

# THE CRIME OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT AND POPULAR UPRISINGS IN AFRICA: ISSUES AND CHALLENGES

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## I. INTRODUCTION

Since 1960s most African states have experienced (successful, attempted or plotted) military coups as a form of government change, undermining the constitutional change of governments and threatening regional peace and security in Africa.<sup>1</sup> Globally, due to poverty, Africa has experienced more coups than any other continent.<sup>2</sup> Recent examples of such coups have taken place in Central African Republic (2003), Guinea-Bissau (2003), Mauritania (2005), Togo (2005), Mauritania (2008), Madagascar (2008), Guinea (2008), Côte d'Ivoire (2010), Mali (2012), Guinea-Bissau (2012 and 2013), Central African Republic (2013), Egypt (2013), Burkina Faso (2015);<sup>3</sup> Gabon (2019);<sup>4</sup> and Sudan (2019).<sup>5</sup> Since unconstitutional changes of governments can spread to other African states, where conflicts have been widespread, African states have a common regional interest to eliminate further unconstitutional changes of governments. This is necessary to ensure 'respect for democratic principles, human rights, the rule of law and good governance',<sup>6</sup> in particular the right to free genuine periodic elections, including

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- 1 See generally H. B. Barka and M. Ncube, *Political Fragility in Africa: Are Military Coups d'Etat a Never-Ending Phenomenon?* (African Development Institute 2012) observing that: 'Since the years of independence, Africa has experienced more than 200 military coups, counting both successful and failed coup attempts.'
- 2 See J. M. Powell and C. L. Thyne, 'Global Instances of Coups from 1950–Present', 48 (2) *Journal of Peace Research* (2011), pp. 249–59; J. M. Powell, *Coups in the World, 1950–Present* < <https://www.jonathanmpowell.com/coup-detat-dataset.html> > (accessed 11 May 2020).
- 3 I. Zamfir, *Actions of the African Union against Coups d'état* (European Parliamentary Research Service 2017).
- 4 African Union (AU), Press Statement, Peace and Security Council 821st Meeting, PSC/PR/BR. (DCCCXI), 9 January 2019.
- 5 See AU, Statement of the Chairperson of the Commission on the Situation in Sudan, 11 April 2019 < <http://www.peaceau.org/uploads/auc-sudan-11-april-2019-.pdf> > (accessed 15 April 2020); AU, Communiqué Adopted by the Peace and Security Council at its 840th meeting held on 15 April 2019 on the situation in Sudan, PSC/PR/COMM.(DCCCXL).
- 6 Constitutive Act of the African Union, adopted 11 July 2000 at the Lomé Summit (Togo), entered into force in 2001, Articles 4(m) and 2(h).

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the right to vote and the right to stand as a candidate for election.<sup>7</sup> It is also essential to achieve, maintain and ‘promote peace, security, and stability on the continent’.<sup>8</sup>

Sustainable peace and stability can be achieved in Africa once the root causes of serious crimes (serious violations of human rights) are addressed. This includes ending impunity for alleged crimes and ensuring accountability for the victims of these crimes through a fair, independent and objective judicial process. To this end, on 27 June 2014 the African Union (AU) Assembly adopted a protocol at Malabo, which provides, among others, for an ‘International Criminal Law Section’ within the African Court of Justice and Human and Peoples’ Rights (African Court).<sup>9</sup> When the Malabo Protocol and the Statute annexed to it enters into force after 15 ratifications,<sup>10</sup> the African Court will become the first regional criminal court to exercise material jurisdiction over 14 (international and transnational) crimes, namely: (1) genocide, (2) crimes against humanity, (3) war crimes, (4) the crime of unconstitutional change of government, (5) piracy, (6) terrorism, (7) mercenarism, (8) corruption, (9) money laundering, (10) trafficking in persons, (11) trafficking in drugs, (12) trafficking in hazardous wastes, (13) illicit exploitation of natural resources and (14) the crime of aggression.<sup>11</sup> Some of these crimes – such as crimes against humanity,<sup>12</sup> genocide,<sup>13</sup> war crimes<sup>14</sup> and torture<sup>15</sup> – constitute *jus cogens* norms (peremptory norms of general international law accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted).<sup>16</sup>

This article considers the jurisdiction of the International Criminal Court (ICC) and the International Criminal Law section of the African Court (section

7 International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, Article 25.

8 Constitutive Act of the African Union, *supra*, note 6, Article 2(f).

9 See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted by the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government held at Malabo, Equatorial Guinea, 27 June 2014 < <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> > (accessed 11 May 2020).

10 *Ibid.*, Article 11.

11 Statute of the African Court of Justice and Human and Peoples’ Rights, Article 28.

12 Articles on State Responsibility, para. 5 of commentary to Article 26; Draft Articles on Crimes against Humanity, Preamble, especially para. (4) of the commentary to the Preamble.

13 Articles on State Responsibility, para. 5 of commentary to Article 26; para. (4) of commentary to Article 40.

14 Articles on State Responsibility, para. 5 of commentary to Article 40; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Report 1996, p. 226, at p. 257, para. 79.

15 Articles on State Responsibility, para. (5) of commentary to Article 26; para. (5) of commentary to Article 40; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, at p. 457, para. 99.

16 Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, 8 ILM 679, Article 53; International Law Commission, *Third Report on Peremptory Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur*, Seventieth session Geneva, 30 April–1 June and 2 July–10 August 2018, A/CN.4/714, 12 February 2018, paras 113–20.

II). It then examines the scope of the crime of unconstitutional change of government and whether there is a right to peaceful rebellion against undemocratic governments in Africa (section III). It also considers the impact of immunity on the prosecution of unconstitutional change of government (section IV). It further explores whether the imposition of the death penalty by domestic courts for the crime of unconstitutional change of government is compatible with African states' international human rights obligations (section V). This is followed by a consideration of the challenge faced in funding the Trust Fund for the benefit of victims of crimes including unconstitutional changes of government (section VI), followed by concluding observations (section VII).

## II. THE INTERNATIONAL CRIMINAL COURT (ICC) AND AFRICAN COURT: COMPLEMENTARY?

The Rome Statute of the International Criminal Court limits the jurisdiction of the International Criminal Court (ICC) over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>17</sup> The Rome Statute does not include a distinct crime of unconstitutional change of government. The ICC's active investigations have been mainly in weak African states. Attempts to initiate investigations into crimes allegedly committed by nationals of powerful states on the territory of other states (e.g. crimes against humanity and war crimes allegedly committed by US military forces on the territory of Afghanistan) have so far been unsuccessful on the basis that such investigations into crimes would not serve the ambiguous concept of 'interests of justice', in accordance with Articles 15(4) and 53(1)(c) of the Rome Statute.<sup>18</sup> This has been justified by Pre-Trial Chamber II on the basis that it would be 'extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects' and that 'pursuing an investigation would inevitably require a significant amount of resources'.<sup>19</sup> Therefore, the Chamber converted the 'interests of justice' concept into a utilitarian efficiency clause based on the possible lack of cooperation and limited prospects of a successful investigation. It ignored linking 'interests of justice' to the gravity of the crime and the interests of the victims as provided in Article 53(1)(c) of the Rome Statute.

It follows that the ICC would not initiate investigations or prosecutions involving nationals of powerful states such as the US (known to be opposed to ICC investigations), whether they are parties or non-parties to the Rome Statute.<sup>20</sup>

17 Rome Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, 33 African States were parties to the Rome Statute in 2018, Articles 5–8.

18 See Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17, 12 April 2019.

19 *Ibid.*, paras. 94–5.

20 See, for example, 'John Bolton Threatens ICC with US Sanctions', *BBC News*, 11 September 2018 < <https://www.bbc.co.uk/news/world-us-canada-45474864> (accessed 11 May 2020);

Consequently, when selecting situations and cases (suspects and charges), the Office of the Prosecutor would increasingly consider operational and practical realities, and the prospects for arrest and successful trials (evidential strength).<sup>21</sup> Thus the 2019–21 Strategic Plan proposes to bring cases against ‘notorious or mid-level perpetrators’ directly involved in the commission of crimes to provide deeper and broader accountability and to have a better prospect of future conviction in ‘potential subsequent cases against higher-level accused’.<sup>22</sup> These are likely to be brought against alleged perpetrators in weaker states in Africa, Asia and Latin America.

It should be noted that the African Court’s temporal, personal and subject-matter jurisdiction overlaps with the jurisdiction of the ICC but the relationship between the African Court and the ICC is not directly addressed.<sup>23</sup> Since the ICC is not a ‘port of first call’ but rather ‘a court of last resort’, its jurisdiction, like that of the African Court, is ‘complimentary to national criminal jurisdiction’.<sup>24</sup> However, in addition to the domestic institutions of the state concerned (such as national courts),<sup>25</sup> states may also collectively choose to exercise their sovereign rights in the form of primary jurisdiction to investigate and prosecute crimes. This may be done by establishing regional, sub-regional or bilateral criminal jurisdictions to investigate and prosecute international and transnational crimes. Where a case is being genuinely investigated or prosecuted by a competent regional, sub-regional or bilateral criminal court or tribunal with jurisdiction, it is analogous to being ‘investigated or prosecuted by a State which has jurisdiction over it’ and thus inadmissible before the ICC.<sup>26</sup> Although all the 14 crimes within the jurisdiction of the African Court threaten human rights, peace, security and stability on the African continent, due to space constraints the focus of this article is limited to the crime of unconstitutional change of government under the Malabo Protocol. By June 2020, more than six years after the adoption of the Malabo Protocol, no single ratification had been secured though 15 states had

C. Morello, ‘U.S. will not give visas to employees of the International Criminal Court’, *Washington Post*, 15 March 2019 < [https://www.washingtonpost.com/world/national-security/us-will-not-give-visas-to-employees-of-the-international-criminal-court/2019/03/15/f44087d4-78df-494a-aa58-d91749eab9b2\\_story.html?noredirect=on&utm\\_term=.b1ddd33f4527](https://www.washingtonpost.com/world/national-security/us-will-not-give-visas-to-employees-of-the-international-criminal-court/2019/03/15/f44087d4-78df-494a-aa58-d91749eab9b2_story.html?noredirect=on&utm_term=.b1ddd33f4527) (accessed 11 May 2020); M. Simons and M. Specia, ‘U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes’, *New York Times*, 5 April 2019 < <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> > (accessed 11 May 2020).

21 See ICC Office of the Prosecutor (OTP), *The Strategic Plan 2019–2021* (14 May 2019); OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016).

22 See ICC OTP, *ibid.*

23 Rome Statute, *supra*, note 17; Malabo Protocol, *supra*, note 9, Article 46H.

24 *Ibid.*, Preamble, para. 10 and Article 1. The African Court’s jurisdiction ‘shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.’

25 See, for example, Benin’s Economic Crimes and Terrorism Court established by Law No. 2018/13 of 2 July 2018; *Sebastien Germain Ajavon v. Republic of Benin*, Application No. 013/2017, Order for Provisional Measures, 7 December 2018.

26 Rome Statute, *supra*, note 17, Article 17(1)(a); M. Jackson, ‘Regional Complementarity: The Rome Statute and Public International Law’, 14 (5) *Journal of International Criminal Justice* (2016), pp. 1061–72.

signed the Protocol.<sup>27</sup> In addition, only a few states (Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Mali, Malawi, Tanzania and the Republic of Tunisia) had submitted optional declarations granting individuals and non-governmental organisations (NGOs) with observer status before the African Commission direct access to the human rights jurisdiction of the African Court on Human and Peoples' Rights under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Four states (Rwanda, Tanzania, Benin and Côte d'Ivoire) withdrew their declarations.

When the Malabo Protocol enters into force after ratification by 15 states and the African Court is established and becomes operational, it will reinforce efforts to encourage and support domestic accountability efforts to prevent, investigate or punish crimes within the jurisdiction of the African Court.<sup>28</sup> It will also build on the record of the ICC which has thus far had limited achievements. The ICC has been involved in more controversies than conducting criminal trials that end in verdicts. Recent controversies include the ICC being sued by its President for higher pay at a time when the institution was struggling to resource its current workload,<sup>29</sup> and its sitting Japanese Judge Kuniko Ozaki becoming an Ambassador of Japan to Estonia while she continued to serve as a non-full-time judge of the Court, raising a question as to the likelihood of confidence in judicial independence being affected.<sup>30</sup> Significantly, Article 40(2) of the Rome Statute explicitly prohibits judges from engaging in any activity which is 'likely to interfere with their judicial functions or to affect confidence in their independence'.

