

Countering Constitutional Crises within the African Union Framework: Legality, Legitimacy and Suitability

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Abstract

The key concepts explored in this paper are legality, legitimacy and suitability. The critical question that this paper therefore addresses is whether the legal framework of the AU in addressing constitutional crises on the continent is fit for purpose. The African Peace and Security Architecture (APSA) is meant to prevent, manage and resolve crisis and conflicts on the African continent. It is therefore important to appreciate the APSA legal framework in order to understand how it contributes in dealing with constitutional crises in Africa. The study thus examines the institutions and bodies of the APSA that are mandated to deal with constitutional crises in Africa, and ascertains their specific areas of competence, their decision-making processes and the many challenges they face in addressing constitutional crises in Africa. It was discovered that certain fundamental issues affect the efficacy of the APSA, including i) institutional challenges; ii) overreliance on external funding; iii) overdependence on external actors; iv) the sovereignty syndrome; v) the lagging of the Northern region of the continent; vi) lack of political will; vii) undermining of Africa by Global Powers; viii) lack of rapid military deployment capability; and ix) weaknesses of some Regional Economic Communities (RECs). In order to strengthen the continent's commitment towards countering constitutional crises, the following are recommended: 1) emphasis on decolonial peace; 2) focusing on conflict prevention; 3) commitment and political will on the part of African leaders; and 4) strengthening the African Standby Force (ASF).

Introduction

Africa has had a chequered history in terms of democratic governance ever since the first wave of independence swept the continent in the late 1950s.¹ Military coup d'états and other forms of unconstitutional changes of government have characterized several decades of independence and self-governance.² Through it all, the continental organization that was

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1 *Edmond Keller*, Decolonization, Independence, and the Failure of Politics, Bloomington, 1995, p.161.

2 *Patrick J. McGowan*, African military coup d'état, 1956–2001: frequency, trends and distribution, in *Journal of Modern African Studies* 41 (2003), pp. 339–370.

established to epitomize African unity, good neighbourliness and strength in diversity, the erstwhile Organization of African Unity (OAU)³, remained all but helpless due to the idea and principle of non-interference. This principle of non-interference in the domestic affairs of sovereign States, essentially prevented the OAU from intervening in Member States that were experiencing one form of constitutional crisis or the other.

As a matter of fact, impunity seems to have been the order of the day in the post-independence era as a disturbing trend emerged in Africa. A lot of the continent's leaders allocated all powers of State to themselves, and presided over corrupt and repressive regimes, sometimes in the name of political philosophy and ideology.⁴ The OAU also failed woefully in ensuring accountability of African leaders to their people – a simple reason being that the OAU Assembly itself was comprised of these same oppressive African leaders.⁵ It took the catastrophic events in Rwanda in 1994 to draw the world's attention to the disastrous consequences of unrestrained and unmitigated impunity in Africa.⁶

In the early 2000's, however, the OAU was succeeded by the African Union (AU), thereby ushering in a new era of regional cooperation and responsibility for the happenings on the continent.⁷ But unlike its predecessor, the AU has moved away from non-interference to non-indifference, which has been characterized as the African version of the Responsibility to Protect (R2P) principle.⁸ Thus, the AU has actively intervened and/or supported regional bodies like the Economic Community of West African States (ECOWAS) in intervening whenever there has been a constitutional crisis.⁹

This paper therefore seeks to generally evaluate the efficacy of the legal regime of the AU, with regard to the role of institutions and bodies of the African Peace and Security Architecture (APSA), their responsibilities and powers when it comes to constitutional crises on the African continent. The suitability of the AU's legal framework is thus put in perspective, but also analysed through the lenses of some specific instances of intervention as the circumstances warranting interference may be peculiar and differ from country to country.

3 The OAU was formed in Addis Ababa in 1963 as the umbrella organization of all African States. However, in 2002 it was disbanded and replaced with the African Union.

4 It is important to note that, several newly independent African States adopted socialism and a one-party state as a political model after independence, and this had massive historical consequences. Among such states were Ghana, Kenya, Uganda, Sudan, Benin, Senegal, Ethiopia, Zimbabwe and Tanzania..

5 *Pal Ahluwalia*, Politics and post-colonial theory, African inflections, London 2000, pp. 151–52, 154.

6 See UN S.C. Res. 955 (1994), 8 November 1994.

7 See African Union, 'Overview', <https://au.int/en/overview> (accessed 18 April 2021).

8 *Marina Sharpe*, From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect, in International Refugee Rights Initiative (2017).

9 *David Kode*, The Complexities of Democracy-Building in Conflict-Affected States: The Role of ECOWAS and the African Union in Côte d'Ivoire, International Institute for Democracy and Electoral Assistance (2016), p. 10.

Due to the nature of the research question, this paper adopts a socio-legal approach. This is the preferred approach since the research question involves a review of legal instruments as well as key decisions taken by entities within the AU, and aims to discuss whether these are effective in countering constitutional crises on the continent. Regarding the methodological imperatives of this approach, the paper briefly delves into the historical antecedents of the present legal framework of the AU for context. Understanding the motivations of the past in terms of the OAU and its decisions regarding constitutional crises is essential in appreciating the present AU framework and decisions towards countering contemporary constitutional crises. Beyond this, the study is however generally descriptive in ascertaining if the AU's present legal framework has been really efficacious in dealing with constitutional crises on the continent. By employing the descriptive research method, the paper concludes with postulations and recommendations on the way forward.

The specific data required for the proper analysis of the research question is made up of the legal instruments of the AU, as well as other soft law instruments (decisions, resolutions, reports, etc.) emanating from the AU and its various organs and scholarly books and articles. Ideally, it would have been the preferred approach to collect the primary data i.e. the AU instruments and decisions etc. from the AU Headquarters in Addis Ababa, Ethiopia. Interacting with AU officials whilst collecting the data first hand would have been particularly helpful, due to the fact that questionnaires could have been administered. However, due to COVID-19 restrictions on travel, these materials have been sourced primarily from library research in Ghana and through contacts within the AU.

