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Constitutional Crises and the Jurisdiction of the African Union

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Introduction

This paper reviews the notion of constitutional crisis in the African context. The concept can be controversial as it is not clear, at first sight, which kind of constitutional crisis fall under the purview of action of the African Union (AU).

The Chadian case reminded us the complexity of the issue following the death of President *Idriss Deby Itno* during a battle with a rebel group in the northern part of the country in April 2021.[1] While the Constitution provided that the interim must be assumed by the President of the National Assembly pending new elections,[2] a constitutional crisis arose because the army had seized power by naming the former President's son, General *Mahamat Kaka Deby*, as head of state for a transitional period of 18 months.[3] The armed forces subsequently imposed a Transition Charter which put the country under the rule of a Military Transition Council and abrogated the Constitution of 4 May 2018.[4] This quasi-monarchical devolution of presidential power has led to several casualties and deaths during demonstrations organised by opposition supporters.[5] However, the AU did not know initially what to do, whether to intervene or not, because nobody was able to say that the facts clearly constituted a case which warranted its action. A fact-finding mission was deployed on the ground in order to enable the AU Peace and Security Council (PSC) to

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1 *Mathieu Olivier*, 'Tchad : le jour où Idriss Déby a été tué au combat' (20 April 2021), <https://www.jeuneafrique.com/1157584/politique/tchad-le-president-idriss-deby-itno-est-decede/> (accessed on 10 May 2021).

2 Constitution of the Republic of Chad (04 May 2018), art. 81.

3 Radio France Internationale, 'Succession d'Idriss Déby au Tchad: l'opposition dénonce un coup d'État' (21 April 2021), <https://www.rfi.fr/fr/afrique/20210421-succession-d-idriss-d%C3%A9by-au-tchad-l-opposition-d%C3%A9nonce-un-coup-d-%C3%A9tat>, (accessed on 10 May 2021).

4 Transition Charter of the Republic of Chad (April 2021), art. 36 and 92.

5 *Edward Mcallister*, 'Two dead, 27 hurt as Chad protesters demand civilian rule' (27 April 2021), <https://www.reuters.com/world/africa/protests-erupt-ndjamena-chadian-protesters-demand-civilian-rule-2021-04-27/> 12 May 2021.

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qualify the case as an unconstitutional change of government and apply or not the relevant AU sanctions.[6]

This kind of problem may arise in other circumstances given the diversity of constitutional crises in Africa. It is therefore necessary to provide a conceptual framework of the notion by analysing four main questions. First, how do we know when a constitutional crisis arises? Second, what are the root causes of constitutional crises in Africa? Third, under which conditions some constitutional crises become a matter of concern for the AU and its Peace and Security Architecture? Fourth, which means are at the AU disposal to address constitutional crises and challenges they pose?

The analysis in this article is based on primary sources from AU organs and its member states. It combines a historical, political, constitutional law, human rights and collective security perspective. Section 2 suggests that constitutional crises are domestic phenomena stemming from the failure of the constitution to fulfil the functions assigned to it within a state. Section 3 demonstrates that constitutional crises in Africa have multiple and cumulative root causes which are mutually reinforcing, ranging from the crisis of post-colonial states themselves, geopolitical stakes and governments' political manoeuvres to maintain or access power against the will of the people to contestations due to bad governance and the poor living conditions of populations claiming for deep political and socio-economic changes. Section 4 determines the three conditions which must be met for constitutional crises to fall within the AU jurisdiction, and section 4 sheds light on the plurality of means which the AU can use in undertaking its action to address these crises.

A. Domestic Origin of Constitutional Crises

A constitutional crisis is a phenomenon linked to the dynamic of domestic legal and political order, firstly, because it occurs within the boundaries of a state. However, foreign countries can also support constitutional crises in the territory of other states, especially when this can safeguard their national interests. A case in point is a secession or a rebel group supplied from abroad. Secondly, a constitutional crisis is domestic since it signals the failure of a state constitution to achieve its functions and goals, notably keeping political behaviours in the limits of ordinary politics and legality, devoid of violence.

This conception is central to constitutionalism. In this paper, constitutionalism is understood as "the doctrine that governments must act within the constraints of a known constitution whether it is written or not".[7] Therefore constitutionalism suggests a commitment to a

6 *Peace and Security Council,* Rapport de la Mission d'Enquête au Tchad du 29 Avril au 5 Mai 2021', 995th meeting, Addis-Ababa (Ethiopia), (12 May 2021).

7 *Morris Kiwinda Mbondenyi* and *Tom Ojienda*, Introduction to and overview of constitutionalism and democratic governance in Africa, in *Morris Kiwinda Mbondenyi* and *Tom Ojienda* (eds.), Constitutionalism and democratic governance in Africa: contemporary perspectives from Sub-Saharan Africa*,* Pretoria, 2013, p. 3.

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set of ideals embodied in the constitution.[8] These ideals include the exercise of democracy, limited government and separation of powers, the respect for the rule of law and human rights, and the possibility of a judicial review of laws and amendments of constitutions.[9] The AU shares the same understanding when it declares that:

> *Constitutionalism denotes limited government. It also entails protection of citizens against arbitrary rule. It is about the existence of clearly defined mechanisms for ensuring that the limitations on state power are legally enforceable. The core elements of constitutionalism include: (a) the recognition and protection of fundamental rights; (b) the separation of powers; (c) an independent judiciary; (d) the review of the constitutionality of laws; (e) the control of amendment of the constitution; and (f) institutions supporting constitutional democracy and accountability.*[10]

These ideals constitute "common values and principles for democratic governance" of African countries, as enshrined in the 2000 Lomé Declaration[11] and the African Charter on Democracy, Elections and Governance (ACDEG) of 2007.[12] However, not every state

8 *Nico Steytler*, The relationship between decentralisation and constitutionalism in Africa: Concepts, conflicts, and hypotheses, in *Charles Manga Fombad* and *Nico Steytler* (eds.) Decentralisation and constitutionalism in Africa*,* Oxford, 2019, pp. 25–52.

