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The African Union, constitutionalism and power-sharing

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The African Union, constitutionalism and power-sharing

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ABSTRACT

Over the past decade, the African Union (AU) had put in place an important normative framework to promote constitutional rule and, in particular, orderly constitutional transfers of power in its member states. Through its Peace and Security Council (PSC), the AU has actively opposed, including through the use of sanctions, unconstitutional changes of government. As a key element of its policy, the PSC systematically advocates a return to constitutional order as a remedy for unconstitutional changes of government. Free and fair elections are an important element in the PSC policy of legitimating a new constitutional and political order. However, while opposing unconstitutional means of obtaining or transferring power, the AU has been generally supportive of the use of power-sharing agreements as an instrument of negotiated conflict settlement. Most power-sharing agreements are not in accordance with the prevailing constitutional order and, as part of a larger peace agreement, often contain new constitutional blueprints. This dual policy of, on the one hand, opposing certain types of unconstitutional changes of government, in particular military coups, and, on the other, advocating power-sharing agreements in the absence of a regulatory framework or normative guidance on such agreements poses an obvious challenge for the consistency of AU policy. Insofar as the AU wishes to nurture a culture of constitutionalism in its member states, it might benefit from developing policy guidelines about how to enhance the legitimacy of a new constitutional order - and of the political regime exercising political authority – be it in the aftermath of a coup or as a result of power-sharing.

1. INTRODUCTION

The promotion of democratic principles and institutions, popular participation and good governance is one of the objectives of the African Union (AU). AU member states on 30 January 2007 adopted an African Charter on Democracy, Elections and Governance, which reaffirms and specifies the AU's adherence to the rule of law and to the principle of constitutionalism. In recent years, the AU has repeatedly condemned coups d'Etat and urged its member states to respect constitutional rule as a way of promoting security, stability and peace on the African continent. Originally inspired by the (limited) ambition to prevent coups in Africa, the AU has gradually developed a broader normative environment for African constitutions and, in particular, orderly constitutional transfers of power. This paper purports to shed light on the normative framework as well as on the practice of the AU - in particular the AU Peace and Security Council (PSC) - in dealing with unconstitutional changes of government, with a focus on the PSC policy of calling for a return to constitutional order as a remedy for unconstitutional changes of government.

Against the background of this expressed AU belief in the value of constitutional rule, this paper pays particular attention to the rise of power-sharing agreements on the African continent. Such negotiated settlements are frequently resorted to, with the support of the AU, as interim and/or more longer term responses to situations of unconstitutional seizure of power, internal armed conflict and post-electoral violence. Power-sharing arrangements are, however, frequently at odds with prevailing constitutional norms about how political power is acceded to, transferred and/or maintained. They often necessitate short term constitutional rearrangements while also putting forward more long term constitutional reform processes.

This paper addresses the tension between the AU's adherence to constitutional rule and its endorsement of power-sharing agreements as a major instrument of conflict settlement on the African continent. This perspective brings to light more fundamental questions about the AU's approach to constitutionalism and about the difficulty of combining policies that are inspired by short-term imperatives of peace, security and stability (art. 3, f of the AU Constitutive Act) with the promotion of longer term goals of democratic state building (art. 3, g). It adds to the debate about the degree of involvement of the regional, intergovernmental level in promoting and protecting constitutional rule at the national level. The paper also highlights the challenge for the AU to refine its governance related benchmarks when legitimating a member state's return to constitutional legality.

2. THE AU AND CONSTITUTIONAL RULE: THE NORMATIVE FRAMEWORK

After decades of strict adherence to the principle of non-interference in internal affairs, the Organization of African Unity (the OAU, the AU's predecessor) issued two decisions on unconstitutional transfers of power, following the May 1997 Harare summit (days after the coup d'Etat in Sierra Leone) and the July 1999 Algiers summit (deciding that Member States whose Governments came to power through unconstitutional means after the Harare Summit should restore constitutional legality and requesting the OAU Secretary-General to assist in programmes intended to return such countries to constitutional and democratic governments). This paved the way for the adoption, in July 2000 - not coincidentally at the very moment of transformation of the OAU into the AU - of a more general policy declaration that continues to be referred to by the AU organs today.

2.1. The Lome Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government

Between 1956 and 2001, sub-Saharan Africa experienced 80 successful and 108 failed coups d'Etat, with thirty states experiencing at least one successful coup during this period of time.[1] The Lome Declaration was prompted by the desire of African leaders to find a response to the scourge of coups that marked the history of post-colonial Africa. Because military coups are not the only type of unconstitutional accession to power, the AU tried to expand its definition of norm violating behavior that requires its attention, introducing the concept of unconstitutional changes of government. However, as our analysis will show, AU practice remains strongly focused on coups and the AU struggles with the exact scope of what constitute unacceptable transfers of power.

The Lome Declaration puts forward a set of common values and principles for democratic governance. These include the adoption of and respect for a democratic constitution, separation of powers, political pluralism (with a role for civil society and for political opposition), protection of human rights (including freedom of expression and freedom of the press) and the organization of free and regular elections. While the Declaration states that non-adherence to those common values and principles often causes a political and institutional crisis which then culminates in an unconstitutional change of government, the latter concept does not include all violations of those same values and principles. The Lome Declaration limits the notion of an unconstitutional change of government to four types of situations: (i) a military coup d'Etat against a democratically elected government, (ii) an intervention by mercenaries to replace a democratically elected government, (iii) the replacement of a democratically elected government by armed dissident groups and rebel movements, and (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

In the event of an unconstitutional change of government occurring in a member State, the Lome Declaration requires the OAU to condemn such a change and to urge for a speedy return to constitutional order. A period of up to six months should be given to the perpetrators to restore constitutional order. During this period, the government concerned should be suspended from participating in the policy organs of the OAU. After the expiration of

[1] Patrick J. McGowan, "African military coups d'états, 1956-2001: frequency, trends and distribution", *Journal of Modern African Studies*, Vol. 41, N° 3, 2003, p.339-370.

the six month period, a range of limited and targeted sanctions against the regime that refuses to restore constitutional order should be imposed, including visa denials, trade restrictions, restrictions of intergovernmental contacts, etc. The Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution – later replaced by the AU Peace and Security Council - was charged with implementing the Lome Declaration.

2.2. The AU Constitutive Act of 11 July 2000

While maintaining the principle of "*non-interference by any member state in the internal affairs of another*" (art. 3, g) as a cornerstone of the functioning of the AU, the Constitutive Act combines this 'tradition' of non-interference as a foundation for the relations between equal and sovereign states with the 'novelty' of non-indifference of the AU.[2] As one of the guiding principles for the functioning of the AU, the Constitutive Act puts forward the "*respect for democratic principles, human rights, the rule of law and good governance*" (art. 4, m). Reflecting this policy of non-indifference, the Act stipulates that the functioning of the AU shall be guided by the principle of "*the condemnation and rejection of unconstitutional changes of government*" (art. 4, p). Without an explicit limitation to the four types of unconstitutional changes mentioned in the Lome Declaration, article 30 ('Suspension') of the Constitutive Act declares that governments coming to power through unconstitutional means shall not be allowed to participate in the activities of the AU.

2.3. The Optional Protocol of 9 July 2002 relating to the Establishment of the Peace and Security Council of the African Union

A Peace and Security Council of the AU was established in March 2004. It is the "*standing decision-making organ for the prevention, management and resolution of conflict*" and the "*collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa*".[3] Respect for constitutional governance is put forward as one of the guiding principles for the election of members of the PSC. Under the Optional Protocol, the PSC, in conjunction with the Chairperson of the Commission, shall "*institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lome Declaration*".[4]

While the Lome Declaration in itself of course remains a source of no more than soft law, this provision, given the binding legal nature of PSC decisions, clearly enhances its potential impact (including through the use of sanctions) on the states parties to the Optional Protocol. Pending the entry into force of the African Charter on Democracy, Elections and Governance, the Lome Declaration continues to be referred to as the main normative basis for the AU policy vis-à-vis unconstitutional changes of government.

2.4. The African Charter of 30 January 2007 on Democracy, Elections and Governance

A legally binding instrument was adopted at Eighth Ordinary Session of the AU Assembly of Heads of State and Government in Addis Ababa on 30 January 2007. As of January 2011, eight states had deposited their instrument of ratification (Burkina Faso, Ethiopia,

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[2] See also Paul D. Williams, "From non-intervention to non-indifference: the origins and development of the African Union's security culture", *African Affairs*, 2007, Vol. 106, N° 423, pp. 253-279.

[3] Optional Protocol of 9 July 2002 relating to the Establishment of the Peace and Security Council of the African Union, article 2.