The key concepts to be explored in this paper are: legality, legitimacy and suitability. Legality refers to the institutions and bodies of the APSA that are legally mandated to deal with constitutional crises in Africa. These include the AU Assembly, the Peace and Security Council (PSC), Regional Mechanisms of Conflict Prevention, Management and Resolution, and other institutions that support decision-making bodies or organs at the continental and regional levels. Legality also raises the question of distribution of competence within the APSA i.e. which organ or body is competent to do what? This concept of legality is thus analysed in respect of the different means of action against constitutional crises in Africa, notably but not limited to: i) intervention; ii) peace support operations; iii) Pan-African sanctions, etc.

Legitimacy on the other hand relates to the procedure of decision-making. It is imperative that procedures outlined in the various relevant instruments intended to counter constitutional crisis is respected by all, otherwise any such counter action may lose its legitimacy. This is because Member States may be divided and contestations may negatively affect the implementation of decisions taken or adopted. In this regard, this paper makes a distinction between procedural modalities external to decision-making bodies or organs (for example, UN Security Council authorisation in case of coercive action; consent of the Member State concerned by the decision to be taken); and procedural modalities internal to decision-making bodies or organs (for example, how are these seized of the matter; the organisation of the vote of decisions, including the potential participation of the state

concerned in the discussion and vote). It is however important to note that legality and legitimacy are intertwined, and thus will be treated together.

Finally, the suitability or practicability issue is a reference to the many different challenges that face the AU in addressing constitutional crises in Africa, notably but not limited to: i) low ability to act pre-emptively and prevent constitutional crises i.e. how the African Governance Architecture (AGA) can contribute to the prevention of constitutional crises in Africa; ii) how to ensure cooperation of Member States in the execution of decisions taken (diplomatic support, support to illegal governments or complicity with, low participation in peace support missions or interventions; etc.); iii) funding problems; iv) collision with geopolitical agenda such as in Burundi, Mali and Chad. Each identified challenge that affects the suitability or practicability and efficacy of the AU framework will be analysed.

In order to appropriately discuss with the aforementioned concepts within the context of the African Union, Section A briefly outlines the African Union's legal framework for dealing with constitutional crises. Section B of the paper then focuses on the concepts of legality and legitimacy. Section C zooms in on the concept of suitability, and then the paper concludes with some recommendations on the way forward in dealing with constitutional crises within the African context.

A. Analysing the African Union's Legal Framework for Dealing with Constitutional Crises

Africa has experienced many successful coups d'état since 1956.¹⁰ The majority of these coups have been provoked by a number of factors, including, but not limited to, national power contestations. In a majority of such incidents, the OAU and later the AU have intervened in one way or the other, in the face of allegations of violations of the sovereignty of some of these States by virtue of the intervention to restore calm and political stability. The rampancy of coup d'états in Africa in the 1990s prompted African leaders to take action at the continental level, in order to end a tradition whereby all those who managed to seize power through brute force were recognized as legitimate rulers of their respective countries.

The APSA is thus meant to prevent, manage and resolve crises and conflicts on the African continent. It is therefore important to appreciate the APSA legal framework in order to understand how it contributes in dealing with constitutional crises in Africa. The Protocol establishing the PSC is recognized as one of the main pillars of the APSA, although there are other supporting institutions and programs, including the AU Assembly, the AU Commission, the Panel of the Wise (POW), the Continental Early Warning System (CEWS), the African Standby Force (ASF) and a Special Fund.¹¹ The focus of this paper

10 *Solomon Ayele Dersso*, Unconstitutional Changes of Government and Unconstitutional Practices in Africa, African Politics, African Peace, 2016, Paper 2.

11 See Protocol relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002).

will thus be to examine the institutions and bodies of the APSA that are mandated to deal with constitutional crises in Africa, and ascertain their specific areas of competence, their decision-making processes and the many challenges they face in addressing constitutional crises in Africa.

B. Legality and Legitimacy

Legality and Legitimacy are at the heart of any system or framework that seeks to preserve and protect the sanctity of a constitutional order one way or the other. Without these distinct but inter-related concepts forming the bedrock from which actions are taken in any constitutional order, there would be no basis for such actions in the first place. This section of the paper throws more light on the legal and regulatory framework that enables the African Union tackle constitutional crises on the continent.

I. Assembly of Heads of State and Government

The AU Constitutive Act establishes several organs through which the Union acts.¹² Among these organs is the AU Assembly. Article 6 of the Constitutive Act provides that the Assembly shall be composed of Heads of States and Government or their duly accredited representatives.¹³ Most importantly, Article 6(2) states categorically that “The Assembly shall be the supreme organ of the Union.” Heads of State and Government are to meet at least once a year in an ordinary session, but extraordinary sessions may be convened as and when the need arises.¹⁴

The functions of the Assembly are set out in Article 9 (1) of the Constitutive Act, which provides as follows:

The functions of the Assembly shall be to: a) determine the common policies of the Union; b) receive, consider and take decisions on reports and recommendations from the other organs of the Union; c) consider requests for Membership of the Union; d) establish any organ of the Union; e) monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States; f) adopt the budget of the Union; g) give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace; h) appoint and terminate the appointment of the judges of the Court of Justice; i) appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.

12 AU Constitutive Act (11 July 2000), article 5.

13 Ibid., article 6(1).

14 Ibid., article 6(3).

The Assembly therefore has been vested with the supervisory power or authority to manage conflict situations and other emergencies, including constitutional crises, albeit acting through the Executive Council.¹⁵ This is pursuant to the fact that the Assembly may delegate any of its powers and functions to any other organ of the AU.¹⁶ The AU Constitutive Act further provides that the AU Assembly can impose sanctions on any Member State that fails to comply with the AU's decisions and policies which includes the protection of the constitutional order of States.¹⁷ The sanctions include denial of transport and communication links with other Member States as well as other political and/or economic measures that the Assembly may determine.¹⁸

But at what point can the AU intervene in a Member State when there is a constitutional crisis? *Dan Kuwali* asserts that:

