

# **African Yearbook of International Law**

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**KLUWER LAW INTERNATIONAL**

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**SPECIAL THEME:  
THE AFRICAN UNION**

**THÈME SPÉCIAL :  
L'UNION AFRICAINE**



# REIMAGINING AFRICAN UNITY: SOME PRELIMINARY REFLECTIONS ON THE CONSTITUTIVE ACT OF THE AFRICAN UNION

Tiyanjana Maluwa\*

## 1. INTRODUCTION

On 12 July 2000, twenty-five African heads of state and government and two foreign ministers signed, on behalf of their countries, the Constitutive Act of the African Union (“the Constitutive Act”), during a ceremony held to mark the closure of the Thirty-sixth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity (OAU) in the Palais des Congrès in Lomé, Togo. The Constitutive Act had earlier been adopted by acclamation by the Assembly on the previous day, 11 July 2000. It has since been signed by all the Member States of the OAU and has, to date, been ratified by all but two of them. It entered into force on 26 May 2001, in accordance with the ratification requirements provided for in its Article 28.<sup>1</sup>

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*The views expressed herein are personal and do not reflect or represent those of the Organization of African Unity.*

<sup>1</sup> The following countries signed the Constitutive Act during the formal signing ceremony on 12 July 2000: Algeria, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea Bissau, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Niger, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Sudan, Togo and Zambia. By 3 March 2001, the Act had been signed by all the fifty-three Member States of the OAU. Article 28 provides: “This

But what does the entry into force of the Constitutive Act mean for the African continent? Indeed, what does it signify for the African States that conceived, elaborated and adopted it within the fairly short space of time spanning the period from September 1999 to July 2000?

The adoption of the Constitutive Act marked a significant milestone in the history of the OAU. In the first place, it represented the first occasion on which the OAU Member States have adopted a treaty intended to supersede the OAU Charter, adopted on 25 May 1963, and replace the OAU itself with a new successor organization, the African Union. It also marked the culmination of the review process which the OAU Member States first embarked upon just over two decades ago when the OAU Charter Review Committee, established by the Assembly of Heads of State and Government in 1979, first met in Mogadishu, Somalia, in 1980.<sup>2</sup> Furthermore, the adoption of the Constitutive Act represented a critical moment in the long process of reconstructing and consolidating African unity and the historic quest for a politically integrated and unified Africa.

In brief, the adoption of the Constitutive Act is the latest manifestation of the search for the realization of the long-cherished idea of a politically and economically integrated and united Africa. This idea has been articulated explicitly and repeatedly in the various debates that have been joined by African political leaders, decision-makers and, to a very limited extent, the general public, through official pronouncements as well as in the various national

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Act shall enter into force thirty (30) days after the deposit of instruments of ratification by two-thirds of the Member States of the OAU", i.e. thirty-six signatories. On 26 April 2001 Nigeria became the thirty-sixth signatory to deposit the instrument of ratification with the OAU Secretary General. The Constitutive Act accordingly entered into force on 26 May 2001. As at 30 September 2001, all the OAU Member States, except the Democratic Republic of Congo and Madagascar, have ratified the Constitutive Act.

<sup>2</sup> The Charter Review Committee was established by the Assembly by decision AHG/Dec.111 (XVI) at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979. The committee held its first session in Mogadishu, Somalia, from 7 to 12 April 1980. It met six times between 1980 and 1996, when it held its last session in Addis Ababa, Ethiopia, from 9 to 15 May 1996.

and international news media.<sup>3</sup> This was also the underlying theme in the speeches delivered by various heads of state during the deliberations that led to the adoption of the Sirte Declaration, to which I shall return shortly, by the Fourth Extraordinary Session of the Assembly of Heads of State and Government on 9 September 1999 in Sirte, Libya.

This paper aims at examining the extent to which the adoption of the Constitutive Act represents a real advance in the historic quest referred to above and providing some preliminary reflections on the most essential elements of this legal instrument. The Sirte Declaration is generally regarded as manifesting a collective commitment by African leaders for reinvigorating the search for the attainment of the vision espoused by the “founding fathers” or, to employ a more appropriate anti-patriarchal term, the “founders” of the OAU, namely to forge closer unity among African peoples and nations. But an immediate question that may be posed is: in what respect(s) will the African Union offer a substantive and qualitative difference from the current institutional framework provided by the OAU? This question is particularly pertinent in view of the criticism which has been advanced by some observers, that beyond a slight expansion of the current objectives and principles of the OAU, and the establishment of new organs and a re-naming of existing OAU organs, the Constitutive Act really does not, in substance, offer much of a difference from the OAU Charter; indeed, that the envisaged African Union is in essence merely the OAU by another name. In other words, it is claimed that Sirte and Lomé are but the most recent stops on the long road already travelled by African leaders and countless advocates of Pan-Africanism in their imagining of a united Africa. If this is so, are the Sirte Declaration and the Constitutive Act thus to be regarded merely as part of the long on-going process of constructing African

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<sup>3</sup> In the absence of any scientifically verifiable opinion polls on this matter, it is difficult to assess or quantify the level of support for, or opposition to, the proposed African Union in the various countries. However, in addition to general discussions conducted in various national news media in some African countries, there has been a fair amount of debate conducted through the pages of such international news magazines as *African Events*, *Jeune Afrique*, *New African* and *West Africa*, to name only a few examples.

unity, and not especially unique developments in themselves? To answer these questions, one needs to recall the political motivation and context behind the elaboration and adoption of the Sirte Declaration. Part of this context can best be explained in terms of the reaction of African countries to the challenge of globalization and to the new approach to regional bloc-formation, referred to in some of the recent literature as the “new regionalism”.<sup>4</sup> It will be shown that while no *a priori* logic might have anticipated or predicted the outcome of the “Sirte process”, there were identifiable subterranean political trends and contextual dynamics which may help explain this outcome. But, first, a brief account of the background to the adoption of the Constitutive Act would be in order.

