IS THE EUROPEAN UNION A MODEL FOR THE AFRICAN UNION?

Name: Christoph Zurmeyer

Student number: ZRMCHR001

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Supervisor: Prof. Derry Devine

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I hereby declare that I have read and understood the regulations governing the submission of Master of Law (LLM) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Cape Town 12.02.2005
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II. List of Abbreviations

AEC African Economic Community
APPER Africa’s Priority Program for Economic Recovery
ASEAN South East Asian Nations
AU African Union
CFI Court of First Instance
CFSP Common Foreign and Security Policy
COPERER Committee of Permanent Representatives (EC)
CSSDCA Conference on Security, Stability, Development, and Cooperation in Africa
EAC East African Community
EC European Community
ECB European Central Bank
ECJ European Court of Justice
ECOSOCC Economic, Social and Cultural Council
ECOWAS Economic Community Of West African States
ECSE European Coal and Steel Community
EEC European Economic Community
EESC European Economic and Social Committee
EP European Parliament (EC)
ESCB European System of Central Banks
EU European Union
Euratom European Atomic Energy Community
FAO Food and Agriculture Organization of the United Nations
ICJ International Court of Justice
IGAD Intergovernmental Authority On Development
IMF International Monetary Fund
JHA Justice and Home Affairs
LPA Lagos Plan of Action
MCPMR Mechanism for Conflict Prevention, Management and Resolution
MEP Member of the European Parliament
MERCOSUR The Southern Cone Common Market
NEPAD New Partnership for Africa’s Development
NGO Non Governmental Organisation
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<th>Abbreviation</th>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>PAP</td>
<td>Pan – African Parliament</td>
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<td>PSC</td>
<td>Peace and Security Council</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SEA</td>
<td>Single European Act</td>
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<td>TEU</td>
<td>Treaty on European Union (Maastricht Agreement)</td>
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<td>ToA</td>
<td>Treaty of Amsterdam</td>
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<td>UN</td>
<td>United Nation</td>
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<td>UNCHR</td>
<td>United Nations Commission on Human Rights</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNICEF</td>
<td>The United Nations Children’s Fund</td>
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<td>WHO</td>
<td>World Health Organization</td>
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1. Introduction

The African Union is the brainchild of Africa’s progressive leaders whose ideas, agendas and philosophies increasingly dominate discourse across the continent. Their aim is to create an institutional framework within which the goals of the African renaissance can be realized and Africa can end its marginalisation within an increasingly globalised world. The African Union (AU) reflects the bold impulse towards unity across Africa. As a result it has adopted a most ambitious unification model, similar to the European Union (EU).¹ The question is though, is this necessarily the best blueprint? Or will it need to be adapted to the requirements of Africa?

Why study the EU and the AU? One of the answers is globalisation. This process takes away from individual States the ability to control day-to-day activities within their territories. A country is no longer “an island unto itself”. It is a part of a larger unit – the world system. The traditional concept of the nation state as an independent entity has been erased in the past twenty years with globalisation and its effects on the domestic and international trading systems.² Requirements of national life have compelled municipal legal systems to recognize unincorporated associations as legal persons.³ International institutions have grown rapidly in recent years due to the increasing need for co-operation among nation states based on international norms.⁴ International organisations form and channel social interactions, taking over many functions that, previously, were monopolistically regulated by states.⁵

The design of the AU and the rapidity with which it is being set up, reflect the tremendous urge towards unity in Africa.⁶ ‘Unity is an article of faith in Africa, ingrained in popular mythology’.⁷ There is no other continent in which the popular desire towards common

³ Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 70
⁴ Ibid.
⁵ Ibid.
⁷ Ibid.
identification is so strong. For that reason, the architects of the AU have sought a blueprint inspired by the most successful model of regional unification that exists, namely the EU.

Europe itself has also changed. It is now more integrated, with a common currency and progress in the areas of foreign and security policy, as well as justice. The founding fathers of what is now the European Union-Jean Monnet, a French civil servant, and Robert Schuman, a French foreign minister of the 1950’s – were convinced that the origins of conflict in Europe lay in the continent’s system of competing nation states. As Schuman put it: “Because Europe was not united, we have had war.” Those founding fathers were determined to build a new Europe that would banish conflict for good. Their building blocks were economic, but their goals were political.

Economic and political integration between the member states of the European Union means that member-countries have to take joint decisions on certain matters. Since the inception of the EU, member states have developed common policies over a very wide range of fields – from agriculture to culture, from consumer affairs to competition, from environment and energy to transport and trade. From this angle, one can argue that strong consensus has been established in certain areas, however it is clear that the European Union is far from speaking with one voice. Consensus in areas such as foreign policy will remain elusive for some time yet due to the entrenched and competitive national interests of member states.

The Iraqi crisis illustrated the divergent of views amongst EU members and the polarisation that can arise around key issues of the day. While some countries like UK, Spain and Portugal supported the invasion of Iraq, other countries like Germany and France were vehemently opposed to it. The expansion of EU membership to an additional 10 countries and the increasingly prominent role the EU is playing across a range of policy area has provoked “Euro sceptics” in various countries to intensify their attacks on the EU. Their attacks are primarily based on the spurious premise that the bigger and more powerful the EU the more national cultures and basic rights will be eroded.

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8 Ibid.
11 http://europa.eu.int/abc/history/index_en.htm#top, accessed November 20, 2004
Turning to Africa, the past two decades have witnessed the revival of multi-party democracy in many countries across the continent, in particular South Africa and Nigeria. These nascent democracies and their leaders have been at the vanguard of moves to create a mechanism and framework for sustainable economic growth across the continent.

The New Partnership for Africa’s Development (NEPAD) has been initiated as a continent-wide program and was presented to the leaders of the G-8 countries on June 27, 2001. The NEPAD strategic framework document arises from a mandate given to the five initiating Heads of State (Algeria, Egypt, Nigeria, Senegal and South Africa) by the Organisation of the OAU to develop an integrated socio-economic development framework for Africa.

NEPAD has been categorised as a project for the realisation of the AU’s goals. More recently, the anachronistic 39-year-old Organisation of African Unity was transformed into the African Union, modelled on the EU - a body that will have its own parliament, central bank, and court. A record 43 of the continent’s leaders took part in an opening ceremony in Durban, South Africa on July 9, 2002. The AU subsequently held its first session on July 9 and July 10, 2002 in Durban.

While the formation of the AU and the adoption of NEPAD have ignited hope that Africa can gradually break from a past characterised by bad governance, exploitation, devastating poverty, disease and institutionalised corruption, the new initiatives are being greeted with scepticism within certain constituencies across the continent. Controversy surrounds the role of the G-8 countries - which are alternately accused of neglect and neo-colonialism-in Africa’s renaissance. Moreover, as drought, regional conflict and the scourge of HIV/AIDS continue to exact a toll on impoverished countries, the question of whether Africa’s leaders are up to the challenge of transformation remains open. While some have embraced democratic principles, others continue to rule through rapacity, despotism, and corruption. This division and the reluctance of progressive leaders to bring anti-democratic leaders, such

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13 Ibid.
15 Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 72
17 Ibid.
as Zimbabwe’s Robert Mugabe, into line fuels fears that there is insufficient political will to transform the encouraging rhetoric into tangible reality.

Given the disparities that exist between African countries both at the political and economic level and the AU’s “accommodating approach” to all African countries (no one is excluded from the AU regardless of the state of their domestic affairs) the question arises as to whether or not the EU is necessarily the best institutional blueprint to follow or whether the AU needs to adapt a specific institutional framework in accordance with the requirements and aspirations of Africa? What are the similarities and differences between the AU and the EU? Is there any comparison actually possible?

When the Organisation of African Unity was established approximately four decades ago there were fewer international and regional organisations, and their mandates were much more limited. In the intervening years, matters have changed considerably. Within Africa, a range of sub-regional organisations such as SADC, ECOWAS, EAC and IGAD has developed in response to specific challenges. In addition, international organisations, especially the UN, have taken on larger and more complex mandates. The AU is created in a world with multiple international and regional organisations, which have overlapping mandates and capacities. Therefore one of the major challenges the AU faces will be how to relate to these other organisations. What linkages should there be between the AU and other international and regional organisations?

‘Does a comparison between the EU and AU make sense today, when the EU has developed in ways that are different from any other regional regime and domestic polity?’ Some people say that the EU resembles no other entity and, in its concept and design, owes nothing to anything found anywhere else. This thesis will demonstrate that the EU is simply the foremost among a whole pack of international bodies that have the power to control what countries do. It is probably the most complex, densely institutionalised and authoritative

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19 Ibid.
20 Marks, Gary, ECSA Review, Does the European Union represent an n of 1?, available at: http://www.eustudies.org/N1debate.htm
supranational regime in the world.\textsuperscript{22} It is unique in many respects. But its uniqueness does not invalidate our efforts to understand it from a comparative perspective. To say that the EU is unique is simply shorthand for saying that we have not yet developed the categories, abstract enough, to see the EU as an instance of a more general phenomenon.

Therefore the central question is, "What categories are abstract enough to generate comparable cases, and not so general that they prevent useful comparisons?"\textsuperscript{23}

The conditions surrounding integration in the EU and the AU are manifestly different. ‘There were and are important differences with regard to levels of economic development, societal pluralism, autonomy of key interest groups, types of economies being integrated, and the role of economic and governmental elites.’\textsuperscript{24} However, differences simply provide important variations to be explained, and do not mean that comparison is impossible. Other distinctions are those in terms of functional relationships among variables across regions, differences not merely in facts, but in how those facts are organised into lawful relationships. Thus, in Western Europe the process of integration was led by key interest groups and statesmen, while in Africa technocrats were more important.\textsuperscript{25}

In Western Europe, the key integrating sectors were those with a high level of autonomy from government, while in certain less developed regions such as Africa integrating sectors were under strongly governmental or colonial control.\textsuperscript{26} However, these differences can also be treated as "data," i.e. observed variations that need to be explained. It makes sense to keep up pressure to develop even more general explanations. In order to generalise and conceptualise, one needs to analyse the EU meaningfully as part of a larger universe of cases.

‘First, and most obviously, the EU can be conceptualised as an international regime and, more specifically, as an example of a regional regime oriented to economic integration.’\textsuperscript{27} As a

\begin{itemize}
\item \textsuperscript{22} Marks, Gary, ECSA Review, \textit{Does the European Union represent an n of 1?}, available at: http://www.eustudies.org/N1debate.htm
\item \textsuperscript{23} Caporaso, James A., ECSA Review, \textit{Does the European Union represent an n of 1?}, available at: http://www.eustudies.org/N1debate.htm
\item \textsuperscript{24} Ibid.
\item \textsuperscript{25} Ibid.
\item \textsuperscript{26} Ibid.
\item \textsuperscript{27} Marks, Gary, ECSA Review, \textit{Does the European Union represent an n of 1?}, available at: http://www.eustudies.org/N1debate.htm
\end{itemize}
regional regime, the EU may be compared to the AU whose goal is to establish a free trade area and customs union.

Secondly, the EU can be conceptualised as a polity, i.e., a regime responsible for authoritative decisions concerning the allocation of values in a society.\textsuperscript{28} Comparison is entirely feasible even assuming that the EU is unique. What matters is whether these comparisons are precise and meaningful and whether they provide a useful basis for generalisation.\textsuperscript{29}

The purpose of this essay is to give a picture of how both the EU and the AU operate as part of the world system and to compare both unions. This thesis will argue that although one can better understand both institutions by comparing them with each other and identifying existing similarities in order to become a successful regime, the AU will have to go its own way by following other potential models such as the Southern Cone Common Market (MERCOSUR) and the Associations of South East Asian Nations (ASEAN) and not simply copying the EU.

