

**BLURRY LINES:  
THE AFRICAN UNION'S IMBALANCED REGIME  
OF CONSTITUTIONALISM AND ITS CONSEQUENCES**

Philip Roessler  
proessler AT wm.edu  
Department of Government  
College of William and Mary

Layla Abi-Falah  
laabifalah AT email.wm.edu  
School of Law  
College of William and Mary

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Abstract

Since its founding in 2002, the African Union has invested in building a regime of constitutionalism that outlaws politics by force and strengthens democracy. The regime, however, has been selectively enforced. The AU regularly invokes it to police military coups, but has never sanctioned incumbents for carrying out constitutional coups—despite rules prohibiting such transgressions. We account for this imbalance and its consequences for democracy and accountability in Africa. Incumbent instrumentalization of the regime is a key cause of lax enforcement but we argue it is compounded by the absence of bright-line rules against constitutional coups.

In Africa, the coup d'état has been mortally wounded. Politics still plays out in the shadow of violence—and will continue to—but forcible seizures of power are no longer the path to sovereign power they once were. This is a remarkable development. Since the 1960s, there have been more than 100 forcible seizures of power. The decline of the coup is one of the most significant policy achievements of the African Union (AU). Building on the Lomé Declaration passed by its predecessor, the Organization of African Unity, the AU has gone to great lengths to bar coup-makers from coming to power. This policy change is linked to the significant reduction of coups in Africa.<sup>1</sup>

With the decline of forcible seizures of power, however, a troubling countertrend has emerged: the rise of the *constitutional coup*—in which incumbents manipulate their constitutions to remove or extend term limits to prolong their hold on power.<sup>2</sup> Despite adopting the African Charter on Democracy, Elections and Governance in 2007 that committed to sanction such offenses as it would military coups, not once has the AU done so. In turning a blind eye to incumbents who trounce constitutional term limits, while shielding them from violent overthrow,

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<sup>1</sup> Powell, Jonathan, Trace Lasley, and Rebecca Schiel. 2016. "Combating Coups d'état in Africa, 1950–2014." *Studies in Comparative International Development* 51(4): 482-502.

<sup>2</sup> On the rise of constitutional coups, see "African Union Must Stop 'Constitutional Coups,'" *Boston Globe*, February 25, 2016. Available at

<https://www.bostonglobe.com/opinion/editorials/2016/02/25/africa-constitutional-coups-can-just-damaging-military-coups/3aKRWUtYruged3DnhnRO8N/story.html>. Kamissa Camara, "Here's How African Leaders Stage 'Constitutional Coups': They Tweak the Constitution to Stay in Power."

*Washington Post: The Monkey Cage*, September 16, 2016. Available at

[https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/16/heres-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power/?utm\\_term=.af789e34ac7d](https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/16/heres-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power/?utm_term=.af789e34ac7d)

Joleen Steyn Kotze, "Africa Faces a New Threat to Democracy: the 'Constitutional Coup,'" *The Conversation*, February 8, 2017. Available at <http://theconversation.com/africa-faces-a-new-threat-to-democracy-the-constitutional-coup-72011>.

the AU is enabling a resurgence of personal rule and, as seen in Burundi and the Democratic Republic of the Congo, triggering new cycles of political instability and conflict.

What accounts for the AU's imbalanced regime of constitutionalism?

In many ways, the regime of constitutionalism that the AU has built and selectively enforces reflects the political interests of the "club of incumbents"<sup>3</sup> who comprise the regional organization. The regime enables autocratic incumbents to give a nod to "promoting democracy," while they consolidate their hold on power. This explanation is important but incomplete. It fails to account for the significant change in the institutional composition and preferences of member states in the lead up to and since the founding of the AU. Democratic elites, including a growing number of incumbents, rival the powerful bloc of autocrats who have traditionally dominated the regional organization. The consequence is there is a growing constituency who see the African Charter not as a tool for protecting incumbent power, but for upholding basic democratic standards and practices with the goal of deepening democracy across the region.

