

The African Union: Hope for better protection of human rights in Africa?

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Historically it may well turn out that the transmutation of the OAU into the African Union is as important as the United Nations replacing the failed League of Nations after World War II

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1 Introduction

The end of the Cold War was a turning point for Africa. It generated hopes for greater prospects of peace, development and integration in the world economy. It also marked the start of a new epoch, in which Africa lost the strategic value it had to the world superpowers and thus became increasingly marginalised both politically and economically. The post-Cold War era also marked the beginning of globalisation, 'a complex set of developments often operating in contradictory, oppositional or even conflictual manner'.¹ Globalisation was ushered in with promises of progress and prosperity for all.² But globalisation also poses serious threats to the sovereignty, cultural and historical identities of the

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** Secretary-General of the Pan-African Movement, based in Kampala, Uganda in an article entitled 'An idea whose time has come' *BBC Focus on Africa Magazine* July–September 2001 48.

¹ J Oloka-Onyango 'Globalisation in the context of increased incidents of racism, racial discrimination and xenophobia' Working Paper of the United Nations Sub-Commission on the Promotion and Protection of Human Rights 22 June 1999 (E/CN4/Sub2/1999/8) para 2.

² Algiers Declaration adopted by the Assembly of the Heads of State and Government during the 35th ordinary session held on 12–14 July 1999 in Algiers, Algeria. AHG/Decl1 (XXXV). The Declaration is reprinted in (1999) 11 *African Journal of International and Comparative Law* 788.

people of Africa and it gravely undermines Africa's development prospects.³ It is becoming clearer that African countries cannot effectively face the challenges of globalisation as single political entities. Globalisation can only be met through a politically and economically unified Africa.

At the same time, it is also becoming widely recognised that economic and social development cannot be achieved without peace and stability. Peace and stability can only thrive in an environment where human rights are respected. Thus the connection between human rights and development and its linkage to regional integration in the context of globalisation are increasingly acknowledged.

This paper focuses on the place of human rights in economic and political integration efforts on the African continent, particularly in the newly established African Union (AU or Union).⁴ The paper is divided into three parts. The first part traces the history of the African unity in pre- and post-colonial Africa as expressed politically in the Organisation of African Unity (OAU) and economically in various regional economic blocs and the African Economic Community (AEC). The second part examines the provisions of the Constitutive Act of the AU with a view of ascertaining the extent to which the Union is more than a mere change of name of the OAU/AEC. The third part compares the protection of human rights in the AU with that in the OAU/AEC.⁵

2 Background: African unity in historical perspective

2.1 African unity before 1963

The idea of African unity or Pan-Africanism is not new.⁶ It has occupied the minds of individuals in African communities since the end of the last

³ As above.

⁴ The African Union was established by the Constitutive Act of the African Union (the Act) which entered into force on 26 May 2001. The Act is reprinted in (2000) 12 *African Journal of International and Comparative Law* 629 and in the Annexure at the end of this article.

⁵ The two bodies, the OAU and AEC, are dealt with together in this paper because since the establishment of the AEC by the Abuja Treaty in 1994, the two have been existing side by side although the OAU overshadowed the AEC. In practice this was reflected by the holding of parallel summits of the OAU and the AEC. For example the recent summit held in Lusaka was the 37th ordinary session of the OAU and at the same time the 5th ordinary session of the AEC.

⁶ A prominent African historian and political scientist, Ali Mazrui, defines Pan-Africanism as a system of values and attitudes that favour the unity and solidarity of Africans and of people of African ancestry. See O Agyeman Nkrumah's *Ghana and East Africa: Pan-Africanism and African Interstate Relations* (1992) 11. On Pan-Africanism see C Legum *Pan Africanism: A short political guide* (1962); K Nkrumah *Africa must unite* (1963); R Cox *Pan-Africanism in practice: PAFMECSA, 1958-1964* (1964); J Nyerere *Freedom and unity: Uhuru na umoja; A selection from writings and speeches, 1952-1965* (1968); A Jacques-Garvey *Philosophy and opinions of Marcus Garvey* (1968); V Thompson *Africa and unity: The evolution of Pan-Africanism* (1969); G Padmore *Pan-Africanism or*

century. This idea was eloquently expressed by Pan-Africanists in the diaspora such as William Dubois and George Padmore.⁷ At the end of the World War II, the idea of Pan-Africanism took the form of demands for self-government for African peoples. African leaders, many of whom had participated in various Pan-Africanist congresses went on to lead independence struggles in their respective countries.⁸ With independence, Pan-Africanism became a banner under which the idea of African unity was promoted as a way for Africans to regain dignity and economic strength in the post-colonial era.⁹