2. Historical Overview of the Existence, Development and Goals of both Unions

Over half a century ago, it was the devastation caused in Europe by World War II which underlay the imperative to build international relationships to guard against any such catastrophe recurring.\textsuperscript{30} The European Community enterprise began with six Member States on 18 April 1951.\textsuperscript{31}

The African Union was founded in Addis Ababa on May 25, 1963, as the Organisation of African Unity.\textsuperscript{32} It retained that name until 2002 when it formally became the African Union.\textsuperscript{33} The African Union has 53 members.\textsuperscript{34}

\textsuperscript{28} \textit{Ibid.}
\textsuperscript{29} \textit{Ibid.}
\textsuperscript{30} see Annex I: Data of the African Union and the European Union compared
\textsuperscript{32} http://encarta.msn.com/encyclopedia_761566763/African_Union.html#endads, accessed December 21, 2004
\textsuperscript{33} \textit{Ibid.}
\textsuperscript{34} \textit{Ibid.}
2.1 European Union

French statesmen Jean Monnet and Robert Schuman are regarded as the architects of the principle that the best way to start the European bonding process was by developing economic ties. This philosophy was the foundation for the Treaty of Paris which was signed in 1951. It established the European Coal and Steel Community (ECSC) which was joined by France, Germany, Italy, the Netherlands, Belgium and Luxembourg. The ECSC was so successful that within a few years the decision was made to integrate other parts of the countries’ economies. Under the Treaty of Rome which came into force in 1958, these six countries founded the European Economic Community (EEC) and European Atomic Energy Community to work alongside the ECSC. In 1967 the three communities formally merged to become collectively known as the European Community (EC) whose main focus was on co-operation in economic and agricultural affairs.

In 1973, the first enlargement of the EC took place with the addition of Denmark, Ireland and the UK. Greece then joined in 1981, Portugal and Spain in 1986. Also in 1986 an important landmark was the signing by the 12 member States of the Single European Act (SEA). The principle purpose of the SEA was to eliminate the remaining barriers to the single internal market before the deadline of 31 December 1992. It also provided a formal framework for political co-operation by member States that was absent from the original treaty. Furthermore, the SEA extended the sphere of community competence and introduced a number of procedural changes designed to accelerate the community decision-making progress.

In 1992 the Treaty on European Union (TEU) was signed at Maastricht and formally established the European Union as the successor to the EC. It entered into force on November 1, 1993 and committed the members to new community goals such as economic and monetary union, and increased governmental co-operation in the fields of foreign and

36 Ibid.
37 Steiner, Josephine and Woods, Lorna, Textbook on EC Law, (2003), Oxford University Press, p. 3
38 Ibid., p. 4
39 Ibid., p. 5
40 Ibid., p. 13
41 Ibid., p. 4
42 Ibid., preface xi
security policy and justice and home affairs.\textsuperscript{43} In 1995, Austria, Finland and Sweden acceded to the Communities, raising the membership total to 15.\textsuperscript{44} As a next step, the Treaty of Amsterdam (ToA) was signed in October 1997 and came into force on 1 May, 1999 with the aim of shifting from the mainly economic conception of the EC to a more political idea, founded on fundamental rights and principles.\textsuperscript{45} In that context, one of the most obvious and important changes was the wholesale renumbering of the Articles of the Treaty of Rome and the Treaty of European Union. In 2000 the Treaty of Nice was signed.\textsuperscript{46} It set forth rules streamlining the size and procedures of EU institutions.\textsuperscript{47} The single currency - the Euro - became a reality on 1 January 2002, when euro notes and coins replaced national currencies in twelve countries (Belgium, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland).\textsuperscript{48}

On April 16, 2003 the Treaty of Athens was signed providing that ten new countries would become members of the EU, and thereby parties to the Treaties on which the Union is founded.\textsuperscript{49} In 2004 the European Union welcomed the ten new countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. This might be counted as the largest of the successive enlargements: from the original six members states in 1952, to nine in 1973, to ten in 1981, to 12 in 1986, to 15 in 1995 and finally now to 25 in May 2004.\textsuperscript{50} Bulgaria, Croatia and Romania expect to follow in a few years’ time and Turkey also aspires to membership of the EU. The Turkish desire for membership divides the EU and provokes a great deal of controversy. It has been challenged by a number of politicians who claim that Turkey does not share a common European cultural heritage and that it is also geographically closer to Asia than to Europe.\textsuperscript{51} Nevertheless, Turkey was recognised as an “official” candidate and thus made formally eligible.\textsuperscript{52}

\begin{flushright}
\begin{footnotes}
\item\textsuperscript{43} Ibid.
\item\textsuperscript{44} Hartley, Trevor C., \textit{European Union Law in a Global Context}, (2004), Cambridge, University Press, p. 10
\item\textsuperscript{45} Steiner, Josephine and Woods, Lorna, \textit{Textbook on EC Law}, (2003), Oxford University Press, p. 9
\item\textsuperscript{46} Hartley, Trevor C., \textit{European Union Law in a Global Context}, (2004), Cambridge, University Press, p. 10
\item\textsuperscript{47} Steiner, Josephine and Woods, Lorna, \textit{Textbook on EC Law}, (2003), Oxford University Press, p. 11
\item\textsuperscript{48} http://europa.eu.int/abc/history/index_en.htm#top, accessed December 15, 2004
\item\textsuperscript{49} Hillion, Christophe, \textit{The European Union is dead. Long live the European Union...a Commentary on the Treaty of Accession}, European Law Review, October 2004, Volume 29, p. 584
\item\textsuperscript{51} see Newsweek, May 3, 2004, p.25 in “Ready for Europe, or No?”: Jacques Chirac’s party came out against Turkish membership on the ground that it would “dilute” Europe and Germany’s opposition Christian Democrats propose a “third way” for Turkey in the form of a “special relationship”, short of full membership.
\end{footnotes}
\end{flushright}
This recent enlargement can also be regarded as a reunion after a long historical interlude, since the incoming member states not only include two Mediterranean island states, Cyprus and Malta, historically linked with Europe, but also eight Central and Eastern European states most of which were, until recently, directly or indirectly within the orbit of the Soviet Union and therefore cut off from Western Europe. Furthermore, the new EU Constitution, which so far has not been ratified by all member states, will bring together for the first time the many treaties and agreements on which the EU is based.

2.2 African Union

The AU is an initiative that replaced the Organisation of African Unity (OAU). The OAU was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments. A further 21 states have joined gradually over the years, with South Africa becoming the 53rd member in 1994. The principal task of the OAU was to advance the development of African states in a variety of fields such as dispute resolution which sought to be done by promoting co-operation and urging collaboration among its members. It was by acclamation that the Assembly of Heads of State and Government in July 1999 in Algiers accepted an invitation from Colonel Muhammar Ghadafi to the 4th Extraordinary Summit in September in Sirte. The purpose of the Extraordinary Summit was to amend the OAU Charter in order to increase its efficiency and effectiveness. The theme of the Sirte Summit was 'Strengthening OAU capacity to enable it to meet the challenges of the new millennium'. This Summit concluded on 9 September 1999 with the Sirte Declaration.

Following the adoption of the Constitutive Act of the African Union, in terms of the Sirte Declaration of 9 September 1999, a decision declaring the establishment of the African Union, was adopted by the 5th Extraordinary OAU Summit held in Sirte, Libya from 1 to 2 March 2001. The Sirte Declaration was followed by summits in Lome in 2000, when the Constitutive Act of the African Union was adopted, and in Lusaka in 2001, when the plan for

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54 see Annex II: Historical steps within the framework of the OAU which paved the way for the establishment of the AU
56 Ibid., p. 37
58 see Annex III: Goals declared at the Sirte Declaration in September 9, 1999
the implementation of the African Union was adopted. The AU Act, which established the African Union, was ratified and entered into force on May 26, 2001.

The AU is based on the common vision of a united Africa and on the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion amongst the peoples of Africa. As a continental organisation it focuses on the promotion of peace, security and stability on the continent as a prerequisite for the implementation of the development and integration agenda of the AU.

3. Legal Structure of the European Union

The European Union consists of three ‘Pillars’. In the middle - the central pillar - are the two Communities; Euratom and the EC (formerly three including ESCS which since 2002 was merged with the EC), known collectively as the European Community. The other two pillars are the Common Foreign and Security Policy (CFSP) and the operation in Justice and Home Affairs (JHA). The EC is governed by community law whereas the CFSP Pillar and the JHA Pillar are governed by intergovernmental co-operation, which means that they are outside Community jurisdiction, particularly that of the Court of Justice.

In this chapter we shall first consider the power and relationship between institutions in order to understand the way they work together. As ‘[t]he European Union is unique among international organisations in the breadth and depth of its legislative powers’, these powers shall form the subject of the second part of this chapter. Part three will shortly examine the legal personality of the Community both at the level of national law and public international law. Part four will take a closer look at the Constitution in terms of its origin, development and function. Since the Community has a wide range of policies, the last part will examine the common market and focus on the four freedoms and the competition policy of the EU.

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60 Ibid.
61 see Annex IV: Objectives of the AU according to Article 3 of the Constitutive Act
62 Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 71
63 http://www.africa-union.org, accessed November 15, 2004
64 Hanlon, James, European Community Law, (2000), London, Sweet & Maxwell, p. 9
65 Ibid.
3.1 The Organs of the European Union

One of the defining features of the Community is the scope and level of power given to its institutions.67 In the following chapter the functions of the key organs and the relationship between them is outlined.

Under the terms of the Constitution, the institutional framework is comprised of the European Parliament, the European Council, the Council of Ministers, the European Commission and the Court of Justice.68

The European Parliament represents the EU's citizens and is directly elected by them.69 The Council of the European Union represents the individual member states, whereas the European Commission seeks to uphold the interests of the Union as a whole.70 This "institutional triangle" produces the policies and laws (directives, regulations and decisions) that apply throughout the EU. In principle, it is the Commission that proposes new EU laws but it is the Parliament and Council that adopt them.

Two other institutions have a vital part to play: the Court of Justice upholds the rule of European law, and the Court of Auditors checks the financing of the Union's activities.71 These institutions were set up under the Treaties, which are the foundation of everything the EU does. The Treaties are agreed upon by the member states' presidents and prime ministers and ratified by their parliaments. They lay down the rules and procedures that the EU institutions must follow. Another key institution, the European Central Bank (ECB), plays a major role in the Union’s economic and monetary policy.72 Alongside these institutions stand two advisory bodies, the Committee of the Regions and the European Economic and Social Committee.73

69 Ibid.
70 Ibid., p. 15-16
71 Ibid., p. 19
72 Ibid.
73 Ibid.
The Commission

The Commission proposes legislation to the Council and the Parliament. It initiates new policies and the legislation needed to put them into effect. Furthermore, the Commission administers the legislation once it is adopted. According to Article 211 of the EC Treaty the Commission has to ensure ‘[…] that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied, formulates recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary, has its own power of decision and participate[s] in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty, exercise[s] the power conferred on it by the Council for the implementation of the rules laid down by the latter.’

According to Article 213 EC, the Commission shall consist of 20 members, at least one but not more than two from each member state. The Commission consisted of 30 members until October 31, 2004 with France, Germany, Italy, Spain and the United Kingdom having two commissioners each. From November 1, 2004, the Commission consists of one commissioner per member state, for a term of office that should expire on October 31, 2009.

The Commission is divided into directorates–general, each one responsible for certain aspects of Community policy. The internal working of the Commission is laid down in Articles 217 to 219 EC Treaty. The Commission takes decisions by a simple majority, provided there is a quorum. The Commissioners are appointed on a five-yearly basis by the Council with the agreement of the member states. According to Article 213 EC, they are not agents of their home states and are not supposed to consult with their national governments to ask what policies they should support, nor are the members states supposed to give them instructions. In reality, however, this principle is not always observed and secret consultations do happen. The Council has no power to dismiss Commissioners during their term of office.

