

## **SPECIAL RESEARCH REPORT**

# **CRITICAL REFLECTIONS ON THE CHALLENGES TO AND MEANS OF STRENGTHENING THE AU NORM BANNING UNCONSTITUTIONAL CHANGES OF GOVERNMENTS (UCG)**

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# CRITICAL REFLECTIONS ON THE CHALLENGES TO AND MEANS OF STRENGTHENING THE AU NORM BANNING UNCONSTITUTIONAL CHANGES OF GOVERNMENTS (UCG)

## INTRODUCTION

On Sunday 5 September 2021, reports of gunshot and an apparent attempted coup started to stream on social media from Guinea capital, Conakry. Some hours later, a video showing the country's President Alpha Conde surrounded by members of the coup perpetrators emerged. Special Forces of Guinea entered the presidential palace after exchange of gun shoots and captured President Conde. Despite initial announcement by the Defense Ministry that the mutiny was foiled, the leader of the coup colonel Mamady Doumbouya, accompanied by his entourage, appeared on national TV to announce the dissolution of Conde's government and the suspension of the Constitution. Apart from holding President Conde in military detention, the coup makers also replaced the regional governors with military commanders.

Unsurprisingly, the turn of events in Conakry gave rise to critical questions about trends in military coups in Africa. At the meeting of the Economic Community of West African States (ECOWAS), Nigeria's Vice President pointed out 'We are sliding back to the infamous 1960s.' He went on to say that, '[o]ur zero-tolerance for coups is important, but clearly insufficient. Are there further steps that we can take to prevent coups d'état?'.<sup>1</sup>

Similarly, President Georeg Weah of Liberia asked 'Is it possible that there could be a correlation between these events and the political situations where constitutions are amended by incumbents to remove term limits through referendums? Or could this be a mere coincidence?' He went on to state that 'If the removal of term limits is serving as a trigger for the overthrow of constitutionally-elected governments, then perhaps we in Ecowas should exert our best efforts to ensure that the term limits in the constitutions of all member states should be respected.'<sup>2</sup>

In response to the events in Guinea and echoing its earlier concern about the resurgence of coups in Africa, the African Union (AU) Peace and Security Council (PSC), in a communique of its 1030th session which suspended Guinea from participation in AU activities, emphasized the need for undertaking 'a comprehensive and objective analysis of the UCG arising from non-consensual and/or politically manipulated democratic processes.'<sup>3</sup> This negotiated formulation referring to 'non-consensual and/or politically manipulated democratic processes' is actually euphemism for amendment of constitutional terms limits to which Weah referred to during the ECOWAS summit.

<sup>1</sup> African Union not doing enough to push for term limits, but moves to reject coups, *The East African*, 13 September 2021, <https://www.theeastafrican.co.ke/tea/rest-of-africa/african-union-term-limits-3548356>

<sup>2</sup> *Ibid.*

<sup>3</sup> African Union, communique of the 1030th session of the PSC, PSC/PR/COMM.(1030(2021)) 10 September 2021.

Considering and addressing the questions raised during the ECOWAS summit are of paramount policy importance not only in responding to the situation in Guinea but also for constitutionalism, rule of law and security at regional and continental levels. Accordingly, and in order to contribute to PSC's request at its 1030th session for comprehensive assessment of UCG, in this special research report, we try to interrogate and outline policy perspectives on the following and related questions: What are the forms of the crisis? What explains this coup? Is there anything that this coup tells us about military coups in Africa and about how actors such as the AU are handling military coups in Africa? What is the best policy approach to respond to the coup?

## **COUP: A PROBLEM AND A SYMPTOM OF OTHER PROBLEMS**

Given that it led to the dissolution of the government and the suspension of the Constitution, the coup in Guinea constitutes a major constitutional crisis. But that is not the only defining feature of the crisis that is the coup. Additionally, it manifests the political and institutional instability of Guinea. By the mere fact of its occurrence, it also creates new economic uncertainties and exacerbates existing economic woes of the country. The coup on its own is thus a problem. Perhaps importantly, it is a symptom of other problems.

It was eleven months ago that Guinea held a presidential election in the middle of the global novel corona virus pandemic. The body charged with the preparation of free and fair election in the country, known by its French acronym as CENI, announced that the incumbent Alpha Conde won the presidential race with 59.5 percent of the votes cast.

