

**Paper presented at the 4<sup>th</sup> European Conference of African Studies**

**Nordic Africa Institute, Uppsala, Sweden**

**15 June 2011**

**Panel 39: The New African Peace and Security Architecture – Perspectives on  
Emerging Practice**

***Title: Unconstitutional changes of government:***

***The democrat's dilemma in theory and practice***

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**UNPUBLISHED PAPER NOT FOR QUOTATION**

## **Introduction:**

An unexpected new wave of democracy broke on Africa's northern shores in 2011, beginning with the ousting of long-standing presidents in Tunisia and Egypt, leading to more deadly conflict in Libya. These events – particularly those in Libya – have divided the African Union (AU), and shaken its fragile new norms of democracy promotion and conflict resolution. Initially, the AU Peace and Security Council (PSC) issued two strong statements in support of the 'legitimate aspirations' for democracy of the people of Egypt and Libya, and condemned violence and violation of international humanitarian law against civilians in Libya.<sup>i</sup> However, after the North Atlantic Treaty Organisation (NATO) intervened in Libya, the AU's older principle of non-interference in the internal affairs of member states was reasserted.

In this dramatic new context, the paper reflects on one of the AU's primary instruments of democracy promotion: the rejection of 'unconstitutional changes of government'. It examines how the principle has been defined and institutionalised within the AU's peace and security architecture. It is argued that each unique case of political crisis has tested and refined the general principle. It then considers the Maghreb revolutions of 2011, particularly the situation in Libya, as crises of governance, which highlight the shortcomings of the AU's conception of democracy promotion in Africa and the limitations of its purported change from the principle of non-interference to 'non-indifference'<sup>iii</sup>.

The problem faced by the AU is that constitutional democracy is seldom firmly in place prior to an 'unconstitutional change'. In some cases, the instigators of change have a legitimate claim in seeking to restore or establish democracy. The AU's stance is that the end cannot justify the means. The problem then becomes how to establish a democracy by democratic means, if authoritarian rule will not allow a peaceful transfer of power? It is a question that has vexed philosophers since the French Revolution and remains a dilemma for African democrats.

## **Reform of the OAU following the post-Cold War ‘wave’ of democratisation in Africa**

The post-Cold War ‘third wave’<sup>iii</sup> of democratisation washed a series of reforms across Africa in the mid-1990s, culminating in the reform of the OAU itself. Ironically, it was President Mugabe as OAU chairperson who said in 1997 that:

The OAU merely used to admit coups had occurred, but now we want to address them. Democracy is getting stronger in Africa and we now have a definite attitude to coups and illegitimate governments.<sup>iv</sup>

A new set of rules for procedural democracy was taking hold, with the emphasis on constitutionalism. One-by-one many African countries adopted constitutions with presidential term limits, regular elections, separation of powers and multi-party representation. This did not result in substantial or consolidated democracy in many of these countries and reversals have taken place, most crucially, in cases whereby presidents have scrapped constitutional term limits to stay in power. By the turn of the millennium, however, the number of African countries respecting the letter, if not the spirit, of constitutional democracy had reached the tipping point needed to adopt the democratisation provisions of the AU Constitutive Act of 2000 and the related protocols, charters and decisions that followed.<sup>v</sup>

Besides the shifting balance between relatively democratic versus authoritarian member states within the organisation, two other factors account for the adoption of new norms of ‘non-indifference’, that is, democracy promotion and intervention for conflict prevention, mediation and resolution. Second was the role of significant ‘norm entrepreneurs’ within the OAU Secretariat (and later the AU Commission). The appointment of Dr Salim Ahmed Salim as Secretary-General of the OAU in 1989 began an era in which the secretariat was to play a decisive political role. Salim was able to exercise considerably more political initiative than his predecessors. This was partially on account of his stature as a former prime minister of Tanzania (who steered the country through President Nyerere’s retirement in 1985), and partially due to the changed context of the end of the Cold War. He was assisted by Ambassador Said Djinnit, as director of cabinet of the OAU Secretary-General from 1989–99, and Assistant Secretary-General in charge of Political Affairs (1999–2002), who became the first AU Peace and Security

