

## **The Arab Spring and the AU Response**

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The revolutions in Tunisia, Egypt and Libya have created a perception that the AU as an institution is irrelevant or marginalized in dealing with crises of governance, with Libya a good case in point. In order to conclude whether such views and perceptions are justified it is important to understand how the AU was expected to respond based on its own statements of principle and its current constraints as a regional mechanism.

### **The “Arab Spring”**

An apt starting point is a quick sketch of what has transpired in North Africa. There will certainly be many variations of the “Arab Spring” narrative that will emphasize different aspects. Former Ghanaian president Jerry Rawlings<sup>1</sup> creatively used the metaphor of a gas stove. He said the gas tap had been left open for too long in North Africa and just needed someone to light a match to set the whole thing alight. The young Tunisian man whose pain of existence became too much to bear and self-immolated did just that. The combustion that spread across the region became unstoppable taking in its wake despots who had hitherto appeared invincible. In Rawlings’ metaphor the gas tap spewed unmitigated plunder of national resources by a ruling elite, chronic corruption, unemployment – especially of the youth, and repression. All this happened under the AU’s watch -- while sitting and dining with those that were recklessly opening the gas tap, as he said -- and if someone had thrown a match from outside, the AU would have gone for that person instead of closing the gas tap.

### **Of the AU, Popular Uprisings, Rebellions and Unconstitutional Change of Government**

On its part the AU vehemently maintains that it acted in a manner consistent with its policy positions and principles<sup>2</sup>. Its positions are reached through consensus and are informed by standards and values that AU member states have committed to. Such values, established by its Constitutive Act, include respect for territorial integrity, and maintenance of peace, security and stability. But building and reaching consensus can be a long process and may not be the best approach in a fast evolving situation like the Libyan crisis. Consensus may not be easy to reach especially where “shared values” of democracy and good governance are subject to different interpretations by AU member states.

The AU further urges the need to distinguish the situations in the three countries. In Tunisia, constitutionalism was respected, in that the Constitutional Council declared the seat of the head of state vacant and the speaker of parliament took over as provided for by the constitution. In Egypt on the other hand, there were attempts to transfer executive power to the vice president who had been appointed by Mubarak in an attempt to appease the uprising; but this was rejected by Tahrir Square. The constitution was

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<sup>1</sup> Intervention during the High Level Retreat on the Promotion of Peace, Security and Stability in Africa, Cairo, Egypt, 4-5 September 2011

<sup>2</sup> Ambassador Ramtane Lamamra, AU Commissioner, Peace and Security, AUC, at the same meeting.

activated in order to transfer power to the speaker of parliament. This again was rejected because election of parliament had been too contaminated for the Speaker to be trusted. Because the military had befriended the revolution and wanted Mubarak to step down, protestors in Tahrir Square accepted transfer of power to the Supreme Council of the Armed Forces. It is not clear who, if anyone, on the part of the protestors was involved in negotiations for power transfer to the military. Also unclear is the constitutional framework within which the transfer was made. There were some in the AU who felt that this amounted to a coup and therefore an unconstitutional change of government. Others maintained that this was popular sovereignty.<sup>3</sup> In the final analysis it appears that there was consensus that, as long as power was not returned to the old regime, what had transpired was a revolution and not unconstitutional change of government. In Libya, what started as a popular uprising quickly turned into an armed rebellion and deteriorated into a civil war. It can also be argued that what contributed to that turn of events was Gadhafi's use of disproportionate force to crush the uprising – and, by contrast with Tunisia and Egypt, the loyalty of (most of) the army to his commands, at least till the end was in sight. The Libyan crisis thus simultaneously created the greatest challenge to the AU's normative framework, and the most urgent demands for its intervention.

### **A Chronology of Interventions**

The AU's efforts to bring about a political solution that would democratically transform Libya illustrate the challenges posed by this combination. Open protests, demonstrations and confrontations started in earnest around 15 February 2011. On 23 February 2011 the AU Peace and Security Council adopted a decision in which they expressed “deep concern with the situation in the Great Socialist People's Libyan Arab Jamahiriya and strongly condemns the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law, which continues to contribute to the loss of human life and the destruction of property”.<sup>4</sup> The AU PSC also resolved to send a fact finding mission to Libya.

