THE AFRICAN UNION—A NEW DAWN FOR AFRICA?

I. INTRODUCTION

In March 2001 the Assembly of Heads of State and Government of the Organisation of African Unity (OAU), meeting in extraordinary session in Sirte, Libya declared the establishment of a new pan-African body, the African Union (Union).[1] The Constitutive Act (Act) of the Union entered into force on 26 May 2001[2] and in due course this new institution will replace the OAU.[3] The Union, the brainchild of Libyan President Qaddafi, and modeled on the European Union, is the culmination of the OAU's piecemeal process of political cooperation and economic integration. It is designed to provide Africa with the legal and institutional framework to confront the twin challenges of the post-Cold War age and globalisation.

Article 2 of the Act provides simply that the 'African Union is hereby established'. There is no stipulation as to whether the Union is an international organisation endowed with international legal personality, able to transact, to acquire rights and assume responsibilities, to institute legal proceedings, etc. The reason for this omission could be that, since the Union is conceived as the successor to the OAU, it will inherit the legal personality of the latter.[4] Notwithstanding this explanation, it is submitted that the Union ought to have been expressly endowed with legal personality, not least because the Act envisages that the two entities will co-exist for a period of at least one year.[5]

II. THE OBJECTIVES OF THE AFRICAN UNION

The objectives of the Union are set out in Article 3 of the Act. There are fourteen objectives, designed to enhance political cooperation and economic integration, ranging

[1] EAHG/Dec.1(V). The Constitutive Act of the African Union is reproduced in (2000) 12 RADIC 629.

[2] See Art 28 of the Act. At the time of writing fifty-one of the OAU's fifty-three Member States (except for the Democratic Republic of the Congo and Madagascar) have ratified the Constitutive Act.

[3] Art 33(1) of the Act states, 'This Act shall replace the Charter of the Organisation of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union.' All OAU treaties are currently being reviewed with a view to their adoption by the Union, see Council of Ministers, 74th Ordinary Session, CM/Dec 588 (LXXIV) (8 July 2001).

[4] The OAU was endowed with legal personality by virtue of Article I of the General Convention on the Privileges and Immunities of the Organisation of African Unity 1965, 1000 UNTS 393, reproduced in G Naldi, *Documents of the Organisation of African Unity* (Mansell, 1992), 38. Nevertheless, the Union appears to satisfy the test for international legal personality as set out by the International Court of Justice in the *Reparations for Injuries Case* (1949) ICJ Rep 174 at 179. The OAU Secretary-General has been authorized to undertake the necessary measures for the devolution of the OAU's assets and liabilities, see OAU Assembly, 37th Ordinary Session, AHG/Dec 160 (XXXVII), para 12 (11 July 2001).

[5] See above n 3.

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from greater unity and solidarity between the countries and peoples of Africa, to promotion of democratic principles and good governance, to protection of human rights, to coordination and harmonisation between the regional economic communities, which have been established or will be established in the African Continent. The latter objective is also one of the central goals of the African Economic Community (AEC), the organisation responsible for the economic integration of the whole Continent.[6]

In general, the objectives cannot be described as overambitious, though they are more expansive than those in the OAU Charter.[7] They reflect rather the current status of developments in the African continent, including notably promoting respect for human rights and recognition of the democratic system. Their general theme is the upgrading of Africa's position in the international plane, where the participating States take the view that they have a rightful role to play in the global economy and in global negotiations. This latter objective, if it were ever to materialise, would undoubtedly constitute a very significant development in inter-African relations. The abandonment of traditional hostility and animosity among African States in favour of a unified position in important transnational political, economic, social, and health issues would constitute a clear sign for the success of the Union.

