

## CURRENT LEGAL DEVELOPMENTS

# The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa

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### Abstract

The African Union marks a new era in institution-building in postcolonial Africa. It is conceived as an aspect of Africa's response to the challenges of globalization and regional integration. It is also part of the historic quest for deeper African unity. This discussion focuses on the political and contextual dynamics behind this development, and assesses its significance for the project of African integration. While offering no extensive examination of all the core provisions of the Constitutive Act, particular attention has been paid to some key principles. It is argued that the African Union represents a significant departure from the political, legal, and institutional framework of the OAU, and is predicated on a range of principles that reflect new thinking and approaches among the African states.

### Key words

African Union; Constitutive Act; regional integration; institution-building; postcolonialism

## I. INTRODUCTION

On 9 July 2002 the African continent entered a new era when the African Union was formally inaugurated in Durban, South Africa. This was almost two years to the day since the adoption of the Constitutive Act of the African Union ('the Constitutive Act')<sup>1</sup> by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) at its thirty-sixth ordinary session in Lome, Togo, on 11 July 2000. The Constitutive Act entered into force on 26 May 2001, following its ratification by two-thirds of the member states of the OAU, as provided for in its Article 28.<sup>2</sup> In terms of Article 33(1), upon its entry into force the Constitutive Act

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1. The text of the Constitutive Act of the African Union can be found at [http://www.oau-oua.org/LOME2000/introductory\\_note.htm](http://www.oau-oua.org/LOME2000/introductory_note.htm).

2. At the time of writing (October 2002), all the 53 former member states of the OAU have signed and ratified the Constitutive Act, except as indicated hereafter: the Democratic Republic of Congo and Madagascar have not ratified it. Guinea, Guinea-Bissau, and Mauritania had indicated through formal written notifications to the former OAU Secretary-General that they have ratified it, but they have not yet deposited the instruments of ratification as required by Article 27(2) of the Act, and are, therefore, not officially listed in OAU records.

replaced the OAU Charter. However, in accordance with the same provision, the Charter, and thereby the OAU, remained operational for a transitional period of one year, following a decision adopted to that effect by the Assembly at its thirty-seventh ordinary session in Lusaka, Zambia, on 10 July 2001.<sup>3</sup> Thus the thirty-eighth ordinary session of the Assembly held in Durban on 8 July 2002 was the last summit of the OAU. This summit marked the demise of the OAU after 39 years of existence, and was immediately followed by the inaugural session of the new organization, which was held at the same venue on 9–10 July 2002.

The adoption of the Constitutive Act marked the turning of a significant page in the modern history of Africa, comparable to the adoption of the OAU Charter itself 37 years earlier, on 25 May 1963. It also signified a critical moment in the quest of African peoples for a politically united and economically integrated continent. At the same time, however, the adoption of the Constitutive Act has given rise to many questions, relating both to the substantive aspects of the proclaimed objectives of the African Union, in particular the project of African integration, and to the modalities and processes for carrying them out. Some of these questions have revolved around the following issues: first, the extent to which the African Union offers a qualitative difference from the organization it has replaced, and whether it truly ushers in a new entity that is not merely a reincarnation of the OAU under another name; and, second, the extent to which the establishment of the African Union represents a credible collective African response to the challenge of globalization, as has been claimed by African leaders themselves. Other questions, addressed in some of the limited academic literature that has appeared to date on the subject, relate to the relevance of the Constitutive Act and the African Union in confronting the equally important and urgent challenges of strengthening democracy, collective security, and human rights in Africa, and the quest for stability and economic development in the region.<sup>4</sup>

The aim of this article is not to address all these questions or, indeed, the many others that arise. My aim is more limited: to offer a preliminary assessment of the legal and political significance of the Constitutive Act. I intend to provide a brief account of the political and contextual dynamics behind this recent manifestation of institution-building in postcolonial Africa, and in doing so to give some broad reflections on the significance of the adoption of the Constitutive Act for the project of African integration. For reasons of scope and space, I do not propose to offer a detailed and systematic analysis of each of the provisions of the Constitutive Act, but rather an overview of the institutional and legal order which it establishes, in the

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as having ratified the Constitutive Act. See OAU Council of Ministers, 76th Ord. Sess., *Report of the Secretary General on the Status of OAU Treaties*, CM/2251 (LXXVI), 18. Morocco, which withdrew from the OAU in 1984 because of its objection to the admission of the Sahrawi Arab Democratic Republic, has not yet acceded to the Constitutive Act. Article 29 provides for accession to the Constitutive Act and admission to membership of the African Union by any African state.