Conde was sworn in as Guinea's president for a third term in December 2020. African election observers from AU and ECOWAS expressed satisfaction about the election and its outcome, with AU's election observation report noting that 'the election of 18 October 2020 took place in a relatively peaceful climate.'<sup>4</sup>

The question then is what changed in nine months into the new term of President Conde to lead to his overthrow from power by the military. Certainly, it is not simply the change of circumstances during these nine months that created the conditions for the military coup. There certainly are deeper issues at play that relate to the credibility of the election and the health of the governance of the country. There are at least five issues that explain why the coup in Guinea happened.

First and foremost, it indicates that the relationship between government and citizens has been severely damaged, a key element of the political governance crisis. In a clear indication of this damaged relationship, the coup did not elicit visible public opposition in Guinea. Indeed, the downfall of Conde's government was greeted by widespread celebrations on the streets of Conakry. Opposition leader Cellou Dalein Diallo welcomed the coup for bringing 'the failure of the dictatorial regime'.

Second, the coup and the public reaction it elicited also signifies that the election that took place in October 2020 was anything but free and fair. It attests to the fact that the election, held in a highly tense and charged political context and in a playing-field tilted decidedly in favor of the incumbent, became a stage-managed exercise organized to give a semblance of democratic credential for extending Conde's stay in power.

<sup>4</sup> See the Report of the African Union Election Observation Mission to Guinea, [https://au.int/sites/default/files/documents/40261-doc-rapport\\_de\\_la\\_mission\\_dobservation\\_electorale\\_de\\_lunion\\_africaine\\_pour\\_lelection\\_presidentielle\\_du\\_18\\_octobre\\_2020\\_en\\_republique\\_de\\_guinee.pdf](https://au.int/sites/default/files/documents/40261-doc-rapport_de_la_mission_dobservation_electorale_de_lunion_africaine_pour_lelection_presidentielle_du_18_octobre_2020_en_republique_de_guinee.pdf)

The situation is made worse by the fact that elections are increasingly being held in an institutional context characterized by the use of the security sector for intimidating and harassing opposition politicians and their supporters<sup>5</sup> and electoral bodies lacking autonomy and impartiality. These are not unique to Guinea but reflect a worrisome trend on the continent which has severely weakened the role that election plays in holding the government in power accountable and facilitating change of leadership.

These developments have eroded the confidence of the public in elections. According to a poll by Afrobarometer, 'while most Africans believe in elections as the best way to select their leaders, popular support for elections has weakened.<sup>6</sup> With leaders perfecting the art of 'winning' elections that they convene for the only purpose of legitimizing themselves characteristic of what Fareed Zekaria called illiberal democracies,<sup>7</sup> it is little surprise that confidence in the capacity of elections for bringing about change of leadership is waning. Yet, in Guinea itself a survey by Afrobarometer established that 77 % of Guineans support democracy and 82 % wish to choose leaders through free and fair elections.

Third, a further manifestation of the governance crisis that created the conditions for coups is the unlimited power amassed by the executive power of government to the point of rendering the constitutional roles of parliament and the judiciary to put checks on the executive authority ineffective.

It is worth noting that the Constitutional Court certified the contested constitutional referendum that paved the way for the third term of Conde. With the independence of institutions compromised and the constitutional avenues for checks and balances severely weakened, it has become possible for the executive to run an increasingly corrupt, repressive and unaccountable system of government. The resultant ineffectiveness of both the formal and informal mechanisms for limiting the excesses of the government opens wide opportunity for members in the military to take matters into their own hands by engaging in coup.

Fourth, it was against this backdrop and in the context of the political tension from the highly controversial constitutional amendment removing the presidential term limit that the process for the presidential election was set in motion. By the time of the electoral season, Guinea has been gripped by political instability that lasted for nearly a year as a result of the protest and political confrontation that Conde's government move for changing the constitution triggered. Following the proposal of a new constitution removing the term of office of the president, opposition groups and civil society organizations, accusing the government of engaging in 'constitutional coup', mobilized large protests opposing the constitutional changes. Despite the protests and the boycott by the opposition, the government secured the constitutional changes in a highly contested referendum held on 22 March 2020.

<sup>5</sup> Sarah Jenkins, S. (2020), *The politics of fear and the securitization of African elections*, 27(5) *Democratisation*, 836-853.

