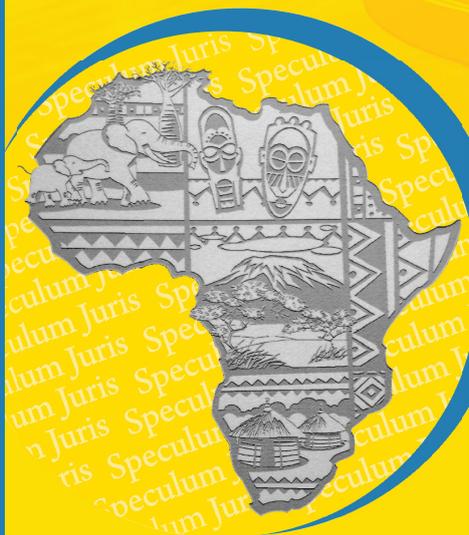


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## One Step Forward, Two Steps Backwards: The Threat of "Third Termism" on Democracy Rule of Law and Governance in Africa

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### Abstract

*The transition from the Organization of African Unity to the African Union heralded a new era for democracy, rule of law and good governance in Africa. For the first time, African states pledged to protect and promote democratic principles and values across the continent. In line with this commitment, the African Union adopted the African Charter on Democracy, Elections and Governance, a legally binding instrument which seeks to ensure the realisation of these values. In doing so, the AU sought to bring unconstitutional change of government to an end. Although the Charter has resulted in the reduction of traditional forms of unconstitutional change of government such as coups d'état, subtle forms of unconstitutional change, such as so-called "third termism", have emerged over the years and is becoming more prevalent across Africa. The AU has remained unresponsive to this development, which raises a number of questions, for instance, whether: Third termism constitutes an unconstitutional change of government; what the effects of third termism on the consolidation of democracy, rule of law good governance and accountability would be; and what the prospects for establishing a regional framework for third termism are. This paper examines the impact of third termism on the consolidation of democracy and rule of law. It is argued that the African Charter on Democracy, Elections and Governance in its present form cannot be relied upon in tackling the problem of third termism. It is also submitted that the AU has no political will to face this challenge. The indifference towards third termism not only reverses the gains made regarding the promotion of democratic principles and values, but also demonstrates double standards when it comes to the implementation of the AU's*

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legal instruments.

**Keywords:** Unconstitutional Change of Government, Third Termism, Term Limits, Rule of Law, African Charter on Democracy, Elections and Governance.

## 1 INTRODUCTION

Unconstitutional change of government has always been one of the biggest threats to democracy, rule of law, good governance, development and peace and security in Africa. Most post-independence states were de-stabilised by unconstitutional change of government by way of a *coup d'état*. In response to this problem, the African Union (AU) adopted successive legal instruments to prohibit the unconstitutional change of government. While these legal instruments reduced the occurrence of *coups d'état*, new forms of unconstitutional change of government that are not adequately dealt with in the AU instruments, have emerged. One such has become known as "third termism", which would require a constitutional revision and amendment. Although third termism has become the most common form of unconstitutional change of government, the AU has remained unresponsive to the practice. This raises the question whether third termism is permissible under the AU legal instruments. The purpose of this paper is to examine the impact of third termism on democracy, the rule of law, good governance, development and peace and security and the extent to which the AU legal instruments dealing with unconstitutional change of government, prohibit this practice. A brief history of presidential terms in Africa will be followed by a discussion of the growing trend of extending or abolishing presidential term limits in Africa. The debate around the advantages and disadvantages of term limits and the extent to which AU legal instruments dealing with unconstitutional change of government prohibit third termism will be discussed as well as the implications of third termism for democracy, the rule of law, good governance, development and peace and security. Finally, the AU's response to this practice and the prospects and challenges of enforcing term limits in Africa will follow.

## 2 HISTORICAL BACKGROUND OF PRESIDENTIAL TERM LIMITS IN AFRICA

Before 1990 most African states' constitutions did not contain clauses proscribing presidential term limits.<sup>1</sup> Only South Africa, Comoros, Tanzania and Liberia had constitutions stipulating term limits.<sup>2</sup> Zafar argues that during this time, a phenomenon called "big man" syndrome<sup>3</sup> existed which invested the president with virtually unlimited power with few checks and balances in place. As a result, leaders like Kwame Nkrumah of Ghana, and Hastings Kamuzu Banda of Nyasaland declared themselves presidents for life.<sup>4</sup> Furthermore, certain African countries adopted the one-party state system, thereby eliminating elections and the transition of political power,<sup>5</sup> a situation which resulted in "oppression, conflict and persistent underdevelopment" that destabilised most newly independent states.<sup>6</sup> One such consequence was the rise of *coups d'état*.<sup>7</sup> Between 1963 and 1990, a total of thirty-one *coups* took place in West Africa where only a few countries had adopted term limits.<sup>8</sup>

A dramatic change to the *status quo* was witnessed in the 1990s when a "whirlwind of

1 Namakula "The Efficacy of Presidential Term Limits in Africa" Mandela Institute for Development Studies Discussion Paper 3-4 [https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-Youth-Dialogue-Discussion-Paper\\_Term-Limits\\_Kevin-Eze.pdf](https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-Youth-Dialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf) (accessed 02-07-2018).

2 Dulani "African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure" (2015), Afrobarometer Dispatch No. 30 [https://www/afrobarometer.org/sites/default/files/publications/Dispatches/ab\\_r6\\_dispatchno30.pdf](https://www/afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30.pdf) (accessed 10-07-2019).

3 Zamfir "Democracy in Africa Power alternation and presidential term limits", European Parliamentary Research Service [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS\\_BRI\(2016\)580880\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) (accessed 15-08-2019).

4 York "The cult of Hastings Banda takes hold", The Globe and Mail <https://www.theglobeandmail.com/news/world/the-cult-of-hastings-banda-takes-hold/article4273860/> (04-08-2019).

5 Zimba "The Origins and Spread of One-Party States in Commonwealth Africa, Their Impact on Personal Liberties: A Case Study of the Zambian Model" in Ndulo *Law in Zambia* (1984) 115.

6 Zamfir "Democracy in Africa Power alternation and presidential term limits". [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS\\_BRI\(2016\)580880\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) (accessed 15-08-2019).

7 Kinyuny "The Crime of Unconstitutional Change of Government (Article 28E)" in Werle, Vormbaum (eds) *The African Criminal Court: A Commentary on the Malabo* (2016).