9 *Jean Leclair*, L'avènement du constitutionnalisme en occident : fondements philosophiques et contingence historique, in Revue de droit de l'Université de Sherbrooke, vol. 41, 2011, pp. 5–6; *Charles Manga Fombad*, Constitutional reforms and constitutionalism in Africa: reflections on some current challenges and future prospects, in Buffalo Law Review, vol. 59, 2011, pp. 1013–1014.

10 Report of the Commission on Governance, Constitutionalism and Elections in Africa (Assembly/AU/9(XXVI)) (2016), para 27, quoted by *Micha Wiebusch* and *Christina Murray,* in Presidential term limits and the African Union', in Journal of African Law, vol. 63, 2019, p. 148.

11 AHG/Decl.5 (XXXVI), Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, 36th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, Lomé (Togo), 10–12 July 2000. The Declaration ascertains the following values and principles: 'i) adoption of a democratic Constitution: its preparation, content and method of revision should be in conformity with generally acceptable principles of democracy; ii) respect for the Constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament; iii) separation of powers and independence of the judiciary; iv) promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process; v) the principle of democratic change and recognition of a role for the opposition; vi) organization of free and regular elections, in conformity with existing texts; vii) guarantee of freedom of expression and freedom of the press, including guaranteeing access to the media for all political stake-holders; viii) constitutional recognition of fundamental rights and freedoms in conformity with the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981; ix) guarantee and promotion of human rights.'.

12 African Charter on Democracy, Elections and Governance (30 January 2007), art. 3. This article provides: "State Parties shall implement this Charter in accordance with the following principles: 1. Respect for human rights and democratic principles; 2. Access to and exercise of state power in accordance with the constitution of the State Party and the principle of the rule of law; 3. Promotion of a system of government that is representative; 4. Holding of regular, transparent,

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which has a constitution is capable to experience such ideals given the fact that even a country where dictatorship prevails is always ruled under the constitution. This has been the case of most African states when coups d'état and other forms of political violence were the principal means of accessing political power, after the failure of first experiences of democratic governance following their independence in the 1960s and before the second wave of democratisation in the 1990s. The main function assigned to constitutions is now to pacify and harmonise the political game so that all political struggles and issues can find their answers and solutions in and within the boundaries of the constitutional document. The constitution also provides for revision procedures so that it can be updated in regard to new circumstances to prevent extra-legal or revolutionary methods.[13] The existence of constitutional safeguards against arbitrariness is not however an absolute guarantee against those who want to resort to force and overthrow the incumbent government.

When constitutions do not fulfil their aforementioned function, a constitutional crisis can potentially arise.[14] In other words, where a constitutional crisis occurs, the constitution in force is disobeyed, abandoned or considered as being incapable to provide, as in ordinary times, the solutions to issues raised by political actors, authorities or the people, as well as to exceptional events that hit the nation. In this regard, a distinction is made between three major types of constitutional crises.[15]

First, there are crises due to political resistance against courts' decisions. In this regard, "political authorities persistently refuse to follow and retaliate against the Court's answer to a question of constitutional meaning".[16] This was experienced in 2007 in the Democratic Republic of the Congo (DRC) when the National Assembly tried to reject the judgments of the Supreme Court of Justice on the disputes against the results of parliamentary elections on the ground that they were unconstitutional, illegal and void.[17] It was suggested that

free and fair elections; 5. Separation of powers; 6. Promotion of gender equality in public and private institutions; 7. Effective participation of citizens in democratic and development processes and in governance of public affairs; 8. Transparency and fairness in the management of public affairs; 9. Condemnation and rejection of acts of corruption, related offenses and impunity; 10. Condemnation and total rejection of unconstitutional changes of government; 11. Strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law."

13 *Charles Manga Fombad*, Some perspectives on durability and change under modern African constitutions, in *Eunice N. Sahle* (ed.), Democracy, constitutionalism, and politics in Africa: historical contexts, developments, and dilemmas, New York, 2017, p. 61.

14 *Jack M. Balkin*, Constitutional crisis and constitutional rot, in Maryland Law Review, vol. 77, 2017, p. 148.

15 *Sanford Levinson* and *Jack M. Balkin*, Constitutional crisis, in University of Pennsylvania Law Review, vol. 157, 2009, p. 714.

16 *Michael J. Gerhardt*, Crisis and constitutionalism, in Montana Law Review, vol. 63, 2002, p. 283.

17 *Evariste Boshab*, Le principe de la séparation des pouvoirs à l'épreuve de l'interprétation des arrêts de la Cour suprême de Justice par l'Assemblée nationale en matière de contentieux électoral, in *Grégoire Bakandeja wa Mpungu*, *André Mbata Betukumesu Mangu* et *Raoul Kienge-Kienge In-*

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obeying the Court would be obligatory only if it had itself complied with the Constitution and the electoral law; and where there is no constitutional answer to issues raised by parliamentarians, given that those judgments were delivered at the first and last instance, the National Assembly could simply disregard them.[18] In Côte d'Ivoire, however, the crisis evolved into an open armed conflict in 2010 causing a lot of deaths among civilians and the destruction of private properties. The electoral commission declared the opposition leader, *Alassane Ouattara*, the winner of the presidential election, but the Constitutional Council concealed this provisional result and decided that the winner was rather the incumbent president, *Laurent Gbagbo*.[19] The opposition rejected this judgment and succeeded to overturn the ruling government. President *Gbagbo* was arrested and transferred to the International Criminal Court (ICC) for war crimes and crimes against humanity he had allegedly committed. The Constitutional Council, on its side, was forced to reconsider its previous decision, although it was delivered at the first and last instance, and declared Alassane Ouattara the winner of the election.[20]

The second type of constitutional crises relates to situations of exceptional circumstances when political authorities decide to suspend the application of provisions of the constitution in order to respond to events such as insurgency and pandemics that threaten the national security or the proper functioning of state institutions.[21] Most African states allow for this kind of departure from their constitutional designs, in the form of state of siege or state of emergency.[22] This are, however, constitutional crises with predicted consequences in so far as political authorities come to the conclusion that observing the constitutional rules as in ordinary times would lead to a collective disaster or peril.[23] International human rights law also acknowledges to states the right to suspend the application of ordinary rules in exceptional circumstances, subject to the respect of rights which are

tudi (eds.), Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République démocratique du Congo. Actes des Journées scientifiques de la Faculté de Droit de l'Université de Kinshasa (18–19 juin 2007), Kinshasa, 2007, pp. 19–27.

