

The African Union

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A. Summary

The article examines the objectives and institutional structure of the African Union (AU) in the light of the experiences of its predecessor the Organization of African Unity (OAU) as well as the African Economic Community (AEC). The OAU largely exercised a political function. The African Union has a much broader mandate, which includes economic integration. Among the new features of the AU are its efforts to be more people-centered through the establishment of a Pan-African Parliament, the Economic, Social and Cultural Council (ECOSOCC) and an emphasis on gender issues. Human rights is included in the mandate, as is conflict management and resolution, including humanitarian intervention. A development blueprint, New Partnership for Africa's Development (NEPAD), has been established with peer review as its main implementing mechanism. The Constitutive Act of the AU¹ creates a number of new institutions, many of them not yet operational. Attention is drawn to the dangers inherent in the proliferation of institutions.

On 26 May 2001 the Constitutive Act of the African Union entered into force. This paved the way for the establishment of the AU. The new organization, with 53 States as Members, was founded with the twin goals of furthering the economic integration and political unity of Africa. This ushered in a new phase in

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¹ Constitutive Act of the African Union, 11 July 2000, reprinted in: ILM, vol. 41, 2002, 1029 (hereinafter: AU Act). All the countries of Africa except Morocco are members. Morocco withdrew its membership from the OAU in 1984 when the Sahrawi Arab Democratic Republic (Western Sahara) was admitted as a member.

Africa's continental cooperation, a process which had started almost 40 years earlier.

B. Background

I. Political Cooperation: OAU

The Heads of State and Government of 32 then most recently independent African states, meeting in Addis Ababa in May 1963, established the first pan-African intergovernmental organization, the Organization of African Unity (OAU). The OAU Charter,² the legal instrument establishing the OAU, was signed on 25 May 1963 and entered into force on 13 September 1963.³ The formation of an African continental intergovernmental organization followed similar developments in other regions, notably the Americas and Europe, where continental bodies had been established in 1948 and 1949 respectively.⁴ It was clear from the start, however, that the new regional body would reflect the unique features of the continent it was created to serve – a continent rich in human and natural resources, but deeply affected by centuries of exploitation, epitomized by slavery and colonialism and subsequently by the exploits of the super powers during the Cold War. It was clear at the beginning of the 1960s that the people of Africa had to join forces to protect their common interests, but it was not obvious how this was to be done.

Preparatory meetings preceding the establishment of the OAU were characterized by divergence of opinion regarding the level of economic integration and political unity to be pursued by the new body. Two groupings with divergent views on how continental integration was to be approached crystallized on the continent. On the one hand, Ghana and Algeria, the most prominent members of

² Reprinted in: *Christof Heyns* (ed.), *Human Rights Law in Africa 1998, 2001*, 117; ILM, vol. 3, 1963, 1116 (hereinafter: OAU Charter).

³ *Malawa* is critical of the widely accepted understanding that 25 May 1963 and not 13 September marked the birth of the OAU. See *Tjunjana Malawa*, *Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of The African Union*, *African Yearbook of International Law (AfrYIL)*, vol. 9, 2001, 22–23.

⁴ The Organization of American States was established in 1948 but can trace its roots back to the International Union of American Republics established in 1890. The Council of Europe was established in 1949. In the area of economic integration, the European Economic Community (later the European Union) was established in 1957 following the European Coal and Steel Community established in 1951. The Arab League, a regional organization bringing together Arab countries in the Middle East and North Africa, was established in 1945. The Arab League is however not a 'continental organization' like the OAU or OAS since its Member States traverse the African and Asian continents.

of colonialism and *apartheid*, were essentially political in nature. Nevertheless, the OAU Charter did open up some space for economic cooperation. Over the years, however, the OAU remained focused mostly on the political aspects of its mandate, particularly the goals of promoting solidarity and eradicating colonialism, and left the issue of economic cooperation largely untouched.¹¹

The OAU played a key role in the development of continental norms and standards on diverse issues such as human rights, the environment, natural resources and refugees. Conventions adopted under the auspices of the OAU include the African Convention on the Conservation of Nature and Natural Resources,¹² the Convention Governing the Specific Aspects of Refugee Problems in Africa,¹³ the Cultural Charter for Africa,¹⁴ the Convention for the Elimination of Mercenaries in Africa,¹⁵ the African Charter on Human and Peoples' Rights (African Charter),¹⁶ the African Charter on the Rights and Welfare of the Child,¹⁷ the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa,¹⁸ the African Nuclear-Weapon-Free Zone Treaty,¹⁹ the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,²⁰ and the OAU Convention on the Prevention

¹¹ *Frans Viljoen*, *The Realisation of Human Rights in Africa through Sub-regional Institutions*, AfrYIL, vol. 7, 1999, 185.

¹² African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, UNTS, vol. 1001, 3, entered into force 16 June 1969.

¹³ Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, UNTS, vol. 1001, 45, entered into force 20 June 1974.

¹⁴ Cultural Charter for Africa, 5 July 1976, entered into force 19 September 1990, available at: <http://www.africa-union.org/home/Welcome.htm>.

¹⁵ Convention for the Elimination of Mercenaries in Africa, 3 July 1977, OAU Doc. CM/433/Rev.L, Annex I (1972), entered into force 22 April 1985.

¹⁶ African Charter on Human and Peoples' Rights, 27 June 1981, reprinted in: ILM, vol. 21, 1982, 58, entered into force 21 October 1986.

¹⁷ African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

¹⁸ Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa, 30 January 1990, reprinted in: ILM, vol. 30, 1991, 773, entered into force 22 April 1998 (hereinafter: Bamako Convention).

¹⁹ African Nuclear-Weapon-Free Zone Treaty, 11 April 1996, reprinted in: ILM, vol. 36, 1996, 698, has not entered into force.

²⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, AU Doc. Assembly/AU/Dec.25 (II) para. 2, will enter into force 25 January 2004.

the so-called Casablanca Group, promoted the formation of a Union Government of African states with among other things a common market and currency.⁵ The vision of this group was a continental political and economic union characterized by substantial ceding of state sovereignty to a continental body and a high level of economic integration and political unity.⁶ On the other hand, the so-called Monrovia Group, which comprised such countries as Nigeria and Côte d'Ivoire, advocated a loose version of economic cooperation characterized by retention of states' sovereignty and relatively low levels of economic integration and political unity.⁷ The compromise between the two views reached at the end of the negotiations tilted towards the Monrovia Group's vision of a relatively loose cooperation in both political and economic spheres.⁸

According to its Charter, the OAU had five purposes:⁹ first, to promote the unity and solidarity of African states; second, to coordinate and intensify African states' collaboration and efforts to achieve a better life for African peoples; third, to defend the sovereignty, territorial integrity and independence of the Member States; fourth, to eradicate colonialism in all its forms; and, last, to promote international cooperation taking into account the UN Charter and the Universal Declaration of Human Rights.¹⁰

It is clear from its objectives and principles that the OAU leaned towards the goal of political unity more than the goal of economic integration. To a large extent this is a reflection of the fact that the main concerns of the then newly independent founding members of the OAU, such as defending their newly obtained political independence and asserting state sovereignty, as well as pursuing the end

⁵ *Gino J. Naldi*, *The Organization of African Unity: An analysis of its role*, 1999, 2.

⁶ The Casablanca Group envisaged the formation of a very close union that would have involved ceding of national sovereignty to the continental body. This conception of the continental cooperation has been achieved by the present day European Union.

⁷ *Naldi* (note 5).

⁸ *Id.*

⁹ OAU Charter (note 2), Art. 2 para. 1 lit. a-c.

¹⁰ The OAU Member States identified seven principles to guide them in pursuit of the five objectives of the organization set out above, OAU Charter, (note 2), Art. 3. Three of these principles, namely sovereign equality of Member States, pacific settlement of disputes and non-interference in the internal affairs of states were picked from the UN Charter. The remaining four principles reflected the interest and concerns of the newly independent states and the geo-political circumstances of the time. Thus the OAU Member States committed themselves to respect the sovereignty and territorial integrity of each state and dedicated themselves to the "total emancipation of the African territories" under foreign rule. Reflecting geo-political concerns in the Cold War era the OAU Member States affirmed the policy of non-alignment and condemned political assassination and "subversive activities on the part of neighboring States or any other State."

and Combating of Terrorism.²¹ In very few instances, however, were effective implementation mechanisms created.