The first concrete steps towards the realisation of African unity were made in the early 1960s when most African countries had gained their independence. Efforts to unite the newly independent countries led to the development of two rival groups (Brazzaville and Casablanca) which had differing opinions as to the ends and means to achieve the African unity.¹⁰ On the one hand, the Brazzaville group (later the Monrovia group), made up mostly of ex-French colonies, represented a gradualist approach and advocated a loose unity, under one umbrella, while retaining national sovereignty. On the other hand, the Casablanca group composed of countries such as Ghana, Morocco, Guinea and Algeria, had a more radical approach involving the creation of the federation of African states with joint institutions and even a joint military command.¹¹ It was King Haile Selassie of Ethiopia who finally managed to get these two groups together in Addis Ababa to discuss the best way to realise the African unity. The outcome of this meeting of 32 African heads of states was a compromise, an institution named the Organisation of

Communism (1972); and C Amate *Inside the OAU: Pan-Africanism in practice* (1986).

⁷ A Chanda 'The Organization of African Unity: An appraisal' (1989-92) 21-24 *Zambia Law Journal* 1.

⁸ Jomo Kenyatta and Kwame Nkrumah, who would later lead Kenya and Ghana to independence, were some of the key organizers of the historic 1945 Pan-African Congress in Manchester which brought together Africans, Black Americans and West Indians of African descent. See Agyeman (n 6 above) 12.

⁹ Chanda (n 7 above) 4.

¹⁰ GJ Naldi *The Organisation of African Unity* (1999) 2.

¹¹ At about the same time the former colonial masters in Africa, the European states, were in process of establishing their own union through the Treaty of Rome — signed in 1958 — which established the European Economic Community. The idea proposed by Nkrumah was more progressive than that of Europe in that it advocated for even stronger political and economic union. On account of the benefits — such as peace, security and prosperity — that have accrued to the European states one imagines tremendous strides that Africa could have made by now if it had already then embraced wholeheartedly the idea of a United Government of Africa.

African Unity.¹² The OAU Charter represented both views but used the vision of the Monrovia group as its core.¹³

2.2 Consolidating the idea of African unity in the OAU: 1963–1999

Despite the creation of the OAU, some African leaders, particularly Kwame Nkrumah of Ghana, felt that Africa needed a stronger union than the one that had been realised in the OAU.¹⁴ Therefore he advocated for an even stronger union of African states. Nkrumah made his last efforts to influence his fellow leaders to establish a union government for the whole of independent Africa during the OAU summit held in Accra, Ghana in 1965. The idea evoked suspicion and animosity from a substantial number of African heads of state.¹⁵ These leaders were not about to give up their hard-fought independence and recently acquired presidential status for the sake of a continental union. The removal of Kwame Nkrumah from power through a military *coup d'état* in 1966 seemed to have ended the discussion about one government for African states for a while.

In the period between 1966 and 1999 efforts were made to realise African unity through the means of economic integration. This was expressed theoretically in a number of OAU declarations, resolutions and plans of actions that were adopted between 1968 and 1980, and in concrete terms in the formation of several sub-regional economic blocs.

The desire to realise African economic integration is clearly articulated in a number of resolutions, decisions and declarations adopted by the OAU Assembly of the Heads of State and Government in Algiers (1968), Addis Ababa (1970), Addis Ababa (1973) and Libreville (1977). To these could be added 'the Monrovia declaration of commitment on the guidelines and measures for national and collective self-reliance in economic and social development for establishment of a new international order', which called for the creation of the African Economic Market as a prelude

¹² The OAU was established by the OAU Charter which was adopted by a conference of heads of state and government in Addis Ababa on 25 May 1963. The OAU Charter is reprinted in 3 *International Legal Materials* 1116 and in I Brownlie (ed) *Basic documents in international law* (1983) 76.

¹³ M Munya 'The Organisation of African Unity and its role in regional conflict resolution and dispute settlement: A critical evaluation' (1999) *Boston College Third World Law Journal* 537 582.

¹⁴ It should be recalled that on the eve of the founding of the OAU, Nkrumah made an impassioned speech in which he argued for the formation of a union government of African states with a common market, currency, monetary zone, central bank, system of defence, citizenship, foreign policy and continental communication system. The speech is reprinted in *New African* January 2000 381 18–25.

¹⁵ After a failure to establish a union government at the Accra summit of 1965, Nyerere said he had heard one head of state expressing relief that he was happy to be returning home to his country while still the head of state. See *New African* January 2000 381 28–31.

to an African Economic Community, and the Lagos Plan of Action and Final Act of Lagos of 1980, which envisaged the creation of an African Economic Community by the year 2000.¹⁶

This was also a period when African states were making efforts to achieve economic integration by establishing organisations and institutions in various sub-regions in Africa. A large number of these organisations and institutions, also known as Regional Economic Communities (REC), have been created, some with overlapping mandates.¹⁷ Some of the key RECs include Economic Community of West African States (ECOWAS) in West Africa; Economic Community of Central African States (ECCAS) in Central Africa; Common Market for East and Southern Africa (COMESA) in East and Southern Africa; East African Community (EAC) in East Africa; Southern African Development Community (SADC) in Southern Africa and Arab Maghreb Union (AMU) in North Africa.