18 *Balingene Kahombo*, 'La Cour suprême de Justice, Cour constitutionnelle transitoire' (2 février 2011), <http://www.la-constitution-en-afrique.org/article-la-cour-supreme-de-justice-a-t-elle-demerite-66284374.html> (accessed on 13 May 2021).

19 Côte d'Ivoire Constitutional Council, *Décision n° CI-2010-EP-034/03–12/CC/SG portant proclamation des résultats définitifs de l'élection présidentielle du 28 novembre 2010,* 3 December 2010, art. 3 (on file with the author).

20 Côte d'Ivoire Constitutional Council, *Décision N°CI 2011 -036 portant proclamation de M. Alassane Ouattara en qualité de président de la République de Côte d`Ivoire*, 04 May 2011, art. 2 (on file with the author); *Franc De Paul Tetang*, De quelques bizarreries constitutionnelles relatives à la primauté du droit international dans l'ordre juridique interne : la Côte d'Ivoire et 'l'affaire de l'élection présidentielle', in Revue française de droit constitutionnel 2012, pp. 45–66.

21 *Levinson* and *Balkin*, note 15, p. 714.

22 *Charles Manga Fombad* and *Lukman Adebisi Abdulrauf,* Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa, in African Human Rights Law Journal, vol. 20, 2020, pp. 376–411.

23 Ibid.

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not susceptible of derogation.[24] Once the threat is eliminated, the constitution is entirely re-established.

The third kind of constitutional crises "involve situations where publicly articulated disagreements about the constitution lead political actors to engage in extraordinary forms of protests beyond mere legal disagreements and political protests".[25] In the African context, this can happen in any case of the use of force to overturn the government in power, when people take to the streets, rise against political authorities or express their disagreements against electoral final results, or when people or communities secede from the country. Examples of such cases include coups d'état, armed rebellions, the Katangese session in 1960 or the secession of Anjouan from the Union of Comoros archipelago in 2008, popular uprisings during the Arab spring in Tunisia, Libya and Egypt between 2011 and 2012, and post-election conflicts in Kenya in 2007 and Zimbabwe in 2008.

Beyond these major categories, there are other types of constitutional crises which relate to any case of unconstitutional change of government in violation of relevant AU legal instruments.[26] It is important to quote against this background the "refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections"[27] such as what occurred in The Gambia in 2017.[28] Other cases are "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

24 International Covenant on Civil and Political Rights (16 December 1966), art. 4 (2); European Convention on Human Rights (4 November 1950), art. 15 (2); American Convention on Human Rights (22 November 1969), art. 27 (2); Arab Charter on Human Rights (15 September 1994), art. 4 (c).

25 *Levinson* and *Balkin*, note 15, p. 714.

26 *Joseph Kazadi Mpiana*, L'Union africaine face à la gestion des changements anticonstitutionnels de gouvernement, in Revue québécoise de droit international, vol. 25 (2), 212, pp. 101–141; *Costantinos Berhutesfa Costantinos*, Unconstitutional regime change: trend perspective and political requisite for stricter law enforcement, in Pan-African Yearbook of Law 2012, pp. 1–18.

27 African Charter on Democracy, Elections and Governance, art. 23 (4).

28 Joint Declaration by the Economic Community of West African States, the African Union and the United Nations on the Political Situation of the Islamic Republic of The Gambia (21 January 2017) <https://au.int/sites/default/files/pressreleases/31910-pr-ecowas-au-un-joint-communique.pdf> accessed on 10 May 2021; PSC/PR/COMM. (DCXLVII), 13 January 2017, paras 3 and 5 (ii); PSC/PR/COMM. (DCLIV), 20 January 2017, para. 8. In fact, President Yaya Jammeh attempted to cling to power despite that he lost the presidential elections held in December 2016. The PSC saw in this situation a case of unconstitutional change of government. In accordance with the ultimatum given by ECOWAS to outgoing President Yaya Jammeh, it decided that as of 19 January 2017, he would cease to be recognized by the AU as legitimate President of the Gambia. The PSC also commended the ECOWAS for its principled stand with regard to this situation, including the consideration to use all necessary means to ensure the respect of the will of the Gambian people. The threat to use force in order to protect democracy, restore the constitutional order and put in power President-elect Adam Barrow persuaded Yaya Jammeh to give up his ambition before seeking refuge in Equatorial Guinea.

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the constitution",[29] and "any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors".[30]

It must be noted that a constitutional crisis does not amount to a mere violation of the constitution because such a violation of the constitution is often redressed in accordance with ordinary techniques of jurisdictional or political review. In this case, the constitution still performs its role as it is supposed to work.[31] Another distinction is between constitutional and political crises. This is obvious in case that a judicial crisis is not political. A political crisis breaks out when political actors publicly express serious disagreements or threaten each other on issues of political or constitutional interests without rejecting the existing constitutional order in which they will endeavour to find solutions to their conflicts.[32] It is only when the constitution breaks down that a political crisis gives rise to a constitutional crisis.

In short, there is a difference between the manner in which constitutional crises manifest themselves in practice and their root causes in the African context. From a political point of view, one needs to take stock of these causes because if the diagnosis of constitutional crises is well made then there is an appropriate reference for a good assessment of the efficacy of measures taken by the AU to address them.