Conceivably, the legitimacy of the AU right to intervention will depend on how the AU answers the question as to when and how it should intervene in a member state. ... Indeed, the framers of the AU Act recognised that the AU's R2P could lawfully override entrenched norms regarding domestic jurisdiction. In this sense, the AU can intervene in situations involving violations of human rights based on evolving conceptions of domestic jurisdiction. However, a question that still has to be answered is when the AU can intervene, in view of the fact that the threshold for intervention, namely war crimes, genocide and crimes against humanity, is still the subject of international debate.¹⁹

Kuwali is not entirely wrong. As a matter of fact, one of the fundamental principles enshrined in the AU Constitutive Act is the principle of non-interference by any Member State in the domestic affairs of another.²⁰ However, article 4(h) of the Constitutive Act mandates the AU "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."²¹ The basis upon which the AU may intervene seems narrow, especially because article 4(h) contemplates the commission of international crimes as the only justification for intervention. These crimes can be of course committed in the course of a constitutional crisis. But there could be other forms of constitutional crises without them being perpetrated

15 Ibid., article 9(1)g).

16 Ibid., article 9(2).

17 Ibid., article 23(2).

18 Ibid.

19 *Dan Kuwali*, The Conundrum of conditions for intervention under article 4(h) of the African Union Act, in African Security Review 2008, pp. 89–111.

20 AU Constitutive Act, article 4(g).

21 Ibid., article 4(h).

that ought to warrant intervention ordinarily, like the mere unconstitutional overthrow of a government for instance.²²

The AU seems to be cognizant of this fact and thus, since 2003, there has been the introduction of the Protocol on Amendments to the AU Constitutive Act, which seeks to, *inter alia*, broaden the scope of article 4(h), by providing the AU with the power to not only intervene in member states in respect of international crimes, but also when there is “a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council.”²³

Despite it being unconstitutionally overthrown, the legitimate government keeps another option to request the AU intervention in order to restore peace and security which is the right of each member state pursuant to article 4 (j) of the AU Constitutive Act. In this case, the consent of the unconstitutional government is not required because it is not regarded as a government since it does not enjoy regional recognition by the African community of states and peoples. Only can other member States make such request for the purpose of intervention in another State under the rule of an unconstitutional government. Therefore, such an intervention would have the same potential as is the case of any other intervention which is unilaterally decided and carried out by the AU in its member states.

So how does the Assembly arrive at a decision to intervene in a Member State of the AU? First and foremost, the Assembly is supposed to meet at least once every year in an ordinary session, with the possibility of an extraordinary session at the request of any Member State, once the request is approved by at least two-thirds of all Member States.²⁴ A quorum for any meeting of the Assembly is two-thirds of the total membership of the AU.²⁵ Decisions of the Assembly are generally arrived at by consensus.²⁶ In the situation whereby consensus cannot be reached, two-thirds majority vote of all Member States of the Union will be required on the matter.²⁷ The Constitutive Act however stipulates that on procedural matters, including on questions whether a matter is one of procedure or not, it shall be determined by a simple majority vote.²⁸

Practically speaking, the Assembly has been seen to act somewhat decisively in situations where constitutional crises have been occasioned in member states. For instance,

22 It must also be noted that under Article 4(j) of the AU Constitutive Act, member states have the right to request intervention from the AU in order to restore peace and security.

23 Protocol on Amendments to the Constitutive Act of the African Union (11 July 2003), article 4.

24 Ibid., article 6(3). It suffices to note that in 2004, the AU Assembly resolved to meet in ordinary session twice a year, each year i.e. January and June/July. However, since 2017, the Assembly has resolved to meet in one ordinary summit per year, and extraordinary sessions as and when necessary. In place of the June/July sessions, the Bureau of the Assembly holds coordination meetings with the AU Commission, Regional Economic Communities and other Regional Mechanisms.

25 Ibid., article 7(2).

26 Ibid., article 7(1).

27 Ibid.

28 Ibid.

in 2003, the AU condemned the overthrow of the government of President *Ange-Félix Patassé* in the Central African Republic, and imposed diplomatic sanctions (suspension of membership) on 17 March 2003. In this vein, the Central Organ, the predecessor of the PSC, issued a communiqué in which it:

(...) strongly condemns the coup d'état which took place in Bangui, Central African Republic, on Saturday, 15 March 2003. In this regard, it recalls the total rejection and condemnation by the African Union of all unconstitutional changes of government, in conformity with the decisions and declarations adopted by the Algiers and Lomé Summits of July 1999 and 2000 respectively and the relevant provisions of the Constitutive Act of the African Union.²⁹

With the intervention of the AU, General *François Bozizé* however requested assistance from Chad to restore law and order in Bangui, and some 300 Chadian troops arrived in Bangui beginning on 19 March 2003. An additional 120 Chadian troops later joined the peacekeeping mission. The World Food Programme (WFP) provided humanitarian assistance to displaced individuals beginning in March 2003. The Economic and Monetary Community of Central Africa (CEMAC) heads-of-state (Cameroon, Chad, Congo-Brazzaville, Equatorial Guinea, and Gabon) also condemned the overthrow of President *Ange-Félix Patassé* on 21 March 2003.

The AU notably suspended the Central African Republic from participating in the activities of the Union. These sanctions were in place for more than two (2) years until they were lifted on 27 June 2005.³⁰ In terms of whether the AU sanctions were effective, it seems that the collective efforts of the AU as well as other bodies, including regional and sub-regional bodies, were helpful in returning the Central African Republic back to constitutional order. However, the main perpetrator of the unconstitutional change of government, General *François Bozizé*, was allowed to contest in presidential elections on 8 May 2005, in which he won two-thirds of the vote. Such a situation is untenable, and it is little wonder that the AU's legal regime was subsequently strengthened with the adoption of the African Charter on Democracy, Elections and Governance (ACDEG) in 2007, which provides in Article 25(4) that "the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State."

29 See Communiqué of the ninetieth ordinary session at ambassadorial level of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution (17 March 2003).

30 The New Humanitarian, Central African Republic: AU lifts coup sanctions (27 June 2005), <https://reliefweb.int/report/central-african-republic/central-african-republic-au-lifts-coup-sanctions> (accessed on 16 April 2021).