[4] Art. 7, para. 1, g

Ghana, Lesotho, Mauritania, Rwanda, South Africa). The African Commission on Human and Peoples' Rights has repeatedly urged all African states to ratify the Charter.[5] Campaigns urging for early ratification of the Charter have been run by the AU Commission as well as by a coalition of African non-governmental organizations. The Charter will enter into force thirty days after the deposit of fifteen instruments of ratification with the chairperson of the Commission of the AU (art. 47-48). The Commission has the responsibility to promote favorable conditions for democratic governance on the African continent, and, more specifically, to "*ensure that effect is given to the decisions of the Union in regard to unconstitutional change of government*" (art. 44, para. 2(d)).

Compared with the Lome Declaration, the African Charter on Democracy, Elections and Governance (henceforth: the Charter) is more ambitious in imposing standards about how political power is to be *exercised* (and not only about how political power is *transferred*). Also, the Charter expands the definition of an unconstitutional change of government as well as the range of sanctions that may apply to states as well as to individuals.

2.4.1. General principles of the Charter

The Charter sets a normative framework in order to promote a culture of democracy and peace, adherence to the principle of the rule of law and protection of human rights on the African continent. It also puts forward a number of principles intended to foster better political, economic and social governance. States are requested to submit, every two years, a report to the AU Commission on the legislative and other relevant measures taken with a view to give effect to the Charter.

The Charter repeatedly expresses the adherence of the signatory parties to the value of constitutionalism. The preamble notes that unconstitutional changes of government are among the essential causes of insecurity, instability and violent conflict in Africa. Promoting the adherence to the principle of the rule of law premised upon the request for, and the supremacy of, the constitution and constitutional order in the political arrangements of the state parties is one of the key objectives of the Charter and is seen as a way of fostering stability, peace, security and development (art. 2). States parties commit themselves to taking all appropriate measures to ensure constitutional rule and, in particular, constitutional transfers of power (art. 5). They shall entrench the principle of the supremacy of the constitution in the political organization of the state and ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be through referendum (art. 10). The Charter also requires states parties to establish public institutions that promote democracy and constitutional order and to ensure that the independence of autonomy of these institutions is guaranteed by the constitution (art. 15). Among these institutions, independent national electoral bodies and electoral observer missions are put forward as essential instruments to entrench a political culture of transfer of power based on the holding of regular, free, fair and transparent elections (art. 17-22).

In general terms, the Charter stipulates that when a situation arises that may affect the democratic political institutional arrangements or the legitimate exercise of power in a state party, the PSC "*shall exercise its responsibilities in order to maintain the constitutional order*" in accordance with the relevant provisions of the Optional Protocol (art. 24).

[5] Resolution ACHPR/Res.133 of 24 November 2008; Resolution ACHPR/Res.164 of 26 May 2010.

2.4.2. Unconstitutional changes of government: definition and sanctions

More specifically, article 23 defines which "*illegal means of accessing or maintaining power*" constitute an unconstitutional change of government. Four categories are almost identical to the ones listed in the Lome Declaration, a fifth one is added. Constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union: (a) any putsch or coup d'Etat[6] against a democratically elected government, (b) any intervention by mercenaries to replace a democratically elected government, (c) any replacement of a democratically elected government by armed dissidents or rebels, (d) any refusal by the incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or (e) any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government. Quite importantly, the Charter clearly stipulates that the five means mentioned in article 23 are not a limitative but an *inter alia* list. While that is understandable in light of the problems to which the definition of the notion has given rise in actual practice (see below) and while it may provide the PSC with the necessary flexibility to respond to certain situations that are not covered by the five types of situations listed, it raises potentially serious concerns, in particular when combining the 'open-ended' definition with the sanctions (including of a criminal nature) the Charter seeks to impose on states and/or individuals.

Article 25 specifies the sanctions states and individuals may incur. When the PSC observes that an unconstitutional change of government has taken place and finds that diplomatic initiatives have failed, it shall "*suspend the said State Party from the exercise of its right to participate in the activities of the Union*", in accordance with the above-mentioned article 30 of the Constitutive Act and article 7 (g) of the Optional Protocol. While this provision leaves some uncertainty as to its interpretation and modalities of application[7], it is specified that, in any case, the suspended state party must continue to fulfill its obligations to the Union and that, notwithstanding the suspension, the Union shall maintain diplomatic contacts and take initiatives to restore democracy in the state party. Sanctions shall also be imposed on AU member states that are proved to have instigated or supported unconstitutional change of government in another State. Regarding individual perpetrators of unconstitutional changes of government, article 25 stipulates that they shall not be allowed to participate in elections held to restore the democratic order or to hold any position of responsibility in political institutions of their State

[6] The notion of *coup d'Etat* is not defined in the Charter. In general, the term refers to events that generally last for no more than a couple of days and through which an incumbent political regime is illegally replaced at the highest level of power by a number of military officers, possibly in conjunction with civilian politicians (see, i.a., Issaka Souaré, *Civil wars and coups d'Etat in West Africa: An attempt to understand the roots and prescribe possible solutions*, Lanham, University Press of America, 2006, 29-30).

[7] Article 30 ('Suspension') of the Constitutive Act ("*Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union*"), to which article 25, para. 1, of the Charter makes reference, does not provide any detail about its scope either. However, Rule 37 ('Sanctions for Unconstitutional Changes of Governments') of the Rules of Procedure of the Assembly of the African Union stipulates that the Assembly shall apply the sanctions provided for in Article 23, para. 2, of the Constitutive Act ("*Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communication links with other Member States, and other measures of a political and economic nature to be determined by the Assembly*"). Quite remarkably, Rule 37 does not refer to Article 23, para. 1, of the Constitutive Act ("*The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments therefrom*").

(para. 4), that they may be tried before the competent court of the Union (para. 5)[8], that the Assembly of Heads of State and Government may decide to apply other forms of sanctions on them, including punitive economic measures (para. 7) and that states parties shall not harbor or give sanctuary to them (para. 8) but rather bring them to justice or take necessary steps to extradite them (para. 9) (*aut dedere aut judicare*). Finally, in accordance with article 26, the PSC shall lift sanctions once the situation that led to the suspension is resolved. What exactly is required in terms of the 'resolving' of the situation that led to the suspension, is unclear from the text of the Charter. As detailed below, AU practice so far requires a return to constitutional order as a solution.

2.5. AU Assembly Decision 269(XIV) of 2 February 2010

Alarmed by the resurgence of (attempted) coups d'Etat in Africa in 2008, the AU Assembly of Heads of State and Government adopted a decision[9] in February 2009 to support the activities undertaken by the PSC in view of an immediate return to constitutional order in the countries concerned by a coup. The Assembly also urged member states to ratify the Charter. Furthermore, it requested the chairperson of the Commission "*to submit concrete recommendations relating to the implementation of appropriate preventive measures against unconstitutional changes of government, as well as to the enhancement of efficiency and capacity building in early warning, good offices and mediation, including the Panel of the Wise*" (para. 6). In July 2009, an interim report by the Chairperson of the Commission was discussed by the Assembly, which requested further consultations with the Regional Economic Communities, the Pan-African Parliament and other relevant AU organs and institutions on the ways and means of strengthening the capacity of the AU to deal with unconstitutional changes of government.[10] In line with a recommendation in the final report, the Assembly adopted a (legally binding) Decision[11] on 2 February 2010 which clearly finds inspiration in the Charter in order to enhance the effectiveness of the AU response. In particular, sanctions put forward in Article 25, paragraphs 1, 4, 6 and 7 of the Charter are included in the Decision. In addition, the Decision adds an important diplomatic sanction, stating that "*Member States should, upon the occurrence of an unconstitutional change of government, not recognize the de facto authorities*" and calling on all non-African international bodies including the United Nations "*to refrain from granting accreditation to such authorities*" (para. 6, I, c).[12] The Decision also underscores the need for the AU to build up proactive capacity to enhance structural prevention of unconstitutional changes of government and it emphasizes the importance of consultation and coordination with regional mechanisms.

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[8] This provision is remarkable because, in the current state of affairs, no court with criminal jurisdiction seems to exist at the level of the Union.

[9] African Union, Assembly of Heads of State and Government, *Decision on the resurgence of the scourge of coups d'Etat in Africa*, Assembly/AU/Dec.220(XII), February 2009.

[10] African Union, Assembly of Heads of State and Government, *Decision on the prevention of unconstitutional changes of government and strengthening the capacity of the African Union to manage such situations*, Assembly/AU/Dec.253(XIII), 3 July 2009.

[11] African Union, Assembly of Heads of State and Government, *Decision on the prevention of unconstitutional changes of government and strengthening the capacity of the African Union to manage such situations*, Assembly/AU/Dec.269(XIV) Rev.1, 2 February 2010.

[12] This raises the question – which goes beyond the scope of this paper – what criteria for accepting the credentials of governments are applied by the UN Credentials Committee and to what extent this can or should be an instrument to promote constitutionality and/or democratic legitimacy of governments. On this question see, i.a., Jean d'Aspremont, "Legitimacy of governments in the age of democracy", *New York University Journal of International Law and Politics*, Vol. 38, N°4, 2006, 878-917.