<sup>6</sup> Fredline M'Cormack-Hale and Mavis Zupork Dome (2021), *Support for elections weakens among Africans, many see them as ineffective in holding leaders accountable*, [https://afrobarometer.org/sites/default/files/publications/Dispatches/ad425-support\\_for\\_elections\\_weakens\\_in\\_africa-afrobarometer\\_dispatch-7feb21.pdf](https://afrobarometer.org/sites/default/files/publications/Dispatches/ad425-support_for_elections_weakens_in_africa-afrobarometer_dispatch-7feb21.pdf)

<sup>7</sup> Fareed Zekaria (1997), *The rise of Illiberal Democracy*, 76(6) *Foreign Affairs*, 22-43

<sup>8</sup> See *Timeline- A year of bloody protests in guinea*, Al Jazeera, 14 October 2020, <https://www.aljazeera.com/news/2020/10/14/timeline-a-year-of-bloody-protests-in-guinea>

The discontents that resulted from the manipulated constitutional referendum removing the term of office of the president adds further political fuel that anyone wishing to remove the government from power can take advantage of. It is no surprise that the opposition leader in Guinea considered the coup by the special forces as an act that brought to a close the work began by pro-democracy groups.

Fifth and finally, the coup is also a manifestation of governance issues in the security sector. It highlights a crisis in civil-military relationship and in the professionalism of the army as well as the existence of weak command and control. In the specific context of Guinea, indications are that the coup is in part a manifestation of the increasing ambition of the Special Forces, whose leadership, despite better treatment from other parts of the army, were dissatisfied with recent financial cuts. The incident also shows the lack of coherence and uneven development among various parts of the military in the country. Given the involvement of the Special Forces in repressing protesters during the yearlong opposition protests, the politicization of this unit must also have played a role for why the Special Forces orchestrated the coup.

While the foregoing issues create the fertile ground for the perpetration of coups, there is nothing that justifies and legitimizes coups. Constitutionally speaking, coup constitutes an act of trespassing by the army as the army ventures into the realm of politics, for which it not only lacks jurisdiction but also competence. Politically speaking, a coup is an abuse of power by the army. Those orchestrating the coup essentially take advantage of the fact that they are in possession of the means of violence which is the only basis for them to dare to overthrow the government.

From a rights perspective, the arrogation by members of the army of the decision to overthrow a government is a usurpation of the inherent right of citizens who hold the sovereign power for changing government. Coups, by resulting in the suspension of constitution, create a legal vacuum that facilitates the conditions for abuse and violation of human rights and due process of the law.

The leader of the Special Forces, Lieutenant-Colonel Mamady Doumbouya, in the televised address announcing the seizure of power stated that the coup was meant to correct the wrong in the politics of Guinea under Conde's government. That the military in Guinea arrogated such role of being an arbiter of politics and hence of correcting the wrong in the politics of the country (by ousting the incumbent government and seizing power), is the most prominent manifestation of the military's abuse of its control of the means of violence. After all, it is downright wrong and dangerous to think that you can solve a political problem through the barrel of the gun.

There is thus nothing virtues about a military coup. The idea of a good coup is an oxymoron. AU norms are right in rejecting coups in general as unconstitutional. It is thus fitting to deny coups any political and legal recognition. The policy of zero tolerance for military coups instituted in the norms of the AU and regional bodies such as ECOWAS has accordingly not only the purpose of safeguarding constitutional processes but also enforcing a standard of conduct that seeks to enforce the professionalism and integrity of the army whose role is to ensure the security and defense of the country.

The AU and ECOWAS are very right in condemning the coup and in withdrawing political, diplomatic and legal recognition to the military junta, through excluding it from participating in the activities of the two bodies. However, as noted earlier, to the extent that the coup is also a symptom of deeper problems of democratic governance, it is not enough that the response of the AU and ECOWAS is limited to the coup. This requires a critical appraisal of the limits of the AU norm on UCG and the gaps in the practice of applying these norms.

## RETHINKING THE AU NORM ON UCG: BEYOND SUSPENSION, TRANSITIONAL GOVERNMENT AND ELECTIONS

There are major gaps in the current arsenal of AU tools for enforcing the ban on UCG. These gaps relate to both the AU norm on UCG and the practice of the AU in enforcing the norm.

