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# **A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union**

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Prepared at the Department of Public Law, Faculty of Law, University of  
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## DECLARATION

I, Babatunde Olaitan Fagbayibo hereby declare that this thesis is my original work and it has not been previously submitted for the award of a degree at any other university.

Signed: .....

Date: .....

Place: .....



*Dedicated to all Africans, who not only desire but  
deserve to live in an open and democratic society.*

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## Abstract

The emergence of the African Union (AU) is seen as an effort to reposition Africa for the challenges of contemporary global *realpolitik* and, in particular, it provides a road map towards the attainment of a political union. The institutional architecture of the AU, modelled after the European Union (EU), indicates an intention on the part of the architects of the AU to endow the organisation with supranational attributes. However, none of its institutions has as yet started to exercise supranational powers.

It is against this background that this thesis explores the feasibility of transforming the AU from a mere intergovernmental organisation into a supranational entity. In the course of the investigation, it was found that a major obstacle to realising this is the absence of shared democratic norms and standards, a consequence of the unconditional membership ideology of the AU. This thesis argues that the starting point of closer integration in Africa should be the cultivation and adoption of shared norms and values. To address this, the study proposes that the AU design an institutional mechanism for regulating its membership. Using the African Peer Review Mechanism (APRM) as a case study, this study shows that it is possible to establish a regulatory regime based on strict adherence to shared fundamental norms and values.

A major recommendation is the transformation of the APRM into a legally binding instrument for setting continental democratic standards, assessing whether member states fulfil these standards and ultimately determining which member states are qualified, based on objective standards, to be part of a democratic AU.

**Keywords:** Africa - African Union - Regional integration - Supranationalism - Nucleus AU - Regional Economic Communities - International organisations - Institution building - African Peer Review Mechanism - Democratic principles

## Summary of thesis

Integration, in Africa as elsewhere, is intended to promote unity and enhance development. Over the past four decades, various continental and sub-regional initiatives have been implemented to buttress these twin ideals. At the continental level, the founding of the Organisation of African Unity (OAU) in 1963, and its eventual transmutation into the African Union (AU) helped formalise the pan-Africanism vision of continental integration. Such formalism has however only been limited to the setting up of intergovernmental institutions, with little or no powers to set and regulate common standards. Even the initial euphoria about the supranational intentions of the architects of the AU, evident from the supposed nature and functions of some of its institutions, has diminished mainly as a result of the inability to match rhetoric with actions. Simply put, there has been little or no difference between the *modus operandi* of the OAU and the AU.

It is against this background that this study attempts to investigate the primary obstacle to supranationalism in Africa, especially at the continental level. Situating African integration within the supranationalism discourse, this study considers some of the peculiar challenges confronting the move towards concretising African unity. It was found that at the root of these obstacles is the inability to create standard and uniform application of democratic values across the continent. Although these standards are espoused in the various AU and sub-regional instruments, practise shows an entrenched culture of their breach. Thus, the question is not so much the enactment of treaties stipulating these values as it is the establishment of an effective regulatory regime that ensures adherence to these shared norms.

Using the African Peer Review Mechanism (APRM) as a case study, and also touching on the EU Copenhagen requirements for membership, this study attempts to demonstrate the feasibility of regulating the membership of the AU.

Without diminishing the importance of pan-Africanism, as an important foundation of integration, this study argues that strict adherence to democratic norms and principles should also form the primary basis of cooperation. As such, this study designs a politico-legal framework for ensuring that membership of a future supranational AU will be anchored to uniformity in the understanding and application of fundamental norms and values.

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*Organisation pour l'Harmonisation en Afrique des Droit des Affaires* (OHADA)  
Treaty, 1993

Protocol on the Establishment of the East African Customs Union, 2004

Protocol on the Statute of African Court of Justice and Human Rights, 2009

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### List of abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
ACJ	African Court of Justice
ACJ&HR	African Court of Justice and Human Rights
AEC	African Economic Community
AEC	African Electoral Commission
ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
AIDA	Africa Infrastructure Development Agency
AIS	African Information Service
ANRA	Africa Natural Resources Agency
APRM	African peer Review Mechanism
APSA	African Union Peace and Security Architecture
ASEAN	Association of South East Asian Nations
AU	African Union

AUCIL	African Union Commission on International Law
AU PRC	African Union Permanent Representative Committee
AU PSC	African Union Peace and Security Council
AU SC	African Union Service Commission
BCEAO	Central Bank of the States of West Africa
BEAC	Bank of Central African States
CADSP	Common African Defense and Security Policy
CAP	Common Agricultural Policy
CCJA	Common Court of Justice and Arbitration
CEEC	Central and Eastern European Countries
CEMAC	Central African Economic and Monetary Community
CSOs	Civil Society Organisations
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
EAAC	East African Highway Cooperation

EAC	East African Community
EAHC	East African Harbours Cooperation
EAHC	East African High Commission
EADB	East African Development Bank
EACSO	East African Common Services Organisation
EAP&TC	East African Posts and Telecommunications Cooperation
EARC	East African Railway Cooperation
EC	European Commission
ECA	Economic Commission for Africa
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECOSOCC	Economic, Social and Cultural Council
ECSC	European Coal and Steel Community
EITI	Extractive Industries Transparency Initiative
ERSUMA	<i>Ecole Regionale Superieure de la Magistrature</i>
ETI	Ecobank Transnational Incorporated

EU	European Union
FDI	Foreign Direct Investment
G8	Group of eight
GNU	Government of National Unity
ICJ	International Court of Justice
ICT	Information and Communication Technology
IMF	International Monetary Fund
MDGs	Millennium Development Goals
MIP	Minimum Integration Programme
MRU	Mano River Union
NEPAD	New Partnership for Africa's Development
NGC	National Governing Council
OAU	Organisation of African Unity
ODA	Overseas Development Assistance
OHADA	<i>Organisation pour l'Harmonisation en Afrique des</i>

*Droit des Affaires*

OSCI	Objectives, Standards, Criteria and Indicators
	Documents
PAP	Pan-African Parliament
PCRD	Post-Conflict Reconstruction and Development
RECs	Regional Economic Communities
RMA	Rand Monetary Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
UAM	<i>Union Africaine et Maghreb</i>
UEMOA	<i>Union Economique et Monetaire Ouest Africaine</i>
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
TCAF	Traditional and Cultural Affairs Forum
WAEMU	West African Economic and Monetary Union
WAMZ	West African Monetary Zone



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## Chapter 1

### Introduction

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### 1.1 Background

The 1960s was an epochal phase in the political history of Africa. Emerging from the throes of colonialism and oppression, independence elites set out to show the world that Africa was capable of giant strides. Such optimism was fuelled by the economic boom of the 1940s to the 1960s - the consequence of a steep increase in the prices of commodities such as cocoa, coffee and mineral resources.<sup>1</sup> Compared to Asian economies, African countries in the 1960s showed better prospects and potential.<sup>2</sup> In addition to this, many of the African leaders who took over the reign of government from the colonialists had received western education and as such were considered intellectually capable of steering the administration of their countries.<sup>3</sup> True to expectations, ideologues such as Kwame Nkrumah and Julius Nyerere came up with blueprints aimed at re-enacting a romantic pre-colonial African society, devoid of socio-economic inequalities.

However, underlining this optimism were a number of stark realities. The Berlin Conference of 1884/85 made Africa the most fragmented continent in the world.

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<sup>1</sup> Meredith M, *The state of Africa: A history of fifty years of independence*. Johannesburg: Jonathan Ball Publishers (2005) 142.

<sup>2</sup> See e.g. Roemer M, 'Could Asian policies propel Africa's growth?' Available at <http://www.cid.harvard.edu/hiid/543.pdf> (Accessed 10 November 2009).

<sup>3</sup> See e.g. Dowden R, *Africa: Altered states, ordinary miracles*. London: Portobello Books (2008) 66-68.

A number of post-colonial African countries were landlocked, had small populations and were not economically viable.<sup>4</sup> The nature of colonial administration in Africa contributed a great deal to the disarticulated economies and underdevelopment of most post-colonial African states. As Ake remarks, unlike colonial experiences in the Americas, Europe and Asia, colonialism in Africa was 'statist'.<sup>5</sup> Ake employs the term 'statist' to describe the arbitrary colonial governance framework, which ensured the redistribution of land, forced labour, restriction of economic activities by Africans and the suppression of dissensions.<sup>6</sup> Infrastructure was developed not as a means of improving the lives of the people but simply as of a way of facilitating the collection and distribution of commodities.<sup>7</sup> Thus, the task of newly independent African states was the restructuring the colonial economic structures into a viable machinery of growth and development.

It was against this backdrop that the idea of regional integration was elevated to a topical discourse. Together with domestic policies, regional integration was seen as a tool for enhancing unity and meaningful socio-economic advancement. According to post-independence elites like Nkrumah, regional integration was the panacea for underdevelopment and prevention of hegemonic threats.<sup>8</sup> As such, the establishment of regional organisations was regarded as utmost priority. Apart from pan-Africanism,<sup>9</sup> another factor which significantly influenced regional integration was the post-1945 worldwide proliferation of regional integration initiatives. The integration efforts in Europe

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<sup>4</sup> African states, according to Agyeman, are 'plagued by the deficiency trilogy of smallness, unnaturalness and illegitimacy'. Agyeman O, *Pan Africanist - federalism*, Center for Economic Research on Africa, Montclair University, New Jersey (1990) 6. Available at <http://www.alpha.montclair.edu/~lebelp/CERAFRM035Agyeman1991.pdf> (Accessed 20 March 2008).

<sup>5</sup> See Ake C, *Democracy and development in Africa*. Washington DC: The Brookings Institution (1996) 1-2.

<sup>6</sup> Ibid, 2-3; see also Ake C, *A political economy of Africa*. New York: Longman (1981).

<sup>7</sup> Ake (1996) 2; Ake (1981) 44-45.

<sup>8</sup> See generally, Nkrumah K, *Africa must unite*. New York: Praeger (1963).

<sup>9</sup> As will be discussed in subsequent chapters, pan-Africanism is an ideal that encapsulates both the racial and geographical oneness of Africans.

and the successful federal arrangement in the United States of America provided a reference framework for proponents of a *United States of Africa*.<sup>10</sup>

In addition to the existing sub-regional integration initiatives, the Organisation of African Unity (OAU) was created in 1963. The formation of the OAU was thus a culmination of a pan-Africanism agenda of encouraging close collaboration among African states, albeit it fell short of the political union envisaged by Nkrumah. Owing to its minimal design as a framework for interaction, the OAU could not provide the necessary fillip for a continental economic development. As such, the 1960s and the 1970s witnessed the establishment of sub-regional integration schemes as viable alternatives for enhancing regional development.<sup>11</sup> The idea was that these Regional Economic Communities (RECs) would act as the building block for the eventual establishment of a continental economic union.<sup>12</sup> These RECs were primarily concerned with issues of economic integration.<sup>13</sup>

Matters relating to good governance and democratic norms were considered by African leaders as ‘high politics’ – which are better handled within the domestic sphere. The enshrined principle of non-interference in the affairs of member states ensured that the OAU simply played a spectator role amidst widespread violations of human rights and the rule of law by a majority of its member states. Ouguergouz notes that the increasing importance of human rights on the international stage, especially the stiff international opposition to serious abuses by some African dictators added impetus to the need for a continental

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<sup>10</sup> See e.g. Nkrumah (1963); see also e.g. Asante S, *Regionalism and Africa's development*. London: Macmillan (1997) 2-3.

<sup>11</sup> See e.g. Asante S, *African development: Adebayo Adedeji's alternative strategies*. London: Hans Zell Publishers (1991) 94.

<sup>12</sup> Ibid, 96.

<sup>13</sup> Other political concerns of the OAU were the fight against apartheid, resolution of conflicts and the protection of refugees.



framework for the protection of human rights.<sup>14</sup> The African Charter on Human and Peoples' Rights (ACHPR) was eventually adopted in 1981.

The disappointing record of human rights violations since the adoption of the ACHPR indicates the little regard attached to the consideration of democratic norms as an indispensable component of regional integration in Africa. The inability to entrench good governance and democratic norms is better understood within the peculiar trajectory of political development in post-colonial Africa. Post-colonial Africa is in a number of ways, an embodiment of contradictions and ironies. Having made a substantial sacrifice in eliminating colonialism and actualising basic human rights, the euphoria of independence quickly dissolved into a rather traumatic experience. Post-independence leaders adopted arbitrary laws reminiscent of the colonial era, which they had previously criticised, in suppressing all forms of dissent and consolidating their new earned powers.<sup>15</sup> Instead of improving the lives of the citizenry, coercive policies were put in place to ensure utmost conformity and obedience. Like a contagion, military coups, corruption and one-party system became the norm. The promise of show-casing how traditional African values can influence governance and economic development gradually derailed amidst the rampant assault on fundamental norms and values.<sup>16</sup>

Unlike the situation in parts of Asia, where the centralisation of power was also used in enhancing economic development, African leaders' obsession with power resulted in the absence of concerted and meaningful development policies.<sup>17</sup> Although development was a dominant theme in the speeches of African leaders, Ake views this more as a strategy of consolidating power than a

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<sup>14</sup> Ouguerouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development in Africa*. The Hague: Martinus Nijhoff (2003) 36-40.

<sup>15</sup> Ake (1996) 3.

<sup>16</sup> As noted above, ideology-driven post-colonial elites such as Nyerere and Kenyatta designed policies aimed at providing governance with a distinct, Afro-centric feel. These include *Ujamaa* in Tanzania and *Harambee* in Kenya.

<sup>17</sup> Ake (1996) 7. Also the transfer of powers to regional institutions was inconceivable as this would result in the diminution of their territorial influence.

framework for economic transformation.<sup>18</sup> Underdevelopment and good governance deficit further exposed African countries to internal conflicts and acts of destabilisation.

It is within the above-described milieu that regional integration continues to operate. The transformation of the OAU into the African Union (AU) should have provided the opportunity for a re-evaluation of the integration process; instead it has contributed to the entrenchment of the malaise. While espousing the EU and the USA as ideal models, African leaders continue to engage in practices which negate the principles that have made such institutions a success story. In spite of the renewed attempt to include human rights and democratic norms as part of regional integration framework, the situation on the ground shows that the continent is still a long way from entrenching democratic standards. Unlike the OAU, the AU and other RECs expressly espouse democratic norms as part of their institutional framework. In addition, the constitutive instruments of these bodies have created seemingly supranational legislative and (quasi) judicial institutions. Given the prevalent erosion of democratic values and norms across the continent, it is no wonder that these institutions have largely remained ineffectual.

The conceptualisation of regional integration and democratic values as being mutually exclusive requires some serious evaluation. The cumulative consequence(s) of such a conception have been largely negative. At the national level, good governance and human rights deficits has resulted in a dire state of affairs, where such states have degenerated into corrupt, repressive and conflict-ridden entities. With weak institutions and vaguely structured development strategies, these states remain key obstacles to the regional integration agenda. If the effectiveness of regional organisations depends on

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<sup>18</sup> African leaders narrowly construed development as a project that would require utmost obedience and conformity. To them, political opposition was an unnecessary distraction and impediment to the attainment of effective and sustainable development. As such, the suppression of dissensions was a necessary component of the march towards developmental state. See Ibid, 9.

the existence of strong national institutions, a position which is absent in Africa, then the state of integration in Africa requires utmost reconsideration. As such, the task should be centred on re-evaluating the position of the present state of regional institutions so that they not only embody ideals of democracy but also become a major driver of entrenching fundamental values across the continent.

While the attachment to state sovereignty is a common problem in all integration initiatives, it is more ingrained in Africa mainly because repressive regimes owe their survival to the accumulation and retention of the state's coercive instruments. Sharing sovereign power with regional institutions would likely raise questions about such regime's claim to legitimacy. To prevent this, the institutional framework of regional organisations is either deliberately designed by political elites to be weak or institutional decisions are routinely disregarded.

The foregoing exposition thus raises some fundamental questions. The first challenges the seriousness of regional integration in Africa.<sup>19</sup> In light of the deficiency of political will among member states to create the necessary operational environment at both the national and regional spheres, for the success of regional integration, it needs to be asked whether there is a conscious effort by the political elites to realise qualitative integration. Conscious effort should, however, not be confused with grand speeches or dictatorial zeal to impose a *United States of Africa*. This is because such calls are made against the backdrop of debilitating factors such as the absence of good governance, weak economic structures and dysfunctional institutional frameworks. In this sense, there needs to be a nexus between democratic ideals and the attempts at instituting integration initiatives.

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<sup>19</sup> See e.g. Udombana J, 'A harmony or a cacophony? The music of integration in the African Union treaty and the New Partnership for Africa's Development'. *Indiana International and Comparative Law Review*. 13 (2002), 202.

This leads to the second question, namely whether a new path should be carved for the realisation of a qualitative and viable integration process. Simply put, is there a need for a paradigm shift in the conceptualisation of African integration, from a narrowly construed idea to one which adopts democratic norms as an indispensable prerequisite? In order to answer these questions, one needs to consider salient issues such as:

- the functioning of sub-regional and continental institutions
- the state of national institutions
- cultivation of shared democratic norms and values
- the design of suitable national and regional development strategies

While regional integration is by no means the sole elixir to Africa's problems, it is a useful development strategy for addressing some of Africa's challenges. Africa's peripheral position, economically and politically, on the global stage requires a strategy that encompasses the pooling of resources and efforts. The strengthening of linkages among African countries is thus essential for both national and regional economic development. As indicated above, such cooperation should be underpinned by adherence to democratic norms.

It is against this background that this study intends to engage in an investigation of the feasibility of charting a nuanced course for continental integration. Considering the challenges and failures of African integration to date, it is pertinent to embark on a comprehensive and detailed study on how to reverse the prevalent political context. In this regard, this thesis will focus on how the AU can be re-positioned to address the numerous continental challenges.

## 1.2 Problem statement and objectives

The core problem which this study intends to investigate is two-fold: a) whether a supranational AU<sup>20</sup> is feasible and b) if this is possible, what should the nature of its institutional framework be?

In addressing these, an attempt will be made to provide answers to the following pertinent questions:

- Can the AU supranationalise under the prevailing circumstances or framework?
- If such possibility is remote, what are the obstacles and possible remedial actions?
- What lessons can be learnt from previous and present supranational attempts in Africa and Europe?
- Is there an existing framework for setting the AU on a supranational path or should a new one be designed?
- If a new framework is designed, would such framework fit under the prevailing structure or would it stand as an independent framework?
- To what extent can democratic values shape the institutional framework of a future supranational AU?

Cumulatively, these questions seek to provide the answer to the ultimate challenge of translating pan-Africanism or the idea of 'Africa' into a transformative agenda. The premise of such exercise is the contextualisation of the discourse on supranationalism, as a means of establishing its relevance to African realities. Specifically, the hypothesis borders on the extent to which supranationalism, through the AU, can help address the peculiar developmental, political and economic, challenges of the African continent. To what extent can traditional African values, which ensure broad-based

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<sup>20</sup> A supranational AU, as will be discussed later, envisages an organisation that is autonomous from its member states through its capacity to issue binding directives to its member states.

community participation in matters which affect the common good, and universal standards provide the democratic framework for deepening regional integration and unity? The success of European supranationalism is instructive as it presents the nexus between commitment to democratic ideals and the proper articulation and implementation of supranational policies. The twin sanctity of democratic institutions in member states and the autonomy of the European Union (EU) are at the core of the (supranational) institutional development of the EU. If any lesson needs to be drawn from the European experience, it is essentially the imperative of infusing and clothing the trajectory of regional integration with democratic ethos.

The task of this study is, therefore, to examine the politico-legal feasibility of carving an integration path strictly based on adherence to democratic norms and values. Against the backdrop of an ingrained philosophy of including all African states in the integration process, coupled with the prevalent paucity of good governance, this study seeks to formulate a nuanced methodology of achieving a democratic supranational AU.

### **1.3 Research methodology**

The methodology adopted by this study is primarily desk and library research. The literature review included both primary and secondary sources. The primary sources consulted comprise treaties, case laws and official documents of the AU and other regional institutions. Secondary sources relied upon are books, journals, newspaper articles, conference papers, working papers and relevant internet sources.

In addition to the desk and library research, field visits were made to the Pan-African Parliament (PAP) Secretariat and the United Nations Headquarters. The visit to PAP Secretariat was aimed at collecting relevant documents and attending a session of the PAP. The PAP session was useful for the understanding and assessment of the functioning and relevance of the

institution. With funding provided by the University of Pretoria, this two months, June 1 – July 31 2009, were spent at the UN Office of Legal Affairs in New York. The visit provided an opportunity to gain valuable insight into the operations of an intergovernmental institution especially the compliance level of member states and the development of international law.

The study applied a descriptive analysis in order to provide a detailed foundation and framework. In this regard, the various theories underpinning the core elements of the thesis are illustrated. In terms of formulating the methodology of attaining supranationalism, including recommendations, the study employs a prescriptive analysis. The comparative method is also used to enrich the discussion on institutional development.

## **1.4 Delimitation and limitations of research study**

### **1.4.1 Delimitation**

Before outlining the limitations of this study, it is important to explain the underlying logic of the broad approaches adopted by this study.

*Continental approach:* The discourse of supranationalism in this thesis is restricted to continental integration. While the findings of this study are also relevant to RECs, the AU has been selected for the following notable reasons. Firstly, as a result of its continental reach, a supranational AU has a better potential of making a meaningful impact on the integration trajectory. Secondly, the fact that certain RECs are making appreciable advances, better than the AU in some cases, towards supranationalism may result in a situation where these institutions find it politically unwise to surrender their powers to the AU. It is thus essential to establish a continental framework that makes the transferral of power easy and beneficial to all parties.

*Democratic approach:* The overriding hypothesis of this study is the consideration of democratic requisites as the primary determinant of a

successful integration process. In this sense, adherence to democratic standards is adopted as a 'political filter' for determining the membership of a supranational AU. The fact that the prevalent ideology of limiting democratic values to a secondary component of the integration process has not resulted in any significant improvement, makes this approach an attractive and pertinent alternative.

#### **1.4.2 Limitations of study**

There are a number of limitations to this study. Although literature is replete with issues affecting African integration, there is a dearth of scholarly materials on how unconditional membership impacts on African integration. Available studies highlight the importance of democracy and good governance without necessarily linking unconditional membership to the absence of shared norms and values.

The study of regional integration is extensive and covers all facets of human endeavours. Even within the adopted politico-legal approach of the study, there is a wide-range of issues which shape the theories and practicalities of the integration process. This study has, however, been restricted to how democratic standards can influence supranational institutional development. The motivation behind this is that the development of a qualitative supranational institution can provide the requisite impetus for addressing the multiple issues under the umbrella of integration.

Another limitation of this study is that as a result of resource constraints, comprehensive research trips to the European Union (EU) and AU Secretariats in Brussels and Addis Ababa respectively could not be undertaken. Interviews with key officials and access to important documents would have provided useful insights into the dynamics of the relationship between member states and international institutions. Consequently, such field visits would have mitigated the effect of the dearth of scholarly writings on this subject.



In terms of the temporal scope of this study, the cut-off time is 31 December 2009. Regional integration, nay African integration is at an interesting phase, with changes occurring rapidly. Important events and documents published post cut-off date, especially impacting on the subject-matter, may render recommendations made either obsolete or confirmed by subsequent events.

### **1.5 Itinerary**

The introductory chapter sets out the background to the study, identifies the problem that the study intends to investigate, the adopted methodology and the limitations of the study.

Chapter two provides a conceptual framework of the study. It presents a theoretical discussion of regional integration and supranationalism. It further examines the theoretical dimensions of African integration, including the factors that will impact on the integration process.

Chapter three provides a critical analysis of supranational attempts in Africa. It starts by examining the institutional structures of selected sub-regional institutions. In order to answer the question on why supranational attempts in Africa have being unsatisfactory, this chapter explores the common politico-legal and economic problems facing African integration.

Chapter four attempts to answer the research question of this thesis by examining the feasibility of a supranational AU. It begins with a theoretical meaning of international organisation and how it fits into the global governance structure. It further provides an analysis of the AU, especially concerning its establishment and the question on whether it can be described as a supranational entity. It finally considers the essential pre-conditions for the attainment of supranationalism.

Chapter five builds on the points identified in chapter four by considering how they can be channelled into the institutional transformation of the AU. It examines the theories of (supranational) institution building and the different perspectives on the quest for AU transformation. Furthermore, this chapter attempts to present a detailed analysis of the institutional design of a future supranational AU.

Finally, chapter six summarises the main findings, discusses further recommendations and the significance of this study.



## Chapter 2

### Conceptual and theoretical framework of regional integration:

#### A politico-legal observation

Coming together is a beginning; keeping together is progress; working together is success –

Henry Ford<sup>21</sup>

#### 2.1 Introduction

#### 2.2 Regional integration: Different theoretical perspectives

##### 2.2.1 Definitional focus

##### 2.2.2 Theories of regional integration: A politico-legal concept

##### 2.2.3 Regional integration and sovereignty: Is the two mutually exclusive?

#### 2.3 Regional integration in Africa: A contextual analysis

##### 2.3.1 The idea of 'Africa': Tracing the philosophical underpinning of unity

##### 2.3.2 Theoretical perspectives on African integration

##### 2.3.3 Searching for an elixir: Is regional integration beneficial to Africa?

##### 2.3.4 Is African integration possible?

#### 2.4 Summary

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<sup>21</sup> Cited in Covey S, *Everyday Greatness*. Nashville: Thomas Nelson (2006) 299.

## 2.1 Introduction

The increasing powers and relevance of the EU in global *realpolitik* has evoked a special interest in regional integration. Not only has the European experiment in integration stimulated a significant global trend;<sup>22</sup> it has also engendered a multi-disciplinary focus on its phenomenal evolution into an organisation that defies the traditional logic of public international law. While the EU remains an international organisation, it functions like nation-states in respect of some policies such as monetary, agriculture and trade. It is this distinctive quality that sets the EU apart from other international organisations and also gives impetus to the study of regional integration, especially supranationalism.

It is against this background that this chapter attempts to engage in a theoretical excursion into this phenomenon and its impact on the global order. This chapter is divided into two parts. In an attempt to put the integration narrative in perspective, the first part will explore the definition of integration, its theoretical manifestations - both political and legal - and lastly, the nagging question on the compatibility of integration and sovereignty. To situate integration within an African context, which forms the focus of the research, the second part begins with the philosophical origins of African integration. It is then followed by an exposition of the various theoretical perspectives on African integration. Next, the inherent advantage(s) of integration in Africa are also discussed. Finally, the possibility of African integration, the question that sets the tone for the subsequent chapters, is considered.

## 2.2 Regional Integration: Different theoretical perspectives

In the past five decades, regional integration has benefited a great deal from multi-disciplinary research and the empirical outputs of international

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<sup>22</sup> Regional integration has been implemented in other parts of the globe – North America through the North America Free Trade Agreement (NAFTA); Latin America through the Southern Common Market (MERCUSOR); Africa through the African Union (AU) and the various Regional Economic Communities (RECs); South East Asia through the Association of South East Asian Nations (ASEAN); Asia Pacific through the Asian Pacific Economic Cooperation (APEC); and the Caribbean through the Caribbean Community and Common Market (CARICOM).

organisations. Like any other field of human endeavour, the study of regional integration lends itself to both abstraction and empiricism, either based on theoretical suppositions or the resultant effect of inter-state cooperation vis-à-vis granting powers to international organisations. In light of this, the various manifestations of regional integration will be considered. It starts with an attempt to define the concept of regional integration, then moves on to discuss the theories of integration and lastly, considers the relationship between national sovereignty and regional integration.

### 2.2.1 Definitional focus

Integration must be understood as part of the dynamics of post-World War II international relations between states. Although the concept of integration is not novel,<sup>23</sup> the post-war *realpolitik* necessitated practical and more organised connectedness between and among states. The realisation that certain functions are transcendental and too multifaceted to be handled by nation states has lent credence to the need for a global governance framework that includes non-state actors.<sup>24</sup> Lindseth explains this phenomenon in the following words:

[T]he extensive delegation of normative power to the executive and technocratic sphere after 1945 [was] reflective of a conscious effort by major political actors to reinforce the nation-state by making it a more effective agent in the promotion of public welfare, by insulating decision-making from the parliamentary interference and factionalism and thereby pre-committing the state to a stream of purportedly welfare-enhancing future policy choices.<sup>25</sup>

However, before defining regional integration, it is pertinent that a distinction is made between the often confused concepts: 'integration' and 'cooperation'. While integration denotes a formal arrangement involving voluntary association

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<sup>23</sup> Hay P, *Federalism and supranational organisation: Patterns of new legal structure*. Urbana: University of Illinois Press (1966) 1-2.

<sup>24</sup> Rosamond B, *Theories of European integration*. London: McMillan (2000) 33.

<sup>25</sup> Lindseth P, 'The contradictions of supranationalism: Administrative governance and constitutionalisation in European integration since the 1950s'. *Loyola of Los Angeles Law Review*. 37/2 (2003) 382.

between states in order to lose the factual attributes of sovereignty, cooperation describes steps on the way to integration.<sup>26</sup> In other words, cooperation precedes integration and may not necessarily lead to formal integration between states; it is rather a phase in the process of integration.<sup>27</sup>

Definitional problems of the concept of regional integration stem from the varying intentions of theorists in respect of its purpose or termination point. The termination point of a regional integration process will determine whether it is political, economic, social or cultural. As Hay indicates, it is a political process with varying applications and scope.<sup>28</sup> Based on the study of the European experiment at integration, Haas defines political integration as:

[T]he process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, super imposed over the pre-existing ones.<sup>29</sup>

Although Haas sees the end result of the process of integration as ‘a new political community, superimposed over the pre-existing ones’,<sup>30</sup> he equally notes that the shifting of loyalties does not necessarily imply the repudiation of national state or government; rather individuals may exercise multiple loyalties based on the functional advantages to be derived from the ‘new centre’ or nation states.<sup>31</sup> This analysis reinforces the durability of nation states in the face of changing dynamics of inter-states relations. This is further exemplified by the

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<sup>26</sup> Haas E, ‘The study of regional integration: Reflections on the joy and anguish of pretheorising’. *International Organisation*. 24/4 (1970) 610.

<sup>27</sup> Ibid.

<sup>28</sup> Hay (1966) 1. Since nation-states remain the dominant participant in international relations, the success or failure of integration process largely depend on the political will and enthusiasm of nation-states. A case in point is the relative success of the EU which has been attributed to the willingness, not at all times, of the member states to relinquish parts of their national sovereignty.

<sup>29</sup> Haas E, *The uniting of Europe: Political, social and economic forces 1950-1957*. Stanford: Stanford University Press (1958) 16.

<sup>30</sup> Ibid, 16.

<sup>31</sup> Ibid, 14.

assertion that integration is primarily driven by public officials (and also interest groups) of member states.<sup>32</sup>

Hay describes integration as ‘the amalgamation of two or more units or of some of their functions’.<sup>33</sup> Cantori & Spiegel view integration as ‘the process of political unification’ based on a ‘degree of similarity or complementarity’ between the political entities involved.<sup>34</sup> Integration in this sense presupposes an element of sameness in tradition, economic ideology and political goals. From an economics perspective, Venables notes that regional integration ‘occurs when countries come together to form free trade areas or customs union, offering members preferential trade access to each other’s markets’.<sup>35</sup> Deutsch et al define integration as:

the attainment, within a territory, of a sense of community and of institutions and practices strong enough and widespread enough to assure, for a long time, dependable expectations of peaceful change among its population.<sup>36</sup>

The above-mentioned definition views integration as an arrangement which excludes conflict as a means of settling disputes among participating states.<sup>37</sup> The emergence of the European Coal and Steel Community (ECSC) in 1951 after a bitter and destructive continental war and the fact that there has not been a recurrence of that tragic incident (at least among EU member states) lends credence to the security-conception of integration.<sup>38</sup>

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<sup>32</sup> Ibid, 17.

<sup>33</sup> Hay (1966) 1.

<sup>34</sup> Cantori L & Spiegel S, *The international politics of regions – A comparative approach*. Englewood Cliffs: New Jersey: Prentice-Hall (1970) 10-11.

<sup>35</sup> Venables A, ‘International trade: Regional economic integration’. *International Encyclopaedia of Social and Behavioural Sciences* (2000) 1. Available at <http://www.econ.ox.ac.uk/members/tony.venables/regenc2.pdf> (Accessed 25 November 2008).

<sup>36</sup> Deutsch k, *Political community and the north Atlantic area*. New York: Greenwood Press (1957) 5

<sup>37</sup> Ibid.

<sup>38</sup> See e.g. O’Neill M, *The politics of European integration*. London: Routledge (1996) 10.

Integration should however not be seen as a ‘big-bang’ occurrence, rather it should be understood as a multi-layered process which happens over a length of time. The length of time over which integration has persisted plays a significant part in its consolidation.<sup>39</sup> The trajectory of integration thus involves crossing a minimalist threshold of political commitment of political actors to a maximalist outcome, which entails the creation of a new political union.<sup>40</sup> A ‘maximalist outcome’ or termination point of the regional integration process is not necessarily dependant on the initial objectives of political actors, but on variable factors influencing every step of the integration process. Therefore, to view integration as a straight-forward, linear process - excluding the vagaries of (sub) national political and economic forces - is not only unsound but also ignores the realities of a state-centric global framework.

**Table 2.1: Forms/stages of regional integration**

<b><i>Preferential trade area</i></b>	An arrangement in which members apply lower tariffs to imports produced by other members than to imports produced by non-members. Members can determine tariffs on imports from non-members.
<b><i>Free trade area</i></b>	A preferential trade area with no tariffs on imports from other members. As in preferential trade areas, members can determine tariffs on import from non-members.
<b><i>Customs union</i></b>	A free trade area in which members impose common tariffs on non-members. Members may also cede sovereignty to a single custom administration.
<b><i>Common Market</i></b>	A customs union that allows free movement of the factors of production (such as capital and labour) across the national borders within the integration area.
<b><i>Economic union</i></b>	A common market with unified monetary and fiscal

<sup>39</sup> Deutsch et al (1957) 6.

<sup>40</sup> O’Neill (1996) 12



	policies including common currency.
<b>Political union</b>	The ultimate stage of integration, in which members become one nation. National governments cede sovereignty over economic and social policies to a supranational authority, establishing common institutions and judicial and legislative processes – including a common parliament

Source: Economic Commission for Africa, *Assessing Regional Integration in Africa*. Addis Ababa: Economic Commission for Africa (2004) 10. [Hereinafter referred to as ECA (2004) ]

Writing on the stages or forms of regional integration, Caproso & Choi note that ‘at best we have a set of labels that may be useful for categorising the path of members undergoing regional integration, rather than a natural sequence through which all integrating states must pass’.<sup>41</sup> In this sense, member states may decide to start with a customs union and move right ahead to forming a political union, without necessarily going through all the stages outlined above. Ultimately, it is the degree of political will among member states that will determine the pace of the integration process.

### **2.2.2 Theories of regional integration: A politico-legal concept**

The European experiment in integration provided a fertile ground for a multi-disciplinary study of the theories of regional integration. Every step of the integration process inspired the propounding of new theoretical assumptions and confirmed or refuted existing theories. Although integration is multi-disciplinary, the works of theorists such as Haas, Mitrany, Moravcsik and Waltz all present a political science/international relations narrative of integration. This is understandable considering the highly political process that brings about the process of integration. However, of equal importance is the legal implication of integration. While political theorists have done extensive work on the theoretical foundation of integration, it is the legal theorists who engage in explaining the

<sup>41</sup> See Caproso & Choi in Carlsnaes et al (2002) 483.

evolutionary nature of integration and also the consequences of the integration process on national and international politico-legal framework. It is against this backdrop that this section will discuss the theories of integration under two rubrics: legal and political.

### **a) Legal theories of integration**

As Weiler puts it, any regional integration process is a creation of the law.<sup>42</sup> After the political negotiations and compromises, member states kick-start the process by agreeing on legal instruments such as Treaties, which clearly spell out the rights and obligations of parties involved and also the programmes of action.<sup>43</sup> Making a distinction between the juridical and political theories of integration, Weiler avers that:

Political theories of ... integration [are] largely wedded to a certain notion about the outcome of the process and embodied a certain predictive element about continued progress. In addition, political theory laid great emphasis on the social, political and economic substantive achievements and less emphasis on the ways and means.<sup>44</sup>

Rather than focus on theoretical assumptions and conclusions, legal analysts investigate the evolution and step-by-step implication(s) of integration arrangements on member states. Legal theories of integration are thus based on a 'continuous progress of integration',<sup>45</sup> an analysis which is more concerned with the interpretation and efficacy of treaty provisions dealing with integration, the position of regional bodies in international law and the effects of laws emanating from such regional bodies in member states.<sup>46</sup>

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<sup>42</sup> Weiler J, *The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration*. Cambridge: Cambridge University Press (1999) 221.

<sup>43</sup> Ibid.

<sup>44</sup> Weiler J, 'The community system: The dual character of supranationalism'. *Yearbook of European Law*. 1 (1981) 270.

<sup>45</sup> Ibid.

<sup>46</sup> Hay (1966) 6-8.

A key implication of regional integration is what international lawyers refer to as the ‘internationalisation of constitutional law’ or ‘constitutionalisation of international law’.<sup>47</sup> Although these two concepts have different meanings, they both have similar results. While the former denotes the emergence of international parallel constitutions as a result of transfer of functions to regional institutions, the latter explains the transformation of treaties into domestic-like constitutions.<sup>48</sup> These concepts jointly highlight the growing influence of international organisations and the possibility (or existence) of an overarching framework by which domestic constitutions should be measured.<sup>49</sup> An (un)intended consequence of an inter-state arrangement is a regulatory framework or a semblance of national constitutional mechanism, which more or less operates on familiar constitutional terminologies.<sup>50</sup> In the context of international organisations, ‘international constitutionalism’ or constitutionalism provides a framework for uniform actions, attribution of powers and implementation of shared values.<sup>51</sup> (This will be discussed in detail in subsequent chapters)

Another important element of the legal theory of integration, which draws significantly from constitutionalism, is the concept of ‘conservatory principles’. Based on the understanding that states remain the primary structure of international relations, the conservatory principles aim to strike a balance between the powers of states and international organisations.<sup>52</sup> Regional bodies are essentially a creation of states and derive their legitimacy from member

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<sup>47</sup> Cottier T & Hertig M, ‘The prospect of 21st century constitutionalism’. *Max Planck Yearbook of United Nations Law*. 7 (2003) 269-70.

<sup>48</sup> *Ibid*, 270-271.

<sup>49</sup> See e.g. Werner W, ‘Constitutionalisation, fragmentation, politicisation, the constitutionalisation of international law as a janus-faced phenomenon’, *Griffen’s View*. 8/2 (2007)19-22.

<sup>50</sup> As Cottier & Hertig highlights, some organisations such as FAO and UNESCO explicitly refer to their founding treaties as ‘constitutions’ and the European Court of Justice termed EU founding treaties as ‘the constitutional Charter of a Community based on the rule of law’. See Cottier & Hertig (2003) 277.

<sup>51</sup> Werner (2007) 22; Weiler (1999) 221; Cottier & Hertig (2003) 271-272.

<sup>52</sup> Dashwood A, Wyatt D, Arnall A & Ross M, *European Union law*. London: Sweet & Maxwell (2000) 151.

states, so it is crucial that legal mechanisms are put in place to safeguard their national interests.

The conservatory principles are further divided into four:<sup>53</sup> subsidiarity, attribution of powers, proportionality and flexibility. The subsidiarity principle highlights the complementary role of international organisations by prescribing that only matters which cannot be effectively dealt with at the national level should be allocated to international organisations.<sup>54</sup> The principle of attribution of powers simply provides that regional organisations only have powers explicitly or impliedly conferred on it.<sup>55</sup> The principle of proportionality is an enquiry into whether the means employed by regional bodies are suitable and necessary for the attainment of the desired objectives.<sup>56</sup> Lastly, the flexibility principle denotes a legal arrangement under which some member states may decide to pursue shared interest outside of the institutional framework.<sup>57</sup>

At this juncture, it is imperative to discuss the central thrust of this thesis: supranationalism. Although supranationalism has been described as a 'political-descriptive' concept,<sup>58</sup> its operation is essentially composed of legal components. What then are the (legal) requirements which define supranationalism? Although this will be elaborated upon in subsequent chapters, it is sufficient to flesh out these points. The following points can be distilled from Hay's analysis as the elements of supranationalism:<sup>59</sup>

- institutional autonomy of an organisation from member states
- ability of an organisation to bind its member states by a majority or weighted majority vote

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<sup>53</sup> Ibid, 153-168.

<sup>54</sup> Ibid, 156-62; see also Lenaerts K & Van Nuffel P, *Constitutional law of the European Union*. London: Sweet & Maxwell (2004) 100-1.

<sup>55</sup> Dashwood et al (2000) 153; Lenaerts & Van Nuffel (2004) 90.

<sup>56</sup> Dashwood et al (2000) 162.

<sup>57</sup> Ibid, 164.

<sup>58</sup> Hay (1966) 69.

<sup>59</sup> Ibid.

- direct binding effect of law emanating from the organisation on natural and legal persons
- attribution of powers which differs markedly from powers bestowed on other organisations

Building on Hay's analysis, Weiler makes a distinction between normative and decisional supranationalism.<sup>60</sup> According to his analysis, normative supranationalism implies that the laws of an organisation:<sup>61</sup>

- have direct effect in member states
- are superior to the laws of member states
- member states are pre-empted from enacting contradictory legislation

On the other hand, decisional supranationalism 'relates to the institutional framework and decision-making processes by which Community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed.'<sup>62</sup> Pescatore<sup>63</sup> also identified three elements of supranationalism as: the recognition of common values and interests; the creation of an effective power and the autonomy of these powers. The absence of the aforementioned elements within an institutional framework simply means that such organisation is an intergovernmental organisation.<sup>64</sup> (See table 2.2 below).

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<sup>60</sup> Weiler (1981) 271.

<sup>61</sup> Ibid, 273-280.

<sup>62</sup> Weiler (1981) 271.

<sup>63</sup> See Pescatore P, *The Law of integration*. Leiden: Sijthoff (1974) 51-52.

<sup>64</sup> Ibid; see also Weiler (1981) 305.

**Table 2.2: Differences between supranational and intergovernmental organisations**

<i>Arena</i>	<i>International (Intergovernmental)</i>	<i>Supranational</i>
<i>Disciplinary background of observers</i>	International relations	Law (typically public law)
<i>Typical issue of governance</i>	Fundamental system rules; issues with immediate political and electoral resonance; international 'high politics'; issues <i>dehors</i> Treaty	The primary legislative agenda of the community; enabling legislation; principal harmonisation measures
<i>Principal players</i>	Member states	Community and Member states
<i>Principal actors</i>	Governments (cabinets; executive branch)	Governments, Community institutions: Commission, Council, Parliament
<i>Level of institutionalisation</i>	Low to medium	High
<i>Mode of political process</i>	Diplomatic negotiation	Legislative process bargaining
<i>Type/style of intercourse</i>	Informal procedures; low level of process rules	Formal procedures; high level of process rules
<i>Visibility/transparency</i>	High actor and event visibility; low transparency of process	Medium to low actor and event visibility; low transparency of process

Source: Adapted from Weiler (1999) 275.

The table above highlights the major procedural differences between intergovernmentalism and supranationalism. Under the former, national elites and their institutions play a central role in the formulation of policies and initiatives while the latter shows the important part played by transnational institutions. It also reveals that supranationalism is not a unipolar process; rather it thrives on the interplay between member states and transnational institutions.

## **b. Political science theories of integration**

The political science theories of integration can be classified under two broad headings: intergovernmentalism and supranationalism. The supranationalist school of thought questions the logic of nation state, especially after the chaotic consequences of the two world wars.<sup>65</sup> At the core of supranationalist theory is the assignment of sovereign powers to a neutral, transnational entity, devoid of the foibles of nation states.<sup>66</sup>

At the other end of the spectrum is the intergovernmental or state-centric school of thought. Advocates of this ideology posit that nation states remain the dominant players in global or regional affairs.<sup>67</sup> Even when transnational entities are set up, intergovernmentalists point to the fact that the representatives of nation states are the primary decision makers and essentially drive the process.<sup>68</sup> Below is a full analysis of the paradigms of political science.

### **i) Functionalism**

Buoyed by the disastrous aftermath of the Second World War (economic meltdown and absence of peace), the protagonists of this approach advocated for the creation of technocratic institutions to handle transnational socio-economic problems.<sup>69</sup> Functionalists display an unyielding belief in the ability of technocratic institutions to manage transnational human needs, peace and public welfare.<sup>70</sup> As Mitrany highlights, these functional bodies will differ from traditional international organisations in the sense that they would be 'executive agencies with autonomous tasks and powers'.<sup>71</sup> This approach presents an alternative to global governance framework, an attempt to dislocate nation

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<sup>65</sup> O'Neil (1996) 21.

<sup>66</sup> Ibid, 21-23.

<sup>67</sup> Ibid, 54-57.

<sup>68</sup> Ibid, 56; see also Blokker N & Schermers H, *International institutional law: Unity within diversity*. The Hague: Martinus Nijhoff (1995) 40.

<sup>69</sup> Mitrany D, *The Functional theory of politics*. London School of Economics and Political Science (1975) 126; see also Rosamond B, *Theories of European integration*. London: McMillan (2000) 33.

<sup>70</sup> For a detailed analysis of the functionalist theory, see generally, Mitrany D, *A working peace system*. Chicago: Quadrangle Books (1966) 25-99.

<sup>71</sup> Mitrany (1975) 125.

states from matters that border on common (transnational) interests.<sup>72</sup> Furthermore, this idea predicts that the efficient performance of responsibilities by transnational functional agencies would lead to the transfer of loyalty from nation state to these agencies (attitudinal change).<sup>73</sup>

Functionalism pessimists argue that this idea ignores the highly political nature of international relations. Mitrany's advocacy of detached and unaffiliated technocratic agencies disregards the state-centric posture of global politics. According to critics, a project which excluded this reality lacked scientific and empirical basis.<sup>74</sup> They also questioned the functionalist assumption of human attitudinal change by arguing that this line of thinking falls within the scope of morality rather than politics.<sup>75</sup> The pervasive and deep-rooted attachment to nationality not only by political actors but individuals essentially rendered the 'attitudinal change' theory impractical.

## ii) Neo-functionalism

Neo-functionalism was a reaction to the perceived inadequacies of functionalism. Neo-functionalists regarded integration as a more complex process than the apolitical method or 'technocratic automaticity' prescribed by functionalism.<sup>76</sup> Neo-functionalism, like its theoretical precursor, highlights the irrelevance of nation states and their inability to maintain peace and security.<sup>77</sup> It, however, acknowledged the primacy of nation states and its political elites (including political parties and interest groups) in the integration process.<sup>78</sup> Thus, this established the empirical foundation of neo-functionalism.

At the core of neo-functionalist agenda is the concept of 'spillover'. This concept refers to situations where integration in one economic sector would lead to

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<sup>72</sup> See generally, Mitrany (1966).

<sup>73</sup> Rosamond (2000) 33.

<sup>74</sup> O'Neil (1996) 34.

<sup>75</sup> Ibid, 33.

<sup>76</sup> Rosamond (2000) 55.

<sup>77</sup> O'Neil (1996) 37.

<sup>78</sup> Haas (1958) 17; Rosamond (2000) 55.



further economic integration within and beyond such sector.<sup>79</sup> The logic behind spillover is that once nation states agree to place the control of a certain sector in the hands of a supranational authority, with success in such sector and with the passage of time, there would be pressures to extend control to other related policy areas. Supranational institutions rather than nation states are seen as the drivers of this process.

Moravcsik, however, argued that spillover into related sectors has not been as consistent as expected.<sup>80</sup> He further notes that neo-functionalism fails to offer an explanation for the domestic dynamics that shapes supranational decisions.<sup>81</sup> Neo-functionalism suffered its greatest setback when the then French president, Charles de Gaulle, altered the trajectory of European integration.<sup>82</sup> In sharp contrast to the postulations of functionalist theorists, de Gaulle rejected the European Commission's (EC) modest attempt to reduce the powers of nation states within the community.<sup>83</sup> In reaction to the growing influence of the EC, de Gaulle, in 1965, remarked that only existing European states 'had the rights to give orders and power to be obeyed'.<sup>84</sup> This singular event exposed the empirical limitations and the rigidities of this approach. It brought to the fore the influence of nation states in the integration process.

### iii) Realism and neo-realism

At the nucleus of the realist theory is the idea that international politics is about the interaction of states in an essentially anarchic universe.<sup>85</sup> States are engaged in a game of survival-of-the-fittest and the quest for security lead to

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<sup>79</sup> This is called 'functional spillover'. See Rosamond (2000) 60.

<sup>80</sup> Moravcsik A, 'Preferences and power in the European Community: A liberal intergovernmentalist approach', *Journal of Common Market Studies*. 31/4 (1993) 476.

<sup>81</sup> *Ibid*, 477.

<sup>82</sup> *Ibid*, 476.

<sup>83</sup> O'Neill (1996) 45.

<sup>84</sup> Cited in Agyemen (1990) 19.

<sup>85</sup> The term 'anarchic' implies that international politics is a system without government or a centralised authority to forestall the threat of violence and the recurrent use of force. See Waltz K, *Theories of international politics*. New York: McGraw-Hill (1979) 88, 102-3.

interstate cooperation.<sup>86</sup> In the pursuit of national interests (security) and survival, states collaborate with other states which have comparative military and economic advantages. To the realists, nation-states remain the principal actors and the only source of legitimate authority; any attempt to replace the nation state with supranational institutions is deemed unnatural and misguided.<sup>87</sup>

Neo-realism builds on the theoretical foundation of realism. It shares a focus on the anarchic nature of international system and the primacy of states in international relations with the realism school of thought. It, however, differs on the emphasis realism places on the inherent properties of states.<sup>88</sup> Neo-realists argued that the international system should be seen as a structure, composed of units (states) with functional similarity but with varied capabilities.<sup>89</sup> The primary difference between states is their capabilities to perform similar tasks - this determines the distribution of capabilities across units.<sup>90</sup> States engage in maximising the possibilities of survival by protecting themselves against others.<sup>91</sup> The pursuit of mutual gain is seen as the catalyst for cooperation among states.<sup>92</sup> The prospect of a skewed gain, therefore, brings about a condition of insecurity and works against cooperation.<sup>93</sup>

Critics argue that the dynamics of European integration over the years have rendered (neo) realism obsolete. A case in point is the increasing allocation of powers to the community institutions. According to critics, this proves that the

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<sup>86</sup> Rosamond (2000) 132. Huntington, however, argues that different types of states define their interests in different ways. Such interest may include similarities in cultural values, ideologies and (democratic) institutions. See Huntington S, *The clash of civilization and the remaking of world order*. The Free Press (2002) 34.

<sup>87</sup> Ibid; see also Godwin G, 'The erosion of external sovereignty?' *Government and Opposition*. 9/1 (1974) 63-64.

<sup>88</sup> Ibid, 132.

<sup>89</sup> Waltz (1979) 96-97.

<sup>90</sup> Ibid, 97.

<sup>91</sup> Ibid, 105; see also Rosamond (2000) 132.

<sup>92</sup> Waltz (1979) 105.

<sup>93</sup> Ibid.

structural attribute of international politics is not necessarily static and anarchic.<sup>94</sup>

#### iv) Liberal intergovernmental approach

Liberal intergovernmentalism builds on Putnam's idea of integration as a metaphorical two-level game played by member states.<sup>95</sup> According to Putnam, office holders build coalitions among domestic groups at the national level.<sup>96</sup> At the international level, the same actors bargain in ways that enhance their position at the domestic level by meeting the demands of key domestic groups.<sup>97</sup>

Moravcsik articulates this approach by evaluating the European integration as a two-stage approach. The first stage, called the demand side, entails the formulation of national preferences through the influence and coordination of various actors, such as social interest groups, within the domestic political space.<sup>98</sup> The second stage, called the supply side, involves interstate bargaining of policies formulated at national level.<sup>99</sup> The outcomes of bargaining between states are determined by factors such as threats of exclusion, unilateral policy alternatives and compromise agreements.<sup>100</sup> This approach differs from both realism and neo-realism in its assertion that domestic politics are not insulated from international politics and vice-versa.<sup>101</sup> Unlike realism and neo-realism which treat states as entities with fixed preferences for wealth and security, liberal intergovernmentalism highlights the adaptive and multifarious nature of inter-state relations in the international arena.<sup>102</sup>

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<sup>94</sup> Rosamond (2000) 134.

<sup>95</sup> Ibid, 136.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Moravcsik (1993) 481.

<sup>99</sup> Ibid.

<sup>100</sup> Moravcsik A, 'Liberal intergovernmentalism and integration: A rejoinder'. *Journal of Common Market Studies*. 33/4 (1995) 612.

<sup>101</sup> Rosamond (2000) 135.

<sup>102</sup> Moravcsik (1993) 481.

Wincott criticises liberal intergovernmentalism for being an approach rather than a theory because it fails to state conditions under which it can be empirically refuted.<sup>103</sup> He further argues that liberal intergovernmentalism fails to take into account the influence of day-to-day policy decisions of the community institutions, rather than that of member states, on the laws of the EU.<sup>104</sup>

As shown in the foregoing discussion, none of the above-described theories solely provides a complete picture or dynamics of the integration process. As such, the appropriate tool of analysis should be a synthesis of ideas. In this regard, this thesis adopts a methodology that seeks to increase the powers of the AU without necessarily discounting the relevance of member states and also sub-regional structures. On one hand, functionalism will serve as a useful tool in explaining the rationale behind having autonomous institutions. On the other hand, realism and liberal intergovernmentalism provides a framework for understanding the motivation behind cooperation and the importance of member states, especially the *regional hegemons*, and civil society.

### **2.2.3 Regional integration and sovereignty: Is the two mutually exclusive?**

Haas' reference to 'a new centre', Mitrany's 'technocratic automaticity' and Deutsch's assertion that '... integration requires ... some kind of organisation'<sup>105</sup> all denote the existence of a non-state actor which possesses powers akin to that of nation state. The implication of this is a tension between the age-long conception of state sovereignty and the place of non-state actors within the architecture of the international system. Traditional public international law is premised on the theory that nation states remain the basic structure of international order. Therefore, any assertion that non-state actors should also share state-centric features seeks to expand the conceptual focus of the nature of international law nay international relations. At the same time, the increasing

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<sup>103</sup> Wincott D, 'Institutional interaction and European integration: Towards an everyday critique of liberal intergovernmentalism'. *Journal of Common Market Studies*. 33 (1995) 599-600.

<sup>104</sup> Ibid, 605; see also Caproso J & Choi Y, 'Comparative regional integration' in Carlsnaes W, Resse T & Simmons B (eds), *Handbook of International Relations*. London: Sage (2002) 488.

<sup>105</sup> Deutsch et al (1957) 6.

clout of non-state actors such as international organisations is indicative of a paradigm shift in the conceptualisation of sovereignty.

What then is this 'intoxicant' which emboldens states to act with impunity within and outside their territorial entities? As Geldenhuys puts it, 'sovereignty is the final sanctuary of the autocrat in contemporary world politics'.<sup>106</sup> In the name of sovereignty, leaders continue to subjugate their citizens, mismanage state economies and frustrate all forms of meaningful intervention (Zimbabwe, Myanmar and North Korea spring to mind here).

Contemporary state sovereignty has its roots in the 1648 agreement to end the discord between feuding European powers.<sup>107</sup> The 1648 Treaty of Westphalia, amongst other provisions, principally laid the foundation for the territorial integrity of nation states.<sup>108</sup> The traditional form of sovereignty can be divided into two: internal and external sovereignty. Internal sovereignty connotes the 'exercise of supreme authority by states within their individual territories'<sup>109</sup> or what Bodin described as the exclusive right 'to give lawes unto all and everie one of its ... subjects and to receive none from them'.<sup>110</sup> According to James, a state's claim of internal sovereignty is dependent on constitutional independence.<sup>111</sup> Thus, a state under colonial rule cannot lay any claim to sovereignty because such right lies with the colonial administration. External sovereignty on the other hand implies the legal independence of a sovereign state - which can only be limited by international law - from other states.<sup>112</sup> It therefore implies the equality of nation states, regardless of differences in

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<sup>106</sup> Geldenhuys D, 'Brothers as keepers: Africa's new sovereignty regime', *Strategic Review For Southern Africa*. XXVIII/1 (2006) 1.

<sup>107</sup> The full text of the 'Treaty of Westphalia' is available at <http://www.yale.edu/lawweb/avalon/westphal.htm> (Accessed 21 October 2007).

<sup>108</sup> Ibid.

<sup>109</sup> Goodwin (1974) 61.

<sup>110</sup> Ibid.

<sup>111</sup> James A, *Sovereignty statehood: The basis of international society*. London: Allen & Unwin (1986) 24-25.

<sup>112</sup> Kelsen H, 'The principle of sovereign equality of states as a basis for international organisation'. *Yale Law Journal*. 53/2 (1944) 208.

capacities, in the international community. The inclusion of the term 'sovereign equality'<sup>113</sup> in the United Nations Charter further reinforced the sanctity of statehood in international law.<sup>114</sup>

The rise of international organisations in a post-1945 global order has, however, spurred a re-conceptualisation of sovereignty.<sup>115</sup> The corollary of establishing these organisations is the transfer of sovereignty or powers necessary for the fulfilment of tasks. While states continue to hang on to sovereignty, there is also a realisation of the need to boost the functional abilities of these organisations. The emphasis on the protection of human rights and global peace has raised a general consensus that interference in the domestic affairs of a state is justifiable under certain circumstances.<sup>116</sup> Also, the realisation that certain socio-economic needs requires a transcendental, global approach has contributed significantly to the limitation of absolute sovereignty.

When the discourse of sovereignty is located within a regional integration process, the question that arises is whether or not sovereignty is divisible. As mentioned earlier, the effective operation of regional organisation is dependent on the transfer of sovereignty by member states. The degree of such transfer determines the level of integration.<sup>117</sup> If regional integration is understood as a process that sets in motion some form of transnational governance framework or multi-level governance, then the notion of divisibility of sovereignty becomes inevitable. To address the issue of divisibility, parallels have been drawn between the devolution of powers under a federal system of government and

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<sup>113</sup> According to the Friendly Relations Declaration of the United Nations General Assembly, the term 'sovereign equality', amongst other provisions, implies the jurisdictional exclusivity of states, equal rights and duties of states and political independence of states. See GA 2625 (XXV) 1970.

<sup>114</sup> See UN Charter, article 2(1). Article 2(7) of the Charter prohibits the UN from intervening in matters within the domestic jurisdiction of member states.

<sup>115</sup> Franck views the emergence of transnational institutions as one of the greatest innovations of international law in the 20<sup>th</sup> Century. See Franck T, 'Three major innovations of international law in the twentieth century', *Quinnipiac Law Review*. 17/1 (1997) 139.

<sup>116</sup> See e.g. Cassese A, *International law*. Oxford: Oxford University Press (2005) 59; see also Brownlie I, *Principles of public international law*. Oxford: Oxford University Press (2003) 293.

<sup>117</sup> Hay (1966) 68.

the transfer of powers to regional organisations. As Hay indicates, a state owns the totality of sovereign powers (bundle of rights) and has the prerogative to share it with other states or institutions.<sup>118</sup> Hay's formulation regards external sovereignty as a direct function of internal sovereignty.<sup>119</sup> What this means is that when a state transfers part of its internal sovereignty or jurisdiction, for example in relation to making immigration laws, to an international organisation, there is also a corollary understanding that the organisation will have the powers to represent such state(s) on the particular subject when dealing with third states.<sup>120</sup>

Lauterpacht agrees that the nation states possess plenitude of powers but that such powers terminate where international obligation begins.<sup>121</sup> The implication of this is that states have powers to exercise national sovereignty, for example the enactment of legislations, as long as it does not conflict with their obligations to the international community.<sup>122</sup> Mitrany views that 'it would indeed be sounder and wiser to speak not of surrender but of a sharing of sovereignty'.<sup>123</sup> This requires the pooling of sovereign authority for the joint performance of a particular task.<sup>124</sup> Mitrany sees sovereignty as a functional concept, that is, the transferral of sovereign powers should be based on the need to execute certain task or function.<sup>125</sup> MacCormick's conception of sovereignty is rather different. He remarks that:

We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it, Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it.<sup>126</sup>

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<sup>118</sup> Hay (1966) 70.

<sup>119</sup> Ibid, 71.

<sup>120</sup> Ibid, 70-74.

<sup>121</sup> Lauterpacht E, 'Sovereignty – myth or reality?' *International Affairs*. 73/1 (1997) 149.

<sup>122</sup> Ibid.

<sup>123</sup> Mitrany (1966) 31.

<sup>124</sup> Ibid 31-32.

<sup>125</sup> Ibid, 31.

<sup>126</sup> MacCormick N, 'Beyond the sovereign state'. *The Modern Law Review*. 56/1 (1993) 16.

There is no doubt that the concept of absolute sovereignty underwent radical reformulation over the years. The ‘global village’ narrative has ensured that states are continuously probed about the treatment of their citizens, natural resources and the environment. Even when states have not explicitly or impliedly limited their sovereign powers, their actions are increasingly being measured by a ‘universal or community values’<sup>127</sup> barometer. The increasing competence of the EU, the influence of the Bretton Wood institutions (International Monetary Fund and the World Bank) on the monetary and fiscal policies of developing countries, the UN’s and AU’s right to militarily intervene in member states clearly indicates that the evolution of sovereignty is yet to reach a terminal point.<sup>128</sup>

The end of the nation state is by no means near but the doctrine of sovereignty will continue to adapt to new realities by evolving into a space big enough to accommodate national concerns and transnational imperatives. In this era of globalisation and technological advancement, both sceptics and optimists will accept that the rules are changing, with no one being able to categorically identify the terminal point of sovereignty. The realities of the twentieth century helped to reshape the concept of sovereignty, who knows what the twenty-first century has in stock. As Carr pointedly puts it, ‘the concept of sovereignty is likely to become in future even more blurred and indistinct than it is at present’.<sup>129</sup>

### **2.3 Regional integration in Africa: A contextual analysis**

Since Africa does not exist in isolation, the trajectory of its integration process, either at the continental or sub-regional level, relates closely to the classical theories of regional integration discussed above. As in the case of Europe,

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<sup>127</sup> See e.g. Werner (2007) 17; see also Olivier M, ‘International and regional requirements for good governance and the rule of law’. *South African Yearbook of International Law*. 32 (2007) 52.