8 Decalo *Coups and Army Rule in Africa: Studies in Military Style* (1979).

democratization" swept across the continent.<sup>9</sup> During this period, there was a shift from authoritarianism as governments began to embrace democratic principles. Dolan notes that between 1990 and 2010, forty-nine African countries had either adopted or amended their constitutions to include provisions for term limits.<sup>10</sup> Several reasons have been cited to explain this development. According to Lebas, the adoption of democratic principles was forced on African states by Western donors who demanded the acceptance of Western democratic values in exchange for donor funding.<sup>11</sup> Lebas further argues that the adoption of liberal democracy was the outcome of mass protests against economic reforms such as the Economic Structural Adjustment Policy (ESAP), which African states adopted on the request of international institutions.<sup>12</sup> The era of democratisation in Africa coincided with the end of the Cold War.<sup>13</sup> African states aligned to the East adopted democratic principles, which included the introduction of presidential term limits. Zafar attributes the adoption of presidential term limits to the African states' desire to circumvent violent change of government, common among states with no presidential term limits.<sup>14</sup>

The adoption of term limits saw a decrease in *coups d'état*. For instance, while ninety-nine *coups* or attempted *coups* were recorded between 1970 and 1989, this number dropped to sixty-seven between 1990 and 2010. Barka and Ncube concur that between 1990 and 2010, African states were "equipped with measures of systemic legitimacy that discouraged praetorian assaults from the armed forces".<sup>15</sup> It is therefore reiterated that presidential term limits are an effective means of preventing *coups d'état*.

## 2.1 A Step Backwards: A Return to Unlimited Presidential Terms

Although term limits were introduced in the constitutions of many African countries in the 1990s, this trend has been reversed. The same leaders who oversaw the introduction of term limits have spearheaded the amendment of their countries' constitutions to extend or abolish term limits – a concept known as "third termism".<sup>16</sup> For instance, Burundi, Comoros, Rwanda, Togo, Gabon, Uganda, Chad, Sudan, and Guinea have amended their constitutions to either extend or remove presidential term limits.<sup>17</sup> Unsuccessful attempts to extend term limits were made in Zambia, Nigeria, Niger, Burkina Faso and Senegal.<sup>18</sup> Term limits were extended or abolished either through the amendment of the constitution, or legal instruments proscribing term limits,<sup>19</sup> or simply ignoring them.<sup>20</sup>

9 Souaré "The AU and the challenge of unconstitutional changes of government in Africa", Institute for Security Studies Paper 197 <https://www.africaportal.org/publications/the-au-and-the-challenge-of-unconstitutional-changes-of-government-in-africa/> (accessed 03-08-2019).

10 Dulani "African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure". Most of these terms were limited two-year terms, with each term being five years long.

11 Lebas "Term Limits and Beyond: Africa's Democratic Hurdles" [http://www.currenthistory.com/CurrentHistory\\_LeBas.pdf](http://www.currenthistory.com/CurrentHistory_LeBas.pdf) (accessed 05-08-2019).

12 *Ibid.*

13 Zamfir "Democracy in Africa Power alternation and presidential term limits" [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS\\_BRI\(2016\)580880\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) (accessed 15-08-2019).

14 *Ibid.*

15 Barka, Ncube "Political Fragility in Africa: Are Military Coups d'Etat a Never-Ending Phenomenon?" <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Economic%20Brief%20-%20Political%20Fragility%20in%20Africa%20Are%20Military%20Coups%20d%E2%80%99Etat%20a%20Never%20Ending%20Phenomenon.pdf> (accessed 11-08-2019).

16 The use of the 'term third termism' is a result of the realisation that most amendments and revisions of constitutions have been aimed allowing an incumbent who is restricted to two terms to run for the third term. However, third termism in this discussion refers to the amendment or revision of constitutions to either extend or abolish term limits.

17 Kiven "Presidential term limits: slippery slope back to authoritarianism in Africa", The Conversation <http://theconversation.com/presidential-term-limits-slippery-slope-back-to-authoritarianism-in-africa-96796> (accessed 08-08-2019).

18 At the time of writing, Guinea was engulfed by protests against attempts by President Alpha Conde's government to amend the Constitution in order to allow the incumbent to stay in power beyond the prescribed two terms. "Several killed in Guinea protests against constitution change" Al Jazeera 14 October 2019 <https://www.aljazeera.com/news/2019/10/dead-guinea-protests-constitution-change-191014151252630.html> (accessed 20-10-2019).

19 Through this method, the judiciary interprets the provisions of the constitution that make it permissible for the incumbent to circumvent term limits See the Burundi case study in s 3 below.

20 This means that when an incumbent's term of office expires, he/she neither calls for elections nor relinquish power. This has been the case in Eritrea. See also Lynch "The Country That's Never Had an Election", Global Policy <https://foreignpolicy.com/2013/11/06/the-country-thats-never-had-an-election/> (accessed 11-08-2019).

## 2.2 Pros and Cons of Term Limits

Proponents of term limits argue that they could enable the peaceful and orderly transition of power.<sup>21</sup> Evidence shows that countries such as South Africa, Tanzania, Namibia, and Mozambique that adhered to term limits experienced peaceful transitions. Souaré concurs that there is a relationship between term limits and leadership alternation.<sup>22</sup> Furthermore, term limits eliminate the need of force or violence to remove an incumbent president. For instance, the countries mentioned above that have enforced term limits have not experienced unconstitutional change of government since attaining independence. In contrast, countries whose constitutions do not contain term limits or have failed to enforce these are likely to experience a protracted transfer of power as well as an unconstitutional change of government. This is illustrated by the events which led to the ousting of Hosni Mubarak of Egypt, Blaise Compaoré of Burkina Faso, Muammar Gaddafi of Libya, and Robert Mugabe of Zimbabwe, all of whom were in power for more than twenty-five years and whose reigns ended protractedly. Consequently, term limits tend to facilitate the peaceful and democratic transfer of political power, an outcome that various AU legal instruments seek to achieve.<sup>23</sup>

Presidential term limits allow for equal opportunities for the contesting of political power, especially in countries where ethnic and tribal divisions are in conflict. For instance, the Arusha Agreement which brought the protracted Burundi Civil War between the Hutus and the Tutsis to an end, recognised that term limits would allow equal opportunity to campaign for high office.<sup>24</sup> Likewise, before the proposed amendment to the Comoros Constitution, s 13 of the Constitution stipulated that the presidency rotate among the country's Islands.<sup>25</sup> The introduction of term limits in the Comoros brought stability and ended a cycle of *coups*.<sup>26</sup> Given the ethnic tensions characterising most African countries it will be argued that term limits could prevent violent transitions.

