Choosing the Ballot not the Bullet: An Analysis of the Prospects of Resolving Unconstitutional Changes of Government in Africa under Article 28E of the Malabo Protocol

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Declaration

I, NJOROGE OLIVIA WAMBUI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....29 March 2019.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Emma Senge

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Dedication

To the common citizen in Africa who has suffered under the hands of despotic governments, you have not been forgotten.

Acknowledgments

My sincere gratitude to my supervisor, Emma Senge for her guidance and patience to ensure that I produce the best work. I would like to thank my International Criminal law lecturers for taking their time with this paper. Thank you to my classmates and colleagues who allowed me to painstakingly explain the concept of unconstitutional change of governments to them and who in return, offered their positive feedback. To my family, I cannot thank you enough for your support and forever pushing me towards greatness and God, for seeing me through it all.

List of Acronyms

ACtHPR	African Court of Human and Peoples' Rights
ACDEG	African Charter on Democracy, Elections and Governance
ACPPDT	African Charter for Popular Participation in Development and Transformation
AHRLJ	African Human Rights Law Journal
AU	African Union
Banjul Charter	African Charter on Human and Peoples' Rights
CAR	Central African Republic
DRC	Democratic Republic of Congo
HoSG	Heads of State and Government
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ILC	International Law Commission
Lomé Declaration	Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government
Merged Court	African Court of Justice and Human Rights
Merged Protocol	Protocol to the Statute of the African Court of Justice and Human Rights
OAU	Organisation of African Unity
UCG	Unconstitutional Change of Government
UN	United Nations

List of Authorities

International Instruments

International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts ,3 August 2001, Supplement No. 10 (A/56/10), chp.I.V.E.1.

Rome Statute of the International Criminal Court, 1998, UNTS 2187.

Regional Instruments

African Charter for Popular Participation in Development and Transformation, 16 February 1990.

African Charter on Democracy, Elections and Governance, 30 January 2007.

Constitutive Act of the African Union, 7 November 2000, 37733.

Draft Statute of the Protocol on the African Court of Justice and Human Rights, 10 June 1998.

Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, (12 July 2000), AHG/Decl.5 (XXXVI).

Protocol on Amendments of the Protocol on the African Court of Justice and Human Rights 27 June 2014, 7804 treaty 0045.

Cases

Josef Altstotter and others, US Military Tribunal Nuremburg 1947.

London and North Eastern Railway v Berriman (1946) AC 278 (UK).

Prosecutor v Al Gaddafi and Al Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC, 2013.

Prosecutor v Vasilijević, 196 citing *Tihomir Blaškid*, Case No. IT-95-14-T Judgment, ICTY Trial Chamber, 2000.

The Prosecutor v Furundžija, Decision on Defence Filings Subsequent to the Close of The Appeal Hearing, ICTY Trial Chamber Judgment, 2000.

The Prosecutor v Hadzihasanović and others, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber, 2003.

Abstract

The focus of this study is on Article 28E of the Protocol on the Amendments to the Protocol of the African Court of Justice and Human Rights Protocol (Malabo Protocol) which provides for the crime of Unconstitutional Changes of Government (UCG). The jurisdiction to try international crimes was conferred on the African Court of Justice and Human Rights in 2008 when the AU decided to streamline the existing Protocols. This study assesses how far Article 28E can go to resolve the phenomenon of UCG in Africa. It takes a critical approach to the framing of the provision by comparing it to Statutes that previously provided for UCG such as the African Charter on Democracy, Elections and Good Governance. The challenge presented by Article 28E is the failure to provide a clear and precise definition for UCG that can serve as a guide for the Court when interpreting and applying the provision. The study thus poses that the likely consequence of this oversight is that Article 28E will prove inadequate to tackle the diverse manifestations of UCG in the continent. This requires a revision of the provision to take into account the realities of a diverse Africa.

CHAPTER 1

INTRODUCTION

1.1 Background

The road to Malabo, where the Protocol in question was adopted, traces its development from the merger of the African Court of Human and Peoples' Rights (ACtHPR) and the Court of Justice. The ACtHPR was created by a Protocol to the African Charter on Human and People's Rights (Banjul Charter). The Protocol entered into force on 25 January 2004 to fulfil the obligations of safeguarding human rights and fundamental freedoms in the region.[1] Notably, the Court of Justice has never become operational despite having been established by the Constitutive Act of the AU.[2]

The decision to merge the two Courts was borne in the AU General Assembly of 2005 where they opted to create one single judicial body (Merged Court).[3] Thus, the Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008 (Merger Protocol). However, the Merger Protocol does not make it clear which Statute it is annexed to. Furthermore, because the Court of Justice Statute never operationalised, the transitional provisions in the 2008 Protocol only refer to the ACtHPR Protocol.[4] The Merger Protocol has not yet come into force due to lack of a minimum number of ratifications in that 28 Member States have signed it but only five States have ratified it.[5]

The proposal to extend the mandate of the new Merged Court was motivated by specific events in the wake of 2008 with European States investigating African State officials and the ICC issuing arrest warrants.[6] The AU Assembly in consultation with the African Commission moved swiftly to begin the process of forming the draft Protocol that would include jurisdiction over international crimes. This was in the hope that Africans would no longer be subjected to

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[1] Naldi G, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg', *International Organizations Law Review* (2012), 383.
[2] Naldi G, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg'.
[3] Juma D, 'Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights' *Max Planck Yearbook of United Nations Law*, (2009). See also HoSG, *Decision on the merger of the African Court on Human and People's Rights and the AU Court of Justice*, Assembly/AU/Dec.83(V), 4-5th July (2005); Decision on the seats of the organs of the African Union, Assembly/AU/Dec.45(III)
[4] Article 4-7, *Protocol on the Statute of the African Court of Justice and Human Rights*, (2008)
[5] Naldi G, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg'.
[6] Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, 22 January 2016, available at https://www.amnesty.org/en/documents/afr01/3063/2016/en/ on 21 February 2018.

foreign courts. After engaging relevant stakeholders, the draft instrument was endorsed.[7] During the 19th Ordinary Session of the AU Assembly where the Draft Protocol was tabled for adoption, it was rejected due to *inter alia* lack of a definition of the crime of unconstitutional change of government.[8] The popular debate surrounding forming the definition was whether to include popular uprisings. Interesting to note, the Draft Protocol contravenes the ILC Articles on State Responsibility by granting immunity, not only to African Heads of State and Government (HoSG) but also to an undefined category of senior officials.[9] The provision containing the crime was left for revision. Despite these reservations, in June 2014, the Malabo Protocol was adopted.[10] As of 2016 only Kenya, Benin, Congo Brazzaville, Guinea-Bissau and Mauritania have ratified the Protocol.

The foregoing developments culminated in the current provision that is Article 28E which provides as follows:

'1. For the purposes of this Statute, 'unconstitutional change of government' means committing or ordering to be committed the following acts, with the aim 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 (6) months before the elections without the consent of the majority of the political actors.

2. For purposes of this Statute, "democratically elected government" has the same meaning as contained in AU instruments.'

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[7] https://www.amnesty.org/en/documents/afr01/3063/2016/en/ on 21 February 2018.

[8] *Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Assembly/AU/Dec.427(XIX), para 2.

[9] Article 1, paragraph 1, *International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts* ,3 August 2001, Supplement No. 10 (A/56/10), chp.I.V.E.1. See also https://www.amnesty.org/en/documents/afr01/3063/2016/en/ on 21 February 2018.

[10] https://www.amnesty.org/en/documents/afr01/3063/2016/en/ on 21 February 2018.

The Malabo Protocol has jurisdiction over 14 different crimes.[11] The most problematic to define has been that of the UCG. This may be due to the diverse manifestations it has had in Africa. The inclusion of this crime has been due to the resurgence of military coups which have been a big weakness in the functioning of democratic societies in post-colonial Africa.[12] So far, the most detailed legal instruments developed by the AU in response to UCGs is the Constitutive Act of the AU. Secondly, the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration)[13] which was the first attempt to describing UCGs and thirdly the African Charter on Democracy, Elections and Governance (ACDEG)[14] which expanded the definition provided in the Lomé Declaration. The policy position of the AU through these instruments has been to maintain a strict adherence to the principles of good governance, and the strengthening of democratic institutions.

Noteworthy, these policy actions were very instrumental in drafting Article 28E. Further, because it is a new Statutory crime, the Court has no jurisprudence to build on. Be that as it may, the rationale to include the crime outweighs the challenges that have surrounded it. UCGs have been blamed by HoSG as being the essential causes of instability, insecurity and violent conflict in Africa.[15] In fact, they would particularly take an interest in this crime because it poses the biggest threat to their peaceful continuous regimes.

1.2 Statement of the Problem

Article 28E of the Malabo Protocol sets out the crime of UCG. It lists six specific acts that would constitute UCG ranging from a *coup d'etat* to changing the electoral laws six months before the general elections without the consent of the majority of the political actors.[16] This underscores the first problem, that the scope provided is too narrow to adequately capture the diverse manifestations that this crime can take and has taken in the past. By providing a list of scenarios rather than a legal definition the provision diminishes the prospects of its applicability. For example, the unconstitutional persistence of governments through

[11] Article 28A, *Protocol on Amendments of the Protocol on the African Court of Justice and Human Rights.*
[12] Souaré I, The AU and the challenge of unconstitutional changes of government in Africa, ISS Paper 197, Institute for Security Studies, August 2009, 1.
[13] *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, (12 July 2000), AHG/Decl.5 (XXXVI).
[14] Article 23(5), *African Charter on Democracy, Elections and Governance*, (2004).
[15] Souaré I, The AU and the challenge of unconstitutional changes of government in Africa, 3.
[16] Article 28E, *Protocol on Amendments of the Protocol on the African Court of Justice and Human Rights.*

conducting fraudulent elections is a form of UCG that has not been included in the list. These occurrences happened in Kenya in 2007, Ethiopia in 2010 and Zimbabwe in 2008.[17]

Additionally, the management of this crime has also been varied depending on the specific country, for example, some countries will insist that a successful insurgent government conduct an election to legitimize themselves. Furthermore, the AU itself has responded differently to the 80 military coups that have occurred between 1956 and 2001.[18] The concern here is that the weak provision will highlight the imbalance of the AU's legal and normative approach to the crime.