On 26 February 2011 the UN Security Council unanimously adopted Resolution 1970 that demanded an end to the violence, referred the situation to the International Criminal Court (ICC) and imposed sanctions, travel bans and assets freeze on Gadhafi and certain government officials. On 10 March the AU convened the PSC, adopted a “roadmap” and established a committee of five heads of state representing the five African regional groupings. On 11 March the European Union came up with a different resolution, declaring that Gadhafi had lost legitimacy: “Colonel Kadhafi must relinquish power immediately. His regime has lost all legitimacy and is no longer an interlocutor for the EU. The European Union has adopted restrictive measures against the country's leadership and against entities holding sizeable assets controlled by the regime, and stands ready to adopt further sanctions”.<sup>5</sup> On 12 March all but two members (Algeria and Syria) of the twenty-two-country Arab League called on the UNSC to impose a no flight zone over Libya. On 17 March the UNSC adopted Resolution 1973 that among other things imposed a no flight zone and authorized the taking of “all necessary measures to protect civilians under threat of attack ... excluding a foreign occupation force of any form”. Resolution 1973 was passed by a vote of ten in favour and five abstentions. All three African non-permanent members of the UNSC voted in favour.

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<sup>3</sup> Lamamra (ibid).

<sup>4</sup> Communique of the 261<sup>st</sup> meeting of the Peace and Security Council, PSC/PR/Comm (CCLXI).

<sup>5</sup> Extraordinary European Council Meeting Declaration, EUCO 7/1/11 REV 1 adopted 11 March 2011.

On 19 March the AU adhoc committee on Libya met in Nouakchott, Mauritania and decided to send a mission to meet the Libyan government and the NTC. The ad hoc committee's mandate also included "to engage AU's partners, in particular the League of Arab States (LAS), the Organisation of the Islamic Conference (OIC), the European Union (EU) and the United Nations, to facilitate coordination of efforts and seek their support for the early resolution of the crisis".<sup>6</sup> The AU mission was unable to visit Libya because on the same day a US led coalition launched more than 100 Tomahawk missiles on key air defence sites across Libya in an operation dubbed "Odyssey Dawn". The Committee requested but was denied permission by the UNSC to fly to Libya and had to wait until April 11 when it was able to visit Benghazi. During a special AU Summit on Libya held in Addis in May, AU Commission chair Jean Ping bemoaned the sidelining of the AU in resolving the Libyan crisis. He said "Africa is not going to be reduced to the status of an observer of its own calamities". This was a strange assertion given that the AU had failed to assert its own role in resolving the crisis, and the vote of the AU members of the UNSC in favour of Resolution 1973.

The AU was, however, also part of the Cairo Group that worked mostly behind the scenes to find a peaceful solution. The group also comprised the UN, the EU, the Arab League, and the Organization of Islamic States. An attempt to reach a settlement was made through a visit to Tripoli by South African president Jacob Zuma on behalf of the AU on 30 May. Zuma was unable to persuade Gadhafi to step down, a key condition of the rebels and NATO.

Meanwhile on 3 March 2011, the African Commission on Human and Peoples Rights (ACHPR) independently instituted proceedings against Libya before the African Court on Human and Peoples Rights (the African Court) alleging serious and widespread violations of the African Charter including repression of peaceful demonstrations and use of heavy weapons against citizens. On 25 March the Court ordered Libya to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons" and to report on the steps it had taken to implement the Order "within a period of fifteen [15] day from the date of receipt of the Order". There is no evidence that Libya paid any attention to this order.