These conflicting preferences between its autocratic and democratic members are a key potential impediment to regional collective action, especially over enforcement of the African Charter. But, following from a long tradition in international law and law more generally, whether and how such divisions matter are, in turn, mediated by the clarity or precision of the regime's rules.<sup>4</sup> When the regime delineates "bright-line rules"—laws that are unambiguous in their interpretation and of which violations are easily observable and objectively verifiable—

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<sup>3</sup> Omorogbe, Eki Yemisi. 2011. "A Club of Incumbents? The African Union and *Coups d'Etat*." *Vanderbilt Journal of Transnational Law* 44: 123-154.

<sup>4</sup> For a valuable summary, see Abbott, Kenneth W., et al. 2000. "The Concept of Legalization." *International Organization* 54 (3): 401-419.

there is less room for member states to use discretionary power to impede enforcement.<sup>5</sup> For the AU's regime of constitutionalism, provisions outlawing forcible seizures of power and incumbents from clinging to power despite being voted out of office represent bright-line rules. There is little ambiguity surrounding what constitutes a military coup or when incumbents defy electoral defeat to stay in power. With no room for disagreement on whether these represent violations of the regime, the AU has acted to sanction transgressors. In contrast, the rules prohibiting constitutional coups represent more of a gray zone. Is a referendum to extend term limits in a country with restricted civil liberties "an infringement on the principles of democratic change of government" or an expression of the will of the people? This ambiguity hinders enforcement and opens the door for autocratic incumbents to exploit this gray zone to strengthen their grip on power.

The solution to this policy problem is clear. The AU needs to reduce the ambiguity surrounding its rules against constitutional coups. One bright-line rule in this regard has been proposed by the Economic Community of West African States (ECOWAS), in its annual meeting in 2015: a universal two-term limit for incumbents in all member states.<sup>6</sup> In adopting such an unambiguous rule, which enjoys broad support from publics across African states, there will be less room for autocrats to cling to power indefinitely and it will strengthen the AU's ability to sanction incumbents who dare to transgress this clear-cut provision.

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<sup>5</sup> Nicholas, Philip M., 2000. "The Myth of Anti-Bribery as Transnational Intrusion." *Cornell International Law Journal*, 33 (3): 627-655.

<sup>6</sup> LeBas, Adrienne. 2016. "Term Limits and Beyond: Africa's Democratic Hurdles." *Current History* 115 (781): 169-174.

The challenge is that the existing rules are no accident. Consistent with the idea that regime compliance is not merely an outcome, but a process,<sup>7</sup> during the writing of the African Charter autocratic incumbents intentionally blurred the lines prohibiting constitutional coups to weaken the constraints on their power. Fixing this will require a concerted and collective effort from democratic stakeholders to re-engage in the process and make a more balanced regime of constitutionalism.

The rest of the paper is organized as follows. First, we explain how African states have collectively re-written the rules for acquiring power and regional recognition. Second, we assess the track record of the AU in enforcing these new rules, highlighting the lax enforcement against constitutional coups. Third, we explain what accounts for this imbalanced regime of constitutionalism. We conclude considering the policy consequences and implications.

## **THE AFRICAN UNION AND THE NEW RULES OF THE GAME**

Since the end of the Cold War and, especially, over the last 15 years there has been a marked shift in the nature of African politics. Forcible seizures of power have given way to elections. The initial impetus for this change was the combination of pressure from below and

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<sup>7</sup> Hillebrecht, Courtney. 2017. "Compliance: Actors, Context and Causal Processes." In Wayne Sandholtz and Christopher A. Whytock, eds., *Research Handbook on the Politics of International Law* (Northampton, MA: Edward Elgar Publishing): 27-54.

from outside forces leading to political liberalization. Buttressing these democratic gains has been the emergence of an anti-coup regime within the African Union.<sup>8</sup>

The anti-coup regime represents a qualitative change from the de facto capital city rule that prevailed since the early 1960s.<sup>9</sup> As Jeffrey Herbst defined it, the capital city rule offered international recognition (and therefore access to external rents, resources and privileges) to any group that controlled the capital city, no matter how it came to power and how much control it had outside the capital.<sup>10</sup> However, with back-to-back coups against elected governments in Burundi and Sierra Leone in 1996 and 1997, respectively, that destabilized regional conflict management efforts, African regional organizations and their member states began to shed their indifference to forcible seizures of power.<sup>11</sup>

In 2000, the OAU adopted the landmark Lomé Declaration that condemned the coup d'état as a means for acquiring power and agreed upon a set of punitive actions the body would take in the event of coups and other unconstitutional changes, including incumbents who refused to relinquish power after losing elections. One of the most important sanctioning mechanisms proposed was suspension from OAU policy organs. Outlawing unconstitutional changes of government would later be enshrined as Article 30 in the Constitutive Act of the African Union, the successor to the OAU. The AU empowered the Peace and Security Council—the key

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<sup>8</sup> Souaré, Issaka K. 2014. "The African Union as a Norm Entrepreneur on Military Coups d'état in Africa (1952–2012): An Empirical Assessment." *The Journal of Modern African Studies* 52 (01): 69-94.