Although there is significant overlap with the instruments of other international organizations, notably the United Nations (UN), the treaties developed and adopted under the aegis of the continental body are "by definition [...] aimed at addressing issues of specific concern to Africa."²²

Article 3 para. 2 of the OAU Charter established the principle of non-interference in the internal affairs of states. However, in the field of human rights, monitoring organs, similar to those under other regional arrangements, were established. The African Commission on Human and Peoples' Rights was established in 1987, following the entry into force of the African Charter the previous year. An African Human Rights Court will be established following the entry into force of the 1998 Protocol to the African Charter in January 2004. The African Committee of Experts on the Rights and Welfare of the Child has held three meetings since the African Children Charter entered into force in 1999.

Disputes between states are unavoidable and the OAU Charter established the Commission of Mediation, Conciliation and Arbitration (CMCA) to settle such disputes between Member States.²³ As conflicts increasingly took on an intra as opposed to an inter-state character, there was a need for more active involvement by the OAU in the form of conflict resolution. With the establishment in 1993 of the Mechanism for Conflict Prevention, Management and Resolution in Africa, the organization tried to address one of the most burning issues on the continent, however with very limited success.²⁴

II. Economic Integration: African Economic Community (AEC)

As economic cooperation at the continental level failed to get off the ground, African states turned to seeking economic integration at sub-regional levels. Hence

²¹ OAU Convention on the Prevention and Combating of Terrorism, 14 July 1999, entered into force 6 December 2002, available at: <http://www.africa-union.org/home/Welcme.htm>.

²² Report of the Interim Chairperson of the Commission on the Status of AU treaties (as at 17 June 2003), AU Doc. EX/CL/36 (III), para. 3.

²³ OAU Charter (note 2), Art. 19.

²⁴ Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, OAU Doc. AHG/DECL. 3 (XXIX). For an evaluation of the Mechanism, see e.g., *Monde Mayanga/Margaret A. Vogt*, An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution, available at: <http://www.ipacademy.org/Publications/Reports/Africa/PublRepoAfrAssessPrint.htm>.

various sub-regions on the continent established so-called Regional Economic Communities (RECs) aimed at strengthening the economic integration of their member countries, an arrangement that persists up to today.

The Economic Community of West African states, ECOWAS, was founded in 1975 and today has 15 Member States.²⁵ The Southern African Development Co-ordination Conference, SADCC, was established in 1980 by nine countries.²⁶ SADCC was transformed into SADC, the Southern African Development Community, in 1992 and today has 14 Member States.²⁷ Other African RECs include Common Market for Eastern and Southern Africa (COMESA),²⁸ Intergovernmental Authority for Development (IGAD),²⁹ Economic Community of Central African States (ECCAS),³⁰ and the Arab Maghreb Union (AMU).³¹

When it finally turned to economic integration in the last quarter of its lifespan, the OAU decided to spearhead this process by coopting the various RECs through the adoption of the Treaty establishing the African Economic Community (AEC or Abuja Treaty) on 3 June 1991.³²

The AEC Treaty entered into force on 12 May 1994. The drafters of the AEC Treaty envisaged the creation of the African Economic Community (AEC), using the RECs as its constitutive parts.

²⁵ Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

²⁶ Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe.

²⁷ In addition to the founding members of SADCC the following countries have joined SADC: Democratic Republic of Congo, Mauritius, Namibia, Seychelles, and South Africa.

²⁸ Treaty Establishing the Common Market for Eastern and Southern Africa, 5 November 1993, reprinted in: ILM, vol. 33, 1994, 1067 (entered into force 8 December 1994), Member States: Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

²⁹ Established 1996. Member States: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, and Uganda.

³⁰ Established 1983. Member States: Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Rwanda, and São Tomé and Príncipe.

³¹ Established 1989. Member States: Algeria, Libya, Mauritania, Morocco, and Tunisia.

³² Treaty Establishing the African Economic Community, 3 June 1991, reprinted in: ILM, vol. 30, 1991, 1241 (hereinafter: AEC Treaty). As of December 2003, the AEC Treaty had been ratified by 47 States. Djibouti, Eritrea, Gabon, Madagascar, Somalia, and Swaziland have not yet ratified the AEC Treaty.

According to its founding treaty, the AEC was established to pursue four objectives:³⁵ first, to promote economic, social and cultural development and the integration of African economies; second, to establish, on a continental scale, a framework for the development, mobilization, and utilization of the human and material resources of Africa in order to achieve self-reliant development; third, to promote cooperation in all fields of human endeavor in order to raise the standard of living of African peoples, and to maintain and enhance its economic stability; fourth, to coordinate and harmonize policies among existing and future RECs in order to foster the gradual establishment of the Community.³⁴

The AEC Treaty envisaged the establishment of the AEC as an integral part of the OAU.³⁵ The AEC Treaty provisions that deal with specific organs, procedures, relationships and modalities of operation consequently borrowed heavily from the OAU Charter and the OAU's mode of operation.³⁶ Furthermore, the AEC shared with the OAU its key bodies such as the Assembly of the Heads of State and Government, the Council of Ministers and the Economic and Social Commission, which had parallel sessions.³⁷

According to the AEC Treaty, the establishment of the AEC was to be achieved gradually in six stages of variable duration over a transitional period not exceeding 34 years.³⁸ At each of these six stages, there were specific activities that were to be implemented. The AEC Treaty envisioned the establishment of the AEC through the eventual amalgamation of the RECs. Thus, rather than viewing the regional economic bodies as rivals in its economic integration endeavors, the AEC Treaty viewed them as key partners and in fact as the building blocks of economic integration on the continent.³⁹

³⁵ AEC Treaty, *id.*, Art. 4 para. 1.

³⁴ The strategy that the AEC Treaty adopts to achieve these objectives is set out in the sixteen paragraphs of AEC Treaty, *id.*, Art. 4 para. 2.

³⁵ AEC Treaty, *id.*, para. 12 of the Preamble.

³⁶ *Jeggon Senghor*, *The Treaty Establishing the African Economic Community: an Introductory Essay*, *AfrYIL*, vol. 1, 1993, 183, 189.

³⁷ *Id.*

³⁸ AU Act (note 1), Art. 6 para. 1. Since the transitional period is calculated from the date of the entry into force of the AEC Treaty, it was envisaged that establishment of the AEC Treaty would be achieved by the year 2028. For a thorough analysis of the provisions of the AEC Treaty, see *Banoh Thompson*, *Economic integration in Africa: A milestone – The Abuja Treaty*, *African Journal of International and Comparative Law*, vol. 5, 1993, 743.

³⁹ AEC Treaty (note 32), para. 10 of the Preamble notes that "the efforts already made in sub-regional and regional sectoral economic cooperation are encouraging and justify a larger and fuller economic integration." In practical terms, the AEC Treaty identifies four points of intersections between the AEC and RECs. First, the AEC Treaty assigns several

III. Transformation of the OAU

With the end of the Cold War in the early 1990s and the simultaneous fall of apartheid and the onset of globalization, it became clear that the opportunity to reform the OAU – by then heavily criticized as an organization of rhetoric rather than impact – had presented itself. This opportunity was seized by *Muammar Gaddafi* of Libya.

Forty four African Heads of State and Government met at the fourth extraordinary Summit of the OAU in Sirte, Libya in September 1999 with the aim of discussing “ways and means of making the OAU effective so as to keep pace with the political and economic developments taking place in the world.”⁴⁰ After two days of debate, the leaders concluded that the OAU “needs to be revitalized in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances.”⁴¹ The African leaders adopted the Sirte Declaration, which called for the establishment of an African Union.⁴² The drafters of the founding instrument of the new organization were given specific instructions to perform their task “taking into account the Charter of the OAU and the Treaty Establishing the African Economic Community.”⁴³

Twenty five OAU Heads of State and Government meeting in July 2000 in Lomé, Togo, adopted the Constitutive Act of the African Union.⁴⁴ By March 2001 all members of the OAU had signed the AU Act, and the fifth extraordinary Summit of the OAU Assembly held on 2 March 2001 in Sirte, Libya, declared the

functions and responsibilities to RECs, in effect turning them into operational arms of the AEC in the implementation of its programs at regional level. Second, the AEC Treaty gives content to the AEC responsibility to coordinate and harmonize the policies of regional communities by requiring the channeling of these policies to the AEC as well empowering the AEC to give binding directives to RECs. Third, the pivotal role of RECs in the creation of the AEC is underlined by the assignment of specific tasks to regional communities at all six stages of the process leading to establishment of the AEC. Lastly, the AEC Treaty provides for representation of RECs in the AEC organs such as the Economic and Social Commission.

⁴⁰ Decision on the Convening of an Extraordinary Session of the OAU Assembly of Heads of State and Government in accordance with Art. 33 para. 5 of its Rules of Procedure, OAU Doc. AHG/Dec.140 (XXXV), para. 2.