II. Peace and Security Council

The PSC was created within the AU framework, to deal with cases of unconstitutional changes of government, among other things.³¹ The Protocol relating to the establishment of the PSC specifies that it shall “institute sanctions [in conjunction with the AU Chairperson] whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration”.³² The objectives of the PSC are outlined in article 3 of the Protocol as follows: promote peace, security and stability in Africa; anticipate and prevent conflicts; promote and implement peace-building and post-conflict reconstruction activities; co-ordinate and harmonize efforts in preventing and combatting terrorism; develop a common defence policy for the AU; and promote and encourage democratic practices, good governance, the rule of law and human rights.³³ Given the broad objectives of the PSC, it is undeniable that this body stands at heart of the APSA.

The PSC is composed of fifteen (15) Member States, who are elected by the AU Executive Council of the African Union on the basis of equal rights in such a manner that ten (10) Member States are elected for a two-year term, whereas the remaining five (5) Member States are elected for a three-year term in order to ensure continuity.³⁴ There are no permanent members of the PSC, and the principle of equitable regional representation and rotation is applied when electing the Member States.³⁵ Thus, Central African States have three (3) seats; Eastern African States also have three (3); Northern African States have two (2) seats; Southern African States have three (3) seats; and Western African States have four (4) seats. Presently, the PSC comprises the following Member States: Algeria, Benin, Burundi, Cameroon, Chad, Djibouti, Egypt, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Nigeria and Senegal.

Article 6 of the Protocol establishing the PSC outlines its functions, which include the promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peace support operations and intervention; as well as peace-building and post-conflict reconstruction.³⁶ The specific powers of the PSC are also provided for in article 7 of the Protocol establishing the PSC.

It is however important to note that the ACDEG provides for a description of a breach of the constitutional order in the exercise of power. Accordingly, the PSC which is mandated to make decisions for the prevention, management and resolution of conflicts has the responsibility to maintain the constitutional order in response to a situation where the democratic political institutional arrangements or the legitimate exercise of power is affect-

³¹ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, article 7(1)(g).

³² *Ibid.*

³³ *Ibid.*, article 3.

³⁴ *Ibid.*, article 5(1).

³⁵ *Ibid.*, article 5(2).

³⁶ *Ibid.*, article 6.

ed.³⁷ This must however be done pursuant to the provisions of the Protocol establishing the AU PSC.³⁸

Similarly, the AU Assembly and the PSC also determine the appropriate sanctions against member states in situations that violate the ACDEG.³⁹ As part of the sanctions regime, the PSC may suspend a State from exercising its rights to participate in the Union's activities although this does not affect the State's obligations towards the Union.⁴⁰ However, the PSC in the case of the Central African Republic after having initially suspended the country for the unconstitutional overthrow of its government in March 2003, noted subsequently as follows:

In view of March 2005 elections which formalized the return of constitutional order, the suspension of the Central African Republic which followed the coup d'état of 15 March 2003 should now be lifted ... In addition, the African Union should support the efforts being deployed to mobilize the international community to provide to the Central African Republic much-needed assistance for its socio-economic recovery.⁴¹

III. African Union Commission

The AU Commission is established by virtue of article 20 of the Constitutive Act, and serves as the Secretariat of the Union. It is composed of a chairperson, deputy or deputies and commissioners.⁴² It is however the Assembly of Heads of State and Government that determine the structure, functions and regulations of the Commission.⁴³ The Assembly thus elects the chairperson and deputy chairperson, whereas the Executive Council elects the six commissioners, who are appointed by the Assembly. In terms of functions of the commission, it represents the AU and defends its interests under the guidance of the Assembly and the Executive Council. Similarly, it initiates proposals to be submitted to other organs of the AU and serves as the official custodian and repository of the Constitutive Act and other AU legal instruments.

37 African Charter on Democracy, Elections and Governance (30 January 2007). This article provides as follows: "When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, hereinafter referred to as the Protocol."

38 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, article 7(1)(f) and (g).

39 African Charter on Democracy, Elections and Governance, article 46.

40 *Ibid.*, articles 25(1) and (2).

41 The New Humanitarian, note 30.

42 Constitutive Act of the African Union, Article 20(2).

43 *Ibid.*, article 20(3).

The commission also monitors the AU's performance, supports the other organs as well as states in implementing AU programmes and manages the budget and resources of the Union. It also coordinates and harmonizes the AU's programmes and policies with those of the Regional Economic Communities (RECs) and ensures gender mainstreaming in all AU programmes and activities. Interestingly, the commission also has the mandate to ensure the implementation of the ACDEG, including commitments relating to maintaining the constitutional order.

IV. Panel of the Wise

The POW is established pursuant to article 11 of the Protocol relating to the establishment of the PSC. The main purpose for its establishment is to support the efforts of the PSC and the AU Commission in the area of conflict prevention.⁴⁴ This Panel is made up of five (5) highly respected African personalities who have distinguished themselves in their various fields of endeavour, especially in relation to peace, security and development of the continent.⁴⁵ Regional representation is critical in the determination of the members of this Panel. Thus, the five geographical regions of Africa have one representative each, i.e. Central Africa, Northern Africa, Eastern Africa, Western Africa and Southern Africa. It is thus the responsibility of the POW to "advise the Peace and Security Council and the Chairperson of the Commission on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa."⁴⁶

The PSC or the Chairperson of the AU Commission may also request the POW to undertake any action deemed appropriate to support the efforts of the aforementioned bodies for the prevention of conflicts.⁴⁷ The Panel may also do this on their own initiative, and may "pronounce itself on issues relating to the promotion and maintenance of peace, security and stability in Africa."⁴⁸ The Panel reports to the PSC directly on its activities, and also reports to the AU Assembly through the PSC.⁴⁹ The modalities in terms of the functioning of the Panel is worked out by the Chairperson of the AU Commission and approved by the PSC.⁵⁰ Below is the current composition of the POW and the regions within Africa its members represent in 2022.

