

## Unconstitutional Change of Government

### *A New Crime within the Jurisdiction of the African Criminal Court*

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#### 1. INTRODUCTION

One of the most interesting and controversial crimes that belong to the subject matter jurisdiction of the newly to be established African Criminal Chamber is undoubtedly the crime of unconstitutional change of government. Article 28E of the Malabo Protocol which is intended to serve as the legal basis of this future African Criminal Court<sup>1</sup> defines this offence as the commission or ordering to be committed of a number of specified acts with the aim of illegally accessing or maintaining power. These acts include:

- (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; and

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<sup>1</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min7(1) Rev. 1, African Union; First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, 15–16 May 2014, Addis Ababa, Ethiopia (hereafter: Malabo Protocol). This essay has previously been published in *Leiden Journal of International Law*, Volume 30, Issue 4 (2017), pp. 967–986 and has been reproduced with the kind permission of the publisher (CUP).

- (f) Any substantial modification to the electoral laws in the last six months before the elections without the consent of the majority of the political actors.

This definition derives from Article 23 of the African Charter on Democracy, Elections and Governance with the exception of the final item – substantial modification of electoral laws – which is missing in the Charter and has been added in the Malabo Protocol.<sup>2</sup> The inclusion of the crime of unconstitutional change of government has been a true bone of contention. It prompted the AU Assembly of Member States in 2012 to postpone the adoption of the Draft Protocol (the predecessor to the Malabo Protocol) and send the drafters back to the drawing table, summoning them to come up with a more precise definition of the crime. However, an expert meeting decided that an amendment of the existing definition was not necessary.

In this article, I will reflect on the nature of this crime in general and I will in particular discuss the question whether it would qualify as a supra-national crime. My interest in the topic is primarily inspired by the consideration that the crime of unconstitutional change of government is atypical for the genus of core crimes. Any criminalization of the conduct at a regional level and the concomitant inclusion of the offence in the jurisdiction of regional courts raises questions about the right of foreign intervention in internal political affairs of the relevant state and the curtailment of the right to rebel (if such a right can be established in the first place).<sup>3</sup> On the other hand, one has to admit that unconstitutional changes of government are related to core crimes, in the sense that they can easily generate widespread oppression and violence.<sup>4</sup> The analogy with the crime of aggression and its relationship with war crimes and crimes against humanity readily comes to mind.

<sup>2</sup> African Charter on Democracy, Elections and Governance, Addis Ababa, 30 January 2007, available at: [www.achpr.org/files/instruments/charter-democracy/aumicom\\_instr\\_charter\\_democracy\\_2007\\_eng.pdf](http://www.achpr.org/files/instruments/charter-democracy/aumicom_instr_charter_democracy_2007_eng.pdf) (last visited: 27 January 2017). For a brief historical survey of the development of the norms on unconstitutional changes of government in the African context, see Gerhard Kemp and Selemani Kinyunyu, 'The Crime of Unconstitutional Change of Government (Article 28E)', in: G. Werle and M. Vormbaum (eds.), *The African Criminal Court; A Commentary on the Malabo Protocol*, International Criminal Justice Series, Volume 10, The Hague 2017, at 61–4.

<sup>3</sup> See on this issue the fascinating article by T. Honoré, 'The Right to Rebel', 8 *Oxford Journal of Legal Studies* (1988), at 34.

<sup>4</sup> The Preamble of the African Charter on Democracy, Elections and Governance expresses the concern of the Member States of the African Union that 'unconstitutional changes of governments are one of the essential causes of insecurity, instability and violent conflict in Africa.' For a comprehensive overview of recent political turmoil in African countries and the dire consequences in their aftermath, see J. Shola Omotola, *Unconstitutional Changes of Government in Africa; What Implications for Democratic Consolidation?*, Discussion paper 70 Nordiska Afrikainstitute, Uppsala (2011).

It is my intention to balance the pros and cons of the criminalization of unconstitutional change of government in order to ascertain whether the inclusion of this crime in the subject matter jurisdiction of the African Criminal Court is justified and recommendable.<sup>5</sup> In that context, I wish to shed some light on the issues just raised and in particular ponder on the question *why* this offence is upgraded to the regional level of criminal law enforcement. To that purpose, I will first briefly sketch the political developments that spurred the initiative to establish the African Criminal Court and include a survey of its main jurisdictional features and competences. Next, I will discuss and analyze the main elements of the crime of unconstitutional change of government against the backdrop of the essence of international crimes. Then, I will search for indications of an acknowledged relationship between political violence and core crimes in the recent case law of the International Criminal Court on the situations in Kenya, Libya and Ivory Coast. I will explore whether a right to rebellion, if we assume that it exists, would impede regional or international organizations from qualifying unconstitutional changes of governments as a crime. Then, I will explore a brief discussion of the principle of non-intervention in internal affairs under international law and proceeds with inquiring what reasons and interests (African) states would have to interfere with civil strife in other states. I end with some final reflections.

## 2. AN EXPERIMENT IN REGIONAL CRIMINAL JUSTICE: THE EMERGENCE OF THE AFRICAN CRIMINAL COURT

The African Criminal Court is actually intended to be a special Chamber under the ‘roof’ of the African Court of Justice and Human Rights. This court has been the outcome of a merger of the African Court of Human and People’s Rights and the African Court of Justice which materialized by a Protocol on 1 July 2008.<sup>6</sup> However, that protocol never received sufficient ratifications and is now superseded by the Malabo Protocol that has reinstated the old name (African Court of Human *and People’s* Rights) and provides that three types of jurisdiction (human rights, general affairs, and international crimes) will be exercised by its separate chambers.<sup>7</sup>

<sup>5</sup> The article chooses primarily a normative perspective. For a legal assessment of the provision in the Malabo Protocol on Unconstitutional Change of Government, see Kemp and Kinyunyu, *supra* note 2, at 64–8.

<sup>6</sup> Assembly/AU/Dec.83(V) (2005).

<sup>7</sup> For a condense survey of the drafting history (until 2013), see A. Abass, ‘The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects’, 60 *Netherlands International Law Review* (2013), at 28–31.

