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Assessing the Repression Of Constitutional Coups in Africa Through the Lens of the Malabo Protocol on International Crimes

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Abstract:

Since the turn of the 21st Century, we have been witnessing ‘constitutional coup’ in many African countries masterminded by leaders determined to cling on to power. The idea of manipulation in itself induces the harmful use of the constitutional norm. "Playing with the hands" on the social contract of a state, however, is a fairly common in all constitutional regimes. After all, it has never been claimed that a constitution should be immutable. Its adaptation is necessary for the evolution of the society it is supposed to govern. But the idea of manipulation underlies a biased use of the Constitution for the benefit of the interests of some. And when this habit, which tends to make constitutional manipulation normality in Africa and to transform the Constitution into a legal instrument of power, is undermined by popular and political insurrection, we witness gross human rights violations. While there have been great advances regarding the legal and institutional mechanisms of international criminal justice at a global level, this determination on the African continent appears as a setback for the established process, thus defeating the very purpose of the existing legislation. Even the Malabo Protocol endowing the expected African Court of Justice and Human Rights with criminal jurisdiction does not create room for investigation and prosecution of these “constitutional coups”. Indeed, neither the drafters of this Protocol nor those of such other instruments as the African Charter on Democracy, Elections and Governance were bothered by this constitutionalizing of malicious constitutional changes, thus giving the green light to maliciously intended leadership behaviours devoid of any criminal liability, as the leaders would remain in power for life. Using the example of constitutional manipulation in Rwanda and Uganda, this Article provides a critical study of the law and practice of the African Union to prove that and how the repression of unconstitutional change of government should extend to “constitutional coups” to have the whole system serve the purpose of international criminal justice and give it its full meaning on the African continent. A

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doctrinal research method was used where qualitative research approaches were employed to facilitate the study. The reason for adopting this method is that it improves a substantial part of the law by means of which it could achieve the broader goal of the study.

Key words: *Malabo protocol, constitution coup, AU, political power*

1. Introduction

There is a number of African leaders attempting or changing constitutions to abolish term limits. This ignites the question of constitutional engineering and its implication to the continent's rule of law, democracy and Human Rights. The recent amendments to the Protocol to the statute establishing the African Court of Justice and Human Rights (Malabo Protocol) prohibit unconstitutional change of government. Thus, under the Malabo Protocol, the African Court of Justice and Human Rights has the jurisdiction over crimes related to unconstitutional change of government in Africa.¹ The Unconstitutional change of government has been interpreted to include coup d'état, mercenary intervention, rebel insurgency and Replacements. However, none within the Protocol touches or addresses the question concerning tempering with Constitution and unconstitutional extension of term limits, thus rendering to an abuse of prerogative powers.

The extension to term limit is only constitutional when changes and amendments is consented by general public through national referendum, which is not the case in African politics.² However, countries like Rwanda have had a referendum which extended the president term in power despite being accused of Human Rights violations and having committed international crimes. The Constitutional Coup to extend presidential term limits is a strategy for those leaders to cling to power and avoid prosecution for the crime they committed while in office. Although Mbokumu did not address the constitutional coup in reflection of the African Court on Human and people's Rights, he tried to narrate the effect of the constitutional coup on democracy and autocratic leadership. Similarly, the Lomé Declaration, also known as African Charter on Democracy, Election and Governance³, condemns and rejects the unconstitutional change of

¹ Article 28A (1) para 4 of the protocol on amendments to the protocol on the statutes of the African Court of Justice and Human Rights, 2014

² Mbaku, J, "Threat to democracy in Africa: The rise of Constitutional Coup. Africa in Focus" 10th January 2020. Brookings. Retrieved from <https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/>

³ The Lome Declaration was adopted by the eight ordinary session of the assembly, held in Addis Ababa, Ethiopia, 30 January 2007.

government⁴. Such proviso is echoed by Article 4(p)⁵ of the Constitutive Act of the African Union, which also condemns and rejects the unconstitutional changes of governments but does not significantly indicate the manipulation of the Constitution to remain in power amounts to a constitutional coup.⁶ The bizarre part of it, is the inapplicability of both statutes to address the issue concerning revolution necessitated by the existing unconstitutional government in a country. It extends double standards on the treatment of the issue concerning the unconstitutional change of government where massive protest against governments, once credibility tests met; have to right to change the government through revolution. However, the revolution and mass protest, regardless of the credibility test used, never equal to national referendum as international law requires. Notwithstanding its significant role in the protection and preservation of democracy in the African Continent, the Lomé Declaration is thus inefficient since it does not address problem like the change of the Constitution to remain in power and election rigging, which is the main factors behind the substantive violation of Human Rights and war in the continent.

Consequently, Malabo Protocol extended its jurisdiction on a number of crimes to include unconstitutional change⁷ of government and corruption compared to the Rome statutes. The aim is to create an avenue for African states to mend the international criminal law in the way that addresses African concerns. However, most heads of states propagate to have Malabo protocol ratified, while at the same time; those leaders are accused of violating fundamental human rights and international humanitarian law. The AU treaty, the African Charter on Democracy, Election and Governance and Malabo Protocol condemn serious crimes as provided within the scope of international law. On the other hand, it harbours protection and immunity to the head of states that tempers with a constitution to cling to power, thus complicating international criminal justice in Africa.