Furthermore, the ICC has handed down highly controversial decisions (for example, on head-of-state immunity<sup>31</sup> and denial of a request to authorise an investigation of Afghanistan on the basis that it would not be in the 'interests

27 The Malabo Protocol had been signed (in alphabetical order) by Benin, Chad, Comoros, Congo, Equatorial Guinea, Ghana, Guinea, Guinea-Bissau, Kenya, Mauritania, Mozambique, Sierra Leone, São Tomé & Príncipe, Togo and Uganda.

28 Malabo Protocol, *supra*, note 9, Article 46H provides that: 'The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities ...'

29 See M. Simons, 'In The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay', *New York Times*, 20 January 2019.

30 ICC, Internal memorandum to Judge Ozaki, Decision on your request of 18 February 2019, CC-01/04-02/06-2326-Anx1 22-03-2019 1/6 EC T, 19 March 2019 < [https://www.icc-cpi.int/RelatedRecords/CR2019\\_01773.PDF](https://www.icc-cpi.int/RelatedRecords/CR2019_01773.PDF) > (accessed 11 May 2020). Following increased criticism, on 1 May 2019 the ICC President announced that Judge Ozaki had resigned the post of Ambassador: see 'Notification Concerning Judge Kuniko Ozaki', ICC-01/04-02/06 (1 May 2019).

31 See the Judgment of the Appeals Chamber; Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa; and Joint Partial Dissenting Opinion of Judge Ibanez and Judge Bossa in *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Bashir – Jordan Decision), ICC-02/05-01/09 OA2 (6 May 2019); *Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal*, CC-PIOS-Q&A-SUD-02-01/19\_Eng (May 2019) < <https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf> > (accessed 11 May 2020).

of justice<sup>32</sup>). It has thus far acquitted (or terminated proceedings against) more individuals alleged to have committed international crimes than it has convicted. Even then, it has convicted mainly rebel leaders in some African states for war crimes and crimes against humanity, mainly committed to seize political power through unconstitutional means. These include:

- convictions for the war crime of enlisting and conscripting children under the age of 15 years into the *Force patriotique pour la libération du Congo* [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (in the Democratic Republic of the Congo – DRC);<sup>33</sup>
- crime against humanity (murder) and war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro (in the Ituri district of the DRC);<sup>34</sup>
- crimes against humanity (murder and rape) and war crimes (murder, rape and pillaging) in the Central African Republic;<sup>35</sup>
- the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012;<sup>36</sup> and
- offences against the administration of justice under Article 70 of the Rome Statute.<sup>37</sup>

Although the ICC needs trials to justify its existence, the exercise of regional criminal jurisdiction could save time and resources spent by the ICC on African

32 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17 (12 April 2019); Request for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, ICC-02/17 (7 June 2019).

33 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 4 April 2012. *Lubanga* was sentenced to 14 years.

34 *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014. *Katanga* was sentenced to 12 years but transferred back to DRC with ‘sentence served’ after eight years.

35 *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016. *Bemba* was sentenced to 18 years but his conviction was reversed on appeal on 8 June 2018. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, 8 June 2018.

36 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016. Al Mahdi was sentenced to nine years on a guilty plea.

37 See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo*, October 2016.

situations<sup>38</sup> and cases (such as *Lubanga*, *Katanga*, *Bemba*, *Al Mahdi*, *Yekatom*,<sup>39</sup> *Gbagbo* and *Blé Goudé*<sup>40</sup>) that could be prosecuted at a regional level. In some cases, due to lack of evidence to prove alleged criminal responsibility beyond reasonable doubt, accused persons have been acquitted after lengthy trials,<sup>41</sup> or charges against accused persons have been withdrawn or vacated and the accused discharged without prejudice to their prosecution afresh in future.<sup>42</sup> Unlike the Rome Statute, the Malabo Protocol provides for the crime of unconstitutional change of government, discussed below.

### III. UNCONSTITUTIONAL CHANGE OF GOVERNMENT

#### A. Background

Unconstitutional changes of government have been widespread in Africa partly because many African leaders are less accountable due to weak institutions to ensure accountability. State power is a means of accumulating wealth. Thus a number of African leaders, mostly male, have been reluctant to organise free and fair elections and unwilling to hand over power peacefully to winning candidates. As a result, there are several serving heads of state in Africa having been in power for three decades or more. The top four of Africa's longest serving heads of state at the time of writing in 2020 were Equatorial Guinea's Teodoro Obiang Nguema Mbasogo (41 years in power since 3 August 1979 after a coup), Cameroon's Paul Biya (38 years in power since 6 November 1982 after serving seven years as prime minister), Congo-Brazzaville's Denis Sassou Nguesso (35 years in power) and

38 Since 2003, the Office of the ICC Prosecutor has conducted investigations in multiple African situations, namely Uganda, the Democratic Republic of the Congo, Darfur, Sudan, the Central African Republic (two distinct situations), Kenya, Libya, Côte d'Ivoire, Mali and Burundi.

39 Public Redacted Version of 'Warrant of Arrest for Alfred Yekatom', ICC-01/14-01/18-1-US-Exp (11 November 2018) < [https://www.icc-cpi.int/CourtRecords/CR2018\\_05412.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_05412.PDF) > (accessed 11 May 2020).

40 *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019. The ICC Trial Chamber I, by majority (Judge Cuno Tarfusser and Judge Geoffrey Henderson; Judge Olga Herrera Carbuccion dissenting), acquitted Laurent Gbagbo (former President of Côte d'Ivoire) and his co-accused, Charles Blé Goudé (former Youth Minister), from all charges of crimes against humanity allegedly committed in Côte d'Ivoire (Ivory Coast) in 2010 and 2011, following the violent political conflict in the context of the 2010 post-electoral violence. The majority held that there was insufficient evidence of a 'common plan' to foment violence to place the accused persons on defence.

41 See, for example, *Bemba Gombo*, ICC-01/05-01/08 A, *supra*, note 35. The trial lasted for some 48 months and the Trial Chamber heard from 77 witnesses. On appeal, it was held that the evidence did not establish, with the required degree of proof, that Bemba, as a military commander, failed to take the necessary and reasonable measures to prevent and/or to punish the crimes.

42 For example, the termination of cases against Uhuru Kenyatta and William Ruto arising out of the 2007–8 post-election violence in Kenya. See *The Prosecutor v. Uhuru Muigai Kenyatta*, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11, 5 December 2014; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11, 5 April 2016.

Uganda's Yoweri Museveni (34 years in power since January 1986 after his rebel group took power through unconstitutional means).

The longer an African head of state stays in office, the harder it is to remove him (or her)<sup>43</sup> through democratic and constitutional means. This is because incumbents wield a lot of power, exercise a substantial degree of control over resources and electoral processes<sup>44</sup> and undermine the fairness of elections, rule of law and independence of the courts.<sup>45</sup> As of May 2020, presidential elections in Africa had only been nullified by courts in three African states only namely Côte d'Ivoire, Kenya and Malawi. On 3 February 2020, the High Court of Malawi in *Saulos Klaus Chilima & Lazarus McCarthy Chakwera v. Arthur Peter Mutharika & Electoral Commission* (Constitutional Reference No. 1 of 2019) found 'widespread, systematic and grave' electoral irregularities when it annulled the presidential election that returned President Peter Mutharika to power in Malawi in May 2019. This was upheld unanimously by Malawi's Supreme Court of Appeal on 8 May 2020 which confirmed that the irregularities in the election 'were not only serious but also troubling'. Incumbent heads of state see themselves as the only ones to develop Africa. For example, in December 2018 President Museveni declared that he will 'not ... retire when the original issues of why

43 Few African heads of state have been women. Ellen Johnson Sirleaf of Liberia was the first democratically elected female head of state in Africa who served as the 24th President of Liberia from 2006 to 2018. Other female heads of state in Africa include Joyce Hilda Banda (President of Malawi, April 2012–May 2014); Ameenah Gurib-Fakim (President of Mauritius, June 2015–March 2018); Sahle-Work Zewde (President of Ethiopia since October 2018 to date); Sylvie Kinigi (Acting President of Burundi, February–October 1993); Ivy Matsepe-Cassaburi (Acting President of South Africa, for four days in September 2005 when the President and his vice were out of the country); Rose Francine Rogombe (Interim President of Gabon, June–October 2009); Agnes Monique Ohsan Bellepeau (Acting President of Mauritius, March–July 2012 and May–June 2015); and Catherine Samba (Acting President of Central African Republic, January 2014–March 2016).

44 See, for example, *Sébastien Germain Marie Aikoue Ajavon v. Republic of Benin*, App No. 062/2019 (African Court on Human and Peoples' Rights, Order of Provisional Measures, 17 April 2020); *Col. Dr. Besigye Kiiza v. Museveni Yoweri Kaguta and Electoral Commission*, Election Petition No. 1 of 2001, [2001] UGSC 3 (21 April 2001): the Supreme Court of Uganda was split (4–3) on whether the presidential election was free and fair. See also *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni*, Election Petition No. 1 of 2006, [2007] UGSC 24 (30 January 2007), a unanimous Supreme Court of Uganda (7–0) concluded that the presidential election was not free and fair. In *Amama Mbabazi v. Yoweri Kaguta Museveni and Others*, Presidential Election Petition No. 01 of 2016, [2016] UGSC 3 (31 March 2016) the Supreme Court of Uganda found 'noncompliance with the principles of free and fair elections' in the Presidential election that was held in Uganda on 18 February 2016. See also *Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others*, Presidential Petition No. 1 of 2017 (20 September 2017), para. 405(i). Kenya's Supreme Court, by a majority (4–3), declared that 'the Presidential Election held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void'.

45 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, Communication 294/04, 26th Activity Report <[http://www.achpr.org/files/sessions/6th-eo/communications/294.04/achpreo6\\_294\\_04\\_eng.pdf](http://www.achpr.org/files/sessions/6th-eo/communications/294.04/achpreo6_294_04_eng.pdf)> (accessed 11 May 2020), paras 118–20; *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda*, Communication 339/2007 <<http://www.achpr.org/communications/decision/339.2007/>> (accessed 11 May 2020), paras 136–8.

Africa nearly perished have not been addressed'.<sup>46</sup> He identified key issues as fighting for Africa's 'prosperity' and 'strategic security'.<sup>47</sup>

To safeguard against life presidents, some African states have introduced term limits in office for serving African heads of state in national constitutions, among them Ghana, Kenya, Mozambique, South Africa and Tanzania. More recently there has been a trend to amend some African constitutions to remove safeguards against overstaying in power by African heads of state.<sup>48</sup> These include the removal of age limits to enable incumbent heads of state stay in power for life or as long as they wish.<sup>49</sup> Accordingly, several African heads of state have amended constitutions to perpetuate their stay in power including President Sam Nujoma of Namibia in 1998, President Gnassingbe Eyadema of Togo in 2002, President Omar Bongo of Gabon in 2003, President Paul Kagame of Rwanda in 2015, President Denis Sassou Nguesso of the Republic of Congo (Brazzaville) in 2015 and President Azali Assoumani of Comoros in 2018. Similar attempts to extend presidential terms have taken place in other African states including: Algeria, Angola, Burkina Faso, Burundi, Cameroon, Chad, Djibouti, Equatorial Guinea, Guinea, Niger, Nigeria, the Republic of Congo, Senegal, Sudan, Togo and Uganda.

Domestic criminal laws in Africa outlaw the overthrow of incumbent governments and such conduct attracts the most severe punishment.<sup>50</sup> Given that unconstitutional changes of governments in Africa threaten regional peace and security as well as socio-economic and political development, African states share an interest in bringing perpetrators to justice.