3. OAU Assembly of Heads of State and Government, 37th Ord. Sess., AHG/Dec.160 (XXXVII), para. 15.  
 4. See, for example, K. Magliveras and G. Naldi, 'The African Union – A New Dawn for Africa?', (2002) 51 ICLQ 415; A. Abass and M. A. Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union', (2002) 49 NILR 1; C. Packer and D. Rukare, 'The New African Union and its Constitutive Act', (2002) 96 AJIL 365. See also T. Maluwa, 'Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union', (2001) 9 *African Yearbook of International Law* 3.

context of the ongoing conversations about African political unity and economic integration.

Of course, a brief discussion such as this one runs the risk of oversimplifying what is a long and complex story. A fuller discussion would have to engage, first and foremost, with the historical processes and the political and intellectual discourses underpinning the idea of African unity and integration. Historically, it would be necessary to locate the African Union project within the earlier attempts at constructing African unity and integration and the accompanying legitimizing narrative of pan-Africanism, to provide a kind of ideological genealogy. Such a discussion might also investigate, for example, the various theoretical debates which have dominated social science and international relations discourses since the 1950s on the subject of regional integration, particularly in relation to the relevance of the experience of European integration for other integration schemes in Africa and elsewhere in the world.<sup>5</sup>

These debates have a certain resonance with the process of institution-building in postcolonial Africa. In part, an engagement with these questions goes some way towards addressing the question: what is the nature of integration entailed in the idea of the African Union? Indeed, what is the basic institutional premise of the African Union: is it a supranational institution or merely an intergovernmental organization, as was the OAU which it has replaced? And what is the relevance of this ongoing theoretical schism in European intellectual and political discourse – between neofunctionalism and intergovernmentalism<sup>6</sup> – for identifying, describing, and predicting the eventual outcome of the processes of economic and political integration in Africa? While this short discussion cannot pretend to present detailed accounts of these integration narratives or respond critically to the questions they raise, it is apt to point out, at least, that these narratives remind us that part of the task involved in explaining the recent developments relating to the establishment of the African Union has to do with the problem of definition. There is a whole range of questions that require definitional clarity and elucidation. For example: is integration an economic or political phenomenon? If it is an economic phenomenon, what levels of interdependence need to be achieved among a group of national economies for them to be described as ‘integrated’? And does economic integration imply political integration? Or, conversely, does political integration create the space for economic integration to flourish? And what does the notion of political integration itself entail?<sup>7</sup>

## 2. THE HISTORICAL BACKGROUND AND POLITICO-LEGAL CONTEXT

The adoption of the Constitutive Act was preceded by a declaration, adopted on 9 September 1999 by the fourth extraordinary session of the OAU Assembly held

5. For a brief account of these debates, see Ben Rosamond, *Theories of European Integration* (Basingstoke, 2000), *passim*.

6. These are only two of the principal theoretical perspectives from which most discussions on European integration tend to proceed. Other perspectives include ‘federalism’, ‘functionalism’, ‘transactionalism’, or ‘pluralism’, to name only a few. For a brief critique of these approaches, see Rosamond, *supra* note 5.

7. For a discussion of some of these questions in relation to European integration, see Rosamond, *ibid*.

in Sirte, Libya ('the Sirte Declaration').<sup>8</sup> The session had been convened at Libya's request '[to] discuss ways and means of making the OAU effective so as to keep pace with the political and economic developments taking place in the world and the preparation required of Africa within the context of globalization so as to preserve its social, economic and political potentials'.<sup>9</sup> In fact, in considering the Libyan request and invitation to host the extraordinary session at its thirty-fifth ordinary session in Algiers on 14 July 1999, the Assembly had viewed this objective as an aspect of Africa's collective response to the phenomenon of globalization. Not surprisingly, various speakers at the Algiers summit, and subsequently in Sirte, reiterated the need to reposition the OAU in the international scheme of things, reorient its objectives, and put in its place a new mechanism in order to reinvigorate the project of African integration in response to the forces of globalization.<sup>10</sup> In brief, there was a perceived need for new forms of institutionalization to advance this project.

The idea of reviewing and reforming the political, legal, and institutional bases of the OAU has a long history and is certainly not the brainchild of Colonel Muammar Gaddafi, the Libyan leader, alone, even if he is currently its most vocal advocate. There is no doubt that, in recent times, he has gone out of his way to cultivate a self-ascribed role as the 'accelerator of the engine for the transformation and reconstruction' of African unity and the 'spiritual father' of the African Union.<sup>11</sup> However, as I have noted elsewhere,<sup>12</sup> a less cynical reading of Gaddafi's proclaimed position, as articulated in various speeches, including those delivered at the inauguration of the African Union, reveals a clear and well-pronounced commitment to the need to

8. For the full text of the Sirte Declaration, see <http://www.libya-un.org/speeches/sirte990909.pdf>. The relevant part provides as follows:

[8.] Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples, in the light of those proposals, and bearing in mind the current situation on the continent, we DECIDE TO:

(i) Establish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organization and the provisions of the Treaty Establishing the African Economic Community.

