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On Unconstitutional Changes of Government: The Case of Libya's NTC

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The African Union (AU) High-Level ad hoc committee on Libya in its 14 September 2011 meeting, held in Pretoria, South Africa, reviewed the situation in Libya. The Communiqué of the ad hoc committee indicates the continuous communication between the AU Commission and the National Transitional Council (NTC). The ad hoc committee has expressed its satisfaction at the commitment of the NTC to the main requests made under the AU Roadmap on Libya, mainly the need to establish an all-inclusive transitional process and ensure the safety and security of African migrants.

The ad hoc committee has also called upon the Peace and Security Council (PSC) "to encourage the NTC to spare no efforts in living up to its pledge to formally institute an all-inclusive transitional government". The *ad hoc* committee also stipulated that the PSC could authorize the NTC to take its AU seat once it establishes an all-inclusive transitional government. It is to be recalled that Libya's seat at the AU has been vacant since the beginning of the NTC-control of Tripoli as the PSC in its 291st meeting failed to officially recognise the NTC as the legitimate government of Libya. This is indicative of the AU's readiness to work with NTC. Revealing the dilemma, the AU is facing, the ad hoc committee referred to the AU normative framework related to unconstitutional changes of government and noted that any decision by the PSC recognizing the NTC should be "without prejudice to the relevant instruments of the AU, particularly those on unconstitutional changes of governments". It also noted the uniqueness of the current reality in Libya. Indeed, this practically constitutes *de facto* recognition of NTC as the authority in Libya.

This recommendation by the *ad hoc* committee raises several important questions regarding the construal of the AU policies on unconstitutional changes of government. Are the North African revolutions incompatible with the various AU Norms? Was the change of government in Libya unconstitutional? Why is involvement of mercenaries inherently anti-constitutional or even unconstitutional? Were there mercenaries involved in the uprising in Libya? How should the Libyan case be handled by the AU from now on? Analyses of the current events in North Africa vis-à-vis the AU normative frameworks related to constitutionalism and democracy should start with three major AU instruments. These are the Constitutive Act of the African Union and the Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government (the Lomé Declaration). To some degree, even if not yet binding, the core principles of the third document, the African Charter on Democracy, Elections, and Governance (the Addis Charter) offer guidance in this regard.

From the cumulative reading of these instruments, one can understand 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 illegal retention of power. *Emplacement* may constitute emplacement of oneself, implantation of someone else as was done by former President Hosni Mubarak of Egypt where the Military Council was handed over power. Tampering with constitutions and unconstitutional extension of term of office constitutes abuse of prerogative power. Such extension of

term of office is constitutional only when amendment is done through national consensus, if possible and by referendum— when necessary. As provided under Article 3 (10), the legislative intention of the Lomé Declaration is to do away with such *replacement* and *emplacement* of government. For this reason, these instruments stipulate a strict sanction regime and punishment of the authors and governments carrying out unconstitutional changes of government.

Generally speaking, there is no tension between the North African events and the AU normative frameworks. On the contrary, the spirits of the law of the AU normative frameworks support public demands to assert the general will of the people. The legislative intention of the Lomé Declaration does not apply to revolutions necessitated by the prevailing unconstitutional governance in a country. If public protests enjoy massive popular support and meet what one may call ‘the credibility test’, then they remain within the rights of people to revolution. The credibility test needs to fulfil three conditions: if there are *violations of substantive rights*, *violation of trust of the people*; and *absence of constitutional mechanisms of redress*, as assessed by the population directly affected and by the international community. When these conditions are prevalent in a country, the people have the right to change the government constitutionally if possible and extra-constitutionally—through revolution - if necessary. For this very reason, the AU needs to work with these countries facing revolts to ensure democratic constitutionalism that does not endanger the right of majority to rule and the right of minority to be protected from abuses of the majority. This is done by constitutionalism.

Applied to the current Libyan case, it is clear that the Gaddafi regime fulfils the above three conditions that warrant a revolution in need of change of government. Nonetheless, due to the armed nature of the Libyan uprising compared to the Tunisian and to some degree that of Egypt, and the employment of mercenaries on both Gaddafi’s and NTC’s side, the change of government in Libya constitutes unconstitutional change of government. The involvement of NATO complicates the case even more.

Under the 1977 OAU Convention, mercenarism is considered as a crime against peace and security. It defeats the will of the people, sovereignty of a state, and the right of self-determination of the people of a given country. When foreigners engage in a direct or indirect participation and aiding of conflicts in African continent, such intervention is considered as a subversion of the will of the people. Thus, in effect, mercenary intervention is anti-thesis of proper revolution and constitutional changes of government.

It is in this context that the AU faces a dilemma with regard to the recognition of the NTC. However, when such non-ideal circumstance to change of government occurs and both sides of the armed war have violated normative frameworks of the AU, as policy organ the AU should weigh the balance of unconstitutionality. It has to choose the least unconstitutional exercise of power. What is more, in making such an important decision, the AU has to employ the credibility test. Gaddafi has been in power for 40 year, without some form of constitution and popular legitimacy. Hence, Gaddafi’s regime epitomizes the best example of unconstitutional emplacement of oneself in power. For the AU, the NTC has a better chance of compliance to the AU normative frameworks. For now, the PSC has to bestow official *de facto* recognition to NTC with some preconditions to fast track to a fully fledged *de jure* recognition. The NTC needs to fulfil two phases: establishing an all-inclusive transitional government immediately that will draft and adopt a constitution, organising democratic election and then transfer power to a constitutionally elected government after a brief transitional phase. These phases will fulfil the AU prerequisite for “the constitutional and legislative framework for the democratic transformation of Libya, as well as for support towards the organization of elections and the national reconciliation process” as provided in its Roadmap. The AU and other international actors have the vital obligation to ensure the credibility of the transitional process.