## 2. BACKGROUND

As has been indicated above, the genesis of the Constitutive Act of the African Union lies in the Sirte Declaration. The Fourth Extraordinary Session of the OAU Assembly of Heads of State and Government was convened at the request of Libya, in accordance with Rule 5 of the Rules of Procedure of the Assembly of Heads of State and Government. The initial request by Libya to convene an extraordinary summit in early September 1999 “to amend the OAU Charter to achieve a [*sic*] stronger African unity” had been made in September 1998.<sup>5</sup> Subsequently, Libya modified the proposed agenda. The extraordinary summit was “[to] discuss the question of strengthening the OAU to enable it to meet the new challenges facing it on the eve of the new century”. The new request was

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<sup>4</sup> For discussions of the different perspectives of this approach, see the various contributions in B. HETTNE, A. INOTAI and O. SUNKEL (eds.), *Globalism and the New Regionalism*, (London: Macmillan, 1999).

<sup>5</sup> Letter from Secretary of the General People’s Committee for Foreign Liaison and International Cooperation of the Great Socialist People’s Libyan Arab Jamahiriya to the Secretary General of the OAU, 28 September 1998; copy on file with the author.

formally sent to all OAU Member States in a communication dated 15 April 1999.<sup>6</sup>

The proposal to convene an extraordinary summit was subsequently reiterated by the Libyan leader, Colonel Muammar Ghaddafi, in the course of his address to the Thirty-fifth Ordinary Session of the Assembly held in Algiers, Algeria, from 12 to 14 July 1999. The speech was something of a *tour d'horizon*, in which Colonel Ghaddafi recalled the historic struggles of the early Pan-Africanists and the relevance of those struggles in the context of the contemporary problems and challenges confronting the African continent in the political, social and economic fields. He also articulated, with characteristic drama and hyperbole, the risk of marginalization which Africa stood to suffer as a result of the on-going globalization process, unless the continent undertook a collective exercise of re-appraising its position in the world today.

Thus, the subsequent decision adopted by the Assembly of Heads of State and Government on 14 July 1999, accepting the Libyan invitation to convene an extraordinary summit from 8 to 9 September 1999, stated the objective of the proposed meeting as:<sup>7</sup>

“[To] discuss ways and means of making the OAU effective so as to keep pace with the political and economic developments taking place in the world and the preparation required of Africa within the context of globalization so as to preserve its social, economic and political potentials.”

In fact, the above-stated objective must be understood within the context of two factors. First, the fact that the efforts to review the OAU Charter had not moved with the anticipated speed and effectiveness. Thus, between 1980 and 1996, when it was last convened, the OAU Charter Review Committee, referred to at the outset of this discussion, had met only six times. Inertia and an apparent lack of a sense of urgency on the part of the committee had driven some Member States into scepticism about any chance of

<sup>6</sup> The Libyan request was communicated by *Note Verbale* No. 53/99, dated 15 April 1999. Only four countries formally reacted to the proposal for the convening of the extraordinary summit: Liberia, Niger and Sudan supported it, while South Africa was not in favour of the proposal.

<sup>7</sup> Decision AHG/Dec.140 (XXXV).



achieving a meaningful review of the Charter. Second, the phenomenon of globalization, which gained currency in the immediate post-Cold War years, had begun to concentrate the collective minds of OAU Member States on the need to reposition the organization in the international scheme of things. In other words, there was an acceptance of the need to review the work of the OAU and to put in its place a new mechanism or institutional structure, and to reorient its objectives in order to reinvigorate the project of African integration.<sup>8</sup>

As can be seen, the idea of reviewing and reforming the political, legal and institutional bases of the OAU has a long history and is certainly not the brain-child of Libya alone, even if Colonel Ghaddafi has, in recent times, been its most vocal and passionate advocate. Nevertheless, a number of explanations have been advanced in an attempt to understand Libya's newly self-ascribed role as the accelerator of the engine for the transformation and reconstruction of African unity and as the "laboratory of the African Union".<sup>9</sup> These have included, for instance, attempts to locate these developments in the context of what is perceived as Ghaddafi's hidden agenda for personal aggrandizement on the African continent. In pointedly dismissive terms, these narratives have recounted past examples of Libya's failed experiments with the establishment of political unions with other African or Arab countries, with the apparent aim of proving that any Libyan-led initiative at constructing pan-African unity is doomed to failure.<sup>10</sup>

<sup>8</sup> The first collective response by African countries to the changes taking place in the world following the collapse of the Berlin Wall in 1989 is encapsulated in the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, adopted by the OAU Assembly of Heads of State and Government in July 1990 at its Twenty-sixth Ordinary Session in Addis Ababa, Ethiopia. The project for the continental economic integration of Africa was given a formal legal basis with the adoption of the Treaty establishing the African Economic Community in 1991. The focal points for regional integration in Africa are the various Regional Economic Communities (RECs), some of which were established prior to the adoption of the treaty, which are perceived by the Treaty establishing the African Economic Community as its "building blocks" (Article 6).

<sup>9</sup> See *Jeune Afrique Economie* 314 (7 August – 3 September 2000), p. 59.

<sup>10</sup> Thus, two months after the adoption of the Constitutive Act of the African Union, *The Economist* could still insist that "Libya's ruler dreams of a United