It is fairly generally acknowledged that the initiative to establish a special criminal chamber within the architecture of the African Court was spurred by the discontent at the exercise of universal jurisdiction over African people, including high state officials, by western states and the selective policy of the International Criminal Court, which is often perceived to be exclusively interested in targeting African countries.<sup>8</sup> The concrete event that prompted mounting tensions between the African Union and the International Criminal Court was the latter's decision to issue arrest warrants for Sudan's incumbent president Al-Bashir. The general opinion was that the initiative was ill-timed and thwarted attempts to achieve peace and reconciliation by political means, thereby displaying callous disregard for African solutions.<sup>9</sup> In a resolution issued in July 2009, the African Union referred to the 'unfortunate consequences that the indictment has had on the delicate peace processes underway in Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.' The resolution enjoined African Union members not to cooperate with the Court when asked to surrender Al-Bashir and requested the Security Council to defer the situation in Darfur in conformity with Article 16 of the Rome Statute, a request that was largely ignored.<sup>10</sup>

In connection with what was perceived as the excessive exercise of universal jurisdiction against African high officials by European criminal courts, the African Union acknowledged that 'universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so without impunity and are brought to justice', but it pointed to an 'abuse of the principle of universal jurisdiction by judges from some non-African States

<sup>8</sup> See for instance M. Du Plessis, 'Implications of the AU decision to give the African Court jurisdiction over international crimes', Paper 235 Institute for Security Studies (June 2012), at 1: 'The process (of creating a criminal chamber within the African Court) occurs against the backdrop of the African Union's open hostility to the International Criminal Court's focus on African situation.' See, extensively, C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011), at 1068–79. The text of this paragraph is partially taken from an earlier publication: Harmen van der Wilt, 'The African Court of Justice and Human and Peoples' Rights and Complementarity', in: G. Werle & M. Vormbaum, *The African Criminal Court – A Commentary on the Malabo Protocol*, Asser: The Hague 2016, Chapter 11.

<sup>9</sup> Murungu, *supra* note 8, at 1078. See also L. Nadya Sadat, 'On the Shores of Lake Victoria: Africa and the Review Conference for the International Criminal Court', Washington University in St. Louis/ School of Law, Paper No. 10–06–04 *Legal Studies Research Paper Series* (16 June 2010), at 5–6.

<sup>10</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), 3 July 2009.

against African leaders.<sup>11</sup> More specific allegations were levied against European States, revealing old grievances: ‘Indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states. For African states, this evokes memories of colonialism.’<sup>12</sup>

The African Union’s decision to vest the African Court of Justice and Human Peoples’ Rights with criminal jurisdiction cannot be viewed in isolation from such deep-rooted misgivings.<sup>13</sup> It is plainly an attempt to pre-empt both the universal jurisdiction of European States and the International Criminal Court. It is telling in this regard that the Preamble of the Malabo Protocol explicitly refers to the African Union Assembly’s Decision on the Abuse of the Principle of Universal Jurisdiction.<sup>14</sup> In short, the African Criminal Court is intended to hold the ICC and Western states aloof and to render ‘African justice for the Africans’. Meanwhile, the situation has reached a stalemate. While the Gambia and South Africa have recently recanted their decision to dissociate themselves from the ICC, the African Union has backed the call of some of the African leaders to leave the Court *en masse*.<sup>15</sup> For all that, the African Criminal Court is still not operational. This final fact should, however, not discourage us to give it due attention.

The subject matter jurisdiction of the African Court is extremely broad, covering both the traditional ‘core crimes’ and a number of so-called ‘transnational crimes’.<sup>16</sup> The elements of crimes are meticulously elaborated in subsequent provisions (Articles 28B–28M). The definitions of the core

<sup>11</sup> Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14 (XI), Assembly/AU/Dec. 199(XI), Eleventh Ordinary Session 30 June–1 July 2008, Sharm El Sheikh, Egypt, §§ 3–5.

<sup>12</sup> Assembly/AU/Dec. 199(XI), *supra* note 11, § 5(iv). For a seminal analysis of the question whether the allegations of neo-colonialism are borne out by the facts, see Res Jorge Schuerch, *The International Criminal Court at the Mercy of Powerful States; How the Rome Statute Promotes Legal Neo-Colonialism*, PhD thesis, University of Amsterdam, 2016.

<sup>13</sup> In a similar vein: M. Ssenyonyo, ‘The Rise of the African Union Opposition to the International Criminal Court’s Investigations and Prosecutions of African Leaders’, 13 *International Criminal Law Review* (2013), at 415–16. He identifies the objections against universal jurisdiction and the displeasure with the International Criminal Court’s strategy as two of the four factors giving impetus to the African Union’s decision.

<sup>14</sup> Preamble of the Malabo Protocol, § 13.

<sup>15</sup> ‘African leaders plan mass withdrawal from international criminal court’, *The Guardian*, available online at: [www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court](http://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court) (last visited: 11 April 2017).

<sup>16</sup> Article 28A mentions: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.

crimes are copied almost *verbatim* from the Rome Statute, whereas the other crimes are derived from legal and political instruments of the African Union and reflect the African realities. According to Article 46H, the African Court is intended to be complementary to domestic jurisdictions. The provision is largely modelled after the parallel article in the Rome Statute (Article 17) although there is one subtle, but possibly far-reaching, difference: in the Malabo text the qualifier ‘genuinely’ is missing. Moreover, the Malabo Protocol is completely silent about the relationship between the African Court and the ICC.<sup>17</sup> Another conspicuous feature of the Malabo Protocol is the introduction of corporate criminal liability (Article 46C). As indicated in the introduction, the proposal to add the crime of ‘unconstitutional change of government’ was contentious and caused a delay of the enactment of the Malabo Protocol. It is to this interesting and controversial crime that I will now turn.

### 3. THE CONSTITUENT ELEMENTS OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT

According to Article 28E of the Malabo Protocol, several different acts can constitute the crime of ‘unconstitutional change of government’. What they all have in common is that they threaten democratically elected governments and procedures. In other words, the entire provision serves to protect institutions and (democratic) processes of political decision-making. In this respect, the offence is not dissimilar from existing international crimes. It is a truism that international criminal justice is primarily concerned with the dismal fate of individual human beings that have suffered – and continue to do so - under flagrant human rights violations amounting to the most heinous international crimes.<sup>18</sup> This does not exclude, however, that communities, (political) institutions or even procedures can be the victims of international crimes. The most conspicuous example is obviously the crime of aggression. Article 8*bis* of the Rome Statute defines the crime of aggression as an ‘act of aggression’ – invasion or attack by armed forces, bombardment, blockade of the ports or coasts etc. – of one state against another state. In other words, the provision aims at the preservation of the integrity of a state.<sup>19</sup> In a similar vein,

<sup>17</sup> On these issues, see van der Wilt, *supra* note 8.

<sup>18</sup> Compare the second item of the Preamble to the Rome Statute that reads ‘Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of mankind’.

<sup>19</sup> For legal analyses of aggression as an international crime, see (amongst many others): R. S. Clark, ‘The crime of aggression’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of*

terrorism as an international crime is not only characterized by the special intent to intimidate the population, but can also have the purpose to force a government to do something or abstain from doing something or can be directed at the demise of economic, social or political institutions.<sup>20</sup>

If we try to dissect the several manifestations of the composite crime of unconstitutional change of government, we can point out at least three conspicuous features. First of all, it might be observed that the term ‘unconstitutional *change*’ is in a sense a misnomer, because it does not only encompass dynamic attempts to topple and replace sitting governments, but also the (illicit) perpetuation of power. After all, Art. 28E refers to the ‘refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections.’ The provision is thus a compound of a dynamic and a static aspect and by no means aims to preserve the political *status quo*. Both the dynamic and static versions give rise to separate questions. Article 28E suggests that *coup d’ états* can be accomplished by making use of mercenaries or rebellious armed groups. Probably, these eventualities are included as separate offences, in order to prevent that the true political beneficiaries might disguise their involvement and get off scot-free by hiding behind the back of their associates.<sup>21</sup> In respect of the static form of unconstitutional ‘change’ of government, a pertinent question is whether the ‘refusal of incumbent government to relinquish power’ also includes tenure prolongations and third term agendas. Shola Omotola convincingly denounces such techniques as clever tricks to circumvent criminal responsibility.<sup>22</sup> Secondly, Article 28E of the Malabo Protocol refers to legislative initiatives that would enable the execution of unconstitutional changes of government. Obviously, such measures would

*the International Criminal Court*, (Leiden/ Boston 2009), at 709–23; M. de Hoon, *The Law and Politics of the Crime of Aggression*, PhD Thesis, Free University of Amsterdam (2015); G. Kemp, *Individual Criminal Liability for the International Crime of Aggression*, (Antwerp – Cambridge – Portland 2016).