B. Root Causes of Constitutional Crises in Africa

With the end of the Cold War, democracy was presented as the magic solution to African crises and conflicts. This proceeded from the assumption that these crises and conflicts were chiefly related to the mismanagement of domestic political struggles, bad governance and issues of minority exclusion.[33] Democratization became the most important African public policy at the national, regional and continental levels, as well as a condition for foreign donors' engagement and assistance to African countries. At the AU level, in particular, member states are now committed to implement the ideals of constitutionalism, open their political regimes to popular participation and foster peaceful competition for accessing or maintaining political power.[34] One of the core objectives of this policy is

29 Ibid., art. 23 (5).

30 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28E (1) (f); International Conference on the Great Lakes Region Protocol on Democracy and Good Governance (1 December 2006), art. 4.

31 *Balkin,* note 14, p. 149.

32 *Levinson* and *Balkin*, note 15, pp. 712–714.

33 *Mwayila Tshiyembe*, Nature et dynamique de la conflictualité africaine, in *Dominique Bangoura* and *Emile Fidieck A. Bidias* (eds.), L'Union africaine et les acteurs sociaux dans la gestion des crises et des conflits armés, Paris, 2006, pp. 33–42; *Pierre-Flambeau Ngayap,* Le monopole et le partage du pouvoir à l'origine des conflits en Afrique, in *Paul Ango Ela* (ed.), La prévention des conflits en Afrique centrale : prospective pour une culture de la paix, Paris, 2001, pp. 59–66.

34 *Balingene Kahombo*, La démocratisation dans l'ombre de crises et violences politiques en Afrique : rétrospective et prospective sur le rôle des opérations de maintien de la paix, in Interna-

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the promotion of democratic change of government, the consolidation of democratic institutions and the improvement of democratic governance in AU member states. The democratic project undertaken in the 1990s benefited from a kind of geopolitical propaganda.[35] African states were encouraged not to miss the opportunity to follow the destiny of the entire world in which liberal democracy prevailed as "the end point of mankind's ideological evolution"[36] after winning victory against communism. Expected advantages included, foremost, peace and security and, then, the emergence of an environment conducive to socio-economic development. The AU Constitutive Act reiterates this by providing that the scourge of conflicts constitutes "a major impediment to the socio-economic development of the continent"[37] and that there is a need "to promote peace, security and stability as a prerequisite for the implementation of development and integration agenda".[38] More recently, in December 2021, the PSC underscored "the need for an integrated, inclusive and comprehensive approach in addressing the peace, security and development nexus in order to mitigate against the perpetuation of violent conflicts and the resulting societal fragmentation, destruction of vital infrastructure, state collapse and socio-economic decline".[39] The strategy that has been used to achieve the goals of the African democratic project ranges from the organization of national conferences, the adoption of new constitutions and/or revision of the previous ones, to transitional governments and elections in order to put in place new political orders.[40]

However, based on facts observed on the ground, constitutional crises have never ceased to occur in Africa and their number seems to have increased in recent years. Constitutions and particularly presidential term limits are not complied with.[41] In 2009, the

tional Conference on 'Two Decades of Democracy and Governance in Africa: Lessons Learned, Challenges and Prospects', organised by the United Nations Economic Commission for Africa (UNECA), Addis Ababa, The Council for the Development of Social Science Research in Africa (CODESRIA), Dakar, and John Hopkins University, Washington, D.C., Dakar, Senegal, 20–22 June 2011.

35 *Joël Baraka Akilimali* et *Trésor Makunya Muhindo*, 'Avant-propos' in *Joël Baraka Akilimali* et *Trésor Makunya Muhindo* (eds.), L'Etat africain et la crise postcoloniale : repenser 60 ans d'alternance institutionnelle et idéologique sans alternative socio-économique, Paris, 2021, p. 20.

36 *Francis Fukuyama*, The End of History and the Last Man, New York, 1992, p. xi.

37 AU Constitutive Act (11 July 2000), preamble, para. 9.

38 Ibid.

39 PSC/MIN/COMM.1055 (2021), 14 December 2021, para. 1.

40 *Charles Zorgbibe*, La naissance du pluralisme politique en Afrique francophone, in Géopolitique Africaine, n°10, 2003, pp. 295–299; *Boketsu Bosoki W'Elima*, Le bilan de la démocratisation de l'Afrique, master thesis in law, University of Kinshasa, 1994, p. 3.

41 *André Mbata B. Mangu*, Monarchies présidentielles et révisions constitutionnelles : le syndrome du troisième mandat ou d'une présidence à vie dans les États-membres de l'Union africaine, in African Journal of Democracy and Governance 2014, pp. 47–66.

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AU itself deplored "the resurgence of the scourge of coups d'état in Africa".[42] Between 2002 and 2022, at least 21 cases of successful unconstitutional changes of government were recorded: Madagascar (2002 and 2009), CAR (2003 and 2013), Togo (2005), Mauritania (2005 and 2008), Guinea Conakry (2008 and 2021), Niger (2010), Ivory Coast (2010), Mali (2012 and 2021), Guinea Bissau (2012), Egypt (2013), Lesotho (2014), Zimbabwe (2017), Sudan (2019 and 2021), Burkina Faso (twice 2022). This reminds us the past as the statistics provided by the AU Commission show that Africa experienced 186 coups d'état between 1956 and 2001, half of which committed between 1980 and 1990.[43] The continent was also confronted with 26 armed conflicts between 1963 and 2000, causing seven million deaths, three million refugees and 20 million internally displaced persons.[44]

Constitutional crises and their expansion signal that democracy has declined in Africa. The democratic project is widely failing after more than three decades of implementation. There are multiple and cumulative causes to explain this state of affairs.