Despite the steady military gains and the fall of Tripoli, the AU steadfastly refused to recognize the National Transitional Council as the legitimate representative of the Libyan people, although individual countries, including Nigeria and Botswana, have broken ranks with the continental body's position. The AU's refusal to recognize the NTC seems to be based on Article 30 of its Constitutive Act<sup>7</sup> that obliges the AU to withhold recognition of governments that come to power through unconstitutional means. The AU insists that its call for an all-inclusive transitional authority is not a call for Gadhafi's return but rather a principled position that takes account of the fragile political dynamics in Libya.<sup>8</sup> It can also be counter-argued that by

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<sup>6</sup> Communique of the meeting of the AU high level adhoc committee on Libya, 19<sup>th</sup> March 2011

<sup>7</sup> The Zimbabwe Herald Online, African Union's Decision on Libyan NTC Noble, September 12, 2011, The Herald, <http://www.herald.co.zw>

<sup>8</sup> The distinction between the regime and the state is very blurred. The concept of Jamahiriya ("state of the masses") is very much a personal creation and largely dependent on his role. The regime has relied on tribal solidarities to secure its power base. Strategic positions within the power structure – notably command of the security forces' most trusted units – have been held by members of Qaddafi's own family, clan and tribe and of other closely allied tribes (International Crisis Group *Popular Protest in North Africa and Middle East: Making Sense of Libya* Middle East/North Africa Report 107, 6 June 2011).

responding with aerial bombing and shelling of civilians Gadhafi had himself lost the legitimacy to represent the Libyan people.

### **The AU's Response: A Critique**

It is evident from the sequence of events that the AU was not missing in action – but whether its actions were the best it could do in the circumstances is a different matter. A major criticism levelled against the AU is that it should have condemned the violence unleashed by the Libyan government on its own citizens right from the outset.<sup>9</sup> In all fairness the AU Peace and Security Council decision of 23 February did that. The more critical question however is whether condemnation alone of Gadhafi's actions was adequate response to the threat that Libyan citizens faced from their own government. The answer is certainly not. The situation warranted invocation of principle (h) under article 4 of the AU Constitutive Act which provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”. Singular pursuit of a political solution to what had rapidly turned into a military situation did not demonstrate a commensurate response to the threat faced by Libyan citizens. There appears to have been a lack of coherence and effective coordination between the different institutions of the AU. The ACHPR and the Court seem to have considered the situation in Libya to be “grave circumstances” requiring a strong intervention by the AU, yet the AUC and the AUPSC were not of the same view. It is also not clear who takes a lead role in a situation such as Libya between the PSC and the chairperson of the Assembly. The different efforts that were being undertaken raise questions regarding the relationship of regional bodies like the AU with the UN: which organization takes precedence and when? In this instance it seems that the UNSC acted because it considered the AU's efforts insufficient – though useful -- and the AU lacking the capacity to rein in Gadhafi. But, as so often in these cases, the principal UNSC members simply failed to look as though they were treating the AU seriously, ignoring the importance of political support from the AU member states for an ultimately successful outcome to the intervention.

One reason why the AU was unable to respond more decisively to the North African uprisings in general, and Libya in particular is that North African member states contribute 53% of the AU's annual budget. Gadhafi was a major actor within the AU. Libya was one of the five AU members<sup>10</sup> that contributed 75% of the AU budget, let alone paying fees for poorer AU members and financially bailing out African leaders now and again. Whereas the Libyan rebels and the international community were of the view that Gadhafi should not be part of the solution to the crisis and were calling for his stepping aside, the AU's official position was to insist on inclusive transitional arrangements. It became clear that Gadhafi was intent on using his military might to contain the uprising; a fact that must have been equally clear to AU leadership. The AU's call for a ceasefire did not lead to any cessation in the use of brutal force by the Gadhafi regime; and then there seemed to be no further tool in the AU's box to ensure that a ceasefire did in fact take place. In such circumstances the AU's continued commitment to a political solution did not inspire a lot of confidence that the AU had the wherewithal to deal with the Libyan crises.

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<sup>9</sup> Pierre Buyoya, Former President of Burundi, Intervention during the High Level Retreat on the Promotion of Peace, Security and Stability in Africa, Cairo, Egypt, 4-5 September 2011.