<sup>20</sup> The Special Tribunal for Lebanon defined the *mens rea* required for terrorism as the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-1-01/1/AC/R176bis), Appeals Chamber, 16 February 2011, §§ 83, 85. The definition in the EU Council Framework Decision 2002/475/JHA on Combating Terrorism, *Official Journal of the European Communities*, No. L 164, 22 June 2002, at 3, adds as a possible aim of terrorists ‘seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation’ (Article 1, s. 1).

<sup>21</sup> It might be observed that ‘mercenaryism’ – a familiar scourge in African countries – is a separate crime (Article 28H) under the Malabo Protocol.

<sup>22</sup> Omotola, *supra* note 4, at 25–7.

serve to render these practices a semblance of legality. And finally, the provision repeatedly emphasizes that the victims or targets of this crime are *democratically* elected governments and candidates that have surfaced victorious after *free, fair, and regular* elections. It connotes the idea that these political factions bear no guilt in any attempt to depose them and that the provision precisely serves to protect democratic processes and fair elections. Moreover, it would appear that the provision does not apply in case of rebellion or insurrection of the population against an incumbent tyrant. I will address this issue in more detail below. While the drafters may be quite sincere when they contemplated the provision, it begs the question who will decide on the legitimacy of a popular uprising against an (oppressive) regime.<sup>23</sup>

#### 4. ON THE RELATIONSHIP BETWEEN UNCONSTITUTIONAL CHANGE OF GOVERNMENT AND CORE CRIMES

As mentioned earlier, the decision to include ‘unconstitutional change of government’ as a crime under the jurisdiction of the future African Criminal Court has been inspired by the specific African situation where internecine struggles for political power have preceded and triggered mass human rights violations. As the ICC has almost exclusively focused on African situations, one might expect that the connection between unconstitutional change of government and international crimes would have surfaced in the case law of (Pre-)Trial Chambers. To a certain extent, this has been the case, although indirectly and rather sparingly. Causal connections between unconstitutional change of government and subsequent core crimes have emerged in the context of inquiries by the ICC Pre-Trial Chambers into the admissibility of cases before the ICC. The assessment of admissibility requires an investigation into domestic criminal proceedings – if any – in which sedition, the crushing of insurgency, and international crimes are often conflated. Such inquiries would shed light on possible inextricable connections between these crimes, potentially impeding further prosecution by the ICC. As is well known, the admissibility assessment involves a two-pronged test.<sup>24</sup> First of all, it must be explored whether the state has developed any activity in the realm of criminal

<sup>23</sup> For similar apprehensions, see A. Abass, ‘Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges’, Vol. 24 No. 3 *European Journal of International Law* (2013), at 941.

<sup>24</sup> Appeals Chamber, *Prosecutor v. Katanga and Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, §§ 75–9.



enforcement at all, with the ICC being able to proceed if the outcome is negative. Next, Article 17(1)(a) of the Rome Statute stipulates that a case is inadmissible where it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. In the *Lubanga* case, Pre-Trial Chamber I held that, for the purpose of the assessment of admissibility, the person subject to the domestic proceedings had to be the same person against whom the proceedings before the Court are being conducted and that the domestic proceedings had to cover substantially the same conduct that was under scrutiny before the Court.<sup>25</sup> This so-called ‘same person, same conduct’ test has become consistent case law of the Court. In investigating whether the national proceedings indeed related to the ‘same (f)acts’, the ICC had – at least theoretically – the opportunity to gain insight in the violence that was applied by accused to seize political power or repel contenders.

In the *Situation in Kenya*, the Kenyan government challenged the admissibility of the case against Kenyatta (and others), arguing that it ‘currently investigated crimes arising out of the 2007–8 Post-Election Violence.’<sup>26</sup> The case was not conducive to a substantive discussion of domestic proceedings, as the government erroneously opined that it was not necessary to investigate the same persons, but that investigation of ‘persons at the same level in the hierarchy’ would suffice for the purpose of the assessment of (in)admissibility.<sup>27</sup> In view of the lack of information that pointed to *ongoing* investigations *against the three suspects* (Kenyatta *cum suis*), the Chamber concluded that a situation of inactivity remained which prompted it to determine that the case was admissible.<sup>28</sup> As the domestic criminal proceedings probably involved both charges of electoral fraud, (illegitimate) claims to political power and international crimes, the Chamber missed the opportunity to address the relationship between these crimes.

The *Situation in Libya*, encompassing the cases against Saif Gaddafi and Al-Senussi, offered more interesting material for exploring the connection

<sup>25</sup> Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo’, 24 February 2006, ICC-01/04-01/06-8-Corr, § 31.

<sup>26</sup> Pre-Trial Chamber II, *Prosecutor v. Francis Kimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute’, 30 May 2011, ICC-01/09-02/11, § 46.

<sup>27</sup> *Prosecutor v. Kenyatta et al.* *supra* note 26, § 49.

<sup>28</sup> *Prosecutor v. Kenyatta et al.* *supra* note 26, § 66.

between political violence and core crimes. The Pre-Trial Chamber summarized the case before the Court as concerning

the individual responsibility of Mr Al-Senussi for killings and acts of *persecution by reason of their (real or perceived) political opposition to the Gaddafi regime carried out on many civilian demonstrators and political dissidents*, allegedly committed directly or through the Security Forces *during the repression of the demonstrations taking place in Benghazi from 15 February 2011 until at least 20 February and as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya.*<sup>29</sup>

After having compared the case before the Court with the case subject to domestic proceedings, the Chamber was satisfied that ‘the same conduct alleged against Mr Al-Senussi in the proceedings before the Court is subject to Libya’s domestic proceedings.’<sup>30</sup> The Pre-Trial Chamber observed that, while the discriminatory intent to target victims on political grounds – which is required for the crime of ‘persecution’ – was not a factual aspect of the domestic proceedings, it nevertheless served as an ‘aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code.’<sup>31</sup> The Chamber concluded that this demonstrated that Al-Senussi was prosecuted in Libya for the same facts that sustained his indictment before the Court. The Chamber acknowledged thus that in both the international and domestic proceedings the core crimes had been inspired by the political motive to repel popular insurrections in the quest to remain in power. The Pre-Trial Chamber did not pronounce any verdict (even not implicitly) on the question whether the rebels had a right to rise against the oppressive Gaddafi regime, nor – for that matter – whether Gaddafi was authorized (or not) to crush the insurgency, for the simple reason that those issues are beyond the jurisdictional competence of the ICC. But the recognition that political persecution emerged from the incumbent regime’s attempt to suppress an insurrection is strong evidence of the Court’s understanding of a close connection between political turmoil and international crimes.

