General Introduction

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This special volume of the journal 'Law in Africa' focuses on the African Union's experience in resolving constitutional crises in Africa. How are the African Union's efforts to resolving such crises contributing to the consolidation of peace and democracy – and therefore constitutionalism – in Africa?

The study flows from the assumption that the African Union (AU) is an agent of democratization in the continent. Such an assumption has a long background. At the end of the Cold War, African states were forced to change from authoritarian to democratic governments, the rule of law and the respect for human rights, as ruling regimes had lost their foreign allies who could no longer support dictators. The post-Cold War 'democratic revival' paved the way for the adoption of numerous regional instruments that framed and promoted common standards of democratic governance that African states should observe. This is the case with the AU Constitutive Act (2000), the Protocol establishing the AU Peace and Security Council (2002), the African Charter on Democracy, Elections and Governance (2007), the Grand Bay (Mauritius) Declaration (1999), the Lomé (Togo) Declaration on Unconstitutional Change of Government (2000), the Solemn Declaration on a Common African Defence and Security Policy (2000), and the Declaration on the Principles Governing Democratic Elections in Africa (2002). Democratic standards provided for in these instruments were largely encapsulated into post-1990 African constitutional documents and legislation that governed transitional and post-transitional periods. Domestic courts – mainly courts with constitutional jurisdiction – were empowered to enforce these standards, by, *inter alia*, ensuring that actions by state organs and officials, and sometimes individuals and private entities, comply with them.

However, the democratic revival promises did not sufficiently meet most peoples' expectations in practice. In many states, such as Burundi, Chad, Comoros, Republic of Congo, Côte d'Ivoire, Liberia, Central African Republic (CAR), the Democratic Republic of the Congo (DRC), The Gambia, Rwanda, Sierra Leone, Somalia, and Soudan, competition for accessing or maintaining political power turned into violence, instability and armed conflicts.[1] The adverse effect of this situation has been the failure of domestic governance

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1 *Balingene Kahombo*, La démocratisation dans l'ombre de crises et violences politiques en Afrique: rétrospective et prospective sur le rôle des opérations de maintien de la paix, paper submitted to

mechanisms to properly function. Courts and the judiciary in general were dysfunctional, corrupt and deprived of their independence, the executives confiscated by new strong men as heads of state, laws were unapplied, and under-development and poverty remained at high rates. As a result, constitutional crises have become recurrent and numerous.[2] The Organisation of African Unity (OAU) had appeared to be less adapted to these contemporary challenges. Hence its replacement by the AU in 2002. However, constitutional crises have not been completely deterred. This trend can be observed in particular between 2019 and 2022 with successive coups in Sudan (2019 and 2021), Mali (2020 and 2021), Guinea (2021) and Burkina Faso (twice in 2022). Yet, the AU shall now function in accordance with the "respect for democratic principles, human rights, the rule of law and good governance"[3] and the "condemnation and rejection of unconstitutional changes of governments".[4] These founding principles are informed by the dialectical relationship between peace, security and democracy in Africa as it is believed that no peace and security can exist without democracy and no democracy can fare well in the absence of peace and security.[5] Peace and democracy are seen as a prerequisite for achieving integration and development in the continent.

Thus, the AU is expected to get involved within its member states in a way to compensate dysfunctional and inefficient domestic mechanisms mandated to settle such constitutional crises by undertaking its own actions to contribute to the entrenchment of democracy, the rule of law, the respect for human rights, peace and stability. Contrary to the OAU's epoch, state sovereignty and the prohibition to interfere in internal affairs of member states are no longer legal impediments to AU measures and interventions.

This special volume highlights the AU experience in settling constitutional crises in Africa since its operationalization in 2002. The study focuses on three main issues. First, it seeks to explain what one can understand by constitutional crises that the AU has the power to address and resolve. In general, constitutional crises are considered to be a "problem or conflict in the function of a government that the political constitution or other fundamental

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2 *Eki Yemisi Omorogbe*, A club of incumbents? The African Union and coups d'Etat, in Vanderbilt Journal of Transnational Law, vol. 44 (1), 2011, pp. 137–154.