First, the failure of the 1990s aforementioned strategy for establishing democratic governance in African states. In fact, heads of states and their governments endeavoured to cling to power against the will of their people through changes or revisions (manipulations) of constitutions and fraudulent elections,[45] while the judiciary, of which constitutional courts above all, are weakened and unable to stop their intention to prevent undemocratic change of government. Opposition leaders or the military had no choice than resorting to force to overthrow such illegitimate or authoritarian incumbents. This has been the case of Guinea (Conakry) with the military coup of 5 September 2021 against President *Alpha Condé* who had won a controversial third term on 18 October 2020 after the controversial adoption of a new constitution.[46] Historically, coups d'état and armed conflicts have not spared any part of the continent. The blocking of democratic processes, the need to put an end to authoritarian regimes and the popular quest for better democratic governance are among the justifications often cited. In other words, when the democratic project has not succeeded by peaceful means, it is the quest for democracy itself which explains constitutional crises in Africa.

42 Assembly/AU/Dec.220 (XII), Decision on the Resurgence of the Scourge of Coups d'état in Africa, 12th Ordinary Session of the Assembly of the African Union, Addis-Ababa (Ethiopia), 1–3 February 2009, paras 1–2.

43 AU Commission, Strategic Plan of the African Union Commission -Volume 1: Vision and Mission of the African Union, Addis-Ababa, May 2004, p. 14.

44 Ibid., pp. 14–15.

45 *James Garang Yach*, The decline of democracy and the rise of coup d'états in Sub-Saharan Africa: Reflections and lessons (25 February 2022), <https://africlaw.com/2022/02/25/the-decline-of-democracy-and-the-rise-of-coup-detats-in-sub-saharan-africa-reflections-and-lessons/> (accessed on 26 February 2022).

46 See Constitution of the Republic of Guinea (22 March 2020).

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Second, the fragility of post-colonial African states is pointed out to demonstrate that these states are not adapted to the context, culture and history of the continent.[47] These are young countries created from disbanded pre-colonial political entities (chiefdoms and empires) in which diverse peoples had been arbitrarily gathered without necessarily having a sense of common pacific coexistence. As a consequence, competition between ethnic groups for the control of state power and economic resources rose.[48] In many African countries, heads of state and government rely on their tribes as a strategy to retain their positions and power. In particular, institutions such as armies suffer from a lack of national integration inasmuch as they are often dominated by officers and/or ordinary soldiers of the same region or ethnic group as the heads of state. As demonstrated by *Emile Ouedraogo*, "recruiting the military predominantly from the ethnicity of the president is an all too common practice in Africa. Officers under such a chain of command are more loyal to the president than to the constitution".[49] As a result, Africa reproduces oppressive states which do not comply with fundamental human rights and create more divisions on ethnic or regional bases among their citizens.

The third cause relates to the role of national armed forces in African politics. While there are several legal instruments that require them to remain outside politics and under the control of civilian authorities,[50] the lack of professionalism and their politicization prompt them to be used by incumbents as tools of political oppression. Where the democratic project has been successful, they may perpetrate coups d'état to re-establish former leaders to power, if they do not themselves seize power. The involvement of national armed forces in politics is not new because history and comparative public law show that many African countries are or have been ruled by military leaders (Burundi, Chad, Congo-Brazzaville, DRC, Ghana, Nigeria, Rwanda, Sudan, Uganda, etc.). Yet "once the precedent of a coup has been established, the probability of subsequent coups rises dramatically".[51] Even where the armed forces are professional, they can be encouraged to intervene when political leaders fail to manage and respond to increasing political and socio-economic claims or needs voiced by opposition supporters or the people. These claims and needs are often intertwined with security issues, such as the fight against terrorism, as is the case in several countries in the Sahel (Burkina Faso, Chad, Mali, Mauritania and Niger) where terrorist groups proliferated after the disintegration of Libya and the death of its leader, *Mouammar Kadhafi*, in 2011. In this case, the armed forces intervene presumably in order to put an end

47 *Mbog Bassong*, Les fondements de l'état de droit en Afrique précoloniale, Paris, 2007.

48 *Balingene Kahombo*, La protection des minorités ethniques en République Démocratique du Congo entre rupture et continuité des ordres constitutionnels antérieurs, in Librairie africaine d'études juridiques, vol. 2, 2010, p. 1.

49 *Emile Ouédraogo*, Advancing military professionalism in Africa', Research Paper No.6, The African Center for Strategic Studies, Washington, D.C., 2014, p. 17.

50 See African Charter on Democracy, Elections and Governance, art.14 (1); International Conference on the Great Lakes Region Protocol on Democracy and Good Governance, art. 20 and 21.

51 *Ouédraogo*, note 49, p. 6.

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to crises which a weak or authoritarian regime or leader is unable to solve, and so as to launch again the democratic process in line with the wish of the people. This is not to say that a "democratic coup d'état"[52] is a good way to implement a democratic project but it simply means that the militarization of African politics is a cause of constitutional crises in Africa.

Fourth, it must be reminded that "economic freedom is a necessary condition for political freedom".[53] The fundamental problem of the African democratic project is that it has largely remained political and electoral, leaving no choice to people as to social justice and equitable distribution of wealth.[54] Poverty is an incentive for crises and conflicts and thus one of the "chronic diseases of democracy".[55] It is an existential threat to the implementation of democracy processes in Africa. The reason why governments become unable to provide better living conditions to their citizens through sound and credible socio-economic measures is mainly bad governance and widespread corruption. But there are also geopolitical and structural justifications. It is so the case of wild liberal economic policies imposed on governments and destroying African economies while putting them under the control of foreign entities and companies that do not care much about the quality of life of populations since their aim is to gain money and send their revenues and benefits outside Africa. In this regard, an annual loss of USD 50 to USD 60 billion in illicit flow of capitals originating from Africa has been reported, which is by far more than the international public development aid.[56] Africans have lost control over most of the strategic sectors of their economies, including banks, food industries and natural resources. Over the past three decades, political and electoral democracy has proved unable to change this system of economic exploitation which dehumanizes the entire continent in favour of foreign states and companies. To borrow the words of the United Nations Special Representative for West Africa, *Annadif Khatir Mahamat Saleh*, coups d'état -and constitutional crises in general -often appear to be "the consequence of political practices that are completely out of step with the aspirations of the populations".[57]

52 *Ozan O. Varol*, The Democratic Coup d'Etat, in Harvard International Law Journal, vol. 53, 2012, pp. 292–356.