It is interesting to observe that the Union's objectives reveal the realisation by the African states that the attainment of such aims as raising living standards, promoting good health, developing research in science and technology, etc cannot be achieved on an individual basis. On the contrary, it requires concerted effort, which is founded, on the one hand, on the political, social and economic integration of the Continent and, on the other hand, on the principles of democracy, popular participation, good governance, and protection of human rights. The express reference to the promotion and protection of human rights is a significant development, as is the commitment to democratic values, and constitute welcome improvements on the OAU Charter, which is silent on these matters.[8] It acknowledges that sustainable economic development flourishes in such a culture. As will be seen, the latter principles run through the whole of the Act.

III. THE PRINCIPLES OF THE AFRICAN UNION

The attainment of these objectives shall be achieved through the strict observance of a number of fundamental principles, in accordance with which the Union shall function. Article 4 of the Act envisages sixteen such principles.[9] Some of them are also reiterated in Article III of the OAU Charter,[10] while other principles appear here for the first time. Among the new, particularly worthy of mention include the participation of African

[6] See Art 4(1)(d) of the Treaty Establishing the African Economic Community 1991, (1991) 30 ILM 1241, reproduced in Naldi, above n 4, 203. Generally, see G Naldi and K Magliveras, 'The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 601.

[7] See Art II (1) of the OAU Charter, 479 UNTS 39, reproduced in Naldi, above n 4, 3. For comment, see Naldi, *The Organization of African Unity: An Analysis of its Role*, 2nd edn (Mansell, 1999), 4.

[8] It should be observed that in 1981 the OAU adopted the African Charter on Human and Peoples' Rights, entered into force 1986, (1982) 21 ILM 58, reproduced in Naldi, above n 4, 109.

[9] See further, below n 30.

[10] See, *inter alia*, the principle of sovereign equality of all member States, peaceful resolution of disputes, non-intervention in the internal affairs of states, etc. For comment, see Naldi, above n 7, 5–14.

people in the Union activities, promotion of self-reliance within the Union's framework, promotion of gender equality and of social justice, respect for the sanctity of human life, a prohibition on the threat of or use of force, the establishment of a common defence policy, and the condemnation and rejection of unconstitutional changes of government. The latter principle follows rationally from the objectives of promoting stability, democratic principles and institutions and good governance on the continent.[11]

Abiding by some of these principles is bound to be problematic. For example, with respect to gender equality, women are routinely disadvantaged, especially by customary laws and practices, in areas such as marriage, divorce, and succession.[12] The reference to respect for the sanctity of human life immediately raises the issue of capital punishment, which is retained by the majority of African States.[13] The establishment of a common defence policy aims to bring to fruition one of the ideals of the founding fathers of the OAU. Despite various initiatives at peace-keeping over the years[14] a common defence policy appears an undertaking that may be beyond the disparate African States. And in relation to human rights and the rule of law, as evidenced by the Zimbabwean Government's defiance of the courts in the recent crisis over land invasions,[15] much remains to be done with respect to their effective enforcement.

It should not escape one's attention that the Union joins an ever-increasing number of international organisations that have recently decided to incorporate 'democracy clauses' in their constitutive instruments. More particularly, in the Organisation of American States, the Protocol of Washington of 14 December 1992 amended its Charter to cater for cases of sudden or irregular interruption of the legitimate exercise of power by the democratically elected government in any Member State.[16] Moreover, the Protocol of Ushuaia on democratic commitment revised the Treaty Establishing the Common Market of the South (*Mercado Común del Sur*, Mercosur). In the context of the European Community, the Treaty of Amsterdam of June 1997 inserted Article 309 to the Treaty of Rome Establishing the European Community. This provision stipulates that a serious and persistent breach of the principles of liberty, democracy, respect for human rights and the rule of law by a Member State could result in suspension of certain membership rights.[17] Finally, in the Commonwealth of Nations, the Millbrook

[11] Note in this respect that there is an interrelation between the Union's objectives and principles; see Art 4(m) of the Act, which includes respect for democratic principles, human rights, the rule of law and good governance among the Union principles.