<sup>128</sup> As Jackson notes, ‘... there is no teleological terminus, no determinate and final destination, and no end of history in the evolution of sovereignty’. See Jackson R, *Sovereignty: Evolution of an idea*. New York: Polity (2007) 112.

<sup>129</sup> Carr E, *The twenty years crisis 1919-1939*. London: Macmillan (1978) 230-231.



theorists and politicians are divided on the best approach to African integration. This lack of unanimity continues to define the paradigms of African integration. This section will thus aim to place African integration in perspective by tracing its origins, theoretical contributions to the idea, the possible benefits of integration, and lastly, the feasibility of continental integration.

### 2.3.1 The idea of 'Africa': Tracing the philosophical underpinning of unity

You are not a country, Africa  
You are a concept  
Fashioned in the minds, each to each  
To hide our separate fears  
To dream our separate dreams

Abioseh Nicol<sup>130</sup>

The supreme irony, according to Mazrui, is that 'it took European colonialism to inform Africans that they were indeed Africans'.<sup>131</sup> The consciousness of being an 'African', as distinct from being an Ashanti or Yoruba or Zulu, was a reaction to external subjugation either in the form of colonialism or racial prejudice.<sup>132</sup> Nyerere captures this in the following words 'the Africans looked at themselves and knew that vis-à-vis the Europeans, they were one'.<sup>133</sup> Along with this racial consciousness was also an awareness of 'geographical contiguities', the realisation that Africans inhabit the same territorial space.<sup>134</sup> The geographic element of pan-Africanism should be understood as not only complementary to

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<sup>130</sup> Nicol A, 'The meaning of Africa' in Weaver R & Bruchac J (eds) *Aftermath: An anthology of poems in english from Africa, Asia, and the Caribbean*. New York: Greenfield Review Press (1977) 76.

<sup>131</sup> Mazrui A, 'Who are Africans: Identity in search of unity' in Falola T, Laremont R & Seghatolislami T (eds) *African redefined: Collected essays of Ali. A. Mazrui, Vol 1*. New Jersey: Africa World Press Incorporated (2002) 37.

<sup>132</sup> See e.g. Nyerere J, 'A United States of Africa'. *Journal of Modern African Studies*. 1/1 (1963) 1; see also Akinoyemi B, 'Nigerian foreign policy in the 21<sup>st</sup> century'. Lecture delivered at the National Institute of Public and Strategic Studies (NIPSS) Kuru, Nigeria (17 June 2003) 7-8. Available at <http://www.profbolajiakinyemi.com/Prof%20Bolaji%20Publications/NIPS%20FINAL%20LECTURE.doc> (Accessed 20 May 2008).

<sup>133</sup> Cited in Akinoyemi B, 'Kwame Nkrumah and pan-Africanism'. *Thisday* (Nigeria). Available at <http://www.thisdayonline.com/nview.php?id=125197> (Accessed 15 October 2008).

<sup>134</sup> Mazrui A, 'On the concept of "We are all Africans"' *The American Political Science Review*. 57/1 (1963) 89-90.

the racial consciousness but also an attempt to include Africa North of the Sahara in the discourse on pan-Africanism.<sup>135</sup> Africa is much a geographic description as it is a racial entity.<sup>136</sup> As the saying goes, nations can choose their friends but not their neighbours; therefore, the geographic composition of the continent is an inescapable reality which informs the quest for unity. Moreover, Mazrui posits that age-long cultural ties between North and sub-Saharan Africa cannot be discounted.<sup>137</sup> This, he notes, is evident in the vocabulary of some of the most widely spoken languages on the continent.<sup>138</sup> It is noteworthy that the debate on the racial divide between North and sub-Saharan Africa has had little or no impact on programmes aimed at continental integration.<sup>139</sup> As will be argued later in this thesis, the basis of unity should rather be based on the existence of the shared norms of rule of law and democratic governance.

The chronological events in Africa's history – the existence of pre-colonial empires, slavery and the arbitrary balkanisation of its territories by European superpowers - thus proved to be an effective emotive tool for rallying 'Africans' both in the Diaspora and on the continent towards a common purpose.<sup>140</sup> As Legum points out, Pan-Africanism is essentially 'a movement of ideas and

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<sup>135</sup> For example, it is on record that ex-president Mobutu Sese Seko of Zaire (now Democratic Republic of Congo) advocated the establishment of an exclusive sub-Saharan (black) African organisation. See Mazrui (2002) 39; see also Akinyemi (2008). Also, Obafemi Awolowo, a prominent Nigerian nationalist, had this to say: 'The Sahara Desert is a natural line of demarcation between the Northern and Southern parts of Africa. It is my considered view that the countries of North Africa should, as a first step, constitute a Zone...other territories south of the Sahara...should constitute another Zone' Cited in Legum C, *Pan Africanism: A short political guide*. London: Pall Mall Press (1962) 270.

<sup>136</sup> For a detailed discussion on the geographical dynamics of the African continent, see Mazrui A, *The Africans: A triple heritage*. New York: Little, Brown & Company (1986) 23-38.

<sup>137</sup> Mazrui (2002) 39

<sup>138</sup> Ibid; Mazrui (1986) 243.

<sup>139</sup> According to Akinyemi, the following factors are responsible for the little impact of North Africa versus sub-Saharan Africa debate on African unity: the strong cooperation and friendship between Gamel Nasser of Egypt and Kwame Nkrumah of Ghana; the need to build a united front against a cold-war-ridden world and *Apartheid* in South Africa. He is, however, quick to add that these factors have receded into the background, with the resurgence of such debate among politicians and the intelligentsia alike. See Akinyemi (2008).

<sup>140</sup> See e.g. Thompson V, *Africa and unity: The evolution of pan-Africanism*. London: Longman (1969) 33. Nyerere remarks that Africa's pre-colonial history demanded that 'African unity must have priority over all other associations'. Cited in Mazrui (1963) 93.

emotions<sup>141</sup> which lends itself to various manifestations. For Africans in the Diaspora, it represented a bond to a disconnected past, a search for common identity and the restoration of freedom and dignity in an oppressed society.<sup>142</sup> Within the continent, Asante observes that pan-Africanism was ‘viewed both as an integrative force and as a movement of liberation’.<sup>143</sup>

The nationalist resistance to colonialism, however, highlighted a paradox: using the oft-derided colonial boundaries as a legitimate instrument of resistance. While this idea may be perceived as pragmatic, it was to set the tone for a post-colonial attachment to national sovereignty. Once African states ‘won’ their hard-earned independence, the next agenda was to consolidate nationalism rather than focus on integrative matters.<sup>144</sup> As Fanon rightly puts it, ‘African unity takes off the mask and crumbles into regionalism inside the hollow shell of nationality itself’.<sup>145</sup> In addition, colonial attachments (Francophone versus Anglophone), differing political ideologies and irredentist motives<sup>146</sup> ensured that efforts of continental integration are consigned to the back seat.<sup>147</sup>

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<sup>141</sup> Legum (1962) 14. Akinyemi calls Pan-Africanism an ‘experiential phenomenon (a phenomenon that arises as a reaction to an experience) ...’ See Akinyemi (2008); Murithi refers to it as ‘an invented idea’. See Murithi T, *The African Union: Pan-Africanism, peace-building and development*. Hampshire, England: Ashgate (2005) 35.

<sup>142</sup> Ibid, 14-23; see also Thompson (1969) 3-19.

<sup>143</sup> Asante (1997) 32; see also Legum (1962) 38.

<sup>144</sup> Mazrui refers to this attitude as ‘the nationalism that looks inwardly territorially’. See Mazrui (1963) 92. Ramutsindela rhetorically questioned whether post-colonial states ‘have been socialised into colonial spaces’. See Ramutsindela M, ‘Deterritorialisation and the African superstate: Do we need a second glass of sherry?’ in Maloka E (ed) *A United States of Africa?* Pretoria: African Institute of South Africa (2001) 100. The answer to this is neither yes nor no. If one was to answer this question in light of the various intra-state conflicts in places like DRC, Nigeria, Rwanda, Burundi, Sudan and Ethiopia, the answer will be a resounding ‘no’. However, in places like Tanzania and Zambia, one can argue that to some extent, these countries have been able to forge a national identity, superior to ethnic interests.

<sup>145</sup> Fanon F, *Wretched of the earth*. New York: Grove Press (1968) 159.

<sup>146</sup> In a bid to forestall fratricidal border struggles between post-colonial African states, the Organisation of African Unity (OAU) in 1964 adopted the *uti possidetis* rule, which mandated member states to respect existing frontiers. This, however, failed to stem the tide of border clashes between African states – Somalia and Kenya, Somalia and Ethiopia, Libya and Chad, Nigeria and Cameroon, Morocco and Western Sahara, just to mention a few. See e.g. Oyebo A, *International law and politics: An African perspective*. Lagos: Bolabay Publications (2003) 24-25.

<sup>147</sup> Asante (1997) 34-35.

The earliest manifestation of pan-Africanism as an 'integrative force' dates back to the 1920s.<sup>148</sup> At that time, a group of intellectuals from the four British dependencies of West Africa - Nigeria, Sierra Leone, Gambia and Gold Coast (later Ghana) - called for closer cooperation and integration of West Africa.<sup>149</sup> One of the principal initiators of this idea, Joseph Casely Hayford (Ghana), presented a demand to the colonial office in London, asking for the establishment of a West African Court of Appeal and a West African University.<sup>150</sup> Although this idea was dismissed by the colonial authorities as 'premature', it laid the foundation for the politically-charged activism of the 1940s, with Nkrumah as a principal player. This era witnessed a renewed focus and an attempt to include Francophone West Africa in the 'integrative' agenda.<sup>151</sup> The Nkrumah-led West African National Secretariat, an offshoot of the 1945 Fifth Pan-African congress in Manchester, resolved in 1946 to use the idea of 'a *West African Federation* as an indispensable lever for the ultimate achievement of a *United States of Africa*'.<sup>152</sup> From this point, the consciousness of continental integration became ingrained in the corpus of the pan-Africanism narrative. Ironically, it also laid the foundation for the idea of integrating Africa on a regional basis.<sup>153</sup>

The independence of Ghana in 1957 provided Nkrumah with the solid base to vigorously pursue the African unity project.<sup>154</sup> Nkrumah's assertion that Ghana's

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<sup>148</sup> Browne argues that the origins of pan-African integrative agenda can be traced back to the ancient kingdoms of West Africa. He writes that kingdoms such as Ghana, Mali and Songhai encompassed several ethnic groups and ecological zones. See Browne D, 'Pan-Africanism and the African Union'. Available at <http://www.siue.edu/~mafolya/JournalInfo/Vol-2/Issue%201%20revised.pdf> (Accessed 20 October 2009).

<sup>149</sup> See Thompson (1969) 28.

<sup>150</sup> Ibid.

<sup>151</sup> Nkrumah traveled to France in order to consult with Francophone West African intellectuals such as Lamin Gueye, Léopold Senghor, Sourou-Migan Apithy and Houphouët-Boigny. See Ibid, 90.

<sup>152</sup> Legum (1962) 32-33; Thompson (1969) 90-91; Ajala A, *Pan Africanism: Evolution, progress and prospects*. London: St. Martin Press (1973) 12.

<sup>153</sup> In 1942, Nkrumah remarked that all West African colonies 'must first unite and become a national unity, absolutely free from the encumbrances of foreign rule, before they can assume the aspect of international cooperation on a grand scale'. Cited in Asante (1997) 32.

<sup>154</sup> Nkrumah's critics, however, describe his pan-African project as a megalomaniac drive. Omari points out that 'Nkrumah sacrificed Ghana on the altar of pan-Africanism, and for his grandiose dreams of African leadership'. See Omari T, *Kwame Nkrumah: The anatomy of an African dictatorship*. London: C. Hurst & Company (1970) 2; see also Meredith (2005) 187. Mazrui also describe Nkrumah as 'a great African but

independence was incomplete without the total independence of other African states not only reinforced the solidarity message inherent in the pan-Africanist thought, it also demonstrated the readiness to give practical effect to the integrative agenda. Building on the momentum of the 1945 Fifth Pan-African congress in Manchester<sup>155</sup> and the 1946 West African National congress, Nkrumah convened the first conference of independent African states in 1958. The conference was attended by the eight already independent African states – Ethiopia, Libya, Liberia, Morocco, Sudan, Tunisia, the United Arab Republic and Ghana. The participating states agreed to establish a Joint Economic Research Committee, charged with the responsibility of promoting trade among African countries, coordinate economic planning and investigate the feasibility of an African common market.<sup>156</sup>

The Second Conference of Independent African States (CISA) was held in Addis Ababa in 1960. In addition to the eleven African states already independent,<sup>157</sup> invitations were sent to yet to be independent African states such as Nigeria, Mali Federation, Congo Kinshasa, Madagascar and Somalia.<sup>158</sup> The conference recommended, amongst other provisions, the establishment of a joint African Development Bank, a joint African Commercial Bank and a preferential trade area.<sup>159</sup> The Ghanaian delegation, supported by their Guinean counterpart, advocated a political union while the Nigerian (who had not yet become independent) and Liberian delegations felt such call was premature.<sup>160</sup> The resultant effect of this was the emergence of two groups -

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not a great Ghanaian'. See Mazrui A, *Nkrumah's legacy and Africa's triple heritage: Between globalisation and counter-terrorism*. Accra: Ghana University Press (2004) 4.

<sup>155</sup> The Manchester conference marked a turning point in the history of Pan-Africanism because for the first time, Africans took a leading part in the deliberations and the resolutions that followed. See Ajala (1973) 10-1

<sup>156</sup> Final Communiqué of the Conference of Independent African States, 15 April to 22 April, 1958, in Thompson (1969) 348-9.

<sup>157</sup> Cameroon, Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, Sudan, Togo, Tunisia and the United Arab Republic.

<sup>158</sup> Ajala (1973) 25.

<sup>159</sup> Resolution of the Second Conference of Independent African States, June 15-24, 1960, in Legum (1962) 158.

<sup>160</sup> *Ibid*, 46-47.

Casablanca and Monrovia - with differing views on African integration. The Casablanca group was a juxtaposition of two elements: an immediate political union and functional cooperation.<sup>161</sup> As Nweke observes, the element of political union within this group gave birth to the 1961 Ghana-Guinea-Mali Union (Union of African States) while the functional element was reflected in the provisions of the Casablanca Charter.<sup>162</sup> On the other hand, the Monrovia group was united in their call for functional cooperation at regional levels as the best approach.<sup>163</sup> The creation of the Organisation of African Unity (OAU) in 1963 was the culmination of decades of efforts aimed at giving the debate on unity a practical effect. Although the OAU Charter represented a triumph of a state-centric, functional cooperation, it was able to unite the differing ideologies under the same banner.

Although the initiatives outlined above exposed the cleavage that existed, and still exists, in relation to the *modus operandi* of African integration, it helped in forging a template for the on-going debate on integration. The idea of 'Africa' might have started as a sentimental attachment to a common heritage; the setting up of institutions both at the regional and continental levels have all contributed to moving pan-Africanism from the realm of romanticism to a realistic and practical objective. Whether through the creation of a Pan-African Parliament (PAP) or the New Partnership on Africa's Development (NEPAD) or the African Peer Review Mechanism (APRM) or the African Charter on Human and Peoples' Rights (ACHPR), pan-Africanism continues to be expressed in nuanced and adaptive forms.

Like any other philosophical theme, pan-Africanism is susceptible to manipulation. When post-independent elites decided to entrench dictatorship, especially through one-party state ideology, African values of collectivism and

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<sup>161</sup> Nweke G, 'The Organisation of African Unity and intra-African functionalism'. *Annals of the American Academy of Political and Social Sciences*. 489 (1987) 136; see also Legum (1969) 56-7.

<sup>162</sup> Nweke (1987) 136.

<sup>163</sup> Legum (1969) 56

consensus were erroneously brandished.<sup>164</sup> When African dictators argue that pre-colonial Africa knew no form of party politics and that community decisions are arrived at through consensus, they cleverly leave out the methodology of how such consensus was arrived at and how dissensions were handled. Political elites conveniently ignore the traditional constitutional principle of checks and balances. As Elias observes, pre-colonial African societies employed some form of control over the paramount king.<sup>165</sup> Elias' analysis is worth quoting:

It is fair to say that the constitutional principle has long been established that, if a king or paramount chief abuses his power, subordinate chiefs have the right to either depose him or to secede from the kingdom with their own people...among the Yorubas, the King would in former times be requested by his chiefs to "open the calabash", that is, to commit suicide by voluntarily taking poison or to go into voluntary exile ... in chiefless societies, somewhat different principles apply: here, the chief of the chief-in-council is invariably replaced by a council of elders.<sup>166</sup>

He further quotes the observation of a former colonial administrator in Gold Coast (now Ghana):

The Gold Coast native is no fool...sovereignty in the Gold Coast tribe lies in the people themselves who elect their chiefs and can, if they desire so, deprive them of office. Each chief is, in fact, but the mouth-piece of his State (Oman) Council,

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<sup>164</sup> Mazrui (2004) 5-6. Robert Mugabe also used the 'traditional-Africa-logic' to justify the imposition of a one-party state in Zimbabwe in the mid-1980s:

You never have two chiefs in a given area. There is only one chief. And various people meet to express their views. Some views may be critical of the chief but at the end of the day, it is the generality of the people's desire which becomes either the rule or the way of life for that particular region.

Cited in Shaw W, 'Towards one party state in Zimbabwe.' *Journal of Modern African Studies*. 24/3 (1986) 377. The former Ivorian president, Houphouet-Boigny also famously proclaimed that African chief cannot know his successor. See Adebayo W, 'Now, the empire strikes back'. *Africa Today*. November 2009, 8; see also Meredith (2005) 167-170.

<sup>165</sup> Elias T, *Africa and the development of international law*. Leiden: Sijthoff (1972) 37-40; see also Elias T, *The nature of African customary law*. Manchester: Manchester University Press (1965) 8-36.

<sup>166</sup> Elias (1972) 38-39; see also Adaramola F, *Basic jurisprudence*. Lagos: Nayee Publishing (2002) 142-143.

without whose approval no chief can perform any executive or judicial act. Accordingly, when the Heads of Chiefs of a province are summoned to the Provincial Council in order, say, to elect representatives of their people as Members of the Legislative Council, each Chief carries with him instructions which he is to pursue and the manner in which he is to record his vote...in order to satisfy themselves that the Head Chief carries out his duties in the manner which the State Council has prescribed, he is accompanied by eight councillors who report the result of the mission on its return home. Could anything be more democratic or more representative of the wishes of a people?<sup>167</sup>

The foregoing exposition exposes the moral bankruptcy of post-colonial elites, who in an attempt to pursue an enlightened self interest, engineered a revision of Africa's history. Even if one was to accept that consensus form the bedrock of traditional African society, it is difficult to understand that people must be intimidated or coerced in order to arrive at some form of manipulated consensus.

The challenge, which is the main thrust of this thesis, is to translate pan-Africanism or the idea of 'Africa' into a transformative agenda. Africa, in the words of Mazrui, 'must stand ready to selectively borrow, adapt, and creatively formulate its strategies for planned development'.<sup>168</sup> The ability to adapt concepts such as regional integration and supranationalism to African realities and to also use them as developmental tools should be the key goal.<sup>169</sup> Beyond the rhetoric of pan-Africanism and the 'United States of Africa', efforts should be geared towards aligning the practicalities of regional cooperation with local specificities and the developmental needs of the African populace. It should draw from traditional African values, which ensures broad-based community participation in matters that affect the common good.

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<sup>167</sup> Ibid.

<sup>168</sup> Mazrui A, 'Africa must not just remain a learner'. *Daily Monitor* (Uganda). Available at [http://www.monitor.co.ug/artman/publish/opinions/Africa\\_must\\_not\\_just\\_remain\\_a\\_learner\\_71811.shtml](http://www.monitor.co.ug/artman/publish/opinions/Africa_must_not_just_remain_a_learner_71811.shtml) (Accessed 30 September 2008).

<sup>169</sup> This is discussed below.



### 2.3.2 Theoretical perspectives on African integration

To rule out a step by step progress towards African unity is to hope that the Almighty will one day say, 'Let there be unity in Africa', and there shall be unity; or to pray for a conqueror. But even a conqueror will have to proceed step by step.

Julius Nyerere<sup>170</sup>

Our objective is African Union now. There is no time to waste. We must unite now or perish.

Kwame Nkrumah<sup>171</sup>

One thing that African integration does not lack is a plethora of theoretical suppositions. Since the colonial era, African intellectuals have, depending on their ideological beliefs and location, offered their views on how to proceed with African integration. If colonialism was the catalyst for the quest for unity, the paradox of Africa's underdevelopment shaped, and continues to shape, the debate on African integration.<sup>172</sup> The unanimity of ideas in respect of unity does not, however, extend to the methodology of attaining such goal. Numerous sobriquets have been used to define the differing opinions on African integration.<sup>173</sup> Basically, theoretical perspectives on African integration can be classified under three schools of thought: idealists, realists and idealists-cum-reterritorialists. This categorisation is based on the philosophical approach of each group to the idea of African integration. While certain groups advocate the pursuance of African integration based on the realities on ground (inherited

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<sup>170</sup> Nyerere J, *Freedom and unity uhuru na umoja: A selection from writings and speeches 1952-1965*. Oxford: Oxford University Press (1966) 302.

<sup>171</sup> Nkrumah K, 'Address to the conference of African heads of state and government, 1963, in *Revolutionary path*. London: PANAF (1973) 233-234.

<sup>172</sup> Writing in 1963, Nkrumah outlines the abundance of natural resources on the continent and argues that only through 'a gigantic self-help programme' can Africa realise its potential. See Nkrumah (1963) 150-151; see also *New Partnership for Africa's Development* (2001) 3. The developmental feature of regional integration is discussed below.

<sup>173</sup> Agyeman for example use terms such as 'militant versus gradualist' and 'all-out Pan-Africanist versus the territorial Patriot-cum-Pan Africanist.' See generally, Agyeman O, *Nkrumah's Ghana and east Africa: Pan-Africanism and African interstate relations*. Rutherford: Fairleigh Dickinson University Press (1992) 78-95. Legum use terms like 'political union (or organic union)' and 'functional cooperation'. See Legum (1962) 57; Maluwa refers to 'absolute integrationists' versus 'minimal integrationists'. See Maluwa T, 'Fast-tracking African unity or making haste slowly? A note on the amendments to the constitutive act of the African Union'. *Netherlands International Law Review*. 51/2 (2004) 201.

colonial boundaries and understanding the differences that exists), others propound either conjuring an 'African leviathan' or a cartographic rearrangement of African boundaries. This section will thus chronicle selected thoughts of Africans on the issue of integration, along the lines of the above-mentioned schools of thought.

**a) *The idealists – Africa must unite now!***

The idealists hinge the development and relevance of Africa on the immediate establishment of a 'United States of Africa' or a 'Union Government for Africa'.<sup>174</sup> Using the United States of America as a referential framework,<sup>175</sup> this school of thought envisages a single, 'Cape-to-Cairo' administration, responsible for implementing coordinated and unified economic and political policies. The aim is to leapfrog the continent from the nadir of underdevelopment to a position of prosperity and relevance within the comity of nations.<sup>176</sup> Nkrumah avers that such union:

need not infringe the essential sovereignty of the African states. These states would continue to exercise independent authority, except in the fields defined and reserved for common action in the interest of the security and orderly development of the whole continent.<sup>177</sup>

He further recommends that such Union should pursue three objectives: overall economic planning on a continental basis; unified military and defence strategy;

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<sup>174</sup> See e.g. Nkrumah (1963) 163-164; see also Nkrumah (1973) 277-297.

<sup>175</sup> Nyerere points out that the fact that Nkrumah, the major proponent of this idea, went to school in the United States of America largely influenced his ideological position on African unity. He opines: 'Kwame [Nkrumah] went to Lincoln University, a black college in the US. He perceived things from a US history, where 13 colonies revolted against the British formed a union'. Cited in Mwakikagile G, *Nyerere and Africa: End of an era*. Las Vegas: Protea Publishing (2002) 300.

<sup>176</sup> Nkrumah (1963) 163-164.

<sup>177</sup> *Ibid*, 218. In line with this, Nkrumah ensured that the Ghanaian constitution stipulated the partial or wholesale surrendering of sovereignty as a contribution towards the attainment of continental unification. See Nkrumah K, *I speak of freedom*. New York: Praeger (1961) 221. Guinea, Mali, Tunisia and Egypt also provided for limitation of sovereignty in their constitutions. See Legum (1962) 66.

and a unified foreign policy and diplomacy.<sup>178</sup> On the institutional architecture of such Union, Nkrumah, in 1964, suggests:

This Union of Government shall consist of an Assembly of Heads of States and Governments headed by a President elected from among the Heads of State and Government of the Independent African States. The Executive of the Union Government will be a Cabinet or Council of Ministers with a Chancellor or Prime Minister as its head, and a Federal Housing consisting of two Chambers – The Senate and a House of Representatives.<sup>179</sup>

This school of thought rejects the regionalist or nationalist approach to African integration. According to Nkrumah:

The idea of regional federations in Africa is fraught with many dangers. There is the danger of the development of regional loyalties, fighting against each other. In effect, regional federations are a form of balkanisation on a grand scale...the best means...is to begin to create a larger and all-embracing loyalty which will hold Africa together as a united people with one government and one destiny.<sup>180</sup>

Ghaddafi, another proponent of a continental federation, highlights the impracticalities of regional federation. Some of the impediments include language barrier and wars and gross underdevelopment in Africa.<sup>181</sup> He (Ghaddafi) remarks:

The advocates of this theory [regional federations] suggest that we have to wait for Somalia to unite and then Eritrea and Ethiopia. We have to wait for Egypt, Libya, Tunisia, Algeria and Morocco (which is outside the African Union) and

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<sup>178</sup> Nkrumah (1963) 218-220.

<sup>179</sup> Nkrumah (1973) 295-296. In his address to African leaders at the 1965 OAU Summit in Accra, Nkrumah further proposed that in addition to a Union president, the Assembly should elect a number of Union Vice-Presidents. See Nkrumah (1973) 309.

<sup>180</sup> Nkrumah (1963) 214-215.

<sup>181</sup> Ghaddafi M, 'Address by the leader of the revolution at the opening session of the north African popular activists' forum' in Tripoli, Libya (21 June, 2007) 4-8. (On file with the author).

Mauritania, and Sahara to become one state...it is impossible for these regions to establish one state.<sup>182</sup>

Without offering any sound theoretical basis, he (Ghaddafi) leaps to assume that the existence of a continental federal executive authority will ensure that even countries in a state war will be forced to converge under the talismanic spell of 'African unity'.<sup>183</sup> It is this kind of reasoning that has made some commentators to conclude that Ghaddafi lacks the ideological coherence and political sophistication displayed by Nkrumah's thesis on the need for continental unification.<sup>184</sup>

One of the fundamental flaws of this ideology is its lack of a sound theoretical basis. Its adherents point to a shifting of loyalty without providing practicalities or methodology for such a shift. For example, no theoretical exposition is provided on how to measure the general acceptance of this idea by the African populace except for anchoring it on an emotional pan-Africanist ideology. Neither is this idea anchored to democratic values. Post-colonial African elites like Nkrumah and Sekou Toure simply assumed position of the essential alchemists, garbed with the superior intellectual prowess to dictate the course of African history.<sup>185</sup>

This line of reasoning stems from the domestic credentials of its major proponents. A roll call of the proponents of this ideology reveals a pattern of

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<sup>182</sup> Ibid, 5.

<sup>183</sup> Ibid, 6.

<sup>184</sup> Maluwa (2004) 6.

<sup>185</sup> Mazrui & Tidy put it aptly:

Paradoxically, however, Nkrumah became the main obstacle to unity in Africa. In his fanatical adherence to idea of Union Government of all Africa and his opposition to regional grouping ... he alienated other African heads of state in the early 1960s.

See Mazrui A & Tidy M, *Nationalism and new states in Africa*. London: Heinemann (1985) 63. At the 1964 OAU summit in Cairo, Nyerere denounced the approach of the federalists, of which Nkrumah was an arrowhead, as 'propaganda'. He notes 'Nothing could be more calculated to bring ridicule to the whole concept of a continental Government in Africa than this incessant and oft-repeated propaganda ...' See Nyerere (1966) 301.

personality cults, suppression of dissension, dogmatic ideologies and a tendency to personalise the unification discourse.<sup>186</sup> This is not to say that other African leaders who espouse different integration ideologies did (and do) not have personal agendas, nevertheless, the issue of continental unification is a sensitive matter that requires utmost exemplary qualities. When leaders operate repressive regimes and in the same breath advocate a 'United States of Africa', it is only natural that people express cynical views on how such leaders intend to either run or fit into the administrative structure of a continental union.<sup>187</sup>

Another flaw is that this paradigm makes the assumption that Africa is homogenous. In an attempt to present a common front, it glosses over the deep cleavages that exist on the continent. There are vast differences - sociological, political, economic and cultural - between countries and regions on the continent. Despite the prescriptions of regional instruments and international donors, democratic ideals are still an exception rather than the rule on the continent. The unevenness of democratic practise, which is evident in the fewer numbers of fair electoral process, the growing number of dictators and the suppression of opposition reveals the absence of shared norms and values. The question is whether a democratic South Africa or Mauritius would feel comfortable to enter into any federal union with a Libya or Zimbabwe? The impracticality of this lies in how administrative structures in the former will interface with the ones in the latter, where institutions are either ineffectual or non-existent.

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<sup>186</sup> One of the accusations often leveled against Nkrumah and Ghaddafi is their ambition to become the president of a 'United States of Africa'. See e.g. 'Qaddafi, ruler of Africa? *The Economist*, September 16-22 (2000) 51; see also Legum (1962) 54-55. For a critical assessment of post-colonial elites, see e.g. Meredith (2005); Omari (1970); Mazrui (2004).

<sup>187</sup> Mazrui surmised Nkrumah's legacy thus: 'His dream of trying to create "one-Africa by abolishing separate states" was an inspiration. His policy of trying to "create one Ghana by abolishing separate political parties" was usurpation'. See Mazrui (2004) 3; see also Mazrui & Tidy (1985) 60-62.

As will be shown below, the economies of most African countries are largely underdeveloped.<sup>188</sup> Suffice to add that since regional integration requires a uniform level of sound economic development across member states, the case for an immediate federal African state appears premature. In addition, the disintegrative tendencies within certain African states need to be properly addressed before any attempt to create a federal union. While it can be argued that these conflicts are a result of the arbitrary balkanisation of the continent by colonialists, there is no proof that replacing the fault lines of African states - with their internal contradictions - with a single government would obliterate these problems. Rather, African integration requires a more fundamental approach in the form of uniform adherence to democratic norms by member states. The evenness of democratic practise can help establish the basis for unity – shared norms and values. This point will be further elaborated upon in subsequent chapters.

The emotional and rhetorical appeal of a federalist ideology remains unassailable; however, the inherent contradictions explained above makes it hard to sell. The urgency of integration in Africa does not necessarily imply that we ignore the core fundamentals. In fact, it, the core fundamentals, should be the guiding philosophy of a federal African state.

### ***b) The realists - unity through the building blocks***

While the realists accept the principal goal of a 'United States of Africa' or 'Union Government for Africa', they differ with the idealists on the time frame or modus of achieving this objective.<sup>189</sup> The realists advocate a regional-functional approach. What this implies is that African unity should be conceptualised through the establishment of regional federations, which would then cede their sovereignty to a larger continental union. The process of attaining such regional

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<sup>188</sup> Mo Ibrahim, the Sudanese philanthropist, bluntly notes, 'the fact is a large number of African countries are not viable ... If they were companies, they would have been declared bankrupt. You switch off the light; you say bye-bye, it doesn't work'. Cited in *New African Magazine* (February 2010) 12.

<sup>189</sup> See e.g. Agyeman (1992) 78-95.

federation should thus be through the orthodox functional approach. Below is an analysis of the realist ideology.

The regional federalists are closer to the idealists in the sense that they propose the establishment of a federated union albeit on a (sub) regional basis. As Kenyatta succinctly puts it, 'I want to see first East Africa united and federated, then the whole of Africa as one'.<sup>190</sup> The rationale behind this thesis is based on the fact that it is easier for states that share similar cultural, administrative and linguistic identities to form a union rather than plunging the whole of Africa, with its internal contradictions and complexities, into a union. According to Nyerere, the advantage(s) of a regional federation lies in the fact that it would enable the area concerned, 'to achieve quickly at least the benefits of greater unity and great strength' and, also, reduce 'the number of states which have to sit down together and agree on the final forms of African unification'.<sup>191</sup> The relative successes of sub-regional organisations in Africa in areas such as monetary integration and the harmonisation of policies vindicate Nyerere's sentiments. Through regional federations, as Nyerere reckoned, the road to an ultimate continental union will be smoothed and made less cumbersome. Nkrumah, however, rejected this theory by arguing that regional federations will only amount to 'balkanisation on a grand scale'.<sup>192</sup> He also perceived this idea as a neo-imperialist agenda, aimed at creating division on the continent.<sup>193</sup>

Intra-African functionalism is an ideology primarily championed by regional federalists as a strategy for ensuring unity, first at the regional level and then at the continental level. Functionalism remains the dominant theme in intra-African integration. The trajectory of African integration has always been defined by the tension between the federalists and the functionalists.<sup>194</sup> The empirical basis of

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<sup>190</sup> Cited in Legum (1962) 65.

<sup>191</sup> Nyerere (1966) 347.

<sup>192</sup> Nkrumah (1963) 214-215.

<sup>193</sup> Agyeman (1992) 82. Nyerere responded to this assertion in the following words: 'To say that the step by step method was invented by the imperialists is to reach the limits of absurdity'. See Nyerere (1966) 302.

<sup>194</sup> Nye (1966) 13-17; Nweke (1987) 135-137.

the functionalist ideology lies in the successful experiments of colonial-inspired functional cooperation<sup>195</sup> that existed in Africa prior to the emergence of the OAU in 1963. The two major functional organisations were the British initiated - East African Common Services Organisation (EACSO)<sup>196</sup> and French inspired - *Union Africaine et Maghreb* (UAM).<sup>197</sup> Based on the prescriptions of orthodox functionalism, intra-African functionalists stress the assignment of functional tasks to transnational institution.<sup>198</sup> However, intra-African functionalism differs from orthodox functionalism in the sense that some of the functional institutions have little or no autonomy and resources (human and material) necessary for effective functioning.<sup>199</sup>

Functionalism has been criticised for being ill-suited to Africa. Since functionalism thrives on the assumption that co-operating states have a developed economy and a virile industrial base, critics argue that these conditions are absent in Africa thus making this theory irrelevant and unsuitable for Africa.<sup>200</sup> As Agyeman notes, the homogeneity of institutional and industrial development is a key feature of European functionalism.<sup>201</sup> Even if Europe is not culturally homogenous, Agyeman posits that similarities exist in ideological

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<sup>195</sup> Colonial administrations in Africa established a number of monetary cooperation arrangement in East Africa, the Federation Rhodesia and Nyasaland, Southern Africa (particularly South Africa, Lesotho, Botswana and Swaziland) and the Franc Zone in west and central Africa. These monetary arrangements were not necessarily to promote exchange rate management and fiscal policy rather they were designed as an expeditious mechanism for colonial administration, especially in relation to the facilitation of international trade and payments. See African Union & Economic Commission for Africa, *Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa*. Addis Ababa: Economic Commission for Africa (2008)183-186.

<sup>196</sup> The EACSO had functional institutions such as East African Railways and Harbours (EAR&H), East African Posts and Telecommunications (EAP&T), and the East African Airways (EAA). See Nye J, *Pan-Africanism and east African integration*. Oxford: Oxford University Press (1966) 136.

<sup>197</sup> The UAM had functional institutions such as the *Union Africaine et Malgache de cooperation economique*, *Union Africaine et Malgache des postes et telecommunications* and *Air Afrique* (These are economic, postal and air services). As Nweke observes, the UAM contributed immensely to the charting of a continental functionalist trajectory. See Nweke (1987) 136-137.

<sup>198</sup> The contents and structures of regional organisations both at the continental and sub-regional levels all contain elements of functionalism, that is, institutions charged with the responsibility of implementing functional tasks like education, science and technology, transport and science. For an outline of functional organisations in Africa, see <http://www.issafrica.org> (Accessed 1 November 2008).

<sup>199</sup> Nweke (1987) 140-141.

<sup>200</sup> Mutua M, 'Why redraw the map of Africa: A Moral and Legal Enquiry'. *Michigan Journal of International Law*. 16 (1995) 1168.

<sup>201</sup> Agyeman (1990) 8.



leanings of political parties and programmes of interest groups across European frontiers.<sup>202</sup>

Another reason cited for the unsuitability of intra-African functionalism is the low level of intra-African trade and investment (see table 2.3 below).<sup>203</sup>

**Table 2.3: Intra-arrangement trade in Africa (Percent of total trade)**

	1970	1980	1990	1998	2003
<b>Exports</b>					
CEMAC	4.9	1.6	2.3	2.3	1.4
COMESA	9.7	9.1	8.1	8.9	8.6
ECOWAS	3.1	10.6	8.9	11.1	10.1
WAEMU	7.9	12.6	15.3	13.0	16.2
SADC	9.4	2.7	6.9	6.0	6.0
Africa	8.8	5.2	7.3	10.5	9.3
<b>Imports</b>					
CEMAC	5.0	3.7	3.6	3.9	2.9
COMESA	6.7	2.8	3.4	3.9	5.8
ECOWAS	3.3	10.2	14.9	12.9	11.5
WAEMU	6.4	7.6	14.8	9.8	13.3
SADC	4.9	3.8	6.0	6.1	6.3
Africa	7.4	5.1	7.9	9.2	10.2

Source: International Monetary Fund, *Direction of trade statistics*. Available at <http://www.imf.org/external/pubs/ft/wp/2005/wp0536.pdf> Accessed (23 June 2007).

The conventional theory of integration holds that if countries within a particular region remove tariffs (i.e. forming a free trade area or customs union), then

<sup>202</sup> Ibid, 8-9.

<sup>203</sup> According to statistics, only 5 countries (except for South Africa) dominate intra-African trade. These are Cote d'Ivoire, Nigeria, Kenya, Zimbabwe and Ghana. See Naude W & Krugell W, 'Global integration of Africa versus regional integration'. *South African Journal of Economic and Management Science*. 4/3 (2001) 498.

there will be an increment in the volume of trade among those countries (trade creation).<sup>204</sup> Placing this in an African context, analysts have argued that the fact that most African countries are primary producers in the same range of products,<sup>205</sup> thus making their products competitive rather than complementary, simply eliminates any prospect of trade creation.<sup>206</sup> The externalisation of external tariffs, that is the creation of a customs union, will result in a substantial loss of revenue, especially in countries where customs revenue forms a chunk of government revenue.<sup>207</sup> If African states decide to pursue functionalism, in spite of the above constraints, it is argued that lowest income countries within the union will suffer real income loss due to trade diversion.<sup>208</sup> Venables illustrates this point in the following words:

Membership in an FTA changes the sources from which products are supplied to member country markets, increasing supply from the partner countries as these receives preferential treatment, but possibly also reducing supply from domestic production and from the rest of the world. To the extent that overall supply is increased and lower cost of imports from the partner country replace higher cost (previously protected) domestic production.<sup>209</sup>

The Common Agricultural Policy (CAP) of the EU has been cited as an example of trade diversion.<sup>210</sup> As Fernandez & Portes observe, the CAP entails that certain European countries have to abandon buying cheaper agricultural products from other parts of the world and rather purchase them from high-cost

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<sup>204</sup> Agyeman (1990)10; see also Gambari I, *Political and comparative dimensions of regional integration: The case of Ecowas 2*. London: Humanities Press (1991) 7-8.

<sup>205</sup> Four non-manufacturing goods constitute 50% of intra-African trade: petroleum, cotton, maize and cocoa. See Naude & Krugell (2001) 498.

<sup>206</sup> Gambari (1991) 7-8; Agyeman (1990) 10-11.

<sup>207</sup> ECA (2004) 12. For example, study has shown that Zambia and Zimbabwe could loose substantial government revenue amounting to 5.6% and 9.8% respectively if free trade is introduced in the Southern African Development Community (SADC). See Venables A, 'Regional integration agreements: A force for convergence or divergence?' *World Bank Policy Research Working Paper no. 2260* (1999) 6.

<sup>208</sup> See e.g. Ibid, ii.

<sup>209</sup> Ibid, 3-4.

<sup>210</sup> See ECA (2004) 11-12; Fernandez R & Portes J, 'Returns to regionalism: An analysis of nontraditional gains from regional trade agreements'. *The World Bank Economic Review*. 12/2 (1998) 200-201.

European sources.<sup>211</sup> This results in domestic price increases for such products.<sup>212</sup>

As a result of the foregoing analysis, some have suggested that African countries should rather pursue a free trade agreement with higher income regions or specific higher income nations.<sup>213</sup> Others have also suggested either a federal arrangement<sup>214</sup> or, as will be discussed below, the outright reconfiguration of African boundaries.

### **c) The idealists-cum-reterritorialists – Let's redraw the map!**

The thesis of this school of thought is simple yet full of complications: tear down the colonial boundaries and replace them with pre-colonial, ethnic-sensitive frontiers.<sup>215</sup> The underlying veracity of this thought stems from the fragmentation of the continent by European powers at the 1884/85 Conference of Berlin.<sup>216</sup> The lines drawn by these European powers were insensitive<sup>217</sup> to

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<sup>211</sup> Fernandez & Portes (1998) 201.

<sup>212</sup> Ibid.

<sup>213</sup> Naude & Krugell (2001) 501.

<sup>214</sup> See Agyeman (1990) 27-8.

<sup>215</sup> See generally, Mutua (1995) 1113-1176; see also Bello A, 'The boundaries must change'. *West Africa*, April (1995) 546; Gakwandi A, 'Towards a new political map of Africa' in Abdul-Raheem T (ed) *Pan-Africanism: Politics, economy and social change in the 21<sup>st</sup> Century*. London: Pluto (1996) 87.

<sup>216</sup> According to Dowden, 'all but two of Africa's concocted countries combine several ethnic groups.' See Dowden (2008) 3.

<sup>217</sup> The statement by a British official who was involved in drawing boundary between Nigeria and Cameroon aptly captures the triviality and insensitive approach of the colonial experts. He remarks:

In those days, we just took a blue pencil and a rule, and we put down at Old Calabar, and drew that line to Yola...I recollect thinking when I was sitting having an audience with the Emir of Yola, surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.

Cited in Mutua (1995) 1135. Also, another colonial administrator, Lord Salisbury, sarcastically remarked;

We have been engaged in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.

Cited in Hargreaves J, 'The making of boundaries: Focus on west Africa' in Asiwaju A (ed) *Partitioned Africans: Ethnic relations across Africa's international boundaries 1884-1984*. Lagos: University of Lagos Press (1985) 22.

the extent that in some cases it separated communities that shared common ancestry, customs and socio political and economic institutions.<sup>218</sup> As Asiwaju observes:

In many instances, such as the Uganda-Sudan frontier through the Kakwa territory, the boundaries have separated communities of worshippers from age-old sacred groves and shrines. In other instances, well exemplified by the Somali, the water resources in a predominantly pastoral and nomadic culture area were located in one state while the pastures were in another.<sup>219</sup>

Much has been written about the (illegal) acquisition of African territories. In an attempt to bring the continent under the European sphere of influence, depraved and illegal methods were employed to dispossess Africans of their territories.<sup>220</sup> For example, the King of Lagos, Dosumu, and his chiefs were forced to sign a treaty of cession in 1861 which stipulates:

I, Docemo, do with the consent and advice of my Council, give transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors forever, the Port and Island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging, and as well the profits and revenues and direct, full and absolute dominion and sovereignty of the said port, island and premises, with all the royalties thereof, freely, fully, entirely and absolutely. I do also covenant and grant that the quiet and peaceable possession thereof shall, with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such persons as Her Majesty shall thereunto appoint, for her use in the performance of this grant; the inhabitants of the said island and territories, as the Queen's subjects, and under her

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<sup>218</sup> Asiwaju A, 'The Conceptual Framework', in Asiwaju A (1985) 2-3. For a detailed tabulated list of partitioned ethnic groups in Africa, see Asiwaju (1985) 256-258. Brownlie, however, argues that the European powers did not always ignore ethnological considerations when delimiting African frontiers. See Brownlie I, *African boundaries: A legal and diplomatic encyclopaedia*. Berkeley: University of California Press (1979) 6.

<sup>219</sup> Ibid, 3. For example, the United Kingdom and Ethiopia entered into an agreement in 1954 that nomadic Somali would be allowed to graze their animals across the border (in Ethiopia) but upon the independence of British Somaliland in 1960, Ethiopia decided not to honour the agreement. See Oyeboode (2003) 23.

<sup>220</sup> The British used Treaties as a pretext for acquiring territories. In most cases, the content of such treaties were either misinterpreted to African chiefs or coercive measures were employed to make them sign. There is no gainsaying that these measures are blatantly in violation of the principles international law, especially rules relating to the validity of treaties. See e.g. Ibid, 90-100; Mutua (1995) 1130-1134.

sovereignty, crown, jurisdiction, and government, being still suffered to live there.<sup>221</sup>

Such was the fate of the continent under what is aptly termed ‘the scramble for Africa’. Although some argue that partitioning is not peculiar to Africa,<sup>222</sup> the resultant effect of this colonial adventure is the designation of Africa as the world’s most fragmented region.<sup>223</sup> The presence of 15 landlocked states in Africa, some of which are not economically viable, is evidence of the arbitrariness of African frontiers.<sup>224</sup>

It is against this backdrop that calls have been made that ‘we should sit down with square-rule and compass and re-design the boundaries of African nations’.<sup>225</sup> Mutua questions the moral and legal legitimacy of ‘colonial’ states by arguing for a compression of the 54 states in Africa into 14 large entities.<sup>226</sup> According to Mutua, the criteria of such cartographic exercise include factors such as historical circumstances; population density; resources and economic viability and ethnic, cultural and geographic variables.<sup>227</sup> In the same vein, Bello views that the states trapped within colonial frontiers have failed.<sup>228</sup> Citing the example of the collapse of the Soviet Union, Bello calls for the redrawing of Africa’s boundaries on ‘a rational and logical basis to take cognisance of the linguistic, cultural and ethnic diversities as is the case with most successful

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<sup>221</sup> Oyeboode (2003) 90-1.

<sup>222</sup> Asiwaju notes that the boundaries of African countries such as Nigeria, Senegal and Mozambique are older than the boundaries of countries like Austria, Hungary, Poland, Greece and Finland. See Asiwaju A, ‘The Global Perspective and Border Management Policy Options’ in Asiwaju (1985) 233, 248.

<sup>223</sup> Akonnor notes that Africa has 165 demarcated borders. See Akonnor K, ‘Stuffing old wine in new bottles: The case of the African Union’ in Mazama A (ed.) *Africa in the 21<sup>st</sup> Century: Toward a new future*, London: Routledge (2007) 200.

<sup>224</sup> Englebert A, Tarango S & Carter M, *Dismemberment and suffocation: A contribution to the debate on AfricanbBoundaries*. Pomona College (2001) 4. Available at [http://www.politics.pomona.edu/penglebert/borders\\_FINAL.pdf](http://www.politics.pomona.edu/penglebert/borders_FINAL.pdf) (Accessed 1 November 2008). African states, according to Agyeman, are ‘plagued by the deficiency trilogy of smallness, unnaturalness and illegitimacy’. See Agyeman (1990) 6.

<sup>225</sup> This statement is credited to the Nigerian Nobel laureate, Wole Soyinka. Cited in Ramutsindela (2001) 96.

<sup>226</sup> Mutua (1995) 1117-8.

<sup>227</sup> Ibid.

<sup>228</sup> Bello (1995) 546.

nations all over the world.<sup>229</sup> Gakwandi also suggests the redrawing of the political map of Africa into seven states.<sup>230</sup> The rationale, according to Gakwandi, behind this includes the elimination of border disputes, easing of ethnic tensions, solid economic development and the emergence of politically and economically viable states.<sup>231</sup>

Critics have however questioned the feasibility of redrawing the boundaries of African states. As Ramutsindela puts it, '[This] exhibits serious defects, not least because they replicate the Berlin territorial fiasco and also reflects the vicious circle of territorial trap'.<sup>232</sup> A question that stands out is whether the regrouping of African states along ethnic lines is an antidote to conflicts or underdevelopment. If one was to consider the example of Somalia, a mono-ethnic state, which nevertheless slipped into large-scale chaos, then the answer might not necessarily lie in the reconfiguration of Africa's boundaries. As it has been argued, arbitrary boundaries are not the sole source of conflicts on the continent.<sup>233</sup> As Englebert et al note, the partitioning of homogenous groups only leads to conflict if such groups share strong political identities and nomadic lifestyles.<sup>234</sup> Even where they share such a bond, the process of nation-building in some African states has tempered claims for ethnic unification.<sup>235</sup>

Apart from the apparent logistical nightmare, the redrawing of Africa's map remains impossible due to the fact that African elites will never reach a consensus on the *modus vivendi* of such exercise. The pragmatic approach will be to de-emphasise the importance of these arbitrary borders by turning them

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<sup>229</sup> Ibid.

<sup>230</sup> Gakwandi (1996) 87.

<sup>231</sup> Ibid.

<sup>232</sup> Ramutsindela (2001) 98.

<sup>233</sup> Ibid; Englebert et al (2001) 5-7; Brownlie (1979) 14-15.

<sup>234</sup> Englebert et al (2001) 6.

<sup>235</sup> Before independence, the Masai ethnic grouping in Kenya and Tanzania petitioned the Colonial authorities for reunification but after independence, this claim has evaporated largely because they have reconciled themselves to the reality of their 'new' homes. See e.g. Ibid. Another factor that reduces the call for border revision is agreements which allowed frontier populations to pursue their everyday economic and social activities without restrictions. See Brownlie (1979) 171, 246, 401, 1051-61.

into a productive and positive ‘theatre of operations’.<sup>236</sup> Asiwaju identifies the three ways of doing this:

(1) Development programmes with specific reference to border areas; (2) border areas within the wider context of bilateral relations and co-operation between the states concerned; and (3) border areas in the still wider context of functional international organisations aimed at regional grouping or integration of the several states in geographically contiguous areas.<sup>237</sup>

Of main concern to this discourse is the third recommendation, which stresses the integrative agenda of Africa’s boundaries. Like Europe, with similar concerns of (arbitrary) partitioning,<sup>238</sup> concerted efforts should be made at obliterating the scars of partitioning through the establishment of regional and continental customs union and common market. An arrangement which allows a Somali to, without any bureaucratic encumbrance, cross the Kenya frontier to either pay courtesy visit to relatives or trade, can only encourage harmonious neighbourliness. As it has been rightly argued, friendly relations between and among African states should start from cultivating conditions for development and respect for customary laws in partitioned communities.<sup>239</sup> As Barkindo admonishes:

[W]e should explore the areas which unite us as Africans and one of the best ways of achieving this must be to study and encourage cultural links across political boundaries – which should be emphasised as points of contact and not of separation.<sup>240</sup>

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<sup>236</sup> Ramutsindela (2001) 100; Asiwaju (1985) 243-245.

<sup>237</sup> Asiwaju (1985) 243-244.

<sup>238</sup> See *Ibid*, 233-6; see also Asiwaju A, ‘Borderlands in Africa: A comparative research perspective with particular reference to Western Europe’ in Asiwaju A & Nugent P (eds), *African boundaries: Barriers, conduits and opportunities*. London: Pinter (1996) 254-9.

<sup>239</sup> See e.g. Phiri S, ‘National integration, Rural development and frontier communities: The case of the Chewa and the Ngoni astride Zambian boundaries with Malawi and Mozambique’ in Asiwaju (1985) 121-4; Barkindo B ‘The Mandara astride the Nigeria-Cameroon boundary’ in Asiwaju (1985) 46; see also Asiwaju (1996) 260.

<sup>240</sup> Barkindo (1985) 46.

### 2.3.3 Searching for an elixir: Is regional integration beneficial to Africa?

A post-integrative era of socio-political and economic upliftment witnessed in Europe is an empirical proof of the development feature of integration. Apart from the old guard (EU-15),<sup>241</sup> new entrants into the EU,<sup>242</sup> especially the Central and East European Countries (CEEC) have recorded significant economic growth. This economic effect is measured based on variables such as the Gross Domestic Product (GDP) per capita growth, investment inflow (factor mobility effect), single market effect and trade effects.<sup>243</sup> Breuss observes that the impact of elimination of trade (export) tariffs on the real GDP of CEECs, over the period 2001-2010, was around 4.5 percent.<sup>244</sup> Trade between the EU-15 and the CEECs (EU-10) rose from 56% in 1993 to 62% in 1995.<sup>245</sup> In addition, CEECs have recorded substantial FDI inflow from EU-15. FDI flows to the EU-10 account for about 40% of GDP.<sup>246</sup> These empirical factors are largely responsible for the EU's designation as a successful regional integration initiative.

Having outlined the foregoing, the question is this: what benefits can Africa derive from integration? The benefits to be derived from regional integration can be classified into two: traditional and non-traditional gains.<sup>247</sup>

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<sup>241</sup> The EU-15 include: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

<sup>242</sup> In 2004, 10 member states from CEEC, also known as the EU-10, joined the EU. They are Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia. In 2007, two more member states from the CEEC joined the organisation: Bulgaria and Romania.

<sup>243</sup> Borota T & Kutan A, 'Regional integration and economic growth: The case of the European Union'. *The Journal of International Trade and Diplomacy*. 2/1 (2008) 94; see also Breuss F, *Macroeconomic effects of EU enlargement for old and new members*. (2001) 4. Available at <http://fritz.breuss.wifo.ac.at/Breuss.PDF> (Accessed 30 November 2008); see also Breintenfellner A, Cuaresmer J, Mooslechner P & Ritzberger-Grunwald D, 'The impact of EU enlargement in 2004 and 2007 on FDI and migration flows: Gravity analysis of factor mobility'. *Monetary Policy and the Economy*. Quarter 2 (2008) 102. Available at [http://www.oenb.at/en/img/mop\\_2008\\_2\\_analyses\\_5\\_tcm16-88559.pdf](http://www.oenb.at/en/img/mop_2008_2_analyses_5_tcm16-88559.pdf) (Accessed 30 November 2008).

<sup>244</sup> Breuss (2001) 6.

<sup>245</sup> European Commission, 'Enlargement, two years after: An economic evaluation'. *Occasional Paper No 24* (2006). Available at [http://ec.europa.eu/enlargement/archives/press\\_corner/newsletter/110506\\_en.htm](http://ec.europa.eu/enlargement/archives/press_corner/newsletter/110506_en.htm) (Accessed 1 December 2008).

<sup>246</sup> Ibid.

<sup>247</sup> See e.g. Fernandez & Portes (1998).



At the core of traditional gains from regional integration is the concept of trade creation.<sup>248</sup> The classical underlying logic of regional integration is that the reduction of trade barriers between countries would enable citizens and firms to obtain goods and services from the cheapest source of supply, thereby, ensuring that production is located based on comparative advantage.<sup>249</sup> To put it simply, trade creation displaces higher cost domestic production in state A with lower cost production from partner state B because tariffs have either been reduced or completely eliminated.<sup>250</sup> The result of this would be an improvement of terms of trade among member states because the removal of tariffs will make goods originating from an integration area less expensive than those from non-member states.<sup>251</sup> As earlier pointed out, this same advantage could also lead to a welfare loss<sup>252</sup> especially for economically weak countries which depend heavily on tariff revenues. For example, analysts have pointed out that the introduction of a free trade area in the Southern Africa Development Community (SADC) would lead to substantial revenue loss for Zambia (5.6%) and Zimbabwe (9.8%).<sup>253</sup> It, has, however been argued that this situation could also provide a stimulus for finding alternative ways of raising funds in such countries.<sup>254</sup>

Another traditional benefit, which is of crucial significance in the African context, is that regional integration brings about an increased market size.<sup>255</sup> The

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<sup>248</sup> Ibid, 200; Venables (2000) 3.

<sup>249</sup> Venables (2000) 3.

<sup>250</sup> Ibid; see also ECA (2004) 11.

<sup>251</sup> Fernandez & Portes (1998) 221.

<sup>252</sup> As Casella postulates

If economics of scale imply that firms located in large countries enjoy lower costs, then the gains from enlarging the bloc will fall disproportionately on small countries, because the entrance of new members diminishes the importance of the domestic market and improves the small countries' relative competitiveness.

Casella A, 'Large countries, small countries and the enlargement of trade blocks'. *European Economic Review*. Vol. 40/2 (1996) 389.

<sup>253</sup> Venables (2000) 6.

<sup>254</sup> ECA (2004) 11. Venables observes that Cambodia introduced value added tax (VAT) after it lost substantial tariff revenues (56%) upon its entry into ASEAN. Venables (2000) 6.

<sup>255</sup> Venables (2000) 7; Fernandez & Portes (1998) 201-2.

balkanisation of Africa, highlighted above, gave birth to mini-states, with small populations and economies. Only five African countries - DRC, Ethiopia, Egypt, Nigeria and South Africa - have a population of more than 30 million.<sup>256</sup> It is thus important that the continent fashion a strategy of combining its markets in order to stimulate investment flows by domestic and foreign investors. For example, the creation of a customs union can serve as incentive to foreign investors to engage in tariff jumping – that is, invest in a member country in order to trade freely with other members.<sup>257</sup> Such investment can spur knowledge and technology transfers and spillovers.<sup>258</sup>

In addition to traditional benefits, there are a number of non-traditional benefits that flow from regional integration. An important benefit in this regard is the existence of a commitment mechanism, either in form of treaties or protocols, which binds member states to minimum standards.<sup>259</sup> By adhering to these standards, member states are in some cases bound to ensure continuity in political and economic reforms, with deviation leading to swift retaliation by partner countries.<sup>260</sup> The condition attached to accession to EU (e.g. democratic reforms) is claimed to be responsible for the consolidation of democracy in former authoritarian regimes in Greece, Spain, Portugal and the CEECs.<sup>261</sup> Where foreign investors know that a certain country is bound by commitment

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<sup>256</sup> Asante (1997) 29.

<sup>257</sup> Fenandez & Portes (1998) 202. Research has shown that integration initiatives such as NAFTA substantially increased FDI in Mexico, and MERCUSOR did the same in Argentina and Brazil. See ECA (2004) 13.

<sup>258</sup> AU & ECA (2006) 81.

<sup>259</sup> Fenandez & Portes (1998) 204-205.

<sup>260</sup> Ibid, 205; Venables (2000) 10. Schmidt highlights that European integration was responsible for major economic reforms in France from the 1960s through to the 1980s. See Schmidt V, *The untold story: The impact of European integration on France in the Mitterrand-Chirac era (1981-1997)*. Paper prepared for delivery at the European Community Studies Association Fifth Biennial International Conference (Seattle, WA, May 29-June 1 1997) 1-2. Available at <http://biblioteca.universa.net/ficha.do?id=13753042-31k> (Accessed 30 November, 2008).

<sup>261</sup> For example, the threat of economic and diplomatic isolation by MERCUSOR was responsible for the prevention of a coup d'état in Paraguay in 1996. See Fenandez & Portes (1998) 208. Ram also observes that European integration was the impetus for large scale political reforms witnessed in Romania in the 1990s. See generally, Ram M, *Romania's reforms through European integration: The domestic effects of European Union law*. 1-23. Available at <http://www.hks.harvard.edu/kokkalis/GSW1/GSW1/20%20Ram.pdf> (Accessed 30 November 2008)

mechanisms, they are likely to invest in such country.<sup>262</sup> Illustratively, where country A, widely known to be a command economy joins a regional organisation that espouses liberal policies, such action will signal to potential investors that country A has adopted liberal policies and thus open for investment.<sup>263</sup>

Regional integration arrangements also enhance bargaining power of member countries in international fora.<sup>264</sup> When countries articulate a common agenda through negotiation as a group, there is the possibility that countries could obtain significant gains. Africa's ambition to be a relevant part of global architecture can only be achieved through multilateral negotiations, not only as a continent but also partnering with other developing nations in the international arena. An entity that represents over 800 million people will definitely carry more weight than one that represents only 20 million people.

Regional integration can also promote cooperation among member states. Regular interfacing among policy makers and other groups bolsters trust, and can in turn minimise the incidence of conflict and instability.<sup>265</sup> In addition, such an arrangement provides a framework for cooperation on sharing of resources (natural and human) and also common problems like pollution and poverty.<sup>266</sup>

The foregoing analysis shows that enhanced cooperation is a useful development strategy. However, the next question is not so much the beneficial nature of regional integration to Africa as it is a question of how the continent can utilise it for its development objectives. Studies have shown both the positive attitude of African countries to regional integration initiatives and also the cost-benefit of regionalism to member states. According to a 2004 research conducted by the Economic Commission for Africa (ECA), over 50% of

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<sup>262</sup> Venables (2000) 10.

<sup>263</sup> Fenandez & Portes (1998) 208-9.

<sup>264</sup> Ibid, 211.

<sup>265</sup> ECA (2004) 14-15; AU & ECA (2006) 84.

<sup>266</sup> ECA (2004) 14-15.

countries involved in regional integration initiatives reported that coordinated macro-economic policies helped control inflation, almost the same number highlighted that it helped reduce budget deficit and about 44% held that it increased the volume of investment.<sup>267</sup> A breakdown of the sectoral impact of regional integration reveals that 50% of member states have benefited from trade and market integration initiatives, 47% from transport, 39% from macro-economic policy convergence, 28% from agricultural and food policy and 26% from energy.<sup>268</sup>

In spite of the foregoing analysis, regional integration by no means represents a singular antidote to Africa's plights. It should rather be viewed as part of an overall development strategy.<sup>269</sup> The benefits highlighted above would not come about as a result of an elitist political resolution to conjure integration; rather it would emerge from concerted efforts to strengthen domestic institutions (political and economic). Only through this can any form of convergence be achieved. Reaping the fruits of integration requires radical and focused decisions. Over and above these sentiments, architects of African integration, sub-regional or continental, should clearly spell out realisable goals and objectives, condition of membership, entrance levels for new members, enforceability mechanisms, and common standards.