2. An overview of the Constitutional Coup

⁴ Article 3(10) of the African Charter on Democracy, Election and Governance adopted in 2007 in Addis Ababa, Ethiopia

⁵ The AU constitutive Act established in 2000 in its preamble categorically states that “conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability.

⁶ See <https://issafrica.org/amp/iss-today/on-unconstitutional-changes-of-government-the-case-of-libyas-ntc>. Accessed on 25th June 2021 at 02:14 A.M

⁷ Supra, see footnote No.1

Some African countries have no clause within their Constitution prescribing term limits for the incumbent presidents or heads of state.⁸ Those countries include Cameroon,⁹ Chad,¹⁰ Djibouti,¹¹ Gabon,¹² Niger,¹³ Togo,¹⁴ Guinea,¹⁵ and Uganda.¹⁶ However, there are exceptional cases like Tanzania, South Africa and Liberia. Some constitutions vest absolute powers in the President, with no check and balance whatsoever.¹⁷ As a result, leaders like Paul Biya of Cameroon, Teodoro Obiang Nguema Mbasogo of Equatorial Guinea and Denis Sassou Nguesso of the Republic of Congo have become presidents for life¹⁸.

Furthermore, some African countries have had a single party system¹⁹ which did not allow the transition of power through democratic elections. Presidents enjoyed enormous power without challenges or being held accountable. This led to conflicts, including civil war, coup d'état and extreme poverty.²⁰ Currently, Africa has experienced more than 108 coup d'état, whereas Sudan and Burundi

⁸ Chigowe, L, "One Step Forward, Two Steps Backwards: The Threat of "Third Termism" on Democracy Rule of Law and Governance in Africa" Special Issue on Rights-based Governance, Participatory Democracy and Accountability, Postdoctoral Fellow, Faculty of Law, Rhodes University, 2020, Page 2

⁹ In 2008, Cameroon amended its Constitution to eliminate presidential term limits and allow President Paul Biya to remain in power, which was interpreted as contrary to democracy, the rule of law, and tranquility.

¹⁰ Chad have changed its constitution to abolish presidential term limits to allow President Idriss Deby to remain in power until 2033. The amended constitution eliminates the post of prime minister and creates a fully presidential system, which is aimed at installing a de facto monarchy in Chad.

¹¹ In 2010, Djibouti changed its constitution to remove presidential term limits in order to allow the incumbent president Ismail Omar run for a third term.

¹² In 2011, Gabon amended its constitution in order to allow president Ali Bongo cling to power.

¹³ Niger amended its constitution in 2017 and abolished presidential term limits

¹⁴ In 2009 Togo changed its constitution to allow president Faure gnassingbe stand for more two terms in power. Surprisingly, people voted for such controversial constitution.

¹⁵ Guinea amended its constitution and abolished presidential term limits to allow president Alfa Konde seek another third term.

¹⁶ In 2017 Uanda parliament passed an amendment to the constitution removing presidential term limits and for the age limits to vie for presidency. Such move has allowed president Yoweri Museveni to seek another term in office after the Election held in 14 January 2021

¹⁷ Articles 98 and 99 of the Ugandan Constitution of 1995, as amended through 2017, give the president far too much power. See also Article 112 of the Rwanda Constitution of 2003 with amendment through 2015, which gives much power to the president and with no limitation whatsoever.

¹⁸ Dulani, B, "African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure" Afro barometer, Dispatch No. 30, 2015, Page 4

¹⁹

²⁰Zamfir,L,"Democracy in Africa Power alternation and presidential term limits". Briefing, European Parliament, 2016, Page

are topping the list.²¹ Political unrest and chaos engulfing the continent reflect a lack of the rule of law and non-adherence to democratic principles.

For about three decades now, the wind of changes has blown on Africa, and most African countries have accepted to practice democracy through amendments of to their constitutions to encompass multiparty, and this had witnessed a transition of power from an authoritarian regime to democratically elected governments.²² However, some African countries seem not ready to accept democratic ways of life, and it seems the adoption of democratic principles was forced on African states by Western donors who demanded the acceptance of Western democratic values in exchange for donor funding.²³ This is evident that democracy was adopted as a mechanism to economic reforms upon the pressure and sanction by the global institutions.²⁴ Thus, the acceptance of a presidential term by most African countries was a potential step to avoid violent transfer of power, especially in states with a presidential term limit²⁵. The democratic change of government has been the significant approach to avoid impunities, and countries that have practiced the practised rule of law and good governance have had no coup d'état. The presidential limit is seen as the most effective means to discourage chaos and unrest in African states.

3. Legal framework against Constitutional coup d'état

Constitutional Coup may be new terminology from the infamous unconstitutional change of government.²⁶ Normally, it occurs when the executives including incumbent President and other C government members seize power through technical or legal manipulation to extend presidential term.²⁷ Perpetrators to the constitutional coup may recall for a referendum as

²¹ Christopher, G, & Mwai, p, Mali coup: Are military takeovers on the rise in Africa? BBC news. 28th April 2022. Also available on <https://www.bbc.com/news/world-africa-46783600>.

