The Nexus between Constitutionalism, Peace and Security in the Law and Practice of the African Union

*Trésor Muhindo Makunya**

Abstract

The African Union (AU), which succeeded the Organisation of African Unity (OAU) in 2002, is based on a strong legal and institutional framework that reinforces constitutionalism at national, regional and continental levels. This framework is a response to the failure of the OAU to tame autocratic tendencies within its member states. It cements the organisation's commitment to infuse the ideals, values and norms of constitutionalism into the conduct of domestic affairs and politics. The relevance of the framework stems from its ability, when adhered to by all member states, to prevent constitutional crises, many of which have a negative impact on national, regional and continental peace and security and often hinder the prospect of constitutional democracy. Using examples of AU interventions to stymie constitutional crises in the form of unconstitutional changes of government in the Central African Republic, Burundi and Southern Sudan, this paper highlights the dialectical relationship between constitutionalism, peace and security, which can ensure that AU interventions reinforce, rather than undermine, constitutional ideals. While noting the AU's inability or unwillingness to apply this framework in all the constitutional crises it has been called upon to address, the article concludes that member states and the AU itself need to commit to the ideals of constitutionalism, otherwise the transformative constitutional framework will remain a mere paper tiger.

Introduction

The dawn of constitutionalism in Africa has been generally associated with two momentous responses, at the domestic and regional and/or continental levels, to constitutional crises which had bedevilled the continent since independence. First, the adoption or amendment of African constitutions to align them with ideals of a limited government and human rights protection[1] (domestic constitutionalism). Second, the shift from the Organisation of

* Doctor of Laws (LLD), University of Pretoria (South Africa); Publications Coordinator and Postdoctoral Research Fellow, Centre for Human Rights, Faculty of Law, University of Pretoria; Convening Editor, African Court Law Report and Co-editor, African Human Rights Yearbook; Advocate at the Court of Appeal of Nord-Kivu (Democratic Republic of Congo). E-mail: tresormakunyamuhindo@gmail.com

1 *Charles Manga Fombad*, Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects, in Buffalo Law Review 59 (2011), pp. 1007–1009; *John M. Mbaku*, Constitutionalism and Africa's Agenda 2063: How to Build "The Africa We Want", in Brooklyn Journal of International Law 45 (2020), pp. 581–582; *Kwasi Prempeh*, 'Africa's

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African Unity (OAU) to the African Union (AU) which has enable to develop continental constitutionalism.[2] Reforms that took place as part of what was dubbed the 'fever' of constitutionalism[3] were nothing less than an attempt to tame autocratic tendencies of African leaders through robust constitutional and institutional mechanisms and to enable the state to perform its social functions.[4] Domestic constitutionalism prompted the recognition and protection of fundamental rights and freedoms in African constitutions and ensured that independent and impartial courts are vested with the power to enforce and apply the constitution.[5] Continental constitutionalism advanced the important role of African international organisations in upholding the constitutional order of their member states to prevent constitutional crises and violations of principles of constitutionalism.[6] These crises had had debilitating effects on state institutions and citizens' security and well-being, the effect of some of which spilling beyond national borders, into refugee and related humanitarian crises.[7] Continental constitutionalism further contributed to the shift from a traditional state-focused to a people-centred conception of security[8] based on a growing understanding that challenges to security exceeded merely military threats.[9]

The swift resolution of constitutional crises by the AU remains vital. Conflict, internal strife and mass atrocities some of which are the result of or lead to constitutional crises persist across the African continent although the AU and its member states had committed to silence the guns by 2020 and then 2030.[10] The 2016 African Union Master Roadmap

"Constitutionalism Revival": False Start or New Dawn?' in International Journal of Constitutional Law 5 (2007), p. 471.

2 *Adem K. Abebe* and *Charles Manga Fombad*, The African Union and the Advancement of Democracy: The Problem of Unconstitutional Retention of Governmental Power, in *Charles Manga Fombad* and *Nico Steytler* (eds.), Democracy, Elections, and Constitutionalism in Africa, Oxford, 2021, p. 62.

3 *Charles Manga Fombad*, African Bills of Rights in a Comparative Perspective, in Fundamina – A Journal of Legal History 2011, p. 33.

4 *Babacar Kanté*, Préface : L'Etat africain et la crise postcoloniale, in *Joël Baraka Akilimali* and *Trésor M. Muhindo* (eds.), L'Etat africain et la crise postcoloniale : Repenser 60 ans d'alternance institutionnelle et idéologique sans alternative socioéconomique, Paris, 2021, p. 12.

5 *Prempeh*, note 1, p. 471.

6 *Micha Wiebusch*, The role of regional organisations in the protection of constitutionalism, in International IDEA Discussion Paper 13, 2016, p. 17.

7 *Patricia Daley*, Refugees, Idps and Citizenship Rights: The Perils of Humanitarianism in the African Great Lakes Region, in Third World Quarterly 34 (2013), pp. 893–895.

8 *Thomas K. Tieku*, African Union Promotion of Human Security in Africa, in African Security Review 16 (2007). See also UN General Assembly Resolution 66/290: 'Follow up to paragraph 143 on human security of the 2005 World Summit Outcome' (10 September 2012).

9 *James J. Hentz*, Introduction: African Security in the 21st Century, in *James J. Hentz* (ed.), Routledge Handbook of African Security, London and New York, 2013, pp. 5–6.

10 *Wafula Okumu*, *Asamoah A. Atta* and *Roba D. Sharamo*, Silencing the Guns in Africa by 2020: Achievements, Opportunities and Challenges, Institute for Security Studies Monographs 203, 2020, p. 33.

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of Practical Steps to Silence the Guns in Africa by 2020 was emphatic that the observance of human rights, good governance and democratic principles as well as the lack of consensus among key political actors on the management of public affairs are some of the challenges the continent continues to face.[11] That over 40 United Nations (UN) and AU peacekeeping missions that have been deployed in Africa since 2000[12] underscores the fragile security and political context within which robust constitutional frameworks operate and the likelihood that they are set aside by strong political leaders and armed groups. The recent resurgence of the old ghost of military overthrow of democratically elected presidents in Mali, Guinea and Burkina Faso or the unconstitutional succession to power in Chad are evidence that threats to constitutionalism in Africa are increasingly prevalent within the very states that are, ironically, committed to its precepts. The fact that the AU condemned coups in Guinea, Burkina Faso and Mali yet condoning the dynastic takeover of power in Chad prompts one to question its commitment to implementing its normative tools on constitutionalism.[13] The bleak picture of constitutionalism on the continent could be attributed to the OAU, and AU's indulgence of some of Africa's kleptocratic and megalomaniac leaders, coupled with the AU's inability to effectively serve as a powerhouse of genuine pressure against undemocratic practices. The unconstitutional grip on power through the quest for third presidential terms in breach of constitutional term limits, as witnessed recently in Guinea and Côte d'Ivoire,[14] but also in Burundi, Congo, Rwanda or Uganda illustrates the erosion of the fundamental rights of citizens as well and the integrity and credibility of democratic institutions.

This paper examines, from a legal and practical perspective, the role of the AU in protecting constitutionalism as a catalyst for peace and security in Africa through the resolution of constitutional crises, by reviewing relevant legal instruments and the practice of the AU in selected African countries. The chapter is premised on the assumption that AU efforts to prevent and resolve constitutional crises can potentially enhance constitution-

11 African Union Master Roadmap of Practical Steps to Silence the Guns in Africa by Year 2020 (Lusaka Master Roadmap 2016), p. 7–9, https://au.int/sites/default/files/documents/37996-doc-au_roadmap_silencing_guns_2020.pdf.en_.pdf (accessed on 13 October 2021).

12 *Daniel Hampton*, *Dorina Bekoe* and *Alix Boucher*, 'Le maintien de la paix : un élément primordial pour la stabilité de l'Afrique' 4 October 2017, https://africacenter.org/fr/spotlight/le-maintien-de-la-paix-un-element-primordial-pour-la-stabilite-en-afrique-par-le-centre-detudes-strategiques-sur-lafrique/ (accessed on 13 October 2021).

13 'The AU reneges on its stance against coup d'état', 27 May 2021, in PSC Insights, https://issafrica.org/pscreport/psc-insights/the-au-reneges-on-its-stance-against-coups-detat (accessed 13 October 2021).

14 *David Zounmenou*, 'Third terms for presidents of Côte d'Ivoire and Guinea must be stopped', 30 September 2020, in *ISS Today* https://issafrica.org/iss-today/third-terms-for-presidents-of-cote-divoire-and-guinea-must-be-stopped (accessed on 13 October 2021).

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alism; thus, maintaining peace, security and stability.[15] There is a dialectic relationship between constitutionalism and peace given that one can hardly strive in the absence of the other.[16]

The study draws on examples from the Central African Republic (CAR) peace initiatives, the South Sudan Commission of Inquiry and the Burundi fact-finding mission that were initiated by the African Union[17] in order to test how these initiatives have enhanced constitutionalism, and maintained peace and security.[18] Constitutional crises in the three countries covered in this study have mainly taken the form of unconstitutional changes of government and serious violations of human rights. These crises have exposed the extent to which historical violence, civil wars, political instability and wide-scale human rights violations tend to hinder efforts for the consolidation of constitutionalism, peace, security and stability. The complexity of constitutional crises in CAR, South Sudan and Burundi triggered multiple responses from the international community, in particular the AU, Regional Economic Communities (RECs) and the United Nations (UN). It is hoped that examining the AU efforts to resolve constitutional crises in the three countries can provide important lessons for interventions that the AU continues to conduct elsewhere on the continent.

The rest of this article is structured as follows. Section 2 conceptualises the notion of 'constitutionalism' and suggests that the emergence of the AU and norm-making symbolise the dawn of 'transformative constitutionalism'[19] at the continental level. Section 3 demonstrates, from a historical perspective, how the OAU failed to advance constitutionalism. Section 4 examines the AU framework on constitutionalism, peace and security. Section 5 reviews the AU PSC's response to constitutional crises in CAR, South Sudan and Burundi to uphold constitutionalism. In conclusion, this chapter argues for the need by the AU, RECs and member states to commit to values and ideals of constitutionalism in view of their purported mandate to maintaining lasting peace and security in Africa.

15 *David J. Francis*, Introduction: Understanding the Context of Peace and Conflict in Africa, in *David Francis* (ed.), Peace and Conflict in Africa, London and New York, 2013, p. 5. See the discussion in section 2.1.2 below.