The idea of continental economic integration was concretised in the Treaty Establishing the African Economic Community (Abuja Treaty),¹⁸ which was adopted under the auspices of the OAU on 3 June 1991 and which entered into force on 12 May 1994 after the requisite number of ratifications was attained.¹⁹ The treaty envisages the establishment of the African Economic Community as an integral part of the OAU. This will be done gradually in six stages over a transitional period not exceeding 34 years.²⁰ Departing from other regional economic treaties, the Abuja Treaty envisions the establishment of the AEC as a goal that should be achieved through encouraging the formation of sub-regional economic bodies, which would eventually amalgamate to create the AEC.²¹

The entry into force of the Abuja Treaty created a situation whereby

¹⁶ See the Preamble to the Abuja Treaty cited below.

¹⁷ Subregional economic integration is a special theme of two consecutive volumes of the *African Yearbook of International Law*. See (1999) 7 *African Yearbook of International Law* 3–81 particularly the articles by Ndulo (on SADC), Kessie (on ECOWAS) and Kaahwa (on EAC). See also (1998) 6 *African Yearbook of International Law* 3–150 especially the article by Gondwe (on COMESA). For an examination of the potential role of the subregional economic institutions in promotion and protection of human rights, see F Viljoen 'The realisation of human rights in Africa through subregional institutions' (1999) 7 *African Yearbook of International Law* 185.

¹⁸ Reprinted in (1993) 1 *African Yearbook of International Law* 227; (1991) 3 *International Legal Materials* 1241; (1991) 3 *African Journal of International and Comparative Law* 792.

¹⁹ OAU 'The African Economic Community' <<http://www.oau-oua.org/document/documents/AEC.htm>> (accessed 31 July 2001). As at 31 July 2001 all OAU member states with the exception of Eritrea had signed the Abuja Treaty and 45 OAU member states had ratified the treaty. OAU CAB/LEG/28.1.

²⁰ Art 6(1) Constitutive Act. For a thorough analysis of the provisions of the Abuja Treaty, see B Thompson 'Economic integration in Africa: A milestone — The Abuja Treaty' (1993) 5 *African Journal of International and Comparative Law* 743.

²¹ While criticising the various attempts to achieve regional economic integration in Africa as having failed to achieve continental fusion, Mistry argues that the Abuja Treaty is useful in that it provides mechanisms to assure a measure of consistency across subregions in their integration measures. P Mistry 'Africa's record of regional cooperation and integration' (2000) 99 *African Affairs* 553–570.

the OAU co-existed with the AEC. In a way the OAU started operating on the basis of both the OAU Charter and Abuja Treaty. This eventually created a need for an institution that would combine the OAU's political nature and the AEC's economic nature. At the same time, the end of the millennium led to a sense of urgency among African leadership to reposition the OAU in order to set the African continent as a whole on a firm path to development and peace in the new millennium.²² It was in this context that the Libyan leader Muammar Gaddafi called a meeting to discuss the formation of a 'United States of Africa'.

2.3 New attempts in 1999: Developments towards adoption of the Constitutive Act of the African Union

Forty-four African leaders met in Libya from 8 to 9 September 1999 at an extraordinary summit of the OAU called by Muammar Gaddafi, to discuss the formation of a 'United States of Africa'.²³ The theme of this summit was 'Strengthening OAU capacity to enable it to meet the challenges of the new millennium'. At this meeting the African leaders adopted the Sirte Declaration²⁴ which called for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-African Parliament.²⁵ The details of the drafting of this Union was to be left to the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Treaty Establishing the African Economic Community.²⁶ The declaration further stated that the decision to establish the AU had been reached after 'frank and extensive discussions'.²⁷

The OAU legal unit then drafted the Constitutive Act of the African Union (the Act). The draft Act was debated in a meeting of legal experts and parliamentarians and later at a ministerial conference held in Tripoli

²² 'The adoption of the Sirte Declaration and subsequently the Constitutive Act of the AU must be viewed as part and parcel of the endeavour which has the ultimate objective of enhancing unity, strengthening cooperation and coordination as well as equipping the African continent with a legal and institutional framework which would enable Africa to gain its rightful place in the community of nations.' *Report of the Secretary-General on the implementation of the Sirte Decision on the African Union* (EAHG/Dec1 (V)) Council of Ministers 74th ordinary session/9th ordinary session of the AEC 2-7 July 2001 Lusaka, Zambia CM/2210 (LXXIV) para 5.