The most conspicuous example of domestic criminal proceedings in respect of political crimes that *did not* coincide with core crimes (at least in which this connection was not demonstrated) – and therefore did not impede

<sup>29</sup> Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11–01/11, § 71 (italics added).

<sup>30</sup> *Prosecutor v. Gaddafi & Al-Senussi*, supra note 29, § 165.

<sup>31</sup> *Prosecutor v. Gaddafi & Al-Senussi*, supra note 29, § 166.

the admissibility of a case – was provided in the *Situation in the Republic of Côte d'Ivoire*, to wit the admissibility challenge relating to the case against Simone Gbagbo.<sup>32</sup> This case concerns

the individual criminal responsibility of [Mrs.] Gbagbo for the commission, jointly with Laurent Gbagbo and his inner circle and through the Ivorian Defence and Security Forces (FDS), who were reinforced by youth militias and mercenaries, of the crimes of murder, rape and other forms of sexual violence, inhumane acts and persecution committed: (i) in the context of the march on the *Radiodiffusion Télévision Ivoirienne* (RTI) building on 16 December 2010; (ii) in the context of the Abobo market shelling on 17 March 2011; and (iii) in relation to the Yopougon massacre on 12 April 2011.<sup>33</sup>

The government of Côte d'Ivoire challenged the admissibility of the case, arguing that some economic crimes and crimes against the state that were prosecuted domestically were preparatory acts to the commission of the crimes with which Mrs. Gbagbo had been charged by the ICC Prosecutor.<sup>34</sup> Unfortunately, the criminal acts have been redacted in the ICC Pre-Trial Chamber's decision and the Appeals Chamber's judgment, so we are precluded from determining their relationship with the core crimes. In any event, the Appeals Chamber held that 'Côte d' Ivoire does not explain, how, in its view, the preparatory nature of the conduct underlying those crimes shows that it is substantially the same conduct as that alleged in the proceedings before the Court and, consequently, that the Pre-Trial Chamber erred by failing to consider those crimes' preparatory nature.'<sup>35</sup>

The wording of the judgment is quite interesting. The Appeals Chamber does not deny that a close connection might have existed between the crimes against the state and international crimes, but only contends that the state had failed to prove that such a relationship would actually conflate both crimes into one 'case' impeding the ICC from further investigation and prosecution. As in the case against Gaddafi and Al-Senussi, the ICC would not be authorized to adjudicate any state crimes allegedly committed by Mrs. Gbagbo.

<sup>32</sup> Pre-Trial Chamber I, *Prosecutor v. Simone Gbagbo*, 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', 11 December 2014, ICC-02/11-01/12-47-Red.

<sup>33</sup> *Prosecutor v. Simone Gbagbo*, supra note 32, §73.

<sup>34</sup> Document in Support of the Appeal, § 66: 'Plusieurs des infractions précitées doivent être analysées en des actes préparatoires ou en des actes fournissant les moyens nécessaires à la commission d'autres crimes.'

<sup>35</sup> *Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ICC-02/11-01/12 OA, 27 May 2015, § 101.

Apart from the legal impediments, there may be political considerations why the ICC is rather reluctant to scrutinize the political context of core crimes and to that purpose engage in the assessment of (for example) unconstitutional changes of governments. After all, the ICC will eschew becoming embroiled in politics. In the context of the case against Laurent Gbagbo, the ICC Prosecutor, Ms. Fatou Bensouda stated that ‘this trial is not about who won the 2010 elections. Nor is it about who should have won the elections. . . The purpose of this trial is to establish individual responsibility of the two accused [Mr Gbagbo and Mr Charles Blé Goudé] of the crimes committed.’<sup>36</sup> While these efforts to keep aloof from politics are commendable, the concern expressed by Ms Bensouda is perhaps a bit exaggerated. As indicated above, the jurisdictional limitations impede the ICC from judging crimes against the constitutional order. Its assessment of the political background of some core crimes is more subtle and indirect. It can either take any political events – like a rebellion or the crushing of an insurgency – into consideration, when the very nature of some core crimes (like persecution on political grounds) makes such assessment inevitable (as is the *Al-Senussi* and *Gaddafi* cases). Or the ICC can, in assessing the admissibility of a case, decide that charges on purely political crimes and international crimes in domestic proceedings are so inextricably linked that they impede the ICC from pursuing a case (a decision the ICC has not yet taken). In both cases, the ICC confirms the causal relationship between the political crimes (including possibly unconstitutional change of government) and core crimes, without expressing any judgment on the former itself.

##### 5. THE RIGHT TO REBEL

There is a potential tension between criminalization of assaults on incumbent governments and the right of rebellion. In the opening sentences of his searching article, Tony Honoré captures succinctly the predicament: “There is a dilemma concerning the relation between human rights and criminal responsibility. Unless in certain conditions we have the right to rebel, much talk of human rights can be dismissed as empty rhetoric. But if there is such a right, we are at times entitled to use violence against our fellow citizens as if we were at war with them. We may properly commit what are by ordinary

<sup>36</sup> D. Connett, ‘Laurent Gbagbo trial: Ivory Coast’s ex-President ‘used rape and murder’ against rivals, ICC told’, *The Independent*, available online at: [www.independent.co.uk/news/world/europe/laurent-gbagbo-trial-ivory-coast-s-ex-president-used-rape-and-murder-against-rivals-icc-told-a6840456.html](http://www.independent.co.uk/news/world/europe/laurent-gbagbo-trial-ivory-coast-s-ex-president-used-rape-and-murder-against-rivals-icc-told-a6840456.html); (last visited: 25 July 2016).

standards the gravest of crimes.<sup>37</sup> For the purpose of this article, it is important to figure out whether the introduction of the crime of ‘unconstitutional change of government’ can be reconciled with the right to rebel. Such an inquiry into the normative compatibility of these notions requires a further investigation of the content of, and limitations on, the right to rebel as well as by whom it is recognized. I am therefore less interested in the question whether there exists a *remedy* to enforce the right to rebel, because the focus is on the crime of ‘unconstitutional change of government’ and whether the introduction of that crime can be trumped by the right to rebel, as a normative counterweight.<sup>38</sup> It is less important whether the right to rebel can actually be *enforced*.

Some light on both the essence of the right to rebel and its limitations is shed by a famous sentence in the Preamble of the Universal Declaration of Human Rights: ‘... whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’ The formulation is rather enigmatic and shrouded in ambiguity. Indeed, it could be interpreted as an exhortation to states to avoid rebellion.<sup>39</sup> Moreover, one should be cautious not to deduce too easily a right to rebellion from these lines, in view of the explicit resistance against recognition of such a right by country delegates during the drafting process of the Universal Declaration.<sup>40</sup> Nonetheless, the Preamble suggests that the international society of states allows people to rise against their oppressing rulers, as an ultimate measure. The situation must have become unbearable and there should be no other method available to escape the ordeal, as is clearly expressed in the words ‘as a last resort’.