Commissioner. Their ideals were written into the legal framework of the AU, as expressed by Djinnit in a speech to the Assembly in 2002:

The Constitutive Act has... made provisions establishing, in essence, the principle of non-indifference to the internal affairs of Member States. The Constitutive Act has specifically provided for the right of the Union to intervene in a Member State in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.<sup>vi</sup>

Third was the confluence in the late 1990s of reform agendas on the part of three powerful leaders, Muammar Gaddafi, Olusegun Obasanjo and Thabo Mbeki, of the OAU's most powerful member states, Libya, Nigeria and South Africa<sup>vii</sup>. The Nigerian and the South African presidents, who were both elected in 1999, came to the OAU table with plans for regional integration, better governance and development, as platforms from which to project their statesmanship. Gaddafi looked to the OAU for legitimation from 1997 onwards, after the Arab League rejected his appeals for support in the face of international sanctions. He resurrected Kwame Nkrumah's vision of a 'united states of Africa' as a vehicle for continental leadership.

Although all three leaders drove the reforms forward, Gaddafi's agenda was at odds with the normative direction the AU was taking towards greater emphasis on democracy, human rights and the 'responsibility to protect' principle enshrined in article 4(h) of the Constitutive Act of the AU, 2000. A telling illustration of Gaddafi's divergence from these ideas is that in 2003, he succeeded in convincing the AU Assembly to adopt an amendment to article 4(h) of the AU Act, to extend the right of the AU to intervene in the case of 'a serious threat to legitimate order' (Protocol on Amendments to the Constitutive Act of the African Union, 2003).<sup>viii</sup>

The original wording of Libya's draft amendment did not refer to unconstitutional changes of government, but to 'cases of unrest or external aggression'<sup>ix</sup>. The word 'unrest' commonly means popular protests against a government, which implies withdrawal of their consent and therefore the legitimacy of that order. Gaddafi had regime security in mind, without concern for legitimacy. The adoption of Gaddafi's amendment suggests that the 'responsibility to protect' norm did not have enough support among member states to prevent them from rejecting Libya's proposal out of hand. This goes some way towards explaining why the AU did not invoke article 4(h) in 2011 to intervene against Gaddafi's vicious response to popular uprisings in Libya.

The three explanations for the reform of the OAU into the AU up until 2002 are equally important to understanding whether and to what extent the new norms of ‘non-indifference’ have been consolidated since 2002: (1) an overall increase in the number of African democracies; (2) an active role played by ‘norm entrepreneurs’ within the secretariat/ commission; and (3) strong leadership by key member states.

### **Definition of ‘unconstitutional changes of government’:**

The AU currently defines an ‘unconstitutional change of government’ in terms of the Lomé Declaration of 2000, as follows:

- 1) military coup d’etat against a democratically elected Government;
- 2) intervention by mercenaries to replace a democratically elected Government;
- 3) replacement of democratically elected Governments by armed dissident groups and rebel movements;
- 4) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.<sup>x</sup>

A controversial fifth element has been added to the definition in the African Charter on Democracy, Elections and Governance, adopted in 2007, namely:

- 5) any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.<sup>xi</sup>

This provision is aimed at preventing the constitutional tampering that enabled, for example, presidents Yoweri Museveni of Uganda and Paul Biya of Cameroon to outstay two terms of office. It will considerably expand the powers of the PSC to use sanctions, once the Democracy Charter enters into force. As of 27 January 2011, the Charter had eight out of the fifteen ratifications needed to enter into force<sup>xii</sup>.

### **The AU’s record since 2002:**

Nine member states of the AU have been suspended and/or faced sanctions by the PSC for unconstitutional changes of government, some more than once. These are Madagascar, Togo, Central African Republic, Mauritania, Guinea, Niger, Guinea-Bissau, Saõ Tome and Príncipe

and Côte d'Ivoire. Sanctions were also implemented against a secessionist group in the Comoros.<sup>xiii</sup> All but one of these cases has been in response to coups d'état. The exception is the suspension of Côte d'Ivoire following Laurent Gbagbo's refusal to relinquish power after losing an election in 2010.<sup>xiv</sup> In this case, the application of the UCOG principles was not contested. An alternative model of negotiating a power-sharing government of national unity was put forward by AU heavyweights, South Africa, Angola and Uganda. This idea was finally dropped after President Zuma changed his position following a state visit to France in March 2011.

