africa's democratic test case' (*BBC News*, 11 February 2005); available online at: <<http://news.bbc.co.uk/1/hi/world/africa/4243477.stm>>.

## 9. Concluding Remarks

There is no gainsaying that democracy is beginning to acquire roots in Africa. Many African countries attained independence from colonialism in the 1960s with 'democratic institutions', but soon degenerated into dictatorships. Until the 1990s, virtually all African countries were under successive dictatorial governments in the nature of one-party government or military government. In both situations, opposition was officially and constitutionally outlawed, with severe consequences for any infraction by anybody. Given the brutal character of those regimes and their general *modus operandi*, it can be said that political independence amounted to the replacement of 'external colonialism' with 'internal colonialism'. Commenting on the phenomenon of unconstitutional change of government in Africa, one commentator has observed:

In 1960 alone, seventeen African States became independent. Twenty years after Ghana had celebrated its sovereignty in 1957, Africa had fifty-one functioning States with 455 million people... Things went very badly for most of these countries. *Military coups seemed to follow one another in endless succession...*<sup>1</sup> *The 1985 Nigerian coup was Africa's seventy-third...*<sup>2</sup> (Italics added.)

Effectively, such governments were equivalent to one-man rule, as democratic elections, involving real contests between contending parties – otherwise described as free and fair elections – were not permitted. In this situation, oppression and repression reigned supreme and official corruption was pervasive, leading to the impoverishment of a large majority of the citizenry.<sup>3</sup> It was a time when Africa really

deserved the sobriquet – the Dark Continent!<sup>4</sup>

Interestingly, the wave of democracy in Africa, which began in the 1990s,<sup>5</sup> is still continuing, and virtually all African countries have been caught up. To sustain this new approach to governance, African countries have made several regional and sub-regional instruments designed to promote and consolidate democracy in Africa. Such instruments include the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government and the Democracy and Good Political Governance Declaration (see above). Importantly, the new resolve in Africa to practise and consolidate democracy in the continent, as reflected in the provisions of the increasing number of instruments in the field of democracy and good governance, appears to have helped to stem the spate of undemocratic (unconstitutional) changes of government in African countries which, as suggested above, were hitherto frequent and pervasive.

However, the recent brief interim succession of Faure Gnassingbe to the Togolese presidency has raised the question of the relationship of those regional-international instruments to some fundamental principles of international law – such as the principles of sovereign equality and non-interference in the internal affairs of a sovereign State. The critical question is whether the regional-international instruments, which essentially permit interference in the internal affairs of a sovereign State, have displaced the hallowed principles of international law, such as, the principles of sovereign equality and non-interference in the internal affairs of a sovereign State. The analysis of the Togolese situation here has shown that the regional-international instruments only displace these principles of international law in limited circumstances.

In fact, as seen above, these fundamental principles of international law are recognized by the regional-international instruments and, in fact, form part of the operational principles of the AU and

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the swearing in of Faure Gnassingbe before the country's Constitutional Court as required by the Constitution arguably conferred legitimacy/legality on the parliamentary actions, and this is consistent with a plethora of subsisting judicial precedents in Africa (and elsewhere in the commonwealth). See, for example, *Uganda v. Commissioner of Prisons, ex parte Matovu*, supra.

1. Barry Rubin, *Modern Dictators: Third World Coupmakers, Strongmen, and Populist Tyrants* (New York: McGraw-Hill, 1987); online version available at: <<http://gloria.idc.ac.il/publications/books/md-summary.html>>. Page references in this work are to the online version of this book. For the corresponding quotation, see p. 80.
2. Barry Rubin, *Modern Dictators*, at p. 107. Since 1985, Africa has recorded many more coups and other unconstitutional changes of government.
3. See generally, Kaniye S.A. Ebeku, 'Promoting Democracy through Regional-International Instruments: The Role of Commonwealth Africa Judiciary' *Verfassung Und Recht in Übersee*, (2004) 37(2), 225–235.

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4. It should be noted, however, that one-party system of government and military rule were akin to the colonial system of government under which most African countries were until the late 1950s and early 1960s. Importantly, since the colonial system of government was not a training in democracy, it could be argued that one-party rule and military rule were the direct offspring of colonialism.

5. For interesting information on this issue, see 'Pro-Democracy Movements Sweep Africa', available online at: <[http://www.forerunner.com/forerunner/X0796\\_Africas\\_Democracy\\_Mo.html](http://www.forerunner.com/forerunner/X0796_Africas_Democracy_Mo.html)>

ECOWAS. As a result, unless the provisions of the instruments are strictly complied with, any interference in the internal affairs of any Member State by another or by a regional organization will be a violation of international law. As this work has shown, the recent actions taken by African countries, AU and ECOWAS against Togo were not entirely in compliance with the relevant regional-international instruments and, therefore, amount to a violation of international law to the extent of non-compliance. Moreover, the analysis of the relevant instruments here has exposed some of their substantive weaknesses. For example, the provision empowering the Assembly of the AU and the PSC to impose sanctions is not clearly streamlined and could be a source of conflicts and difficulties in the future.

All in all, while the pursuit of the ideals and practice of democracy by African countries is a welcome development, it needs to be recognized that the project must be carried out in accordance with the rule of law. As Judge Gilbert Guillaume, former President of the International Court of Justice, recently put it: 'States...must...act in compliance with the law, and in particular with international law... . That is the underlying condition for the legitimacy of their action'.<sup>1</sup> To be sure, non-compliance with international law could endanger international/regional peace and security and this would be antithetical to the ultimate goal of the UN and regional organizations such as ECOWAS and the AU as well as the ultimate goal of the pursuit of democracy as can be seen in the Charter of the UN and numerous regional instruments, including the Constitutive Act of the AU.

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1. See Gilbert Guillaume, 'Terrorism and International Law', *supra*, at 548.

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