[12] See the controversial judgment of the Supreme Court of Zimbabwe in *Magaya v Magaya* [1999] 3 LRC 35. But cf *Attorney-General v Unity Dow* [1992] LRC (Const) 623 (Botswana Court of Appeal). Currently, the OAU is formulating a draft protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, see Council of Ministers, 74th Ordinary Session, CM/Dec 618 (LXXIV) (8 July 2001).

[13] See Report by the UN Secretary General on the Question of the Death Penalty, UN Doc E/CN.4/1999/52.

[14] See Naldi, above n 7, 29–33.

[15] See *Commercial Farmers Union v. Minister of Lands, Agriculture and Resettlement and Others* 2001 (3) BCLR 197 (ZS). Not only has the order of the Supreme Court been ignored but the Chief Justice was coerced into resigning his post and other members of the judiciary have been threatened.

[16] See K Magliveras, *Exclusion from Participation in International Organisations: The Law and Practice Behind Member States' Expulsion and Suspension of Membership* (Kluwer Law International, 1999), 171–4.

[17] See Magliveras, *The Adoption of Punitive Measures by the European Community and the European Union Against Recalcitrant Member States: Analysis, Criticism and Some Proposals*, European Public Law Series, Volume VII (Bruylant, 1999).

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Commonwealth Action Programme on the Harare Declaration[18] established a mechanism to deal with instances of unconstitutional overthrow of democratically elected governments.[19]

It could be argued that the condemnation and rejection of unconstitutional changes of government is incompatible with the principle of non-interference by any Member State in the internal affairs of another.[20] Although it would appear true to say that in this instance it is not actually the Member States themselves that condemn and reject unconstitutional governments but rather the Union itself, the fact remains that there is an obvious trend in the Act towards limiting the sacred sovereignty of Member States and moving in the direction of permitting the involvement of the Union in the domestic affairs of participating countries.[21]

This is best evidenced by the principle embodied in Article 4(j), which refers to a Member State's right to request Union intervention in order to restore peace and security, and the principle embodied in Article 4(h), which confers upon the Union the right to intervene in a Member State in the event of 'grave circumstances'.[22] This term is defined in the same provision as war crimes, genocide, and crimes against humanity.[23] Although the modalities of such intervention are not specified in the Act,[24] the question arises whether it is lawful under international law, considering the prerogative of the UN Security Council to determine whether a particular incident can be characterised as a threat to or breach of international peace or an act of aggression, to order measures of a forcible or non-forcible nature.[25]

Furthermore, it is doubtful whether the Union could be considered as a regional

[18] The Action Programme was adopted during the Auckland Summit Meeting of Nov 1995, reproduced in [1996] *The Round Table* 123.

[19] See Magliveras, above n 16, 168 et seq.

[20] Art 4(g) of the Act. See also Art 3(b) of the Act.

[21] Despite the OAU's emphasis on the principle of non-interference, in practice this rule has often gone unobserved in Africa, see Naldi, above n 7, 6–11. In fact, it is difficult to argue with the observation of then UN Secretary-General Boutros Boutros-Ghali that 'the time of absolute and exclusive sovereignty' has passed, *Agenda for Peace*, UN Doc S/24111 (17 June 1992), reproduced in (1992) 31 ILM 953, para 17. It ought to be stressed that the African Commission on Human and Peoples' Rights has condemned military seizures of power, see, eg, Eighth Annual Activity Report, Resolution on the Human Rights Situation in Africa (1996) 3 IHRR 245–6.

[22] Cf Art 58(1) of the African Charter on Human and Peoples' Rights, above n 8, which refers to 'a series of serious or massive violations of human and peoples' rights'. In *Organisation Mondiale Contre la Torture and the Association Internationale des Juristes Democrates and Others v Rwanda*, Communication Nos 27/89, 46/91, 49/91, 99/93, (1999) 6 IHRR 816 the African Commission on Human and Peoples' Rights relied on this provision to find that the violence in Rwanda amounted to gross violations of human rights. See also, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Provisional Measures*, Order of 1 July 2000, (2000) 39 ILM 1100, para 42, where the ICJ observed that it was not disputed that grave violations of human rights had occurred on the territory of the Democratic Republic of the Congo.