²³ (1999) 36 *Africa Research Bulletin* 13677.

²⁴ OAU Doc EAHG/Dec1 (IV) Rev 1, reprinted in (1999) 7 *African Yearbook of International Law* 411.

²⁵ Para 8(ii) Sirte Declaration.

²⁶ (1999) 36 *Africa Research Bulletin* 13678.

²⁷ Para 8 Sirte Declaration.

from 31 May to 2 June 2000.²⁸ The involvement of the African parliamentarians was intended to ensure that the Union becomes more closely connected with the people.²⁹ The Act was adopted by the OAU Assembly of Heads of State and Government in Lomé in July 2000.³⁰ All members of the OAU had signed the Act by March 2001,³¹ and therefore the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001 declared the establishment of the AU.³² However, to fulfil the legal requirements for the Union, the Constitutive Act had to be ratified by two-thirds of the member states of the OAU.³³ This was achieved on 26 April 2001 when Nigeria became the thirty-sixth OAU member state to deposit its instrument of ratification of the Constitutive Act of the AU with the OAU Secretary-General.³⁴ The AU became a legal and political reality a month thereafter, on 26 May 2001, when the Constitutive Act entered into force.³⁵ The Constitutive Act of the AU is annexed to this article.

3 The Constitutive Act of the African Union

The process towards the establishment of the AU ran concurrently with efforts to develop a blueprint for African development in the 21st century. The blueprint in place is known as the New African Initiative³⁶

²⁸ Para 247, OAU Secretary-General report <<http://www.oau-oua.org/LOMÉ2000/ENGLISH%20INTRO%Note%20SG.htm>> (accessed 31 July 2001). According to this report the most important aspect of the debate was the nature and form of the African Union. On this issue the Ministerial Conference underscored the need to establish the African Union in keeping with the Pan-African vision of the OAU founding fathers.

²⁹ That notwithstanding, criticism has been voiced on the lack of direct involvement of civil society and the masses in the debates regarding the formation of the Union. The criticism was voiced by a number of participants during a public lecture on the African Union given by Prof Tiyanjana Maluwa, the Legal Counsel of the OAU, and attended by this writer in November 2000 at the University of Pretoria, South Africa.

³⁰ 36th ordinary session of the Assembly held in Lomé, Togo 10–11 July 2000.

³¹ OAU 'Decision on the Africa Union' 5th OAU extraordinary session of the Assembly of the Heads of State and Government 1–2 March 2001 Sirte, Libya EAHG/Dec1–4 (V).

³² As above.

³³ The Constitutive Act of the Africa Union entered into force 30 days after the deposit of the instruments of ratification by two-thirds of the members of the OAU. See art 28 Constitutive Act.

³⁴ OAU 'The Constitutive Act of the African Union attains the legal requirement for entering into force' Press release No 52/2001 at <http://www.oau-oua.org/oau_info/pressrelease/PRESS%20RELEASE%20NO%2052-%202001.htm> (accessed 31 July 2001).

³⁵ As at 31 July 2001, 44 OAU member states have ratified and deposited the instruments of the ratification in accordance with art 27(2) of the Act and seven countries have informed the OAU secretariat that they have ratified the Act and that the instruments of ratification will be deposited with the General Secretariat in due course. Only two member states, namely the Democratic Republic of Congo and Madagascar, are yet to ratify the Act. See OAU CAB/LEG/23.15/Vol.IX paras 1–3.

and it is a result of a merger between the Millennium Partnership for African Recovery Programme (MAP) developed by President Thabo Mbeki of South Africa and the Omega Plan developed by President Abdoulaye Wade of Senegal. The AU provides a structural framework supporting the implementation of the New African Initiative. The New African Initiative could be seen as the fuel that fires the engine of the AU.

The AU is loosely modelled on the European Union. It is intended to become a pan-African body with strong political and economic ties that would replace the OAU. But is the AU a new organisation or just the same old OAU with a new name? An analysis of the salient features of the Union will now be conducted by comparing the provisions of the Act with those of the OAU Charter in order to establish the extent to which the AU is in fact a new organisation.

3.1 Objectives and principles of the Union

Article 2 of the Act establishes the AU. The AU is more comprehensive in its objectives than the OAU. It has 14 objectives,³⁷ nine more than those the OAU aimed to achieve. Of these, four are repetitions of those of the OAU, namely, achieving African unity; defending sovereignty, territorial integrity and independence of African states; encouraging international co-operation; and, achieving a better life for the peoples of Africa.³⁸ For obvious reasons, the OAU's goal of eradicating all forms of colonialism from Africa is left out in the Act.³⁹

The Union is to be guided by 16 principles,⁴⁰ again nine more than those of the OAU. However, only four of the seven guiding principles of the OAU found their way into the Act. These are sovereign equality of member states, non-interference in the internal affairs of states, peaceful settlement of disputes and condemnation of political assassination and subversive activities.⁴¹ Among the new principles, the prohibition of the use (or threat of the use of force) is a recent addition copied from the UN Charter.⁴² Others, for instance the principle of sacrosanctity of the colonial borders, reflect the developments in the OAU in the 38 years of its existence.⁴³ Still others, for example the right of the Union to

³⁶ The New African Initiative is available on the Internet at <<http://www.polity.org.za/govdocs/misc/mapomega.html>> (accessed 31 July 2001).