(ii) Accelerate the process of implementing the Treaty Establishing the African Economic Community, in particular:

(a) Shorten the implementation periods of the Abuja Treaty.

(b) Ensure the speedy establishment of all the institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and, in particular, [the Pan-African Parliament].

9. OAU Assembly of Heads of State and Government, 35th Ord. Sess., AHG/Dec.140 (XXXV).

10. Similar descriptions of European integration as a response to the forces of globalization can be found in the copious literature on the European Union. In this context, one writer has observed that: 'European integration can be seen as a distinct west European effort to contain the consequences of globalisation. Rather than be forced to choose between the national polity for developing policies and the relative anarchy of the globe, west Europeans invented a form of regional governance with polity-like features to extend the state and to broaden the boundary between themselves and the rest of the world.' See H. Wallace, 'Politics and Policy in the European Union: the Challenge of Governance', in H. Wallace and W. Wallace (eds.), *Policy-Making in the European Union* (Oxford, 1996), 16.

11. See *Jeune Afrique Economie* 314 (7 Aug.–3 Sept. 2000), 59. See also, for example, *The Observer*, 4 March 2002, 22. Of course, there is no doubt that Gaddafi himself and his regime have not spared any effort in cultivating his image as the principal architect of the African Union, even while acknowledging the role of earlier African political leaders, such as Kwame Nkrumah, as the originators of the idea of the African Union; see text of interview with Ali Triki, Libya's Minister of African Affairs and a close confidante of Colonel Gaddafi, conducted during the Durban summit, at <http://allafrica.com/stories/200207240002.html>.

12. See my discussion in the work cited, *supra* note 4.

reinvigorate the quest for a more united and cohesive Africa. A recurrent theme in these pronouncements is his critique of the postcolonial African state as an illegitimate product of the balkanization policy of European colonialism and his questioning of the legitimacy of the inherited colonial territorial divisions which have, in many cases, split peoples and communities that in previous times belonged to the same polities. Gaddafi is not alone on this, as anyone familiar with some of the more critical African legal and historical scholarship would easily testify.<sup>13</sup> In questioning the historical legitimacy and political logic of the colonial balkanization of Africa, one is in fact questioning the very legitimacy of the international law principle of *uti possidetis*, on which the protection of colonial boundaries in Africa has been based and which was given political sanctity in the well-known resolution adopted by the first ordinary session of the OAU in Cairo, Egypt, in July 1964.<sup>14</sup>

This critique recalls similar pronouncements made in the early 1960s by Ghana's first president, Kwame Nkrumah, who challenged Africans to rethink the whole question of the inviolability of the boundaries inherited at independence by the postcolonial African states. In this sense, the adoption of the Constitutive Act has its antecedents in the pan-Africanist movement of the pre-independence era. The project is, therefore, not one individual country's sole initiative,<sup>15</sup> or one particular leader's obsession with personal aggrandizement. To insist otherwise is to run the risk of missing the historical context in which current debates about African unity and integration must be located. It is not insignificant that, notwithstanding their initial differences or misgivings over Gaddafi's advocacy of the matter, all African countries have publicly expressed their commitment to the idea of a more united Africa by signing and, with a couple of exceptions, ratifying the Constitutive

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13. Wole Soyinka has strongly attacked the arbitrary colonial partition of Africa and the deprivation of organic identities and its costly consequences. In an apparent reference to the 1964 OAU Resolution on Border Disputes Among African States, he charges that 'the OAU [formally] consecrated this act of arrogant aggression, reinforced by civil wars on varied scales of mutual destruction in defense of the imperial mandate'; see W. Soyinka, *The Burden of Memory, The Muse of Forgiveness* (Oxford/New York, 1999), 40–41. See also O. Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa', (2000) 41 *Harvard International Law Journal* 503. For a different perspective, see A. Mbembe, 'At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa', (1999) *CODESRIA Bulletin Nos. 3 & 4*, 4, esp. at 6, where he states, *inter alia*: '[It] is clear that the boundaries inherited from colonization were not defined by Africans themselves. But contrary to a common assumption, this does not necessarily mean that they were arbitrary. [Moreover,] to state that current African boundaries are merely a product of colonial arbitrariness is to ignore their multiple geneses. In fact, their establishment antedated the Congress of Berlin, whose objective was to distribute sovereignty among the different powers engaged in dividing up the Continent.'
14. OAU Assembly of Heads of State and Government, 1st Ord. Sess., AHG/Res.16 (I): Resolution on Border Disputes Among African States, adopted on 21 July 1964. The principle of *uti possidetis* was effectively characterized as a principle of regional international law in Africa by the International Court of Justice in the *Frontier Dispute (Burkina Faso v. Mali)* Case; see ICJ Rep. 1986, 554.
15. The facile assumption that the African Union is the brainchild of President Gaddafi is not limited to the popular media alone. Thus, in one of the few academic discussions to have appeared on the issue so far, Magliveras and Naldi observe that 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'. See Magliveras and Naldi, *supra* note 4, 415. Yet there is something contradictory in describing this development as both Gaddafi's brainchild and as part of the OAU's process of political co-operation and economic integration. While it cannot be denied that Gaddafi has given the idea its most recent impetus, the project of African political and economic union and integration has its roots in earlier historical antecedents and was explicitly envisaged in Article 6 of the Abuja Treaty. The idea of the African Union is not, as such, Gaddafi's singular invention.