This lack of a uniform approach will continue to be solidified by the fact that the definition of the crime itself is too narrow. It is worth noting that the scenarios depicted in Article 28E are substantially similar to the definition provided in the Lomé Declaration.[19] This in itself is a problem because this definition has proven to be insufficient. Rather than adopt a forward-looking approach it only covers, in the broadest terms, instances that are no longer being witnessed in the modern era. Accordingly, it can be concluded that this approach will not stand. This is to say that it will not stand the test of time.

1.3 Statement of Objectives

The general aim of this paper would be to highlight the particular nuances of the main problem stated above. The specific objective is to assess how far Article 28E will go to solve the crime of unconstitutional changes in government. Further, looking at past occurrences of UCGs in Africa and how they were managed by the relevant States and the AU to pinpoint a possible solution to the quagmire that has been left by the provision in the Malabo Protocol.

1.4 Hypotheses

Noting the problems above, this study hypothesises the following:

1. Article 28E will prove to be inadequate in prosecuting UCGs in Africa; this will squander the effort put in to include the provision on the Malabo Protocol.

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[17] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime' Unpublished LLM Thesis, University of Mauritius, 31 October 2012, 35.

[18] Souaré I, 'The AU and the challenge of unconstitutional changes of government in Africa', *Institute for Security Studies*, August 2009, 7.

[19] *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, (12 July 2000), AHG/Decl.5 (XXXVI).

2. The Merged Court will have an uphill task in interpreting the provision due to the reasons provided. This may lead to an overly broad interpretation that will open the floodgates of prosecution, or alternately, a narrow interpretation that might cause a similar outcome as presupposed in the first hypothesis.

1.5 Research Questions

This study will be guided by the following questions aimed at proving the hypothesis.

1. How does the historical normative and legislative framework of the AU for UCGs inform the interpretation of Article 28E?
2. What are the content and substantive deficiencies of Article 28E as a criminal legal provision?
3. What are the challenges and prospects of resolving UCGs in Africa and creating systematic jurisprudence on the same?

1.6 Theoretical Framework

This study will be underpinned by the theory of the rule of law. This theory has two conceptions, the formal elements and the procedural elements. The formal elements bring out the substance of the text to ensure that it is inter alia clear, certain, predictable while the procedural elements ask how the law is applied, the institutions and judges who determine if the law has been breached.

Further relevant to this theory is the maxim *nullum crimen sine lege*. AV Dicey's first out of three conceptions of the rule of law is that no man can lawfully be made to suffer in body or goods unless for the distinct breach of the law.[20] This is drawn from the doctrine of strict legality which postulates that a person may only be held criminally liable if at the time of performing the act in question it was regarded as a criminal offence.[21] Montesquieu particularly developed the value of legalism which looked down on how despotic governments enacted very simple laws that had no procedural delicacy.[22] Legalism was necessary to restrain the power of the ruler and safeguard the prerogatives of the legislature and the judiciary.[23] This

[20] Dicey A, *The Law of the Constitution*, Oxford University Press, 2013.
[21] Cassese A et al, *International Criminal Law*, Oxford University Press, 2013, 24.
[22] Montesquieu, *The Spirit of the Laws*, France, 1748.
[23] Cassese A *et al*, *International Criminal Law,* 25.

came to be seen as the rule of law which obligated both the rulers and citizens to obey the law. Additionally, it requires that the law conform to certain minimum standards of justice.[24]

The law in Article 28E is too narrow therefore, not broad or complex enough to determine what exactly amounts to UCG. This leaves it open and creates a lot of uncertainty. Consequently, where the law is uncertain it undermines the rule of law.

1.7 Literature review

This review will be divided into three parts, first briefly on the merge of the ACtHPR and the Court of Justice, secondly on the empowerment of the Merged Court to try International crimes, and finally on UCG's in Africa.

1.7.1 The Merged Court

G Naldi's article 'The African Court of Justice and Human Rights: A Judicial Curate's Egg' provides an interesting critique on the viability of the Merged Court taking into account the slow operation of the first two.[25] He provides an overview of the new Court and its similarity to the International Court of Justice and the Inter-American Court of Human Rights. Additionally, he assesses the initial reception of the Merged Court and the position it has taken in the International Community.

Dan Juma's 'Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights'.[26] This author argues that the merger of the two Courts is a transition. He develops this argument by examining whether the African Human Rights system has gained or lost prospects in the transition. Ultimately, he concludes that the Merged Court may not be able to solve the normative and institutional deficiencies of the system. It will continue to be a work in progress inevitably lying in the hands of the African Commission.

1.7.2 The empowerment of the Merged Court to try International crimes

Amnesty International, 'Legal and Institutional Implications of the Merged and Expanded African Court' which traces the history of adding a criminal jurisdiction.[27] This paper studies

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[24] Mbondenyi M and Ambani J, *The New Constitutional Law of Kenya: Principles, Government & Human Rights*, Claripress Ltd Nairobi, 2012.

[25] Naldi G, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg'.

[26] Juma D, 'Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights'.

[27] https://www.amnesty.org/en/documents/afr01/3063/2016/en/ on 21 February 2018.

the possible effects of the criminal jurisdiction on relevant stakeholders such as victims of gross violations and the AU. The purpose of this policy paper is to generate a discussion amongst the stakeholders on the implications of the Malabo Protocol.

Don Deya's much cited article 'Worth the Wait: Pushing for The African Court to exercise Jurisdiction for International Crimes' which provides the reasons for the expansion and an overview of the succession of African International Courts thus far.[28]

1.7.3 UCG in Africa

Shola Omotola's 'Unconstitutional Changes of Government in Africa' whose main concern is the consolidation of democracy in Africa.[29] He explores the different forms of UCG and the institutional mechanisms of preventing them. The paper draws from empirical data to suggest that the current trend will be of great consequence to the democratic stability of Kenya. This author suggests that the problem of UCGs stems from the different democratic processes in Africa. An examination of the political institutional mechanisms is critical for preventing UCG.

1.8 Research Methodology

This study will be conducted using primary data obtained from Statutes, legal instruments such as Malabo Protocol and the Lomé Declaration. It will also make use of statistics provided by the AU resources on facts such as the number of military coups that have taken place within a specified period of time. Secondary sources will be of most use, journal articles, judicial precedents, textbooks if any. Moreover, the study will adopt a qualitative approach to analyse the data obtained. This is necessary in order to fulfil the objectives listed above. These are the most appropriate methods because they contain the most informative data which are easily accessible. The method chosen also arranges the information needed in a format that can easily be transferred into this current study.

1.9 Limitations

First, the use of secondary sources creates challenges of access to authentic information. The most ideal methodology would have been to acquire information from the drafters of the Protocol. However, to mitigate these challenges the paper will give special attention to scholars

[28] Deya D, 'Worth the Wait: Pushing for The African Court to exercise Jurisdiction for International Crimes'.
[29] Omotola J, 'Unconstitutional Changes of Government in Africa: What implications for Democratic consolidation?', *Nordiska Afrikainstitutet*, 2011, 5.

who have been able to conduct interviews with the drafters of the Protocol. For example, Tesfaye Albab in his LLM thesis.[30]

1.10 Chapter Breakdown

Chapter one will lay the foundation for the paper, providing the background of the study, the problem arising and the objectives of the paper. Further, it will provide the hypothesis and how this relates with the research questions.

Chapter two will discuss the rule of law and how it relates with Article 28E. The rule of law and its two main features will be used to critique Article 28E. This chapter will also provide reasons for foregoing democracy as the underpinning theory although, on the face of it, democracy and UCG are closely connected.

Chapter three will begin by looking at the data establishing UCG thus asserting the significance of the study. Thereafter, a historical appraisal of the development of Article 28E will be necessary to understand why it was drafted in the manner that it was and how this subsequently will affect the way it will be applied.

Chapter four will address the challenges of Article 28E, first from a substantive perspective then from a procedural perspective. The substantive aspect will involve an investigation into whether Article 28E meets the standard required for criminal provisions and the procedural aspect will be assess how the application of the provision will bring about inconsistencies.

Chapter five concludes the study by providing the research findings and offering recommendations to the challenges that have been highlighted.

[30] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime' 6.

CHAPTER 2

THEORETICAL FRAMEWORK

Introduction

This study will be underpinned by the theory of the rule of law. The current provision of Article 28E infringes on the rule of law in the following ways. First, it does not adhere to the formal legal requirements of clear and determinate rules. Secondly, the procedural requirements have not been met. Leaving the Court with wide discretionary powers undermines separation of powers leading the judges to usurp the powers of the legislators.

The chapter will begin with a short discussion on the rule of law. It will rely on John Locke's formulation and Brian Tamanaha's subsequent modern conception. The first section will outline the formal requirements, particularly focusing on the rule of clear, determinate and predictable norms, not those that are vague or contestable. This section will look at the work of Lon Fuller and John Locke. The second section will outline the procedural aspects with focus on the requirement of an institution to adjudge those who breach the law. The procedural elements have to do with the institutions established to enforce the law and the processes by which the law is administered.[31] This will lay the basis for a discussion on Montesquieu's conception of the separation of powers. The third section will be on the relationship between the rule of law and democracy. Although they are heavily dependent on each other, democracy as a theory is not included in the definition of the rule of law. This section will explain the reasons why democracy is not be suitable for such a study and the prevalence of the rule of law.

1.1 Definition of the Rule of Law

The rule of law is understood to mean that governments and citizens are bound by and abide by the law.[32] Both the government and the citizen are important components because they contribute to the realisation of the rule of law. Governments should operate within a framework of law that they are accountable to. Additionally, the rule of law is a major source for the legitimation of governments.[33] Similarly, citizens are required to obey legal norms even those they disagree with. The protection of the law ought to be accessed by everyone. Access comprising not only public knowledge but also clarity and the capability to understand and

[31] The Rule of Law, *Stanford Encyclopaedia of Philosophy,* 22 June 2016 https://plato.stanford.edu/entries/rule-of-law/#FormProcSubsRequ on 9 November 2018.
[32] Tamanaha B, 'The History and Elements of The Rule of Law', *Singapore Journal of Legal Studies,* (2012) 233.
[33] Tamanaha B, 'The History and Elements of The Rule of Law', 237.

internalize it. These features relate to the formal and procedural aspects of the rule of law which shall be discussed in turn.