The notion of rebellion as ‘ultimate remedy’ resonates in the grand tradition of political philosophers. Calvin’s acknowledgement of the right to resist the monarch had – unlike what one might have expected – clearly political, rather than religious, connotations. If the king renounced his primary duty, to wit the protection of the liberties of the people, selected persons entrusted with power and authority within the realm would be allowed to disobey and, if necessary, depose him in order to preserve order: ‘Certain remedies against tyranny are allowable, for example, when magistrates and estates have been

<sup>37</sup> Honoré, *supra* note 3, at 34.

<sup>38</sup> Compare Honoré, *supra* note 3, at 35 who identifies *recognition* and *remedy* as necessary features of rights, distinguishing them from mere aspirations.

<sup>39</sup> Honoré, *supra* note 3, at 42.

<sup>40</sup> B. Dunér, ‘Rebellion: The Ultimate Human Right?’, Vol. 9, No. 2 *International Journal of Human Rights* (June 2005), at 253 points out that ‘Several countries made it clear that they did not want to see rebellion as a right.’

constituted and given the care of the commonwealth: they shall have the power to keep the prince to his duty and even to coerce him if he attempts anything unlawful.<sup>41</sup>

Calvin predicated this right – or even duty – to disobey the unfaithful king on the premise that the relation between the ruler and citizen ‘was not a direct one, but occurred through the mediating agency of the law.’<sup>42</sup> Ultimately, the resistance therefore served to vindicate the primacy of the law.

For John Locke, the right to revolt was a logical sequel of his postulating the predominance of society over politics, in which we already discern the traces of Rousseau’s political discourse. The monarch only rules by the grace of the will of the community and its role was that of ‘image, phantom, or representative of the commonwealth, acted by the will of society, declared in its laws.’<sup>43</sup> If the king strayed from the right course, blatantly abused his powers and oppressed the people, the society had the right to depose him by forceful means, in order to restore the ideal state of nature. Locke suggested that the fierceness of the reaction that was visited upon him was proportionate and reciprocal to the initial violence: ‘In all States and Condition the true remedy of Force without Authority, is to oppose Force to it. The use of force without Authority, always puts him that uses it into a state of War, as the Aggressor, and renders him liable to be treated accordingly.’<sup>44</sup> Nonetheless, Locke immediately qualified his position by pointing out that rebellion would only be appropriate when ‘the inconvenience is so great that the majority feel it, and are weary of it, and find a necessity to have it amended.’<sup>45</sup>

It is not difficult to understand the relentless emphasis on ‘last resort’, because an unchecked right to revolt would be a ‘perpetual foundation for disorder.’<sup>46</sup> Besides, for states the curtailment of the right to rebel is a question of sheer self-preservation. Domestic criminal codes contain criminal provisions, outlawing insurrection and overthrow of incumbent governments and such conduct is generally threatened with severe punishment. Article 94 of the Dutch Penal Code, for example, punishes the assault, undertaken with the intent to destroy or unlawfully change the constitutional government or the

<sup>41</sup> J. Calvin, *Calvani Opera*, (ed. G. Baum, E. Cunitz and E. Reuss), 50 volumes (Braunschweig 1863–1900, Volume 29: 557, 636–7); quoted by S. S. Wolin, *Politics and Vision*, (Expanded Edition, Princeton University Press 2004), at 169.

<sup>42</sup> Wolin, *supra* note 41, at 169.

<sup>43</sup> J. Locke, *Two Treatises of Government*, (ed. by Peter Laslett, New York 1965), Second Treatise, § 151.

<sup>44</sup> Locke, *supra* note 43, § 155.

<sup>45</sup> Locke, *supra* note 43, § 169.

<sup>46</sup> Locke, *supra* note 43, § 169.

order of succession of the throne with life imprisonment or a prison sentence of maximum of 30 years (or a fine of the 5th category).<sup>47</sup> Such regulations belong to the sovereign realm of states and international (human rights) law does not deny them the right of self-defence against the threat of annihilation. In this context, it is noteworthy that Article 4(1) of the International Covenant on Civil and Political Rights embodies the state's authority to derogate from certain human rights in emergency situations:

'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

Commenting on this provision, Bertil Dunér observes that 'it goes without saying that this possibility given to the state contradicts a right to rebellion: it is for the survival of the state that it was introduced.'<sup>48</sup> Even those states that recognize a right to resist official power make the necessary qualifications. Article 20(4) of the German Constitution (*Grundgesetz*) acknowledges such a *Widerstandsrecht*: 'All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.' The provision is essentially conservative, as it can only be invoked in order to preserve, not to change the constitutional order. Moreover, the notion that the right to resist is a measure of last resort is manifestly included in the addition that there should not be any other remedy available.

It is interesting to compare the rather modest recognition of the right of resistance, as acknowledged by political philosophers and embodied in the German Constitution and the Universal Declaration of Human Rights, with the proposed provision on unconstitutional change of government in the Malabo Protocol. In all serious pleas for a right to resist, including the German constitutional provision, the requirement that any resort to force should be an ultimate remedy is a steady concern. It seems to suggest that rebellion is only allowed if a tyranny or oppressive regime chokes all political opposition and makes life unbearable. The Malabo Protocol only prohibits assaults on *democratically elected* governments. The implication seems to be that in those situations a revolution would not be an appropriate *ultimum remedium*, because there would be other (democratic) means to oust the

<sup>47</sup> Translation by the author.

<sup>48</sup> Dunér, *supra* note 40, at 255.

incumbent powerholders. In this sense, the provision in the Malabo Protocol would not be in contravention of a restricted – and generally acknowledged – right to revolt, because the former clearly does not encompass resistance against tyranny. The acknowledgement of the citizens' right to resist attempts to abolish the constitutional order, as incorporated in the German Constitution, is especially interesting. It might arguably govern situations of powerholders clinging to their position and acting in clear violation of the constitution. This comports with the 'static' variety of unconstitutional change of government, as envisaged in Article 28E of the Malabo Protocol. By making such practices a crime, the Malabo Protocol rather seems to sustain (a limited use of) the right to rebel than to counter it. We might therefore come to the intermediate conclusion that the criminal provision on unconstitutional change of government does not infringe the right to rebel.