⁴¹ Sirte Declaration, OAU Doc. EAHG/Decl. (IV) Rev.1, reprinted in: AfrYIL, vol. 7, 1999, 411, para. 6.

⁴² *Id.*, para. 8 lit. i.

⁴³ *Id.*, para. 8 lit. iii.

⁴⁴ Decision on the Establishment of the African Union and the Pan-African Parliament, OAU Doc. AHG/Dec. 143 (XXXVI), para. 3.

establishment of the AU.⁴⁵ Albeit, in terms of the AU Act, the African Union only became a legal entity on 26 May 2001.⁴⁶

The AU Act was set to replace the OAU Charter after a one-year transition period.⁴⁷ Accordingly, the 37th OAU Summit held in Lusaka, Zambia, approved a one year transition from the OAU to the AU starting in July 2001. On 9 July 2002 the African Heads of State and Government launched the AU in Durban, South Africa.

Since its entry into force in 2001, there have been three legally significant developments regarding the AU Act. In the first place the AU Assembly adopted the Protocol to the Act on the Peace and Security Council (PSC) during its first session held in Durban in July 2002.⁴⁸ The PSC would replace the largely ineffective Mechanism for Conflict Prevention, Management and Resolution in Africa.⁴⁹ Secondly, the First Extraordinary Session of the AU Assembly meeting in February 2003 in Addis Ababa, Ethiopia adopted a series of amendments of diverse nature to the Constitutive Act.⁵⁰ In the third place the Protocol to the Constitutive

⁴⁵ Decision on the African Union, OAU Doc. EAHG/Dec.1 (V), para. 1.

⁴⁶ AU Act (note 1), Art. 28 stipulates that the Act will enter into force 30 days after being ratified by two-thirds of the Member States of the OAU. On 26 April 2001 Nigeria became the thirty-sixth OAU Member State to deposit its instrument of ratification of the Constitutive Act of the African Union with the OAU Secretary-General. Therefore, the African Union became a legal reality a month thereafter, on 26 May 2001, when the Constitutive Act entered into force.

⁴⁷ AU Act (note 1), Art. 33.

⁴⁸ Decision on the Establishment of the Peace and Security Council of the African Union, AU Doc. ASS/AU/Dec.4 (I), para. 4.

⁴⁹ The Mechanism remained in place until the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted 10 July 2002, entered into force on 26 December 2003. available at: <http://www.africa-union.org/home/Welcome.htm> (hereinafter: PSC Protocol).

⁵⁰ Report of the First Extraordinary Session of the Assembly of the African Union, 3 February 2003, AU Doc. EX/Assembly/Rpt. (I) (hereinafter: Report of the First AU Assembly Extraordinary Session), para. 23. The main amendments adopted in this session include the addition of three new objectives aimed at ensuring more effective participation of women in decision-making, development and promotion of common policies and encouraging participation of African Diaspora. There are also three novel principles related to the right of the union to intervene in situations where legitimate order is under threat, restraint of Member States to enter into agreements which are incompatible with the principles of the African Union as well as prohibition of the use of territory of Member State to subvert other States. Other significant amendments include the elevation of Kiswahili as an official language of the Union and proscription of a possibility for a Member State to renounce its membership to the AU. The remaining amendments are mostly institutional in nature. Particularly worthy of mention being the addition of a new article providing for the Peace and Security Council (PSC). The

Act Establishing the African Court of Justice was adopted at the Maputo Summit in July 2003.⁵¹

The transformation from the OAU to the AU, necessary and perhaps even inevitable as it was, has been criticized on account of the apparent lack of transparency and consultation during the process. Much has been made of the leading role played by Libya, with other Member States largely following, but equally significant is the fact that there was very little consultation at the national level in the states concerned. According to *Malawa* the process of conceptualizing, debating and elaborating the Constitutive Act did not live up to the promise of popular participation that some political leaders in Africa have been advocating.⁵²

C. Salient Features of the African Union

I. The Evolutionary Nature of the Constitutive Act

Naldi and *Magliveras* observe that the AU is the "culmination of the OAU's piecemeal process of political cooperation and economic integration" over the years since the introduction of the OAU.⁵³ To demonstrate the evolutionary nature of the Constitutive Act, we will consider major developments in each of the OAU's four decades of existence and trace its reflection in the Constitutive Act.

One year after its formation, the OAU faced the challenge of emerging border conflicts and tensions arising from the colonial legacy, in particular the arbitrary mapping of African colonial states' borders. During the scramble for Africa, at the Berlin Conference in 1885, the European colonial powers divided the continent amongst them in a manner that was largely insensitive to the ethnic and nationalistic distribution of territories. The question that arose with the independence of African states was whether the eggs in this omelet could now be unscrambled. The OAU Assembly meeting in Cairo in 1964 adopted a resolution asserting the intangibility of colonial borders and asserting the principle of *uti possidetis*.⁵⁴ The Cairo resolution is now reflected in Article 4 lit. b of the AU Act which identifies "respect of borders existing on achievement of independence" as one of the AU's operating principles.

Protocol on the Amendments was opened for signature during the Second Ordinary Session of the Assembly in Maputo, in July 2003.

⁵¹ Protocol to the Constitutive Act Establishing the African Court of Justice, AU Doc. Assembly/AU/Dec.25 (II), para. 2 (hereinafter: ACJ Protocol).

⁵² *Malawa* (note 3), 36–37.

⁵³ *Gino J. Naldi/Konstantinos D. Magliveras*, *The African Union – A New Dawn for Africa?*, *International and Comparative Law Quarterly*, vol. 51, 2002, 415.

⁵⁴ OAU Doc. AHG/Res.16 (I).

In the 1970s, many African governments carried out massive violations of the rights of their citizens with impunity, and used the principle of non-intervention recognized in the OAU Charter as a shield from criticism by their peers and the organization, rendering the OAU impotent in the face of widespread violations of the very values fought for during the anti-colonial struggles, this time by independence leaders. This triggered the reconsideration of the principle of non-intervention in the internal affairs of states. The 1979 OAU Summit was faced with the unpleasant reality that it was not the OAU which had brought an end to the murderous regime of *Idi Amin*, but an intervention by Tanzania in Uganda in violation of the OAU Charter. The Assembly instructed the OAU Secretary-General to organize a meeting of experts to prepare a preliminary draft of a regional human rights instrument.⁵⁵ The drafting process culminated in the adoption of the African Charter on Human and Peoples' Rights on 17 June 1981. The African Charter could be seen as an antecedent for the prominent featuring of human rights in the objectives and principles of the AU.

Malawa points out that the last two decades of the 20th century have witnessed a worldwide revival of interest in regionalism.⁵⁶ In Africa this reawakening of interest in regionalism has led to the strengthening of the existent RECs and establishment of new ones, and also the African Economic Community. As a reflection of the relevance of this development for the OAU's evolution, the Constitutive Act identifies acceleration of "political and socio-economic integration of the continent" as one of the objectives of the AU.⁵⁷

One of the major developments in the OAU in the 1990s, signifying a change of tide, was the crystallization of the principle of condemnation and rejection of unconstitutional changes of governments in the African political and legal context. This principle, now recognized in the Constitutive Act,⁵⁸ codifies successive resolutions by the OAU Assembly made in 1999⁵⁹ and 2000.⁶⁰ The development of the African continental body clearly reflects a gradual watering down of the original rigid concept of state sovereignty, at least in the area of human rights.

⁵⁵ Decision on Human and Peoples' Rights in Africa, OAU Doc. AHG/Dec.115 (XVI) Rev.1, para. 2 lit. b, reprinted in: *Christof Heyns* (ed.), *Human Rights Law in Africa 1999*, 2002, 127.

⁵⁶ *Malawa* (note 3), 14.

⁵⁷ AU Act (note 1), Art. 3 lit. c.

⁵⁸ *Id.*, Art. 4 lit. p.

⁵⁹ OAU Doc. AHG/Dec.141 (XXXV).

⁶⁰ Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, OAU Doc. AHG/Dec.5 (XXXVI). See also Decision on Unconstitutional Changes of Government in Africa – CM/2166 (LXXII), OAU Doc. AHG/Dec.150 (XXXVI).