44 Protocol Relating to the Establishment of the Peace and Security Council of the AU, article 11(1).

45 Ibid., article 11(2). These five individuals are selected by the chairperson of the AU Commission after consultation with member states, on the basis of regional representation, and they are subsequently appointed by the Assembly of Heads of State and Government to serve a period of three (3) years.

46 Ibid., article 11(3).

47 Ibid., article 11(4).

48 Ibid.

49 Ibid., article 11(5).

50 Ibid., article 11(7).

Name	Region
1. H.E. Domitien Ndayizeye	Central Africa
2. H.E. Amre Moussa	Northern Africa
3. Hon. Lady Justice Effie Owuor	Eastern Africa
4. Professor Babacar Kante	Western Africa
5. H.E. Phumzile Mlambo-Ngcuka	Southern Africa

V. Continental Early Warning System

The CEWS is established in order to facilitate the anticipation and prevention of conflicts in Africa.⁵¹ The CEWS consists of an observation and monitoring centre, known as The Situation Room and observation and monitoring units of the various regional mechanisms.⁵² Article 12(3) of the PSC Protocol further provides that “The Commission shall also collaborate with the United nations, its agencies, other relevant international organizations, research centers, academic institutions and NGOs, to facilitate the effective functioning of the Early Warning System.”

An early warning module has been developed and is based on well-defined and acceptable political, economic, social, military and humanitarian indicators, used to analyse developments within the continent for the purposes of recommending the most appropriate course of action in every situation.⁵³ The Chairperson of the AU Commission is required to use the information gathered through the CEWS timeously to advise the PSC on potential conflicts and threats to peace and security in Africa, whilst recommending the best course of action in each situation.⁵⁴

VI. African Standby Force

The ASF has been established to enable the PSC and the AU Assembly perform their role in respect of the deployment of peace support missions and interventions.⁵⁵ This Force comprises “standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice.”⁵⁶ The mandate of the ASF thus includes: observation and monitoring missions; peace support missions; intervention in a member state where the need arises; preventive deployment;

51 Ibid., article 12(1).

52 Ibid., article 12(2).

53 Ibid., article 12(4).

54 Ibid., article 12(5).

55 Ibid., article 13(1).

56 Ibid.

peace-building; humanitarian assistance; and any other functions as may be mandated by the PSC or the AU Assembly.⁵⁷

VII. Peace Fund

Article 21 of the Protocol relating to the establishment of the PSC provides for the establishment of a Peace Fund. This is to provide the necessary financial resources for peace support missions and other operational activities related to peace and security.⁵⁸ The fund itself is made up of financial appropriations from the regular budget of the AU.⁵⁹ There is also a revolving Trust Fund established within the Peace Fund.⁶⁰

VIII. Regional Economic Communities/Regional Mechanisms for Conflict Prevention, Management and Resolution

RECs are basically groupings of African States that have been established to ensure and facilitate integration within the specific African region. On their part, Regional Mechanisms (RMs) for Conflict Prevention, Management and Resolution are established between African States with the purpose of ensuring peace and security within that specific region. RECs/RMs therefore play a pivotal role within the APSA. This is due to the fact that these communities and mechanisms are much closer to the areas where constitutional crises may occur on the continent, and are thus able to deal with such situations in a timeous manner. Several examples of how RECs have dealt with regional situations abound. The situation in Niger in 2009, exemplifies this quite succinctly.

Article 36 of the Niger Constitution of 9 August 1999 limited presidential term limits to two five-year periods. *Mamadou Tandja* was elected in 1999, and in 2004; therefore, *Tandja*'s period in office was due to end on 22 December 2009. *Tandja*, through a referendum on 4 August 2009, removed the presidential term limits from the Constitution and extended his period in office for an additional three years. Niger's constitutional court declared that these modifications violated the 1999 Constitution. After the court decision, on 26 May 2009, *Tandja* dissolved Parliament and assumed emergency powers under Article 53 of the Constitution. Three days later, he dissolved the constitutional court. His actions led to national and international protests and to a constitutional crisis within the country.

ECOWAS found that the situation was unconstitutional and imposed sanctions, refusing “to support candidates presented by the Member State concerned for elective posts in the international organizations” and refusing “to organize ECOWAS meetings in the Member State concerned.” ECOWAS also threatened to suspend Niger from all ECOWAS decision

57 Ibid., article 13(3).

58 Ibid., article 21(1).

59 Ibid., article 21(2).

60 Ibid., article 21(4).

making bodies and to refer the matter to the AU for similar action, unless the nation indefinitely suspended a planned legislative election scheduled for 20 October 2009, and continued the political dialogue with other leading political parties on resolving the political crisis. The PSC endorsed the ECOWAS decision on 29 October 2009, but it did not threaten specific action or suspend Niger's membership. Instead, the Council requested that the Chairperson of the AU Commission work closely with ECOWAS for a speedy and consensual resolution of the crisis and the democratic functioning of Niger's institutions.

On 18 February 2010, a military coup led by *Salou Djibo* ousted *Tandja* from office. The junta seized the President and ministers, suspended the Constitution, and stated that "the days of autocratic regimes in this country are over" and that its only goal was to "accompany the return to democracy in our dear homeland".⁶¹ The regime received support from the population and opposition leaders, shown through two days of demonstrations and a rally in Niamey on 20 February 2010. It is important to note that Niger deposited its instrument of ratification of the PSC Protocol in August 2003. Although the Council did not take any action following *Tandja*'s violation of the constitutionally mandated term limit, it immediately condemned the coup and suspended Niger from all AU activities until the country returned to constitutional order as it existed before the referendum.

In requiring a return to the pre-referendum period, the Council implicitly recognized the illegality of *Tandja*'s actions. The Council's stance reinforced the 2009 December mediation between the Nigerien stakeholders, which was led by ECOWAS and supported by the AU. As a result, in May 2010, the coup leaders announced a transition timetable to achieve civilian rule by 18 February 2011, as well as elections from which the military would be barred. The coup might have however paved the way for the democratic elections that were postponed by *Tandja*'s illegal act.