3. A RETURN TO CONSTITUTIONAL ORDER AS A REMEDY FOR UNCONSTITUTIONAL CHANGES OF GOVERNMENT: RECENT AU POLICY AND PRACTICE

The normative framework, which has developed remarkably fast over the past decade, has been actively applied by the AU, in particular through the decisions of the Peace and Security Council. This section is based on an analysis of AU policy and practice in response to all of the situations arising after the establishment of the PSC in early 2004 and classified by the PSC as unconstitutional changes of government at their time of occurrence. In addition, some situations that were not classified as an unconstitutional change of government will be taken into account. Should similar events occur after the entry into force of the Charter, they may well be classified as unconstitutional changes of government as defined by the Charter. Also, some of these situations have given rise – with the support of the AU - to power-sharing arrangements with important constitutional implications (see below). A table with an overview of all situations referred to is attached (see Annex). [13]

This section focuses on the *reaction* by the AU PSC, in particular on how the required return to constitutional order – and constitutionalism more generally – shapes its remedial policy in response to unconstitutional changes of government. While the AU policy is obviously inspired by the ambition to discourage, the effectiveness or success of the AU policy in *preventing* unconstitutional changes of government is not the subject of our analysis.[14] It would also go beyond the scope of this paper to analyze in more detail the *procedural and institutional aspects* of the range of diplomatic initiatives taken by the AU, very often in conjunction with regional actors like ECOWAS (Economic Community of West African States). [15] These initiatives include the establishment of international contact groups, the sending of high level missions, assistance in mediation processes, etcetera. As shown in the table, the AU has also fairly systematically made use of the possibility to impose sanctions on the state concerned.

The PSC generally addresses its calls for remedial measures to 'the parties' or 'the stakeholders' concerned by the events (which, depending on the particular country situation, may refer to political parties, armed movements, the armed forces, etc.). There is, however, some inconsistency in the terminology used to designate the entity responsible for the unconstitutional change of government. These entities have been referred to as "*the perpetrators of the coup*" (CAR), "*the authors of the coup d'Etat*" (Mauritania 2009), the "*illegal authorities emanating from the coup d'Etat*" (Guinea), "*the de facto authorities*" (Madagascar, Niger, Togo) and "*the new authorities*" (Mauritania 2005).

The PSC systematically insists on the need for a return to constitutional order as the appropriate remedy. This return to constitutional order can consist of two types of measures.

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[13] As shown in the table, reference will also be made to selected positions adopted by the OAU Central Organ of the Mechanism for Conflict Prevention, Management and Resolution after the adoption of the Lome Declaration. This paper covers developments occurring before 31 December 2010.

[14] Other authors identified several important obstacles and express doubt at the effectiveness of the AU to enforce the Charter (see, i.a., Ibrahima Kane, "The implementation of the African Charter on Democracy, Elections and Governance", *African Security Review*, Vol. 17, N° 4, 2008, p. 44-63).

[15] See the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of ECOWAS.

3.1. A return to the constitutional *status quo ante*

In some situations, the requested return to constitutional order amounts to a return to the *status quo ante*, i.e. the re-establishment of the constitutional order as it existed before the unconstitutional change of government, which is a classical remedy for internationally wrongful behaviour. This remedial policy is adopted in situations in which the PSC calls for the re-installment of the ousted authorities or for the application of the constitutional rules on succession of power.

> In the situation of CAR, the AU demanded the re-instatement of the democratically elected government. In the situation of Togo, the PSC requested a return to constitutional legality through the resignation of Faure Gnassingbe and the respect of the provisions of the Togolese Constitution regarding the succession of power. In the situation of Sao Tome and Principe, the PSC welcomed the return of the elected president. In the situation of Madagascar, the PSC demanded that all parties comply with the constitutional provisions on interim arrangements in the event of resignation of the President. In the situation of Guinea, the PSC (initially) called for the respect of the constitutional provisions relating to the succession of the Head of State (but later amended its position, as explained below). In the situation of Niger, the PSC requested – following the coup of 18 February 2010 - the restoration of constitutional order in the country as it existed before the referendum of 4 August 2009.[16] In the situation of Mauritania (2008), the PSC demanded the unconditional restoration of the elected president.[17]

3.2. Elections, possibly preceded by temporary power-sharing, as return to constitutional order

In other situations, the requested return to constitutional order amounts to the replacement of the *de facto* authorities by to a new, constitutionally established regime. This replacement is supported, actively encouraged and legitimated by the AU insofar as it is done through a process of free and fair elections. This alternative remedial policy is particularly relevant when a return to the constitutional *status quo ante* has become *de iure* or *de facto* impossible.[18] Depending on the particular country situation, presidential and/or legislative elections have been put forward as the necessary – but, insofar as they are free and fair, at same time sufficient – condition for the 're-constitutionalization' of the political order, therefore also resulting in the lifting of AU sanctions. In principle, and in accordance with the time-frame put forward in the Lome Declaration, the PSC calls for the return to constitutional order through the holding of elections in a period of up to six months. In several cases, however, the PSC expressed support for the organization of electoral processes after the six months deadline, realizing that the review of electoral legislation or the establishment of independent electoral commissions and other aspects of the organization of elections may inevitably require more time.

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[16] This referendum was called by incumbent President Tandja in order to allow him to run for an extra period of three years. Although this referendum was ruled to be unconstitutional by the Constitutional Court, the AU had not – and rightly so, given the definition laid down in the Lome Agreement – classified it as an unconstitutional change of government. Implicitly, however, by calling for a return to the status quo ante prior to the referendum, it confirmed the unconstitutionality of the referendum.

[17] In this case, the PSC also "*declared null and void all measures of constitutional, institutional and legislative nature taken by the military authorities and that followed the coup d'Etat of 6 August 2008*". While the latter statement appears to be the logical consequence of a return to the status quo ante, it is a remarkable interference by the PSC in the domestic legal order of Mauritania.

[18] There may be a legal/constitutional vacuum (e.g. assassination of the President and his constitutional interim successors) or a practical impossibility (e.g. situation of wide-spread chaos and violence).

> In the situation of Mauritania (2005), the PSC dispatched a ministerial delegation to discuss the "*modalities for a speedy restoration of constitutional order in the country*". In the months following the coup, the PSC noted with satisfaction the commitments made and the steps taken "*towards the swift restoration of constitutional order by a process which will culminate in the holding of free, fair and transparent elections*". In the situation of Niger, where a return to a constitutional *status quo ante* had become *de iure* impossible (given the unconstitutional rule by the ousted president), the PSC called for a transitional period not exceeding six months and ending through elections, leaving it to the *de facto* authorities to decide on the modalities of Niger's return to constitutional order. Revising its initial position in the situation of Guinea in light of the political reality on the ground, the PSC called for a rapid return to constitutional order, expressing its support for a temporary power-sharing arrangement, to be followed by the holding of legislative and presidential elections.

In some situations, the newly elected, constitutional regime was made up of the *de facto* authorities born out of the coup d'Etat 'legitimating' and 'legalising' themselves through elections. Faced with severe criticism on these situations of 'democratically legitimized' electoral coups, the AU recently refined its policy. Pending the entry into force of the Charter, and with reference to the AU Assembly Decision of 2 February 2010, the PSC recently rejected the participation of perpetrators of unconstitutional changes of government in elections held to restore constitutional order.

> In the situation of CAR, Togo and Mauritania (2008), the PSC expressed satisfaction at the holding of elections and lifted the AU sanctions, despite the fact that the elections paved the way for the *de facto* authorities – led by François Bozize, Faure Gnassingbe and Abdel Aziz respectively - to remain in power. More recently, in the situation of Niger, the PSC welcomed elections but excluded the participation of the authors of the unconstitutional change of government in the elections scheduled at the end of the period of transition. In the situation of Guinea, the PSC repeatedly welcomed the announcement of elections as the decisive step towards the restoration of constitutional order, satisfied that those responsible for the unconstitutional change of government accepted not to participate in the elections.

In some situations, the AU actively supported the establishment of temporary transitional governments though interim political power-sharing arrangements, pending the holding of new elections.

> In the situation of Mauritania (2008), the AU welcomed the signature of the Dakar Framework Agreement of June 2009, the establishment of the transitional government of national unity on that basis – including the participation of the movement responsible for the unconstitutional change of government - and the announcement of the presidential elections. As a result, the suspension measure against Mauritania as well as the sanctions imposed on individuals were lifted. In the situation of Madagascar, the AU actively supported negotiations that led to the Maputo Agreements of 8 and 9 August 2009 and the Addis Ababa Additional Act of 6 November 2009, which provided for the establishment of a transitional consensus government of national unity – including the participation of the movement responsible for the unconstitutional change of government – and the announcement of general elections. In the situation of Guinea, the AU welcomed the Ouagadougou Joint Declaration of January 2010, which led to the establishment of a government of national unity, as an interim arrangement leading to elections scheduled for 2011.