<sup>9</sup> Roessler, Philip. 2016. *Ethnic Politics and State Power in Africa: The Logic of the Coup-Civil War Trap* (New York: Cambridge University Press).

<sup>10</sup> Herbst, Jeffrey. 2000. *States and Power in Africa: Comparative Lessons in Authority and Control*. Princeton, NJ: Princeton University Press.

<sup>11</sup> Williams, Paul D. 2007. "From Non-intervention to Non-indifference: The Origins and Development of the African Union's Security Culture." *African Affairs* 106 (423): 253-279.

enforcement organ of the regional organization—to police unconstitutional changes of government, “as provided for in the Lomé Declaration.”

The AU’s anti-coup rules were designed to give room for democracy to flourish in Africa. But as coups were banned, a countertrend emerged. A number of African incumbents orchestrated *constitutional coups*—manipulating their constitutions to remove or extend term limits to prolong their hold on power. Though in nearly every case incumbents “operate[d] *through* rather than around the constitution,” as Daniel Posner and Daniel Young note, these maneuvers had the effect of entrenching incumbent power and thwarting alternations of rule that are more likely when incumbents step down. Up through 2007, 21 presidents reached term limits but only 11 accepted the limit. The other 10 sought to defy term limits and change the constitution, of which 7 were successful. This autocratic drift motivated the AU to deem such constitutional coups as unconstitutional changes of government.<sup>12</sup>

In 2007, the AU promulgated the African Charter on Democracy, Elections and Governance. In it, the AU expanded its regime of constitutionalism beyond forcible seizures of power (subsection 1 and 2 of Article 23) and democratic obstruction by incumbents who lost elections (subsection 4) to also include: “*Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government*” (subsection 5). This was an important addendum. The AU was acknowledging that, unless incumbents faced the same constraints as their rivals, outlawing politics by force was insufficient

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<sup>12</sup> Emphasis in original. Posner, Daniel N., and Daniel J. Young. Forthcoming. “Term Limits and the Transfer of Power.” In Nicholas Cheeseman, ed. *Institutions and Democracy in Africa: How the Rules of the Game Shape Political Developments* (New York: Cambridge University Press).

to underpin a new constitutional order. The African Charter came into effect in 2012 after fifteen states ratified it.

### **A REGIME OF CONSTITUTIONALISM: ASSESSING THE AU'S TRACK RECORD**

Fifteen years after the initiation of the African Union and ten years after the adoption of the African Charter, what is the AU's track record on upholding this regime of constitutionalism? A clear pattern has emerged. The AU has taken decisive and consistent action against forcible seizures of power and rejected incumbents who have clung to power after being voted out of office. In contrast, the regional organization has been much weaker in sanctioning incumbents who infringe upon the principles of democratic change of government.

#### *Rejecting Politics by Force*

Consistent with the initial motivation for the Lomé Declaration and the rules against unconstitutional changes of government, the AU has taken robust action against coups and other forcible seizures of power. No fewer than ten states have been suspended from the AU after groups sought to seize power by force: Central African Republic was suspended in 2003; Togo was suspended in 2005; Mauritania in 2005 and then again in 2008; Guinea in 2008; Madagascar in 2009; Niger in 2010; Mali in 2012; Guinea-Bissau suspended in 2012; Egypt in 2013; Central African Republic in 2013, and Burkina Faso in 2015.

In the first few years of the AU's existence, coup plotters sought to exploit a loophole in the AU's anti-coup rule by forcibly seizing power and then, to avoid sanctions and suspension,

restored the “constitutional order” by holding elections that they won—what Souaré refers to as *auto-legitimation*.<sup>13</sup> Coup plotters in Togo and Mauritania pulled this off before the AU closed this loophole. This new provision, included in the African Charter as well as endorsed by the AU Assembly in February 2010 at its Fourteenth Ordinary Session, has further strengthened the hand of democratic forces and blocked the coup as a path to sovereign power.

