POLICY BRIEFING 30

Governance of Africa's Resources Programme

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# Unconstitutional Changes of Government: The Democrat's Dilemma in Africa

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## RECOMMENDATIONS

- Members of the Pan-African Parliament (PAP) should urge their national parliaments to ratify the African Charter on Democracy, Elections and Governance to ensure that it enters into force by 2012.
- In response to recent uprisings in North Africa, the PAP should debate the appropriate regional response to civilian-led popular uprisings for democracy and advise the African Union Peace and Security Council (PSC) accordingly. In particular, the PAP should clarify when and why a civilian-led uprising against a head of state should not be defined as an unconstitutional change of government.
- The PAP should develop guidelines for the African Union 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 PAP should urge the PSC to apply more consistently and strenuously the principle of unconstitutional changes of government when incumbent heads of state refuse to leave office after losing a democratic election, as occurred in Zimbabwe in 2008 and Côte d'Ivoire in 2010.

## EXECUTIVE SUMMARY

Since 2002, a well-established principle and practice of the African Union (AU) has been the rejection of unconstitutional changes of government. The use of this instrument of democracy promotion has set the AU apart from its predecessor, the Organisation of African Unity (OAU). In Madagascar, Togo, Guinea, Niger, Mauritania, Côte d'Ivoire and other member states, suspension from the AU and sanctions have been applied against coups d'état; 'counter-coups' (when one military junta topples another); assumption of power without holding elections; suspension of constitutional term limits to stay in power; and the refusal of incumbent leaders to step down after electoral defeat. Yet the application of this rule is seldom straightforward. In 2011, popular uprisings in North Africa highlighted the democrat's dilemma: how to establish democracy by democratic means? When and why should this principle be applied by the AU?

## 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 and leading to more deadly conflict in Libya. When asked for comment on the quickly unfolding events at the AU Summit in January, Jean Ping, chairperson of the AU Commission, initially had no response. However, by February the AU Peace and Security Council (PSC) had issued two of its strongest statements ever made in support of the 'legitimate aspirations' of the people of Egypt and Libya and condemning violence and violation of international humanitarian law against civilians in Libya.[2]

In this dramatic new context, what are the limitations in theory and in practice of the rejection of 'unconstitutional changes of government', one of the AU's primary instruments of democracy promotion over the past nine years. Since the launch of the AU in July 2002, the principle has been defined and institutionalised within the AU's peace and security architecture and refined and tested with each unique political crisis. However, the Maghreb revolutions of 2011 highlight the shortcomings of the AU's conception of democracy in Africa.

The problem facing the AU is that constitutional democracy is seldom firmly in place prior to the 'unconstitutional change'. In several cases, the instigators of change have a legitimate claim for seeking to restore or establish democracy. However, 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.

## THE POST-COLD WAR 'WAVE' OF DEMOCRATISATION IN AFRICA

In the mid-1990s, the post-Cold War 'third wave'[3] of democratisation washed a series of reforms across Africa, culminating in the reform of the OAU itself. Ironically, it was President Mugabe, the then OAU chairperson, who in 1997 said 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'.[4]

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. In many of these countries, this did not result in substantial or consolidated democracy, and reversals have taken place, most crucially when presidents have scrapped constitutional term limits to stay in power. However, by the turn of the millennium, 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.[5]

## 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.[6]

A controversial fifth element was added to the definition in the African Charter on Democracy, Elections and Governance, adopted in 2007: (5) any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.[7]

This provision is aimed at preventing the constitutional tampering that enabled, for example, Presidents Museveni of Uganda and 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 required 15 ratifications).[8]

## COUNTRIES FACING SANCTIONS

Eight member states of the AU have been suspended and/or face 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 and Côte d'Ivoire. Sanctions were also implemented against a secessionist group in the Comoros.[9] All but one of these

cases were in response to coups d'état, with the exception of Côte d'Ivoire's suspension following Laurent Gbagbo's refusal to relinquish power after losing an election in 2010.[10] In the case of Côte d'Ivoire, whether the AU sticks to its principles, or follows South Africa, Angola and Uganda's preferred solution of a negotiated power-sharing arrangement, will have important ramifications for the organisation, as well as for its future dealings with the crisis in Zimbabwe.