²² Souaré, I, k, "The AU and the challenge of unconstitutional changes of government in Africa", Institute for Security Studies, Paper 197, 2009, page 3-10

²³ Chigowe, L, "One Step Forward, Two Steps Backwards: The Threat of "Third Termism" on Democracy Rule of Law and Governance in Africa", 2177Special Issue on Rights-based Governance, Participatory Democracy and Accountability, Postdoctoral Fellow, Faculty of Law, Rhodes University, Juris Vol 34, No 3, 2020, Page 4

²⁴ In 1980, the World Bank and IMF imposed economic sanction to Tanzania, after the country refused advice of structured economic adjustment and free economy. This sanction made the country review its fiscal policy and in 1985 the country revised its constitution to include presidential term limit followed by democratic elections in 1995

²⁵ Supra, see footnote No. 24

²⁶ Supra

²⁷ Katja, S, N, "constitutional coups: advancing executive power in Latin-American democracies" Paper prepared for presentation at the Center for the Study of Democracy, 7th Annual Southern California Graduate Student Conference, University of California, 2011 e

manipulation to just their motive of re-writing the Constitution to cling to power.²⁸ In contemporary African politics, the constitutional coup has taken a new course, and some African leaders are reluctant to retire or relinquish power peacefully.²⁹ However, the Lomé Declaration on the Framework for an AU response to unconstitutional changes of government³⁰ gave the meaning of Unconstitutional change of government to include 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 party after Free, fair and regular elections.

The same position is echoed under Article 4(p) of the Constitutive Act of the Africa Union, which provides *inter alia*. The African Union shall function in accordance with the principles, including condemnation and rejection of unconstitutional changes of governments.³¹ The African Union is committed to condemning and sanctioning any government within the Union that gains power through unconstitutional means, and which is reflected in Article 30,³² which sanctions any government that may seize power through unconstitutional means. For example, the same provision stipulates that governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

As to show determination and dedication to ending impunity in the continent, the African Union established Malabo Protocol hereinafter referred to as the Protocol on an amendment to the protocol on the statute of the African Court of Justice and Human Rights³³, which in its preamble vows to condemn and criminalize unconstitutional change of government (UCG). For instance, the court promises to respect the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive

²⁸ Scheppele, H. "Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)". *Transnational Law & Contemporary Problems*, . Page 23-50

²⁹ *Supra*, see footnote no. 29

³⁰ AHG/Decl.5 (XXXVI) of 2000 also cited by Ndulo, M, "the prohibition of unconstitutional change of government, The African Union: Legal and Institutional Framework" *Cover The African Union: Legal and Institutional Framework*, E-Book ISBN: 9789004227729 Publisher: Brill | Nijhoff.920120 Page 24.

³¹ Article 4(p) of the Constitutive Act of the African Union established in May 2001

³² Constitutive Act of the African Union of 2021.

³³ This protocol was established in 2014 following the meeting of all AU head of states in Malabo city, Equatorial Guinea as step forward to establish African Court on Criminal Justice and campaign to withdraw from International Criminal Court (ICC)

activities, unconstitutional changes of governments and acts of aggression. Article 28A of the Malabo Protocol criminalizes unconstitutional change of government. It further provides that, subject to the right of appeal, the International Criminal Law Section of the Court shall have the power to try persons for the crimes provided that the person has committed the Unconstitutional Change of Government.³⁴ To the surprise, the AU legal framework does not seem to solve the challenge of Constitutional Coup nor does it provide a substantive meaning of constitutional coup. Several questions have remained imminent and unanswered, for instance: -

Firstly, is the unconstitutional change of government provided under AU legal instrument the same as the Constitutional coup? Secondly, does the Malabo Protocol make sense in a growing wave for African leaders to extend prudential term limit? Thirdly, does Constitutional manipulation constitutes unconstitutional change of government and extension of the presidential term limit?

The questions above simulate the existing puzzle in Africa in regards to the lacuna within AU legal instruments, which do not address the question of Constitutional Coup. In reality, Unconstitutional Change of government has similar meaning to the Constitutional Coup. The latter is where government officials manipulate the Constitution without necessarily approval from citizens to extend the presidential term limit and seize power. Neither the Malabo Protocol³⁵ nor the Constitutive Act of the African Union³⁶ has any clause to indicate how a Constitutional coup is similar to the crime of the Unconstitutional change of government. Most of the leaders have used the weakness of these legal instruments to commit a constitutional coup and AU taking no action whatsoever.

Another question was whether the Malabo Protocol makes sense in a growing wave for African leaders to extend presidential term limit through constitutional Coup. The answers may vary depending on the school of thought and changes, if any, to address such legal impunity. The Malabo protocol has practically no clause to regulate and deter impunities related to constitutional coups in African Union member states, thus meaningless. The Malabo Protocol is somehow

³⁴ Tull, D, M, and Simons, C, "The Institutionalizations of Power Revisited, Presidential term of limits in Africa, 2017, Page 5-12

³⁵ *Supra*

³⁶ The AU constitutive Act established in 2000 in its preamble categorically states that "conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability.

counterproductive even before it is ratified and become operational. On the other hand, AU has legal framework in place to respond to undemocratic constitution amendments, but due to lack of clarity and implementation plan, has witnessed African leaders attempt to amend constitutions, contributing to insecurity, instability and instability violation of human rights. The establishment of the amended protocol on ACHPR was to fight and bring to justice perpetrators of human sufferings. Still, those impunities are growing rampant on the continent of Africa.