The one exception to the rule has been Egypt. For a year, the AU took a hardline position against the regime of Abdel Fattah el-Sisi, even as the United States and the European Union were more ambivalent and accepting of his seizure of power. But, then, in contravention of its rule against “auto-legitimation,” the AU eventually lifted Egypt’s suspension and recognized the Sisi government after he held and won a presidential election. The AU justified re-entry on grounds that having had the suspension in place for “close to a year...sent a strong message to the Egyptian stakeholders regarding AU’s attachment to its principles and instruments” and it was necessary “for the AU to remain engaged with Egypt and to accompany the efforts of the Egyptian authorities for the full implementation of the Roadmap” (a transitional process outlined by the military government to restore democracy).<sup>14</sup> This concession came on the heels of an active diplomatic campaign by Egypt to be re-admitted back into the AU. This points to a potential limit of the AU’s anti-coup rule: it is conditional on a target state’s diplomatic clout and strategic linkages.

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<sup>13</sup> Souaré, Issaka K. 2014. "The African Union as a Norm Entrepreneur on Military Coups d'état in Africa (1952–2012): An Empirical Assessment." *The Journal of Modern African Studies* 52 (01): 69-94.

<sup>14</sup> Peace and Security Council of the African Union (AU), Communiqué at its 442nd meeting on the situation in the Arab Republic of Egypt PSC/PR/COMM.2 (CDXLII).

### *Ensuring Incumbents Respect Election Outcomes*

Beyond policing forcible seizures of power, the AU has also served as a third-party enforcer to uphold election outcomes when the incumbent refuses to accept defeat. In Cote d'Ivoire in 2010 the African Union acted swiftly after incumbent Laurent Gbagbo rejected the Independent Electoral Commission's decision to declare opposition candidate, Alassane Ouattara, the winner of the country's run-off election. Within two weeks of the voting, the AU, following the lead of ECOWAS, suspended Cote d'Ivoire from the AU, until the democratically-elected candidate assumed state power. This was the first time the African Union suspended a state for its incumbent refusing to accept electoral defeat—a key provision included in the Lomé Declaration.

The African Union took similar action in Gambia after the long-standing incumbent, Yahya Jammeh, sought to negate his electoral defeat (after having initially accepted the results) at the hands of opposition candidate, Adama Barrow. Within 72 hours of Jammeh defying the outcome of the election, the AU PSC put out a communiqué on December 12, 2016 invoking the African Charter and reminding Jammeh of the AU's "total rejection...of unconstitutional changes of government, in particular any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections, as provided for in Article 23 (4) of the Charter."<sup>15</sup> ECOWAS similarly took decisive action and threatened to use force to uphold the results of the election. On January 13, 2017, the AU PSC declared the election results "inviolable" and declared the regional organization would cease to recognize Jammeh as

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<sup>15</sup> Peace and Security Council of the African Union (AU), Communiqué at its 644th meeting on December 12, 2016, PSC/PR/COMM.2 (CDXLII).

legitimate president of The Gambia when his term ended on January 19 and endorsed ECOWAS' "endeavors...to find a way for a speedy and peaceful transfer of power" in the country.<sup>16</sup> Jammeh eventually relinquished power after ECOWAS intervened militarily on January 19.

In both cases, the AU worked in concert with ECOWAS, which was out in front in both crises. Moreover, while the AU withdrew its recognition of the recalcitrant incumbents in line with the Lomé Declaration and subsection 4 of Article 23 of the African Charter, coercive action was taken by other actors—France and the United Nations in the case of Cote d'Ivoire and Senegal as part of ECOWAS in the case of Gambia.

### *Strengthening Constitutional Safeguards Against Incumbents*

In response to the rise of constitutional coups, the AU included the provision banning such maneuvers in the African Charter that came into force in 2012. The intent was to prevent incumbents from changing their constitutions to remove or extend term limits. In the few years since 2012, there have been several egregious cases of incumbents manipulating, defying or outright ignoring term limits to stay in power.