<sup>10</sup> The others are Algeria, Egypt, Nigeria, and South Africa

While the West cannot be exonerated for having collaborated with Gadhafi when it suited their interests, and for the hypocrisy of the US, France, the UK and Italy in particular, in their sudden epiphany about the evils of his regime, these criticisms cannot be used by the AU to circumvent its responsibility to protect the Libyan people who faced grave danger from their own leader and government. If the African Standby Force that has been in the works for a long time was operational, this would have been an appropriate instance for deployment. The AU contends that by voting for UNSC Resolution 1973 it sided with the Libyan people although it did not support the NATO interpretation or manipulation of Resolution 1973 to justify the much more widespread bombing of Libyan military facilities. There are some who say that it was a grave mistake for AU member states on the UNSC to have voted for use of force against a member state. We may never know for sure the extent to which Gadhafi would have gone against his citizens to retain power. His conduct in the aftermath of the uprising, and his previous history, does make it plausible that a lot more civilians could have died with no intervention than ended up dying as a result of NATO bombing.

It is very doubtful that any political intervention by the AU would have persuaded Gadhafi to concede to the demands of Libyan citizens to be governed democratically. And even an unequivocal political intervention was never likely: the AU's major constraint in dealing with the Libyan crisis and other governance crises is its long-standing tolerance of repression and oppression within its ranks. AU member states need to accept and take seriously the AU's responsibility to act in circumstances where citizens face grave threats to their lives and give the AU the means to play that role. The "African solutions for African problems" mantra becomes problematic when the leadership of the AU is a large part of the problem. It appears that the AU failed to assert its role by engaging the UN, NATO and the other non-permanent members on the UNSC vigorously and early on. Thus, while the military action undertaken by NATO under the pretext of Resolution 1973 is questionable in terms of motive, and it is hard to believe was based purely on humanitarian grounds as claimed, it does not absolve the AU from the responsibility to take decisive action to protect Libyan citizens who faced grave and real threat to their lives. To the extent that the AU failed to take its own standards seriously at an early stage, the NATO intervention became justified: by its failure to take sufficient measures to stop Gadhafi from killing his own people, the AU invited NATO into the fray.

### **Enter International Justice**

The AU is also of the view that the ICC tends to complicate matters. There is a legitimate expectation on the part of the AU that, in the interests of peace, justice and stability, the UNSC should allow provisions of Article 16 of the Rome Statute<sup>11</sup> to take effect in some cases – such as the indictment of President Bashir in Sudan. The issuing of an arrest warrant by the ICC prosecutor could be a divisive factor in Africa and prevent the negotiation of peace. The AU is of the view that application of Article 16 does not amount to impunity but that an eye for an eye approach will make the whole world blind. The more critical issue in the case of Libya, however, is not about peace versus justice, but rather the credibility and professionalism of ICC's Office of the Prosecutor (OTP). In Kenya, where the ICC-OTP had access on the ground, it took a nearly a year to make a call on indictees. In Libya, where he had no access at all it took less than a month to

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<sup>11</sup> Article 16 allows for deferral of investigation or prosecution "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

indict. Even if the indictment were justified, this speed makes it look as though the OTP was simply a legal tool to extend NATO's military reach.

## Conclusion

The AU's efforts to respond to the Libyan crisis have proved to be inadequate. The threat posed to Libyans by Gadhafi and his regime required a much more robust response from the AU that would rein in one of their own. The decision by the AU to concentrate on seeking a political solution was to take the path of least resistance that gave rise to the perception that either the AU was reluctant or did not have the capacity to stop Gadhafi. Despite his despicable governance and democracy credentials Gadhafi had for long been accepted as a key player in the AU. This state of affairs appears to have constrained the AU from acting decisively when the crisis erupted in Libya. The reluctance by the AU to seriously engage the NTC in finding a solution has undermined the AU's credibility as an impartial mediator. While it is difficult to predict whether Libya will complete a democratic transition, the AU finds itself with very little wriggle room to influence the situation. By refusing to recognize the NTC the AU may have again boxed itself into a corner that may increasingly become difficult to come out of. The AU should have been less ambivalent about engaging the NTC because both the preamble to the Universal Declaration on Human Rights and the African Charter on Human and Peoples' Rights provide a basis for such engagement with movements against repressive governments.<sup>12</sup>

