

# The founding of the African Union and the search for African unity: A dream deferred

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## Abstract

*These reflections are based on a presentation made by Judge Ben Kioko during the International Law Month @ Kabarak webinar on Reflecting on 25 years of the African Union Constitutive Act, organised by the Kabarak University Press on 7 August 2025. The essay discusses the two foundational African legal instruments – the Charter of the Organisation of African Unity and the Constitutive Act of the African Union, noting the reasons that necessitated the change from the former to the latter. This unique insider reflection of this transformational period highlights some aspects of the process of this change and the main issues or challenges, including during the early implementation of the Constitutive Act. It also shares some perspectives on the aborted processes for a Union Government and African Union Authority from 2005 to 2013.*

**Keywords:** OAU Charter, AU Constitutive Act, proposed Union Government, proposed African Union Authority, African unity

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## Introduction

The Charter of the Organisation of African Unity (OAU Charter) was the product of a consensus between two groups. The first was the Casablanca Group led by Kwame Nkrumah of Ghana – which included leaders of Algeria, Egypt, Ghana, Guinea, Libya, Mali, and Morocco, that advocated for a politically unified federation of African states.<sup>1</sup> The second was the Monrovia Group, led by Léopold Sédar Senghor of Senegal – which included leaders of Ethiopia, Liberia, Nigeria, Senegal, and most former French colonies, who preferred a loose alliance based on gradual economic integration. Evidently, the latter group prevailed in the framing the OAU Charter.<sup>2</sup>

However, the vision then and subsequently has always been that the integration process would ultimately lead to the United States of Africa. Indeed, some African constitutions make provisions giving up sovereignty in favour of continental unity.<sup>3</sup> Unfortunately, every new initiative on African unity since then has come with its own timelines, resulting in the earlier goal posts being kicked further down the road.

In this piece, I will seek to briefly sketch out the fundamental differences between the two foundational legal instruments – the OAU Charter and the Constitutive Act of the African Union (AU Constitutive), discuss what motivated the change, highlight some aspects of the process and the main issues or challenges, including during the early implementation of the Constitutive Act. I will also share some brief perspectives on the aborted processes for a Union Government and AU Authority from 2005 to 2013.

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<sup>1</sup> Taslim Olawale Elias, 'The Charter of the Organisation of African Unity', 59(2) *American Journal of International Law* (1965) 243-245.

<sup>2</sup> Elias, 'The Charter of the Organization of African Unity', 243-245.

<sup>3</sup> See for example, Constitution of the Republic of Senegal (2001, as amended to 2009) Article 96; Constitution of the Republic of Mali (1992) Article 117; Constitution of Burkina Faso (1991) Article 146. Other countries include Ghana and Guinea.

## Differences in two African foundational legal instruments

While the two foundational legal instruments, the OAU Charter and the AU Constitutive Act, share similar goals, they differ significantly in scope, vision, and approach. I see three main areas, namely: the core principles, the new organs that were created, and the institutional powers.

### *Objectives and core principles*

The OAU Charter's main objectives were to rid the continent of colonisation and apartheid, to promote state-centric unity and solidarity, and safeguard the sovereignty and territorial integrity of member states.<sup>4</sup> Continental integration was state-centric and to be carried out gradually with states retaining full sovereignty. On peace and security, the OAU Charter envisaged mostly diplomatic solutions and mediation.<sup>5</sup> Significantly, the OAU Charter, like the UN Charter, accorded primacy to the Westphalian principles of sovereignty and non-interference in internal affairs.<sup>6</sup>

The Constitutive Act, on the other hand, envisages comprehensive integration encompassing political, economic, social, cultural, and security realms including plans for common currency, single market, and infrastructure.<sup>7</sup> It also sets out broader objectives and principles and has strong provisions on democratic principles, rule of law, and promotion and protection of human rights, good governance and human security. It also emphasises people-centered development and greater enforcement and judicial mechanisms, all of which were not in the OAU Charter.<sup>8</sup> Additionally, the Constitutive Act, while respecting sovereignty,

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<sup>4</sup> Organisation of African Unity (OAU) Charter, 25 May 1963, 6947 UNTS 70, Article II(1) (a)(c) and (d).

<sup>5</sup> OAU Charter, Article II(2)(a).

<sup>6</sup> OAU Charter, Article III.

<sup>7</sup> Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3, Article 3(c)-(f).

<sup>8</sup> See generally, Constitutive Act of the African Union, Articles 3 and 4.

allows intervention in member states to prevent mass atrocities such as war crimes, genocide, and others under Article 4(h).<sup>9</sup>

### *New organs created*

Under Article 7 of the OAU Charter, four organs were created, namely, the Assembly of Heads of State and Government; the Council of Ministers; the General Secretariat; and, the Commission of Mediation, Conciliation and Arbitration.<sup>10</sup>

On the other hand, Article 5 of the AU Constitutive Act has retained the Assembly, and the Ministerial Council with a new name – the Executive Council, removed the Commission of Mediation, Conciliation and Arbitration, but created the following new organs: the Pan-African Parliament; the Court of Justice; the Commission (to replace the OAU General Secretariat); the Permanent Representatives Committee; the Specialised Technical Committees (ministerial); the Economic, Social and Cultural Council; and the Financial Institutions.<sup>11</sup>

It should be noted that all the new organs set out in Article 5 of the Constitutive Act had been created by the Abuja Treaty except the AU Commission, the Permanent Representatives Committee and the Economic, Social and Cultural Council, which is an organ for civil society engagement.<sup>12</sup> However, Article 5(2) in the Constitutive Act, empowering the Assembly to create other organs that it may deem necessary, without the need to amend the treaty, was neither in the Abuja Treaty nor the OAU Charter.<sup>13</sup>

For avoidance of doubt, it should be noted that other treaty bodies that are not set out in Article 5, such as the Peace and Security Council,

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<sup>9</sup> Ben Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', 85(852) *International Review of the Red Cross* (2003) 807.