One of the most flagrant violations was Pierre Nkurunziza of Burundi's bid to extend his presidential tenure in power. Despite having failed to gain supra-majority parliamentary approval to change the constitution in 2014 to pave the way for him to run for a third term, Nkurunziza declared his candidacy in the 2015 presidential election. Nkurunziza's decision to

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<sup>16</sup> Peace and Security Council of the African Union (AU), Communiqué at its 647th meeting on January 13, 2017, PSC/PR/COMM.2 (DCXLVII).

run for a third term unleashed a cycle of insecurity that rocked the country, leading to hundreds killed over the next year.<sup>17</sup> The African Union was seized of the issue from the moment the crisis began in late April but never invoked Article 23 of the African Charter to sanction Nkurunziza for defying term limits nor for failing to meet regional standards for the organization of free, fair, transparent and credible elections. (Instead, the AU deferred to Nkurunziza's appeal to Burundi's Constitutional Court regarding the legality of his third term bid.) In contrast, in the midst of the crisis when military officers moved to depose Nkurunziza in a coup d'état for disregarding the 2005 Constitution and threatening to derail the country's hard-fought for peace, the African Union came out strongly against the military intervention, "condemning the attempt to take power by force in Burundi."<sup>18</sup> As the crisis continued throughout 2015, the AU PSC in response to the continued killings and human rights violations authorized the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU), in line with its authority under the AU's Constitutive Act to intervene in a member state in cases of war crimes, genocide and crimes against humanity. But the mission never got off the ground when the AU member states opposed the deployment of the force.<sup>19</sup>

On the heels of the AU's lax response to Nkurunziza's third term bid, Denis Sassou-Nguesso of Congo-Brazzaville and Paul Kagame of Rwanda orchestrated constitutional referenda in the second part of 2015 to extend their holds on power. The AU PSC remained silent on Rwanda.

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<sup>17</sup> "Political Crisis in Burundi," Council of Foreign Relations, Global Conflict Tracker. Available at <https://www.cfr.org/interactives/global-conflict-tracker?marker=23#!/conflict/political-crisis-in-burundi>

<sup>18</sup> Peace and Security Council of the African Union (AU), Communiqué at its 507th meeting on May 14, 2015, PSC/PR/COMM (DVII).

<sup>19</sup> International Crisis Group, "The African Union and the Burundi Crisis: Ambition versus Reality," Crisis Group Africa Briefing N°122 (Nairobi/Brussels), September 28, 2016.

When violence broke out in Congo-Brazzaville ahead of that referendum the Chairperson of the Commission of the African Union (AU), Dr. Nkosazana Dlamini Zuma, issued a statement on October 21, 2015, paying lip service to the African Charter. But the AU did not invoke or threaten to invoke its sanctioning authority under Article 23.

In 2016, the contagion of constitutional coups spread to the Democratic Republic of the Congo where, with the end of incumbent Joseph Kabila's two terms in office, elections were to be held in November to choose a new president. Lacking the support to change the constitution either through the parliament or via popular referendum, Kabila turned to delay tactics. In September, the country's electoral commission petitioned the constitutional court to postpone the next presidential vote on the grounds of problems with voter registration and funding. This sparked anti-government protests and a brutal crackdown by government forces; dozens were killed. As Kabila infringed "on the principles of democratic change of government," the African Union once again did not invoke or threaten to invoke Article 23 of the African Charter. Instead, in concert with the South African Development Community, it pushed for a negotiated solution. The "dialogue" that ensued did not include the country's strongest opposition leaders and was criticized by the Catholic Church. Nonetheless, the "dialogue" proceeded and on October 18 a political agreement was reached that postponed elections until April 2018 while remaining silent on Kabila's participation in the election and continuation in power at the end of his constitutionally-mandated term on 20<sup>th</sup> December 2016. In the end the agreement was rejected by the Congolese opposition and the crisis continued. A subsequent agreement was

brokered by the Catholic Church at the end of 2016 that insisted Kabila step down once elections are held before the end of 2017. The agreement remains in the balance.

In sum, despite facing textbook cases of incumbents infringing on the principles of democratic change of government by manipulating their constitutions or other legal instruments to keep themselves in power—and despite threatening order and stability in two important post-conflict countries, Burundi and DRC—the African Union and the Peace and Security Council did not invoke its sanctioning authority under the African Charter on Democracy, Elections and Governance to uphold constitutionalism. This stands in stark contrast to its readiness to police military coups, including ones that were triggered by incumbents' contempt for constitutional limits to their power.