#### **2.3.4 Is African integration possible?**

The question posed above strikes at the heart of the issues raised earlier: the appropriate methodology of integrating Africa. Should there be a federal union of African states or an EU type of integration or rather should Africans revert to a pre-colonial frontier configuration? This question also provides the framework for tackling subsequent chapters of this thesis. While this section is not aimed at fully exploring this question, it will only attempt to tease out some of the salient points to be considered later in the thesis. In order to determine the feasibility of

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<sup>267</sup> AU & ECA (2006) 82.

<sup>268</sup> Ibid.

<sup>269</sup> ECA (2004) 22.

African integration, one must consider both internal and external factors that will influence African integration.

*a) Social imperative*

On the internal factors, it is pertinent to consider the sociological implication of the integration narrative. As mentioned earlier, the term 'Africans' is a constructed idea, an idea which is antedated by ethnic affiliations. Ethnic affiliations are so strong that in some cases they transcends national citizenship.<sup>270</sup> Therefore, any attempt to 'impose'<sup>271</sup> an African identity, without paying adequate attention to ethnic complexities and values and how these can inform and nourish the integration debate, can only be disadvantageous.<sup>272</sup> Dowden's observation about Africa's identity is worth quoting in full:

Who would dare make generalisations about Asia based on Bangladesh? Or about Europe based on Greece? ... Even if you divide Africa in three; Africa north of the Sahara, South Africa and its orbit, and the zone in between, there are few common factors within these regions ... Africa's social systems, beliefs and culture are as diverse as its peoples and as disparate as its climates. West Africa feels quite different from East Africa, and even within West Africa you could never mistake Nigeria for Senegal. And neither of them seems on the

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<sup>270</sup> Citing the example of the Chewa and the Ngoni of Zambia, Mozambique and Malawi, Phiri notes that the behavioural pattern of these ethnic groups shows an overriding attachment to cultural ties as opposed to their national domain. See Phiri in Asiwaju (1985) 105-25, 245.

<sup>271</sup> I use this word only to refer to how some post-colonial elites skilfully gloss over ethnic cleavages in an attempt to create a façade of unity and cohesion. As Nye aptly notes:

The choice between them - between tribalism and Pan-Africanism - was not made by any popular plebiscite, but by the educated elite, who have generally opted for Pan-Africanism because of their views about size and power in world politics. They believe that tribal nations would be divided and ruled from outside, whereas a Pan-African nation would mean world power and dignity.

See Nye (1966) 9.

<sup>272</sup> This is not to deny the existence of an attachment to a sense of similarity in values and race among Africans, an attachment that often goes beyond national identity. However, this attachment is only emotional and is yet to be shaped into something concrete. The deplorable state of political leadership and gross underdevelopment on the continent are factors that militate against such goal. Being an African should thus move beyond abstracts and should be defined by socio political and economic upliftment of the African populace.

same planet as Mali. Every time you say 'Africa is ...' the words crumble and break. For every generalisation you must exclude at least five countries.<sup>273</sup>

As Asiwaju tellingly points out, 'partitioned Africans ... should be regarded as ... the basis for extremely valuable ethnological, social and cultural links on which to build surer traditions of international relations on the continent.'<sup>274</sup> Europe's ability to forge unity amidst multiple nationalities and cultural identities should serve as a useful lesson to Africa. As Fontaine observes, the EU has been able to promote economic growth based on 'regional specialities and the rich diversity of traditions and cultures'.<sup>275</sup> The reality of ethnic pluralism on the continent should be channelled into an integrative agenda which promotes diversity, celebrates the values embedded in African culture and promoting programmes which accentuates inclusion. In respect of Association of South-East Asian Nations (ASEAN), Narine observes that the so-called 'ASEAN way' of diplomacy stems from the Malay cultural practices of *musjawarah* and *mufukat*.<sup>276</sup> He further explains:

*Musjawarah* means 'that a leader should not act arbitrarily or impose his will, but rather make gentle suggestions of the path a community should follow, being careful always to consult all other participants fully and to take their views and feelings into consideration before delivering his synthesis conclusions.' *Mufukat* means consensus and is the goal toward which *musjawarah* is directed.<sup>277</sup>

While the EU might appear appealing as a referential framework on a theoretical plane, the reality is that Africa will have to fashion its own approach. Africa's search for lessons must transcend the adoption of EU's institutional architecture and policies. As Olivier & Olivier points out, 'authentic integration in Africa seems possible, but according to architecture still to be discovered and

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<sup>273</sup> Dowden (2008) 10.

<sup>274</sup> Asiwaju (1985) 245-246.

<sup>275</sup> Fontaine P, *Europe in 12 lessons*. Brussels: European Commission (2006) 6.

<sup>276</sup> Narine S, *Explaining ASEAN: Regionalism in south-east Asia*. Boulder Colorado: Lynne Rienner (2002) 31.

<sup>277</sup> Ibid.

designed'.<sup>278</sup> Such 'architecture' should be autochthonous and sensitive to local specificities. Nevertheless, it should also include elements that have been responsible for the success of other integration initiatives. These include variables like peace and security, good governance and human rights.

*b) Democratic imperative*

Be it at the sub-regional or continental levels, architects of African integration should make concerted efforts at fashioning a consensus on democratic values. As Dare rhetorically intones,

As the world struggles to build new structures ... isn't it time also to reconsider a system that subjects fragile developing countries to violent spasms every four or five years, keeps them in suspended animation in between, and yet solves nothing and settle nothing?<sup>279</sup>

While it is not suggested that Africa should devise a system that encourages the ubiquitous 'sit-tight syndrome',<sup>280</sup> African democracy should be adapted to reflect what Ake calls 'socio-cultural realities'.<sup>281</sup> Without sacrificing the inherent values and principles of democracy, Ake argues that the starting point of democracy in Africa should be an emphasis on the communal over the individual – a system which prioritises social welfare and common good.<sup>282</sup> He, however, admits that a unique African democracy will not emerge from a rational blueprint but rather, from 'practical experience and improvisation in the course of a hard struggle'.<sup>283</sup> The reality is that Africa cannot afford to pursue concrete unity without some form of common *grundnorm*. Africa's tapestry of rich cultural traditions is an adequate reference point for developing such basic

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<sup>278</sup> Olivier G & Olivier M, 'Models of regional integration: The European Union and the African Union', *SA Public Law*. 19/1 (2004) 362.

<sup>279</sup> Dare O, 'Up from misbegotten orthodoxies'. *The Nation* (Nigeria) 4, November, 2008. Available at <http://www.thenationonline.com/dynamicpage.asp?id=68527> (Accessed 4 November, 2008).

<sup>280</sup> This phrase is used to describe African leaders who have decided to rule perpetually.

<sup>281</sup> Ake C, 'The unique case of African democracy' *International Affairs*. 69/2 (1993) 242.

<sup>282</sup> *Ibid*, 242-4. Nyerere defines African democracy as 'government by discussion'. See Nyerere (1966) 104.

<sup>283</sup> *Ibid*, 244.

norms. The challenge is thus to devise a framework for achieving this. (This point will be fully elaborated upon in subsequent chapters).

*c) Technology imperative*

Envisaging an integrated Africa in the 21<sup>st</sup> century without adequate consideration of the development of Information and Communication Technology (ICT) simply amounts, at the very best, to a pipe dream. Africa can safely be classified as what De Wet refers to as a ‘technology colony’.<sup>284</sup> He observes that although many developing countries have gained political independence, they are yet to achieve technology independence, that is, the technological know-how necessary for economic development.<sup>285</sup> To put it simply, Africa operates at the periphery of global technological innovation. Painting the dire state of technology on the continent, a NEPAD report views:

African economic integration and participation in the global economy is constrained by factors such as the high cost of access for end-users to foreign-owned satellite telecommunication providers for cross-border regional and international telecommunication traffic. In addition, high Internet access cost, low bandwidth, poor ICT infrastructure and often unreliable communication facilities further exacerbate the challenges the African countries face.<sup>286</sup>

The impact of technology in fostering regional integration cannot be overstated. As Cappellin notes, technology can further integration in two ways: improve cohesion and enhance economic development in less developed regions.<sup>287</sup> More than political rhetoric, technology has the capacity of creating a borderless African community. The availability of technology, especially ICT, will ease the

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<sup>284</sup> De Wet G, *Emerging from the technology colony: A view from the South*. University of Pretoria (1999) 1-2.

<sup>285</sup> Ibid.

<sup>286</sup> ‘NEPAD ICT infrastructure programme’. Available at [http://event-africa-networking.web.cern.ch/event-africa-networking/cdrom/NEPAD/NEPAD\\_ICT\\_Infrastructure\\_Brochure\\_Sept05.pdf](http://event-africa-networking.web.cern.ch/event-africa-networking/cdrom/NEPAD/NEPAD_ICT_Infrastructure_Brochure_Sept05.pdf). (Accessed 10 November, 2008). [Hereinafter referred to as NEPAD ICT Document]. Africa is the region with the lowest internet penetration in the world. Africa’s share of global internet penetration stands at 5.3%. Available at <http://www.internetworldstats.com/stats1.htm> (Accessed 10 November, 2008).

<sup>287</sup> Cappellin R, ‘International knowledge and integration networks for European integration, cohesion and enlargement’. *International Social Science Journal*. 56/180 (2004) 207.



process of collaboration on academic, leisure and business projects across the continent. Since integration also requires cooperation of interest and voluntary groups across frontiers, technology will help create a platform for enhancing such initiatives. These points are not lost on architects of African integration, hence the initiative to establish a submarine optic fibre ring around Africa coastline.<sup>288</sup>

The various submarine fibre-optic cable initiatives, aimed at improving internet connection speed and lowering phone call tariffs, have immense potentials.<sup>289</sup> In addition to this is the so-called 'African-style communication revolution', which reduces or eliminates roaming charges on mobile calls across specific African countries.<sup>290</sup> If given the necessary political backing, these private sector initiatives are capable of translating integration objectives into realities. For instance, the borderless network initiative, apart from being a convenient measure, gives full meaning to the idea of free movement of persons. Cheap and fast communication will also ease the process of business interactions across the continent. This will further stimulate cross-border trade and investment. In terms of economic development, the telecommunication sector in Africa has proved to be a major magnet of FDI. The meteoric rise of mobile phone usage has attracted major companies from Europe, Asia, Middle East and pan-African operators.<sup>291</sup> The huge investments made by these companies have contributed significantly to the economy of African countries.

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<sup>288</sup> See NEPAD ICT Document; see also 'East African Submarine Optic Fibre Project'. Available at [http://www.icglr.org/common/docs/docs\\_repository/3310eassy.pdf](http://www.icglr.org/common/docs/docs_repository/3310eassy.pdf) (Accessed 30 October 2008).

<sup>289</sup> The following are examples of such initiatives: SAT-3/SAFE; GLO-1; AWCC; SEACOM; EASSy; and TEAMS. See African Economic Outlook (2009) 90-93; see also 'Banding together'. BBC Focus on Africa (April-June 2009) 44-46.

<sup>290</sup> African Economic Outlook (2009) 101; see also <http://www.zain.com/muse/obj/lang.default/portal.view/content/About%20us/Worldwide%20Presence/Africa-13%20countries> (Accessed 25 November 2008).

<sup>291</sup> See African Economic Outlook (2009) 93-95. Between 2000 and 2007, record shows that private investment in African telecommunication rose from USD5.4 billion to USD13.5 billion. See Ibid, 96. According to the Secretary General of the International Telecommunications Union (ITU), about USD8 billion was invested in the development of ICT in Africa in 2008. Available at <http://allafrica.com/stories/200909140463.html> (Accessed 1 November 2009).

However, for ICT to efficiently play a significant role in shaping the integration process, more needs to be done. While the harmonisation of ICT policies in Africa remains the ultimate objective, it is essential to consider some preliminary measures. In order to guarantee the confidence of potential and current investors, it is essential that African governments grant more powers and autonomy to national regulatory agencies.<sup>292</sup> As Gasmi et al note, the independence of regulatory institutions should not be considered in isolation but rather as part of a broader strategy of good governance.<sup>293</sup> The independence of regulatory institutions cannot be gauged by merely observing a change in structure; instead the general environment within which they operate must conform to democratic ideals and standards.<sup>294</sup>

It is crucial that sub-regional and continental organisations partner with ICT companies on programmes which directly impact on regional integration. Cross-border initiatives such as the submarine optic fibre cables and borderless networks should bear the imprints of the aspirations of African integration. In this regard, further details should be worked out on how relevant continental and sub-regional institutions will be brought on board as partners on these projects. The partnership referred to here is not so much financial as it is a political statement which confirms technology as an indispensable driver of African integration.

While political elites and academics continue to debate endlessly on the modalities of integrating Africa, technology, particularly the initiatives highlighted above, will play a central role in creating a multi-layered and functional African community, built on innovation and effective communication.

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<sup>292</sup> See African Economic Outlook (2009) 95-96.

<sup>293</sup> Gasmi F, Noumba Um P, Recuero Vito P, 'Political accountability and regulatory performance in infrastructure industries: An empirical analysis'. *World Bank Economic Review* (2009) 20.

<sup>294</sup> Ibid.

d) *External imperatives*

The external dimension or influence on integration cannot be understated. For example, the European integration came about as a result of a geo-political reaction to what De Gaulle referred to as the 'two hegemonies': the Soviet Union and the United States of America.<sup>295</sup> In the same vein, the US provided the financial assistance for the economic reconstruction of Europe, a move which provided a much needed fillip for the integration experiment.<sup>296</sup> As Africa grapples with integrative issues in the 21<sup>st</sup> century, the influence of external actors and conditions will play a huge role in shaping this discourse. The shift in global balance of power, or what Cilliers refers to as the 'rise of the rest',<sup>297</sup> will no doubt impact on Africa. Also, the increasing relevance of the EU, especially as a model and as a global force, will provide useful and sober parallels for integration initiatives across the continent.

The (economic) rise of countries like India, China and Brazil, especially in relation to their quest for Africa's natural resources, has key implications not

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<sup>295</sup> See Hoffmann S, 'Obstinate or obsolete? The fate of the nation-states and the case of Western Europe' in Cantori & Spiegel (1970) 81.

<sup>296</sup> The Marshall Plan (known officially as the European Recovery Programme), an initiative named after US Secretary of State George Marshall, was a post World War II economic recovery plan for Europe. As Hogan puts it:

The strategic assumption behind this policy held that an integrated economic order, particularly one headed by supranational institutions, would help control German nationalism, reconcile Germany's recovery with France's economic and security concerns, and thus create a balance of power in the West sufficient to contain Soviet power in the East. The economic assumptions grew fundamentally out of the American experience at home, where a large internal economy integrated by free-market forces and central institutions of coordination and control seemed to have laid a ground work for a new era of economic and social stability. An economic United States of Europe would bring similar benefits...and in the process would realise all of their goals on the continent.

See Hogan M, *The marshall plan: America, Britain, and the reconstruction of Western Europe, 1947-1952*. Cambridge: Cambridge University Press (1987) 27.

<sup>297</sup> See Cilliers J, *Africa in the new world: How global and domestic developments will impact by 2025*. Pretoria: Institute of Security Studies (2008) 18. See also Zakariah F, *The post-American world*. New York: W.W Norton (2009). This reality is poignantly painted in a report published by the US National Intelligence Council (2008) titled - *Global trends 2025: A transformed world – The national intelligence council's 2025 project*. The report, amongst other provisions, predicts that the rules of the international system and global architecture would change as a result of the emergence of new players like Brazil, India, Russia and China. Available at [http://www.dni.gov/nic/PDF\\_2025/2025\\_Global\\_Trends\\_Final\\_Report.pdf](http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf) (Accessed 25 November 2008).

only for individual African countries but also for the continent as a whole. The volume of investment by the so-called 'non-traditional financiers', of which China and India are key role players, illuminates the potential for infrastructure development necessary for regional integration.<sup>298</sup> According to a World Bank report (2008), the sizeable investments of these Asian giants in infrastructural projects, helps to fill the gap of annual infrastructure deficit estimated at US\$22 billion.<sup>299</sup> Analysts have viewed that this changing investment landscape portends a replacement of the (in) famous 'Washington consensus' with an equally suspicious 'Beijing consensus'.<sup>300</sup> While the former hinges the deployment of aid to democratic governance, the latter accentuates non-interference in the domestic affairs of states.<sup>301</sup> In a continent where democratic governance is an exception rather than the norm, the 'Beijing consensus' represents not only a boost for autocrats but also a de-emphasis of the centrality of democracy and rule of law in the integration process.

#### *e) Other imperatives*

As stated previously, the foregoing discussion is not an exhaustive outline of African integration issues, since more will be discussed in subsequent chapters; however, it represents some of the fundamental issues that will shape this discourse. African integration draws a lot of scepticism, notably as a result of issues such as absence of democratic practise, levels of intra-African trade and the smallness of African markets. The experiences of past and present experiments should serve as a useful navigation tool (This will be discussed in the next chapter). Obsession with theories, including debates over their practicability in the African context, has in a way eclipsed the focus on devising other strategies for integrating the continent. As Schoeman, for example

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<sup>298</sup> China's investment in Africa peaked at USD8 billion in 2006, an amount four times that of India, and dropped to USD5 billion in 2007. See Foster V, Butterfield W, Chen C & Pushak N, *Building bridges: China's role as infrastructure financier for Africa*. World Bank (2008) 52. Available at [http://siteresources.worldbank.org/INTAFRICA/Resources/Building\\_Bridges\\_Master\\_Version\\_wo-Embg\\_with\\_cover.pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/Building_Bridges_Master_Version_wo-Embg_with_cover.pdf) (Accessed 20 November 2008); see also Cilliers (2008) 24-25.

<sup>299</sup> Foster et al (2008) 23.

<sup>300</sup> Alden C, 'China in Africa'. *African Security Review*. 17/1 (2008) 122.

<sup>301</sup> Ibid; see also Foster et al (2008) 6.

observes, the emphasis should shift from the volume of intra-African transactions (quantity) to the beneficial value of such transaction (quality).<sup>302</sup> Illustratively, the emphasis could be on strengthening the position of Africa in international forums by articulating a common agenda on issues concerning the welfare of the continent.<sup>303</sup> Also, regional powers can play an important role in the field of human resources by sending experts to countries in shortage of necessary skills. Such cooperation will help foster cooperation between African states.

## 2.4 Summary

The search for alternatives to guarantee continental peace and economic prosperity in Europe after the Second World War gave birth to regional integration and its different theories. At the core of regional integration - be it in the developed or the developing world - lies the need for peace, security and meaningful development. The developmental feature of regional integration, as experienced in Europe, provides a concrete proof for its adoption.

This chapter provides a critical analysis of regional integration through a theoretical, multi-disciplinary perspective. Apart from considering the political theories of integration, this chapter also highlights the legal theories of integration, especially their central role in the integration process. Also, the compatibility of sovereignty and regional integration is considered. It was observed that the two are not mutually exclusive because the need for addressing transnational imperatives will require some sort of balancing and adaptation.

Furthermore, this chapter explores integration through the lens of African politics and history. The pan-Africanism root of integration is discussed, including how it shaped the different theoretical perspectives on the *modus*

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<sup>302</sup> Schoeman M, 'Imagining a community – The African Union as an emerging security community'. *Strategic Review for Southern Africa*. XXIV/1 (2002) 13.

<sup>303</sup> *Ibid*, 14.



*operandi* of integration in Africa. Lastly, this chapter argues that in spite of the utilitarian feature of integration, the continent should chart its own integration trajectory, based on experiences and peculiarities. The next chapter will examine some of the experiments of supranationalism within the African context.

## CHAPTER 3

### Supranationalism in the African context: A critical look at past and present attempts at building supranational organisations in Africa

Experience seems to most of us to lead to conclusions, but empiricism has sworn never to draw from them.

George Santayana<sup>304</sup>

#### 3.1 Introduction

#### 3.2 Methodology employed to identify elements of supranationalism in Africa

#### 3.3 Overview of selected supranational attempts in Africa

##### 3.3.1 Economic Community of West African States (ECOWAS)

##### 3.3.2 Southern African Customs Union (SACU)

##### 3.3.3 Senegambia Confederation

###### 3.3.3.1 The rise and fall of the Confederation

##### 3.3.4 East African Community

###### 3.3.4.1 As it was in the beginning (1947-1961)

###### 3.3.4.2 A post-colonial adventure (1967-1977)

###### 3.3.4.3 A twenty-first century attempt (1999-present)

##### 3.3.5 *Organisation pour l'Harmonisation en Afrique des Droit des Affaires (OHADA)*

###### 3.3.5.1 Supranational features of the OHADA

##### 3.3.6 West African Economic and Monetary Union (WAEMU)

##### 3.3.7 Central African Economic and Monetary Community

<sup>304</sup> Available at [http://www.brainyquote.com/quotes/authors/g/george\\_santayana.html](http://www.brainyquote.com/quotes/authors/g/george_santayana.html) (Accessed 20 March 2009).

(CEMAC)

3.4 Common factors hindering the maximal realisation of supranationalism in Africa

3.4.1 Weak institutional machinery

3.4.2 Non-implementation of key integration initiatives

3.4.3 Crowded integration landscape

3.4.4 Skewed distribution of benefits and hegemonic threats

3.4.5 Political instability

3.4.6 Democratic deficit

3.5 Summary

### 3.1 Introduction

Ever since the colonial era, attempts have been made, throughout the various regions of Africa, at building supranational<sup>305</sup> units chiefly for both administrative and legal convenience. Examples of such attempts include the Federation of Rhodesia and Nyasaland, the East African High Commission and the Federations in former French West and Equatorial Africa, which were all attempts at forging a supranational nation state.

These 'federations' could not withstand the intricate dynamics of the independence *tsunami* mainly because the post-independence political elite consolidated colonially-defined national territorial integrity and sovereignty. Instead, efforts were geared towards establishing supranational organisations at sub-regional levels to cater for functional economic needs. At the continental level, the OAU Charter was far from establishing a continental supranational organisation. Rather, emblems of supranationalism remain prominent at the sub-regional levels: the East African Commission (EAC), the Economic Community of West African States (ECOWAS), and the Organisation for Harmonisation in Africa of Business Laws (OHADA).

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<sup>305</sup> See Chapter 2, section 2.2.2 for a discussion on the concept of supranationalism.



It is against this background that this chapter aims at investigating past and present attempts at supranationalism on the continent, the successes and failures of such experiments and the lessons to be learnt from them. As Africa embarks on the journey of solidifying its unity through the establishment of leviathan continental institutions, efforts should be geared towards building on the experiences of past and present experiments at the sub-regional level. Such experiments offer instructive lessons as they are rooted in similar historical and social contexts.

Thus, this chapter begins with an explanatory analysis of the methodology employed in identifying supranationalism in Africa. It is then followed by an outline of supranational attempts within Africa. It concludes by discussing some of the common challenges, as evident in the foregoing analysis, facing (supranationalism) integration in Africa.

### **3.2 Methodology employed to identifying elements of supranationalism in Africa**

The approach that will be adopted in the identification and analysis of supranational elements in Africa is based on the features identified in the previous chapter. As already indicated, supranationalism is a politico-legal concept, which embodies, but is not limited to, the following core elements: decisional autonomy (in particular, majority voting rule) and the binding effect of organisation laws.<sup>306</sup>

The terminal point or ultimate objective of an integration process is either expressly stipulated in a constitutive treaty or implied by the nature of powers conferred on such an organisation by its member states.<sup>307</sup> As previously highlighted, traditional international law regards states as the primary structure of global architecture. Therefore, any organisation created by states must

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<sup>306</sup> Weiler (1981) 271; Hay (1966) 69; Pescatore (1974) 51-52.

<sup>307</sup> Even where such powers are not clearly stipulated, express or implied, at the outset, there may be an evolutionary process, albeit with the consent of member states.

operate within the ambit of state or national influence. This, however, does not impinge on the legal personality of such organisation.

Legal personality is the concept which defines ‘the actual attribution of rights and/or duties (of international organisations) on the international plane’.<sup>308</sup> As noted above, such attributes are expressly or tacitly stipulated in the constituent treaty.<sup>309</sup> The constituent treaty will for example indicate the procedural capacity of an international organisation to make treaties, enforce its decisions and enter into agreements with other entities.<sup>310</sup> Similarly, such powers could be inferred from the powers and objectives of the particular organisation.

The *Reparation for Injuries Suffered in the Service of the United Nations* case is the *locus classicus* in this regard. In this case, the International Court of Justice (ICJ) had to decide whether the UN possesses the capacity to bring an international claim for reparation against a responsible government for injuries suffered by the organisation or its staff.<sup>311</sup> After examining the UN Charter, especially the provisions of Articles 104 and 105<sup>312</sup> the Court held that the functions entrusted to the organisation is an indication that the UN has the competence and autonomy to fulfil such tasks.<sup>313</sup> It is important to note that the extent of the functions of a particular organisation determines the level of its legal personality. For example, an organisation such as the EU has a more extensive legal personality than the UN or the AU. This is because the EU, unlike the latter, has moved from the minimal threshold of inter-state cooperation to the creation of institutions parallel to, and/or superseding the

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<sup>308</sup> Shaw M, *International law*. Cambridge: Cambridge University Press (1997) 194.

<sup>309</sup> Ibid, 909.

<sup>310</sup> Ibid, 191.

<sup>311</sup> International Court of Justice Report, 1949, 174.

<sup>312</sup> Article 104 states that ‘[The UN] shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes’. Article 105(1) provides that ‘the organization shall enjoy in the territory of each of its member such privileges and immunities that are necessary for the fulfilment of its purposes’.

<sup>313</sup> I.C.J Rep, 179, 185.

jurisdiction of its member states in relation to agreed matters of common interests.

It must, however, be emphasised that the discourse on supranationalism should not begin from an ‘all-or-nothing’ perspective. Any enquiry into the presence, or lack thereof, of supranational elements should not only be directed at identifying overarching supranational features but in addition, engage in highlighting the hybridity or juxtaposition of elements – intergovernmental and supranational.

The reality is that even when an organisation possesses all the elements of supranationalism, there are still some embedded features of intergovernmentalism. The EU, for example is designated as a supranational organisation, however, one of its primary decision making organs, the Council of European Union, consists of national ministers, who primarily champion the agenda of their governments.<sup>314</sup> The Council remains the apex decision-making body on matters relating to foreign policy, justice and home affairs.<sup>315</sup> Also, the UN, an archetypal intergovernmental organisation, exercises supranational powers especially in relation to voting rules in the General Assembly and sometimes in the Security Council.<sup>316</sup>

Although most integration bodies in Africa operate on an intergovernmental level, this chapter will adopt a methodological approach of identifying and analysing supranational elements embedded in some of these organisations.

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<sup>314</sup> Dashwood A, ‘States in the European Union’. *European Law Review*. 23 (1998) 205-206.

<sup>315</sup> *Ibid.*

<sup>316</sup> Weiler (1981) 305.

### 3.3 Overview of selected supranational attempts in Africa

#### 3.3.1 Economic Community of West African States (ECOWAS)

As mentioned in the previous chapter, the earliest manifestation of pan-African integration can be traced to West Africa.<sup>317</sup> Intertwined with the nationalist struggle against colonialism, activists from (British) West Africa, as early as the mid-nineteenth century, advocated for regional cooperation through either a federal arrangement or the establishment of common institutions such as the Court of Appeal and a university.<sup>318</sup>

Decolonisation in the early 1960s further intensified efforts at integration mainly by political elite, a marked shift from the previous advocacy by non-state actors.<sup>319</sup> Concrete attempts to transform the 'idea' of West Africa into an institutional form started in 1972 when the leaders of Nigeria and Togo, Generals Gowon and Eyadema respectively, signed a bilateral Treaty aimed as a launch pad for wider sub-regional cooperation.<sup>320</sup> On 28 May 1975, fifteen West African states converged in Lagos to sign the Treaty establishing ECOWAS.<sup>321</sup> The economic focus of the 1975 Treaty can be gleaned from some of its objectives which include the elimination of customs duties, free movement of persons, capital, and services, and the harmonisation of agricultural and industrial policies.<sup>322</sup>

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<sup>317</sup> Thompson (1969) 28; Kufuor K, *The institutional transformation of the Economic Community of West African States*. London: Ashgate (2006) 19-21; Asante S, *The Political economy of regionalism in Africa: A decade of the Economic Community of West African States (ECOWAS)*. New York: Praeger (1986) 45-47.

<sup>318</sup> Thompson (1969) 28; Kufuor (2006) 19-20; Asante (1986) 45-47.

<sup>319</sup> Kufuor (2006) 20-21.

<sup>320</sup> Asante (1986) 55.

<sup>321</sup> These states include Benin, Burkina Faso (formerly Upper Volta), Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde acceded to the ECOWAS Treaty in 1977. In 1999/2000, Mauritania withdrew its membership from ECOWAS.

<sup>322</sup> The 1975 ECOWAS Treaty, Art. 2

The stark reality of a fast-changing global political and economic order,<sup>323</sup> especially the realisation that the 1975 Treaty proved inadequate at deepening regional integration led to the establishment, in May 1990, of a Committee of Eminent Persons to review the 1975 Treaty.<sup>324</sup> Part of the recommendation of the Committee was the need to place more emphasis on supranationalism within ECOWAS, especially the vesting of more powers on the organs of the community.<sup>325</sup> The Committee's report thus formed the basis of the 1993 revised Treaty of ECOWAS.

The revised Treaty made provision for the following institutions:<sup>326</sup>

- Authority of Heads of State and Government (Authority)
- Council of Ministers
- Community Parliament
- Economic and Social Council
- Community Court of Justice
- Executive Secretariat
- Fund for Cooperation, Compensation and Development and
- Specialised Technical Commissions

To underscore its mission of institutional transformation, the Authority, in June 2006, approved the transformation of the Executive Secretariat into a nine-

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<sup>323</sup> Kufuor identify the following as part of the factors that necessitated the move towards supranationalism in ECOWAS:

- the need for institutional efficiency
- search for political legitimacy by ECOWAS leaders
- ideological change within West Africa
- stronger regional security architecture and
- the need to be a major player in international trade.

See Kufuor (2006) 40-46.

<sup>324</sup> See generally *Review of the ECOWAS Treaty: Final Report of the Committee of Eminent Persons* in Kufuor (2006) 132-170.

<sup>325</sup> *Ibid*, 146.

<sup>326</sup> The 1993 revised ECOWAS Treaty, art. 6.

member Commission with a President, a Vice-President and seven Commissioners.<sup>327</sup>

Having experienced some of Africa's worst armed conflicts, ECOWAS found it important to put in place a supranational security mechanism.<sup>328</sup> In this regard, the security architecture of ECOWAS has been adjudged as one of the best on the continent.<sup>329</sup> The ECOWAS has successfully intervened in hot-spots such as Liberia, Sierra Leone, and Guinea Bissau.<sup>330</sup> Learning from the past mistakes of its interventions across the sub-region, ECOWAS has established an overarching, all-inclusive security mechanism which consists of Mediation and Security Council, Defence and Security Commission, and a Council of Elders.<sup>331</sup> The Mediation and Security Council is made up of ten members, and decisions are made by a two-thirds majority of six members.<sup>332</sup> In addition, civil society is encouraged to contribute to the organisation's early warning system mechanism.<sup>333</sup>

### 3.3.2 Southern Africa Customs Union (SACU)

SACU<sup>334</sup> was established in 1910, thus making it the world's oldest Customs Union.<sup>335</sup> Its origins dates back to the 1889 Customs Union Convention entered into between the British Colony of Cape of Good Hope and the Orange Free State Boer Republic.<sup>336</sup> The 1910 agreement extended membership of the organisation to British High Commission Territories (HCT) of Basutoland (now

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<sup>327</sup> See the ECOWAS Newsletter, issue 1 of October 2006.

<sup>328</sup> According to Adebajo, the three civil conflicts in Liberia, Sierra Leone and Guinea Bissau claimed over 250,000 lives and over 1.2 million refugees. See Adebajo A, 'The curse of Berlin: Africa's security dilemmas'. *IPG* Vol.4 (2005) 90.

<sup>329</sup> Ibid; See also Cilliers J, *The African standby force: An update on progress*. Pretoria: Institute of Security Studies Paper 160 (2008) 13-14.

<sup>330</sup> <http://www.sec.ecowas.int/sitecedeado/english/peace.htm> (Accessed 20 January 2009).

<sup>331</sup> Adebajo (2005) 90; see also <http://www.sec.ecowas.int/sitecedeado/english/peace.htm> (Accessed 20 May 2009).

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> It consists of Botswana, Lesotho, Namibia, Swaziland and South Africa. The member states except for South Africa are commonly referred to as the BLNS states.

<sup>335</sup> See <http://www.sacu.int> (Accessed 30 November 2008)

<sup>336</sup> Ibid.

Lesotho), Bechuanaland (now Botswana) and Swaziland. Namibia (then South West Africa) was a *de facto* member because it was then administered by South Africa.<sup>337</sup> The underlying idea behind this arrangement was to incorporate the HCTs into South Africa.<sup>338</sup>

The 1910 agreement tasked SACU with supranational duties by providing for the free movement of manufactured products, a common external tariff on all goods imported into the Union and a revenue sharing formula for the distribution of customs and excise.<sup>339</sup> Under this agreement, South Africa was to receive 98.7% of the joint revenue, Bechuanaland (0.27%), Basutoland (0.88%) and Swaziland (0.15%).<sup>340</sup> Another feature of SACU is the 1974 Rand Monetary Agreement (RMA), which made the rand the only legal tender within SACU.<sup>341</sup> However, Botswana pulled out of the arrangement in 1975. To address the concerns of other member states, especially in relation to independent monetary control, the agreement was amended in 1986 by giving more autonomy to Lesotho and Swaziland.<sup>342</sup>

Growing concerns about certain policies emanating from South Africa, which largely resulted in trade diversion<sup>343</sup> and subsequent negative impact on the GDP of other member states, led to the replacement of the 1910 agreement by the 1969 agreement.<sup>344</sup> The 1969 agreement attempted to address the major source of contention, namely a revenue sharing formula,<sup>345</sup> by making provision

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<sup>337</sup> Ibid.

<sup>338</sup> The electoral victory of the National Party in South Africa in 1948 signalled the impossibility of such move. See Gibb R, 'Regional integration in post-Apartheid Southern Africa: The case of renegotiating the Southern African Customs Union'. *Journal of Southern African Studies*. 23/1 (1997) 75-76.

<sup>339</sup> Ibid, see also Gibb (1997) 75.

<sup>340</sup> Gibb (1997) 75.

<sup>341</sup> AU & ECA (2008) 185.

<sup>342</sup> Ibid.

<sup>343</sup> According to Gibb, trade diversion 'occurs when a customs union adopts a protectionist external trade regime forcing member states to displace imports of efficiently produced goods from countries outside the trading arrangement with more expensive imports from partner countries'. See Ibid, 78.

<sup>344</sup> Ibid, 75.

<sup>345</sup> The revenue derived from SACU's common external tariff represents a significant source of economic development in the BLNS countries. According Ngwenya, it makes up approximately 50% of Swaziland's

for the inclusion of excise duties in the common revenue pool.<sup>346</sup> This revenue pool is divided among the member states according to annual imports, production and consumption of dutiable goods.<sup>347</sup> Based on this arrangement, the revenue share of member states, except for South Africa, is further enhanced by an annual 42% compensation allowance.<sup>348</sup>

These measures did little to change the *status quo* mainly because South Africa still retained the sole decision-making power over policies affecting the customs union arrangement.<sup>349</sup> South Africa's transition to democratic governance and the independence of Namibia set the tone for a renewed engagement on SACU policies.<sup>350</sup> These negotiations gave birth to the 2002 SACU Agreement. To highlight the importance of joint decision-making, the new agreement created an independent administrative body (the Secretariat) to oversee SACU.<sup>351</sup> Other independent institutions include the SACU Council of Ministers, the Commission, National Bodies, Tariff Board, Technical Liaison Committees and a Tribunal.<sup>352</sup> On the contentious issue of revenue sharing, the new agreement provided for a revised formula, which consists of customs, excise and development components.<sup>353</sup>

Compared to other sub-regional entities, SACU has achieved far-reaching and substantial achievements such as the harmonisation of policies on competition, investment and intellectual property rights.<sup>354</sup> In addition, the organisation also

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and Lesotho's budget revenues, and 30% and 17% of the budget revenues of Namibia and Botswana. See Ngwenya S, 'Fair deal: The new SACU draft agreement', *Sisebenze Sonke*. 4 (2002) 26.

<sup>346</sup> Gibb (1997) 77; see also <http://www.sacu.int>

<sup>347</sup> Gibb (1997) 77.

<sup>348</sup> Ibid; <http://www.sacu.int>

<sup>349</sup> <http://www.sacu.int>

<sup>350</sup> Ibid, see also Alden C & Soko M, 'South Africa's economic relations with Africa: Hegemony and its discontents'. *Journal of Modern African Studies*. 43/3 (2005) 370-371

<sup>351</sup> 2002 SACU Agreement, art. 3.

<sup>352</sup> Ibid, art. 7.

<sup>353</sup> <http://www.sacu.int>

<sup>354</sup> Draper P et al, 'SACU, regional integration and the overlap issue in southern Africa: From spaghetti to cannelloni'. *Trade Policy Report No. 15*. South African Institute of International Affairs (2007) 18.



has a relatively successful framework for engaging with external parties such as the EU and the United States of America.<sup>355</sup>

### 3.3.3 The Senegambia Confederation

The inclusion of the Senegambia Confederation in a discussion on supranationalism is instructive, considering the fact that it was the only political union between an independent French (Senegal) and English (The Gambia) speaking African country.<sup>356</sup> This bold experiment attempted to move beyond the oft-prescribed idea of regionalism by reverting to a pre-colonial format.

The Gambia serves as a prime example and permanent landmark of the arbitrary demarcation of African boundaries, as it is almost surrounded by its much larger neighbour, Senegal except on its seaward margin.<sup>357</sup> The question of arbitrary delineation of African boundaries led to the adoption of the *Uti possidetis* principle by the OAU. This principle simply implies that colonial boundaries should remain unchanged.<sup>358</sup> This was a pragmatic approach aimed at preventing chaos. However, it failed to stem the tide of border conflicts between African states.<sup>359</sup>

Unlike other parts of Africa where disputes over colonial boundaries resulted in bloody skirmishes, both Senegal and Gambia jointly resolved to de-emphasise their colonial boundaries by creating a Confederation. While the abortive 1981 coup in The Gambia could be identified as the immediate reason for its establishment, the origins of the Confederation dates back to the colonial era.<sup>360</sup>

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<sup>355</sup> Ibid.

<sup>356</sup> Hughes A & Lewis J, 'Beyond francophonie? The Senegambia Confederation in retrospect' in Bach D & Kirk-Greene ed. *State and society in francophone Africa since independence*. Oxford: St. Martin (1995) 228.

<sup>357</sup> Robson P, 'The problem of Senegambia'. *The Journal of Modern African Studies*. 3/3 (1965) 395.

<sup>358</sup> In the border case between Mali and Burkina Faso, the ICJ held that the *uti possidetis* rule freezes the territorial title and only allows self-determination within the colonial boundaries. See *Frontier Dispute* case 1986 ICJ Rep 554.

<sup>359</sup> See e.g. Oyeboode (2003) 24-25.

<sup>360</sup> Richmond E, 'Senegambia and confederation: History, expectations and disillusion.' *Journal of Third World Studies*. 10/2 (1993) 176.

Senegambia was the name given to the political unit created by an agreement between the colonial British and French authorities in the 18<sup>th</sup> century.<sup>361</sup>

The twilight of colonialism brought about a revival of discussions on closer cooperation between the two nations. Robson<sup>362</sup> identified the three main reasons for the resurgence of talks between both countries: strong doubts about Gambia's economic viability; the disadvantageous economic frontiers between both countries; and political (security) reasons. Series of discussions were held in order to iron out the modalities of establishing closer ties between both countries. Recommendations ranged from the establishing of a loose federation (confederation), functional cooperation and the so-called 'Treaty of Association'. The Treaty of Association led to the creation of a Senegalo-Gambian Secretariat (1967) and the Gambian River Basin Development Organisation (1978).<sup>363</sup>

As a result of the abortive coup of July 1981 in The Gambia which was quelled by Senegalese army,<sup>364</sup> coupled with the need to address internal security and external aggression, the leaders of both countries, Dawda Jawara (The Gambia) and Abdou Diouf (Senegal), decided to form the Senegambia Confederation in 1982.

Although the treaty of the confederation reaffirmed the absolute sovereignty of both countries,<sup>365</sup> attempts were made to establish institutions which had some authority over the member states.

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<sup>361</sup> Ibid.

<sup>362</sup> Robson (1965)395.

<sup>363</sup> Hughes & Lewis (1995) 229.

<sup>364</sup> This intervention was based on the 1965 defense pact signed at Gambian independence. See Hughes & Lewis (1995) 231.

<sup>365</sup> See Clause 2 of the Confederation Treaty. It further outlined the objectives of the confederation. It include:

- The integration of the Armed and security forces of both nations.
- The development of an economic and monetary union.
- Coordination of policies in the field of external relations and communication.
- Creation of joint institutions

*a. The executive arm*

The treaty provided for the offices of the president and vice president.<sup>366</sup> Under this arrangement, the Senegalese head of state was to be the president of the confederation and the Gambian president as the vice president. This decision was based on the fact that Senegal was the bigger partner. Decisions were to be made by agreement.<sup>367</sup> National parliaments of both states were given extensive powers to determine and delegate relevant subjects to be discussed by the executive and the Assembly.

*b. The judicial arm*

Initially, the power to resolve disputes were in the hands of the Confederal head of state,<sup>368</sup> in 1987, an ad-hoc Confederal Court of Appeal was established.<sup>369</sup> It was to be presided over by a judge from a neutral country.<sup>370</sup>

*c. The legislative arm*

The 60-member Confederal parliament<sup>371</sup> (40 Senegalese and 20 Gambians) and the Council of Ministers<sup>372</sup> (5 Senegalese and 4 Gambians) met twice a year. The members of the parliament were elected indirectly by the national parliaments of both countries. In order to allay the concerns of Gambia, especially in respect of Senegal's domination of the Confederation, a mechanism was devised to ensure that a majority vote required at least five Gambians.<sup>373</sup> In addition, a Gambian was made the speaker of the Assembly.

### **3.3.3.1 The rise and fall of the confederation**

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<sup>366</sup> Ibid, Section 2.

<sup>367</sup> Ibid, Clause 7.

<sup>368</sup> Ibid, Clause 15.

<sup>369</sup> Hugh & Lewis (1995) 235.

<sup>370</sup> Ibid.

<sup>371</sup> Confederation Treaty, Section 4.

<sup>372</sup> Ibid, Section 3.

<sup>373</sup> Hughes & Lewis (1995) 236.

If one were to analyse the confederation through the prism of security, which was one of the primary reasons behind the founding of the confederation, the final assessment will be unarguably positive. The confederation could be regarded as an answer to the numerous security threats bedeviling both countries. Senegal for example, had to deal with Islamic fundamentalists, ethnic secessionists from the lower Casamance region, and the alleged influences of Nkrumah, Sekou Toure and later Muammar Ghaddafi on anti-government elements.<sup>374</sup> The Gambia on the other hand also had to contend with dissidents believed to be supported by Libya and Guinea Bissau.<sup>375</sup>

It was against this backdrop that defence protocols were ratified to create a 'Confederal Brigade'. The Confederal army battalion was stationed in the six security zones of the confederation. While this security arrangement was successful in stemming the activities of radical elements against both countries, some Gambians viewed the presence of Senegalese army as an occupation of The Gambia.<sup>376</sup>

On the economic front, both countries differed on the creation of a customs union. The Gambia reckoned that a customs union would deprive it of at least 25% of its total tax revenues.<sup>377</sup> A way out of this would have been an agreement based on a specially negotiated allocation of revenue and the development of transport and industries in the Gambia.<sup>378</sup> Both countries could, however, not arrive at a compromise arrangement as at the time of the dissolution of the confederation.<sup>379</sup> In respect of creating a monetary union, The Gambia had in principle agreed to join the franc zone - a monetary arrangement which already included Senegal.<sup>380</sup>

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<sup>374</sup> Ibid, 230.

<sup>375</sup> Ibid, 231.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid, 237.

<sup>378</sup> Robson P, 'Regional integration and the crisis in sub-saharan Africa'. *The Journal of Modern African Studies*. 23/4 (1985) 613.

<sup>379</sup> Ibid.

<sup>380</sup> Hugh & Lewis (1995) 238.

In relation to foreign policy, both countries were free to pursue individual foreign policies with the long-term intention of coordinating decisions on international issues.<sup>381</sup>

The confederation was dissolved in 1989 by the then Senegalese president, Abdou Diouf admitting in hindsight that ‘privileged relationship’ rather than ‘full integration’ was the more feasible option.<sup>382</sup> This dissolution put a halt to what would have been a classical experiment and model of how Africa as a continent could tread the thorny path of regional integration. It could have for example attempted to address the questions about social, linguistic, economic and political divisions that exist on the African continent and within individual states.

Furthermore, it could have exposed the centrality of democratic values and norms in the process of regional integration. It would have been interesting to see how the Confederation would elect the members of the legislature, the influence of opposition parties, the durability of its democratic institutions, whether a bi-jural system would have evolved, the impact of the judgments of the Confederal Court of Appeal, the operations of the Confederal bilingual institutions and more importantly, how it will feed into the larger African framework.

While various events have overtaken the dissolution of the Confederation - the 1994 coup in The Gambia, the election of the veteran opposition leader, Abdoulaye Wade in Senegal - it is instructive to closely scrutinise the elements that led to its dissolution (this will be done below). Moreover, Senegal these days has channelled its energies into promoting continental integration initiatives rather than reviving the Confederation while the Gambia has plunged into an authoritarian state. These developments have in more ways than one doused the flames of building a supranational entity between the two states.

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<sup>381</sup> Ibid.

<sup>382</sup> Ibid.

### 3.3.4 The East African Community

What started as a colonial enterprise and later metamorphosed, in spite of numerous obstacles, into a modern day model of regional integration, the EAC is an archetypal example of building integration on similar linguistic, cultural and social pillars.<sup>383</sup> The discussion on the East African integration will be divided into three phases: the colonial period (1947-1961); the post-colonial period until its dissolution in 1977; and finally, its revival (1999 -present).

#### 3.3.4.1 As it was in the beginning (1947-1961)

As stated earlier, East African integration dates back to the attempt by the British colonial authority to build an economic bloc and at the same time secure greater political control over the region.<sup>384</sup> Prior to the 1926 Governors' Conference, which laid a groundwork for future areas of cooperation, the region had witnessed the establishment of supranational institutions such as the Kenya-Uganda Railway,<sup>385</sup> Court of Appeal for East Africa (1902), common currency (1905), a Postal Union (1917) and a customs Union (1917).<sup>386</sup>

After a series of recommendations and reports highlighting the feasibility of closer integration in the region,<sup>387</sup> the East Africa High Commission (EAHC)<sup>388</sup> was officially established in 1948. The headquarters of the EAHC was situated in Nairobi, Kenya. The Commission comprised the Governors of Kenya, Tangayika (later Tanzania) and Uganda, the administrator, a Commissioner for

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<sup>383</sup> See e.g. Mazzeo D, 'Problems of regional cooperation in east Africa' in Fredland R & Potholm C (eds) *Integration and disintegration in east Africa*. Lanham MD: University Press of America (1980) 82.

<sup>384</sup> Ojeinda T, 'The East African Court of Justice in the re-established East African Community: Institutional structure and function in the integration process'. *East African Journal of Peace & Human Rights*. 11/2 (2005) 221-222.

<sup>385</sup> The construction of this railway in 1894 is commonly regarded as the start of integration process in the region. See Odhiambo W, 'The East African Customs Union and its Implications' in Ajulu R (ed), *The Making of a Region: The revival of the East African Community*. Midrand, South Africa: Institute for Global Dialogue (2005) 214.

<sup>386</sup> Ojeinda (2005) 222.

<sup>387</sup> Delupis I, *The East African Community and common market*. London: Longman (1970) 19-26

<sup>388</sup> Delupis observe that the EAHC was not an international organisation *strictu sensu* because its members were colonial entities. See Delupis (1970) 31.

Transport, a Postmaster General and a Legal Secretary. The Legislative Assembly, with the consent of the High Commission, had the power to enact laws for the three territories.<sup>389</sup> The activities of the High Commission covered a whole range of fields such as aviation, telecommunications, income tax, custom and excise, science and research, defence and education.

#### **3.3.4.2 The post-colonial adventure (1967-1977)**

Being a colonial construct, the EAHC's legitimacy was largely questioned by the majority of East Africans. They, in particular the leading political elites in the three territories of the region, questioned the composition of the commission, the loyalty of its members and its detachment from the realities on the ground.<sup>390</sup> The sharp disapproval of the EAHC was in addition fuelled by the quest for independence in the three territories. Political elites viewed the Commission as a vestige of the British Empire and were determined to wrest the control of both their territories and the organisation from the colonialists.

The continued opposition to the functioning of the EAHC led to discussions between the East African leadership and their British counterparts. An agreement was finally reached and the EAHC was replaced in December 1961 by a new institution called the East African Common Services Organisation (EACSO).

The EASCO differed from its predecessor in a number of ways. Apart from the fact that it was established by an agreement among the three East African governments, the constitution also provided that the executive will be responsible to the three East African governments.<sup>391</sup> Unlike its predecessor, the EASCO reflected an African outlook by ensuring that East Africans were

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<sup>389</sup> Some of the important Acts enacted by the Assembly include the Railways and Harbours Administration Act, Customs Management Act, Income Tax Management Act and Acts setting up institutions of higher learning in East Africa. See Banfield J, 'The structure and administration of the East African Common Services Organisation' in Leys C & Robson P (eds) *Federation in East Africa: Opportunities and problems*. Oxford: Oxford University Press (1965) 32.

<sup>390</sup> Ibid, 34.

<sup>391</sup> Ibid.

placed in leadership positions. The Central Legislative Assembly for example, had more East Africans among its membership.<sup>392</sup>

The EASCO served as a veritable platform for enhancing cooperation among the territories. The political elites of the territories viewed the independence of their respective territories as the first step, followed by the creation of a Federal East African state. In 1963, the political leaders of the East African states - Jomo Kenyatta (Kenya), Julius Nyerere (Tangayika)<sup>393</sup> and Milton Obote (Uganda) - signed a declaration of federation.<sup>394</sup> The declaration, amongst other provisions, aimed at establishing a Federation of East Africa.<sup>395</sup>

Pursuant to endowing the organisation with more powers and based on the recommendations of the Phillip Commission, the East African Community Treaty was signed in Kampala, Uganda on 6 June 1967 and was inaugurated in Arusha on 1 December, 1967. The East African Community (EAC) incorporated the EASCO. In terms of the institutional machinery, there was a major change in terms of the appointment of the members of the Legislative Assembly. Unlike the EASCO, where members of the Legislative Assembly were elected through a system of direct election by state legislatures, member states were now given the authority to select members of the Assembly.<sup>396</sup> This act stifled the performance of the Assembly since the new members' loyalties lied with the national powers and thus prevented them from being critical of the national authorities.<sup>397</sup> The Common Market Tribunal, the Court of Appeal for East Africa and the East African Industrial Court jointly held the judicial powers.<sup>398</sup>

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<sup>392</sup> Banfield (1965) 36-7; see also Springer A, 'Community chronology' in Fredland & Potholm (1980) 15.

<sup>393</sup> In 1964, Tangayika and Zanzibar united to form Tanzania.

<sup>394</sup> See 'The Federation Declaration' of 5 June, 1963.

<sup>395</sup> As a result of Uganda's stiff resistance to surrendering sovereignty in respect of citizenship and foreign affairs, the idea of a political union was deemed no longer feasible. A major consequence of this was the 1965 decision to dismantle the East African Currency Board thus introducing separate currencies in the three member states. See Delupis (1970) 49-50, 53.

<sup>396</sup> Springer (1980) 22.

<sup>397</sup> Ibid.

<sup>398</sup> The Tribunal had the power to hear cases relating to the alleged violations of the Common Market and also giving advisory opinion to the Common Market Council. The Industrial Court could only rule on



If the signing of the Declaration of Federation marked a watershed moment, the inauguration of the EAC was largely seen as the concretisation of the historical cooperation among the three regions.<sup>399</sup>

The EAC inherited the organisational structure of the EASCO. It functioned through its organs:<sup>400</sup> the East African Authority; the East African Legislative Assembly; the East African Ministers; the Tribunals and the East African Development Bank. The EAC also operated the following Common Services: the East African Highway Cooperation (EAAC), the East African Posts and Telecommunications Cooperation (EAP&TC), the East African Railways Cooperation (EARC) and the East African Harbours Cooperation (EAHC).

Alongside the European Community, it was widely acclaimed as one of the best experiments in regional cooperation. One would have expected that the shared values of the member states should be sufficient to hold the organisation together. As Mazzeo rightly pointed out, a multiplicity of factors (political and economic) contributed directly and indirectly to the dissolution of the community.<sup>401</sup> The disbanding of the East African Currency Board, a year after the signing of the EAC, was seen as the first ominous development in the long road towards the eventual dissolution of the community.<sup>402</sup> This particular act ensured that the member states effectively removed the idea of a monetary union from the radar screen of the community.<sup>403</sup>

### 3.3.4.3 A twenty-first century attempt (1999 - present)

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disputes of industrial nature while the jurisdictional competence of the Court of Appeal was determined by the national laws. See *Ibid*, 23.

<sup>399</sup> Delupis (1970) 52.

<sup>400</sup> Treaty for East African Cooperation (1967), art. 3.

<sup>401</sup> Mazzeo D, 'The experience of the East African Community: Implications for the theory and practice of regional cooperation in Africa'. In Mazzeo D (ed) *African regional organisations*. Cambridge: Cambridge University Press (1984) 151.

<sup>402</sup> Mugomba A, 'Regional organisations and African underdevelopment: The Collapse of the East African Community'. *The Journal of Modern African Studies*. Vol.16/2 (1978) 264; see also Odhiambo (2005) 215

<sup>403</sup> Odhiambo (2005) 215

The revival of the EAC, after its demise in 1977, has its origin in article 14.02 of the Mediation Agreement of 1984. In terms of this agreement, three heads of state (Kenya, Tanzania and Uganda) agreed to 'explore areas of future co-operation and to make concrete arrangement for such co-operation'.<sup>404</sup> The preparatory work for the re-establishment of the EAC began in 1993, when the three heads of state signed the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation. The Treaty establishing the East African Community was signed in Arusha on 30 November 1999. The Treaty entered into force in 2000. Article 9 of the EAC Treaty outlines the following as the institutions of the community: the Summit, the Council, the East African Court of Justice, the East African Legislative Assembly, the Secretariat, the Sectoral Committees and the Coordination Committees.<sup>405</sup> In a milestone development, Burundi and Rwanda became members of the EAC on 1 July 2007.

In order to prevent the pitfalls of the past, the preamble of the Treaty identified the following as the reasons for the dissolution of the old EAC:<sup>406</sup> lack of strong political will; lack of private sector and civil society participation; disproportionate sharing of benefits among partner states and the inability to address this. The objectives of the EAC are, amongst other provisions:<sup>407</sup>

- To establish a Customs Union (this was launched in 2005)
- a Common Market (expected to be operational by 2010)
- a Monetary Union (2012)
- And ultimately, a Political Federation.

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<sup>404</sup> Available at <http://www.eac.int/history.htm> (Accessed on the 12 March 2008).

<sup>405</sup> See the East African Community Treaty – 1999. Available <http://www.eac.int/documents/EAC%20Treaty.pdf> (Accessed 12 March 2008).

<sup>406</sup> Ibid.

<sup>407</sup> Ibid, art. 5 of the EAC Treaty.

In line with the goal of establishing a political federation, a three-year revolving presidency shall be established by 2011, followed by the election of a president for the entire federation by 2013.<sup>408</sup>

Unlike the situation in the old EAC, where there was an ideological polarisation, all the countries in the new EAC - including the two new members - have similar economic policies. The IMF/World Bank driven Structural Adjustment Programme (SAP) not only placed member states on the path of economic liberalisation, it also fostered improvements in the economy of member states.<sup>409</sup>

In order to avert the mistakes of the past vis-à-vis the skewed benefits in favour of Kenya, the Customs Union Protocol provides for duty free movement of all exports from Tanzania and Uganda into Kenya.<sup>410</sup> Goods from Kenya into Uganda and Tanzania are classified into two categories: Category A qualifies for immediate duty free treatment while the goods in Category B would be subjected to gradual tariff reduction over a period of 5 years.<sup>411</sup>

The plan to establish a political federation by 2011 is an issue which requires a pragmatic and cautious approach. Apart from the factors surrounding the futile attempt of the past, the EAC is faced with a whole range of complex dynamics. The security situation in Northern Uganda, Burundi, Southern Sudan and Somalia could have a negative impact on the stability of the proposed

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<sup>408</sup> Draper et al (2007) 14. Doubts have been expressed about the possibility of a single government by 2012. Opinion survey indicates that while 30% of Kenyans favour the establishment of a monetary union, 36% are opposed to it. See *The East African* newspaper (Kenya) April 20-26, 2009, 10.

<sup>409</sup> According to World Bank statistics, Uganda recorded an average growth rate of 6.7% a year between 1992 and 1999. The average per capita income also rose from USD200 in 1990 to USD359 in 2002. Similarly, GDP growth in Tanzania increased from 3.7% in 1998 to 6.3% in 2002. Per capita income also increased from USD184 in 1998 to USD207 in 2002. See e.g. The World Bank, *African development indicators*. Washington DC: The World Bank (2004).

<sup>410</sup> Protocol on the Establishment of the East African Customs Union, art. 11.

<sup>411</sup> *Ibid*, art. 11(3).

federation.<sup>412</sup> Political instability, resulting from electoral fraud and absence of genuine democratisation process, as recently witnessed in Kenya and Uganda makes the attainability of a political federation a doubtful exercise. In a situation where citizens remain sceptical and disillusioned about constitutional developments in their states, it is highly unlikely that such citizens would place their confidence and trust in a large-scale regional federation. This is also applicable to African integration in general.

The consolidation of democratic governance, human rights and public participation are essential ingredients necessary for the success of the political federation. Unlike the old EAC which was built around the relationship among the three post-independence elites, the new EAC should endeavour to include the people of East Africa in the integration process. As Kamanyi suggests, 'the ultimate decision of when and how to federate must be put to East Africans in a referendum to endorse or reject a widely negotiated federal constitution'.<sup>413</sup> It is also important that member states transfer the requisite sovereign powers to the institutions of the new EAC. As evident in the EU, independent and autonomous institutions are crucial for the progress of the integration process.

The new EAC seems to be set on an irreversible path of regional integration.<sup>414</sup> It is expected that it would put in place adequate measures for preventing the mistakes of the past and also the promotion of mechanisms for the strengthening of integration initiatives. In a similar vein, it will be interesting to

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<sup>412</sup> See e.g. Mfanga M, 'African integration can't skip its five powerhouses'. Available at <http://www.ippmedia.com/ipp/guardian/200705/18/90734.html> (Accessed on 25 March 2009).

<sup>413</sup> Kamanyi J, *The East African political federation: Progress, challenges and prospect for constitutional development*. Paper presented at the Annual Sir Udo Udoma Symposium, Makerere University, Kampala (2006) 7. Available at <http://www.kituoachakatiba.co.ug/staffppr1.pdf> (Accessed 10 March 2008).

<sup>414</sup> Tanzania is singled out as stalling the fast-tracking of regional integration mainly due to its opposition to issues such as access to land, use of national identity cards for travelling within the region and permanent residency. Another source of concern is the dispute between Kenya and Uganda over Mizingo Island. See generally, *The East African* (2009).

see how the future East African political federation will fit into the matrix of a continental integration.<sup>415</sup>

### **3.3.5 Organisation pour l'Harmonisation en Afrique des Droit des Affaires (OHADA)**

The OHADA (in English, Organisation for the Harmonisation of Business Law in Africa) remains one of the boldest attempts at supranationalism on the continent. The character of the OHADA Treaty, which was adopted on 17 October 1993, is essentially pro-development and business inclined.<sup>416</sup> Built around the existing economic and political relations among francophone African countries,<sup>417</sup> the Treaty aims to accelerate economic development and foreign investments in member states through the provision of a secure judicial environment. The Treaty regulates - through the Uniform Acts - the following areas: company law, general commercial law, securities, enforcement measures, insolvency law, arbitration, accounting law and transport.<sup>418</sup> At present, there are sixteen member states spread across west and central Africa.<sup>419</sup> Since the majority of member states are francophone countries, the OHADA laws are largely based on the French legal system.<sup>420</sup> In pursuant of the goal of continental integration, the Treaty provides that membership is open to all member states of the AU.<sup>421</sup>

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<sup>415</sup> The EAC, together with seven RECs, is officially recognised as one of the building blocks towards continental integration.

<sup>416</sup> See generally, Dickerson C, 'Harmonising business law in Africa: OHADA calls the tune'. *Columbia Journal of Transnational Law*. 44/17 (2005) 17-73

<sup>417</sup> Each of the OHADA member states belong to the two major French based economic and monetary zones: West Africa – *Union Economique et Monetaire Ouest Africaine* (UEMOA) and Central Africa - *Communaute Economique et Monetaire l'Afrique Centrale* (CEMAC).

<sup>418</sup> <http://www.ohada.com/textes.php> (Accessed 23 April 2008).

<sup>419</sup> They include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Gabon, Equatorial Guinea, Guinea, Guinea -Bissau, Mali, Niger, Senegal and Togo. Most of the OHADA members are francophone countries with few exceptions: Equatorial Guinea (Spanish), Guinea - Bissau (Portuguese) and the English speaking parts of Cameroon.

<sup>420</sup> The laws of Guinea Bissau (which was colonised by Portugal) and Equatorial Guinea (colonised by Spain) are similar to the French legal system. This was due to the influence of the French Commercial Code on the Spanish and Portuguese laws. These laws belong to the civil law tradition. See Porta R et al, 'Law and finance'. *Journal of Political Economy*. 106/6 (1998) 1118.