## Moving Forward

What should the AU do now that the fall of the Gadhafi regime is (almost) a *fait accompli*? It is still early days to conclude that defeat of Gadhafi by the rebels will bring about a democratic dispensation. The AU is still fearful that in the long run another Somalia may have been created. Concerns have also been raised about leadership of the rebel movement that includes within its ranks Guantanamo Bay and Afghanistan Mujahedeen alumni.<sup>13</sup>

Despite its obviously limited capacity in responding to situations such as the uprisings in North Africa, the AU still needs to be engaged in the hope that its role can become more effective. There is a real possibility similar resistance to tyranny and oppression will be witnessed in other parts of Africa. The following are potential advocacy entry points on which the AU can be engaged:

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<sup>12</sup> Third paragraph in the preamble to the UDHR recognizes the people's right to resort to rebellion against tyranny by providing that human rights should be protected by rule of law "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression". The ACHPR Article 20(2) and (3) confers colonized or oppressed people with right to "liberate themselves by resorting to any means recognised by the international community". The Charter enjoins State parties to assist the oppressed in their liberation struggle.

<sup>13</sup> Abdel Hakim al-Hasady, an influential Islamic preacher and high-school teacher spent five years at a training camp in eastern Afghanistan. Sufyan Ben Qumu, a Libyan army veteran who worked for Osama bin Laden's holding company in Sudan and later for an al Qaeda-linked charity in Afghanistan. Both Messrs. Hasady and Ben Qumu were picked up by Pakistani authorities after the U.S.-led invasion of Afghanistan in 2001 and were turned over to the U.S. Mr. Hasady was released to Libyan custody two months later. Mr. Ben Qumu spent six years at Guantanamo Bay before he was turned over to Libyan custody in 2007. They were both released from Libyan prisons in 2008 as part of reconciliation with Islamists in Libya. They have been involved in the recruitment training and deployment of rebel fighters (The Wall Street Journal, Sunday, April 2, 2011)

1. The AU, possibly through the PSC, is urged to have an honest dialogue about its member states' compliance with AU principles and standards. This will avoid the current situation we find ourselves in where the AU was aware of what was happening in North Africa and elsewhere (Swaziland and Malawi for example) but chose to turn a blind eye.
2. The AU needs to put in place an effective system for the operationalization of its intervention under Article 4 (h) of the Constitutive Act.
3. The AU also needs to sort out the coordination problems between its organs dealing with gross and massive violations of human rights in Africa
4. The AU needs to put an effective system in place through which it engages with the UN and other regional groupings to be able to assert its role and influence decision making within the international community.
5. The international community as well as the AU need to prioritize developing rapid response capacity of the AU. The Africa standby force is one such initiative that could be supported.
6. The AU should engage with the ICC-OTP on the need to conduct itself in a professional and credible manner that demonstrates that it has applied its mind sufficiently to the issues at hand to avoid the perception that the ICC is biased in its conduct.
7. The AU PSC should take serious note of upcoming elections that are likely to be contentious and anticipate possible outcomes that may require its interventions through periodic assessment of the level of preparedness to hold elections.
8. The AU should stop prevaricating about recognition of the Libyan NTC and engage it in a robust manner that seeks a stable solution to the Libyan crisis and the region.
9. The African Court on Human and Peoples' Rights is urged to complete investigations and finalize the case against Libya brought before it by the African Commission on Human and Peoples' Rights on 3 March 2011.
10. The AU needs to act long before a situation turns into a crisis. There is an urgent need for AU institutions such as the ACHPR, the Pan African Parliament, the African Peer Review Mechanism, the AU Panel of the Wise, to play a more effective role in monitoring member states compliance with standards. The AU needs to come up with an enforcement mechanism for standards provided for in ACDEG.

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