II. A Fusion of the OAU and the AEC

The AU is the successor of the OAU as well as the AEC. The AEC was established as an integral part of the OAU and as from May 1994, the OAU and the AEC were coexisting like Siamese twins. The duality of the pan-African organization found expression in the fact that it was officially referred to as the OAU/AEC. As mentioned, the AEC Treaty provisions that deal with specific organs, procedures, relationships and modalities of operation borrowed heavily from the OAU Charter and the OAU's *modus operandi*. The AEC shared with the OAU key organs such as the Assembly of the Heads of State and Government and the Council of Ministers, and the two held parallel sessions annually. It could be argued that political and economic aspects of regional cooperation on the African continent, which in the past had, at least formally, been pursued separately through the OAU and the AEC respectively, converge in the African Union.⁶¹

III. National Sovereignty and the AU

Even though the model of the European Union (EU) has been influential in shaping it, the AU is neither the African equivalent of the EU nor a 'United States of Africa.'⁶² The AU does not involve a significant devolution of national authority to the continental body, as is the case with the EU. Rather like its predecessor, the AU remains a "medium for strong cooperation and integrative mechanism of independent African States."⁶³ The decisions of the African Court of Justice (ACJ) will obviously be binding, but its jurisdiction is limited.

Experience has shown that many African states are wary of ceding national sovereignty. Unlike the EU, which has powers to issue legally binding directives, the AU does not enjoy similar powers. This situation is unlikely to change without a major revision of the provisions of the Constitutive Act. The exception, as outlined above, is the area of human rights, where increasingly continental supervision is accepted. This will culminate in legally binding decisions of the African Court on Human and Peoples' Rights.

⁶¹ OAU had an economic mandate but it was neglected, see *Alfred Chanda*, *The Organization of African Unity: An Appraisal*, *Zambia Law Journal*, vol. 21-24, 1989-92, 1, 25.

⁶² As *Maluma* points out "advocates of a United States of Africa will look in vain in the provisions of the Constitutive Act for illumination of an integrated federal or confederal political entity to which the Member States have ceded certain sovereign powers or competencies," *Maluma* (note 3), 34.

⁶³ *Nsongurua J. Udombana*, *A Harmony or Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, *Indiana International and Comparative Law Review*, vol. 13, 2003, 185, 213.

IV. The Objectives of the African Union

The fact that the establishment of the AU was partially informed by the desire to amalgamate the OAU and the AEC is demonstrated by the reflection of objectives of the OAU and the AEC in six of the 14 objectives of the AU.⁶⁴

Besides restating the OAU's and AEC's objectives, the Constitutive Act prescribes new objectives for the continental body. These include promoting peace, security, and stability on the continent; promoting democratic principles and institutions, popular participation, and good governance; and promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.⁶⁵

Other novel objectives are: establishing the necessary conditions which will enable the continent to play its rightful role in the global economy and in international negotiations; accelerating the political and socio-economic integration of the continent; promoting and defending African common positions on issues of interest to the continent and its peoples; advancing the development of the continent by promoting research in all fields, in particular in science and technology; and, working with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.⁶⁶

V. Organs of the AU

1. Introduction

Article 5 para. 1 of the Constitutive Act enumerates the organs of the Union.⁶⁷ They are the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives

⁶⁴ The AU Constitutive Act reflects three OAU objectives. These are achieving African unity, defending sovereignty, territorial integrity, and independence of African states; and promoting international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. Three of the AU objectives are similar to the AEC objectives and in fact constitute a restatement of the AEC objectives in the AU Constitutive Act. These are promoting sustainable development at the economic, social and cultural levels as well as the integration of African economies; promoting cooperation in all fields of human activity to raise the living standards of African peoples; and, coordinating and harmonizing the policies between the existing and future regional economic communities for the gradual attainment of the objectives of the Union.

⁶⁵ AU Act (note 1), Art. 3.

⁶⁶ *Id.*

⁶⁷ For a detailed discussion of the organs of the AU see *Nsongurua J. Udombana, The Institutional Structure of the African Union: A Legal Analysis*, California Western International Law Journal, vol. 33, 2003, 69.

Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions.⁶⁸ The OAU's Commission of Mediation, Conciliation and Arbitration is left out in the African Union.⁶⁹ The Assembly can decide to establish other organs in accordance with Article 5 para. 2 of the Constitutive Act. The Assembly thus adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union at its Summit in Durban in July 2002.

In terms of modalities in bringing the various institutions into operation, the AU Assembly determines the functions, powers, composition and organization of the Commission of the Union, the Permanent Representatives Committee and the Economic, Social and Cultural Council, by way of resolutions. Protocols establishing the Pan-African Parliament and the Court of Justice have been adopted, and has in the case of the Pan-African Parliament received the required number of ratifications to enter into force. Protocols establishing the financial institutions, the African Central Bank, the African Monetary Fund, and the African Investment Bank, have not yet been adopted.

2. The Assembly

The Assembly of the Union is composed of the Heads of State and Government of the Member States of the AU and meets at least once a year.⁷⁰ As the supreme organ of the Union, the Assembly determines the common policies of the Union; monitors their implementation; establishes the organs of the Union; and receives, considers, and takes decisions on reports and recommendations of other organs of the Union. Both the AEC Treaty and the OAU Charter provided for the Assembly of the Heads of State and Government.⁷¹

One of the most important functions of the AU Assembly is to determine the common policies of the AU.⁷² These policies will concretize the objectives of the Union, and may relate for example to accelerated political and socio-economic integration, and the promotion of sustainable development and of good governance.

⁶⁸ The Assembly of the Union, the Executive Council, the Commission, and the Specialized Technical Committees are equivalent to the Assembly of the Heads of State and Government, the Council of Ministers, General Secretariat, and Specialized Commissions in the OAU institutional structure.

⁶⁹ Equivalents of the Pan-African Parliament, the Court of Justice, the Economic Social and Cultural Council and the financial institutions were provided for in the AEC Treaty.

⁷⁰ AU Act (note 1), Art. 6

⁷¹ OAU Charter (note 2), Art. 8; AEC Treaty (note 32), Art. 7.

⁷² AU Act (note 1), Art. 9 para. 1 lit. a.

3. The Executive Council and the Permanent Representatives Committee

The Executive Council comprises Ministers of Foreign Affairs of Member States of the AU and meets at least twice a year for ordinary sessions.⁷³ The Executive Council has two main functions. The first is to coordinate and take decisions on policies in areas of common interest to Member States including, among other things, foreign trade; energy, industry and mineral resources; education, culture, health and human resource developments; and social security.⁷⁴ The second is to consider issues referred to it and monitor the implementation of policies formulated by the Assembly.⁷⁵ A similar organ, albeit in a different name, the Council of Ministers, was provided for in the OAU Charter and the Abuja Treaty.

The Permanent Representatives Committee is composed of the permanent representatives (ambassadors) of the Member States to the AU. It is mandated to prepare the work of the Executive Council.⁷⁶

4. The Pan-African Parliament

The establishment of a Pan-African Parliament (PAP) was provided for in the Protocol to the AEC Treaty relating to the Pan-African Parliament (PAP Protocol) which was adopted on 2 March 2001.⁷⁷ The PAP is aimed at ensuring the full participation of the African people in development and economic integration of the continent.⁷⁸ The drafting of the Protocol to the AEC Treaty establishing the PAP was in the advanced stages when the AU Constitutive Act was adopted in 2000. On 14 November 2003, Senegal became the 24th member of the AEC to ratify the protocol. The required ratification by a simple majority of AEC members was then met and the protocol will enter into force on 14 December 2003. It has not yet been decided where the PAP will be located. Only South Africa and Libya have offered to host the institution.⁷⁹

⁷³ *Id.*, Art. 10.

⁷⁴ *Id.*, Art. 13 para. 1.

⁷⁵ *Id.*, Art. 13 para. 2.

⁷⁶ *Id.*, Art. 21.

⁷⁷ Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, 2 March 2001, available at: <http://www.africa-union.org/home/Welcome.htm> (hereinafter: PAP Protocol).

⁷⁸ *Id.*, Art. 17.

⁷⁹ As *Cilliers* has pointed out there is little chance that Libya, a country that has no national parliament, would be offered to host the PAP. *Jakkie Cilliers, From Durban to Maputo – A Review of 2003 Summit of the African Union*, ISS Paper 76, August 2003, 8.

5. *The African Court of Justice*

The Court of Justice of the AU is provided for under Article 18 of the Act. The Court will be seized with matters of interpretation arising from the application or implementation of the Act. While the OAU did not have an equivalent institution, a similar institution had been provided for in the AEC Treaty. In July 2003 the AU Summit in Maputo adopted the Protocol on the Court of Justice of the African Union (ACJ Protocol).⁸⁰ The Protocol establishes the Court of Justice as the principal judicial organ of the AU.⁸¹ It should also be noted that most RECs have established courts to decide disputes under their respective treaties.

6. *The Commission*

The Commission of the Union, which serves as its secretariat, is composed of the Chairperson, his or her deputy and eight commissioners assisted by the necessary staff.⁸² This organ is equivalent to the General Secretariat in the OAU Charter and AEC Treaty.