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75 Ibid., p. 20
78 Ibid., p. 590
81 Ibid., p. 20
82 Ibid., 21
only the European Parliament can do that (this power can, however, be used only against the Commission as a whole). The appointments must be confirmed by the Parliament.

In summary, - the functions of the Commission are threefold. First, it acts as an initiator of Community action. All important decisions made by the Council are to be made on the basis of proposals from the Commission. Secondly, the Commission acts as the guardian of the treaties. According to Article 10 EC, member states are obliged to ‘[t]ake all appropriate measures […] to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community […]’. It is the Commission’s duty to seek out and bring to an end any infringements of EC law by member states, if necessary by proceedings under Article 226 EC before the ECJ. Thirdly, the Commission functions as the executive of the Community in the sense that it implements the policy decisions which have been taken by the Council.

The Council

The Council of the European Union, also known as Council of Ministers, is the main EU decision-making body. It is the Union institution in which the governments of the member states are represented. Each member state is represented by its own ministers. The Council is not a fixed body. The presidency rotates between the member states on a six-monthly basis. Pursuant to Article 4 [D] of the Treaty on European Union ‘[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.’ According to Article 202 EC the Council’s task is ‘[t]o ensure that the objectives set out in the EC Treaty are attained […]’. It shall ‘ensure coordination of the general economic policies of the Member States; have power to take decisions [and] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down.’

83 Ibid., p. 20
85 Ibid., p. 31
86 Ibid.
87 Ibid.
88 Ibid., p. 25
89 Hartley, Trevor C., European Union Law in a Global Context, (2004), Cambridge, University Press, p. 28
90 Ibid., p. 30
92 Ibid.
93 Ibid.
The European Parliament

The European Parliament (EP) is the institution in which the people of the member states are represented. Before the accession in 2004 it consisted of 626 members (“MEPs”), with Germany having 99, France, the United Kingdom and Italy each having 87 representatives, Spain 64, the Netherlands 31, Belgium, Greece and Portugal each 25, Sweden 21, Austria 20, Denmark and Finland each 16, Ireland 15 and Luxembourg 6. Since the start of the new 2004 – 2009 term, the parliament consists of 732 members. The division of MEPs among the member states has always been criticised. Germany, for instance, has the fewest representatives per capita whilst Luxembourg has a disproportionately high number of representatives given its size. The Treaty of Nice re-balanced the numbers in the European Parliament to account for the enlargement of the Community and established that the maximum number of MEPs will be 732. For example, since the start of the new term of the European Parliament in June 2004, the new allocation of seats grants the Czech Republic and Hungary the same number of seats as old member states with the similar population, thereby correcting the imbalanced distribution.

While members meet in plenary sessions once a week per month in Strasbourg, the majority of Parliament’s Committee meetings are held in Brussels. Members come from 75 political parties and sit in 11 broad multi-national political groupings. They are elected for five years within national systems along national party lines. But once elected, they group together in “European” parties. This means, for instance that the British Labour Party sits with their European colleagues in the Socialist grouping.

In most areas, Parliament has a role of co-legislator, stands as the budgetary authority alongside the Council, and also exercises some political control over the Commission. Concerning legislative power, the Parliament can give advisory opinions as well as final assent in respect of admission of new members and the conclusion of association agreements.

98 Ibid.
99 Ibid.
100 Ibid.
with non–member countries.\textsuperscript{102} The requirement for consultation and co-operation by Parliament was strengthened by the introduction of Article 251 EC. Pursuant to Article 251 EC the Treaty of the European Union introduced a right of co-decisions with the Council in certain defined areas such as culture, health, environment and consumer protection, whereby Parliament takes joint decisions with the Council. Moreover, the new Constitution also strengthened the European Parliament’s powers as co-legislator by extending to new areas the scope of the so-called co-decision procedure.

In terms of investigatory and informative powers, under Article 192 EC the Parliament may request policy initiatives. Under Article 193 EC the Parliament sets up committees and under Article 197 EC the Parliament hears petitions.\textsuperscript{103} In its supervisory role, the Parliament exercises direct political control over the Commission. According to Article 201 EC, the Parliament can force the resignation of the Commission by passing a motion of censure.\textsuperscript{104} In January 1999, there was a motion of censure against the Commission headed by Jaques Santer, who had been subject to widespread criticism for failing to take effective action against fraud and corruption by Commission officials.\textsuperscript{105} Under Article 214 (2) EC the Parliament must be consulted on the nomination of the President and the appointment of Commissioners and the Commission as a whole has to be approved by Parliament.\textsuperscript{106} In September 2004, the incoming European Commission President Jose Manuel Barroso was forced to withdraw his original line-up after MEPs threatened to veto the entire proposed commission if Mr Rocco Buttiglione stayed on as candidate for commissioner for Justice, Freedom and Security.\textsuperscript{107}

**The Court of Justice**

The Court of Justice of the European Union comprises the European Court of Justice (ECJ) and the Court of First Instance (CFI).\textsuperscript{108} The ECJ and the CFI are composed of one judge from each member state and according to Article 233 EC will be chosen by common accord of the governments of the member states.\textsuperscript{109} The judges from both courts are appointed for a


\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid.


\textsuperscript{107} http://news.bbc.co.uk/2/hi/europe/3982409.stm, accessed December, 10, 2004


\textsuperscript{109} Ibid.
six year term. The judges of the ECJ are assisted by 8 advocates General, whose functions are to present a detailed analysis of all the relevant issues of fact and law together with their recommendations to the Court.\textsuperscript{110}

The jurisdiction of the CFI includes disputes between the Community and its servants, and applications for judicial review and damages by “natural and legal persons”.\textsuperscript{111} The ECJ has jurisdiction in disputes between member states, between the Union and its member states, between institutions and between private individuals and the Union.\textsuperscript{112} It is responsible for enforcing Community law and in this capacity may be required to decide matters of constitutional law, administrative law, social law and economic law in matters brought directly before it or on application from national courts.\textsuperscript{113} This power to issue preliminary rulings is essential to ensure a uniform interpretation of Community law throughout the Union.

Although the ECJ judgements are binding, they are not precedents in the English sense; the ECJ always remains free to depart from previous decisions in light of new facts.\textsuperscript{114} “The constitutionality of the Union has been developed to a large extent by the case law of the Court of Justice, creating an autonomous legal order the supreme norms of which are the Treaties.”\textsuperscript{115}

\textbf{The European Central Bank}

The task of the European Central Bank (ECB) is to conduct European monetary policy as defined by the European System of Central Banks (ESCB).\textsuperscript{116} Since the establishment of monetary union and the creation of a single currency in 1999, its primary aim is to maintain price stability. Its decision-making bodies are the Governing Council and the Executive Board, which manage monetary growth, carry out exchange operations, hold and manage the

\begin{thebibliography}{99}
\item  \textsuperscript{110}Ibid.
\item  \textsuperscript{111}Steiner, Josephine and Woods, Lorna, \textit{Textbook on EC Law}, (2003), Oxford, University Press, p. 36
\item  \textsuperscript{112}Ibid., p. 35
\item  \textsuperscript{113}Ibid., p. 34
\item  \textsuperscript{114}Ibid., p. 35
\item  \textsuperscript{115}Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 297
\item  \textsuperscript{116}http://europa.eu.int/futurum, \textit{A Constitution for Europe – Presentation To Citizens}, p. 19, accessed December 5, 2004
\end{thebibliography}
official exchange reserves of the member states and ensure the running of payments systems.\textsuperscript{117}

**The Committee of the Regions**

The Committee of the Regions comprises representatives of local and regional authorities. The number of members of the Committee of the Regions is established at a maximum of 350.\textsuperscript{118} It was established by the Treaty of the European Union to represent regional interests.\textsuperscript{119} Its task is to act in an advisory capacity in specified circumstances, as provided by the EC Treaty (e.g., Article 149 (4) education, Article 151 (5) culture, Article 161 and Article 162 regional development).\textsuperscript{120} However, the powers of this Committee are weak, since it just has a consulting function.\textsuperscript{121}

**The Economic and Social Committee**

The European Economic and Social Committee (EESC) consists of representatives of the economic and social sectors and of civil society, which are appointed by the Council for a period of 5 years.\textsuperscript{122} It represents sectional interests such as farmers, workers, trade unionists, or merely members of the general public.\textsuperscript{123} The EESC gives advisory opinion to the institutions, particularly in the context of the legislative procedure. It is entitled to advise the Community institutions, on its own initiative, on all questions affecting Community law.\textsuperscript{124}

### 3.2 Legal Status of the European Union

A subject of international law is any member of the international community who is bound by international law, meaning that it is capable, potentially, to possess international rights and duties and initiate an international claim.\textsuperscript{125} ‘If the EC has long been recognized as a subject

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\end{enumerate}
\end{footnotesize}
of international law, an ambiguity remains as to the European Union legal capacity.\textsuperscript{126} Article 24 of the Treaty on the European Union gives the Council the power to conclude external agreements with states and international organisations.\textsuperscript{127} But it is unclear whether the Council concludes international agreements on behalf of the member states - which would correspond to the current intergovernmental nature of the EU - or on behalf of the Union.\textsuperscript{128}

The Union is legally composed of two Communities endowed with a distinct legal personality - the European Community ("EC") and the European Atomic Energy Community ("Euratom"), as well as of policies and forms of co-operation based on the Treaty on European Union.\textsuperscript{129} Despite these legal personalities, the Treaty on European Union (TEU) establishing the EU did not explicitly confer international legal personality upon the EU itself.\textsuperscript{130} There are no treaty provisions ensuring that the Union will accept responsibility for any obligations to be incurred.\textsuperscript{131} Because of this lack of clarity, the Nice Treaty added a paragraph to Art 24 of the Treaty on the European Union to specify that agreements concluded by the Council are binding vis-à-vis the institutions of the Union, thus granting the Union a \textit{de facto} functional capacity to conclude agreements with third states.\textsuperscript{132}

Nevertheless, the Convention Working Group on Legal Personality considered that the current situation still leads to confusion in relations with states that are not members of the Union and among Europeans themselves.\textsuperscript{133} Hence, Article 6 of the draft Constitution states that "the Union shall have legal personality".\textsuperscript{134} The consequences of such a development range from the liability to act on behalf of the member states and sign treaties in all Union fields of activities, to legal standing before courts, memberships of international organisations or participation in international conventions.\textsuperscript{135} However, the Constitution is still a draft and

\begin{itemize}
\item \textsuperscript{126} Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 308
\item \textsuperscript{128} Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 308
\item \textsuperscript{129} \textit{Ibid.}, p. 300
\item \textsuperscript{131} \textit{Ibid.}
\item \textsuperscript{132} Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 308
\item \textsuperscript{133} \textit{Ibid.}
\item \textsuperscript{134} \textit{Ibid.}
\item \textsuperscript{135} \textit{Ibid.}
\end{itemize}
the 25 national governments of the European Union have given themselves two years to ratify the Constitution, after it’s signing in October 2004.\textsuperscript{136}

### 3.3 The EU Constitution

Spurred by the enlargement of the European Union, Europe's leaders decided to overhaul its institutions. To that end they launched, in 2002, a “constitutional convention” chaired by Valéry Giscard d'Estaing, with delegates from all members and members-to-be.\textsuperscript{137} There were 4 component questions to resolve: simplifying the treaties; re-organisation; the future status of the Fundamental Rights of the EU; and the contents of a constitution for the Union.\textsuperscript{138} In June 2003 after 16 months of deliberation the Convention released a draft of the constitution.\textsuperscript{139} But the tension inherent between making the EU work better and maintaining national sovereignties proved to be too much for the text, which foundered over the distribution of voting power between members. Talks revived in March 2004, and by June 18th of last year the EU leaders had finally agreed on a version.\textsuperscript{140} The basic terms of the EU constitution are now plain to see, though by no means simple.