<sup>421</sup> OHADA Treaty – General Clause Title 1, art. 53. The following countries have signified their intentions to join the organisation – the Democratic Republic of Congo (which is in the process of becoming a member), Ghana, Nigeria and Liberia. See Cousin B & Carton A, *OHADA: A common legal system*

### 3.3.5.1 Supranational features of the OHADA

An important supranational component of the Treaty is the provision which stipulates that the Uniform Acts are immediately applicable in the domestic laws of each member state.<sup>422</sup> Unless specified otherwise (in the Uniform Act), the Treaty provides that Uniform Acts shall enter into force 90 days after their adoption.<sup>423</sup> In addition, the Uniform Acts shall have direct effect, allowing any party to rely on its provisions, 30 days after their publication in the OHADA official journal.<sup>424</sup>

In order to give effect to its supranational goal, the Treaty has established the following institutions:

#### *a. Common Court of Justice and Arbitration (CCJA)*

There is no gainsaying the fact that one of the obstacles to foreign investments in the continent is the unreliability of national judicial systems. Recourse to the courts is sometime frustrating due to a number of factors which include bureaucratic bottlenecks, lengthy court process, weak laws and incompetent judicial officers. It is in light of this that the drafters of the OHADA Treaty have provided for a common court to interpret and monitor the implementation of the Uniform Acts. The provision of a secure judicial system is expected to bolster the confidence of actual and potential investors. The CCJA is located in Abidjan, Cote d'Ivoire.

The CCJA has two functions vis-à-vis OHADA laws: an arbitration centre and a Supreme Court for judgments delivered by national Courts of Appeal. However, the role of the court as an arbitration centre remains undeveloped.<sup>425</sup> As the Court of last resort in terms of the OHADA laws, the CCJA plays a primary role

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*providing a reliable legal and judicial environment in Africa for foreign investors.* (2007) 2. Available at <http://www.cerclehorizon.com/clubohada/nosarticle/judicial-environment-in-africa.pdf>. (Accessed 1 April 2007).

<sup>422</sup> OHADA Treaty, art. 10.

<sup>423</sup> Ibid, art. 9.

<sup>424</sup> Ibid.

<sup>425</sup> Dickerson (2005) 56.

in ensuring that there is uniform application of the OHADA laws in member states.<sup>426</sup> In respect of interpretation of the treaty, both the member states and the Council of Ministers may approach the Court in this regard.<sup>427</sup> Appeal to the Court can either be instituted by one of the parties to the proceedings or by referral of a national court.<sup>428</sup> In relation to the enforcement of the Court's decisions, the Treaty entrusts the member states with this function.<sup>429</sup>

Appraising the functioning of the Court, Dickerson observed that national courts are reluctant to send business-related cases to the CCJA coupled with the fact that logistical problems (especially financial) hinder parties from appealing to the CCJA.<sup>430</sup> Explanation for the unwillingness of national courts to refer OHADA related cases to the CCJA is largely attributed to the fear of losing "interesting cases" to the CCJA.<sup>431</sup> This attitude is, to some extent, a reflection of an attachment to national sovereignty, which has the potential of impeding the progressive aspirations of the OHADA.

#### *b. Council of Ministers*

The Council is the legislative organ of the OHADA. It is composed of Justice and Finance Ministers of member states. This composition is a reflection of the primary role of national governments in this process. Although this has been criticised as a "non-democratic aspect [o]f the OHADA structure",<sup>432</sup> it not only represents a practical way of balancing national sovereignty and supranationalism but also beams the lights of scrutiny on the activities and commitment of national governments to the OHADA. It is important to note that even the EU - which is regarded as the most advanced supranational

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<sup>426</sup> See arts. 13-18 of the OHADA Treaty.

<sup>427</sup> Ibid, art. 14. On a number of occasions, the CCJA has ruled that the OHADA laws are superior to any conflicting national laws. See Dickerson (2005) 56.

<sup>428</sup> Ibid, art. 15.

<sup>429</sup> Ibid, art. 20.

<sup>430</sup> Dickerson (2005) 57-58.

<sup>431</sup> Ibid.

<sup>432</sup> Ibid, 60.

organisation in the world - still operates within the framework of mechanisms which protect the interests of national governments.

Except for the adoption of Uniform Acts, the decisions of the Council are reached by an overall majority of the member states present and voting.<sup>433</sup> This approach is indicative of the supranational aspirations of the OHADA. It is, however, expected that in the long run, the decisions on Uniform Acts will also be reached by majority votes.

*c. Ecole Regionale Supérieure de la Magistrature (ERSUMA)*

The ERSUMA (in English, Regional High Judiciary School) was established to train legal professionals in the member states.<sup>434</sup> Considering the revolutionising aims of the OHADA, the creation of this school could not have been more appropriate.

*d. Permanent Secretariat*

The Permanent Secretariat is the engine room of the organisation. It is responsible for drawing up the Uniform Acts.<sup>435</sup> The effective functioning of the organisation is dependent on the transfer of more powers to the Permanent Secretariat. As Dickerson suggested, the administrative oversight functions of the Secretariat should be strengthened.<sup>436</sup> This could be done in phases, over a period of time. Underfunding - a familiar virus which plagues regional integration initiatives on the continent - remains a major problem. It is essential that member states provide the OHADA institutions with the requisite funding so that they could be able to implement programmes which are vital for the proper functioning of the organisation.<sup>437</sup>

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<sup>433</sup> See art. 3 of the OHADA Treaty.

<sup>434</sup> Ibid, art. 41.

<sup>435</sup> Ibid, art. 7.

<sup>436</sup> Dickerson (2005) 70.

<sup>437</sup> Ibid, 69.



### 3.3.6 The West African Economic and Monetary Union (WAEMU/UEMOA)

WAEMU is one of two CFA franc zones in Africa, the other being the Central African Economic and Monetary Community (CEMAC). Built around a common, convertible currency - the CFA franc - and a shared colonial heritage,<sup>438</sup> the WAEMU was established in 1994 as a measure to address the attendant effects of the devaluation of the CFA franc and in turn, strengthening the economic cooperation among member states.<sup>439</sup> The objectives of the organisation include the harmonisation of laws, the creation of a common market and the convergence of macro-economic policies of member states.<sup>440</sup>

The supranational ambition of the organisation is affirmed in article 6 of the UEMOA Treaty.<sup>441</sup> Lavergne notes that the supranational nature of the UEMOA can be inferred from four functions highlighted in the treaty:<sup>442</sup>

- Supranationality over monetary matters
- Prohibition of the application of new protectionist measures against member states (Article 77)
- Obligatory nature of institution directives, regulations and decisions (Article 43)
- Surveillance mechanisms and sanctions (Articles 64, 65, 72-75)

The institutional architecture of the organisation comprises of the Conference of Heads of State, the Council of Ministers, the Court of Justice, the Commission

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<sup>438</sup> The original seven members - Benin, Burkina Faso, Cote d'Ivoire, Mali, Niger, Senegal and Togo - are francophone countries. Guinea-Bissau, a Portuguese speaking country, later joined the group in 1997.

<sup>439</sup> Pattillo C & Masson P, *Monetary union in West Africa (ECOWAS): Is it desirable and how could it be achieved?* International Monetary Fund (2001) 8-9; see also Oleynik G, Alexander N & Oliyik S (eds), *West African Economic and Monetary Union (WAEMU) business law handbook*. Washington DC: International Business Publications (2003) 6-7.

<sup>440</sup> See art. 4 of the UEMOA Treaty Available at <http://www.uemoa.int> (translated version) (Accessed 25 March 2009).

<sup>441</sup> Art. 6 state the UEMOA's statutes are superior to the laws of member states.

<sup>442</sup> Lavergne R, 'Reflections on an agenda for regional integration and cooperation in West Africa'. Available at [http://www.idrc.ca/pan/ev-68350-201-1-DO\\_TOPIC.html](http://www.idrc.ca/pan/ev-68350-201-1-DO_TOPIC.html) (Accessed 20 December 2009).

and the Central Bank of the States of West Africa (BCEAO).<sup>443</sup> The BCEAO is the institution that truly reflects the supranational status of the organisation.<sup>444</sup> It is the institution solely responsible for the issuing currency on the territory of its member states and also monetary policy within the zone.<sup>445</sup> In this regard, the BCEAO has been commended for pursuing prudent monetary policy amidst worsening economic performance in some member states.<sup>446</sup>

Among the achievements of the WAEMU since its inception are the convergence of macro-economic criteria, harmonisation of business laws (especially indirect taxation regulations), establishments of customs union and common external tariff.<sup>447</sup>

### **3.3.7 The Central African Economic and Monetary Community (CEMAC)**

As previously mentioned, the CEMAC<sup>448</sup> is the second CFA Franc zone in Africa. The CEMAC, in 1994, replaced Customs and Economic Union of Central Africa (UDEAC), an organisation that was established, in 1961, to promote monetary cooperation among francophone central African nations.<sup>449</sup> CEMAC, like WAEMU, aims to create a common market, harmonise laws and sectoral policies, and the convergence of macro-economic policies of member states.<sup>450</sup> The organisation is made up of the following institutions: the Conference of the Heads of States, Council of Ministers, Community Parliament, Court of Justice, and the Bank of Central African States (BEAC).<sup>451</sup>

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<sup>443</sup> <http://www.uemoa.int>

<sup>444</sup> See e.g. Busch G, 'The CFA, ECOWAS and monetary union' (2009) 4. Available at [http://www.ocnus.net/artman2/publish/Editorial\\_10/The\\_CFA\\_ECOWAS\\_And\\_Monetary\\_Union.shtml](http://www.ocnus.net/artman2/publish/Editorial_10/The_CFA_ECOWAS_And_Monetary_Union.shtml) (Accessed 20 March 2009)

<sup>445</sup> Ibid; see also Oleynik et al (2003)

<sup>446</sup> See 'West African Economic and Monetary Union: Recent economic developments and regional policy issues; and public information notice on the executive board discussion'. *IMF Country Report No. 03/70* (2003) 4. Available at <http://www.imf.org/external/pubs/ft/scr/2003/cr0370.pdf> (Accessed 1 March, 2009). [Hereinafter referred to as IMF (2003) ]

<sup>447</sup> <http://www.uemoa.int>; see also ECA (2004) 30.

<sup>448</sup> Of the six members of the organisation, five - Cameroon, Central Africa, Congo, Gabon and Chad - are former French colonies. The sixth member, Equatorial Guinea, is a former Spanish colony.

<sup>449</sup> <http://www.cemac.cf> (translated version) (Accessed 20 March 2009).

<sup>450</sup> Ibid.

<sup>451</sup> Ibid.

As with the WAEMU, the BEAC is the supranational institution responsible for issuing the CFA Franc within the zone and in addition, the control over the monetary policy of the zone.<sup>452</sup> At present, the CEMAC has in place financial and legal (harmonisation of business laws) regulatory mechanisms.<sup>453</sup>

However, the customs union is yet to function effectively largely as a result of the low level of intra-community trade, bureaucratic bottlenecks that hinder the free flow of goods and services and the lack of political will to fast-track integration.<sup>454</sup>

### **3.4 Common factors hindering the maximal realisation of supranationalism in Africa**

As evident in the preceding discussion, experimentation with supranationalism is not novel in Africa. Some of the organisations discussed above have made considerable progress on certain fronts, especially on monetary, security, business and judicial matters. Setting the tone for continental integration, these institutions have made modest, and sometimes bold, incursions into issues bordering on state sovereignty. Although mainly working within the rigid context of over-bearing member states' influence, organisations like CEMAC and WAEMU have put in place structures for monitoring and ensuring compliance with monetary policies of member states. The OHADA framework ensures, through its institutions, the supranationality of its jurisdiction on matters relating to the harmonised business laws. In a series of interviews conducted by Dickerson with various stakeholders across OHADA member states, optimistic views were expressed about the success of the process, especially in relation to the execution of judgments.<sup>455</sup> In the SACU, the revenue derived from the Common External Tariff (CET) amounts to a significant portion of the budget

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<sup>452</sup> Ibid.

<sup>453</sup> ECA (2004) 29.

<sup>454</sup> <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTREGINI/EXTAFRREGINICOO/0,,contentMDK:20626584~menuPK:1592430~pagePK:64168445~piPK:64168309~theSitePK:1587585,00.html>  
(Accessed 10 February 2010).

<sup>455</sup> Dickerson (2005) 65.

revenue of its member states.<sup>456</sup> All of these point to the beneficial nature of supranationalism and its potential in addressing some of the continent's problems.

In spite of the achievements outlined above, there is still room for more improvement. As will be shown below, the worrying question relates to the glaring disconnect between commitment to supranationalism at public fora and the creation of an enabling environment for it to be operational. To put it simply, there has been a gross lack of political will on the part of Africa states to translate goals and objectives into reality.<sup>457</sup> As Udombana aptly surmises:

African leaders lack the certitude to face the challenges of integration. Integration requires that each constituent party have clearly defined national plans and strategies to achieve economic development. Like a child in a toyshop, most leaders in Africa do not know which way to look. They have been unable to make the changes that will sustain growth and development. Others are not prepared to subordinate immediate national plans to long-term economic regional goals or to cede essential elements of sovereignty to regional institutions.<sup>458</sup>

Thus, this section will attempt to tease out some of the obstacles to integration in Africa, especially within the context of supranationalism. In essence, the discussion will primarily focus on factors responsible for the inability of regional organisations in Africa to exercise supranational powers.

### **3.4.1 Weak Institutional Machinery**

A major impediment to operationalising supranationalism in Africa is the fact that regional institutions are not independent enough to implement integration initiatives. These institutions are expected to operate based on the whims of member states, often run by dictators with personal interests at heart, rather

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<sup>456</sup> It makes up approximately 50% of Swaziland's and Lesotho's budget revenues, and 30% and 17% of the budget revenues of Namibia and Botswana. See Ngwenya (2002) 26.

<sup>457</sup> See e.g. Thompson B, 'Legal problems of economic integration in west African sub-region'. *African Journal of International and Comparative Law*. 2 (1990) 86.

<sup>458</sup> See Udombana (2002) 202.

than to fulfil the ambitious objectives of the organisation. It is thus not uncommon to see the dissolution or derailment of integration initiatives based on the change of government in member states or personal differences among heads of state.<sup>459</sup>

The dissolution of the first EAC is a classical case. The 1971 military putsch in Uganda quickened the eventual demise of the community. Julius Nyerere, being a close friend to the overthrown Milton Obote, disliked Idi Amin, the new Ugandan leader.<sup>460</sup> As Garba notes, both Nyerere and Amin threw caution to the wind by verbally abusing each other at public forums.<sup>461</sup> The functioning of the community was adversely affected by this enmity.<sup>462</sup>

Since decision making powers are firmly placed in the hands of heads of states, the institutional machinery of most African organisations lack the power to initiate and supervise policies. It seems as if African leaders abhor the transference of sovereignty to regional institutions.

There is a strong nexus between the effective implementation of integration initiatives and the autonomy of regional institutions. The ability of these institutions to act above member states, in respect of specific areas of common interests, ensures that integration is firmly placed in capable and neutral hands, insulated from the vagaries of national politics. It also guarantees that integration proceeds at a significant pace since decisions will not always be taken by unanimity or consensus. In the case of the OHADA, it could be argued

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<sup>459</sup> In relation to the New Partnership for Africa's Development (NEPAD), some analysts have expressed concern about the continued existence of the organisation, especially after its main architects, Olusegun Obasanjo and Thabo Mbeki, retire from office as presidents of their respective countries. See e.g. Dowden (2008) 534.

<sup>460</sup> Nyerere also resented the fact that Idi Amin was seen by white minority regimes in Southern Africa as an archetypical embodiment of the failure of black African leadership. See Gregorian H, *Plowshares into swords: The former member states and the 1978-1979 war* in Potholm & Fredland (1980) 189.

<sup>461</sup> Garba J, *Diplomatic soldering: The conduct of Nigerian foreign policy, 1975-1979*. Ibadan: Spectrum Books (1987) 125.

<sup>462</sup> As Mazzeo observed, the East African Authority, the highest decision making organ of the community, had no meeting in seven years as a result of this clash. See Mazzeo (1984) 156.

that the successful implementation of the harmonisation of business law is largely attributable to an independent and reliable Court of Justice.<sup>463</sup> The same can be said about the BCEAO and BEAC as independent institutions within the WAEMU/UEMOA and CEMAC respectively.

Another factor that hampers the smooth running of integration initiatives is the lack of funds. The epileptic state of the economies of some African states coupled with their obligations to pay annual dues to the various sub regional organisations they belong to, largely contributes to the inability to discharge their financial obligations.<sup>464</sup> There is no gainsaying the point that the availability of funds is crucial for the virility of any organisation, most especially an organisation charged with the responsibility of furthering - a capital intensive project - regional integration and co-operation.<sup>465</sup>

### **3.4.2 Non-implementation of key integration initiatives**

As mentioned earlier, one of the core features of supranationalism is the binding nature of laws emanating from international institutions. In order for such laws to have teeth, it is necessary that they either enjoy equal legal status with domestic laws or in some cases, supersede them. This is where the doctrinal question of the relationship between international and domestic law comes into the picture.

In international law, there are three theories governing such a relationship: monism, dualism and harmonisation.<sup>466</sup> According to monists, law is

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<sup>463</sup> In a series of interviews conducted by Dickerson with various stakeholders in OHADA member states, many expressed their optimism about the success of this initiative and also praised the clarity of OHADA laws vis-à-vis the execution of judgments. See Dickerson (2005) 65.

<sup>464</sup> The issue of overlapping and multiple memberships will be discussed below.

<sup>465</sup> In CEMAC for example, it has been observed that lack of funds has made it impossible to retain or hire qualified staff. See International Monetary Fund, 'Central African Economic and Monetary Community – Recent developments and regional policy issues' *IMF Country Report No 05/403* (2005) 19. Available at <http://www.imf.org/external/pubs/ft/scr/2005/cr05403.pdf> (Accessed 20 March, 2009) [Hereinafter referred to as IMF (2005)].

<sup>466</sup> Dugard J, *International law: A South African perspective*. Cape Town: Juta (2005) 43-47; Umozurike U, *Introduction to international law*. Ibadan: Spectrum (2005) 47-48.

hierarchical, with international law and domestic/national law being part of the same legal order.<sup>467</sup> Therefore, international law applies in the domestic system without any need for its incorporation.<sup>468</sup> Dualists view that both international law and domestic law are two distinct fields of law.<sup>469</sup> Furthermore, in order for international law to be binding in the domestic system, there is a need for some process of incorporation or transformation.<sup>470</sup> Lastly, the harmonists seek to arrive at some form of convergence by holding that where there is a conflict between the application of international law and domestic law, the court should apply the rules operative within its jurisdiction.<sup>471</sup> The consequence of this is that the court may apply either of the two.<sup>472</sup>

Placing these theories within the African context, the issue is not so much the nature of the legal framework, be it monist or dualist, but rather the lack of political will to domestically implement international law in the form of integration programmes such as elimination of tariffs and free movement of persons.<sup>473</sup> In spite of the agreement on free movement of persons and goods within ECOWAS, it has been observed that security agents continue to harass and intimidate citizens across ECOWAS frontiers.<sup>474</sup> Also, the proposed common currency, the Eco, for the West African sub-region which is expected to be launched in December 2009, remains unlikely due to the non-implementation of convergence criteria by member states.<sup>475</sup> The routine disregard or non-

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<sup>467</sup> Dugard (2005) 47.

<sup>468</sup> Ibid.

<sup>469</sup> Ibid, 47-48; Umozurike (2005) 30.

<sup>470</sup> Umozurike (2005) 30.

<sup>471</sup> Ibid, 31.

<sup>472</sup> Ibid.

<sup>473</sup> Thompson (1990) 90; ECA (2004) 33; Kufuor K, 'Securing compliance with the judgments of the ECOWAS court of justice', *African Journal of International and Comparative Law*. 8 (1996) 6-7.

<sup>474</sup> 'ECOWAS, media and challenges of integration'. *The Punch* (Nigeria). Available at <http://h2.punchng.com/Articl.aspx?theartic=Art200901022225112> (Accessed January 2, 2009). In 1983, the Nigerian government, in contravention of the ECOWAS Protocol on Free Movement of Persons, expelled nationals of ECOWAS member states from its territory. See Kufuor (2006) 33.

<sup>475</sup> The West African Monetary Zone (WAMZ) is a monetary arrangement among five countries: Gambia, Guinea, Nigeria, Sierra Leone and Ghana. See Obayuwana O & Okwe M, 'Nigeria, Ghana, others yet to meet condition for Eco currency' *The Guardian* (Nigeria) 19 May 2009. Available at [http://www.ngrguardiannews.com/news/article03//indexn2\\_html?pdate=190509&ptitle=Nigeria,%20Ghana,%20others%20yet%20to%20meet%20conditions%20for%20Eco%20currency](http://www.ngrguardiannews.com/news/article03//indexn2_html?pdate=190509&ptitle=Nigeria,%20Ghana,%20others%20yet%20to%20meet%20conditions%20for%20Eco%20currency) (Accessed 19 May 2009).

implementation of these policies decimates the relevance of institutional machinery.<sup>476</sup>

Also related to the above discussion is the issue of the dichotomised legal tradition bequeathed to Africa by colonisation. A principal effect of colonisation is the adoption of the legal system of the colonialists. As such, African countries have divergent rules and regulations governing specific issues. Citing the example of the Mano River Union (MRU), Thompson shows how the income tax regimes in Sierra Leone, colonised by Britain, frustrates foreign investment while the tax regime in Liberia, influenced by the United States of America, is more favourable.<sup>477</sup> The consequence of such dissimilarities is the uneven implementation or outright disregard of policies by member states.<sup>478</sup> This reality is more evident in the practice of some African states to rather integrate around shared legal system (e.g. OHADA and WAEMU). There is no doubt that a shared legal system makes integration, especially the harmonisation of laws, easier.

Yet, it is equally important that in order to translate the vision of continental integration into practise, member states must be prepared to embark on the reconciliation of laws in various areas. In this regard, more efforts should be geared towards identifying the common denominators in each of the legal systems and more importantly, devising laws which suit the African peculiarities. For example, lessons and ideas could be drawn from African customary laws.

### ***3.4.3 Crowded integration landscape***

The proliferation of regional organisations is an indicator of the failure of African states to genuinely commit to a single, well-thought-out and implementable

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<sup>476</sup> According to the IMF, in spite of the establishment of a customs union within WAEMU and CEMAC, the momentum of integration continue to be slowed down by member states' non-compliance with key convergence criteria. See IMF (2003) 4; IMF (2005) 16.

<sup>477</sup> Thompson (1990) 96.

<sup>478</sup> Ibid, 94-97.



programme.<sup>479</sup> Although the Constitutive Act provides that the AU must 'coordinate and harmonise the policies between the existing and future RECs for the gradual attainment of the objectives of the Union',<sup>480</sup> the AU is yet to finalise the protocol which will provide a legal framework for the relationship between it and the RECs.<sup>481</sup> In order to address this, a number of views have emerged on how to rationalise the RECs.<sup>482</sup>

As long as the landscape of African integration is defined by multiple RECs with overlapping and replicated membership, integration will remain a mirage. Integration cannot be achieved in a situation where the constituent agencies are pulling in different directions. To effectively proceed with the rationalisation process, a detailed audit of each of the fourteen RECs should be carried out in order to determine their viability and relevance to the integration process. The audit should establish key points such as the proximity of each RECs' activity to

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<sup>479</sup>According to a ECA survey, the following points were identified as the reason why African countries join more than one REC:

- strategic and political reasons
- economic reasons
- Complementarity
- historical reasons
- geographical proximity
- need for additional external resources
- political pressure
- cultural vision.

See AU & ECA (2006) 52-54.

<sup>480</sup> See Article 3(l) of the Constitutive Act.

<sup>481</sup> See the Draft Protocol on the Relationship Between the Regional Economic Communities (REC) and the AU. *EX/CL/158(IX)*

<sup>482</sup> The UN Economic Commission also proposed five possible scenarios: a) Managing the status quo, b) Rationalisation by merger and absorption, which entail the merging of existing RECs in order to come up with 5 RECs in each of Africa's sub-region, c) Rationalisation around rooted communities, which calls for the creation of RECs according to common characteristics such as geography, ethnicity and sociology. d) Rationalisation by division of labour, which divides cooperation efforts into regional and sub-regional programmes, categorising them according to the interests of the countries in the same region and e) Rationalisation through harmonisation and coordination, which aims at the harmonisation and coordination of trade liberalisation, and macro-economic convergence policies and criteria of the current regional economic blocs. See AU & ECA (2006) 115-26. The AU Commission has also proposed four possible rationalisation scenarios: a) Maintaining the status quo, b) Maintaining the tenets of the Abuja Treaty within a shorter time frame, c) Rationalisation by anchored community, d) Rationalisation of a political decision by heads of state. See Report of the meeting of experts on the rationalisation of Regional Economic Communities (RECs) held in Ouagadougou, Burkina Faso. 27-29 March, 2006.

the realisation of the steps outlined by the Abuja Treaty, the feasibility of limiting the membership of states to one REC, delineation of duties and objectives among the RECs, synchronisation of policies and the consequence(s) of narrowing down RECs to five.<sup>483</sup>

**Table 3.1: Member states of major sub-regional organisations in Africa**

COUNTRIES	UMA	CEMAC	COMESA	CENSAD	EAC	ECCAS	CEPGL	ECOWAS	IOC	IGAD	MRU	SACU	SADC	UEMOA
ALGERIA	*													
ANGOLA			*			*							*	
BENIN				*				*						*
BOTSWANA												*	*	
BURKINA FASO				*				*						*
BURUNDI			*		*	*	*							
CAMEROON		*				*								
CAPE VERDE								*						
CENTRAL AFRICAN REPUBLIC		*		*		*								
CHAD		*		*		*								
CONGO		*				*								
COMOROS			*						*					
COTE D'IVOIRE				*				*						*
DJIBOUTI			*	*						*				
EGYPT			*	*										
ERITREA			*	*						*				
ETHIOPIA			*							*				
GABON		*				*								
GAMBIA				*				*						

<sup>483</sup> The delineation of powers between a future supranational AU and the RECs is discussed in chapter 5.



GHANA								*						
GUINEA								*			*			
GUINEA BISSAU								*						*
EQUATORIAL GUINEA		*				*								
KENYA			*			*				*				
LESOTHO												*	*	
LIBERIA								*			*			
LIBYA	*			*										
MADAGASCAR			*						*					
MALAWI			*										*	
MALI				*				*						*
MAURITANIA	*												*	
MAURITIUS			*						*					
MOROCCO	*			*										
MOZAMBIQUE													*	
NAMIBIA			*									*	*	
NIGER				*				*						*
NIGERIA				*				*						
UGANDA			*			*				*				
DEMOCRATIC REPUBLIC OF CONGO			*			*	*						*	
RWANDA			*		*	*	*							
SAO TOME						*								
SENEGAL				*				*						*
SEYCHELLES			*						*				*	
SIERRA LEONE								*			*			
SOMALIA				*						*				
SOUTH AFRICA												*	*	

SUDAN			*	*						*				
SWAZILAND			*									*	*	
TANZANIA					*								*	
TOGO				*				*						*
TUNISIA	*			*										
ZAMBIA			*										*	
ZIMBABWE			*										*	

Source: Adapted from Kennes W, African regional economic integration and the European Union, in Bach D (ed) *Regionalisation, integration and disintegration in Africa* Bloomington: Indiana University Press (1999) 40

Out of the 54 African countries outlined above, only 5 belong to one regional organisation, 27 belong to two organisations, 17 belong to three organisations and 3 belong to four organisations.

#### **3.4.4 Skewed distribution of benefits and hegemonic threats**

One of the principal motivations behind a state's participation in regional integration initiatives is the expectation of immediate and long-term welfare gains. In a situation where a country loses out on the benefits accruing from integration schemes, there is a strong possibility of such a country either committing half-heartedly to integration objectives or completely pulling out.<sup>484</sup> As Molle points out, two reasons underline the need for redistribution policies in a regional integration scheme. The first is the 'efficiency argument' which holds that uneven distribution of benefits such as production factors and economic activities prevents the economy from reaping full profits and attaining maximum potential.<sup>485</sup> The second is the 'equity argument' which states that inequality is socially unacceptable and morally unfair.<sup>486</sup>

<sup>484</sup>Molle W, *Economic integration and equal distribution*. Working Paper Series 216. Washington DC: Inter-American Development Bank (1997) 7-8.

<sup>485</sup> Molle (1997) 8

<sup>486</sup> Ibid, 9.

The position with regional integration in Africa is that countries with the strongest economies end up deriving maximum advantage to the detriment of other member states. For example, in the old EAC, Kenya, due to its relatively developed economy, benefited more than the other partner states. Various measures were put in place to address this imbalance. The transfer tax system was adopted to ensure that industries in Uganda and Tanzania operated efficiently through the provision of additional budgetary revenues.<sup>487</sup> A related measure was the East Africa Development Bank's (EADB) to increase its investment in the less industrialised states.<sup>488</sup> Due to its limited resources, the EADB could not achieve a significant result in this regard.<sup>489</sup> Another criticism levelled against the bank was that it invested in projects which had little effect on the strengthening of the economies of member states.<sup>490</sup> One of the measures of ensuring redistribution was the relocation of the headquarters of common services and decentralisation of the operations. The lack of clarity with regard to the objective of decentralisation brought about a position of two centres of power: the Community on one hand and the country headquarters on the other.<sup>491</sup>

These measures, in spite of their well intentioned aims, were insufficient to redress imbalances which had their roots in the colonial administrative configuration. The low level of development of member states accentuated even the slightest trace of inequality. This situation exacerbated the tempo of rivalry in the Community and thus contributed to the dissolution of the Community.

As noted earlier, the transformation of SACU from an organisation 'cast in imperialist mould'<sup>492</sup> into an institution of equals led to the review of the revenue

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<sup>487</sup> Hazlewood (1985) 176; Mazzeo (1984) 153.

<sup>488</sup> The Bank's development activity was unevenly distributed in order to benefit the less developed member states: Tanzania (38.75%), Uganda (38.75%) and Kenya (22.5%). See Fredland R, *Who killed the East African Community?* in Fredland & Potholm (1980) 65-66.

<sup>489</sup> Mazzeo (1985) 155.

<sup>490</sup> Hazlewood (1985) 176-177.

<sup>491</sup> Mazzeo (1985) 154-155.

<sup>492</sup> Alden & Soko (2005) 373

sharing formula. In spite of the generous and favourable revenue sharing formula, Alden & Soko observe that South Africa, due to its developed infrastructure and currency, remains the dominant partner in the relationship.<sup>493</sup> The fact that the South African rand remains the legal tender within the zone, except for Botswana, means that member states cannot exercise independent fiscal and macro-economic policies without South Africa's consent.<sup>494</sup>

Also in the Senegambia Confederation, Senegal, being the larger and stronger partner, viewed the Confederation as an economic union - hence its insistence on a customs union in spite of Gambia's reservations - which would eventually evolve into a political merger.<sup>495</sup> On the Gambian side, this smacked of an attempt to absorb their country into a larger Senegal.<sup>496</sup> Although no express statements were made to highlight Senegalese domination, the perception persisted.<sup>497</sup> This could have been countered by allowing Gambia's proposition of rotational presidency of the Confederation. Furthermore, concerted efforts should have been made towards coming up with a workable arrangement which would compensate Gambia in the event of any loss as a result of the customs union.

In a situation where regional *hegemon*s solely dictate and determine the pace of integration, there is bound to be the decimation of the influence of regional organisations. In such a scenario, regional organisations become the mouth-piece of regional powers and thus lose legitimacy and support from smaller member states. This situation is pointedly explained as follows:

[T]he more obvious the existence of a regional *hegemon*, the more vigorous the rejection amongst smaller states. The independence of this variable in relation to 'national identities' is based on the fact that asymmetry can be perceived as a

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<sup>493</sup> Ibid, 372-273.

<sup>494</sup> Ibid, 372.

<sup>495</sup> Hugh & Lewis (1995) 239.

<sup>496</sup> Some Gambians saw the Confederation as a pretext for Wolof hegemony. The Wolof ethnic group is one of the dominant trans-frontier ethnic groups in the area. See Ibid, 236.

<sup>497</sup> Ibid, 239.

hazard without this being based on national sentiments: citizens can shirk supranational projects involving a much larger entity due to fears that the lack of influence of their own country within the arrangements will harm local interests, regardless of their attitudes towards the concept of nationhood.<sup>498</sup>

While the influence of regional *hegemons* in any integration process cannot be completely wished away, the point being made is that it is essential that mechanisms which allow the indispensability of smaller member states in the decision-making process are put in place.

### **3.4.5 Political instability**

It is trite knowledge that the implementation of integration objectives demands some level of political stability in member states. Supranational organisations can only (effectively) assert their control and influence in a stable climate. The fact that integration programmes require domestic and uniform implementation lends credence to this assertion. The instability in most African countries, as a result of election rigging, intimidation of the opposition and the citizenry clearly frustrates the attainment of uniformity of standards and objectives. From Gabon to Egypt, Zimbabwe to Cameroon, Eritrea to Libya, Equatorial Guinea to Gambia, African leaders continue to make a mockery of the core principles of good governance and democracy. This has in turn spurred a litany of perennial conflicts plaguing the continent.<sup>499</sup>

The negative impact of armed conflicts on the continent's economy cannot be over-emphasised.<sup>500</sup> According to the IMF, the crisis in Cote d'Ivoire, the largest country in the WAEMU zone, impacted negatively on the economic situation of

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<sup>498</sup> MacClanahan Y, *Supranational integration: Explaining the distinctive levels of sovereignty transferral between the different integrated areas*. Available at <http://portal.idc.ac.il/He/schools/Government/staff/Documents/Yair%20McKlanahan%20paper.doc> (Accessed 20 April 2008).

<sup>499</sup> See e.g. Cilliers J, *Towards a continental early warning system for Africa*. Pretoria: Institute of Security Studies Paper 102 (2005) 20.

<sup>500</sup> It is estimated that over a period of 15 years, 1990-2005, Africa has lost \$284 billion to conflicts and wars. The continent's economy has also within this period, shrunk by an average of 15% yearly. See *Africa's missing billion*, IANSA, Oxfam, and Saferworld (2007) 8-9. Available at [http://www.oxfam.org.uk/resources/policy/conflict\\_disasters/downloads/bp107\\_africa\\_missing\\_billions.pdf](http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/bp107_africa_missing_billions.pdf) (Accessed 12 October 2007). [Hereinafter referred to as Oxfam & Saferworld].

the whole zone.<sup>501</sup> Conflicts undermine the integration process by creating distrust among member states and more importantly, the diversion of funds that could have been used to promote and sustain integration initiatives.<sup>502</sup> Such commitments should also include the devolution of monitoring and disciplinary powers to regional institutions.<sup>503</sup> With such powers, regional institutions would be able to promptly intervene in (potential) conflict situations and also impose relevant sanctions on errant member states.

### **3.4.6 Democratic deficit**

The centrality of democracy to the integration process cannot be understated. As previously highlighted, integration requires the uniform application of standards and objectives. In this regard, member states are expected to embrace and practice the principles of good governance and democracy. The need for adherence to democratic values is even more pertinent considering the fact that the onus of enforcing decisions is placed on member states. If integration is understood as a process which not only promotes the establishment of common institutions but also the upliftment of individuals, then it is crucial that these individuals enjoy the rights to exercise their democratic rights. As Habib et al point out:

These norms are critical to further deepen integration...Africa will unite faster if Africans embark on democratisation drives and create democratic institutions based on the logic of the self-empowerment of the people on the foundation of an effective and engaged state civil society nexus.<sup>504</sup>

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<sup>501</sup> See IMF (2003) 4; see also International Monetary Fund, 'West African Economic and Monetary Union: Recent economic developments and regional policy issues in 2000' (2001) 4. Available at <http://www.imf.org/external/pubs/ft/scr/2001/cr01193.pdf> (Accessed 1 March, 2009).

<sup>502</sup> It is also estimated that about 24 African countries have spent around USD300bn on conflicts since 1990. See Oxfam & Saferworld (2007) 3.

<sup>503</sup> See e.g. Fagbayibo B, 'Make African Union supranational'. *The Nation* (Nigeria) 22 April 2008.

<sup>504</sup> Habib A, Muchie M & Padayachee P, *African integration and civil society: The case of the African Union*. Development Research Series, Working Paper No 137 (2006) 16. Available at <http://www.dir.ihis.aau.dk/?contentId=3426698&assetId=3427050> (Accessed 20 March 2008).



The problem with the integration process in Africa is that the people are excluded from matters relating to integration. Decisions and policies emanating from regional integration are neither subjected to referendums or wide consultation with the people concerned. The consequence is that the people know little about the integration process and thus attach little or no legitimacy to the regional institutions. It thus begs the question: If some African leaders are not prepared to allow democratisation at the national sphere, what is the probability of encouraging it at a transnational or regional level? As highlighted in the previous chapter, the tendency of reducing integration into egotistical contestation and an automated process stems from the poor democratic credentials of these leaders at the domestic level.<sup>505</sup> This has led to the conclusion, in some quarters, that regional organisations in Africa are merely an instrument for legitimising and maintaining (autocratic) regimes on the continent.<sup>506</sup>

Even when integration is exclusively based on business and monetary matters (e.g. OHADA, WAEMU and CEMAC), the idea of democracy and good governance cannot be totally removed from it. While some may argue that matters like these have nothing to do with human rights, the reality is that the absence of rule of law in member states may also have negative effects on the willingness of potential investors.

As long as the commitment to democratic values remains within the realm of rhetoric, integration initiatives will continue to flounder, unable to attain their full potential. Therefore, it is of the essence that regional institutions are

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<sup>505</sup> According to the 2009 Freedom House Survey of Political Rights and Civil Liberties, Sub-Saharan African countries record a poor showing in terms of adherence to rule of law and democratic governance. Of the 48 countries surveyed, only 10 (21%) were regarded as free, 23 (48%) were rated partly free and 15 (31%) were rated not free. Available at [http://www.freedomhouse.org/uploads/special\\_report/77.pdf](http://www.freedomhouse.org/uploads/special_report/77.pdf) (Accessed 11 April 2009) [Hereinafter referred to as Freedom House Survey 2009].

<sup>506</sup> See e.g. Fanta E, 'Politics of (non-)integration and shadow regionalism in Africa', 17-19. Paper presented at BISA Workshop, Open University Milton Keynes, United Kingdom, July 9 2008. Available at <http://www.open.ac.uk/socialsciences/bisa-africa/workshop/efanta.pdf> (Accessed 31 March 2009).

bequeathed with the necessary powers to monitor compliance with democratic standards in member states.

### **3.5 Summary**

This chapter provides a critical analysis of supranational experiments within Africa. It further offers an insight into the organisational framework of such experiments. Like other regional integration schemes, African integration has had its fair share of problems. The point is that Africa has never been in short supply of integration initiatives, the problem, however, lies in the lack of sufficient political will by member states to translate statements into concrete action.

Political will, beyond the oft-cited problem of weak economic structures of African state, plays a major role in the success of any integration process. As evident from the relative success of the OHADA, the granting of requisite powers to regional organisation is fundamental. It is not suggested that political will is the singular basis for a successful regional integration process; it nevertheless, helps firm up the foundation on which virile cooperation can be built upon.

The success of supranationalism in the continent is thus dependant on learning from the experiences of organisations that have attempted to establish leviathan institutions. As shown in this chapter, the problems experienced by these organisations are similar. While it is simplistic to assume that the compliance with the suggestions offered above will guarantee the effective operation of supranationalism in Africa, working towards understanding these obstacles and gradually correcting them is a necessary first step.

The next chapter investigates the feasibility of a supranational AU.



## Chapter 4

### **Journey to the unknown: An analytical discourse on the feasibility of a supranational African Union**

Two roads diverged in a wood, and I –  
I took the one less travelled by,  
And that has made all the difference

Robert Frost (The road not taken)<sup>507</sup>

- 4.1 Introduction
- 4.2 Conceptualising international organisation
  - 4.2.1 Definition of international organisations
  - 4.2.2 Categorisation of international organisations
- 4.3 The African Union: A roadmap to continental integration
  - 4.3.1 The creation of the African Union
  - 4.3.2 The Constitutive Act: A balancing act
  - 4.3.3 A supranational African Union?
- 4.4 The feasibility of a supranational African Union
  - 4.4.1 Membership
    - 4.4.1.1 The APRM: An overview
    - 4.4.1.2 The APRM as a tool of regulating AU membership: A  
critique
  - 4.4.2 Harmonisation of laws
  - 4.4.3 Public participation
  - 4.4.4 Development

<sup>507</sup> Available at <http://www.bartleby.com/119/1.html> (Accessed 20 June 2009)

- 4.4.4.1 The politics of self-reliant development
- 4.4.4.2 Boosting domestic resource mobilisation
- 4.4.4.3 Towards an AU driven development agenda

#### 4.5 Summary

### 4.1 Introduction

Unlike its predecessor, the OAU, the AU was designed as a vehicle for the attainment of closer continental integration. The institutional architecture of the union coupled with its ambitious developmental strategies evinces a determination to transcend the realms of national politics. It also represents an attempt to place Africa in the mainstream of global *realpolitik*.

This chapter, therefore, intends to move beyond the theory by investigating the practicalities of transforming the AU into a supranational entity. In doing so, this chapter begins with a theoretical analysis of the phenomenon of international organisations and how it fits into a global administrative framework. This is followed by an exposition of the AU, which includes the circumstances surrounding its creation, its Constitutive Act and presents arguments analysing whether the word 'supranational' aptly defines it. The chapter concludes with an analysis of some of the key ingredients necessary for the organisational transformation of the AU.

### 4.2 Conceptualising international organisation

Although the concept of international organisation dates back to ancient times, contemporary international organisations have their roots in the nineteenth century.<sup>508</sup> In response to a changing global environment vis-à-vis political and economic concerns, contemporary political systems devised the concept of

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<sup>508</sup> See e.g. Sands P & Klein P, *Bowett's law of international institution*. London: Sweet & Maxwell (2001) 1-4; see also Abi-Saab G, 'The concept of international organisations: A synthesis', in Abi-Saab G (ed), *The concept of international organisation*. Paris: UNESCO (1981) 9-11; see also Gerbet P, 'Rise and development of international organisation: A synthesis', in Abi Saab (1981) 28-49.

creating organisations within the community.<sup>509</sup> In a world shaped and defined by multiple states, with different capacities and concerns, international organisations have been designed not only to regulate interstate action and cooperation but to also address issues which have ‘attained a dimension stretching far beyond national boundaries’.<sup>510</sup>

Operating in a state-centric global environment, international organisations are expected to fulfil such transnational functions within the ambit or framework of their stated objectives. These objectives are generally based on a prior agreement amongst interested states. This has been described as ‘functional finality’ of international organisations.<sup>511</sup> Simply put, ‘functional finality’ denotes the circumscribed latitude of international organisations vis-à-vis matters that fall outside the scope of their duties.<sup>512</sup> Over the years, the concept of international organisation has evolved especially with the emergence of institutions that have redefined the basic premise of international institutions (e.g. the EU).

#### **4.2.1 Definition of international organisations**

In order to provide a conceptual framework for the understanding of this phenomenon, it is important that one defines the concept and purpose of international organisations. Although the said concept could be defined based on diverse perspectives, common denominators run through these definitions.

Abi-Saab makes a distinction between the political and legal definitions of this concept.<sup>513</sup> At the core of the legal definition of an international organisation is the concept of legal personality. The attribution of legal personality to an international organisation entails that such an organisation is a subject of

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<sup>509</sup> See e.g. Abi-Saab (1981) 10, see also Claude I, *Swords into plowshares: The problems and progress of international organisations*. New York: New York (1971) 22.

<sup>510</sup> Schermers & Blokker (1995) 1.

<sup>511</sup> Ibid, 16-19.

<sup>512</sup> Ibid, 17.

<sup>513</sup> Abi-Saab (1981) 11-12.

international law and is also capable of possessing international rights and duties.<sup>514</sup> The *Reparation for Injuries* case remains the *locus classicus* on international legal personality, although it dates from 1949. In this case, the International Court of Justice (ICJ) had to consider whether or not the UN had the capacity to bring an international claim against a state. After considering the UN Charter, the court concluded that the attribution of certain functions, rights and duties to the organisation is an indication of international legal personality.<sup>515</sup>

Legal personality thus enables international organisations to make decisions that are not necessarily identical with the will of its member states, conclude treaties and also has international responsibility.<sup>516</sup> As a consequence, the ICJ stressed that possession of international legal personality is not an indication of statehood; rather it only implies the possession of international rights and obligations.<sup>517</sup> Since the legal personality of international organisations is determined by member states, as reflected in its constitutive instrument, legal experts are thus of the view that international organisations are secondary actors or minor adjuncts in the international system.<sup>518</sup>

The political definition on the other hand, points to the fact that apart from the legal component, international organisations are ‘... transnational entities which take shape beyond frontiers and governments’.<sup>519</sup> Put basically, they obtain a life independent of their creators (member states). The increasing supranational powers of the EU over the years have lent credence to the views of political theorists vis-à-vis the conceptual framework of international organisations. In as much as the powers of the EU are determined by the political willingness of

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<sup>514</sup> Sands & Klein (2001) 473.

<sup>515</sup> ICJ Reports (1949) 179.

<sup>516</sup> Abi-Saab (1981) 12-13, see also Sands & Klein (2001) 470-476.

<sup>517</sup> ICJ Reports (1949) 178.

<sup>518</sup> Abi-Saab (1981) 12.

<sup>519</sup> Ibid.

member states, it has nevertheless evolved into an organisation that exists alongside its member states albeit in relation to its areas of competence.

From a legal point of view, Virally defines an international organisation as

an association of states, established by agreement among its members and possessing permanent system or set of organs, whose task it is to pursue objectives of common interests by means of cooperation among its members.<sup>520</sup>

As with Abi-Saab's classification, the above definition also highlights the components of an international organisation: the central role of states in their existence and their (relative) autonomous powers. As such, both the legal and political conceptualisations of international organisations are interrelated and should thus guide any study on the development or strengthening of international/regional institutions.

#### **4.2.2 Categorisation of international organisations**

There are several classifications of international organisations. Classification could be made based on functions, permanence, scope and the composition of international organisations.<sup>521</sup> However, for the purpose of this chapter, the basis of classification will be the competence (or purpose) of such an organisation. As highlighted above, the constitutive act of international organisations stipulates the powers of such organisation. Where there has been no express stipulation, the powers of such organisation may be deduced from the functions accorded to the organisation.<sup>522</sup> Virally<sup>523</sup> thus makes a distinction between an organisation whose function is cooperation and an organisation

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<sup>520</sup> Virally M, *Definition and classification of international organisations: A legal approach*, in Abi Saab (1981) 51.

<sup>521</sup> Ibid, 56-58; see also e.g. Amerasinghe C, *Principles of the institutional laws of international organisations*. Cambridge: Cambridge University Press (2005) 9.

<sup>522</sup> See e.g. I.C.J. Rep. (1949) 179.

<sup>523</sup> Virally (1981) 54.

whose function is integration. Amerasinghe simply refers to this as a ‘distinction between supranational organisations and those that are not supranational’.<sup>524</sup>

Organisations whose functions are aimed at cooperation (or non-supranationalism) operate within the framework of a state-centric international politics. Their autonomy is largely circumscribed, and is only entrusted with the task of discharging functions which are sometimes beyond domestic approach and solutions.<sup>525</sup> On the other hand, an organisation whose function is aimed at integration (supranationalism) is exclusively, above member states, responsible for regulating allotted transnational activities.<sup>526</sup> The corollary of this is the exercise of binding powers and the possession of certain attributes often associated with nation states. It should, however, be noted that it is possible for an organisation whose function is cooperation to evolve into an organisation whose function is integration.<sup>527</sup>

One must, however, avoid the pitfalls of rigid classification. For example, based on the structural framework of the UN, it could easily be classified as an organisation with the function of cooperation. This is not necessarily misplaced. However, when one looks at the function of one of its primary organs, the Security Council, which has the powers to make binding decisions in relation to matters of peace and security, one, is faced with the difficulty of classification in practice. Another example is the EU, which is an archetypical interplay between cooperation and integration (or between intergovernmentalism and supranationalism).

The existence of international organisations, in spite of a state-centric defined international system, reflects the complex dynamics of global *realpolitik*. On one hand, we are faced with an organisation that owes its existence and survival to

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<sup>524</sup> Amerasinghe (2005) 9.

<sup>525</sup> See e.g. Virally (1981) 54.

<sup>526</sup> Ibid.

<sup>527</sup> Haas observes that cooperation precedes integration and may not necessarily lead to formal integration between states; it is rather a phase in the process of integration. See Haas (1970) 610.



national powers. When challenged, states are quick to point out the subsidiary roles of international organisations, thereby underlining the supremacy of their sovereignty. On the other hand, these state-created entities possess certain powers which markedly resemble sovereign powers and basically operate at par with nation states. In spite of this, nation states remain a major force in international relations. This reality thus begs the question of how international organisation will continue to fit into a global political structure. Could international organisations arguably one day replace nation states? Would international organisations continue to attend to transnational problems? Or would international organisations simply fizzle out after solving the various transnational issues, which form the basis of their existence?

There is no single answer to the complex configuration of the global administrative system. A realistic view is that international organisations will continue to exist, attending to transnational needs on a supranational levels and also consolidate their competence to prevent (or minimise) hegemonic threats and level the playing field.

Explaining the reasons why international organisations cannot totally replace nation states, Hoffman identifies three core points: national consciousness, national situation and nationalism.<sup>528</sup> National consciousness is described as ‘a sense of cohesion and distinctiveness which sets one off from the other group’.<sup>529</sup> National situation is a combination of objective data (social structure, political system and geography) and subjective factors (values, prejudices and opinions).<sup>530</sup> Nationalism is ‘an ideology – the doctrine or ideology that gives to the nation in world affairs absolute value and top priority’.<sup>531</sup> Zurn also highlights two factors responsible for the primacy of nation states, especially when it comes to auto-compliance. The first is that the state has a monopoly of force,

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<sup>528</sup> See Hoffmann in Spiegel & Cantori (1970) 77-79.

<sup>529</sup> Ibid, 77.

<sup>530</sup> Ibid, 77-78.

<sup>531</sup> Ibid, 78-79.

and as such could compel obedience and conformity to its rules and standards.<sup>532</sup> The second relates to the citizens' psychological attachment to a particular nation state (national identity).<sup>533</sup>

Therefore, the contestation between nation states and international organisation will remain part of the global governance framework albeit skilful methods of balancing this continue to evolve.<sup>534</sup>

### 4.3 The African Union: A roadmap to continental integration

The continued inability of the OAU to respond to intra-African conflicts, curtail the deluge of gross human rights violations and address contemporary challenges facing the continent prompted a radical revamp of the organisation needed for the continent to move forward. More importantly, the view was held that the organisation had completed its primary functions namely eradicating colonialism, ending *Apartheid* and establishing the independence of African states.<sup>535</sup>

In order to address these inadequacies, there were suggestions including:

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<sup>532</sup> Zurn M, 'Law and compliance at different levels' in Joerges C & Zurn M (eds), *Law and governance in postnational Europe: Compliance beyond the nation-state*. Cambridge: Cambridge University Press (2005) 5.

<sup>533</sup> Ibid.

<sup>534</sup> As discussed in chapter 2, mechanisms such as subsidiarity, attribution of powers, proportionality and flexibility have been adopted to maintain a balance between national interests and powers of international organisations. Other mechanisms such as principles of direct effect, supremacy and pre-emption will be discussed below. These theories are essential features of federalism, a constitutional arrangement that bequeaths some degree of autonomy to its constituent parts. International law scholars refer to the use of constitutional law terminologies and principles in the international arena as 'the constitutionalisation of international law'. See Werner (2007) 22; Cottier & Hertig (2003) 271-272; Weiler J, 'The transformation of Europe'. *The Yale Law Journal*. 100/8 (1991) 2413-2419.

<sup>535</sup> Packer C & Rukare D, 'The new African Union and its Constitutive Act'. *The American Journal of International Law*. 96 (2002) 366. Akonnor, however, is of the view that some African territories are still under foreign occupation. They include Chagos Islands and St. Helena Island (United Kingdom); Canary Islands and Ceuta/Melilla (Spain); La Reunion and Mayotte (France); and the Azores and the Madeiras (Portugal). See Akonnor (2007) 193.

- The establishment of a political military planning unit tasked with peacekeeping and conflict resolution<sup>536</sup>
- resuscitating the long-dormant Commission for Mediation, Conciliation and Arbitration<sup>537</sup> and
- giving more powers to the OAU secretary-general.<sup>538</sup>

However, none of these reforms were implemented. Instead, African leaders decided to replace the OAU in its entirety with a new organisation – the African Union. One could thus expand Kennes' thesis by stating that the creation of the AU is a continuation of the second wave of integration in Africa.<sup>539</sup>

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<sup>536</sup> Wiseman H, 'The OAU: Peacekeeping and conflict resolution' in El-Ayouty Y & Zartman I (ed), *The OAU after twenty years* New York: Praeger (1984) 147.

<sup>537</sup> See Packer (2002) 368.

<sup>538</sup> See El-Ayouty (1994) 184.

<sup>539</sup> Kennes divided African integration drive into two waves:

the first took place during the post-independence period; i.e. the 1960s and the early 1970s, with an extension of Southern Africa to around 1980. The second wave is quite recent; its start might be put around the time of the signing of the Abuja Treaty on the signing of the African Economic Treaty.

See Kennes in Bach (1999) 27. Also, Adedeji classify African integration into five phases:

- The first phase, in the early 20<sup>th</sup> century, was the historic struggle for Pan-Africanism led by African leaders and Africans in the Diaspora. In parallel, colonial administrators established colonial federation in west, central and eastern Africa.
- The 1960s represented a second phase, in which numerous intersectoral and multilateral organisations were set up mostly at sub-regional level.
- The third stage was the period between 1975-1983, during which a number of breakthroughs led to the establishment of sub-regional entities.
- The fourth stage was in the 1980s and 1990s during which notable documents such as the Lagos Plan of Action (LPA) and the Abuja Treaty were adopted.
- The creation of the AU represents the fifth stage.

See Economic Commission for Africa, *Third African Development Forum (ADF III): Defining priorities for regional integration* (2002) 9. Available at <http://www.uneca.org/adfIII/docs/ADF2001%20Concept%20Paper.PDF> (Accessed 21 July 2009). (Hereinafter referred to as ADF III 2002)



#### Box 4.1 : Timelines for African integration

Timeline:

- 1963** Formation of the OAU
- 1980** Lagos Plan of Action and the Final Act of Lagos
- 1981** African Charter on Human and Peoples' Rights
- 1990** Abuja Treaty establishing the African Economic Community (AEC)
- 1991** Kampala Conference on Security, Stability, Development and Cooperation in Africa  
(CSSDCA)
- 1998** Protocol to the African Charter on Human and Peoples' Rights on the Establishment of  
an African Court on Human and Peoples' Rights
- 1999** Sirte Declaration
- 2000** OAU Declaration on Unconstitutional Change of Government  
Constitutive Act of the AU
- 2002** NEPAD
- 2003** AU Convention on Preventing and Combating Corruption  
Memorandum of Understanding on the APRM  
Protocol to the African Charter on the Rights of Women in Africa
- 2004** Inauguration of the Pan-African Parliament
- 2006** Inauguration of the African Court on Human and Peoples' Rights
- 2007** African Charter on Democracy, Elections and Governance (ACDEG)  
Grand Debate on Union Government (Accra Declaration)
- 2009** Protocol on the Statute of the African Court of Justice and Human Rights  
Decision to transform the AU Commission to AU Authority

Source: Reconstructed from Wanyeki L, 'Africa Unite! ...' *Open Space* Vol. 2/2 (2008) 102

#### 4.3.1 The creation of the AU

At the thirty-fifth ordinary session of the OAU Assembly held in Algiers, the Libyan leader, Muammar Ghadaffi, proposed to convene an extra-ordinary summit to be held in Sirte, Libya in September 1999, in order to:

[d]iscuss ways and means of making the OAU effective so as to keep pace with the political and economic developments taking place in the world and the preparation required of Africa within the context of globalisation so as to preserve its social, economic and political potentials<sup>540</sup>

Quite a number of reasons have been advanced for Ghadaffi's leading role in the quest for African unity. One of the major reasons include Ghadaffi's tactical shift to Sub-Sahara African affairs after his abortive attempt at establishing an Arab union.<sup>541</sup> Others point to Ghadaffi's gratitude to Africa for the OAU's collective support throughout Libya's dispute with the United States of America and the United Kingdom over the Lockerbie affair.<sup>542</sup> While Ghadaffi's commitment to the African unity project remains commendable, it ironically highlights an important issue: the relevance of democratic principles to the African process of integration, especially considering his abhorrence of democratic values.<sup>543</sup>

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<sup>540</sup> Decision AHG/Dec.140 (XXXV).

<sup>541</sup> See generally, Hugo G, *Mission impossible? Colonel Ghadaffi's quest for unity*, Available at [http://www.issafrika.org/index.php?link\\_id=4698&link\\_type=12&slink\\_type=12&tmpl\\_id=3](http://www.issafrika.org/index.php?link_id=4698&link_type=12&slink_type=12&tmpl_id=3) (Accessed 11 July 2007). At the Sirte Summit, Ghadaffi intoned, 'I wasted over 30 years advocating for ARAB unity in vain. I gave up and now I came to Africa. If you are going to similarly fail me, I would have no choice but to go to the Mediterranean!' Cited in Dagash I, *The OAU: Reality or fiction?* (2006) 105.

<sup>542</sup> See Huliaras A, 'Qadhafi's comeback: Libya and sub-Saharan African in the 1990s'. *African Affairs*. 100 (2001) 10-13. See also Maluwa T, Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union. *African Yearbook of International Law*. 9 (2001) 9 .

<sup>543</sup> Muammar Ghaddafi is on record to have pronounced multi-party democracy as the root cause of instability and conflicts in Africa. See e.g. <http://news.bbc.co.uk/2/hi/africa/7883178.stm> (Accessed 14 October 2009).

Ghaddafi's not too impressive democratic credentials place a moral burden on his quest for a united Africa.<sup>544</sup> The African integration process is a sensitive task which requires more than charisma but, most importantly, a genuine commitment to a pan-African democratic rebirth.

At the Sirte summit, Libya capitalised on the fact that there was no working document for consideration, by circulating its own draft document titled a 'draft Sirte Declaration'.<sup>545</sup> The draft Treaty called for the establishment of an 'African Union' with organs such as the African Congress; the Summit Council; the Executive Council; the General Secretariat; the Specialised Executive Committees; the Supreme African Court; and the African Monetary Fund.<sup>546</sup> On the other hand, the OAU General Secretariat had prepared a draft treaty which was totally different from the Libyan document.<sup>547</sup>

A ministerial group was tasked with preparing a compromise document.<sup>548</sup> Following an extensive discussion and debate among the heads of state, the Sirte Declaration was adopted. The preamble reads:

Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples...we decided to establish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organisation and the provisions of the Treaty establishing the African Economic Treaty<sup>549</sup>

Since this declaration did not specify the form or shape the new AU was to take, it was left to a team of legal experts to decide on the following questions:<sup>550</sup>

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<sup>544</sup> See e.g. Fagbayibo B, 'Ghaddafi's vision of African unity'. *The Nigerian Tribune*, 11 March 2009.

Available at <http://www.tribune.com.ng/11032009/opinion2.html> (Accessed 11 March 2009).

<sup>545</sup> Maluwa (2001) 17.

<sup>546</sup> Ibid.

<sup>547</sup> Ibid.

<sup>548</sup> Ibid.

<sup>549</sup> Decision EAHG/Draft/Decl. (IV).

<sup>550</sup> Maluwa (2001) 20

- whether the new organisation should exist alongside the OAU and the African Economic Community (AEC)
- if the new organisation could be merged with the OAU and the AEC
- the replacement of the OAU while keeping the AEC intact
- whether the institutional architecture of the new organisation should be modelled on the EU

With regard to the relationship between the OAU and the new organisation, three views emerged:<sup>551</sup>

- that the AU should be a strong institution that should transcend the existing institutional framework
- that the proposed AU should be a part of the continental organisations in which the OAU provides the framework and the African Economic Community (AEC) and the union become pillars and
- the need to amend the OAU Charter with a view to establish a new institutional framework

After much deliberation and debate, the team of experts could not agree on the relationship between the OAU and the new organisation. A draft legal text establishing the AU was, however, adopted by the experts and later submitted to the Tripoli ministerial meeting, which was held between 31 May and 2 June 2000.<sup>552</sup> Through the interventions of the presidents of Mali and Ghana, the ministerial meeting was able to settle the critical questions surrounding the nature and shape of the proposed organisation.<sup>553</sup> It was concluded that the OAU would evolve into the AU.<sup>554</sup> The Constitutive Act was subsequently

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<sup>551</sup> Genge M, Kornegey F & Rule S, 'Formation of the African Union, African Economic Community and the Pan-African Parliament', *African Institute Research Paper* (2000) 3-4. Available at <http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN003885.pdf> (Accessed 20 August 2008).

<sup>552</sup> Maluwa (2001) 20

<sup>553</sup> Genge et al (2000) 4-5

<sup>554</sup> Ibid.

adopted by the Assembly on July 11, 2000. By March 2001, all the member states of the OAU had acceded to the Constitutive Act.<sup>555</sup>

**Table 4.1: Comparative table of the OAU and the AU**

OAU	AU
<b>Single source of authority:</b> The Assembly of Heads of State and Government	<b>Many sources of authority:</b> the Assembly of the union, the Judiciary (Court of Justice) and Parliament (PAP)
<b>Primacy of national sovereignty:</b> Non-interference in internal affairs.	Respect for national authority but rights to intervention in grave circumstances and suspension of regimes coming to power by unconstitutional means.
No provisions on the possibility of future common sovereignty.	Provisions allowing for monitoring of compliance with decisions in the context of the CSSDCA.
<b>Basic objective:</b> Collective struggle for the liberation of African countries from colonialism and defence of national sovereignty.	<b>Basic objective:</b> To enable Africa to meet the challenges of the 21 <sup>st</sup> century and strengthen the continent's position within the global economy and the international community.
The OAU is distinct from the African Economic Community (Abuja Treaty).	Integration of the African Economic Treaty (AEC) and its regional integration programme into the AU.
<b>The OAU Secretariat:</b> Headed by a Secretary-General, who initially had no powers to take initiatives.	<b>The AU Commission</b> is the executive arm of the Union, with specific powers in terms of initiatives.
Secretary General and Assistant Secretaries General elected.	Members of the Commission elected and endowed with fully recognised political power.
Purely intergovernmental approach	Community and intergovernmental approach possible.  Guardian of Treaties.