### Gaps in the AU norm banning UCG

It is possible to identify at least four gaps in the existing AU norm on UCG. The first major drawback in the norm on UCG relates to addressing the democratic deficits (absence of checks and balances, authoritarian and corrupt system of governance, disputed constitutional amendment for extension of the term of office of the incumbent and flawed elections) that in the first place create the conditions for UCG including military coups. Accordingly, this relates to addressing the root causes of UCG.

Admittedly, the Lomé Declaration itself outlined a set of democratic values and principles and emphasised that ‘the strict adherence to these principles and the strengthening of democratic institutions will considerably reduce the risks of unconstitutional change on our Continent.’ This notwithstanding, the norm on UCG has continued to be applied in a context that is largely divorced from the broader issues of the rule of law, human rights, democracy and good governance.

This disconnect between the AU norm on UCG and the background context that precipitates the UCG has in part to do with the fact that the AU instruments have created two categories of norms: those for which clear enforcement measures and sanctions have been established and those without such similar enforcement measures. Accordingly, from those breaches of AU democratic and human rights norms identified as threats to peace and security in the 2004 AU Solemn Declaration on the Common Defense and Security Policy, the ban of UCG is the only one for whose occurrence a sanction is specifically prescribed in AU’s founding legal instrument. Thus, Article 30 of the Constitutive Act provides that ‘[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.’ The details of the measures of censure and sanction are specified beyond Article 23 of the Constitutive Act in the Lomé Declaration and the AU Charter on Elections, Democracy and Governance. Similar kind of measures of censure and sanction are lacking for cases of breaches of other AU norms on democracy, constitutionalism, the rule of law and respect for and protection of human and peoples’ rights, however serious those breaches.<sup>9</sup>

<sup>9</sup> Of course, the AU Constitutive Act expressly envisages in Article 23 that non-implementation of decisions of the AU can lead to sanctions but such measures have rarely been invoked.

Accordingly, while the AU has developed a relatively sophisticated framework for enforcing the norm on UCG, it has not provided for similar mechanisms of sanctioning serious democratic and human rights breaches,<sup>10</sup> which create the conditions for the occurrence of UCG. The AU, thus, lacks the kinds of measures that it needs to adopt in response to systematic violations of human rights, unconstitutional use of government power and generally serious democratic deficits in member States.

Related to the above and the second major gap in the AU norm banning UCG is the lack of mechanisms for dealing with the phenomenon of 'constitutional coups'. This involves the abuse and manipulative use by incumbent presidents of constitutional processes for extending their term of office beyond the two-term limit set in constitution.

There is as such nothing in the AU norms that prohibits the revision or amendment of constitutional clauses on presidential term limits. Like other matters that the constitution of a country governs, such a revision or amendment is a matter subject to the constitutional and democratic procedures of each country. As a matter of general policy statement therefore, revision or amendment is legitimate and legal as long as it is done in accordance with established constitutional provisions and enjoys democratic legitimacy.

At the same time, the AU norms are not completely bereft of provisions with potential relevance to term limits. In this regard, the most authoritative statement of AU's normative position is found in Article 23 of the African Charter on Democracy, Elections and Governance.

One of the 'illegal means of accessing or maintaining power' deemed as constituting UCG in Article 23(5) of the Charter is 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.' However, the concern of the AU norm as stipulated in Article 23 (5) of the Charter is not with amendment or revision per se. It is rather with the legitimacy and constitutional propriety of how (the inclusivity and credibility of the process) and the end for which such amendment or revision is made.

However, there is a lack of clarity on the applicability of Article 23 (5). Specifically, the criteria and process for application of the standards of this article remain unsettled. Additionally, there has not been an instance in which the AU directly invoked the application of this provision. This has created an environment in which 'constitutional coups' are perpetrated with no concern for any legal or diplomatic consequences. During the last two decades there were some 26 instances of constitutional amendments in 20 African states that led to the removal or loosening of presidential term limits. As noted earlier, one of the recent such cases was Guinea. In none of these cases was Article 23 (5) invoked.

The AU remains ambivalent, if not completely reluctant, to reject attempts by incumbent leaders to amend their constitutions in order to remove presidential term limits, which has now become a trigger of instability and violence in Africa. Many observers are thus right in pointing out that the case of Guinea illustrates how the extension of term limits in the face of popular opposition increases the likelihood of various forms of crises including military coup.