#### **BLURRY LINES: EXPLAINING THE AU'S INCOMPLETE REGIME OF CONSTITUTIONALISM**

What accounts for the AU's checkered enforcement policy?

Consistent with a large literature in international relations, we would expect the AU's regime of constitutionalism to reflect and be a product of the underlying distribution of power within the regional organization.<sup>20</sup> As “a club of incumbents,” as Eki Yemisi Omorogbe describes the AU, its members converged on a set of rules that strengthened the power of sitting heads of state while tying the hands of their rivals. In outlawing prospective coups d'état—while taking no retroactive action—the incumbents eliminated a key potential threat to their political survival. A similar logic helps to account for the AU's feeble response to constitutional coups.

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<sup>20</sup> See for example: Krasner, Stephen D. 1991. "Global Communications and National Power: Life on the Pareto Frontier." *World Politics* 43 (3): 336-366.

Lest such rules constrain their power in the future, member states have been loath to invoke the African Charter against their colleagues who violate term-limits or use other tactics to extend their tenure.

The AU's regime of constitutionalism, however, cannot simply be reduced to incumbent instrumentalization. As described above, twice the AU has sanctioned incumbents for violations of the African Charter. These cases reflect the strength of democratic preferences and norms among an important bloc within the AU—a function of the shifting composition of the AU. At the end of 1997 of the 48 heads of state in sub-Saharan Africa, only 21 (or 44 percent) had initially come to power through elections.<sup>21</sup> By 2002 that number increased to 27 (or 56 percent). In 2017 it stands at 37 of 49 (or 76 percent). The changing institutional composition of member states has given rise to elites who are both socialized and invested in democracy. For these elites, the African Charter facilitates coordination among member states to uphold and strengthen basic democratic standards and practices. And without the rise of this democratic elite it is unlikely the AU's regime of constitutionalism would have formed in the first place.

This conflict within the AU between autocratic incumbents who see the regime as a tool for consolidating their hold on power versus democratic elites who see it as a mechanism for strengthening democratic governance hinders collective action. But, following from a prominent body of scholarship in international law, we would expect this intra-organizational conflict and

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<sup>21</sup> This excludes regular transfers of power, such as the transition from Agostinho Neto to José Eduardo dos Santos in Angola in 1979, but in which the head of state was not elected into power. Both follow formal rules but can be distinguished whether they follow democratic procedures in a Schumpeterian sense. It also excludes rulers that initially came to power through non-electoral means but which were subsequently elected. We expect the socializing effects of democracy to be weaker among rulers who initially came to power by force but then accept elections.

regime enforcement to be mediated by the clarity of the rules of the regime.<sup>22</sup> It is more difficult for factions to use discretionary power to block enforcement of provisions that are unambiguous in their interpretation and of which violations are easily observable and objectively verifiable—what legal scholars refer to as bright-line rules.

In the case of the AU's regime of constitutionalism, provisions outlawing forcible seizures of power and incumbents from clinging to power despite being voted out of office represent bright-line rules. There is broad agreement on what constitutes a military coup or when incumbents are clinging to power after being voted out of office. With such unequivocal transgressions difficult to obscure, the costs are higher for member states to defect from the regime and oppose enforcement.

In contrast, the rules prohibiting constitutional coups represent more of a gray zone. For example, did Nkurunziza's petition to the Constitutional Court of Burundi to validate his third term bid represent "an infringement on the principles of democratic change of government" or adherence to the letter of the law? The fact that there were allegations that the Court was under duress to rubberstamp Nkurunziza's third term bid suggests the former. What about in Rwanda where citizens voted in a referendum to change the constitution to allow Paul Kagame to extend his reign? Is this an expression of the will of the people? Given the restrictions on civil liberties in Rwanda, the legitimacy of such an act is equally murky.

