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On unconstitutional changes of government

The case of the National Transitional Council of Libya

Mehari Taddele Maru

This short paper discusses the North African uprisings that led to the change of leadership in Tunisia and Egypt, and the issues surrounding the recognition of the National Transitional Council (NTC) of Libya by the African Union (AU) after the killing of Muammar Gaddafi. In doing so, the paper analyses the uprisings in North Africa vis-à-vis the AU normative frameworks related to unconstitutional changes of government and democratic constitutionalism. The implications of these AU policies on the recognition of the NTC and how the AU recognised the NTC afterwards is also discussed. Finally, some recommendations are made with regard to how the AU should deal with similar uprisings in Africa in the future.

Keywords Unconstitutional change, National Transitional Council, Libya, African Union, NATO, UN Security Council

At its 14 September 2011 meeting, the African Union high-level Ad Hoc Committee on Libya reviewed the situation in Libya. The communiqué of the Ad Hoc Committee indicated that there was continuous communication between the AU Commission and the National Transitional Council (NTC) of Libya. The Ad Hoc Committee expressed its pleasure with the NTC's commitment to the main requests made under the AU roadmap on Libya, and particularly the need to establish an all-inclusive transitional process and ensure the safety and security of African migrants.

The Ad Hoc Committee also called upon the AU Peace and Security Council (PSC) 'to encourage the NTC to spare no efforts in ensuring its effective follow-up to living up to its pledge to formally institute an all-inclusive transitional government'.¹ The committee also stipulated that the PSC could authorise the NTC to take its AU seat once it had established an all-inclusive transitional government. Libya's seat in the AU had been vacant

since the fall of Tripoli to the rebels, as the PSC failed to officially recognise the NTC as the legitimate government of Libya at its 291st meeting. This is indicative of the AU's readiness to work with the NTC. Revealing the AU's dilemma, the Ad Hoc Committee referred to the AU normative frameworks related to unconstitutional changes of government and noted that any decision by the PSC to recognise the NTC should be 'without prejudice to the relevant instruments of the AU, particularly those on unconstitutional changes of governments'.² The committee also noted the uniqueness of the current reality in Libya, and its approach for all practical purposes constitutes *de facto* recognition of the NTC as the authority in Libya.

This recommendation by the Ad Hoc Committee raises several important questions regarding the interpretation and understanding of AU policies on unconstitutional changes of government. Are the North African revolutions incompatible with various AU norms? Was the change of government in Libya unconstitutional? Why is the involvement of mercenaries considered to be inherently unconstitutional? Were mercenaries involved in the uprising in Libya? How should the Libyan case be handled by the AU in the future?

An analysis of the current events in North Africa vis-à-vis the AU's normative frameworks related to constitutionalism and democracy should start with the principles embodied in three major AU instruments. These are the Constitutive Act of the AU, the Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government (the Lomé Declaration)³ and, although it is three ratifications short of entering into effect and thus not yet binding, the core principles of the African Charter on Democracy, Elections, and Governance (the Addis Ababa Charter).⁴

These instruments reveal that there are two forms of unconstitutional changes of government: unconstitutional *replacement* and *emplacement* of constitutional government. Replacement is an illegal accession to power and it includes coup d'état, mercenary intervention and rebel insurgency. Emplacement refers to the illegal retention of power. Emplacement in turn may constitute emplacement of an individual or placing someone else in a position of power, as was done by President Hosni Mubarak of Egypt when he handed over power to the Military Council. Tampering with constitutions and unconstitutional extensions of terms of office constitute abuse of prerogative power. Such extensions of terms of office are constitutional only when an amendment to this effect is authorised through national consensus, if possible, or by referendum. As provided in article 3(10), the legislative intention of the Lomé Declaration is to do away with such replacement and emplacement of governments. For this reason these instruments stipulate a strict sanction regime and punishment of individuals and governments carrying out unconstitutional changes of government.