16 See African Union, Agenda 2063: The Africa We Want, 2015, p. 5 (Aspiration 3) https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf (accessed 11 May 2021). See generally *Mbaku,* note 1, pp. 600–601.

17 See Communiqué, PSC/PR/COMM. (DLI) of 17 October 2015, https://www.peaceau.org/uploads/psc.551.burundi.17.10.2015.pdf (accessed on 11 May 2021), and Communiqué, PSC/AHG/COMM.1 (CDXI) Rev. 1, https://www.peaceau.org/uploads/psc-com-411-south-sudan-30-12-2013.pdf of 30 December 2013 (accessed on 11 May 2021).

18 *Solomon Dersso*, The African Union's Agenda on the Protection of Civilians: A Review of Its Ambition and Practice, in *Dan Kuwali* and *Frans Viljoen* (eds.), By all means necessary: Protecting civilians and preventing mass atrocities in Africa, Pretoria, 2017, pp. 394–395.

19 See generally *Karl E. Klare*, Legal Culture and Transformative Constitutionalism, in South African Journal on Human Rights 14 (1998), p. 150.

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This commitment is primarily important because of the intrinsic interlinkages between constitutionalism, peace and security in Africa.

A. Constitutionalism, Peace and Security: An Overview

This section first reviews the meaning and nature of the concept of constitutionalism; and subsequently, the mutually reinforcing relationship between constitutionalism, peace and security. Understanding their complex interrelationships allows for an appreciation of how the AU's intervention in constitutional crises can strengthen constitutionalism, peace and security.

I. Constitutionalism and its Implications for Regional Intergovernmental Organisations

Constitutionalism centres around the idea that limitations are imposed on the exercise of public power, which ought to be exercised within the confines of the constitution to prevent tyranny and anarchy.[20] A regime which abides by ideals of constitutionalism is one where 'limitations are imposed on government when it is based on certain core values; (…) and the ability of citizens to legally compel government to operate within these limitations'.[21] This definition is generally seen as negative constitutionalism.[22] It goes hand in glove with positive constitutionalism which points to the extent to which the constitution establishes a state capable of working for the greater good of its people.[23] Constitutionalism, whether negative or positive, is anathema to despotism, arbitrary exercise of executive, legislative and judicial powers, discrimination against minorities and the tyranny of the majority or minority[24] which it seeks to limit.[25] Only the observance of these limitations may enhance the legitimacy of a government.[26]

It is clear that constitutionalism is more than just the observance of procedural safeguards established in a constitution; it embraces an idea of substantive observance of

20 *Fombad*, note 1, p. 1012.

21 Ibid., p. 1014.

22 *Nicholas William Barber*, The Principles of Constitutionalism, Oxford, 2018, p. 2.

23 *Barber*, note 22, p. 9; *Franciso J. Urbina* and *Clemente Recabarren*, 'I·CONnect – Book Review: Urbina and Recabarren on Barber's "The Principles of Constitutionalism"', <http://www.iconnectblog.com/2020/04/book-review-urbina-and-recabarren-on-barbers-the-principles-of-constitutionalism/> (accessed on 28 April 2021).

24 *Wil Waluchow*, Constitutionalism, in *Edward N. Zalta* (ed.), The Stanford Encyclopedia of Philosophy, Stanford, 2018, https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/ (accessed on 28 April 2021).

25 *André Mbata Mangu*, Constitutionalisme, constitutions, et limitation des pouvoirs et des mandats présidentiels en Afrique in *Frédéric Joël Aivo* (ed.), La constitution béninoise du 11 décembre 1990 : un modèle pour l'Afrique? Mélanges en l'honneur de Maurice Ahanhanzo-Glélé, Paris, 2014, p. 738.

26 *Waluchow*, note 24.

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the (rule of) law, democratic principles, separation of powers and human rights. Scholars generally identify a set of criteria for a constitutional democracy to be considered as embracing ideals of constitutionalism. For example, *Mangu* notes three important features characteristic of constitutionalism, namely, imposed limitations on the government, legitimacy of the constitution acquired when individuals can identify their aspirations and hopes in the constitution and human rights protection.[27] *Fombad* suggests that constitutionalism has six cumulative features, notably the recognition and protection of fundamental rights and freedom, the principle of separation of powers, an independent judiciary, a system of constitutional review of laws, the control of the amendment of the constitution and the entrenchment of independent institutions.[28] Additional features include a robust and strong civil society, democracy and the rule of law.[29] The existence of a constitution or democratic institutions therefore does not necessarily translate into constitutionalism.

Constitutionalism goes beyond its most common Western liberal-democratic understanding.[30] The liberal-democratic notion is often viewed as being indifferent to the necessity for the state to play an active role in addressing historical marginalisation.[31] An additional aspect to the definition of constitutionalism is the aim to empower the state and its organs to use the constitution for transformative purposes where equal opportunities are guaranteed to all and socio-economic rights can be enforced for the benefit of the poor.[32] The latter ascribes to the politico-ethical understanding of constitutionalism as a 'theory prescribing how to (re)constitute a political society'.[33]

Constitutionalism, and transformative constitutionalism in particular, characterise the policy and practice of African international organisations like the AU.[34] International law scholars have debated issues relating to global constitutionalism[35] or the existence

27 *Mangu,* note 25, p. 742.

28 *Fombad,* note 1, p. 1014.

29 *Barber,* note 22, p. 10.

30 *Nico Steytler*, The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts, and Hypothesis, in *Charles M. Fombad* and *Nico Steytler* (eds), Decentralization and Constitutionalism in Africa, Oxford, 2019, p. 28.

31 Ibid.

32 Ibid.

33 *Tshepo Madlingozi*, Social Justice in a Time of Neo-Apartheid Constitutionalism, in Stellenbosch Law Review 28 (2017), pp. 123, 126.

34 See generally *Henry G. Schermers* and *Niels M. Blokker*, International institutional law, Leiden, 2011, pp. 11–14.

35 *Jean-Bernard Auby*, Global constitutionalism and normative hierarchies, in *Martin Belov* (ed.), Global constitutionalism and its challenges to Westphalian constitutional law, 2018, pp. 4–5; *Anne Peters*, 'Global Constitutionalism', The Encyclopedia of Political Thought (American Cancer Society 2014), <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118474396.wbept0421> (accessed on 11 May 2021).

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of an international constitutional order.[36] *Schermers* and *Blokker* argue that international law has developed rules and institutions which perform some constitutional functions.[37] The two authors consider that the United Nations Charter represents the Constitution of the international community.[38] Similar constitutional features can be identified at continental levels. The Organisation of American States and the European Union are generally viewed as representing regional American and European constitutionalism.[39] In the African context, the AU Constitutive Act and several human rights and democracy-treaties have 'internationalised' constitutional law and established a *sui generis* African continental constitutionalism.[40] In this regard, the following observations can be made.

First, since the idea of constitutionalism translates liberal-democratic values most international organisations purport to achieve and defend,[41] the AU organs can be required to adopt a positive and firm stance towards member states that seem not to observe these values. As will be shown,[42] the adoption of international treaties with core elements of constitutionalism within the AU and the establishment of institutions tasked with following upon their implementation are already an indication that the organisation must stand against practices of African states that do not advance constitutionalism. The transformation from the OAU to the AU was not only structural or institutional. It was equally normative and ideological.[43] Post-OAU Pan-Africanism has institutional and normative arrangements aimed at transforming the attitude of the organisation towards its member states, enabling it to swiftly react against violations of individual and collective rights and the encroachment on the constitutional order.[44] Normatively, transformative constitutionalism within the AU aims to enforce, at the continental level, some of the basic features of constitutionalism including the protection and the promotion of human rights and ideals of a limited government and to overcome or complement constitutional shortcomings in its member states.[45]

36 See for example *Bardo Fassbender*, The United Nations Charter as the Constitution of the international community, Leiden and Boston, 2009, pp. 1–3.

37 *Schermers* and *Blokker*, note 34, p.11.

38 Ibid.

39 *Armin von Bogdandy* and others, Ius constitutionale commune en America Latina: A Regional Approach to Transformative Constitutionalism, in *Armin von Bogdandy* and others (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford, 2017, p. 4; *Schermers* and *Blokker,* note 34, pp. 11–12.

40 *Charles Manga Fombad*, Internationalization of Constitutional Law and Constitutionalism in Africa, in The American Journal of Comparative Law 60 (2012), pp. 450–455.

41 *Micha Wiebusch*, The role of regional organisations in the protection of constitutionalism, in International IDEA Discussion Paper, 2016, p. 17.

42 See discussion in section 4 (or point C).

43 *Steytler*, note 30, p. 30.

44 See discussion in section 4 (or point C).

45 *Bogdandy* and others, note 39, p. 4.

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Second, it can be self-defeating to the aim, purpose and mission of the AU if member states adopt domestic legislation, measures and behaviours that contradict the very ideals of constitutionalism deep-rooted in AU legal instruments they have ratified.[46] The same can be said when they do not follow AU decisions and policies implementing these instruments.[47] Through article 7(2) and (3) of the Protocol on the establishment of the AU Peace and Security Council (PSC), member states have empowered the latter to act on their behalf in order to maintain peace and security and commit to abide by its decisions when fulfilling its mandate. Thus, PSC's decisions adopted pursuant to this provisions are legally binding.[48]

Third, as human rights sit at the heart of constitutionalism,[49] both the AU and its member states must ensure their actions do not impede on the exercise of fundamental rights and freedoms. They are required to take steps[50] to prevent impunity which can adversely affect the prospect for peace, security and stability. This aligns with most state obligations under international human rights law to protect individuals against the violation of rights by state agents, non-state actors and investigate when such violations are committed.[51] Values of solidarity and cooperation among states as well as between the AU and states may consequently ensure human rights are upheld both at the domestic and regional levels.[52]

The foregoing demonstrates that the concept of constitutionalism has several attributes which, when used at the domestic, regional and continental levels, may transform practices and behaviours of states and prevent constitutional crises.

II. Constitutionalism, Peace and Security as Mutually Reinforcing

Peace is generally viewed as 'a political condition that ensures justice and social stability through formal and informal institutions, practices, and norms' whilst security is 'a subjective state in which an individual or collectivity feels free from threats, anxiety and

46 *Micha Wiebusch* and *Christina Murray*, Presidential Term Limits and the African Union, in Journal of African Law 63 (2019), pp. 131–132.