The character of the rule of law manifests itself in two forms, the formal elements and the procedural elements. The formal elements require that laws are general, widely promulgated, clear and determinate. The procedural aspects connote the practical way laws should be applied and administered. Some of the procedural requirements include that hearings against a suspect be conducted by an independent and impartial tribunal, due process procedures such as access to evidence, right to legal counsel and right to defence, additionally, a defendant has the right to a reasoned judgement and the penalty imposed should be a consequence of imposing the law.[34]

The first element investigates the substance of the rules. It also questions how they came into being and if they followed due process. The second element is more concerned with how the rule is applied to the citizen. This is the adjudicative process which has come to be codified as fair trial rights.

1.2 The Formal Elements of the Rule of Law

Lon Fuller through his book, *The Morality of Law* describes eight principles for the rule of law. He creates the basic criteria for effective legislation that is instrumentally valuable. They include; generality, promulgation, prospectivity, clarity, non-contradiction, constancy and they must not ask the impossible.[35] According to Fuller, there exists a moral obligation to obey the law that stems from the nature of law itself. This obligation was due to the connection between law and morality. He went on to state that the ability to abide by these criteria underscored the success of lawmakers. The fidelity to the law by the citizens was conditional on the actions of government officials.[36] The citizens cannot reasonably be expected to follow those rules that are not determinate or even known. They must be capable of being obeyed before they can be obeyed. There is an expectation by the citizenry that the government will fulfil its duty to the rule of law. This is necessary for their political relationship to be sustained. Fuller describes this relationship as a reciprocal one. The duty of one to act depends on the behaviour of others.[37]

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[34] Tashima A, 'The War of Terror and the Rule of Law', *Asian American Law Journal*, (2008), 248.
[35] Fuller L, *The Morality of law*, Yale University Press, New Haven, 1964, 637.
[36] Murphy C, 'Lon Fuller and the Moral Value of the Rule of Law', *Law and Philosophy*, 24, (2005), 240.
[37] Murphy C, 'Lon Fuller and the Moral Value of the Rule of Law', 242.

One of the things that people wanted escape in the state of nature was people's incalculable opinions.[38] This was John Locke's view in his second of the *Two Treatise of Government* where he emphasized the importance of predictability of positive law.[39] The problem with the state of nature is that everyone has a different synthesis of what the law ought to be. One person's conclusions may not be the same as another even though they were both thinking hard about the same thing. Evidence of this unpredictability is currently present in Article 28E. The gap will force the judges to make their own deductions to supplement the missing information. Drawing from Locke's treatise, observably, this may create tension in consequent judgments.

1.3 The Procedural Elements of the Rule of Law

The formal substantive elements are complemented by procedural aspects of the rule of law.[40] It can be argued that the procedural aspects are of more significance to the ordinary person.[41] This is because they present the instances when they have real interactions with the law. Therefore, it becomes important to them that the rule of law is adhered to. Support for this is observed in the legislation of procedural aspects as core rights in numerous Constitutions.[42] Further, even where the substantive aspects are failing the only recourse is to the procedural elements to correct this failure. For example, in Kenya one may challenge an unconstitutional Statute in the High Court.[43]

The relevant procedural element for this paper is the right to have an independent and impartial tribunal. Article 28E will present a challenge to the ACtHPR because it does not offer much guidance for interpretation. Thus, the Court will be forced to employ wide discretionary powers when an unconventional case is presented to them. Undoubtably, this will infringe on the constitutional principle of separation of powers.

Montesquieu is recognised for providing the best account on this perspective of the rule of law. He proffered that the judiciary should be separated from the executive and the legislator. It should be able to remain the mouthpiece of the law without being distracted by the work of

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[38] Locke J, *The Second Treatise of Civil Government,* Awnsham Churchill, London, 1689, 7.
[39] The Rule of Law, *Stanford Encyclopaedia of Philosophy,* 22 June 2016 https://plato.stanford.edu/entries/rule-of-law/#FormProcSubsRequ on 9 November 2018.
[40] The Rule of Law, *Stanford Encyclopaedia of Philosophy,* 22 June 2016 https://plato.stanford.edu/entries/rule-of-law/#FormProcSubsRequ on 9 November 2018.
[41] The Rule of Law, *Stanford Encyclopaedia of Philosophy,* 22 June 2016 https://plato.stanford.edu/entries/rule-of-law/#FormProcSubsRequ on 9 November 2018.
[42] Article 49,50, Constitution of Kenya (2010).
[43] Article 165(3)d, Constitution of Kenya (2010).

legislators.[44] Montesquieu particularly developed the value of legalism which looked down on how despotic governments enacted very simple laws that had no procedural delicacy.[45] Legalism was necessary to retrain the power of the ruler and safeguard the prerogative of the legislature and the judiciary.[46] This came to be seen as the rule of law which obligated both the rulers and citizens to obey the law.

Consequently, the law in Article 28E is too narrow and thus this undermines the rule of law and legalism by failing to implicitly respect the strict role that the judiciary plays in interpreting laws. A role that should always remain distinct from the legislature.

1.4 Rule of Law Distinguished from Democracy

When describing good governance, rule of law and democracy have become inseparable concepts. These are two distinct systems of political organization.[47] Democracy requires that political power be held by representatives elected in free and regularly scheduled elections.[48] Rule of law, however, provides that political power be exercised[49] through generally applicable rules regarding the formal and procedural elements mentioned above. The distinction is that democracy refers to the method by which political rulers are appointed while the rule of law is concerned with how political power is exercised.[50] Although distinct the two are interdependent values that make complimentary contributions to good governance. Democracy is associated with a wide array of civil rights that can only be protected by the rule of law.[51]

For example, the rule of law requires that every person is equal and their interests in government should be considered in equal measure.[52] This is necessary for democratic ideals to be achieved. These include the equal consideration of interests when it comes to voting.[53] Further, rule of law ensures the respect for election results and other such legal entitlements in a democracy.[54]

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[44] The Rule of Law, *Stanford Encyclopaedia of Philosophy,* 22 June 2016 https://plato.stanford.edu/entries/rule-of-law/#FormProcSubsRequ on 9 November 2018.
[45] Montesquieu, *The Spirit of the Laws*, France, 1748.
[46] Cassese A *et al*, *International Criminal Law,* Oxford University Press, 2013, 25.
[47] Ash T, A Little Democracy is a Dangerous Thing—So Let's Have More of It, The Guardian, 2 August 2006, http:// www.theguardian.com/commentisfree/2006/aug/03/usa.syria on 9 November 2018.
[48] Hendricks F, *Vital Democracy: A Theory of Democracy in Action,* Oxford Scholarship Online, London 2010, 22 (There are various forms of democracies as explained by Hendriks in his book, this is only a basic definition)
[49] Pennock J, *Administration and The Rule of Law,* Farrar and Rinehart Incorporated, Canberra, 1941, 15.
[50] Raban O, 'The Rationalization of Policy: On the Relation Between Democracy and The Rule of Law', 18 *Legislation and Public Policy*, (2015), 46.
[51] Raban O, 'The Rationalization of Policy: On the Relation Between Democracy and The Rule of Law', 48.
[52] Akech M, *Administrative Law*, Strathmore University Press, Nairobi, 2016, 9
[53] Dahl RA, *Democracy and its Critics*, Yale University Press, New Haven, 1989, 84,86.
[54] Akech M, *Administrative Law*, 13.

With respect to this paper, there are three reasons for foregoing democracy and adopting the rule of law perspective to the subject matter. Firstly, democracy by itself cannot ensure the attainment of fundamental civil rights such as liberty and equality. It is possible for a representative government to fail to act within the interests of the demos.[55] Thus, government officials must operate 'within a limiting framework of the law'.[56] They should respect the existing law and even where they want to change the existing law they ought to respect the restraints imposed on them.[57] In most recent liberal democracies this limitation is found in the Constitution. Consequently, the rule of law has been considered the essence of constitutionalism.[58]

Secondly, the principles forming the rule of law are more applicable in this context because they promote certainty, predictability and security. This is discernible between the government and its citizens and between citizens themselves.[59] Hence a peaceful social order is maintained through legal rules. There exist reliable expectations of conduct with each party fulfilling their duties.[60]

Thirdly, not all African countries are democratic in how they organize political power. For example, Morocco, Lesotho and Swaziland remain the last three monarchies in Africa.[61] The Sahel State of Niger, Sudan, Eritrea and Algeria are States that are governed in an authoritarian manner.[62] There are those with partial democracies and complete breakdown of the government systems. Therefore, it would be improper to impose the ideal of democracy on a Statute that is designed to apply to the whole of Africa. Indeed, African Statutes ought to be drafted in view of the diverse nature of African States.

Thus, the interpretation of Article 28E should take a forward-looking approach that prohibits partial democracies and representative governments that find legal means of manipulating the law totally disregarding the interests of the citizenry.

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[55] Akech M, *Administrative Law*, 5.
[56] Tamanaha B, 'A Concise Guide to the Rule of Law', *Legal Studies Research Paper Series,* 115.
[57] Akech M, *Administrative Law*, 9.
[58] Akech M, *Administrative Law*, 9.
[59] Tamanaha B, 'A Concise Guide to the Rule of Law' 8.
[60] Tamanaha B, 'A Concise Guide to the Rule of Law' 10.
[61] Ademola A, Africa's Last Three Monarchies and Why They Remain Standing, 12 February 2018, https://face2faceafrica.com/article/africas-last-three-monarchies-remain-standing on 9 November 2018
[62] Koch A et al, 'Profiteers of Migration? Authoritarian States in Africa and European Migration Management', 4, *German Institute for International and Security Affairs,* (2018), 1.

Having heavily relied on Fuller's account of the Rule of law, it is necessary at this point to assess his responses to criticisms from HLA Hart.[63] The main objection was that the rule of law is only instrumentally morally valuable, that is valuable to the extent that the legal system pursues morally good ends.[64] Fuller responds that the rule of law is conditionally non-instrumentally valuable as well. This is by how the legal system structures its political relationships. There is a moral basis for the duties of citizens and government officials.