<sup>10</sup> OAU Charter, Article VII.

<sup>11</sup> See generally, AU Constitutive Act, Article 5.

<sup>12</sup> Treaty Establishing the African Economic Community (Abuja Treaty), 3 June 1991, I-55375 UNTS, Article 7.

<sup>13</sup> Constitutive Act of the African Union, Article 5.

the African Court on Human and Peoples' Rights, and the African Commission on Human and Peoples' Rights, are organs of the Union.

### *Institutional powers*

The Charter envisioned the OAU as a weak intergovernmental organisation, with no enforcement powers for its decisions and no judicial arm. It was essentially an alliance of independent states with the Assembly as the supreme organ and the single source of power. No sovereign power was donated to the OAU or to the General Secretariat.

The AU on the other hand has some supranational elements with the ultimate objective of being a supranational authority with multiple sources of power. The AU can impose sanctions for unconstitutional changes of government under Article 30. This also includes failure to comply with the decisions and policies of the Union such as denial of transport and communications links with other member states and other measures of a political and economic nature as provided for in Article 23(2) of the Constitutive Act.

It is worth noting that some policy organs such as the Peace and Security Council, the Assembly and the judicial bodies make binding decisions. Furthermore, the Peace and Security Architecture has institutionalised responses with early warning systems and peacekeeping capability. However, while the sanctions for unconstitutional changes of government have been implemented, those for failure to comply with decisions and policies remain aspirations as the guidelines for their application have never been adopted.

### **Why the change from OAU to AU?**

The debate about transforming the OAU to the AU was informed by the belief that the fundamentally changing circumstances required a new collective way of doing things, including an agreement on shared

values which had not been articulated in the 1963 OAU Charter.<sup>14</sup> I hold the view that the transformation of the OAU to the AU, was informed by a multiplicity of factors, beyond the end of the decolonisation agenda. I will highlight only five.

*Frustration with the slow pace of review of the OAU Charter*

By late 1970s, much of Africa had been liberated from colonialism except for the racist regimes in South Africa, Zimbabwe, and Namibia. In light of this, the OAU Assembly meeting in Monrovia, Liberia, in July 1979 established the OAU Charter Review Committee – composed of 14 States, to make a detailed study and to re-examine the provisions of the Charter in light of the changes and realities in Africa and make specific proposals.<sup>15</sup>

Interestingly, by May 1982, the Committee had completed its work but for reasons that are unclear, no action was taken to consider and formalise the Committee's recommendations. In its Report, the Committee had made new proposals, *inter alia*, on respect and protection of human and peoples' rights; and unreserved dedication to the promotion and achievement of political unity and economic integration of Africa were made. Proposals for establishment of an African Court of Justice, an African Defence Force, and inclusion of the African Commission on Human and Peoples Rights in the Charter were considered by the Committee.

By mid-1990s, the Committee's recommendations had been overtaken by events especially by completion of the decolonisation agenda with the democratic elections in South Africa in 1994. Accordingly, in 1996, a government experts meeting was convened to review the work of the Committee considering the new developments. Although the review was completed, implementation of the Abuja

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<sup>14</sup> Corinne A Packer and Donald Rukare, 'The new African Union and its Constitutive Act', 96(2) *American Journal of International Law* (2002) 366-367.

<sup>15</sup> OAU Decision on the Review of the Charter, June 1979, AHG/Dec.111 (XVI) Rev.1, para 1.

Treaty and new initiatives on African unity made it necessary to cease the Charter review process.<sup>16</sup>

*Perceived inability to speak with one voice*

Africa was not speaking with one voice at international fora and was also faced with linguistic, geographical, and other divisive tendencies in internal deliberations. State representatives would attend international fora and take positions completely inimical to the African Common Position, often at the behest of neo-colonial powers.

*Frustration with the slow pace of political and socio-economic integration and especially the implementation of the Abuja Treaty*

The Abuja Treaty was adopted in 1991 and came into force on 12 May 1994. It envisioned a phased continental integration process, in six stages of variable duration spanning 34 years, involving the coordination, harmonisation, and progressive integration of existing and future regional economic communities (RECs) as building blocks.

The Treaty was adopted in implementation of key frameworks and strategies such as the Monrovia Declaration (1979),<sup>17</sup> the Lagos Plan of Action (1980), and the Final Act of Lagos (1980). The Abuja Treaty provides for six key stages:

strengthening and establishing RECs within a period not exceeding five (5) years (like SADC, COMESA);<sup>18</sup>

stabilising trade barriers and non-tariff barriers, customs duties and taxes within a period not exceeding eight (8) years;<sup>19</sup>

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<sup>16</sup> See generally Packer and Rukare, 'The new African Union and its Constitutive Act', 366-370.

<sup>17</sup> OAU Monrovia Declaration of Commitment of the Heads of State and Government of the Organization of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order, 20 July 1979, AHG/ST.3 (XVI) Rev.1.

<sup>18</sup> Abuja Treaty, Article 6(2)(a).

<sup>19</sup> Abuja Treaty, Article 6(2)(b).

establishing a free trade area and the customs union by adopting a common external tariff within a period not exceeding ten (10) years;<sup>20</sup>

within a period not exceeding two (2) years, coordination and harmonisation of tariff and non-tariff systems among the RECs and adoption of a common external tariff;<sup>21</sup>

within a period not exceeding four (4) years, establishing a common market with free movement of people and the rights of residence through the adoption of common policies and harmonisation of monetary, financial and fiscal policies;<sup>22</sup>

within a period not exceeding five (5) years, integration of all the sectors and the establishment of a single domestic market, a Pan-African Economic and Monetary Union, the African Central Bank and a single African currency.<sup>23</sup>

The Assembly was empowered to determine, when the objectives of a particular stage had been attained and to approve the transition to the next stage. Significantly, the six key stages would have moved Africa from a free trade area to a customs union, to a common market with free movement of people and the rights of residence to a single domestic market, a Pan-African Economic and Monetary Union, (the African Central Bank and a single African currency by 2028. In other words, three years from now, we should have been close to the European Union model of integration.