[23] Genocide and crimes against humanity have been established by the International Criminal Tribunal for Rwanda, see *The Prosecutor v Akayesu*, Judgment of 2 Sept 1998, (1998) 37 ILM 1399, and *The Prosecutor v Kambanda*, Judgment of 4 Sept 1998, (1998) 37 ILM 1411.

[24] Apart from the fact that intervention requires the prior decision of the Union Assembly, on which see below. It is interesting to note that the Act presupposes that intervention for humanitarian purposes is lawful, a debatable assumption.

[25] See Arts 39–42 of the UN Charter.

arrangement within the meaning of Article 52 of the UN Charter.[26] Notwithstanding that the establishment of a common defence policy features as a Union principle,[27] this is clearly not sufficient to regard it as a regional arrangement.[28] In applying Articles 39 et seq, the Security Council has shown that it does not consider itself restricted by the 'international' dimension of its mandate. There are examples where the Security Council has intervened even though the incident concerned a single country. For example, in the case of Somalia the Security Council exercised its prerogative in an attempt to bring to an end the civil strife in that country.[29]

In the dawn of the twenty-first century, offences committed during hostilities and, in particular, genocide and crimes against humanity are unfortunately the prevailing reality for Africa. Sierra Leone, Liberia, Sudan, are among the countries facing this reality, which could destabilise their respective regions for many years to come. Thus, the question of whether and how the Union could intervene in such instances is not a theoretical one but one which is bound to confront the Union from its very early days.

IV. THE ORGANS OF THE AFRICAN UNION

According to Article 5 of the Act, the Union shall comprise the following nine single organs and category of organs as well as any other organ that the Assembly may decide to establish in the future:[30] The Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions. Of these organs, only the Assembly is an OAU organ. All other organs are new. The number of organs in the Union appears to be very large and in the long run it could not only result in the cumbersome operation of the Union but also present a financial burden.

In Article 6(2) of the Act the Assembly of Heads of State and Government is proclaimed to be the Union's supreme organ. Its powers and functions are laid down in Article 9(1) and include the determination of Union common policies, the consideration of requests for membership, the monitoring of implementation of Union policies and decisions and compliance with the same, the direction of the Executive Council as concerns the management of conflicts and armed hostilities, etc. The Assembly's unfettered right

[26] This provision allows the existence of regional arrangements for dealing with the maintenance of peace and security in a manner appropriate for regional action, provided that they act in accordance with the Charter.

[27] See Art 4(d) of the Act.

[28] The intervention by ECOWAS in Liberia is particularly intriguing in this context because the Security Council retrospectively legitimised its operation under Chapter VII of the Charter, see A Parsons, *From Cold War to Hot Peace: UN Interventions, 1947–1995* (Penguin 1995), 215–19. See further, KO Kufuor, 'The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States', (1993) 5 *RADIC* 525.

[29] See Security Council Resolutions 794 (1992) and 837 (1993).

[30] In accordance with Art 5(2) of the Act the OAU Assembly has incorporated the Mechanism for Conflict Prevention, Management and Resolution, mandated with the adoption of anticipatory and preventive measures to resolve disputes, as one of the Union organs, AHG/Dec 160 (XXXVII), para 8(a)(ii). The aims of the Mechanism for Conflict Prevention, Management, and Resolution, have been subsequently adopted by the OAU Assembly as an integral part of the objectives and principles of the Union, AHG/Dec 160 (XXXVII), para 8(a)(i). On the Mechanism, see further, Naldi, above n 7, 32–3.

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to delegate *any* of its powers and functions to *any* Union organ[31] could potentially give rise to significant problems, since it was clearly not the intention of the Act's drafters to have lesser organs decide on such fundamental issues as, for example, the admission of new Member States or the establishment of new organs. Thus, it can only be expected that the Assembly shall exercise this right with the necessary care and utmost caution required under the circumstances.