In 1997 Africa's first regional body, the Organisation of African Unity (OAU) – the predecessor of the AU – adopted a decision strongly condemning the *coup d'état* which took place in Sierra Leone on 25 May 1997 and called for 'the

46 M. Kahungu, 'I am Not About to Retire, Says Museveni', *Daily Monitor*, 13 December 2018.

47 *Ibid.* See also Council on Foreign Relations, Africa's 'Leaders for Life', < <https://www.cfr.org/background/africas-leaders-life> > (accessed 3 May 2020); AFP, 'Clinging to Power via Constitutional Reform in Africa', *Daily Monitor*, 28 February 2020.

48 See, for example, the Constitution (Amendment) Act, No. 2 of 2017 (Uganda). On 20 December 2017, after giving 29 million Ugandan shillings to every member of parliament (MP), a total of 317 MPs voted in favour of the Amendment, 97 voted against it and 2 MPs abstained from the vote. President Museveni signed the bill into an Act of Parliament on 27 December 2017.

49 For example, when Uganda's President Yoweri Museveni (who has been head of state for over 34 years since 1986 after using unconstitutional means) attained the age of 73 in 2017, government troops were amassed at the Legislative Assembly to intimidate MPs and pass an amendment of the Constitution of Uganda 1995, Article 102(b), which had set the age limit for Uganda's head of state as 35–75 years by providing that: 'A person is not qualified for election as President unless that person is not less than thirty-five years and not more than seventy-five years of age.' See the Constitution (Amendment) Act, No. 1 of 2018; *Mabirizi & Others v. Attorney General* (Consolidated Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018 and 13 of 2018) [2018] UGCC 4 (26 July 2018) < <https://ulii.org/ug/judgment/court-appeal-uganda/2018/37> > (accessed 11 May 2020); *Male H. Mabirizi K. Kivanuka & Others v. Attorney General* (Constitutional Appeals No. 02, 03 and 04 of 2018) [2019] UGSC 6 (18 April 2019) < <https://ulii.org/ug/judgment/supreme-court-uganda/2019/6> (accessed 11 May 2020).

50 This includes a death penalty. See, for example, Uganda's Penal Code Act 1950 (cap 120, Laws of Uganda), Article 23(1)(c).

immediate restoration of constitutional order'.<sup>51</sup> It called on *all* African states, and the international community at large, to 'refrain from recognizing the new regime and lending support in any form whatsoever to the perpetrators of the coup d'état'.<sup>52</sup> This was followed by the adoption of declarations at Algiers and Lomé rejecting unconstitutional changes of government and emphasising the importance of democratic governmental change.<sup>53</sup>

Consistent with the OAU,<sup>54</sup> the AU Constitutive Charter, which entered into force in 2001, condemns and rejects 'unconstitutional changes of governments'.<sup>55</sup> It further introduced a suspension mechanism for any member state whose government has been overthrown by unconstitutional means by providing that: 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.'<sup>56</sup> In addition the AU decided that its member states 'should' not recognise *de facto* authorities upon the occurrence of an unconstitutional change of government.<sup>57</sup> It further called on 'all non-African international bodies, including the United Nations and its General Assembly, to refrain from granting accreditation to such authorities'.<sup>58</sup>

This is intended to protect democratically elected governments, institutions and processes and the procedures of political decision-making. Thus the African Charter on Democracy, Elections and Governance provides that perpetrators of unconstitutional changes of government 'shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State'.<sup>59</sup> In addition, perpetrators of unconstitutional change of government may be 'tried before the competent court

51 See Decisions Adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers, CM/Dec.330–363 (LXVI), 28–31 May 1997, Harare, Zimbabwe: Sierra Leone, DOC.CM/2004 (LXVI)–C.

52 *Ibid.*

53 See, for example, Declarations and Decisions Adopted by the Thirty-Fifth Assembly of Heads of State and Government, 12–14 July 1999, Algiers, Algeria: Decision, AHG/Dec. 142 (XXXV), para. 1 the OAU Assembly decided that 'Member States whose Governments came to power through unconstitutional means after the Harare Summit, [held in May 1997] should restore constitutional legality before the next Summit'; [Lomé] Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI), adopted during the Thirty-Sixth Ordinary Session of the OAU Assembly in Lomé, Togo from 10–12 July 2000.

54 See, for example, Lomé Declaration of July 2000.

55 Constitutive Act of the African Union, *supra*, note 6, Article 4(p).

56 *Ibid.*, Article 30.

57 Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage such Situations – Doc. Assembly/AU/4(XIV), Assembly/AU/Dec.269(XIV), adopted by the Fourteenth Ordinary Session of the AU Assembly in Addis Ababa, Ethiopia on 2 February 2010, para. 6(I)(c).

58 *Ibid.*

59 See the African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) < <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> > (accessed 11 May 2020), Article 25(4). See also Decision on the Prevention of Unconstitutional Changes of Government, *supra*, note 57, para. 6(I)(b).

of the [African] Union'.<sup>60</sup> However, a number of African states have not ratified the African Charter on Democracy.<sup>61</sup>

## **B. Defining the Crime of Unconstitutional Change of Government**

The Malabo Protocol gives effect to the African Charter on Democracy provision on unconstitutional change of government and other AU documents calling for the prosecution of such perpetrators,<sup>62</sup> by granting the African Court jurisdiction to try the crime of 'unconstitutional change of government' when the concerned state is 'unwilling or unable' to pursue criminal investigations and prosecutions.<sup>63</sup> This crime is defined as the commission or ordering to be committed the following six acts, with the 'aim' (intent) of 'illegally accessing or maintaining power':

- (a) a putsch or coup d'état against a democratically elected government;
- (b) an intervention by mercenaries to replace a democratically elected government;
- (c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- (d) any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- (e) any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
- (f) any substantial modification to the electoral laws in the last six months before the elections without the consent of the majority of the political actors.<sup>64</sup>

It is notable from the foregoing that acts constituting the crime of unconstitutional change of government can be classified into two broad categories. First, unlawful acts by individuals or groups directed against 'a democratically elected government' with the intention of 'illegally accessing' power, namely a putsch or *coup d'état*, intervention by mercenaries and the use of armed dissidents or rebels

60 African Charter on Democracy, Elections and Governance, *ibid.*, Article 25(5).

61 By May 2020, more than ten years since the adoption of the African Charter on Democracy, the Charter had been ratified by 34 out of 55 AU member states. The following 21 states had not ratified the Charter: Angola, Botswana, Burundi, Cape Verde, Congo, DRC, Egypt, Equatorial Guinea, Eritrea, Gabon, Kenya, Libya, Morocco, Mauritius, Senegal, Somalia, Eswatini (formerly Swaziland), Tanzania, Tunisia, Uganda and Zimbabwe.

62 See, for example, the Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa (Ezulwini, Kingdom of Swaziland, 17–19 December 2017) < <http://www.peaceau.org/uploads/ezulwini-framework-english.pdf> > (accessed 11 May 2020), para. 4(iii) provides that 'perpetrators of coups d'état shall be liable for prosecution before the African Court of Justice and Human Rights'.

63 Malabo Protocol, *supra*, note 9, Article 46H.

64 Statute of the African Court of Justice and Human and Peoples' Rights, Article 28E. See also African Charter on Democracy, Elections and Governance, *supra*, note 59, Article 23 and Lomé Declaration of July 2000, *supra*, note 53.

or political assassination. Second, unconstitutional acts by serving governments with the intention of ‘illegally maintaining power’, namely refusal to relinquish power to the winning party or candidate, unconstitutional amendment of the constitution, and undemocratic modification to the electoral laws in the last six months before elections.

Unconstitutional change of government undermines the objectives and principles of the African Union including the rule of law, popular participation and good/democratic governance, the promotion of human rights, and the development and entrenchment of a democratic culture.<sup>65</sup> The AU thus recognises that unconstitutional changes of governments ‘are one of the essential causes of insecurity, instability and violent conflict in Africa’.<sup>66</sup> Thus unconstitutional changes of government constitute a threat to development, ‘democracy, peace and security’ in Africa.<sup>67</sup> The African Commission on Human and Peoples’ Rights has stressed that coups violate the right of every citizen to ‘participate freely’ in the government of his or her country under Article 13(1) of the African Charter as well as the right of all peoples to ‘freely determine their political status’ under Article 20(1) of the African Charter.<sup>68</sup>

### **C. Is There a Right to Peaceful Rebellion/Resistance against African Undemocratic Governments?**

The Malabo Protocol implicitly acknowledges a peaceful right to resistance against an undemocratic government (tyranny, oppression, oppressing rulers) by defining one of the acts of the crime of ‘unconstitutional change of government’ as ‘a putsch or coup d’état against a *democratically elected government*’.<sup>69</sup> The Protocol does not clearly define what is meant by a ‘*democratically elected government*’ in the African context.<sup>70</sup> However, it lays down a number of principles such a government shall strive to achieve, including institutionalising ‘good political governance’ through effective public administration; an effective parliament; an independent judiciary; regular, free and fair elections; political pluralism including multiparty political systems; and respect of the rule of law.<sup>71</sup> Thus a democratic government should promote the characteristics of a democratic society, which include pluralism, tolerance, broad-mindedness, equality, liberty and the encouragement of self-fulfilment.<sup>72</sup>

65 Constitutive Act of the African Union, *supra*, note 6, Articles 3 and 4.

66 African Charter on Democracy, Elections and Governance, *supra*, note 61, Preamble.

67 Resolution on the Unconstitutional Change Governments, ACHPR/Res.213, 2 May 2012; Resolution on the Situation in Comoros, ACHPR/Res.34, 5 May 1999.

68 ACHPR/Res.213, *supra*, note 67; *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96, 11 May 2000, para. 7, (2000) AHRLR 107.

69 Statute of the African Court of Justice and Human and Peoples’ Rights, Article 28E(1)(a), emphasis added.

70 *Ibid.*, Article 28E(2): ‘For purposes of this Statute, “democratically elected government” has the same meaning as contained in AU instruments.’

71 African Charter on Democracy, *supra*, note 59, Article 32.

72 See *Refah Partisi (the Welfare Party) v. Turkey* (Apps 41340/98, 41342/98, and 41344/98), 13 February 2003, (2003) 37 EHRR 1, paras 86–95.

A noted above, the Malabo Protocol limits the crime of ‘unconstitutional change of government’ to a putsch or *coup d’état* against a ‘democratically elected government’. Therefore, arguably, a *coup d’état* against an undemocratically elected government intended to hand over power, without delay, to an inclusive civilian led government would not amount to a crime of unconstitutional change of government. During the drafting of the Malabo Protocol, consideration was given to whether popular uprising should follow within the definition of unconstitutional change of government, but was rejected.<sup>73</sup> International law protects the right of ‘all peoples’<sup>74</sup> to self-determination by virtue of which they ‘freely determine their political status and freely pursue their economic, social and cultural development’.<sup>75</sup> This includes both internal and external political status, without external interference,<sup>76</sup> reflecting ‘a free and genuine expression of the will of the peoples concerned’.<sup>77</sup> Since genuine periodic elections are a condition of ‘an effective political democracy’,<sup>78</sup> the genuine will of peoples concerned is determined in most cases by popular public consultation through regular, free and fair elections or referenda, though this may be expressed through peaceful popular demonstration.

Thus, as a last resort, ‘rebellion against tyranny and oppression’ from undemocratic regimes (in colonial and non-colonial territories) is not criminalised.<sup>79</sup> Indeed, Article 20(2) of the African Charter on Human and Peoples’ Rights explicitly protects the right of ‘colonised or oppressed peoples’ to ‘free themselves from the bonds of domination by resorting to any means recognised by the international community’. The means recognised include peaceful demonstration against ‘oppression and domination’.<sup>80</sup> The implication is that a ‘struggle waged by peoples according to the principles of international law

73 Report of the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications, AfCHPR/LEGAL/Doc.3, para. 12.

74 See Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS-89/CONF.602/7 (22 February 1990) <<http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>> (accessed 11 May 2020). A people in the context of the right to self-determination refers to ‘a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life’.

75 ICCPR, *supra*, note 7, Article 1; International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, Article 1; African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), Article 20 (emphasis added).