Act within the short period of fewer than two years following its adoption. This commitment was reinforced in most of the speeches made at the inaugural summit.

Moreover, as pointed out above, part of the political context within which the adoption of the Sirte Declaration and, subsequently, the Constitutive Act should be understood is the challenge posed by the forces of globalization, and Africa's response to them. The project of establishing the African Union is predicated on the premise that the construction of a large integrated regional bloc is the only efficient response to the challenge of globalization. This assumption is also evident in the call for the acceleration of the economic integration of the African continent made by the African political leaders at Sirte.<sup>16</sup> But what was the background to this call?

The last 25 years have witnessed an increase in African economic integration schemes and institutions, referred to as regional economic communities (RECs), which are regarded as the 'building blocks' of the African Economic Community (AEC), established in 1991 under the Abuja Treaty.<sup>17</sup> Currently, the major RECs are the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel–Saharan States (more commonly known by the acronym CEN-SAD), the Economic Community of Central African States (ECCAS), and the more recently established East African Community (EAC).<sup>18</sup> All these were intended to be the basis on which the linear progression of African integration envisaged under Article 6 of the Abuja Treaty, from free trade areas to a continent-wide common market, would proceed. The proposed Abuja process brings into focus some aspects of the questions raised earlier: is the end point of economic integration a customs union, a common market, or full economic and monetary union? What types and levels of common institutionalization are associated with an integrated economic space? Does this economic integration imply political integration? And so on.

The OAU's own approach to African integration did not faithfully follow the logic of the Abuja Treaty. Mulat has aptly observed that regionalization in Africa has followed a rather complicated route, and trade issues and economic considerations alone do not appear to be the basis for it in every case. Nevertheless, he also demonstrates that regionalism can complement and further facilitate the drive

16. The Sirte Declaration called for the acceleration of the process of implementing the Abuja Treaty by, *inter alia*, shortening the implementation periods of the treaty. See para. 8(ii)(a) of the Declaration, at <http://www.libya-un.org/speeches/sirte990909.pdf>.

17. The Treaty Establishing the African Economic Community (also commonly referred to as the Abuja Treaty) was adopted by OAU member states on 3 June 1991. It set up the African Economic Community (AEC) as an integral part of the OAU (Article 98). The Abuja Treaty, which entered into force on 12 May 1994, has not been abrogated by the Constitutive Act, and its provisions shall have precedence over any inconsistent or contrary provisions of the Treaty (Article 33(2) of the Act).

18. There are seven RECs that were formally recognized by the OAU as the 'building blocks' of the African Economic Community: the Arab Maghreb Union (AMU), COMESA, CEN-SAD, ECCAS, ECOWAS, the Intergovernmental Authority on Development (IGAD), and SADC. It should be noted that the membership of these RECs does not necessarily coincide with membership of the geographical regions into which OAU (and now the African Union) member states are divided: Central Africa, East Africa, North Africa, Southern Africa, and West Africa. Furthermore, there is also a considerable degree of overlapping membership between the different organizations, with some countries belonging to as many as three different RECs, and some RECs drawing their membership from at least three different geographical regions.

towards multilateralism and economic globalization, and that perhaps the strongest justification yet for Africa's RECs is to be found in the long-term possibilities they create for sustained growth and improved welfare.<sup>19</sup> Despite the fact that these questions were not addressed as such in Sirte, few of the African political leaders at that summit would have disagreed with this analysis. It was against this background, characterized by a lack of strategic clarity and the slow pace of implementation of the Abuja Treaty programme, that the call was made in the Sirte Declaration to accelerate the project of African integration by short-cutting the tortuous path mapped out in the Abuja Treaty and establishing a new institution, the African Union.