Madagascar's instability in the past ten years has proved an insurmountable problem for the AU since its founding summit in July 2002. The member state was the first to be suspended for an unconstitutional change of government, following a disputed election in 2002 when the incumbent for 30 years, Didier Ratsiraka, refused to concede defeat to businessman Marc Ravalomanana. In this case, the AU was seen to be siding against popular demands for democracy by supporting the incumbent – a bad start for the new norm of democracy promotion. The AU suspended Madagascar again in 2009 when Ravalomanana himself was the victim of a coup d'état, and was forced to flee to South Africa. Yet the organisation has had little impact on the situation, perhaps due to a lack of political will on the part of Southern African leaders to address the remote island's political problems.

In Togo in February 2005, the son of the late dictator, Gnassingbe Eyedema, defied the country's constitution by assuming the presidency. The AU followed the lead of ECOWAS by suspending Togo and announcing sanctions against the member state. It allowed Faure Gnassingbe to legitimate his leadership, however, by running successfully for election. The PSC has since refined the UCOG principle to exclude those responsible for an unconstitutional change of government from subsequently taking part in elections. The AU responses to coups in the Central African Republic in March 2003 and Mauritania in August 2005 were relatively muted, taking into account the popular sentiment in these two countries.<sup>xv</sup> On 6 August 2008, however, Mauritania's newly-elected president, Sidi Abdallahi, was overthrown in another coup. That time, the AU did not hesitate to condemn it. In São Tomé and Príncipe, swift mediation following a coup in 2003 meant that the AU did not have to implement the UCOG principle fully. In Guinea-Bissau, the coup leaders who overthrew presidents Kumba Yala in 2003 and Nino Vieira in 2009 pre-empted AU action by quickly handing over power to the chairman of the National Assembly to organise elections in accordance with the national constitution.

The case of Niger in 2010 illustrates the dilemmas of applying the UCOG principle quite clearly. The coup d'état in February 2010 followed President Tandja's suspension of the constitution in order to remain in power, which the Economic Community of West African States (ECOWAS) had rightly defined as an 'unconstitutional change of government'. The AU endorsed ECOWAS' position and imposition of sanctions against Niger in October 2009. The ousting of Tandja shortly thereafter was called a 'counter-coup' by Niger's opposition groups and some within ECOWAS. Nevertheless, the AU was bound to implement the UCOG principle once again and steer the country towards elections, which it did.

In Guinea, the death of long-standing president Lansana Conté in December 2008 left a power vacuum and inevitably an unconstitutional change followed, as military captain Moussa Dadis Camara suspended the constitution and took charge of the country. Senegalese President Wade, the elder statesman of the region, supported the military takeover on the grounds that order had to come before democracy in such a tumultuous region. Atrocities committed by Camara's troops in a football stadium in September 2009 turned regional opinion against the military junta, and the shooting of Camara propelled parties towards a compromise, and the AU was able to oversee relatively successful elections in 2010.

The application of the UCOG principle has revealed a problem for the organisation of adjudicating between 'good coups' and 'bad coups'.<sup>xvi</sup> Francis Ikome points out that there are two reasons for coups: (1) the ambitions and opportunism of those who plot the coup, and (2) bad governance that has shut down peaceful, democratic methods of changing a government.<sup>xvii</sup> 'Good coups', in which the overthrow of bad governments is met with jubilation on the streets, present a 'dilemma' for the AU's 'blanket injunction' against coups. Ikome asks: 'What options are left for an oppressed people, when the oppressors constrain all avenues of peaceful change?'<sup>xviii</sup> The nature of this dilemma has quickly become apparent to the PSC through its attempts to apply the new rules in a number of cases.