76 The Final Act of the Conference on Security and Cooperation in Europe, 1 August 1975 (Helsinki Final Act 1975), 14 ILM 1292, Principle VIII.

77 *Western Sahara Case* [1975] ICJ Rep 12, para. 55.

78 *Matthews v. United Kingdom* (App 24833/94), 18 February 1999, (1999) 28 EHRR 361.

79 Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948), Preamble, para. 3 recognises that: ‘it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’.

80 *Kevin Mgwanga Gunme et al. v. Cameroon*, Communication 266/03, 27 May 2009, (2009) AHRLR 9, para. 197.

for their liberation or self-determination'<sup>81</sup> from colonialism, 'alien subjugation, domination and exploitation' in all its forms and manifestations<sup>82</sup> or from undemocratic governments against domestic oppression which results in a change of government is or should be excused from criminal liability for unconstitutional change of government. While this is not explicitly provided for in the Malabo Protocol, it is consistent with the practice of the AU. This is discerned from the fact that the AU did not suspend Tunisia, Egypt and Libya during the Arab Spring, and more recently (April 2019) the AU did not immediately suspend Sudan after the military takeover of power on 11 April 2019 following popular protests leading to the suspension of the Constitution, the dissolution of the National Assembly, the formation of a military-led transitional government and the arrest of President Omar Al Bashir.<sup>83</sup>

However, the AU 'strongly condemn[ed] and totally reject[ed] the seizure of power by the Sudanese military and its plan to lead the transition for two years'.<sup>84</sup> It demanded that the Sudanese military step aside and hand over power to a transitional civilian-led political authority involving all Sudanese political actors and stakeholders, which will lead to the holding, as quickly as possible, of free, fair and transparent elections.<sup>85</sup> This followed the AU chairperson's statement appealing to all stakeholders to engage in an 'inclusive dialogue' to create the conditions that will make it possible to meet the aspirations of the Sudanese people to democracy, good governance and well-being and restore constitutional order as soon as possible.<sup>86</sup> Thus emphasis was placed on finding an all-inclusive and consensual solution leading to the formation of the civilian-led Transitional Authority to lead the process towards the restoration of constitutional order through fair, democratic and transparent elections.<sup>87</sup> It was only after establishing lack of progress towards the establishment of a civilian-led Transitional Authority

81 Statute of the African Court of Justice and Human and Peoples' Rights, Article 28G(c) provides with respect to terrorism that 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts'.

82 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) (14 December 1960), UN Doc. A/4684 (1961), Preamble and para. 1; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970, GA Res 2625(xxv) (24 October 1970) Annex, UN Doc. A/5217 at 121 (1970).

83 AU Peace and Security Council, Communiqué, PSC/PR/COMM.(DCCCXL), Adopted by the Peace and Security Council at its 840th meeting held on 15 April 2019 on the situation in Sudan < <http://www.peaceau.org/uploads/840-psc-communication-sudan.eng.pdf> > (accessed 11 May 2020).

84 *Ibid.*, para. 5(a).

85 *Ibid.*, para. 5(b), (c), (d).

86 See AU, Statement of the Chairperson of the Commission on the Situation in Sudan, 11 April 2019 < <http://www.peaceau.org/uploads/auc-sudan-11-april-2019-.pdf> > (accessed 15 April 2019).

87 AU Peace and Security Council, Communiqué, PSC/PR/COMM.(DCCCXLVI), Adopted by the Peace and Security Council at its 846th meeting held in Tunis, Tunisia, on 30 April 2019, on the situation in The Sudan < <http://www.peaceau.org/uploads/psc-com-sudan-30-april-2019-eng.pdf> > (accessed 30 April 2019), para. 8(a).

that the AU decided to ‘suspend, with immediate effect, the participation of the Republic of Sudan in all AU activities until the effective establishment of a civilian-led Transitional Authority’ as the only way to allow the Sudan to exit from its crisis.<sup>88</sup>

Similarly, the AU did not suspend Zimbabwe after military intervention and the confinement of President Robert Mugabe, which paved the way for Mugabe’s ‘resignation’<sup>89</sup> in November 2017 after 37 years in power.<sup>90</sup> The AU Commission chairperson did not consider the events in Zimbabwe as a military coup and thus did not condemn the intervention and takeover by the military. Instead the chairperson recognised the military as part of the ‘stakeholders’ by urging ‘all stakeholders to address the current situation in accordance with the Constitution of Zimbabwe and the relevant instruments of the African Union, including the African Charter on Democracy, Elections and Governance’.<sup>91</sup> In addition, the African Commission on Human and Peoples’ Rights simply called on ‘all stakeholders to address the current situation and resolve the crisis peacefully’ in strict adherence to the Constitution of Zimbabwe and applicable regional and international instruments.<sup>92</sup> This view was supported by the Southern African Development Community (SADC).<sup>93</sup> Consequently, the AU recognised the events in Zimbabwe leading to Mugabe’s ‘resignation’ as the legitimate expression of the will of Zimbabwean people paving the way ‘for a transition process, owned and led by the sovereign people of Zimbabwe’.<sup>94</sup> The AU ignored the fact that the replacement of Mugabe by a former (rather than the incumbent) vice president, after military intervention, was contrary to Zimbabwe’s Constitution.<sup>95</sup> Therefore, in these circumstances, the non-suspension of Zimbabwe from the activities of the

88 AU Peace and Security Council, Communiqué, PSC/PR/COMM.(DCCCXLIV), Adopted by the Peace and Security Council at its 854th meeting held on 6 June 2019, on the situation in The Sudan < <http://www.peaceau.org/uploads/psc.854.comm.sudan.6.6.19.pdf> > para. 12 (accessed 11 May 2020).

89 See ‘Robert Mugabe’s Resignation Letter in Full’, *Al Jazeera*, 21 November 2017 < <https://www.aljazeera.com/news/2017/11/robert-mugabe-resignation-letter-full-171121195448333.html> > (accessed 31 December 2018).

90 See Statement by the Chairperson of the African Union Commission on the situation in Zimbabwe < <http://www.peaceau.org/uploads/statement-by-the-chairperson-of-auc-on-zimbabwe-ff.pdf> > (accessed 11 May 2020).

91 *Ibid.*

92 See Statement of the African Commission on Human and Peoples’ Rights following the events unfolding in the Republic of Zimbabwe since 14 November 2017 (21 November 2017) < <http://www.achpr.org/press/2017/11/d373/> > (accessed 11 May 2020).

93 See SADC, ‘SADC Organ Troika Plus Council Chairperson Ministerial Meeting discusses the Political Situation in Zimbabwe’, 16 November 2017 <http://www.sadc.int/news-events/news/press-release-sadc-organ-troika-plus-council-chairperson-ministerial-meeting-discusses-political-situation-zimbabwe/> > (accessed 11 May 2020), para. 6 provides: ‘SADC Organ Troika called upon all stakeholders in Zimbabwe to settle the political challenges through peaceful means.’

94 See Statement of the Chairperson of the Commission of the African Union on the Situation in Zimbabwe, Addis Ababa, 21 November 2017 < <http://www.peaceau.org/uploads/auc-statement-zimbabwe-21nov2017english.pdf> > (accessed 11 May 2020).

95 Constitution of Zimbabwe Amendment (No. 20) Act 2013, Article 92(3) provides that: ‘The President and the Vice-Presidents are directly elected jointly by registered voters throughout Zimbabwe.’ Under Article 10(1)(a), ‘If the President dies, resigns or is removed from office the

AU was inconsistent with Article 30 of the AU Constitutive Act.<sup>96</sup> It follows that the AU accepted that it is legitimate to rise up/resist peacefully against oppressive political systems or undemocratic government (forcing an elected head of state to 'resign') in order to escape the worst consequences of human rights violations,<sup>97</sup> and facilitate 'a peaceful transfer of power in a manner that secures the democratic future of their country'.<sup>98</sup> Similarly, the AU did not condemn the popular protests in Algeria in March 2019 against 82-year-old president, Abdelaziz Bouteflika's decision to stand for a fifth term as Algerian President after twenty years in office. The protests forced him to resign. The AU Commission chairperson simply called for 'national dialogue to achieve the necessary consensus to accurately implement ... reforms in an atmosphere of peace, stability, and sustainability of the state.'<sup>99</sup> Furthermore, the AU did not condemn the 2019 popular protests in Sudan, which finally ended the regime of long-term serving head of state and ousting with a military intervention President Omar Al-Bashir, aged 75 (after nearly thirty years in power).

On the other hand, the AU has consistently implemented its suspension mechanism from participation in the activities of all the organs of the AU in states where unconstitutional changes of government have taken place through military *coups d'état*. The AU did so, for example, in Egypt (2013),<sup>100</sup> Madagascar (2009),<sup>101</sup> Mauritania (2005),<sup>102</sup> Niger (2010)<sup>103</sup> and Togo (2005)<sup>104</sup> and did not lift the suspension until what it considered to be democratic elections were held and the constitutional order was restored. This practice was observed regardless of the prospects of the coup to the restoration of democratic governance in Mauritania, Niger and Egypt.

A number of African heads of state do not relinquish power to winning candidates after free, fair and regular elections or do not organise regular free and fair elections. Instead they are forced from power by coups, rebel movements

first Vice-President assumes office as President until the expiry of the former President's term of office.'

- 96 AU Constitutive Act, *supra*, note 6, Article 30 provides that: 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.'
- 97 G. D. Blunt, 'Is There a Human Right to Resistance?', 39 (4) *Human Rights Quarterly* (2017), pp. 860–81.
- 98 AU Commission Chairperson Statement, 21 November 2017, *supra*, note 94.
- 99 See African Union calls for 'national dialogue to bring Algerian crisis to an end', *Middle East Monitor*, 18 March 2019 < <https://www.middleeastmonitor.com/20190318-african-union-calls-for-national-dialogue-to-bring-algerian-crisis-to-an-end/> > (accessed 11 May 2020).
- 100 AU, Communiqué, Peace and Security Council 384th Meeting, 5 July 2013, PSC/PR/COMM.(CCCLXXXIV).
- 101 AU, Communiqué, Peace and Security Council 181st Meeting, 20 March 2009, PSC/PR/COMM.(CLXXXI).
- 102 AU, Statement, Peace and Security Council, 36th Meeting, 4 August 2005, PSC/PR/Stat.(XXXVI)-(ii).
- 103 AU, Communiqué, Peace and Security Council 216th Meeting, 19 February 2010, PSC/PR/COMM.2(CCXXVI).
- 104 AU, Communiqué of the Twenty-Fifth Meeting of the Peace and Security Council, Peace and Security Council 25th Meeting, 25 February 2005, PSC/PR/Comm.(XXV).

and popular uprisings. As a result, several coups and attempted coups have taken place in post-colonial African states,<sup>105</sup> for example in Togo (2005), Mauritania (2005 and 2008), Guinea (2008), Madagascar (2009) and Niger (2010). Between 2010 and 2017 more than ten African heads of state were removed from power after popular protests. These include Blaise Compaoré of Burkina Faso (2014), Hosni Mubarak of Egypt (2011), Mohamed Morsi (2013), Zine El Abidine Ben Ali of Tunisia (2011) and Muammar Mohammed Abu Minyar Gaddafi of Libya (2011). The AU did not condemn the peaceful protests but condemned military involvement observing:

If mass uprisings, no matter how popular they might be, are allowed to justify the intervention of the military to remove democratically-elected Governments, then, no AU Member State could be immune and periodic instabilities will be inevitable.<sup>106</sup>

Therefore the current practice of the AU recognises the rights to freedom of expression, association and peaceful assembly, as protected by Articles 9, 10 and 11 of the African Charter. These articles protect a right to peaceful protest – the non-violent gathering of persons outdoors or indoors held on publicly or privately owned property with a common expressive purpose such as conveying a collective position on a particular issue. This may take several forms, including: marches, demonstrations, meetings, processions, strikes, rallies, sit-ins, flash-mobs and resistance against undemocratic governments with the aim of advancing the implementation of human rights. However, there is no justification for military intervention to remove democratically elected governments.