Although some aspects of these questions have been eloquently discussed in some of the academic literature on regional integration in Africa,<sup>20</sup> no serious engagement with these questions has ever been undertaken at the highest political level. Beyond the broad platitudes about the need to enhance African unity and integration, there has not been a deep discussion among political leaders in Africa on the idea of the African Union, on the very meaning of the 'union' entailed in this project and its economic, legal, and political implications for the continent. Some leaders regard it as the panacea for all of Africa's economic and political problems, while yet others still view it as the thin end of the wedge in a move towards the creation of a 'United States of Africa'.<sup>21</sup>

As stated earlier, considerations of space and the intended scope of this article do not permit a detailed examination of all the provisions of the Constitutive Act. So, while an extensive and systematic analysis of all the core objectives and principles of the African Union, which are to be found, respectively, in Articles 3 and 4, would be instructive, such an exercise would require a much longer discussion going beyond the scope of this article. Suffice it to note that the Constitutive Act enumerates a rather expansive list of 14 objectives and 16 principles that go well beyond those enshrined in the OAU Charter. Of particular interest, perhaps, is the fact that Article 4 of the Constitutive Act incorporates new, radically expanded principles with potentially far-reaching implications. Some of these principles are more or less generally recognized in international law, for example, the prohibition of the use of force among member states; peaceful coexistence among member states and their right to live in peace and security; and respect for democratic principles, human rights the rule of law, and good governance. Other principles reflect new thinking and new approaches among African states: the principles of participation by African peoples in the activities of the organization; the establishment of a common defence policy for the African continent; the right of the African Union to intervene in member states under certain conditions where war crimes, genocide and crimes

19. T. Mulat, 'Multilateralism and Africa's Regional Economic Communities', (1998) 32 *JWT* 115 at 138.

20. See, for example, *ibid.*, and the literature cited therein.

21. Thus President Gnassingbe Eyadema of Togo, who was the chairman of the OAU at the time of the adoption of the Constitutive Act in July 2000, somewhat elliptically referred to the birth of the 'United States of Africa' in his speech, delivered on behalf of the West African region, at the public ceremony to launch the African Union on 9 July 2002. While this may have been intended merely as a dramatic way of bringing to the attention of the public the significance of the launching of the African Union, it is well to remember that President Eyadema is one of the few African leaders who have expressed support for Colonel Gaddafi's oft-repeated proposal for the creation of a 'United States of Africa'.

against humanity have been committed; the right of member states to request intervention from the African Union in order to restore peace and security; the promotion of self-reliance; the promotion of gender equality; the promotion of social justice so as to ensure balanced economic development; and the condemnation and rejection of unconstitutional changes of government.

What, then, is the added value in this long catalogue of principles of the African Union? There can be no doubt that, within the African political context, the inclusion of principles in such a constitutive legal instrument relating to issues of gender equality, good governance, democratization, humanitarian intervention, war crimes and crimes against humanity, social justice, rejection of unconstitutional changes of government, and so on, would have been unthinkable or unacceptable a decade or so ago. In view of the high purchase placed upon the commitment to respect democracy, human rights, and the rule of law in African politics these days, it may be appropriate to make a few remarks on this.

Apart from its inclusion in the Constitutive Act, the commitment to democracy, human rights and the rule of law also happens to be one of the fundamental principles upon which the recently adopted *New Partnership for Africa's Development* (NEPAD), itself now a programme of the African Union,<sup>22</sup> is based. Indeed, apropos the principle relating to respect for democracy, human rights the rule of law, and good governance, the African Union has been hailed as joining an ever-increasing number of international organizations that have recently decided to incorporate 'democracy clauses' in their constitutive instruments.<sup>23</sup> In this respect, some instructive comparisons have been made with a number of other regional organizations. Thus it has been noted that the Organization of American States Charter was amended in 1992 to cater for cases of sudden or irregular change of legitimate exercise of power by the democratically elected government in any member state.<sup>24</sup> Other organizations that have more recently amended their constitutive legal instruments to insert democracy clauses are the Common Market of the South (Mercosur) and the European Union, through the amendment effected by the Treaty of Amsterdam of 1997 to the Treaty of Rome (Article 309) to provide for suspension of certain membership rights of countries in persistent breach of the principles of democracy, human rights,

22. The New Partnership for Africa's Development (NEPAD) is a holistic, comprehensive, and integrated strategic framework for the socioeconomic development of Africa, which articulates a comprehensive vision for the development of the African continent, with a programme of action that embraces initiatives on peace and security, democracy and political governance, as well as economic and corporate governance with a commitment to regional and sub-regional approaches to development. Although its origins lie in the initiatives of some individual African countries, notably Algeria, Egypt, Nigeria, Senegal, and South Africa, it was adopted as a programme of the OAU at its Lusaka summit on 11 July 2001 (see AHG/Decl.1 (XXXVII)) and reaffirmed as a programme of the African Union by the Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD) adopted by its inaugural summit on 10 July 2002 (see ASS/AU/Dec.1 (I)). It is thus an African-led, African-owned and African-managed initiative underpinned by an agreed set of principles to which the participating states pledge their commitment. From a human-rights perspective the most important of these principles is the commitment by the states to '[promoting] and protecting human rights in the respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels'.