As seen in other international regimes, this ambiguity is a key cause of non-compliance and impediment to enforcement, especially in mixed-ratified regimes in which there is not universal

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<sup>22</sup> As Abbot et al. pithily note: "clarity is essential to the force of law." Abbott, Kenneth W., et al. 2000. "The Concept of Legalization." *International Organization* 54 (3): 401-419.

commitment to the regime's tenets.<sup>23</sup> In the absence of clear legal rules, individuals turn to normative precepts to guide their behavior but are prone to follow and invoke norms of noncompliance rather than norms of compliance when the former align closer with individuals' self-interest.<sup>24</sup> This is evident in the case of the African Charter's provisions against "infringements on the principles of democratic change of government." Given the blurry lines as to what constitutes a "constitutional coup," incumbents, interested in staying in power, are more likely to be guided by and invoke norms of noncompliance (e.g., that extending their term limits reflects the will of the people or is justifiable because other leaders have also violated term limits) than norms of compliance (e.g., it is wrong for rulers to stay in power indefinitely).

The African Charter's blurry lines on constitutional coups are no coincidence. They are endogenous to the interests of autocratic incumbents. In a previous draft of the African Charter, Subsection 5 of Article 23 was more explicit in its definition of term limit violations as unconstitutional changes of government, specifying any: "Amendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution of the State Party concerned, *to prolong the tenure of office for the incumbent government.*" In other words, it deemed illegal any change of the existing constitution to prolong the tenure of the sitting head of state. But, according to the report of the ministerial meeting on the draft African Charter in Banjul in June 2006, this provision was watered down to its final version after the objection of

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<sup>23</sup> Morrow, James D., 2007. "When Do States Follow the Laws of War?" *American Political Science Review* 101 (3): 559-572. As of the end of 2017, 45 out of 55 African states have signed the African Charter but of these only 30 have ratified it.

<sup>24</sup> Feldman, Yuval, and Alon Harel. 2008. "Social Norms, Self-interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma." *Review of Law & Economics* 4.1 (2008): 81-126.

member states, ostensibly, “on the grounds that maintaining a government in power is a function of democratic expression, within the framework of constitutional rules and procedures in force.”<sup>25</sup>

## CONSEQUENCES AND POLICY IMPLICATIONS

The consequences of this change and the AU’s lax enforcement of textbook cases of constitutional coups have been grave. As seen in Burundi, Congo-Brazzaville, DRC and Rwanda, incumbents are exploiting this permissiveness to consolidate their hold on power. Even more, with the AU’s policing of irregular seizures of power, rivals are unable to use force or the threat of force to hold rulers accountable for manipulating their constitutions or other formal institutions to stay in power. Knowing their rivals’ hands are tied by the anti-coup policies of the AU and foreign donors, such as the United States, incumbents have more room to amass personal power.<sup>26</sup> This is exactly the outcome of Nkurunziza’s defiance of term limits in Burundi. When army officers rose up in support of popular protests to hold Nkurunziza accountable for flouting the constitution, the AU let the Burundian ruler off the hook by rejecting the coup.

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<sup>25</sup> Emphasis added. The minutes suggest it was the Uganda delegation that expressed reservation of subsection 5 as initially crafted. Executive Council of the African Union. “Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lome Declaration on Unconstitutional Changes of Government in Africa.” Ninth Ordinary Session, 25-29 June 2006, Banjul, The Gambia.

<sup>26</sup> For an application to South Sudan, see the concluding chapter in Roessler, Philip. 2016. *Ethnic Politics and State Power in Africa: The Logic of the Coup-Civil War Trap*. New York: Cambridge University Press.

In its current form, the AU's regime of constitutionalism is undermining democracy and increasing personal rule in Africa's most at-risk states. The solution to this problem is not to scrap anti-coup rules, which are proving effective at preventing violent seizures of power. Force is a powerful accountability mechanism but an inefficient one; it can do much more harm than good.<sup>27</sup> The solution is to strengthen constitutional constraints on incumbents. As is, the AU's regime of constitutionalism is failing on this dimension; it is giving a free pass to incumbents who cling to power indefinitely—as long as they do not lose elections.

We have argued that this is partially due to a lack of political will, but also a function of the ambiguity that shrouds Article 23, subsection 5 of the African Charter. An effective way for the AU to address this problem is to sharpen its rule against term limit changes. One simple solution was proposed by ECOWAS in its meeting in 2015: adopting a universal two-term limit for all member states. Under the weight of objections from two of its autocratic members—one of whom has since been ousted from power—ECOWAS tabled the proposal.<sup>28</sup> The African Union should pick up the mantle.