53 *Claudio Lara Cortès* and *Consuelo Silva Florez*, 'Introduction' in *Claudio Lara Cortès* and *Consuelo Silva Florez* (eds.), Democratic renewal versus neoliberalism: towards empowerment and inclusion, Buenos Aires, 2014, p. 11.

54 *Godwin Onuaha*, Is another transition possible? African transitions to democracy and the limit of praxis, in *Claudio Lara Cortès* and *Consuelo Silva Florez* (eds.), Democratic renewal versus neoliberalism: towards empowerment and inclusion, Buenos Aires, 2014, p. 66.

55 See *Frédéric Worms*, Les maladies chroniques de la démocratie, Paris, 2017.

56 *Ibrahim Assane Mayika*, L'Afrique à l'heure des choix. Manifeste pour des solutions panafricaines, Paris, 2018, pp. 19–20.

57 *United Nations,* 'UN top envoy: Resurgence of coups d'état, consequence of being 'completely out of step' (10 January 2022), <https://news.un.org/en/story/2022/01/1109452> (accessed on 03 April 2022).

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The fifth and last cause of constitutional crises is competition between great powers in Africa. In fact, there are still various zones of influence in the continent where great powers pursue the protection of their own economic, military, security and cultural interests. The remote battle between France and Russia in CAR and Mali illustrates this well. In Mali, the army led by Colonel *Assimi Goïta*, who perpetrated coups d'état against President *Ibrahim Boubacar Keita* on 18 August 2020 and against transition President *Bah N'Daw* on 24 May 2021, does not hide its alliance with Russia and its reluctance to cooperation with France, the former colonial power. In CAR, democratically elected President *Faustin-Arrchange Touadera* faces persistent rumours of coup d'état while he has made Russia a strategic partner in his fight against armed groups in his country.[58] *Emmanuel Macron*, the French President has not failed to state that President *Touadera* has become hostage of the paramilitary group Wagner linked to the Russian interests in Africa.[59] Such a competition is not new but reminds us the history of Africa which demonstrates how big powers interfere in African affairs, overthrow unfavourable governments or simply support regime changes. These are mechanisms of imperialism and neo-colonialism[60] which have a direct negative impact on democracy, peace and security on the continent.

Be that as it may, every constitutional crisis is not a matter of concern to the AU. There are conditions which must be met for such a crisis to fall under the purview of the latter's action.

C. Conditions to Fall under the Jurisdiction of the African Union

Constitutional matters are normally issues of domestic policy which, according to the International Court of Justice (ICJ), falls within states' exclusive jurisdiction.[61] In this regard, every state enjoys constitutional autonomy which confers on it the right to choose and implement freely its constitutional, political, economic and social system without external interference.[62] It is an aspect of the principle of self-determination of each people and state.

58 *Kizzi Asala*, CAR: Government Denounces Ex-President's "Coup d'état Attempt" (20 December 2020), <https://www.africanews.com/2020/12/19/central-african-government-denounces-president-s-coup-d-etat-attempt/> (accessed on 03 April 2022); *Achille Mbog Pibasso*, 'Centrafrique : la Minusca rejette des accusations de tentative de coup d'Etat contre le président Touadéra', (22 February 2022), <https://www.financialafrik.com/2022/02/22/centrafrique-la-minusca-rejette-des-accusations-de-tentative-de-coup-detat-contre-le-president-touadera/> (accessed on 03 April 2022).

59 *Radio France Internationale,* 'Centrafrique : Macron juge le président Touadéra « otage du groupe Wagner »' (31 May 2021), <https://www.rfi.fr/fr/afrique/20210531-centrafrique-macron-juge-le-pr%C3%A9sident-touad%C3%A9ra-otage-du-groupe-wagner> (accessed on 03 April 2022).

60 *Kwame Nkrumah*, Le néo-colonialisme, dernier state de l'impérialisme, Paris, 1965, p. 245.

61 *Military and Paramilitary Activities in und against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986*, para. 258.

62 *Gérad Cahin*, Limitation du pouvoir constituent : le point de vue de l'internationaliste, in Civitas Europa 2014, p. 69.

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However, the principle of constitutional autonomy is relative as states must comply with their international obligations.[63] Many of these obligations are constitutional by nature. They reflect the increasing process of internationalization of constitutional law.[64] Dealing with constitutional crises within a state is another limitation to the constitutional autonomy of every state. Not every crisis does however require an international intervention. In the African context, a constitutional crisis must be serious to fall within the AU jurisdiction. To reach this threshold, it appears from AU legal instruments and policy documents, as well its practice that three main conditions must be fulfilled.

First and foremost, the crisis must lead to the violation of common values and principles for democratic governance. This requirement is in line with the AU objective to "promote democratic principles and institutions, popular participation and good governance",[65] and the duty on member states to respect "democratic principles (…), the rule of law and good governance".[66] In the same vein, the AU Constitutive Act proclaims the "condemnation and rejection of unconstitutional changes of governments"[67] to protect democracy, the will of the peoples and peace. In other words, any case of unconstitutional change of government is a serious constitutional crisis for the AU which warrants its action. The Union must remain on its feet as the watchdog of common values and principles of democratic governance on which its member states have freely agreed.