Another question was whether a Constitutional Coup constitutes an unconstitutional change of government and extension of the presidential term Limit? Unfortunately, Africa Union is silent on the challenge of a growing trend of extension of presidential term limits through constitutional Manipulations. The AU, through Lomé' Declaration, does not include constitutional coup or constitutional manipulation as a sufficient element to establish the unconstitutional change of government. It would be argued that African leaders have deliberately not included the crime of constitutional coup within its statutes to shield themselves. This is so because most of them are accused of committing Human Rights violations and atrocities on their way to power. The constitutional coup is not included in all AU instruments, a mistake which affects the rule of law, democracy and good governance in Africa. Contemporarily, Africa has too many criminal justice issues that result from inefficient legal instruments. If those impunities are ignored, African leaders will continue extending their term limit to the expense of democracy and human rights, thus complicating international criminal justices in the continent.

4. Africa response on Constitutional Coup

In practice, African countries have made presidential term limits in their constitutions, limiting the president's tenure to two terms. But not all African countries have a tenure of two terms. Therefore some African countries have reviewed their constitutions to eliminate term limits, and this has been due to the absence of regulations from AU legal instruments. Countries like Uganda in 2005, Algeria in 2008, Cameroon in 2008, Rwanda in 2016, Gabon in 2003 and Namibia in 1999 changed their Constitution to abolish term limits and prolong presidential tenure. On the contrary, the AU legal instruments such as Malabo Protocol and the Constitutive Act of the African Union, do not provide presidential term limits. This has motivated greedy leaders to amend constitutions to eliminate the limit for one to be president.

It is undisputed facts that presidential term limit guarantee accountability, adherence to democratic principles and rule, and also increases confidence of the general public to their government. In some cases, the constitutional coup has envisioned to countries in Africa whose presidential tenure was ending while a constitution provided no room to extend term limit. Elvy urges the AU to encourage its member states to incorporate presidential term limit in their constitution. Elvy's sought may not see the light of the day due to different perspectives regarding presidential term limits and different political ideologies encompassed by each member's state.³⁷

As African countries engage in a race to change their Constitution to eliminate restrictions on presidential term limit, a genuine question, however remains as to whether the constitution amendments reflect the will of the people and whether Unconstitutional Change of government has a similar meaning to the Constitutional Coup. The latter is where government officials manipulate the constitution without necessarily approval from citizens to extend presidential term limit and seize power. Neither the Malabo Protocol³⁸ nor the Constitutive Act of the African Union³⁹ has any clause to indicate how a Constitutional coup is similar to the crime of the Unconstitutional change of government. Most the leaders have used the weakness of this legal instruments to commit constitutional coup and AU taking no action whatsoever.

The AU legal instruments are inaccurate and vague in encompassing the meaning of a constitutional coup which is contrary to all forms of civilization, democracy and good governance of any given society. The instruments such as Malabo Protocol and Lomé Declaration only consider an unconstitutional change of government in the mentality which involves military coup d'état, rigging of election and failure to relinquish power for the outgoing president who may have conceded election. However, AU legal framework is silent on what makes legal and illegal constitutional amendments to extend presidential term limits. With those shortcomings, African leaders take advantage to commit constitutional Coup d'état while knowing there would be no repercussions. Now the question is, if the objective of the amendment process is to circumvent the system and subvert democracy as freely expressed by the will of the people to remain in power after serving constitutionally allowed terms in office, then the amendment

³⁷ Elvy, S, "Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance" 27 *Emory Int'l L. Rev.* 41 (2013).

³⁸ *Supra*

³⁹ The AU constitutive Act established in 2000 in its preamble categorically states that "conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability.

is not constitutionally genuine. For instance, some countries conduct fake referendum to manipulate the population to justify amending the Constitution.⁴⁰ The situation in Uganda of eliminating the presidential term limit echoes that of impunity elsewhere in Africa and joins the ranks of other leaders such as Paul Kagame in Rwanda, who amended the Constitution in 2015 to stay in power. The constitutional coup by Ivorian president Alassane Ouattara disobeyed the Constitution's two terms limit and sought a third term in 2020 elections.