The document was brought back to life by means of compromises struck between popular majorities and the smaller states. It organises every EU treaty into a single document and commits the EU to common policies of defence, asylum and immigration, and to stewardship under a single president.\textsuperscript{141} However, Jack Straw, the British foreign minister, argues that new provisions which welcome the national parliaments to enforce subsidiarity thereby strengthen the principle substantially.\textsuperscript{142}


\textsuperscript{137} \url{http://europa.eu.int/futurum}, A Constitution for Europe – Presentation To Citizens, p. 4, accessed December 5, 2004


\textsuperscript{140} \textit{Ibid.}

\textsuperscript{141} \url{http://europa.eu.int/futurum}, A Constitution for Europe – Presentation To Citizens, p. 8, accessed December 5, 2004

\textsuperscript{142} \url{http://news.bbc.co.uk/2/hi/europe/3982409.stm}, accessed December 1, 2004
The Treaty was adopted by the 25 Heads of State and Government in Brussels on 17 and 18 June 2004. National governments and voters will have the last word. The document must be ratified by 25 countries, some of which, including the United Kingdom will hold popular referenda. Legally, the Constitution cannot come into force unless all 25 countries ratify it.

The Constitution puts forward a single text to replace all the existing Treaties in the interests of readability and clarity. It is divided into four parts, explaining respectively the constitutional architecture of the European Union, the Union’s Charter of Fundamental Rights, the policies and operation of the Union and lastly, general and final provisions, including the procedures for adopting and revising the Constitution. One of the key purposes of the Constitution is to clarify the Union’s powers or competences and the respective roles of its institutions. The Community and the Union will merge and the Maastricht “pillars” structure will be abolished. The common foreign and security policy (second pillar) is included in Title V of Part III of the Constitution, entitled the “Unions’ External Action” whereas Police and judicial co–operation in criminal matters (third pillar) is grouped with the current EC competencies on visa, asylum, immigration and other policies related to free movement of persons, in Chapter IV of Title III of Part III of the Constitution, entitled the “area of freedom, security and justice.

These developments notwithstanding, the Constitution's passage through so many hurdles is far from guaranteed and the referenda to be held in several countries will not necessarily bring positive results.

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145 Ibid., p. 26
147 The full text of the Constitution is available on the website: [http://europa.eu.int/futurum](http://europa.eu.int/futurum), accessed, November 28, 2004
149 Lenaerts, Koen and Gerard, Damien, *The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed*, European Law Review, June 2004, Volume 29, p. 300
150 Ibid.
3.4 Legislative powers

The purpose of this chapter is to outline the different types of Community acts and to consider legislative procedures. It will also examine two crucial general principles of the EU, subsidiarity and supremacy.

3.4.1 Types of Community Acts

The legislative powers of the Community institutions are laid down in Article 249 EC, which states that ‘[i]n order to carry out their task and in accordance with the provision of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.’ Article 249 EC distinguishes binding and non-binding Acts. Yet, it does not distinguish between legislation and administrative acts, which most member states’ legal systems do.

Regulations

In terms of Article 249 EC, ‘[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states.’ Regulations apply to everybody and lay down general rules. They are normative acts, designed to apply to situations in the abstract. They are directly applicable, which means that they are automatically part of the law of the land in every Member State and do not require any further implementation to take effect. Furthermore the rights bestowed by a regulation cannot be subjected, at the national level, to implementing provisions diverging from those laid down by the regulation itself. The advantage of this is that there is a uniform rule throughout the Community.

153 Ibid.
Directives

Article 249 EC states that ‘[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed’, but shall leave to the national authorities the choice of form and method. They are intended to be weaker instruments than regulations. They are binding on the member states as to the result to be achieved, but allow each state discretion as to form and method of implementation. The advantage of directives compared to regulations is that they allow the rule to be adapted to suit local conditions and to fit into the legal system of the member state in question.

Decisions

Pursuant to Article 249 EC ‘[a] decision shall be binding in its entirety upon those to whom it is addressed.’ It is an individual act designed to be addressed to states, companies or individuals.

Recommendations and opinions

According to Article 249 EC, ‘[r]ecommendations and opinions shall have no binding force.’ However, they are clearly of persuasive authority. They clarify the interpretation of national provisions adopted in order to implement them or of binding EEC measures which they are designed to supplement.

The line between regulations, directives, decisions, recommendations and opinions is not as clear cut as Article 249 EC would suggest. In Confédération National des Producteurs des Fruits et Légumes v Council it was held that the true nature of an act is determined not by its form but by its content and object. Moreover, measures have been found to be hybrid to contain some parts in the nature of a regulation, and other parts in the nature of decisions.

To find out the true nature of an act, the essential distinction seems to be between a

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167 Ibid., p. 103
regulation, which is normative, applicable to categories of persons envisaged both in the abstract and as a whole, and a decision, which concerns designated persons individually.\textsuperscript{170}

3.4.2 Legislative procedures

The Commission, the Council and the European Parliament are empowered to legislate.\textsuperscript{171} Articles 253 EC and 254 EC lay down the formalities to be followed when the Community adopts legislative measures.\textsuperscript{172}

Consultation procedure

The basic legislative procedure is that the Commission makes a proposal, the Parliament gives its opinion, and the Council adopts the measure.\textsuperscript{173} The Parliament’s view must be considered not binding on the Council.\textsuperscript{174} Under this procedure, the Parliaments’ role is purely advisory. This form of legislative procedure is still used in some areas, such as agriculture, economic and social cohesion and economic and monetary policy.\textsuperscript{175}

Co-operation procedure

This was introduced in 1986 by the SEA in order to give the Parliament a more important role.\textsuperscript{176} According to Article 252 EC the co-operation procedure requires that Parliament be given the opportunity to propose amendments to the draft legislation.\textsuperscript{177} Where applicable the Council voted according to the qualified-majority procedure, except where Parliament rejected the measure. Here the Council could adopt it only if it acted by unanimity.\textsuperscript{178} The co-operation procedure has been largely superseded by the co-decision procedure and is now limited to certain aspects of monetary policy only.\textsuperscript{179}

\textsuperscript{170} Ibid.
\textsuperscript{171} Ibid., p. 44
\textsuperscript{172} http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf, accessed November 2, 2004
\textsuperscript{175} Ibid.
\textsuperscript{176} Hartley, Trevor C., \textit{European Union Law in a Global Context}, (2004), Cambridge, University Press, p. 50
\textsuperscript{177} http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf, accessed November 2, 2004
\textsuperscript{178} Hartley, Trevor C., \textit{European Union Law in a Global Context}, (2004), Cambridge, University Press, p. 50
\textsuperscript{179} Ibid., p. 51
Co–decision procedure

This procedure was introduced by the TEU and amended by the ToA. It is laid down in Article 251 EC and provides for legislation to be adopted jointly by the Council and the Parliament. The Commission presents a proposal that goes to the Council and the Parliament. If the Parliament does not suggest any amendments and approves the proposal, the act is adopted. If the Parliament adopts amendments in the first reading and the Council approves all the amendments contained in the Parliaments’ opinion, the act is adopted in the amended form. If the Parliament adopts amendments, which are not in generally accepted by the Council, the Council then adopts what is called a “common position”, which is a statement of its preferred form of the measure. According to Article 251 (2) b EC, the Parliament can reject it by a majority of its members. Pursuant to Article 251 (2) c EC, if the Parliament wants a different version from the common position proposed by the Council, it can amend it by a majority of its members in a second reading. In terms of Article 251 (3) EC, if these amendments are not accepted by the Council a “conciliation committee” consisting of an equal number of representatives of Council and Parliament is set up, which has to find a solution acceptable to both institutions. Nevertheless, this solution has to be adopted by the Parliament and the Council, otherwise the measure fails. Although this procedure now seems to have given the Parliament real power within the legislative procedure, it is not without its critics.

The co-decision procedure is long and complex, and a particular concern is that the conciliation committee is not open to the public. This leads to questions as to how transparent and democratic the process actually is.

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183 Ibid.
184 Ibid.
185 Ibid.
187 Ibid.
190 Ibid.
3.5 **Principle of Subsidiarity**

The powers of the EU institutions are of course limited. There is first of all the principle of *ultra-vires*, which means that the EU can only operate within the powers granted to it by the member states.\(^{191}\) There is also the principle of subsidiarity, which is introduced into the EC Treaty by Article 5 of TEU. Article 5 requires the Community to act: ‘[o]nly if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community.’\(^ {192}\) This principle is also made clear in Article 7 EC which states that ‘[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty.’\(^ {193}\) The principle of subsidiarity is concerned with fostering social responsibility and can also be found in Article 1 (ex A) TEU, which provides that decisions of the European Union ‘[b]e taken as closely as possible to the people’.\(^ {194}\) It has not been incorporated into the EC Treaty but can be seen as a general principle of law if not as a basis to challenge EC Law at least as an aid to the interpretation of Article 5 EC.\(^ {195}\) This principle is designed to ensure that whenever the Union exercises its powers it acts only to the extent that such action is actually required and brings added value to action taken by member states.\(^ {196}\)

3.6 **Principle of Supremacy**

With its doctrine of supremacy of Community law over national law, Community law has fundamentally reconceived the relationship between national law and “inter”-national law, at least for the member states of the European Community.\(^ {197}\) Community law is incorporated into national law and available for application in the national sphere. In case of a conflict between obligations derived from Community law and those derived from national law, those

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\(^{192}\) Ibid., p. 177


\(^{195}\) Ibid.

\(^{196}\) [http://europa.eu.int/futurum](http://europa.eu.int/futurum), A Constitution for Europe – Presentation To Citizens, p. 12, accessed December 5, 2004

derived from Community law will prevail.\textsuperscript{198} The European level of governance is rooted in a system of divided sovereignty.\textsuperscript{199}

The European Union acknowledges its co-existence with sovereign states.\textsuperscript{200} It is not a federation like the United States of America where the federal level comprises ‘[…] one Nation […] indivisible and where states were - progressively - denied sovereignty.’\textsuperscript{201} Nor is it simply an organisation for co-operation between governments, like the United Nations where Security Council Resolutions can only create obligations for UN Members but not directly for private persons.\textsuperscript{202} It is, in fact, unique. The countries that make up the EU (its "member states") pool their sovereignty in order to gain strength and global influence none of them could have on their own. Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level. Thus, the European Court of Justice, in its seminal judgement in 1963 in the Case \textit{Van Gend en Loos} stated that

\begin{quote}
‘[T]he objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.’\textsuperscript{203}
\end{quote}

\begin{flushright}
\textsuperscript{198} \textit{Ibid.}, p. 177
\textsuperscript{199} Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 313
\textsuperscript{200} see Article 5 of the draft Constitution, The full text of the Constitution is available on the website: \url{http://europa.eu.int/futurum}, accessed, November 28, 2004
\textsuperscript{201} Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 314
\end{flushright}
In 1964, in another important case, *Costa v. Enel*, the European Court developed this analysis further and stated that

‘[B]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having […] real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights […] and thus created a body of law which binds both their nationals and themselves.’

3.7 The Common Market

The creation of the common market is one of the central purposes of the European Community. It is more than a customs union. In addition to free movement of goods, it assures free movement of labour, free movement of capital and payments, free movement of services and the right of enterprises to establish themselves in another member state. The specific activities to fulfil this task can be found in Article 3 EC. Yet, the enlargement through the 2004 Act of Accession, which is an integral part of the Treaty of Accession (Treaty of Athens), includes an internal market safeguard clause. This which gives the Commission the right to take appropriate measures if a new member state fails to implement commitments undertaken in the context of accession negotiations, causing a serious breach of the functioning of the internal market, or an upcoming risk of such breach.