23. Magliveras and Naldi, *supra* note 4, 417.

24. As amended by the Protocol of Washington of 14 December 1992. See discussion in K. Magliveras, *Exclusion from Participation in International Organizations: The Law and Practice Behind member states' Expulsion and Suspension of Membership* (The Hague, 1999), 171–4.

and the rule of law. It could be said that these developments are indicative of the gradual recognition by these organizations of what Thomas Franck, not too long ago, characterized as the 'emerging right to democratic governance'.<sup>25</sup>

The principle regarding respect for democracy must be linked to another principle, which also represents a radical departure from the OAU Charter and thus merits particular mention in this brief discussion. Article 30 provides for the suspension from participation in the activities of the organization of any government of a member state that comes to power through unconstitutional means. The inclusion of this provision in the Constitutive Act strengthens and codifies the resolutions previously adopted by the OAU policy organs on the need to impose sanctions on governments that violate democratically established constitutional authority and to require such regimes to restore constitutional order speedily. I would argue that this should be viewed within the wider context of the more recent engagement by the OAU with the issues of democratization, human rights, and good governance. This does not mean, as some commentators seem to suggest,<sup>26</sup> that the African Union should be expected to use force to reverse military coups d'état in member states, as ECOWAS did in Sierra Leone in 1998, but that governments coming to power through such means should no longer have a place at the African diplomatic table. In fact, this policy had been applied by the OAU since 1997, following the adoption of a decision to that effect by the OAU summit in Harare, Zimbabwe, in July of that year.<sup>27</sup> Accordingly, no government that came to power through military coups d'état after 1997 was allowed to participate in the meetings of the OAU policy organs, that is, at ministerial and summit levels. This ban was applied at various times to the military regimes in Comoros, Côte d'Ivoire, and Niger. The decision was also invoked by the OAU as justification for the exclusion from participation by the Marc Ramalovanana-led government of Madagascar in the last summit of the OAU and the inaugural summit of the African Union, because of the alleged constitutional irregularity of the manner in which that government assumed power following the disputed presidential election results in the country.<sup>28</sup> However, the real test of the commitment of African states to these new principles will lie in their responses to the continuing instances of actual disregard for democracy and violations of human rights which characterize the political behaviour of some of their leaders, including those who claim to have come to power through the democratic process. The

25. T. M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46.

26. See Abass and Baderin, *supra* note 4, 25–6.

27. On 30 May 1997, the OAU Council of Ministers adopted a decision to exclude the military regime which had come to power in Sierra Leone in a military putsch only five days earlier, on 25 May, from participating in the OAU ministerial and summit meetings then taking place in Harare, Zimbabwe: see CM/Rpt/LXVI. Further decisions on the non-participation of unconstitutional governments in OAU meetings were adopted in Algiers by the Council and the Assembly, respectively, in July 1999: CM/Dec.483 (LXX) and AHG/Dec.141 (XXXV). Subsequently, at the Lome summit, in addition to adopting the Constitutive Act of the African Union, the Assembly also adopted the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI).

28. See decision ASS/AU/Dec.7 (I). However, in view of the fact that Madagascar has not yet ratified the Constitutive Act it cannot be regarded as a member of the new body, and is thus not bound by its decisions or by the obligations entailed in membership of the organization. The decision to exclude it from participating in the inaugural session of the African Union was, therefore, legally superfluous.

ambivalence and outright silence of most African leaders towards the continuing allegations of electoral fraud and human rights violations in Zimbabwe does not augur well for the African Union's new-found commitment to the democracy principle.

In this respect, mention should be made of the Declaration Governing Democratic Elections in Africa adopted by the last ordinary session of the OAU in Durban.<sup>29</sup> This declaration sets out, *inter alia*, the agreed principles of democratic elections, the responsibilities of member states, and the rights and obligations under which democratic elections are conducted. The principles enunciated under this declaration include the primacy of the rule of law, the separation of powers, and the independence of the judiciary, as well as the notions of periodic, regular elections held under conditions of freedom and fairness, as provided for in national constitutions and other supporting legal instruments. As a declaration, it is not binding on the member states in the same way that the organization's decisions and resolutions are.<sup>30</sup> However, its significance cannot be discounted since it is intended to provide a guiding framework and harmonize viewpoints. It certainly complements the earlier decisions and declarations by the OAU on unconstitutional changes of government referred to above. If the provisions of this declaration are given effect by the member states, the claim that the African Union has joined the concert of regional organizations that have incorporated 'democracy clauses' in their constitutive instruments will have been borne out.

Article 5(1) of the Constitutive Act enumerates the organs of the Union.<sup>31</sup> While it may be lamented that the Constitutive Act provides only the barest indication of the functional attributes, institutional powers, and interrelationships between the different organs,<sup>32</sup> it should also be understood that, as with most such institutional structures, these could only best be defined in some detail in the rules of procedure and regulations to be adopted for these organs. The draft rules of procedure for the various organs were subsequently prepared following a series of consultations and meetings of representatives and legal experts from the member states convened in the intervening period between the Lusaka summit and inaugural session of the African Union. In fact, the first formal business of the Assembly of the African Union was to consider and approve its rules of procedure and those of the Executive Council, and the statutes of the Commission. As already noted above, equally significantly, the inaugural summit also adopted the Protocol Relating to the Establishment of the

29. See AHG/Decl.1 (XXXVIII).

30. See Rule 33 of the Rules of Procedure of the Assembly for the differences between regulations, decisions, directives, recommendations, declarations, etc.