According to Article 6(3), the Assembly shall meet in ordinary session once yearly and in extraordinary session upon the request by a Member State, which has been approved by a two-thirds majority. Considering that fifty-three states signed the Act and assuming that they all ratify it, the required two-thirds majority equals thirty-six Member states, a figure which could prove rather difficult to attain. Admittedly, the same provision appeared in Article IX of the OAU Charter, which, however, was initially signed by only thirty-two states.[32]

The mode of taking decisions is that of consensus, a traditional means of conducting multilateral affairs in the African Continent.[33] However, on many occasions the requirement of achieving consensus in international organisations has proven to be extremely difficult and has resulted in inaction paralysing the organisation's functioning. Therefore, the drafters of the Act have very thoughtfully stipulated in Article 7(1) that, failing consensus, decisions shall be reached by a two-thirds majority. Since the quorum at Assembly meetings is two-thirds of the total Union membership, decisions could be taken by as few as twenty-three votes assuming a membership of fifty-three countries. An important exception to the consensus rule is stipulated in Article 7(1), namely that decisions on procedural matters, including the question of whether a particular matter is procedural or not, are to be reached by simple majority.

The next organ listed in the Act is the Executive Council of Ministers of the Union. It shall be composed of the Ministers of Foreign Affairs or other Ministers designated by the Member States.[34] The ordinary and extraordinary sessions, the mode of reaching decisions and the quorum in the Executive Council are identical to the provisions applying to the Assembly with the exception that the Council shall meet twice a year in ordinary session. Although the Executive Council shall be responsible to the Assembly, it does enjoy a degree of independence, which is best evidenced by the fact the Rules of Procedure shall be adopted by it without necessitating the Assembly's assistance.[35]

The main function of the Executive Council is to coordinate and monitor the implementation of the Union policies, as these have been determined and/ or formulated by the Assembly. Article 13 enumerates eleven different areas of interest to the Member States, whose coordination falls within the competence of the Executive Council. All of these areas are technical in nature, in the broadest sense of the word,[36] and only the area of 'nationality, residence and immigration' touches upon political issues. It is

[31] See Art 9(2) of the Act.

[32] See Naldi, above n 7, 2.

[33] The OAU has usually operated by consensus, Naldi, above n 7, 19. Consensus is also required for reaching decisions in the supreme organ of the Common Market for Eastern and Southern Africa, the Authority; see Art 8(7) of the Treaty Establishing COMESA 1993, (1994) 33 ILM 1067.

[34] See Art 10(1) of the Act. The Executive Council seems to correspond to the OAU's Council of Ministers.

[35] See, respectively, Arts 13(2) and 12 of the Act.

[36] Art 13 refers to the areas of, inter alia, energy, food and agriculture, environmental protection, transport, education, science and technology, etc.

noteworthy that the Council has such a focused role to play, while wider issues relating to Union objectives (eg promotion of peace and security, protection of human rights, harmonisation between existing and future regional economic communities, etc) have not been included in its terms of reference.

The establishment of the Pan-African Parliament is without any doubt an important development not only because, in the words of Article 17(1), it will '[e]nsure the full participation of African peoples in the development and integration of the continent' but also because the experience gained from the operation of similar organs in other regional organisations[37] has shown the advantages to be gained from the involvement of the so-called 'human factor'. As is also true with the Court of Justice and the Financial Institutions, the composition, powers, functions and organisation of the Pan-African Parliament '[s]hall be defined in a protocol relating thereto'.[38]

That the Act itself fails to make any provision as concerns these issues should be criticised. The mere establishment of organs without laying down basic regulatory aspects, especially when these organs do not exist under the OAU, questions at least the seriousness of the Union's founding fathers in achieving the stated objectives. Moreover, the legal relationship between these protocols and the Act is not stated. In particular, there is no stipulation as to whether the protocols shall be considered an integral part of the Act, whether they will be adopted by the Union (presumably by the Assembly) or by only those States that have ratified the Act, whether accession to the Act will be conditioned upon accession to the protocols, etc.