Generally speaking, there is no tension between the events in North Africa and the AU normative frameworks. On the contrary, the spirit of the laws of the AU normative frameworks supports public demands to assert the general will of the people. The legislative intention of the Lomé Declaration does not apply to revolutions resulting from prevailing unconstitutional governance in a country. As far as public protests enjoy massive popular support and meet what may be called 'the credibility test', they remain within the rights of people to engage in revolution. The credibility test needs to fulfil three conditions, namely systemic violations of substantive rights, violations of trust of the people, and absence of constitutional mechanisms of redress, as assessed by the directly affected population and by the international community. When such conditions prevail in a country, the people have the right to change their government constitutionally if possible and extra-constitutionally, through revolution, if necessary. Indeed, the AU needs to urge its member states to enable their populations to

express their concerns and their legitimate aspirations for better governance and performance from their governments.

In the exercise of political power within the democratic context, people, as the principals, are the bearers of power, and the state is their agent. The state as agent exercises power by delegation. When the agent misuses or abuses this delegated power, the people have the right to revoke the delegation/agency. In its simplest form, when such revocation of power occurs through popular protest, it constitutes a revolution. In a revolution the people take state power (legislative, adjudicatory and executive) back from the persons placed in power for a short time. In short, revolution could be said to transform the latent power of the people to the active exercise of that power. Sometimes, due to the absence of the separation of powers, revolutions may lead to excesses which endanger constitutional limits of the majority power on minority rights. For this very reason the AU needs to work with those countries facing revolts to ensure democratic constitutionalism that does not endanger the right of the majority to rule and the right of the minority to be protected from abuses by the majority. This is done by constitutionalism.

When applied to the current situation in Libya, it is clear that Gaddafi's regime fulfilled all the conditions that warrant a revolution to bring about a change of government. Nonetheless, owing to the armed nature of the Libyan uprising compared to the events in Tunisia and to some degree those of Egypt, and the use of mercenaries in support of both Gaddafi and the NTC, the change of government in Libya constitutes an unconstitutional change of government for two reasons: the armed nature of the NTC; and the involvement of foreigners in this civil war. The involvement of the North Atlantic Treaty Organisation (NATO) and the Arab League, at the request of the NTC, complicates the situation even more.

The external factors and forces behind the uprising in Benghazi and the resultant civil war and bombings by NATO raised several vexing questions with regard to the nature of the change of government in Libya and also, to a limited degree, the events in Egypt. Generally speaking, while the Tunisian and Egyptian revolutions were spiritually within the AU normative frameworks, the Libyan change of government has some elements of an unconstitutional change of government. The Tunisian transfer of power from Zine al-Abidine Ben-Ali to the Speaker, albeit a hasty declaration of succession by the then Prime Minister of Tunisia, was done within the stipulations of the constitution of the country. In the case of Egypt, unlike in Tunisia, Mubarak was pushed aside by the military in collaboration with the dominant powers. When the United States and the Egyptian military leaders realised that Mubarak's regime was impossible to salvage, they acted to rescue the military and associated interests in Egypt. Power was handed over, not to the Vice-President or the Speaker as the Egyptian constitution stipulates, but to a military council. Indeed, both the Egyptian and Tunisian protests are true cases of revolution that had broad-based popular support. However, legally speaking, the Egyptian transfer of power to a military council contains elements of an unconstitutional change of government.

In the case of Libya the involvement of international actors complicated matters. Given the history and posture of the Gaddafi regime in the wake of the uprisings in Benghazi and the possibility of mass killings, it was understandable that the international community, through the United Nations Security Council (UNSC), decided to intervene to protect civilians from Gaddafi's excessive use of power. However, the purpose of the bombing changed from that of 'the protection of civilians' to 'the protection of rebels' as we now see it.

There are a number of questions that need to be answered: Could the 'rebel groups' and the NTC members be regarded as 'civilians' in the spirit of international humanitarian law?