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3.7.1 The four freedoms

In terms of Article 14 (2) EC ‘[t]he internal market shall comprise an area without internal frontiers in which the free movements of goods, persons, services and capital is ensured in accordance with the provision of this Treaty.’\textsuperscript{208} These are referred to together as the “four freedoms”.

Free movements of goods

The EC is a customs union where goods can move freely without any barrier.\textsuperscript{209} Contrary to a free trade area, free trade rules apply not only to goods produced within the custom union, but apply also to goods imported from the outside of the union.\textsuperscript{210} All member states agree to a common external tariff which means that imports from the outside must receive the same treatment irrespective of the state through which they enter the union.\textsuperscript{211} The principle of freedom of movement of goods has been described as the “corner stone” of the Community.\textsuperscript{212} For most member states, the entry to a single Community - wide market was and remains one of the most important reasons to become a membership.\textsuperscript{213}

The relevant provisions in the EC Treaty are Article 23, 28, 29 and 31 EC.\textsuperscript{214} According to Article 32 (2) EC the rules laid down for the establishment of the common market apply not only to industrial products but also to agricultural products, unless otherwise provided in Articles 33 to 38 EC.\textsuperscript{215} In terms of Article 28 EC ‘[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’\textsuperscript{216} Some very important cases have been decided by the ECJ about this Article, since the wording “quantitative restrictions” leaves considerable scope for judicial interpretation. In this regard, two cases should be mentioned.

In the case “Procureur du Roi v. Dassonville” the ECJ held that “[a]ll trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or

\textsuperscript{208} http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf, accessed November 2, 2004
\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid.
\textsuperscript{211} Ibid.
\textsuperscript{212} Ibid.
\textsuperscript{213} Ibid.
\textsuperscript{215} Ibid.
\textsuperscript{216} Ibid.
potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.\textsuperscript{217} This wide interpretation of what constitutes a quantitative restriction was affirmed in the \textit{``Cassis de Dijon''} case. Here, the European Court stated ‘that disparities between national laws may themselves be treated as measures having equivalent effect to quantitative restrictions potentially caught by Article 28 EC.’\textsuperscript{218} Furthermore, ‘[a] State is able to apply a technical regulation to exclude from its market a product made or marketed in another State where traditions or tastes are different only provided it is able to show a sufficiently strong reason for its local rule which operates in the public interest and is of a sufficient weight to override the impetus towards market integration.’\textsuperscript{219} This principle known as ‘mutual recognition’ provides a basis to deregulate the Community-wide market by opening up national markets to goods originating in other states with divergent regulatory regimes.\textsuperscript{220}

In conclusion, it can be said that it is extremely difficult, probably impossible, to eliminate all barriers to trade and that in certain strictly defined circumstances trade barriers may still be permitted under Community law.\textsuperscript{221} But as Hartley suggests: '[i]f all Member States apply the same restriction, there will be no barrier.'\textsuperscript{222}

**Free movement of people**

Articles 39 - 42 EC regulate free movement of persons whereas Articles 43 - 48 EC regulate freedom of establishment.\textsuperscript{223} People have the right to be treated in the host member state free from discrimination on the grounds of nationality.\textsuperscript{224}

Article 39 EC states that workers from one member state are allowed to move to another member state to work.\textsuperscript{225} The idea of Article 39 EC is to even out wage levels and thus put

\begin{flushleft}
\textsuperscript{220} Ibid.
\textsuperscript{221} Hartley, Trevor C., \textit{European Union Law in a Global Context}, (2004), Cambridge, University Press, p. 404
\textsuperscript{222} Ibid.
\textsuperscript{223} http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf, accessed November 2, 2004
\textsuperscript{225} http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf, accessed November 2, 2004
\end{flushleft}
manufacturers in all member states on a more equal footing.\textsuperscript{226} Any employee, regardless of pay or status, is regarded as a “worker” by Community law.\textsuperscript{227} However, since the common market was established, immigration rights have come to be regarded as more than a matter of economics. As a result through secondary legislation, further categories of persons were given the right of free movement such as retired persons, students and persons of independent means.\textsuperscript{228} Moreover, the introduction of European citizenship in the TEU also emphasized the move away from the individual as a purely economic actor.\textsuperscript{229} In terms of Article 18 - 21, citizens of the Union have the right to move and reside freely within the territory of the member states, the right to stand and vote in municipal and European Parliament elections, and the right to petition the Ombudsman and the European Parliament.\textsuperscript{230} The new member states were expected to implement the free movement of workers \textit{aquis} upon accession.\textsuperscript{231}

Article 43 deals with the right of enterprises to establish themselves in another member state.\textsuperscript{232} It means that corporations and businessmen are allowed to move to another member state to set up a branch, or even to establish their head office.\textsuperscript{233} Though critical, Community rights are not absolute. According to Articles 39 (3) and Article 46 they are subject to derogation on the grounds of public policy, public security and public health.\textsuperscript{234} In addition, fearing welfare tourism, old member states asked for transitional arrangements in relation to Central and Eastern European workers, in the form of temporary restrictions on labour market access.\textsuperscript{235} With respect to CEE workers, the Act of Accession allows restrictions for up to seven years.\textsuperscript{236}

\begin{flushleft}
\textsuperscript{227} Ibid., p. 408
\textsuperscript{228} Ibid.
\textsuperscript{230} Ibid.
\textsuperscript{231} Hillion, Christophe, \textit{The European Union is dead. Long live the European Union...a Commentary on the Treaty of Accession}, European Law Review, October 2004, Volume 29, p. 596-597
\textsuperscript{235} Hillion, Christophe, \textit{The European Union is dead. Long live the European Union...a Commentary on the Treaty of Accession}, European Law Review, October 2004, Volume 29, p. 597
\textsuperscript{236} Ibid.
\end{flushleft}
Freedom to provide services

Freedom to provide services is found in Articles 49 - 55 EC.237 It includes freedom to access both the territory and the market of other member states and to be treated on the same basis as the nationals of the host member state.238 Providers and receivers of services have temporary immigration rights that last as long as is necessary to provide and receive the services.239 According to article 50 “services” are defined as those normally provided for remuneration and shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.240

Free movement of capital

The provisions on capital are found in articles 56 - 60 EC.241 Article 56 (1) states that “[…] all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”242 Yet, according to Articles 57 (2) EC, 59 and Article 60 the Council may take measures limiting the movement of capital from third countries.243 Furthermore, for historical and political reasons, various new member states such as Poland or the Czech Republic requested the right to maintain restrictions concerning acquisitions of secondary houses, agricultural lands and forests by non-resident Community nationals.244 They were concerned by the prospect of re-acquisition of land confiscated at the end of Second World II and thus were allowed to maintain their national legislation on the acquisition of secondary residences for five years.245

3.7.2 Competition policy

Competition policy is one of the most highly developed of the community’s common policies, with a great impact on business establishments situated both inside and outside the common market.246 Free movement of goods and services and freedom of establishment within the

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241 Ibid.
242 Ibid.
243 Ibid.
245 Ibid.
Community would be of little effect if parties were free to engage in restrictive practices such as concerted price fixing or market sharing.\textsuperscript{247} It is the Commission that develops the general substantive competition policy.

Article 3 (g) EC states that the activities of the Community shall include ‘a system ensuring that competition in the internal market is not distorted’.\textsuperscript{248} The rules applicable to competition policy can be found in Articles 81 - 99 EC.\textsuperscript{249} These provisions can be divided into those which focus on the activities of governments and those which deal with the actions of private undertakings.\textsuperscript{250}

The first group of provisions which deals with aid granted by states can be found in Articles 87 - 89.\textsuperscript{251} State aid represents for member states an important instrument of economic and social policy, which is necessary to the economic health of a region or to whole sectors of the economy, especially in times of economic difficulty.\textsuperscript{252} On the other side it can also be a threat to the free movement of goods, since by giving government aid to a particular undertaking or industry, it hinders competition between member states and interferes with the functioning of the single market.\textsuperscript{253} The regulation of state aid therefore requires a balancing of the interests of member states and of the Community. This challenge could increase following the EU enlargement, as some of the new economies are still weak and it may be felt that state aid is a useful way of strengthening economic development in these countries.\textsuperscript{254}

The second group of provisions which affects the undertakings themselves, deals with agreements between two or more parties whose collusion prevents access to markets or products to the detriment of third parties or consumers (Article 81).\textsuperscript{255} It also deals with the effect of structural changes such as mergers and acquisitions (Article 81), companies capitalising from dominant positions to the detriment of competitors and customers (Article 82) and rules relating to public undertakings granted special or exclusive rights (Article

\textsuperscript{247} Ibid., p. 395-396
\textsuperscript{249} Ibid.
\textsuperscript{252} Steiner, Josephine and Woods, Lorna, Textbook on EC Law, (2003), Oxford, University Press, p. 280
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid., p. 297
Price fixing and market sharing agreements in particular have been very common. The ensuing reduction in competition is reduced which may have the effect of increasing the price of goods or services. Market sharing is damaging for a market without barriers especially where companies from different member states agree not to compete in each other’s respective fields, since in a common market businesses should face competition from those established in other member states. The Community was therefore given a strong mandate to pursue anti-competitive practices.

A principle area of directly applicable Community law is that of European Competition law. It was governed by Regulation No 17/62 which is now replaced by Regulation No 17/62 at 1 May 2004. The purpose was to decentralise the administration of European competition law and to integrate national competition authorities and national courts into the administration of competition law. There is now a system of parallel responsibilities between the Commission and national authorities. However, important powers will stay with the Commission which, acting as the European competition authority will pursue and punish severe breaches of competition rules.

The general conclusion that can be drawn is that the intention of EU competition policy is to support economic activity and to increase efficiency by enabling goods and resources to flow freely according to the operation of normal and free market forces. It is intended to enhance the competitiveness of European industry in a world market. Finally, the Community competition policy also seeks to protect and encourage small and medium sized companies.

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256 Ibid.
258 Ibid.
260 Ibid.
261 Ibid.
262 Ibid., p. 974
263 Ibid.
264 Ibid.
265 Ibid.
266 Ibid.

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4. The Institutional Framework of the African Union

The AU replaced the OAU as successor and took over the rights, powers and obligations of the OAU.266 However, the AU differs from the OAU charter in many ways.267 Whereas the OAU charter promoted anti-colonialism and secure national sovereignty, the AU stands now for political, social and economic integration.268 It is Africa’s premier institution and principal organisation for the promotion of accelerated socio-economic integration of the continent. It is based on the common vision of a united Africa and on the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion amongst the peoples of Africa.269 Its headquarters is in Addis Ababa, Ethiopia.270 The AU Act271 establishes the AU as a political, economic and social organisation.272 It has thirty-three articles, beside its preamble which, though not part of its substantive provisions, can be taken into consideration when interpreting the Act.273

4.1 The Organs of the African Union

According to Article 5 of Act, the Union compromises the following nine single organs, each with a different composition, power, and sphere of operation, origin and voting procedure.274

The Assembly

The Assembly is composed of Heads of State and Government or their duly accredited representatives. In terms of Article 6 (2) of the Act the Assembly of Heads of State and Government is the supreme organ of the Union.275 Its powers and function are laid down in Article 9 (1) of the Act and include inter alia the determination of Union common policies, the consideration of requests for membership, the monitoring of implementation of Union

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266 Ibid., p. 73
267 Ibid.
268 Ibid.
269 http://www.africa-union.org, accessed December 2, 2004
272 Nsonguru, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 73
policies and decisions and the direction of the Executive Council as concerns the management of conflicts and armed hostilities. Yet, the Act is not clear about the legal status of AU decisions, but the rules of procedure which the Act allows to be adapted address this issue adequately. Two broad categories of decisions can be identified: regulations and directives on the one side, which are legally binding, and non-binding recommendations, declarations, resolutions etc., on the other. However, some declarations or resolutions may become binding under international law if their provisions become general practice by states. According to Article 6 (3), the Assembly shall meet in ordinary session once yearly and in extraordinary session upon request by a member state.