#### 6. THE CRIME OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT IN THE MALABO PROTOCOL AND THE PRINCIPLE OF NON-INTERVENTION

The essential question in this article is to explore whether there are good reasons for African states to elevate the repression of unconstitutional change of government to a supra-national (regional) level. In that context, it is necessary to inquire whether any criminalization of this conduct does not contravene essential rights and prerogatives – as has been done in the previous paragraph. However, that does not suffice. While the previous section has indeed demonstrated that the offence of unconstitutional change of government does not violate the right to rebel and that states are entitled to restrain and, if necessary, suppress insurrections, it is by no means clear why this offence should come under the jurisdiction of a regional court. The proper yardstick for assessing whether this crime qualifies for 'promotion' is, I submit, whether criminalization surpasses merely parochial interests of the state and epitomizes the idea that it has become the business of a wider community of states.<sup>49</sup>

In the realm of international criminal law, the universal interest in the repression of international crimes can be gleaned from the fact that they qualify as violations of customary international law.<sup>50</sup> Could the argument be made

<sup>49</sup> On the distinction between parochial and universal interests as the foundation of the difference between domestic and international (criminal) law, see G. P. Fletcher, 'Parochial versus Universal Criminal Law', 3 *Journal of International Criminal Justice* (2005), at 20–34.

<sup>50</sup> Compare, amongst others, *Cassese's International Criminal Law*, (3rd ed. Revised by A. Cassese, at Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, Oxford 2013), at 20.



that, by analogy, a regional organization like the African Union can legitimately claim jurisdiction over a crime the prohibition whereof has solidified in (regional) customary law? Such a line of reasoning is (implicitly) defended by Ademola Abass who, after expressing concerns that not ‘all crimes (within the jurisdiction of the African Court) are, in fact, ‘international’ and ‘serious’ enough to warrant international prosecution’, contends that the crime of unconstitutional change of government would certainly meet those criteria:

The acts constituting unconstitutional change of government . . . have, for a long time, been practices which have been consistently rejected by the majority of African states, as evidenced by myriad treaties and declarations adopted over several decades to outlaw them. The African Charter on Democracy, Election and Government is therefore merely a codification of what had become a quintessential custom in Africa: the rejection of UCG (Unconstitutional Change of Government).<sup>51</sup>

The idea that regional customary law could serve as an appropriate legal basis for the selection of crimes that qualify for subject matter jurisdiction of a regional criminal court is interesting.<sup>52</sup> But a thorough research into whether unconstitutional change of government indeed meets this standard is beyond the scope of this article. Moreover, I would hold that the category of crimes under the jurisdiction of the African Criminal Court is not exhausted by those offences that demonstrably belong to the realm of regional customary law. All of the offences mentioned in Article 28A of the Malabo Protocol are subject of (regional) treaties in which states commit themselves to criminalize the conduct, render mutual assistance in criminal matters and pledge to either prosecute or extradite (*aut dedere, aut judicare*) those suspected of those offences that are found on their territory.<sup>53</sup> The very fact that African states conclude treaties with a view to the common criminal law enforcement in respect of certain offences is proof that they share an interest in their suppression. Any decision to outsource such law enforcement to a regional court is a logical next step that is facilitated by the prior enactment of such treaties. After all, States are not prohibited by international law to establish a regional criminal court and equip this court with jurisdiction over crimes of common

<sup>51</sup> Abass, *supra* note 7, at 34.

<sup>52</sup> See for a general analysis on regional customary law and its relationship with general customary law: A. D’Amato, ‘The Concept of Special Custom in International Law’, Paper 116 Faculty Working Papers (2010) available online at: <http://schoalrlycommons.la.northwestern.edu/facultyworkingpapers/116> (last visited: 23 January 2017.)

<sup>53</sup> For an extensive analysis of these regional suppression treaties, see: H. van der Wilt, ‘On Regional Criminal Courts as Representatives of Political Communities’, in (Kevin Jon Heller and others), *The Oxford Handbook of International Criminal Law*, Oxford 2019 (forthcoming).

concern, provided that such offences are criminalized under their domestic law and the regional court does not apply the law retroactively.

Yet, intuitively, the crime of unconstitutional change of government seems to be of a different nature than the other crimes featuring in Article 28A of the Malabo Protocol. Civil unrest that can turn into rebellion or insurrection is a typical internal affair. Article 2, section 7 of the UN Charter precludes the United Nations from intervening in affairs that essentially belong to the domestic jurisdiction of a state and regional instruments confirm that states are under a duty to abstain from such interference.<sup>54</sup> The argument could be made that a transfer of criminal jurisdiction in respect of internal political crimes to a regional court would amount to such an intervention which is prohibited under international law. On closer scrutiny, however, this assumption is far-fetched and even incorrect. It is generally acknowledged in international law that states are allowed to seek the assistance of other states in order to suppress rebellion or insurrection. Conversely, states are not entitled to support insurgents.<sup>55</sup> It should be recalled in this context that in the famous *Nicaragua v. US* case the International Court of Justice found that the US assistance to the *contras*, such as financial support, training and supply of weapons constituted ‘a clear breach of the principle of non-intervention.’<sup>56</sup> The construction obviously serves the preservation of world order and favours established governments, to the detriment of rebels.<sup>57</sup> The asymmetric interpretation of the principle of non-intervention raises the question whether this principle, rather than precluding criminalization of unconstitutional change of government, not actually supports such an initiative. After all, it could be argued that the assistance of states to the hard-pressed government might consist of bringing the rebels to criminal justice before a regional court.

<sup>54</sup> See also Article 15 of the Charter of American States, Bogotá 30 April 1948, T.I.A.S. 2361: ‘No State or group of States has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State.’

<sup>55</sup> Compare J. C. Novogrod, ‘Internal Strife. Self-Determination and World Order’, in M. Cherif Bassiouni (ed.) *International Terrorism and Political Crimes*, Springfield Illinois 1975, at 103: ‘During rebellion there is no dispute that assistance may be given to the legitimate government upon request, but, contrarily, none may be given to the rebels’; later adding that ‘it is not surprising that even when the revolt becomes somewhat more sustained in time and place and is organized under responsible leaders, the resulting insurgency still does affect the rule that the established government may be assisted but the insurgents may not.’ See also M. N. Shaw, *International Law*, 6th ed., Cambridge 2008, at 1152: ‘The reverse side of the proposition – that states are allowed to seek the assistance of other states in the suppression of rebellion – is that aid to rebels is contrary to international law.’

<sup>56</sup> ICJ, Case Concerning the Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits 27 June 1986, General List No. 70, § 242.

<sup>57</sup> Novogrod, supra note 55, at 103.

However, this position is also untenable for two reasons. For one thing, the free consent of the state is a prerequisite for the legitimacy of the foreign assistance.<sup>58</sup> Besides, absent a treaty, no state is under an obligation to render assistance to the established government during insurgency.<sup>59</sup> Secondly, as soon as the insurgency has ‘matured’ into belligerency, a foreign state is under an obligation to remain neutral and forfeits its right to support the incumbent government.<sup>60</sup> Obviously, states would be allowed to take sides and become a co-belligerent with one of the two factions. For the purpose of our research, this entails that foreign states would not be allowed to bring belligerents to criminal justice before a regional court on account of their revolt, as soon as they have succeeded in achieving that status.