3 AU Constitutive (11 July 2000), art. 4 (m).

4 Ibid., art.4 (p).

5 AHG/Decl.4 (XXXVI), Solemn Declaration on the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA), 36th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Lomé (Togo), 10–12 July 2000, para.9 (h). See also *Anastase Shyaka*, Les conflits en Afrique des Grands Lacs et esquisse de leur résolution, Varsovie, 2003.

governing law is perceived to be unable to resolve".[6] How can these crises be categorized? Obviously, the concept does not refer only to unconstitutional changes of government; it is more than that. Hence, the need to provide a conceptual framework of the notion of constitutional crises in the African context in order to understand their significance for AU peacebuilding efforts on the continent.

Second, the study examines the AU legal and institutional framework to deal with African constitutional crises. How is it adapted to the context? An emphasis is placed on the African Peace and Security Architecture (APSA). Does it offer sufficient leverage in situations where peoples' will and their (right to) self-determination are at stake? To this end, the study identifies AU's means of action and analyses how it resorts to them in specific circumstances. Part of the discussion bears on the use of force to defend democracy through intervention missions and peace support operations. The study also examines the application of AU sanctions against unconstitutional changes of government, decided and implemented alone or in cooperation with Regional Economic Communities (RECs). Another axis of analysis relates to the assistance the AU gives to its member states regarding election processes through, among others, electoral observation missions and the resolution of elections-related violence or post-election disputes. Challenges which the AU is facing or has encountered are underlined.

Third, the study assesses the impact of the AU actions in resolving constitutional crises on peace, stability, democracy and constitutionalism on the continent. What are the AU strengths and limits in this regard? Which lessons can be drawn for the future?

As it may be seen, this volume does not include issues related to the settlement of constitutional disputes through regional human rights protection bodies, such as the African Court and Commission on Human and Peoples' Rights, or courts of justice of RECs, such as the Economic Community of West African States and East African Community courts of Justice. This area of research has already been the subject of an abundant literature.[7] Our study rather focuses on political, diplomatic and military actions or measures adopted by the AU and its peace and security architecture to resolve constitutional crises in Africa. It does not examine whether democracy as a form of government is good or not for African states.

As such, the study mainly analyses legal questions. From a methodological point of view, it is therefore primarily based on a legal perspective, combining international law in

6 *Xenophon Contiades* and *Alkmene Fotiadou*, How constitutions reacted to financial crisis, in *Xenophon Contiades* (ed.), Constitutions in the global financial crisis: A comparative analysis, Farham, 2013, p. 53.

7 *Alain Didier Olinga*, La promotion de la démocratie et d'un ordre constitutionnel de qualité par le système africain des droits fondamentaux : entre acquis et défis, in African Human Rights Yearbook, vol. 1, 2017, pp. 221–243; *Sègnonna Horace Adjolohoun* and *Eric M. Ngango Youmbi*, L'émergence d'un juge électoral régional africain, in African Human Rights Yearbook, vol. 3, 2019, pp. 22–48 ; *James Thuo Gathii*, The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change, Oxford, 2020.

general, AU law, and African comparative constitutional law. This approach also matches better with the profiles of authors who have contributed to this volume. All of them are legal scholars even though some have a partial background in political science and international relations. However, the study takes into account facts-based evidence and, to some extent, political and sociological views, because constitutional crises and constitutional law issues in general are at the intersection of factual events and political science. For this reason, it is an interdisciplinary study, if only in part. Therefore, articles in this volume are not merely abstract analyses but include case studies and facts collected or observed on the ground. Each author has endeavoured to apply this approach to his or her paper or study.

As already stated, the main objective of this study is to examine how the AU settles constitutional crises within its member states for the purpose of building peace and entrenching democracy and constitutionalism in Africa. It pursues four specific objectives:

- Provide a conceptualization and manifestation of African constitutional crises and determine specific conditions that need to be met for one to qualify as such and trigger any AU's actions;
- Review the existing AU legal and institutional framework to addressing constitutional crises through the examination of various cases wherein the AU was involved;
- Assess the impact of the AU's actions in resolving constitutional crises towards enhancing peace, stability, democracy and constitutionalism in its member states.
- Provide a valuable reference document with recommendations to policy-makers in peacebuilding and the elimination of root causes of conflicts and crises in Africa.