The vindictive character and ambition of African leaders to remain in power are interpreted as because of poor and weak institutions to defend democracy and a lack of active opposition parties, which thus render the countries susceptible to a constitutional coup. However, the issue is whether there can be strong opposition parties in a situation where opposing politicians are jailed, persecuted, and intimidated. In practice, the African Union has several times prevented military coups, which are explained as unconstitutional government changes, and measures have been taken to deter such impunity. The most recent was the punitive measure against Coup de tat in Guinea-Conakry. But the same AU has failed to encounter crime related to constitutional coups, and neither do its legal instruments criminalize constitutional coups or the extension of the presidential term limit against the will of the people. But in reality, few participate and get involved in changing the Constitution. There is no empirical evidence, for example, that the constitutional changes in Rwanda, Uganda, Togo, and Equatorial Guinea were initiated by civilians. The AU has remained skeptical and silent in the face of such a constitutional coup crime.⁴¹

5. Legal instrument deters crime of Constitutional Coup

Because of the impunity of international crime committed in Africa, the AU has taken drastic measures to arrest the situation and make the African continent a better place to live.⁴² In compliance with international law,⁴³ the AU has initiated

⁴⁰ These kind of deceitful, propaganda to change constitution have happened in Rwanda and Uganda, where fake referendum were made to amend the constitution and abolish presidential term limit in 2016. These are the constitutional coup which Africa Union is silent and reluctant to talk about it.

⁴¹ Vunyingah, M, "Unconstitutional Changes of Government in Africa: An Assessment of the Relevance of the Constitutive Act of the African Union, Africa institute of south Africa briefing, no 44, 2011

⁴² Evelyne Asaala, Traditional African Approaches to Justice for International Crimes: Suitable Alternative Paths to Accountability?, Konrad-Adenauer-Stiftung (2020) Page 3-6

⁴³ Articles 31-33 of the Vienna Conventions on the Law of Treaties entail principles for interpreting conventions, treaties etc. These principles are recognized as representing customary international law.

an institutional framework that spearheads criminal justice in the continent.⁴⁴ The AU has adopted various instruments to restore tranquility by discouraging impunity and prosecuting perpetrators of international crimes within the AU jurisdictions. Those instruments include the Constitutive Act,⁴⁵ the African Charter on Human and People's Rights,⁴⁶ the African Charter on Democracy, Elections and Governance and the Protocol on Amendments to the Statute of the African Court of Justice and Human Rights (Malabo Protocol).⁴⁷

5.1 The Constitutive Act of AU

The Constitutive Act of the African Union ⁴⁸ was adopted in 2000 at Lomé, Togo, establishing rules that govern and control the conduct of member states.⁴⁹ The Act enshrines human rights, democracy and criminal justice through its number of provisions, which in theory remain potential and significant.⁵⁰ In reflection of what is happening worldwide, having the Constitutive Act of the AU paves a new roadmap beyond the boundary of the earlier chapter.⁵¹ The Act supersedes all AU treaties, legal documents, and judgments that provide the foundation and purpose for establishing institutions framework within the AU context, such as the Africa Union Commission.⁵² The introductory part of the Act⁵³ contains clauses in which its stipulations have taken different paths and diverged on issues of international crime and fighting impunity⁵⁴ as compared to the previous instruments.⁵⁵ With that aspect, a number of goals and objectives have been the *casus foederis* to achieve solidarity, defence of sovereignty and territorial integrity and independence, common African positions on issues affecting the

⁴⁴ Supra, see note No. 43

⁴⁵ The Constitutive Act of the Africa Union of 2000

⁴⁶ African Charter on Human and Peoples Rights was adopted in 1981

⁴⁷ Malabo Protocol was adopted in 2014 by AU in order to ratify and extend criminal jurisdiction to the African Court on Human and people's Rights and as measure to avoid ICC over African states.

⁴⁸ The constitutive Act of African Union was adopted in 2001

⁴⁹ Constitutive Act, OAU Charters & Rules of Procedure of the African Union" available on www.au.int. Retrieved 31 August 2021.

⁵⁰ Article 4(g) Constitutive Act of the Africa Union

⁵¹ The African Charter on Human and People's Rights of 1981 which was established by then OAU which intended to promote and protect human rights and basic freedoms in the African continent.

⁵² Olympio Francisco Kofi Nyaxo, "Transformation of the Organization of African Unity (OAU): A New Vision for the 21st Century, or Political Rhetoric?, A Dissertation submitted to the Department of Political Science, Universität Trier, Germany, in partial fulfilment of the Requirements for the award of Doctor of Philosophy (PhD), (2004) Page 144

⁵³ Supra, see note No. 53

⁵⁴ The constitutive Act of AU of 2000

⁵⁵ Supra, see note 53

continent of Africa, as well as international cooperation and peace-building.⁵⁶ The roadmap toward sustainable peace, democracy and the rule of law was characterized by significant progress by the African Union, which sought the need for the Lomé Declaration in the first place. The declaration became defunct, as Solomon ^[10] has implanted in his writing that it could not compel member states to observe human rights, democracy, and good governance until the AU adopted the Constitutive Act. Weirdly, the Constitutive Act of the African Union has inherited weaknesses and problems emanating from the Lomé Declaration, as it is mute on the question of a constitutional coup to allow incumbent presidents to cling to power. ^[11] In dealing with impunity and the administration of criminal justice on the continent, the African Union's Constitutive Act discourages all forms of impunity through Article 4(p), which prohibits unconstitutional change of government or transition of power through undemocratic means. Among many other things, the statute discourages taking power by force. It has gone far enough to include rigging elections to secure power, amounting to an undemocratic change of government.⁵⁷

The above issue simulates the existing puzzle in Africa in regards to the lacuna within AU legal instruments, which technically have not covered the crimes of a constitutional coup and constitutional manipulation in order to cling to power.