#### IV. IMPACT OF IMMUNITY ON THE PROSECUTION OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT

Unlike Article 27 of the Rome Statute, which removes immunities in proceedings before the ICC itself (at the ‘vertical level’) and before national authorities (at the ‘horizontal level’),<sup>107</sup> Article 46*Abis* of the Malabo Protocol grants immunities to serving AU heads of state and other senior state officials during their office by providing that:

105 See P. J. McGowan, ‘African Military Coups D’état, 1956–2001: Frequency, Trends and Distribution’, 41(3) *Journal of Modern African Studies* (2003), pp. 339–70 observing that between January 1956 and December 2001 in 48 sub-Saharan African states there were 80 successful coups d’état, 108 failed coup attempts and 139 reported coup plots.

106 AU, Final Report of the African Union High-Level Panel for Egypt, PSC/AHG/4.(CDXVI), Peace and Security Council 442th Meeting 17 June 2014, para. 73.

107 Rome Statute, *supra*, note 17, Article 27(2): ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’; *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 6 July 2017, para. 76 the ICC Pre-Trial Chamber II considered that ‘the effect of Article 27(2) of the [Rome] Statute . . . concerns both, vertically, the relationship between a State Party and the Court and, horizontally, the inter-State relationships between States Parties to the Statute.’

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The ordinary meaning to be given to the reference in the above provision to immunity 'based on their functions' may be read as granting functional (organic/subject matter) immunity or immunity *ratione materiae*. This immunity accrues under *customary international law* to all state agents acting in their governmental or *official capacity* (excluding acts in a private capacity). The aim is to protect certain official acts carried out by individuals on behalf of the state. The official act is attributed to the state and thus it continues to apply after the individual has ceased to hold public office.

It may also be read as granting personal (*ratione personae* or procedural) immunity since it explicitly refers to the 'serving' head of state or government, 'anybody acting or entitled to act in such capacity', e.g. vice or deputy president, and other unnamed 'senior state officials', possibly including the Minister for Foreign Affairs and Defence Minister. This type of immunity is granted by *international customary or treaty rules* to some categories of individuals on account of their functions or the office or status of a person essential to a state's administration while in office (e.g. serving heads of state or government, ministers for foreign affairs, heads of diplomatic missions/ambassadors). They cover both the official and private acts of such office bearers but they lapse when the officeholder leaves office.

It follows that perpetrators of an unconstitutional change of government (after replacing a democratically elected government or refusal by incumbents to relinquish power to the winning party or candidate) may invoke immunity as a procedural bar to their investigation or prosecution as long as they remain in office. This means that immunities may encourage and perpetuate the unconstitutional change of government and exercise of power unless governments which acquire or retain power unconstitutionally are not recognised. If interpreted broadly, immunity granted to serving African heads of state or other undefined 'senior state officials' has the potential to undermine the Court's ability to exercise its jurisdiction and thereby create an insurmountable obstacle to the Court's legitimacy, effectiveness and credibility. Such a situation would be incompatible with the object and purpose of granting the African Court criminal jurisdiction generally, and also granting the Court jurisdiction in particular over the crime of unconstitutional change of government.

Therefore the terms of Article 46*Abis* should be read restrictively in their context and in the light of the object and purpose of the Malabo Protocol in at least four ways. First, state officials granted immunity should be restricted to 'democratically elected officials' only so that officials who acquire power through unconstitutional means do not benefit from immunity. The effect of the contrary reading would be to make an important provision directed at ending unconstitutional change of government inoperable for most practical purposes.

Second, ‘tenure of office’ in Article 46*Abis* of the Malabo Protocol should be read restrictively by limiting tenure of office to end when an incumbent head of state refuses to relinquish power to the winning party or candidate after free, fair and regular elections. Third, Article 46*Abis* should be understood to mean that immunity *ratione materiae* does not apply to any crime prohibited by a peremptory norm of general international law (*jus cogens*).<sup>108</sup> This promotes accountability and justice for the victims of atrocity crimes as well as providing leaders with greater legitimacy and support. This would be consistent with the obligations of African state parties under other international treaties (such as the Genocide Convention and the Rome Statute) as well as the obligations of several states under domestic laws implementing these international treaties.<sup>109</sup> Thus some domestic courts in Africa—e.g. South Africa’s Supreme Court of Appeal and Kenya’s Court of Appeal—have held that a serving head of state or government (or any other state official) subject to an ICC arrest warrant(s) may be arrested when present in a state’s territory and surrendered to the ICC.<sup>110</sup> In addition, domestic courts have held that international law immunities, including the immunity of heads of state, do not apply under domestic law when a person is sought for domestic prosecution for genocide, war crimes and crimes against humanity.<sup>111</sup>

Finally, ‘customary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States’<sup>112</sup> even when

108 ILC Draft Article 7(1) on immunity of state officials from foreign criminal jurisdiction, as provisionally adopted in 2017, reads: ‘Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance’. For a discussion see D. Tladi, ‘The International Law Commission’s Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?’ 32 (1) *Leiden Journal of International Law* (2019), pp. 169–87.

109 See, for example, South Africa’s Implementation of the Rome Statute of the International Criminal Court Act, No. 27 of 2002, sections 4(2)(a) and 10(9).

110 *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (The South African Supreme Court of Appeal of South Africa, 15 March 2016) paras. 96–101; *Attorney General & 2 Others v. Kenya Section of the International Commission of Jurists*, Civil Appeal 105 of 2012 and Criminal Appeal 274 of 2011(Consolidated) (16 February 2018), [2018] eKLR <<http://kenyalaw.org/caselaw/cases/view/148746/>> (accessed 11 May 2020): ‘Under customary international law, the UN Charter, the Rome Statute and the International Crimes Act [No. 16 of 2008, Laws of Kenya], and as a UN Member State it was legitimate for Kenya to disregard President Al Bashir’s immunity and execute the ICC’s request for cooperation by arresting him, because under the concept of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention on the Law of Treaties “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”’ (emphasis in the original).

111 *Ibid.* See also Uganda victims foundation v. Attorney General & Minister of Justice and Constitutional Affairs, criminal application no. 0006/2017 (The International Division of the High Court of Uganda, 19 December 2019)

112 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ‘Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir’, ICC-02/05-01/09-302, 6 July 2017, para. 68 (*Bashir–South Africa Decision*); ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir’, ICC-02/05-01/09 (11 December 2017), para. 27 (*Bashir–Jordan Decision*).

suspected of having committed one or more international crimes.<sup>113</sup> This is intended to ensure ‘the effective performance of the functions of sitting Heads of States’.<sup>114</sup> Thus immunities *ratione personae* to incumbent or serving heads of states have been granted before foreign national courts (e.g. in cases of Gaddafi<sup>115</sup> and Robert Mugabe for alleged torture),<sup>116</sup> and granted to other state officials, e.g. the Minister for Foreign Affairs (Mr Abdulaye Yerodia Ndombasi),<sup>117</sup> the Israeli Minister of Defence (General Shaul Mofaz for alleged ‘grave breaches’ of the Geneva Conventions)<sup>118</sup> and the Chinese Minister for Commerce and International Trade (Bo Xilai for alleged offences relating to torture).<sup>119</sup> However, such immunities have not been granted to either serving or former heads of state or other state officials before international criminal tribunals or ‘*certain* international criminal courts, where they have jurisdiction’.<sup>120</sup> This is because relevant treaties provide that the official position of a person, whether as head of state or government or as a responsible government official, does not relieve the accused from criminal responsibility,<sup>121</sup> impose a duty on state parties to cooperate

113 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ‘Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court’, ICC-02/05-01/09 (9 April 2014), para. 25 (*Bashir–DRC Decision*).

114 *Ibid.*

115 France, *Gaddafi*, Judgment of the French Court of Cassation of 13 March 2001 (No. 00-87215), (2001)125 International Law Reports 456, para. 9: ‘Under international law, regardless of the gravity of the crime denounced, there is no exception to the principle of immunity from jurisdiction for *incumbent* heads of State in foreign courts’ (emphasis added).

116 United Kingdom, Decision, *Robert Mugabe*, Judgment of 14 January 2004, Bow Street Magistrates Court, Tim Workman J, 53 *ICLQ* (2004), p. 769: ‘I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe and is entitled *whilst he is Head of State* to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for’ (emphasis added).

117 *Arrest Warrant of 11 April 2000 Case (Democratic Rep. of Congo v. Belgium)* (Judgment, 14 February 2002), ICJ Reports 2002, p. 3, para. 54: ‘the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.’

118 United Kingdom, *Shaul Mofaz*, Judgment of 12 February 2004, Bow Street Magistrates Court, CL Pratt J, 53 *ICLQ* (2004) p. 771. The judge declined to issue the warrant of arrest on the basis that ‘a [serving] Defence Minister would automatically acquire ... immunity in the same way as that pertaining to a Foreign Minister’ since ‘the roles of defence and foreign policy are very much intertwined’.

119 United Kingdom, *Re Bo Xilai*, Judgment of 8 November 2005, Bow Street Magistrates Court, 128 International Law Reports 713. After recalling the judgment of the International Court of Justice in the *Arrest Warrant Case*, the Court determined that the Chinese Minister for Commerce’s functions were ‘equivalent to those exercised by a Foreign Minister’.

120 *Arrest Warrant Case*, *supra*, note 117, para. 61 (emphasis added).

121 See, for example, Charter of the International Military Tribunal at Nuremberg, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945, 82 UNTS 279, Article 7; Charter of the International Military Tribunal for the Far East, 19 January 1946, Article 6; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993), Article 7(2); Statute of the International Criminal Tribunal for Rwanda (1994), Article 6(2); Statute of the Special Court for Sierra Leone, Security Council Resolution 1315 (2000) of 14 August 2000, Article 6(2).

with the international court and exclude immunity from the arrest and surrender of any person sought by the tribunal or court based on official capacity.<sup>122</sup> In addition, in some situations (e.g. Darfur/Sudan and Libya) the Security Council, acting under Chapter VII of the Charter of the United Nations, imposed obligations on relevant non-state parties to the Rome Statute to ‘cooperate fully’ with the ICC.<sup>123</sup> This obligation includes the removal of all possible impediments to the exercise of the Court’s jurisdiction, including the removal of immunities from foreign domestic jurisdiction. Thus the effect of a Security Council resolution triggering the ICC jurisdiction under Article 13(b) of the Rome Statute is that ‘the legal framework of the [Rome] Statute applies, in its entirety, with respect to the situation referred’.<sup>124</sup> This includes the obligation to recognise and accept that immunity otherwise available under international law was removed by virtue of applying the Rome Statute, including Article 27, between the court and the state of the accused (at the ‘vertical’ level) and that immunity was also removed in the relationship between ICC state parties requested to arrest and surrender an accused person, and the state of the accused person (at the ‘horizontal’ level).<sup>125</sup>

This has rendered inapplicable any (state or diplomatic) immunity on the ground of official capacity that would otherwise exist under international law.<sup>126</sup> As a result, the ICC Pre-Trial Chambers have found a number of African state parties to the Rome Statute (including Chad, Malawi, Democratic Republic of the Congo, Uganda, Djibouti and South Africa) in breach of their treaty obligations following their deliberate refusal to arrest and surrender Omar Al Bashir during his presence on their territory.<sup>127</sup> The reasoning of the Pre-Trial Chamber has been inconsistent. The *first* line of reasoning advanced in 2011 in *Bashir–Malawi* and *Bashir–Chad Decisions* by the ICC Pre-Trial Chamber was that:

the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by

122 See, for example, Rome Statute, *supra*, note 17, Article 27.

123 See, for example, UN Security Council Resolution 1593 (2005), para. 2: the SC decided that the ‘Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.’ See also UN Security Council Resolution 1970 (2011), para. 5: the SC decided that ‘the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution ...’

124 *Bashir–Jordan Decision*, *supra*, note 112, para. 37. See also *Bashir–South Africa Decision*, *supra*, note 112, paras 85–6; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ‘Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute’, ICC-01/11-01/11, 1 June 2012, paras 28–9.

125 *Bashir–South Africa Decision*, *supra*, note 112, paras 76–80; *Bashir–Jordan Decision*, *supra*, note 112, paras 33–45.