Source: Adapted from the African Union, *Strategic plan of the African Union Commission, Volume 1*. Addis Ababa: African Union Commission (2004) 23-24. Available at <http://www.africanunion.org/AU%20summit%202004/VOLUM%201%20-%20STRATEGIC%20PLAN%20OF%20THE%20COMMISSION%20-%20last%20version-%E2%80%A6.pdf>. (Accessed 20 June 2007).

<sup>555</sup> Packer & Rukare (2002) 365



What this table highlights is not so much the difference between intergovernmentalism and supranationalism as it is the potential of the AU to transform into a supranational entity. The powers of the AU institutions, the possibility of monitoring compliance and the integration of the AEC Treaty into AU structures, are all references to such potential.

#### **4.3.2 The Constitutive Act (CA): A balancing act**

As Olowu rightly observes, the Constitutive Act is '[a] mere roadmap to the required regional understanding for future continent-wide cooperation and integration in Africa'.<sup>556</sup> In response to global realities, the CA symbolises a necessary and ambitious plan to help solve continental problems and also to fast track the process of integration. In this regard, the CA provides for democratic ideals and institutions charged with steering Africa towards the 'promised land' of continental integration. In the same breadth, the CA builds on the socio-political realities on the continent by incorporating mechanisms aimed at preserving the hegemonic influence of autocratic regimes on the continent. It is this contradictory (perhaps balancing) act that continues to frustrate or limit the organisation from living up to its espoused ideals. Below is an exposition of the content of the CA.

##### *a) Democratic principles*

Articles 3 and 4 of the CA deal, respectively, with the objectives and principles, which mirror the objectives found in Article II of the OAU Charter except for the new added objectives which include – the promotion of good governance; the promotion and protection of human rights; the promotion of peace, security and

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<sup>556</sup> Olowu D, 'Regional integration, development and the African Union agenda: Challenges, gaps and opportunities'. *Transnational International Law and Comparative Problems*. 13 (2003) 222-3; see also Maluwa T, 'The Constitutive Act of the African Union and institutional building in postcolonial Africa'. *Leiden Journal of International law*. 16 (2003) 168; Udombana also opined that the AU Treaty ...is not a global programme of action. It only defined a general framework that is aimed at taking up the challenges facing the continent'. See Udombana (2002) 218. Thomashausen, on the other hand, view that the AU rests on the two pillars of good governance and the institutional goal of the creation of a Union Government. See Thomashausen A, *Union government for Africa*. Paper presented at the Symposium on the Prospect of an African Union Government as Crucial to the Integration Process in Africa. (Burgers Park Hotel, Pretoria, 29 June 2007). (On file with the author).

stability on the continent; promotion of democratic principles and institutions; the promotion of sustainable development at the economic, social and cultural levels; the establishment of the necessary conditions for the continent to play its rightful role in the global economy and in international negotiations; and the coordination and harmonisation of policies between the various African RECs. All of these objectives reflect the understanding and the need to tackle the contemporary challenges facing the continent.

Article 4(h) provides a caveat to the principle of non-interference by stipulating the right of the Union to intervene in Member States under the following conditions: war crimes, genocide and crime against humanity and, through a 2003 amendment, a serious threat to legitimate order. The inclusion of this provision is justified by the need to prevent a recurrence of the Rwandan genocide and a need to put a stop to the incessant conflicts ravaging the continent. Other provisions include the right of Member States to request for intervention from the Union in order to restore peace and security. Intervention by the Union, however, requires a decision by the Union's Assembly of Heads of State and government.<sup>557</sup>

In a marked departure from the OAU Charter, article 30 of the Constitutive Act provides for the prohibition from the participation in the activities of the organisation where the government of a member state has come to power through unconstitutional means.<sup>558</sup> This provision, read together with the

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<sup>557</sup> Packer & Rukare argue that this provision raises the risk of inaction on the part of the heads of state mainly due to the fact that it could also be evoked in order to interfere in the event of conflict in their own countries. They are also of the view that governments could request intervention in order to retain power and suppress popular rebellion. See Packer (2002) 373.

<sup>558</sup> In accordance with this provision, the AU in 2002 barred Madagascar from attending the inauguration of the organisation after a decision that the transfer of power to Marc Ravalomanana was unconstitutional. The organisation again in 2009 suspended Madagascar as a result of the unconstitutional ascendance to power of the opposition leader, Andry Rajoelina. This was after Marc Ravalomanana was pressured to step down and handed over power to the military, which in turn transferred power to Rajoelina. In 2005, the AU suspended Mauritania from all organisational activities after a military coup. Furthermore, it also suspended Togo and imposed travel and economic sanction on its officials as a result of the unconstitutional change of leadership in February 2005. In December 2008, the AU also suspended Guinea after a military coup.

objectives to promote human rights, social justice, gender equality and good governance, once again buttress the idea that these elements are essential ingredients, not only for the development of the continent but also for a solid and viable integration process. It is pertinent that an organisation responsible for overseeing continental integration process is bestowed with adequate powers and resources indispensable for the discharge of its functions. The Constitutive Act also provides for the imposition of sanctions on Member States which fail to comply with the decisions and policies of the AU.<sup>559</sup>

*b) Conservatory principle*<sup>560</sup>

As mentioned previously, the Constitutive Act builds on the socio-political realities of the continent by putting in place measures aimed at preserving the *status quo* either through maintaining colonial boundaries or the protection of African leaders.

Article 4(b) reasserted the *uti possidetis* principle by stating the respect of borders existing on the achievement of independence. Article 4 re-affirms the four of the seven principles stipulated in Article III of the OAU Charter. They are – sovereign equality; non-interference in the internal affairs of member states; peaceful settlement of disputes; and the condemnation of political assassination and subversive activities. The 2003 amendment to article 4(h), which provides for intervention in order to prevent serious threat to serious legitimate order, should be understood as a measure of protecting and preserving all regimes, regardless of their nature. This reasoning stems from two positions. Firstly, the AU Constitutive Act did not define the term ‘legitimate order’.<sup>561</sup> Secondly, the

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<sup>559</sup> Art. 23(2) of AU CA. It further provides for the imposition of sanctions on members that defaults in the payments of its contribution.

<sup>560</sup> Conservatory principle is a politico-legal term used to describe mechanisms aimed at balancing the interests of member states and international organisation. In essence, this allows member states, in spite of granting powers to organisations, exercise authority over matters which extensively borders on national interest. See Dashwood et al (2000)151. However, in the context of this chapter, conservatory principles denote the preservation of the *status quo*, especially the preservation of state and its political elites.

<sup>561</sup> It could also be argued that other AU instruments, especially the ACDEG, in article 23 (1-5), defines actions which are not ‘legitimate order’ to include the following:

premature ratification of questionable elections across the continent, without any serious investigation into the substance of the process, points to a tacit acknowledgment of impunity. This also applies to the principles of non-interference and condemnation of subversive activities. As altruistic as these provisions appear, the fact remains that the political leadership in some African countries lacks legitimacy. To guarantee the preservation of such regimes, without addressing the question of legitimacy, smacks of contradiction and an avenue for inaction.

*c) Institutional structure*

Article 5 spells out the internal institutional architecture of the African Union. It is composed of – the Assembly of the Union; the Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representative Committee; the Specialised Technical Committees; the Economic, Social and Cultural Council; and the financial institutions (consisting of the African Central Bank, the African Monetary Fund and the African Investment Bank). Other notable bodies which are not listed here include the Peace and Security Council (PSC), the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM).

The Assembly of the Union is the supreme governing body of the Union. It is composed of fifty-three heads of state and government. The Assembly meets once a year in an ordinary session with the possibility of extraordinary sessions

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- Any putsch against a democratically elected government
  - Any intervention by mercenary to replace a democratically elected government
  - Any replacement of a democratically elected government by rebels
  - Any refusal by an incumbent government to relinquish power to the winning party or candidate
  - Any amendment or revision of the constitution or legal instruments, which is an infringement on the principle of democratic change of government

It however remains to be seen how the AU, either through its administrative or judicial organs, would interpret or apply this provision. Reading the above-outlined provisions together with article 4(h) of the AU CA, the ACJ&HR may one day be faced with making a radical decision on the legality, or lack thereof, of an incumbent regime.

called by a two-thirds majority. Decision and resolutions are by two-thirds majority while questions of procedure require only a simple majority.

The Executive Council is made up of ministers designated by the member states (mainly ministers of foreign affairs). It meets twice in a year with the possibility of extraordinary sessions. It coordinates and takes decisions on common policies such as foreign trade, transport, agriculture and communication.

The Pan-African Parliament is the legislative body of the African Union. It presently has advisory and consultative powers which will last for the first five years of its existence – it was inaugurated in March 2004 – after which it will start exercising full legislative powers (this is fully discussed in the next chapter). The parliament is composed of 265 representatives elected by the legislature of the 53 AU states rather than being directly elected in their own capacity.

The Court of Justice is to be merged with the African Court on Human and Peoples' Rights and will be known as the African Court of Justice and Human Rights (ACJ&HR).<sup>562</sup> It will be made up of two sections: a General Affairs Section composed of eight judges and a Human Rights Section composed of eight judges.<sup>563</sup> The Court shall be responsible for the interpretation and application of the AU Constitutive Act, any questions on international law, other Union treaties and all subsidiary legal instruments adopted by the AU and the OAU.<sup>564</sup> The Court is yet to be operational.

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<sup>562</sup> See the Protocol on the Statute of African Court of Justice and Human Rights, art. 2. [Hereinafter referred to as ACJ&HR Protocol]. Prior to this merger, the African Court on Human and Peoples' Rights had a separate Protocol, which entered into force in 2004. At the AU Summit in Khartoum in January 2006, the eleven judges of the court were elected and it was decided that the seat of the Court will be in Tanzania. See Beyani C, 'Recent developments in the African human rights system 2004 – 2006'. *Human Rights Law Review*. 7/3 (2007) 583-584.

<sup>563</sup> ACJ&HR Protocol, art. 16.

<sup>564</sup> *Ibid*, art. 28.

The AU Commission functions as the executive arm or secretariat of the AU.<sup>565</sup> It implements AU policies. The Commission is headed by a Chairperson and ten commissioners dealing with different policy areas.

The Permanent Representatives Committee consists of nominated permanent representatives of member states. It serves as the secretariat of the Executive Council by preparing the work of the Executive Council.<sup>566</sup>

The Specialised Technical Committee prepares the background work on common policy projects falling within their competence. These include rural economy and agriculture, science and technology, energy, education, environment, health, transport, trade and natural resources.

The Economic, Social and Cultural Council (ECOSOCC) is an advisory organ composed of Civil Society Organisations (CSOs) on the continent. It is aimed at ensuring the participation of the peoples of Africa in the AU process.<sup>567</sup>

The Union shall have three financial institutions: the African Central Bank, the African Monetary Fund and the African Investment Bank. Like the ACJ&HR, these institutions are yet to be operational.

#### **4.3.3 A supranational African Union?**

Based on the provisions of the CA outlined above, the next enquiry is whether or not the AU is a supranational organisation. If not, the next question is whether it has been designed, based on its objectives, to evolve into a

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<sup>565</sup> At the 12<sup>th</sup> AU Summit in Addis Ababa, held from 1 – 3 February 2009, the Assembly decided to grant more powers to the Commission by transforming it into the AU Authority. AU/Dec.206 (XI).

<sup>566</sup> Art. 21 of the AU CA.

<sup>567</sup> The actualisation of this ideal continue to be hampered by factors such as lack of awareness, limited funding, ambiguous election process to the body and the fact that the body only has an advisory status. See *Towards a people-driven African Union: Current obstacles and new opportunities*. AfriMAP, AFRODAD & Oxfam (2007) 6. Available at [http://www.soros.org/resources/articles\\_publications/publications/people\\_20070124](http://www.soros.org/resources/articles_publications/publications/people_20070124) (Accessed 24 February 2008)

supranational organisation. In order to answer these questions, the necessary departure point is to measure the AU, in its present state, against some of the characteristics of supranationalism.

As indicated elsewhere, supranationalism entails the existence of an organisation that operates above the framework of nation states. While international relations is essentially state-centric, the concept of supranationalism seeks to craft the ideology of resolving common and related problems through neutral and technocratic institutions. Weiler identifies two features of supranationalism as decisional and normative supranationalism.<sup>568</sup> He notes that it is the combination of these two features that distinguishes a supranational organisation from other intergovernmental organisations.<sup>569</sup> According to Pescatore, there are three criteria of supranationalism.<sup>570</sup>

- the recognition of common values and interests
- creation of an effective power and
- the autonomy of these powers

He further observes that:

[e]ven where common interests and common values are recognised, the second element of supranationality, recognition of common authority is lacking. Nothing more, then, has been achieved than what is called international cooperation.<sup>571</sup>

The corollary of this is the existence of an insulated decision making body which takes binding decisions and also responsible for the supervision and implementation of such decisions.<sup>572</sup> Taking into account the primacy of nation states in global *realpolitik*, the architecture of supranationalism includes states

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<sup>568</sup> Weiler (1981) 271.

<sup>569</sup> Ibid, 305.

<sup>570</sup> See Pescatore (1974) 50-51.

<sup>571</sup> Ibid, 51-52

<sup>572</sup> See e.g. Lenaerts & Van Nuffel (1999) 16-22.

as privileged players in the integration process.<sup>573</sup> Since Weiler's classification neatly captures all of these ingredients highlighted, it will provide the basis for assessing the supranational status, or lack thereof, of the AU.

According to Weiler, normative supranationalism entails 'the relationships and hierarchy which exists between the EC policies and legal measures on one hand, and competing policies and legal measures of member states on the other'.<sup>574</sup> This definition denotes the existence of three situations:

- Firstly, whether in respect of common interests and competence, the policies and laws of such organisation has direct effect in member states<sup>575</sup>
- Secondly, whether the laws of the organisation are superior to the laws of the member states<sup>576</sup>
- And lastly, whether member states are pre-empted from enacting contradictory legislations<sup>577</sup>

All of these features are embodied in the institutional machinery of the EU.<sup>578</sup> In respect of business laws, one could also assert that these features are present

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<sup>573</sup> Weiler (1999) 273.

<sup>574</sup> Weiler (1981) 271.

<sup>575</sup> The doctrine of direct effect is described as 'a provision which is clear and unconditional and bestows a legal right on a natural or legal person, exercisable against another natural person, or against the authorities of a member state'. Dashwood et al (2000) 158-159.

<sup>576</sup> The doctrine of supremacy is defined as 'the capacity of that norm of Community law to overrule inconsistent norms of national law in domestic law proceedings'. See De Witt B, 'Direct effect, supremacy, and the nature of the legal order', in Craig P & De Burca G (ed), *The evolution of EU law*. Oxford: Oxford University Press (1999) 152.

<sup>577</sup> In *Commission v Council*, the European Court of Justice (ECJ) highlighted the principle of pre-emption by ruling that

each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligation towards third countries affecting the whole sphere of application of the Community legal system.

See (Case 22/70) [1971] ECR 263, paras. 17-18.



in the OHADA system.<sup>579</sup> The AU system, however, lacks any of these measures.

Although the transfer of sovereignty to the AU has been limited, a careful reading of the AU Constitutive Act suggests that the architects of the organisation intended to create a supranational entity.<sup>580</sup> The intention to confer supranational powers on the institutions of the AU can be gleaned from the preamble of the Constitutive Act which reads thus:

We, heads of States and Government of the member states... [are] determined to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively.

Although the phrase 'necessary powers and resources' seems vague, circumstances surrounding the creation of the AU<sup>581</sup> and efforts aimed at clothing these common institutions with more powers indicate that willingness to operate beyond intergovernmentalism. An example of this is the February 2009 decision of the Assembly to grant more powers to the AU Commission by transforming it into an AU Authority.<sup>582</sup>

These common institutions, referred to in the preamble, are listed in article 5. In a clear departure from the OAU era, these institutions have been established to

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<sup>578</sup> As discussed in the preceding, the supremacy of EU laws over national laws and the direct effect of its laws in the territory of member states make the EU a supranational authority. See e.g. Weiler (1991) 2403-2483; Weiler (1981) 267-306

<sup>579</sup> Art. 10 of the OHADA Treaty stipulate that the OHADA Uniform Acts are directly applicable in the territories of the member states. Art. 9 provide that the Acts shall have direct effect 30 days after their publication in the OHADA official journal.

<sup>580</sup> According to Hay, 'Supranationalism ... does not depend on express stipulation, but follows from powers and functions actually accorded to an organisation'. See Hay (1966) 30.

<sup>581</sup> As explained above, the AU was created against the background of the realisation that the OAU was ineffectual in addressing continental problems and more importantly, continental integration. In spite of the disappointments with the operation of the AU, which will be discussed below, the AU is designed to address the apparent shortcomings of its predecessor. Thus in terms of its form, the AU may pass the supranational test but in terms of substance, it falls short.

<sup>582</sup> AU/Dec.206 (XI).

address - at a supranational level - specific challenges ranging from security, human rights, globalisation, socio-economic development, political and democratic governance.

A closer look at the functions of these institutions reveals an intention on the part of the drafters of the CA to confer some degree of supranationalism on these institutions. The Assembly, in article 9 of the Constitutive Act, has the powers to determine common policies, monitor implementation of these policies and ensure compliance by member states.<sup>583</sup> It also has the power to impose sanctions on member states that fail to comply with these common policies.<sup>584</sup> The function of the Executive Council is to coordinate and take decisions on policies ranging from foreign trade, immigration matters, transport and communication, education, health and agriculture.<sup>585</sup>

The proposed ACJ&HR will have jurisdiction over matters relating to the interpretation of the Constitutive Act, disputes between states, acts and functions of the organs of the AU.<sup>586</sup> The General Section and the Human Rights Section may constitute itself into one or more special chambers, and the judgment given by either of the Chambers will be considered as rendered by the Court.<sup>587</sup> The judgment of the Court is final and the decision is binding on the parties.<sup>588</sup>

Another allusion to supranationalism is the AU's right to intervention. Unlike its predecessor, the OAU Charter, the Constitutive Act circumscribes the provision on sovereignty and territorial integrity of member states<sup>589</sup> by stipulating in

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<sup>583</sup> As Olivier & Olivier point out, the CA is silent on the legal status of AU decisions. There is no clear indication as to the binding nature or direct effect of such decisions in member states. See Oliver & Olivier (2004) 362. This is one of the features that define the intergovernmental nature of the AU.

<sup>584</sup> AU CA, art. 23(2).

<sup>585</sup> Ibid, art. 13.

<sup>586</sup> Art. 28 of the ACJ&HR Protocol.

<sup>587</sup> Ibid, art. 19 (1) & (2).

<sup>588</sup> Ibid, art 46(1) & (2).

<sup>589</sup> AU CA art. 3 (b).

article 4(h) the right of the AU, as against that of member states,<sup>590</sup> to intervene under the following conditions: war crimes, genocide, crime against humanity and, through a 2003 amendment, a serious threat to legitimate order.

While it could be argued that the AU as an institution had in some instances, notably through the normative provisions in its Constitutive Act, intervened in the internal affairs of member states,<sup>591</sup> the fact remains that the designated purveyors of normative supranationalism are yet to take shape.<sup>592</sup> In illustration, the PAP still exercises consultative and advisory powers (it is expected to start exercising full legislative powers five years after its inauguration)<sup>593</sup> and the members are not directly elected by citizens of the member states.<sup>594</sup> The parliament's full legislative powers are to be defined by the Assembly.<sup>595</sup> At the moment, the PAP still exercises advisory powers. With no implementation date of the ACJ&HR in sight, coupled with the deferral of the exercise of full legislative powers by the PAP, one can only speculate on how these important institutions will exercise supranational powers.

Decisional supranationalism, according to Weiler, 'relates to the institutional framework and decision-making processes by which Community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed'.<sup>596</sup> This definition sketches the matrix of the

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<sup>590</sup> While art.4 (g) provides that any member state may not interfere in the internal affairs of another, it does not expressly prevent the AU as institution from intervening.

<sup>591</sup> These include the decision to bar Madagascar from attending the inauguration of the AU in 2002, suspension of Togo in 2005, mandating Senegal to put in place appropriate legal mechanism for the trial of Hissan Habre and the deployment of troops to hot spots such as Darfur, Somalia and Burundi.

<sup>592</sup> Decision-making powers are firmly placed in the hands of organs which are entirely composed of representatives of national governments. The Assembly is composed of Heads of States while the Executive Council is composed of the Ministers of Foreign Affairs or designated Ministers of member states.

<sup>593</sup> See Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament 2001, art. 2(3). The PAP was inaugurated in March 2004.

<sup>594</sup> PAP, in accordance with art. 4(2), is presently composed of five nominees each from member states which add up to 265 members. See [http://www.pan-african-parliament.org/AboutPAP\\_Overview.aspx](http://www.pan-african-parliament.org/AboutPAP_Overview.aspx) (Accessed 10 October 2007). It remains to be seen how the AU would handle the direct elections of PAP members considering the fact that the continent is plagued by the high incidence of massive electoral fraud.

<sup>595</sup> See PAP Protocol, art 11.

<sup>596</sup> Weiler (1981) 271.

decision making process in supranational organisations. As explained above, supranationalism entails the autonomy of intergovernmental institutions vis-à-vis the decision making process. This autonomous power is better explained by the existence of the majority voting system.<sup>597</sup> The majority voting system ensures that as long as the voting requirement is satisfied, member states are bound by a decision whether or not they support such a decision.

It appears that while the AU has little or no measure of normative supranationalism, there exists an element of decisional supranationalism. In terms of article 7 of the Constitutive Act, the Assembly can ratify decisions by 'consensus or failing which, by a two thirds majority of the member states of the Union, apart from procedural matters which require a simple majority'. The decision-making process in the Executive Council is the same as the Assembly's.

As mentioned above, the supranational status of an international organisation is determined by the existence of both decisional and normative supranationalism within the institutional framework. Based on the absence of normative supranationalism within the institutional framework of the AU, it can only be classified as an intergovernmental organisation, although it has the potential of evolving into a supranational organisation.

In chapter 2, the benefits of regional integration are discussed. Supranationalism, as pointed out above, represents an advanced form of cooperation among states. It requires the surrendering of substantial portion of state sovereignty to neutral, transnational institutions. Such institutions are then empowered to act parallel to and/or above member states in respect of matters which fall within their jurisdiction. Therefore, what can Africa benefit from establishing supranational institutions? It should be noted from the outset that supranationalism is by no means the singular antidote to Africa's problems.

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<sup>597</sup> Ibid, 281.

Rather supranationalism, in the context of this thesis, is seen as a catalyst for entrenching democratic norms and values on the continent. The absence of democratic practises at the national level is one of the major impediments to development. It is, therefore, essential that a supranational framework for ensuring the uniform adherence to democratic values is put in place. Bequeathing such institutions with the requisite powers of monitoring and ensuring compliance is pertinent. The next chapter considers the possibility of monitoring and compliance. However, below is a discussion of some of the critical ingredients necessary for the organisational transformation or the 'supranationalisation', of the AU.<sup>598</sup>

#### **4.4 The feasibility of a supranational African Union**

The path towards supranationalism is lined with numerous (legal, political and economic) landmines. For several decades, the continent has been besieged by a multiplicity of self-destructing tendencies ranging from senseless civil wars, the depletion of power structures and institutions, unsustainable development strategies and a dearth of committed leadership. The woeful conditions at the national levels continue to deplete or in some cases, makes a mockery of attempts to achieve regional integration objectives. The laudable vision of a 'united Africa' has thus been reduced to a utopian hope or 'organised hypocrisy' as a result of some of the inherent contradictions displayed by its major proponents.<sup>599</sup> African leaders aspire to attain the impressive status of the EU without necessarily being ready to subscribe to the ingredients that have made the EU a success story.

The nagging question remains: How can Africa build a formidable institution capable of vigorously pursuing and attaining integration objectives? Or to put it

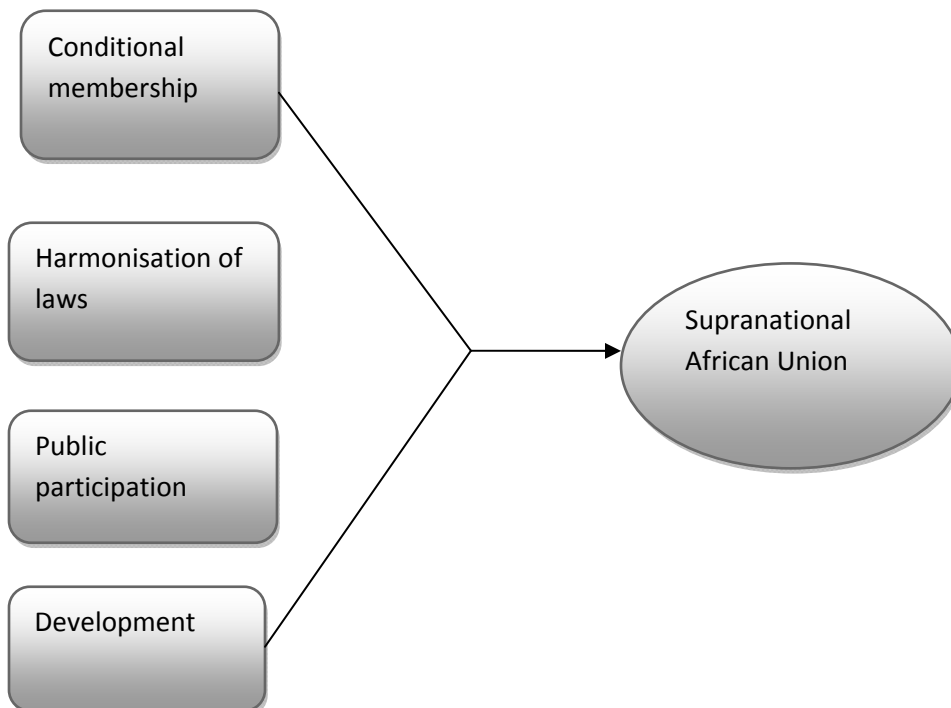
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<sup>598</sup> The next chapter looks at how these core ingredients fit into the institutional structure of a future supranational AU.

<sup>599</sup> As indicated earlier, Muammar Ghaddafi, one of the foremost proponent of African unity, is hardly an exemplar of democratic ideals and values. He has been in power for 40 years, running a one-man show in Libya. Another example is Kwame Nkrumah, who is regarded as one of the founding fathers of the political unification ideology, who also ruled Ghana with an iron fist.

simply, how can the AU be transformed into a supranational entity? This section will consider some of the politico-legal measures indispensable for the attainment of such objective. These measures derive from an attempt to establish the nexus between democratic ideals and the operationalisation of a supranational entity.

**Diagram 4.1: Ingredients of Afro-supranationalism**



Source: Own construction

#### **4.4.1 Membership**

As highlighted earlier, states remain the dominant players in the international system. International organisations come into existence based on the political consent of states. States are thus free to either join or relinquish their membership of international organisations. International organisations are expected to operate based on the whims of member states. On the other hand, the membership criteria of an organisation determine the philosophy cum

direction of the organisation. While the membership of the EU is open to all European states, new member states are expected to fulfil three basic conditions, as specified by the Copenhagen criteria.<sup>600</sup> They are the following:

- Political criteria - This includes the availability of stable institutions guaranteeing democracy, rule of law, human rights and respect for the protection of minorities;
- Economic criteria - A functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;
- Institutional criteria - The ability to take on the obligations of membership, including the support for the aims of the Union. They must have a public administration capable of applying and managing EU laws in practice.

These three elements pointedly affirm the basis of the EU. Through these three criteria, the EU has been successful in promoting the entrenchment of the ethos of democracy across its member states. The organisation also offers institutional (financial and administrative) support to new members so that they could fulfil the above-stipulated obligations.

One would have expected that since the AU is modelled after the EU (see table 4.2 below), the architects of the AU would stipulate certain conditions for membership of the organisation. However, this was not the position. Ignoring the failures and visionless posture of its predecessor, the AU based the sole criteria for membership on geography and race.<sup>601</sup> In a contradictory tone, the Constitutive Act espouses the ideals of democracy, rule of law and human rights.<sup>602</sup> Little wonder why the organisation is seen in some quarters as nothing

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<sup>600</sup> See e.g. Folsom R, *European Union law in a nutshell*. St. Paul MN: West Group (1999) 21-22; see also [http://europa.eu/scadplus/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://europa.eu/scadplus/glossary/accession_criteria_copenhagen_en.htm) (Accessed 20 August 2008).

<sup>601</sup> In a statement pointing to the insignificance of joining the old OAU (this could also be said about the AU), the Eritrean president, Issaias Afewerki, opined: 'we are joining the OAU not because of your achievement, but because you are our African brothers'. Cited in Akonnor (2007) 197.

<sup>602</sup> See e.g. arts 4 & 30 of the AU CA.

more than ‘an old wine in a new bottle’.<sup>603</sup> Ayittey’s indictment of the AU is worth quoting in full:

The AU is a hopeless and feckless organisation, it waits until an African country implodes and then launches urgent appeals for international aid. A den of unrepentant despots, the AU cannot even define democracy let alone respect its own African Charter of Human and Peoples’ Rights. Afflicted with intellectual astigmatism, it can see with eagle-eye clarity the colonial injustices perpetrated against Africans by Europeans; but it is hopelessly blind to the equally heinous injustices African leaders perpetrate against their own people.<sup>604</sup>

Unconditional membership has not only entrenched the impunity that reigned during the OAU era, it also serves as an indication of the emptiness of the cherished goal of a united Africa. By using the oft-vaunted and amorphous concept of ‘African brotherhood’ as a determinant for membership, the AU has exposed the paucity of a cohesive ideological framework for African integration. The commitment to a united Africa does not lie in the ability to write books on African unity, organise ‘talk-shops’ on the need for integration or to make unification a ‘lifelong dream’ (a *lá* Nkrumah); rather it denotes the existence of a culture of uniformity in terms of democratic practice, and the respect of the rights of individual, all within the framework of the values and practices of African society. As the Togolese president, Faure Gnassingbe, rightly puts it:

I’m wondering if we can ever get a political union when we have very different political systems at the moment... [I]t is difficult because you have some countries adopting a democratic system and others not doing so, how could we have political unity? ... [W]e must set standard of governance which we should respect and observe ... [I]f we want to have a political union, I think we should synchronise our political systems first.<sup>605</sup>

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<sup>603</sup> See e.g. Akonnor (2007) 191-209.

<sup>604</sup> Ayittey G, ‘Leading from behind’. *BBC Focus on Africa* (October – December 2008) 34.

<sup>605</sup> Cited in *New African Magazine* (March 2010) 20-21.



A glance at the list of African presidents who have entrenched themselves in power further puts a big question mark on the seriousness of continental integration.<sup>606</sup> This thus begs the following questions: What then is the best way to approach the issue of unconditional membership? Should the AU be dissolved so that a new organisation founded on the ethos of democratic values and norms can emerge? Or rather, should the AU be retained while member states commit and surrender themselves to strict enforcement and compliance mechanisms?

Before answering these questions, one must be mindful of the realities on the ground. The first reality is that any call for the dismantling of the current AU is nothing more than wishful thinking.<sup>607</sup> The majority of member states are satisfied with the *status quo* – the nominal significance of the organisation. The other reality, which stems from the first, is that the AU is an intergovernmental organisation with no real powers to forge the desired ideological rebirth. In spite of these challenges, there is a prospect for the development of a process capable of regulating the membership structure of the AU. The APRM is a prime example of such process. Before dealing with the way in which the APRM could be used as a legal and political tool for regulating AU membership, it is important to present an overview of the process and its impact thus far.

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<sup>606</sup> For example, the now late Omar Bongo of Gabon was in power from 1967-2009; Muammar Ghadaffi of Libya (1969); Obiang Nguema Mbasango of Equatorial Guinea (1979); Robert Mugabe of Zimbabwe (1980); Hosni Mubarak of Egypt (1981); Paul Biya of Cameroon (1982) and Yoweri Museveni of Uganda (1986). See e.g. *New African Magazine*. (June 2008) 8.

<sup>607</sup> Albright aptly captured the three global realities: ‘... totalitarian governments are alive and well; their neighbours are reluctant to press them to change; and the notion of national sovereignty as sacred is gaining ground, helped in no small part by the disastrous results of the American invasion of Iraq.’ Albright M, *The end of intervention*. Available at [http://www.nytimes.com/2008/06/11/opinion/11albright.html?\\_r=1&th&emc=th&oref=slogin](http://www.nytimes.com/2008/06/11/opinion/11albright.html?_r=1&th&emc=th&oref=slogin) (Accessed 11 June 2008).

**Table 4.2: Comparison between the EU and the AU**

The European Union	The African Union
<p><b>Membership:</b></p> <ul style="list-style-type: none"> <li>• The EU is made up of 27 members.</li> <li>• The need for continental peace and security after the devastating Second World War and economic reconstruction of Europe were the major motivation behind the formation of the EU.</li> <li>• Membership is not automatic; it is based on the adherence to the principles of democracy, durable institutions at the national level and free market economy.</li> </ul>	<p><b>Membership:</b></p> <ul style="list-style-type: none"> <li>• The AU is composed of 53 members.</li> <li>• The inadequacy of the OAU to address contemporary global challenges and the need to fast-track continental integration led to the creation of the AU.</li> <li>• Membership is open to all African states.<sup>608</sup></li> </ul>
<p><b>Institutional structure:</b></p> <ul style="list-style-type: none"> <li>• <b>The European Council</b> is composed of presidents and prime ministers of EU states</li> <li>• <b>The Council of European Union</b> (Council) is the primary decision making organ of the EU. It is made up ministers from member states.</li> <li>• <b>The European Parliament</b> is composed of members elected directly by EU citizens. Representation is based on the population of each member state. It</li> </ul>	<p><b>Institutional structure:</b></p> <ul style="list-style-type: none"> <li>• <b>The Assembly of Heads of States and Government</b> is the supreme decision making organ of the AU</li> <li>• <b>The Executive Council</b> is composed of foreign ministers or designated ministers from member states.</li> <li>• <b>The Pan-African Parliament</b> is the advisory and consultative</li> </ul>

<sup>608</sup> Wanyeki views that the decision to include Africans in the Diaspora in the activities of the AU is an indication that associate membership may be extended to non-African states. Wanyeki (2008) 103. Recent calls by African presidents such as Ghaddafi and Wade about the inclusion of Caribbean states as members of the AU should also be understood within this context. See e.g. ‘Ghaddafi wants Caribbean in Africa’. Available at <http://news.bbc.co.uk/2/hi/africa/7883178.stm> (Accessed 20 February 2010); see also ‘African Union to consider “land for Haitians” plan’ Available at <http://www.reuters.com/article/idUSTRE60U0IV20100131> (Accessed 20 February 2010).



<p>shares legislative powers with the Council.</p> <ul style="list-style-type: none"> <li>• <b>The European Commission</b> is the executive arm of the Union. It is responsible for initiating legislation. It is composed of a president and 27 commissioners.</li> <li>• <b>The Court of Justice</b> is the judicial organ of the EU.</li> <li>• <b>The financial institutions:</b> European Central Bank and European Investment Bank</li> <li>• <b>The Economic and Social Committee</b></li> <li>• <b>The Committee of Permanent Representative</b> (COREPER) is made up of ambassadors of member states of the EU.</li> </ul>	<p>legislative arm of the AU. It is expected to exercise full legislative powers in the future. Each member state has five representatives.</p> <ul style="list-style-type: none"> <li>• <b>The AU Commission</b> is the executive arm of the AU. It is headed by a Chairperson and ten commissioners.</li> <li>• <b>The African Court of Justice and Human Rights</b> (ACJ&amp;HR) is the judicial organ of the AU. It is yet to take off.</li> <li>• <b>The financial institutions:</b> African Central Bank, African Monetary Fund and African Investment Bank</li> <li>• <b>The Economic, Social and Cultural Council; the Specialised Technical Committees.</b></li> <li>• <b>The Permanent Representative Committee</b> (PRC) is composed of permanent representatives of member states to the union.</li> </ul>
<p><b>Decision-making process:</b></p>	<p><b>Decision-making process:</b></p>

<ul style="list-style-type: none"> <li>• The Council and European Parliament share decision making powers.</li> <li>• Decisions are reached, depending on the matter, either through consensus or the Qualified Majority Voting (QMV) system.</li> <li>• The QMV is a weighted voting system which gives each member state of the EU a certain number of votes based on its size and population.</li> </ul>	<ul style="list-style-type: none"> <li>• The Assembly is the primary decision-making body, with the Executive Council been responsible for the implementation of such decisions</li> <li>• Decisions, in both the Assembly and Executive Council, are taken either through consensus or two-thirds majority</li> </ul>
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Source: Reconstructed from Olivier & Olivier (2004) 359

#### 4.4.1.1 The APRM: An Overview

Born out of the need to reverse the recurrent governance deficit in Africa, the APRM has been described as ‘the most ambitious piece of innovation to have come out of Africa since decolonisation.’<sup>609</sup> For several decades, governance issues in Africa have been at the fore. It is undeniable that most of the ills plaguing the continent have their roots in the unbridled and excessive use of powers by the executive. The sheer magnitude of Africa’s problems thus required a pragmatic, home-grown corrective mechanism. It is against this background, and also to give maximum effect to the principles NEPAD, that African leaders decided, in 2002, to invent a peer review mechanism, modelled on both donor-prescribed criteria and a broad-based methodology.<sup>610</sup>

At an organisational level, the APRM is made up of the Committee of Participating Heads of State and Government (APR Forum) which constitutes the APRM’s highest decision making body. It meets about twice a year, often on

<sup>609</sup> Hansungule M, *The role of APRM in strengthening governance in Africa: Opportunities and constraints in implementation*. Prepared for the Office of the United Nations Special Adviser on Africa (2007) 2. Available at <http://www.un.org/africa/osaa/reports/overview%20APRM%20paper%20Dec%202007.pdf> (Accessed 20 June 2008); see also e.g. Herbert R & Gruzd S, *The African peer review mechanism: Lessons from the pioneers*. Johannesburg: South African Institute of International Affairs (SAIIA). (2008) 4

<sup>610</sup> See e.g. Herbert & Gruzd (2008) 7-8.

the margins of AU Summits, to discuss APRM Country Review Reports of countries that have completed the exercise.

The APR Panel of Eminent Persons (APR Panel) is made up of seven distinguished Africans, appointed to five year terms.<sup>611</sup> It exercises oversight over the APRM process. Each of the Panel members is responsible for overseeing designated country review process.

The APR Secretariat is the engine room of the APRM process. It is responsible for preparing the background research report on the countries to be reviewed. It is also charged with the responsibility of providing logistic and administrative support for country missions.

The pragmatic nature of the APRM process is evident in the provision which stipulates that the process is voluntary.<sup>612</sup> This is understandable considering that African states have a zealous respect for their sovereignty. At the same time, it offers a pragmatic method of entrenching good governance without necessarily alienating member states hostile to a new order of governance reforms. While membership is automatically based on the membership of the AU, acceding states are obligated to 'clearly define a time-bound Programme of Action for implementing the Declaration on Democracy, Political, Economic, and Corporate Governance including periodic reviews'.<sup>613</sup> The base document

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<sup>611</sup> They include the current Chairperson, Prof Adebayo Adedeji (Nigeria), Ambassador Bethuel Kiplagat (Kenya), Mr Mohammed Babes (Algeria), Dr Graça Machel (Mozambique), Dr Dorothy Njuema (Cameroon), Mrs Marie-Angelique Savané (Senegal) and Dr Chris Stals (South Africa). At its January 2009 meeting, the Forum retained Prof. Adedeji as the Chairperson for a period of one year while Mrs Domitila Mukantaganzwa (Rwanda) was appointed to the Panel. Dr Stals, Mrs Savane, Ambassador Kiplagat, Dr Njuema have all completed their terms of office. Available at <http://www.aprm-international.org/> (Accessed 20 November 2009).

<sup>612</sup> AHG/235/XXXV111, Annex 11, para 1. As at May 2008, 29 countries have acceded to APRM: Algeria, Angola, Benin, Burkina Faso, Cameroon, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Republic of Congo, Rwanda, Sao Tome and the Principe, Senegal, Sierra Leone, South Africa, Sudan, Uganda, Tanzania, Togo and Zambia. <http://www.uneca.org/aprm/CountriesStatus.asp> (Accessed 30 March 2009).

<sup>613</sup> AHG/235/XXXV111, Annex 11, para 13.

stipulates four types of review.<sup>614</sup> Each of the review has five complex and time consuming stages. The five stage process is set out below:<sup>615</sup>

- **Stage 1:** At this stage, the APRM Secretariat prepares a background research paper on the country to be reviewed in relation to the four thematic areas: Democracy and Political Governance, Economic Governance and Management, Corporate Governance and Socio-economic Governance.
- **Stage 2:** This is the Country Review Mission. Based on the background research paper, the country review team, led by a panel member visits the country to be reviewed. The team is usually composed of about 15-25 experts and is expected to spend between two to three weeks in the country. During the visit, the team will engage in the widest range of consultations with government officials, political parties, and civil society including the media, academia and trade unions.
- **Stage 3:** After the Country Review Mission, the team is expected to discuss the issues observed during the visit and then prepare a draft Country Review Report. This report is sent back to the government of the country in question for comments. The government cannot amend the report; it can only append its comments to the report.
- **Stage 4:** The Secretariat then submits the final Country Review Report to the APR Forum, Heads of States and Government, for peer review. The time allotted for this process is a modest two hours.
- **Stage 5:** Six months after the discussion by the Forum, the report is tabled before the relevant institutions: the PAP, RECs, African Commission on Human and Peoples' Rights, AU PSC and ECOSOCC.

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<sup>614</sup> The first review is the base review, which will be carried out within eighteen months of a country becoming a member of the APRM process. The second review is a periodic review which takes place every two to four years. Thirdly, a member country can, for its own reasons, ask for a review that is not part of the periodically mandated reviews. And lastly, participating Heads of States and Government, on sensing signs of an impending political and economic crisis in a member country, can call for a review. See Ibid, para 14.

<sup>615</sup> Ibid, para 18-25; see also Herbert & Gruzd (2008) 16-17; NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, paras 21-28.

So far, only ten countries, out of the twenty-nine which have acceded to the APRM document, have successfully completed the five stages review process (base review): Ghana, Rwanda, Kenya, South Africa, Nigeria, Burkina Faso, Uganda, Mali, Mozambique and Algeria.<sup>616</sup> As apparent in the outlined stages, the APRM is designed to be an all-inclusive process. By including the civil society in the process, the APRM presents an alternative and viable platform for discussing national matters, strengthening national institutions and also highlighting the importance of public participation in national matters. From a Kenyan perspective, Akoth points out:

This process and the instruments devised for the APRM research mean that Kenya self assessment yielded, in some respects, the most comprehensive documentation to date of the political, social, cultural and economic situation in Kenya. The APRM process also helped give ordinary Kenyans some voices to their concerns, and the process, coupled with the much contested constitutional review which was under way during the same period, shows that Kenyans want more in how their country is governed.<sup>617</sup>

In order to give the APRM process a national feel, participating countries are expected to establish two main institutions: the National Focal Point and the National Governing Council. The APR focal point should be at ministerial level

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<sup>616</sup> Interestingly, Mauritius - a country adjudged as one of the few democratic nations in Africa and also one of the first four countries which volunteered to be reviewed - has failed to go through the APRM process. Reasons advanced for this range from change of government, funding problems and a self-assuring attitude which an observer describes as 'the government did not feel it had anything to prove'. See Herbert & Gruzd (2008) 243, 249. The APRM process has however resumed in Mauritius. See 'The APRM Newsletter' January 2009, 3. Available at <http://www.aprm-international.org> (Accessed 20 November 2009). [Hereinafter referred to as the APRM Newsletter 2009]. As at July 2009, the following countries have initiated plans to kick-start the APRM process: Ethiopia, Sierra Leone, Cameroon, Lesotho and Zambia. See [http://www.pacweb.org/Documents/APRM-Monitor/APRM\\_Monitor\\_7.pdf](http://www.pacweb.org/Documents/APRM-Monitor/APRM_Monitor_7.pdf) (Accessed 20 November 2009)

<sup>617</sup> Akoth S, *The APRM process in Kenya: A pathway to a new state?* Open Society Initiative for East Africa (OSIEA) and African Governance Monitoring and Advocacy Project (Afrimap), (2007) 2. Available at [http://www.afriMAP.org/english/images/report/APRM\\_Kenya\\_EN.pdf](http://www.afriMAP.org/english/images/report/APRM_Kenya_EN.pdf) (Accessed 8 June, 2008). Kenya is currently busy with the follow-up process. Other countries busy with the progress reports are Algeria, Benin, Ghana and Rwanda. See APRM Newsletter (2009) 2, 4.

or a high-level official reporting directly to the Head of State or Government with the necessary technical committees supporting it.<sup>618</sup>

Another interesting dimension of the APRM process is the composition of the National Governing Council (NGC). The NGC is the body responsible for the implementation of the APRM at the national level by overseeing the production of the Country Self Assessment Report and Programme of Action. Unlike the APR focal point, the composition of the NGC is more broad-based. The Country Guideline stipulates that the council should include representatives of civil society (women, youth, trade unions, peoples with disability and business organisation) and government.

In Ghana, the Governing Council was composed of seven distinguished individuals from the academia, the international diplomatic corps, religious leaders and the civil society.<sup>619</sup> Without detracting from the credibility of the members, the Ghanaian civil society, however, complained that wide consultation did not take place before the members were chosen.<sup>620</sup> In a bid to correct the flaws of the Ghanaian process, the Kenyan Governing Council was an outcome of a democratic process.<sup>621</sup> It was made up of thirty-three members drawn from government, civil society and the private sector.<sup>622</sup> The South African Governing Council had a total of 15 members, with ten members from the civil society and five government ministers.<sup>623</sup> The Rwandan National Commission had fifty members, with more than 60% government representation.<sup>624</sup>

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<sup>618</sup> See NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, para 48.

<sup>619</sup> Herbert & Gruzd (2008) 159.

<sup>620</sup> Bing-Pappoe A, *Ghana and the APRM: A critical assessment*. African Governance Monitoring and Advocacy Project (AfriMAP), (2007) 21. Available at [http://www.afriMAP.org/english/images/reports/AfriMAP\\_APRM\\_Ghana\\_EN.pdf](http://www.afriMAP.org/english/images/reports/AfriMAP_APRM_Ghana_EN.pdf). (Accessed 8 June, 2008).

<sup>621</sup> Akoth (2007) 7-9; see also Herbert & Gruzd (2008) 192-193.

<sup>622</sup> Akoth (2007) 21.

<sup>623</sup> A cabinet minister chaired the Council. See Herbert & Gruzd (2008) 276-277.

<sup>624</sup> *Ibid*, 219.



In spite of the several limitations identified by observers of the APRM, the process has been able to capture the varying contestations at the national levels. More importantly, it clearly presents the perspectives on governance issues in Africa and the ways of tackling them. Although the process is designed to entrench the principles of good governance in participating countries, it also has the potential of being an instrument for regulating the membership of the AU as will be elaborated below.

#### **4.4.1.2 The APRM as a tool for regulating AU membership: A critique**

The APRM process is indeed revolutionary. The fact that more than half of the countries on the continent have acceded to it, is a testament to its legitimacy and importance as a self-correcting instrument.<sup>625</sup> In the countries already reviewed, the APRM has sensitively, yet boldly and critically, dissected relevant issues stagnating national, and to some extent, continental development. National issues such as revenue and fiscal allocation, corruption, constitutional reform, independence of the separate branches of government, and public participation were for the first time handled by a continental body.

In the Ghanaian review report, positive signs such as an open and fair political space, impressive economic growth and transparent handling of the APRM process were highlighted.<sup>626</sup> The report, however, pointed attention to certain concerns like the political manipulation of the judiciary, corruption, poor service delivery, an ill-equipped Electoral Commission, gender imbalance in politics and the low levels of awareness of corporate social responsibility.<sup>627</sup> To emphasise the seriousness of the process, the Ghanaian government has taken steps to incorporate the views of the review report and Programme of Action in its developmental strategies.<sup>628</sup>

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<sup>625</sup> As Ambassador Kiplagat, one of the APRM Panel members, observed, 'The APRM ... is not an instrument for punishment or exclusion, but rather it is a mechanism to identify our strong points, share them and help rectify our weak areas'. Cited in Ibid, 101.

<sup>626</sup> <http://www.uneca.org/aprm/Story101806.asp> (Accessed 20 July 2008).

<sup>627</sup> Ibid.

<sup>628</sup> See e.g. Bing-Pappoe (2007) 16; Herbert & Gruzd (2008) 179

Rwanda was praised for establishing key institutions for the implementation of government's unity and reconciliation programme, the ratification of most international human rights instruments, gender equality in politics and favourable environment for public participation.<sup>629</sup> The bad practices observed in Rwanda include the restriction on political rights, lack of capacity within institutions aimed at promoting good governance and socio-economic development and the compromised independence of the judiciary.<sup>630</sup>

The Kenyan report highlighted the following as some of the best practices in the country:<sup>631</sup> a great degree of political freedom and human rights, a vibrant civil society and media, improved GDP growth, vibrant agricultural export sector and a relatively stable country. Some of the challenges include corruption, elusive national unity, the absence of broad based and inclusive political parties, high incidence of poverty, gender imbalance in government and private sector, and the lack of efficient service delivery.<sup>632</sup>

The South African country review report identified the following best practices: transparent and conducive political environment, a first-world economic and physical infrastructure, strong public financial management, a robust legal system and gender equality in the public sphere.<sup>633</sup> Some of the key challenges are racial division, high crime rate, high incidence of unemployment and poverty, critical shortage of skills, xenophobia and the under-representation of women in the private sector.<sup>634</sup>

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<sup>629</sup> *APRM country review report no 2: Republic of Rwanda*. African Union and the African Peer Review Mechanism (2006) 14-21, 142-9.

<sup>630</sup> *Ibid.*

<sup>631</sup> *APRM country review report no 3: Country review report and programme of action of the Republic of Kenya*. African Union and the African Peer Review Mechanism (2006) xvi-xxvi

<sup>632</sup> *Ibid.*

<sup>633</sup> *South African country review report*, (2007). Available at <http://www.aprm.org.za/docs/SACountryReviewReport5.pdf> (Accessed 12 June 2008).

<sup>634</sup> *Ibid.*

The Mozambique country review commended the government for recording tremendous achievements in sustaining peace after decades of civil war, respect for constitutional rights of the citizens, impressive post-conflict economic growth rate, institutional reforms and the guarantee of multi-party democracy.<sup>635</sup> The high levels of poverty and criminal activities (especially illicit human and drug trafficking), wide-spread corruption, weak institutions, and limited compliance with international and regional instruments.<sup>636</sup>

Having highlighted the foregoing, the next step is to consider the question raised earlier: Whether the APRM could be used as a tool for regulating AU membership.<sup>637</sup> In answering this question, two fundamental issues will be considered. Firstly, the methodology of rationalising the AU and secondly, how the APRM can be strengthened in order to accomplish this task.

#### **a) Conditional membership**

As stated earlier, any call for the dissolution of the current AU is, at the best, imaginary. However, the case for an enabling instrument aimed at strengthening and further developing the enforcement and compliance mechanisms of the AU is well founded. The reality is that not all the members of the AU are prepared to subscribe to a new and more stringent order - an order which places due emphasis on the ethos of constitutional democracy and values. The growing number of ageing 'sit-tight' rulers and electoral manipulation across the continent lends credence to this view. Even among those who have supposedly subscribed to the new order, many only exhibit half-hearted commitment to democratic values. As Ake rightly observes, democracy, to some African leaders 'is largely a strategy for power, not a

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<sup>635</sup> *APRM country review report no 11: Republic of Mozambique*. African Union and the African Peer Review Mechanism (2009). Available at <http://www.aprm-international.org> (Accessed 20 November 2009).

<sup>636</sup> Ibid.

<sup>637</sup> Gumede also suggested entry requirements for joining the AU. See Gumede W, 'African Union needs entrance exam' Available at [http://newsweek.washingtonpost.com/postglobal/william\\_gumede/2007/04/african\\_union\\_needs\\_entrance\\_e.html](http://newsweek.washingtonpost.com/postglobal/william_gumede/2007/04/african_union_needs_entrance_e.html) (Accessed 20 November 2009)

vehicle for popular empowerment'.<sup>638</sup> Thus, the so called democratic revolution of the 1990s only exists more in theory rather than in practice.

The feasible strategy is arguably to create a 'nucleus AU' within the current AU (see Diagram 4.2 below). Before explaining the idea of 'nucleus AU', it is important to highlight a few points. Firstly, it is not suggested that this idea is the sole elixir; rather, it is one of the remedial steps in correcting the institutional defects of the AU. It is thus not an all-or-nothing or elitist approach; instead it aims at strengthening and cultivating shared norms necessary for continental integration. As Kuhn puts it, 'to be accepted as a paradigm, a theory must seem better than its competitors, but it need not, and in fact never does, explain all the facts with which it can be confronted'.<sup>639</sup> Secondly, the proposed approach is developed in such a way that it could one day be incorporated into the structure of the AU.

The consequence of the 'nucleus AU' idea is that the present AU - with its faulty foundation - would still be retained but member states will be required to undergo a compulsory and rigorous test in order to become part of the integration process. A reformed APRM, which will be discussed below, will serve as the test. This does not call for the creation of a parallel continental organisation rather it seeks to create an enabling and nuanced platform for the attainment of continental unity. In politico-legal terms, the 'nucleus AU' is simply an expression of the principle of flexibility or variable geometry. Dashwood et al, described this principle - in relation to the EU - as a:

[d]esignated legal arrangements under which it is recognised that one or more member states may, in principle, remain permanently outside certain activities or practices being pursued within the institutional framework of the Union, either

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<sup>638</sup> Ake (1993) 240.

<sup>639</sup> Kuhn T, 'The structure of scientific revolutions' cited in Huntington (2002) 30.

because they choose to do so or because they do not meet the criteria for participation.<sup>640</sup>

Without detracting from the cardinal and cherished goal of African unity, this principle will allow member states with similar ideals to pursue deeper integration at an appreciable pace.<sup>641</sup> As Akonnor aptly puts it, '[I]t is better to have a united empowered and independent Africa, comprising some African states rather than have a united but weak and dependent Africa, comprising all African states.'<sup>642</sup>

So far, continental integration has failed largely because of the sentimental urge to lump together 'the good, the bad and the ugly'. Often, African leaders have stood silently by the sideline, watching their colleagues engage in ruinous policies and subjugation of their people. The prevalence of impunity is further fuelled by the absence of an effective and coordinated continental response mechanism - strong enough to employ punitive economic, military and political measures against belligerent member states.

Hinging the political and economic development of Africa on the AU in its present configuration is delusional. While some may argue that the idea of 'nucleus AU' is impractical and likely to be frustrated by some powerful countries who are satisfied with the *status quo*, this argument can be countered by the enthusiastic acceptance of the APRM process by certain African countries.

Although it may not be perfect, the APRM is an organic process capable of developing into a viable mechanism. 'Organic' in the sense that it has

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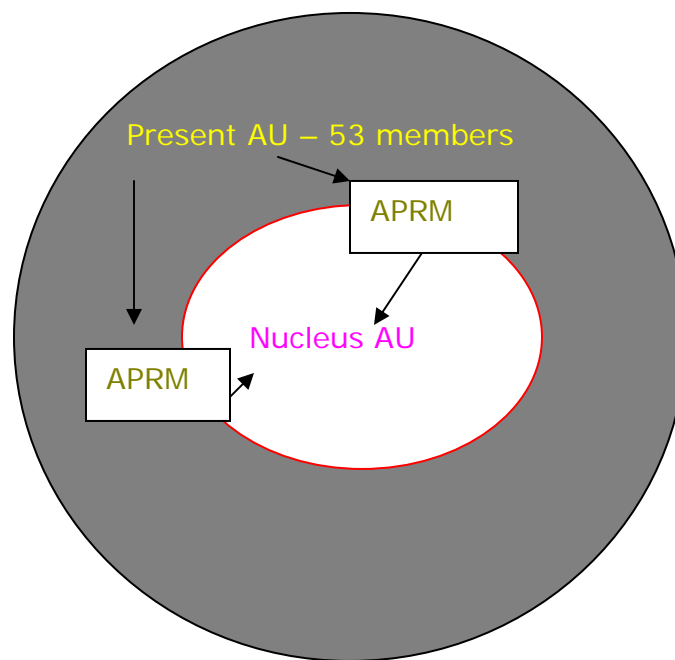
<sup>640</sup> Dashwood A, Wyatt D, Arnall A & Ross M, *European Union law*. London: Sweet & Maxwell (2006) 112; see also Warleigh A, *Flexible integration: Which model for the European Union?* London: Continuum (2002) 1-3.

<sup>641</sup> Ibid, 113; see also Kennes (1999) 33.

<sup>642</sup> Akonnor (2007) 197.

established a platform, through ‘soft laws’,<sup>643</sup> for broadening public discourse in African politics which could in turn provide a fertile ground for democratic culture. Out of the 29 states that have acceded to the APRM, there is the likelihood, judging by their democratic credentials and with subtle persuasions, that at least one-third would be ready to proceed with the ‘nucleus AU’ idea. It is expected that the success, through periodic review and effective compliance measures, of this project will not only entrench democratic culture on the continent but will also encourage other nations to join. To reiterate the point made earlier, the idea is not to alienate other African states but to present an alternative *modus operandi* for moving the continent forward.

**Diagram 4.2: The ‘nucleus AU’**



Source: Own construction

<sup>643</sup> As will be discussed below, the APRM lacks definitive legal status within the AU and on the international plane.

The shaded part of the diagram represents the prevailing configuration of the AU. It shows that this framework will remain unchanged. However, the arrow pointing at the APRM box implies that member states will have to first conform to a compulsory APRM standards before being allowed to be part of the proposed 'nucleus AU'.

### ***b. Transforming the APRM into an institution***

A core component of the proposed 'nucleus AU' is a reformed APRM process. As shown in the figure above, a reformed APRM will serve as the gateway into the nucleus. Two major issues lie at the heart of the case for a reformed APRM: Legal status and methodology.

#### *i) Legal status*

Any discussion on the role of the APRM in regulating AU membership must start with the discussion on one of the fundamental elements of international law – legal personality or status. The conferment of legal status on an organisation, depending on its functions and missions, equips it with the capacity to conclude treaties, incur rights and obligations, and the ability to enforce its own decisions.<sup>644</sup> As with NEPAD, the APRM exists without any definitive legal status.<sup>645</sup> Its constitutive documents<sup>646</sup> are not Treaties and thus

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<sup>644</sup> ICJ Rep (1949) 178-179; see also Sands & Klein (2001) 470-476.

<sup>645</sup> There has been so much controversy surrounding the relationship between the AU and NEPAD. This issue was finally resolved, and subsequently confirmed by the AU Assembly, in April 2008 at a review summit of five heads of state. It was decided that NEPAD will be integrated into AU structure and processes. This will also include the granting of legal personality to the NEPAD secretariat in South Africa. See Assembly/AU/Dec.205 (XI). The Assembly arrived at a similar conclusion in relation to the APRM. See Assembly/AU/Dec. 198 (XI). For further discussion on the dynamics of the incorporation of NEPAD into the AU, see e.g. Rukato H, *Future Africa: Prospects for democracy and development under NEPAD*. New Jersey: Africa World Press (2010) 219-233.

<sup>646</sup> The following jointly constitute the APRM documents:

- Memorandum of Understanding (MOU) on the APRM
- Declaration on Democracy, Political, Economic and Corporate Governance
- APRM Base Document
- APRM Organisation and Processes
- Objectives, Standards, Criteria and Indicators for the APRM
- Outline of the Memorandum of Understanding on Technical Assessments and the Country Review Visit

See NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, para 1.

lack legal teeth.<sup>647</sup> The consequence of this is that participating countries cannot be compelled to comply with the principles and provisions of the APRM. In illustration, where any of the participating states fail to engage in a broad-based consultative process, there is no legal instrument to ensure that these salient provisions are complied with.<sup>648</sup> Although paragraph 24 of the Base Document sketches the possibility of imposing punitive measures against a defaulting participating country, it is at best vaguely written because no specific punitive measures are listed. Furthermore, placing the onus of applying punitive measures on the participating Heads of State and Government is unrealistic considering the entrenched practice of ‘African solidarity’ even in the face of impunity.

While the foregoing is excusable if the APRM is seen in the context of a voluntary process, it remains antithetical to the principles of a ‘nucleus AU’. Because the configuration of a ‘nucleus AU’ presupposes strict and unqualified adherence to democratic values, it is of crucial importance that a sound legal regulative framework be put in place. The legitimacy of the process is dependent on the political will of the participating Heads of State and Government to craft a process of endowing the APRM with legal clout.

A good starting point will be to condense the APRM constitutive documents into a single treaty-like document to be ratified by participating countries. This ‘APRM Treaty’ must explicitly specify, amongst other provisions, the legal consequences of non-compliance,<sup>649</sup> effective enforcement mechanisms, the regulative nature of the Treaty, and the legal personality of the APRM institutions. To address the latter point, the 11<sup>th</sup> Ordinary session of the AU Assembly, held in Egypt from 30 June – 1 July 2008, decided that legal status will be granted to the APRM through its incorporation into the structures and

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<sup>647</sup> Hansungule (2007) 8.

<sup>648</sup> Ibid.

<sup>649</sup> A detailed discussion on compliance is in the next chapter.



processes of the AU.<sup>650</sup> This is a welcome development. However, it remains to be seen how the process will function amidst a culture of rampant erosion of democratic values and good governance deficit.

### *ii) Methodology*

The second point that needs to be addressed is the methodology followed by the APRM. As mentioned earlier, the APRM process is rigorous, time consuming and expensive. Because it provides an avenue for the oft-elusive and much needed public discourse and contestations, experience has shown that this same advantage is ironically partly responsible for the drawn-out nature of the process.<sup>651</sup> Although it was envisaged that the whole process, from the date of inception to the review by Heads of State and Government, should take six – nine months, practice has indicated otherwise. In Ghana, the APRM process took 22 months, Rwanda took 27 months, Kenya took 24 months and the South African process lasted for 28 months.<sup>652</sup>

There is thus a need to strike a balance between the efficiency of the review process and the duration of the process. To put it differently, there is a need to reduce the duration of the process and at same time maintain the overall objective of the process. One of the dangers of a prolonged APRM process is the decimation of the momentum attached to the process, with all parties involved being distracted by urgent national matters.<sup>653</sup> To prevent this, the APRM process must be insulated from the vagaries of national dynamics. As explained earlier, this involves granting the APRM legal status.