Conclusion

The problem articulated by Article 28E of the Malabo protocol presents a challenge to the rule of law. The provision is not determinate and cannot therefore, be conclusively be relied upon. The African Union is failing in its responsibility to uphold the rule of law. This will result in the States not accepting to be governed by the Malabo Protocol. Reciprocity is only required when both parties respect their duties to one another. This is already evidenced by the slow ratifications of the Malabo Protocol. Additionally, the missing guidance from the provision has left wide discretionary powers of interpretation to the judges. This conflicts with the purpose of separation of powers. Essentially, the ACtHPR will have to extend the application of Article 28E through its judgements. Judgements that the Court could always review. Further, this creates an uncertain position on the matter.

For this paper, rule of law was elected over democracy. Democracy as a political ideal has an appreciation of numerous values that are similar with the rule of law. However, the vast forms of democracy are incapable of securing all the values that required by the rule of law. Moreover, Article 28E cannot be cured by imposing democratic ideals and it would be unsuitable to expect the standard of democracy for all African States.

Finally, the rule of law as espoused by Fuller is morally valuable independent of the goals set by the legal system it seeks to establish. It develops a worthwhile criterion for creating just laws that ensure healthy political relationships between the government and the governed.

[63] Hart H, *The Concept of Law*, Oxford University Press, London, 1965.
[64] Murphy C, 'Lon Fuller and the Moral Value of the Rule of Law', 246.

CHAPTER 3

A HISTORICAL APPRAISAL OF THE NORMATIVE FRAMEWORK FOR UCGS IN AFRICA

Introduction

Article 28E presents a challenge to the rule of law in Africa as was concluded in the previous chapter. It is from this backdrop that this current chapter will first look at the significance of combating UCGs in the region. Democratic instability and good governance have been a challenge in post-colonial Africa, this is the position asserted by the empirical data presented. Following this, the study will move onto how the provision was developed from the antecedent Statutes concerned with popular participation and good governance in Africa. The historical development is key to understanding why the provision has taken its current form. Furthermore, this chapter addresses the subsequent challenges that arise from such a formulation.

Thereafter, the chapter will endeavour to examine the deficiencies of Article 28E. The first is based on its content as a legal provision. This part will analyse the substance of the provision and why its current formulation is problematic. Secondly, the procedural challenges will be addressed, this regards the difficulties that will arise when applying this provision to the various possible circumstances that could constitute UCG.

3.1 The Significance of Prohibiting UCGs in Africa

Sub-Saharan Africa has suffered 80 coups and 180 attempted coups between 1951 and 2001.[65] They were particularly prevalent during the fight for independence and started to taper off at the start of the 21st century.[66] The occurrence of coups and other forms of UCG is attributed to autocratic rule and the absence of legitimate means of changing governments.[67] It is thus, necessary to create a legal framework that will effectively prevent African countries from being the victims of this scourge.

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[65] Vandeginste S, 'The African Union, Constitutionalism and Power-sharing', *IOB Working Paper*, (2011) 7.
[66] Economist Intelligence Unit, *Democracy Index 2011: Democracy under stress*, 2011, 26.
[67] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 46.

Table 1: Coups d'état in Africa between 1958 and 2008

Region	Country	Year	Total
West Africa	Benin	1963, 1965 (x2), 1967, 1969, 1972	6
	Burkina Faso	1980, 1982, 1983, 1987	4
	Cote D'Ivoire	1999	1
	Gambia	1994	1
	Ghana	1966, 1972, 1978, 1981	4
	Guinea	1984, 2008	2
	Guinea-Bissau	1980, 2003	2
	Liberia	1980	1
	Mali	1968, 1991	2
	Niger	1976, 1996	2
	Nigeria	1966 (x2), 1975, 1983, 1985, 1993	6
	Sierra Leone	1967, 1968, 1992, 1997	4
	Togo	1963, 1967, 2005	3
Central Africa	Burundi	1966 (x2), 1976, 1987, 1996	5
	CAR	1966, 1979, 1981, 2003	4
	Chad	1975, 1979, 1990	3
	Congo-Brazzaville	1968, 1999	1
	DRC	1965, 1964	2
	Equatorial Guinea	1979	1
	Rwanda	1973	1
East Africa	Somalia	1969	1
	Sudan	1958, 1969, 1985, 1989	4
	Uganda	1966, 1971, 1979, 1980, 1985, 1986	6
Southern Africa	Lesotho	1986, 1991	2
North Africa	Algeria	1965	1
	Libya	1969	1

	Mauritius	1978, 1984, 2005, 2009	4
	Tunisia	1987	1

Source: Adapted from Jeune Afrique 2516, March 2009, and souare (2006), as reproduced in Zounmenou (2009).

3.2 A Historical Appraisal of Article 28E on the Normative and Legislative Framework of the AU

The first key document concerned with good governance in Africa was the African Charter for Popular Participation in Development and Transformation (ACPPDT). It was adopted in 1990 during the International Conference on Popular Participation in the Recovery and Development Process in Africa that was held in Arusha, Tanzania.[68] It entrenched the idea that 'inevitably and irresistibly, popular participation will have a role to play in Africa.'[69] This was done under the initiative of the submissions of different NGOs to the UN General Assembly. The Conference was organised by the Economic Commission of Africa in collaboration with the UN.[70] At the time there was growing concern over the serious deterioration in the human rights and economic conditions during the 1980s.[71] The objectives of the Conference were to recognize the role of people's participation in Africa's development efforts, identify obstacles and define appropriate approaches to the promotion of popular participation, among others.[72] Developments such as ACPPDT were necessary because most UCGs were occurring against authoritarian regimes, the democracies in Africa were hardly Constitutional, therefore, the unconstitutional change was in an effort to restore democracy.[73]

The second key document of the Organisation of African Unity (OAU) in respect of UCG was the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government.[74] It was adopted during the annual summit of the OAU in Lomé, Togo in July 2000. This was the earliest attempt by the OAU to define and ban UCG. Aiming to preserve

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[68] *African Charter for Popular Participation in Development and Transformation*, (16 February 1990)

[69] Paragraph 37, *African Charter for Popular Participation in Development and Transformation*, (16 February 1990)

[70] Paragraph 1, *African Charter for Popular Participation in Development and Transformation*, (16 February 1990)

[71] Paragraph 3, *African Charter for Popular Participation in Development and Transformation*, (16 February 1990)

[72] Paragraph 4, *African Charter for Popular Participation in Development and Transformation*, (16 February 1990)

[73] Sturman K, 'Unconstitutional Changes of Government: The Democrat's Dilemma in Africa' 30 *South African Institute of International Affairs,* (2011) 2.

[74] *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*.

the ongoing democratisation in the continent,[75] the Lomé Declaration reveals a strong prominence on the principles of democratic governance to be adhered by all OAU States. This included the adoption of a democratic Constitution, political pluralism or any other form of participatory democracy.[76] The HoSG equated democracy to the reduction of UCG. The Lomé Declaration lists four main instances of UCG as stated below:

- Military coup d'état against a democratically elected government
- Intervention by mercenaries to replace a democratically elected government
- Replacement of democratically elected governments by armed dissident groups and rebel movements; and
- The refusal by an incumbent government to relinquish power to the winning political party after free, fair and regular elections[77]

This instrument has been criticised for lacking binding force as it is only a Declaration, thus, it largely depends on the political will of the member States. Nevertheless, this does not negate its contribution as a guiding document to provide a course of conduct.[78]

The third main document prohibiting UCG in Africa is the Constitutive Act of the AU which was adopted in 2000 in Lomé, Togo. This effectively replaced the OAU Charter. The main goal of the OAU was to rid the African Continent of colonialism, to attain this it had to emphasis on principles such as state sovereignty and territorial integrity. Values such as human rights, conflict management and socio-economic integration of the Continent were left out.[79] The AU sought to fill the gaps left by the OAU.

Article 4(p) of the Constitutive Act, condemns and rejects UCG.[80] Article 30 prohibits governments that have come into power through unconstitutional means from participating in the activities of the AU.[81] Nonetheless, the Constitutive Act is not conclusive because it does

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[75] Dersso S, 'Unconstitutional Changes of Government and Unconstitutional Practices in Africa' 2 *Africa Politics, Africa Peace* (2016) 3.
[76] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 12.
[77] *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government.*
[78] Sharamo R, Programme Head of the Conflict Prevention Programme at the Institute for Security Studies (ISS) in Addis Ababa.
[79] Kindiki K, 'The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal',3 *African Human rights Journal*, (2003) 97-118.

[80] Article 4(p), Constitutive Act of the African Union, 7 November 2000, 37733
[81] Article 30, Constitutive Act of the African Union.

not provide for a definition of UCG. Therefore, the Lomé Declaration complements it in this regard. Further, it builds on the sanctions to be imposed by the AU in instances of UCG. Noteworthy, the Constitutive Act has been ratified by all member States of the AU and is therefore binding in contrast to the Lomé Declaration.

Finally, the fourth key document is the ACDEG which was adopted on 30 January 2007 in Addis Ababa. It entered into force on 15 February 2012 after receiving fifteen ratifications. By September 2017, it had received thirty ratifications and has been signed by forty-five States.[82] This was the first direct attempt to legislate on UCG.[83] It was developed from the Lomé Declaration and has since added a fifth situation of UCG to be found in Article 23(5) which provides that UCG includes 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.'[84] Additionally, it expanded the measures to be taken against UCG and it strengthened the sanctions regime.[85]

Article 14(2) provides that State parties should take legislative and regulatory measures to ensure perpetrators are dealt with according to the law.[86] Article 25(4) provides that perpetrators are not allowed to participate in elections held to restore democratic order or hold any position of responsibility in the political institutions of their State.[87] Further, Article 25(5) provides that perpetrators may be tried before any competent court of the AU.