It may be interesting to pay some attention to the relationship between the principle of non-intervention and the static form of unconstitutional change of government. Would states be allowed to intervene when defeated dictators cling to their position and refuse to abdicate in favour of democratically elected power contenders? The issue is topical in view of the recent intervention by troops from other West-African countries in the Gambia in order to remove outgoing president Yahya Jammeh who was adamant in his decision to stay in power.<sup>61</sup> In his discussion whether such an intervention for the restoration of democracy is permitted, Malcolm Shaw is quite determined where he holds that ‘apart from the problems of defining democracy, such a proposition is not acceptable in international law in view of the clear provisions in the UN Charter.’<sup>62</sup> One might deduce from this, *per argumentum a contrario*, that less invasive measures which imply no use of (military) force,

<sup>58</sup> Novogrod, *supra* note 55, at 105–6: ‘Implicit in the permissibility of assistance to the lawful government during rebellion and insurgency is the understanding that such aid is based on the express or tacit consent of the strife-torn state. Without the requisite consent of the incumbent government, any assistance thrust upon it would be unwarranted interference in its internal affairs.’ See also Shaw, *supra* note 54, at 1151: ‘It would appear that in general outside aid to the government authorities to repress a revolt is perfectly legitimate, provided, *of course*, it was requested by the government.’ (Italics added.)

<sup>59</sup> Novogrod, *supra* note 55, at 107.

<sup>60</sup> Garner ‘Questions of International Law in the Spanish Civil War’, 31 *American Journal of International Law* (1937), at 66, 69: ‘It – the foreign state – loses the right which it had during the period of insurgency to assist the legitimate government and henceforth must treat both belligerents alike.’ See Shaw, *supra* note 55, at 1150, asserting that ‘[o]nce the rebels have been accepted by other states as belligerents . . . the rules governing the conduct of hostilities become applicable to both sides, so that, for example, the recognizing states must then adopt a position of neutrality.’

<sup>61</sup> See the headlines in ‘Military intervention looms as Jammeh clings to power’, Al Jazeera, (19 January 2017), available online at: [www.aljazeera.com/news/2017/01/gambia-jammeh-military-intervention-170119035928489.html](http://www.aljazeera.com/news/2017/01/gambia-jammeh-military-intervention-170119035928489.html) (last visited: 23 January 2017).

<sup>62</sup> Shaw, *supra* note 55, at 1158.

like regional criminal law enforcement, would be allowed. However, even if that position can be vindicated, other obstacles may abound.

At this point, it is necessary to briefly discuss the topic of immunities. Article 46*Abis* of the Malabo Protocol stipulates that '[n]o charges shall be commenced or continued before the (African) Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure or office'.

The provision exhibits an obvious retrogression from Article 27 of the Rome Statute that has abolished all immunities before the International Criminal Court. It is not entirely clear whether Article 46*Abis* only refers to personal immunities (*ratione personae*) or would also cover functional immunities (*ratione materiae*), but the explicit mention of 'serving Heads of State' and the addition 'during their office' suggest that the former option was intended.<sup>63</sup> The problem of immunities in the context of international criminal law has been widely debated, in particular in relation to the arrest warrants issued against President Al-Bashir.<sup>64</sup> Moreover, the immunity issue has a far wider purport and may affect prosecution and trial of all international and transnational crimes under the jurisdiction of the African Criminal Court. For these reasons, an extensive discussion of the topic is beyond the scope of this article. Nonetheless, it cannot be denied that immunities have special repercussions for the crime of unconstitutional change of government. For one thing, those who succeed in toppling a democratically elected government may invoke immunity as soon as they have come to power. Secondly, those who refuse to make way for victorious and freely elected contenders appear to be shielded against prosecution as long as they remain in office.

<sup>63</sup> Compare D. Tladi, 'Immunities (Article 46*Abis*)', in Werle and Vormbaum, *supra* note 2, at 207: 'Although Article 46*Abis* could be read as establishing two categories of immunities, namely immunity *ratione materiae* and immunity *ratione personae*, on balance it appears that this second alternative is likely what was meant by the African Union.'

<sup>64</sup> See on immunities and international criminal law in general: D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004), at 407–33; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *European Journal of International Law* (2002), at 853–75. In relation to the Al Bashir-case: D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and Its Impact on Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009), at 333–52; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* (2009), at 315–32; D. Tladi, 'The ICC decisions in Chad and Malawi: On Cooperation, Immunities and Article 98', 11 *Journal of International Criminal Justice* (2013), at 199–221. On the contested provision in the Malabo Protocol: D. Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (doctrinal) Wheat from the (Normative) Chaff', 13 *Journal of International Criminal Justice* (2015), at 3–17.

Immunities serve as a double-edged sword that benefits vested interests and perpetuates unlawful exercise of power. To be sure, there are ways to circumvent such predicaments, by withholding recognition of governments that have seized power by illegitimate means or by stipulating that tenure ends whenever an incumbent head of state refuses to abdicate.<sup>65</sup> Still, it bears emphasis that immunities constitute an impressive bulwark that may impede a successful repression of unconstitutional change of government.

Returning to the principle of non-intervention, it appears that this principle neither prohibits, nor sustains the criminalization of unconstitutional change of government. The principle is entirely subservient to the sovereign will of states, which stands to logic as it serves to protect their interests. States are at liberty to seek assistance of other states against insurgents and such assistance may take the form of criminal law enforcement by an African Criminal Court, but they are not bound by such an arrangement if they are not party to the Malabo Protocol. The freedom that international law bestows on states to seek assistance is even wider than acknowledged under the Malabo Protocol because such prerogatives are not dependent on the democratic quality of the government in power. The only limitation that the principle of non-intervention entails is that belligerents are not to be held criminally accountable because that would imply a breach of neutrality. Furthermore, the interpretation of the principle is understandably skewed in favour of preservation of the *status quo*. However, any obstacles in the prosecution of incumbent powerholders will probably be caused by inconsistencies in the law on immunities, rather than by the principle of non-intervention itself. Nonetheless, both the principle of non-intervention itself and its exceptions and limitations are primarily inspired by the quest for stability in international relations. And this rationale is of primary importance for the understanding of the introduction of the crime of unconstitutional change of government and its elevation to a regional level in Africa.

