

Reflecting on 25 years of the African Union Constitutive Act: Drafting history, legal philosophy and broad objects of the renewal of Africa's continental body*

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Abstract

This reflection by Hajer Gueldich, delivered during Kabarak University Press' International Law Month, 2025 revisits the African Union Constitutive Act 25 years after its adoption. It traces the hopes and contradictions that have shaped the AU's legal and institutional journey since Lomé. The Constitutive Act is presented not simply as a treaty, but as a bold statement of Africa's determination to imagine a different future, one grounded in non-indifference to atrocities, a commitment to demo-

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cratic governance, and an integrated approach to peace and development. Gueldich reflects on the Act's unique innovations. More so, its influence on global legal norms, and the ways Africa has defined its own place in international law through instruments such as the African Charter on Democracy and the AU Transitional Justice Policy. At the same time, she acknowledges the difficult realities of coups, insecurity, and weakened political will that threaten this vision. The reflection ends with a call to action – that the AU's renewal must be shared with citizens and the wider pan-African community if the promise of a peaceful, just, and people-driven Africa is to be realised.

Keywords: Constitutive Act of the African Union, 25th anniversary, non-indifference, unconstitutional changes of government, regional constitution, Africa's contribution to international law, African legal renewal

Introduction – The Constitutive Act: The birth of a new normative order

The adoption of the Constitutive Act in Lomé in 2000 signified more than a rebranding of the Organisation of African Unity (OAU).¹ It was, in essence, a rupture with the past, a legal emancipation from the rigid non-interventionist paradigm of the post-colonial era. From a legal-positivist perspective, it marked a paradigmatic shift in the architecture of African regionalism.

The principle of non-indifference, enshrined in Article 4(h), constitutes a rare normative evolution in international law. It empowers the African Union to intervene, without invitation, in a member state in cases of war crimes, genocide, and crimes against humanity. This formulation departs from the classical interpretation of sovereignty under Article 2(7) of the UN Charter and gives rise to new understandings of the limits of domestic jurisdiction when confronted with mass atrocities.²

This provision has been praised in legal scholarship as an early articulation of what would later be accepted as the responsibility to protect (R2P).³ However, it is also grounded in Africa's own jurisprudential heritage, including the African Charter on Human and Peoples' Rights and the historical experience of post-colonial armed conflicts. In this regard, the Constitutive Act not only aligns with but also contributes to the progressive development of customary international law.

Distinctive legal features in comparative perspective

Several provisions of the Constitutive Act render it a *sui generis* legal text among the foundational documents of regional organisations.

¹ Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3.

² Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Article 2(7).

³ Jared Genser, 'The United Nations Security Council's implementation of the responsibility to protect: A review of past interventions and recommendations for improvement', 18(2) *Chicago Journal of International Law* (2018) 422-423.

First, regarding democratic legitimacy as a legal requirement, Article 30 codifies the illegitimacy of governments that come to power through unconstitutional means.⁴ This is not a political declaration but a legally binding provision, operationalised through decisions of suspension and sanctions. Further, in some instances, it is also operationalised through referral to the AU Peace and Security Council. It marks a departure from the permissiveness of earlier international practice and reinforces the principle that legitimacy derives not merely from effective control but from constitutional and democratic processes.

Yet, this innovation has not been free from contradiction. Firstly, the inconsistent application of Article 30, influenced by geopolitical alliances, varying political will, and institutional constraints, threatens to erode its normative force. The proliferation of unconstitutional changes of government in recent years, including *coups d'état* and power grabs under the guise of constitutional reform, exposes the fragility of our enforcement architecture.⁵

Secondly, on institutional equality and anti-hegemony within the AU, it is perhaps the only continental organisation that constitutionally enshrines the equality of all its member states without privileging any with veto powers or permanent seats.⁶ This reflects the Pan-African aspiration to a horizontal, non-hierarchical order in international relations. However, this egalitarian design also places considerable pressure on consensus-building processes, often resulting in protracted negotiation and diluted decision-making.⁷

Thirdly, the Constitutive Act's integrated mandate blends human rights, peace and security, economic development, and social justice

⁴ Constitutive Act of the African Union, Article 30.

⁵ Nneka Okuchukwu, 'Unconstitutional change of government in Africa (AU): The fragility of the African governance agenda: A crisis of legitimacy', *The European Centre for Development Policy Management (ECDPM)*, 30 October 2023, 2-4.

⁶ Constitutive Act of the African Union, Article 4(a).