31. The organs established by Article 5(1) are: the Assembly, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives' Committee, the Specialized Technical Committees, the Economic and Social Council, and the Financial Institutions. As regards the Financial Institutions, three are envisaged under Article 19: the African Central Bank, the African Monetary Fund, and the African Investment Bank. Furthermore, Article 14 provides for seven Specialized Technical Committees, with the possibility that the Assembly may establish others. All in all, then, the Constitutive Act expressly establishes 17 different organs. In view of the fact that provision is made under Article 5(2) for the establishment of additional organs by the Assembly, it is easy to see that, in time, the new organization will operate with the kind of proliferation of committees, and the accompanying bureaucratic and financial implications, that have come to characterize the operations of the European Union. Already, one of the principal decisions of the inaugural summit has been the establishment of a new organ, the Peace and Security Council.

32. See Packer and Rukare, *supra* note 4, 374 *et seq.*

Peace and Security Council of the African Union. This organ, clearly intended as an African version of the UN Security Council, was not provided for in the Constitutive Act, but has been established in terms of the decision adopted by the thirty-seventh ordinary session of the OAU<sup>33</sup> by which the Assembly decided to incorporate the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution as one of the organs of the African Union, in accordance with Article 5(2) of the Constitutive Act. The protocol, which was immediately signed by 28 countries following its adoption, shall enter into force upon the deposit of instruments of ratification by a simple majority of the member states.<sup>34</sup>

### 3. CONCLUDING REMARKS

I would conclude this brief discussion by recalling two of the questions posed at the outset: to what extent was the adoption of the Constitutive Act a manifestation of the desire of African states and peoples to create a new institutional framework representing a substantive departure from the OAU? And to what extent does it represent a distinct and credible African effort to contain the challenge of globalization, in the manner in which similar claims have been made for the European Union?<sup>35</sup>

It is apt to recall that in his report to the thirty-seventh ordinary session of the OAU Assembly in Lusaka in July 2001, the OAU Secretary-General made the pertinent observation that:<sup>36</sup>

[It] is important to point out that when African leaders decided to establish the African Union when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organization which was going to be a continuation of the OAU by another name.

The African Union is supposed to represent a new economic, legal, institutional, and political order for Africa, and not an instance of merely pouring old wine into new bottles. As such, it holds out a lot of promise for the citizens of Africa as providing a new framework within which to pursue the decades-old project of deepening their unity and cohesion in the economic, political, and social spheres. It cannot be denied that the establishment of the African Union, based on the shared vision encapsulated in the objectives and principles contained in the Constitutive Act, provides a new beginning for Africa. But, as with all such new beginnings, the proof of the pudding is in the eating. Unless African states exhibit the political will and commitment to implement these objectives and principles faithfully, the advent of the African Union could turn out to be yet another false dawn for Africa. Much has been made of the fact that the recent impetus towards the African Union was, in large measure, propelled by Muammar Gaddafi's single-minded advocacy. Yet, as I have argued here, it would be a mistake to ignore the historical antecedents and

33. AHG/Dec.160 (XXXVII).

34. See AU Assembly of Heads of State and Government, 1st Ord. Sess., ASS/AU/Dec.3 (I): Decision on the Establishment of the Peace and Security Council of the African Union.

35. See Wallace, *supra* note 10.

36. See OAU Council of Ministers, 74th Ord. Sess., *Report of the Secretary General on the Implementation of the Sirte Decision on the African Union (EAHG/Dec.1 (V)*, para. 26.

context in which the African Union has been established. These antecedents and the context point towards an ideal that has a longer history and is widely shared by most Africans: that of forming a stronger and more cohesive institution to enable them to confront the challenges of the day. This explains why, despite the initial misgivings, cynicism, and outright hostility in some quarters, and despite the deplorable lack of grassroots involvement in the initial debates, the idea of the African Union appears to have been positively embraced by both the political leadership and the common citizenry in most parts of Africa.