Article 28E is mainly modelled on the Lomé Declaration, therefore, the provisions are similar. The Lomé Declaration did not provide for fraudulent elections including rigging and manipulating the election process. Article 28E(1)(d) which provides for the refusal of incumbents to relinquish power after conducting free and fair election was extracted from the Lomé Declaration in its entirety. This provision does not acknowledge the challenge of fraudulent elections in Africa.[88] which may be referred to as the unconstitutional persistence of governments. Evidence of this is drawn from the Ethiopian elections in 2010. The incumbent managed to secure 99.6% of the seats in Parliament. There was complete absence of the

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[82] Aniekwe C, Oette L, The 10th Anniversary of the African Charter on Democracy, Elections and Governance

[83] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 14.
[84] Article 23(5), *African Charter on Democracy, Elections and Governance*, (2004).
[85] Dersso S, 'Unconstitutional Changes of Government and Unconstitutional Practices in Africa' 3
[86] Article 14(2), *African Charter on Democracy, Elections and Governance*, (2004).
[87] Article 25(4), *African Charter on Democracy, Elections and Governance*, (2004).
[88] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime',35

conditions for a free or fair election. This includes lack of meaningful participation, fear among voters and candidates to discuss their policy proposals.[89]

Furthermore, Article 23(5) of ACDEG has been replicated under Article 28E (1)e of the Malabo Protocol. This sub-section prohibits amendments or revision to the Constitution and legal instruments in contravention of principles of democratic change of government.[90] Certainly, this has been a challenge in Africa in the past. The most common form is the extension of term limits successfully completed by Tandja Mamadou of Niger in 2010, Ismail Omar Guelleh of Djibouti in 2010, Abdelaziz Bouteflika of Algeria in 2008 and Paul Biya of Cameroon in 2008.[91] The issue here is that the AU has not been active in responding to this form of UCG and there is doubt on whether the Court will be any different.[92]

The challenges brought about by Article 28E ultimately result in how the provision has been drafted. There is a demonstrated lack of substantive sufficiency and procedural delicacy. The provision was not a new invention by the drafters of the Malabo Protocol, rather it was an innovation from the antecedent Statutes discussed above. This reveals that the drafters built upon the existing definitions of UCG within the AU legal framework oblivious to the fact that such an approach may possibly create gaps.

It thus necessary to subsequently examine the meaning of UCG free from any pre-conceived notions or ideas. At the heart of unconstitutional rule, power is obtained and transferred through the use or the threat of use of force. Further, the Constitution and other electoral laws are typically abrogated, suspended or significantly amended to terminate the normal democratic process.[93]

Conclusion

The efforts toward democratic consolidation and stability in Africa has been a long-convoluted journey. Albeit with difficulties, AU member States have continuously sought to ensure peace, security and stability.[94] This is witnessed from the Statutes preceding the Malabo Protocol

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[89] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime',35.
[90] Article 28E (1)e, *Protocol on Amendments of the Protocol on the African Court of Justice and Human Rights.*
[91] 'Changing the Constitution to remain in power' 20 December 2013 https://www.france24.com/en/20091023-changing-constitution-remain-power on 16 January 2019; Omotola S, 'Unconstitutional changes of government in Africa. What Implications for Democratic Consolidation?' 29.
[92] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 36.
[93] Ndulo M, *The African Union, Legal and Institutional Framework*, Leiden, Brill Nijhoff, 2012, 253
[94] Preamble, *Protocol on Amendments of the Protocol on the African Court of Justice and Human Rights.*

which affirm the commitment to rid the continent of the scourge of UCG. One possible reason for this is that HoSG recognise that UCG is a real threat to their tenure in office irrespective of whether they assumed power through legitimate means.

Be that as it may, this visionary aspiration is not followed through when the provision is drafted in the Malabo Protocol. The Statute is marred with simple errors that are an affront to the principles of international criminal law. Subsequently, this causes complications to the Merged Court when determining their range of interpretation, carefully balancing between the intention of the drafters and the interest of the accused persons.

CHAPTER 4

PROSPECTIVE CHALLENGES WITH THE INTERPRETATION AND APPLICATION OF ARTICLE 28E

Introduction

The preceding chapter assessed the historical normative and legislative framework of the AU for combating UCGs in Africa in an effort to rationalise Article 28E. This discussion revealed that Article 28E was the product of amending preceding provisions on UCG. This was not the best approach considering that the Statutes that it was built upon had their own share of difficulties. Thus, the challenges were simply transferred onto the Malabo Protocol. One tangible challenge is the fact that Article 28E was developed from political policy instruments, but the Malabo Protocol is intended to be a criminal statute. This creates a discrepancy between the standards required for a general policy treaty and a criminal statute. Furthermore, the prospects of successfully prosecuting UCG under Article 28E look dim. Not only is the political will to ratify the Protocol discouraging but also there are real concerns over the impact on the principle of non-intervention.

Consequently, this chapter endeavours to examine the deficiencies of Article 28E. The first is based on its content as a legal provision. This part will analyse the substance of the provision and why its current formulation is problematic. Secondly, the procedural challenges will be addressed, this regards the difficulties that will arise when applying this provision to the various possible circumstances that could constitute UCG. Finally, an assessment of the modern manifestations of UCG that have not been catered for by Article 28E.

4.1 An Evaluation of the Substance and Content of Article 28E as a Criminal Legal Provision

The Malabo Protocol has been adopted as an International Criminal law Statute and therefore, it must adhere to the principles regulating criminal provisions. Of importance here is the principle of legality which comprises substantive justice and strict legality.[95] Under the former, the paramount interest is to protect the society from the transgressions of an individual, irrespective of whether their conduct had already been criminalized.[96] This doctrine is articulated as the *nullum crimen* standard.

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[95] Cassese A, *International Criminal Law*, Oxford University Press, Oxford, 2013, 24.
[96] Cassese A, *International Criminal Law*, Oxford University Press, Oxford, 2013, 24.

The principle of legality encompasses three main features including the principle of non-retroactivity, specificity and the prohibition of analogy.[97] The next section will explain how Article 28E fails to satisfy these features.

4.1.1 Specificity

Criminal rules must be as detailed as possible to clearly indicate to the addressee the conduct prohibited. This contains the objective elements of the crime and the requisite *mens rea*.[98] The Trial Chamber of the ICTY in the *Furundžija* case expounded on the principle of specificity. The Court was trying to arrive at an accurate definition of rape and therefore, had to rely on general principles of International Criminal Law (ICL) and those principles common to major legal systems.[99] Article 28E does not achieve the required threshold of specificity because it does not define in detail the objective or subjective elements. Thus, the Court is likely to find itself in a similar position as in the *Furundžija* case.

4.1.2 Non-retroactivity

Rules may not cover acts performed prior to their enactment unless such rules are favourable to the accused. This prevents arbitrary punishment. Nevertheless, the nature of ICL requires that rules are continuously identified, clarified or spelled out to have legal determinacy. This characteristic should be reconciled with the principle of non-retroactivity.[100] The ICTY in *Hadzihasanović* provided that the Courts may not create a new offence, with a new actus reus or mens rea they may only adapt the provisions to the prevailing social conditions. The extension of the legal ingredients of an offence must be restricted to the essence of the offence and secondly must be reasonably foreseeable by the accused.[101]

4.1.3 Ban on Analogy and Extensive Interpretation

The definition of the crime cannot be extended by analogy.[102] Criminal courts may not extend the purport of a criminal rule to a matter that is unregulated by law (*analogia legis*). This

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[97] 'General principles of international criminal law', ICRC Advisory Service on International Humanitarian law 31 October 2013 https://www.icrc.org/en/document/general-principles-international-criminal-law-factsheet on 16 January 2019.

[98] Cassese A, *International Criminal Law,* 28.

[99] *The Prosecutor v Furundžija,* Decision on Defence Filings Subsequent to the Close of The Appeal Hearing, ICTY Trial Chamber Judgment, 2000, 177.

[100] Cassese A, *International Criminal Law,* 30.

[101] *The Prosecutor v Hadzihasanović and others,* Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber, 2003, 34.

[102] 'General principles of international criminal law', ICRC Advisory Service on International Humanitarian law31 October 2013 https://www.icrc.org/en/document/general-principles-international-criminal-law-factsheet on 16 January 2019.

principle applies to both customary norms and treaty law such as the Malabo Protocol. Definition of crimes are to be strictly construed in order to exclude isolated cases.[103] In case of any ambiguity, the definition shall be interpreted in favour of the accused.[104] This does not bar the Court from interpreting or clarifying the elements of crimes nor does it preclude the progressive development of the law by the court. However, the ICTY trial chamber in the *Vasilijević* case explained this principle by stating that:

> "[U]nder no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal."[105]

Analysing Article 28E using these pre-conditions reveals disconcerting inadequacies. The Court will have a difficult time trying to balance the interests between clarifying the provision and not extending the definition by analogy. It is already evident that the six theoretical provisions under Article 28E have diverse real-world expressions.

4.2 The Prospective Challenges of Enforcing and Applying Article 28E in Africa

4.2.1 The Different Policy Responses of the AU has created a conflicting normative framework

Before the adoption of the Malabo Protocol, the AU has taken a stance against the varying forms of UCGs including some of the forms that have found their way into the Malabo Protocol. The concern here is that the responses have produced contradictory norms that will not assist the Merged Court in interpreting the provision.[106]

For each of the different instances of UCG under Article 28E, the AU has had a different policy position. Over the years these have included condemnation, suspension, imposition of sanctions and the deployment of envoys.[107] This is irrespective of the fact that the Lomé

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[103] *Josef Altstotter and others,* US Military Tribunal Nuremburg 1947, 284-285.
[104] Article 22(2) Rome Statute of the International Criminal Court, 1998, UNTS 2187.
[105] *Prosecutor v Vasilijević*, 196 citing *Tihomir Blaškid*, Case No. IT-95-14-T Judgment, ICTY Trial Chamber, 2000, 193-204.
[106] Ulf Engel, "Unconstitutional Changes of Government: New AU Policies in Defence of Democracy", South African Association of Political Studies, Stellenbosch, 1–4 September 2010; Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 19.
[107] Omotola J, 'Unconstitutional Changes of Government in Africa: What Implications for Democratic Consolidation?',35.