4. POWER-SHARING AND CONSTITUTIONALISM

The above has shown the AU's interest in safeguarding constitutional rule in its member states, including in disruptive, revolutionary situations which were traditionally considered to be a matter of strictly internal affairs. Given the AU support for power-sharing agreements arising in the context of situations classified as unconstitutional changes of government (as well as in other situations), the constitutional implications of such agreements require our attention. Can an AU policy which generally seems to favour the use of power-sharing be reconciled with its adherence to constitutionalism?

Before addressing the constitutional implications of power-sharing agreements, this section briefly summarizes three types of situations in which the AU has actively supported the use of power-sharing agreements. It also introduces the two main types of power-sharing one can distinguish by looking at its objectives.

4.1. Types of situations in which the AU supports power-sharing agreements

First, as referred to above, power-sharing agreements are sometimes resorted to as a temporary arrangement in the aftermath of unconstitutional changes of government. Here, power-sharing is advocated by the AU as an interim measure to enable a return to constitutional order through elections.

Secondly, and more frequently, power-sharing has become the dominant mode of ending internal armed conflicts. Today, intrastate wars rarely end through a military victory of one the parties (with some notable exceptions, like in the case of Sri Lanka). Most of the time, internationally mediated peace accords (generally made up of a series of agreements between belligerent parties) are the main strategy to arrive at an end of the armed conflict. Such negotiated settlements frequently involve power-sharing agreements between the parties.[19] Power-sharing agreements, in this case, essentially amount to a compromise which, on the one hand, reflects the prevailing balance of (bargaining) power between the negotiating parties and which, on the other hand, addresses their concerns and serves their interests. These power-sharing agreements generally include provisions on the exercise of political authority in one or more of four dimensions (political, economic, security and territorial power-sharing).[20] These dimensions are a backbone of all constitutional orders and it therefore comes as no surprise that power-sharing agreements may be hard to reconcile with the prevailing constitutional order.

Thirdly, 'crisis' power-sharing agreements have been used in the context of post-electoral violence. Two well-known cases are the situations of Kenya and Zimbabwe (both in 2008), where in the wake of contested and 'collapsed' electoral processes, a power-sharing agreement was resorted to prevent a further escalation of political violence. It would be erroneous, however, to assume that this has now developed into a new norm. In the situation of Côte d'Ivoire (2010), with two self-declared winners of the presidential elections – incumbent president Gbagbo being declared the winner by the constitutional court and challenger Ouattara being declared the winner by the national electoral commission, with the support of the UN operation in Côte d'Ivoire and international election observers – the theoretical option of

[19] See, i.a., the thematic issue on "Power-sharing in Africa" of *Africa Spectrum*, Vol. 49, N° 3, 2009.

[20] Caroline Hartzell and Matthew Hoddie, *Crafting Peace. Power-sharing institutions and the negotiated settlement of civil wars*, Pennsylvania State University Press, 2008, 208 p.

negotiating a power-sharing deal was in reality never (at least publicly) put forward as a solution. Looking back the experience in Kenya and Zimbabwe, the AU Commissioner for Political Affairs in September 2009 noted that a response to violent contestations of the outcome of electoral processes through power-sharing is problematic. "*In many instances, the response to the violence experienced has been to prescribe negotiated arrangements for stabilization purposes. Whilst such an approach is understandable, prescriptions of power sharing arrangements will have the consequence of weakening the momentum towards building the rules of competition that invariably embody winners and losers. Whilst a consensus government may be a good thing in itself, building this through rewarding the violence of losing parties makes a mockery of electoral competition*"[21]. In its 2010 report on election related disputes and political violence, the AU Panel of the Wise equally observed that the use of post-electoral crisis power-sharing arrangements, if not well managed, "*may spiral out of control and become a political tool, abused for purposes of manipulating the democratic process and annulling the people's vote*"[22].

The latter observation refers to a common danger of power-sharing in the context of all three types of situations. The use of power-sharing inevitably comes with an important demonstration effect and creates incentives for those actors possibly considering the use of armed violence (be in the context of a coup, of an internal armed conflict or in the aftermath of elections) as a way of gaining access to political power.

4.2. Types of power-sharing

Power-sharing arrangements can – as far as their objectives are concerned – be subdivided in two categories.

On the one hand, as referred to above, power-sharing is mostly advocated as a short term, peace and security-oriented, 'cake-sharing' arrangement. Its mere objective is to bring an end to hostilities by offering the carrot of (political, economic, military and/or territorial) power to elites.

On the other hand, power-sharing has been considered as a longer term strategy of promoting representative and inclusive governance in deeply divided, in particular ethnically segmented, societies.[23] While recognizing the difficulties of transplanting power-sharing mechanisms from well-established democracies to societies that are negotiating their exit from internal armed conflict, proponents have strongly recommended the use of consociational power-sharing as a tool for post-conflict state (re-)construction, including as far as constitutional design is concerned.[24] Some authors have warned against the inherently 'escalating' nature of

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[21] African Union, *Statement delivered by Her Excellency Mrs Julia Dolly Joiner, Commissioner for Political Affairs, African Union Commission at the Parliamentary Conference on Democracy in Africa organized jointly by the Inter-Parliamentary Union and the Parliament of Botswana*, 14 September 2009, p. 5.

[22] International Peace Institute, *Election-Related Disputes and Political Violence. Strengthening the Role of the African Union in Preventing, Managing and Resolving Conflict, Report of the AU Panel of the Wise*, African Union Series, July 2010, p. 4. See also LeVan, who argues that this type of power-sharing post-election pacts threaten to displace political competition and allow stubborn incumbents or electoral losers to negotiate their way to power (Carl LeVan, "Power Sharing and Inclusive Politics in Africa's Uncertain Democracies", *Governance*, Vol. 24, N° 1, 2011, 31-53).

[23] See, i.a., the thematic issue on "Constitutionalism in divided societies" of the International Journal of Constitutional Law, Vol. 5, N° 4, 2007 and Sujit Choudhry (ed.), *Constitutional Design for Divided Societies. Integration or Accommodation?*, Oxford, Oxford University Press, 2008, 492 p.

[24] Arend Lijphart, "Constitutional design for divided societies", *Journal of Democracy*, Vol. 15, N° 2, 2004, 96-109.

consociational power-sharing. Among them, some recommend more centripetal, moderating power-sharing modalities[25], while others recommend power-dividing corrections[26] as an alternative means of curbing the risk of political oppression of minorities by the (demographic and political) majority in purely majoritarian systems.

In some situations, peace accords can contain power-sharing agreements that are inspired by both objectives. This is particularly relevant when the segmental cleavages in society are also reflected in the leadership of the armed opponents and when the armed struggle is – at least partly – motivated by collective grievances of one or more of the societal segments. In the case of Burundi, for instance, successive peace agreements have included both types of power-sharing. The Arusha Peace and Reconciliation Agreement of 2000 contained a constitutional blueprint with important consociational elements aimed at pacifying the political cohabitation between ethnic segments. The 2003 and 2006 peace accords were, in the first place, a matter of 'cake-sharing' power-sharing.

4.3. Power-sharing and the constitutional order

The AU support for power-sharing raises the question whether this policy can be reconciled with its rejection of unconstitutional means of acceding to, transferring or maintaining political power.

4.3.1. In theory, power-sharing agreements are not necessarily incompatible with the existing constitutional order. It may well be possible to attribute positions in the political, military, economic sphere in a way that is fully compatible with the constitutional order. This is particularly the case when the power-sharing agreement does not involve the most senior positions.

> In the 2006 power-sharing agreement between the Government of Burundi and the rebel movement Palipehutu-FNL, a total of 33 posts (at the level of embassies, state owned enterprises, ministerial advisors, etc.) were granted to the FNL in return for the latter's agreement to lay down arms. The agreement was fully in accordance with the Constitution.

Generally much more problematic are situations in which strong executive power is shared. In particular in Africa's strongly presidential systems, in which executive power is largely concentrated in the hands of the presidency, political power-sharing – mostly through the creation of positions of vice-president or prime minister with autonomous executive power - is particularly difficult to organize without violating or amending the Constitution.

4.3.2. Most power-sharing agreements – whether or not as part of a larger peace agreement – clearly reflect 'constitution-making' intentions of the parties. The 'contract' signed between the parties often awards itself a quasi-constitutional status for the shorter term, includes a new and longer term constitutional blueprint and includes wording to ensure the incorporation of the power-sharing arrangement in the existing legal and constitutional order.[27]

4.3.3. In practice, most power-sharing agreements are clearly incompatible with the constitutional order.

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[25] Donald Horowitz, *Ethnic Groups in Conflict*, Berkeley, University of California Press, 2000.

[26] Philip Roeder, "Power dividing as an alternative to ethnic power sharing", in Philip Roeder and Donald Rothchild (eds.) *Sustainable peace. Power and democracy after civil wars,* Ithaca and London, Cornell University Press, 2005, 51-82.

[27] Bell refers to the "contrived constitutional form" of peace agreements (Christine Bell, *On the Law of Peace. Peace Agreements and the Lex Pacificatoria*, Oxford, Oxford University Press, 2008, 149-153).