³⁷ Art 3 Constitutive Act.

³⁸ Arts 2(a), 2(c), 2(e) & 2(b) OAU Charter and arts 3(a), 3(b), 3(e) & 3(k) Constitutive Act.

³⁹ Art 2(d) OAU Charter.

⁴⁰ Art 4 Constitutive Act.

⁴¹ The OAU principles of respect for sovereignty and territorial integrity of states, emancipation of dependent African territories and non-alignment are left out.

⁴² Art 2(4) UN Charter.

intervene in a member state pursuant to a decision by the Assembly in respect to grave circumstances, namely war crimes, genocide and crimes against humanity and the right of member states to request intervention from the Union in order to restore peace and security, reflect developments in international law in general.⁴⁴ Additional novel principles in the Act include gender equality, participation of the African peoples in the activities of the Union, a common defence policy for the African continent, self-reliance, social justice, peaceful co-existence of member states and respect for democratic principles, human rights, the rule of law and good governance.

3.2 Organs of the Union: Their composition, role and functioning

Article 5(a) of the Act enumerates the organs of the Union. They are the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committee, the Economic, Social and Cultural Council and financial institutions. The Assembly of the Union, the Executive Council, the Commission and the Specialised Technical Committees are equivalent to the Assembly of the Heads of State and Government, the Council of Ministers, General Secretariat and Specialised Commissions in the OAU institutional structure. The OAU's Commission of Mediation, Conciliation and Arbitration is left out in the African Union. The Pan-African Parliament, the Court of Justice and the Economic Social and Cultural Council have equivalent structures in the African Economic Community. The Union's Permanent Representative Committee and Financial Institutions are new institutions.

Articles 6 to 9 deal with the Assembly. They describe issues such as its composition, its meetings, decision making within the Assembly, quorum for meetings and the powers and functions of the Assembly. The Assembly is composed of the Heads of State and Government and meets at least once a year. As the supreme organ of the Union, the Assembly determines the common policies of the Union; monitors the implementation thereof; establishes any organ of the Union; and receives, considers and takes decisions on reports and recommendations of other organs of the Union.

⁴³ This principle was developed in the Cairo Declaration of 1964. The same could be said of other Union guiding principles such as condemnation and rejection of unconstitutional changes of government, which was stated in the OAU summit in Algiers, Algeria in 1999.

⁴⁴ These two principles are based on a new and controversial doctrine of humanitarian intervention. For further details on this doctrine see FK Abiew *The evolution of the doctrine and practice of humanitarian intervention* (1999).

The Executive Council is the subject of articles 10 to 13. It is composed of Ministers of Foreign Affairs and meets at least twice a year for ordinary sessions. The Executive Council has two main functions: First, 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. Its second function is to consider issues referred to it and monitor the implementation of policies formulated by the Assembly. A similar organ, albeit in a different name — the Council of Ministers — was provided for in the OAU Charter and the Abuja Treaty.⁴⁵

Articles 14 to 16 delineate the establishment, composition, functions and meetings of Specialised Technical Committees. Seven committees dealing with diverse issues such as rural economy and agricultural matters; trade, customs and immigration matters; and health, labour and social affairs are to be established. The Specialised Technical Committees shall be composed of ministers or senior officials responsible for sectors falling within their respective areas of competence. These committees are tasked to carry out five major functions including the preparation, harmonisation and supervision of projects and programmes of the Union and follow-up and evaluation of the implementation of the decisions taken by the organs of the Union. The OAU Charter did not provide for specialised committees. However, the Abuja Treaty provided for the same institutions.⁴⁶

To ensure the full participation of African people in development and economic integration of the continent, article 17 of the Act establishes the Pan-African Parliament. The Court of Justice of the Union 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.⁴⁷ Article 19 provides for the establishment of the Union's financial institutions, namely the African Central Bank, the African Monetary Fund and the African Investment Bank. The Act provides in very clear terms that the composition, powers, organisation and rules of the above institutions will be defined in a protocol relating thereto. In other words, distinct protocols will have to be adopted by the Union to establish the Pan-African Parliament, the Court of Justice of the Union and each of the abovementioned financial institutions.⁴⁸ So far there have been

⁴⁵ Arts 12–15 OAU Charter and 11–13 Abuja Treaty.