Term limits facilitate the development of state institutions. In the absence of term limits, a patronage system will become inevitable, as the incumbent will attempt to exercise influence over key state institutions by appointing preferential individuals who will serve his/her own interests to stay in power.<sup>27</sup> Examples of countries where long-serving leaders have established such systems include Zimbabwe, Burundi and Uganda with presidents having influence over key departments such as the judiciary, and electoral commissions. In contrast, where term limits prevail, the incumbent will strive to develop equitable and effective institutions for which he/she will be accountable, even after leaving office.<sup>28</sup> Furthermore, leaders of countries where term limits prevail, have little incentive to manipulate state institutions for their own gain. An absence of term limits may also spell no incentive to an adherence to the rule of law because such leaders will be less likely to be held accountable during their terms of office. Zamfir notes that such states also tend to have poor human rights records.<sup>29</sup> Another benefit of term limits is that electoral processes tend to be competitive, free and fair.<sup>30</sup> In contrast, an incumbent whose term of office is not limited by the constitution can be motivated to manipulate electoral

21 Namakula "The Efficacy of Presidential Term Limits in Africa" <https://www//minds-africa.org/wp-content/uploads/2018/> (accessed 11-08-2019).

22 Souaré "The AU and the challenge of unconstitutional changes of government in Africa". <https://www.africaportal.org/publications/the-au-and-the-challenge-of-unconstitutional-changes-of-government-in-africa/> (accessed 03-08-2019).

23 See Article 5 of the African Charter on Elections, Democracy and Good Governance.

24 Williams "The African Union and coercive diplomacy: the case of Burundi" 2018 *Journal of Modern African Studies* 973 679.

25 Comoros's Constitution of 2001 with Amendments through 2009.

26 Ahmed "Comoros leader says wins vote to extend presidential term limits" Reuters 2 August 2018 <https://www.reuters.com/article/us-comoros-referendum/comoros-leader-says-wins-vote-to-extend-presidential-term-limits-idUSKBN1KN1TR> (accessed 15-08-2019).

27 Zamfir "Democracy in Africa Power alternation and presidential term limits" [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS\\_BRI\(2016\)580880\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) (accessed 15-08-2019).

28 Wilmot "How and why term limits matter" <http://africanarguments.org/2015/10/05/how-and-why-term-limits-matter/> (accessed 13-08-2019).

29 Zamfir "Democracy in Africa Power alternation and presidential term limits". [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS\\_BRI\(2016\)580880\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) (accessed 15-08-2019).

30 Namakula "The Efficacy of Presidential Term Limits in Africa". [https://www//minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-Youth-Dialogue-Discussion-Paper\\_Term-Limits\\_Kevin-Eze.pdf](https://www//minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-Youth-Dialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf) (accessed 02-07-2018).

processes in order to remain in office.

Opponents of presidential term limits have argued that limiting the number of terms a head of state can serve is a constraint on democracy since the populace cannot choose its preferred candidates. Those who support this view argue that presidents who have amended constitutions to extend or abolish term limits continue to win elections, thus demonstrating their popular support.<sup>31</sup> While it is true that leaders who amend their countries' constitutions to prolong their stay in power have won elections, the reality is that most long-serving leaders in Africa have a track record of manipulating electoral processes. For example, Presidents Nkurunziza of Burundi, Museveni of Uganda, and Gnassingbé of Togo whose countries' constitutions were amended to extend term limits, were re-elected under controversial circumstances. The fact that those who have extended or abolished term limits went on to secure further terms is no proof of leaders' popularity. An Afrobarometer survey shows that there is strong support for term limits in most African countries, including those with extended term limits and re-elected leaders,<sup>32</sup> proving that term limits do not hamper democracy.

Another reason put forward to justify the extension or abolition of term limits is that they "deprive the population of the opportunity to retain performing leaders and preventing them from achieving some appreciable projects".<sup>33</sup> This argument is difficult to sustain. A case in point is that Rwanda is the only country deemed to have experienced considerable development and economic growth, which owes more to the populace's satisfaction with President Kagame's performance. In contrast, other countries where the same presidents have been in power over a long period have not experienced meaningful development. For instance, Uganda, Zimbabwe, Eritrea and Togo where presidents have served for unlimited terms remain underdeveloped. It is indefensible that leaders of these countries who served for more than three decades refuse to vacate office on the grounds of unfinished projects. Souaré concurs that most leaders who pushed for extension or complete removal of term limits have done so towards the end of long terms and it is debatable whether these leaders can still be expected to "perform well in a third term when they have failed to do so for years, if not decades".<sup>34</sup> The author therefore rejects the hypothesis that term limits prevent incumbent presidents from completing their projects.

A further argument in favour of the extension or removal of term limits is that they cause instability, as a leadership vacuum is created when an incumbent steps down. The belief is that term limits have not been successful in preventing conflicts arising from succession rivalries. This argument is flawed for a number of reasons. First, as pointed out above, when African countries adopted term limits in the 1990s, the number of *coups* carried out drastically decreased. Second, violent steps were required to remove most long-serving leaders leaving the countries concerned on the brink of anarchy. In contrast, countries where leaders have adhered to term limits have experienced stability and smooth transitions.

Lastly, opponents of presidential term limits attempt to justify their reasons by stating that stable democracies such as the United Kingdom and Germany do not have term limits. However, the author believes that there are more compelling arguments for term limits in Africa than the situation in these countries. First, as Souaré notes, the electoral processes in countries such as Germany and the United Kingdom are free and fair and allow the "electorate to remove non-performing leaders during elections".<sup>35</sup> Those aspiring for political office do not have an incentive to resort to unconstitutional means to secure political power as they stand a chance to compete in free and fair elections. In contrast, the electoral processes in most African countries are designed to ensure that the incumbent retains power. This means that those aspiring to high office will have no choice other than to resort to the unconstitutional means of removing governments. Second, countries such as Germany and the United Kingdom have independent institutions that can be relied upon to uphold the rule of law. Therefore, long-serving leaders are held accountable even during their term of office, whereas most leaders in

31 *Ibid.*

32 Dulani "African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure" [https://afrobarometer.org/sites/default/files/publications/Dispatches/ab\\_r6\\_dispatchno30.pdf](https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30.pdf) (accessed 10-07-2019).

33 Souaré "The AU and the challenge of unconstitutional changes of government in Africa". <https://www.africaportal.org/publications/the-au-and-the-challenge-of-unconstitutional-changes-of-government-in-africa/> (accessed 03-08-2019).