47 See for example Article 27 of the 1969 Vienna Convention on the Law of Treaties.

48 These provisions mimic Article 24(1) of the United Nations Charter: "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

49 *Henk Botha*, *Andre J. Van der Walt* and *J.ohan Van der Walt* (eds.), Rights and Democracy: In a Transformative Constitution, Stellenbosch, 2004; *Bogdandy* and others, note 39, p. 4.

50 *Martin Scheinin,* Core rights and obligations, in *Dinah Shelton* (ed.), The Oxford handbook of international human rights law, Oxford, 2013, p. 536.

51 *Dinah Shelton* and *Ariel Gould,* Positive and negative obligations, in *Dinah Shelton* (ed.), The Oxford handbook of international human rights law, Oxford, 2013, p. 566.

52 Constitutive Act of the African Union (2000/2001), Preamble, para 1; in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, Pretoria, 2018, p. 4.

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dangers'.[53] The traditional notion of security places the state at the centre of the security paradigm. Recent developments have shown how, like the state, societies and individuals need the protection from fear and want[54] and a conducive environment for human development.[55] For peace to prevail, a number of elements must be met, including the balance of political power among the various groups within a society, legitimacy of decision makers and implementers, transparency and accountability, reliable and trusted institutions for resolving conflicts, sense of equality and respect and mutual understanding among various groups.[56]

These elements boil down to the need and the respect for the limitations imposed on the exercise of powers and the implementation of constitutional provisions protecting the rights of minorities and ensuring equitable distribution of wealth and resources that can possibly pre-empt the occurrence of constitutional crises. Human security as well as peace can properly flourish when the powers of government are limited by written and accepted rules, exercised within the stricture of the constitution and when citizens can use possibilities offered to them to challenge attempts to break the rules which are the bedrock of peace and stability. Equally, the absence of peace and conflict resolution impedes on the achievement of democratic stability, governance and fails to sustain development.[57]

It stems from the main AU instruments, including the AU Constitutive Act,[58] the Solemn Declaration on a Common African Defence and Security Policy (the Declaration), the Non-Aggression and Common Defence Pact,[59] and the PSC Protocol,[60] that security has three dimensions: traditional state-centric security, human security and African security.[61] As defined in the Declaration, security includes some aspects of Western liberal and transformative constitutionalism.[62]

53 *Ebrima Sall* and *Mary E. King*, A Glossary of Terms and Concepts in Peace and Conflict Studies, University for the Peace, San José, 2005, p. 70.

54 *Solomon A. Dersso*, Promotion of human security in Africa: The role of African human rights institutions, ISS Monograph Series No. 145, 2008, p. 5. See also *Timothy M. Shaw*, Human Security versus National Security in Africa: Developmental versus Failed States among the Rest, in *James J. Hentz* (ed.), Routledge Handbook of African Security, New York, 2013, p. 36.

55 *Sall* and *King,* note 53, p. 71.

56 Ibid., pp. 56–57.

57 *Francis,* note 15*,* p. 9.

58 AU Constitutive Act, articles 3(f), 4(j).

59 African Union Non-Aggression and Common Defence Pact (31 January 2005), article 4(b).

60 Protocol Relating the Establishment of the Peace and Security Council of the African Union (9 July 2002), articles 2 and 3.

61 AU Solemn Declaration on the Common African Defence and Security Policy adopted in Sirte, Great Libyan Arab Jamahariya (February 2004), para 6.

62 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 6.

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The concept of human security identifies security at a personal, community, national and international levels[63] while respect and protection of human rights remain central to the achievement of human security.[64] As a result, the threat to one component of human security affects others. Although the state has the primary obligation to ensure security, the antagonistic relation between states and citizens means that states cannot be trusted enough.[65] International organisations should be entrusted with the mission to intervene in instances of imminent threats to individual and collective security.[66] As the Declaration makes it clear, the new concept of security will aim to safeguard 'the security of individuals, families, communities, and the state/national life in the economic, political and social dimensions'.[67]

A weak and fragile state cannot sufficiently secure the interests of individuals especially those of minorities and vulnerable groups.[68] A poor observance of ideals of constitutionalism may multiply intra-state conflicts.[69] The Declaration provides a list of factors that fuel intra-states conflicts in Africa which generally result from the poor level of commitment and respect for fundamental elements of constitutionalism.[70]

A number of observations may be made at this stage to define the mutually reinforcing and beneficial relationship between constitutionalism, peace and security in Africa. First,

63 *Cheryl Hendricks*, From state security to human security in Southern Africa: Policy research and capacity building, https://issafrica.org/chapter-1-introduction-from-state-security-to-human-security-in-southern-africa-cheryl-hendricks (accessed on 12 May 2021).

64 African Union Non-Aggression and Common Defence Pact, article 1 (k).

65 Ibid.

66 Ibid. See also *Dan Kuwali*, Article 4 (h), the responsibility to protect and the protection of civilians, in *Dan Kuwali* and *Frans Viljoen* (eds.), By all means necessary: Protecting civilians and preventing mass atrocities in Africa, Pretoria, 2017, p. 22.

67 Ext/Assembly/AU/1–2/(II), note 62, para 6.

68 See African Union Commission of Inquiry on South Sudan, 'Final Report of the African Union Commission of Inquiry on South Sudan' (15 October 2014), (The South Sudan Report), http://www.peaceau.org/uploads/auciss.final.report.pdf (accessed 12 May 2021), para 82.

69 See for illustrations African Commission on Human and Peoples' Rights *Communication 266/03: Kevin Mgwanga Gunme* et al. *v Cameroon* paras 181 and others. See generally *Carlson Anyangwe*, The normative power of the right to self-determination under the African Charter and the principle of territorial integrity: Competing values of human dignity and system stability, in African Human Rights Yearbook 2 (2018), pp. 47–71.

70 Ext/Assembly/AU/1–2/(II), note 62, para 8(ii): 'a) the existence of grave circumstances, namely war crimes, genocide and crimes against humanity; b) 'lack of respect of sanctity of life', c) 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', d) improper conduct of electoral processes; e) lack of commitment by the parties to abide by the elections conducted in line with the laws of the country; f) 'absence of the promotion and protection of human and peoples' rights, individual and collective freedoms, equality of opportunity for all, including women, children and ethnic minorities'; g) Poverty and inequitable distribution of natural resources; and corruption; h) Political, religious and ethnic extremism, as well as racism'.

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political insecurity caused by the poor respect of democratic principles and human rights had adversely affected individual security and plunged people into continuous fear on the continent.[71] For example, the quest for third presidential terms by African presidents has had a toll on individual and collective security, causing some people to flee their country.[72] Following the failed *coup d'état* and the quest for a third term by President *Nkurunziza* in Burundi, over 140 000 Burundian fled to the neighbouring Democratic Republic of Congo (DRC), Rwanda and Tanzania in early April 2015.[73] *Joseph Kabila's* unwavering attempts to seek a third presidential term between 2015 and 2018 in DRC led to mass protests, internet shutdowns, political trials and the extrajudicial killings of protestors.[74] During the same period, violence by armed groups escalated.[75] Around 90 individuals lost their lives when demonstrating against President *Alpha Conde's* attempts to seek a third presidential term in October 2020 in Guinea.[76] Quests for presidential third terms are an illustration of how infringing constitutional arrangements can create insecurity and instability. The AU has remained insensitive towards third-term attempts on the continent despite their prevalence and effects on peace, security and stability.[77] As constitutionalism is the bedrock of peace and security, the existence of constitutional provisions limiting the number and duration of presidential terms reassure groups that they have the chance to compete in elections and may hold the legitimate expectation to rule the country.

Second, the ill-management of internal power sharing between majority and minority ethnic groups generally result in civil wars which can adversely impact neighbouring

71 *Charles Manga Fombad*, Presidential Term Limits through Constitutional Amendments in Africa: Deconstructing Legitimacy, in *Grant Masterson* and *Melanie Meirotti* (eds.), Checks and Balances: African Constitutions and Democracy in the 21st Century, Johannesburg, 2017, p. 54. See also *Grace Wakio Kakai*, The role of continental and regional courts in peace-building through judicial resolution of election-related disputes, in African Human Rights Yearbook 4 (2020), p. 348.

72 African Union, Report of the Delegations of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi (7–13 December 2015), (The African Human Rights Commission Report on Burundi), https://www.achpr.org/news/viewdetail?id=198 (accessed 12 May 2021), para 76.

73 Ibid., paras 57 and 76.

74 *Michael Gyan Nyarko* and *Trésor Makunya*, Selected Developments in Human Rights and Democratisation during 2017: Sub-Saharan Africa, in Global Campus Human Rights Journal 2 (2018), pp. 156–157.

75 *Pascal Mulegwa*, RDC : 120 groupes armés identifiés dans l'Est (Rapport), 7 December 2017, https://www.aa.com.tr/fr/afrique/rdc-120-groupes-arm%C3%A9s-identifi%C3%A9s-dans-lest-rapport-/998024 (accessed 12 May 2021); RDC: Inquiet de La Situation Politique et Des Risques d'instabilité, Le Conseil Appelle à Accélérer La Mise En Œuvre de l'accord Du 31 Décembre | Couverture Des Réunions & Communiqués de Presse, <https://www.un.org/press/fr/2017/cs12928.doc.htm> (accessed 12 May 2021).

76 Aljazera News, 'Guinea Opposition Condemns 90 Protest Deaths Ahead of Polls', <https://www.aljazeera.com/news/2020/10/13/guinea-opposition-decries-90-protest-deaths> (accessed 10 May 2021).

77 *Wiebusch* and *Murray* (note 46); *Fombad*, note 71, p. 55.