⁴⁶ Arts 25–27 Abuja Treaty.

⁴⁷ Art 20 Constitutive Act.

⁴⁸ While the OAU Charter provided for neither the Pan-African Parliament nor the Pan-African Court of Justice, the Abuja Treaty envisages the establishment of both institutions. See the Abuja Treaty; arts 14 & 18. However, neither of the two treaties provided for the establishment of the African continental financial institutions.

developments towards the establishment of only one of these institutions, the Pan-African Parliament.⁴⁹

The Commission of the Union is composed of the Chairperson, his or her deputies and the commissioners and assisted by the necessary staff.⁵⁰ The Commission of the Union is the Secretariat of the Union. The Union will also have a Permanent Representatives Committee composed of the permanent representative to the Union and mandated to prepare the work of the Executive Council. Finally, the Economic, Social and Cultural Council, an advisory body composed of different social and professional groups of member states, shall be established.⁵¹ The functions, powers, composition and organisation of the three institutions stated above shall be determined by the Assembly.

Article 5(b) of the Act makes it clear that the list of the AU organs provided for in article 5(a) of the Act is not exhaustive. The organs that we have enumerated above are not the only AU organs. According to article 5(b) of the Act, the term 'African Union organs' includes 'other organs that the Assembly may decide to establish'. Using this provision, the OAU Assembly meeting in Lusaka recently decided to 'incorporate

⁴⁹ These developments are due to the fact that the process was already underway to establish the Pan-African Parliament within the AEC. The OAU General Secretariat drafted the protocol on the Pan-African parliament. The draft was referred to experts from member states that met in April 2000. This was followed by the discussion at both parliamentary and ministerial levels in May 2000. The ministerial conference requested the OAU Secretariat to make some amendments. The amended draft was discussed at the first meeting of the African parliamentarians on the establishment of the African parliament held in Pretoria in November 2000. Then it was considered by the preparatory meeting of the OAU Council of Ministers in February 2001, see OAU 'Report of 73rd ordinary session of the Council of Ministers' 22–26 February 2001 Tripoli, Libya OAU Doc CM/Rpt (LXXIII) para 103. The amended draft protocol was finally adopted by the OAU Assembly in March 2001. See OAU 'Decision on the Draft Protocol on the Treaty Establishing the African Economic Community relating to the Pan-African Parliament', 5th extraordinary session of the Assembly of the Heads of State and Government 1–2 March 2001 Sirte, Libya EAHG/3 (V) para 2.

⁵⁰ Art 20 Constitutive Act. This organ is equivalent to the General Secretariat in the OAU Charter (arts 16–18) and the Abuja Treaty (arts 21–23).

⁵¹ Art 21 Constitutive Act. The OAU Charter did not provide for such a body, but the Abuja Treaty provided for an equivalent organ named the Economic and Social Commission. See arts 15–17 Abuja Treaty. The OAU Assembly has decided that in view of the establishment of the Economic, Social and Cultural Council, the Economic and Social Commission provided for in the Abuja Treaty would cease to exist at the end of transitional period between OAU/AEC to the AU. The transitional period from the OAU/AEC to the AU is one year from July 2001. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' 37th ordinary session of the Assembly of Heads of State and Government July 2001 Lusaka, Zambia AHG/Dec1 (XXXVII) para 7(b).

the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution as one of the organs of the Union'.⁵²

The OAU Assembly of the Heads of State and Government mandated the Secretary-General of the OAU to undertake necessary consultation with member states with a view to working out the modalities and guidelines for the launching of the organs of the Union.⁵³ The summit made it clear that in undertaking this task priority has to be given to the key Union organs, namely the Assembly, the Executive Council, the Commission and the Permanent Representatives Committee.⁵⁴

3.3 General and transitional provisions

Article 23 of the Act delineates the measures that should be taken against states that fail to comply with decisions and policies of the Union or defaults in the payment of its contributions to the budget of the Union.⁵⁵

4 The Union and human rights

It has been argued that the successful enforcement of human rights in Africa will depend, in part, on the development of economic integration among states on the continent.⁵⁶ This alone could justify the welcoming of the establishment of the AU, which is the highest level of economic integration that African states could aspire to, by members of the human

⁵² To that end the OAU Assembly requested the Secretary-General to undertake a review of the structure, procedures and the working methods of the Central Organ including the possibility of changing its name. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 8. The Central Organ had been established as a constituent part of the OAU mechanism for prevention, management and resolution of conflict in Africa by the Assembly of Heads of State and Government meeting in Cairo, Egypt in 1993. See Declaration of the Assembly of the Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, reprinted in (1994) 6 *African Journal of International and Comparative Law* 158.

⁵³ OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 4.