<sup>10</sup> Solomon Ayele Dersso (2012), *The adequacy of the APSA to deal with serious democratic deficits: Lessons from North African uprisings*, 21 (3) *African Security Review*, 4-23, 13.

It is worth recalling that in Burkina Faso in 2014 the attempt by then president of the country, Blaise Compaore, to run for a third term triggered a popular uprising that culminated in the demise of his regime. The recurrence of extension of term limits and the crises that such extensions trigger are such that the PSC considered in its 1014th session 'manipulation of national constitutions to extend term limits' as one of the issues threatening peace and security on the continent.<sup>11</sup> As the experience in Guinea and the earlier cases including Burkina Faso attested, there is accordingly a pressing need for clarifying how Article 23(5) applies and establish clear processes for its enforcement against 'constitutional coups' or manipulated extension of term limits.

The third gap in the AU norm on UCG concerns its application vis-à-vis changes of government resulting from popular uprisings. This lacuna became evident during the North African popular uprisings during 2011 and 2012. The challenge that the AU faced with respect to the uprisings in Tunisia and Egypt was the determination of whether or not the change of government that the uprisings brought about was a case of UCG. While the case of Libya stood out as qualitatively separate case, owing to the descent of the country into civil war soon after protests started, in both Tunisia and Egypt the popular uprisings culminated in the overthrow of their respective government. In both instances, the change in government came about outside of the processes laid down in the respective constitutions.

Not only the norm on UCG but also the broader AU governance norms proved inadequate. They offer no systematic and particular guidance on how to respond to popular democratic uprisings.<sup>12</sup> At the heart of this lies the difficulty of distinguishing between legitimate uprisings and those that may amount to situations that AU norms and policy instruments proscribe.<sup>13</sup> This gap in the existing AU norm on UCG is not without its consequences. It has made the decision-making of the AU with respect to changes of government in situations of popular uprisings unpredictable and lacking in transparency. The PSC has recognized this gap during its 432nd and 871st sessions in April 2014 and August 2019<sup>14</sup> respectively. The PSC has particularly requested the AUC Chair 'to expedite the finalisation of the draft AU framework on responses to popular uprisings and to submit the draft for consideration by Council, as soon as possible' during its 871st session.

The fourth lacuna involves the lack of clarity on the question of under what conditions a country affected by UCG is said to have achieved restoration of constitutional order. As Issaka Souare put it, 'while condemning military coups and insisting on the 'restoration of constitutional order', the policy does not provide any explicit definition of what exactly constitutes the successful restoration of constitutional order.<sup>15</sup> As an earlier Amani Africa policy brief pointed out,<sup>16</sup> despite the fact that the formation of a new government based on free and fair election is considered as the preferred signifier of the return of the country to constitutional order,

<sup>11</sup> African Union, *communiqué of the 1014th session of the PSC, PSC/PR/COMM.1014(2021)* 26 July 2021.

<sup>12</sup> Dersso, note 10 above, 13.

<sup>13</sup> As former South African President Thabo Mbeki put it, 'The stark choice Africa faced was – should we side with the demonstrators or with the governments they demanded should resign!' Thabo Mbeki, *In Libya the West has Marginalized African Concerns*, [http://www.african-times.com/index.php?option=com\\_content&view=article&id=13702:let-us-solve-our-problems-by-ourselves&catid=38:politics&Itemid=54](http://www.african-times.com/index.php?option=com_content&view=article&id=13702:let-us-solve-our-problems-by-ourselves&catid=38:politics&Itemid=54)

<sup>14</sup> African Union, *press statement of the 871 session of the PSC, PSC/PR/BR.(DCCCLXXI)* 22 August 2019

<sup>15</sup> Issaka Souare (2014), 'The African Union as a Norm Entrepreneur on Military coups d'état in Africa (1952– 2012): An Empirical Assessment', *52The Journal of Modern African Studies*, 79.

<sup>16</sup> See Amani Africa, *The quest for restoration of constitutional order in Mali, Policy Brief 2* (August 2020)

AU practices show that a country sanctioned for UCG may in some cases be considered to have met the requirements of restoration of constitutional order under the AU norm on UCG and hence to have sanctions imposed on it lifted even before the holding of elections for establishing a new government.