*Faced with the end of the Cold War and a globalising world, the continent was forced to take stock of these developments and act accordingly*

The OAU Summit of July 1990 was held against the background of the fall of the Berlin Wall on 9 November 1989, the end of the Cold War and the tendency towards regional integration in Europe and the Americas. The Summit, therefore, focused on the implications for Africa from this changing global landscape, including democratisation in Eastern Europe and the emergence of the process of globalisation, with

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<sup>20</sup> Abuja Treaty, Article 6(2)(c).

<sup>21</sup> Abuja Treaty, Article 6(2)(d).

<sup>22</sup> Abuja Treaty, Article 6(2)(e).

<sup>23</sup> Abuja Treaty, Article 6(2)(e).

its various opportunities and threats, based on the Report of the OAU Secretary-General, Dr Salim Ahmed Salim.<sup>24</sup>

The outcome was the landmark Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World.<sup>25</sup> The Summit took note of the establishment of trading and economic blocs as well as the advances in science and technology.<sup>26</sup> These they found constituted major factors which should guide Africa's collective thinking about the challenges and options before her in the 1990s and beyond, in view of the real threat of marginalisation of the continent.<sup>27</sup> The Declaration outlined the impact of the new reality on Africa, the challenges faced, their root causes, and the imperative to look for solutions from within, including finding peaceful and speedy resolution of all the conflicts on the continent.<sup>28</sup>

On unity, the Heads of State and Government agreed to strengthen the OAU so that it may also become 'a viable instrument in the service of Africa's economic development and integration ... with greater determination to be masters of our destiny'.<sup>29</sup> They reaffirmed that Africa's development is the responsibility of our governments and peoples, and their commitment to maintain and strengthen unity and solidarity and to pool resources and wisdom. This was in order to face the challenges of the decade of the 1990s and beyond, change the bleak socio-economic

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<sup>24</sup> Antony Karol Muma, 'Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU', 3 *Kabarak Law Review* (2024) 237-238.

<sup>25</sup> Declaration of the Assembly of Heads of State and Government of the Organisation of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, 11 July 1990, AHG/Decl.1 (XXVI), 1990.

<sup>26</sup> OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 2.

<sup>27</sup> OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 2.

<sup>28</sup> OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 11.

<sup>29</sup> OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 12.

prospects of our continent and guarantee a better life for all peoples and future generations yet unborn.

On democracy, they recommitted themselves to the 'further democratisation of societies, to the consolidation of national democratic institutions and asserted that democracy and development should go together and should be mutually reinforcing'.<sup>30</sup> They agreed to promote 'democratic governance, popular participation, human rights, rule of law, and high standards of accountability and popular-based political processes which ensure the involvement of all including in particular women and youth in the development efforts'.<sup>31</sup>

These conclusions were subsequently amplified in several landmark declarations addressing emerging challenges such as the OAU Mechanism for the Prevention, Management and Resolution of Conflicts (1993);<sup>32</sup> and Relaunching Africa's Economic and Social Development: The Cairo Agenda of Action (1995), which underlined the need to address the internal challenges of governance, the root causes of conflicts, and respect for human rights.

Other instruments included the Grand Bay (Mauritius) Declaration and Plan of Action on Human Rights in Africa (1999);<sup>33</sup> the Constitutive Act of the African Union (2000); the New Partnership for Africa's Development (NEPAD) (2001); and the Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) (2000);<sup>34</sup> which adopted a memorandum on civil society participation, transparency, and principles of action in four key areas known as

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<sup>30</sup> OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 10.

<sup>31</sup> OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 10.

<sup>32</sup> OAU Declaration of the Assembly of Heads of State and Government on the establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 28-30 June 1993, AHG/Decl.3 (XXIX).

<sup>33</sup> Grand Bay (Mauritius) Declaration and Plan of Action on Human Rights in Africa (1999).

<sup>34</sup> OAU Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), 10-12 July 2000, AHG/Decl.4 (XXXVI).

‘the four calabashes’, namely: i) collective security; ii) stability; iii) development; and iv) cooperation.

The Solemn Declaration was followed by a Memorandum of Understanding also adopted at the first AU Summit in Durban in 2002, binding member states to key performance indicators, a framework of implementation and monitoring performance. As an example, on cooperation, the Assembly agreed to establish a firm and binding commitment by all member states for all the regional economic blocs to attain full customs union status by 2005, and full common market status by 2010, and to adopt an investment code by 2005, and the implementation of the Yamoussoukro Declaration concerning the Liberalisation of Air Transport Markets in Africa by 2005. All the targets were never met.

#### *The 1994 genocide in Rwanda*

Another watershed moment was the 1994 genocide in Rwanda which, undoubtedly, was a loud wake up call for Africa. The OAU had tried but failed to prevent the genocide through the Arusha process of negotiations, whose outcome was not implemented.

In 1998, the OAU created the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (IPEP) composed of seven eminent African and non-African individuals.<sup>35</sup>

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<sup>35</sup> OAU, Establishment of the Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events, July 1998, CM/2063 (LXVIII). The members of the Panel were: HE Sir Ketumile Masire, former President of Botswana, Chair; HE General Amadou Toumani Toure, former Head of State of Mali; Ms Lisbet Palme, Sweden, then Chairperson of the Swedish Committee of UNICEF, Expert on the UN Committee on the Rights of the Child; Ambassador Stephen Lewis, Canada, former Ambassador and Permanent Representative of Canada to the UN and then Deputy Executive Director of UNICEF; Ms Ellen Johnson-Sirleaf, Liberia, former Government Minister and then Assistant Administrator and Executive Director, Regional Bureau for Africa of the UNDP; Ambassador Hocine Djoudi, Algeria, Member of the National Council and Vice-President of Foreign Affairs Commission; Justice RN Bhagwati, India, former Chief Justice of the Supreme Court of India and Vice-Chairman, UN Human Rights Committee.