There are ten directorates, each headed by a commissioner; peace and security; political affairs; infrastructure and energy; social affairs; human resources, science and technology; trade and industry; rural economy and agriculture; economic affairs; women, gender and development; and programming, budgeting, finance and accounting.

In addition to these directorates and the bureau of the chairperson, the Commission has a Department for Afro-Arab cooperation. The Commission is also the coordinating body of the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). The Secretariat of the NEPAD, currently based in South Africa, is envisaged to be integrated into the Commission in the future.⁸³

7. *Specialized Technical Committees*

Seven Specialized Technical Committees are to be established, dealing with *inter alia* such diverse issues as rural economy and agricultural matters; trade, customs and immigration matters; and, health, labor and social affairs.⁸⁴ The Specialized Technical Committees shall be composed of ministers or senior officials responsi-

⁸⁰ ACJ Protocol (note 51).

⁸¹ *Id.*, Art. 2 para. 2.

⁸² AU Act (note 1), Art. 20.

⁸³ For a discussion on NEPAD see *infra*, Section D.III.

⁸⁴ AU Act (note 1), Art. 14.

ble for the sectors falling within their respective areas of competence. The Committees are tasked to carry out five major functions including the preparation, harmonization and supervision of projects and programs of the Union, and follow-up and evaluation of the implementation of the decisions taken by the organs of the Union.⁸⁵

8. Economic, Social and Cultural Council

The Constitutive Act provides for the Economic, Social and Cultural Council (ECOSOCC), an advisory body composed of different social and professional groups of Member States.⁸⁶ The ECOSOCC will be established once its Statutes have been adopted by the Assembly. Draft Statutes were presented at the Maputo Summit in July 2003. It was then decided to widen the consultations on the Draft Statutes within civil society. The Statutes are expected to be adopted by the Assembly in July 2004. According to Article 4 of the Draft Statutes, ECOSOCC will consist of 150 civil society organizations, two from each AU Member, 24 regional transnational organizations and 20 organizations representing the African diaspora.

9. Financial Institutions

The establishment of the Union's financial institutions, namely the African Central Bank, the African Monetary Fund, and the African Investment Bank, is envisaged by the Constitutive Act.⁸⁷ The composition, powers, organization, and rules of each of the above institutions will be defined in protocols relating thereto which will be adopted in future.

10. The Peace and Security Council

The Peace and Security Council is the body with the primary mandate for conflict prevention, management and resolution. The PSC will be established once its protocol enters into force. On 26 December 2003 Nigeria became the 27th Member State of the AU to deposit the instrument of ratification. The simple majority of ratifications has thus been fulfilled and the Protocol entered into force on the same day in accordance with Article 25 para. 5 of the PSC Protocol. The Protocol

⁸⁵ The OAU Charter did not provide for Specialized Committees. However, the AEC Treaty (note 32), Art. 25 provided for the same.

⁸⁶ AU Act (note 1), Art. 22; the OAU Charter (note 2) did not provide for such a body, but the AEC Treaty (note 32), Art. 15 provided for an equivalent organ named the Economic and Social Commission.

⁸⁷ AU Act (note 1), Art. 19.

will supercede resolutions and decisions of the OAU relating to the Mechanism for Conflict Prevention, Management and Resolution in Africa. The PSC will have 15 Member States.⁸⁸

D. New Features

I. Towards a People-centered Organization

In spite of the non-participatory nature of its own origins, the new organization seeks to be more people-centered than its predecessors. The AU has the objective of promoting popular participation and operates on the basis of the principle of participation of the African peoples in the activities of the Union. The Pan-African Parliament and the Economic, Social and Cultural Council (ECOSOCC) will be established as the institutional framework of the people-centered provisions in the AU Act.⁸⁹

President *Thabo Mbeki* of South Africa, one of the main architects of the AU, has emphasized the importance of the establishment of the ECOSOCC:

We should be concerned that we have not made sufficient progress with regard to the formation of the Economic, Social and Cultural Council (ECOSOCC). I think we would all agree that this situation is undesirable, because in the various Union meetings held during the past year, concern about alienating the people in the establishment of the Union has been expressed. We must act to live up to our commitment to ensure the urgent involvement of civil society organizations and professional bodies in the processes of the Union. Accordingly, it is necessary to finalize the proposals for the launching of ECOSOCC.⁹⁰

The ECOSOCC will be an advisory organ composed of different social and professional groups of the Member States of the Union.⁹¹ An essential factor of a civil society grouping like this must be that it is representative. It is therefore essential

⁸⁸ PSC Protocol (note 49), Art. 5.

⁸⁹ See AU Act (note 1), Arts. 17 and 22; at the Lusaka OAU Summit in 2001, the OAU Assembly emphasized the importance of involving African NGOs, socio-economic organizations, professional associations and civil society in general in Africa's integration process as well as in the formulation and implementation of programs of the African Union. See Decision on the Implementation of the Sirte Summit Decision on the African Union, OAU Doc. AHG/Dec.1 (XXXVII) para. 7. Similarly at the Maputo AU Summit, the AU Assembly underscored the importance of setting up the PAP to "[...] ensure the effective and full participation of African peoples in the development and integration of the Continent," see AU Doc. Assembly/AU/Dec.17 (II), para. 2.

⁹⁰ Opening Statement by H.E. President *Thabo Mbeki*, outgoing chairperson of the African Union at the 2nd ordinary session of the Assembly of Heads of State and Government, 10 July 2003, Maputo, Mozambique.

⁹¹ AU Act (note 1), Art. 22.

that the selection procedure be transparent. Article 10 of the Draft Statutes deals with the Selection Committee. This Committee will select the members of the ECOSOCC, but the Draft Statutes are quiet on the question of the membership of the Selection Committee except that the members should be representatives of African civil society from the five regions and the African diaspora. The members of the Selection Committee are likely to be appointed by the Assembly when it adopts the Statutes, probably at the AU Summit in July 2004.

The Pan-African Parliament is another feature in the process of making the Union people centered. Each PAP Member State will be represented by five appointed members. The members will be elected by and among members of national parliaments or other deliberative organs and must "reflect the diversity of political opinions in each National Parliament or other deliberative organ."⁹² The aim of the PAP is set to develop it to a directly elected legislative organ but to obtain this will require amendments to the Protocol establishing PAP.⁹³ An amendment to the protocol will only enter into force after ratification by two-thirds of the Member States of the AEC.⁹⁴ The process to establish a directly elected parliament with legislative powers will therefore be quite cumbersome. It should however also be noted that continent-wide elections will be costly. Even today many states are struggling to fund their own national elections. The main problem of the indirect election of the PAP as it currently stands is that many national parliaments themselves do not have democratic credentials.

Despite the problems pointed out above, the provisions on the establishment of the PAP and the ECOSOCC offer more hope of involvement of the African people in the activities of the Union than was the case in the OAU. A political space has been created for the involvement of African people and popular organizations in the activities of the AU which did not exist before.

II. Gender Issues Given Prominence

Gender equality is recognized as one of the principles of the AU.⁹⁵ One of the new objectives of the Union introduced by the amendments to the Constitutive Act is the commitment to "ensure the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas."⁹⁶

⁹² PAP Protocol (note 77), Art. 4 para. 3.

⁹³ *Id.*, Art. 2 para. 3.

⁹⁴ *Id.*, Art. 24 para. 5.

⁹⁵ AU Act (note 1), Art. 4 para. 1.

⁹⁶ *Id.*, Art. 3 lit. i, as amended through the Protocol on amendments to the Constitutive Act of the African Union (not yet in force). The recent amendments to the Constitutive Act have also lead to the use of more gender sensitive language in the Act. Thus for

Giving effect to its new commitment to ensure effective participation of women in decision making, of the ten members of the Commission of the AU, five are women.⁹⁷ This compares quite favorably with other regional institutions. In the European Union for example only five of the 20 commissioners are women.⁹⁸ It is hoped that this momentum of seeking gender parity in decision-making will be maintained in the other organs of the AU such as the ACJ and PAP. Only one of the five members of the PAP appointed by the Member States is required to be a woman.⁹⁹ It remains to be seen for how long the highest decision making body, the Assembly of Heads of State and Government, will remain an exclusively male club.

The adoption in Maputo of the Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women in 2003 might also help to give gender issues a more prominent role at the domestic level.

III. Socio-economic Development Agenda Linked to Regional Integration: NEPAD

The New Partnership for Africa's Development (NEPAD) is a pan-African development blueprint developed under the auspices of the OAU, and now operating under the rubric of the AU. NEPAD has its own institutional framework including a secretariat, which is linked to the AU institutional structure. The OAU Assembly established the central institution in the NEPAD institutional framework, the Heads of State and Government Implementing Committee (HSIC), and delegated to it the mandate to ensure a continuous follow-up on the NEPAD initiative, particularly the establishment of the relevant management institutions. At the secretariat level, the AU Chairperson is an *ex officio* member of the HSIC and the AU Commission participates in NEPAD's Steering Committee meetings.