### Gaps in AU's practice of implementing the norm

The above lacuna on what constitutes restoration of constitutional order created further problems of practice with respect to the implementation of the norm on UCG. One such problem is the apparent divergence between the AU and some of the RECs on the question of when a country is said to have achieved restoration of constitutional order.

This divergence of policy practice between AU and RECs was observed with respect to the UCG that took place in Mali and in Guinea Bissau in 2012. While the regional block ECOWAS lifted the suspension of Mali following the signing of the 6 April 2012 agreement, the AU withheld the lifting of the sanctions on Mali.<sup>17</sup> A similar discord emerged between ECOWAS and the AU with respect to the situation in Guinea Bissau.<sup>18</sup> While ECOWAS insisted that the transitional government fulfilled the requirements for lifting suspension and repeatedly urged the AU to lift the suspension, the AU persisted with its position of upholding the suspension until elections were held and a democratically elected government was in place.

The practice on implementing the norm on UCG has not always been consistent. In Addition to the above, this inconsistency in particular concerns both the adoption of a timely and firm action when UCG takes place and the application of the sanctions in a non-arbitrary fashion.

Questions thus abound as to why the seizure of power by the military in Mali was treated differently from the seizure of power and suspension of the constitution by the military in Chad during the course of 2021.

The concern is not simply the lack of consistency and hence the question of credibility that such lack of consistency gives rise to but also the dangerous precedent that the lack of enforcement of the applicable rules is sure to set. Despite the fact that there are explanations to the occurrence of the coups in Mali and Guinea specific to the political context of each country, trends of weak enforcement of the ban against coups seems to have encouraged the coup makers. Whether in Sudan in 2019, in Mali in 2020 or in Chad and Mali in 2021, the men in uniform have been successful in extracting concession from ECOWAS and the AU such that they were able to have the application of the consequences of the occurrence of UCG bent, limited or completely disregarded.

The other gap in the AU practice relates to the consistent application of the ban of auto-legitimation through election of coup perpetrators. One of the challenges the AU faced in 2000s in enforcing the norm on UCG was the phenomenon of auto-legitimization of coup makers. In Togo, after the failure of the initial attempt of the army to install Faure Gnassingbe as successor, upon the death of the country's president Gnassingbe Eyadema in 2005, following sanctions by AU and ECOWAS, Mr Faure achieved his objectives of ascending to power by participating in the election organized to form a new government. In the same year, after removing the incumbent and seizing power through a military coup, François Bozizé subsequently held elections and legitimized himself as 'democratically' elected president of CAR.

<sup>17</sup> See Solomon A. Dersso, *Annual Review of the Peace and Security Council 2012/2013 (ISS, January 2013)*, 66-67.

<sup>18</sup> *Ibid*, 70-71; See also Solomon A. Dersso, *Annual Review of the Peace and Security Council 2013/2014 (ISS, January 2014)*, 70.

In an attempt to counter this trend and prevent perpetrators of coup from accruing benefits out of their participation in unconstitutional acts, the AU imposed a ban on perpetrators of coup from standing for election that was held for restoring constitutional order. This was first done in 2007 with the adoption of the African Charter on Elections, Democracy and Governance. Subsequently, this ban on participation of coup makers in elections was also sanctioned in a decision of the PSC and the AU Assembly in 2010. In the cases of military seizures of power that took place in 2021, the enforcement of this specific ban is set to be another test for the AU. Certainly, failure to uphold the conditions set for transition including non-participation of coup makers in elections is sure to further dent the credibility of both the norm and the institutions enforcing it, including the PSC.

It is also evident that not all RECs have developed robust norms and practices that ban UCG, hence there is inconsistency across the various regions in terms of capacity to prevent or manage UCG. Without the applicability of the ban on UCG across RECs/RMs, it is very difficult if not impossible to achieve policy coordination between the AU and RECs/RMs on enforcing this norm.

## CONCLUSION

The deposing of President Conde through military coup has understandably triggered a debate about the efficacy and legitimacy of the AU ban on UCG. Coming against the background of two earlier cases of military seizure of power in 2021, it has prompted analysis and policy makers to express concern about risk of return to the time of the Organization of African Unity (OAU) when coups were the main avenue for change of government. To be sure coups are not as common as in the old days of the OAU.