The Panel had a wide mandate: '[T]o investigate the genocide in Rwanda and the surrounding events ... as part of efforts aimed at averting and preventing further wide-scale conflicts ...'. The Panel was 'to establish the facts about how such a grievous crime was conceived, planned, and executed, to look at the failure to enforce the Genocide Convention in Rwanda and in the Great Lakes Region, and to recommend measures aimed at redressing the consequences of the genocide and at preventing any possible recurrence of such a crime'.<sup>36</sup>

The Panel was also required specifically to investigate the 1993 Arusha Peace Agreement, the 1994 killing of Rwandan President Juvenal Habyarimana, the genocide that followed, and the subsequent refugee crisis as well as 'the role, before, during, and after the genocide', of the UN and its agencies, the OAU, internal and external forces, and NGOs, and 'what African and Non-African leaders and governments individually or collectively could have done to avert the genocide'.<sup>37</sup>

The Report was presented at the OAU Summit in Lomé, Togo in July 2000. The International Panel of Eminent Personalities Report highlighted the failures of the OAU itself and its member states, the neighbouring countries in the Great Lakes region, successive Rwandese governments and the UN and Western powers, especially, the influence and responsibility of several European states and the USA. Noteworthy, its intention was not to determine the guilt of various actors. The Panel made many recommendations aimed at ensuring this never happens again, which were duly adopted. The commitment to ensure this never happens again no doubt influenced the establishment of the African Security Architecture.

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<sup>36</sup> OAU, *Rwanda: The preventable genocide*, 2002, para 2.

<sup>37</sup> OAU, *Rwanda: The preventable genocide*, Annex A, part II.

## **The how: Sirte Declaration and negotiation, adoption and early implementation of the Constitutive Act**

The main process towards the realisation of the AU started at the OAU Algiers Summit in 1999. At that Summit, Colonel Muammar Gaddafi submitted a proposal to hold an extraordinary meeting on the issue of the transformation of the OAU and specifically 'to discuss ways and means of making the OAU effective so as to keep pace with political and economic developments taking place in the world'. After due deliberations, the OAU Assembly endorsed the proposal vide Decision AHG/Dec.140 (XXXV) on the Convening of an Extraordinary Session of the OAU Assembly in accordance with Rule 33(5) of its Rules of Procedure.<sup>38</sup>

The Extraordinary Session of the Assembly was convened in Sirte, Libya on 9 September 1999. It was preceded by meetings of government experts/ambassadors, and the Council of Ministers.<sup>39</sup> At those preparatory meetings, the Secretariat submitted, as is the usual practice, documentation it had prepared in anticipation of the possible outcomes of the Summit.

These documents were duly considered and recommendations made to the Assembly. However, at the Assembly level, Colonel Gaddafi submitted directly to the Summit, two alternative proposals, which the delegates and the Secretariat were unaware of until a few minutes before the commencement of the Assembly Session.<sup>40</sup> The proposals were on the establishment of the United States of Africa (the USA model) and the establishment of the Union of African States (the former Soviet Union model).

During the deliberations on the Gaddafi proposals, the predominant opinion was that Africa was not yet ready for a federation or

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<sup>38</sup> OAU Decision on the Convening of an Extraordinary Session of the OAU Assembly of Heads of State and Government in accordance with Article 33(5) of its Rules of Procedure, 1999, AHG/Dec. 140 (XXXV), para 2.

<sup>39</sup> Packer and Rukare, 'The new African Union and its Constitutive Act', 370.

<sup>40</sup> Ilias Luursema, 'Muammar Gaddafi and the African Union: For a United Africa!', *The Collector*, 12 April 2023.

confederation. Instead, it was agreed to establish the African Union. Accordingly, in the Sirte Declaration, the Assembly called for the establishment of the African Union in conformity with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty.<sup>41</sup>

The Assembly also decided to accelerate the process of implementing the Abuja Treaty, in particular to: shorten the implementation periods of the Abuja Treaty;<sup>42</sup> 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;<sup>43</sup> strengthen and consolidate the RECs.<sup>44</sup>

The Sirte Declaration also tasked the Ministers together with the Secretariat to prepare the constitutive legal texts of the Union, and to submit its report to the June 2000 Assembly Session.<sup>45</sup> To this end, the OAU Secretary-General, Dr Salim Ahmed Salim established an Inter-Departmental Task Force led by the Assistant Secretary General for Political Affairs. In addition, a multi-disciplinary team of expert consultants with backgrounds in politics, law, economic integration, and international relations were also hired, and met in Addis Ababa over a one-month period, to develop the preparatory documents.

In the end, the team submitted a draft Constitutive Act that proposed pyramid type of institutional framework with the AU and the AEC at the bottom of the pyramid and OAU at the top. This was no doubt a misunderstanding of the Sirte Declaration. It seems the consultants were misled by the words 'in conformity with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty'. A small internal drafting team, which I chaired, was quickly set up within the Inter-Departmental Task Force, to redraft the texts submitted by the consultants.

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<sup>41</sup> Packer and Rukare, 'The new African Union and its Constitutive Act', 370-371.

<sup>42</sup> Sirte Declaration, 9 September 1999, Article 8(ii)(a).

<sup>43</sup> Sirte Declaration, Article 8(ii)(b).

<sup>44</sup> Sirte Declaration, Article 8(ii)(c).