In reality, an unconstitutional change of government has a similar meaning to a constitutional coup. The latter is where government officials manipulate the constitution without the necessary approval from the citizens to extend the presidential term limit and seize power. Neither the Malabo Protocol⁵⁸ nor the Constitutive Act of the African Union⁵⁹ has a clause to indicate how a constitutional coup is similar to the crime of an unconstitutional change of government. Most leaders have used the weakness of these legal instruments to commit constitutional coups, and the AU has taken no action whatsoever.⁶⁰ However, AU, through its Constitutive Act, does not include constitutional coup or constitutional manipulation as sufficient elements to establish the unconstitutional change of government. It focuses with the unconstitutional change of government through five possible situations, including military coup d'état against a democratically elected Government; intervention by mercenaries to replace a democratically elected Government; replacement of democratically

⁵⁶ Article 3 a, b, d, e and f of the Constitutive Act of the African Union of 2000

⁵⁷ Solomon Ayele Dersso, "Unconstitutional Changes of Government and Unconstitutional Practices in Africa", Africa Politics and African Peace, Paper No.2 (2016) Page 3

⁵⁸ Supra, see foot note 58

⁵⁹ Supra, see foot note No. 53

⁶⁰ Empasis is mine

elected Governments by armed dissident groups and rebel movements; the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

I would argue that African leaders have deliberately not included the crime of constitutional Coup within its statutes to shield themselves. This is because most of them have been accused of human rights violations and atrocities they committed on their way to power. The constitutional Coup is not included in all AU instruments, which affects the rule of law, democracy and good governance in Africa. Contemporarily, Africa has too many criminal justice issues that result from inefficient legal instruments. If those impunities are ignored, African leaders will continue to cling to power through constitutional coup at the expense of democracy and human rights, thus complicating international criminal justices in the continent.

5.2 African Charter on Democracy, Elections and Governance⁶¹

In 2007 African Union had its summit in Addis Ababa, Ethiopia. The agenda was to establish and adopt a Regional Instrument (statute) that would address undemocratic elections and taking power by force.⁶² In two decades, AU and its predecessor OAU worked hard to promote and consolidate democracy and good governance in the continent.⁶³ Notwithstanding the charter's effort in upholding civil and political rights, it has spelled out the mischief of unconstitutional change of government⁶⁴, which is the focus of this discussion. With details and analogy, the charter expounds on the issues of unconstitutional change of government where the seizure of power and government takeover is highly condemned within the charter,⁶⁵ and sanction is extended to individuals or groups of people or government that rise from such illegal transition of power.⁶⁶

⁶¹ The African Charter on Democracy, Election and Governance was adopted in 2007 in order to promote peace, tranquility, democracy and rule of law in the Region.

⁶² Nadjita F. N, " African Charter On Democracy, Elections and Governance: A critical analysis," Open Society Institute, Aro governance Monitoring and advocacy Projects (2007).

⁶³ Supra, see note No. 69

⁶⁴ The African Charter on Democracy, Elections and Good Governance under Article 2(4), 3(10), Article 14(2), (3), Article 23 and 25 sanction prohibits, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development.

⁶⁵ The African Charter on Democracy, Election and Governance of 2007

⁶⁶ See Article 16(2) and (3) of the African Charter on Democracy, Election and Governance of 2007

6. UN response on Crime of Constitutional Coup in Africa

To grasp the way on how legal norms against impunity emerged and extended to become an internationally recognized norm within the realm of international law, it is noteworthy to narrate the role of the United Nations (UN) and Africa Union (AU) in fighting the impunity of Constitutional coup that hampers the African criminal justice system. The History has witnessed United Nations and African Union as major actors and pioneers for peace, security and stability in Africa through numerous involvements, including condemnation of acts related to jeopardising peace and stability, as well as indicting perpetrators of international crime before the international criminal court. But the question lingers on as to how far have these Organizations managed to solve the problem of undemocratic change of Constitution and remedies to the victims of constitution coup, specifically in Africa? This chapter expound on the practical response from both United Nations and Africa Union whenever there is a constitutional coup and further examines the contemporary legal framework in an encounter to the new crime of Constitutional coup, and provides a comprehensive and critical analysis of UN and AU legal framework as well practices in responding to mischief resulting from a constitutional coup and criminal justice in Africa.

Article 24(1) of the UN charter empowers UN Security Council to intervene in area of conflicts in order to reinstate peace and order. Under Article 39-42 of the UN charter⁶⁷, UN Security Council may opt to impose sanctions against perpetrators of international crimes and use force to restore peace and harmony. The key issues here are that the UN is concerned with political crises among UN member states, which attract intervention from the international community. The UN position leaves a vacuum in a situation where leaders stage a constitutional coup to cling to power. Empirical evidence indicates that the UN lacks a normative framework to regulate and defuse constitutional coups and democracy malpractices that have become a norm in African politics and some parts of Asia, such as Myanmar. In practice, the UN has condemned acts that may threaten peace, and its resolution has always been to urge conflicting parties to adhere to the rule of law. For example, during the constitutional coup in Burundi in 2015, the UN condemned the imbonerakule perpetrator of violence and called for peace and the return of the rule of law.