126 See, for example, *Bashir–Jordan Decision*, *supra*, note 112, paras 33–45; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ‘Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir’ (*Bashir–Malawi Decision*), ICC-02/05-01/09-Corr. (13 December 2011), para. 36; ‘Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir’ (*Bashir–Chad Decision*), ICC-02/05-01/09 (13 December 2011), para 13; *Bashir–DRC Decision*, *supra*, note 113, paras 29–32.

127 *Ibid.*

an international court. This is equally applicable to former or sitting Heads of States not parties to the Statute whenever the Court may exercise jurisdiction.<sup>128</sup>

The Pre-Trial Chamber claimed that immunity does not arise before international courts and tribunals because they are ‘totally independent of states and subject to strict rules of impartiality’.<sup>129</sup> It should be noted, however, that there is no general ‘international court’ exception to immunity per se, but immunities are relinquished through state consent to founding instruments of courts/tribunals or by other means such as the UN Security Council Chapter VII resolution or waivers of immunity.

The *second* line of reasoning was advanced in a subsequent consideration of the issue of immunity of heads of states non-party to the Rome Statute in *Bashir–DRC Decision*. The Pre-Trial Chamber II accepted that there could be instances where the issue of personal immunities of heads of state of a non-state party may justifiably be raised before the Court and that ‘the solution provided for in the [Rome] Statute to resolve such conflicts is found in article 98(1) of the Statute’.<sup>130</sup>

In 2017, Pre-Trial Chamber II in *Bashir–South Africa Decision* advanced a *third* line of reasoning by stating that ‘since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27(2) of the [Rome] Statute, in its plain meaning, also encompasses that immunity’.<sup>131</sup> It asserted that if states party were to rely on immunities to refuse cooperation, it would make the Court’s role overwhelmingly difficult and that would be contrary to the purpose and object of Article 27(2).<sup>132</sup>

Although the AU currently argues that serving heads of state and government and other senior state officials of non-state parties to the Rome Statute enjoy immunity from arrest or prosecution for alleged international crimes,<sup>133</sup> it is desirable that the practice of the International Criminal Law Section of the African Court should be consistent with the practice of other international criminal tribunals or court in order to avoid conflicting obligations.

In the main *Judgment in the Jordan Referral re Al-Bashir Appeal* of 6 May 2019, the ICC Appeals Chamber found that Jordan had no ground to refuse to execute the request by the ICC for arrest and surrender of Omar Al-Bashir, the

128 *Bashir–Malawi Decision*, *supra*, note 126, para. 36; *Bashir–Chad Decision*, *supra*, note 126, para. 13.

129 *Bashir–Malawi Decision*, *supra*, note 126, para. 34.

130 *Bashir–DRC Decision*, *supra*, note 113, para. 27.

131 *Bashir–South Africa Decision*, *supra*, note 144, para. 74.

132 *Ibid.*, para. 75.

133 See, for example, African Union, *Decision on the International Criminal Court–Doc. EX.CL/1068(XXXII)*, Assembly/AU/Dec.672 (XXX), (30th Ordinary Session of the Assembly, 28–29 January 2018, Addis Ababa, Ethiopia), para. 5 (ii); UN General Assembly, ‘Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials’, A/73/144 (18 July 2018).

then head of state of Sudan – a non-state party to the Rome Statute.<sup>134</sup> The ICC Appeals Chamber held that ‘[t]here is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court.’<sup>135</sup> Endorsing the ICC Pre-Trial Chamber I’s 2011 *Bashir–Malawi Decision*, the Appeals Chamber also held that ‘[t]he absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant [...] also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State.’<sup>136</sup> An ‘international court’ (tribunal or commission) was defined as ‘an adjudicatory body that exercises jurisdiction at the behest of two or more states’.<sup>137</sup> Under what circumstances does horizontal immunity not (or cannot be presumed to) apply? Is it any time an international court requests arrest and surrender? Or is it only if the requested state is obliged to carry out the request, either by the court’s statute or by UNSC resolution? Or is it if the requested state is ‘urged’ (though not obliged) to carry out the request by UNSC resolution? The Joint Concurring Opinion of four out of the five judges (incorporated by reference in the main judgment) explained that:

[T]here is no rule of customary international law that recognises immunity for high officials of states, including Heads of State, before an international criminal tribunal that has jurisdiction to try suspects of crimes under international law. Article 27 of the Rome Statute appropriately reflects this reality of customary international law.<sup>138</sup>

This suggests that horizontal immunity does not apply any time an international court requests arrest and surrender. Accordingly, a state requested to arrest and surrender a person wanted by the ICC – as Jordan was requested – ‘should not be seen to be exercising the kind of jurisdiction that is forbidden of forum States under customary international law in relation to foreign sovereigns.’<sup>139</sup> In these judges’ view, the arrest and surrender process is not an exercise of domestic criminal jurisdiction as such but the requested states are ‘merely acting as jurisdictional surrogates of the ICC, for the purposes of enabling it to exercise its jurisdiction effectively’.<sup>140</sup> Although the Appeals Chamber’s judgment confirms the trend of non-immunity in international criminal justice, the reasoning suggests that by establishing the ICC, parties to the Rome Statute have in effect taken away the rights of non-state parties under international law. This opens the ICC

134 *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Bashir – Jordan Decision), ICC-02/05-01/09 OA2 (6 May 2019).

135 *Ibid.*, para. 113.

136 *Ibid.*, para. 114.

137 *Ibid.*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1-Corr 17-05-2019 2/190 NM PT OA2 (6 May 2019), para. 56.

138 *Ibid.*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1-Corr 17-05-2019 2/190 NM PT OA2, para. 446.

139 *Ibid.*, para. 444.

140 *Ibid.*, para. 445.

to criticism from non-state parties for granting to itself the power to remove rights that non-state parties have under international law. It may also be read as permitting two or more states to establish an international court to prosecute senior state officials, including heads of state, of third states.

## V. IMPOSITION OF THE DEATH PENALTY FOR THE CRIME OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT

Several African states have abolished the death penalty in law or in practice,<sup>141</sup> just like many other states in the rest of the world.<sup>142</sup> However, there are still a number of African states prescribing the death penalty for some crimes, including the imposition of the (mandatory) death penalty for the crime of unconstitutional change of government. African states that had not abolished the death penalty in 2017 included Botswana, Chad, Comoros, Democratic Republic of the Congo (DRC), Egypt, Equatorial Guinea, Ethiopia, Gambia,<sup>143</sup> Ghana, Lesotho, Libya, Mauritania,<sup>144</sup> Nigeria, Somalia, South Sudan, Sudan, Uganda, and Zimbabwe.<sup>145</sup> For example, Article 50 of Sudan's Penal Code provides for the death penalty as one of the penalties courts may impose for the offence of 'undermining the constitutional system' by stating that:

Whoever commits any act intending thereby to undermine the Constitutional System of the State or to endanger its independence or unity *shall be punished with death* or life imprisonment and he may also be dispossessed of all his property.<sup>146</sup>

Similarly, section 23(1) (c) and (d) of the Penal Code Act of Uganda provides:

Any person who, (c) contrives any plot, act or matter and expresses or declares such plot, act or matter by any utterances or by any overt act in order, by force of arms, to overturn the government as by law established; (d) aids or abets another person in the commission of the foregoing acts, or becomes an accessory before or after the fact to any

141 See Amnesty International, *Death Sentences and Executions 2018*, ACT 50/9870/2019 (Amnesty International, 10 April 2019) 48. 20 States in sub-Saharan Africa had abolished the death penalty for all crimes in 2018.

142 See Report of the UN Secretary-General, *Question of the Death Penalty*, A/HRC/39/19 (14 September 2018).

143 Although Gambia's Constitution (1996 as amended) prescribes the death penalty for the offence of 'treason' (art. 6), on 18 February 2018 President Adama Barrow announced an official moratorium on the application of the death penalty and the commutation of death sentences to life imprisonment, as a step towards abolition of the death penalty in The Gambia.

144 In May 2018, Mauritania adopted amendments which made the death penalty mandatory for any person convicted of 'blasphemous speech' and acts deemed 'sacrilegious'. Article 306 of the Penal Code, as revised, provides that any Muslim guilty of apostasy or blasphemy will be sentenced to death upon arrest without possibility of clemency based on repentance.

145 Amnesty International, *Death Sentences and Executions 2018*, *supra*, note 141, 49.

146 The Penal Code 1991 (Sudan), Article 50 (emphasis added).

of the foregoing acts or conceals any of those acts, commits an offence and *shall suffer death*.<sup>147</sup>

The offence of treason has been used against presidential candidates and aspirants in order to keep them under detention before conviction and discourage them from standing against the incumbent head of state (see, for example, *Col. (Rtd) Kizza Besigye v. Uganda*, Criminal Application No. 83 of 2016, 12 July 2016; and *Uganda v. Lt Gen. Henry Tumukunde*, CO/006/20, 16 March 2020). The imposition of the death penalty for the crime of unconstitutional change of government (and for other crimes) should be abolished in all circumstances or at least states should establish a moratorium on the death penalty due to several reasons including the following.

First, the death penalty cannot be reconciled with full respect for the right to life as protected by the African Charter on Human and Peoples' Rights<sup>148</sup> and other human rights treaties (such as the ICCPR) to which most African states are parties.<sup>149</sup> The African Charter does not include any provision recognising the death penalty, even for 'the most serious crimes'. Indeed, Article 4 of the African Charter provides that: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. In November 2015, the African Commission on Human and Peoples' Rights (African Commission) adopted a General Comment on the right to life.<sup>150</sup> The Commission confirmed that 'Whatever the offense or the circumstances of the trial, the execution of pregnant or nursing women, children, elderly persons or persons with psychosocial [mental] or intellectual disabilities,<sup>151</sup> will always amount to a violation of the right to life'.<sup>152</sup> In addition, in states which have not yet abolished the death penalty, the Commission stressed that 'it is vital that it [the death penalty] is used for only 'the most serious crimes' – understood to be crimes of 'extreme gravity involving intentional killing'<sup>153</sup> and only after a fair hearing, exhaustion of the

147 Penal Code Act 1950 (Uganda), Cap 120, Laws of Uganda 2000 (emphasis added).

148 African Charter, *supra*, note 75, Article 4: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

149 Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, CCPR/C/GC/36, 30 October 2018.

150 African Commission, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (November 2015) < <https://www.achpr.org/legalinstruments/detail?id=10> > (accessed 11 May 2020).

151 See Economic and Social Council Resolutions 1984/50 and 1989/64; CCPR/C/74/D/684/1996; A/67/279, para. 58; and A/HRC/36/26; *Lester Pitman & Hernandez v. The State*, [2017] UKPC 6 (Privy Council Appeals, Trinidad and Tobago, 23 March 2017).

152 African Commission, *General Comment No. 3, supra*, note 150, para. 25.

153 See *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, Communication 277/2003, 12 October 2013, para. 203: 'The phrase "most serious crimes" should be interpreted in the most restrictive and exceptional manner possible and that the death penalty should only be considered in cases where the crime is intentional, and results in lethal or extremely grave consequences.' See also Human Rights Committee, *Concluding Observations on the Third Periodic Report of Lebanon*, CCPR/C/LBN/CO/3 (5 April 2018) para. 22; *Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991 (1993).

right to an appeal to competent national organs<sup>154</sup> and after requests for amnesties, pardons or commutations have been meaningfully considered and conclusively decided upon.<sup>155</sup> It is contrary to the object and purpose of Article 4 of the African Charter for state parties to take steps to increase *de facto* the rate of and extent to which they resort to the death penalty, or to reduce the number of amnesties, pardons and commutations they grant.<sup>156</sup>

Unconstitutional changes of government which do not involve intentional killing should not be punishable by death. Even where the death penalty is prescribed by domestic law for ‘the most serious crimes’, there should be judicial discretion to consider whether or not to issue the death sentence in the particular personal circumstances of the offender and the particular circumstances of the offence, including any specific mitigating/attenuating or aggravating factors.<sup>157</sup> Therefore interpreting Article 4 of the African Charter in context and in the light of present-day conditions so as to render its provisions practical and effective (rather than merely theoretical and illusory) and in harmony with other rules of public international law of which it forms part supports the abolition of the death penalty. This view finds support in the fact that the abolition of the death penalty is not only desirable but necessary for the protection of everyone’s right to life and for the full recognition of the inherent dignity of all human beings.<sup>158</sup> Thus both the African Commission and the African Court on Human and Peoples’ Rights have held that the prohibition of cruel, inhuman or degrading punishment or treatment under Article 5 of the African Charter is absolute.<sup>159</sup> The African Court initially refrained from declaring whether the imposition of the mandatory death

154 African Charter, Article 7(1); *Mgosi Mwita Makungu v. United Republic of Tanzania*, Application No. 006/2016, Judgment, 7 December 2018, para. 57.