<sup>45</sup> Sirte Declaration, Article 8(iii).

The updated texts were later submitted to member states and to two consecutive meetings of Experts and Parliamentarians, held in Addis Ababa in April 2000, and in May 2000 in Tripoli, Libya, respectively. Thereafter, a ministerial session held in Tripoli, Libya from 31 May to 2 June 2000, reviewed the draft Constitutive Act and decided to establish a member states' working group together with the Secretariat to further elaborate on the draft Act.

The working group submitted the revised draft Constitutive Act to the Council of Ministers at its session held in Lomé, Togo from 6 to 8 July 2000. The Council of Ministers reviewed the draft Constitutive Act again and after further deliberations, approved it on 8 July 2000 and recommended it for consideration and adoption by the OAU Assembly. The Assembly meeting at the same venue from 10 to 12 July 2000, formally adopted the Constitutive Act on 12 July 2000 and urged OAU member states to ratify it as soon as possible.

## **The launch of the African Union**

The political birth of the African Union was proclaimed at an Extraordinary Session of the OAU Assembly Sirte, Libya 1-2 March 2001, upon signing of the Act by majority of the member states.<sup>46</sup> Regarding the legal birth, the Summit noted that the Constitutive Act would enter in to force 30 days after the deposit of the instruments of ratification by two-thirds of the member states of the OAU, as provided for in Article 28 of the Constitutive Act. It also instructed that other necessary legal instruments should be prepared.

At the subsequent and ultimate OAU Summit held in Lusaka, Zambia in June 2001, the Assembly noted that the Constitutive Act had entered into force on 26 May 2001.<sup>47</sup> This mandated the OAU Secretary-General to undertake consultations on the modalities and guidelines for the launch of the organs of the African Union. Additionally, it

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<sup>46</sup> Packer and Rukare, 'The new African Union and its Constitutive Act', 370-372.

<sup>47</sup> Packer and Rukare, 'The new African Union and its Constitutive Act', 365-367.

was to prepare the draft rules of procedure for these organs in consultation with the ambassadors and a ministerial committee.<sup>48</sup> The Assembly prioritised the launch of the key organs, namely: the Assembly, the Executive Council, the Commission, and the Committee of Permanent Representatives, and requested the Secretary General to submit proposals concerning the structure, functions, and regulations of the Commission.<sup>49</sup> The Assembly also declared a transitional period of one year.

The Constitutive Act entered into force on 26 May 2001, and the African Union (AU) Assembly of Heads of State and Government held its first Ordinary and Inaugural Session in Durban, South Africa, in July 2002.<sup>50</sup> The Public Inaugural Session of the Union took place at the FNB Stadium in Durban on 9 July 2002.

At that session, the Assembly reviewed and adopted other necessary legal instruments of the Union such as the Rules of Procedure of the Assembly, of the Executive Council and the Permanent Representatives Committee as well as the Statutes of the Commission. It also adopted the Protocol on the Peace and Security Council. The Assembly also declared a one-year interim period.

### **Gaddafi's proposals for amendments to the Constitutive Act**

Strangely, as the Assembly was holding its inaugural session, Colonel Gaddafi presented proposed amendments to the Constitutive Act.<sup>51</sup> The main proposals included, *inter alia*, deletion of the article on withdrawal from the Union as according to him, it constituted an invitation to states to withdraw.<sup>52</sup> There were also other proposals including one

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<sup>48</sup> Congressional Research Service (CRS) Report for Congress, 'The African Union', Order Code RS21332, 30 April 2003, 3.

<sup>49</sup> CRS Report for Congress, 'The African Union', 3.

<sup>50</sup> CRS Report for Congress, 'The African Union', 3.

<sup>51</sup> African Union Assembly, Decision on the Proposed Amendments to Articles of the Constitutive Act, Assembly/AU/Dec.3(I), First Ordinary Session, Durban, 9-10 July 2002.

<sup>52</sup> African Union Assembly, Decision on the Proposed Amendments to Articles of the

discouraging member states from concluding any treaty or alliance that is incompatible with the principles and objectives of the Union.<sup>53</sup> This item was deferred. Colonel Gaddafi also proposed the establishment of a Single African Army.

The Summit did not accept the proposal for a Single African Army. However, it stressed the need for a common African Defence and Security Policy and requested the Chairperson of the Assembly to establish a group of experts to examine all aspects related to the establishment of a Common African Defence and Security Policy and submit recommendations for the consideration of the next ordinary session of the Assembly.<sup>54</sup> This proposal evolved to the adoption of the AU Non-Aggression and Common Defence Pact in Abuja, Nigeria on 31 January 2005.

After the Summit, the Interim Chairperson of the AU Commission, Amara Essy, led a delegation to meet Colonel Gaddafi to persuade him that it was too soon to start amending the Act. On the proposal to delete the provision on withdrawal, we explained that deletion could not stop a state from withdrawing its membership, as Indonesia once did at the United Nations based on the provisions of the Vienna Convention on the Law of Treaties and customary international law. We failed to convince him and instead helped to redraft the proposals to align with Union procedures.

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Constitutive Act, Assembly/AU/Dec.3(I), First Ordinary Session, Durban, 9-10 July 2002. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969, Articles 54-56, Libya opposed the inclusion of an express withdrawal clause, arguing that it symbolically facilitated exit, even though withdrawal would remain possible under general international law.

<sup>53</sup> African Union Assembly, Decision on the Proposed Amendments to Articles of the Constitutive Act, Assembly/AU/Dec.3(I), 1st Ordinary Session, Durban, 9-10 July 2002. See also African Union, Protocol on Amendments to the Constitutive Act of the African Union, July 2003; Constitutive Act of the African Article 4. Among the Libyan proposals were suggestions to amend the withdrawal provisions of the Constitutive Act, on the basis that an express exit clause undermined the permanence of the Union, as well as proposals aimed at limiting member states' ability to enter into treaties or alliances incompatible with the Union's principles and objectives.