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countries. The example of the Rwandan Genocide and the mass influx of refugees in DRC in 1994 perfectly illustrate this.[78] Furthermore, Uganda, Burundi and Rwanda waged a war against DRC on the ground that the existence of hostile foreign armed groups on DRC's soil constitutes a permanent threat to their security and stability.[79] In countries with protracted refugee situations, popularly held assumptions that refugees burden host countries threaten peace and stability. Under the AU Non-Aggression and Common Defence Pact, state parties espouse this view.[80]

There are other forms of constitutional crises that can jeopardise peace and security when improperly dealt with. The PSC identifies unconstitutional changes of government and popular uprisings as serious threats to peace and security.[81] In 2019, it called on AU member states to 'further strengthen good governance and accountability, deepen and consolidate democracy and rule of law to enhancing peace, security, and stability' which it affirmed to being at the heart of many conflicts in Africa.[82] The African Commission on Human and Peoples' Rights (African Commission) also noted in its report on Burundi, for instance that impunity of human rights violations aggravated the crisis.[83]

Furthermore, Aspiration four of Agenda 2063 makes the interconnectedness and interdependency between constitutionalism, peace, security and stability in Africa equally unambiguous. It is recognised that proper management of diversity leads to wealth, harmony and social and economic transformation. 'An entrenched and flourishing culture of human rights, democracy, gender equality, inclusion and peace' are among means that can

78 *Daley*, note 7, pp. 893–895.

79 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004 AHRLR 19 (ACHPR 2003) in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, 6. ed., Pretoria University Law Press, 2016, p. 246, para 2. See also International Court of Justice, Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda), 19 December 2005, para 39.

80 The Pact provides as follows: the Heads of State and Government reaffirm 'that appropriate development institutions and promotion of a strong democratic culture through organisation of honest and regular elections, respect for human rights and the rule of law, combating corruption and impunity and formulation of sustainable development policies are vital to collective security, peace and stability'.

81 *Paul-Simon Handy*, *Fonteh Akum* and *Félicité Djilo*, What causes Africa's coups? That is the question, 8 September 2020, https://issafrica.org/iss-today/what-causes-africas-coups-that-is-the-question (accessed 12 May 2021): 'deficiencies in governance. Greed, selfishness, mismanagement of diversity, failure to seize opportunities, marginalisation, human rights violations, unwillingness to accept electoral defeat, manipulation of constitutions and their revision through unconstitutional means to serve narrow interests, and corruption are all major contributors to unconstitutional changes of Governments and popular uprisings.'.

82 African Union Peace and Security Council, 871st meeting, 22 August 2019, Press statement, PSC/PR/BR. (DCCCLXXI), https://www.peaceau.org/uploads/psc.871.press.statement.popular.uprisings.22.08.2019.pdf (accessed 12 May 2021).

83 African Commission on Human and Peoples' Rights Report on Burundi, note 72, para 25.

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achieve aspiration 4.[84] Pertinently, it is recognised that 'a prosperous, integrated and united Africa, based on good governance, democracy, social inclusion and respect for human rights, justice and the rule of law' are the pre-conditions for a peaceful and conflict-free continent.[85] Although the implementation of these aspirations is meeting with challenges,[86] it is clear that the AU has institutions and norms that can enhance its capacity to promote constitutionalism in its member states and mitigate potential threats to peace and security. This was one of the shortcomings of the OAU, as the next section shows.

III. Constitutionalism as the Missing Link between the OAU and its Member States

The OAU was established in a context where the new African ruling elites where ridding themselves of constitutional texts that could hinder their desire to rule uncontrolled. The period between 1960 and 1963 that preceded the advent of the OAU saw an upsurge in the amendment or replacement of independence constitutions in 13 African countries.[87] From 1963 when the OAU started to operate, any signs of constitutionalism and democratic liberalism, whether separation of powers, political pluralism, robust civil society, judicial review or effective and enforceable human rights were lacking in many countries,[88] save perhaps Botswana, Mauritius and The Gambia.[89]

Under the OAU Charter, member states were convinced that to promote mutual understanding, solidarity and cooperation, they needed to establish and maintain 'conditions for peace and security'.[90] However, they adopted a narrower conception of 'security', one which aims to preserve national security and the security of the imperial presidents at the expense of individual or group of individuals. The OAU belief in the advancement of 'human progress' was also doomed since it was meant to be achieved within the Hobbesian

84 African Union, note 16, p. 6.

85 Ibid.

86 First Continental Report on the Implementation of Agenda 2063 (February 2020), pp. 1–3, https://au.int/sites/default/files/documents/38060-doc-agenda_2063_implementation_report_en_web_version.pdf (accessed 12 May 2021). See also African Peer Review Mechanism & African Governance Architecture 'The Africa Governance Report: Promoting African Union Values', p. 51, https://au.int/sites/default/files/documents/36843-doc-aga_report_-_english_-_online.pdf (accessed 12 May 2021).

87 For example, in Ghana of Kwame Nkrumah; see *Trésor Makunya Muhindo* and *Kwadwo Appiagyei-Atua*, Soldiers in civilian uniform: the role of the military in the pursuit of third-termism, in *Romola Adeola* and *Makau wa Mutua* (eds.), Palgrave handbook of African democracy, 2022.

88 *Issa G. Shivji,* Three generations of constitutions in Africa: an overview and assessment in social and economic context, (2003), p. 3, http://repository.udsm.ac.tz:8080/xmlui/bitstream/handle/20.500.11810/2118/Three_Generations_of_Constitutions_in_Af.pdf?sequence=1&isAllowed=y#:~:text=Three%20modes%20are%20identified%3A%20(i,(sovereign)%20conferences%2Fconventions. (accessed on 11 May 2021).

89 *Greg Mills* et al., Democracy works: Rewiring politics to Africa's advantage, Picador Africa, New York, 2019, p. 78.

90 1963 Charter of the Organization of African Unity, Preamble, para 6.

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state security paradigm where national security occupied the centre stage of domestic and foreign security policies.[91] Under Article 2(2)(f) of the OAU Charter, member states pledged to 'co-ordinate and harmonise their general policies' in 'co-operation for defence and security'. Nevertheless, the organisation did not premise its defence and security cooperation over strict respect of ideals of constitutionalism. Neither did it attempt to urge its member states to ensure that their domestic quest for peace and security should include the respect of fundamental principles of constitutionalism. OAU member states reaffirmed their adherence to the Universal Declaration of Human Rights but said little about how to give effect to this adherence.

The scourge of *coup d'état* which became frequent in most African countries affected the stability of political institutions and led to the over militarisation of governance, constitutionalism and security.[92] In an environment where the three classical powers were confined into one big man, where judges could be recruited and sacked at the whims of the President, the OAU became an organisation aimed at enhancing the 'brotherhood' and 'solidarity' among presidents for life.[93] Individuals who came to power through unconstitutional means could become OAU Chairpersons[94] or human rights violations could be perpetrated under the powerless gaze of the OAU in the name of 'non-interference'.[95]

These sorry tales show that the OAU was unwilling and unable to promote and uphold ideals of constitutionalism which could have spared the continent of constitutional crises.[96] The principle of non-interference strengthened the belief that threats to security and peace among African states were external to the state and could merely be engineered from outside the state.[97] The understanding that 'predatory and abusive states, or state weakness

91 *Kwadwo Appiagyei-Atua* and others, State Security, Securitisation and Human Security in Africa: The Tensions, Contradictions and Hopes for Reconciliation, in Global Campus Human Rights Journal 1 (2020), p. 4; *Tieku*, note 8, p. 26.

92 *Samuel M. Makinda* and *Wafula Okumu*, The African Union: Challenges of Globalization, Security, and Governance, Oxford, 2007, p. 77; *Pat McGowan* and *Thomas H. Johnson*, Sixty Coups in Thirty Years – Further Evidence Regarding African Military Coups d'État, in The Journal of Modern African Studies 24 (1986), p. 539. Sixty successful *coups* were recorded between 1956 and 1985, eight having been staged in 1966 alone leading to a sad situation where by 1986 only 18 countries out of 50 were under civilian presidency. By 2001, the record reached 80 successful and 108 failed coups d'état.

93 *Mills* et al., note 89, p. 80.

94 Ibid. See also The New York Times, Amin New Head of African Organization (29 July 1975), <https://www.nytimes.com/1975/07/29/archives/amin-new-head-of-african-organization.html> (accessed on 4 May 2021).

95 *Abadir M. Ibrahim*, Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post-Tahrir Assessment, in African Human Rights Law Journal 12 (2012), p. 39; *Frans Viljoen*, International Human Rights Law in Africa, Oxford, 2012, pp. 158–159.

96 *Viljoen,* note 95*,* pp. 153–156.

97 Ibid., p. 158.

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and failure could be the very threat to peace and security[98] or that there could exist several other forms of threats to peace and security than external states[99] was missing. The idea of Pan-Africanism remained mainly concerned with challenges encountered by the states and regimes and little about challenges facing ordinary Africans.[100] The advent of the AU saw the adoption of several instruments which it can use as the mighty sword to prevent and resolve constitutional crises.

B. Constitutionalism, Peace and Security within the African Union Legal Framework

The AU established normative and institutional frameworks to promote constitutionalism, peace and security with the hope that the interlinkages among the three concepts could prevent constitutional crises. Both the AU Constitutive Act and the African Charter on Democracy, Elections and Governance (ACDEG) put human rights and democratic governance at the centre of constitutionalism. Under the AU Constitutive Act, member states confer on the Union the mission to promote peace, security, and stability on the continent; promote democratic principles and institutions, popular participation and good governance, promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments.[101] This commitment is also included in African Union principles. Under Article 4, the AU is set to operate according to, among others, the following principles: participation of the African peoples in the activities of the Union; 'the right of the Union 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'; 'the right of Member States to request intervention from the Union in order to restore peace and security'; 'promotion of gender equality', 'respect for democratic principles, human rights, the rule of law and good governance', 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities' as well

98 *Edward Newman*, Critical Human Security Studies, in Review of International Studies, Cambridge, 2010, p. 94.

99 Examples include corruption and bad governance; see *Ibrahim Harun*, The Impact of Endemic Corruption on Constitutionalism and Peace-Building in Somalia, in *Charles M. Fombad* and *Nico Steytler* (eds.), Corruption and Constitutionalism in Africa, Oxford, 2020, p. 268; *Francois Venter*, State Capture, Corruption, and Constitutionalism in South Africa, in *Charles M. Fombad* and *Nico Steytler* (eds.), Corruption and Constitutionalism in Africa, Oxford, 2020, pp. 71–72; *Charles M. Fombad*, Corruption and the Crisis of Constitutionalism in Africa, in *Charles M. Fombad* and *Nico Steytler* (eds.), Corruption and Constitutionalism in Africa, Oxford, 2020, p. 16.

100 *Tieku,* note 8, p. 28. See the establishment of the OAU Mechanism for Conflict Prevention, Management, and Resolution 1993 or the adoption of the 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government.