34 *Ibid.*

35 *Ibid.*

Africa are not, owing to weak institutions. All the above indicate that the need for term limits is crucially important in Africa, more so than in other countries.

### 3 AU LEGAL FRAMEWORK ON UNCONSTITUTIONAL CHANGE OF GOVERNMENT AND THIRD TERMISM

The transition from the OAU to the AU expedited the adoption of democratic principles by African states. Unlike the OAU, which pursued principles such as state sovereignty, political and economic integration and the fight against neo-colonialism,<sup>36</sup> the AU seeks to advance democratic values and principles. According to Article 4 (m) of the Constitutive Act of the AU, one of the guiding principles of the AU is the "respect for democratic principles, human rights, the Rule of Law and good governance".<sup>37</sup> The AU undertakes to consolidate democratic institutions and culture, and to ensure good governance and the rule of law.<sup>38</sup> To promote these principles, the AU adopted the African Charter on Democracy, Elections and Governance (ACDEG) in 2007.<sup>39</sup> The objectives of the Charter include promoting adherence to democracy,<sup>40</sup> rule of law, including the respect of constitutional supremacy and constitutional order,<sup>41</sup> promoting free and fair elections,<sup>42</sup> the independence of the judiciary<sup>43</sup> and to nurture, support and consolidate good governance.<sup>44</sup> The ACDEG also prohibits unconstitutional change of government.

Prior to the adoption of the ACDEG, the AU made various declarations denouncing unconstitutional change of government. These include the Harare Declaration of 1997,<sup>45</sup> the Algiers Declaration of 1999,<sup>46</sup> and the Lomé Declaration of 2000.<sup>47</sup> However, these declarations had no binding effect on states and upon closer examination it was revealed that the condemnation of unconstitutional change of government was only aimed at traditional forms of constitutional change of government, such as the use of mercenaries to remove a constitutionally elected government, refusal to relinquish power after losing elections, and *coups d'état*. The AU took a bolder step to deal with third termism when it adopted the ACDEG, which classifies the amendment or revision of constitutions or legal instruments to extend or abolish term limits. The ACDEG does not define unconstitutional change of government. This definition can, however, be found in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Malabo in 2014 (Malabo Protocol), which defines unconstitutional change of government as any an act committed with the aim of "illegally accessing or maintaining power".<sup>48</sup> Since the amendment or revision of constitutions is aimed at maintaining power, one can argue that it fits in under the definition of unconstitutional change of government. This finds support from Article 23(5) of the ACDEG which states that "any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government" constitute an unconstitutional change of government and "shall draw appropriate sanctions by the Union".<sup>49</sup>

However, a closer examination of the provisions of the ACDEG reveals that they cannot be relied upon to prohibit third termism. First, the definition of unconstitutional change of government is limited in scope. For an amendment or revision of a constitution or legal instrument to be classified as unconstitutional change of government, it must constitute an

36 Article II of the Organization of African Unity (OAU), Charter of the Organization of African Unity, 25 May 1963.

37 Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000.

38 Para 9 of the AU Constitutive Act.

39 African Charter on Democracy, Elections and Governance, 2007. (Referred as ACDEG thereafter).

40 Article 2 (1) of the ACDEG.

41 Article 2 (2) of the ACDEG.

42 Article 2 (3) of the ACDEG.

43 Article 2 (5) of the ACDEG.

44 Article 2 (6) of the ACDEG.

45 Decisions adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers, 28-31 May 1997, Harare, Zimbabwe CM/Dec.330-363 (LXVI), Sierra Leone – (DOC. CM/2004 (LXVI) - C-.

46 Declarations and Decisions adopted by the Thirty-Fifth Assembly of Heads of State and Government, 12-14 July 1999, Algiers, Algeria, Decision AHG/Dec. 142 (XXXV).

47 Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI).

48 African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014.

49 African Charter on Democracy, Elections and Governance, 2007.

"infringement on the principles of democratic change of government".<sup>50</sup> The Charter does not clarify what these principles of democratic change of government are. Similarly, Article 28E (1) (e) of the Malabo Protocol states that acts of unconstitutional change of government include "any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of 'democratic change of government'".<sup>51</sup> In the absence of clarity on what the principles of democratic change of government are, it is difficult to determine when the extension or abolition of term limits constitute unconstitutional change of government. Saungweme concurs that Article 23(5) is so broad that it could easily be manipulated and circumvented.<sup>52</sup> The author would argue that "the Charter should have in unequivocal and unambiguous terms specifically referred to the types of constitutional amendments that would be regarded as violations of democratic principles, such as amendments to extend the presidential term of office".<sup>53</sup> Because of this loophole, the AU will find it difficult to enforce the prohibition on third termism.<sup>54</sup>

In terms of the ACDGE, an amendment will have to be illegal to constitute unconstitutional change of government. Similarly, the Malabo Protocol requires an amendment to be inconsistent with the constitution of a country. It is the author's opinion that there are two instances where an amendment or revision of a constitution to extend or abolish term limits would constitute unconstitutional change of government. The first is when term limits are contained in entrenched clauses that are not subject to amendments. For instance, s 220 of the Constitution of the Democratic Republic of Congo (2005) prohibits any amendment or revision that is aimed at altering the "number and length of the terms of office of the President".<sup>55</sup> Thus, an amendment of such a provision is illegal and inconsistent with the Constitution and thus prohibited by the ACDEG and the Malabo Protocol. The second instance where an amendment or revision of a constitution to extend or abolish limits will be inconsistent with the constitution, is when due process has not been followed. For example, where a constitution requires an amendment to be approved by a quorum of the legislature, or to be subject to a referendum. Failure to meet these requirements would result in inconsistency with the constitution, and will therefore come down to an unconstitutional change of government.

What the discussion above reveals is that unlike *coups d'état* which are categorically prohibited, the amendment or revision of constitutions or legal instruments is partially prohibited, which renders it weak. For instance, the provisions of most constitutions that deal with term limits are not entrenched which means that most countries are able to amend their constitutions to extend or abolish term limits without committing unconstitutional change of government. Further, most incumbent presidents in Africa are able to influence legislative, judicial and even electoral processes in their countries. This makes it easier for them to tamper with their constitutions as will be described below. This is possible because the AU itself does not provide any guidelines to determine whether an amendment or revision of a constitution is permissible. Therefore, the provisions of the ACDEG and the Malabo Protocol are couched in loose terms which makes it easy and permissible for governments to circumvent the prohibition. Another shortcoming of the ACDEG and the Malabo Protocol's prohibition of third termism is that their provisions do not apply to situations where incumbents fail to call for elections or refuse to relinquish power after the expiry of their terms. For instance, President Joseph Kabila of the Democratic Republic of Congo whose second and final term had expired in December 2016 remained in power for two more years. Similarly, despite the fact that the Eritrean Constitution prescribes a maximum of two five-year terms, President Isaias Afwerki has not called for elections or relinquished power since the country obtained independence in 1993. The Charter does not classify failure to hold such elections as unconstitutional change of government, which creates a situation open to exploitation.