Even so, the trend is concerning. The PSC has identified at its 1014th session, the resurgence of UCG as one of the peace and security challenges facing the continent.

As the foregoing analysis shows, coups are a product of the specific political conditions of the society concerned. From the perspective of the AU norm, the occurrence of coups also reflects the attitude of coup makers to the ban on coups. First, it may indicate that coup makers are increasingly having little regard to the ban and are willing to bear the costs of the ban. Indeed, the sentiments that Nigeria's Vice President expressed as captured in the introductory part of this special report is indicative that there is emerging perception on the part of coup makers that the benefits of engaging in coups outweighs the negative consequences from the norms of AU and regional bodies banning coups.

Second, the occurrence of coups also show that coup makers have come to recognize that AU and regional bodies have become lenient in their enforcement of the norms banning coup, thereby enabling coup makers to legitimize themselves by negotiating a concession for exercising major influence in the political process of their country.

Third, the resurgence of coups also points to the willingness of men in uniform to take advantage of the inability of the norm on UCG to address the governance deficits including the perpetration of constitutional coups by incumbent presidents. Liberia's President was accurate that 'If the removal of term limits is serving as a trigger for the overthrow of constitutionally-elected governments, then perhaps we in Ecowas should exert our best efforts to ensure that the term limits in the constitutions of all member states should be respected.'

The events in Guinea also show a weakness of early warning and the initiation of effective and timely preventive measures. There is no doubt that the AU and regional bodies such as ECOWAS are right in initiating the reactive measures in response to the coup in Guinea. However, the reactive measures are only important as far as the coup is concerned but not with respect to the conditions that contributed to the occurrence of the coup. The AU and ECOWAS should have acted on the early warnings on the constitutional disputes and the resultant governance deficits afflicting Guinea and pushed the necessary political and institutional reforms. The lesson from this experience and the earlier experience in Burkina Faso, where the failure to dissuade Compaore from proceeding with his efforts to change the constitutional clause limiting the term of office of the president in the face of mounting popular opposition in the months before November 2014, is that political confrontations and upheavals about third term of presidents in office should be an area of concern for the continental early warning system (CEWS) in respect of which AU and regional bodies should initiate appropriate early responses.

Going further, the AU could, as part of its early warning process, scan and assess the vulnerability of AU member States to potential troubles relating to attempts at changing or removing constitutional term limits and plan and deploy timely preventative measures.

It is clear from the events in Guinea that there are major governance issues that create the conditions for the occurrence of military coups. But it is a mistake to consider military coups exclusively as a manifestation of the democratic governance deficits afflicting a country. A coup is on its own a problem even when it occurred in a context of major governance deficits and enjoy significant public support.

It is very dangerous if, from the perspective of the AU norm banning UCG, a distinction was to be made between coups that have a degree of legitimacy and those lacking such legitimacy. Any tendency on the part of the AU and regional bodies to treat coups differently on account of the conditions that precipitated them creates an opening that would render effective enforcement of the AU norm increasingly untenable. This is indeed a major lesson from the recent practices of the AU in dealing with military coups on a case by case and by creating exceptions that cannot be credibly defended and consistently applied. The implication of the foregoing is that the AU should treat all military coups, irrespective of the democratic governance deficits that makes their occurrence possible and popular the same way by denying them any political and legal recognition and legitimacy. Accordingly, it should condemn all of them without any distinction, apply suspension against them and facilitate, through pressure and diplomacy, the speedy transfer of power by the coup makers to a civilian transitional government that will implement institutional reforms and elections on the basis of a roadmap drawn up with the participation of all political and social forces of the country concerned.

In terms of addressing the crisis of credibility facing the AU norm banning UCG, the current normative hierarchy that assigns different consequences to UCG and to serious human rights and democratic deficits should be eliminated. The sanctions applicable in cases of UCG should be made applicable to cases involving systematic and widespread violations of rule of law, human and peoples' rights and basic democratic principles. It is therefore high time to heed the counsel of the former AU Peace and Security Commissioner, Ramtane Lamamra, who in a statement at the 284th meeting of the PSC, observed '[t]he AU should have the necessary capacity to enforce compliance by all Member States with all its instruments.