Further, does the killing of Gaddafi meet the necessity and proportionality criteria as a legitimate military target to ensure the protection of civilians and civilian areas? Will the killing of Gaddafi reduce attacks on civilians, or lead to more deaths and suffering as it did in the cases of Iraq and Kosovo? The purpose of the bombing has undergone rapid metamorphosis from 'Gaddafi is not a target' to 'Gaddafi is a legitimate target' of the air strikes. Moreover, the AU roadmap is the only political map that exists, but it has been ignored by the UNSC and the international community, including NATO.

Both Gaddafi and the NTC employed foreigners in their military operations. Given that the NTC is not an association of civilians, but of armed groups with a chain of command, it is treated as a non-civilian group under humanitarian law. Moreover, the NTC has recently been accused of systemic violations of human rights, including summary executions of former members of the Libyan government, arbitrary killings of civilians opposing the uprising and abuses of migrants from sub-Saharan countries. Indeed, the protection of civilians and civilian populated areas should also be extended to areas under the control of Gaddafi's forces that are attacked by the NTC forces. In other words, the provisions of the UNSC Resolution 1973 relating to the protection of civilians should also be applicable to NTC liberated areas, which now includes almost the whole of Libya.⁵

Under the 1977 OAU Convention, mercenarism is considered a crime against peace and security.⁶ It defeats the will of the people, the sovereignty of a state, and the right of self-determination of the people of a given country. When foreigners engage directly or indirectly in conflicts on the African continent, such intervention is considered a subversion of the will of the people. Thus, in effect, mercenary intervention is the antithesis of acceptable revolutionary and constitutional changes of government.

Several media reports, particularly newspapers in Niger, Chad, Sudan, Nigeria, Guinea, Angola, Mali, Liberia, Mozambique and Ghana, either carried adverts for mercenaries (at US\$2 500 per day) or referred to the involvement of their nationals in the armed conflict. Many, including Reuters and Al Jazeera, reported that more than 2 000 African, Arab and East European mercenaries, including former 500 Polisario Front members, were fighting on the side of the Gaddafi government.⁷ In fact, Gaddafi's government admitted to the presence of non-Libyan soldiers in its armed forces. However, Gaddafi's government defended such involvement as legal and a long-term practice under Libyan law.⁸

In a report submitted to the UN Human Rights Council, the Gaddafi government admitted that there were more than 200 foreigners in the army drawn from 'friendly and brotherly countries' such as Egypt, Tunisia, Sudan, Chad, Mali and Niger. Several media reports pointed to the involvement of hundreds of mercenaries from the United Kingdom, the US, France and some Arab countries on the side of the NTC. According to some reports, private military companies from Latin America and Middle Eastern countries were engaged in the armed conflict, serving on both sides of the civil war. Al Jazeera video footage of a US war plane that crashed in the Benghazi area and the UK Foreign Secretary's confirmation of UK military involvement in the armed conflict tend to confirm such reports. However, the NTC and Western governments denied the presence of mercenaries in Libya. It is in this context that the AU faces a dilemma with regard to the recognition of the NTC.

However, in the event of such non-ideal changes of government, and when both sides of the armed war have violated normative frameworks of the AU, the AU should be prepared to support those who seek to implement the least unconstitutional exercise of power. In making such an important decision, the AU needs to employ the credibility test. Gaddafi was in power for 40 years, without any form of constitution or popular legitimacy. Hence,

Gaddafi's regime epitomised the best African example of the unconstitutional emplacement of an individual in power. The NTC has a better chance of compliance with AU normative frameworks. For now, the PSC has to bestow official *de facto* recognition on the NTC with some preconditions for a fast-tracked advance to full-fledged *de jure* recognition. The NTC needs to fulfil two phases: immediately establish an all-inclusive transitional government that will draft and adopt a constitution and organise democratic elections and then transfer power to a constitutionally elected government after a brief transitional phase. This approach will satisfy the AU prerequisite for 'the constitutional and legislative framework for the democratic transformation of Libya, as well as for support towards the organisation of elections and the national reconciliation process' as provided in its roadmap. The AU and other international actors have a vital obligation to ensure the credibility of the transitional process.