⁵⁴ In this respect, the OAU Assembly mandated the Secretary-General in consultation with member states to submit proposals regarding the structure, functions and powers of the Commission (n 51 above para 5).

⁵⁵ This provision was informed by the desire to ensure that the Union does not inherit the OAU's negative legacy of resource deprivation arising from the failure of member states to meet their financial obligations.

⁵⁶ C Heyns & F Viljoen 'An overview of international protection of human rights in Africa' (1999) 15 *South African Journal of Human Rights* 425 433. These authors argue that as a general rule the international enforcement of human rights depends for its success on the existence of, among other factors, a web of trade relations between the respective states because only where these exist can their potential severance in cases where human rights violations come to light constitute a real threat to coerce the states to adhere to human rights principles.

rights community. The Act itself, however, also contains provisions that put human rights on the agenda of the AU.

4.1 Human rights provisions in the Constitutive Act of the African Union

The provisions of the Preamble and those that set out the objectives and principles of the Act include human rights in very clear terms. The Preamble of the Act states that African leaders are 'determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.⁵⁷ Two of the objectives of the AU, as defined in the text, incorporate human rights issues in very explicit manner. Article 3(g) provides that the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter or Charter) and other relevant human rights instruments is an objective of the Union.⁵⁸ Similarly, the promotion of democratic principles and institutions, popular participation and good governance are also some of the objectives of the Union.

At least five of the fundamental principles of the Union could be said to embody human rights provisions. Respect for democratic principles, human rights, the rule of law and good governance are described as some of the principles of the Union.⁵⁹ Article 4(c) of the Act guarantees the right of African peoples to participate in the activities of the Union.⁶⁰ Other guiding principles of the AU that have human rights implications include promotion of gender equality, the promotion of social justice to ensure balanced economic development, and condemnation and rejection of unconstitutional changes of government.⁶¹

The objective of the Union to promote popular participation and the corresponding principle of participation of African peoples in the activities of the Union find concrete expression in the proposed Pan-African Parliament and the Economic, Social and Cultural Council. The proposed Parliament will initially be elected by national parliaments. The institution of the Pan-African Parliament introduces an element of representation in a pan-African body, which the OAU never had.⁶²

⁵⁷ Para 10 Preamble to the Act.

⁵⁸ There is a similar provision in art 3(g) of the Abuja Treaty, although as a principle and not an objective as is the case in the Act.

⁵⁹ Art 4(m) Constitutive Act.

⁶⁰ The establishment of the Pan-African Parliament is said to be geared towards ensuring the full participation of African peoples in the development and economic integration. See art 17 Constitutive Act.

⁶¹ Arts 4(l), 4(n) & 4(p) Constitutive Act.

⁶² See T Abdul-Raheem 'An idea whose time has come' *BBC Focus on Africa Magazine* July–September 2001 48.

Similarly, the Economic, Social and Cultural Council will be composed of different social and professional groups of the member states of the Union.⁶³ The African civil society will find it easier to put pressure on these two representative bodies to make progress on diverse issues such as human rights, free movement of people in the Union and other trade issues.⁶⁴

Article 30 states in very precise terms that a government that shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union. This provision embodies the Algiers Summit decision on unconstitutional changes in Africa.

4.2 Human rights enforcement mechanisms and the African Union

The African human rights system is centred on the African Charter and is designed to operate within the OAU institutional framework.⁶⁵ Its enforcement mechanism comprises the African Commission on Human and Peoples' Rights (African Commission or Commission) and to be established African Court on Human and Peoples' Rights (African Court). Given the role of the two institutions in the African human rights scene, it is important to establish their status within the AU.

During its April 2001 session, the African Commission took note of the imminent entry into force of the Act of the AU and decided to initiate a discussion on the place of the African Charter in the African Union.⁶⁶ It is instructive to note that the Constitutive Act of the AU makes reference to the African Charter in its objectives.⁶⁷ However, the Act is silent on the African Commission. The Assembly of the Head of State and Government meeting in Lusaka in July 2001 did not adopt a decision recognising the African Commission as one of the organs of the Union.⁶⁸

⁶³ Art 22 Constitutive Act. At the recently held Lusaka OAU summit, the OAU Assembly emphasised the importance of involving African NGOs, socio-economic organisations, professional associations and civil society in general in Africa's integration process as well as in the formulation and implementation of programmes of the African Union. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 7.

⁶⁴ See Abdul-Raheem (n 62 above) 48.

⁶⁵ The African Charter was adopted by the OAU Assembly of the Heads of State and Government in Nairobi on 27 June 1981 and entered into force on 21 October 1986. The text of the Charter is reprinted in (1982) 21 *International Legal Materials* 58.