The Executive Council

‘The Executive Council of the AU […] will function both as a political and an economic body of the Union.’ Pursuant to Article 10 (1) of the Act it is composed of ministers or authorities designated by the governments of members states. It is analogous to the composition of the Council of the EU. The ordinary and extraordinary session, the mode of reaching decisions and the quorum in the Executive Council are identical to the provisions applying to the Assembly with the exception that the council shall meet twice a year in ordinary sessions. The functions of the Executive Council are listed in Article 13 of the Act. The Executive Council is responsible to the Assembly and its major function is to coordinate and observe the implementation of the Union policies, as these have been determined by the Assembly. Comparatively, according to Article 202 EC the European Council has ‘to ensure that the objectives set out in this Treaty are attained.’ Pursuant to Article 11 (1)

276 Ibid.
278 Ibid.
279 Ngongurua, J. Udombana, The Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 93. Quaere: In such a case it might be asked whether the regulating law would be general international law or African regional law rather than the law of the AU?
of the Act, a simple majority vote is required for procedural matters, including the question whether a matter is one of procedure or not.\(^{287}\) For the European Council a different procedure applies. According to Article 205 (1) and (2) EC the Council acts either by a simple majority of its members or by a qualified majority.\(^{288}\)

**The Pan-African Parliament**

In terms of Article 17 (1) the Pan-African Parliament (PAP) is an organ, like its EU counterpart, which should ensure the full participation of African peoples in governance, development and economic integration of the continent.\(^{289}\) It is vested with consultative and advisory functions.\(^{290}\) The protocol relating to the composition, powers, functions and organisation of the Pan-African Parliament has been signed by the member states. In November 2004, Senegal became the 24\(^{th}\) member of the AU to ratify the protocol establishing the PAP.\(^{291}\) By reaching that threshold, the protocol came into force.\(^{292}\) It has twenty-five articles and deals with the anatomy and physiognomy of the PAP.\(^{293}\) According to Article 4 (2) the PAP shall be composed of five representatives from member states.\(^{294}\) Each member ‘[…] shall be elected or designated by the respective National Parliaments or any other deliberative organs of the member states.’\(^{295}\) The term of office of a member of the PAP […] ‘shall run concurrently with his or her term in the National Parliament or other deliberative organ.’\(^{296}\) According to Article 11 (1) of the Protocol, the PAP, either on its own initiative or at the request of the Assembly or other policy organs, can examine discuss or express an opinion on any matters which relate to human rights, the consolidation of

\(^{292}\) Ibid.
democratic institutions, the promotion of good governance and the rule of law and make such recommendations as it may see fit.297

During its first five years, the PAP will be an advisory body, but ‘[i]n principle, the PAP is conceived as a legislative body capable of creating international law – like the EU.’298 This will be the ultimate aim of the PAP.

The Commission

According to Article 20 (2) of the Act, the Commission shall be composed of the chairperson, the deputy chairperson, eight commissioners and staff members. Each commissioner shall be responsible for a portfolio.299 Pursuant to Article 20 (1) of the Act, the Commission shall have the function of the Union secretariat and regarding Article 20 (3) of the Act, its structure, functions and regulations shall be determined by the Assembly.300 It is the key organ playing a central role in the day-to-day management of the African Union. Among others, it represents the Union and defends its interests, elaborates draft common positions of the Union and prepares strategic plans and studies for consideration by the Executive Council. Furthermore, the Commission has the dual mandate of promoting and protecting human and peoples’ rights in terms of the African Charter.301 According to Article 45 of the African Charter, the Commission can investigate inter-state complaints and upon finding a state in violation of the Charter, the Commission issues a report stating the facts and its findings.302

The Permanent Representatives' Committee

According to Article 21 (1) of the Act, the Permanent Representatives’ Committee is composed of member states accredited to the Union.303 Under Article 21 (2) of the Act, it is charged with the responsibility of preparing the work of the Executive Council.304 The structure is analogous to the Committee of Permanent Representatives under the EU Treaty

298 Ibid., p. 104
300 Ibid.
302 Ibid., see also Article 45 of the African Charter available on internet:
http://www1.umn.edu/humanrts/instree/z1afchar.htm, accessed January 3, 2005
304 Ibid.
whereby, according to Article 207 (1) EC the Committee, ‘[…] shall be responsible for preparing the work of the Council and for carrying out the task assigned to it by the Council.’

ECOSOCC

According to Article 22 (1) of the Act, the Economic, Social and Cultural Council (ECOSOCC) is an advisory organ composed of different social and professional groups in the member states of the Union. It is a priority institution to ensure the effective representation of civil society organisations and their input into the decision–making process of the AU. Under Article 22 (2) of the Act, the statutes constituting its functions, powers, composition and organisation shall be determined by the Assembly.

Peace and Security Council (PSC)

The protocol of the summit of Lusaka, July 2001, held pursuant to Article 5 (2) of the Act, created the PSC within the African Union. Pursuant to Article 2 of this protocol, the PSC is a standing decision-making organ for the prevention, management and resolution of conflicts. The purpose of this organ is to facilitate timely and efficient response to conflict and crisis situations in Africa.

The Court of Justice

According to Article 18 (1) of the Act, a Court of Justice of the Union shall be established. The statutes defining the composition and functions of the Court of Justice shall be defined in a separate protocol relating thereto. The protocol was adopted by the second ordinary session of the Assembly of the Union in Maputo on July 11, 2003. Pursuant to Article 3 of the protocol ‘[t]he court shall consist of eleven Judges who are nationals of States Parties.’

309 http://www.african-union.org, accessed November 25, 2004
310 See Chapter V, Section C: The African Union and Peace and Security
311 http://www.african-union.org, accessed November 25, 2004
313 Ibid.
315 Ibid.
According to Article 7 (1) of the protocol the Assembly shall elect the judges.\textsuperscript{316} They ‘[…] shall be seized with matters of interpretation arising from the application or implementation of this Act.’\textsuperscript{317} The Court of Justice will be competent primarily to adjudicate matters arising from the interpretation of the Constitutive Act.

\textbf{The Specialised Technical Committees}

The Specialised Technical Committees are meant to address sectoral issues such as rural economy and agricultural matters.\textsuperscript{318} In general, they shall prepare projects of the Union, ensure the supervision and the evaluation of the implementation of decisions taken by the organs of the AU and submit reports and recommendations on the implementation of the provisions of the Act.\textsuperscript{319} They are situated at ministerial level.\textsuperscript{320} The Assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other Committees. They shall be composed of ministers or senior officials responsible for sectors falling within their respective areas of competence.\textsuperscript{321}

\textbf{The Financial Institutions}

According to Article 19 of the Act, the Union shall have the following financial institutions, whose rules and regulations shall be defined in protocols relating thereto:\textsuperscript{322}

- The African Central Bank
- The African Monetary Fund
- The African Investment Bank

These institutions will probably have functions comparable to those of the Bretton Wood Institutions, namely the World Bank and the International Monetary Fund (IMF).\textsuperscript{323}

\textsuperscript{316} Ibid.
\textsuperscript{318} for a full list of the Specialized Technical Committees see Annex VI
\textsuperscript{321} Ibid.
\textsuperscript{322} Ibid.
4.2 Legal Status of the African Union

‘The attribution of personality to international organisations has become indispensable in modern international law.’ In its Advisory Opinion on “Reparation for Injuries suffered in the Service of the United Nations” the International Court of Justice (ICJ) defined an “international person” as follows:

‘[…] the organisation is an international person […] [which means] that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.’

According to Rachel Fried, the criteria for international legal personality in international organisations can be summarised as follows:

- A permanent public international organisation i.e. it must be established by an international agreement, equipped with a least one organ and be established under international law.

- A distinction, in terms of legal powers and purposes, between the organisation and its member states which means that as an organisation there must be a group which can permanently express a legal will distinct from that of its individual members (volonté distincte).

- The existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

The AU was created to take up the multifaceted challenges confronting the African continent and peoples. Though brought into being by the member states, it has a separate existence.

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324 Ibid., p. 81
326 Ibid., p. 13-14
327 Ibid., p. 14
from them.” Moreover it is endless in size and eternal in time, allowing for the admission of other members “at any time after the entry into force” of the Act. The AU established various organs with defined functions, which are of the organisation, not of the member states, though composed of the latter. Their powers extend to matters which are exercisable on the international plane such as the right of intervention.

For these and other reasons, the AU is undoubtedly an international legal person, which also has an international legal responsibility extending beyond, but alongside, the member states. The member states of the AU, which have ratified the AU Act, recognise the legal order of the AU. This means that AU law is introduced into fields previously governed by municipal law. The same position applies with regards to EU law and the national law of the member states, where the EC law has precedence over domestic law. Hence, the AU law will be binding on member states including their legislative agencies, courts and administrations.

5. Analysis of the European Union and the African Union

Organs constitute the basic mechanism of international organisations. It is clear that the powers of the respective institutions have evolved over time, especially those of the EU. The next two chapters will stress some weak and strong points of the most important institutions - especially those of the AU - in order to compare them with each other and to better understand that a simple blueprint of the EU is not sensible. The subsequent chapter will deal with some of the principal issues surrounding the role of the AU in promoting regional peace and security. Finally, the last chapter will provide a brief overview and emphasise that each organ faces different problems which will, as they evolve, require a different approach to their solutions.

330 Ibid.
331 Ibid.
332 see Article 4 (h) of the AU Act available at [http://www.africa-union.org](http://www.africa-union.org), accessed December 13, 2004
334 Ibid., p. 129
335 see case Costa v. Enel, footnote 143
5.1 Organs of the European Union

Concerning the number of Members of the European Parliament, we have seen that it follows the principle of degressive proportionality. That can be seen as a weak point. If the Parliament is meant to supply the democratic element in the Community, the votes of all citizens should be of the same value. As Hartley states, ‘[e]quality of voting rights is an essential constituent of democracy.’\(^\text{337}\) Despite the introduction of direct elections, the uniform system of election envisaged by Article 190 (3) EC has not yet been introduced. In this context, it is noteworthy that recent elections have had low participation rates, ‘[w]hich may cast doubt on the claims of the European Parliament to legitimacy on the basis of the direct election of its members.’\(^\text{338}\) National interests, as represented by the Council of Ministers, have predominated for a long time and the Parliament’s influence and control of the Commission have not been very significant. It is fair to say that the powers given to the European Parliament since Maastricht and the introduction of the Constitution went some way to redress the institutional balance and to remedy the much-criticised ‘democratic deficit’ in the decision making progress.\(^\text{339}\) However, critics suggest that these changes did not go far enough and that the Parliament should have more powers.\(^\text{340}\)

As mentioned above, the member states take turns holding the presidency of the Council. This rotating presidency has led to criticism that the Council of Ministers lacks coherency since there is no one who is responsible for co-ordinating policies.\(^\text{341}\)

The Commission has also been subject to significant critique. Commission officials are regarded as out-of-touch and unaccountable. They are supposed to represent the Community interests, but sometimes seem more concerned with their own interests, power and status than that of the Community.\(^\text{342}\) Moreover corruption is not unknown. The European Commission, led now by Mr Jose Manuel Barroso, a former Portuguese Prime Minister, has suffered from two successive weak presidencies. Mr Barroso will have to try to restore confidence and morale in the new Commission.\(^\text{343}\)


\(^{340}\) *Ibid.*, p. 25

\(^{341}\) *Ibid.*


The Court of Justice may also face further reforms due to the enlargement, since more member states mean more judges, more languages and a wider range of legal traditions.\textsuperscript{344} The average number of cases decided on by the ECJ is rising steadily. These cases are also taking longer to be decided. In 2003, references for preliminary rulings and direct actions took approximately 25 months. The regular time taken to hear appeals was 28 months, compared to 19 months in 2002.\textsuperscript{345}

The current institutional structure of the Communities was established for a system with a more limited membership. Expanding the Community’s competence increases the number of tasks the Community institutions have to perform. The current member states were aware of this problem and tried to commence institutional reform with the Treaty of Nice.\textsuperscript{346} Nevertheless, it seems clear that further change is inevitable. In this regard, the ratification of the new Constitution will be an important step in building a higher profile for the Union, not only in relation to third states, but also vis–à–vis European citizens. This development will assure legal certainty, transparency and an improvement of the perception of the Union as a single voice expressing a single position.\textsuperscript{347}

\section*{5.2 Organs of the African Union}

The Assembly and the Commission are the key organs. Their governance and administrative responsibility will be considerably more difficult than in other organs, given the task of setting up and running the other institutions envisaged by the Constitutive Act. With regard to regional economic co-operation and integration, the Economic, Social and Cultural Council, the specialised committees and the financial institutions will be crucial. In terms of governance and democracy, the Pan-African Parliament and the Court of Justice will in their turn play a central role.