Owing to these considerations, the recognition of the NTC not only threatened the AU's normative frameworks governing unconstitutional changes of government, but more importantly, such recognition would amount to an official endorsement of its own marginalisation by the deliberate acts of the international actors actively supporting the NTC. This is a pertinent concern that the international community needs to address and a reason for the AU and NTC to work together to ensure a speedy transition to an all-inclusive transitional process to a democratic Libya. Non-recognition of, and non-cooperation with, the NTC will put the majority of Libyans in grave danger, the very situation the AU wanted to avoid by implementing the roadmap. The AU has in the past worked with military juntas that toppled democratically elected governments, the most recent cases being those of Madagascar and Mauritania. It now similarly needs to work with the NTC. Later on the AU recognised the NTC officially.⁹

The international community, particularly the UNSC, is known for its double standards in the application of international law when it comes to African issues. NATO's expansive interpretation of the objectives and scope of UN resolutions and its disproportional use of force remain questionable. For the international community, particularly the UNSC and NATO, the swift application of the no-fly zone on Libya exposed their double standards in handling African cases. For almost a year and half, the PSC of the AU has repeatedly pleaded with the UNSC to impose a no-fly zone in Somalia to protect civilians. In this African country 200 people have been dying every day for the last 20 years due to the civil war and because of the serious famine that has devastated the Horn of Africa. Compared to the case in Libya, the humanitarian catastrophe in Somalia should have received urgent attention on the UNSC agenda and NATO should have been willing to intervene some time ago. Without question, NATO and UNSC legitimacy will increasingly be damaged by this inconsistent approach to crises in Africa and the AU, UNSC and NATO will have to work to mend their diplomatic relations.

The AU roadmap still remains very relevant. The humanitarian crisis in Libya stems from the political crisis, which accordingly requires a largely political solution. The AU roadmap mainly contains provisions for the transitional period. In this regard the elements of exclusivity of the transitional process and protection of civilians remain as solid now as it was a few months ago. The AU stance against the far-reaching interpretation of the UN resolutions and its opposition to the NATO bombings were not aimed at entrenching Gaddafi in power. The stand emanates from the need to minimise civilian casualties, to avoid any unconstitutional change of government and from respect for the territorial integrity and sovereignty of Libya. Reading between the lines of its decisions and discussions, it seems that the AU would like to push for the right of Libyans to use their own resources, including oil. Similarly, the

NTC should be criticised for rejecting the AU roadmap and for serving as a front for forces harbouring contempt of the AU. In a way, the decision of the AU PSC taken during its 291st meeting indicates its disapproval of the attitude and stance of the UNSC and NATO. The international community needs to take the AU more seriously and render due respect to its mandates. The present discordant relations between the AU and international organisations will have a negative effect on the partnership. The AU thus needs to take the issue further and insist on consultation with the international community.

The AU has to pressure the NTC to ensure that the transitional process is inclusive of all segments of the Libyan society, which consists mainly of clans. The NTC and the AU need to work together to ensure that Libyans elect their government peacefully and democratically. There is no doubt that the foreign policy and relations of the NTC and future elected Libyan government will be different from that of Gaddafi. First, Gaddafi's foreign policy in Africa stemmed from his personal interest to lead a United States of Africa – a project in which he heavily, but unsuccessfully, invested for the last decade. Libya had too small a territory and population for 'the Brother Leader'. He wanted a much bigger territory and population to lead. For the NTC, and presumably for the next elected government, Libya will still be a challenge to govern, given that some of the clans may be reluctant to accept the current leadership and composition of the NTC. That is why the NTC was unable to come up with a list of cabinet members for a number of weeks in late 2011.