That said, I believe that the Constitutive Act has not addressed the issue of the political unification of the continent in any substantive and direct manner, beyond the objectives stated in Article 3(a) and (c), namely to ‘achieve greater unity and solidarity between African countries and the peoples of Africa’, and ‘accelerate the political and socioeconomic integration of the continent’. As it stands, the Constitutive Act is hardly the charter for the politically integrated Africa that some African political leaders or commentators have made it out to be. Nor is it a programme of action, in the sense that the Abuja Treaty is. Rather, it is an organizational framework aimed at providing the parameters for the future political integration of the continent. Or, as some commentators have put it, ‘the Union serves as a guide map of where Africa wants to go’.<sup>37</sup> It is also a project aimed at bringing the ordinary people of Africa into a common political community, in which they can participate fully and democratically. This objective is captured in the principle of the African Union relating to the ‘participation of the African peoples in the activities of the Union’ and in the promise that the new institution should be ‘truly a community of peoples’. The idea of bringing Africa closer to its citizens will sound familiar to followers of recent European Union summits, where the rhetoric has remained that of ‘bringing Europe closer to its citizens’. The Pan-African Parliament, one of the principal organs of the African Union, is intended to perform the function that some in Europe would like to see the European Parliament perform: ensuring the democratic legitimacy of the continental integration project and the connection of the project with the grassroots through a strengthening of the parliament’s powers and an enhancement of its representational character. If it is to succeed as a community of peoples, the African Union must, at the outset, avoid what has become the grouse of today’s European citizenry: that it is cut off from what the European Union is doing in its name.

A global reading of the text suggests that the emphasis in the Constitutive Act is on economic integration and co-ordination of the socioeconomic agenda of the continent. But even this has not been designed to follow the integration schema envisaged under the Abuja Treaty and may not, in practical terms, advance the African integration project in the way that the most ardent advocates of the African Union generally assume. Moreover, it cannot certainly be regarded as a sure-footed strategy in Africa’s efforts to contain the consequences of globalization, notwithstanding the rhetorical claims of some African political leaders. Yet the gradualist approach of

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37. Packer and Rukare, *supra* note 4, 379.

consolidating economic integration, as a way of consolidating the foundation for subsequent political integration, is both the most rational and realistic. Experience in other regions of the world, especially Europe, has amply demonstrated that regional integration is a long and complex process. This experience is instructive, and Africa would ignore it at its own peril.

Although the project of reconstructing and consolidating African unity has not yet resulted in the long sought-after political union of the continent, the adoption of the Constitutive Act of the African Union and the more recent inauguration of this new institution represent a modest, but important, advance in the long-standing efforts to establish an integrated African economic and political space. The Durban summit marked the formal launching of the African Union. Its operationalization, however, requires further practical measures and decisions, including the election of the members of the Commission, to be conducted at the next session of the Assembly of the Union scheduled to be held in Maputo, Mozambique, in July 2003. Of course, only time will tell whether the legal and institutional framework established under the Constitutive Act provides the African continent and its people with a durable foundation for deeper political unity and economic integration. The establishment of the African Union comes in the long shadow of the collapse of the bipolar Cold War world and the uncertainties of the post-1990 international political landscape, and within the context of the increasing demands of globalization and regional bloc-formation. All these trajectories have coalesced to create a context in which the African political leadership and people have begun to understand, as never before, the imperative of regional integration as the key to their collective survival and advancement. This is not to suggest that the African Union has prepared the ground for the ultimate formation of a territorially unified 'United States of Africa', as some political leaders, such as Libya's Muammar Gaddafi, would dearly wish. However, the level of political commitment to the idea of African unity and political integration today, as demonstrated in the 'Sirte process' which began in the Libyan coastal town on 9 September 1999 and culminated in the inauguration of the African Union in the South African coastal city of Durban on 9 July 2002, indicates a readiness across the African political spectrum to put in place a stronger and more cohesive institution than that previously provided by the OAU. In this sense, it would be wrong to deny Africa the possibility of an incremental evolution towards the kind of closer integration that Europe has undergone over the last half-century.

But, perhaps, it would be appropriate to conclude with a word of caution. Despite its acknowledged failures, the OAU has, in almost four decades of existence, provided Africans with a framework for the co-ordination of their shared political objectives, at least as regards some of the cardinal and overarching concerns of the past decades: decolonization, the fight against apartheid and racist minority rule, and as a vehicle for forging a common socioeconomic agenda.<sup>38</sup> It has also made an admirable

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38. The major achievements of the OAU have been recognized and enumerated in a somewhat self-congratulatory declaration adopted by the first ordinary session of the Assembly of Heads of State and Government of the African Union on 10 July 2002, ASS/AU/Decl.2 (I): the Durban Declaration in Tribute to the Organization of African Unity and on the Launching of the African Union.

contribution to postcolonial institution building and international law-making.<sup>39</sup> But the problems that Africa continues to face today, for example deepening poverty and economic decline, the challenges of globalization, and continued threats to peace and security and the full enjoyment of human rights by all, require new approaches, strategies, and institutional frameworks. African states must empower the African Union to make it a credible institution to enable them to confront these enduring problems effectively. Unless this happens, the African Union will, indeed, amount to nothing more than a continuation of the OAU by another name.

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39. See T. Maluwa, 'International Law-Making in Postcolonial Africa: the Role of the Organization of African Unity', (2002) 49 NILR 81.