101 Constitutive Act of the African Union (2000/2001), Article 3; in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, Pretoria, 2018, p. 5.

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as condemnation and rejection of unconstitutional changes of governments'.[102] This framework is transformative compared to the OAU Charter although the AU Constitutive Act equally maintains a number of old principles, such as the respect of state sovereignty and non-interference in domestic affairs of a member state by another member, which can be interpreted as significantly limiting the Union's ability to bring transformation in domestic affairs.[103] The African Charter on Human and Peoples' Rights is the AU Bill of Rights. Excluding Morocco, all the AU member states have ratified the African Charter.[104] It constitutes an important shield against tyranny and arbitrariness together with its additional protocols.[105]

Article 23 of the African Charter guarantees to 'all peoples' the right to 'national and international peace and security'.[106] Since the African Charter enjoins states to recognise the rights provided therein and adopt measures for their implementation,[107] states have accepted that the African Commission can review their measures adopted in order to increase individual security and reduce the likelihood of threats to peace.[108] Mindful of this obligation, African states, at the 50th anniversary of the OAU/AU undertook not to legate conflict to future generation, end wars in Africa by 2020 by addressing the root causes of conflicts.[109] Resolution 467 of the African Commission further reminded state parties in December 2020 to ensure the prevention of violent conflicts which generally result from

102 Constitutive Act of the African Union (2000/2001), Article 4 in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, Pretoria, 2016, p. 5.

103 *Shewit Wolde Michael*, The reality of the AU's responses to crises, 7 January 2021, https://issafrica.org/iss-today/the-reality-of-the-aus-response-to-crises (accessed on 12 May 2021).

104 *African Union* 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights' (2017), https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed on 12 May 2021).

105 *Rafaa Ben Achour*, Les Protocoles Normatifs à La Charte Africaine Des Droits de l'homme et Des Peuples, in Annuaire africain des droits de l'homme 4 (2020), pp. 83, 87–88.

106 See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004 AHRLR 19 (ACHPR 2003), in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, Pretoria, 2016, p. 246, para 76. See also *XYZ v Republic of Benin,* Application No. 059/2019, Judgment of the African Court on Human and Peoples' Rights of 27 November 2020, paras 143 and 144; *XYZ v Republic*, Application No. 010/2020, Judgement of the African Court on Human and Peoples' Rights of 27 November 2020, para 133.

107 Article 1 of the African Charter on Human and Peoples' Rights.

108 A number of African countries have incorporated this provision in their Constitution. See Article 52 of the 2006 DRC Constitution and Article 14 of the 2018 Burundi Constitution.

109 50th Anniversary Solemn Declaration, Point E, https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf (accessed 12 May 2021). The pursuit of this goal continues up to 2030.

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constitutional crises or governance deficit.[110] In sharp contrast with the traditional notion of security, Article 23 of the African Charter may be seen as imposing on member states an obligation to preserve security in its various facets (individual, local, community, national, regional and international).[111] The significance of Article 23 within the AU framework is strengthened by the reference to a number of AU international treaties to human and peoples' rights provided for under the African Charter. Other AU treaties reflect the potential for upholding constitutionalism in order to mitigate threats to peace and security.

The ACDEG requires states to foster 'participatory political systems with well-functioning and, if need be, inclusive institutions' as a means to promote peace, security and stability.[112] It condemns and combats unconstitutional changes of government in a spirit bequeathed upon it by the 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government,[113] and fosters inclusive decision-making on matters of governance and constitutionalism. For instance, Article 10(2) provides that the amendment and revision of national constitutions be subjected to national consensus which can also be obtained through referendum.[114] Bearing in mind how the exclusion of groups of individuals has been at the root of conflicts in African states, the relevance of this provision cannot be overemphasised.[115] The ACDEG guarantees the supremacy of the Constitution, the relevance of equality and equal protection and participation of all in a democratic society.[116] Several other AU treaties, whether on corruption,[117] decentralisation,[118] terrorism,[119] conservation of nature and natural resources,[120] internally displaced

110 *African Commission on Human and Peoples' Rights,* Resolution 467 on the Need for Silencing the Guns in Africa Based on Human and Peoples' Rights, https://www.achpr.org/sessions/resolutions?id=502 (accessed on 12 May 2021).

111 *Jackie Cilliers*, 'Human security in Africa: a conceptual framework for review', p. 8, https://media.africaportal.org/documents/AHSIMONO1.pdf (accessed on 12 May 2021).

112 African Charter on Democracy, Elections and Governance (2007/2012), Article 38(1) in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, Pretoria, 2016, p. 134.

113 AHG/Decl.5 (XXXVI) http://www.peaceau.org/uploads/ahg-decl-5-xxxvi-e.pdf (accessed on 12 May 2021).

114 See also African Court on Human and Peoples' *Rights Houngoue Eric Noudehouenou v Benin, Application No. 003/2020 (4 December 2020),* paras 56–67.

115 *Abu Bakarr Bah*, Democracy and Civil War: Citizenship and Peacemaking in Côte d'Ivoire, in African Affairs 109 (2010), p. 602.

116 Articles 10 and 30.

117 Article 3(2) of the 2003/2006 African Union Convention on Preventing and Combatting Corruption.

118 Article 4 (c); (e) of the 2014/2019 African Union Charter on the Values and Principles of Decentralisation, Local Governance and Local Development.

119 Preamble 7–10 of the OAU Convention on the Prevention and Combatting Terrorism.

120 Article 3 of the African Convention on the Conservation of Nature and Natural Resources.

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persons,[121] maritime security and safety,[122] or cybersecurity recognise the centrality of ensuring the protection and promotion of human rights in the fight against specific phenomenon which have been considered as 'new' threats to peace and security in Africa. These norms are thus transformative in nature and scope and can readily be utilised by AU institutions to uphold constitutionalism and prevent constitutional crises.

The PSC and the AU Commission[123] particularly have been entrusted with a mandate to ensure and promote constitutionalism by *preventing*, *managing* and *following up*[124] on adverse effects of conflicts-related violations of principles of constitutionalism. Article 2 of the PSC Protocol envisages that the Council acts as 'a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa'. As conflict and crises generally lead to 'unstable and dangerous situation affecting an individual, group, community, or whole society', the ability of the PSC to prevent or act swiftly against human rights violations may be a major contribution towards preserving peace and security through actions aimed at strengthening constitutionalism. Significantly, the PSC has the power to 'follow-up, within the framework of its conflict prevention responsibilities, the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by Member States'[125] and decide 'on any other issue having implications for the maintenance of peace, security and stability on the Continent'.[126]

The PSC can thus send a fact-finding mission to a country facing a constitutional crisis as it did in April 2021 following the death of the Chadian President *Idris Déby*[127] or establish a Commission of Inquiry to investigate human rights violations arising from conflict over power struggle as in 2015 in South Sudan.[128] The collaboration between the PSC and the African Commission on Human and Peoples' Rights entertain on matters relevant to the PSC's mandate can also enhance constitutionalism in time of crisis.[129] In

121 Article 3 of the African Union Convention for the Assistance of Internally Displaced Persons.

122 Article 2 of the African Charter on Maritime Security and Safety and Development in Africa.

123 Protocol relating to the Establishment of the Peace and Security Council of the African Union (2002/2003), Article 7 in *Christof Heyns* and *Magnus Killander* (eds.), Compendium of Key Human Rights Documents of the African Union, Pretoria, 2016, pp. 19–20.

124 Ibid.

125 Ibid. Article 7(1)(m) of the Peace and Security Protocol. The PSC looked recently into the role of women in social changes: time for recognition in line with the commemoration of the UNSCR 1325; Living together in Peace Respect for cultural, religious and ethnic diversity; respect for traditional and customary values; promote solidarity.

126 Ibid, article 7(1)(r).

127 PSC/BR/COMM.2 (CMXCIII), Communiqué, https://reliefweb.int/sites/reliefweb.int/files/resources/eng-com-993rd-psc-meeting-on-chad-22-april-2021.pdf (accessed on 12 May 2021).

128 African Union Commission of Inquiry on South Sudan, note 68.

129 Protocol relating to the Establishment of the Peace and Security Council of the African Union, article 19. The two bodies first met on 8 August 2019 for consultative purposes. See 'Report of

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2015, the PSC invited the African Commission on Human and Peoples' Rights to conduct an investigation into the human rights violations and other abuses in Burundi[130] as it did in 2013 in response to the crisis in Mali.[131]

Overall, the PSC mandate has been diversely applied in conflict situations, sometimes leading to outcomes that could be seen as a regression of constitutionalism and peace and security.[132] The PSC has reportedly gained some success in the exercise of its mandate. The report on the implementation of Agenda 2063 suggests a remarkable continental performance – aggregated score of 48 per cent – in establishing a 'peaceful and secure Africa'.[133] Several AU member states established 'mechanisms and strengthened capacities for maintaining peace and security at the national level'.[134] The road to constitutionalism remains thwarted with numerous stumbling blocks.[135] This underscores the necessity for various AU organs and mechanisms to cooperate.[136] The AU is taking steady steps to foster a culture of constitutionalism on the continent, for example through Aspiration 3 of Agenda 2063.

the Peace and Security Council on Its Activities and the State of Peace and Security in Africa, for the Period from February 2019 to February 2020', para 12, https://au.int/sites/default/files/documents/38309-doc-8_report_on_psc_on_its_activities_and_the_state_of_peace_security_in_africa_.pdf (accessed on 12 May 2021). According to the 2020 Revised Rules of Procedure of the African Commission: 'When the Commission considers that one or more Communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, it shall bring the matter to the attention of the Assembly and the Peace and Security Council of the African Union, in accordance with Article 58 of the Charter and Article 19 of the Protocol on the Peace and Security Council'.

130 Africa Commission on Human and Peoples' Rights Resolution 310 on the Urgency for Undertaking Fact-Finding Mission to Burundi https://www.achpr.org/sessions/resolutions?id=336 (accessed on 12 May 2021).

131 *Amnesty International,* Counting gains, filling gaps: Strengthening African Union's response to human rights violations committed in conflict situations, 2017, p. 9.

132 See generally *Stef Vandeginste*, The African Union, Constitutionalism, and Power-Sharing, in Journal of African Law 57 (2013), pp. 1–28.

133 First Continental Report on the Implementation of Agenda 2063 (February 2020), p. 1, https://au.int/sites/default/files/documents/38060-doc-agenda_2063_implementation_report_en_web_version.pdf (accessed on 12 May 2021).