\textsuperscript{345} Biondi, Andrea and Harmer Katherine, 2002 and 2003 in Luxembourg: \textit{Recent Developments, European Public Law}, December 2004, Volume 10, p. 582
\textsuperscript{347} Lenaerts, Koen and Gerard, Damien, \textit{The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed}, European Law Review, June 2004, Volume 29, p. 309
Regarding the Commission, there is no clarity as to whether its findings on state violations in terms of Article 45 of the African Charter are legally binding. The same can be said for the remedies it orders, as these remedies are of a recommendatory nature only. Transparency on this issue would be helpful to increase the persuasive force of its findings, regardless of whether they are binding or not. Of central relevance is the moral and legal authority that governments and other members of the international community attach to published reports and conclusions of the organs concerned. Clarity is therefore most desirable.

The AU Assembly is the political organ of the Union and, in that sense, is similar to the General Assembly of the UN or the European Council. Unlike the European Council, which according to Article 4 of the EU Treaty must submit reports to the European Parliament, the AU Assembly does not have any such obligation under the Act. Such a procedure would be necessary in order to follow the doctrine of separation of powers and to maintain the checks and balances within the system. Article 9 (2) of the Act states that the Assembly has the right to delegate any of its powers and functions to any Union organ. It was clearly not the intention of the Act’s drafters to have lesser organs decide on crucial issues such as, for instance, the admission of new member states. It can only be expected that the Assembly will exercise this right with the necessary care and caution required under the circumstances. Pursuant to Article 5 (2) of the Act, the Assembly is given power to establish any other organ of the Union. This will be important in the future due to the fact that one of the major weaknesses of the Act is the absence of political mechanisms to implement the Act and support its determined objectives.

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349 Ibid., p. 4
351 Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 87
352 Ibid., p. 83
353 Ibid., p. 94
356 Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 84
According to Article 6 (3) of the Act, the Assembly shall meet in ordinary session only once a year and in extraordinary session upon request by a member state.\(^{357}\) The request must be approved by a two-thirds majority. Considering the fact that fifty-three states signed and ratified the Act, the required two-thirds majority could be rather difficult to attain. This has the potential to therefore paralyse the Union since an ordinary session once a year provides limited opportunity for decision-making. The mode of taking decisions is that of consensus, which can also be very difficult to reach, especially in international organisations. However, on this point the Act provides a solution. Article 7 (1) of the Act stipulates that, failing consensus, decisions shall be reached by a two-thirds majority. Since the quorum at Assembly meetings is two-thirds of the total Union membership, decisions can be taken by as few as twenty three states.\(^{358}\)

The establishment of the Pan-African Parliament was also an important step since, in the words of Article 17 (1) of the Act, it will ‘[e]nsure the full participation of African peoples in the development and integration of the continent’.\(^{359}\) However, pursuant to Article 17 (2), its composition, powers, functions and organisation ‘[s]hall be defined in a protocol relating thereto’. Yet, the Act itself fails to describe these issues more precisely.\(^{360}\) The mere establishment of such an important organ without laying down basic regulatory aspects, questions at least the seriousness of the objectives stated in Article 17 (1) of the Act.\(^{361}\) Furthermore, the legal relationship between this protocol and the Act is not stated. It is therefore not clear whether the protocol is be considered an integral part of the Act, and whether it will be adopted by the Union or only by those states that have ratified the Act.\(^{362}\)

Similar to the EC Treaty, the PAP should be able to exercise some form of control over the Commission. Article 193 EC provides that the European Parliament may, at request of a quarter of its members, set up a temporary Committee of Inquiry to investigate other institutions’ or bodies’ alleged contraventions in the implementation of Community law.\(^{363}\)

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\(^{359}\) Ibid.

\(^{360}\) Ibid.


\(^{362}\) Ibid., p. 179

The process and criteria of selection or election of those who are going to serve as people’s representatives in the PAP is very important. It determines whether or not African people feel a sense of ownership over this body and are encouraged to support it.\textsuperscript{364} According to Article 190 (3) EC, the ‘[r]epresentatives shall be elected for a term of five years.’\textsuperscript{365} In the AU, however, the method of electing Parliamentarians can be criticized. As mentioned before, a person will cease to be a member of the PAP when he ceases to be a member of his National Parliament or other deliberative organ.\textsuperscript{366} This will allow some members to serve for longer periods than others, depending on the constitutional arrangements in each member state.\textsuperscript{367} Since some African countries are still governed by authoritarian regimes, it is doubtful that the arrangement under the PAP Protocol will bring consistency, in view of the different constitutional structures in Africa.\textsuperscript{368}

Another crucial step was the establishment of the Court of Justice. However, Article 18 of the Act gives no details about the composition, function and organisation of the Court. Specifically Article 18 (2) only refers to a protocol that relates thereto. The jurisdiction of the Court is simply stated in Article 26 to concern matters relating to the interpretation and application of the Act. In that context, Nsongurua states that ‘[t]he court will have to strike a balance between a restrictive interpretation, which seeks to protect the sovereignty of Member States, and the principle of \textit{effet utile} (effectiveness).’\textsuperscript{369} It is important to clarify the jurisdiction of this Court and how it will relate to national courts.\textsuperscript{370} Will it have the same mandate as the ECJ, which has supremacy over national courts and thus may rule national law invalid if it conflicts with EU law? That needs to be answered soon in order to promote good governance and the rule of the law in Africa. Moreover, it is crucial to vest the AU Court with the power of judicial review so as to counterbalance the powers of the political organs.\textsuperscript{371} By way of contrast, the ECJ has, in terms of Article 230, ‘[…] jurisdiction in actions brought by a

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\textsuperscript{364} Prof. Maria Nzomo, \textit{The Architecture and Capacity of the African Union}, AU/ADF Symposium, 3-8 March 2002 speech available at:


\textsuperscript{366} see footnote 181


\textsuperscript{368} Ibid.

\textsuperscript{369} \textit{Ibid.}, p. 106

\textsuperscript{370} Prof. Maria Nzomo, \textit{The Architecture and Capacity of the African Union}, AU/ADF Symposium, 3-8 March 2002, speech available at:

Member State, the European Parliament, Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.372

Another problematic issue is the nature of the relationship between the Court of Justice and the African Human Rights Court, adopted at the Summit of the OAU/AU in Burkina Faso on 10 June 1998.373 The AU Assembly decided at its third Ordinary Session in July in Addis Ababa, to integrate the African Court of Justice and the Court of Justice into one Court.374 The African Court is empowered to hear cases challenging violations of the civil and political rights as well as economic, social and cultural rights under the African Charter.375 This could create a jurisdictional conflict between the two courts. A possible solution would be to expand the mandate of the Human Rights Court to cover the interpretation of the AU Act and not to establish Court of Justice or to incorporate the Human Rights Court into the AU Court.376 Either approach should provide a full remedy for human rights violations. Moreover, it can be doubted whether Africa can afford two supra-national courts.377 Therefore, the AU decision to integrate the Courts into one court ought to be supported.

At the moment, most African governments suppress NGO (Non Governmental Organisation) operations, which they see as a threat to their hold on power. Thus far, the AU agenda has been driven almost entirely by governments, without inclusion and engagement of non-state sectors.378 In the EU, by contrast, the language of openness and participation is very much in the forefront, especially in terms of NGO participation.379 As Professor Maria Nzomo suggests, representatives of the non-state sectors should be recruited to contribute to the capacity building of some of the constitutive organs of the Union.380 The AU is moving now

375 Ibid.
376 Ibid.
377 Nsongurua, J Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 112
378 Ibid., p. 112

47
in the right direction by creating an Economic, Social and Cultural Council, through which NGOs and trade unions will have the right to participate in the affairs of the continental body.

As far as the financial institutions are concerned, no details are given in the Act as to their aims and purposes. Article 19 refers only to a protocol that relates thereto. A common currency, which led to the establishment of the European Central Bank, would help the continent to improve its domestic commerce since it would reduce transaction costs. Such a development however will not happen for a number of years due to the plethora of obstacles that need to be overcome. For instance, the currency that some West African countries share is backed by the French treasury and linked to several conditions that many other African states could not meet.\(^\text{381}\)

The Permanent Representatives Committee, which - according to Article 21 - shall be composed of the member states’ permanent representatives to the Union, will only represent the interests of the respective countries. Since no provision of the Act indicates how its organisation is to be regulated, it appears likely to function as an extra-Union organ. This is similar to the original Committee of Permanent Representatives (COREPER), which functioned alongside the Council of the European Community and did not constitute an official organ of the EU. Thus, it is also questionable whether the Court of Justice could exercise jurisdiction over it.\(^\text{382}\)

On paper, the AU follows the political theory and legal doctrine of separation of powers between legislature, executive and judiciary. In practice, however, some important matters such as legislative power, external enforcement and important acts of internal administration - like the budget are concentrated in the AU Assembly.\(^\text{383}\) The Act creates a large number of organs which will have to operate with each other, and whose mandates will have to be much more specific to ensure successful and effective operation.\(^\text{384}\) To make sure that the different institutions of the European Union work together, the EU requires an extremely expensive

\(^{381}\) [www.economist.com](http://www.economist.com), July 8th 2002, *from the Economist Global Agenda-a step in the right direction*, accessed November 8, 2004; there exists also the “Rand monetary” which includes South Africa, Namibia, Lesotho and Swaziland.


bureaucracy and thousands of highly skilled personnel. The AU is thus far unable to cope with similar complexity. The number of organs in the AU already appears to be too many and this could in the long run be a financial burden.\textsuperscript{385} This raises several questions. Most fundamentally, where will the resources come from?\textsuperscript{386} And are they primarily membership dues or will the AU be seeking other sources of funding?\textsuperscript{387} Since most of the African countries are dependent on finance from OECD countries would it make sense to turn directly to AU governments or would it be advisable to go directly to international aid partners for financial needs?\textsuperscript{388} It is clear that success will very much depend on the amount of resources available. How can costs be cut? One solution could be, instead of establishing institutional structures that could be accommodated elsewhere, strengthening the existing AU institutions and collaborating with sub-regional institutions.\textsuperscript{389} Besides these financial questions, a second question will be where and how to get the skilled staff required for building and later managing the institutions.\textsuperscript{390} In this respect, lessons can be learned from the UN and other international organisations such as the EU, where governments often send their best politicians to Brussels to work as Commissioners.