In practice, the PSC is evolving a set of responses depending on the context. These range from a relatively mild statement of condemnation, to suspension of the country's membership of the AU, to economic sanctions. Each case is also followed with careful regional mediation to persuade the coup leaders to restore or introduce constitutional democracy, free, fair elections and a process of legitimation of a new government.

To ignore a coup would be to allow a cycle of political instability to set in. A way out of the dilemma posed by ‘good’ and ‘bad’ coups would be to point out that the AU’s definition of an unconstitutional change of government applies to coups d’etat against *democratically elected* governments only.<sup>xix</sup> This could be used to justify a more moderate reaction to ‘good coups’ than to ‘bad coups’, provided that the AU made some attempt at consistency and employed objective criteria when making these case-by-case decisions.

### **The Maghreb revolutions of 2011**

The constitutionalism on which the AU’s democracy promotion is founded does not currently provide for an adequate response to popular democratic uprisings. The events of early 2011 demonstrate the limitations of the AU’s architecture for promoting democracy. Taking to the streets to remove a head of state from power is clearly an unconstitutional change of government, since constitutional democracy only allows for removal from power by elections. There is a fine line between a spontaneous expression of the will of the people and mob rule, since the peoples’ will may be determined haphazardly by estimation of numbers (often filtered by the media), and not by an accurate vote.

The uprising against Gaddafi is easier to exempt from the definition of unconstitutional changes of government than those against Mubarak or Ben Ali. This is because Gaddafi has never held so much as a charade of elections since coming to power in 1969, disqualifying Libya from even the broadest definition of a ‘democratically elected government’. This is in contrast to Egypt, in which the uprising’s legitimacy depends on a judgement of the quality of elections won by Mubarak only weeks earlier.

A second deciding factor for the legitimacy of these uprisings concerns the role of the military. The definition of unconstitutional changes of government refers to armed rebellions by the military, ‘armed dissident groups’ or rebel movements. Perhaps this is why the Egyptian army stood so carefully to one side until President Mubarak had bowed to public pressure to stand down. In Libya’s case, the dissidents occupied the moral high ground as the firepower unleashed against them was so much greater than they could muster in self-defence.

The PSC communiqué of 16 February sided unequivocally with the protestors and against the Egyptian government. The communiqué



...Notes the deep aspirations of the Egyptian people, especially its youth, to change and the opening of the political space in order to be able to democratically designate institutions that are truly representative and respectful of freedoms and human rights; [and] expresses AU solidarity with the Egyptian people whose desire for democracy is consistent with the relevant instruments of the AU and the continent's commitment to promote democratization, good governance and respect for human rights.<sup>xx</sup>

Similarly, on 23 February, the PSC issued a statement on the situation in Libya, that:

...strongly condemns the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law... [and] underscores that the aspirations of the people of Libya for democracy, political reform, justice and socio-economic development are legitimate...<sup>xxi</sup>

The language of these two communiqués was remarkable, given that Egypt and Libya are two of the AU's 'big 5' members, each responsible for paying 15% of the organisation's ordinary budget. It was all the more remarkable for the fact that the composition of the PSC at the time included some of the most authoritarian states on the continent: Equatorial Guinea, Zimbabwe, Chad and Libya itself. Shortly thereafter, however, the AU was revealed to be deeply divided over the issue of military intervention in Libya.

Following the February meeting of the PSC on Libya, the AU established a high-level committee, led by South African President Jacob Zuma and including Mauritania, Mali, Uganda and Congo (Brazzaville), to take further action. The panel met on 10 March and rejected 'foreign military intervention' in Libya. They resolved to travel to Libya to attempt mediation between Gaddafi and the opposition movement. At the same time, an international debate was unfolding on whether and how to respond to Gaddafi's military campaign against the uprising. This included a proposal to establish a 'no-fly zone' over Libya – a euphemism for military action that stopped short of deploying foreign ground forces on Libyan soil.