The establishment of the Court of Justice in Article 18 signifies a welcome departure from the OAU Charter, which never envisaged a judicial organ.[39] The jurisdiction of the Court of Justice is simply stated in Article 26 of the Act to concern matters relating to the interpretation and application of the Act and, while we must await the conclusion of the required Protocol for details, its competence might probably include the settlement of disputes between Member States, or between Member States and Union organs, the validity of the decisions adopted by the various Union organs, and possibly the interpretation and application of its Protocols, etc. The relationship between this Court and the courts proposed by the AEC[40] and the Protocol Establishing an African Court of Human and Peoples' Rights[41] will also have to be addressed. It should be noted that by virtue of Article 9(1)(h) the appointment to and termination of the office of Court judgeships has been assumed by the Assembly.

As far as the Financial Institutions are concerned, Article 19 stipulates that there will be the following three: the African Central Bank, the African Monetary Fund and

[37] Especially in the European Continent, where the Parliamentary Assembly functions in the Council of Europe, the European Parliament in the European Community, the Parliamentary Assembly in the Organization for Security and Cooperation in Europe, etc.

[38] See, respectively, Arts 18(2), 19, and 17(2) of the Act.

[39] The OAU Charter did envisage a quasi-judicial organ, the Commission of Mediation Conciliation and Arbitration which, however, never became operational. According to Article XIX, Member States pledged to settle all their disputes peacefully by referring them to that Commission, whose composition, functions and organisation was laid down in the Protocol of the Commission of Mediation Conciliation and Arbitration of 21 July 1964, (1964) 3 ILM 1116, reproduced in Naldi, above n 4, 32. See further, Naldi, above n 7, 24–9.

[40] See Naldi and Magliveras, above n 6, 610–15.

[41] Reproduced in (2000) 12 *RADIC* 187. Generally, see Naldi and Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', (1998) 16 *Netherlands Quarterly of Human Rights* 431.

the African Investment Bank. There are no details given in the Act as to the aim and purposes of these Institutions. It is interesting to observe that none of these entities has been entitled 'Development Banks', which would have been in line with the objective of accelerating Africa's economic integration,[42] probably because there are already three such institutions covering most of the Continent. These are the Central African States Development Bank, which was established on 3 December 1975, the East African Development Bank, set up on 6 June 1967, and the West African Development Bank, established on 14 November 1973.

According to Article 20(1), the Commission of the Union shall have the function of the Union Secretariat. It shall be composed of the Chairman, the deputy or deputies and the Commissioners and shall be assisted by the necessary staff. Probably because the Commission is regarded as a subsidiary organ, its structure, functions and regulations shall not be laid down in a separate Protocol but will be determined by the Assembly. Pending its establishment, the General Secretariat of the OAU shall serve as the Union interim Secretariat.[43]

The next organ to be established by the Act is the Permanent Representatives Committee pursuant to Article 21, which shall be composed of the Member States' permanent representatives to the Union. It shall be responsible for preparing the work of the Executive Council and shall act on that organ's instructions. The creation of this Committee appears to be problematic. Although it closely resembles the Committee of Permanent Representatives (COREPER), which functions alongside the Council of the European Community, it does not constitute an official organ of the European Community.[44] Since the Committee is composed of permanent representatives, who would naturally continue to represent the interests of their respective countries, it will not be answerable to the Union and, to that extent, it is questionable whether the Court of Justice could exercise jurisdiction over it. On the other hand, the lack of any provision in the Act as to how the Committee's organisation is to be regulated would appear to indicate that in reality it is going to function as an extra-Union organ.

The final organ to be created by the Act is the Economic, Social, and Cultural Council. According to Article 22, it will be an organ with advisory capacity only and shall be composed of different social and professional groups active in the Member States. The details about its composition, as well its functions, powers and organisation, shall be determined by the Assembly. Clearly, the establishment of this organ caters for the active involvement of specific national groups in the technical aspects of the Union.