The experience of the European Union demonstrates the importance of an optimal supportive environment for a thriving regional economic integration program. The Marshall plan helped to rebuild the European economies destroyed by

example the phrase 'founding fathers' in the Preamble to the Act has been replaced by the word 'founders' as explicit recognition of "the role women have played and continue to play in the development and pursuit of the common vision of a strong, cohesive and united Africa," *cf.* Report of the First Extraordinary Session of the Executive Council on the Proposed Amendments to the Constitutive Act of the African Union, AU Doc. Ex/EX.CL/Rpt. (I) Rev.1, para. 34.

⁹⁷ Decision on the Appointment of AU Commissioners, AU Doc. Assembly/AU/Dec. 28 (II), para. 2.

⁹⁸ The 20 Commissioners, available at: http://europa.eu.int/comm/commissioners/index_en.htm.

⁹⁹ PAP Protocol (note 77), Art. 4.

World War II and thus provided the foundation for the future economic integration in Europe. NEPAD is Africa's closest equivalent to the Marshall Plan. The implementation of the NEPAD project could create optimal conditions for economic cooperation and provide a foundation on which genuine and sustainable African-wide economic integration can be achieved. However, as *Mills* points out, "in States where governance is minimal or absent, aid is likely to distort the delivery of government and exacerbate the situation rather than assist development."¹⁰⁰

Regional economic integration will never be realized merely by drafting treaties purporting to institutionalize this ideal. It will be achieved through putting in place regional-based economic infrastructure and implementing policies that promote intra-regional trade and which harmonize and rationalize regional integration efforts. These are measures that are in NEPAD's program of action. NEPAD intends to use RECs as its implementing arms. Thus, the implementation of NEPAD is likely to go a long way towards realizing Africa's regional economic integration.

IV. Focus on Human Rights

As mentioned above one of the objectives of the African Union according to the Constitutive Act is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."¹⁰¹ Human rights also plays a central role in NEPAD.¹⁰² The increased focus on human rights is good but as has been pointed out elsewhere, there are risks of overlap and a fight for limited resources.¹⁰³

International human rights standards have so far been poorly implemented on the continent. To what extent a relatively weak regional monitoring system is to blame for this is disputable. The Commission on Human and Peoples' Rights has started to acquire a more prominent profile, and engages well with civil society. However, the limited number of decisions that has been adopted can not be said

¹⁰⁰ *Greg Mills, Poverty to Prosperity: Globalisation, Good Governance and African Recovery, 2002, 84.* *Mills* also notes a study by *Harbeson and Rotschild* according to which the total aid flows under the Marshall Plan 1948–1952 did not exceed 2.5 % of the GDP of the recipient countries. By 1996 African countries, excluding Nigeria and South Africa, received on average 12.3 % of GDP in aid, *id.*

¹⁰¹ AU Act (note 1), Art. 3 lit. h.

¹⁰² For a discussion of the African Peer Review Mechanism, the monitoring system under NEPAD, see *infra*, Section E.I.4.

¹⁰³ See e.g., *Evarist Baimu, Human Rights in NEPAD and its Implications for the African Human Rights System, African Human Rights Law Journal (AHRLJ), vol. 2, 2002, 301.*

to reflect the actual situation of human rights on the continent. It remains to be seen to what extent the African Human Rights Court will reinforce the system. The problems encountered in obtaining the 15 ratifications of the Protocol necessary for the Court to be established are not encouraging.

The African Court of Justice will also have competency to deal with human rights issues, but not as a result of an individual petition. It should also be noted that RECs can play an important role in human rights protection.¹⁰⁴

One of the preconditions for an effective regional human rights system seems to be the existence of economic and other ties between the countries involved, to ensure the possibility of effective peer pressure.¹⁰⁵ From this point of view, the focus of the AU on economic integration holds out prospects for a more effective regional human rights system.

The question is how the renewed focus on human rights at the continental level will affect the enjoyment of human rights for the people of Africa, many of whom have for long been denied their most basic rights.

E. Legal Issues Raised by the Formation of the AU

I. Implementation of Decisions

The Union has a number of measures at hand to ensure implementation of its decisions. This is addressing one of the weaknesses of the OAU. However, it is too early to evaluate how effective these measures are. Some of them are not even operational yet.

1. Suspension

According to Article 30 of the Constitutive Act, a government that has come to power through unconstitutional means shall not be allowed to participate in the activities of the Union. The exact meaning of the term 'unconstitutional means' in Article 30 still needs to be clarified. For example, does gaining or retaining power through a massively rigged election constitute an unconstitutional usurpation of power? The African Court of Justice or even the African Human Rights Court could have a role in defining these terms.

¹⁰⁴ See to this *Vifoen* (note 11) and *Sirule Frederick Musungu*, *Economic Integration and Human Rights in Africa: A Comment on Conceptual Linkages*, AHRLJ, vol. 3, 2003, 88.

¹⁰⁵ See *Christof Heyns*, *The African Regional Human Rights System: In Need of Reform?*, AHRLJ, vol. 1, 2001, 155.

2. Sanctions

The Constitutive Act in Article 23 para. 1 makes provision for sanctions against Member States that default in their payments to the Union. Article 23 para. 2 gives much broader powers to impose sanctions of a political or economic nature against a Member State that fails to comply with the decisions and policies of the Union.

3. The African Court of Justice

The ACJ Protocol empowers the Court to issue binding judgments on a wide range of issues,¹⁰⁶ provisional measures¹⁰⁷ as well as advisory opinions.¹⁰⁸ The ACJ Protocol makes it clear that while it does not operate on the basis of precedent, its decisions on the interpretation and application of the AU Act shall be binding on AU Member States and organs of the Union.¹⁰⁹

The ACJ may be expected to deal mainly with contentious matters of a political and economic nature. It goes without saying that disputes may arise over any aspect of the policies and their implementation. The ACJ Protocol grants the power to appear before it to states party to the Protocol as well as the AU Assembly, the AU Parliament and other organs of the AU authorized by the Assembly.¹¹⁰

¹⁰⁶ ACJ Protocol (note 51), Art. 19 para. 1 gives the ACJ jurisdiction in the following matters: (a) the interpretation and application of the AU Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (g) the nature or extent of the reparation to be made for the breach of an obligation.

¹⁰⁷ ACJ Protocol (note 51), Art. 22.

¹⁰⁸ *Id.*, Art. 44. According to this provision, the Court "may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the ECOSOCC, any of the Financial Institutions, a Regional Economic Community or such other organs of the Union as may be authorized by the Assembly."

¹⁰⁹ *Id.*, Art. 38 para. 1.

¹¹⁰ *Id.*, Art. 18 para. 1 lit. a-b; The Commission or a member of staff of the Commission are competent to appear before the ACJ in a dispute between them within the limits and under the conditions laid down in the Staff Rules and Regulations of the Union. See *id.*, Art. 18 para. 1 lit. c.

Third parties may be allowed to appear before it under conditions to be determined by the Assembly and with the consent of the State Party concerned.¹¹¹

The decisions of the African Human Rights Court will also be binding.

4. Peer Review

Peer review has been described as "the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles."¹¹² One of the characteristics of a peer review system is that it is non-confrontational.

Peer review was developed by and is used most extensively by the OECD, but it is also used by other international organizations. Peer review is used to monitor a wide range of different international obligations, such as development aid, anti-corruption measures, and educational policy.¹¹³

The broadest approach to peer review so far has been taken in the African Peer Review Mechanism (APRM) established under the NEPAD, which will have the mandate to examine democracy and political governance, economic governance and management, corporate governance and socio-economic development. The first peer review under the APRM is expected to take place during 2004.¹¹⁴

While the APRM has received much attention in Africa and the rest of the world, less attention has been given to the monitoring system under the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA).¹¹⁵ The monitoring mechanism developed in the Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa have similarities with the APRM. It should also be noted that the Memorandum of Understanding raises many of the same issues that are raised in the NEPAD declaration that form the basis for the APRM. A number of meetings have been held to sort out the relationship between CSSDCA and NEPAD to avoid overlap. While CSSDCA will retain and develop its own system it has also been decided to give CSSDCA

¹¹¹ *Id.*, Art. 18 para. 1 lit. d.

¹¹² *Fabrizio Paganini, Peer Review: A Tool for Co-operation and Change – An Analysis of an OECD Working Method*, OECD, September 2002.