## WHAT TO DO ABOUT 'GOOD COUPS'?

Francis Ikome makes a convincing argument that there are 'good coups' and 'bad coups',[11] pointing out that coups occur for two reasons: (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.[12] '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 because 'what options are left for an oppressed people, when the oppressors constrain all avenues of peaceful change?'[13]

In practice, the PSC is evolving a set of responses, which depend on the context and range from a relatively mild statement of condemnation, to suspension of the country's membership of the AU, to economic sanctions. To ignore a coup would allow a cycle of political instability to set in. Therefore, a way out of the 'good' and 'bad' coup dilemma would be to point out that the AU's definition of an unconstitutional change of government applies to coups d'état against democratically elected governments only.[14] 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 2011 MAGHREB REVOLUTIONS

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 the removal from power by elections. A fine line lies 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 and not by an accurate vote.

The uprising against Gaddafi was 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'. The most difficult case was Egypt, in which the uprising's legitimacy depended 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, as 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, expressing '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.'[15]

Similarly, on 23 February, in the statement issued on the situation in Libya, the PSC '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...'.[16]

The language of these two communiqués is 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. All the more remarkable is that at the time the PSC included some of the most authoritarian states on the continent: Equatorial Guinea, Zimbabwe, Chad and Libya itself. This demonstrates that the principle of democracy promotion has reached a level of institutionalisation within the AU. A few months ago, it seemed unthinkable that the AU's Libyan sponsor, Muammar Gadaffi, could be held accountable for 42 years of unconstitutional rule. Yet the AU has now been presented with this ultimate test case of its commitment to democracy and human rights.

## CONCLUSION

While the AU's response to each case 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 that the AU has not taken up are as significant as those that have elicited a response. For example, why does Laurent Gbagbo face stronger sanction from the AU than Robert Mugabe, when both leaders refuse to admit to clear electoral defeat? Does ECOWAS prompt the AU to act more readily than the Southern African Development Community or the Intergovernmental Authority on Development, or are the regional hegemons like Nigeria and South Africa driving the PSC decisions? These questions need to be addressed as the organisation develops its jurisprudence in defence of democracy.

## ENDNOTES

1 Dr Kathryn Sturman is head of the Governance of Africa's Resources Programme at SAIIA. This briefing was prepared for a presentation to the Pan-African Parliament, South Africa.

2 African Union Peace and Security Council (AU PSC), *Communiqué*, PSCPR/COMM.(CCLX), 260th Meeting, Ethiopia, 16 February 2011; African Union PSC, *Communiqué*, PSCPR/COMM.(CCLXI), 261st Meeting, Ethiopia, 23 February 2011.

3 Huntington Samuel P, *The Third Wave: Democratisation in the Late Twentieth Century*. Oklahoma: University of Oklahoma Press, 1992.

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

5 For a summary of empirical evidence of Africa's democratisation, see Engel U, *Unconstitutional Changes of Government – New AU Policies in Defence of Democracy*, Working Paper Series, 9. Leipzig: Universitat Leipzig, 2010, pp. 4–5.

6 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, 2000.

7 African Charter on Democracy, Elections and Governance, 2007, Article 23(5).

8 Burkina Faso, Ethiopia, Ghana, Lesotho, Mauritania, Rwanda, South Africa and Sierra Leone.

9 For a detailed discussion of cases up to 2008, see Sturman K, 'The use of sanctions by the AU: peaceful means to peaceful ends?' in *SAIIA Yearbook 2009*. Johannesburg: SAIIA, 2009. For a review of cases from 2008 to 2010, see Engel U, *op. cit*. Also see Williams P, 'From non-intervention to non-indifference: the origins and development of the African Union's security culture', *African Affairs*, 106, 423, pp. 253–80.

10 AU PSC, *Communiqué*, PSCPR/COMM.(CCLII), 252nd Meeting, Ethiopia, 9 December 2010.

11 Ikome F, *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.

12 *Ibid.*, p. 23.

13 *Ibid.*, p. 42.

14 Democracy Charter, 2007, Article 23(1).

15 AU PSC, *op. cit.,* 16 February 2011.

16 AU PSC, *op. cit.,* 23 February 2011.

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