The next step is to come up with a strategy document that stipulates a maximum period of twelve months for the APRM process. Without derogating from the overall objective of the APRM, participating countries and the APR

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<sup>650</sup> See Assembly/AU/Dec.198 (XI).

<sup>651</sup> Hansungule (2007) 19.

<sup>652</sup> Herbert & Gruzd (2008) 139.

<sup>653</sup> Ibid, 140.

Secretariat must operate within the specified time limit. This will require that the APR Secretariat is materially equipped not only to handle administrative issues but also to help participating countries to abide by the stated regulations. This would for example entail the setting up of an APRM fund dedicated to complementing the efforts of participating countries.

Another point of concern is the format of the APRM Questionnaire. The Questionnaire is based on the framework outlined in the Objectives, Standards, Criteria and Indicators (OSCI) document.<sup>654</sup> It is aimed at putting the APRM process in perspective by ensuring standardisation and broad based participation.<sup>655</sup> The Questionnaire<sup>656</sup> expands on the OSCI document by providing for 58 questions and 183 indicators, divided into four thematic areas:

- Democracy and good political governance
- Economic governance and management
- Corporate governance
- Socio-economic development

Without deviating from widely acknowledged universal principles, it is important that the Questionnaire is reviewed in order to reflect country peculiarities. The standardisation of the Questionnaire has resulted in a situation where cogent matters affecting individual countries are glossed over. Some of the significant subjects that have been left out in the Questionnaire include humanitarian law issues, criminal justice, the impact of (sub) national government and the implementation of NEPAD programmes.<sup>657</sup> To remedy this, participating countries should be actively involved in the process of drafting the Questionnaire. In a similar vein, a cue should be taken from the South African approach by mandating countries to translate the Questionnaire into local

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<sup>654</sup> NEPAD/HSGIC/03-2003/APRM/Guideline/OSCI

<sup>655</sup> *Country Self-Assessment for the African Peer Review Mechanism*, para 2. Available at <http://www.nepad.org/aprm> (Accessed 20 May, 2008).

<sup>656</sup> *Ibid.*

<sup>657</sup> See Hansungule (2007) 19; Herbert & Gruzd (2008) 47-49.

languages.<sup>658</sup> This will not only promote awareness, it will also enhance a keen sense of ownership.

For the purpose of the ‘nucleus AU’, it is crucial that the Questionnaire is tailored to critically examine the nexus between national institutions and the process of integration. The central question should be whether national institutions have the capacity to promote and implement integration initiatives. As with the EU, mechanisms should be put in place to assist countries in meeting the stipulated targets.

Lastly, there is a need to diminish the role of Heads of State and Government in the APRM process. It is undeniable that the relative success of the process so far is attributable to its voluntary peer review nature, which allows participating Heads of States and Government to share their experiences and thoughts. This is not necessarily a bad thing except for the fact that it could also be the ‘clog in the wheel’ of the process. African leaders are not exactly known for challenging the misdeeds of each other. While the Heads of States and Government retain the role of ceremonial purveyor of the peer review process, efforts should be made to transfer the real powers to an independent body – for example the APR Panel. This will, however, entail that the civil society and the PAP are involved in the nomination of the ‘eminent persons’.<sup>659</sup>

#### **4.4.2 Harmonisation of laws**

While integration is essentially a political process, harmonisation is a legal tool for the coherent and uniform implementation of integration objectives.<sup>660</sup> Thus harmonisation, at the international level, is the legal tool for transforming (political) integration objectives into uniformly applied principles at the national level. The corollary of such exercise is the uniformity in the application of laws

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<sup>658</sup> *South African Country Review Report*. (2007) 44.

<sup>659</sup> Hansungule (2007) 8.

<sup>660</sup> See e.g. Mbaye K ‘Foreword’ in Mator B, Pilkington N, Sellers D & Thouvenot S, *Business Law in Africa: OHADA and the Harmonisation Process*, London: Evershed (2002) xxiv.

and standards, an essential feature of supranationalism. Normative supranationalism, as discussed above, places the laws of supranational institutions at the top of hierarchy of norms. The possibility of this is, however, dependent on the effective harmonisation of policies and norms.

Allot defines harmonisation as ‘the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self sufficient bodies of law’.<sup>661</sup> Also, Bassani & Mattei refer to harmonisation as the ‘[C]onvergence of rules only to a limited extent, in order to attain a workable coordination among them’.<sup>662</sup> Harmonisation should, however, not be confused with unification. While harmonisation represents a pragmatic, coordinated approach to regulate specific aspects of the law, unification implies:

The creation of a new, uniform legal system entirely replacing the pre-existing legal systems, which no longer exist, either as self sufficient systems or as bodies of rules incorporated in the larger whole; although the unified law may well draw its rules from any of the component legal systems which it has replaced.<sup>663</sup>

The incorporation of different legal systems under a basic framework is an essential component of harmonisation. The emphasis is thus on finding a common ground for the co-existence of different legal traditions. Without seeking the total unification of laws, harmonisation is a pragmatic concept which only aims to create common standards.<sup>664</sup> The corollary of this is that the common standards takes precedence over national laws and member states are thus prohibited from taking unilateral actions in relation to such

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<sup>661</sup> Allot A, ‘Towards the unification of laws in Africa’. *The International and Comparative Law Quarterly*. 14/2 (1965) 377.

<sup>662</sup> Bassani M & Mattei U, ‘The common core approach to European private law’ Available at <http://www.jus.unitn.it/cardoza/commoncore/Insearch.html> (Accessed 20 December 2008).

<sup>663</sup> Allot (1965) 377.

<sup>664</sup> As Menski asserted, ‘harmonisation as a process of ascertaining the admitted limits of international unification does not necessarily amount to a vision of total uniformity’. See Menski W, *Comparative law in a global context: The legal systems of Asia and Africa*. Cambridge: Cambridge University Press (2006) 39.

standards.<sup>665</sup> The benefits to be derived from this, according to Yakubu, include:<sup>666</sup>

- Practical predictable rules for the determination of the appropriate law to apply in solving practical problems on uniform basis<sup>667</sup>
- Inter-play of legal collaboration and mutual respect between various legal systems<sup>668</sup>
- Co-operation and systemisation of rules of law of various states<sup>669</sup>
- Avoidance of costly, confusing and delay which are necessary incidents of divergent choice of law rules<sup>670</sup>
- Cross-fertilisation of ideas which enriches community laws<sup>671</sup>

In the EU, harmonisation policies are implemented through the use of directives. Directives are binding on member states but member states have a choice of implementation format.<sup>672</sup> The implementation of directives at the national level either requires the enactment of legislation by national parliament or through agreement by reference.<sup>673</sup> Failure by a member state to transpose the directive in a timely manner ignites the 'direct effect' application of the directive within its territory.<sup>674</sup> Another measure which may be used in effecting harmonisation is a 'model law'. According to Madlingozi, 'a model law is a framework...that proposes to member states how they ought to frame their

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<sup>665</sup> See e.g. Weatherill S, *Cases and Materials on EU Law*. Oxford: Oxford University Press (2006) 620.

<sup>666</sup> Yakubu A, *Harmonisation of laws in Africa*. Lagos: Malthouse Press (1999)

<sup>667</sup> Ibid, 29.

<sup>668</sup> Ibid

<sup>669</sup> Ibid, 32

<sup>670</sup> Ibid

<sup>671</sup> Ibid, 33.

<sup>672</sup> Dashwood et al (2006) 164; see also Weatherill (2006) 133.

<sup>673</sup> See Ginsburg T & Cooter R, *Lexmetrics: Why the same laws are longer in some countries than others*. American Law and Economics Association General Meetings, Paper 64 (2004). 5. Available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1080&context=alea> (Accessed 30 April 2008).

<sup>674</sup> What this means is that individuals will be able to derive rights from the directive despite the fact that it is yet to be incorporated. See e.g. Weatherill (2006) 134; Dashwood et al (2006) 165.

legislation in a specific area.<sup>675</sup> Unlike directives, model law is a flexible approach that is sensitive to state sovereignty.<sup>676</sup>

Unlike Europe, continental harmonisation of laws is yet to be actualised in Africa. A major impediment to the realisation of this goal is the fragmentation of legal systems in Africa. As a result of the colonial enterprise, African nations subscribe to different Eurocentric legal traditions – common law, civil law and in some cases hybrid legal systems (e.g. South Africa). Other factors responsible for the diversity of laws in Africa include the existence of various indigenous laws within a particular country and the introduction of the system of federalism, which has resulted in the different application of laws within a particular state.<sup>677</sup> This reality has resulted in a situation where countries find it convenient to harmonise around a shared legal system (e.g. the OHADA, CEMAC and WAEMU) or sub-regional (e.g. SADC and ECOWAS). In this regard, it has been argued that the harmonisation of laws and policies should begin at the REC level. The reasons advanced for this range from the familiarity of RECs with sectors or issues that require urgent attention (subsidiarity), consensus could be easily reached, and the need for a bottom-up approach.<sup>678</sup>

It is against this backdrop that the CA provides that the AU shall be responsible for the coordination of policies of the RECs.<sup>679</sup> Similarly, the PAP is vested with the powers to promote the coordination and harmonisation of policies in Africa.<sup>680</sup> The AU is yet to finalise the protocol which will provide a legal

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<sup>675</sup> Madlingozi T, 'The role of Pan African Parliament and regional parliamentary fora in the harmonisation of laws and policies in Africa'. Paper presented at the Seminar on the Harmonisation of Regional Economic Communities (RECs and RPFs), Kasane, Botswana 12-13 March 2007. 32 (On file with the author).

<sup>676</sup> Ibid.

<sup>677</sup> Bamodu G, 'Transnational law, unification and harmonisation of international commercial law in Africa'. *Journal of African Law*. 38 (1994) 125-130.

<sup>678</sup> Madlingozi (2007) 28.

<sup>679</sup> See Article 3(1) of the Constitutive Act.

<sup>680</sup> Article 11(7) of the PAP Protocol states that one of the functions of the PAP is 'to promote the coordination and harmonisation of policies, measures, programmes and activities of the Regional Economic Communities and the parliamentary fora of Africa'.

framework for the relationship between it and the RECs.<sup>681</sup> Although the RECs continue to interact with the AU by participating in the meetings of the PRC, Executive Council and the AU Assembly,<sup>682</sup> it is still imperative that a permanent framework is put in place for the convergence of protocols and programmes. This is essential, bearing in mind that some of these RECs have recorded substantial progress which, if properly harnessed and coordinated, could further integration efforts at the continental level.

There are two dominant trends with regard to how to proceed with harmonisation of laws in Africa. A school of thought, largely influenced by globalisation, suggests that Africa should deviate from adopting any of the existing legal systems; instead, legal harmonisation in Africa should reflect a neutral and international law based approach.<sup>683</sup> This approach attempts to strike a balance between the differing legal traditions in order to come up with a system which conforms to contemporary global *realpolitik*.

Another school of thought holds that legal harmonisation should reflect African values and traditions. A continent-wide legal harmonisation must be sensitive to socio-cultural realities - like the high incidence of poverty, illiteracy and a poor legal culture - and thus provide a mechanism for addressing these ills.<sup>684</sup> The urge to conform to global trends should not be an excuse for excluding the socio-legal realities on the ground. By excluding the social norms and values of the common people, the dynamism of the law is diminished and, in turn, the desired consequence(s) become unattainable.

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<sup>681</sup> See the Draft Protocol on the Relationship Between the Regional Economic Communities (RECs) and the AU. EX/CL/158(1X)

<sup>682</sup> See AFRODAD & Oxfam GB (2007) 25.

<sup>683</sup> Fontaine M, 'The draft OHADA uniform act on contracts and the UNIDROIT principles of international commercial contract'. *Uniform Law Review*. 3 (2004) 577; see also Date-Bah S, 'The UNIDROIT principles of international commercial contracts and the harmonisation of the principles of commercial contracts in west and central Africa: Reflections on the OHADA project from the perspectives of a common lawyer from West Africa. *Uniform Law Review*. 2 (2004) 272.

<sup>684</sup> Fontaine (2004) 577-579.

In light of the foregoing, it is essential that while Africa remains part of the global community and will thus benefit from adherence to global rules and principles, it is equally crucial that harmonisation of laws reflect local specificities. As Menski asserts:

Placative advocacy of a return to 'custom' and 'tradition' is too simple as a remedy. But complete denial of a place for custom and tradition within the dynamism of legal reconstruction in African laws is also far too simplistic, since the input of social norms and common people's values into law-making remains a universal phenomenon.<sup>685</sup>

It is, therefore, crucial that the architects of continental harmonisation policies engage in a broad-based consultation process in order to come up with programmes that not only foster development but also embody societal dynamics. In this regard, such laws must factor into consideration the high levels of illiteracy on the continent by making provisions for simplified legal rules, alternative (traditional) dispute resolution mechanisms and culture of the people.<sup>686</sup>

Most importantly, member states must also demonstrate the necessary political will for the realisation of this goal. Practice has shown that at the sub-regional level, some member states display 'below-the-par' commitment to harmonisation policies by delaying to ratify or sign harmonisation protocols and failing to implement harmonisation protocols.<sup>687</sup> To prevent incidents like these, measures like the flexibility of implementation format and the principle of direct effect should be adopted. As indicated above, the principle of direct effect will eliminate the uneven implementation of policies and also ensure that integration proceeds at an appreciable pace.

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<sup>685</sup> Menski (2006) 485.

<sup>686</sup> See e.g. Fontaine (2004) 578-581.

<sup>687</sup> ECA (2004) 48-51.



#### 4.4.3 Public participation

'We are not bringing together states, we are uniting people' – Jean Monnet<sup>688</sup>

The centrality of people to the integration process cannot be understated. If the aim of integration is understood to be the establishment of a trans-frontier community of people, then the need to involve citizens becomes crucial. To achieve this, trans-frontier community of people, member states are expected to establish supranational institutions capable of effectively regulating broad matters ranging from the free movement of persons, protection of fundamental human rights, and socio-economic welfare of citizens. The consequence of this is what Haas explains as the shifting of loyalty of citizens of member states to a new centre – supranational institutions.<sup>689</sup> This 'shifting of loyalty' can, however, only occur if citizens are part of the process of integration. The EU, for example has devised measures - ranging from national referendums on EU policies, direct election of EU parliamentarians and the principle of direct effect - to accentuate the importance of people in the integration process.<sup>690</sup>

However, a signature feature of integration in Africa is the tendency to locate the discussion on African integration within an elitist realm. African integration, like national politics, continues to be treated as an exclusive preserve of African leaders. The dialogue on integration is thus confined to the glittering venues of regional organisation summits and posh secretariats. It is a truism that the success and sustainability of the integration process is dependent on the broad participation of the African populace in the design and implementation of integration initiatives.<sup>691</sup>

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<sup>688</sup> Cited in Fontaine (2006) 43.

<sup>689</sup> Haas (1958) 16; Rosamond (2000) 33.

<sup>690</sup> Fontaine (2006) 40-43.

<sup>691</sup> See e.g. Asante (1997) 174.

The success or progress of African integration should be measured by how it meaningfully impacts on the lives of ordinary Africans and not how it only benefits the elites. The fact that diplomats and top government officials can travel without visas is not a necessary indicator of the success of regional integration. The ‘common man or woman’ on the streets of Kigali, Arusha, Kumasi and Maputo must be given the opportunity to contribute to this debate. Consultation mechanisms such as national referendums, active involvement of civil society, grassroots meetings, enhanced interaction between national socio-political and cultural organisations and trans-frontier youth fora are needed. As suggested by Asante, integration can further be enhanced through its introduction into the academic curricula at African schools.<sup>692</sup> In addition, citizens should directly elect members of PAP by universal suffrage. These measures will go a long way in granting regional institutions greater democratic legitimacy and broad support.

In the same vein, the involvement of the private sector in the integration process is also crucial. Since the economic reforms started in the mid-1980s, the capacity of the private sector in Africa to contribute to economic growth has been strengthened.<sup>693</sup> Unlike national governments, the private sector is not usually bogged down by bureaucratic bottlenecks and political sentiments and this places it in a strategic position to facilitate cross-border investments, infrastructure development and creation of jobs. The corollary of these contributions is an increased market size which also benefits the private sector.

In this regard, the ‘one network’ is a commendable example of private sector initiative which allows people to make cross-border mobile calls at local rates.<sup>694</sup>

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<sup>692</sup> Asante (1997) 175; see also Fagbayibo B, ‘Beyond political rhetoric: Transforming the debate on African integration into an academic discipline in African universities’ in Le Roux A & Mitchell J (eds), *Curriculum issues in higher education: Conference proceedings*. Pretoria: University of South Africa Press (2009) 18-25.

<sup>693</sup> AU & ECA (2006) 86.

<sup>694</sup> These countries are spread across Central, East and West Africa. They include: Burkina Faso, Chad, the Republic of Congo, the Democratic Republic of Congo, Gabon, Kenya, Malawi, Niger, Nigeria, Sudan, Tanzania and Uganda. Available at

This initiative is a big booster to the policy on free movement of persons across African borders. Another example is the Ecobank Transnational Incorporated (ETI), a joint initiative between ECOWAS member states and the private sector, which operates in 18 countries spread across Central and West Africa.<sup>695</sup> In a related development, five countries within the West Africa sub-region, in a bid to ease trade procedures and free movement of persons, have agreed to outsource the management of border non-core functions to the private sector.<sup>696</sup> In order to ensure the meaningful contribution and participation of the private sector, through employment of labour and contribution to regional economy, national governments must remove legal and economic barriers hampering the participation of the private sector.

#### 4.4.4 Development

As highlighted earlier, the functionalist school of thought advocate the creation of technocratic institutions as drivers of transnational or regional development. According to Mitrany, the foremost protagonist of this idea, the feasibility of this approach is dependent on entrusting these institutions with 'autonomous tasks and powers'.<sup>697</sup> In other words, there is a strong nexus between the existence of supranational institutions and development. As Rodrik et al pointedly put it, 'the quality of institutions trumps everything else'.<sup>698</sup> The level of (economic) development witnessed in CEECs after acceding to the various elements of EU supranationalism is a testament to the developmental feature of regionalism nay

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<http://www.zain.com/muse/obj/lang.default/portal.view/content/About%20us/Worldwide%20Presence/Africa-13%20countries> (Accessed 25 November 2008).

<sup>695</sup> Benin, Burkina Faso, Cameroon, Cape Verde, Central Africa, Chad, Cote d'Ivoire, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome, Senegal, Sierra Leone and Togo. See <http://www.ecobank.com/english/group/ecobank.aspx?RubID=3&RubID=1&SSRubID=1> (Accessed 30 August 2007).

<sup>696</sup> The five countries are Benin, Cote D'Ivoire, Ghana, Nigeria and Togo. Available at <http://www.thisdayonline.com/nview.php?id=89617> (Accessed 18 September 2007).

<sup>697</sup> Mitrany (1975) 125.

<sup>698</sup> Rodrik D, Subraminian A & Trebbi F, 'Institutions rule: The primacy of institutions over geography and integration in economic development'. *Journal of Economic Growth*. 9 (2004) 135.

supranationalism.<sup>699</sup> In light of the foregoing, two issues stand out. The first highlights the indispensability of strong institutions to regional development and the second indicates the importance of crafting a developmental agenda that fits the peculiar needs of a region. While the EU serves as a useful model, it is crucial that Africa devises a development strategy that suits its environment.<sup>700</sup> It is against this background that this section considers the dynamics of development in Africa.

Summarising the state of development in post-colonial Africa, Ake asserts that ‘the problem is not so much that development has failed as that it was never really on the agenda in the first place’.<sup>701</sup> This statement aptly captures the trajectory of development strategies in Africa, which includes broken promises, half-hearted commitments and the absence of home-grown mechanisms to drive development. There is no gainsaying that the history of post-colonial Africa is replete with ideas and strategies aimed at fostering national and regional development agendas. This, in turn, brought about the involvement of various actors - with competing agendas<sup>702</sup> - in the scripting and implementation of development programmes, chief of which includes the Bretton Woods Institutions (the World Bank and the International Monetary Fund), ECA, the OAU (now AU) and the RECs.

Africa’s permanent spot at the periphery of global economy - largely attributable to factors such as sparse population,<sup>703</sup> fragmented markets, limited infrastructure and large-scale corruption - inspired the quest for sustainable

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<sup>699</sup> As noted in chapter 2, the impact of the elimination of external tariff on the GDP of CEEC was around 4.5%, in addition the volume of trade between other EU members and the CEEC rose from 56% in 1993 to 62% in 1995.

<sup>700</sup> AU & ECA (2006) 33-34; Rodrik et al (2004) 9.

<sup>701</sup> Ake (1996) 1.

<sup>702</sup> Ibid, 21-22.

<sup>703</sup> Only five African countries (Democratic Republic of Congo, Ethiopia, Egypt, Nigeria, and South Africa) have a population of more than 30 million; eight countries have a population of less than 1 million each and 14 countries have a population between 1 and 4 million. See Agubuzu L, ‘Regional Economic Integration: A Development Paradigm for Africa’ in Onimode B et al (eds), *Africa development and governance strategies in the 21<sup>st</sup> century: Looking back to move forward: Essays in honour of Adebayo Adedeji at seventy*. (2004) 205; see also Asante (1997) 29.

models of development. The dominant development ideology on the continent remains regional economic cooperation and integration or what Adedeji described as 'strategy of sub-regional and functional cooperation'.<sup>704</sup> The major proponent of this ideology is the ECA.<sup>705</sup> Through the creation of regional and sub-regional organisations, this ideology presupposes the coordination of development policies which would in turn engender collective self-reliance and robust growth in African economies.<sup>706</sup> This ideology led to the proliferation of RECs across the continent and also found expression in three significant blueprints for continental integration:

- the Lagos Plan of Action for the Economic Development of Africa (1980-2000) and the Final Act of Lagos
- the African Economic Community Treaty (1991)
- the New Partnership for Africa's Development (2001)

#### **4.4.4.1 The politics of self-reliant development**

The common themes that run through the three aforementioned documents are the reduction of Africa's dependency on external funding, strengthening of regional linkages, self reliance and ironically, western funding of developmental strategies.<sup>707</sup> Herein lies the inherent contradiction in Africa's development strategies. On the one hand, the notion of self reliance is trumpeted by the fact that no genuine effort is made to create a favourable environment for self-driven development. On the other hand, with the exception of the NEPAD document, the international community is expected to generously bankroll African development agendas.

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<sup>704</sup> Cited in Asante (1991) 94.

<sup>705</sup> Ibid; see also Asante (1997) 31.

<sup>706</sup> Asante (1997) 31.

<sup>707</sup> See e.g. Cummings R, 'A historical perspective on the Lagos plan of action' in Nyang'oro J & Shaw T (eds), *Beyond structural adjustment in Africa: The political economy of sustainable and democratic development*. New York: Praeger (1992) 39; see also *The New Partnership for Africa's Development* (2001) Available at <http://www.nepad.org/2005/files/home.php> (Accessed 20 February 2008); see also Asante (1997) 92-3.

The notion of self-reliance should be defined within the context of popular participation in developmental programmes. As Ake observes, post independence elite have for a long time manipulated the meaning of this concept to narrowly denote a resistance against foreign domination.<sup>708</sup> Self-reliance means more than this. Being an inward-looking approach, which seeks primarily to change pattern of production and enhance Africa's domestic market, self-reliance places the individual at the core of developmental strategies.<sup>709</sup> According to Cummings, the exclusion of local African institutions, which regulated distribution of benefits and resources in pre-colonial African societies, continue to impede the success of national and continental development strategies.<sup>710</sup>

The fear of any form of opposition to repressive regimes coupled with the attitude of western-oriented development experts<sup>711</sup> has resulted in the neglect of traditional African values of consensus, group-based approach to community challenges. The key to enhancing the self-reliant development lies in the ability to weave developmental goals around cultural values.<sup>712</sup> As Asante rightly points out, developmental strategies 'should aim at improving not only the economic but the social, cultural and environmental welfare of a nation'.<sup>713</sup> It is thus essential that all the segments of the society - women, youth, civil society and rural dwellers - should be involved in this process. Ensuring the active and genuine participation of these sectors requires the existence of constitutional democracy. A democratic environment is a catalyst to a robust, people-driven

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<sup>708</sup> Ake (1996) 140.

<sup>709</sup> Ibid 140-142; see also Asante (1991) 36-55; Onimode B, 'Mobilisation for the implementation of alternative development paradigms in the 21<sup>st</sup> century Africa' in Onimode et al (2004) 21-22.

<sup>710</sup> Cummings in Nyang'oro & Shaw (1992) 39-40; see also Ake (1996) 15-16. In a bid to centralise power, post-independence elite put in place mechanism to either abolish or decimate the influence of the traditional institution of chieftaincy, in spite of the central role this institution plays in the regulation of cultural values and local development. See e.g. Economic Commission for Africa, *Relevance of African traditional institutions of governance*. Addis Ababa: Economic Commission for Africa (2007) 8. Available at <http://www.uneca.org> (Accessed 30 October 2009). [Hereinafter referred to as ECA 2007].

<sup>711</sup> According to Ake, there is a blanket conception of rural Africans as being opposed to change and modernisation. The consequence of this is the crafting of a development agenda that does not take into account the cultural context of the people concerned. See Ake (1996) 15-16.

<sup>712</sup> Asante (1991) 68-70.

<sup>713</sup> Ibid, 47-48.

development agenda. Where people have a choice of determining the kind of government they want, they would in turn be empowered to determine the content of developmental programmes and thus grant it legitimacy.<sup>714</sup>

Since the onus of implementing continental development strategies falls on regional organisation, it is of the essence that they are bequeathed with efficient administrative capacity. Steering the course of a self-reliant ideology entails the existence of a vibrant and competent organisational structure. It is ironic that African leaders have in the past trumpeted the need for home-grown development strategy but later jettisoning them for World Bank/IMF development blueprints.<sup>715</sup> Non-commitment to strengthening institutions at national and continental levels recurrently exposes African leaders to manipulation at the hands of foreign patrons.<sup>716</sup> The advent of NEPAD has however signalled a determination - albeit a shaky one - to break from the past traditions (this will be discussed below).

A key obstacle to the realisation of self-reliant development is the unbridled attachment to foreign aid. Foreign aid is construed by some African governments as 'Africa's historical right'.<sup>717</sup> This approach has entrenched a culture of dependency, where external assistance is narrowly construed by both the donor and recipient as charity.<sup>718</sup> On the part of the donor, conditions which exclude cultural realities are tied to aid. For example, a facade of multi-party democracy - which obviously still entrenches the impunity of the past and also extricates the majority of the people from the governing process - is considered

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<sup>714</sup> This has been succinctly described as 'democratic economic development strategy'. See Onimode et al (2004) 245.

<sup>715</sup> Asante (1991) 63; Ake (1996) 21-40; Nyang'oro J, 'The evolving role of African state under Structural adjustment', in Nyang'oro & Shaw (1992) 13-25.

<sup>716</sup> See e.g. Ake (1996) 7.

<sup>717</sup> Asante (1991) 65.

<sup>718</sup> See e.g. Udombana J, 'The third world and the right to development: Agenda for the next millennium', *Human Rights Quarterly*, 22/3 (2000) 782-783.

as sufficient. In other instances, conditions are tied to economic reform policies which totally negate the philosophy of self reliant development.<sup>719</sup>

It is against this background that the NEPAD document came into being. The document advocated for a paradigm shift in the relationship between Africa and the international community.<sup>720</sup> It further states: 'Africans are appealing neither for the further entrenchment of dependency through aid, nor for marginal concession'.<sup>721</sup> Rather, the document seeks to attract foreign direct investment (FDI).<sup>722</sup> Beyond conditional aid, NEPAD advocates mutually agreed performance targets and standards for both donors and recipients of aid.<sup>723</sup> Unlike other development documents before it, NEPAD hinged continental development on the adherence to democratic values and standards.<sup>724</sup> This ideology has found expression in the APRM process, and also forms the basis of the above proposed 'nucleus AU'.

On the issue of resources mobilisation, the document highlights a combination of external and internal sources. The primary source of funding is expected from foreign investment, in addition to this are an increased Overseas Development Assistance (ODA) and debt reduction.<sup>725</sup> The entrenchment of democratic values is expected to create a favourable environment and attraction of private capital flows. In relation to domestic resources mobilisation, African governments are implored to rationalise government expenditure, take steps to increase national savings by firms and households, ensure effective tax

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<sup>719</sup> Kankwenda M, 'Forty years of development illusions: Revisiting development policies and practices in Africa, in Onimode et al (2004) 9.

<sup>720</sup> NEPAD (2001) 2.

<sup>721</sup> Ibid, 1.

<sup>722</sup> To meet Africa's development goals, it is estimated that the continent needs an annual amount of US\$64 billion or an estimated 7% annual economic growth rate. See *ibid*, 37.

<sup>723</sup> Anyemedu K, 'Financing Africa's development: Can aid dependence be avoided?' in Adesina et al (eds) *Africa & development: Challenges in the new millenium: The NEPAD debate*. Dakar: CODESRIA (2005) 266.

<sup>724</sup> NEPAD (2001) 17.

<sup>725</sup> *Ibid*, 37-40.



collection and reverse the flow of capital flight.<sup>726</sup> In response to the NEPAD initiative, the Group of Eight (G8) leaders at the Gleneagles summit pledged to double ODA to Africa to USD25 billion by 2010.<sup>727</sup> This commitment covers wide ranging issues like education, health, peace and security, governance, debt relief and trade.<sup>728</sup> In addition, this ODA is aimed at helping Africa meet its Millennium Development Goals (MDGs).<sup>729</sup> Subsequent summits in St. Petersburg and Heiligendamm reaffirmed these commitments. On the basis of mutual understanding, African leaders agreed on their own part to entrench democratic values, strengthen regional cooperation and increase budgetary allocations to health and education.<sup>730</sup>

However, an assessment of the progress of these commitments paints a not too impressive picture. Collectively, the G8 has only delivered a meagre USD3.035 billion, which amounts to 14% of the pledged commitment.<sup>731</sup> The report singled out Canada, France and Japan as the ‘culprits’ while the United States, United Kingdom, Germany and Italy have all made some progress - albeit much needs to be done - in terms of ODA.<sup>732</sup> Taking a cursory look at performance in terms of sectoral commitments, it is shown that

- the G8 is well on track with cancellation of debts,<sup>733</sup>
- little or no progress in terms of commitment to ‘make trade work for Africa’,<sup>734</sup>
- considerable progress made in terms of commitment to health (HIV/AIDS, tuberculosis, malaria and polio)<sup>735</sup>
- not on track in terms of achieving universal primary education (UPE)<sup>736</sup>

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<sup>726</sup> Ibid 37.

<sup>727</sup> *The Data Report 2008*, 31. Available at <http://www.one.org/report> (Accessed 15 August 2008).

<sup>728</sup> Ibid, 22-28.

<sup>729</sup> Ibid, 30.

<sup>730</sup> Ibid, 140-154.

<sup>731</sup> Ibid, 34.

<sup>732</sup> Ibid.

<sup>733</sup> Ibid, 56-63.

<sup>734</sup> Ibid, 72-73.

<sup>735</sup> Ibid, 74-96.

The conclusion that can be drawn from the above exposition is that the international community is yet to grasp the urgency of redressing underdevelopment in the continent. In spite of the NEPAD blueprint, it seems that the culture of dependency and patronising gestures are still fully intact. This further reinforces the view that the acceptance of NEPAD by the developed world is nothing more than an act of 'political correctness'.<sup>737</sup> It can also be argued that African leaders have not fulfilled their own part of the bargain. For example, little has been done to strengthen regional cooperation by granting regional bodies supranational powers. In addition, the democratisation process continues to be stunted by electoral chicanery and intimidation of the opposition.<sup>738</sup>

#### **4.4.4.2 Boosting domestic resources mobilisation**

Viewed objectively, it can be argued that the primary responsibility of remedying continental woes lies with African states themselves. This is inevitably linked to granting of more powers to regional institutions. Placing too much hope on the international community and their tax payers can only entrench the dependency syndrome. While it is true that Africa cannot solely finance its development agenda, it is equally essential that strong emphasis and genuine commitment is directed towards the creation of a sustainable domestic financing structure. Unlike domestic savings mobilisation, the NEPAD document present a well-detailed and elaborate structure of attracting ODA and private capital flows.<sup>739</sup>

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<sup>736</sup> Ibid, 108.

<sup>737</sup> Taylor I, 'NEPAD and the global political economy: Towards an African century or another false start' in Adesina et al (2005) 68.

<sup>738</sup> As Onyekakeyah notes, '... unenviable happenings across Africa show that ballot coup has replaced military coup d'etat on the continent. Without political stability there can be no economic or social progress. The political instability stagnates progress in all fronts and leaves the people in a state of quandary. See Onyekakeyah L, *Is Africa the sick baby of the world*. The Nigerian Guardian. Available at [http://www.guardiannewsngr.com/editorial\\_opinion/article02//indexn3\\_html?](http://www.guardiannewsngr.com/editorial_opinion/article02//indexn3_html?) (Accessed 08 July 2008).

<sup>739</sup> NEPAD (2001) 37-40; see also Onimode et al (2004) 240; Anyemedu (2005) 256-257.

Although the NEPAD document highlighted the importance of domestic resources mobilisation, more emphasis is placed on external financing. Research, however, indicates that the flow of FDI is not so much premised on factors highlighted in the NEPAD document as it is on geo-political considerations and the presence of natural resources.<sup>740</sup> The emergence of China as a major source of FDI into the continent has also reiterated this sentiment. China's policy of non-interference in domestic affairs has drawn several criticisms especially in relation to Sudan.<sup>741</sup>

According to a 2007 report by the United Nations Conference on Trade and Development (UNCTAD), ten African countries received about 90% or US\$32 billion of the continent's inflow of FDI.<sup>742</sup> The majority of these investments have gone towards oil, gas and mining while other sectors such as transport and communications have also attracted sizeable investment.<sup>743</sup> In addition, the careful management of Mergers and Acquisitions (M&A)<sup>744</sup> deals and privatisation of public enterprises have also attracted FDI.<sup>745</sup> In spite of the sanguinity about FDI, the Report reveals a decline in the total inflow of FDI into Africa from 3.1% in 2005 to 2.7% in 2006.<sup>746</sup>

The above analysis thus highlights the importance of giving serious focus and attention to domestic resources mobilisation. Corruption remains one of the biggest impediments to domestic resources mobilisation. According to the World Bank, about 25% (USD148 billion) of Africa's Gross Domestic Product

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<sup>740</sup> Onimode (2004) 248-250.

<sup>741</sup> See e.g. Aning K & Lecoutre D, 'China's venture in Africa' *African Security Review*. 17/1 (2008) 43-44; see also *Arms, oil and Darfur: The evolution of relations between China and Sudan*. Sudan Issue Brief (2007) Available at [http://hei.unige.ch/sas/files/portal/spotlight/sudan/Sudan\\_pdf/SIB%207%20Arms.pdf](http://hei.unige.ch/sas/files/portal/spotlight/sudan/Sudan_pdf/SIB%207%20Arms.pdf). (Accessed 20 August 2008).

<sup>742</sup> The top ten receivers of FDI are Egypt, Nigeria, Sudan, Tunisia, Morocco, Algeria, Libya, Equatorial Guinea, Chad and Ghana. Available at <http://www.unctad.org/wir> (Accessed 25 August 2008).

[Hereinafter referred to as World Investment Report 2007]

<sup>743</sup> See Ibid.

<sup>744</sup> The 2007 World Investment Report shows that the value of cross border M&A in Africa peaked at an appreciable US\$18 billion in 2006. See Ibid.

<sup>745</sup> Anyemedu (2005) 267.

<sup>746</sup> Compared to Africa, South, East and South East Asia attract 15% of the global share of FDI while Latin America and the Caribbean draw 6%. See World Investment Report 2007.

(GDP) is lost to corruption every year.<sup>747</sup> This shocking revelation requires a pragmatic mechanism of plugging factors engendering corrupt practices. Addressing corruption head on will require concerted efforts at strengthening national institutions charged with fighting corruption. The establishment of anti-corruption agencies is not sufficient; African states must demonstrate the necessary political will by equipping such agencies with effective legal and administrative backing. In addition, there is a need for the reorientation of the societal value system, which will go a long way in granting moral fillip to the fight against corruption.<sup>748</sup> The international community also has a huge role to play in this regard. The repatriation of stolen funds should be given the utmost attention as well as the prosecution of foreign firms engaged in corrupt practices in Africa.<sup>749</sup> Also, African states must adhere to prudent fiscal policies and the pruning of expenditure on flamboyance. As Anyemedu points out, money spent on private jets, official vehicles and foreign trips could be better utilised on priorities such as education, health and poverty alleviation.<sup>750</sup>

The financial impact of conflicts on African economies is depressing. According to a 2007 survey, Africa has, within 1990-2005, lost USD284 billion to conflicts and wars, with the continent's economy shrinking by an average of 15% yearly.<sup>751</sup> Prevention of conflicts on the continent can only boost public domestic savings; it is thus crucial that conflict prevention programmes at continental and sub regional levels are given the requisite impetus to succeed. It is trite that the root cause of most conflicts of the continent is the absence of a democratic order; therefore, the observance of these principles is non-negotiable for the presence of peace and stability.

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<sup>747</sup> Available at

<http://www.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,menuPK/258652>  
(Accessed 25 August 2008).

<sup>748</sup> See e.g. Lawal G, 'Corruption and development in Africa: Challenges for political and economic change', *Humanity and Social Sciences Journal*. 2/1 (2007) 6.

<sup>749</sup> Anyemedu (2005) 272-273.

<sup>750</sup> *Ibid*, 271.

<sup>751</sup> See *Africa's missing billion*, IANSA, Oxfam & Saferworld (2007) 8-9. Available at [http://www.oxfam.org.uk/resources/policy/conflict\\_disasters/downloads/bp107\\_africa\\_missing\\_billions.pdf](http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/bp107_africa_missing_billions.pdf)  
(Accessed 12 October 2007).

There is also a need for large scale reforms in the banking sector in order for it to be able to provide much needed finance for small enterprises.<sup>752</sup> Government alone cannot boost domestic savings; the strengthening of the private sector is essential for the existence of a viable public-private partnership geared towards substantial accumulation of domestic savings. In this regard, wealth creation should be the primary focus. Agriculture, a mainstay of African societies, should be given high priority through major investments and provision of requisite infrastructures.<sup>753</sup>

While the above measures will not automatically translate into a radical increment in domestic savings, it at least has the potential of laying a veritable foundation for a well focused and genuine commitment to domestic savings as an alternative to financing African development.

#### **4.4.4.3 Towards an AU driven development agenda**

The foregoing analysis identifies some of the important components of Africa's development agenda. Indeed, development in Africa has, at the best, been marginal. The political contexts within which development strategies are designed remain the biggest stumbling block to its efficacy. It is, therefore, imperative that the development agenda exists within a democratic milieu. The AU has a big role to play in this regard. As argued earlier, the AU in its present configuration is incapable of driving both the democratic and development agenda. A 'nucleus AU', as proposed in the foregoing, will have both the legitimacy and competence to set the tone for a genuine and sustainable development agenda.

The primary responsibility of the AU in ensuring the entrenchment of democratic norms thus locates it within the core of Africa's development agenda. Through

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<sup>752</sup> Katseli L, 'Financing Africa's development'. Fifth International forum on African perspectives (2005) Available at <http://www.oecd.org/dataoecd/24/7/34976384.pdf> (Accessed 25 August 2008)

<sup>753</sup> Ibid, 2; see also Onimode (2004) 244.

its monitoring and disciplinary mechanisms, a supranational AU can stimulate an enabling environment for development. As will be further elaborated upon in the next chapter, the institutional design of a future supranational AU is key in determining how it will play this role. Suffice to note that such an institutional framework should in itself be a product of a process built on utmost adherence to democratic norms and standards.

#### **4.5 Summary**

The trajectory of closer cooperation and integration in Africa has by no means being smooth sailing. The rhetoric on integration is yet to be matched by a well-honed political will and commitment. The shift from the OAU to the AU was expected to bring vibrancy to regionalism and most importantly usher in an era of supranationalism but the reality on the ground proves otherwise. The unbridled attachment to sovereignty and flagrant abuse of democratic principles across the continent continue to hamper the effective functioning of the organisation.

Further, the current configuration of the organisation vis-à-vis unconditional membership stands in contradiction to the much espoused principles of democracy and good governance. It exposes the organisation's lack of ideology. There is thus a need for a paradigm shift in the conception of African integration and how to proceed with it. The AU, as proposed in this chapter, thus requires a democratic rebirth. The ambitious goals of the organisation can only be effectively realized upon the genuine commitment by member states to adhere to democratic principles and granting of requisite over-arching powers to the organisation. A detailed analysis of how these fundamentals can shape the design of a future supranational AU is discussed in the next chapter.

## Chapter 5

### **Building a leviathan: The institutional architecture of a future supranational African Union**

It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than the creation of a new order of things. For the initiator has the enmity of all who profit by the preservation of the old institution and merely lukewarm defenders in those who would gain by the new one

Nicolo Machiavelli<sup>754</sup>

#### 5.1 Introduction

#### 5.2 Paving the path of supranational integration: Theorising institution building

#### 5.3 The quest for AU transformation: An overview of perspectives

##### 5.3.1 The Pan-African Parliament (PAP)

##### 5.3.2 The AU Commission

##### 5.3.3 The African Court of Justice and Human Rights (ACJ&HR)

##### 5.3.4 Dominant themes in the quest for AU transformation

#### 5.4 Building a qualitative leviathan: Institutional structure of a supranational AU

##### 5.4.1 The idea of 'nucleus AU' revisited

##### 5.4.2 Institutional organisation

###### 5.4.2.1 Road to transformation: Preliminary matter

###### 5.4.2.2 The legal framework of a supranational AU

<sup>754</sup> Available at <http://www.quotedb.com/authors/nicolo-machiavelli> (Accessed 01 August 2008).

#### 5.4.2.3 Institutional architecture: What manner of Union?

#### 5.4.2.4 Ensuring compliance with the decisions of a supranational AU

### 5.5 Summary

## 5.1 Introduction

‘Quality of institutions’ according to Rodrick et al, ‘trumps everything else’.<sup>755</sup>

This succinct, yet powerful, statement precisely indicates the centrality of durable institutions to growth and development of any society. Metz also locates the success of European integration within the framework of institution building:

Institutions and decision-making procedures have from the very beginning of integration proved very effective as a framework for shaping policies in an organisation that subsequently expanded its size and tasks. Especially the establishment of supranational institutions that can initiate and adopt binding legislation for the member states explains to a large extent the European success story.<sup>756</sup>

In the same vein, it is crucial that institutions are built around the peculiarities of a particular area. Be it at the national or international sphere, the effectiveness or qualitative output of any institution will depend on the ability of its architects to tailor its shape and functions around specificities particularly the historical and cultural background, needs and values of the people. As Goodin aptly remarks:

[T]he fundamental notion of (institutional) design...relates to “goodness of fit” of the designed object to its environment...a well designed, in particular, would be one

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<sup>755</sup> Rodrik et al (2004) 135.

<sup>756</sup> Metz A, *Strengthening capacities for reform – Perspectives of institutional building in the European Union*. Centre for Applied Policy Research (CAP) Working Paper (2006) 4 Available at <http://www.cap-lmu.de/publikationen/2006/metz.php> (Accessed 20 April 2009).



that is both internally consistent and externally in harmony with the rest of the social order in which it is set.<sup>757</sup>

In as much as the EU serves as an admirable lesson and for regional integration, Africa must devise its own approach to regional integration. The path towards the building of a qualitative EU is rooted in a peculiar historical, political and economic context; therefore, to prescribe a verbatim approach in Africa is not only tantamount to ignoring realities but also a recipe for failure. However, this does not necessarily mean that the EU experience is totally irrelevant; it is in fact imperative in a globalised environment to continue to interact, draw and adapt useful lessons from the practice in other climes. The overriding aim should thus be the contextualisation of these practices.

It is against this background that this chapter aims to channel the core themes that have emerged from the preceding chapters into a coherent, African-specific institutional framework. In the preceding chapters, issues such as good governance, democracy, public participation and economic development have stood out as some of the necessary ingredients of regional integration. More importantly, the idea of a 'nucleus AU' was proposed as a feasible alternative to guaranteeing the qualitative attainment of a supranational AU. As explained elsewhere in this thesis, this idea is a radical approach which seeks to deviate from a redundant 'all-comers' philosophy that has characterised regional integration in Africa.

In order to provide a conceptual framework, this chapter begins with a theoretical discourse of institutional design. This is then followed by a discussion of the perspectives on institutional transformation of the AU. Lastly, it examines how the theories emanating from the foregoing analyses can be channelled into constructing a formidable and value-driven supranational continental institution.

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<sup>757</sup> Goodin R, 'Institutions and their design' in Goodin R (ed), *The theory of institutional design*. Cambridge: Cambridge University Press (1996) 37.

## 5.2 Paving the path of supranational integration: Theorising institution building

Institution building or design, as noted above, remains a necessary prerequisite for attaining meaningful cooperation and integration amongst member states, especially if the ultimate objective of such cooperation is supranationalism. Thus, the paths of integration will differ according to the objectives and intentions of member states. If for example member states agree that the cooperation among them should be limited to mere intergovernmental interaction, then its institutions are not expected to act contrary to and/or beyond national sovereignties. If, on the other hand, the integration or cooperation is designed to be supranational, the focus will be directed towards building institutions and putting in place mechanisms for the transfer of powers to such institution. Since the proposed ‘nucleus AU’ is framed as a feasible path to Afro-supranationalism, it is important to engage in a theoretical discourse of the concept of institutional design.

The term ‘institutional design’ is a concept that has found application in virtually every field of human endeavour.<sup>758</sup> The scope of this thesis, however, allows for a description rooted in social science. Bobrow & Dryzek define (institutional) design as ‘the creation of an actionable form to promote valued outcomes in a particular context’.<sup>759</sup> This definition highlights policy-making as the thrust of institution design. Building on this, Goodin identifies the three pillars of institutional design as the designs of policies,<sup>760</sup> mechanisms<sup>761</sup> and whole systems.<sup>762</sup> Pettit provides a useful description of institutional design:

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<sup>758</sup> Ibid, 31.

<sup>759</sup> Cited in Ibid.

<sup>760</sup> This is described as ‘...the crafting of new solutions, through a creative combination of recollection and innovation and a serious engagement with both values and contexts’. See Ibid 31-32.

<sup>761</sup> Mechanism design is an economic concept which relates to resource allocation. Ibid, 32-33.

<sup>762</sup> This is concerned with how designed object (policy, mechanism and system) fit into the larger context in which it is set. In essence, this borders on the realisation of set goals and objectives. Ibid, 33-34.

When I speak of institutional design I do not necessarily have in mind the devising, from scratch, of new social arrangements. The phrase certainly covers that case, but it is meant to also apply to more commonplace project of examining existing arrangements to see if they are satisfactory and of altering them where necessary: the project of rethinking and reshaping things - perhaps quite modestly – rather than the project of giving them their initial form.<sup>763</sup>

Since the focus of this chapter, and this thesis, is the strengthening of AU institutions, this section will analyse the fundamentals of supranational institutional design. In this regard, the four scenarios outlined by Richmond & Heisenberg are instructive. In their analysis of supranational institutional design, four points are highlighted.<sup>764</sup>

- Intentionality (Did the member states intend to create a supranational institution?)
- Specificity (How concrete is the mandate of the institution?)
- Relationship to national institution (How much does the supranational institution depend on its national counterpart?)
- Institutional copying (Is the supranational institution explicitly modelled on a specific national institution?)

Another important point that will be added to these is compliance. This is crucial considering the fact that compliance with institutional decisions remains a major challenge in regional integration. Effective compliance grants institutions legitimacy, thus it is crucial that drafters of treaties put in place measures for ensuring the feasibility of compliance.

Before analysing these points, it is pertinent to note that the above-outlined principles are by no means sacrosanct; rather they provide some form of

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<sup>763</sup> Pettit P, 'Institutional design and rational choice' in Goodin (2006) 55.

<sup>764</sup> Richmond A & Heisenberg D, *Supranational institutional building in the European Union: A comparison of the European Court of Justice and the European Central Bank*. Paper presented at the European Community Studies Association's Biennial International Conference, Pittsburgh, P.A., June 2-5, 1999. Available at [http://www.aei.pitt.edu/2372/01/002574\\_1.pdf](http://www.aei.pitt.edu/2372/01/002574_1.pdf) (Accessed 20 April 2009).

template that can be borrowed and adapted to Africa's situation. As Mazrui aptly admonishes, 'Africa must stand ready to selectively borrow, adapt, and creatively formulate its strategies for planned development'.<sup>765</sup>

*a) Intentionality*

Richmond & Heisenberg define 'intentionality of institutional design' as 'the awareness of the Treaty drafters of the institutional design's effect on national sovereignty'.<sup>766</sup> This implies that member states precisely set the parameters of the powers to be bequeathed to international institutions. As with any human endeavour, the contemplation of Treaty drafters does not always match the eventual reality. As Richmond & Heisenberg observe, the drafters of the EU judicial system, the European Court of Justice (ECJ), did not exactly envisage that the ECJ would make substantial inroads into national sovereignty and thus become a major driver of supranationalism in Europe ('silent motor of integration').<sup>767</sup> Thus, intention is not static but sensitive to the dynamics and need of the integration arrangement. In this regard, Goodin remarks that 'institutions are often the product of intentional activities gone wrong – unintended by-products, the products of various intentional actions cutting across one another, misdirected intentions, or just plain mistakes'.<sup>768</sup>

The issue of intention of the drafters of the AU Constitutive Act has been addressed in the previous chapter. Suffice to add that the incorporation of the comprehensive AEC Treaty into the AU structures is another strong indication of the intention to tread a supranational path. The Treaty, which was adopted in 1991, established a timetable towards the creation of an African Economic Community by outlining a six-stage process over a period of not exceeding 34

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<sup>765</sup> Mazrui (2008).

<sup>766</sup> Richmond & Heisenberg (1999) 3.

<sup>767</sup> For example, the Judicial Committee rejected a number of proposals, chief of which was the idea of a self-contained European court system, with lower courts and ECJ as a supreme court. In addition, the Committee left the question of enforcement with the member states. See *ibid* 2, 3-6.

<sup>768</sup> Goodin (2006) 28.

years.<sup>769</sup> Read together with other AU documents, which have been explained in the previous chapter, one can safely argue that the supranational intention of the architects of the AU is not in doubt. Nevertheless, the glaring lacuna between intention and action can only be explained on the basis of tacit or express underlying resolve on the part of the architects (political elites) not to activate the espoused intentions. This is reflected in numerous ways ranging from non-compliance to stated guidelines, withholding of financial dues, weak or non-implementation of integration initiatives and unbridled attachment to national sovereignty.<sup>770</sup>

### *b) Specificity*

The specificity of institutional mandate is described as '[t]he precision and detail of the Treaty language stipulating the rights and responsibilities of supranational institutions'.<sup>771</sup> The word 'precise' denotes some kind of rigid, 'cast-in-stone' rules that cannot be deviated from. However, practice reveals that supranational institutions thrive on the ability to explore the flexibility or *revisability* of their mandates.<sup>772</sup> An archetypical example is the ECJ's progressive interpretation of some EU laws which appear, on face value, restrictive.<sup>773</sup> Just like intentionality, the scope of institutional mandate should also be responsive to changes and environmental dictates.<sup>774</sup>

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<sup>769</sup> See art. 6 of *The African Economic Community Treaty*, 1991. Below is an outline of the six-stage process:

- Strengthening of the the RECs (5 years)
- Removal of tariffs and duties on goods within the RECs (8 years)
- Establishment of a free trade area and custom union within each REC (10 years)
- Coordination and harmonisation of tariff and non-tariff systems among the RECs (2 years)
- Establishment of an African Common Market (4 years)
- Consolidation of the common market, the establishment of a monetary union, central bank, parliament and single currency (5 years)

<sup>770</sup> These issues have been discussed in chapter 3.

<sup>771</sup> Richmond & Heisenberg (1999) 7-8

<sup>772</sup> Ibid, 8; Goodin (2006) 40.

<sup>773</sup> A former justice of the ECJ explains this phenomenon as 'the conversion of quantity to quality'. See Richmond & Heisenberg (1999) 8-11

<sup>774</sup> Goodin (2006) 40.

In this sense, the specificity of mandate must accord with what Goodin describes as the 'goodness of fit'.<sup>775</sup> Simply put, when designing objectives, principles and mandates of institutions, the drafters must be sensitive to the social order of that particular environment.<sup>776</sup> As explained above, the socio-political and economic context of Europe makes certain institutional principles non-transferrable to Africa. This does not, however, preclude the experimentation with, and reflection on ideas that have proved successful in other regions.<sup>777</sup>

*c) Relationship to national institution*

The issue of the relationship between national institutions and supranational institutions strikes at the heart of the basic premise of international relations. States remain the framework of international relations, and international institutions are the result of consensual agreements between and/or among states. Thus, in order to avoid a chaotic and acrimonious scenario, it is important that mechanisms are put in place to ensure a symbiotic relationship between both institutions.

The functionalist ideology, which prescribes a completely detached supranational agency as answer to transnational welfare and development, was rendered impractical by analysts simply because it ignores the nature and realities of international relations.<sup>778</sup> To rectify this, the neo-functionalists hinged the existence of supranational agencies to the proactive roles of national elites, which includes political parties and interest groups.<sup>779</sup> In this sense, the involvement of national elites can only result in measures that aim to strike a delicate balance between their national and transnational interests. Since national institutions enhance the internal and external legitimacy of states, the

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<sup>775</sup> Ibid, 37.

<sup>776</sup> Ibid; Pettit (2006) 55-56.

<sup>777</sup> Goodin (2006) 42.

<sup>778</sup> O'Neil (1996) 34.

<sup>779</sup> Haas (1958) 17; Rosamond (2000) 55.

urge to synchronise their functions and that of supranational institutions becomes crucial.<sup>780</sup>

Supranational judicial institutions are mostly designed to reflect this principle. In the EU, for example, national courts may refer cases relating to the interpretation of EU laws to the ECJ for guidance.<sup>781</sup> The ECJ's ruling will then allow the national court to dispose of the matter itself. To ensure cooperative relationship between it and national courts, the ECJ once ruled that referral of cases is not necessary where the application of Community law is clear and definitive.<sup>782</sup> In the OHADA, the national courts may also request advice from the CCJA on matters relating to the implementation of the OHADA Uniform Acts.<sup>783</sup> However, the CCJA remains the Court of final appeal on OHADA laws.<sup>784</sup>

However, reliance on or cooperation with national institutions should not serve as a to the progress of integration. Since supranationalism entails the uniform application of rules and programmes, it is of the essence that national institutions are strengthened and have the capacity to promote and translate integration objectives into national realities. In a situation where the conduit is defective, the progressive realisation of goals becomes stunted. Thus, the call for African integration to be woven around shared norms and values becomes pertinent. The uniform adherence to principles (economic and political) can only benefit the quest for unity. The emphasis on shared values and norms in some of the adopted AU documents points to an acknowledgment of these principles as not only a viable foundation for regional integration but also the importance

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<sup>780</sup> An example is the requirement for the exhaustion of local remedies. What this means is that natural or legal persons seeking to take their cases to international adjudicatory fora should in the first instance, except under extenuating circumstances, make use of national courts. Only after this can they proceed to the transnational arena.

<sup>781</sup> European Community Treaty, art. 234.

<sup>782</sup> *CILFIT v Ministry of Health* [1982] ECR 3415

<sup>783</sup> OHADA Treaty, art. 14.

<sup>784</sup> *Ibid*, arts. 14 & 15.

of strengthening national institutions.<sup>785</sup> The skewed or non-implementation of these principles is cumulatively responsible for the epileptic nature of integration drive on the continent.

*d) Institutional copying*

Richmond & Heisenberg define institutional copying as ‘the extent to which the supranational entity was explicitly copying features of a specific national counterpart’.<sup>786</sup> This is done either through the wholesale replication of a similar national institution or a combination of features of different national institutions.<sup>787</sup> Since national institutions often predate their regional counterparts, this exercise ensures that useful lessons are drawn from the experiences of the former. While both institutions operate within different social dynamics, institutional copying can at least provide the possible institutional path and destination of a regional institution.

According to Richmond & Heisenberg, institutional copying, in relation to supranational judicial institutions, can have two positive effects: the expansion of the authority of the institution and the development of its own institutional character.<sup>788</sup> In relation to the former, since national procedures are imported into a transnational context, officials at the transnational level have the authority to interpret Community laws within the context of a national legal dispute.<sup>789</sup> The effect of this is that even when such decisions override existing national laws, it is viewed not as a conflict with national laws but rather as part of the

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<sup>785</sup> These shared values are clearly articulated in instruments such as the AU Constitutive Act, NEPAD, APRM, ACDEG and the Convention on Preventing and Combating Corruption.

<sup>786</sup> Richmond & Heisenberg (1999) 14. According to Cini, the EEC Commission was notably modeled on the highly technocratic French public administration. See Cini M, ‘The European Commission’ in Warleigh A (ed), *Understanding European Union institutions*. London: Routledge (2002) 47.

<sup>787</sup> In the EU for instance, the ECB is modelled on the German *Bundesbank* while the ECJ is an amalgamation of the unique features of several judicial systems. See Ibid. Warleigh, however, notes that EU institutions are not simply a replica of national institutions rather they ‘... serve as a kind of laboratory for those concerned with how politics can be adapted in an era in which globalisation is lessening the independence of nation states’. See Warleigh A, ‘Why study the institutions of the EU?’ in Warleigh (2002) 6.

<sup>788</sup> Richmond & Heisenberg (1999) 15-16.

<sup>789</sup> Ibid, 16.



development of existing national laws.<sup>790</sup> The latter effect is that because the institution is the product of the amalgamation of different philosophies of national institutions, the transnational institution stands in a better stead to develop its own unique character, which reflects the influence of the diverse philosophies.<sup>791</sup>

The usefulness of institutional copying for African integration cannot be understated. As Africa embarks on the path of establishing and strengthening regional institutions, it is crucial that lessons are drawn from best practices in both national and sub-regional institutions. On issues ranging from poverty alleviation, elections, governance, economic development and information technology, the architects of African integration must be prepared to study the process of tackling these issues at the national level and also include the relevant national actors in the planning, monitoring and evaluation of similar measures at the regional level. The Information Technology revolution in Rwanda, commendable electoral processes in places like Ghana, Botswana and South Africa, the successful harmonisation of business laws in OHADA, can all be harnessed and channelled into similar continental programmes.

#### *e) Compliance*

All of the above analyses remain irrelevant so long as states routinely disregard decisions and rules emanating from regional institutions. As noted earlier, compliance with institutional decisions guarantees the competence and legitimacy of such organisation. As Chayes & Chayes put it, 'the adoption of a Treaty, like the enactment of any other law, establishes an authoritative rule system. Compliance is the normal organisational presumption'.<sup>792</sup> Theorists argue that the low rate of compliance with international regulations stem from two factors. The first is that unlike national governments, international

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<sup>790</sup> Ibid.

<sup>791</sup> Ibid.

<sup>792</sup> Chayes A & Chayes H, 'On compliance'. *International Organisation*. 47/2 (1993) 179.

institutions lack the monopoly of legitimate force.<sup>793</sup> The second is the absence of national identity, a psychological factor that determines the consent of the subjects.<sup>794</sup> In order to gain a better understanding of this topic, some of the underpinning theoretical expositions of compliance are outlined below.

The first is the rational choice theory. This theory is predicated on the assumption that self-interest often dictates non-compliant behaviour.<sup>795</sup> To remedy this, this theory offers two strategies: the deviant-centred strategy and the complier-centred strategy.<sup>796</sup> The deviant-centred strategy proposes that if self-interest is the primary reason for non-compliance, then institutional design should aim to put in place measures that increase the motivation for compliance.<sup>797</sup> Crafting such a motivation will, however, vary, depending on the interests of member states. Because of its custom-built allowance for motivation, this theory prescribes coercive measures of enforcement for any deviation from laid down principles.<sup>798</sup> The complier-centred strategy on the other hand eliminates the prospect of self interest and motivations by assuming that an association of like-minded entities will ensure compliance.<sup>799</sup> To guarantee this, the complier-centred strategy prescribes that members must go through some sort of screening or vetting process.<sup>800</sup> The EU membership criteria are an apt example. Another example is the 'nucleus AU' idea which is discussed in the previous chapter.

The second theory, as propounded by Chayes & Chayes, rejects the claim that non-compliance is motivated by the calculated interests of member states.<sup>801</sup> According to this theory, the question of interest is superfluous since concerns

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<sup>793</sup> See e.g. Zurn in Joerges & Zurn (2005) 5.

<sup>794</sup> Ibid; see also Hoffmann in Cantori & Spiegel (1970) 77-79.

<sup>795</sup> Petit in Goodin (2006) 71.

<sup>796</sup> Ibid, 72-87.

<sup>797</sup> Ibid, 72.

<sup>798</sup> Ibid.

<sup>799</sup> Ibid, 78-87.

<sup>800</sup> Ibid, 79.

<sup>801</sup> Chayes & Chayes (1993) 176. This is also known as the Managerial model. See also Kufuor (2006) 60.

of member states are usually dealt with during negotiations preceding the enactment of treaties.<sup>802</sup> Thus, the failure to adhere to treaty regulations stems from factors other than calculated interests of member states. These factors range from the ambiguity of treaty language, lack of financial or administrative capacity for implementation and the absence of ‘a period of transition’ between the adoption of the treaty and the expected time of compliance.<sup>803</sup> To address this, this theory de-emphasises formal enforcement measures by advocating an approach which accentuates continued interaction and engagement between organisations and states and states *inter se*.<sup>804</sup>

The third is known as the legitimacy model. Legitimacy, according to Franck, is ‘the quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.’<sup>805</sup> The quest for legitimacy of international law rules is predicated on the perceived disregard and violation of its rules and regulations.<sup>806</sup> This theory holds that the violation of international rules is as much an issue of legitimacy deficiency (of rules and rule-making institutions) as it is the lack of instrument of enforcement.<sup>807</sup> Thus the focus should be on how to enhance the legitimacy of international law rules as an essential means of ensuring voluntary or non-coercive compliant behaviour from member states.<sup>808</sup> In order to achieve this, Franck identifies the core factors necessary for guaranteeing the legitimacy of rules as determinacy, symbolic validation, coherence and adherence.<sup>809</sup> Such points are discussed below:

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<sup>802</sup> Chayes & Chayes (1993) 179-185.