Western powers, the United States in particular, were reluctant to intervene militarily in an oil-rich Muslim country without at least formal approval from a number of Muslim nations. This signal was received on 12 March, when the Council of the League of Arab States called for the imposition of a no-fly zone over Libya. Thus, the AU's approach of seeking to mediate between parties to the conflict was eclipsed two days later by the Arab League, a regional organisation which had long held antagonistic relations with Gaddafi.

On 18 March 2011, the United Nations Security Council (UNSC) adopted Resolution 1973, which mandated military intervention short of ground deployments, by a coalition of willing member states. All three African member states of the UNSC, South Africa, Nigeria and Gabon, voted in favour of the resolution. This placed the AU, and President Zuma, in a bind of having to simultaneously support the UNSC resolution, while maintaining the high-level committee's position of seeking a negotiated, 'peaceful' solution to the Libyan conflict.

Although a political resolution to the conflict is certainly necessary in the long-run, the high-level committee's attempts to mediate were premature and unrealistic, seeking an assurance of a ceasefire from Gaddafi in April in the midst of the bombing, while the opposition movement refused to even enter discussions on the AU's terms. Subsequent statements by the AU, for example, on 25 May, 'recognise and respect' the UNSC resolution regarding the need to protect civilians in Libya, while objecting to NATO's interpretation of the resolution and calling for an end to the NATO intervention.

The AU's response to Gaddafi's war to stay in power breaks the pattern established on the rejection of other military power grabs by way of coups d'état. In this ultimate test case for the AU's new norms, the older anti-colonial principles of state sovereignty and non-interference in internal affairs in Africa have turned out to be the more entrenched point of view among member states in 2011. This is despite the fact that soon after its launch, the AU was credited with being at the forefront of the international debate on humanitarian intervention, contributing to the United Nations' acceptance of the idea of sovereignty as the 'responsibility to protect'.<sup>xxii</sup>

While Gaddafi's purported stature within the organisation has been commonly cited as the reason why the AU has rejected military intervention to stop his attacks on civilians, this paper points to other reasons for this stance. Each of the three factors enabling the reform of the OAU into the AU also has explanatory power here. First, although there has been an increase in the number of democracies in Africa since the end of the Cold War, there are still many undemocratic regimes represented in the Assembly of the AU, who feel threatened by the North African popular protests for democracy.

Second, the norm entrepreneurs within the OAU Secretariat, and later the AU Commission, may have succeeded in changing the principles of the organisation on paper. However, the

consolidation of these principles can only be achieved by the member states themselves. While the PSC has applied the norm of rejection of unconstitutional changes of government, it has stopped short of applying the article 4(h) right to military intervention<sup>xxiii</sup>. Each of the AU peace missions undertaken to date has been with the consent of the government of the country in which the mission has been deployed, even in Sudan, where the PSC worked hard to convince President Al Bashir to consent to the AU deployment to Darfur. Finally, the combination of strong leadership driving the reform agenda of the AU forward was weakened after the departure from politics of presidents Mbeki and Obasanjo. The cause of an African ‘responsibility to protect’ lacks a bold champion on the continent in 2011.

## **Conclusion**

While the AU’s response to each case of unconstitutional changes of government is meant to be automatic and uncompromising, decisions whether and how to respond take place in the context of many factors beyond matters of principle. Cases which have not been taken up by the AU are as significant as those that have elicited a response. For example, why did Laurent Gbagbo face stronger sanctions from the AU than Robert Mugabe, when both leaders refused to admit to clear electoral defeat? Is the prevalence of West African cases because this region is less stable than North, East, Southern or Central Africa, or is there an uneven consolidation of the norm among regional economic communities (RECs)? Does ECOWAS prompt the AU to act more readily than SADC or IGAD, or are the regional powers like Nigeria and South Africa driving the PSC decisions? These questions should be addressed as the organisation develops its jurisprudence in defence of democracy.

Following the popular uprisings for democracy in North Africa in 2011, the PSC needs to clarify when and why a civilian-led uprising against a head of state *should not* be defined as an unconstitutional change of government. It then needs to develop guidelines for the AU on how to steer popular uprisings towards the restoration or establishment of constitutional democracy, including provision for transitional government, a timeframe for elections and the consolidation of democratic institutions. The principle of humanitarian intervention, which was adopted in 2000 at the height of international support for this radical idea, will need to be refined and debated within an African context for some time to come.