In my view, the best and probably only reason why states have a common interest in the repression of unconstitutional change of government is that insurgency is contagious. While it seemingly is restricted to the territory of one state, it cannot easily be contained and has the nasty habit of spilling over to neighbouring countries. The analogy with the crime of aggression is highly appropriate here. There is no consensus among political philosophers and legal commentators that aggression is the most hideous of crimes. Larry May, for instance, contends that the crime of aggression is not clearly the worst of

<sup>65</sup> On these solutions, see Tladi, *supra* note 63, at 208 and Kemp & Kinyuny, *supra* note 2, at 69, respectively.

crimes, because state aggression may in some cases be the lesser evil, especially when it creates on balance positive effects.<sup>66</sup> Those, however, who consider aggression the worst of crimes often refer to Von Clausewitz' famous discourse *On War* in which he argues that war is essentially boundless. According to Von Clausewitz, 'war is an act of force which theoretically can have no limits'.<sup>67</sup> And he goes on to explain the mechanics of escalation that are inherent to warfare. The logic of war is that 'each of the adversaries forces the hand of the other. War tends toward the utmost exertion of forces' which implies increased ruthlessness, since 'the ruthless user of force who shrinks from no amount of bloodshed must gain an advantage if his opponent does not do the same'.<sup>68</sup> Because the stakes of glory versus defeat are so high, the antagonists hold each other hostage and run into a downward whirl of death and destruction.<sup>69</sup> This vicious circle of ever mounting violence is not restricted to the initial parties. As the adversaries try everything possible to gain the upper hand, they seek the assistance of allies. And so, war expands in space and time, involving more and more participants. It is precisely due to this process of escalation that war does not stop at geographical boundaries. It has prompted states to outlaw war as a method of dispute settlement, because the experience had taught them that it can redound on themselves.<sup>70</sup>

In case of civil strife, one would expect that its violent effects would be less volatile, but the experience in Africa in particular has proved otherwise. Examples of insurrections, crossing border and affecting several countries abound. The carnage in the Congo at the turn of the century which has often been qualified as an 'African world war' originated from the civil wars in Rwanda and Burundi. Other players soon tuned in, always in pursuit of raw materials, sometimes in order to root out rebels who found refuge in the vast

<sup>66</sup> L. May, *Aggression and Crimes against Peace*, Cambridge 2008, at 223–5.

<sup>67</sup> K. Von Clausewitz, *On War*, (translation by M. Howard and P. Paret, Princeton 1976), at 76.

<sup>68</sup> Von Clausewitz, *supra* note 67, at 75/76.

<sup>69</sup> For a vivid discussion of von Clausewitz' arguments, see M. Walzer, *Just and Unjust Wars*, (3rd ed. New York 1977 (2000)), at 23. Walzer, however, does not agree with Von Clausewitz grim and fatalistic view. As war is a social construction, it is, in his opinion, possible to modify and temperate war fare (*Just and Unjust Wars*, at 25).

<sup>70</sup> G. Best, *War & Law since 1945*, (Oxford 1994), at 54. Best explains how the urge in the *interbellum* to get rid of war altogether was in effect conducive to a neglect of the improvement of the *jus in bello*: 'So profound and unsettling, however, was the impression made upon that generation of survivors by, as they called it, the Great War, that their consequent responses went far beyond such patching of the *jus in bello*. It was no doubt desirable that war should never again be fought in ways as beastly as those in which the Great War had specialized. But how much more desirable that great wars should never happen again and that the use of armed force among States, so far as it could not be absolutely prevented, should be controlled to serve the common good!'

jungle (Museveni's Uganda) and sometimes in retaliation for earlier support of insurgents by Congo (Angola).<sup>71</sup> The Lord's Resistance Army, after having partially been defeated by Ugandan forces in the north of the country, moved its camps to neighbouring Sudan and the Central African Republic, creating havoc in those states.<sup>72</sup> The string of events in the 'Arab Spring' exhibiting a domino effect in several countries was explicitly mentioned in the warrant of arrest issued against Al-Senussi.<sup>73</sup> And the infamous civil war, fuelled by the hunt for diamonds in Sierra Leone, was initially triggered by incessant tribal warfare in neighbouring Liberia that did not end with the demise of the dictatorship of Samuel Doe, but gave new opportunities to arch-schemer Charles Taylor.<sup>74</sup> Against this backdrop one can understand the urge of African states to join forces and engage in criminal repression of the unconstitutional change of government.

#### 7. SOME FINAL REFLECTIONS

It has been my objective to investigate and understand why a typical domestic political event like unconstitutional change of government has been upgraded in the African context to a 'supranational crime' that is supposed to be countered by law enforcement at a regional level. I have argued that criminalization of the conduct as such does not infringe a supposed right of rebellion. Nor would the elevation of the offence to the regional level contradict the principle of non-intervention. However, while these principles do not defeat the prosecution and trial of unconstitutional change of government by the African Criminal Court, it is still not clear why states would be inclined to move criminal law enforcement in respect of this crime to a higher level. One reason that comes to mind is that serious political strife is connected to core

<sup>71</sup> For a chilling account, see M. Meredith, *The State of Africa: A History of Fifty Years of Independence*, (London 2006), at 524–45. As Meredith observes (p. 535): 'One province after another joined the rebellion. Not only were Rwanda and Uganda involved in the campaign but Angola too, long resentful of Mobutu's support for the Angolan rebel leader Jonas Savimbi.'

<sup>72</sup> In a recent Resolution, the Security Council noted that the LRA 'is still engaged in or providing support for acts that undermine the peace, stability or security of the CAR.' UN SC Res. 2262(2016), § 12.

<sup>73</sup> *Prosecutor v. Al Gaddafi and Al Senussi*, supra note 29, § 70: 'Following the events in Tunisia and Egypt which led to the departure of their respective Presidents in the early months of 2011, a State policy was designed . . . aimed at deterring and quelling the demonstrations of civilians against the regime of Gaddafi.'

<sup>74</sup> Compare with Meredith, supra note 71, at 550: 'The dominant role played by the Krahn, particularly in suppressing dissent, provoked tribal animosities that had long lain dormant. The eventual consequence was civil war. It was a war that was not confined to Liberia but spread into neighbouring countries, engulfing the whole region in conflict.'

crimes in the sense that they generate those crimes. The analogy with the crime of aggression is apposite, in that aggression not only promotes war crimes but also constitutes the *sine qua non* for their occurrence. The Nuremberg Military Tribunal succinctly expressed this: 'To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'<sup>75</sup> Like inter-state war, insurgencies trigger violence and augment the risk of heinous crimes being committed. Nonetheless, the explanation is not entirely satisfactory, because penalization of unconstitutional change of government does not aim to counter political violence at all costs. Its objective is to suppress assaults on *democratic* institutions, suggesting that such illegitimate activities in particular are likely to affect peace and stability within a political community. A second – and arguably better – explanation is that insurgencies are not contained to single states but are inclined to spread to other countries. Again, the analogy with the crime of aggression is striking. The Nuremberg Tribunal noted that '[w]ar is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.'<sup>76</sup> These lines lay bare the infectious nature of war. With respect to internal rebellions, this is not essentially different. The African continent in particular has been plagued by internal strife that easily moves from state to state. States have a common interest in suppressing both the dynamic and static form of unconstitutional change of government because the ensuing unrest and violence is not likely to stop at their borders.

The inclusion of this crime in the Malabo Protocol suggests that states are confident that the African Criminal Court may be better equipped to take on the investigation and prosecution of perpetrators of the offence. After all, the relationship between this court and domestic jurisdictions is governed by the principle of complementarity which implies that the Court can intervene when the state, due to internal political tensions, is unable to pursue criminal proceedings. Of course, we have no guarantee that the incorporation of the crime within the jurisdiction of the African Court will reduce or prevent its occurrence. However, the same holds true for the crime of aggression in the Rome Statute. It may be considered, though, as a normative expression of a genuine common concern of African states.

<sup>75</sup> *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22nd August – 1st October 1946), at 421.

<sup>76</sup> *Ibid.*