In reality, the UN does not have a clear legal framework or policy defusing constitutional coups and constitution manipulations. Such a gap has created

⁶⁷ The Charter of the United Nations was signed on June 26, 1945, in San Fransisco and came into force on October 24, 1945

difficulties in drawing demarcation points of whether the new crime of constitution coup contravenes international law. Despite the African Union and other regional organizations having norms rebutting a country's departure from its Constitution and the rule of law, the UN does not have such kinds of norms and only recognizes unconstitutional change of government where there is a coup d'état and a failure to relinquish power for the incumbent president after the expiry of his/her tenure. However, the modus operandi has changed, and heads of state have adopted new methods, especially changing constitutions to eliminate term limits and cling to power.

The UN has minimal response to constitutional coups and has hardly engaged itself whenever cases of such nature happen. For example, constitution coups in Rwanda, Madagascar, Uganda, and Burundi have not warranted a UN decision on the matter. The UN's silence on such crimes can be interpreted as the genesis of all impunity affecting international criminal justice. The perpetrators of international crimes are also leaders who temper the constitution Constitution to remain in office. Changing the Constitution is a technique to escape criminal liability for those accused of contravening international law. As opposed to the Malabo Protocol, the ICC has no reservations/immunity regarding prosecuting heads of states accused of crimes, thus creating conflicts for the two institutions.

7. Rwanda Constitution of 2003 and its coup in 2015

After civil war in 1994, Rwanda managed to have its Constitution in 2003 to lead the country to a transition period after the crisis. It was the point of departure from the 1991 constitution and the post-genocide Constitution. In 2015, Rwanda changed its Constitution to allow President Kagame to cling to power, regardless of criticism from within and outside the country, condemning the act of constitution manipulation. In the case of the *Green Democratic Party versus President Paul Kagame (2015)*, the supreme court of Rwanda dismissed the petition, citing incompetence of the grounds for the petition and granting Kagame another term to run for the presidency. The court stated in its obiter that the people of Rwanda could decide how they wanted to be governed.⁶⁸

For the sake of human rights defender and pioneers of criminal justice, there is no good thing to expect from the constitutional amendment of 2015, which has made Kagame remain in power. Most scholars consider the constitutional amendment as a constitutional coup and the said Constitution being a simple instrument within the hands of the RPF led the government to deceive the

⁶⁸ Nick H, "Constitutionalism à la Rwandaise": In *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (pp. 195–225)

international community, especially donor countries, especially western countries that Rwanda is adhering to democratic principles and political values. As Filip Reyntjens contends that Paul Kagame may be a tyrant, Rwanda applies a style of victor's justice in which judiciary isn't free⁶⁹. The constitutional coup in 2015 is the manifestation of power-mongering, where Kagame and his allies won a fake election in what they call a landslide victory.

In practice, many things do not meet criteria to apply democracy and the rule of law in Rwanda.⁷⁰ The lack of public challenge to this questionable constitutional amendment suggests that Kagame was favoured by extension, the RPF is above politics, above the opposition, and above the Constitution. The enforcement of term limits cannot effect change in a system that is effectively a cult of personality, in which an individual's grip on power extends far beyond his presidency. The uncomfortable fact is that, while small pockets of opposition exist, there is no widespread dissatisfaction with Kagame. The president is an overwhelmingly popular figure within the country, both due to his time in office and his role in ending the horrific Rwandan genocide in 1994. It is not only possible, but likely that a vast majority of Rwandans supports the constitutional amendment. Kagame enjoys a popular mandate and is also the pillar of a political system built around him and whose alternative is unknown.

8. Sanctions against Constitutional Coup

It is very unfortunate that, the AU legal framework does not put much emphasis on the constitutional coup but rather highlights the unconstitutional change of government where it procures military coup d'état, mercenary intervention and rebel insurgency, to mention in a nutshell. African Union has been condemning unconstitutional change of government prescribed within the statutes. Still, the same AU have done nothing to sanction the African state's practice of constitution coup and constitutional amendments to extend presidential term limit and allow the incumbent president to cling to power. In some circumstances, when there is an unconstitutional change of government, the AU may take the initiative to sanction the state in military actions, economic sanctions and suspension from the union. Article 30 of the Constitutive Act provides inter alia that "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union. The sanction may last for six months, although it has been criticized to

⁶⁹ Filip, R, "Political Governance in Post Genocide Rwanda" (New York: Cambridge University Press, 2013).