¹¹³ *Id.*

¹¹⁴ For an overview of the APRM see e.g., *Jakies Cilliers, Peace and Security Through Good Governance – A Guide to the NEPAD African Peer Review Mechanism*, ISS Occasional Paper 70, April 2003.

¹¹⁵ CSSDCA was established by the OAU Summit in Lomé in July 2000. It was established at the initiative of Nigeria drawing inspiration from the experience of the Conference on Security and Cooperation in Europe (CSCE, now OSCE).

responsibilities under the APRM process in the sphere of political governance.¹¹⁶ Other regional institutions such as the African Commission on Human and Peoples' Rights will play a similar role in relation to the APRM within their field of expertise.¹¹⁷

II. The Use of Force by the AU and the UN Charter

The AU Act is the first international treaty to recognize the right of an international organization to intervene for humanitarian purposes (humanitarian intervention).¹¹⁸ Article 4 lit. h of the Act provides that the AU shall operate in accordance with the principle that the AU has the right to intervene in a Member State pursuant to a decision of the Assembly in respect of "grave circumstances, namely war crimes, genocide and crimes against humanity."¹¹⁹ The recent amendment to Article 4 lit. h has extended the right of the Union to intervene in a Member State to include situations where there is a serious threat to legitimate order for the purpose of restoring peace and stability in that Member State. Depending on how it is interpreted and applied the right to intervene poses both a danger and opportunity to the furtherance of rule of law and human dignity in Africa.¹²⁰ Whether

¹¹⁶ Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), available at: http://www.africa-union.org/Structure_of_the_Commission/depCsscda.htm.

¹¹⁷ *Id.*

¹¹⁸ Writing on this aspect, *Makau* has commented that "[...] in an era in which post-independence Africa has witnessed the horrors of genocide and ethnic cleansing perpetrated on its own soil an against her own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of such grave circumstances as war crimes, genocide and crimes against humanity." *Makau* (note 3), 28–29.

¹¹⁹ AU Act (note 1), Art. 4 lit. h.

¹²⁰ A static interpretation of humanitarian intervention could result in application of this right to intervene in the AU Act to entrench the regimes in power rather than protecting human and peoples' rights. On the other hand a people-centered interpretation of humanitarian intervention can be advanced on two grounds. First, the fact that the AU can only intervene where *legitimate* order is under threat suggests that the AU will not intervene where an *illegitimate* order is under threat from popular uprising. It follows that the AU should not prop up a regime in seeking to cling to power despite losing the mandate of the people through a free and fair election. Besides, since the AU has the right to intervene in instances where legitimate order is under threat it is probable that the Union may be required to be proactive and not simply wait for the request of a government under threat or even to seek consent of that state before it intervenes. If this reading of the intervention provision is correct, there is a window of opportunity for the AU to act even in instances where it is not in the interest of the regime in power to have the AU intervene as conspicuously demonstrated by absence of invitation. See *Esarist Baimu/Kathryn*

this provision will translate into interventions aimed at protecting human rights or those aimed at retaining unpopular regimes in power, remains to be seen.

The recognition of the principle of intervention by the AU in Member States recognized in the Constitutive Act raises the issue of the compatibility of this principle with the UN Charter. The establishment of the Peace and Security Council and indeed of the AU itself must be viewed in the context of Chapter VIII of the UN Charter entitled 'Regional Arrangements.' The need to assess the validity of the PSC and the AU under the UN Charter is determined by the crucial need to ensure that there is no conflict between the Constitutive Act and the PSC Protocol and the UN Charter.

All AU members, with the exception of the Sahrawi Arab Democratic Republic (Western Sahara), are UN members. According to Article 103 of the UN Charter obligations of the UN members under the UN Charter prevail over obligations under any other international obligations in the event of a conflict between two sets of international obligations. Article 2 para. 4 of the UN Charter states that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Abass and *Baderin* conclude as follows:

By ratifying the AU Act, African States must be understood to have agreed that the AU can intervene in their affairs [...]. A consequent use of force by that Union can not thereby derogate from the territorial integrity or political independence of that State.¹²¹

Once it has entered into force the Peace and Security Council of the AU will have broad powers as set out in Article 7 of the PSC Protocol. The PSC may undertake peace-making and peace-building functions and deploy peace support missions on its own initiative. However, for intervention in accordance with Article 4 lit. h of the AU Act the consent of the Assembly must be sought.

III. The Constitutive Act and the AEC Treaty

In submerging the AEC, the AU takes over some of the institutions that had been envisaged under the AEC Treaty.¹²² The Constitutive Act states that "the

Sturman, Amendment to the African Union' Right to Intervene: A Shift from Human Security to Regime Security?, *African Security Review*, vol. 12, 2003, 37, 44.

¹²¹ *Ademola Abass/Mashood A. Baderin*, Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union, *Netherlands International Law Review*, vol. 49, 2002, 1, 19.

¹²² Thus the AU Act envisions the establishment of the Pan-African Parliament, AU Act (note 1), Art. 17 and AEC Treaty (note 32), Art. 14; the Court of Justice, AU Act (note 1), Art. 18 and AEC Treaty (note 32), Arts. 18–20; the Specialized Technical Committees, AU

provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the [AEC] Treaty.¹²³ Thus the AEC Treaty would continue to operate in as much as its provisions are in conformity with the Constitutive Act. The continued operation of the AEC Treaty was reaffirmed during the first AU Assembly of the Heads of State and Government held in Durban in July 2002. During this meeting the AU Assembly requested the AU Member States to "take the necessary steps to ratify the [AEC] Treaty and to accede to it as quickly as possible, if they have not yet done so."¹²⁴ Similarly, during the recent session held in Maputo the Interim Chairperson of the AU Commission submitted a report on the implementation of the AEC Treaty.¹²⁵

The succession provision identified above notwithstanding, there is a problem in that the AEC and AU do not share the exact same membership. As of December 2003, the Constitutive Act had been ratified by 53 African states while the AEC Treaty had been ratified by 47 states. The disparity in status of ratification of the two treaties could interfere with the smooth operation of the above succession provision. However, this appears to be a short-term problem which will be resolved sometime in the future when both the AEC Treaty and the Constitutive Act are ratified by all African states.

While the Constitutive Act envisages the continued operation of the AEC Treaty, the situation is different for the OAU Charter. The Constitutive Act states explicitly that it replaces the OAU Charter.¹²⁶ However, it is interesting to note that while the AEC Treaty is still operational, the body established under it (the AEC) seems to have been submerged within the AU. It should be recalled that since the establishment of the AEC in 1994, the OAU and the AEC have been existing side by side, although the former overshadowed the latter. Unlike the OAU, which was often referred to as the OAU/AEC, highlighting its dual political and economic institutional dimensions, the AU is referred to simply as the AU without any reference whatsoever to the AEC. According to *Packer and Rukare*, "while the institution of the AEC has become defunct, the provisions of the AEC Treaty that are modified by, or additional to, the Constitutive Act remain legally binding."¹²⁷

Act (note 1), Arts. 14–16; and the African Monetary Fund, AU Act (note 1), Art. 19 para. b. The AEC Treaty envisaged the formation of the African Monetary Union and not African Monetary Fund, cf. AEC Treaty (note 32), Arts. 6 para. 2 lit. f (iii) and 44 para. 2 lit. g; African Central Bank, AU Act (note 1), Art. 19 para. 1 and AEC Treaty (note 32), Art. 6 para. 2 lit. f (iii); and the Economic Social and Cultural Council, AU Act (note 1), Art. 22.

¹²³ AU Act (note 1), Art. 33 para. 2.

¹²⁴ AU Doc. AHG/AU/AEC/Dec. (I), para. 2.

¹²⁵ AU Doc. EX/CL/30 (III).

¹²⁶ AU Act (note 1), Art. 33 para. 1.

¹²⁷ *Corinne A. A. Packer/Donald Rukare*, *The New African Union and its Constitutive Act*, *American Journal of International Law*, vol. 96, 2002, 365, 372.