Some institutions have threatened that they will stop their partnership with the AU (meaning funding the AU's programmes), unless the AU changes its position on Libya. However, the imposition of conditions as a prerequisite for funding and to bend the AU to the funder's will, is not in effect different from Gaddafi's 15 per cent contributions to the AU, for which many of these international institutions criticised the AU in the first place. For the AU to stand on its own feet and avoid such conditions, the African states need to provide sufficient funding to allow the AU to operate independently. This would not necessarily lead to the rejection of any funding from partners. In addition, for the AU and African countries to take an independent stance and take decisions as they see fit, they need to contribute sufficient resources to their regional governance institutions. Only by putting their money where their mouths are will African countries be able to take decisions about what they think is best for Africa. Otherwise, those who control the coffers of Africa and the AU will also try to control its destiny.

Notes

- 1 Final communiqué of meeting of the AU High-level Ad Hoc Committee on Libya, Pretoria, South Africa, 14 September 2011, paragraph 6, <http://www.thepresidency.gov.za/pebble.asp?relid=4858&t=79> (accessed 11 January 2011).
- 2 Ibid, paragraph 7.
- 3 Organisation of African Unity, Assembly of Heads of State and Government, Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)), 36th ordinary session held in Lomé, Togo, 10–12 July 2000, http://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm (accessed 12 December 2011).
- 4 African Charter on Democracy, Elections and Governance, Assembly/AU/Dec.147(VIII), Adopted by the eighth ordinary session of the Assembly, Addis Ababa, Ethiopia, 30 January 2007, http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed 7 January 2012). This charter is expected to enter into effect this year.
- 5 United Nations Security Council, Resolution 1973 (2011), S/RES/1973 (2011), Adopted by the Security Council at its 6498th meeting, on 17 March 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement> (accessed 7 January 2011).

- 6 OAU Convention for the Elimination of Mercenarism in Africa, CM/817(XXIX), Annex II Rev 1, Adopted in Libreville on 3 July 1977, http://www.au.int/en/sites/default/files/Convention_En_Elimination_of_Mercenariism_in_Africa_Libreville_03July1977_52.pdf (accessed 7 January 2012).
- 7 For more particulars see the following: Nick Meo, African mercenaries in Libya nervously await their fate, *The Telegraph*, 27 February, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8349414/African-mercenaries-in-Libya-nervously-await-their-fate.html> (accessed 8 October 2011); Anna-Mahjar-Barducci, African mercenaries in Libya, Part 2, Stonegate Institute, 1 April 2011, <http://www.hudson-ny.org/2008/african-mercenaries-libya-2i> (accessed 18 August 2011); Samir Bennis, Libya: Over 556 of the Polisario mercenaries in the hands of NTC, *Morocco World News*, 25 August, 2011, <http://morocoworldnews.com/2011/08/libya-over-556-of-the-polisario-mercenaries-in-the-hands-of-ntc/> (accessed 18 August 2011); Julian Borger and Martin Chulov, Al-Jazeera footage captures 'western troops on the ground' in Libya, *The Guardian UK*, <http://www.sott.net/articles/show/229345-Al-Jazeera-footage-captures-western-troops-on-the-ground-in-Libya>, 30 May 2011, (accessed 18 August 2011); Samia Nakhoul, Special report: The secret plan to take Tripoli, Reuters, 6 September 2011, <http://www.reuters.com/article/2011/09/06/us-libya-endgame-idUSTRE7853C520110906> (accessed 18 August 2011).
- 8 Response of the Great Socialist People's Libyan Arab Jamahiriya to charges of human rights violations under the Human Rights Council Resolution A/HRC/S-15/2, 25 February 2011.
- 9 Communiqué of the 294th meeting of the Peace and Security Council, New York, 21 September 2011, PSC/PR/COMM(CCXCIV), http://www.goss-online.org/magnoliaPublic/en/news/press/mainColumnParagraphs/01115/content_files/file/PSC%20COMMUNIQUE%20-%2021%2009%2011%20ENG.pdf (accessed 11 January 2012).