<sup>54</sup> African Union Assembly, Decision on the Proposed Amendments to Articles of the Constitutive Act, Assembly/AU/Dec.3(I); Decision on a Common African Defence and Security, 1st Ordinary Session, Durban, 9-10 July 2002, para 1-2.

Resultantly, the proposed amendments were encapsulated in a Draft Protocol on Amendments prepared by the AU Commission which was reviewed by meetings of experts and Permanent Representatives, and later ministers and formally adopted by the Assembly in July 2003. The Protocol is not yet in force 22 years later, as it requires ratification by two thirds majority of states (37) but has so to date obtained only thirty ratifications.<sup>55</sup>

### **This man Gaddafi**

Before moving to another section on the early implementation of the Constitutive Act and Union Government Project, I feel compelled to say something about Colonel Gaddafi, not only because of his role in the establishment of the AU, but also his many proposals whose deliberations disrupted the normal equilibrium during the Assembly sessions due to his deeply uncompromising stance. Although some of his proposals were often misguided, there is no doubt he was committed to African unity.

His approach reminds me of the words of Thomas Sankara, a Pan-Africanist revolutionary who served as the President of Burkina Faso from 1983 until his assassination in 1987:

You cannot carry out fundamental change without a certain amount of madness. In this case, it comes from nonconformity, the courage to turn your back on the old formulas, the courage to invent the future. It took the madmen of yesterday for us to be able to act with extreme clarity today. I want to be one of those madmen. We must dare to invent the future.<sup>56</sup>

It seems to me that those sentiments were inherent in Colonel Gaddafi's DNA. Gaddafi was no doubt a complex man who could not be defined by a single identity or experience and who meant many things to different people. At the personal level, he was kind and considerate,

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<sup>55</sup> Protocol on the Amendments to the Constitutive Act of the African Union, Assembly of the African Union, Maputo, 11 July 2003, Article XIII, Status as at 15 December 2025.

<sup>56</sup> Thomas Sankara, *Thomas Sankara speaks: The Burkina Faso revolution 1983-87*, Pathfinder, 1988, 144.

spoke good English and loved to tell stories. At the same time, he was ruthless and unforgiving to his opponents just like any other dictator. He supported every shade of terrorist and rebel groups in Africa and abroad.<sup>57</sup>

On African unity, I believe Gaddafi wanted to be remembered as a unifier and champion of African unity who succeeded where Nkrumah failed. It is likely that he turned his attention to Africa after many failed attempts to bring about unity in the Arab world.<sup>58</sup> Every single initiative on African unity was conceived by him personally, with his close advisers just taking notes.

Strangely, according to his close advisers, Gaddafi was not bothered or interested in the briefings about the continental shelf dispute between Libya and Malta at the International Court of Justice (ICJ). When he was AU Chairperson for one year, 2009 to 2010, he summoned and sent an aircraft to pick the AU Commission Chair, Jean Ping, to go to Libya 14 times (I accompanied him on some of those trips). That year he also travelled to the AU headquarters in Addis Ababa three times, often without or at extremely short advance notices.

## **Early implementation of the Constitutive Act and the African Union government project**

Since the Constitutive Act abrogated and replaced the OAU Charter and any inconsistent provisions of the Abuja Treaty of 1991, it is pertinent to ask whether it advanced and shifted the OAU towards a more integrated continental body. Evidently, the Constitutive Act introduced a new normative framework and strengthened continental institutions. However, it seems to me that the stated intention to shorten the implementation periods of the Abuja Treaty was not achieved.

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<sup>57</sup> See for example the Lockerbie bombing of Pan Am Flight 103 on 21 December 1988, which took off from Heathrow Airport in London bound for New York City, with 259 passengers and crew and 190 Americans, and which came down in Lockerbie Scotland. Libya took responsibility and paid compensation to the victims.

<sup>58</sup> For example, the Union of Arab Republics 1971 (Libya, Egypt, and Syria) and the Arab Islamic Republic 1974 (a proposed union of Libya and Tunisia), all failed to take off.

Where the Abuja Treaty provided for SMART – specific, measurable, achievable, relevant, and time-bound – goals, the Act settled for general objectives without any timelines. This has allowed a situation where the original timelines in the Abuja Treaty have been surpassed and the goals and aspirations in other subsequent initiatives have simply kicked the can down the road. Neither the African Continental Free Trade Area (AfCFTA) nor Agenda 2063, can possibly be said to have shortened the implementation periods of the Abuja Treaty.

One noteworthy development though, from the implementation of the Constitutive Act was the adoption of the first AU Strategic Plan 2004 to 2008, with agreed strategic objectives, pillars and strategies; mission, vision and shared values, and activities.<sup>59</sup> To implement the new programmes and activities, a new budget of US\$ 260 million was adopted, a big jump from the last OAU budget of US\$43 million. This budget allowed the AU to undertake more activities, including in the peace and security cluster, although it remains largely funded by partners.

### **African Union Government project**

The long running African Union Government project arose from the submission by Libya of four interrelated items in the agenda of the sessions of the Executive Council and the Assembly held in Abuja, Nigeria, in January 2005.<sup>60</sup> The items proposed, *inter alia*, the creation of the posts of Ministers of Defence, Foreign Affairs, Transport and Communications, Foreign Trade and the cancellation of customs, and harmonisation of custom tariffs among member states.

The debate on these straightforward proposals went on for six years and evolved into deliberations on how to strengthen our common institutions with various options metamorphosing from a strengthened

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<sup>59</sup> African Union, 'Commission of the African Union: 2004-2007 strategic plan', 2 *Strategic Framework* (2004).