In some situations, the text of the power-sharing agreement does not deal with its own legal status and simply fails to address its compatibility with the prevailing constitution.

> In the situation of Guinée, the Ouagadougou Joint Declaration of 2010 was signed by leading members of the CNDD, the movement responsible for the coup d'Etat and by the international mediator. It was agreed to establish a National Council of Transition composed of 101 members representing all segments of society. The agreement confirmed the interim de facto presidency of Konate (CNDD) and provided for the appointment of a Prime Minister from the '*Forum des Forces Vives du Guinée*' opposition movement as the head of a government of national unity. The AU PSC repeatedly welcomed the Ouagadougou Agreement which, undoubtedly, violated the Constitution, but which was seen as a necessary interim agreement prior to the organization of elections.
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> In the situation of Chad, the N'Djamena August 2007 power-sharing agreement clearly violated the Constitution on several points, for instance by indefinitely ("*until the time of election of a new national assembly*") extending the legislature which - under the prevailing constitution - ended in 2007. While no explicit wording was included regarding its legal or constitutional status, the Agreement also stipulated that no laws adopted as a result of the power-sharing agreement could possibly be amended in a way that derailed them from their original objectives as put forward by the agreement.

In other situations, this incompatibility is explicitly acknowledged, but provisions have been included which either rule out the possibility of challenging the constitutionality of the power-sharing agreement or which award supra-constitutional status to the power-sharing agreement.

> Article 35 of the Comprehensive Peace Agreement for Liberia (Accra, 18 August 2003) stipulates that *"In order to give effect to paragraph 8(i) of the Ceasefire Agreement of 17th June 2003 signed by the GOL, the LURD and the MODEL, for the formation of a Transitional Government, the Parties agree on the need for an extra-Constitutional arrangement that will facilitate its formation and take into account the establishment and proper functioning of the entire transitional arrangement"* (para. 1a) and *"For the avoidance of doubt, relevant provisions of the Constitution, statutes and other laws of Liberia which are inconsistent with the provision of this Agreement are also hereby suspended"* (para. 1b), while "*All other provisions of the 1986 Constitution of the Republic of Liberia shall remain in force"* (para. 1c). The Agreement itself ruled out the possibility for Liberians to challenge its constitutionality. In fact, the Agreement stipulated that "*Immediately upon the installation of the National Transitional Government of Liberia, all members of the Supreme Court of Liberia shall be deemed to have resigned*" (art. XXVII, para. 2.
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> In the case of Madagascar, the 2009 Maputo Charter of the Transition – in addition to announcing that a new Constitutional order will be designed (art. 35) – stipulates that the Charter constitutes the constitutional law of the transition (art. 42) and that all constitutional and legislative provisions that are not contrary to the Charter remain in force (art. 43), clearly granting supra-constitutional status to the Charter. The PSC repeatedly expressed its support for the power-sharing agreement, urging the de facto authorities borne out of the unconstitutional change of government to formally accept the Maputo Agreement and the Addis Abada Additional Act of 6 November 2009 and "*to revoke any domestic legal instrument which contains contrary stipulations*"[28].
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> In the case of Burundi, the 2000 Arusha Peace and Reconciliation Agreement provides for the establishment of transitional, power-sharing institutions for a period of up to three years stipulating that "*The constitutional provisions governing the powers, duties and functioning of the transitional Executive, the transitional Legislature and the Judiciary, as well as the rights and duties of citizens and of political*

[28] AU, PSC, *Communiqué of 19 February 2010*, para. 6.

parties and associations, shall be as set forth hereunder and, where this text is silent, in the Constitution of the Republic of Burundi of 13 March 1992. When there is a conflict between the Constitution and the Agreement, the provisions of the Agreement shall prevail" (Protocol II Democracy and Good Governance, Chapter II Transitional Arrangements, article 15, para. 2). Furthermore, the Agreement stipulates that, by its signature, "*the National Assembly agrees, within four weeks, to (a) adopt the present protocol as the supreme law without any amendments to the substance of the Agreement*". Also, it is agreed that during the transition period, a new Constitution will be drafted which must be in conformity with the principles – including the consociational power-sharing rules - set forth in the Arusha Agreement. The Constitutional Court was charged with verifying the conformity of the post-transition Constitution with the constitutional framework put forward by the Arusha Agreement. Although in practice, this did not occur[29], it clearly indicates the intention of the signatory parties to award supra-constitutional status to the Agreement. The power-sharing provisions in the 2003 peace agreement between the Transitional Government established in accordance with the Arusha Agreement and the CNDD-FDD rebel movement, also award themselves supra-constitutional status. They do so, on the one hand, indirectly by stipulating that the GCA constitutes "*an integral part of the Arusha Peace and Reconciliation Agreement for Burundi*" and, on the other, directly by stating that "*any constitutional, legislative or regulatory provisions which are inconsistent with this Agreement shall be amended as soon as possible in order to bring them into line with this Agreement*" (Art. 2-3).

4.3.4. In some situations, constitutional 'emergency' amendments or arrangements are called upon in order to keep up to appearance of constitutional continuity and of constitutional conformity of the power-sharing agreement.

In Kenya, highly creative use was made of a (retroactive) 'transitional constitution' arrangement.

In the situation of Kenya, a power-sharing "Agreement on the principle of partnership of the coalition government" was signed on 28 February 2008, with a draft "National Accord and Reconciliation Act" as an integral part to it. The latter Act was adopted in parliament on 6 March 2008. The power-sharing agreement and the Act provided for the creation of the position of a prime minister as head of the grand coalition government. The autonomous executive power granted (at the request of one of the negotiating parties) to the prime minister was clearly contrary to the prevailing constitution. The Agreement stipulated that the Act shall be entrenched in the Constitution. The Act stipulated that it shall cease to apply upon dissolution of the tenth parliament, if the coalition government was dissolved or a new Constitution enacted. There was a clear intention to give quasi-constitutional status to the Act. The Act also stated that Parliament will convene at the earliest moment to enact these agreements, in the form of an act of Parliament and the necessary amendment to the Constitution. Upon entry into force, on 17 April 2008, opposition leader Odinga took office as prime minister. At the same moment, a Constitution of Kenya Amendment Act and a Constitution of Kenya Review Act were adopted, in order to facilitate a comprehensive review of the Constitution. A Constitution of Kenya review committee was established, which submitted a draft Constitution in November 2009. A new Constitution was approved by referendum in 2010, which, quite interestingly, does no longer provide for the position of a prime minister. But, as part of its transitional arrangement, the 2010 Constitution itself stipulates that some of its provisions (including on the executive) will not apply and states that the power-sharing Agreement

[29] For a more detailed legal analysis, see Stef Vandeginste, *Stones Left Unturned. Law and Transitional Justice in Burundi*, Antwerp, Intersentia, 2010, 392-393.

> and the National Accord and Reconciliation Act will continue to apply until the 2012 elections (which retroactively confirmed their quasi-constitutional or 'transitional constitutional' status).[30]

In the case of Sierra Leone, the power-sharing agreement did not elaborate on its constitutionality, but contained provisions in order to ensure that possible incompatibilities between the agreement and the existing constitution or other legislation were retroactively removed.

> The 25 May 1999 Lome Agreement for Sierra Leone stipulated (under Art. X – Review of the present Constitution) that "*In order to ensure that the Constitution of Sierra Leone represents the needs and aspirations of the people of Sierra Leone and that no constitutional or any other legal provision prevents the implementation of the present Agreement, the Government of Sierra Leone shall take the necessary steps to establish a Constitutional Review Committee to review the provisions of the present Constitution, and where deemed appropriate, recommend revisions and amendments, in accordance with Part V, Section 108 of the Constitution of 1991*". Also, in Art. XXXVI – Registration and Publication, it was agreed that "*the Sierra Leone Government shall register the signed Agreement not later than 15 days from the date of the signing of this Agreement. The signed Agreement shall also be published in the Sierra Leone Gazette not later than 48 (Forty - Eight) hours after the date of registration of this Agreement. This Agreement shall be laid before the Parliament of Sierra Leone not later than 21 (Twenty-One) days after the signing of this Agreement.*" The legality of the agreement was indeed retroactively arranged by the adoption of the Lome Peace Agreement Ratification Act of 15 July 1999 by the Sierra Leone Parliament.

In Zimbabwe, the need to ensure conformity with the Constitution through a constitutional amendment was explicitly recognized and an 'urgency amendment' of the Constitution was adopted at the time of entry into force of the power-sharing agreement.