155 African Commission, *General Comment No. 3*, *supra*, note 150, para. 24. See also Human Rights Committee, *Mrs Tamara Chikunova v. Uzbekistan*, Communication No. 1043/2002, Views adopted on 16 March 2007, CCPR/C/89/D/1043/2002 (2007), para. 7.6; *Mr. Webby Chisanga v. Zambia*, Communication No. 1132/2002, Views adopted on 18 October 2005, UN Doc. CCPR/C/85/D/1132/2002 (2005), para. 7.5; *Ally Rajab and Others v. United Republic of Tanzania*, Application No. 007/2015 (African Court on Human and Peoples’ Rights, Judgment of 28 November 2019).

156 Human Rights Committee, *Concluding Observations: Chad*, CCPR/C/TCD/CO/1 (11 August 2009), para. 19.

157 *Eversley Thompson v. St. Vincent and the Grenadines*, Communication No. 806/1998, UN Doc. CCPR/C/70/D/806/1998 (2000), para. 8.2; *Pagdayawon Rolando v. Philippines*, Communication No. 1110/2002, UN Doc. CCPR/C/82/D/1110/2002 (8 December 2004), para. 5.2; *Francis Karioko Muruatetu & Another v. Republic [of Kenya]*, Petition No. 15 of 2015 (As Consolidated with Petition No. 16 of 2015) [2017] eKLR <<http://kenyalaw.org/caselaw/cases/view/145193/>> (Supreme Court of Kenya, 4 December 2017). Relevant circumstances include: age of the offender; being a first offender; whether the offender pleaded guilty; character and record of the offender; remorsefulness of the offender; the possibility of reform and social re-adaptation of the offender.

158 Article 5 of the Charter provides that ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly ... torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’

159 See *Huri-Laws v. Nigeria*, Communication 225/98, (2000) AHRLR 273 41; *Armand Guehi v. United Republic of Tanzania, Republic of Cote D’Ivoire Intervening*, Application No. 001/2015 Judgment 7 December 2018, para. 131.

penalty, without consideration of the individual circumstances of the offence or the offender, amounts to arbitrary deprivation of the right to life or to cruel, inhuman or degrading punishment or treatment.<sup>160</sup> However, the Court confirmed in 2019 in the case of *Ally Rajab and Others v. United Republic of Tanzania*, Application No. 007/2015 (Judgment of 28 November 2019) para. 114 that the mandatory imposition of the death penalty constitutes an arbitrary deprivation of the right to life in violation of Article 4 of the African Charter. This is because it does not permit a convicted person to present mitigating evidence. It also deprives the court of ‘discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law’ as well as depriving the court of discretion to take into account ‘specific and crucial circumstances such as the participation of each individual offender in the crime’ (para. 109).

Significantly, the African Commission has clarified that: ‘In no circumstances shall the imposition of the death penalty be mandatory for an offence.’<sup>161</sup> Furthermore, given that military courts/tribunals have been used in Africa to conduct unfair trials and to impose death sentences rendering the right to life as protected by Article 3 of the African Charter meaningless, ‘Military courts shall not have the power to impose the death penalty.’<sup>162</sup> State parties to the African Charter that have not already abolished the death penalty should ‘immediately establish a moratorium on executions’<sup>163</sup> and ‘adopt measures aimed at the full abolition of the death penalty’ under all circumstances.<sup>164</sup> Such recent measures in Africa include the adoption and entry into force of criminal codes (e.g. in Benin<sup>165</sup> and Burkina Faso<sup>166</sup>) and military justice codes (e.g. in the Central African Republic<sup>167</sup> and Guinea<sup>168</sup>) which do not provide for the death penalty; or the increasing restriction of the scope or use of the death penalty (e.g. the National Assembly of Chad promulgated a penal code which abolishes the death penalty for ordinary crimes, while maintaining it for ‘terrorism’).<sup>169</sup>

Second, Article 43A of the Malabo Protocol, as adopted by African states, explicitly excluded the death penalty for persons convicted of international crimes

160 *Dexter Eddie Johnson v. Republic of Ghana*, Application No. 016/2017 (Ruling on Jurisdiction and Admissibility, 28 March 2019). The Court declined to consider on merits whether the imposition of the automatic and mandatory death penalty violates the right to life on the basis that the UN Human Rights Committee adjudicated on the same issues brought before Court in *Dexter Eddie Johnson v. Ghana*, Communication No. 2177/2012, 27 March 2014, UN Doc CCPR/C/110/D/2177/2012 (2014), para 7.3.

161 African Commission, *General Comment No. 3, supra*, note 150, para. 24.

162 *Ibid.*

163 The Commission considers that ‘a moratorium is a move that paves the way for abolition of the death penalty’.

164 African Commission on Human and Peoples’ Rights, ‘Resolution on the Right to Life in Africa’, ACHPR/Res. 375 (LX) 2017, 22 May 2017. See also Resolutions ACHPR/Res.42(XXVI)99, 15 November 1999, para. 2; ACHPR/Res.136(XXXIII)08, 24 November 2008, para 2; ACHPR/Res.287, 29 July 2014, para. 5; ACHPR/Res. 227.

165 Law 2018-15.

166 Assemblée Nationale < <https://www.assembleenationale.bf/> > (accessed 11 May 2020).

167 Military Justice Code, adopted March 2017

168 Military Justice Code, in force 28 December 2017.

169 Law No. 2017-01, 8 May 2017.

by the African Court.<sup>170</sup> This explicit exclusion is based on the understanding that abolition of the death penalty in all circumstances ‘contributes to enhancement of human dignity and progressive development of human rights’.<sup>171</sup> An increasing number of states and human rights bodies consider the death penalty as a cruel, inhuman or degrading form of punishment<sup>172</sup> as reflected in several ways including:

- (a) subsequent treaties by states or subsequent practice establishing treaties against the death penalty, for example the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;<sup>173</sup>
- (b) the growing number of state parties to such treaties;<sup>174</sup>
- (c) the increasing number of states abolishing the death penalty *de jure*<sup>175</sup> and non-abolitionist states that have introduced a *de facto* moratorium on the exercise of the death penalty for all crimes and in all circumstances;<sup>176</sup>
- (d) statutes of international criminal tribunals do not provide for the death penalty but refer to imprisonment and the return of any property and proceeds acquired by criminal conduct to their rightful owners;<sup>177</sup>

170 Malabo Protocol, *supra*, note 9, Article 43A provides ‘... the Court shall pronounce judgment and impose sentences and/or penalties, *other than the death penalty*, for persons convicted of international crimes under this Statute’ (emphasis added).

171 See Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, General Assembly Resolution 44/128 of 15 December 1989, Preamble. See also Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OAS Treaty Series No. 73 (1990), adopted 8 June 1990; Protocol No. 6 to the European Convention on Human Rights, Concerning the Abolition of the Death Penalty, ETS 114, entered into force 1 March 1985; Protocol No. 13 to the European Convention on Human Rights, Concerning the Abolition of the Death Penalty in All Circumstances, ETS No. 187, Vilnius, 3.V.2002.

172 African Commission, *General Comment No. 3, supra*, note 150, para. 22: ‘... International law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment.’ See also UN, *High-level Panel Discussion on the Question of the Death Penalty: Report of the United Nations High Commissioner for Human Rights*, UN Doc., A/HRC/36/27 (4 July 2017), para. 48.

173 General Assembly Resolution 44/128 of 15 December 1989. Eleven AU States were parties to the ICCPR Second Optional Protocol in 2019.

174 By December 2018, 86 states had ratified the ICCPR Second Optional Protocol.

175 Amnesty International, *supra*, note 141. One hundred and six states did not provide for the death penalty for any crime under domestic law in 2017.

176 *Ibid.* States that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last ten years and are believed to have a policy or established practice of not carrying out executions: Algeria, Brunei Darussalam, Burkina Faso, Cameroon, Central African Republic, Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Malawi, Maldives, Mali, Mauritania, Morocco/Western Sahara, Myanmar, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea (Republic of Korea), Sri Lanka, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia and Zambia.

177 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute), UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1

- (e) emergency of a norm not to facilitate capital punishment in retentionist states by refraining from ‘refoulement, extradition, [or] deportation’ of any individual to another state where there exists ‘substantial grounds to believe’ that he or she would face a real risk of being subjected to the death penalty in the destination state<sup>178</sup> or by providing materials for use in executions; and
- (f) (quasi-)judicial decisions against the imposition of the death penalty,<sup>179</sup> particularly after unfair trials,<sup>180</sup> pending a final judgment,<sup>181</sup> against persons below eighteen years of age<sup>182</sup> or persons below twenty-one years of age,<sup>183</sup> abolishing the use of the death penalty

(1993), Article 24; Statute of the International Tribunal for Rwanda (ICTR Statute), Article 23; Rome Statute, Article 77.

- 178 African Commission, *General Comment No. 3*, *supra*, note 150, at para. 23; *Al-Saadoon and Mufdhi v. United Kingdom*, App 61498/08, 2 March 2010, 51 EHRR 9, para. 123; *Al Nashiri v. Poland*, App 28761/11, 24 July 2014, para. 576; *A.L. (X.W.) v. Russia*, App 44095/14, 29 October 2015, para 66; *F.G. v. Sweden*, App 43611/11, 23 March 2016, para. 110.
- 179 See, for example, *Groupe de Travail sur les Dossiers Judiciaires Stratégiques (Working Group on Strategic Legal Cases) v. Democratic Republic of Congo*, Communication 259/02; Communication 319/06, 24 July 2011, para. 69; *Interights & Ditshwanelo v. Republic of Botswana*, Communication 319/06, 18 November 2015, para. 66.
- 180 See, for example, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, Communications 137/94, 139/94, 154/96, and 161/97, (2000) AHRLR 212 (12th Annual Activity Report) para. 103; *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication 334/06, (2011) AHRLR 42, para. 231. See also *NG v. Canada*, Communication No. 469/1991, Views adopted on 5 November 1993, CCPR/C/49/D/469/1991 (7 January 1994) para. 16.2: ‘The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant.’ See also *Öcalan v. Turkey*, App 46221/99, Judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) of 12 May 2005, 41 EHRR 985, para. 163–75. By 13 votes to four, the Court concluded in para. 175 that ‘the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 [of the ECHR]’.
- 181 *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, ICJ Reports 2017, p. 231, para. 58. The International Court of Justice ordered that ‘Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order’. See also *Dexter Eddie Johnson v. Republic of Ghana*, Application No. 016/2017 (African Court on Human and Peoples’ Rights, Order of Provisional Measures, 28 September 2017). The Court ordered Ghana to ‘refrain from executing the death penalty against the Applicant until the Application [against execution of the death penalty] is heard and determined’. See further *Ghati Mwita v United Republic of Tanzania*, Application no 012/2019. African Court on Human and Peoples’ Rights, Ruling on provisional measures, 9 April 2020). The Court ordered Tanzania to stay execution of the death sentence handed down against the applicant pending the court’s determination of the Application on merits.
- 182 See the Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989, Article 37(a); African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990), Article 5(3); Byagonza Christopher (*represented by Dr. Curtis Doebbler and Ms. Margreet Wewerinke*) v. *Uganda*, Communication 365/08; *Groupe de Travail sur les Dossiers Judiciaires Stratégiques (Working Group on Strategic Legal Cases) v. Democratic Republic of Congo*, Communication 259/02; Communication 319/06, 24 July 2011, paras 70 and 72; *Republic v. Limbikani Wilson Mtambo*, Sentence Rehearing Cause No. 20 of 2015 (High Court of Malawi).
- 183 *Kentucky v. Bredhold*, Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, Case No. 14-CR-161 (1 August 2017), 11.