There are a number of advantages to such a rule. First, it provides a bright-line rule for constraining incumbents. Just as it is very clear as to what constitutes a forcible seizure of power or when incumbent rulers are refusing to accept electoral loss, there is no gray zone when it comes to a ruler trying to serve for more than two terms. And the AU should not allow

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<sup>27</sup> See for example: Svobik, Milan W. 2012. *The Politics of Authoritarian Rule*. New York: Cambridge University Press; Roessler, Philip, and David Ohls. 2018. "Self-Enforcing Powersharing in Weak States." *International Organization*.

<sup>28</sup> "Two Term Limit? Not For Us, West African Presidents Say, Adding to Central Africa-led Push-back," *Mail and Guardian Africa*, May 21, 2015. Available at <http://mgafrica.com/article/2015-05-21-third-term-limit-not-for-us-west-african-presidents-say-adding-to-central-africa-led-push-back>

incumbent rulers to reset their tenure clock. Once the rule comes into effect, if an incumbent has already served two terms, he or she must step down after finishing the current term.

A second advantage is this rule will boost alternations of power in Africa, increasing elite buy-in and legitimacy for the democratic system.<sup>29</sup> Opposition parties in Africa are significantly more likely to win elections when the sitting president does not stand.<sup>30</sup> And electoral turnovers are further found to increase citizenry support for the democratic system.<sup>31</sup>

A third advantage is it will set the African Union apart as the most progressive regional body when it comes to constitutionalism. As noted, the organization has already made great strides in policing coups. It can also serve as the global torch-bearer for constitutional term limits.

Some African incumbents will surely object on two grounds. First, incumbents will argue that regionally-mandated term limits forfeit their citizenry's right to self-determination. If citizens want to have their leaders serve for life, why should they be denied that choice? But as has been widely noted, extensive survey data from Afrobarometer belies this argument.

According to data from Round 6 of the Afrobarometer survey, some 75 percent of citizens across

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<sup>29</sup> Maltz, Gideon. 2007. "The Case for Presidential Term Limits." *Journal of Democracy* 18 (1), pp.128-142. Opalo, Ken. "Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi." Constitutionnet.org, July 30, 2015. Available at <http://www.constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi>

<sup>30</sup> Cheeseman, Nic. 2010. "African Elections as Vehicles for Change." *Journal of Democracy* 21 (4):139-153.

<sup>31</sup> Moehler, Devra C. and Staffan I. Lindberg. 2009. "Narrowing the Legitimacy Gap: Turnovers as a Cause of Democratic Consolidation." *The Journal of Politics* 71(4), pp.1448-1466.

34 countries support term limits.<sup>32</sup> If anything, in trouncing term limits African rulers are negating their citizens' self-determination. Second, incumbents may cry that term limits represent an infringement of their sovereignty. But as this new rule will represent a collective choice made by member states, it will be no different from the AU choosing to outlaw coups. If this rule makes the price of AU membership too high, member states can opt out of the regional organization.

One concern is that this externally-mandated rule will inadvertently weaken democracy in member states by supplanting the democratizing effects of civil society, political parties and citizens being forced to mobilize to uphold term limits. Ideally demand for term limits would engender the mobilization of such local democratic forces—as has occurred in Nigeria in 2006 and Burkina Faso in 2014 and in Togo in 2017. But, of course, the need for this rule in the first place is that the AU's regime of constitutionalism is helping to stack the deck against such democratic forces by aiding incumbents to personalize power. The democratizing benefits that come from strict term limits and the alternations of power they induce should more than offset the democratic costs that come from their external enforcement.

Twenty years since African states began to rewrite the rules governing inter-state relations, force is no longer a viable path to sovereign power. This is a major achievement. But the AU's regime of constitutionalism is incomplete. Until incumbents face the same hard constraints as their rivals, personal rule—the bane of political and economic development in Africa—will

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<sup>32</sup> Dulani, Boniface. "African Publics Strongly Support Term Limits, Resist Leaders' Efforts to Extend their Tenure." Afrobarometer Dispatch No. 30. May 25, 2015. Available at [http://afrobarometer.org/sites/default/files/publications/Dispatches/ab\\_r6\\_dispatchno30.pdf](http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30.pdf)

persist. The AU can address this with a simple but bold policy change that is broadly supported across the continent and will give a powerful boost to democratic consolidation.

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