> In the situation of Zimbabwe, article XX of the 2008 power-sharing agreement laid down the 'Framework for a New Government' and stipulated that the executive authority of the power-sharing government was to be vested in and shared among the President, the Prime Minister and the Cabinet. Further provisions – clearly contrary to the prevailing constitution – detailed the powers of these institutions. In accordance with article 20.1.6 of the power-sharing agreement, opposition leader Tsvangirai was sworn in as new prime minister on 11 February 2009. Constitutional Amendment Act N°19 was adopted in parliament on the very same day. This amendment was adopted in accordance with article XXIV ('Interim Constitutional Amendments') of the power-sharing agreement in which it was agreed "*that the constitutional amendments which are necessary for the implementation of this agreement shall be passed by parliament and assented to by the President as Constitution of Zimbabwe Amendment Act No 19. The Parties undertake to unconditionally support the enactment of the said Constitution of Zimbabwe Amendment No 19*". In addition to this 'urgency amendment' of the Constitution, Article VI of the power-sharing agreement provided for a longer term constitutional review process.

In Côte d'Ivoire (2002), use was made to a 'state of emergency'-clause in the Constitution itself so as to allow for the implementation of a power-sharing agreement provision which otherwise, i.e. without application of that clause, would have been unconstitutional.

> In order to implement a power-sharing agreement provision on the eligibility of presidential candidates – stating that that it should suffice if the candidate is born of a father OR (and not AND) a mother born Ivorian, which was contrary to the strict '*Ivoireté*' citizenship requirement laid down in article 35 of the

[30] See also Henry Amadi, "Kenya's Grand Coalition Government – Another Obstacle to Urgent Constitutional Reform?", *Africa Spectrum*, Vol. 49, N° 3, 2009, 149-164.

Constitution - incumbent president Gbagbo, under strong international pressure and despite his personal reluctance to do so (see below), used his powers under article 48 of the Constitution. This 'state of emergency'-clause grants exceptional powers to the president allowing him to adopt measures needed to save the integrity of the country. On this basis, a presidential decree (*Décision 2005-01/PR du 5 mai 2005 relative à la désignation à titre exceptionnel des candidats à l'élection présidentielle d'octobre 2005*) was adopted to implement part of the power-sharing agreement, stipulating that exceptionally and for the sole purpose of the presidential election of October 2005, candidates presented by the political parties signatories to the Linas-Marcoussis power-sharing agreement are automatically eligible (contrary to other candidates who had to meet the constitutional requirement under article 35). The decision also disabled the Constitutional Council from verifying the eligibility of presidential candidates presented by the parties to the Linas-Marcoussis agreement.[31]

4.3.5. A final observation, be it of a somewhat different nature, is that the requirement of constitutional conformity of power-sharing can be instrumentalised when it serves the interest of one of the negotiating or signatory parties.

As noted above, in the situation of Côte d'Ivoire (2002), the power-sharing agreement called for an amendment of article 35 of the Constitution of 23 July 2000 on the conditions of eligibility of presidential election candidates. Apart from this proposed amendment, it was agreed that the constitutional order should be fully respected. The AU and the wider international community called for implementation of the power-sharing agreement. However, incumbent president Gbagbo argued that under the terms of 126 of the Constitution, the agreed amendment required a two-thirds majority in parliament and needed to be passed by referendum. He also argued that, in line with art. 127 (ruling out the possibility of a constitutional amendment when the integrity of the territory is under threat), this was not possible until there was a disarmament of rebel forces. In the end, a compromise was found through the use of article 48 of the Constitution (see above).

In the case of Kenya, a major point of disagreement between the two parties to the power-sharing negotiations concerned the position and powers of the prime minister. The government and the PNU party of incumbent president Kibaki only accepted changes that could be accommodated by article 16 of the Constitution (which clearly established presidential control over the government, including the yet to be created post of 'prime minister'). Opposition party ODM wanted to make sure that a newly created ministerial position was constitutionally enshrined since otherwise that position and the powers that come with it could be removed at the discretionary decision of the President. ODM claimed autonomous executive powers for the prime minister. AU mediator Kofi Annan brought in former UN Legal Counsel Hans Correll to help and solve the dispute about the power and responsibilities of the prime minister, the process for nominating ministers and dissolving the government (the security of tenure) as well as to advise on whether the changes required an act of parliament and also an amendment of the Kenyan constitution.

4.4. The AU and power-sharing: some interim conclusions

This brief analysis of recent power-sharing agreement practice reveals, first of all, that most power-sharing agreements are not in accordance with the prevailing constitutional order, in which case the agreements are generally given supra-constitutional status. Secondly, power-sharing agreements often contain constitutional blueprints and/or give rise to far-reaching constitutional reform processes. Thirdly, creative strategies are used to bring power-sharing

[31] For a critical analysis by a former Constitutional Council judge, see Marie-Agathe Baroan, *Démocratie et élections en Côte d'Ivoire: Ombres et lumières*, Paper presented to the World Congress of the International Association of Constitutional Law, October 2010, 26p.

agreements in harmony with requirements of constitutional continuity – or, at the very least, in order to keep up appearances of constitutional continuity. At the same time, this concern for constitutional continuity offers an argument that can be strategically used by some of the negotiating parties when it serves their interests. In conclusion, with the active support of the AU, power-sharing agreements are used in order to re-design both the short term and the long term constitutional order in a way that is felt politically desirable by the negotiating parties (which essentially reflects their bargaining power around the negotiations table).

As a result, there is an undeniable tension between, on the one hand, AU support for power-sharing agreements and, on the other, the provision laid down in its Constitutive Act that "*Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union*" (art. 30), and, more generally, its adherence to the value of constitutional rule.

This raises the question whether, for the AU, a return to constitutional rule after a coup, after an armed conflict or after failed elections must meet certain substantive criteria of legitimacy and accountability of governance.

5. LEGITIMATING THE RETURN TO CONSTITUTIONAL LEGALITY: AU STANDARDS

Before the 'third wave' of democratization hit the African continent, questions about the legality of the new constitutional order were hardly raised at the intergovernmental OAU level. At the national level, several coups d'Etat were even justified as necessary to restore constitutional order after periods of constitutional breakdown.[32] Domestic judiciaries often referred to Kelsen's theory of revolutionary legality to justify the start of a new constitutional order.[33]

Given its ambition to construct a more democratic, rule of law abiding polity at the level of its member states, this 'legalistic' approach to constitutionalism can no longer be applied by the AU today. As the main regional intergovernmental actor, the AU has become an important source of external legitimacy of African regimes. While the role of OAU could be summarized as that of the international *registrar* noting the existence of a new constitutional order, the AU has become more of a *judge* validating the constitutionality of a transfer of power.[34] This begs the question which governance-related values inspire the AU policy on the legitimacy of a return to constitutional order. This section briefly looks at the following factors and to what extent they shape AU policy as it legitimates a member state's return to constitutional rule: free and fair elections (5.1.), accountability for past abuses (5.2.), popular ownership and responses to conflict-related collective grievances (5.3.). Attention is paid to recent practice, as well as to the prospects offered by the Charter.

5.1. In several respects, elections conducted in accordance with democratic standards of freedom and fairness are a legitimating factor that shapes the AU policy on constitutional rule.

First, the definition of an unconstitutional change of government refers to activities undertaken against *democratically elected* governments and to incumbents refusing to relinquish power *after free, fair and regular* elections. Secondly, in the three types of situations referred to above, the AU regards 'founding' free and fair elections held after a period of power-sharing as the starting point of the new constitutional order. The Charter adds weight to the importance of elections as an element in the AU policy on constitutional rule. Chapter 7 of the Charter deals with democratic elections and pays major attention to advisory services offered by the AU Commission as well as to the deployment of electoral observer missions.

From a normative perspective, one may argue that the AU PSC policy should more clearly reflect the fact that incumbent regimes are particularly good at consolidating their power, including through seemingly free and fair elections (and that the AU should therefore develop or refine its standards accordingly). One might also argue that incumbents remaining in office after fraudulent elections should be treated similarly to those responsible for an unconstitutional change of government as defined by the Charter. Also, while some literature confirms the 'self-

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[32] Frederick Cowell, "Preventing coups in Africa: attempts at the protection of human rights and constitutions", *The International Journal of Human Rights*, Vol. 15, N° 5, June 2011, p. 751.

[33] According to Kelsen, a legal order ceases to exist when the constitution is changed in a way that is not in accordance with its own provisions (Hans Kelsen, *General Theory of Law and State*, New York, Russell and Russell, 1973).

[34] While it would go beyond the scope of this paper to analyze this trend at a more global level, it is worth referring to the 'democratic entitlement' school of thought which developed in the early nineties and which argued that legitimacy of governments was no longer an exclusively national matter but should also be assessed by international standards (including democracy). See Thomas Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law*, Vol. 86 , N° 1, 1992, 46-91.

reinforcing' power of elections as an instrument to promote a more politically liberal and competitive regime, it has become clear that elections are cleverly used by incumbent regimes to consolidate and 'autocratize' their rule, while keeping up democratic appearances and organizing multi-party elections.[35] The case could be made that the AU should find inspiration in the literature on alternation of powers as an indicator for democratization and therefore insist on inserting presidential term limits in the new Constitution.[36]

5.2. To what extent is accountability of those individuals responsible for the events leading to a violation of the constitutional order an element in the AU policy of legitimating a return to constitutional rule?