From this discussion, it is evident that although the AU legal instruments purport to prohibit third termism, this prohibition is superficial. While other forms of unconstitutional

50 African Charter on Democracy, Elections and Governance, 2007.

51 Article 28E (1) (e) of the Malabo Protocol, 2014.

52 Saungweme "A Critical Look at the Charter on Democracy, Elections and Governance in Africa" [https://sarpn.org/documents/d0002566/Charter\\_Saungweme\\_May2007.pdf](https://sarpn.org/documents/d0002566/Charter_Saungweme_May2007.pdf) (accessed 27-08-2019).

53 *Ibid.*

54 Since the ACDEG and the Malabo Protocol were adopted at a time when the practice of amending or revising constitutions to extend or abolish term limits was rife, the AU should have shown its disapproval of the practice by specifically mentioning what it intended to prohibit.

55 Section 70 of the Constitution of the Democratic Republic of Congo, 2005.

change of government are prohibited in unequivocal terms, the clauses that purport to prohibit third termism are couched in vague terms, thereby enabling incumbent presidents to manipulate their constitutions with impunity. This is not surprising given that some states were strongly opposed to a clause that would have completely prohibited them from extending or abolishing term limits.<sup>56</sup> The author therefore submits that the AU legal instruments dealing with unconstitutional change of government are ineffective in prohibiting third termism.

#### 4 IMPLICATIONS OF THIRD TERMISM ON DEMOCRACY, THE RULE OF LAW AND GOOD GOVERNANCE: SOME CASE STUDIES

Why should the AU be concerned about third termism? Put differently, why should an amendment of a constitution, which is the prerogative of a sovereign state be of concern to a continental body? The answer can be found in the effect of third termism on the principles the AU seeks to promote, namely democracy, the rule of law, good governance, development and peace and security. To demonstrate the impact of third termism on these principles, the following case studies will be examined.

##### (i) Burkina Faso

In 2014 the government of Blaise Compaoré announced plans to conduct a referendum on constitutional amendments, which would have allowed him to stand for re-election.<sup>57</sup> The announcement provoked violent protests, the burning of the parliament building in Ouagadougou and widespread unrest. The protests forced Compaoré to resign and flee to the Ivory Coast.<sup>58</sup> This left a vacuum that prompted a military power struggle between General Honore Traore and Lieutenant Colonel Isaac Zida. Zida emerged victorious, but pressure from the African Union and the international community forced him to hand bow to a civilian government<sup>59</sup> and Michel Kafando was elected as interim leader.<sup>60</sup> In September 2015 members of the Presidential Guard staged a *coup* which saw Kafando and Zida who had been appointed prime minister in the interim government, detained and General Gilbert Diendéré proclaimed as the new president.<sup>61</sup> The intervention of the Economic Community of West African States (ECOWAS) and threats of sanctions from the AU resulted in the restoration of the interim government. Burkina Faso eventually held an election in 2015 which was won by Roch Marc Kaboré, thus bringing the crisis to an end.

The situation in Burkina Faso triggered widespread violence, which resulted in loss of lives and destruction of property,<sup>62</sup> threatening peace and security and bringing the country to the brink of anarchy. Further, the two *coups* that followed the resignation of Compaoré indicate that the attempt to amend the constitution to extend presidential terms has resulted in the violation of the AU principles on unconstitutional change of government. Nevertheless, the AU did not condemn the actions of President Compaoré and his government. Instead, the Peace and Security Council only intervened to condemn the two *coups* that took place after Compaoré's resignation. The author is therefore of the opinion that the AU displays double standards when it comes to unconstitutional change of government. This response suggests that despite the threat which third termism has on peace and security, undermining democracy and the rule of law, the AU is not prepared to deal with it in the same way it has dealt with other forms of unconstitutional change of government.

56 Kioko "The African Charter on Democracy, Elections and Governance as a Justiciable Instrument" (1998) *Journal of African* 39 46.

57 Elgie "The Politics of Presidential Term limits" <https://www.oxfordscholarship.com/view/10.1093/oso/9780198837404.001.0001/oso-9780198837404-chapter-18?print=pdf> (accessed 02-09-2019).

58 "Blaise Compaore, Burkina Faso president, resigns after violent protests" CBC News 1 November 2014 <https://www.cbc.ca/news/world/blaise-compaore-burkina-faso-president-resigns-after-violent-protests-1.2819254> (accessed 29-08-2019).

59 Smith "Power struggle in Burkina Faso after Blaise Compaoré resigns as president" The Guardian 1 November 2014 <https://www.theguardian.com/world/2014/oct/31/burkina-faso-president-blaise-compaore-ousted-says-army> (accessed 24-08-2019).

60 "Burkina Faso declares Michel Kafando interim president" BBC News 17 November 2014 <https://www.bbc.com/news/world-africa-30076907> (accessed 25-08-2019).

61 Rakotomalala and Karoui "The rise and fall of Burkina Faso's coup: what you need to know".

62 Salihu "Burkina Faso: An Unforeseen Crisis?" <https://www.accord.org.za/conflict-trends/burkina-faso/> (accessed 12-08-2019).

## (ii) Burundi

President Pierre Nkurunziza came to power in 2005.. This followed a protracted twelve-year civil war which ended after the signing of the Arusha Peace Agreement.<sup>63</sup> In 2014, a year before the Burundi general elections, Nkurunziza unsuccessfully attempted to amend the Burundi Constitution to allow him a third successive term. In 2015 the Burundi Constitutional Court found that Nkurunziza could stand again. This was after he had argued that his first term from 2005 to 2010 should not be taken into account, as he had not been elected by the people but by parliament.<sup>64</sup> According to Judge Sylvere Nimpagaritse (who fled the country before the judgment was announced) the judges in this case were under "enormous pressure" and even faced death threats from Burundi officials.<sup>65</sup> This interference in the judicial process enabled Nkurunziza to stand for a third term, in violation of the rule of law.