⁷⁰ Nick, H, "Constitutionalism à la Rwandaise": In *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (pp. 195–225)

be inadequate and too short, and this comes as a last resort by AU to the defaulting member states after they have exhausted all diplomatic efforts to bring the country under Diplomatic rule⁷¹ In practice though, member states are suspended in a matter of days after the unconstitutional change of Government was committed, keeping up with the Lomé Declaration provisions, which do not impose such conditionality. This position provides a verdict of double standards by AU in dealing with the Constitution Coup and unconstitutional change of government altogether.⁷² I would reference the Gambia election where president Jammeh (as he then was) refused to step down and domestic court declared him the winner of the election despite losing it. The Africa Union and ECOWAS made quick interventions and condemned the ordeal⁷³. However, there has been heads of states engaged in undemocratic practice, accused of committing international crime and constitutional coup without AU sanctions. This goes in the history of Rwanda and Uganda's Constitutional coup, which have allowed both presidents⁷⁴ to remain in power. The 2015 referendum that potentially approved constitutional changes in Rwanda waived the presidential term limit and gave the incumbent president the right to reign until 2034.⁷⁵ The same applies to Uganda, where constitution changes have abolished the presidential term limit in favour of president Museveni to remain in office forever.⁷⁶ Notably, these two leaders have actively participated in activities that could be construed as constitutional coup impunity. Yet, neither the African Union nor other institutions have condemned such malpractices as they did to President Jammeh during the Gambia political crisis.⁷⁷

⁷¹ Article 25(1) of the

⁷² Supra. See footnote No. 161

⁷³ Dov Bachmann, S and Sowatey-Adjei, N “The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?”, Washington International Law Journal, 29 Wash. L. Rev. 247 (2020). Page 30-32

⁷⁴Africanews; African presidents resist term limits: Guinea, Burundi, Cameroon, Rwanda, Uganda (21st October 2010). also available on <https://www.africanews.com/2019/10/21/african-presidents-resist-term-limits-guinea-burundi-cameroon-rwanda-uganda/> . accessed on 18th October 2021

⁷⁵ Claudine,V, ‘Rwanda: Paul Kagame is in Line to Stay in Office Until 2034’ THE CONVERSATION, 18th January 2016. Retrieved from <https://theconversation.com/rwanda-paul-kagame-is-inline-to-stay-in-office-until-2034-53257>.

⁷⁶ Mfumba, I, “Presidents Who Amended Constitution to Stay in Power” Daily MONITOR, Uganda, 17th December 2017. Retrieved from <http://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html>.

⁷⁷ Camara, K “Here's How African Leaders Stage 'Constitutional Coups': They Tweak the Constitution to Stay in Power, WASHINGTON POST, 16th September 2016. Retrieved from <https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/16/heres-how-african-leaders-stage-constitutionalcoups-they-tweak-the-constitution-to-stay-in-power>.

9. The future of Malabo Protocol in fighting constitution Coup

The Malabo Protocol of 2014 was established to spearhead African Criminal Justice through the African Court of Justice on People and Human Rights (ACPHR) so that Africans can solve their problems without interference from international courts, preferably the International Criminal Court (ICC). The Protocol came as the motion of the AU to pull out of the ICC because they deduced that the International Criminal Court was targeting African leaders and was biased.⁷⁸ The court has jurisdiction to try fourteen offences, including the offence of unconstitutional change of government, as per Article 28A (1) Paragraph 4, which provides that "subject to the right of appeal, the international criminal law of the court shall have the power to try a person for the crime provided, including the crime of unconstitutional change of government." This provision does not cure the mischief of constitutional manipulation and constitutional coup to extend the term limit for the president whose time is ending. The gap in this statute is what creates impunity and allows African leaders to avoid criminal liability by shielding this statute's shortcoming. Despite not being ratified, the Malabo Protocol contains controversial provisions when it comes to the administration of justice in the African continent. Article 46A provides immunity for the head of state and government from prosecution. It shields the head of state against international crimes through immunities which a state official enjoys while in office, thus triggering conflicts between the African Union and the International Criminal Court.

The purpose of the Malabo protocol is to create an avenue for African states to mend international criminal law to address African concerns. Most African Heads of State advocate for the Malabo Protocol on behalf of the AU while they are accused of violating human rights and international humanitarian law. This means ratifying the Malabo protocol creates shields for criminals and complicates international criminal justice in Africa. Thus, in the future in terms of the efficiency of the Malabo Protocol in fighting impunity, Its goal is to combat mischief and impunity, particularly concerning constitutional coups and power grabs in Africa. Unless the statute or protocol is amended to tackle the contemporary issues affecting criminal justice in Africa, it will be dead on arrival.

10. Conclusion

⁷⁸ Plessis, M, "Implications of the African Union's immunity for African leaders, granting immunity from prosecution to heads of state and other senior officials in Africa is short sighted, and at odds with the AU's Constitutive Act, 2014" Also available on <https://issafrica.org/research/papers/implications-of-the-african-unions-immunity-for-african-leaders>.

This article examined the position of the Africa Union on Constitutional Coup and the relevancy of the Malabo Protocol as an amendment protocol to the African Court of Justice on people and Human Rights. It responds to questions such as whether the unconstitutional change of government provided under AU legal instrument is the same as to Constitutional coup; does the Malabo Protocol make sense in a situation where there is a growing wave for African leaders to extend the prudential term limit? And if Constitutional Manipulation constitutes unconstitutional change of government and extension of presidential term Limit. Countries like Uganda, Rwanda, Ivory Coast and Togo have amended their Constitutions to remove the presidential term limit and allow imperial presidency. AU has remained unresponsive on the question of a constitutional coup, and neither do AU statutes criminalize constitutional manipulation to gain power. These flaws have rendered the entire AU legal instrument irrelevant in addressing the problem of state-engineered constitutional changes that amount to a constitutional coup and render the Malabo Protocol meaningless.