<sup>803</sup> Ibid, 188-197.

<sup>804</sup> Ibid, 201-204.

<sup>805</sup> Franck T, ‘Legitimacy in the international system’. *American Journal of International Law*. 82/4 (1988) 706.

<sup>806</sup> Ibid, 710.

<sup>807</sup> Ibid.

<sup>808</sup> Ibid, 710-713.

<sup>809</sup> Ibid, 712.

- Determinacy, or pointedly referred to as textual determinacy, implies the ability of a text to convey a clear and ascertainable message.<sup>810</sup> In this sense, compliance will be better guaranteed if respondents (member states) are presented with less elastic, straight-forward obligations.<sup>811</sup> As Franck puts it, '[t]he more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify non-compliance'.<sup>812</sup>
- Symbolic validation relates to the ability of the text to communicate authority.<sup>813</sup> The three concepts that best explains this theory are: symbolic validation, ritual and pedigree. Symbolic validation refers to the use of a signal to elicit compliance with a command.<sup>814</sup> An example of this is the singing of national anthems or the affirmation of a pledge.<sup>815</sup> Ritual and pedigree enhances compliance through ceremonies and emphasis on cultural anthropology of rules.<sup>816</sup> In the African context, Kufuor argues that the continuous invocation of pan-Africanism is an example of symbolic validation that aims to ensure compliance.<sup>817</sup>
- While determinacy and symbolic validation seek to legitimise rules, coherence points to the uniform and general application of rules and procedures.<sup>818</sup> In this regard, rules should be applied equally to all member states, regardless of their size and capacity. Inconsistent application of rules will thus elicit resistance or non-compliance by aggrieved states.

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<sup>810</sup> Ibid, 713.

<sup>811</sup> Ibid, 713-714.

<sup>812</sup> Ibid, 714.

<sup>813</sup> Ibid, 725.

<sup>814</sup> Ibid.

<sup>815</sup> Ibid, 726.

<sup>816</sup> Ibid.

<sup>817</sup> Kufuor (2006) 64.

<sup>818</sup> Franck (1988) 735-751.

- Lastly, adherence relates to the link between rules and the procedural framework or process of making such rules.<sup>819</sup> In this vein, laws made by a recognisable and organised institution are likely to be adhered to than rules emanating from an ad-hoc arrangement.<sup>820</sup> Franck argues that over the years, the international system has devised a number of sophisticated and highly developed rule-making institutions.<sup>821</sup>

Having outlined the foregoing fundamentals, the next objective is to determine the extent of its applicability to the proposal of this thesis. But before doing that, it is instructive to start with an outline of some of the perspectives on the institutional transformation of the AU.

The logic behind this exercise is two-pronged. Firstly, it aims to show that the idea of institutional transformation of the AU is by no means novel. Secondly, beyond using it as a reference tool, the analysis below is aimed at showing the distinct difference between available proposals and the approach of this thesis. The approach of this thesis, as will be explained below, deviates from an all-encompassing, ‘free-for-all’ ideology by proposing an institutional framework that strictly adheres to shared norms, primarily reflected in its membership composition.

### **5.3 The quest for AU transformation: An overview of perspectives**

As mentioned in the foregoing, the quest for institutional transformation of the AU remains a constant theme of political discourse on the continent. The failure to attain the long-held dream of political and economic integration is generally accepted as a corollary of the institutional deficiency of the AU. Ironically, a substantial amount of studies on how to transform the AU into an effective driver of integration come from within – the organs of the AU.

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<sup>819</sup> Ibid, 752.

<sup>820</sup> Ibid.

<sup>821</sup> Some of the organs identified by Franck include the World Bank, the European Court of Justice and regional human rights tribunals. Ibid, 752-753.

To fully understand the underlying motivation behind this, one needs to situate it within Haas' narrative of integration. Haas explains that integration is primarily driven by the political elites of member states.<sup>822</sup> As the French newspaper, *Le Monde*, aptly frames it, 'the elites have their heads in the global world ... The population keeps theirs in the national territory'.<sup>823</sup> Since member states are largely responsible for appointing the officials of regional institutions, it could be argued that these officials are an extension of national political elites. While this does not necessarily cast a doubt on the neutrality of such officials, it points to the primacy of nation states in international relations and thus their vantage position in terms of setting and attaining integration agendas. This does not, however, foreclose divergence of views and strategy between officials and member states.<sup>824</sup> The position of the AU can thus be explained in the following ways.

First, the technocrats (officials from the AU Commission) and politicians (members of PAP) working within these institutions have invested significant human resources in the project of granting these organs some modicum of legitimacy. Thus, these officials form part of the political elite with vested interests in the eventual autonomy of these organs. These officials see themselves as the custodians of a process too delicate to be completely surrendered to the whims of national politics.

The second explanation relates to the continued inability of member states to provide a coherent direction or agree on a feasible road-map. Largely constrained by limited funds and abysmally low levels of political will amongst member states, these initiatives are geared towards elevating the integration

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<sup>822</sup> Haas (1958) 17; see also MacClanahan Y, *Supranational integration: Explaining the distinctive levels of sovereignty transferral between the different integrated areas*. Unpublished Doctoral thesis: Universitat Pompeu Fabra, Barcelona (2004) 216-7.

<sup>823</sup> Cited in *Ibid*, 216.

<sup>824</sup> As explained in chapter 2, a number of politico-legal mechanisms have been devised to either prevent or manage situations where interests of member states and technocrats at regional institutions conflict. These include the principles of subsidiarity, attribution of powers, proportionality and flexibility.

debate to pole position and thus stimulating corresponding attitude from member states.

It is against this background that some of the documents that will be discussed below were authored. In order to present a holistic view of these interventions, the views of scholars will also be discussed. The discussion will focus on proposals on how to strengthen the three key organs of the AU: the PAP (parliament), the AU Commission (executive) and the ACJ&HR (judiciary).

### **5.3.1 The Pan-African Parliament (PAP)**

The clamour for the strengthening of the PAP should be understood within the political context surrounding its existence. Put differently, one should look at why and how it was established, the intentions of its architects (as shown in its founding protocol) and importantly, the express or tacit positions of its architects as to the expected time of exercise of full powers.

Although the PAP was only established in 2004, the idea of a continental parliament was one of the recognised organs of the AEC Treaty.<sup>825</sup> The AEC Treaty was adopted during the existence of the old OAU. However, the transformation of the OAU to AU ensured that PAP became an organ of the new organisation.<sup>826</sup> Moving a step further, the AU Constitutive Act provided the framework for the eventual protocol establishing the parliament.<sup>827</sup> Giving full expression to article 17(1) of the Constitutive Act,<sup>828</sup> article 3 of the PAP Protocol enumerates the objectives of PAP as:

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<sup>825</sup> Art. 14 of the AEC Treaty (1991). In fact, the idea of a continental legislature has always been part of the integration narrative. Addressing African leaders at the 1964 OAU Summit, Nkrumah proposed a continental bicameral legislature: The Senate and a House of Representative. See Nkrumah (1973) 295-296.

<sup>826</sup> Art. 5 & 17 of the AU CA

<sup>827</sup> Ibid, art. 17(2).

<sup>828</sup> This article provides that the purpose of the PAP is to 'ensure the full participation of African peoples in the development and economic integration of the continent'.

- facilitation of the effective implementation of the policies and objectives of the AU
- promotion of the principles of human rights and democracy in Africa
- encouraging good governance, transparency and accountability in member states
- promotion of peace, security and stability
- facilitation of cooperation among Regional Economic Communities (RECs) and their parliamentary fora
- familiarisation of Africans with the programme of integration

Although it exercises only consultative and advisory powers, the protocol (article 11) stipulates that such powers shall be exercised over matters like:

- harmonisation or coordination of laws of member states, RECs and their parliamentary fora
- discussion on the budget of the Community and make recommendations thereon prior to its approval by the Assembly
- requesting the officials of the AU to attend its sessions, produce documents or assist in the discharge of its duties
- promoting the programmes and objectives of the AU in the constituencies of the member states
- adoption of its own rules and procedures

Lastly, it is important to highlight a factor that has significantly contributed to the urgency of transforming the PAP. Read together, articles 2(3) and 11 of the PAP Protocol indicate that the parliament may start exercising meaningful legislative powers at the end of its first term of five years (2009). As Mpanyane rightly points out, the completion of the first term does not equal automatic granting of full legislative powers since state parties still have to convene a



conference on the review of the PAP process thus far.<sup>829</sup> The reality on the ground, however, strongly points to the infeasibility of this goal.<sup>830</sup> The lack of political will to fulfil the promise of full legislative powers has, however, not affected the launching of a variety of initiatives geared towards mapping feasible ways of strengthening the PAP.

Measured against the outlined points above, various studies on the transformation of PAP collectively, expressly and impliedly, highlight the following draw-backs:<sup>831</sup>

- nomination, instead of direct election, of PAP members
- uneven democratic culture across the continent
- lack of effective legislative powers
- lack of political will to transfer powers to the PAP

Mindful of the political milieu within which African integration operates, these studies have adopted a cautious, pragmatic approach in addressing the issue of transformation. These approaches are designed to accommodate the realities and peculiarities of African integration, chiefly the existence of sub-regional parliamentary fora, overbearing influence of member states, and democratic and good governance deficit in some member states. In this regard, most of

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<sup>829</sup> Mpanyane S, *Transformation of the Pan-African Parliament: A path to a legislative body?* Occasional Paper 181, Institute of Security Studies (2009) 4; see also art. 25 (1) of the PAP Protocol.

<sup>830</sup> Mpanyane (2009) 4.

<sup>831</sup> Ibid, 1-20; Hugo G, *The Pan-African Parliament: Is the glass half-full or half-empty?* Occasional Paper 168, Institute of Security Studies (2008) 1-12; Pan-African Parliament, *Strategic Plan 2006-2010*; Musila G, *United States of Africa: Positioning the Pan-African Parliament and Court in the political union debate.* Occasional Paper 142, Institute of Security Studies (2007) 1-16; Pan-African Parliament and the Institute of Security Studies, *Report of the Pan-African Parliament seminar on strengthening the capacity of the Pan-African parliament to exercise effective oversight.* One-day ISS/PAP Workshop, Gallagher Estate Midrand, 18<sup>th</sup> October 2007 (On file with the author) [Hereinafter referred to as ISS & PAP Report 2007]; Pan-African Parliament, *Report of the Committee on rules on the transformation of the Pan-African Parliament.* PAP/C.9/CRPD/RPT/37/08 [Hereinafter referred to as PAP Report 2008] ; African Union, *Study on an African Union Government: Towards the United States of Africa.* Addis Ababa: African Union (2006) 16-17 [Hereinafter referred to as African Union 2006]; Pan-African Parliament, *The Pan African Parliament contribution to the grand debate on the African Union Government.* PAP/P.7/WP/52/07 [Hereinafter referred to as PAP 2007]

these studies have employed a comparative analytical tool, especially in relation to existing regional parliamentary bodies, in explaining how legislative powers can be transferred to the PAP.<sup>832</sup>

With regard to the issue of membership, there is unanimity of opinion on the need for direct elections of PAP representatives through universal adult suffrage, even in the face of little or no political will to effect this.<sup>833</sup> The legitimacy of the body, according to opinions, can only be guaranteed when members are seen as the direct representatives of African people rather than being selected by governments.<sup>834</sup> In the same vein, it has also been proposed that such representation must accommodate proportionality, that is, African states with huge populations should have more representatives.<sup>835</sup> On the question of elections, Hugo views that a political culture which fosters irregularities and electoral chicanery in some African countries may diminish the credibility of PAP elections.<sup>836</sup>

On the politically charged issue of full legislative powers, these studies have adopted methods designed to ensure gradual and incremental transferral of powers. Unlike the insistence on direct elections of the PAP members, these studies have commonly anchored the exercise of reasonable legislative powers to the exploitation of existing legislative structures within the AU and sub-regional levels.<sup>837</sup> Mpanyane notes that the starting point of the PAP transformation should be the activation of a framework that ensures 'practical

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<sup>832</sup> Mpanyane (2009); Musila (2007); PAP Report (2008)

<sup>833</sup> Contradistinctively, it has been noted that the advent of a popularly elected EU parliament was not a consequence of popular mobilisation rather it was primarily driven by political elites in Europe in order to grant legitimacy to the integration process. See e.g. MacClanahan (2004) 215-6.

<sup>834</sup> PAP (2007) 12; Hugo (2008) 8-9; ISS & PAP (2007); Mpanyane (2009) 11. Musila, however argues that the nomination of PAP members is less of a manifestation of illegitimacy as the lack of exercise of full legislative powers. Musila (2007) 8.

<sup>835</sup> Musila (2007) 8; African Union (2006) 17.

<sup>836</sup> Hugo (2008) 9. On how members of the PAP should be elected, Musila suggests that, like in the EU, separate elections should be held to elect PAP members. Musila (2007) 8.

<sup>837</sup> PAP Report (2008) 20; Hugo (2008) 9; Mpanyane (2009) 10; African Union (2006) 17; ISS & PAP (2007) 16

cooperation and regular interaction with other AU institutions'.<sup>838</sup> Such cooperation, according to him, should include joint briefings and submission of reports with relevant AU institutions and continuous engagement with national and regional legislative bodies.<sup>839</sup> Musila also avers that the PAP can utilise AU adjudicatory organs to ascertain clarity on some of its mandate and thus enhance the enforcement of its obligations.<sup>840</sup>

On the kind of laws that should emanate from a transformed PAP, analysts have proposed that the PAP should start with the issuance of model laws to member states.<sup>841</sup> The problem with this idea is that states are not obliged to implement model laws; therefore, it will have little or no effect on the strengthening of the PAP's legislative powers.<sup>842</sup>

Engaging in a comparative analysis, Musila proposes that the PAP could start exercising powers over issues that have assumed a transnational character.<sup>843</sup> These include human rights, trade, immigration and free movement of people.<sup>844</sup> He further notes that the exercise of full legislative powers by the PAP should be underpinned by the well-known principle of subsidiarity.<sup>845</sup>

In conclusion, other measures that have been identified as necessary for the transformation of the PAP include:

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<sup>838</sup> Mpanyane (2009) 10.

<sup>839</sup> Ibid; PAP Report (2008) 20.

<sup>840</sup> ISS & PAP (2007) 16.

<sup>841</sup> See generally the Pan-African Parliament, *Report of the Pan-African Parliament seminar on the harmonisation of Regional Economic Communities and Regional Parliamentary Assemblies*. Arusha, Tanzania (2006); see also Madlingozi (2007) 32.

<sup>842</sup> Musila (2007) 9.

<sup>843</sup> Ibid.

<sup>844</sup> Ibid.

<sup>845</sup> Ibid. This principle implies that international institutions should only handle matters that cannot be effectively dealt with at the national level. For a detailed discussion on this principle, see Dashwood et al (2000) 156-62; Lenants & Van Nuffel (2004) 100-1.

- control over its own budget, which should include discussion and review of the budget of the whole AU<sup>846</sup>
- recruitment of staff with the requisite skills<sup>847</sup>
- confirmation and appointment of senior officers of the AU Commission and judges of the ACJ&HR<sup>848</sup>

### 5.3.2 The AU Commission

The AU Commission is the designated engine-room cum executive arm of the AU.<sup>849</sup> As it is in the EU, the AU Commission is designed to anchor the political and economic objectives of the AU and ultimately be the vehicle for the eventual realisation of a continental government. Part of its objectives includes:<sup>850</sup>

- initiating proposals for consideration by the organs of the AU
- implementation of decisions taken by other organs of the AU
- coordinating and monitoring implementation of AU decision
- representing the AU

While these remain laudable, the reality on the ground posits otherwise. Weakened by lack of political will among member states and its internal bureaucratic bottlenecks, the Commission continues to under-perform.<sup>851</sup>

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<sup>846</sup> Mpanyane (2009) 10.

<sup>847</sup> Ibid, 11.

<sup>848</sup> PAP (2007) 12.

<sup>849</sup> Or what Nugent, writing about the EU, aptly terms 'the conscience of the Union'. Nugent N, *The government and politics of the European Union*. Durham: Duke University Press (1999) 141.

<sup>850</sup> Art. 3 of the AU CA.

<sup>851</sup> In spite of this, Ayangafac & Mpyisi highlight some of the achievements of the Commission to include raising the profile of the AU, the clear articulation of the African agenda; implementation of the peace and security architecture; and the comprehensive policies on conflict and democratic governance. Ayangafac C & Mpyisi K, *The proposed AU Authority: Hybridisation, balancing, intergovernmentalism and supranationalism*. Institute of Security Studies Situation Report (2009) 3; See also African Union Commission, *Strategic Plan 2009-2012*. Addis Ababa (2009) 17 (Hereinafter referred to as Strategic Plan 2009-2012); see also *Audit Report of the African Union*. Addis Ababa (2007) 75-76. [Hereinafter referred to as AU Audit Report 2007].

According to the 2007 AU Audit report, the implementation rate of the decisions emanating from the Commission is just over 10%.<sup>852</sup>

It is against this background that efforts have been made to transform the Commission into an effective, supranational entity. The most recent of such efforts is the decision taken by the General Assembly of the AU to transform the Commission into an AU Authority.<sup>853</sup> It is, however, important to locate the issue of transformation of the Commission within the ideological divide that defines the quest for integration in Africa: Gradualist (minimalist) and the Maximalist.<sup>854</sup>

According to the Gradualists, the Commission is fulfilling its primary tasks, which are advocacy and coordination, but its failure stems from the deficiency of technical ability such as managerial problems, inadequate resources and competence, internal institutional incoherence and lack of coordination.<sup>855</sup> In essence, the gradualists regard revamping the internal administrative structure (technocratic ability) of the Commission as the necessary starting point. On the other hand, the Maximalists anchor the deficiency of the Commission to a vaguely articulated design, mandate and function.<sup>856</sup> Thus, they argue that the only way to correct this is to endow the Commission with wide-ranging supranational powers, similar to that of a national cabinet.<sup>857</sup> According to Anyangafac & Mpyisi, the proposed AU Authority is more in line with the Gradualist ideology since it only emphasises a change in structure rather than a change in the decision-making or implementation process of the AU.<sup>858</sup>

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<sup>852</sup> See generally, AU Audit Report (2007).

<sup>853</sup> See AU/Dec.233(XII), Special Session and Twelfth Ordinary Session 1-3 February 2009 Addis Ababa, Ethiopia.

<sup>854</sup> For a detailed contemporary discussion on the ideological views that define African integration, see e.g. Lecoutre D, 'Reflections on the 2007 Accra grand debate on a Union Government for Africa' in Murithi T (ed) *Towards a Union Government for Africa: Challenges and opportunities*. Institute of Security Studies Monograph Series 140 (2008) 45-59.

<sup>855</sup> Anyangafac & Mpyisi (2009) 2.

<sup>856</sup> Ibid.

<sup>857</sup> Ibid.

<sup>858</sup> Ibid, 3.

However, before discussing the proposed AU Authority, it is instructive to look at the existing proposals on the institutional transformation of the Commission. Since its inception, the AU Commission has authored important documents indicating the process and strategy of its transformation. Titled 'Strategic Plan of the African Union Commission 2004-2007 and 2009-2012', these documents capture the underlying philosophy and components of African integration, stages of transformation and more importantly, the central role of the Commission in attaining integration objectives. The first document, 'Strategic Plan 2004-2007', identifies the three components of (profound) institutional transformation as follows:<sup>859</sup>

- Institutional strengthening of the AU Commission
- Rationalisation of the institutional architecture
- Refinement of AU governance process

The first point - institutional strengthening of the Commission - adopts an inward looking approach, by stressing the improvement of the overall technical ability of the Commission. As a measure aimed at capacity building within the Commission, the following points are highlighted: the need for structural adjustments of the departments, training of staff members, recruitment of skilled personnel, upgrading the Commission's ICT infrastructure, and improved coordination within the Commission.<sup>860</sup> The process is designed in order to equip the Commission with the necessary skills for coordinating the integration process.

The second point - rationalisation of the institutional architecture - looks at the relationship between the Commission and other stakeholders in the integration process. The recognised stakeholders include member states, RECs, NEPAD,

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<sup>859</sup> African Union Commission, *Strategic Plan of the Commission of the African Union: Volume 2: 2004-2007 Strategic framework of the Commission of the African Union*. Addis Ababa: African Union (2004) 19. (Hereinafter referred to as Strategic Plan 2004-2007).

<sup>860</sup> Ibid, 17-24.

Specialised Institutions of the AU, AU organs and AU international partners (United Nations Economic Commission for Africa, African Development Bank and international donors).<sup>861</sup> The idea is to ensure that there is effective coordination and communication between the Commission and these bodies so as to ensure coherent design and implementation of integration goals.<sup>862</sup> Especially in the relation to the NEPAD, the specialised institutions and the RECs, this document points to how the Commission can exert continental leadership in the integration process.<sup>863</sup>

An underlying theme of the rationalisation process is the so-called ‘Minimum Integration Programme (MIP)’, which is:

[i]ntended to provide greater coherence in the overall movement towards regional integration on a continental level ... [it] include a set of programmes to deliver on such goals as the establishment of a regional brigade for the African Stand-by Force, coordination of and a common approach to international trade negotiations, trade liberalisation, free movement goals within each REC, regional common policy in various areas, common monetary policy, common policy in various sectors, etc...

In essence, the MIP is a gradualist framework which provides the stages or process of attaining continental integration. It particularly focuses on the coordination and harmonisation of RECs by putting in place the framework for cooperation and integration of the RECs into a continental programme of action.<sup>864</sup>

The last point - refinement of the governance process - focuses on the need to create an open and transparent management and interaction within the AU. It identifies the four elements of successful governance as:<sup>865</sup>

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<sup>861</sup> Ibid, 27.

<sup>862</sup> Ibid, 27-35.

<sup>863</sup> Ibid.

<sup>864</sup> Ibid, 31-32.

<sup>865</sup> Ibid, 38-41.

- *Formulation of decision making mechanisms that would facilitate the building of a shared vision.* This highlights the importance of consultation on policy initiatives and the strengthening of evaluation mechanisms.
- *Partnership for participatory governance.* In this regard, mechanisms should be put in place to ensure the participation of relevant stakeholders (PAP, ECOSOCC, etc.) in the matters of the Union.
- *Organise participation.* The increased involvement of the two democratic control organs (PAP and ECOSOCC) in the governance of the Union.
- *Progress towards a multi-annual financing structure.*<sup>866</sup> The importance of diversifying the financing of the Commission. Suggestions range from the deduction of 0.5% of the budget resources of member states, 10% deduction from the budget of Defence Ministries of AU member states, establishment of a fiduciary fund and exceptional contribution from the cost of air tickets for travels from outside or to the continent.

Building on the 2004-2007 Strategic Plan and realising that the objectives and goals highlighted in this document are yet to be fully realised, the Commission authored the 2009-2012 Strategic Plan.<sup>867</sup> The document highlights the Commission's comparative advantages (in relation to other stakeholders) to include:<sup>868</sup>

- political integration (continental reach and mandate of 53 states to coordinate integration)

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<sup>866</sup> Other sources of finance which have been suggested include an imposition of Union tax on insurance policies, and a 5%-10% tax on natural resources in Africa's top- and sub-soil. See Interim Standing Committee of the Economic, Social and Cultural Council (ECOSOCC) of the AU, *Draft contribution to the Grand Debate on the African Union Government*. (2007) Available at [http://www.foscam.org/Draft\\_contribution\\_of\\_Ecossoc.doc](http://www.foscam.org/Draft_contribution_of_Ecossoc.doc) (Accessed 10 October 2009) 12, 14-15. (Hereinafter referred to as ECOSOCC 2007).

<sup>867</sup> A SWOT (Strength, Weaknesses, Opportunities and Threats) Analysis of the 2004-2007 Strategic Plan reveal some of the factors responsible for the weak implementation as inadequate physical infrastructure, unsupportive organisational culture, inadequate team work, inadequate sources of funds, administrative and leadership challenges, weak reputation, presence and reach in the continent, and inadequate and inflexible structural arrangements. See Strategic Plan 2009-2012, 17.

<sup>868</sup> Ibid, 18.



- scientific, economic, social and physical integration and development
- governance (e.g. the establishment of the APRM)
- institutional capacity building for continental integration and development
- peace and security (increased visibility in the arena of conflict prevention, resolution and management)

The report further considers the following as the strategic pillars around which its mandate and functions can be strengthened: peace and security; integration, development and cooperation; shared values; and institution and capacity building.

With regard to the first pillar, peace and security, the Commission aims to stem the tide of conflicts on the continent by coordinating and overseeing the implementation of policies emanating from AU Peace and Security Architecture (APSA), Common African Defense and Security Policy (CADSP) and the Post-Conflict Reconstruction and Development (PCRD).<sup>869</sup>

The second pillar is sub-divided into three: development, integration and cooperation. The programme on development is expected to achieve improved productivity, infrastructure development, agricultural development, youth development, migration policies, social welfare and diffusion of technology.<sup>870</sup> The programme on integration is focused on the implementation of the MIP, free movement of persons, goods, capital and services and the rationalisation and harmonisation of RECs.<sup>871</sup> The programme on cooperation is geared towards the establishment of a common platform for trade negotiations, increased trade and development, enhanced intra-African cooperation and strengthened global strategic partnership.<sup>872</sup>

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<sup>869</sup> Ibid, 22.

<sup>870</sup> Ibid, 23-26.

<sup>871</sup> Ibid, 26-27.

<sup>872</sup> Ibid, 27-29.

The third pillar, shared values, focuses on the cultivation and entrenchment of democratic values such as good governance, democracy, human rights, gender equality and cultural values.<sup>873</sup> In this regard, the Commission will focus the strengthening and full implementation of the APRM, the promotion of cultural diversity, promotion of ratification and entry into force of all outstanding treaties, promotion and protection of African heritage, continental humanitarian policy and the implementation of gender policies.<sup>874</sup>

The last pillar, capacity building, aims to refine and develop the internal administration of the Commission. To achieve this, the Commission expects to put in place an effective human resources management reform programme, prioritises gender mainstreaming, improve organisational culture, improve working environment, timely and effective communication, and regular interaction with other AU organs and the RECs.<sup>875</sup> The above-outlined functions are expected to be exercised by 2012.

As part of the contributions to the famous ‘2007 Accra Grand Debate on a Union Government’, the AU authored a study which expressed the restructuring of the existing institutions of the AU as an essential element of the proposed African Union Government.<sup>876</sup> It particularly highlights the importance of granting more powers to the office of the Chairperson of the AU Commission.<sup>877</sup> In this regard, it recommends the extension of the tenure of the Chairperson to ‘non-renewable fixed term tenure of seven years.’<sup>878</sup> In addition, it suggests that the Chairperson be involved, together with the Assembly, in the process of appointing his or her Deputy and the Commissioners.<sup>879</sup>

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<sup>873</sup> Ibid, 30-33.

<sup>874</sup> Ibid.

<sup>875</sup> Ibid, 34-36.

<sup>876</sup> AU (2006) 14.

<sup>877</sup> Ibid, 16.

<sup>878</sup> Ibid.

<sup>879</sup> Ibid.

Another important document that is worth considering is the AU Audit Report. Prepared by independent experts, at the request of the AU to, amongst other matters, evaluate the process of integration, review the operation of all the organs of the AU, assess the efficiency of the AU and make concrete recommendations on how to accelerate the integration process.<sup>880</sup> In its evaluation of the Commission, the Report notes that there is a ‘fundamental lack of a full comprehension of the power, function, the authority, and the responsibilities of the principal actors (the Chairperson, Deputy Chairperson and the eight Commissioners).<sup>881</sup> According to the Report, this has negatively impacted on the management systems of the Commission.<sup>882</sup> The vaguely articulated delineation of powers and functions within the organisation has resulted in, according to the Report, lack of supervision, failure to delegate functions to Directors and mid-level staff, non-existent internal communication, low morale among staff and consequently, a dysfunctional system.<sup>883</sup> To address these, the Report recommends measures such as:<sup>884</sup>

- bequeathing the Chairperson with powers to exercise full authority, which includes the power to assign portfolios to Commissioners
- compulsory induction for all members and staff of the Commission
- four-year tenure for elected posts, with the elections of the Chairperson and his or Deputy taking place a year before those of the Commissioners
- assigning the coordination of staff matters and inter-departmental issues to the Secretary to the Commission
- mandatory regular meetings of the Commissioners and the Directors
- establishment of the AU Service Commission (AUSC) to be responsible for recruitment, appointments, promotions and enforcing discipline

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<sup>880</sup> AU Audit Report (2007), xvi. Cillier notes that the audit came about as a result of an attempt by Southern African states to checkmate the then Chairperson of the AU, Alpha Konare, who was viewed as belonging to the maximalist ideological camp. See Cilliers (2008) 103.

<sup>881</sup> AU Audit Report (2007) 45.

<sup>882</sup> Ibid, 47.

<sup>883</sup> Ibid, 47-48.

<sup>884</sup> Ibid, 46-77.

It is important at this juncture to discuss the most recent intervention in the long list of proposals aimed at transforming the Commission. At the 12<sup>th</sup> Ordinary Session of the Assembly of the AU in January 2009, African leaders decided to transform the Commission into an AU Authority.<sup>885</sup> Under the AU Authority, the positions of the Chairperson, Deputy Chairperson and Commissioner would be re-designated as President, Vice President and Union Secretary respectively.<sup>886</sup> The Union Secretaries will be assigned twelve reconfigured portfolios.<sup>887</sup> The Authority's responsibilities or areas of jurisdiction can be classified, depending on the political sensitivity of the issues concerned, under two rubrics.<sup>888</sup> The first rubric deals with issues that have little impact on national sovereignty:

- Continent-wide poverty reduction
- Inter-regional and continental infrastructure
- Global warming, desertification and coastal erosion
- Epidemics and pandemics
- Research/university centres of excellence
- Food security

The second rubric is matters which will have direct impact on state sovereignty:

- Free movement of persons
- Foreign and Defence policy
- International trade and negotiations
- Transnational crime
- Peace and security

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<sup>885</sup> AU/Dec.233(XII).

<sup>886</sup> Ibid.

<sup>887</sup> These include Defence, Peace and Security; Political Affairs and External Relations; International Trade and Co-operation; Continental and Regional Integration; Development, Finance and Economic Planning; Youth, Culture & Social Development; Education, Science and Technology; Agriculture & Water; Environment and Natural Resources; Continental Justice and Legal Affairs; Labour & Migration; and Health & Population. See Ibid, 3-6.

<sup>888</sup> Ayangafac & Mpyisi (2009) 4; see also Ibid, 2.

According to Ayangafac & Mpyisi, the Authority should have exclusive power, within the framework of the principle of subsidiarity, to initiate agenda and policies under the first rubric.<sup>889</sup> The idea behind this is to place the Authority in the driving seat of integration matters.<sup>890</sup> It is suggested that the Executive Council should initiate policies under the second rubric while the Authority provides support and coordination framework for implementation.<sup>891</sup>

### 5.3.3 African Court of Justice and Human Rights (ACJ&HR)

The importance of an adjudicatory organ in the integration process cannot be over-emphasised. As shown in the EU, a judicial organ has the potential to fast-track the integration process, even beyond the conceptions of the political actors involved.<sup>892</sup> Since the institutional path of the ACJ&HR, compared to the two organs discussed above, has not been straightforward, especially considering the merger issues and the fact that it is yet to take off, it is crucial that a succinct background is provided.

Unlike its predecessor, the OAU Charter, the Constitutive Act made provision for the establishment of an African Court of Justice (ACJ).<sup>893</sup> However, before the coming into being of the AU, African leaders agreed, in 1998, to complement the work of the African Commission on Human and Peoples' Rights (ACHPR) by establishing an African Court on Human and Peoples' Rights (AfCHPR).<sup>894</sup> The Protocol establishing the Court was adopted in 1998, it entered into force in 2004 and the eleven judges of the Court were elected in January 2006 at the AU Summit in Khartoum, Sudan.<sup>895</sup> Since its inauguration in 2006, the AfCHPR has held three sessions, which includes the agreement on

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<sup>889</sup> Ayangafac & Mpyisi (2009) 4.

<sup>890</sup> Ibid.

<sup>891</sup> Ibid.

<sup>892</sup> See e.g. Richmond A & Heisenberg (1999) 3-6; see also Raworth P, *Introduction to the legal system of the European Union*. New York: Oceana Publication (2001) 84.

<sup>893</sup> Art. 5 of the AU CA

<sup>894</sup> Although the AfCHPR was not included as one of the organs of the new AU, it can be argued that the intention of the drafters of the Constitutive Act was the existence of a dual judicial organ for the AU.

<sup>895</sup> See Assembly/AU/Dec.100 (VI).

programme of work, meeting with members of the ACHPR and judges of the sub-regional Courts, and the adoption of rules of procedure and staff structure.<sup>896</sup>

However, upon the suggestion from Nigeria, the AU Assembly decided, in 2004, to merge the AfCHPR with the yet-to-be actualised ACJ.<sup>897</sup> The primary reason for doing this is that it is financially prudent, considering the fact that the continent struggles to meet the financial obligations of other integration initiatives.<sup>898</sup> Critics, however, highlight the logistical difficulty that will arise from the merger, bearing in mind that the AfCHPR is already operational.<sup>899</sup>

The Protocol establishing the merged Court, ACJ&HR, was finally adopted the 11<sup>th</sup> AU Summit in June-July 2008.<sup>900</sup> In terms of the Protocol, the Court has two sections: the General Affairs and the Human Rights Sections each composed of 8 judges.<sup>901</sup> Under the transitional arrangement, the term of office of the eleven judges of the AfCHPR would come to an end upon the election and inauguration of the judges of the ACJ&HR.<sup>902</sup> In order to create balanced representation, the Protocol provides that each geographical region of the continent will be represented by 3 judges, except for the most populous, the

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<sup>896</sup> AU Audit Report, 87; see also Sceats S, *Africa's new human rights court: Whistling in the wind?* Chatham House Briefing Paper (2009) 4-5. Available at <http://www.chathamhouse.org.uk/publications/papers/view/-/id/721/> (Accessed 20 October 2009).

<sup>897</sup> Assembly/AU/Dec.45 (III) Rev. 1.

<sup>898</sup> Other advantages to be derived from the merger include the elevation of the status of human rights within the AU, simplicity, potentially stronger enforcement, unified and coherent indigenous jurisprudence, synergy between human rights and political/economic issues. See generally Kindiki K, 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal difficulties and merits'. *African Journal of International & Comparative Law*. 15/1 (2007) 144-145; Sceats (2009) 5-6; Beyani (2007) 584; Musila (2007) 4.

<sup>899</sup> Kindiki (2007) 141. Sceats notes that there is a high risk of relegating the human rights section of the court to the background since states will likely be more concerned about issues, such as border disputes, within the general section. Sceats (2009) 6; see also Musila (2007) 4.

<sup>900</sup> ACJ&HR Protocol (2008).

<sup>901</sup> *Ibid*, art. 16.

<sup>902</sup> *Ibid*, art.4.

Western Region which will have 4 judges.<sup>903</sup> The ACJ&HR will be competent to hear the following cases:<sup>904</sup>

- Interpretation and application of the Constitutive Act and other AU Treaties
- Interpretation and application of the African Charter, Charter on the Rights and Welfare of the Child, Charter on Human and Peoples' Rights, Rights of Women and other human rights documents
- Any question of international law
- Decisions, regulations and directives of the organs of the AU
- Breach of any obligation owed to state parties or the AU
- Nature and extent of reparation to be made for such breach

The following parties are eligible to access the General Affairs Section of the Court:<sup>905</sup>

- State parties to its Protocol
- Organs of the AU as authorised by the Assembly
- Staff member of the AU appealing to a dispute as set out in the Staff Rules and Regulations of the Union.

The Human Rights Section is open to the following parties:<sup>906</sup>

- State parties to the Protocol
- The African Commission on Human and Peoples' Rights (ACHPR)
- The African Committee of Experts on the Rights and Welfare of the Child
- Accredited African Intergovernmental Organisations

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<sup>903</sup> Ibid, art. 3(3).

<sup>904</sup> Ibid, art. 28.

<sup>905</sup> Ibid, art. 29.

<sup>906</sup> Ibid, art. 30.

- African National Human Rights Institutions
- Individuals or Non Governmental Organisations (NGOs) accredited to the AU, on the condition that the responding state party has made a specific declaration accepting the competence of the Court in this regard.

With respect to the enforcement of the judgments of the Court, article 46(4) of the Protocol provides where a party fails to comply with the decision of the Court, the Court may refer the matter to the Assembly.

Although the Court is yet to be operational, analysts have provided a number of suggestions to address its perceived inadequacies. A major point of concern is the restrictive accessibility to the Human Rights section of the Court as stipulated in article 30(f). It is argued that the impact of the Court can only be felt if individuals and NGOs are allowed automatic access without any formal declaration to this effect by the state party concerned.<sup>907</sup> In addition, Sceats views that measures such as effective protection programmes for victims and witnesses, and free legal aid will enhance the credibility and efficacy of the Court.<sup>908</sup> In terms of creating awareness, it has also been suggested that the Court hold sessions outside of its permanent base in Tanzania.<sup>909</sup>

With respect to the structure of the Court, Musila argues that considering the technicalities of some of the functions stipulated in articles 28 & 29, it is important that the drafters of the ACJ&HR Protocol reconsider the operationalisation of a unified tribunal.<sup>910</sup> In this regard, he proposes two options. The first advocates a single African Court of Justice with specialised chambers dealing with issues such as human rights, union civil service and

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<sup>907</sup> See e.g. Odinkalu C & Mbelle N, *Africa: Continent needs effective human rights court*. Available at <http://www.allafrica.com/stories/200806240710.html> (Accessed 30 August 2009); see also Sceats (2009)

13; Musila (2007) 5.

<sup>908</sup> Sceats (2009) 13.

<sup>909</sup> Ibid.

<sup>910</sup> Musila (2007) 4.



trade.<sup>911</sup> The second option envisages the establishment of a major tribunal, which will exist alongside satellite or autonomous specialised tribunals.<sup>912</sup> In addition, he recommends that the positions of the judges, like that of the president and Vice-President of the Court, should be made full-time, considering the numerous legal issues the Court will have to address.<sup>913</sup>

In relation to the enforcement of the judgments of the Court, it is suggested that this responsibility should rather lie with an appropriate political body, capable of effectively monitoring compliance with court orders.<sup>914</sup> One such body is the Committee of Ministers, a body responsible for ensuring the compliance with the judgments of the European Court of Human Rights (ECHR).<sup>915</sup>

#### **5.3.4 Dominant themes in the quest for AU transformation**

The foregoing analysis represents, but are by no means exhaustive, the trends and patterns of institutional transformation of the AU. It provides a window to understanding the ideological contours and thoughts embedded in the pursuit and eventual transformation of the AU. Thus, in light of the conclusions drawn from the above analysis, this section will attempt to flesh out some of the factors that continue to shape or influence transformation. These conclusions can be explained under the following broad headings:

- Group-based approach

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<sup>911</sup> Ibid.

<sup>912</sup> Ibid, 4-5.

<sup>913</sup> Ibid, 5. Only the President and Vice-President shall reside at the seat of the Court (art. 22 of the ACJ&HR Protocol) and receive annual salaries (art. 23(1)), while other judges will only receive sitting allowance for each day on which they exercise their functions (art. 23(2)).

<sup>914</sup> Musila (2007) 5-6.

<sup>915</sup> Ibid. According to art. 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Committee of Ministers is charged with the task of supervising the execution of the judgments of the ECHR. Art. 46(2) of the Convention, the Committee invites the respondent in order to gather information about how the respondent intends to abide by the judgment of the Court. In a situation where the respondent defaults, the Committee has the powers to exert political and diplomatic pressures. However, it has been observed that in practice, the Committee rather engages in constructive dialogue with defaulting respondents. See generally, the Committee's website: [http://www.coe.int/t/dghl/monitoring/execution/Presentation/Default\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/Default_en.asp) (Accessed 10 September 2009).

- Diffusion
- Incrementalism

*a) Group-based approach*

The first, which is premised on the unconditional membership ideology of African integration, assumes that eventual transformation must include all the 53 members of the AU. A cursory glance at the above analyses reveals an underlying motif, which upholds the inclusion and participation of all member states in the transformation process. Even where some member states are outside the framework of the institutional process (e.g. the PAP and the ACJ&HR), the short, medium and long term goal remains the eventual inclusion of such states in the process. Hence the oft-stated appeal for ratification and adoption of related legal instruments.<sup>916</sup>

As indicated in previous chapters, the basis of a group-based, all-inclusive approach to membership is the ideology of pan-Africanism. Underpinned by the dual realities of racial consciousness and the geographic contiguity of African states,<sup>917</sup> pan-Africanism provides the political manure which continues to sustain unconditional membership.

*b) Diffusion*

The similarity between the EU and the AU extends beyond institutional structure and nomenclature; it is also evident in the proposed trajectory of AU transformation. As outlined above, transformation issues ranging from direct election of PAP members, increased legislative powers of the PAP, strengthening the Commission, and the structure and enforcement of the judgments of the ACJ&HR all bear a striking resemblance to what obtains in the EU.

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<sup>916</sup> See e.g. PAP (2007) 13; Musila (2007) 10.

<sup>917</sup> Mazrui (1963) 89-90.

The above situation is best explained within the context of what social scientists call the diffusion model. Levi-Faur define diffusion as the:

process by which the adoption of a social system is communicated through certain channels overtime and triggers mechanisms that increase the probability of its adoption by other members who have not yet adopted it.<sup>918</sup>

As a sub-set of the diffusion model, the ‘policy transfer approach’ best describes the similarity between the EU and the AU. As Levi-Faur puts it, the policy transfer approach is ‘the process by which knowledge about how policies, administrative arrangements, institution and ideas in one political setting is used in another political setting in the development of change’.<sup>919</sup>

Elkins & Simmons, however, note that diffusion has little to do with the outcomes of policy transfers; rather it focuses on the mechanisms and processes that shape the likely outcome.<sup>920</sup> What this implies is that diffusion does not necessarily guarantee the successful operationalisation of a copied process, it simply points to the similarity of process and structure. In this vein, Elkins & Simmons identify the two kinds of diffusion as *adaptation to altered conditions* and *diffusion via learning*.

*Adaptation to altered condition* denotes the contextualisation or adjustment of a copied process to the prevailing conditions of a particular area.<sup>921</sup> This is similar to what Goodin pointedly typify as ‘goodness of fit’.<sup>922</sup> While *adaptation to altered condition* aims to re-shape adopted policies, *diffusion via learning*

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<sup>918</sup> Levi-Faur D, ‘The global diffusion of regulatory capitalism’ in Levi-Faur D & Jordana J (eds), ‘The rise of regulatory capitalism: Global diffusion of a new world order’. *The Annals of the American Academy of Political and Social Science*. 598 (2005) 202; see also Elkins K & Simmons B, ‘On waves, clusters and diffusions: A conceptual framework’ in Levi-Faur & Jordana (2005) 36-38.

<sup>919</sup> Levi-Faur (2005) 202. In this regard, the success of the EU, especially in terms of its supranational features, has had a huge impact on policy-makers and architects of the integration process in Africa, both at the sub-regional and continental levels.

<sup>920</sup> Elkins & Simmons (2005) 36.

<sup>921</sup> Ibid, 39-42.

<sup>922</sup> This relates to how a designed objective or policy is consistent with the social order of a particular environment. See Goodin (1996) 37.

implies the adoption of policies as an instructive tool.<sup>923</sup> In this case, policy-makers adopt proven, tested and successful models without engaging in an evaluation of the effectiveness of such model in a specific setting or clime.<sup>924</sup>

Locating this within the African context, one could argue that the AU is essentially the by-product of the *diffusion via learning* of the EU process. Except for minor differences,<sup>925</sup> the AU - in terms of its structure, institutional machinery, mandates and objectives - is a replica of the EU.<sup>926</sup>

### *c) Incrementalism*

As discussed earlier, African integration has for the past four decades been defined by the struggle between the advocates of an immediate establishment of a Union (federal) Government and a gradual, incremental attainment of such Union. At every point, the incrementalists have succeeded in shaping the discourse - a point evident in the outcomes of institutional design and initiatives.<sup>927</sup> A cursory look at the above analyses is testament of the triumph of incremental approach to transforming the AU. Examples include the emphasis on MIP by the Commission, suggestions on the nature and kind of laws that should emanate from the PAP, and the jurisdictional sphere of the proposed AU Authority.

Apart from the unbridled attachment to national sovereignty, incrementalism proves to represent a politically pragmatic tool for advancing integration, particularly in a climate where there is an acute deficiency of political will on the part of the supposed principal actors. Thus, incrementalism provides a narrative that acknowledges the importance of national sovereignty but at the same time

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<sup>923</sup> Elkins & Simmons (2005) 42.

<sup>924</sup> Ibid, 42-45.

<sup>925</sup> These differences range from pan-Africanism rhetoric, the membership composition (unconditional membership in the AU); the number of Commissioners in the Commission and judges of the ACJ&HR, the proposed re-designation of the positions of the top officials of the Commission; and the merged court (ACJ&HR).

<sup>926</sup> See chapter 4, table 4.2.

<sup>927</sup> See e.g. Lecoutre in Murithi (2008) 55-57.

outlines the ways and means of gradual transference of authority to a transnational entity. In addition, the presence of sub-regional organisations with their relatively developed institutions requires a strategy that emphasises balanced and effective coordination and incorporation. As shown in the above exposition, proposals on AU transformation stress the importance of learning from and establishing substantial linkages with sub-regional institutions.

#### **5.4 Building a qualitative leviathan: Institutional structure of a supranational AU**

It is instructive at this juncture to recap the salient points that have so far emerged from this research. The aim behind this is to establish the extent to which these issues relate to the central thrust of this chapter: the institutional framework of a supranational African Union. In no specific order, below are the dominant positions:

- Regional integration is an important aspect of Africa's development strategy.
- Lack of political will to implement integration objectives,<sup>928</sup> political instability, democratic deficit at national level and regional hegemonic threats are some of the obstacles to the realisation of Afro-supranationalism.
- Pan-Africanism should not be the primary basis of African integration.
- The 'nucleus AU' is a feasible route to attaining Afro-supranationalism.
- It is important to locate institutional building or design within the socio-political, cultural and economic contexts of a particular area.

These points may be cross-cutting and related. Cumulatively they have the potential of shaping the on-going discourse on AU transformation. More

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<sup>928</sup> As Kufuor notes the failure of supranationalism is not just about lack of political will but also the fact that the existence of certain supranational institutions is completely needless because there is clearly nothing to supervise. Using the ECOWAS as an example, he posits that the suggestion on the creation of an agency to regulate capital movement within ECOWAS is simply academic since there is low level of capital movement within the Community. See Kufuor (2006) 57.

importantly, these points will serve as an analytical tool for subsequent analyses.

#### 5.4.1 The idea of a ‘nucleus AU’ revisited

The ‘nucleus AU’, an idea already discussed in the previous chapter, is the core of this thesis. Against the backdrop of institutional reform, it is pertinent that we revisit this idea, in order to be clear on how it will work in practise. The previous chapter suggests the ‘nucleus AU’ as a feasible framework for attaining a supranational AU. This section thus seeks to clarify and expand on some aspects of this idea, especially the attempt to review the present configuration of regional integration in Africa. Put differently, if the ‘nucleus AU’ is portrayed as the ideal representation of Afro-supranationalism, how does it fit into the prevalent realities of governance structures or *realpolitik* on the continent?

Since African integration is primarily defined by a pan-Africanist narrative which prioritises race and geography as a pre-requisite for membership, this idea appears, on face value, unrealistic. The question expected to be posed is neither based on the legal framework or economic impact of such enterprise but the feasibility of excluding African countries from a supposed pan-African agenda. Put simply, why challenge the *status quo*?

It should be restated that the ‘nucleus AU’ is not designed to renounce the underlying logic of pan-Africanism, particularly the importance of uniting Africa. Rather it is part of the discourse on seeking credible alternatives to addressing the disillusioned state of continental integration or specifically, the AU.<sup>929</sup> The ‘nucleus AU’ is framed as the underlying philosophy that should shape the rejuvenation and strengthening of the AU. As such, the question is not so much the importance of unity as it is the methodology of attaining such aspiration.

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<sup>929</sup> Pettit’s description of institutional design is instructive here. He describes it as ‘[t]he project of rethinking and reshaping things – perhaps quite modestly – rather than the project of giving them their initial form. See Pettit (2006) 55.

In this regard, the ‘nucleus AU’ is a nuanced expression of pan-Africanism, which highlights the essence of fashioning shared and common values. It questions membership criteria which are primarily based on race and geography rather than strict adherence to democratic values. As depicted by the diagram in the previous chapter, the present arrangement of 53 member states will still be retained. However, member states wishing to pursue deeper integration based on shared democratic norms can do so as long as they successfully scale the hurdles of a reformed APRM.<sup>930</sup>

This idea is not aimed at perpetually locking out certain African states from the integration project. Instead, it is geared towards entrenching a culture of democratic practise across the continent.<sup>931</sup> It seeks to enthrone uniformity of standard and practise, an essential requirement for a successful regional integration process. Upon the fulfilment of laid down requirements, states which initially fail to meet the required criteria may then decide to join the integration process. Continued flagellation of human rights and good governance principles on the continent can primarily be attributed to a regime which condones and rationalises serial violations without incorporating effective mechanisms for individual or collective dissension.<sup>932</sup> The usual hurried approach of presenting

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<sup>930</sup> See chapter 4, diagram 4.2.

<sup>931</sup> Analysts note that the underpinning democratic values of the EU and the urge to join the organisation spurred democratic reforms and practice in countries such as Romania, Spain and Greece See e.g. Ram M, *Romania’s Reforms through European Integration: The Domestic Effects of European Union Law*. 1-23. Available at <http://www.hks.harvard.edu/kokkalis/GSW1/GSW1/20%20Ram.pdf> (Accessed 30 November 2008); see also Fenandez & Portes (1998) 208. Brenton also observes that an organisation built on the tenets of democratic standards and values offers its members a ‘badge of respectability’. He further explains

you could have one high-profile meeting a year at which insiders could congratulate each other on their legitimacy, while outsiders looked on uncomfortably. The process of entry and exit should be arranged to give maximum support to the forces for democracy in the countries concerned.

See Brenton T, *Join the club but only if your elections are free*. The Times (United Kingdom) July 14 (2009) 22.

<sup>932</sup> For instance Birikorang opines that the entrenchment of the AU’s rule against unconstitutional change of government continues to be undermined by the insistence of certain influential African presidents on the non-application or removal of sanctions against violating states. See Birikorang E, ‘Revisiting the trajectory of regime change in Africa – An overview’. Paper presented at the AHSI Seminar: Unconstitutional regime changes: The resurgence of coups in Africa (2009) 5-6. Available at

a common front<sup>933</sup> or establishing a Government of National Unity (GNU) in troubled member states,<sup>934</sup> without properly addressing the root-cause(s) of problems, are typical examples.

In addition, member states should be offered some form of incentive for adhering to the required democratic standards. As previously highlighted under the discussion on compliance, states exhibit positive compliant behaviour when measures that increase motivation are present.<sup>935</sup> According to Brenton, this may come in the form of monetary assistance directed at the overall economic development of poorer and aspiring members.<sup>936</sup>

In summation, the 'nucleus AU' is a politico-legal<sup>937</sup> framework which seeks to present nuanced, alternative methodological approach of pan-African institution building at the continental level. Embedded in this idea is an understanding of the peculiarities of Africa, a realisation which informs the need to design a framework which is sensitive to these specificities. Some of these peculiarities include, but not limited to:

- the existence of multiple RECs, some of which are relatively developed<sup>938</sup>

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[http://www.issafrica.org/dynamic/administration/file\\_manager/file\\_links/09SEP09BIRIKORANG.PDF?link\\_id=5391&slink\\_id=8371&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.issafrica.org/dynamic/administration/file_manager/file_links/09SEP09BIRIKORANG.PDF?link_id=5391&slink_id=8371&link_type=12&slink_type=13&tmpl_id=3) (Accessed on 9 October 2009).

<sup>933</sup> Soyinka typifies this arrangement as 'a club of personalities in perpetual mutual adoration'. See ADF III (2002) 37.

<sup>934</sup> In recent times, African leaders have crafted the GNU as a politically expedient mechanism for legitimising questionable leaders, by co-opting the real winners of the elections as secondary players in the government. Kenya and Zimbabwe are examples.

<sup>935</sup> This is known as the 'deviant-centred strategy'. Petit (2006) 72.

<sup>936</sup> Brenton (2009) 22.

<sup>937</sup> In the context of this thesis, this term denotes a) the normative instruments or framework that ensures compliance with the decisions of the AU b) the nature and shape of a future supranational AU and the factors capable of influencing it and c) the underlying objectives and goals of such process.

<sup>938</sup> This can have both positive and negative consequence for continental integration. On one hand, the success of sub-regional institutions can positively influence the development of corresponding institutions at the continental level. Such influence could come through continuous interactions, exchange of personnel and information-sharing. On the other hand, once these sub-regional institutions attain their stated (supranational) goals, acquiescing to an amorphous continental body might be considered unwise and impossible.



- limited finance for regional integration initiatives
- weak institutions at national levels
- low level of awareness and participation of the African populace in the integration process
- poor state of African economies
- deficiency of incentives to ensure compliance with institutional directives<sup>939</sup>
- ideological cleavage (maximalists versus minimalists)

These variables set the integration process in Africa apart from that of Europe, hence the importance of avoiding the pitfalls of prescribing the EU as a verbatim model.<sup>940</sup> As earlier stated, there is no danger in drawing useful lessons from the EU, especially the universal and workable factors that have ensured its success. Also, its pitfalls should be considered.<sup>941</sup>

The following discussion on the institutional framework of a supranational AU should be understood within the context of the prescribed 'nucleus AU'. While some of these institutions are already in existence under the current AU framework, the discussion below is done within the purview of an existing uniformity of adherence to democratic values and norms. It is thus conditional and prospective.

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<sup>939</sup> Incentive to comply with decisions should not be confused with the motivation to join regional organisations. While states may feel compelled to join an organisation due to the potential economic benefits, it does not follow that such states will necessarily comply with the decisions of such organisation, especially if it conflicts with their political or economic interests. According to research, while the compliance the implementation of integration initiatives remain abysmally low, a reasonable number of African countries highlight the benefits they derive from their membership of RECs. 50% of countries surveyed reported that regional integration helped control inflation, 44% point to increase in investment, 50% benefitted from trade and market integration initiatives, 44% from transport, 39% from macro-economic convergence, 28% from agriculture and 26% from energy. See AU & ECA (2006) 82.

<sup>940</sup> This can only amount to rigid classification. It is akin to setting up oneself for failure and disappointment. Since both Europe and Africa have different histories, cultures and political structures, such verbatim process can only result in a dysfunctional state of affairs.

<sup>941</sup> These include limited public participation in the EU process, democratic deficits, and mismanagements in the EU institutions. See e.g. Cini (2002) 56.

## 5.4.2 Institutional organisation

### 5.4.2.1 Road to transformation: Preliminary matters

'Africa doesn't need strong men; it needs strong institutions' - Barack Obama<sup>942</sup>

As highlighted previously, the aim of this thesis is neither to re-invent the wheel nor create a brand-new institutional framework. Instead, it is a response to the organisational deficiency of the AU, and thus seeks to engage in a theoretical discourse of re-evaluation of the integration process, albeit at the continental level. This entails a dissection of the institutional arrangement (which has been done in the foregoing), and highlights the aspects that need to either be retained or refined and proffer additional framework that can meet some of the deficiencies that have been pointed out.<sup>943</sup>

According to Warleigh, institutions should perform the following roles:

Institutions act as forums in which actors cooperate, argue, deliberate and make the decisions which eventually constitute public policy. Institutions can also shape the values and belief systems of those who work within them. As a result, they influence not just what actors do, but often also how they view the world in which they live as well as the people and ideas with which they must engage in order to realise their goals.<sup>944</sup>

Therefore, how can the decisions that emanate from the AU promote the essence of democratic governance, respect for human rights and concrete disapproval of violations? How can the AU impact meaningfully on the lives of Africans, shape continental socio-economic development and elevate the profile of the continent on the global stage? These questions border on the legitimacy

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<sup>942</sup> 'A new moment of promise'. Speech delivered to Ghanaian Parliament, July 11 2009. Available at <http://www.voanews.com/english/archive/2009-07/2009-07-11-voa6.cfm?CFID=325741458&CFTOKEN=96528518&jsessionid=de305792520a434292ec4d292c4a77a74456> (Accessed 20 October 2009).

<sup>943</sup> This is in line with Pettit's description of institutional design. See Pettit (2006) 55.

<sup>944</sup> Warleigh (2002) 4.

of the AU as an embodiment of the aspiration, values and renaissance of Africa. As Murithi aptly notes, the AU should be an enabler, supporter, facilitator and protector of the Africa people.<sup>945</sup>

The challenges facing the continent are gargantuan and require serious attention. Institutional reform of the AU, although not being the sole elixir, is an appropriate starting point. Institutional reform should, however, not be framed in such a way that it ignores the fundamental root problems. Rather, the underlying problems should shape the process of transformation and consequently the outcome of the institutional framework. For example what is the essence in granting more legislative powers to the PAP while some of its members are products of electoral irregularities? Why allow leaders who have emerged through questionable electoral process participate, and in turn shape the affairs of the AU? Why elect a serial violator of the supposed principles of the AU as its Chairperson? How can one expect motivation and qualitative output from AU institutions when the supposed principal actors routinely disregard their directives and decisions?

It is thus crucial that the goal of transformation objectively reflect a balance between the diagnostic appraisal and panaceas proposed. The diagnosis of a problem will usually point to possible solutions. However, the solution(s) offered must be specific and capable of adequately rectifying the problem diagnosed.<sup>946</sup> Situating this within the context of this study, the solutions offered should not only be desirable but be responsive to the social dynamics of the continent.

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<sup>945</sup> Murithi (2005) vii.

<sup>946</sup> Iatrogenic interventions should also be avoided. This is a situation where the solutions administered, and not the underlying problems, leads to failure and inaction. Pat Utomi, a Nigerian policy analyst, has used this word, 'iatrogenic', to describe some of the policies of the Nigerian government. See e.g. 'The trouble with the new CBN leadership'. Available at <http://www.ngrguardiannews.com/business/article05//indexn3.html?pdate=070210&ptitle=The%20Trouble%20With%20The%20New%20CBN%20Leadership,%20By%20Utomi&cpdate=070210> (Accessed 07 February 2010).

It is also important to avoid setting specific time-frames for the process of African integration. One thing practise has shown is that such targets have resulted in failure and disappointments. As Kambudzi remarks, these deadlines are simply unrealistic considering the fact that the parameters for achieving the stipulated targets are absent.<sup>947</sup> Therefore the approach of this thesis is not based on a specific chronological time-frame. Instead it hinges the feasibility of deeper and qualitative integration on the consolidation of democratic values among member states. Put differently, it envisages a two-stage process: firstly, the consolidation of democratic norms and institutions at the national level and secondly, crafting a transnational process based on uniform democratic standard.

It is important at this juncture to note that the underlying hypothesis or the context within which the institutional framework of the supranational AU is discussed is that membership will be regulated, thereby resulting in a situation where all members adhere to uniform democratic standards. The following discussion will centre on the germane points to consider in the discourse on Afro-supranationalism. These issues will be discussed under the broad themes of legal framework, institutional architecture and the feasibility of compliance.

#### **5.4.2.2 The legal framework of a supranational AU**

Weiler describes regional integration process as a creation of the law.<sup>948</sup> This description implies the centrality of Treaties and other related legal instruments as the foundation or reflection, explicit or implicit, of the destination and shape of the regional integration process. Thus, a study of the principles, obligations, institutional structure and objectives of a particular international institution, as stipulated in its constitutive legal instrument, will indicate whether it is an intergovernmental or supranational structure.

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<sup>947</sup> Kambudzi A, 'Portrayal of a possible path to a single government for Africa' in in Murithi M (ed), *Towards a union government of Africa: Challenges and opportunities*. ISS Monograph Series No 140 (2008) 17-18.

<sup>948</sup> Weiler (1999) 221.

Where the organisation is supranational, the superintending legal framework will contain the dual elements of normative and decisional supranationalism.<sup>949</sup> While normative supranationalism denotes the supremacy of Community or Union laws in relation to national laws, decisional supranationalism presupposes majority voting system as an essential framework of the institutional decision making process.<sup>950</sup> Since supranational entities do not exist in a vacuum but within a largely state-centric global order, mechanisms have been designed to balance legal implications with political realities. One such mechanism is the principle of subsidiarity. As earlier discussed, this principle protects national interests by guaranteeing the relevance and supremacy of national institutions in relation to matters which are best handled at the national level.<sup>951</sup> As Zurn puts it:

A supranational charter is, thereby, neither required to represent a territorial state nor does it presuppose the dissolution of national political systems. What it does require, however, is that the interests and concerns of non-nationals should be considered and legalised through juridification at levels beyond the nation-state and through the internalisation of international regulations.<sup>952</sup>

When designing a legal framework for continental integration, it is pertinent not only to apply the legal principles associated with supranationalism<sup>953</sup> but also to

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<sup>949</sup> Weiler (1981) 273-280.

<sup>950</sup> Ibid; Hay (1966) 69; Pescatore (1974) 51-52.

<sup>951</sup> See e.g. Dashwood et al (2000) 156-162.

<sup>952</sup> Zurn in Joerges & Zurns (2005) 37

<sup>953</sup> Supranationalism should however not result in 'democratic deficit' of the organisation. Zweifel identifies the seven key indicators of democratic deficit, or lack thereof, as:

- Appointment (whether a directly elected legislature is involved in the appointment of key officials of the organisation)
- Participation (the involvement of the civil society in the decision-making process of the organisation)
- Transparency (whether the decision-making process is open and accessible to the public)
- Reason-giving (whether the organisation widely publishes the rationale behind its decisions)
- Overrule (whether there is a mechanism for checks and balances within the institutional framework)
- Monitoring (how are policies and decisions of the institutions monitored?)

keep in perspective the realities on the ground. This implies the existence of an uneven socio-political and economic development across the continent and also the absence of shared norms and values. And as such, the insistence on phrases such as ‘African constitution’,<sup>954</sup> ‘United States of Africa’ or a ‘Union Government’<sup>955</sup> amounts to by-passing or conveniently ignoring the need for concerted progressive realisation of unity. In this vein, the supranational African Union, a virile institution built on the tenets of shared democratic values, provides a framework for solidifying the foundation of a future Union Government.<sup>956</sup> It is suggested that a reformed AU Constitutive Act is required to serve this purpose. The following are some of the issues that should be covered by the reformed Treaty.

a) *Objectives and principles*<sup>957</sup>

The reformed Treaty should not only encapsulate shared democratic standards, it should also include institutions and measures that are capable of promoting and safe-guarding such ideals. For instance, the provision dealing with conditional or regulated membership should consequently make way for the

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- Independence of the organisation from the overbearing influence of member states

See Zweifel T, *International organisations and democracy: Accountability, policies and power*. Boulder: Lynne Rienner Publishers (2006) 18-26.