Declaration and the Addis Charter both set forth frameworks for dealing with each of the situations. Needless to say, this challenge has also been brought about by the prevailing attitude by HoSG at the time when an UCG occurs. For instance, military coups were prevalent in the 1990's but did not draw strong condemnation from the AU until 2000 when the Lomé Declaration was adopted.[108]

With respect to military coups, the response has usually been condemnation, calling on putschists either to immediately revert to the old order or conduct elections within six months.[109] In Guinea, AU responded by condemning the coup on 23 December 2008, suspended the country on 29 December 2008 and went ahead to impose sanctions on 17 September 2009. In Guinea-Bissau, the AU only condemned the coup and sent a special envoy to mediate the conflict but did not suspend the country. This is contrasted to Madagascar, where the AU applied all applied different responses, including condemnation of the coup and imposition of sanctions on 17 March 2009 and the eventual suspension of the country on 20 March 2009.[110] Additionally, the AU also established International Contact Groups (ICG) in Mauritania, Guinea and Madagascar through which the union coordinates and harmonises its efforts with the UN.[111]

Regarding constitutional amendment for tenure prolongation, the responses were equally varied. In 2009, the Nigerien President Tanja unilaterally made a decision to dissolve the elected Parliament in order to facilitate the removing of term limits. The AU did not intervene until the military took over the government.[112] It is evident that this form of UCG does not evoke strong reactions from the AU unless it is superseded by another action such as military intervention.

Concerning the failure of incumbents to step down, the approach by the AU has been conciliatory.[113] On two separate occasions, it involved mediation and a power-sharing agreement. For example, Kenya in 2008, the conflict was mediated by Kofi Annan leading to the conclusion of a power sharing agreement between the incumbent and the opposition. In

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[108] Souaré I, The AU and the challenge of unconstitutional changes of government in Africa, 4.
[109] Omotola J, 'Unconstitutional Changes of Government in Africa' 32
[110] Omotola J, 'Unconstitutional Changes of Government in Africa' 33
[111] Ulf Engel, "Unconstitutional Changes of Government: New AU Policies in Defence of Democracy", South African Association of Political Studies, Stellenbosch, 1–4 September 2010.
[112] Daniel K, 2010, 'Why the Coup in Niger May be a Good Omen' 22 February. Available at http://www.ghanaweb.com/GhanaHomePage/features/artikel. php?ID=177096 on 21 January 2019.
[113] Omotola J, 'Unconstitutional Changes of Government in Africa' 34.

Zimbabwe, a similar process was facilitated by Thabo Mbeki.[114] However, the most momentous of this form of UCG was in Ivory Coast when Laurent Gbagbo refused to step down as President after the run-off election of 28 November 2010.[115] This was despite the international recognition of Alassane Ouattara as the winner of the election. He held onto power in the face of sanctions from the AU Peace and Security Council and a statement from the UN Secretary-General. He proposed a power-sharing agreement where he would remain President and Ouattara becomes the Prime Minister. Before Ouattara could assume power, Gbagbo had to be forcefully removed with the assistance of UN peace-keepers, French LICORNE troops and pro-Ouattara forces.[116]

It is worthy to note that between December 2018 and January 2019 there have been three different allegations of UCGs in Africa. This section will analyse the three different responses of the AU in this regard. The first was over the December 30 presidential election in DRC. This election had been postponed twice and marred with violence and logistical errors.[117] For example, in the capital Kinshasa about two thirds of the polling machines had been destroyed by fire. The AU raised 'serious doubts' over the conformity of the announced results and the actual results of the ballot boxes.[118] Secondly, the attempted military coup against the president Ali Bongo, who happened to be out of the country at the time due to ill-health.[119] The perpetrators of the coup stated their objectives to be the mental and physical inability of the president to rule the country.[120] Finally, the popular protests in Sudan against military dictatorship. The protests were escalated by the steep increase in food prices disclosing a deep-sited political dissatisfaction by the public.[121]

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[114] Tendi, Blessing-Miles, 2010, 'Power sharing: the new military coup' 1 June. Available at http://www.guardian.co.uk/commentisfree/2010/jun/01/ethiopia-africa-powersharing

[115] https://www.economist.com/baobab/2011/04/06/gbagbo-refuses-to-budge on 21 January 2019.

[116] Omotola J, 'Unconstitutional Changes of Government in Africa' 35.

[117] Mohamed H et al, Democratic Republic of the Congo: Elections 2018, 28 December 2018, available at https://www.aljazeera.com/indepth/interactive/2018/12/democratic-republic-congo-elections-2018-181228120427725.html on 28 January 2019.

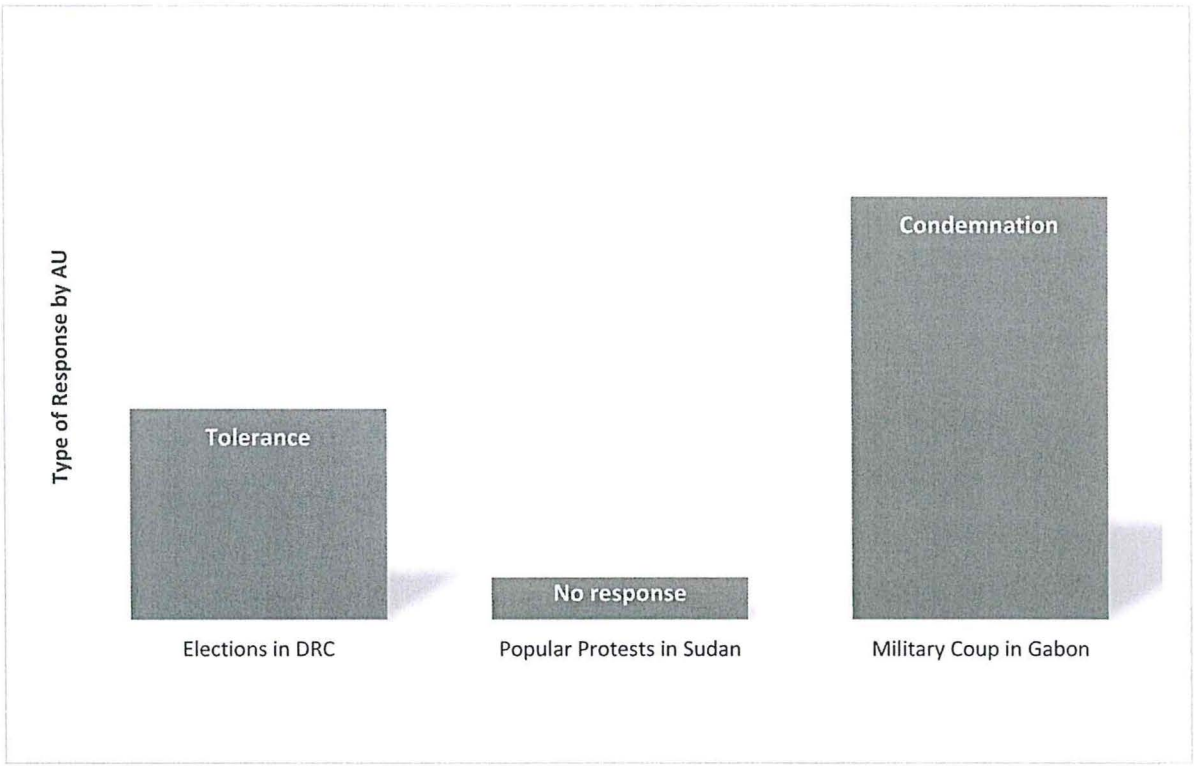
[118] Emmot R, EU AU signal support, but no acclaim, for Congo President-elect, 22 January 2019, available at https://www.reuters.com/article/us-congo-election-eu/eu-au-signal-support-but-no-acclaim-for-congo-president-elect-idUSKCN1PG1JW on 28 January 2019.

[119] 'What You Need to Know about the Attempted Coup in Gabon' 7 January 2019 available at https://www.aljazeera.com/news/2019/01/attempted-coup-gabon-190107071230267.html on 28 January 2019.

[120] Goma Y, '2 Plotters Killed as Gabon Government Puts Down Attempted Military Coup' 7 January 2019 available at http://time.com/5495933/gabon-government-military-coup/ on 28 January 2019.

[121] 'Respond to 'legitimate grievances' of Sudanese people, UN human rights experts urge, following protests', 28 December 2018, available at https://news.un.org/en/story/2018/12/1029441 on 28 January 2019.

Table 2: The different responses by the AU to UCG in 2019



Source: Compiled by author from varying sources

Demonstrated above is the varying responses of the AU to each of these three recent situations. Taking into account the normative and legislative framework against UCG, including the yet to be enforced Malabo Protocol. It is apparent that the response dwindles in strength with regards to the situations that are not clear-cut. For the Gabon military coup, there was firm condemnation because it is an outright breach of the law, however, for less straightforward popular protests and ambiguous elections, there were feeble reactions. This is likely to be replicated when adjudicating over Article 28E.

The significance of these varied responses is that they produce divergent policy outcomes. Discernibly from evaluating the three forms of UCG above, the outcomes have been different depending on the position the AU took. This is not sustainable from the perspective of a criminal court for the sole reason that it will manifest inconsistencies and ambiguities which will defeat the purpose of having a legal framework in the first place.

4.2.2 The Implication on the Right to Self-determination and Popular Protests

The AU lists democracy as one of its founding principles.[122] This includes the right to self-determination which has been guaranteed in other AU regional instruments. The consternation is how this right relates with UCG. The Banjul Charter provides 'All People's right to freely determine their political status and pursue their economic and social development... Colonized and oppressed peoples shall have the rights to free themselves from the bond of domination'.[123] This right has been exercised in different forms in the past that would currently constitute a form of UCG in the present. The AU has not clarified the situation in instances of UCG where a section of the citizenry claims to be exercising their democratic will to free themselves from oppression. This was illustrated in 2013 by the Egyptian President Mohamed Morsi was ousted by the military. This was a complex situation because on the one hand, a democratically elected president was removed through military might on the other millions of Egyptians demanded for the president's resignation. The Army claimed to have been responding to the people's demands.[124] The response was to initiate a ceasefire dialogue that would quell the tension in the country.[125]

Noteworthy, popular uprising was deleted from the definition of UCG during the drafting process.[126] This was done in the interest of protecting the right to protest.

Furthermore, this consideration is coupled with the principle of non-intervention in the internal affairs of a State. This principle is enshrined in the UN Charter, precluding the UN and other States from intervening in matters that are essentially within the domestic jurisdiction of the State involved.[127] Authors writing in this field have argued that the transfer of criminal jurisdiction to a regional court over what would otherwise constitute intervention is a breach of international law.[128] However, this position is untenable with regards to UCG in Africa. By

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[122] Article 4, Constitutive Act.