This should be coupled with credible deterrent measures against non-compliance and violation of AU instruments and frameworks by member states.<sup>19</sup> For this, it is imperative the recommendations of the AU human rights and governance bodies including those contained in the country reports of the African Peer Review Mechanism (APRM) should be used and can serve as the basis.

Similarly, a consistent application of the norm on UCG demands standardizing the approach on the ban on UCG at the level of RECs/RMs. As the experience of policy coordination between ECOWAS and AU on the coup in Guinea shows, it is of significance that all RECs/RMs have complementary standards proscribing and sanctioning UCG.

With respect to ensuring the application of Article 23 (5) of the African Charter on Elections, Democracy and Governance, there are at least four steps worth pursuing. First the AU should encourage a consensual, participatory and inclusive processes when constitutional amendments on presidential term limits are considered in a member State. Second, a further measure in dealing with the effects of attempts at amending presidential term limit on peace and security as well as democratization is for the AU both to elaborate the conditions that legitimate revision of constitutions should meet and to play the role of monitoring and certifying such processes similar to its role in election observation. This can be done through implementing the request of the PSC for the elaboration of

principles and guidelines on amendments of constitutions which will be universally applicable to all member states.<sup>20</sup> Third, in case of doubt about whether the processes are legitimate and consultative that ensured the free participation of all segments of society, the matter could be referred to an independent commission of inquiry or to the AU human rights bodies. Fourth, taking into account the fact that tampering with term limit is becoming trigger of instability and violence, the AU may through its policy organs and its legislative process determine acts of tampering with constitutional provisions on term limits that fail to comply with such processes and face public opposition as constituting UCG under Article 23(5).<sup>21</sup>

Similarly, in order to address the other gaps including for clearly specifying the standard by which constitutional order is said to have been restored as a matter of rule and the point at which the sanctions imposed are to be lifted and to implement the PSC decision on clarifying the relationship between popular uprisings and UCG,<sup>22</sup> the PSC should convene a special retreat focusing on mechanisms for strengthening the AU norm on UCG and its effective implementation. This could be the occasion for the PSC to also consolidate into a single instrument the various rules on the ban on UCG that are to be found scattered in various documents.<sup>23</sup> The consolidation of the AU rules on UCG into a single document would also help to facilitate the adoption of the same standards on UCG by RECs/RMs that currently don't have any similar norm on UCG.

<sup>19</sup> Statement of AU Peace and Security Commissioner, Ambassador Ramtane Lamamra at the AU PSC 275th meeting, <http://www.au.int/en/dp/ps/content/statement-ambassador-ramtane-lamamra-commissioner-peace-and-security-275th-au-peace-and-secu>.

<sup>20</sup> African Union, Press Statement of the 791st session, PSC/PR/BR. (DCCXCI), 22 August 2018.

<sup>21</sup> It is worth noting that the PSC in the statement of its 791st session has already stated that failure to respect (constitutional principles, the rule of law and AU instruments on democracy and constitutional rule) often lead to situations of tension with serious political and security imputation, which, in turn, could trigger political crisis. African Union, Press Statement of the 791st session, PSC/PR/BR. (DCCXCI), 22 August 2018.

<sup>22</sup> African Union, Press Statement, PSC/PR/BR.(CDXXXII), April 29, 2014.

<sup>23</sup> The need for such consolidation into one instrument of AU provisions on UCG is identified by the PSC at its 791st session. See African Union, Press Statement of the 791st session, PSC/PR/BR. (DCCXCI), 22 August 2018.

Within the framework of the foregoing, in order to ensure a robust, principled, consistent and transparent implementation and enforcement of the norm banning UCG, the PSC should establish as its subsidiary body an expert group on the implementation of the AU norm on UCG. This is a body that offers technical support in assessing the occurrence of UCG, the nature of UCG that occurred in a country, the conditions that should be met for restoration of constitutional order and of lifting of sanctions imposed due to UCG and the best strategy for ensuring that the application of the norm on UCG on a country is able to induce speedy return to constitutional order. The group may consist of a representative of PSC members from each of the five regions, two representatives of the AU Commission one of them from the Office of the Legal Counsel and two independent experts consisting of a legal expert and a representative of a civil society group on the promotion of constitutional governance.

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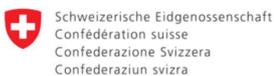
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