In order to achieve these objectives, the study relies, among others, on AU legal instruments, official reports by AU organs or RECs, scholarly work, and other data obtained from informal discussions or interviews with relevant actors. Preference is given to an overall assessment and analysis of the issues that have been raised with examples and case-studies drawn from different parts of Africa.

Apart from the general introduction and conclusion, this volume contains six papers or articles. In the first article, *Balingene Kahombo* reviews the notion of constitutional crisis in the African context, identifies their root causes and specifies three conditions which must be alternatively or cumulatively met for a constitutional crisis to fall within the AU jurisdiction.

In the second article, *Kwaku Agyeman-Budu* analyses the AU legal and institutional framework in regard to challenges raised by constitutional crises in Africa. In this vein, he does not only highlight the role of AU organs, such as the AU Assembly and the Peace and Security Council (PSC), but also of RECs and Regional Mechanisms (RMs) which are an integral part of the APSA. He finds that despite its current robustness, the AU legal and institutional framework still suffers from a number of vulnerabilities that need to be addressed in order to achieve lasting peace and security on the continent. He underscores the need to push for a strong political will of African leaders and states in order to materialize the AU peacebuilding aspirations, and the importance of promoting decolonial

peace which breaks with the persistent colonial structures of independent African countries and the mentalities of neo-colonial dependence on great powers and former colonizers. He suggests that the AU should strengthen the military component of the APSA to improve its capacity of response to constitutional crises and, before all, to focus more on conflict prevention.

Trésor Muhindo Makunya, on his part, examines the relationship between constitutionalism, peace and security in the AU law and practice. In this paper 3, he extensively defines the notion of constitutionalism and examines how the AU attempts to foster its ideals in the efforts to resolve African constitutional crises. To this end, he analyses three case-studies, namely, Burundi, the Central African Republic (CAR) and South Sudan. For the author, the AU's strength, compared to the former OAU, is its ideological perspective linked to transformative constitutionalism based on a robust legal framework which prompts it to play an active role within its member states. *Makunya* argues that in the countries selected for his analysis, the AU has resorted to peace support operations, interventions and fact-finding missions to investigate human rights violations committed during constitutional crises as a means to solve them or mitigate their adverse effects. While this is already a positive development in peacebuilding, *Makunya* states that AU actions have notably been weaken by the lack of political will of member states to support measures that it had adopted, the shield of state sovereignty defying the robustness of applicable law in practice, and the lack of harmonious and coherent collaboration with relevant RECs. Therefore, the AU's record on resolving constitutional crises in the countries examined is mitigated. In CAR, for instance, due to its weaknesses, the AU peace support operation was even replaced by the United Nations peacekeepers; in Burundi, the AU intervention mission failed to be deployed, whilst the outcomes of the fact-finding mission have not been implemented so as to fight impunity. Likewise in South Sudan, the ad hoc mechanism for justice which was proposed remains in its prime infancy, if not a fiction. *Makunya* suggests that there is a need for a strong commitment to constitutionalism on the part of the AU, RECs and their member states. The AU should also work hands in hands with civil society organisations and other non-state actors, such national human rights institutions, in order to create a culture of constitutionalism at the domestic levels as a means to prevent constitutional crises from emerging or escalating.

In the fourth article, *Magdalena Sylister* focuses on the AU use of force to settle constitutional crises and uphold democracy. She uses and compares four case-studies, namely Burundi, Comoros, The Gambia and Mali. In this regard, she indicates that the results of AU actions vary depending on each case, but using force is already a milestone demonstrating that Africa and the AU assume their responsibility to solve African problems without necessarily waiting for the help from outside. Some of the achievements that have been identified include preventing the escalation of conflicts and crises, as in Burundi in 2015, thanks to the threat to deploy an intervention mission without the consent of the Burundian government in order to stop the crisis caused by President *Nkurunziza's* third presidential term. In The Gambia, the integrity of elections results was respected by outgoing President