134 Ibid., p. 7. The PSC report also shows that much still needs to be done in relation to aspiration 3 which scored 16 per cent – the second weakest performance along with aspiration 5.

135 Ibid.

136 See for example the African Peer Review Mechanism (APRM). The African Peer Review Mechanism is empowered to conduct a review in times of political and economic crises. This review enables the institution to take a proactive role in understanding the problem in a country and envisage the ways in which solutions can be effective. Phases which are provided and collaboration with domestic, sub-regional, regional and international actors may aptly provide the institution with a holistic understanding of issues facing member states. The success of the model therefore requires of the APRM to be proactive in method and sufficiently willing to prevent the occurrence of constitutional crisis that adversely affect political governance and democracy.

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It is contended that AU various organs must play a significant role, especially within member states for 'a universal culture' of constitutionalism to sink in. They can use proactively their mandate so that transformative leadership and capable institutions are in place within AU member states and ready 'to chop the ugly head of impunity off its stiffened neck'[137] to prevent or resolve constitutional crises. The next section examines how and whether the AU has used effectively its mandate to resolve constitutional crises in CAR, South Sudan and Burundi.

C. The AU Resolution of Constitutional Crises in Selected African Countries and Constitutionalism

It comes out from the previous section that the constitutive and treaty-law framework on which the AU rests allows the continental organisation to foster constitutionalism while resolving constitutional crises. This section looks at practical interventions of the AU to resolve constitutional crises in the Central African Republic, South Sudan and Burundi and the extent to which it has or not advanced constitutionalism.

I. Promoting Peace Initiatives to uphold Constitutionalism in the Central African Republic

The AU teamed up with the Economic Communities of Central African States (ECCAS) and the UN to swiftly respond to the crisis that broke out in CAR in 2013. This case of successful unconstitutional change of government deriving from the military overthrow of elected President *Bozizé* by armed militia triggered AU intervention. The crisis was said to have been caused by the irregularities and fraud which had marred the elections, reflective of entrenched electoral malpractices, as well as the violation of the 2008 Libreville Comprehensive Peace Agreement which was expected to cement lasting peace in CAR. CAR is the very example of a country affected by chronic instability resulting in five successful military takeovers and seven failures, as well as the proliferation of armed groups that have made any prospects of building peace through negotiation improbable. Between 1997 and 2020, 13 peace agreements – roughly one every two years – have been signed in CAR and constitutions often fail to serve as frameworks to prevent the upsurge in authoritarianism, pre-empt conflicts and devolve powers.[138]

Initially, the AU left the resolution of the conflict to ECCAS because of the complementarity principle based on which the regional economic community is supposed to have

137 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* SA 580 (CC), (31 March 2016), para 1.

138 *Mohamed M. Diatta*, New approach to peace needed in the Central African Republic, ISS Central African Report (2021), p. 7.

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comparative advantages in resolving the crisis.[139] ECCAS was also already overseeing the peace process resulting from 12 July 2008 and 15 December 2013 peace agreements,[140] through its *Mission de consolidation de la paix en Centrafrique* (MICOPAX). The relay among various peace missions in CAR illustrates the multiplicity of actors involved in the resolution of several CAR crises. The signing of peace agreements as a means to settle constitutional crisis and peacekeeping operations to protect civilian population have been generally preferred. MICOPAX was subsequently integrated into the AU-led International Support Mission for CAR (MISCA) given that it (MICOPAX) failed to maintain basic order. MISCA was backed up by the UN Security Council Resolution 2127 which mandated it to protect civilians, restore order, create space for humanitarian assistance and support the reform of security sector and the disarmament and demobilisation process.[141] In a subsequent move to consolidate the peace process and the protection of civilian population, the UN incorporated MISCA into MINUSCA.

Tripartite efforts by the AU, ECCAS and UN strengthened constitutionalism in CAR in several ways. They supported the transitional government wherein diverse communities and representatives of militia participated, hoping that this could diffuse tensions and appease those who generally believed previous governments were less inclusive.[142] The adoption of the 2016 Constitution with relevant features of modern constitutionalism was a positive outcome of the AU support for the CAR peace process as it also laid the groundwork for the first post-transition elections. The Constitution made explicit the country's commitment to pluralistic democracy, 'the respect for the separation and the equilibrium of the powers in order to guarantee the security of persons and of property, the protection of the most vulnerable, notably minorities, and the full exercise of fundamental freedoms and rights'.[143] Constitutional review of legislative and administrative acts has been strengthened by the creation of a Constitutional Court. In 2020, the latter Court was instrumental in preventing an extension of President's *Touadera* presidential term using COVID-19 pandemic as an excuse.[144] In doing so, the Constitutional Court prevented a non-consensual change to the Constitution that could have potentially plunged the country into another crisis. Equally,

139 *Tatiana Carayannis* and *Mignonne Fowlis*, Lessons from African Union – United Nations Cooperation in Peace Operations in the Central African Republic, in African Security Review26 (2017), pp. 230–231.

140 'The AU re-takes the lead in Central Africa', 31 May 2019, in PSC Insights, https://issafrica.org/pscreport/psc-insights/the-au-re-takes-the-lead-in-central-africa (accessed on 13 October 2021).

141 *Carayannis* and *Fowli,* note 1389*,* p. 225.

142 *Andrea Ceriana Mayneri*, La Centrafrique, de la rébellion Séléka aux groupes anti-balaka (2012–2014): Usages de la violence, schème persécutif et traitement médiatique du conflit, in Politique africaine 2014, N° 134, p. 185.

143 Constitution of the Central African Republic (30 March 2016), Preamble, para. 7.

144 *Sonia Vohito*, COVID-19 and Unamendable Limits on Duration of Presidential and Legislative Terms in the Central African Republic, (ConstitutionNet), <https://constitutionnet.org/news/covid-19-and-unamendable-limits-duration-presidential-and-legislative-terms-central-african> (accessed 13 October 2021).

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numerous provisions of the Political Agreement for Peace and Reconciliation in the Central African Republic (2019) reiterate the centrality of constitutionalism and strict observance of constitutional provisions as the way to preserve the gain of the political process. In including principles such as secularism, equality among community and regions, recognition, respect and appreciation of cultural and religious diversity, the prohibition of political violence, corruption and impunity and respect for human rights and human dignity,[145] the government and the 14 armed groups made it clear that the complete disregard of principles of constitutionalism was the root causes of conflict in CAR. By the same token, peace and stability could be restored when these principles are strictly complied with by all stakeholders.

The niceness of constitutional and peace agreement provisions is not necessarily the guarantee of full compliance. Nor does it determine that the warring factions would give up in a heartbeat the military struggle which seems to provide them with significant financial gains. There is evidence that the number of armed groups surged from three in 2008 to 14 in 2019, that implementation of the 2019 Agreement has stalled and that armed groups and other political actors question the legitimacy of the current president who they claim rigged the elections.[146] However, this robust framework in place (the constitution and the 2019 peace agreement) demonstrates that the AU and its partners shepherd a peace process which, at least on paper, did not sacrifice constitutionalism, accountability for mass atrocities and democratic governance at the altar of peace and reconciliation. This is not always the case. The AU mediation of the 2016 DRC constitutional and electoral crisis, for instance, resulted in the adoption of a power sharing agreement which postponed presidential and national legislative elections to April 2018 instead of December 2016 as the Constitution and electoral laws contemplated.[147]

Be that as it may, some issues arising from the AU's resolution of the CAR's constitutional crisis can underscore the need, as some have suggested,[148] for more radical approaches to the crisis, but also to clarify the common ground of complementarity between the AU and ECCAS. Armed groups are rarely deterred by peacekeepers who cannot combat them directly. *Paul-Simon Handy*, therefore, proposes an intervention brigade to be established in the CAR, modelled to the one the UN Security Council established in the DRC through Resolution 2098 (2013) to neutralise armed groups, reduce the threat they pose to state

145 Political Agreement for Peace and Reconciliation in the Central African Republic (February 2019), Article 1.

146 *Diatta*, note 138, pp. 7–8.

147 *Phidias Ahadi Senge Milemba*, Les accords politiques du 18 octobre et 31 décembre 2016 en République Démocratique du Congo : Entre sacrifice de la démocratie et gain de la paix?, in Journal of Humanities and Social Science 22 (2017), p. 69.

148 *Paul-Simon Handy*, 'CAR elections expose the depth of the country's crisis' 13 January 2021 *ISS Today* https://issafrica.org/iss-today/car-elections-expose-the-depth-of-the-countrys-crisis (accessed on 13 October 2021).

https://doi.org/10.5771/2363-6270-2022-1-53 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ND

authority and civilian population.[149] This coercive military intervention is a solution that can be resorted to through a joint effort by the UN Security Council and the PSC along with Central Africa powers. Its relevance in the CAR context can be explained by the fact that most armed groups have been reluctant to respect peace agreements, continue to commit human rights violations and campaign against the deployment of the national army in areas they control.[150] Furthermore, the mandate of existing peacekeeping forces is limited to mere protection of civilian population depriving them of the ability to initiate military operations to quell armed groups. Nonetheless, the intervention brigade model, if it is to be replicated in CAR, must learn from the failure that the brigade established in the DRC met in quelling armed groups such as the Democratic Forces for the Liberation of Rwanda (FDLR) and the Allied Democratic Forces (ADF) which are structurally embedded within local communities and might cause collateral damages should serious intervention be thought of. CAR seems to be no different owing to the fact that most armed groups are scattered into various communities and they exercise state authority and control in many parts of the country. The intervention brigade must also be conferred on an overt mandate to initiate military action against armed groups that disregard the constitutional order and basic human rights standards.

II. The African Union Commission of Inquiry in South Sudan and Constitutionalism

The crisis and violence which erupted in December 2013 in South Sudan is a classic case of failed unconstitutional change of government. It originated from the quarrel within the Presidential Guard born out of attempts to disarm some of its sections composed of Nuer soldiers and a seemingly aborted military coup against the sitting President.[151] Regardless of the exact trigger,[152] the consequences of the crisis, including serious human rights violations, the inability for the state to perform its functions and the prospect that the crisis could become an ethnic conflict and civil war were crucial reasons for an intervention from the AU and RECs to ensure peace and stability domestically and in the region.[153] The PSC decided to establish the Commission of Inquiry on South Sudan and entrusted the African Union Commission and the African Commission on Human and Peoples' Rights the task to operationalise it. The rationale behind a Commission of Inquiry as a mechanism to resolve the South Sudan constitutional crisis seems to have been the desire to ensure that the AU and other international actors get the full picture of human and material damages the crisis

149 UNSC Res. 2098 (2013), 28 March 2013, paras 9–10.

150 Letter dated 14 December 2018 from the Panel of Experts on the Central African Republic Established Pursuant to Resolution 2399 (2018) Addressed to the President of the Security Council, 2–3.