First, this question relates to vetting of individuals from senior political[37] office. Contrary to the Lome Declaration – which remains silent on this issue - but in line with the Charter and the AU Assembly decision of February 2010, the AU PSC increasingly systematically requires that those responsible for an unconstitutional change of government do not participate in the elections that should put the country back on track towards constitutional order. From the decisions of the PSC, it is not entirely clear what motivates this new policy.[38] It might be inspired by reasons of legality, coups generally being contrary to domestic criminal law and therefore those responsible must be banned from participating. This explanation is however contradicted by the fact that the PSC is generally supportive of amnesty legislation included in the power-sharing agreement. A second possible argument relates to the fact that without excluding those individually responsible, the elections - and the AU support to them – ends up legitimating *de facto* but illegal authorities who, because of their control over state resources, stand a good chance of winning the elections. Indeed, the AU was criticized for legitimating an 'electoral coup' in the situations of CAR, Togo and Mauritania (2008).

Quite remarkably, in situations that – so far – have not been classified as unconstitutional changes of government by the PSC but in which power-sharing agreements are concluded that are very often contrary to the constitution, the AU policy is radically different. In such situations, the transformation of rebel movements to political parties and the participation of their leaders in elections is strongly encouraged. Levitt rejects "*the ludicrous assumption*" inherent in power-sharing practice "*that warlords and rebels are intent on becoming practicing democrats*"[39]. The contradiction is indeed striking. As a result, the PSC inevitably sends the message to potential rebels that political violence – not through a coup but through an armed conflict and a negotiated settlement - is an accepted way of acceding to political power. This

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[35] On elections as a potential mode of democratization but also of autocratization, see, i.a., Staffan Lindberg (ed.), *Democratization by Elections: a new mode of transition*, Baltimore, Johns Hopkins University Press, 2009.

[36] A draft of the Charter, prepared for the meeting of AU foreign affairs ministers in June 2006, referred to the need to prevent the manipulation of constitutions and legal instruments for prolongation of tenure of office by an incumbent regime. No such provision was included in the final version. Souare suggests a binding continent-wide policy on two-term limits of a maximum of seven years for presidential mandates (Issaka Souaré, *The AU and the challenge of unconstitutional changes of government in Africa*, Pretoria, Institute of Security Studies, ISS Paper 197, August 2009, p.9).

[37] This obviously leaves open the possibility of a 'real' commander hiding behind the back of the so-called coup leader. Also, vetting a leader from taking part in the elections, may not prevent this person from taking up a powerful position in the security forces.

[38] Another major question not addressed here is how, by whom and through which procedure those responsible are identified.

[39] Jeremy Levitt, "Illegal peace? An inquiry into the legality of power-sharing with warlords and rebels in Africa", *Michigan Journal of International Law*, Vol. 27, 2005-2006, 506.

can lead to the remarkable situation (like in Chad and Burundi 2000) in which those responsible for a successful coup cannot participate in the elections, whereas those responsible for a failed coup attempt, starting a civil war and negotiating a power-sharing deal are actively encouraged to participate in the elections. There are at least two possible explanations for this apparent contradiction. First, the AU position may reflect its policy of sanctioning those responsible for reversing a democratic order, but not necessarily rejecting the possibility of insurgents waging war against non-elected authoritarian regimes.[40] Secondly, and more likely, in supporting power-sharing (and subsequent elections) with armed insurgents, the AU may well be inspired by a short-term peace and security agenda rather than by longer term objectives of state building and constitutionalism.

Does the AU require accountability, possibly through criminal prosecution, of those responsible for criminal offences under national law (insurrection, endangering the security of the state, etc.) or acts amounting to crimes under international law (war crimes, crimes against humanity, torture)? In several power-sharing agreements (like in Mauritania 2009) some kind of amnesty is included and therefore at least indirectly encouraged by the AU. From a normative perspective, the case could be made for AU guidelines – possibly along the lines of the UN mediation policy on this issue[41] – preventing the PSC from endorsing amnesty for crimes under international law as part of a power-sharing agreement.

What prospects does the Charter offer on this point? As noted above, a vetting provision is included stipulating that "*The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State*" (art. 25, para. 4). Paragraph 9 also includes a *dedere aut iudicare* provision for perpetrators of unconstitutional changes of government. It is not entirely clear whether the drafters of the Charters had the intention of defining a new crime under international law (in which case the wording of the Charter could have benefitted from more accuracy) or whether this provision simply reflects the reality that in most domestic legislation coups are criminal offences. No provisions are included in the Charter on the accountability for human rights crimes under international law committed in the context of coups or other unconstitutional processes of acceding to power.

5.3. What does the AU require concerning the social foundations of the new Constitution, procedurally (in terms of participation in the constitution-making process) or substantively (should, for instance, the new constitution address the root causes of identity-based armed conflict in deeply divided societies)?

In its recent practice, the PSC has expressed satisfaction at the fact that a referendum is held when adopting a new Constitution (e.g. in Kenya) or that power-sharing negotiations are not merely a matter of opaque elite deals but do imply broader society representatives (e.g. the process of national dialogue in Mauritania). But the AU does not seem to apply a more systematic policy on inclusiveness, participation and transparency of constitution-making processes.[42] Article 10 of the Charter stipulates that "*State Parties shall*

[40] If correct, this explanation should require the AU to differentiate its policy depending on the kind of regime insurgents wage war against.

[41] See the (internal) UN Secretary-General *Guidelines for UN Representatives on Certain Aspects of Negotiation for Conflict Resolution* (issued in 1999 and update in 2006).

[42] On a comparative note, see the UN Secretary-General *Guidance Note on UN Assistance to Constitution-making Processes* (issued in April 2009).

ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum". It will be hard to reconcile this provision with the kind of 'urgency' constitutional amendments to which power-sharing agreements have given rise in recent practice. Also, in particular in ethnically divided societies, a referendum may have potentially divisive effects and should therefore be handled with great care during a constitution-making process.

Substantively, the case could be made that, in legitimating the new constitution, the AU should require that underlying societal grievances that gave rise to the coup or the contested elections or the internal armed conflict must be addressed in the new constitutional order (and, as a result, in the electoral legislation)? The AU Panel of the Wise in July 2010 noted that "*While Africa's electoral systems should reflect regional, ethnic and demographic needs and variations, the pattern of high-stakes winner-takes-all electoral systems seems to be one of the major causes of violence and political instability. Africa should make deliberate efforts to progressively and creatively move towards electoral systems that broaden representation, recognize diversity, respect equity and respect majority rule while at the same time protecting minority rights*".[43] This could be read as an encouragement for African deeply (in particular ethnically) segmented societies to introduce consociational power-sharing elements in its constitutional design.

More generally, there seems to be a clear need for the AU to adopt a more norms based (in fact Charter based) approach as part of its mediation policy in order to restructure its remedial policy around a return (or transformation) to a *democratic* constitutional order.

[43] International Peace Institute, *op. cit.* (note 22 supra), p. 4.

6. CONCLUDING OBSERVATIONS

The adoption of the African Charter on Democracy, Elections and Governance reflects a remarkable trend in the policy of the African Union. While upholding the classical principles of respect for national sovereignty and non-interference in domestic affairs, the transformation of the OAU into the AU inaugurated a new policy of non-indifference and a commitment by AU member states to promote democracy, locally as well as across national borders. A tradition of automatic recognition of military coups and of the associated domestic constitutional 'revolution' has clearly come to an end. The AU rejection of unconstitutional changes of government and its policy of advocating a return to constitutional order as the main remedy for such situations, is the most visible face of its more general commitment to the promotion of constitutional rule on the African continent. However, when analyzing the practice of the AU – in particular in combination with the AU support for the use of power-sharing agreements – several problems and constraints can be identified.

A number of problems relate to the definition of the type of situations which the AU rejects as unconstitutional means of acceding to power. Quite understandably given the re-emergence of coups on the African continent in the late nineties, the AU has so far primarily focused on military coups d'Etat. Nevertheless, the notions of coup d'Etat and unconstitutional change of government only partly overlap. Not all coups are considered undesirable by the AU even though, in terms of the constitutional law of the country directly concerned by the events, all of them are, in all likelihood, unconstitutional. Coups are rejected only when perpetrated against a democratically elected government.[44] Other types of unconstitutional accession to power have been included in the definition - in particular in the open ended *inter alia* list laid down in the Charter - but have in actual practice (see Kenya, Côte d'Ivoire 2010) not been classified as unconstitutional changes of government by the AU. Other situations were classified as an unconstitutional change of government when that was not the case (Niger). Some situations are, in all likelihood, blatantly unconstitutional but not included in the definition, such as the situation of an incumbent government that stays in power by indefinitely delaying elections or after fraudulent elections. A critical challenge here are situations in which incumbents amend the Constitution in a way that is most likely to favour the continuation of their rule. More fundamentally even for the AU peace and security policy, our analysis shows that, while the AU rejects unconstitutional changes of government, power-sharing agreements – which in most cases amount to an unconstitutional means of acceding to power – are not considered problematic and, to the contrary, actively encouraged by the AU. Considering AU practice in recent years, there are good reasons to believe that this incoherence is due to the fact that while orderly constitutional transfers of power and, more generally, constitutional rule are seen as indispensable for the long term promotion of sustainable peace and security on the African continent, power-sharing agreements are primarily used as instruments to respond to short term stability imperatives, most notably to obtain an immediate cessation of hostilities. While this may explain the inconsistency, the question remains whether it also justifies it, in particular because it seems to undermine the validity of the norm the AU has so ambitiously put

[44] Some authors have called upon the AU PSC to revise its policy and to make a distinction between 'good' and 'bad' coups, not on the basis of the democratic nature of the ousted regime, but by considering popular support for the coup and the coup's potential to advance democracy (Eki Yemisi Omorogbe, "A Club of Incumbents? The African Union and *Coups d'Etat*", *Vanderbilt Journal of International Law*, Vol. 44, 2011, 123-154). The obvious difficulty with this proposed criterion is that the democratizing effect of a coup can only be assessed retrospectively, while the PSC reacts immediately after the (attempted) coup.

forward. More generally, while a promising regulatory framework has been put in place to deal with coups and other selected types of unconstitutional changes of government, normative guidance for the AU policy in the field of power-sharing is currently absent.