In conclusion, the Act creates a vast number of Union organs.[45] Whereas this arguably is in line with the objectives enshrined in it, for example the achievement of greater unity and solidarity between the African countries and their peoples, the promotion of sustainable development at economic, social, and cultural levels,[46] the parallel

[42] See Art 3(c) of the Act.

[43] See Art 33(4) of the Act.

[44] Although COREPER is expressly mentioned in Art 207(1) of the Consolidated Version of the Treaty Establishing the European Community, it is classified as an 'auxiliary body'; see Case C-25/94 *Commission v Council (Re FAO Agreement)* [1996] ECR I-1469 at 1505.

[45] A number of specialised technical committees are also envisaged under Art 14 of the Act, eg on Monetary and Financial Affairs, on Trade, Customs and Immigration, and on Health, Labour and Social Affairs. According to Art 15 of the Act their functions include the preparation, coordination and harmonisation of projects and programmes, and the supervision and evaluation of the implementation of decisions taken by Union organs.

[46] See, respectively, Arts 3(a) and (j) of the Act.

operation of so many organs with no specific mandate and whose operation will necessitate large sums of money in an era where established international organisations struggle to ensure their basic financing pose a dilemma as to their effectiveness and success.

V. THE IMPOSITION OF PUNITIVE MEASURES

The Act envisages three separate instances justifying the imposition of measures of a punitive nature. In the first two instances, which are regulated by Article 23, the Act refers to 'sanctions' and in the third instance, which is regulated by Article 30, to 'suspension'. According to the first instance, if a Member State defaults in the payment of its contributions to the Union budget, the Assembly '*shall* determine the appropriate sanctions to be imposed' on it (emphasis added).[47] The sanctions are enumerated in an exhaustive fashion: the recalcitrant state shall be denied the right to speak at meetings, to vote, to present candidates for any Union position or post and shall not benefit from any activity or commitment of the Union.

Notwithstanding the need to ensure diligence in the payment of assessed financial contributions, this provision could be criticised as being unduly harsh, especially if compared with similar clauses in the constitutive instruments of other international organisations. Thus, Article 19 of the UN Charter, which has been followed by a large number of other international organisations, stipulates that a Member state in arrears shall have no vote in the General Assembly if it exceeds the amount of contributions due for the preceding two full years, unless the failure to pay was due to conditions beyond its control. The harshness of Article 23(1) of the Act is indeed puzzling for the following three reasons. First, because the corresponding provision in the AEC Treaty subscribes to the 'two years in arrears' rule and lets recalcitrant States off if they are not in the position to pay assessed contributions for external reasons.[48] Secondly, because it is a fact that a large number of African countries face difficult and pressing financial problems threatening their very existence. Thirdly, because the drafters of the Act appear to have neglected the position in other African organisations. For example, Article 77(3) of the Revised Treaty Establishing the Economic Organisation of Western African States[49] authorizes the deferment of the enforcement of sanctions if the non-fulfilment of obligations is due to reasons beyond the control of the recalcitrant State.[50]

The second instance justifying the imposition of sanctions is the failure by any Member State to comply with the decisions and policies of the Union. According to Article 23(2), recalcitrant Member States '*may* be subjected to other sanctions', which could take the form of denial of transport and communication links with other Member States and other measures of a political and economic nature, which shall be determined by the Assembly (emphasis added). The wording of this provision is unclear and raises questions of interpretation.

In particular, would a Member State, which is not in compliance with Union deci-

[47] See Art 23(1) of the Act. Note that the Act makes no provision relating to the budget with the exception of Art 9(1)(f) stipulating that it shall be adopted by the Assembly. Cf Art 23 of the OAU Charter.

[48] See Art 84 of the AEC Treaty, above n 6.