<sup>954</sup> While the points and ideals encapsulated in the ‘Third Draft Constitution of United Africa’, a document authored by African civil society in 2005, are instructive and commendable, the semantic connotation of the document (as a Constitution) conveys a tone of total readiness and finality. The drafters of this document should rather have adopted a tag which indicates that the document as a working progress which may eventually become an African Constitution. It is against this background that this section argues that the legal framework of a supranational arrangement remain a Treaty, albeit a reformed one. However, such Treaty may one day evolve into a Constitution. The United Africa Draft Constitution is available at <http://www.foscaml.org> (Accessed 10 October 2009). (Hereinafter referred to as UA Draft Constitution 2005); see also Tadjadjeu M, ‘An African constitution: Ten hypotheses of what it should include’ in Murithi (2008) 171-181.

<sup>955</sup> In the ECOSOCC’s contribution to the Grand Debate on the AU Government, the two phrases that have dominated African integration, ‘United States of Africa’ and the ‘Union Government’, is clarified. The ‘United States of Africa’ is an older concept, one which dates back to early 20<sup>th</sup> Century. It aspires for the United States of America model. The ‘Union Government’ on the other hand is a recent concept, 2005 to be precise, which implies a reinforced, reformed AU. See ECOSOCC (2007) 5-6.

<sup>956</sup> As MacClanahan explains, while federalisation, viewed as the last stage of supranational integration, precisely denotes the formation of a new country, supranationalism merely denotes the addition of an extra layer to existing political system. MacClanahan (2004) 4.

<sup>957</sup> The objectives of a supranational AU should be an expression of what Brenton refers to as a ‘badge of respectability’, that is, values capable of eliciting best practices. Brenton (2009) 22.

strengthening of existing institutions and the establishment of an additional supporting framework. In addition, such institutions should be clothed with real monitoring and disciplinary powers.

*b) Subsidiarity and cooperation*

The principle of subsidiarity is pivotal in African integration discourse considering the multi-layered (continental, sub-regional and national) nature of governance structure. Thus, such treaty should provide a clear framework that stipulates the functions of each level of the governance structure. While it is easier to centralise non-institutional forms of political integration,<sup>958</sup> the integration of already developed institutions at sub-regional level may prove more difficult than envisaged. What this implies is that the institutions (executive, legislative and judicial) at the sub-regional level, just like national institutions, will remain.<sup>959</sup> However, they will be part of an interlocking and hierarchical relationship which clearly delineates functions and obligations according to the scale or effects of actions. To ensure coordination and cohesion of plans and activities, the Treaty should provide a framework that promotes periodic interaction and exchange of personnel between the continental and sub-regional actors.<sup>960</sup>

*c) Institutional balance*

The (democratic) legitimacy of a supranational AU, especially with regard to the supremacy of its laws, will depend on the fair distribution of powers within the Union. As with the EU, the test for the AU will be on how to delineate the

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<sup>958</sup> Examples include free movement, Union passports, abolition of border controls, transnational voting rights, peace-keeping and monetary union.

<sup>959</sup> This suggestion should be understood within the context of the earlier recommendation on the need for RECs to be reduced to five. The current framework of multiple RECs is too problematic for the effective operation of the principle of subsidiarity.

<sup>960</sup> Ngwane for example propose that there should be three continental liaison partners within the RECs charged with monitoring convergence and complementarity of policies and programmes. See Ngwane G, *Towards a confederated United States of Africa (Between A6 and the African Union Authority)*. Available at <http://www.gngwane.com/2009/07/towards-a-confederated-united-states-of-africa-between-a6-and-the-african-union-authority.html> (Accessed 10 October 2009).

exercise of decision-making powers among technocrats (AU Commission), national politicians (the Assembly and Executive Council) and representatives of the people (PAP and ECOSOCC). In this regard, the reformed Treaty should provide a framework that not only allows the PAP to exercise reasonable legislative powers but improves the channel through which ordinary Africans can take ownership of the integration process. These could include national referenda, awareness campaigns, formal recognition of transnational cultural and traditional fora and cooperation with educational institutions.

*d) Guaranteed autonomy*

Apart from expressly tagging the AU as a supranational Union, the reformed Treaty should include provisions which reflect the autonomy of its institutions. Such provisions should insulate the institutional machinery from national politics.<sup>961</sup> Matters such as appointments, decision-making process, developmental programmes and policy frameworks should be managed to an extent that they highlight the independence of Union institutions. This independence should also be reflected in the nature of its laws and decisions. Such laws, especially in the areas of exclusive competence, must be superior to and have direct effect within the territorial jurisdiction of member states. Alongside consensus, weighted voting should also be prioritised as an institutional decision-making mechanism.

*e) Revenue generation*

Since limited financial resources remain one of the biggest obstacles to African integration, the inclusion of a well thought-out internally generated revenue system is imperative. It has been suggested that alternative means of generating income for the AU should include the imposition of taxes on natural

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<sup>961</sup> Insulation does not amount to the creation of an iron-clad barrier between the Union and national politics; rather it posits that, within a symbiotic matrix, the Union institutions are empowered to shape the integration process, especially through matters where they have exclusive competence.



resources and air tickets, deduction from national defence budgets and the establishment of a fiduciary fund.<sup>962</sup>

*f) Compliance mechanisms*

As this will be discussed later, it will suffice to note that the possibility, or lack thereof, of compliance with the decisions of an organisation determines its (in) effectiveness. Therefore, the reformed Treaty must include a detailed framework which highlights mechanisms, ranging from tough to benign, for ensuring compliance with institutional decisions.

*g) Opt-outs and flexibility arrangements*

The reality of any integration enterprise is that not all member states will be comfortable with the pace, slow or fast, of the process. This can result in a situation whereby certain member states decide to proceed at a faster pace, albeit within the institution framework. Also, domestic imperatives might prevent a member state(s) from agreeing to certain supranational decisions or outcomes. Thus, without sacrificing the fundamental values of the Union, the reformed Treaty should provide legal frameworks that permit, in the former scenario, flexibility arrangements and, in the latter case, opt-outs. In addition, member states willing to renounce their membership must be allowed to do so.<sup>963</sup>

*h) No rigid classifications*

Apart from espousing the broad goals of supranationalism, the reformed Treaty should avoid classifications that portray ideological views, which veracity or acceptance is yet to be tested. As such, terms like 'United States of Africa' or 'African constitution' which connote radical and immediate shedding of sovereignty should be omitted. The Treaty should be skilfully crafted in a way

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<sup>962</sup> ECOSOCC (2007) 12, 14-15; AU Strategic Plan 2004-2007, 38-41; Tadadjeu in Murithi (2008) 177-178.

<sup>963</sup> Libya is one country that is vehemently opposed to this idea. It views this as a divisive tool. See Maluwa (2004) 229. This idea of preventing member states to exercise this right is antithetical to the philosophy underpinning the establishment of a supranational AU.

that presents integration objectives and goals as dynamic and capable of evolving. To peddle fixed concepts like federalism or confederalism is to deny the organic development of the organisation.

#### 5.4.2.3 Institutional architecture: What manner of Union?

As aforementioned, there is a need to avoid typifying the future of the AU with phrases which connote finality or terminus.<sup>964</sup> This can have the following effects:

- Firstly, it can heighten the paranoia of states which already have a problem with shedding their sovereignty or embarking on a journey to the unknown.
- Secondly, phrases such as 'Union Government' or the 'United States of Africa' wrongly assume a state of readiness, when all indices on the ground indicate otherwise.<sup>965</sup>
- Thirdly, it diminishes the debate on the cultivation of shared norms and values as a prerequisite for proceeding with a continental Union.<sup>966</sup>

While the appellation used in this thesis, namely 'supranational', is in tune with the above phrases to the extent that it advocates a continental leviathan structure, it differs on the account of prioritising democratic requisite. As such, the institutional structure of the AU should reflect, in its composition, the values of democracy. Neither federalism nor confederalism should at this stage be

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<sup>964</sup> Writing in 2003, Maluwa highlights the absence of deep discussion and understanding among political elites on the meaning of 'union'. He further notes, 'some leaders regard it as the panacea for all Africa's economic and political problems, while yet others still view it as the thin end of the wedge in a move towards the creation of a "United States of Africa"'. See Maluwa (2003) 163. Different interpretations and motives on the part of African political leaders evince an absence of common values and uniform adherence to a clearly framed socio-political goal. The fact that the most vocal advocates of a 'United States of Africa' run an autocratic regime in their domestic domains posit the little or no importance attached to democratic norms as the basis of a future continental leviathan. For example, the Libyan leader, Muammar Ghaddafi, a leading proponent of the creation of a 'United States of Africa', views multi-party democracy as the root cause of instability and conflicts in Africa. See e.g. <http://news.bbc.co.uk/2/hi/africa/7883178.stm> (Accessed 14 October 2009).

<sup>965</sup> Kambudzi in Murithi (2008) 17-18.

<sup>966</sup> Utterances and actions of the proponents of this philosophy indicate the little or no value attached to the idea of democratic governance. One such is Ghaddafi's continuous denunciation of democracy.

advocated as the terminal point of African integration; rather the process should be allowed to organically develop into any political system, which is shaped by democratic norms and standards.

The following discussion will focus on specific institutions which are central to the entrenchment of democratic values and norms in a future supranational AU. The existing AU institutions, although not discussed here, remain part of the institutional framework.

*a) PAP: From talk-shop to peoples' assembly*

The legitimacy of the PAP as an avenue for fast-tracking supranationalism is hinged on two factors: the direct election of its members and the exercise of full legislative powers. The PAP's potential of shaping the discourse on integration cannot be understated. The direct election of its members, based on proportionality, can have the following consequences:

- Expanding the (democratic) frontier of the effective consideration of transnational matters. Unlike the situation where members are nominated and thus answerable or sympathetic to their governments, the direct election of members will usher in an era of objectivity, neutrality and substance vis-à-vis debates and discussions.
- As it is in Europe, this will lead to the emergence of transnational political parties and transnational political coalitions.<sup>967</sup> It will provide an avenue for constructive engagement among the different ideological groupings on the continent, an engagement removed from the sometimes antagonistic context of national politics. In this sense, issues will be considered not within the context of ethnic affiliations and divisions but with a transnational outlook.

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<sup>967</sup> The transnational political groups represented in the European Parliament include Europeans People' Party (with the most seats), Alliance of Liberals and Democrats for Europe, Independence/Democracy, Union for Europe of the Nations, Greens/European Free Alliance, Socialist Group, European United Left – Nordic Green Left, and Non-attached members. See Fontaine (2006) 19; see also Cini in Warleigh (2002) 63.

- Elevate the importance of transparent, free and fair election. As will be discussed below, elections to the PAP should be monitored by a continental body. As such, the standard for the fairness and transparency of the elections is safeguarded by a neutral body which is insulated from the vagaries of national politics. This does not, however, remove the influence of national politics from the process as issues are largely shaped by domestic factors.<sup>968</sup> An (un) intended consequence of this may be the diffusion of minimum standards and best practices.
- Increased awareness of integration issues. The participation of ordinary citizens in the electoral process, especially through nation-wide campaigns, ensures that they are confronted with transnational issues and politics. This electoral process will provide an empirical proof of how Africans perceive the integration process.<sup>969</sup> In addition, the roles of national trade unions, political parties, CSOs and the private sector will be instructive because they have the capacity to shape the opinions and views of the citizens.

On the issue of proportionality, the highest number of allocated seats per state should be ten, with two being the least.<sup>970</sup> This suggestion takes into account the limited financial resources available for integration initiatives. When the situation improves, the number of seats can be increased.

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<sup>968</sup> Moravcsik, writing on European integration, posit that integration has both the demand and supply sides. The demand side entails that issues are formulated and shaped through the influence of national actors such as trade unions, interest groups and political parties. The supply side relates to the interstate bargaining of policies formulated at national level. See Moravcsik (1993) 481.

<sup>969</sup> As with Europe, the ideology of the party or coalition with the most seats will be an indicator of the mood of the citizens as to the pace of integration. This is in addition to national referendum on integration matters. For a detailed assessment of the European electoral process, see e.g. Franklin M, 'European elections and European voters' in Richardson J (ed), *European Union: Power and policy-making*. London: Routledge (1996) 201-216.

<sup>970</sup> This would be based on the population of each member state. For example, member states with a population of over 50 million could have ten members while member states that have less than 5 million people could be assigned 2 seats.

Without creating a complex and excessive bureaucratic network, the PAP should be able to exercise reasonable legislative powers.<sup>971</sup> Unlike the EU with its two-tier structure (national and regional), the PAP will have to share legislative powers with sub-regional and national parliaments. In addition, it will also have to contend with the Executive Council. Thus, the reformed AU Treaty should clearly stipulate the delineation of powers, areas of cooperation and the incremental attainment of reasonable legislative powers. In light of this, it may be asked to what extent can the PAP drive the entrenchment of democratic norms or more pointedly exercise democratic supervision over the Union? Although the two questions posed are related, the latter deals with the internal workings of the AU while the former denotes the external perception of the PAP as a legitimate institution.

To exercise democratic supervision over the AU, the PAP has to either be solely or jointly<sup>972</sup> involved in the:

- appointment, confirmation and removal of AU Commissioners (or Union Secretaries), members of the proposed African Electoral Commission (AEC) and judges of the ACJ&HR
- consideration of APRM and AEC reports on democratic standards
- consideration of the report on activities of other AU organs
- debate on the imposition of sanctions on AU member states
- the PAP should have exclusive control over its budget and the power to discuss the budget of the AU as a whole.<sup>973</sup>
- in terms of increasing awareness about its activities, the PAP committees or task team should conduct open hearings outside its headquarters.
- bilateral and multilateral agreements entered into by the Union.

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<sup>971</sup> As Mpanyane rightly views, the exercise of supranational powers by the PAP cannot be discussed in isolation. As such, the PAP can only exercise reasonable legislative powers within a framework that also endows other AU organs with supranational powers. Mpanyane (2009) 5.

<sup>972</sup> With the Executive Council and the AU Commission

<sup>973</sup> For a detailed discussion on the institutional strengthening of the PAP, see e.g. Mpanyane (2009).

The exercise of democratic supervision should, however, be underpinned by enhanced functional cooperation with other governance structures such as sub-regional and national parliamentary bodies. As Mpanyane notes, such cooperation should include regular meetings, joint briefings and information-sharing.<sup>974</sup> For instance, when debating on whether or not to impose sanctions on a member state, the PAP should take into account available reports from the relevant sub-regional institution as well as wider consultation with the relevant stakeholders. As the supranational AU will be built on democratic values and norms, such cooperation should neither be at the expense of fundamental values nor be guided by pure political expediency but a philosophy that affirms the *grundnorm* of the Union – consistent democratic standards and values and the rule of law.

The eventual process of direct elections and exercise of real legislative powers should, however, be preceded by an inclusive audit involving wider consultation among stakeholders - member states, CSOs and the African populace. Beyond formal meetings and seminars, such consultation should include a framework for gauging the views of African citizens on the need to strengthen the PAP. Such involvement is what Zurn describes as ‘deliberative supranationalism’.<sup>975</sup>

*b) ACJ&HR: Deepening fundamental (integration) values*

The influential role of a judicial organ in any integration process cannot be ignored. The Court’s liberal and innovative interpretation of provisions in the constitutive instrument or Treaty may affect the development of concepts and principles which are essential for the furtherance and solidification of the integration process.<sup>976</sup> The reference to the ECJ as the ‘silent motor of

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<sup>974</sup> Ibid, 10.

<sup>975</sup> Deliberative supranationalism includes deliberations surrounding the enactment of regulations affecting the people, arguing about relevant problems, and the chance to articulate opinions on matters that would otherwise be dealt with in specialist media. See Zurn in Joerges & Zurn (2005) 37.

<sup>976</sup> See e.g. Raworth (2001) 84.

integration<sup>977</sup> is a testament of the influence of its rich jurisprudence in the enhancement of European integration. Through several landmark judgments, the Court has given teeth to principles such as direct effect,<sup>978</sup> supremacy<sup>979</sup> and pre-emption.<sup>980</sup> For Wincott, the Court's activist role in ensuring the effectiveness of EU laws is tantamount to the 'constitutionalisation' of the constitutive Treaty.<sup>981</sup> He describes 'constitutionalisation' as:

[t]he transformation of Community law from a system of conventional international law, which in principle imposes direct obligations on only states, to a new form of law, much more like the internal law of states.<sup>982</sup>

While a supranational judicial organ is not specifically clothed with policy-making powers or the capacity to chauffeur the integration process, as these are the functions of technocrats and politicians, it can surreptitiously play this role through the dynamism and determination of its officials to develop a sound transnational legal system.<sup>983</sup>

The envisaged ACJ&HR thus has the potential of fast-tracking closer integration through its jurisprudence. Based on its exclusive competence, the Court will be expected to adjudicate on pertinent issues such as member states' ratification of and adherence to key principles and instruments, multi-level governance within the AU, human rights violations, the role of sub-regional institutions within the multi-layered integration framework, legitimacy of national regimes and appropriate sanctions for non-compliance with the AU rules and regulations. In

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<sup>977</sup> See e.g. Richmond & Heisenberg (1999) 2.

<sup>978</sup> *Van Gend en Loos v Nedelandse* (Case 26/62) [1963] ECR 1; *Reyners v Belgium* (Case 2/74) [1974] ECR 631

<sup>979</sup> *Flamino Costa v Enel* (Case 6/64) [1964] ECR 585, 593; *Amministrazione delle Finanze v Simmenthal* (Case 106/77) [1978] ECR 629; *Van Gend* case [1963] ECR 1.

<sup>980</sup> *Commission v Council* (Case 22/70) [1971] ECR 263; *Commission v Finland* (Case 469/98) [2002] ECR I-9627.

<sup>981</sup> Wincott D, 'The court of justice and the European policy process' in Richardson (1996) 181-182.

<sup>982</sup> *Ibid*; see also Cottier & Hertig (2003) 270-271.

<sup>983</sup> The ECJ's substantial influence on the development of the EU legal system is attributed to factors such as the cleverness and political acumen of judges, the normative power of the 'formalism' of the law and the lack of attention paid to the Court during the early stages of the integration process. See Wincott in Richardson (1996) 193.

order for the ACJ&HR to effectively undertake these functions, certain points need to be given utmost priority.

Firstly, the appointment of judges to the Court should be merit driven. In this regard, such judges should be dynamic, progressive and have a good grasp of international law and politics. The delicate nature of the task before the Court, especially in relation to the entrenchment of democratic norms and values, requires a pragmatic and nuanced method of adjudication. Africa's different legal traditions (common, civil and customary) should be used as a platform for enriching the jurisprudence of the Court.

Secondly, it is important to provide the Court with a sound support framework. In order to ensure efficiency and maximum output, the ACJ&HR should be provided with adequate research support, skilled personnel and a working environment conducive to productivity.

Thirdly, in order to prevent the Court from being subdued by an avalanche of cases, it is pertinent that national and sub-regional judicial organs are granted the powers to act as Court of first instance in some cases that fall within the exclusive competence of the ACJ&HR. The Court's reliance on national structures, either as judicial partners or as an instrument of ensuring compliance, implies that national institutions conform to the minimum democratic standards set down by the Union. The independence of the judiciary, neutrality and efficiency of security apparatuses, transparency of the electoral process and accountability of the national executive are some of the factors that will make the task of the ACJ&HR easier and effective.

*c) AU Authority: Policy incubator*

As rightly highlighted in the foregoing discussion, the effective exercise of supranational technocratic functions is dependent on the reform of the internal administration of the AU Commission (to be known as the Authority). Both the



reports initiated within (e.g. the Strategic Plan documents) and externally (e.g. the AU Audit report) indicate the essence of a professional and highly efficient technocratic agency. Thus any discussion on the allocation of supranational powers of policy initiation and implementation to the Commission must begin with an overhaul of the Commission's institutional set-up.

The expertise and knowledge of the officials of the Commission in relation to the assigned portfolio is crucial. While the recruitment of the principal officials, Chairperson and the Commissioners, is political - to the extent that member states nominate them - it is important that member states take into account the track record and know-how of the individuals presented.

The Chairperson and his or her deputy could be a former head of state,<sup>984</sup> an ex-foreign affairs minister or an African who has a proven track record of superintending an intergovernmental institution. Similarly, the Commissioners must possess skills commensurate to their assigned portfolios. In appointing Commissioners, utmost priority should be given to their technocratic abilities such as managerial skills (private or public) and acute understanding of the assigned task. In this regard, the PAP's oversight role will be important in determining the veracity of such competence(s).

The suggestion on the establishment of the AUSC as the body to be responsible for recruitment, appointments, promotion and discipline of the professional and general staff of the Commission is commendable.<sup>985</sup> Such a body will ensure the promotion of professionalism and qualitative output by making sure that the right people are picked for available positions.<sup>986</sup> In addition to this, it is essential that the morale of staff members is boosted

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<sup>984</sup> Such ex-head of state must be rated highly as someone with a proven track-record of adherence to democratic standards and champion of political and economic development. Such appointment will highlight the seriousness of the integration process.

<sup>985</sup> See AU Audit Report (2007) 53-54.

<sup>986</sup> In the EU, the Commission staffs are recruited through competitive examinations across member states. See e.g. Christiansen T, 'The European Commission: Administration in turbulent times' in Richardson (1996) 96.

through the provision of adequate resources for the fulfilment of their duties. This will impact positively on the retention of skilled personnel.<sup>987</sup> The issue of capacity building is also important. In this regard, the Commission should fully exploit avenues for cooperation with international institutions such as the UN, the EU, the international community and sub-regional institutions on the training and exchange of personnel.<sup>988</sup> Such a programme should be designed in a way that promotes and encourages retention.<sup>989</sup>

Having discussed the strengthening of the administrative capacity of the Commission, the next point is the consideration of the exercise of supranational powers of policy initiation and implementation. As shown in the foregoing, literature is replete with how the Commission can exercise these functions. More importantly, it has been shown that the exercise of such functions is contingent on the recruitment of skilled and competent officials. The technical expertise and understanding of the underlying politics and dynamics of transnational issues can only contribute positively to the efficiency of the Commission. Another imperative is the promotion of accountability and transparency of the activities of the Commission. In addition to political oversight by the PAP, the African populace should be sensitised on the operations of the Commission.<sup>990</sup>

#### *d) Other institutions*

In addition to the above institutions, it is essential that specialised and functional institutions are established to either complement the efforts of the principal

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<sup>987</sup> According to the AU Audit Report, between July 2004 and October 2007, five of the thirteen directors of the Commission resigned. AU Audit Report (2007) 47.

<sup>988</sup> In addition to the capacity building of staff members, it has been suggested that the Commission should establish paid internship programme for African youth. See Ibid, 54. This suggestion is very essential as it has the potential of stimulating the interest of the youth in African integration.

<sup>989</sup> For instance, officials involved in the training programme could be mandated to sign agreements signifying their dedication to the Commission within a stipulated period after such training.

<sup>990</sup> This could be done through cooperation with African and international media, continent-wide publication of documents, an improved and up-to-date AU website and increased involvement of the civil society. See AU Audit Report (2007) 70-75.

organs or primarily focus on specific issues relating to matters of democratic governance and development. The following are examples of such agencies:

- *African Electoral Commission (AEC)*: Political development in post-colonial Africa remains tainted by the high level of electoral irregularities across the continent. Despite the adoption of the ACDEG and the ad-hoc constitution of electoral observers to monitor elections across the continent, the situation appears to be worsening. From Zimbabwe, Kenya, Algeria, Gabon, Nigeria to Egypt, the issue of transparency and fairness of the electoral process continues to beg for more constructive attention.

Thus the proposed AEC is an attempt to address this malaise. The AEC should be a permanent body mandated to monitor elections,<sup>991</sup> work closely with parallel sub-regional bodies, report on the state of national electoral process, and recommend appropriate sanctions to be imposed on defaulting member states. The AEC should be composed of a Chairperson and Commissioners with distinguished and competent track record as members of national electoral bodies and the civil society.

- *The APRM*: As elaborated upon in the previous chapter, the APRM has the potential of playing a central role in the entrenchment of democratic governance on the continent. Even as a voluntary mechanism, it has created a contested space for deliberation on pertinent national issues hitherto suppressed by autocratic regimes across the continent. As suggested, the APRM could play a more effective role if it is transformed into a compulsory process, superintended by an independent and permanent Secretariat.<sup>992</sup> The purpose of the APRM will be to determine

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<sup>991</sup> This should be done in collaboration with the relevant national and sub-regional bodies.

<sup>992</sup> As earlier noted, the AU Assembly, in April 2008, adopted the decision to confer legal personality to the APRM. See Assembly/AU/Dec. 198 (XI). See also section 4.4 in the previous chapter for a detailed discussion on the APRM.

whether or not member states meet the minimum standard of membership, based on the review process.

- *Africa Natural Resources Agency (ANRA)*: As Kambudzi notes, this agency should be mandated to ‘provide and implement a continental regulatory framework governing the exploitation and transformation of Africa’s natural resources’.<sup>993</sup> Similar to the Extractive Industries Transparency Initiative (EITI), the ANRA should provide a framework which enhances the ethos of accountability and transparency in the exploitation of natural resources on the continent.<sup>994</sup> In addition, the ANRA should be charged with determining the tax to be imposed on natural resources in Africa’s top-soil and sub-soil. The advantages, according to Ayangafac, of establishing a common framework for the management of natural resources include an enhancement of human security, prevention of conflicts, adoption of uniform environmental standards, functional spillover into other related areas and the enhancement of Africa’s position in the global political economy.<sup>995</sup>
- *Africa Infrastructure Development Agency (AIDA)*: As proposed by Kambudzi, this agency will be responsible for overseeing the planning and implementation of physical infrastructure such as road, railway, waterways and telecommunication. This agency should only have exclusive competence on matters which directly impact on regional integration. The poor state of physical infrastructure on the continent is a key obstacle to the process of integration and this intervention will go a long way in addressing the problem.<sup>996</sup>

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<sup>993</sup> Kambudzi (2008) 26.

<sup>994</sup> For more on the EITI, see <http://www.eiti.org> (Accessed 20 October 2009).

<sup>995</sup> See Ayangafac C, *Natural resources boom: A blessing or a curse to African integration*. (2009). Available at [http://www.issafrica.org/index.php?link\\_id=7895&link\\_type=12&mlink\\_type=12&tmpl\\_id=3](http://www.issafrica.org/index.php?link_id=7895&link_type=12&mlink_type=12&tmpl_id=3) (Accessed 24 July 2009).

<sup>996</sup> The Trans-Africa Highway Programme proposed by the ECA is one such initiative designed to address this problem. It is aimed at upgrading nine strategic highway sections across the continent – Cairo-Dakar,

- *The AU Commission on International Law (AUCIL)*: The already established AUCIL, together with the ACJ&HR will play a significant role in the legal development of the AU. Charged with the codification and progressive development of international law in the African context,<sup>997</sup> the AUCIL will have to, amongst other things, determine issues relating to harmonisation of laws and the legal implications of supranationalism in the African context, especially the centrality of democratic standards and durable institutions.
- *African Information Services (AIS)*: This agency will be tasked with the collation, management and dissemination of the activities of a supranational African Union. Working in tandem with the Communications Unit of the AU Commission, the AIS should adopt both conventional and creative methods of conveying the state of affairs in the Union to the general public. Modern technologies such as mobile phones and the internet (including social networking websites) should be fully exploited. To ensure effective coordination and coverage, there should either be AIS liaison officers in each of the organs of the AU or regular interaction with the communication departments of such organs.
- *Traditional and Cultural Affairs Forum (TCAF)*: In addition to ECOSOCC, it is pertinent to create a forum for interaction among traditional leaders

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Algiers-Lagos, Tripoli-Windhoek, Cairo-Gaborone, Dakar-N'djamena, N'djamena-Djibouti, Lagos-Dakar, Lagos-Mombasa, and Beira-Lobito. See AU & ECA (2006) 11.

<sup>997</sup> Other objectives include:

- To propose draft framework agreements, model regulations, formulations and analyses of emerging trends in States' practice
- To assist in the revision of existing Treaties, assist in the identification of areas in which new Treaties are required and prepare drafts thereof
- To conduct studies on legal matters of interest to the Union and its member states
- To encourage the teaching, study, publication and dissemination of literature on international law, in particular laws of the Union.

See art.4 of the Draft Statute of the African Union Commission on International Law.  
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on the continent.<sup>998</sup> Beyond the recent sycophantic and propaganda initiatives,<sup>999</sup> such a body should play an active role in highlighting Africa's rich diversity of cultures and traditions and how it can influence supranational programmes and initiatives.<sup>1000</sup> Unlike the other institutions discussed above, the TCAF should only have an advisory status.

Provided with the necessary wherewithal, these institutions, together with principal organs such as the PAP, AU Commission and the ACJ&HR, are capable of placing Afro-supranationalism on a value-driven, development-oriented and socio-cultural sensitive course.

#### **5.4.2.4 Ensuring compliance with the decisions of a supranational AU**

The transfer of powers to an international organisation, especially concerning its corollary of expected compliance with rules, remains a contentious issue in a largely state-centric global order. The imperatives, political and/or economic, of establishing international organisations are not in doubt, a fact which is evident in the global proliferation of international organisations. The problem, however, lies in the non-acceptance of institutional directives as a legitimate consequence of institutional creation. Put differently, the difficulty is in accepting the hierarchical superiority and binding nature of international obligations.

Although compliance is regarded as an 'organisational presumption',<sup>1001</sup> practice reveals significant deficiencies of levels of compliance. Even in an organisation such as the EU, which is prided as a model of supranationalism, studies show a high level of infringements. In the 1990s, 10% of EU directives were not complied with and around 1,000 infringement proceedings were

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<sup>998</sup> The King of Asante in Ghana has expressed similar view. See *New African Magazine*, October 2009, 54.

<sup>999</sup> A case in point is the Libyan-financed meeting of over 200 traditional rulers across Africa in which the Libyan leader, Muammar Ghaddafi, was crowned as the 'King of African Kings'. In addition to this, the traditional leaders rubber-stamped Ghaddafi's vision of a 'United States of Africa'. See *Ibid*, 53-54.

<sup>1000</sup> For a detailed discussion on how African traditional institutions can contribute to governance and development, see ECA (2007).

<sup>1001</sup> Chayes & Chayes (1993) 179.

brought against defaulting member states.<sup>1002</sup> Although there has been marked improvements over the years,<sup>1003</sup> this goes to prove that good compliance is not necessarily a programmed by-product of supranationalism. While supranationalism depends on good compliance for its survival and evolution, the reality of international relations entails a nuanced approach of minimising the occurrence and effects of non-compliance.

Such an understanding is reflected in the studies on compliance. Neyer & Wolf conceptualise compliance as a process of two types: Initial non-compliance and a compliance crisis.<sup>1004</sup> Initial non-compliance may occur as a result of a member states' lack of the necessary resources, financial and human, to implement regulations and directives.<sup>1005</sup> It may also be the consequence of an elastic or ambiguous rule or obligation, and the referral to a Court for clarification may cause delay in implementation.<sup>1006</sup> Other factors which may motivate initial non-compliance include a lack of effective monitoring capacity, and a deliberate process on the part of a member state to either avoid the cost of compliance or bring about the reinterpretation of a contentious rule.<sup>1007</sup>

On the other hand, 'compliance crisis' is an outright disregard of the decision of an authoritative body.<sup>1008</sup> An example is where a member state simply ignores or adduces legal reasons for not wanting to comply with the final decision of a supranational (quasi) judicial body. In this regard, such a member state can question the legitimacy of the institution by either drawing attention to the inconsistent application of rules and/or the deficiency in the procedural

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<sup>1002</sup> See e.g. Neyer J & Zurn M, 'Conclusions – the conditions of compliance' in Joerges & Zurn (2005) 185.

<sup>1003</sup> Neyer & Zurn note that EU countries exhibited a compliance rate of over 96% in relation to the internal market programme. Also, the deficit in terms of compliance with directives was reduced from 6.3% in November 1997 to 2.5% in May 2001. See Ibid.

<sup>1004</sup> Neyer J & Wolf D, 'Analysis of compliance with international rules' in Joerges & Zurn (2005) 45.

<sup>1005</sup> Ibid; See also Chayes & Chayes (1993) 188-197.

<sup>1006</sup> Neyer & Wolf in Joerges & Zurn (2005) 46; See also Franck (1988) 714.

<sup>1007</sup> Neyer & Wolf in Joerges & Zurn (2005) 45-46.

<sup>1008</sup> Ibid, 46.

framework under which the decision was made.<sup>1009</sup> An example of the latter, according to Franck, is when an ad-hoc adjudicatory body makes a decision.<sup>1010</sup> Another example is when there is little or no economic incentive to induce compliance.<sup>1011</sup>

The above exposition shows the contours of compliance and how different variables can influence states' behaviour. As with Europe, non-compliance in Africa can be attributed to political, economic, legal and social factors. As such the departure point of any discussion of compliance with supranational AU decisions should be an acceptance of the inevitability of non-compliance. Such an understanding will not only provide useful guidelines for minimising the incidence of non-compliance but also designing compliance mechanisms that takes into account the political and economic realities on the continent. Thus the discussion below will explore possible means of ensuring compliance with the decisions of supranational AU.

*a) Strengthened national institutions*

The effectiveness of any supranational arrangement requires a concrete synergy between a supranational entity and its corresponding national institutions. As supranational institutions cannot literally enforce their own rules within the jurisdiction of member states,<sup>1012</sup> thus the onus of enforcement shifts to national institutions. As such, it is imperative that national institutions possess the necessary efficiency to translate supranational objectives into domestic norms.

The independence of national institutions such as the judiciary, the parliament and the electoral body are essential for the entrenchment of democratic standards and goals. When democratic values are already ingrained in

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<sup>1009</sup> Franck (1988) 735-752.

<sup>1010</sup> Ibid, 752. See also Neyer & Wolf in Joerges & Zurn (2005) 43.

<sup>1011</sup> Kufuor links this point to the high incidence of non-compliance in ECOWAS. See Kufuor (1996) 7.

<sup>1012</sup> Theorists argue that international organisations cannot do this because they lack both the monopoly of legitimate force and national identity to compel consent. See e.g. Zurn in Joerges & Zurn (2005) 5.



domestic practice, it becomes easier for member states to accept supranational standards as norms.<sup>1013</sup> Therefore, the first step in ensuring compliance, or minimising the incidence of non-compliance, with the decisions and rules of a supranational AU should begin with an appraisal of democratic standards in member states. Where any state falls short of the laid down criteria, assistance should be offered. In this regard, the AU (vertical) and democratic member states (horizontal) could provide both human and material resources in aiding such state to build its national institutions.<sup>1014</sup> However, if such state refuses to accept this form of assistance or deliberately maintains its autocratic practices, it should fall outside of the supranational AU framework.<sup>1015</sup> As noted earlier, having an organisation of (democratic) like-minded states does not necessarily eliminate non-compliance, rather it allows for better anticipation and strategic reduction of the incidence of non-compliance.

*b) Enhanced incentive for compliance*

As a rule for ensuring compliance, the deviant-centred strategy is premised on the idea that a states' self-interest will determine its level of compliance. Where compliance conflicts with such interest(s), then the state is likely to ignore compliance.<sup>1016</sup> Thus, Pettit views that the institutional/organisational framework must incorporate mechanisms for motivating states to comply.<sup>1017</sup> Chayes & Chayes reject the view that non-compliant behaviour is motivated by calculated self-interest.<sup>1018</sup> Rather, their view is that non-compliance often stems from factors ranging from ambiguity in Treaty provisions to the lack of financial or administrative means to implement treaty standards.<sup>1019</sup>

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<sup>1013</sup> As Kufuor rightly observes, the prevalent situation in post-colonial Africa, where national executives routinely undermine the decisions of the national judiciary, explains the usual disregard of supranational decisions. Kufuor (1996) 7-8.

<sup>1014</sup> The EU offers wide-ranging support to member states, especially the CEEC, to enable them implement and enforce EU policies. See e.g. Neyer & Wolf in Joerges & Zurn (2005) 61.

<sup>1015</sup> This is the underlying idea of the earlier proposed 'nucleus AU'. See section 5.4.1 above and also Chapter 4.

<sup>1016</sup> Pettit in Goodin (2006) 71.

<sup>1017</sup> Ibid, 72.

<sup>1018</sup> Chayes & Chayes (1993) 176; see also Neyer & Wolf in Joerges & Zurn (2005) 45-46, 61-62.

<sup>1019</sup> Ibid, 188-197.

While the above-mentioned theories differ on the cause(s) of non-compliance, they, explicitly or implicitly, highlight the necessity of providing incentives to ensure compliance. As with the EU, member states of the AU are also constrained by lack of administrative and financial capacity to implement integration objectives.<sup>1020</sup> As such, in addition to earning the 'badge of respectability' as a result of being a member of a supranational AU, mechanisms should be devised for enhancing and compensating for compliance. As noted in the foregoing analysis, both vertical and horizontal assistance should be offered for developing the capacity to comply with supranational AU rules. Thus, the attractiveness of a supranational AU should not only be its democratic nature but also its potential as a framework for improving the economic conditions of its member states.

*c) Participatory policy-making process*

As highlighted in the foregoing, the participation of civil society in supranational activities is crucial. Not only will this enhance the legitimacy of supranational institutions, it also ensures a keen sense of ownership by the people. This kind of participation ensures that citizens will become more cognisant of the origins of rules and regulations, the obligations of member states and the compliance mechanisms. In addition, enhanced participation will propel civil society to get more involved in playing an (in) direct role in monitoring compliance, reporting infringements and exerting pressure on member states to comply.<sup>1021</sup>

*d) Enforcement through national institutions*

Closely related to the issue discussed earlier, on strengthening national institutions, is the politically pragmatic idea of using established national institutions as enforcing instruments. This point is particularly important for

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<sup>1020</sup> According to a survey conducted by the ECA, the major factor constraining the implementation of regional integration initiatives is the lack of resources (68%). Close to 75% of the countries polled cite this as a major hindrance, 44% point to the lack of capacity. See AU & ECA (2006) 73-74.

<sup>1021</sup> See e.g. Kufuor (1996) 9-10; see also Neyer & Wolf in Joerges & Zürn (2005) 51-52, 57-59.

ensuring compliance with ACJ&HR judgements. In order to minimise the possibility of non-compliance, it is essential that domestic courts are prioritised not only as partners but also as a direct guarantor and enforcer of supranational rules and regulations.<sup>1022</sup> This will impact on the gradual internalisation and legitimacy of supranational laws as part of the domestic *grundnorm*.

*e) Decentralised monitoring system*

In addition to the monitoring duty of the AU Commission, it is also important to establish other ad-hoc specialised monitoring bodies. Such bodies, composed of civil society and technical experts, should be designed to complement the efforts of the Commission by supervising the compliance with certain standards and guidelines. These could include compliance with ACJ&HR judgements, consumer protection, environmental standards and human rights protection. To minimise costs, these bodies should only be constituted when it is absolutely necessary, for example, where the AU Commission lacks administrative competence to monitor. The advantage of a decentralised monitoring system is that it engenders objective and thorough evaluation.<sup>1023</sup>

*f) Coordinated sanctions*

Apart from the prevalent deficiency of good governance and democratic values at the national level, the major reason why sanctions are ineffective in the African system is that member states have little to lose despite the imposition of sanctions. The low level of intra-African trade entails that trade and economic embargos amount to an inconsequential tool. In order to ensure the efficacy of sanctions, it is crucial that the organisation devises a synergised programme of sanctioning which includes the international community.

In this regard, the AU should engage the UN, EU and other relevant players in the process of sanctioning errant member states. As such, any sanction

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<sup>1022</sup> See e.g. Kufuor (1996) 11; see also Musila (2007) 10.

<sup>1023</sup> See e.g. Neyer & Wolf in Joerges & Zurn (2005) 51.

imposed will not only have the backing of these bodies but also incorporate their facilities and disciplinary mechanisms. However, this measure should only be employed in a case of 'compliance crisis', where a member state, in spite of all entreaties, ignores the decisions of the organisation.

## **5.5 Summary**

Having considered the feasibility of a supranational AU, especially considering the fundamentals, this chapter set out to investigate how such factors can be channelled into a supranational institutional framework. To put the analysis in perspective, the discussion began with a theoretical outline of the imperatives of supranational institutional design/building. Underpinning the theories discussed are the ideas that institutions should be designed within the context of the peculiarities of their environment and the need to develop effective compliance mechanisms.

Further, it considered the different perspectives on the need to transform the AU. This discussion focused on the PAP, ACJ&HR and AU Commission. The common thread that runs through these perspectives include an affirmation of the gradualist approach to African integration and the idea that all 53 member states must be included in the integration process.

In conclusion, this chapter discusses the institutional organisation of a future supranational AU. The departure point of such discussion is that membership should be based on adherence to democratic norms and standards. This chapter demonstrates how these norms should reflect in the legal framework, institutional structure and compliance mechanisms of the organisation.



## Chapter 6

### Final analysis: *Quo vadis Africa?*

Just because we cannot see clearly the end of the road...that is no reason for not setting out on the journey. On the contrary, great change dominates the world, and unless we move with change we will become its victim.

John. F. Kennedy<sup>1024</sup>

Traveller, you must set out  
at dawn. And wipe your feet upon  
the dog-nose wetness of the earth

Wole Soyinka (Death in the dawn)<sup>1025</sup>

#### 6.1 Introduction

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6.3.1.1 Consensus on the meaning and application of 'shared norms  
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<sup>1024</sup> Cited in Nicholls G, *The challenge to scholarship: Rethinking, learning and research*. London: Routledge (2005) 113.

<sup>1025</sup> Moore G & Beier U (eds), *The penguin book of modern African poetry*. London: Penguin Books (1998) 246.

### 6.3.2 National recommendations

### 6.4 Contribution to practice

## 6.1 Introduction

Africa's search for unity, an idea that has taken different dimensions, has been going on for over four decades and will continue to be influenced by the political and economic variables of the 21<sup>st</sup> century. The advances made by the EU, especially in relation to changing the pre-existing political structure in Europe, have inspired a global pursuit of regional integration as a tool for unity and development. The establishment of the AU is Africa's answer to European supranationalism and its consequent achievements. The tacit indicators and verbal communications of its architects all point at the intention to use the organisation as a supranational platform for addressing Africa's socio-political and economic problems. With a truly functional and value-driven AU, Africa is poised to become the master of its own destiny.

This thesis aimed to situate Africa within the supranationalism discourse by investigating the feasibility of achieving the long desired political and economic integration. This was done through an in-depth theoretical analysis of regional integration and elements of supranationalism, an assessment of supranational attempts at the sub-regional level, and the key obstacles to attaining the desired level of supranationalism. Primarily focusing on continental integration, this work identified the primary obstacle to Afro-supranationalism as the unconditional membership ideology of the AU. An attempt was thus made to suggest mechanisms for addressing this.

The aim of this chapter is to present the summary of findings of the entire thesis, make recommendations on the way forward and indicate how this research can stimulate further studies on Afro-supranationalism.

## 6.2 Summary of research findings

The research question posed at the beginning of this study was to determine the feasibility of transforming the AU from a mere intergovernmental institution to a supranational entity. Put differently, the question was whether the existing politico-legal framework or prevailing political situation in Africa can lead to the establishment of a supranational structure. This study showed that the existing framework is deficient and suggested the adoption of a nuanced politico-legal framework, which is based on the cultivation of shared democratic norms and values.

As a point of departure, this study commenced with a theoretical analysis of regional integration. This analysis considered the political and legal understanding of regional integration, how supranationalism fits into the discourse and the relationship between state sovereignty and regional integration. It further contextualised this discussion by looking at the origins of regional integration in Africa and the different ideologies on the methodology of achieving African integration. Addressing the question whether Africa can integrate, it was found that while integration remains a developmental tool, it is not the sole elixir to Africa's political and economic woes. While the EU provides a useful lesson, it was noted that Africa should carve its unique integration path. It further found that the factors that will impact on African integration are ICT, democratic culture and investment by external actors, especially China, India and Brazil.

Having established a conceptual and theoretical framework for the scope of study, selected past and present supranational attempts in Africa were investigated. The aim was to evaluate the success and failings of such experiments in order to determine how it can provide useful lessons for the debate on continental integration. After an assessment of these sub-regional institutions, it was found that a number of common factors are responsible for the little or no movement toward supranationalism. This ranges from weak

institutional machinery, the disregard for democratic values and the rule of law at national levels, non-implementation of directives and regulations, overlapping and replicated membership of RECs, hegemonic threats, and political instability to democratic deficit at national level. The lack of political will on the part of member states remains a huge obstacle to realisation of supranationalism in Africa.

Against the background of identifying the key obstacles to the attainment of supranationalism at the sub-regional level, chapter four of the study investigated whether the AU is a supranational organisation. By testing the actual functioning of the organisation against the elements of supranationalism, it was found that the AU is yet to attain a supranational status although it has the potential. The proposition was that four key variables are at the core of the feasibility of supranationalism at the continental level: membership, harmonisation of laws, public participation and development.

The discussion on membership enjoyed some importance within the evaluation, especially concerning the identification of the AU's principle of unconditional membership as the primary obstacle to the cultivation and entrenchment of shared norms of democratic principles. Accordingly, the study explored the APRM process as a potential politico-legal tool for regulating membership of the AU, thereby creating a 'nucleus AU'. The study established that for the process to be an authentic tool for assessing eligibility of membership, the APRM must both be a compulsory process and possess legal status. The study was, however, quick to add that the proposed 'nucleus AU' is not aimed at replacing the AU. Rather, it presents a nuanced approach of strengthening and cultivating shared democratic norms.

Effective harmonisation of laws and policies is identified as an essential legal tool which gives impetus to the political process of integration. It was found that the fragmentation of legal systems is one of the key impediments to the



realisation of continental harmonisation in Africa. It further explored the two main ideological currents on how Africa should proceed with the harmonisation project. The first suggests that harmonisation of laws should be based on a neutral, international law model. The second holds that the harmonisation project should be set against the background of cultural values and norms of the African society. The study found that there can be some convergence between the two ideologies.

On public participation, the study highlighted the need to locate the people within the process of regional integration. The study emphasised the need to devise nuanced consultation mechanisms. Citing examples in the financial and ICT sectors, it was found that the private sector can play a key role in fast-tracking regional integration.

On the last variable, development, the study engaged in a theoretical discourse of the African development agenda. The purpose was to establish how a supranational institution can anchor a viable continental development strategy. It was found that the failure of development strategies on the continent lies in the inability to create culture-centred, people-oriented development goals. The stifling of democratic values and practises in certain African states ensures that the people are not involved in the crafting of policies affecting them. In addition, the dependency on foreign aid, corruption, lack of political will to transfer authority to regional institutions, and political instability were found to be major impediments to development.

Based on the findings in the previous chapters, chapter five sets out to investigate how the principles of democratic governance can be channelled into the establishment of a supranational AU. The analysis on the theories of institutional design showed that it is imperative that institutions are designed around the peculiarities of the environment they are meant to serve. Such consideration should then shape further discussion on the mandate, functions

and the feasibility of compliance with the institutional decisions. After considering institution design, the study engaged in a theoretical discourse of some of the dominant opinions on the issue of transforming the AU into a supranational entity. In contradiction to the approach of this study, it was found that none of the opinions advocated regulated membership for the AU. In addition, these opinions are more in tune with the gradualist approach to African integration.

Having evaluated the viewpoints on institutional transformation, the study advanced to establishing a normative framework for a future supranational AU. The analysis pointed out some of the issues that should guide the quest for institutional transformation. It found that appellations such as 'United States of Africa', 'Union Government of Africa' and 'African Constitution' presume a state of readiness and can thus stymie the capacity of the integration process to evolve according to the dynamics of the 21<sup>st</sup> century. As such, institutional development should be premised on current realities and feasible targets. It was thus found that the cultivation and entrenchment of democratic values and norms be reflected in the institutional structure and mandates of the organisation.

Overall, this study found that the prevalent political structure of unconditional membership is antithetical to the realisation of a supranational AU. The proposed 'nucleus AU' can provide an alternative framework for advancing continental unity, one which is based on fundamental democratic values. As noted in the introduction, the analytical framework of this thesis is motivated by the dearth of research on how unconditional membership negatively impacts on the progress of African integration. In this regard, this study aims to stimulate multi-disciplinary research on nuanced ways of addressing the quest for quality-oriented unity.

### **6.3 Further recommendations**

Africa's long walk towards closer cooperation and integration has by no means reached a definitive phase. The plethora of initiatives and attempts at forging a supranational framework to address many of Africa's problems continues to falter as a result of multiple factors which have been identified in the preceding chapters. In light of these, this study proposed the 'nucleus AU' as the suitable means of attaining continental supranationalism. This idea is hinged on the review of AU membership criteria, with strict adherence and uniform application of shared norms and values as the primary determinate of membership. Building on recommendations already proffered in previous chapters, this section seeks to highlight the essential catalysts for the establishment and functioning of the 'nucleus AU'. This will be done under two rubrics: transnational and national recommendations.

#### **6.3.1 Transnational recommendations**

##### **6.3.1.1 Consensus on the meaning and application of 'shared norms and values'**

The core of the 'nucleus AU' idea is the strict adherence to shared norms and values. As highlighted in the preceding chapters, these include good governance, respect for fundamental rights and transparent electoral processes. Although all of these are espoused in AU and other sub-regional instruments, the reality on the ground shows that little or no meaning is attached to them. The spate of unconstitutional changes of government, either through military coups or subversion of constitutional principles by incumbents, demonstrate that Africa is far from entrenching the culture of shared norms and principles. How then can the continent arrive at a consensus on the meaning and application of these principles?

As suggested in chapter 5, the effective realisation of a democratic AU hinges on the enactment of a reformed AU Constitutive Act.<sup>1026</sup> Such a comprehensive

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<sup>1026</sup> See section 5.4.2.2

document will amongst other provisions, clearly stipulate, and explain, the objectives and principles of the organisation. This will include the clear and concise fleshing out of concepts such as ‘legitimate order’, ‘unconstitutional change of government’, ‘fundamental rights’, and ‘good governance’ as well as the consequences in respect of violations. Ambiguity in the treaty language should be steered away from, a factor which Chayes & Chayes identify as one of the reasons for non-compliance with international regulations.<sup>1027</sup> To ensure legitimacy, these concepts should be explained within the context of traditional African values, such as ‘*Ubuntu*’, which places emphasis on respect for human rights and governance.

In order to ensure the uniform and substantive application of these norms, it is essential that measures that ensure compliance and monitor enforcement are put in place. As discussed in chapter 5, these measures include administrative and financial incentives for compliance, coordinated sanctioning system and enforcement through national institutions.<sup>1028</sup>

### **6.3.1.2 Regional *hegemons* must take the lead**

Regional *hegemons* can either have a positive or negative impact on the integration process. With their economic and military prowess, regional powers can monopolise the majority of political and economic gains of regional integration, thereby creating a climate of mistrust.<sup>1029</sup> On the other hand, such *hegemons* can use their stature to influence attitudinal change and thus spur the integration process. As evident in the ECOWAS, a regional *hegemon* can significantly contribute to the maintenance of regional security.<sup>1030</sup> As such, regional powers can complement the efforts of a supranational AU by promoting the principles of democracy and good governance not only within but outside their boundaries. A democratic regional *hegemon* will have the moral and

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<sup>1027</sup> Chayes & Chayes (1993) 188-197.

<sup>1028</sup> See section 5.4.2.4.

<sup>1029</sup> See section 3.4.4 in chapter 3.

<sup>1030</sup> See e.g. Adebajo (2005) 89-90.

political clout to exert diplomatic pressure on its errant neighbour(s) to adopt a democratic culture. Regional *hegemons* can also play a key role in offering financial and administrative assistance to other member states in developing their institutions thus increasing their capacities to adhere to democratic standards.<sup>1031</sup>

However, the democratic culture within African regional *hegemons* leaves much to be desired. Except for South Africa, other regional *hegemons* such as Kenya, Nigeria, and Egypt are serial violators of sacrosanct principles of democratic governance. They have weak democratic institutions, struggle with conducting transparent elections and rank low in surveys on good governance.<sup>1032</sup> Simply put, these regional *hegemons* suffer from credibility deficiency.

The reality is that African integration cannot make meaningful progress without the active role and exemplary leadership by regional *hegemons*. Starting from the sub-regional levels, democratic and prosperous regional *hegemons* have the potential of infusing continental integration with the requisite legitimacy and success. In as much as the inclusion of regional *hegemons* in the 'nucleus AU' framework will be a strategic move, it is of the essence that the underlying principles of this idea are not sacrificed. As such, the basis for including the regional *hegemons* should remain strict adherence to democratic ideals and norms.

### 6.3.1.3 Enhanced monitoring systems

As noted in the preceding chapter, the task of monitoring and entrenching democratic values and rule of law cannot be the exclusive preserve of a

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<sup>1031</sup> For example, South Africa is involved in the improvement of infrastructure and the training of legal officers and civil servants from the Democratic Republic of Congo. See e.g. 'South Africa and Democratic Republic of Congo sign multi-sectoral agreements'. Available at <http://www.unpan1.un.org/intradoc/groups/public/.../cpsi/unpan027213.pdf> (Accessed 20 October 2009).

<sup>1032</sup> According to the Freedom House Survey of Political and Civil Liberties, both Nigeria and Kenya were ranked partly free. See Freedom House Survey (2009). In the Ibrahim Index on African Governance, Kenya and Nigeria ranked 17 and 39 respectively. Available at <http://site.moibrahimfoundation.org/index-2008/> (Accessed 3 November 2009).

supranational AU. It is impossible for the organisation to monitor every aspect of state and non-state actors' attitude to stipulated norms and principles. In this sense, there is a need for civil society to play a complementary role in monitoring and reporting of best practices and violations.

Civil society initiatives such as the Ibrahim Index of African Governance and AU Monitor are commendable. However, much still needs to be done. More CSOs should be involved in monitoring the implementation of good governance standards at national, sub-regional and continental levels. Such involvement should range from general to sectoral analysis of the progress of African integration. These initiatives should, however, not exist in isolation. Efforts should be made to coordinate and incorporate their findings into the broader organisational framework of a supranational AU. This will in no way diminish the objectivity or independence of such initiatives; rather it will strengthen the pursuit and attainment of a common goal.

#### **6.3.1.4 Nuanced methods of ensuring public participation**

In addition to traditional methods of public participation - such as referendum, direct election of supranational legislators and the recognition of civil society fora, it is important to explore other ways of getting the people involved in the integration process. One such measure is the previously proposed inclusion of African integration in the curricula of African universities.<sup>1033</sup> Asante explains that teaching African integration has the potential to 'infuse among the younger generations of Africans a tradition of integrative spirit and thinking'.<sup>1034</sup> As the AU Audit Report suggests, such education should also extend to internship programmes by the AU Commission.<sup>1035</sup> This approach will go a long way in enhancing the knowledge of African youth on integration matters and in turn broaden the pool of skilled human resources necessary for integration.<sup>1036</sup>

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<sup>1033</sup> Asante (1997) 175; see also Fagbayibo (2009) 18-25.

<sup>1034</sup> Asante (1997) 175.

<sup>1035</sup> AU Audit Report (2007) 54.

<sup>1036</sup> Fagbayibo (2009) 20.

Other measures should include the setting up of national focal points for discussions and analyses of integration matters. Such forums should be broad based - composed of government officials and civil society. Linked to the AU Commission and relevant national agencies, the forums should be charged with increasing awareness of integration through constant interaction with the general populace. For instance, the forums could promote horizontal transnational affiliations among students, artistes, traders and professionals.

#### **6.3.1.5 Capacity building for African integration**

As pointed out in the previous chapter, the effective functioning of regional institutions is dependent on a highly efficient and professional technocratic staff structure. Equally important is the need to design a uniform policy for the training of national officials responsible for implementing supranational directives. In this regard, member states and international partners should provide the necessary funding for programmes that enhances the awareness of police, judicial, immigration and other relevant government officials on integration issues. Such programme should provide regular guidelines and directions, through seminars and instruction manuals, on regional integration initiatives and the responsibilities of officials in this regard. In addition to this, it is also imperative that relevant government departments incorporate these measures as part of institution directives and orders.

#### **6.3.2 National recommendations**

As noted in the previous chapter, the 'nucleus AU' can only be built on an entrenched democratic practise across AU member states. As such, there is a need for nuanced political will to establish and strengthen critical national institutions necessary for the development of the 'nucleus AU' idea. Such institutions include the judiciary, legislature, police, electoral commission and anti-corruption agencies. These institutions are important implementing agencies of supranational directives and are thus required to possess a corresponding amount of independence and legitimacy.

To achieve these, certain factors are essential. Firstly, member states should make the internalisation<sup>1037</sup> of the ethos of shared norms and principles an utmost priority. In this regard, the principles of good governance and rule of law espoused in treaties and protocols should be implemented not as transnational directives but as part of national goals and objectives.

Secondly, member states with satisfactory democratic credentials should be more proactive in ensuring that other member states meet the desired criteria. In this sense, such member states, with good democratic records, should provide both human and financial resources to help develop the capacities of fellow member states to meet the requirements of the 'nucleus AU'. Where certain member states continue to engage in acts contrary to espoused shared norms, the so called 'democratic member states' should employ all means to highlight, through diplomatic negotiations or sanctions, such aberrations.

Thirdly, different indexes on democratic practise in African states show that only a handful would pass the strict test of becoming a member of the 'nucleus AU'. What this implies is the reality that not all states will initially be part of the 'nucleus AU' idea. As such, states that already satisfy the prerequisite should kick-start the process, with the understanding that other states will, upon the fulfilment of prescribed conditions, join later. The operationalisation of the 'nucleus AU' is not dependent on the numbers; rather it requires a commitment to democratic norms and values.

#### **6.4 Contributions to practise**

This study is a multi-disciplinary exercise which encompasses fields such as international law, political science, international relations, economics and sociology. In the course of investigations, it was found that for Africa to make a significant push with regional integration; nuanced and radical methods should

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<sup>1037</sup> Internalisation would require a legislative transformation or incorporation of international law into domestic norms and regulations. This is discussed in chapter 3, section 3.4.2.



be considered. As such, this study argued for a review of the ‘unconditional membership’ ideology of African integration. Although this study is an addition to the numerous works on African integration, its pioneering nature lies in its examination and presentation of the methodology of regulating membership of the AU. The dearth of scholarly materials on unconditional membership can perhaps be attributed to the acceptance of the logic that no African state should be left behind in the march towards full unity and cooperation. As such, the shortage of materials is not so much a question of intellectual aloofness as it is the consideration of this topic as impractical. In this regard, this study introduces a nuanced pattern of discourse to African integration by highlighting the possibility of such a task.

Without laying any claim to a definitive approach, this study will serve as a theoretical stimulus for future research on general and specific analysis on the direction of African integration. By critically engaging the so-called basis for African integration, pan-Africanism, this study provides a valuable practical guide for an unconventional understanding of the problems of African integration – a contribution that will immensely assist related research projects.

In future, researchers may engage in an empirical analysis of the nexus between integration and democracy. The result of such study may further provide sufficient justification(s) for reviewing AU membership criteria. Furthermore, researchers may explore a comparative study of membership structure of international institutions and how it impacts on institutional development. In addition, future research may help determine how relevant traditional African values can help shape the integration discourse.

It is expected that this study may contribute to the design of policy frameworks aimed at strengthening of African regional institutions. Even if the core proposal of this study is not fully implemented, it will at least influence the serious

consideration of democratic norms as a fundamental component of the integration process.

Beyond the contribution to the body of knowledge, this study is an affirmation of the views of Africans, who desire qualitative integration – woven around the principles of shared democratic values and norms.

**Table 6.1: Tabulated overview of the key requirements for a ‘nucleus AU’**

	<b>Imperatives (legal, political, economic and social)</b>	<b>Feasibility</b>	<b>Likely obstacles</b>
<b><i>Nucleus AU</i></b>	Conditional membership	The APRM was considered as a likely tool for effecting this.	The ‘wisdom’ of including all African countries in the integration agenda is ingrained and will be difficult to change.
	Democratised national institutions	The strengthening of critical institutions - such as judiciary, legislature and electoral commissions - is important for the internalisation of supranational goals and objectives.	The entrenched rationalisation of impunities, especially the consideration of the ‘Government of National Unity’ (GNU) idea as a corrective measure, is a huge threat to democratisation.
	Harmonisation of laws	Since Africa remains a part of the global community, harmonisation of laws and policies will	Lack of political will, sentimental attachment to colonial legal traditions and



		reflect the principles of globalisation. However, such project should be underlined by the peculiarities of African societies.	state sovereignty.
	Enhanced participation of the people in the integration process	Direct election of the PAP members, referendum on integration initiatives, teaching of African integration at universities, full recognition of ECOSOCC, recognition of traditional leaders' forum.	High illiteracy levels across the continent and the growing number of autocratic regimes can frustrate this goal.
	Effective compliance	Provision of administrative and financial incentives for compliance, strengthened national institutions, participatory policy-making process, enforcement through national institutions and coordinated sanctioning system are some of the factors that can ensure effective compliance.	Limited capacity of most African states to provide financial and administrative incentives for compliance and widespread deficit of democratic practises are likely hindrances.



	Development	There must be active and genuine participation of every segment of the society in the crafting of development strategies.	Poor state of African economies, good governance deficit, lack of political will and rampant corruption are major obstacles.
	Regional <i>hegemons</i>	Active roles of regional <i>hegemons</i> like Nigeria and South Africa in the initiation of integration initiatives and assistance to other member states is indicative of the potential of regional <i>hegemons</i> to drive development.	Little or no adherence to democratic norms diminishes their credibility and legitimacy to drive regional integration.

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