This triggered widespread protests resulting in the deaths of protestors and the displacement of nearly 200 000 people.<sup>66</sup> In the midst of the crisis, an attempted *coup* took place, but was quelled by the authorities. Violence escalated following the July 2015 elections, which secured Nkurunziza a third term. The International Criminal Court Prosecutor believed that 593 people were killed between 2015 and 2017, and that crimes against humanity such as murder, torture, rape and enforced disappearance were committed.<sup>67</sup> The instability in Burundi prompted the African Union Peace and Security Council to establish the African Prevention and Protection Mission in Burundi (MAPROBU), which was tasked with the prevention of escalation of violence, protection of civilians and creating conducive conditions for dialogue.<sup>68</sup>

In May 2018 a referendum was held and the proposal to increase the presidential term from five to seven years was approved.<sup>69</sup> However, this referendum took place in an atmosphere of intimidation, gross violation of human rights, and repression of those opposed to the referendum.<sup>70</sup> The African Commission on Human and Peoples' Rights identified violations of human rights during this period.<sup>71</sup> The United Nations Human Rights Council also found that international crimes could have been committed in the run-up to the referendum.<sup>72</sup> Once again the Burundi crisis has proved that third termism constitutes a threat to peace and security. Like Burkina Faso, the decision to extend term limits also resulted in an attempted *coup*.

Although the AU was quick to condemn the attempted *coup*,<sup>73</sup> it failed to condemn the actions of President Nkurunziza. Although the late Benjamin Mkapa (former President of Tanzania) who had been appointed by the East African Community as mediator in Burundi warned that the proposed extension of term limits would violate the Arusha Peace Agreement,<sup>74</sup> the AU failed to act against the decision to amend the Constitution. While the PSC issued a communiqué which reiterated the need to respect the Arusha Agreement and condemned the gross human rights violations, it failed to condemn the proposal to amend the Constitution.<sup>75</sup> Similarly, while the then AU Commission Chairperson Nkosazana Dlamini-Zuma acknowledged

63 Arusha Peace and Reconciliation Agreement for Burundi, Arusha, 28 August 2000. One of the key terms of the Arusha Agreement was that it established presidential term limits. According to the Agreement, the president would be elected for a five year term which was renewable once and no person could serve more than two terms. This term was included in the Burundi Constitution.

64 Nduwimana "Burundi court clears president to run again, angers protesters" <https://www.reuters.com/article/us-burundi-politics/burundi-court-clears-president-to-run-again-angers-protesters-idUSKBN0NQ0KT20150505> (accessed 10-08-2015).

65 "Senior Burundi judge flees rather than approve president's candidacy" *The Guardian*, 5 May 2015 <https://www.theguardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents-candidacy> (accessed 19-08-2019).

66 "Burundi Events of 2015" *Human Rights Watch Report* <https://www.hrw.org/world-report/2016/country-chapters/burundi> (accessed 20-08-2019).

67 "Report on Preliminary Examination Activities" *International Criminal Court Office of the Prosecutor 2017* [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf) (accessed 25-08-2019).

68 Communiqué of the 565th meeting of the PSC on the situation in Burundi.

69 Since these changes did not apply retrospectively, President Nkurunziza is now eligible to serve for two more terms.

70 Human Rights Council Report of the Commission of Inquiry on Burundi A/HRC/39/63, 8 August 2018

71 African Commission on Human and Peoples' Rights, Resolution on the Human Rights Situation in the Republic of Burundi, Document ACHPR/Res. 412 (LXII) 2018.

72 Human Rights Council Report of the Commission of Inquiry on Burundi A/HRC/42/49, 6 August 2019.

73 "African Union condemns Burundi coup attempt" *World Bulletin* 14 May 2015.

74 Ani "The AU should take a stand on Burundi's constitutional review", Institute for Security Studies <https://issafrica.org/iss-today/the-au-should-take-a-stand-on-burundis-constitutional-review> (accessed 28-08-2019).

75 Communiqué of the 565th meeting of the PSC on the situation in Burundi.

that Nkurunziza's decision to run for a third term violated the Arusha Agreement, she did not condemn his attempt to meddle with term limits.<sup>76</sup> Once again, this demonstrates the AU's reluctance to intervene in situations where governments disregard their constitutions to extend term limits. The Burundi case study highlights the threat third termism poses for the rule of law, democracy and peace and security.

### (iii) The Democratic Republic of Congo (DRC)

President Joseph Kabila came to power in 2001 after succeeding his father, Laurent-Désiré Kabila who had been assassinated in the same year.<sup>77</sup> The Constitution of the DRC adopted in 2005, provides that the President can only be elected for a five-year term, renewable once only.<sup>78</sup> This provision is not subject to amendments.<sup>79</sup> Since this provision did not apply retrospectively, Kabila started his first term in 2006. He was re-elected in 2011 for the second and final term, which ended in December 2016. However, upon the expiry of his term, Kabila did not step down, nor did he call for an election.<sup>80</sup> Instead, elections were continuously postponed on several occasions, which threatened the already fragile peace in the country.<sup>81</sup> The delay gave rise to a suspicion that Kabila was planning to cling to power, which triggered protests resulting in a number of civilians being killed between 2016 and 2018.<sup>82</sup>

## 4.1 Impact of Third Termism on the Rule of Law, Democracy, Development, and Peace and Security

The three case studies above, demonstrate clearly how interference with term limits violates the rule of law<sup>83</sup> and undermines democracy, which could lead to state collapse.<sup>84</sup> Hengari concurs that the collapse of governments in Burundi and Burkina Faso as a result of third termism should raise red flags for the AU.<sup>85</sup> Lastly, the case studies above show that third termism has serious implications for peace and security. This poses risks for human rights violations, including the commission of serious international crimes such as committed in Burundi. The objectives of the AU is to promote peace, security, and stability on the continent.<sup>86</sup> It also recognises that conflicts are an impediment to socio-economic development of the continent.<sup>87</sup> The instability that arises as a result of third termism undermines the realisation of these goals.

The AU legal instruments prescribe a number of responses in instances where unconstitutional change of government took place. Article 25 (1) of the ACDEG requires that a state that effected an unconstitutional change of government must be suspended from the activities of the AU. The AU has relied on these provisions to suspend Madagascar, Mauritania, Egypt, Mali and Burkina Faso, following the overthrow of legitimate governments through *coups d'état*. Further, perpetrators of unconstitutional change of government are liable to prosecution before competent courts. However, as the case studies show, the AU has responded with indifference to the practice of amending or abolishing term limits. Furthermore, the AU failed to respond to the extension of term limits in the Republic of the Congo, Senegal, the Comoros Islands, Togo, and most recently Guinea, and the Ivory Coast where attempts to extend term

<sup>76</sup> Williams *Journal of Modern African Studies* 2018 681.