[123] Article 20, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

[124] Yihdego Z, 'Democracy, Peoples' Uprising and Unconstitutional Change of Government in Egypt: The African Union Principles and Responses', *European Journal of International Law*, (2013).

[125] Yihdego Z, 'Democracy, Peoples' Uprising and Unconstitutional Change of Government in Egypt: The African Union Principles and Responses'.

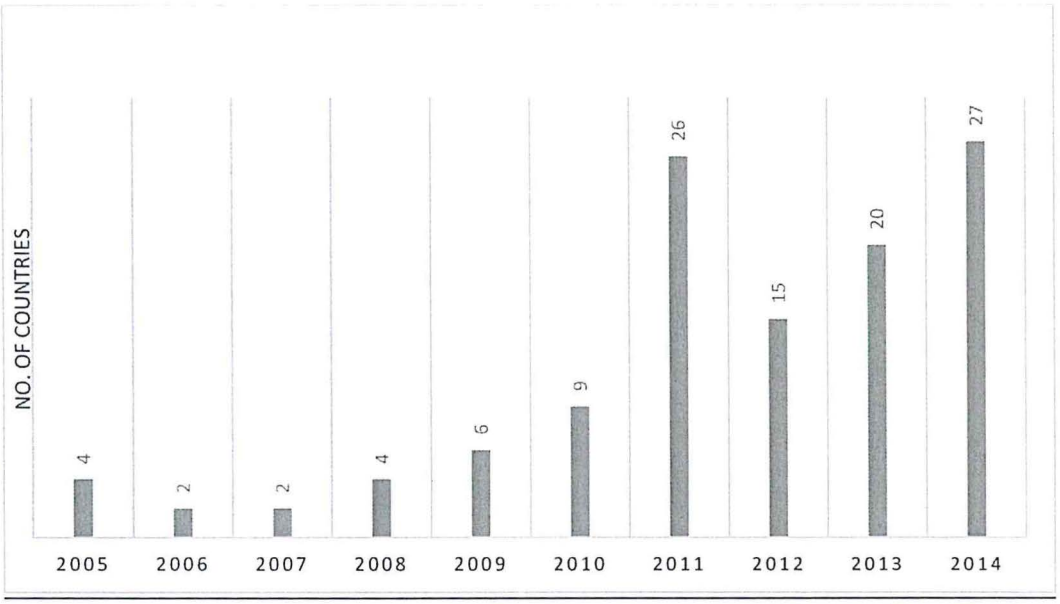
[126] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, 2016, 16.

[127] Article 2(7), Charter of the United Nations, 26 June 1945.

[128] Novogrod J, 'Internal Strife. Self-Determination and World Order', in Bassiouni M (ed.) *International Terrorism and Political Crimes* 1975, 103; Shaw M, *International Law*, 6ed, Cambridge University Press, Cambridge 2008, 1152.

dint of African States concluding treaties on this matter shows a collective interest to combat the crime regionally. The natural progression is to establish a common criminal court with authority over crimes of common concern. This is not in breach of international law.[129] Nonetheless, the principle of non-intervention is fully sub-servient to the sovereign will of States. They are at liberty to seek assistance, and in doing so quell any form of insurrection on their territory.

Table 3: Number of African Protests by Year



Source: Branch A, Mampilly Z, Africa Uprising: Popular Protest and Political Change, 68.

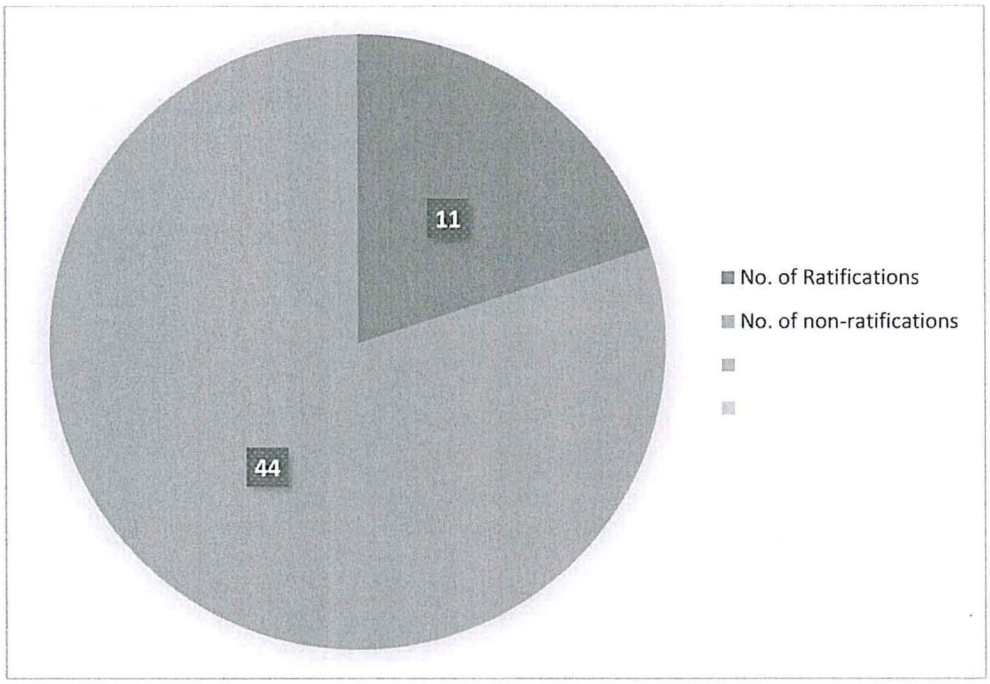
4.2.3 Complementary Jurisdiction and the Political Will of States

A further issue that arises with enforcing Article 28E is that of jurisdiction of the Court *vis-à-vis* the jurisdiction of the State. Similar to the ICC, the Merged Court will only have jurisdiction to try the crimes in its mandate where the State is unable or unwilling.[130] For the State Parties to have the capacity to try the crimes in the Protocol they must include them in their municipal law. The likelihood that a State will prosecute an incumbent government for any of the forms of UCG is slim.[131] This is because by the time a person or party successfully completes a form of UCG then they have a powerful hold over the politics of the State.

[129] Wilt H, 'Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court', 30, *Leiden Journal of International Law*, (2017), 981.
[130] Article 46H, *Protocol on Amendments of the Protocol on the African Court of Justice and Human Rights.*
[131] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 44.

Moreover, it is for this reason *inter alia* that the ratification process of this Protocol has been very slow, eighteen years since the adoption date, the Protocol is still awaiting the fifteenth ratification. This demonstrates a clear lack of political will to be governed by the Protocol, drawing from the questions brought up by States on the appropriateness of a Court to entertain such a 'politically sensitive matter'.[132] The success of the Merger Court is brought into question. This is an unfortunate regression from the positive steps taken by State parties of the AU to reject and condemn UCG in the region.[133]

Table 4: Number of States that have ratified the Malabo Protocol



Source: https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html

4.3 Modern forms of UCG that have not been provided for under Article 28

4.3.1 Popular Protests

Popular protests were excluded from the definition of UCG because they are believed to collectively represent the will of the people and to prohibit them would be unduly repress the voices of the common citizen. The following data is an illustrative sample that protests still

[132] Wilt H, 'Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court', 985.
[133] Albab T, 'African Court of Justice and Human and Peoples' Rights: Prospects and Challenges of Prosecuting Unconstitutional changes of Government as an International Crime', 39

present a challenge to peaceful order in many countries in Africa. Possibly an indication that their governments are not legitimate in the first place. Additionally, rarely is it a phenomenon that can be contained in one territory. Different scholars have considered forms of UCG as infectious, capable of spreading across territories.[134] Thus, the concerns of the AU considering this form of UCG are valid, however, to turn a blind eye to the problem is not to make it disappear.

Table 5: List of African Protests 2005-2014

Country	Year
Algeria	2011, 2012, 2013, 2014
Angola	2011, 2013, 2014
Benin	2011, 2014
Botswana	2011
Burkina Faso	2011, 2014
Burundi	2014
Cameroon	2008, 2012
Central African Republic	2006, 2013, 2014
Chad	2010, 2014
Côte d'Ivoire	2010, 2011
Democratic Republic of Congo	2011, 2013
Djibouti	2005, 2011, 2014
Egypt	2008, 2009, 2010, 2011, 2012, 2013, 2014
Ethiopia	2005, 2006, 2013, 2014
Gabon	2009, 2011, 2012, 2014
Guinea	2007, 2009, 2013, 2014
Kenya	2008, 2010, 2013
Lesotho	2011
Liberia	2011
Libya	2011, 2013
Madagascar	2009, 2010, 2013
Malawi	2011
Mali	2012, 2013
Mauritania	2011, 2012, 2013
Mauritius	2011
Morocco	2011, 2012, 2013
Mozambique	2010, 2012, 2013
Niger	2009, 2013, 2014
Nigeria	2012
Senegal	2011, 2012
Somalia	2010, 2014

[134] Wilt H, 'Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court', 985; Branch A, Mampilly Z, *Africa Uprising: Popular Protest and Political Change,* London, Zed Press, 2015 66.