151 African Union Commission of Inquiry on South Sudan, note 68, para 68.

152 The *coup attempt* has not been confirmed by the AU mission to South Sudan.

153 *Robert Gerenge*, South Sudan's December 2013 Conflict: Bolting State-Building Fault Lines with Social Capital, in African Journal on Conflict Resolution 15 (2015), p. 86.

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caused. This would subsequently inform or lay the foundation for more robust actions that could be envisaged including mediation initiatives and international criminal prosecutions. Clearly, the Commission of Inquiry was the starting point of a holistic approach to the resolution of the crisis.[154]

This Commission of Inquiry was more than just a commission tasked with investigating and reporting human rights violations and abuses.[155] Its mandate included the investigation of 'the causes underlying [human rights] violations' and the provision of 'recommendations on the best ways and means to ensure accountability, reconciliation and healing among South Sudanese communities *with a view to deterring the occurrence of the violations in future*' (emphasis added).[156] The broadness of this mandate speaks to the PSC being cognizant of the possibility that the existence or the lack of constitutionalism and a culture for observing and implementing the constitution can cause conflicts. The Commission notes, for example, the lack of implementation of constitutional guarantees that could reduce tension.[157] This included the lack of observance of separation of powers between the executive and legislature,[158] the militarisation of politics and politicisation and ethnicization of security forces.[159] Appropriate mechanisms to implement gender equality were non-existent.[160] According to the Commission of Inquiry, the 'crisis in South Sudan [wa]s primarily attributable to the inability of relevant institutions to mediate and manage conflicts, which split out into the army, and subsequently the general population'.[161] It is clear that the PSC saw in the South Sudanese conflict the inability of the state to provide security for individuals. The state was weak. The very individuals and institutions that could prevent conflict and violence were involved.[162] The state, through an ethnically divided army and state institutions, thus became the source of insecurity.

The Commission of Inquiry made recommendations aimed at ensuring accountability for egregious human rights violations; and at rebuilding state institutions and public con-

154 African Union Commission of Inquiry on South Sudan, note 68, para 4. The Commission was chaired by Olusegun Obasanjo, former president of Nigeria. Other members of the Commission were Justice Sophia Akuffo, former president of the African Court on Human and Peoples' Rights, Professor Mahmood Mamdani from Makerere University, Bineta Diop, AU Chairperson's Special Envoy on Women, Peace and Security and Professor Pacifique Manirakiza, then member of the African Commission on Human and Peoples' Rights.

155 *Thomas Probert* and *Christof Heyns*, Introduction: The role of National Commissions of Inquiry in securing the supreme human right, in *Thomas Probert* and *Christof Heyns* (eds.), National Commissions of Inquiry in Africa: Vehicles to pursue accountability for violations of the right to life, Pretoria, 2020, p. 2.

156 African Union Commission of Inquiry on South Sudan, note 68, para 2.

157 Ibid., para 48.

158 Ibid., para 161.

159 Ibid., para 1019.

160 Ibid., para 48.

161 Ibid., para 992.

162 Ibid., paras 392, 393 and 547.

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fidence in them.[163] The Commission of Inquiry was instrumental in helping the South Sudanese population understand reforms that were needed for their executive, legislative and judicial institutions to meet the standards of constitutionalism and prevent threats to peace, security and stability.[164]

The stance the PSC adopted towards the Commission of Inquiry's report was, however, less encouraging.[165] It was characterized by indifference. It took long for the PSC to accept the publication of the report and when it did so, it made it clear that it was simply for 'public information' purposes.[166] It was said that the report could have potentially jeopardized the peace-making efforts that were conducted in Addis Ababa.[167] However, the impact of the Commission's findings and, consequently, of the PSC involvement could not be underestimated. The transitional justice package proposed by the Commission influenced the transitional justice mechanisms established under the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS).[168] The R-ARCSS provides that the to-be established Hybrid Court for South Sudan may use the Commission's report when 'carrying out its investigations'.[169] Earlier on, the Protocol on Agreed Principles on Transitional Arrangements towards the Resolution of the Crisis in South Sudan excluded from the participation in the transitional government individuals involved in mass atrocities as identified by the Commission of Inquiry and obliged them to resign if they were already partaking in the transition.[170] As the then Chairperson of the AU Commission indicated, the report could aptly serve South Sudanese leaders to conduct an 'introspection and critical assessment of their deeds and failures, in order to lay the ground for political and social renewal and legitimacy'.[171] The PSC established Commission can be lauded for having emphasised on the need to address the root causes of the conflict in South Sudan and provided a blueprint for doing so.[172]

163 Ibid., para 991 and subsequent.

164 Ibid., para 998 and subsequent.

165 *Amnesty International,* Counting gains, filling gaps: Strengthening African Union's response to human rights violations committed in conflict situations (20 April 2017), pp. 56–57.

166 Ibid., p. 57.

167 Ibid.

168 See Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (12 September 2018), Chapter V.

169 Ibid., para 5.3.6.1.

170 Ibid., para 15.

171 African Union, Press release: The African Union releases the report of the AU Commission of Inquiry on South Sudan, 27 October 2015, http://www.peaceau.org/uploads/auc-press-release-release-auciss-reports-27-10-2015.pdf (accessed on 13 May 2021).

172 See also *Francis M. Deng*, Preventing mass atrocities in Africa: The case of the two Sudans, in *Tony Karbo* and *Kudrat Virk* (eds.), The Palgrave handbook of peacebuilding in Africa, Cham, 2018, p. 104.

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The AU is currently making strides for the establishment of the Hybrid Court for South Sudan as per R-ARCSS but the government of South Sudan seems not to be willing to play its part.[173] The AU Office of the Legal Counsel developed and shared with the government the memorandum of understanding on the Court, its draft statute and rules of procedure[174] as the Court is a key instrument in providing justice for mass atrocities.

Clearly, the success of the AU's role in resolving constitutional crisis also depends on the willingness of AU member states to address adverse effects of constitutional crises. This is not a new obligation imposed on member states since they committed to combat impunity under the AU Constitutive Act and promote constitutionalism. The call from a group of South Sudanese and civil society organisations directed at the PSC to unilaterally establish the Hybrid Court[175] tested the AU's ability to address impunity in the absence of cooperation from the state concerned.

Similarly, the findings of the Commission of Inquiry could have enabled the PSC to adopt targeted individual or collective sanctions against those that were involved in the crisis. Identifying those individuals was not that problematic because the Commission submitted along its report, 'possible alleged perpetrators that might bear the greatest responsibility' for the human rights violations committed.[176] These sanctions which could include asset freezing, and travel bans could have had deterrent effects for possible similar violations. The PSC, based on its Article 7-powers can combine sanctions as a mechanism to resolve constitutional crises with other approaches it already deployed, including the support to mediation process led by Intergovernmental Authority on Development (IGAD).

III. The Intricacies of Resolving Constitutional Crises in the Context of Mass Atrocities in Burundi

In 2015, violence erupted in Burundi following the decision by President *Nkurunziza* to seek a third presidential term which was seen as an affront to the Constitution of Burundi and the 2000 Arusha Peace and Reconciliation Agreement (Arusha Agreement).[177] Burundi

173 Webinar Report: The establishment of the African Union Hybrid Court for South Sudan organised on 25 August 2020 by Human Rights Watch, Institute for Security Studies and Transitional Justice Working Group, South Sudan, https://www.hrw.org/sites/default/files/media_2020/10/Webinar%20Report%20-%20Establishment%20of%20the%20AU%20Hybrid%20Court%20for%20South%20Sudan.pdf (accessed on 13 October 2021).

174 *John Ikubaje*, Senior Political Officer, AU Department of Political Affairs during the webinar organised on 25 August 2020 by Human Rights Watch, Institute for Security Studies and Transitional Justice Working Group, South Sudan, https://www.hrw.org/sites/default/files/media_2020/10/Webinar%20Report%20-%20Establishment%20of%20the%20AU%20Hybrid%20Court%20for%20South%20Sudan.pdf (accessed on 13 October 2021).

175 Letter to the AU Peace and Security Council Regarding the Session on South Sudan, https://www.hrw.org/news/2020/07/15/letter-au-peace-and-security-council-regarding-session-south-sudan.

176 African Union Commission of Inquiry on South Sudan, note 68, para 827.

177 *Vandeginste*, note 132.

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has a long history of violence and oppression that has taken an ethnic Tutsi-Hutu turn. The decade long civil war between 1993 and 2003 dismantled the basic structures of the state and peaceful cohabitation among major ethnic groups. The Arusha Agreement which ended this conflict laid the ground for the revival of constitutionalism in Burundi and allowed for the adoption of a constitution with provisions to prevent ethnic rivalries in the public administration, the army and government.[178] *Nkurunziza's* third term bid and the failed *coup d'état* against him were nothing less than the denial of peace and reconciliation progress made since the Arusha Agreement. They constituted unconstitutional changes of government which subsequently impacted on domestic and regional peace and security through extrajudicial killings and massive influx of Burundian refugees in neighbouring countries.[179]

The AU was already involved in resolving the crisis in Burundi since it was designated as the guarantor of the implementation of the Arusha Agreement and had subsequently sent a peacekeeping mission to Burundi in 2003, the African Union Mission in Burundi (AMIB).[180] To resolve the 2015 constitutional crisis, the Union prioritized preventive diplomacy but made a threat for military intervention – which it did not carry through – when violence and human rights violations escalated.[181] The success of AU intervention in constitutional crises, whether through the use of military intervention or sanctions requires support from the concerned state, RECs and the broader AU community of states and peoples. The rejection by the government of Burundi of the proposed African Prevention and Protection Mission in Burundi (MAPROBU) and the lack of consensus among African Heads of State on its deployment is a case in point. It is also important to underscore that the diverse diplomatic mechanisms implemented – an AU Special Envoy to Burundi, a visit of an AU High-Level Panel made up of five African heads of states and government,[182] human rights observers and military experts – did not tackle the democratic question of third-term limit that was the source of the constitutional crisis.