<sup>77</sup> Kabila was not elected into office. After the Sun City Agreement signed between the government and the rebels, a Transitional Government headed by Kabila was established in 2002.

<sup>78</sup> Section 70 of the Constitution of the Democratic Republic of Congo, 2005.

<sup>79</sup> Section 220 of the Constitution of the Democratic Republic of Congo.

<sup>80</sup> Fabricius "DRC tense as Joseph Kabila keeps everyone guessing" *Daily Maverick* 28 May 2018 <https://www.dailymaverick.co.za/article/2018-05-28-drc-tense-as-joseph-kabila-keeps-everyone-guessing/> (accessed 08-08-2018).

<sup>81</sup> "Tense days in DRC as presidential challengers line up" *News24* 6 August 2018 <https://www.news24.com/Africa/News/tense-days-in-drc-as-presidential-challengers-line-up-20180806> (accessed 07-08-2018).

<sup>82</sup> "Congo election delayed by 2 years pushed back another week" *CBC News* 20 December 2018 <https://www.cbc.ca/news/world/congo-election-postponed-1.4953721> (accessed 27-08-2019).

<sup>83</sup> Rule of law in this respect refers to the requirement that governments must act in accordance with pre-determined, clear rules which are enforced by impartial courts in accordance with fair procedures.

<sup>84</sup> Democracy in this case refers to the idea that the consent of the governed is the defining characteristic of the relationship between the government and the people.

<sup>85</sup> Hengari "Presidential Term Limits: A New African Foreign Policy Challenge", *South African Institute of International Affairs Policy Briefing* <http://www.saiia.org.za/research/presidential-term-limits-a-new-african-foreign-policy-challenge/> (accessed 21-08-2019).

<sup>86</sup> Article 3 (f) of the AU Constitutive Act.

<sup>87</sup> Para 18 of preamble the AU Constitutive Act.

limits are currently under way. The AU's response can largely be attributed to the fact that it does not have a firm stance on third termism as its instruments dealing with unconstitutional change of government are vague when it comes to the extension of term limits.

## 5 PROSPECTS AND CHALLENGES OF DEALING WITH THE PROBLEM OF THIRD TERMISM

Unconstitutional change of government constitutes a threat to the rule of law, democracy, good governance, development and peace and security. For these reasons, it is argued that the AU has an incentive to reconsider its position regarding third termism. But what could the AU do to address the challenges arising from the practice of extending term limits? The principle of sovereignty does not allow the AU to bar its members from amending their constitutions.<sup>88</sup> The idea of sovereignty has been at the centre of the AU's relationship with its members.<sup>89</sup> On the other hand the Constitutive Act of the AU does not adopt a rigid approach to sovereignty, as it allows the AU to intervene in Member States under grave circumstances, namely war crimes, genocide and crimes against humanity and serious threat to the legitimate order, to restore peace and stability to a Member State.<sup>90</sup> Although third termism is a serious threat to the principles and values that the AU seeks to advance, prohibiting states from amending their constitutions is not the solution. Souaré concurs that "adopting and implementing a policy that will force countries to adhere to term limits "would clearly be revolutionary, particularly given that some leaders have shown a clear hostility towards it by abolishing its provision from their national constitutions".<sup>91</sup> Although it has been argued that the benefits of term limits outweigh the disadvantages, and that third termism has created crises in most cases where it has been effected, situations may arise where states, for justifiable and *bona fide* reasons would need to revise the provisions on term limits. Consequently, an outright prohibition of amendments of constitutions cannot be supported. Similarly, prescribing standard presidential term limits for states is not feasible given that there are countries such as Eswatini with absolute monarchs. However, this does not mean that the AU is powerless to deal with third termism.

The author believes that the AU must revisit the ACDEG in order to address the issue of third termism. The first step in dealing with the problem is to remove the ambiguity in the AU legal instruments around whether third termism constitutes unconstitutional change of government. As pointed out above, the provisions which purport to prohibit amendment or revision of legal instruments to extend or abolish term limits are couched in such loose terms that it is difficult to determine whether these practices are prohibited and the nature of the amendments that are prohibited. For instance, it has been pointed out that the AU legal instruments state that an amendment or revision of a constitution is prohibited if it infringes on the principles of a democratic change of government. If the AU intends to prohibit third termism, it must provide clarity on these principles. This will not only confirm the AU's commitment to the prohibition of third termism but will further demonstrate its commitment to the enforcement of principles contained in its Constitutive Act.

Second, the AU must provide states with enforceable guidelines that must be adhered to when amending their constitutions. In particular, the guidelines must ensure that any amendments of constitutions to extend term limits comply with the rule of law and promote democratic principles. For instance, the ACDEG requires an amendment or revision of a constitution to "reposes on national consensus".<sup>92</sup> As was witnessed in several countries, leaders have manipulated judicial, legislative or electoral processes to effect these constitutional amendments. The violence and mass protests seen in countries that have amended their constitutions to extend term limits suggest a lack of national consensus about such amendments.<sup>93</sup> The AU guidelines should address these issues, including the criteria to

88 Manirakiza "Insecurity implications of unconstitutional changes of government in Africa: from military to constitutional coups" 2016 *Journal of Military and Strategic Studies* 86.

89 The AU Constitutive Act states that one of the principles upon which the AU operates is respect for state sovereignty.

90 Article 4(h) of the AU Constitutive Act.

91 Souaré "The AU and the challenge of unconstitutional changes of government in Africa" <https://www.africaportal.org/publications/the-au-and-the-challenge-of-unconstitutional-changes-of-government-in-africa/> (accessed 03-08-2019).

92 Article 10 of ACDEG.

93 For example, the judgment of the Burundi Constitutional Court which allowed Nkurunziza to run for a third term was made in circumstances characterised by intimidation of judicial officers. See "Senior Burundi judge

be used in determining whether the process of amending or revising term limits are in line with national consensus. Further, the AU must put in place measures that deal with situations where attempts to revise constitutions result in violence that threaten peace and security. It is author's view that when states fail to comply with these guidelines, any resulting amendments will have to be treated as unconstitutional change of government. Lastly, the AU should put in place effective enforcement mechanisms to address the issue of third termism.