The second condition for a constitutional crisis to fall under the AU jurisdiction is to cause human rights violations, including attempts to the rights to life, personal dignity, freedom of movement and individual property. This is reminiscent of the 1999 Grand Bay Declaration which emphasizes that human rights violations in Africa are caused, among others, by unconstitutional changes of government.[68] Under the AU Constitutive Act, member states are committed to observe "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities".[69] The AU itself aims to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".[70] But, in observing the situations on the ground, it is clear that human rights violations are often if not always associated with cases of constitutional crises within member states, for example in the context of armed conflicts or popular demonstrations

63 *Military and Paramilitary Activities in und against Nicaragua,* note 61, para. 258.

64 See *Charles Manga Fombad*, 'Internationalization of constitutional law and constitutionalism in Africa', American Journal of Comparative Law, vol. 60 (2), 2012, pp. 439–474.

65 AU Constitutive Act, art. 3 (h).

66 Ibid. art. 4 (m).

67 Ibid. art. 4 (p).

68 CONF/HRA/DECL (I), Declaration and Plan of Action, 1st OAU Ministerial Conference on Human Rights, Grand Bay (Mauritius), 12–16 April 1999, para. 8(p).

69 AU Constitutive Act, art. 4 (o).

70 Ibid. art. 3 (h).

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challenging a head of state who wants to run for a third term in violation of the constitution. This trend was particularly observed in Burundi in 2015 when President *Pierre Nkurunziza* sought to win a third term which was not explicitly authorized by the Constitution but allowed by the Constitutional Court.[71] The AU observed the perpetration of serious human rights violations in the governmental efforts to silence protestors, which led the PSC to threaten Burundi with a coercive military intervention should it not accept the deployment of a peace support operation called the African Prevention and Protection Mission in Burundi (MAPROBU).[72] As the 2003 Kigali Declaration states, the respect for human rights is "indispensable for the maintenance of national, regional and international peace and security"[73] and constitutes "the fundamental bedrock for sustainable development".[74] This approach puts human security in the heart of collective security, which means that peace and security are not only an issue for each state or the continent as a whole, but also a matter of concern to every individual person. According to the AU Non-aggression and Common Defence Pact, the notion of human security must be understood in terms of satisfaction of basic needs of the individual, such as personal and physical security.[75] It also includes "the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development".[76]

The last condition and not the least is fulfilled if a constitutional crisis is regarded as such as a threat to regional peace and security. This condition stems from the broad mandate of the PSC to "decide on any other issue having implications for the maintenance of peace, security and stability on the continent".[77] The Common African Defence and Security Policy (CADSP) is even more explicit when it retains among common African security threats "coup d'états and unconstitutional changes of government; and situations which prevent and undermine the promotion of democratic institutions and structures, including the absence of the rule of law, equitable social order, popular participation and good governance".[78] Put aside unconstitutional changes of governments, the threshold for each

71 Constitutional Court of the Republic of Burundi, Judgment in the matter of the interpretation of the constitution (RCCB303), 04 May 2015, art. 5 (on file with the author).

72 PSC/PR/COMM (DLXV), 17 December 2015, para. 13 (c) (iv).

73 MIN/CONF/HRA/Decl.1(I), Kigali Declaration, The First AU Ministerial Conference on Human Rights in Africa, Kigali (Rwanda), 8 May 2003, preamble, para. 3.

74 Ibid.

75 African Union Non-aggression and Common Defence Pact (31 January 2005), art. 1 (k).

76 Ibid.

77 Protocol Relating the Establishment of the Peace and Security Council of the African Union (9 July 2002), art. 7 (1) (r).

78 Ext/Assembly/AU/1–2/(II), Solemn Declaration on a Common African Defence and Security Policy, 2nd Extraordinary Session of the Assembly of the African Union, Sirte (Libya), 27–28 February 2004, para. 8 (ii) (g).

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case to be regarded as a continental or regional security threat is likely to be determined on a case-by-case basis. In any event, if a constitutional crisis is followed by the plight of internally displaced persons and refugees in neighbouring countries as well as human rights violations, it clearly reaches that threshold to fall under the purview of action of the AU.

Finally, it is not sufficient to know whether the AU is entitled to take action. It is still necessary to clarify how it can deal with the aforementioned threats and which measures it could precisely adopt to this effect.

D. African Union's Means of Action

When a constitutional crisis arises in a member state and if it is serious enough to warrant the undertaking of continental or regional action, the AU intervenes with a view to building peace. Peacebuilding refers to "the means to institutionalize peace, and remove the root causes of conflict".[79] It can include several strategies and operational tools aiming to prevent, manage or settle the case at hand, including conflicts mediation and support to the conclusion of peace and reconciliation agreements, cooperation with Regional Economic Communities (RECs), peace support operations, coercive military interventions, collective sanctions against a state or individuals, post-conflict and development recommendations and even criminal laws.[80] These strategies and tools are used in the efforts to restore the constitutional order which has broken down. It appears as a circular process, that is, promote peace first between different stakeholders, and then restore the constitutional order which, in turn, would prevent further resurgence of constitutional crises from occurring.

In this regard, the AU relies on a range of legal instruments, such as the AU Constitutive Act, the Protocol on the establishment of the PSC, the ACDEG, the Solemn Declaration on a Common African Defence and Security Policy, the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, and the OAU Declaration on the Principles Governing Democratic Elections in Africa. These form the main legal framework, but the AU sought to improve its capacity as new challenges had emerged since 2009: disregards of existing rules, lack of ratification of treaties by member states, post-elections conflicts and crises, among others. Three initiatives can be mentioned here.

The first one relates to post-electoral disputes. The AU Assembly took a decision in 2008 stressing "the need to initiate a collective reflection on the challenges linked to the tension and disputes that often characterize electoral processes in Africa, including the strengthening of African capacity at national, regional and continental levels to observe

79 *Terence McNamee* and *Monde Muyangwa*, 'Introduction', in *Terence McNamee* and *Monde Muyangwa* (eds.), Peacebuilding in Africa: lessons learned for policymakers and practitioners, 2021, p. 7.

80 *McNamee* and *Muyangwa,* note 79, p. 6.