⁷ Bakare Adebola Rafiu, 'African Union and the developmental transformation of Africa: Challenges, achievement and prospects', 3(1) *European Journal of Sustainable Development* (2014) 79-81.

into a single legal instrument.⁸ This contrasts with the segmented mandates seen in other regions. It affirms the indivisibility of rights and the interdependence of policy domains, an approach reflective of both African jurisprudence and the holistic philosophy embedded in instruments such as the African Charter on Human and Peoples' Rights.

Additionally, the constitutional hierarchy of the Act functions not only as a treaty but as a constitutional order. It establishes foundational principles, institutional competences, and binding values.⁹ In this regard, its status resembles that of a regional constitution, setting it apart from mere intergovernmental charters. Its supremacy over other AU instruments is recognised in AU practice and jurisprudence.

Africa's contribution to the evolution of international law

Africa has not merely adopted the norms of global international law; it has refined and redefined them. The Constitutive Act is part of a larger normative constellation that includes: a) the Lomé Declaration (2000), advancing legal accountability for unconstitutional governance; b) the African Charter on Democracy, Elections and Governance (2007), which provides enforceable standards on democratic norms; c) the AU Transitional Justice Policy (2019), which integrates local justice mechanisms and community-based reconciliation; and d) the Malabo Protocol (2014), establishing criminal jurisdiction over international crimes at the regional level, including corruption, terrorism, and environmental crimes.¹⁰

⁸ Constitutive Act of the African Union, Articles 3(e)-(j) and 4(m)-(o).

⁹ Constitutive Act of the African Union, Articles 6, 9 and 23.

¹⁰ Organisation of Africa Unity, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, Assembly of Heads of State and Government, 36th Ordinary Session, Lomé, Togo, AHG/Decl.5 (XXXVI), 12 July 2000 (Lomé Declaration); African Charter on Democracy, Elections and Governance, Reg No I-55377, 30 January 2007; African Union, African Union Transitional Justice Policy, 32nd Ordinary Session, Addis Ababa, 12 February 2019.

Moreover, through the African Union Commission on International Law (AUCIL), Africa is asserting its capacity to codify and progressively develop its own legal order. This is contributing to the universality of international law while preserving legal pluralism.¹¹ However, this contribution faces existential threats. The crisis of non-adherence to Pan-Africanism, precipitated by shifting global geopolitics and internal democratic decline, has intensified. The continent grapples with a resurgence of terrorism, transnational crime, violent extremism, and the displacement of populations on an unprecedented scale.¹² These phenomena expose the chasm between the Constitutive Act's normative ambition and the often-grim reality on the ground.

The role of civic actors in legal renewal

To bridge this gap, the implementation of the Constitutive Act must be democratised. The youth, civil society, and media must become co-guardians of its principles. The future of African integration will depend not only on intergovernmental processes but on civic constitutionalism which comprises of the reappropriation of the AU's foundational values by its peoples. Legal education, public litigation, and participatory policymaking are all mechanisms that can breathe life into dormant provisions. The African citizen, as envisaged in the Preamble of the Constitutive Act, must become the subject and not merely the object of integration.¹³

¹¹ Statute of the African Union Commission on International Law, 1 February 2009, Article 5.

¹² Bakare Adebola Rafiu, 'African Union and the developmental transformation of Africa: Challenges, achievement and prospects', 3(1) *European Journal of Sustainable Development* (2014) 79-81.

¹³ Constitutive Act of the African Union, Preamble.

The path forward: Constitutional realism and transformative will

This 25th anniversary is not only a historical milestone, but also a moment of reckoning. The AU must consolidate its legal foundations through the reinforced compliance mechanisms for Article 30.¹⁴ Furthermore, we must operationalise the Malabo Protocol,¹⁵ and ensure greater justiciability of AU law through expanded access to legal recourse, and the continued evolution of institutional frameworks. All of which can respond flexibly to complex, transnational crises. But above all, the Constitutive Act must remain a living instrument, capable of interpreting Africa's ever-evolving needs while rooted in its foundational principles – unity, solidarity, justice, and dignity.

Conclusion

Let me end with the foundational vision embedded in the Constitutive Act which is:

An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena.¹⁶

This is not merely a political aspiration. It is a constitutional promise. One that imposes duties on states, empowers institutions, and affirms the agency of the African peoples. In the spirit of legal renewal and civic hope, let us recommit ourselves to building an AU not just worthy of its name, but true to its normative foundations.

I thank you for your kind attention and for taking the time to read this reflection.

¹⁴ Constitutive Act of the African Union, Article 30.

¹⁵ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014 (not yet entered into force) (Malabo Protocol).

¹⁶ African Union, 'Agenda 2063: The Africa we want', 2015, 4.