South Africa	2009, 2010, 2011, 2014
Sudan	2011, 2012, 2013
Swaziland	2011, 2012, 2013
Tanzania	2011, 2012, 2013
Togo	2005, 2010, 2011, 2012, 2013, 2014
Tunisia	2011, 2012, 2013, 2014
Uganda	2011
Western Sahara	2011
Zimbabwe	2005, 2007, 2008

Source: Branch A, Mampilly Z, Africa Uprising: Popular Protest and Political Change, 65

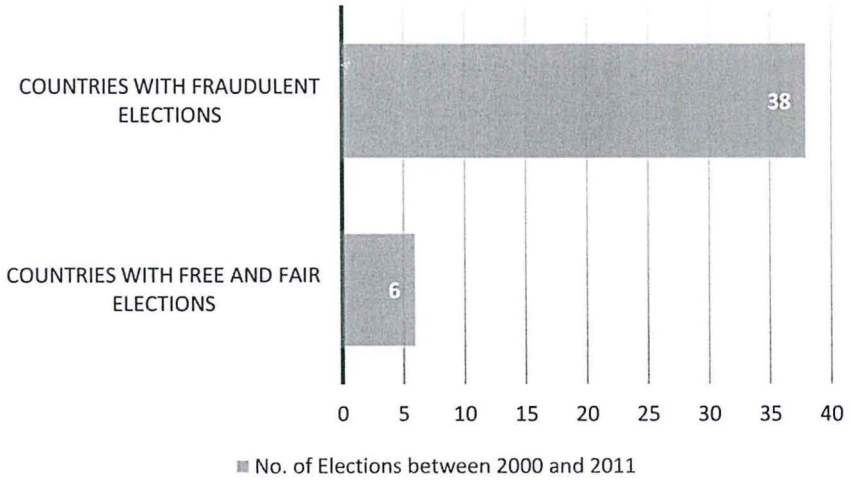
4.3.2 Fraudulent Elections

Article 28E of the Malabo Protocol only provides for an incumbent's refusal to relinquish power it does not address the incumbent holding fraudulent elections to maintain the power. Alternatively, it does not presuppose a situation where any other prospective candidate may interfere with the democratic process of transferring power to illegitimately gain success. Noteworthy, Article 28E makes no mention of conducting elections. This is a peculiar oversight given that majority of democratic Africa makes use of elections to transfer power to subsequent governments. Moreover, the occurrence of fraudulent elections is more common than those that are free and fair as the data suggests. Examples of African States that have held fraudulent elections in the past include Kenya in 2007, Zimbabwe in 2008 and Ethiopia in 2010 where the incumbent secured 99.6% of the total seats in Parliament.[135]

Similar to popular protests, this is an instance of UCG that is always heavily debated between opposing parties. The issue of their legitimacy or lawfulness will depend on the perspective of the party that has been addressed. This was the case in the countries which have experienced these modern forms, the winning party confirms the results while the opposition claims fraud and unlawful interference. Therefore, these two forms are just as significant as the five provided for under Article 28E.

[135] Economist Intelligence Unit, *Democracy Index 2011: Democracy under stress*, 2011, 7.

Table 6: Comparison between Countries with fraudulent elections and free and fair elections



Conclusion

From the data presented it is apparent that that popular protests are frequent and diverse in Africa with the most recent one taking place in Sudan. This should prompt a response from the AU on the position of popular protests in relation to UCG. The clarification of this matter among others, might increase the political will of States to ratify the Malabo Protocol. Moreover, the insufficiency of the Malabo Protocol is highlighted by the number of countries engaging in fraudulent elections. This requires the drafters to consider the content of the provision, examining whether it will suffice without running the risk of over-legislating.

An assessment of the prospects of the Merged Court is discouraging when viewed in light of all the challenges that the Malabo Protocol faces. These challenges require the drafters to return to the drawing board and make necessary amendments that will yield positive results. The prohibition of UCG has been referred to as quintessential custom in Africa, therefore, the codification of this through the myriad of treaties only serves as evidence.[136] Insurgencies although occurring in the territory of one State have been regarded to have a contagious effect capable of generating into widespread oppression. Examples of civil strife crossing borders in Africa abound.[137] From the domino effect during the Arab spring,[138] the civil war for the hunt

[136] Abass A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 34.
[137] Wilt H, 'Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court', 984.
[138] *Prosecutor v Al Gaddafi and Al Senussi,* Decision on the admissibility of the case against Abdullah Al-Senussi, ICC, 2013, 70.

of blood diamonds in Sierra Leone[139] and the Lord Resistance Army moving its camps from Uganda to Sudan and the Central African Republic.[140] It is against this backdrop that the fight against UCG must carry on.

[139] Meredith M, *The State of Africa: A History of Fifty Years of Independence*, Free Press, London, 2006 524-545.

[140] UNSC S/RES/2262 (2016), Resolution Extending Sanction on Central African Republic, 12.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

Introduction

It is evident that UCGs and all their various forms constitute a real impediment to the development of Africa. They establish dictatorships, subvert democratic governance, preclude the exercise of the rights of people to constitute or change their government, and lead to the violations of human rights.[141] The AU through its Conventions and Declarations has sought to purge the Continent of this vice. Their commitment to see the eradication of UCG was solidified through the adoption of the Malabo Protocol. This was not an easy venture by any measure and the challenges are apparent both in the text of the legal provisions and the reception and application by member States to the AU.

This chapter concludes the study by providing the key findings of the research and the recommendations that might possibly solve the issues that have been raised throughout the paper.

Restating the Initial Problem

The main criticism of Article 28E of the Malabo Protocol is that it lacks precision by offering a narrow approach to combating UCGs in Africa. The objective of this paper was to outline the various issues that arise from this narrow approach. The provision has left out a number of possible UCGs such as popular protests and fraudulent elections. Furthermore, the AU has been inconsistent with their responses to UCG this in turn makes the resolution of the crime ineffective. Not to mention that it sets a bad precedent for the Merged Court.

Research Findings

This paper was guided by three research questions. First, it sought out to investigate the reasoning behind Article 28E, tracing its development from the documents adopted by the OAU such as the Lomé Declaration until its current formulation in the Malabo Protocol. Understanding how the provision came to acquire its current form explains the reason for its inadequacies. This is because it was not a new invention by the drafters, instead it was a replication of previous similar provisions. This study found that when the OAU was operational

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[141] Odinkalu, Chidi A.,'Concerning Kenya: The Current AU Position on Unconstitutional Change of Government', Open Society Initiative Africa Governance Monitoring and Advocacy Project (AfriMAP), 2008,. Available at http:// www.afrimap.org/english/images/paper/AU&UnconstitutionalChangesinGovt_Odinkalu_Jan08.pdf on 30 January 2019.

its main concern was principles such as state sovereignty and territorial integrity, this was thus reflected in its documents. Aspects such as UCG took a backseat before it was brought to the front by the AU. Additionally, Article 28E was replicated from documents that were not criminal statutes. Therefore, the drafting did not meet ICL standards and this create new challenges when the crime is being prosecuted before the Merged Court.

Secondly, if the content of Article 28E meets the threshold set for criminal provisions. The nature of criminal provisions is that they are required to abide by the principle of legality. Legality is divided into three features and they include specificity, non-retroactivity and the ban on analogy and extensive interpretation. From the foregoing discussion, it became imminent that the development of this crime by the Merged Court might infringe this principle. This is due to the fact that a brief look at the provision reveals there is not much guidance that it can provide.

Consequently, a conflict will arise between two possible rules of legal construction. The literal rule which requires a plain reading of the text will defeat the purpose of prohibiting UCG. It is not by any stretch of the imagination that crimes, particularly international crimes, are ever evolving taking on new forms that had not been pre-conceived. These novel forms are likely to be left out by a strict literal interpretation. Then there is the golden rule that looks to the purpose of the text by interrogating the intention of the drafters. The challenges with this method of interpretation is that it is said to infringe on the separation of powers because the judges can easily usurp the function of law makers.[142] This is a conflict that can be resolved by amending Article 28E to comply with the requirements of legality.

Thirdly, taking a forward-looking approach to the matter, what are the prospective challenges that the AU and the Merged Court will face when applying Article 28E. This evaluation brought out a number of issues. The AU's inconsistent approach to handling UCG has contributed to its ineffectiveness. There is low political will to ratify the Malabo Protocol as evidenced by the empirical data. This could be due to a number of reasons, the uncertainty over the material jurisdiction of the Merged Court, the obligations that state parties will have once they ratify the Protocol among others. This question further revealed that Article 28E is insufficient because the data shows numerous instances of UCG that would subsequently be left out of the purview of the Merged Court.

[142] *London and North Eastern Railway v Berriman* (1946) AC 278 (UK)

Some Final Remarks

To conclude, it is worthy of applause the strides that the AU has made not only in the fight against UCG but also in trying to uphold human rights. The Malabo Protocol promises to be a visionary statute, the first of its kind, legislating for regional crimes that have not previously been provided for in any international or regional statute. There were initial concerns that this was only a reactionary measure to exclude the jurisdiction of the ICC over African States. However, it has gone far and beyond to become a torchbearer in regional crimes. This is not a task that the AU should take lightly because the rest of the world will use this as a stepping stone to develop this area of law. Thus, it would be prudent to ensure that the AU responsibly discharges the task that has been placed on its shoulders.

Recommendations

This study concludes with the following recommendations on the concrete actions to be taken:

Legal Recommendations

a) A broader definition of unconstitutional changes of government should be designed to include all illegal means of accessing and maintaining power.[143] This is necessary to cover conduct that has currently been left out by the narrow definition.
b) Accordingly, the definition should exhibit sufficient flexibility that will take into account the development in the means of changing governments. This will prevent the situation described in the research findings where the hands of the Court are tied when interpreting the Statute.
c) The AU should consider formulating an Elements of Crime document which is explanatory in nature similar to that of the ICC.[144] Article 9 of the Rome Statute provides for the Elements of Crime document which shall assist the ICC in interpreting and applying the crimes over which it has jurisdiction.[145] The Elements of Crime document breaks down the constituent elements of all the crimes provided for in the Rome Statute. Therefore, a similar document for the Malabo Protocol will not only cure the deficiencies under Article 28E but also all the other 13 crimes provided for. This will effectively guide the interpretation and application of the Malabo Protocol.

[143] Förander K, 'Dealing with unconstitutional changes of government - The African Union way', Unpublished LLM Thesis, University of Lund, 2010, 71.
[144] Paragraph 1, Elements of Crime, International Criminal Court publication, RC/11, 2010.
[145] Article 9, Rome Statute of the International Criminal Court.

Policy Recommendations

a) The AU ought to overcome the inconsistency in responding to UCG which in effect creates a double standard and a contradictory normative framework. This approach is not feasible if the perpetrators of UCG are to be held accountable. Instead it sets a bad precedent for the policy position of the AU in subsequent UCGs.

b) A regional policy is required to agree on some of the terms set under Article 28E. For example, acceptable presidential term limits and refusal to relinquish power. This would reduce the current breadth of the scope to practical limits.

c) African institutions should strengthen the respect for constitutional transfer of power to facilitate the development of States. This can be done by making regional instruments necessary for UCGs, such as the Lomé Declaration and ACDEG, binding. Thereafter, lobbying and encouraging the ratification and domestication of these instruments.

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