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<sup>i</sup> African Union Peace and Security Council, *Communiqué*, 260<sup>th</sup> Meeting, Addis Ababa, Ethiopia, 16 February 2011: PSCPR/COMM.(CCLX); African Union Peace and Security Council, *Communiqué*, 261<sup>st</sup> Meeting, Addis Ababa, Ethiopia, 23 February 2011: PSCPR/COMM.(CCLXI).

<sup>ii</sup> Said Djinnit, 'Speech to the Pan-African Development Forum Symposium on the African Union'. Addis Ababa, 3 March 2002.

<sup>iii</sup> Samuel P. Huntington, *The Third Wave: Democratisation in the Late Twentieth Century*. Oklahoma, University of Oklahoma Press, 1992.

<sup>iv</sup> President Robert Mugabe, quoted in *South African Press Association*, 4/6/1997.

<sup>v</sup> For a summary of empirical evidence of Africa's democratization, see Ulf Engel, *Unconstitutional Changes of Government – New AU Policies in Defence of Democracy*. Universität Leipzig, Working Paper Series No.9, Leipzig 2010, pp. 4-5.

<sup>vi</sup> Djinnit, 2002, *op cit*.

<sup>vii</sup> Thomas Tiekou, (2004), 'Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union.' *African Affairs* 103, no. 411: 249–68.

<sup>viii</sup> For further analysis of this decision, see Evarist Baimu and Kathryn Sturman (2003), 'Amendment to the African Union's Right to Intervene: A Shift from Human Security to Regime Security?' *African Security Review* 12, no. 2: 37–45.

<sup>ix</sup> Unpublished draft amendment, quoted in Baimu and Sturman, *op cit*, p 39.

<sup>x</sup> Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, 2000.

<sup>xi</sup> African Charter on Democracy, Elections and Governance, 2007, Article 23(5).

<sup>xii</sup> Burkina Faso, Ethiopia, Ghana, Lesotho, Mauritania, Rwanda, South Africa and Sierra Leone.

<sup>xiii</sup> For a detailed discussion of cases up to 2008, see Kathryn Sturman, (2009) 'The use of sanctions by the AU: peaceful means to peaceful ends?' in *SAIIA Yearbook 2009*, Johannesburg: SAIIA. For a review of cases from 2008 to 2010, see Ulf Engel, *op cit*. Also see Paul Williams, 'From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture', in *African Affairs*, 106:423, 253-80.

<sup>xiv</sup> African Union Peace and Security Council, *Communiqué*, 252<sup>nd</sup> Meeting, Addis Ababa, Ethiopia, 9 December 2010: PSCPR/COMM.(CCLII).

<sup>xv</sup> Francis Ikome, *Good Coups and Bad Coups: The Limits of the AU's Injunction on Unconstitutional Changes of Government*, Occasional Paper 55, Johannesburg: Institute for Global Dialogue, 2007, pp. 38–41.

<sup>xvi</sup> *Ibid*.

<sup>xvii</sup> *Ibid*, p. 23.

<sup>xviii</sup> *Ibid*, p. 42.

<sup>xix</sup> Democracy Charter, 2007, Art. 23(1).

<sup>xx</sup> African Union Peace and Security Council, *Communiqué*, 260<sup>th</sup> Meeting, Addis Ababa, Ethiopia, 16 February 2011: PSCPR/COMM.(CCLX).

<sup>xxi</sup> African Union Peace and Security Council, *Communiqué*, 261<sup>st</sup> Meeting, Addis Ababa, Ethiopia, 23 February 2011: PSCPR/COMM.(CCLXI).

<sup>xxii</sup> Alex Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit.' *Ethics and International Affairs* 20, no. 2, 2006: pp. 143–169.

<sup>xxiii</sup> Paul Williams, 'The "Responsibility to Protect", Norm Localisation and African International Society', in *Global Responsibility to Protect 1* (2009), 392-416, p. 407.