The need to accelerate the political and socio-economic integration of the continent provided an impetus to the adoption of the Constitutive Act of the AU.¹²⁸ Indeed, the OAU Extraordinary Summit held in Sirte in September 1999, which spearheaded the creation of the AU, called for the shortening of the implementation periods of the AEC Treaty and the speedy establishment of all institutions provided for in the AEC Treaty, such as the African Central Bank and the African Monetary Union.¹²⁹ The adoption of the AU Constitutive Act drastically changed the previous continental economic integration strategy, which hinged on a gradualist six-stage process spanning 34 years. A rush towards continental economic integration has replaced a gradualist approach.¹³⁰

The new continental economic integration under the AU poses a risk to the ongoing regional integration efforts of the RECs on the continent for two reasons. First, the AU purports to merge political and economic dimensions of international cooperation on the continent which in the past had been pursued separately by the OAU and the AEC respectively. In doing this, there is a danger that economic matters may be marginalized by political matters. Second, while the role of regional communities had been clearly defined under the AEC Treaty, their role is much less clear under the AU framework. This risks putting in disarray RECs which are in a process of consolidating their modest but significant gains in achieving economic integration in their respective regions. Recognizing this problem, the Commission is developing a Draft Protocol on Relations between the AU and RECs.¹³¹

F. The Future

I. The Problem of Proliferation

The African continent currently boasts a plethora of inter-governmental organizations. Given the resource constraints that many countries on the continent face and the dangers of diffused focus that this proliferation poses, there is a need to consider how to address the problem of institutional proliferation as matter of urgency.

¹²⁸ AU Act (note 1), Art. 3 lit. c.

¹²⁹ Sirte Declaration (note 41), para. 8 lit. iii.

¹³⁰ This view is shared by *Makawa* who points out that "[...] the decision to establish the African Union immediately was a deliberate attempt to circumvent the slow, incremental process envisaged in Art. 6 of the Abuja Treaty, which was scheduled to cover a transitional period not exceeding thirty-four years," *Makawa* (note 3), 36.

¹³¹ AU Doc. EX/CL/22 (III).

Though the AU budget is growing modestly (increasing from US-\$ 35.6 mio. in 2003 to US-\$ 43 mio. for 2004), there is no question that the African Union has too limited resources for a very wide mandate. It should also be noted that the arrears amounted to almost US-\$ 40 million in June 2003, though there is indication that this problem is being addressed by the set up of a new system for member contributions to the organization.¹³²

The Constitutive Act creates many new institutions, some of them not yet operational. The Pan-African Parliament and the Peace and Security Council have received the required number of ratifications to be established. They will then compete with already existing institutions for the limited resources. The establishment of the African Court of Justice probably lies in the more distant future.

Whether newly established institutions will win the fight for resources over already established institutions remains to be seen. In addition many of the new institutions request cooperation with existing institutions that are already overburdened. The envisaged cooperation will in most cases be beneficial but it must come with the allocation of enough resources. For example the African Commission on Human and Peoples' Rights, which suffers from serious resource constraints, is envisaged to play important roles in relation to e.g. the Peace and Security Council and the APRM, commitments that can turn out to be very demanding on the already scarce resources if taken seriously.

II. AU's Continuing Role as a Lawmaker: Contributing to the Development of International Law

As noted above, the OAU played an important role in developing regional norms and standards. The AU is poised to continue playing this role.¹³³ Some of the treaties adopted under the auspices of the OAU have contributed to international law by codifying an emerging or contested principle of international law. This has occurred in the fields of human rights,¹³⁴ refugee law¹³⁵ and environmen-

¹³² Financing of the African Union, available at: <http://www.dfa.gov.za/docs/pq1341.htm>.

¹³³ In addition to protocols dealing with the organizational structure of the AU, three treaties were adopted at the AU Summit in Maputo in July 2003. These were the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Convention on Preventing and Combating of Corruption, and the revised version of the African Convention on the Conservation of Nature and Natural Resources.

¹³⁴ The African Charter on Human and Peoples' Rights is the first treaty to codify the right to development.

¹³⁵ The key African instrument in this area is the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which was adopted in 1969 and entered into force in 1974. This Convention expands the definition of the term refugee beyond anyone

tal law.¹³⁶ The most recent contribution to international law has been in the field of humanitarian law in which Africa has been a pioneer in codifying the right to intervene in the Constitutive Act of the AU.

III. AU as a Forum for Developing Common Positions on Global Issues

The AU will continue to be a premier forum for developing common African positions on global issues. To strengthen its ability to play this role, the African Union has, for example, applied for observer status in the WTO.¹³⁷ Recently, the AU Assembly mandated "the Chairperson of the Assembly in consultation with the Commission to set up a negotiating team [...] to negotiate on behalf of all Member States the fundamental issues that are being negotiated in the WTO."¹³⁸

There is a commitment to seek alliance with Africans in the Diaspora. The Constitutive Act provides that it will "invite and encourage the full participation of the African Diaspora, in the building of the African Union."¹³⁹ Exactly what this means in practice remains to be seen.

IV. AU – A Working Template of "Ever Closer Union" of African States?

The AU has structures for harmonization and synchronization of sub-regional economic integration on the continent with an eye for their eventual consolidation into a singular continental organization. However, the strategy of the AU as an 'ever closer union' is characterized by ambiguity and competing strategies reminiscent of the debates of the 1960s between gradualism and radicalism.

who flees his country on account of "a well-founded fear of being persecuted" to include anyone who is compelled to flee his country of residence owing to external aggression, occupation, foreign domination or events seriously disturbing public order. See *Madrud R. Rwelamira*, The 1969 OAU Convention Concerning the Specific Aspects of Refugee, *International Journal of Refugee Law*, vol. 1, 1989, 557.

¹³⁶ The Bamako Convention (note 18) which was adopted in January 1991 and entered into force in April 1998, bans the dumping of hazardous waste into any area of the sea. For further information see *Fatsab Ouguerbourg*, The Bamako Convention on Hazardous Waste: A New Step in the Development of African International Environmental Law, *AfrYL*, vol. 1, 1993, 195.

¹³⁷ Declaration on the Fifth WTO Ministerial Conference, AU Doc. Assembly/AU/Dec. 4 (II), para. 10.

¹³⁸ *Id.*, para. 11.

¹³⁹ Report of the Second Extraordinary Session of the Executive Council, AU Doc. EX/EX.CL/RPT. (II), para. 18.

On the one hand, there is a view that the most pragmatic way of achieving continental union is through strengthening sub-regional economic groupings and at some point in future consolidate them into a single entity. This view is reflected in the AEC Treaty and in the commitment of the AU's socio-economic development program, NEPAD, to work through sub-regional economic groupings. The rationale for this view is that continental integration is not feasible given the combination of the huge continent; the underdeveloped transport and communication infrastructure; the similarity of economic structure of many countries which does not favor intra-Africa trade.¹⁴⁰

On the other hand is the view that Africa needs to work towards continental integration now and establish common continental institutions. This strategy finds expression in the provisions of the AU Act calling for the establishment of continental economic institutions such as the African Monetary Union and the African Central Bank and the efforts towards establishment of a common continental defense policy.

With lack of clarity on what strategy Africa is pursuing at the moment, it will be difficult to measure progress. The African leadership needs to come out with a clearer strategy of giving content and effect to the ideal of pan-African unity.

G. Conclusion

Looking in retrospect at the history of the African Union three phases are discernible. The first phase took up the first thirty years of OAU existence whereby OAU found its meaning and relevance as an anti-colonial and anti-apartheid continental forum. The changes in South Africa in the early 1990s ushered the second phase whereby the OAU was trying to redefine itself in light of the contemporary challenges. This phase culminated in the establishment of the African Union which signaled the commencement of the third phase whereby the AU has to deliver tangible results if it is to remain relevant to African people.

It is by demonstration through actions that it is up to its tasks to deliver tangible results that the AU will earn the respect and confidence of African peoples. Commenting on the key role as a political authority to be played by the PSC in peace and security matters, *Romano Prodi*, the President of the European Commission, advised the Heads of State and Government to take into account the experience in the European Union that "authority comes from deeds. It is not the result of declarations."¹⁴¹ Despite the good intentions manifest in the Constitutive Act and

¹⁴⁰ Some of these arguments are raised by *Chanda* to counteract the concept of 'United States of Africa,' see *Chanda* (note 61), 2.

¹⁴¹ Address by the President of the European Commission, Mr. *Romano Prodi*, at the African Union Heads of State Meeting, Maputo, 11 July 2003.

other documents of the African Union these will come to naught if they are not accompanied by effective implementation. The key question then is, will the leadership in Africa marshal the necessary political will to live up to the commitments they have undertaken under the Constitutive Act and other binding and non-binding instruments adopted under its auspices and auspices of its predecessor the OAU?

The former Secretary-General of the OAU, *Idi Oumaro*, said that "the OAU will be what members make it. It can be a great organization provided the views of its members go beyond the narrow limits of their borders."¹⁴² The same is true of the African Union. The Union can become a great organization if its members want it to. But first its leaders must start to implement the principles they have agreed on at home. The ultimate building blocks of any intergovernmental organization remain the Member States. Only when sound economic and governance policies are followed in a critical number of the Member States can the intergovernmental body be expected to do the same.

¹⁴² West Africa, 6 June 1988, 1009, quoted by *Chanda* (note 61), 29.