<sup>60</sup> Tim Murithi, 'Introduction: Contextualising the debate on a Union Government for Africa', in Timothy Murithi (ed) *Towards a Union Government for Africa: Challenges and opportunities*, Pretoria, Institute for Security Studies (ISS), 2008, 5.

Commission, into a Union government and an AU Authority. Out of those six years, four years were devoted to deliberations around the Union government and two years around the African Union Authority.

Over those four years, the Assembly held eight ordinary sessions, two extra ordinary sessions and two special sessions devoted to the issue of the Union Government. There were also three successive Committees of Heads of State one chaired by President Yoweri Museveni, then President Olusegun Obasanjo, then President Jakaya Kikwete with each holding at least two meetings in different places.<sup>61</sup>

In addition, the Ordinary Session of the Assembly held in Accra Ghana in July 2007 was unusually devoted to one single agenda item, the Grand Debate on the Union Government.<sup>62</sup> On the other hand, the Executive Council held eight ordinary sessions, four extra ordinary sessions, and three ministerial retreats in different places devoted to this issue.<sup>63</sup> Several sessions of the ministerial committees were also held. In its various sessions, the Assembly reaffirmed that the ultimate goal of the African Union was full political and economic integration leading to the United States of Africa. Conceptually, therefore, the Union Government was supposed to be a bridge towards the ultimate goal of establishing the United States of Africa.

Some of the issues addressed in the various sessions, included the following: the steps needed for the realisation of this objective; the structure; the process; the nature of the consultations to be undertaken; identification of the contents of the Union Government concept; identification of domains of competence and their impact on the sovereignty of member states; identification of the relationship between the Union Government and the RECs; elaboration of the roadmap together with timeframes; and identification of additional sources of financing the activities of the Union.

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<sup>61</sup> Tim Murithi, 'From Pan-Africanism to the Union of Africa', *Pambazuka News*, 20 June 2007.

<sup>62</sup> Murithi, 'Introduction: Contextualising the debate on a Union Government for Africa', 5-6.

<sup>63</sup> Murithi, 'From Pan-Africanism to the Union of Africa'.

The outcome of the Grand Debate in Accra, in July 2007, was the Accra Declaration by the Assembly. Its preambular and substantive provisions were telling:

One, it expressed its conviction that ‘the ultimate objective of the African Union is the United States of Africa with a Union Government as envisaged by the founding fathers of the Organisation of African Unity and, in particular, the visionary leader, Dr Kwame Nkrumah of Ghana’.<sup>64</sup>

Two, ‘the Union Government should be built on common values that need to be identified and agreed upon as benchmarks’.<sup>65</sup>

Three, by ‘involving the African peoples to ensure that the African Union is a Union of peoples and not just a “Union of states and governments”, as well as the African Diaspora in the processes of economic and political integration of our continent’.<sup>66</sup>

Furthermore, the Accra Declaration stressed the need ‘to conduct immediately, an Audit of the Executive Council in terms of Article 10 of the Constitutive Act, the Commission as well as the other organs of the AU in accordance with the Terms of Reference adopted by the 10th Extraordinary Session of our Executive Council held in Zimbali, South Africa on 10 May 2007’.<sup>67</sup>

The Declaration also purposed ‘to establish a ministerial committee to examine the following: identification of the contents of the Union Government concept and its relations with national governments; identification of domains of competence and the impact of the establishment of the Union Government on the sovereignty of Member States; definition of the relationship between the Union Government and the regional economic communities (RECs); elaboration of the roadmap together with timeframes for establishing the Union Government; and identification of additional sources of financing the activities of the Union’.<sup>68</sup>

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<sup>64</sup> Accra Declaration, 3 July 2007, (Assembly/AU/Decl.2(IX)), Preamble para 1.

<sup>65</sup> Accra Declaration, Preamble para 4.

<sup>66</sup> Accra Declaration, Preamble para 5.

<sup>67</sup> Accra Declaration, para 2(b); Constitutive Act of the African Union, Article 10.

<sup>68</sup> Accra Declaration, para 1(c).

Subsequently, a High-Level Panel for the Audit of the African Union was set up led Professor Adebayo Adedeji, as Chair of the Panel. The Panel's Report containing 159 recommendations to galvanise the integration process, outlined eight benchmarks which were crucial to the realisation of the African Union Government project. These benchmarks were:

revamping the institutions of the Union; popularising and internalising Africa's core values; mobilising and engaging the peoples of Africa for the Union Government project; free movement of the peoples of Africa; rationalisation of the RECs; fast-tracking the move towards an African Common Market and the African Economic Community; establishment of continental financial and monetary institutions; developing African entrepreneurial elite towards regional and continental investment projects that advance unity and integration.<sup>69</sup>

In the deliberations that followed, the issue of the appropriate integration model that Africa should adopt was also discussed. Suggestions were made that Africa could learn from integration models of societies such as Europe, USA, Brazil, and India. However, these models developed around the economic, ideological, and political imperatives of those societies which might be different from Africa's own peculiarities. There was a general consensus that as much as possible, Africa should design its own model of integration. At the same time, it was agreed that Africa cannot continue to drag its feet on the need for greater integration. Furthermore, the people of the continent deserved leadership on this matter, and should be involved in the integration processes.

The process for a Union Government was underpinned by many studies and wide-ranging consultations with stakeholders such as member states and the regional economic communities, and especially by ECOSOCC and civil society organisations that submitted detailed proposals. These consultations were undertaken at the political level as well as the technical level. There were also base studies undertaken by consultants followed by many validation workshops. The base study, *inter alia*, proposed that:

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<sup>69</sup> African Union High Level Panel, 'Audit of the African Union', 18 December 2007, para 488.