Thus, in the case of Niger, the PSC condemned a coup that might have advanced democracy. This is somewhat problematic when the incumbent displaced by the coup was undermining democratic institutions. That said, the AU's policy has the democratic merit of forcing the junta to promise to hold democratic elections, in which they will not participate. And this is a clear example where a REC has played a crucial role in a situation of constitutional crisis in one of its member states, in close collaboration with the other bodies within the APSA.

C. Suitability

Any action or step taken towards countering constitutional crises may be legal and legitimate, as it may be provided for within the broad legal and regulatory framework. But the question that remains is whether such actions, albeit legal and legitimate, are suitable? This

61 See Aljazeera News, 'Niger transition government named: Coup leaders name 5 soldiers to 20-member provisional cabinet' (1 March 2010) <https://www.aljazeera.com/news/2010/3/1/niger-transitional-government-named> (accessed on 25 November 2022).

section of the paper explores the suitability of the means of countering constitutional crises in Africa from different perspectives.

I. Institutional Challenges

The implementation of the peace and security agenda is severely affected by the inadequate institutional capacity of the AU.⁶² The AU does not have the capacity to organize, run or finance a Peace Support Operation (PSO) deployment.⁶³ The onus of financing, logistical support, and sustaining such a mission has been left to the UN and lead nations, such as South Africa in the case of the African Union Mission in Burundi (AMIB).⁶⁴

The AU Commission has lacked the staff and the experience to plan and conduct missions, and also has suffered from a confusing array of donor capacity-building assistance packages and schemes.⁶⁵ The PSC has devoted relatively little attention to the prevention of conflict or to structural issues that encourage bad governance.⁶⁶ In its modus operandi, the PSC has been reactive rather than proactive in responding to conflicts on the continent.⁶⁷ Challenges of the CEWS include weak link between early warning and early response by decision makers, inadequate gathering of relevant data due to ever-changing nature of conflict dynamics, low connectivity between the CEWS and the regional early warning systems.⁶⁸

The AU has very limited peace mission planning, deployment, and operation capabilities.⁶⁹ This is complicated by the fact that the AU does not have a unit for lessons learned.⁷⁰ There is also no effective process for evaluating the operation while the mission is in process or after it is completed.⁷¹ Furthermore, the AU does not debrief the personnel returning from missions and has no institutional memory on the PSO it has been involved in.⁷² Even the framework for establishing the ASF does not recommend end-of-mission assessment; exit interviews, debriefing and mid-mission assessments; a PSO documentation centre; and archives.⁷³

62 *Samuel Makinda and Wafula Okumu, The African Union Challenges of Globalization, Security, and Governance*, New York, 2008, p. 90.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*, p. 93.

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

II. Overreliance in External Funding

Funds for the operationalization of APSA are overwhelmingly provided by the international community, with the EU being the primary contributor.⁷⁴ Of these funds, 50% go towards ASF.⁷⁵

The riskiness of having the funding of APSA relying on international donors to such a large extent is a problem which the AU is very much aware and has been doing what it can to get this message across to AU members.⁷⁶ The dependence is partly explained by dependence theory, according to which the world trading system tends to keep most developing states in a condition of economic and political bondage, resulting in a neo-imperial and neo-colonial relationship between rich and poor countries. Thus, the autonomy of the African states has increasingly been eroded by the international community including through prescriptions made to national budgetary and policy processes in states that receive donor funds.

There is no doubt that aid affects the policy autonomy of aid-recipient countries. Given the limited financial resources of African states, the role of the national government has become necessarily limited to accepting ready-made policy packages prepared elsewhere or already agreed upon by the main donors. Donor funding has been critical not only in the establishment and operationalization of the ASF, but also generally in financing AU-originated peacekeeping and peace support missions.

The lack of African financial independence has been lamented perennially. According to *Siphamandla*, “the reliance on former colonial powers and other external forces for financial and technical resources seriously undermine the AU’s peacebuilding”.⁷⁷ According to the author, this over-reliance and dependence on funding from external sources essentially “defeats the very purpose of the AU approach”.⁷⁸ *Makinda* and *Okumu* argues that the AU’s over-reliance on international peace partners, particularly the G7 countries, threatens to hinder its development into an independent organization.⁷⁹ It seems as though that despite the rhetoric about self-pacification, the AU security architecture is almost entirely dependent on outside funding, which enables outsiders to shape Africa’s security agenda, a view shared by the present author as well.⁸⁰

74 Adriana Lins de Albuquerque, The African Peace and Security Architecture (APSA) – Discussing the Remaining Challenges (2016) <https://observatoire-boutros-ghali.org/sites/default/files/APSA.pdf> (accessed on 27 March 2021).

75 Ibid.

76 Ibid., p. 30.

77 Siphamandla Zondi, African Union Approaches to Peacebuilding – Efforts at Shifting the Continent towards Decolonial Peace, in African Journal on Conflict Resolution 17 (2017), p. 125.

78 Ibid.

79 Makinda and Okumu, note 62, p. 92.

80 Ibid., p. 93.

According to *Isiaka*, this problem is caused by the developing nature of the African economy and the lack of commitment of African leaders to the AU.⁸¹ As a result, the organisation has had to rely extensively on external donors to fund its peace operations and the APSA.⁸² This is very dangerous in the sense that such funding is neither predictable nor guaranteed.⁸³ Any withdrawal of these funds or delay in disbursement for whatever reason can seriously hamper efforts towards peace building on the continent. To this end, one can agree with the position that overreliance on funding from outside the African continent creates avenues for donors to interfere with and influence AU decisions on the APSA and its peace operations; thereby making the African ownership of the APSA uncertain.⁸⁴

The lack of adequate internal funds sometimes seems to compel the AU to resort to mediation even in conflicts which require stronger means of intervention, including use of force, such as the cases of Libya and Mali. It is imperative that we begin to find ways of generating funds from within the continent for purposes of paying for African peacekeeping.⁸⁵ If this is not done, the cycle of insecurity and the need for peacekeeping will continue to feed a dependency pattern, which is not healthy for the aspirations of an independent AU working for African peace and security.⁸⁶ Nevertheless, the mandatory assistance and support from the UN apparatus would still be needed in line with the global agenda for peace.⁸⁷

Generally, it is evident that there is considerable progress on Member States compliance with regards to their financial obligations of the Union.⁸⁸ The complexity of modern peacekeeping and conflict prevention means that no single organisation is able on its own to address the challenges involved. The AU is an important partner to the UN in addressing conflict situations in Africa. To date, the EU has been the main funder of AU peace support operations through the African Peace Facility (APF), but there is a need for the AU to move towards more financial autonomy and ownership of its peace and security activities.