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and monitor elections".[81] This led to the report of the AU Panel of Wise of 2009 "on strengthening the role of the African Union in the prevention, management and resolution of election-related disputes and violent conflicts in Africa". The report particularly proposes the reinforcement of preventive and management measures of post-election conflicts, including the ratification of AU instruments by member states, the timely deployment of election observation missions, electoral assistance and mediation in conflicts.[82] Drawing on both cases of mediation in Kenya and Zimbabwe, the Panel of Wise saw itself as a proactive body that could use strategic interventions to anticipate crises or to solve them.[83]

The second initiative relates to the development of the Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa. The conclusions emphasize, among other things, on cooperation with RECs, the creation and role of the PSC Committee of sanctions to improve their effectiveness, the reinforcement of such sanctions without negative effects on the civil population, and the need to shorten the transitional period of six months to three months provided for to enable perpetrators of unconstitutional changes of governments to restore constitutional order.[84] This development has resulted in the adoption by the AU Assembly of the 2010 Decision "on the prevention of unconstitutional changes of government and strengthening the capacity of the African Union to manage such situations". Regarding sanctions, the decision provides that:

> *(...) in addition to the suspension of the country concerned, the following measures shall apply: a. non-participation of the perpetrators of the unconstitutional change in the elections held to restore constitutional order; b. implementation of sanctions against any Member State that is proved to have instigated or supported an unconstitutional change in another State; c. implementation by the Assembly of other sanctions, including punitive economic sanctions.*[85]

81 Assembly/UA/Dec.187 (X), Decision on the situation in Kenya following the presidential elections of 27 December 2007, 9th ordinary session of the AU Assembly, Addis Ababa (Ethiopia), 31 January – 2 February 2008, para. 8.

82 *AU Assembly,* Report of the panel of the wise on strengthening the role of the African Union in the prevention, management and resolution of election-related disputes and violent conflicts in Africa (Assembly/AU/6(XIII) Annex II, Addis Ababa, 1st -3rd July 2009, paras. 91–104.

83 *AU Assembly,* note 82, paras. 102–104.

84 *AU Commission,* Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa, Ezulwini (Kingdom of Swaziland), 17–19 December 2009, point II.

85 Assembly/AU/Dec.269(XIV) Rev.1, Decision on the prevention of unconstitutional changes of government and strengthening the capacity of the African Union to manage such situations, 14th ordinary session of the AU Assembly, Addis Ababa (Ethiopia), 31 January -2 February 2010, para. 6 (i) (b).

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These sanctions are also provided for in the ACDEG.[86] However, an expected positive impact of AU Assembly's decision is to be binding on all member states as to the measures to be taken even if they have not yet ratified the aforementioned Charter in accordance with their constitutional procedures.

The third and last initiative is the revival of the cooperation between RECs and the AU in dealing with peace and security issues, and in particular constitutional crises, in Africa. It is a reminder that the institutional system of action and reaction against such crises is multi-level and this system forms the African peace and security architecture (APSA) pursuant the 2002 Protocol establishing the PSC.[87] The question is however how this cooperation with RECs and regional mechanisms of conflict prevention, management and resolution can be framed to enhance their efficacy. This is among the issues under debate in the process of the AU institutional reform. But, based on the current legal instruments and the AU practice, the APSA operates on the basis of the principle of complementarity. It means that even if the PSC is regarded as the organ which assumes the primary responsibility in the maintenance of peace and security on the continent,[88] it must be complemented by the jurisdiction of RECs or Regional Mechanisms (RMs) which have comparative advantages to deal with the situation, notably owing to their proximity with the affected state and a better understanding of the specificities of the case at hand.[89] This has been seen in the 2008 Zimbabwe case because the AU had preferred to leave the responsibility to solve through mediation the post-election conflict to the Southern African Development Community (SADC).[90] In The Gambia, when President *Yaya Jammeh* attempted to cling to power despite that he had lost the December 2016 presidential elections, the AU left the matter under the jurisdiction of the Economic Community of West African States (ECOWAS).[91]

It remains to be seen, more profoundly, how the AU concretely resorts to these means at its disposal and to which extent they are efficient. Which measures can be chosen in a particular case and under which criteria of selection? What is known, *a priori*, is that some measures are dictated by AU legal instruments themselves. For example, in the event of unconstitutional change of government, the direct consequence is to condemn the case and suspend the participation of the unconstitutional government from the AU activities. In other circumstances, the measures to be adopted will likely depend on the political and

86 African Charter on Democracy, Elections and Governance, arts. 24–26.

87 Protocol relating the establishment of the Peace and Security Council of the African Union, art. 16 (1).

88 Ibid.

89 Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, the REC and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa (2008), article XX (1).

90 *AU Assembly,* note 82, para. 100.

91 *Balingene Kahombo*, 'The Peace and Security Council of the African Union: Rise or Decline of Collective Security in Africa?' KFG Working Paper Series, No.23, Berlin Potsdam Research Group "The International Law: Rise or Decline?", Berlin, December 2018, p. 20.

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diplomatic choice of the AU and its peace and security architecture. It is the aim of papers in this special volume to test this in practice and see how the AU is efficient in preventing, managing and resolving constitutional crises in Africa.

Conclusion

Constitutional crises are one of the root causes of conflicts and lack of peace in Africa. They stem from challenges to domestic constitutional order, when the constitution fails to fulfil its traditional goals of pacifying and harmonizing political struggles for accessing or maintaining power.

The AU takes these crises seriously and has managed to improve its own means to address them properly. This happens so because any case of constitutional crisis implies violations of common democratic values and principles on which member states have agreed and probably human rights violations. Such a crisis can also be regarded as such as a direct threat to regional peace and security under the determination of the AU peace and security architecture.

The means to which the AU can resort are various, but all of them aim to build peace and restore the constitutional order which has broken down. The next papers of this special volume evaluate the AU practice in this regard and draw some perspectives on how it promotes democracy, constitutionalism, peace and security in response to such crises or with a view to eradicating them from the continent.

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