[49] Signed on 24 July 1993; (1996) 35 ILM 660; (1996) 8 RADIC 187.

[50] See Magliveras, 'African International Organisations: Suspension and Expulsion of Members' [1999] *Australian International Law Journal* 158, 169–170.

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sions, be compulsorily subjected to the sanctions envisaged in Article 23(1) and, subject to the Assembly's discretion, to those mentioned in Article 23(2) as well? Is the term 'measures of a political nature' to be understood as so far reaching as to include suspension from membership or even expulsion from the Union? Contrary to being in default in the payment of financial contributions, which is a question of fact, which organ is going to determine authoritatively the non-compliance with decisions and policies of the Union?[51] Since the determination of non-compliance is primarily a legal and not a political matter, the only reasonable answer would be for the Court of Justice to have the relevant jurisdiction. Finally, and this is an observation applying to both Article 23(1) and Article 23(2), considering that, as has already been mentioned, Assembly decisions are to be reached by consensus, provision ought to have been made in the Act to the effect that recalcitrant Member States shall have no vote in the Assembly's decisions imposing sanctions.

Despite these apparent deficiencies in the drafting of Article 23(2), it should be considered as adequate deterrence for Member States to obey and fulfill the obligations and duties flowing from the decisions and policies of the Union. Especially, the imposition of the threatened sanction of cutting off transport and communication links between the recalcitrant country and the other Member States should constitute adequate 'punishment' inducing the former to return to legality. This should prove to be particularly true in the case of the numerous African land-locked countries.[52]

The third instance of imposing punitive measures is envisaged in Article 30. It stipulates that those governments that shall come to power through unconstitutional means shall be prohibited from participating in the Union activities. An initial observation is that the article's title, namely 'suspension', is somewhat misleading; the term 'exclusion' describes the situation more accurately. The essence of Article 30 is that the Member State, where the unconstitutional *coup d'état* occurred, is not suspended either from the Union organs or from the Union itself. It is only the unlawful government which, for as long as it remains in power, shall not be allowed to take part in the activities of the Union. It follows that, whenever the Member State in question returns to constitutional normality, its status quo in the Union shall be reinstated.

Article 30 does raise crucial questions as relates to its modus operandi. In particular, who determines whether a government has taken power through unconstitutional means? What exactly is the ambit of non-participation in the Union activities? Considering that today a majority of African governments could not be described as democratic, at least by First World standards, would their overthrow by popular uprisings trigger the application of the suspension clause? The inclusion in the Act of Article 30 was made in furtherance of its relevant principles and objectives.[53] Its proper and consistent application should act not only as a deterrent to attempts at unconstitutional removals of legitimate governments but should also give to the Union the opportunity to promote democratic principles and the rule of law among Member States.

[51] Admittedly, the monitoring of the implementation of Union policies has been entrusted to the Assembly. However, the determination of non-compliance is a function completely different from monitoring.

[52] There are currently fifteen land-locked countries in Africa.

[53] See above n 11 and corresponding text.

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VI. CONCLUSION

The significance of the creation of the Union cannot be overstated. It represents the most concrete manifestation towards the realisation of a process of political cooperation and economic integration of the States of the African Continent begun by the OAU. The swift adoption of the Act encapsulates the urgent hopes and aspirations of the countries and peoples of Africa for peace, security, stability and development. Commitments to popular participation, good governance and human rights are especially welcome developments. The Union would appear to have the democratic legitimacy that the OAU has always lacked. The Union should also have the legal and institutional framework to provide for enhanced cooperation and integration. It replaces the discredited OAU that was simply ill-equipped to meet the contemporary and future challenges of a post-colonial and post-Cold War era. However, much complex work still remains to be done on the mandate and operational capacity of the Union organs and it will be important to ensure that they are endowed with the powers necessary to fulfill their mission. Ultimately the success or failure of this brave new venture will be largely dependent on whether many African regimes are able to set aside their traditional enmities and whether many African leaders are able to rise above their vainglory.

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