⁶⁶ Final Communiqué of the 29th ordinary session of the African Commission on Human and Peoples' Rights 23 April–7 May 2001, para 10. The Commission adopted a resolution on the African Charter and the AU.

⁶⁷ Art 3(h) Constitutive Act.

⁶⁸ Incidentally in the same summit, the OAU Assembly did adopt a decision in which it recognised the Mechanism for Conflict Prevention, Management and Resolution as an organ of the AU. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) paras 8(a) & (b).

The African Court has not yet been established. Yet, given the likelihood that it would be established in the near future, it is appropriate to take up the issue regarding its status in the African Union too. The Lusaka summit again has not given any guidance on this issue and the matter is open for debate and speculation. Particularly important in this regard is the question as to which institution takes over the role of the Council of Ministers in enforcing judgments of the African Court of Human Rights. This issue has been clarified in neither the Constitutive Act nor by the recent OAU summit in Lusaka.

The other issue that may be of interest is the role that the African Court of Justice could play in the enforcement of human rights obligations. The European equivalent of the African Court of Justice, the European Court of Justice, has played a significant role in the development of human rights in Europe.⁶⁹ If the European model of political and economic integration is any guide on this matter, the African Court of Justice could, in a similar way, play a significant role in advancing human rights in the continent in conjunction with the African Court.⁷⁰ The Protocol on the African Court of Justice is yet to be drafted. However, it would be interesting to see how the African Court of Justice will relate to the African Court in the Protocol and in practice.

5 Conclusion

The AU cannot be said to be radically different in qualitative and quantitative terms from the OAU/AEC.⁷¹ The Union, however, has a more explicit human rights focus than the OAU/AEC.⁷² In a sense it could be

⁶⁹ For more information on the role of the European Court of Justice in human rights protection see L Woods 'The European Union and human rights' in R Hanski & M Sukksi (eds) *An introduction to the international protection of human rights* (1999) 351–367.

⁷⁰ The potential human rights mandate of this court is explored in CM Peter 'The proposed African Court of Justice — jurisprudential, procedural, enforcement problems and beyond (1993) 1 *East African Journal of Peace and Human Rights* 117.

⁷¹ The AU evolves from the combination of OAU and AEC. The institutions that the Union establishes are to a large extent similar to those that the OAU/AEC had set out to establish albeit in a more gradual process. Therefore what the Union actually sets out to achieve is to fast-track the process of economic integration that had been set in motion by the OAU/AEC. This view finds support in para 7 of the Preamble to the Act which states that the African leaders are 'convinced of the need to accelerate the process of implementing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalisation' (my emphasis).

⁷² This is not surprising given the fact that the OAU was established at the time when human rights were considered to be internal matters and outside the purview of an intergovernmental body. Although the AEC was established in a period when human rights were on international agenda, its objectives were more restrictive than those of the Union as they were principally economic in nature. The Union however has been established at the time when human rights are foremost concepts in international relations.

argued that the AU is an attempt to unite the ideals of African unity and human rights on the continent. The progressive nature of the AU regarding human rights is clear in the Preamble of the Constitutive Act and in its objectives and guiding principles. Furthermore, the provision on the establishment of the Pan-African Parliament and the Economic, Social and Cultural Council offers hopes of more involvement of African people in the activities of the Union than was the case in the OAU.⁷³ But in order for these provisions to have the desired impact there is a need to equip the organs, structures and mechanisms of the AU to effectively implement these provisions so as to realise the goal of fully integrating the human rights framework in the activities of the AU.

The retention in the Constitutive Act of the principle of non-interference in the internal affairs of member states which, on the main, accounts for the failure on the part of the OAU to address human rights violations in the continent, is a cause for concern. One could argue that the principle of non-interference has been watered down so much in recent years as to pose no threat to human rights protection efforts. In any event, there are other principles such as the right of the Union to intervene and the respect of human rights that would balance it out. However, the principle of Union intervention is restricted to situations of genocide and crimes against humanity. Yet most of the violations of human rights in Africa do not reach those grievous levels and thus they are outside the purview of intervention.

Experience has shown that treaties and regional institutions by themselves do not necessarily translate into better protection of human rights unless accompanied by political will. In the final analysis, while the Constitutive Act contains elaborate human rights provisions, the extent to which the Union will be more protective of human rights will depend on the political will of the states to give effect to those ideals, the progressive interpretation of the Act by the African Court of Justice and the leadership by the African Commission and Union organs in championing the human rights cause on the continent.

⁷³ The intention to bring the Union closer to the African people is reaffirmed by the Lusaka summit of the OAU Heads of State and Government which acknowledges the member states' primary responsibility of popularising the African Union and urges the member states to take the necessary steps to ensure that the Union is truly a community of peoples. The summit further requested the OAU General Secretariat and regional communities to undertake complementary actions to popularise the Union. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 6.