81 *Isiaka A. Badmus*, The African Union's Role in Peacekeeping, Building on Lessons Learned from Security Operations, London, 2015, p. 224.

82 *Ibid.*

83 *Ibid.*

84 *Ibid.*

85 *Badmus*, note 81, p. 228.

86 *Ibid.*

87 *Ibid.*

88 African Union, Financing the Union. Towards the Financial Autonomy of the African Union: Status Report – an Update, version four (June 2020), p. 9.

III. Overdependence on External Actors

The AU is a new actor in peacebuilding and thus has not had any tangible successes.⁸⁹ Given the fact that it has been in existence for only two decades or so, and considering the many conflicts that have bedevilled the continent since the AU's establishment, measuring the success or otherwise of the organisation seems to be subjective, especially in light of resource constraints. This is because peacebuilding in Africa is a heavy and costly task that is beyond AU's capacity. Consequently, the AU has been heavily dependent on external actors, such as the UN, EU and Western Powers. However, those powers have generally been reluctant to contribute troops to UN peacekeeping, especially in Africa. They may provide direct assistance to the governments of their former colonies or to regional organisations.⁹⁰

The UN is, undoubtedly, the principal custodian of international peace and security, but a critical examination of its peace operations in dealing with post-Cold War African conflicts revealed many problems (both political and organisational), which accounted for its failures in such conflict contexts as Somalia and Rwanda in the 1990s.⁹¹ These failures reinforced the belief of African leaders that UN peacekeeping was unreliable and could not guarantee African security.⁹²

The weight of politics at the UN as an institution, and at the UN Security Council in particular, delays organisational responses to African security challenges.⁹³ This is particularly so when the strategic interests of the five permanent members (P-5) are not threatened or at stake.⁹⁴ The UN is a very political organisation and the politics (among the P-5 in particular) behind most of the political and security issues in the UN make it difficult for the organisation to make prompt decisions.⁹⁵

The problems with UN peace operations in African conflicts become inflamed because there is a general lack of political will to deal with or resolve some of the internal conflicts, especially those that occur within the context of so-called collapsed states.⁹⁶ Equally, the major powers are generally not interested in sending their troops to UN peace operations in Africa.⁹⁷ This situation is quite surprising because for many years African soldiers have been involved in UN peacekeeping operations in different parts of the world.⁹⁸ It is

89 *Gilbert M. Khadiagala*, The African Union in Peacebuilding in Africa, in *Terence McNamee and Monde Muyangwa* (eds.), *The State of Peacebuilding in Africa: Lessons Learned for Policymakers and Practitioners* 2021, p. 197.

90 *Ibid.*

91 *Badmus*, note 81, pp. 216–217.

92 *Ibid.*, p. 217.

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Badmus*, note 81, p. 217.

97 *Ibid.*

98 *Ibid.*

noteworthy that between 1948 and 2008, African troops participated in 53 out of 63 UN peace operations and troops from Africa accounted for 40 per cent of the peacekeepers deployed worldwide during the same period.⁹⁹ “Peace in Africa must be assured by the exertions of Africans themselves”¹⁰⁰ and not external forces.

IV. Sovereignty Syndrome

Despite the AU’s right to intervene, its member states continue to enjoy their sovereignty. One can observe a trend of “African leaders’ traditional reluctance to cede sovereignty even partially to any higher authority”,¹⁰¹ which suggests that “the AU will need to accord value to the sanctity of borders and the principle of non-interference”.¹⁰² While the AU has made bold moves to construct normative frameworks to strengthen common approaches to African conflicts, these efforts have yet to find critical resonance in contexts marked by the age-old fealty to sovereignty. African countries are sometimes reluctant to invite AU intervention because of clinging too much on sovereignty, example in the Libya crisis after the overthrow of Gadhafi in 2011. Consequently, conflicts escalate rapidly at the expense of innocent civilians.

V. Lagging of the North

While the West, East, Southern and Central African regions have established their forces, the Northern region is still lagging.¹⁰³ The North African Regional Capability (NARC) was created to fill a regional vacuum.¹⁰⁴ However, the Arab Maghreb Union under which NARC would fall was dormant following its establishment in 1989, proved difficult to revitalize because of tensions among member states.¹⁰⁵ The tensions were caused by divergent approaches among the AMU’s member states in resolving the issue of Western Sahara.¹⁰⁶ Thus, there was a need to create a regional mechanism to enable the North African countries to contribute to ASF.¹⁰⁷ Libya played a coordinating role in establishing the NARC,

99 Ibid.

100 Kristina Powell and Thomas Tieku, The African Union’s New Security Agenda: Is Africa Closer to a Pax Pan-Africana?, in *International Journal* 60 (2005), p. 945.

101 Ibid., p. 946.

102 Ibid., pp. 946–947.

103 Kasaija Phillip Apuuli, The AU’s Peace and Security Architecture: The African Standby Force, in Tony Karbo and Timothy Murithi (eds.), *The African Union – Autocracy, Diploma and Peace-building in Africa*, London, New York and Cape Town, 2018, pp. 149–182.