Other questions relate to the interplay between the international and national norms and institutions. First, when rejecting unconstitutional changes of government, the AU applies an internationally defined concept which classifies certain types of situations as automatically amounting to a violation of the constitution of the country concerned. The AU so far did not adopt a 'territorial state' perspective, which would imply applying national law to decide whether or not a change of government – including a power-sharing agreement - is constitutional or not.[45] Our analysis also reveals tensions between the roles of national and of international bodies, for instance in classifying a situation, in identifying those responsible, in defining domestic legal consequences of the unconstitutional accession to power, in defining criteria for what can be accepted as a legitimate return to constitutional order, etc. In general, the AU (rightly) seems to think that leaving it up to the national level of the various states parties to decide whether or not the constitution has been violated is, in all likelihood, a very poor and little effective way of rejecting and sanctioning unconstitutional changes of government. As the situation of Madagascar[46] and other cases have shown, national bodies that might in theory have the legal authority to adjudicate on the constitutionality of changes of government, including through power-sharing agreements, are in practice rarely capable of doing so, mostly because they have themselves been deeply affected by the events (i.e. they have been deprived of their legal powers or they have been suspended or annulled or they lack credibility and legitimacy, etc.).

The AU policy is clearly inspired by a belief in the democratizing and stabilizing values of constitutional rule and of elections. However, power may be acceded to and exercised in accordance with the Constitution, but still not be democratic. Elections also do not necessarily entail democratization and, as practice has shown, may provide a thin veil for perpetrators of a coup or warlords to legitimize their take-over. Apart from its recent policy of vetting coup perpetrators from participating in elections, the AU has so far been rather flexible in legitimating a return to constitutional order. Insofar as the AU wishes to nurture a culture of constitutionalism in its member states, it might benefit from developing policy guidelines about how to enhance the legitimacy of a new constitutional order - and of the political regime exercising political authority - in the aftermath of a coup or a power-sharing agreement.

[45] Compare with the Inter-American Democratic Charter – adopted by the General Assembly of the Organization of American States – from which the drafters of the African Charter are said to have drawn inspiration (Edward McMahon and Scott Baker, *Piecing a Democratic Quilt. Universal Norms and Regional Organizations*, Bloomfield, Kumarian Press, 2006, 134). This Charter – which equally considers that the constitutional subordination of all state institutions to legally constituted civilian authority and respect for the rule of law are essential to democracy - does not define the concept of "*unconstitutional interruption of the democratic order*" or "*unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state*" (art. 17-22). This seems to suggest that these concepts need to be defined in accordance with the constitutional law of the country concerned.

[46] The Constitutional Court validated the coup d'Etat by Rajoelina (*Décision N° 03-HCC/D2 du 23 avril 2009 concernant des requêtes relatives à la situation de transition*).

ANNEX

List of country situations referred to

Situations classified as unconstitutional changes of government by the AU		
Country	***Year***	***Brief description of events***
Central African Republic	2003	Coup d'Etat against President Patassé by former army General François Bozize (March). AU sanctions imposed. Elections held in 2005, won by Bozize. Sanctions lifted.
Guinea	2008	Decease of President Conté and coup d'Etat by the National Council for Democracy and Development of Captain Camara (December). AU sanctions imposed. Assassination attempt against Camara (December 2009). Ouagadougou Joint Declaration (January 2009): power-sharing agreement and interim government of national unity. Presidential elections, won by opposition candidate Condé (December 2010).
Guinea Bissau	2003	Coup d'Etat against President Kumba Yala by the Military Committee for the Restoration of Constitutional and Democratic Order (September). Legislative elections (March 2004) and presidential elections (June 2005), won by President Vieira, earlier deposed in a 1998 coup. (The assassination of Vieira by some military officials, in March 2009, was not seen as a coup, but as a revenge killing.)
Madagascar	2009	Coup d'Etat against President Ravolamanana by the Military Directorate of Andry Rajoelina (March). AU sanctions imposed. Maputo Agreements (August) and Addis Ababa Additional Act (November): power-sharing agreement, but not implemented. Elections announced but not held. Sanctions maintained.
Mauritania	2005 2008	Coup d'Etat against President Taya by the Military Council for Justice and Democracy of Colonel Vall (August). AU sanctions imposed. National Days of Dialogue and Constitutional referendum. Legislative (November 2006) and presidential (March 2007) elections. President Abdallahi sworn in. Sanctions lifted (April 2007). Coup d'Etat against President Abdallahi by General Abdel Aziz (August). AU sanctions imposed. Dakar Framework Agreement (June 2009): power-sharing agreement and establishment of interim government of national unity. Presidential elections (July 2009), won by Abdel Aziz. Sanctions lifted.
Niger	2010	Coup d'Etat against President Tandja by the Supreme Council for the Restoration of Democracy of Djibo Salou (February). AU sanctions imposed and AU request to return to the situation of before 4 August 2009 (i.e. before the one-sided constitutional amendment and dissolution of national assembly and constitutional court by President Tandja). Legislative and presidential elections announced for January 2011.
Sao Tome & Principe	2003	Coup d'Etat against President Fradique de Menezes by Major Pereira. One week later, general amnesty granted to coup plotters who return power to the President.
Togo	2005	Decease of President Gnassingbe Eyadema due to heart failure (February). Succession by his son Faure Gnassingbe (rather than by the chairman of the National Assembly) and constitutional amendment in order to allow Faure Gnassingbe to complete the presidential term limit of his father. AU sanctions imposed. Elections (April), won by Faure Gnassingbe. Sanctions lifted.

Continued on next page

Other situations		
Country	***Year***	***Brief description of events***
Burundi	2000	Signature of the Arusha Peace and Reconciliation Agreement, between the Government, National Assembly and two coalitions of political parties. Establishment of a Transitional Government and continued peace negotiations.
	2003	Peace Agreement between the Transitional Government and rebel movement CNDD-FDD of Pierre Nkurunziza. Power-sharing agreement and announcement of elections, held in 2005, won by Nkurunziza.
	2006	Peace Agreement between Government and rebel movement Palipehutu-FNL.
Chad	2006	Armed attacks by rebel movements (April) condemned as attempted unconstitutional change of government. N'djamena Agreement (August 2007) and Syrte Agreement (October 2007): cease-fire, amnesty and power-sharing agreement with several rebel movements. Continued violence and political instability. Elections scheduled for 2011.
Côte d'Ivoire	2002	Military coup attempt and start of a rebellion. Linas-Marcoussis power-sharing agreement (January 2003). Continued violence and signature of follow-up agreements (Accra, July 2004; Pretoria, April 2005; Ouagadougou, March 2007).
	2010	After repeated delays, presidential elections held (November 2010), incumbent President Gbagbo and challenger Ouattara both claiming electoral victory. AU expresses support for Ouattara but does not classify the situation as an unconstitutional change of government.
Kenya	2007	Presidential and legislative elections. Incumbent President Kibaki sworn in despite protests by the opposition. Massive post-electoral violence. Signature of an Agreement on the principle of partnership of a coalition government and a draft National Accord and Reconciliation Act (February 2008). Power-sharing arrangement and Constitutional review process.
Liberia	2003	Negotiated end of the civil war. Comprehensive Peace Agreement for Liberia (Accra, August 2003). Establishment of a National Transitional Government. Power-sharing.
Sierra Leone	1999	Negotiated end of the civil war. Signature of the Lome Peace Agreement between President Kabbah the Revolutionary United Front of Foday Sankoh. Power-sharing.
Zimbabwe	2008	Run-off of the presidential elections, opposition candidate Tsvangirai withdrawing because of massive violence. Incumbent President Mugabe wins the elections. Global Political Agreement between ZANU-PF and two MDC formations (September 2008). Power-sharing.

Source: author's compilation

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