for all crimes<sup>184</sup> or at least for ordinary crimes,<sup>185</sup> and against the mandatory death penalty,<sup>186</sup> limiting the death sentence to ‘very grave and rare circumstances because of its finality’;<sup>187</sup> and increased state practice of commuting all death sentences to custodial or life sentences, for example in Benin,<sup>188</sup> Kenya<sup>189</sup> and Tanzania.<sup>190</sup>

The foregoing developments increasingly indicate ‘a broadening international consensus in favour of abolition of the death penalty and in states which have retained the death penalty, a broadening consensus not to carry it out’.<sup>191</sup> In 2015 the African Commission considered that the death penalty was a ‘barbaric and ineffective form of criminal justice’.<sup>192</sup>

Therefore, the Malabo Protocol, like the Rome Statute,<sup>193</sup> limits the penalties imposed by the African Court to prison sentences and/or pecuniary fines.<sup>194</sup> The Protocol does not limit the term of imprisonment to any specified number of years. In addition, it permits the African Court to order the forfeiture of any property, proceeds or any asset acquired unlawfully and their return to the rightful owner.<sup>195</sup>

- 184 See, for example, *Rauf v. State of Delaware*, No. 39, 2016. The Delaware Supreme Court (in the United States of America) held that the capital sentencing statute in that state was unconstitutional, and therefore abolished the death penalty. This decision applies retroactively, *Powell v. State of Delaware*, No. 310, 2016.
- 185 See, for example, Guatemala Constitutional Court, Decision 5986–2016, 24 October 2017, the Court effectively abolished the death penalty for ordinary crimes by declaring Articles in the Penal Code and the Anti-Narcotics Law allowing for the imposition of the death penalty unconstitutional.
- 186 See, for example, *Jabari Sensimania Nervais v. The Queen and Severin v. The Queen* [2018] CCJ 19 (Caribbean Court of Justice, 27 June 2018); *Attorney-General v. Susan Kigula & 417 others v.* (Constitutional Appeal No. 3 of 2006) [2009] UGSC 6 (Supreme Court of Uganda, 21 January 2009); *Francis Kafantayeni and others v. The Attorney General of Malawi*, Constitutional Case No. 12 of 2005, [2007] MWHC1, discussed in M. J. Nkhata, ‘Bidding Farewell to Mandatory Capital Punishment: Francis Kafantayeni & Others v Attorney General’, 1(1) *Malawi Law Journal* (2007), 103.
- 187 *Mbunya Godfrey v. Uganda*, Criminal Appeal No. 04 of 2011, (Supreme Court of Uganda) observing that ‘when a death sentence is executed, the appellant has no chance to reform and/or to reconcile with the community’.
- 188 See Decree No. 08/2018/PR/SGG/CM/OJ/ORD (February 2018), commuting the death sentences of the last 14 death row prisoners to life imprisonment. Benin’s National Assembly adopted a new Penal Code on 5 June 2018 removing all references to the death penalty in the Code.
- 189 In October 2016, the President of Kenya commuted all death sentences (2,747 inmates) to life sentences. See ‘Death Row Convicts Get a Reprieve’ < <http://www.president.go.ke/2016/10/24/death-row-convicts-get-a-reprieve/> > (accessed 11 May 2020).
- 190 In December 2017, the President of the United Republic of Tanzania pardoned 61 death-row inmates. See Legal and Human Rights Centre, *Tanzania Human Rights Report–2017* < [https://www.humanrights.or.tz/assets/images/upload/files/LHRC%20THRR%202017\(2\).pdf](https://www.humanrights.or.tz/assets/images/upload/files/LHRC%20THRR%202017(2).pdf) > (accessed 11 May 2020), p. 26.
- 191 *Roger Judge v. Canada*, Communication No. 829/1998, Views adopted on 5 August 2002, CCPR/C/78/D/829/1998, (20 October 2003), para. 10.3.
- 192 African Commission, *General Comment No. 3*, *supra*, note 150, Preface, para. 5.
- 193 Rome Statute, *supra*, note 17, Article 77. The first two convictions—*Lubanga* and *Katanga*—resulted in custodial sentences of 14 and 12 years respectively.
- 194 Malabo Protocol, *supra*, note 9, Article 43A(2).
- 195 *Ibid.*, Article 43A(5).

In principle, similar penalties should be applied by domestic courts to the crime of unconstitutional change of government since it would be illogical to impose a death penalty in national criminal law when it is explicitly excluded at regional and global levels. In any case the African Union Model National Law on Universal Jurisdiction over International Crimes (genocide, crimes against humanity, war crimes, piracy, trafficking in narcotics and terrorism) does not provide for the imposition of the death penalty but rather prescribes a term of imprisonment only.<sup>196</sup> Penalties not mentioned in the Model National Law (or in Article 77 of the Rome Statute), and notably the death penalty, are necessarily excluded.

## **VI. THE CHALLENGE OF FUNDING VICTIMS' NEEDS OF CRIMES INCLUDING UNCONSTITUTIONAL CHANGES OF GOVERNMENT**

The Malabo Protocol provides for relief for the victims of violations of human rights or victims of crimes under investigation and prosecution by the African Court and their families: the Trust Fund.<sup>197</sup> This is intended (a) to implement Court-ordered reparations (restitution, compensation and rehabilitation) and (b) to provide physical, psychological and material support/assistance to victims and their families in consideration of the significant scale of harm suffered by victims of crimes,<sup>198</sup> thus contributing to sustainable peace and post-conflict reconciliation. The term 'victims of crimes' is not defined in the Protocol but should be understood to include 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.<sup>199</sup> Therefore victims of unconstitutional change of government may include relatives of persons who die or suffer injury as a result of violent unconstitutional changes. In addition, victims of the crime of unconstitutional change of government may include 'organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.<sup>200</sup>

Apart from money or property collected through fines or forfeiture,<sup>201</sup> it is likely that the Trust Fund will obtain funds from voluntary fundraising from donor governments, international organisations, corporations, other entities and individuals to cover the cost of reparation awards for victims that are ordered by the Court. However, the African Union has traditionally struggled to provide

196 African Union Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI (May 2012), Article 19: 'Any person guilty of serious international crimes under this law shall be liable to punishment upon conviction to a sentence not less than (twenty) years.'

197 Malabo Protocol, *supra*, note 9, Article 46M.

198 *Ibid.*, Articles 45 and 46M.

199 ICC Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A, Rule 85(a).

200 *Ibid.*, Rule 85(b).

201 Malabo Protocol, *supra*, note 9, Article 46M(2).

adequate funds or resources to finance the operations of regional (quasi-) judicial institutions – the African Commission and Court on Human and Peoples’ Rights – because member states are often late in the submission of their assessed contributions.<sup>202</sup>

A similar ICC Trust Fund for Victims<sup>203</sup> has experienced severe underfunding every year leaving millions of direct or indirect victims in need of assistance in several African states including Central African Republic, Côte d’Ivoire, DRC, Mali and Uganda.<sup>204</sup> Funds have mainly been contributed by European States, e.g. Denmark, Finland, Germany, Ireland, Netherlands, Norway, Sweden and the UK. Although the ICC had only achieved a few convictions in its first 15 years of operation (2003–18), it faced serious challenges with respect to reparations. So far, the amount of ICC reparations orders are: 1 million US dollars for the *Lubanga* case, 1 million US dollars for the *Katanga* case and 2.7 million euros for the *Al Mahdi* case. While reparations are intended to ‘oblige those responsible for serious crimes to repair the harm they have caused to the victims’ and to ‘ensure that offenders account for their acts’, offenders typically claim indigency.<sup>205</sup>

By December 2018, although some reparation awards made in 2017 had been fulfilled,<sup>206</sup> major ICC reparation awards were still outstanding. For example, the December 2017 reparations awarded in *Lubanga* came to USD 10 million,<sup>207</sup> of which an amount equal to about USD 3.96 million has been raised so far by the Trust Fund. In the *Al Mahdi* case 2.7 million euros were awarded in an (individual, collective and symbolic) reparations order,<sup>208</sup> of which half has been covered by the Trust Fund. In the absence of sufficient funding for the reparations awards, the African Court’s legitimacy would be affected by awards that are not fully enforced.

202 See, for example, *2016 Activity Report of the African Court on Human and Peoples’ Rights 1 January–31 December 2016*, EX.CL/999(XXX) (2017), para. 58: ‘inadequate human and financial resources have affected the smooth functioning of the Court’.

203 Rome Statute, *supra*, note 17, Article 79.

204 ICC, The Trust Fund for Victims < <https://www.trustfundforvictims.org/> > (accessed 11 May 2020).

205 *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’, ICC-01/04-01/06 (7 August 2012), para. 179; Judgment on the Appeals, ICC-01/04-01/06 A A 2 A 3 (3 March 2015) para 65 ‘... reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence’.

206 In the case of *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07 (24 March 2017), the order for reparations of a symbolic compensation award of USD 250 for each of the 297 victims and collective reparations awards for support for housing, support for income-generating activities, support for education and psychological support was met by the Trust Fund which allocated USD 1 million for victims.

207 *The Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, ICC-01/04-01/06 (21 December 2017).

208 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, ICC-01/12-01/15 (17 August 2017).

## VII. CONCLUSION

Unconstitutional change of governments in many African states has had a negative impact on regional peace and security in Africa. The consequences of the unconstitutional change of governments (ensuing violations of human rights) are not limited to territories of states in which such changes have taken place, but they extend beyond borders thereby leading to spill-over effects on other states. Thus the African Court may play a significant role in the investigation and prosecution of perpetrators of this crime where domestic jurisdictions are unwilling or unable genuinely to carry out the investigation or prosecution. For this to be effective, as a starting point, universal ratification of the Malabo Protocol by all African states is necessary to demonstrate the commitment of AU member states to the jurisdiction of the African Court including investigation and prosecution of the crime of unconstitutional change of government. African leaders who refuse to relinquish power to winning candidates after free and fair elections or through undemocratic amendments to constitutions or electoral laws should not be granted immunity under the Malabo Protocol. Ratification of the Malabo Protocol must be matched by national implementation of the obligations emanating therefrom through legislative and other measures including policies aimed at addressing the root causes of unconstitutional change of governments, such as poverty and lack of commitment to genuine periodic free and fair elections. States should abolish the death penalty for the crime of unconstitutional change of government (as well as for other crimes) and take all necessary measures to accede to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty so as to turn Africa into a 'death-penalty-free area'. The imposition of the death penalty is no longer compatible with the African Charter. In 2015 the African Commission rightly observed:

... given the 'evolution of international human rights law and jurisprudence, and State practice', and cognisant of the progressive work undertaken by the Commission's own Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings in Africa, the Commission considers it increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary. As a result it is difficult to conceive that, if called upon in future to do so, that the Commission will find that the death penalty, however it is executed, is any longer compatible with the African Charter.<sup>209</sup>

As argued above, exercising the right to peaceful demonstration should not constitute a crime under the Malabo Protocol. In sum, popular uprisings against undemocratic governments in Africa are compatible with AU norms on unconstitutional changes of government. Such uprisings may be justified in the following highly exceptional circumstances: (a) where the government becomes

209 *Interights & Ditshwanelo v. The Republic of Botswana*, Communication 319/06, 18 November 2015, para. 66.

totally authoritarian to the point of losing its legitimacy; (b) the absence or total ineffectiveness of constitutional processes for effecting genuine change of government; (c) popularity of the uprisings in the sense of attracting significant portions of the population on a non-discriminatory basis; (d) the absence of involvement of the military in removing the government and non-participation of the military in elections held to restore the democratic order; (e) non-use of force or violent means (exclusive use of peaceful means) in the popular protests; and (f) the speedy return to constitutional order based on democratic institutions.<sup>210</sup>

210 Final Report of the African Union High-Level Panel for Egypt, *supra*, note 106, para. 83; Communiqué of the 216th Meeting of the Peace and Security Council, 19 February 2010, PSC/PR/COMM.2(CCXVI), para. 4.