104 Ibid., p. 173.

105 Ibid.

106 Ibid.

107 Ibid.

and at a meeting in Tripoli in 2008 it was agreed to locate an executive secretariat there.¹⁰⁸ A memorandum of understanding on the establishment of the NARC was agreed among the members in 2008.¹⁰⁹ However, the constitutional and legal regulations in some member states, such as Tunisia have delayed its ratification.¹¹⁰ Thus the North African countries have fallen behind in establishing NARC.¹¹¹ The political upheavals that have rocked Libya since 2011 have meant that the country cannot play a meaningful role in the NARC.¹¹² In its assessment on the ASF in 2013, the AU believed that NARC region will not be able to achieve full operational capability due to the significant disruptions that the ASF project suffered because of the Arab Spring and the ongoing uncertainty in Libya, Egypt and other countries in the region.¹¹³

VI. Lack of Political Will

There is an apparent lack of political will on the part of member states to interfere in each other's affairs for protection purpose.¹¹⁴ Furthermore, the absence of a total commitment from the political leaders on the continent to the AU's security management activities, in terms of matching rhetoric with action, has had a negative impact on AU peacekeeping efforts.¹¹⁵ Several research studies have shown that lack of political will is the foundation issue for most of the problems facing the AU in operationalising the APSA and building its peacekeeping capacities.¹¹⁶ African leaders need to be more committed to the AU and the APSA to achieve the objectives of the security architecture.¹¹⁷ To demonstrate full and genuine support for the APSA and AU peace operations, political leaders on the continent must not only provide financial resources, but they should also further contribute meaningfully by ensuring the readiness of the ASF with whatever logistical backup they can provide when it is needed.¹¹⁸

108 Ibid.

109 Ibid.

110 Ibid.

111 Ibid.

112 Ibid.

113 *Apuuli*, note 103, p. 173.

114 *Powell* and *Tieku*, note 100, p. 952.

115 *Badmus*, note 81, p. 224.

116 Ibid.

117 Ibid.

118 Ibid.

VII. Undermining of African Agency by Global Powers

Some global powers through their actions continue to undermine African agency in resolving the peace and security issues on the continent.¹¹⁹ The French in Mali and Côte d'Ivoire and NATO (North Atlantic Treaty Organization) in Libya are clear examples of how the powerful countries in the West as well as Western organisations often thwart the effort of the continental and regional bodies.¹²⁰

The AU however needs to recognize its own shortcomings in the financial and military arena and foster closer relations with NATO to help build the APSA, especially the ASF as it pursues the collective interests of its member states. In addition to strengthening their diplomatic capacities, regular joint exercises and joint military operations would help to build stronger interregional trust between the African military and NATO for future operations in Africa. The AU and NATO should make conscious efforts to improve upon the security governance arrangement between them. APSA norms should guide the AU's engagement with NATO, particularly in relation to consultations, dialogue, and negotiation with NATO. This would ensure mutual respect and allow for the predictability of the actions of these organizations as they seek to promote peace and security in Africa.

In this regard, the signing of the technical agreement on 8 May 2014, which formalized the status of the work of the NATO Military Liaison Office at the AU headquarters, is an important step toward the institutionalization of their relationship. The agreement will likely pave the way for long term cooperation between the AU and NATO on matters related to Africa's peace and security.

VIII. Lack of Rapid Deployment Capability

Resources have been lacking to develop the rapid deployment capability outlined in the ASF scenarios. The rapid deployment capability of the ASF is key to the notion of finding an "African solution to African problems". This is because it is intended to give the AU the military capability to deploy at short notice to prevent war crimes, genocide or crimes against humanity, rather than having to be at the mercy of the international community deciding to take action.

Rapid deployment capability is the critical capability that has been lacking from the ASF to date. This is preventing the ASF from performing the most challenging mission scenarios, namely those including complex multidimensional peacekeeping and interventions. One concrete problem with deploying the ASF is that the regional standby brigades are not in fact comprised of stand-by forces, but of troops pledged by member states from their own national armies and which may be engaged elsewhere at any given time. Thus pledged troops may not necessarily be available on demand.

119 *Kwesi Aning and Fiifi Edu-Afful, African Agency in R2P: Interventions by African Union and ECOWAS in Mali, Côte d'Ivoire, and Libya, in International Studies Review 1 (2016), p. 12.*

120 *Ibid.*

For example, Nigeria provides the vast majority of troops to the ECOWAS Standby Force. Since the majority of the Nigerian military is currently involved in fighting Boko Haram, it is unlikely that Nigeria would be able, or indeed willing, to divert troops to an ECOWAS/ASF mission.¹²¹

Hence, despite troop pledges, ASF troop availability ultimately remains dependent on the national security situation of individual member states and on the political will to divert troops to a particular ASF mission.¹²² The lack of rapid deployment capacity has prevented the AU from declaring the ASF as having reached full operational capability.¹²³

Conclusions and Recommendations

A. More Focus on Conflict Prevention

The AU should invest more efforts in consolidating the normative frameworks and shared values on democratic governance, anticorruption and economic governance, youth and women's inclusion, and transitional justice, and instil a culture of compliance through national, sub-regional and regional instruments. The ECOWAS interventions in several countries to promote democratization and the rule of law such as in The Gambia underscore the fact that strong regional institutions are critical in the internalization of continental and regional norms.

The regional nature of conflicts in the Sahel, the Horn of Africa, and the Great Lakes region points to the importance of investing in conflict prevention and early warning systems. Ultimately, conflict prevention is one of the antidotes to African conflicts.

Sustainable peacebuilding ultimately hinges on national governance systems led by responsible and accountable leaders who are able to initiate and galvanize policies that address the myriad drivers of conflicts, including preventing the relapse into violence.

B. Strong Commitment of African Leaders

The effectiveness of the APSA to guarantee African security is a function of the level of commitment and seriousness of African leaders.¹²⁴ The strong political will of the African leaders to the AU as an organization and their adequate funding of the APSA as well as the logistics they are willing to provide for the security mechanism will go a long way to realize the APSA's grand vision of finding African solutions to African problems.¹²⁵

121 *Lins de Albuquerque*, note 74, p. 18.

122 Ibid.

123 Ibid.

124 *Badmus*, note 81, p. 219.

125 Ibid.

C. Strengthening of the Military Component

The AU in collaboration with the RECs/RMs should make more efforts in strengthening the ASF both logistically and financially. It is important that the ASF includes an aviation brigade.¹²⁶ Its establishment would enhance the capacity of AU peacekeeping missions, especially in their aerial capabilities, as this will address the problems of accessibility in some mission areas such as Darfur where wide expanses in the interior of the continent are largely inaccessible by roads.¹²⁷

126 Ibid., p. 226.

127 Ibid.