The Union Government will be a political transitory arrangement towards the United States of Africa. As such, it should consist of a more focused Assembly in terms of its work, and an Executive Council backed by an effective Permanent Representatives Committee, and result-oriented Specialised Technical Committees as may be required. In addition, the Union Government would have a Commission with Executive authority on matters totally or partially delegated by Union Members. Finally, it would be supported by more effective parliamentary and judicial systems, as well as efficient continental financial institutions and an adequate participatory framework for non-state actors.<sup>70</sup>

While this was ongoing, at the Ordinary Session of the Assembly held in Sirte, Libya from 4 to 5 July 2005, Libya submitted three new proposals: To revise the symbols and emblems inherited from the OAU; the establishment of a Pan-African Stock Exchange; and the establishment of a mechanism for participation in Bilateral Summits between Africa and Certain States.<sup>71</sup>

#### *Appellation of Union Government was a misnomer*

At the end of it all, after backs and forths, and all the meetings and deliberations over a period of four years that I have outlined above, the Assembly decided at its Session in Addis Ababa in February 2009, that the appellation of Union Government was a misnomer.<sup>72</sup> The central argument was that having two governments in Addis Ababa, one a Federal Government for Ethiopia and another for the continent, would create confusion.

The Assembly therefore decided that, rather than a Union Government, it should be renamed African Union Authority. The Authority should be a strengthened Commission with a structure comprising of the President, the Vice President, and Secretaries with portfolios based on areas of shared competencies as agreed upon. This decision was tak-

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<sup>70</sup> African Union, 'Study on an African Union government: Towards the United States of Africa', 2006, 6, paras 15-17.

<sup>71</sup> African Union Decision on the Proposals by the Great Socialist People's Libyan Arab Jamahiriya, EX.CL/Dec.274(VIII), 2005, 1-4.

<sup>72</sup> African Union Assembly Decision on the Special Session of the Assembly on the Union Government, Assembly/AU/Dec.233(XII), Twelfth Ordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia, February 2009, 1-3.

en even though the Assembly had constantly echoed and re-echoed the point that the need for the Union Government was no longer a question, but rather 'what to establish' and accept as the 'structural and or operational and administrative content' of the Union Government. Indeed, at its January 2008 session, the Executive Council, agreed not to reopen the debate on the merits and demerits of the Union Government because this was the essence of the Grand Debate in Accra, leading to the establishment of the Audit Panel and the Ministerial Committee on the Union Government.

At its July 2009 session in Sirte, Libya, the Commission was requested to prepare legal instruments for amendments to the Constitutive Act, the Rules of Procedure of the Assembly, the Executive Council, the Peace and Security Council, the Permanent Representatives Committee (PRC), and the Statutes of the Commission related to the Creation of the African Union (AU) Authority, and to submit to a meeting of government experts to consider them. In addition, the Commission was to submit proposals on the structure of the new AU Authority, and the financial implications of the transformation of the Commission into the AU Authority, in collaboration with the PRC.

Pursuant to the Assembly's request, the Commission prepared consequential amendments to 11 legal instruments and convened four different meetings of government experts and ambassadors, and subsequently submitted the outcome to the Executive Council and the Assembly.

#### *Reconsideration of decision*

At the Assembly's session in July 2009, Libya requested for a 'Reconsideration of the Decision on the Transformation of the African Union Commission into the African Union Authority'. This proposal was rejected.

During the armed conflict that began with peaceful protests against Gaddafi's regime, and which escalated into a full-blown civil war up to October 2011 when Colonel Gaddafi was assassinated, this issue took

a back burner. Consideration of the legal instruments for the establishment of the African Union Authority, was deferred several times, and later laid to rest in January 2013, when the Assembly decided to set aside the process of converting the AUC into an Authority and, instead, to strengthen the existing Commission.

## **Concluding remarks**

As I had said earlier, the Abuja Treaty envisaged that by 2028, 34 years after its entry into force and about three years from now, we should have had full integration of all the sectors and the establishment of a single domestic market, a Pan-African Economic and Monetary Union, the African Central Bank and a single African currency, and free movement of people. The AfCFTA Agreement is no doubt an improved and more elaborate version of the Abuja Treaty, with respect to trade matters. However, neither the AfCFTA nor Agenda 2063, can possibly be said to have shortened the implementation periods of the Abuja Treaty. The inescapable conclusion, therefore, is that we are nowhere near reaching the goal of deeper unity and integration set out in the Sirte Declaration. All the new initiatives have just kicked the ultimate goal down the road without any immediate timelines.

The continental integration process has been a compromise between those who preferred a revolutionary approach and those who preferred a gradualist approach. According to President Thabo Mbeki, during the debate on Sirte Declaration of 9 September 1999, the difference in approach was 'between those that wanted to run and those who wanted to walk'. Evidently, most of our leaders prefer walking and walking slowly for that matter. However, I would suggest that there was a third group composed of Presidents Obasanjo, Abdelaziz Bouteflika, and Abdoulaye Wade, among others that also preferred walking but briskly.

It is a truism that every major cause must have a leader. In Europe, Jean Monnet was the unifying force behind the birth of the European

Union. In Africa, it was undoubtedly Kwame Nkrumah in the late 1950s and early 60s until the coup of 1966. In the 90s and the early 2000s it was Colonel Gaddafi. During those two periods, there were other leaders who shared that vision but none as strongly. However, with the assassination of Gaddafi in October 2011, and the exit from the stage of some leaders who favoured walking quickly, the vision and momentum for real and meaningful political and socio-economic integration seems to have lost steam and left abandoned, unattended in the African wilderness.

To end on a positive note, I believe that a new generation of visionary leaders will ascend to power and take up the baton of Pan-Africanism where the leaders of yesterday left it. As John C Maxwell once said, 'everything rises and falls on leadership'.<sup>73</sup>

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<sup>73</sup> John C Maxwell, *The 21 irrefutable laws of leadership: Follow them and people will follow you*, Thomas Nelson, 1998.