The Burundian crisis highlights the co-existence of several constitutional issues that arise in cases of unconstitutional changes of government through a third-term bid. There is first the need to restore the constitutional order and, second, to protect fundamental rights of those who resort to the street to protest against the third term bid. Both can prompt the AU to deploy various strategies. In relation to the first issue, the AU has so far been unable to force an incumbent to step down. The East African Community (EAC) that could support the AU in this vein was engulfed in a state of paralysis since in Uganda and Rwanda among

178 See Articles 129, 143 and 164 of the Constitution of Burundi (18 March 2018).

179 African Union, note 72, para 57.

180 *Nina Wilén* and *Paul D. Williams*, The African Union and Coercive Diplomacy: The Case of Burundi, in The Journal of Modern African Studies 56 (2018), pp. 673, 677; *Yann Bedzigui* and *Nelson A. Lusala*, The AU and the ICGLR in Burundi, Central Africa Report 2, 2016.

181 Ibid., pp. 684–687.

182 Jacob Zuma (South Africa), Mohamed Ould Abdel Aziz (Mauritania), Macky Sall (Senegal), Ali Bongo Ondimba (Gabon) and Hailemariam Dessalegn (Ethiopia).

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some of its members, incumbents either removed presidential term limits or extended their terms.[183]

The AU thus focused on the protection of the civilian population by making it clear that it would not tolerate the violation of human rights and decided to send an African Commission on Human and Peoples' Rights fact-finding mission to investigate alleged violations. Investigation of mass atrocities can counter the resurgence of constitutional crises by bringing behind bars perpetrators of human rights violations and providing justice to victims. The African Commission on Human and Peoples' Rights was mandated by the PSC to conduct investigation into human rights violations in Burundi and report to the PSC so that it could adopt informed measures. The mission investigated all forms of human rights violations and other abuses, established their causes, facts and circumstances, specified and classified them and prepared recommendations on measures the PSC could take.[184] Contrary to the South Sudan crisis where the PSC mandated an ad hoc commission, the PSC resorted to an already existing regional human rights body to conduct the investigation in Burundi. This is the reason the fact-finding mission was composed of members of the African Commission on Human and Peoples' Rights alone. Resort to ad hoc and existing human rights bodies underscores the diversity of mechanisms at the disposal of the PSC to robustly fight against constitutional crises. The technical know-how of the Commission in matters of investigation has been proven through various missions already conducted to DRC, Senegal, Zimbabwe, Mauritania, Sudan, Nigeria[185] and recently to the Tigray Region of the Federal Democratic Republic of Ethiopia.[186]

The investigation in Burundi exposed both the lack of cooperation by Burundi in securing accountability for human rights violations committed by state and non-state actors[187] and the lethargy within the PSC to swiftly act on recommendations submitted by the African Commission on Human and Peoples' Rights to provide lasting solutions to the crisis.[188]

The creation of a tribunal to try individuals involved in human rights violations committed during the crisis and to ensure accountability[189] has received less attention from the PSC. Two significant elements can be flagged here. First, the PSC reiterated the necessity to respect the Arusha Peace Agreement and the Constitution as the fundamental guarantee

183 *Nina Wilén* and *Paul D. Williams*, note 182, pp. 689–690.

184 African Union, note 72, para 4.

185 *Viljoen,* note 95, pp. 344–348.

186 African Commission on Human and Peoples' Rights, 482 Resolution on the Fact-Finding Mission to the Tigray Region of the Federal Democratic Republic of Ethiopia, ACHPR/Res.482 (EXT.OS/XXXII), 12 May 2021.

187 *Amnesty International*, note 166, p. 56.

188 Ibid.

189 African Union, note 72, para. 172(c).

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of stability, peace and security in Burundi.[190] Second, it made sure that the recommendation made by the African Commission are considered by the EAC mediation team of the Inter-Burundian Dialogue 'within the context of the Dialogue'.[191] The AU's resolution of the Burundi constitutional crisis was clearly hampered by three cumulative factors: its lack of courage to take bold steps to ensure accountability for mass atrocities;[192] its observance of the principle of sovereignty[193] and the reliance on regional mechanisms from the EAC to mediate conflicts in member states.

Conclusion

This chapter has reviewed the law and practice of the AU on constitutionalism as a catalyst for peace and security in Africa. As demonstrated, constitutionalism has an intrinsic and mutually reinforcing relationship with peace, security and stability. Whilst constitutionalism provides normative and institutional basis for peace and security, it can only thrive where peace and security are established and maintained. This dialectical relationship must be appreciated both by the AU organs and its member states for the AU transformative role to be realised and for the prevention of constitutional crises in Africa to be effective. The advent of the AU signalled the dawn of 'transformative constitutionalism' in Africa. This ideological shift reflects in AU interventions within its member states, such as CAR, South Sudan and Burundi. The reaction of the PSC can be lauded and reflects the responsiveness one would expect from a structurally, normatively and ideologically transformed organisation.

There are two specific issues that must be addressed in order to strengthen the AU capability to resolve constitutional crises; namely the weak political will from African governments and the clarification of the framework for the collaboration between AU and RECs. *Wolde Michael* notes how despite Article 4(h) of the AU Constitutive Act, sovereignty and non-interference continue to impede on AU's ability to prevent crises from undermining peace and security.[194] According to the AU Commissioner, the fact that the AU is intergovernmental and its organs are headed by member states can also explain why the organisation inconsistently applies its policies and legal instruments.[195] Member states heading AU organs find it difficult to act against a state that allegedly violates principles of constitutionalism as they would not want the same intrusion in their domestic

190 PSC/PR/COMM/2 (DXCV), 28 April 2016, para 3 https://reliefweb.int/sites/reliefweb.int/files/resources/psc-595-comm-achpr-28-4-2016.pdf (accessed on 13 May 2021).

191 Ibid., para. 7.

192 On 27 April 2021, when the PSC decided to 'end the mandate of the AU Human Rights Observers and Military Experts Mission in Burundi on 31 May 2021', it equally did not allude to accountability.

193 *Michael,* note 103.

194 Ibid.

195 Ibid.

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affairs. Most early warnings made by the AU Commission are overlooked by the AU organs including the PSC. RECs are providing a helping hand to the AU when it comes to resolving constitutional crises especially as they understand the regional context and have been involved in conflict resolution in member states. This is the case of ECCAS (CAR), IGAD (South Sudan) and EAC (Burundi). However, their partnership with the AU must be honed by a legal framework which allows the AU to coordinate actions RECs undertake in conflict situations so that they do not jeopardise the peacebuilding processes. The existing Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa signed between the AU and eight RECs/RMs contains some legal deficits, notably the lack of distribution of competencies among signatories and of clarity on the nature and scope of principles of subsidiarity and complementarity. These loopholes have impeded on effective cooperation and coherence among signatories of the MoU in instances of constitutional crises.[196] Examples from ECCAS involvement in CAR have demonstrated how Chad and the Republic of Congo primarily used the conflict to advance their own interests and agenda and to side line AU actions.[197] In Burundi, most EAC members were reluctant to support AU possible military intervention and to recognise that the unconstitutional grip on power by *Nkurunziza* contradicted AU values, which RECs and African countries must advance.

Above all, the transformative constitutionalism ethos will hardly be attained unless AU organs, RECs and member states commit to values of constitutionalism, viz. to the 'practice or body of ideas, attitudes, and rules as patterns of behaviour, *limiting* political powers and all other authorities in a society by means of so-called basic laws'.[198] It is necessary that AU constitutionalism protects interests of states and must not forget the relevance of placing individuals at the centre of its actions.[199] The AU must build strong relationship with state and non-state entities at the domestic level. This can enhance a *strong* culture of constitutionalism and human rights among state organs. A culture of human rights 'promotes the construction of societies in which the intrinsic dignity of human beings is recognized, along with a notion of justice that tolerates neither impunity nor the extremes of inequality and exclusion […]. In this way, a culture of rights perspective confronts

196 See generally *Kai Striebinger*, Coordination between the African Union and the Regional Economic Communities, 2016, pp. 13–15.

197 Institute for Security Studies, 'The AU re-takes the lead in Central Africa', PSC Insights (31 May 2019), https://issafrica.org/pscreport/psc-insights/the-au-re-takes-the-lead-in-central-africa (accessed on 13 October 2021).

198 *Jasminka Hasanbegović*, On the (Un)Changing Judge Icons and Their Creators: On Deborah, Coke and Montesquieu, Posner and Barak, and Some Others, in *Pierluigi Chiassoni* and *Bojan Spaić* (eds.), Judges and Adjudication in Constitutional Democracies: A View from Legal Realism, Cham, 2021, p. 85.

199 AU Constitutive Act, Article 4(c).

https://doi.org/10.5771/2363-6270-2022-1-53 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ND

authoritarian conceptions of the state'.[200] The AU organs can build and develop strong partnerships with the emerging independent institutions such as national human rights institutions, public prosecutions, ombudspersons. The African Commission on Human and Peoples' Rights had already recognised the 'importance of the role of national institutions and other specialised human rights institutions in the promotion and protection of human rights and in creating public awareness in Africa'.[201] The increasing entrenchment of these institutions under African constitutions and the role some of them have over the years played in ensuring the rights of the very marginalised in African communities[202] and taming executive authoritarianism[203] may provide some encouragements for the AU organs to engage with them. This can potentially *prevent*, *manage*, and *react against adverse* effects of conflicts within its member states.

200 *E. Caceres,* Building a culture of rights (25 September 2007), https://snacla.org/article/building-culture-rights (accessed on 20 April 2021).

201 *African Commission on Human and Peoples' Rights*, '370 Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa – ACHPR/Res.370(LX)' (22 May 2017), https://www.achpr.org/sessions/resolutions?id=412 (accessed on 13 May 2021).

202 *Charles Manga Fombad*, The Diffusion of South African-Style Institutions? A Study in Comparative Constitutionalism, in *Rosalind Dixon* and *Theunis Roux* (eds.), Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence, Cambridge 2018, p. 366.

203 *Charles Manga Fombad*, Taming Executive Authoritarianism in Africa: Some Reflections on Current Trends in Horizontal and Vertical Accountability, in Hague Journal on the Rule of Law 12 (2020), p. 63.

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