Yahya Jammeh after a threat of military action by ECOWAS, in close cooperation with the AU, in order to establish in power the elected President, Mr *Adama Barrow* in 2017. In Comoros, the integrity of the country was safeguarded against the secession of Anjouan. The author also mentions a number of constraints in each case study. She particularly notes the fact that the AU and RECs/RMs are unable to deploy troops on the ground in a long-term perspective without being assisted by the international community, beginning with the United Nations. She stresses that the AU faces huge financial dependency on external donors. This could be partly alleviated if the current reform on alternative sources of financing AU activities is successful.

Serugo Jean Baptiste and *Balingene Kahombo* take stock of AU sanctions against unconstitutional change of government in article 5. They review the legal background to this phenomenon and observe that despite the adoption of numerous legal instruments, unconstitutional changes of government remain recurrent and widespread across the continent. They argue that the AU has at its disposal a variety of sanctions, ranging from politico-diplomatic sanctions to targeted as well economic sanctions. Furthermore, perpetrators of unconstitutional change of government are liable to criminal sanction which can be carried out at the domestic, regional and continental levels. However, in this area, the authors note, sanctions do not suffice to restore democratic order. In fact, the AU policy of sanctions is accompanied by diplomatic contacts and support to the establishment of transition government, power sharing deals and the organization of new elections. This fosters the rise of crisis constitutionalism which precedes the establishment of new democratic political orders. If this can be considered as a success in itself, the authors contend that in most of the cases, the AU and even RECs/RMs fail to restore to power overthrown governments. Rather, *de facto* authorities succeed to retain their positions after legitimizing their power through presumed democratic elections. In addition, member states and some RECs, such as ECCAS in the situation in CAR in 2003, undermine the AU policy of sanctions. Be it as it may, *Serugo* and *Kahombo* argue that the AU legal framework still has some loopholes in that a number of situations are not covered by it, such as infringing the principles of democratic government through fraudulent or delayed elections. They suggest that the better way to deal with unconstitutional changes of government is prevention. This requires, they note, a universal African adherence to common values of democratic governance, including the ratification of relevant AU treaties and their implementation at the domestic level.

In article 6, *Marystella Auma Simiyu* reflects on the AU preventive role of constitutional crises through its support to elections in Africa. She notes that free, fair, credible and transparent elections are essential to democracy and in the African context, an additional aspiration of 'peaceful' is added to the lexicon on elections. *Simuyu* states that this emerges from a history of election-related violence that has meted severe consequences on human security, and socio-economic and political development in Africa spanning from Kenya, Nigeria, Zimbabwe, Côte d'Ivoire, the DRC, and most recently in Uganda in its 2021 elections. She demonstrates that under its objective to promote peace, security, and stability

in Africa, the AU has employed various measures to achieve this goal with varied success, including the Panel of the Wise (POW), the Continental Early Warning System (CEWS), and Election Observation Missions (EOMs) to identify early warning signs of conflict and prevent disputes from escalating into electoral violence. She assesses the AU experience in Kenya (2007, 2013 and 2017), Zimbabwe (2008, 2013 and 2018), and Côte d'Ivoire (2010, 2015 and 2020). In these jurisdictions, she argues, while the AU's preventive action was evident, electoral violence was among other irregularities and illegalities that marred the credibility of elections. This emanates from a disconnect between norms in theory and norms in practice, weak institutional capacity, poor enforcement of the AU's recommendations, and ineffective redress of structural issues in members states. While acknowledging that the AU's preventive actions cannot be a panacea for avoiding electoral violence in Africa, the paper explores how the AU can enhance its effectiveness in conflict prevention throughout the election cycle in African countries.

In short, this volume engages the debate on how constitutional crises are resolved in Africa and makes recommendations to improve the efficacy of AU peacebuilding mechanisms and to prevent these crises. The authors do not claim to have exhausted the whole subject. But, hopefully, this volume can stimulate further debates and reflections among academics, practitioners, policy makers on constitutionalism, democratization, human rights, peace and security processes in Africa.