Asked what the impact of these guidelines on sovereignty would be, the author would respond that such guidelines do not interfere with state sovereignty for the following reasons. First, the AU has a normative framework in place. For instance, the ACDEG contains guidelines that must be followed in conducting elections. These deal with the issue of amendments or revision of constitutions, albeit vaguely. As such, there is nothing sinister in adopting guidelines that govern the amendment or revision of constitutions. Second, the AU has demonstrated its willingness to interfere with sovereignty in order to deal with other forms of unconstitutional change of government. For instance, it has relied on the provisions of the ACDEG to suspend Madagascar, Mauritania, Egypt, Mali and Burkina Faso after *coups* were carried out in these countries. Further, when Laurent Gbagbo refused to relinquish power after losing elections, the AU relied on the ACDEG to suspend Côte d'Ivoire's membership from the AU.<sup>94</sup> The AU also relied on the ACDEG to put pressure on Yahya Jammeh of The Gambia to relinquish power after losing elections.<sup>95</sup> If interfering with sovereignty did not stop the AU from acting against *coups* or refusal to hand over power after elections, there should be no reason why AU should be prevented from intervening.

Another reason why the AU will have to overlook sovereignty is the impact of this practice on peace and security. Events in Burkina Faso and Burundi show that third termism could trigger other forms of unconstitutional change of government. This, in itself, is sufficient justification for the AU to become involved, as the consequences of fiddling with term limits have the potential of developing into regional and/or even international crises. Hengari concurs that the instability occurring in Burundi, Burkina Faso and the DRC highlighted the assumption that term limits should be a national sovereignty issue under stress.<sup>96</sup> It is therefore argued that sovereignty does not constitute an obstacle to the adoption or enforcement of guidelines on amendments or revision of constitutions to extend term limits. Therefore, any failure to adopt or enforce these guidelines will be due to lack of political will rather than impediments imposed by sovereignty.

A second, and perhaps more serious impediment to the enforcement of guidelines on third termism is the lack of political will on the part of the AU. The enforcement of the ACDEG in general, and the provisions dealing with unconstitutional change of government in particular, has thus far been weak. This is further worsened by the fact that some of the leaders who have stayed in power while exceeding their term limits are responsible for making key decisions of the AU. Such leaders are unlikely to support the idea of putting constraints on how states can amend their constitutions. Zamfir concurs that African leaders "have no incentive to promote a pan-African policy that would run counter to their interests".<sup>97</sup> Therefore any measures taken to deal with third termism are unlikely to succeed in the absence of political force, which is lacking at the moment. Yet, there are encouraging signs that the threats caused by third termism are beginning to be realised. During the AU 25<sup>th</sup> Summit in 2015, Jacob Zuma, former President of South Africa, highlighted the need to adhere to "African Union norms and instruments aimed at strengthening governance and democracy on the continent such as the African Charter on Democracy, Elections and Governance".<sup>98</sup> Zuma further argued that adhering to these

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flees rather than approve president's candidacy" The Guardian, 5 May 2015 <https://www.theguardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents-candidacy> (accessed 19-08-2019). Similarly, although the referendum in Burundi revealed that 70% of the population approved the amendments, it was carried under hostile conditions characterised by state repression of those opposed to the amendments. See also Wiebusch, Murray "Presidential Term Limits and the African Union" 2019 *Journal of African Law* 131 145.

94 Peace and Security Council 252<sup>nd</sup> Meeting Communiqué, ADDIS Ababa, Ethiopia, 9 December 2010.

95 African Union Press Release, <http://au.int/en/pressreleases/20170118> (accessed 08-08-2020).

96 Hengari "Presidential Term Limits: A New African Foreign Policy Challenge". <https://www//africaportal.org/publications> (accessed 08-08-2020).

97 Zamfir "Democracy in Africa Power alternation and presidential term limits" [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS\\_BRI\(2016\)580880\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) (accessed 15-08-2019).

98 Intervention by President Jacob Zuma on the AU Peace and Security Council and its activities during the 24th Ordinary Session of the Assembly of the African Union Heads of State and Government Addis Ababa 30

instruments is an essential step towards the "realization of sustainable peace".<sup>99</sup> Further, it is also important to note that discussions surrounding the adequacy of the ACDEG to promote democratic values have been taking place within the AU.<sup>100</sup> It is within this context that the AU must address the issue of third termism as well as put in place mechanisms to enforce such guidelines.

Further efforts at regional level to address the issue of term limits show promising signs that states may be moving towards recognising the challenges arising from third termism. For instance, the Economic Community of West African States' attempt to adopt a regional framework proscribing term limits was initially rejected by The Gambia and Togo. However, after the ouster of Yahya Jammeh, the new Gambian President pledged to include a two-term limit in the constitutional amendments that are currently under way.<sup>101</sup> Similarly, Togo, which abolished term limits in 2005, has started with reforms aimed at re-introducing a two-term limit.<sup>102</sup> Therefore, while the adoption of a comprehensive regional policy on term limits will face resistance, there is hope that the continent may eventually reach consensus regarding the dangers of third termism.

## 6 CONCLUSION

The adoption of the Constitutive Act of the AU gave birth to a new era as far as the promotion of democratic principles, the rule of law and good governance in Africa are concerned. Although member states have made some progress in adopting democratic principles, the last decade has seen a reversal of such gains and this can largely be attributed to third termism. The culture of amending or revising constitutions in order to prolong a leader's stay in power has created a crisis, which, if not managed, could result in political and constitutional crises, and failed states. Thus, third termism is an emergency which the AU cannot continue to ignore. The AU needs to revise its legal framework on unconstitutional change of government to deal effectively with third termism. There is also a need for the AU to strengthen its enforcement mechanism to ensure that states adhere to democratic principles when amending their constitutions. A failure to address this problem could ultimately lead to anarchy.

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January 2015.

<sup>99</sup> *Ibid.*

<sup>100</sup> See Communiqué of the 791<sup>st</sup> meeting of the PSC, Decision on Governance, Constitutionalism and Elections in Africa (2016), Assembly/AU/Dec.592 (XXVI).

<sup>101</sup> Jobarteh "Constitutional Developments in The Gambia: Readying for a New Constitution" The Law HUB Gambia 18 February 2018 <https://www.lawhubgambia.com/lawhug-net/tag/term+limits> (accessed 23-08-2019).

<sup>102</sup> Zodzi "Togolese to vote on presidential term limits after parliament impasse" Reuters 19 September 2017 <https://www.reuters.com/article/us-togo-protests/togolese-to-vote-on-presidential-term-limits-after-parliament-impasse-idUSKCN1BU23S> (accessed 20-08-2019).