5.3 The African Union and Peace and Security

‘Africa presently holds the highest record of interstate wars and conflicts [which] […] have contributed more to the socio-economic decline of the Continent and the suffering of the civilian population than any other factor.’\textsuperscript{391} Security threats are both internal and external and most conflicts in Africa contain elements of both.\textsuperscript{392} It can be observed that the institutions of the AU do not provide for a ‘security council’, though this is one of the goals of

\textsuperscript{385} Ibid., p. 177
\textsuperscript{387} Ibid.
\textsuperscript{388} Ibid.
\textsuperscript{389} Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 86
\textsuperscript{391} Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 120
the Union.\textsuperscript{393} This reflects the set up in the EU, which delegates external security affairs to the OSCE and NATO.\textsuperscript{394} Yet, in December 1998, the heads of state and government of France and the United Kingdom issued a joint declaration that began the process of a defence provision in the Treaty of Amsterdam.\textsuperscript{395} They stated that ‘the Union must have the capacity for autonomous action, backed up by credible military forces, the means to use them, and a readiness to do so, in order to respond to international crisis.’\textsuperscript{396} In February 2000, the Council set up an Interim Political and Security Committee with a mandate to prepare for the functioning of the European policy on security and defence.\textsuperscript{397} On a regional level ‘[…] the European experience has been based on complex institutional linkages between states and between them and regional and sub regional organisations.’\textsuperscript{398}

In Africa, the process of creating the AU involves a number of intergovernmental initiatives at a regional level. During the OAU summit held in Cairo in 1993, African leaders established a Mechanism for Conflict Prevention, Management and Resolution (MCPMR).\textsuperscript{399} However, this Pan-African organisation never became a principal player in peace processes in Africa.\textsuperscript{400} Given the importance of peace and security issues in Africa, it was nevertheless unrealistic that it would be disbanded. Hence, the central organ of the MCPMR is now included as one of the organs of the AU.\textsuperscript{401} Moreover, one year after the establishment of the AU, African heads of state and government adopted a protocol relating to the establishment of a Peace and Security Council (PSC) in Durban, South Africa.\textsuperscript{402} It entered into force on 26 December,
2003, after ratification by the required 27 of the AU’s 53 member countries. The Council replaced the former MCPMR, incorporating relevant structures and methods in order to serve as the continent’s collective security arrangement.

According to Article 7 of the Protocol, the task of the PSC is to ‘[…] authorise the mounting and deployment of peace support missions; recommend to the Assembly intervention in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; institute sanctions, whenever an unconstitutional change of government takes place; implement the common defence policy of the AU; follow up the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by member states; and support and facilitate humanitarian action in situations of armed conflict or major natural disasters.’

At a regional level, there are other organisations such as the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA), and the peace and security component of NEPAD, both of which have peace and security mandates. At a sub-regional level, there are organisations, such as those being established within the Economic Community of West African States (ECOWAS) or the Intergovernmental Authority on Development in the Horn of Africa. This raises the challenge of determining how the AU will relate to these organisations.

To avoid competing regional authorities, it would be necessary to have a single ‘African Security Council’, whether located at the AU, CSSDCA or NEPAD. The sub-regional institutions should collect and process data at their respective levels and transmit these to the

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PSC. In this context, Nsongurua suggests that ‘[t]he AU should co-ordinate its activities with other African organizations, co-operate where appropriate and practicable with neighbouring countries, and liaise with the UN in regards to peacekeeping and peace-making activities.’

5.4 Outlook

To compare both Unions and, to understand their differences and the similarities between the two, it is helpful to take a closer look at the problems both are currently experiencing and what challenges they are likely to face in the future.

With the 1995 and 2004 enlargements, the EU will face certain problems. Failure by member states to ratify the constitution, or the inability of newcomer countries to meet Euro currency standards, might force a loosening of some EU agreements and perhaps lead to several levels of EU participation. This creates the risk that the EU will be divided between an “inner” core of politically integrated countries and a looser “outer” economic association of members. In an EU of 25, it is more of a challenge to preserve coherence and unity than in the original Community of six.

How will the EU cope with this? First of all, the ability of the new member states to adjust to EU membership will require a big effort on their part. It will take some time for them to implement something approaching 100,000 pages of _aquis communautaire_, which consists of complex legal areas and texts. They will have to adapt or even change their legislation and their administrations will have to be convinced to accept EU Law as an everyday part of domestic law and domestic legal life. A lot still needs to be done in the training of judges and strengthening of judicial systems.

Secondly, what is the ability of EU institutions to cope with a Union consisting of 25 member states? Even though Guenter Verheugen, Commissioner in charge of the enlargement, called it “the most significant chance for the EU at the beginning of the twenty-first century”, the

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integration of these new member states brings a great challenge for the EU.\textsuperscript{411} There will be an increasing case load both at the ECJ and the CFI. It can be expected that the length of proceedings will increase. Furthermore, how will it be possible to preserve, and if possible to increase, efficiency in the EU legislative and decision-making process?\textsuperscript{412} In this context, reforming the Union’s institutional framework and extending the competencies of the EU will be a new EU challenge. The inability of member governments to agree on institutional reform at Amsterdam in 1997 has proven how difficult it is to press on with further reforms. Here, the new EU Constitution is the first step in the right direction.

Thirdly, the EU is facing a problem of legitimacy, identification, and popular perceptions. Strong and coherent popular support is lacking. The negative outcomes of referenda, twice in Denmark and Norway, once in Ireland, and the close calls in France (Maastricht) and Sweden (accession), have shown that people are more sceptical about and frustrated with the EU than euphoric.\textsuperscript{413} People realise that there is a host of obligations to meet and adjustments to be made, but do not see why all this should be done. The rights of EU citizens must be strengthened. ‘How can the Union become a more participatory model of democratic involvement in which individuals derive as much benefit as possible from open government meaning open meetings and meaningful transparency as well as access to information?’\textsuperscript{414} They will have to be more involved, for instance, by giving them access to a privileged political procedure, increasing the powers of the European Ombudsman and improving administrative procedures.\textsuperscript{415}

To conclude, transparency, efficiency and democratic accountability of the EU procedures must be improved.

\textsuperscript{413} Ibid., p. 223
The AU, on the other hand, faces different problems which will have to resolve in the near future in order to be successful. Unlike the European Union, the African Union has not adopted the principle of supremacy. At the time of the OAU’s founding, African leaders disagreed about what kind of organisation it should be. While some leaders were in favour of the creation of a central government that would unite all of Africa under one authority, others had recently gained independence from colonial rule and their leaders opposed the idea. Article 4 (b) of the Act enshrines the inviolability of colonial boundaries and supports the principle of *uti possidetis*. This means that externally, it seeks to prevent possible use of force by neighbours and internally, it gives clear notice to minorities that secession is not an option. Here, Nsongurua argues that it is presently difficult to support on the one side the principle of *uti possidetis* and on the other side moving the continent towards a more integrated entity. Yet, the history of Europe has proven that although there are minorities seeking independence such as the Corsican population in France or the Basque population in Spain, the Continent has moved towards much more integrated entity than it was fifty years ago.

It can be said that there is at least an obvious trend in the Act of the African Union towards limiting the sovereignty of member states and moving in the direction of permitting the involvement of the Union in the domestic affairs of participating countries. Under its Act it can, for instance, intervene in affairs of member states such as elections. This has been seen already in Madagascar, where the AU refused to recognise Ravalomanana (who claimed to have won disputed presidential elections) and instead demanded a fresh poll. In connection with such events Article 4 (j) of the Act gives a member state the right to request Union intervention in order to restore peace and security. According to Article 4 (h), the Union has the countervailing right to intervene in a member state in the event of ‘grave circumstances’.

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417 Ibid.
419 Ibid.
422 Ibid.
Whereas the OAU Charter was silent on the legal status of the decision of the OAU Assembly, decisions of the AU Assembly in the categories of regulations and directives are now binding. They have to be published in the Official Journal of the AU and become automatically “enforceable” 30 days after publication. If states are not complying with its decisions, the AU Assembly may impose sanctions of an economic or political nature. The term “grave circumstances” is defined in the same provision as war crimes, genocide, and crimes against humanity.

In this context several problems arise. First of all, the Act presupposes that intervention for humanitarian purposes is lawful. This is a debatable assumption in terms of public international law. Secondly, Articles 3 (g) and 4 (b) refer to the principle of non-interference by any member states in the internal affairs of another. Therefore, it could be said that the condemnation and rejection of unconstitutional changes of government is incompatible with the principle of non-interference. However, in cases like Madagascar it is not the member states that condemn and reject unconstitutional governments rather the Union itself. As a result this may not be seen as incompatible with the principle of non-interference. Thirdly, intervention could be unlawful under international law, considering the prerogative of the UN Security Council to determine whether a particular incident can be characterised as a threat to or breach of international peace or an act of aggression so as to justify measures of a forcible nature.

Furthermore, it is not clear whether the Union could be considered as a regional arrangement within the meaning of Article 52 of the UN Charter. This provision allows the existence of regional arrangements for dealing with maintenance of peace and security in a manner appropriate for regional action, provided that they act in accordance with the Charter. Countries such as Rwanda, DRC, Liberia, Sudan or Cote d’Ivoire face crimes against humanity, genocide or civil war, which could destabilise their respective regions for many years to come. African leaders still feel uncomfortable criticising each other and most of the

424 Ibid.
427 Ibid.
time only symbolic sanctions have been taken against leaders who exploit their countries and abuse their power.  

Therefore, the question of whether and how the Union could intervene in such cases is not a theoretical one but one which the African Union needs to confront in its very early days.  

Another important feature in the EU is the centrality of elections and democratic referenda to approve countries’ accession to the Union and its key components. This democratic component is missing in the AU process. According to Article 29 (1) of the AU Act, membership is restricted to “African states”. Admission will be decided by a simple majority of member states. Yet, the Act does not define a “state” for the purposes of admission, which means that the Assembly will decide if an entity seeking admission is a “state”. In the case “Conditions of Admission of a State to Membership in the United Nations”, the International Court of Justice (ICJ) stated that conditions for admission are subject to the Organisation, meaning that the conditions for membership are subject to the judgement of the Organisation’s members. In this context, Nsongurua claims that it is not clear whether an admission to membership by a simple majority will translate into collective recognition. Regarding the accession of new memberships, the African Union should follow the procedure applied by the European Union in order to establish a strong Union with equal opportunities. Since June 1993, when the European Council meeting in Copenhagen took a commitment to enlarge the European Union to the Central and Eastern European

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434 Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 78
436 Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 78
countries, firm political and economic conditions were laid down in very specific terms.\(^{437}\) To accede, a country has to show:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union\(^{438}\)

These standards have since been referred to as the “Copenhagen criteria”. They have to be read jointly with the relevant Treaty provisions which in 1993, were to be found in Article O of the TEU and set down the formal procedures for an application.\(^{439}\) Though the accession conditions have been elaborated upon since their proclamation, the European Council, when addressing the question of enlargement, still refers to the “Copenhagen criteria”.\(^{440}\) They supplement the provisions Article 49 (1) TEU to the extent that one can speak of the progressive ‘constitutionalisation’ of the Copenhagen criteria.\(^{441}\) The use of strict accession conditions, together with evolving obligations, has allowed the European Union and its member states to ensure that new members satisfy the economic and political conditions of the EU. These elements are essential to its functioning.

\(^{438}\) Ibid., p. 2  
\(^{439}\) Ibid.  
\(^{440}\) Ibid., p. 21  
\(^{441}\) Ibid., p. 22
6. Conclusion

The African Union is Africa’s premier institution and principal organisation for the promotion of accelerated socio-economic integration on the continent. Its Act provides a great and historical opportunity for major economic and political transformation in Africa.\textsuperscript{442} The AU has given itself 10 years, a period dubbed the age of ‘capacity building’, to radically change Africa. The European Union, however, was initially just a coal-and-steel trading body and is now the largest common market with 370 million consumers. It must not be forgotten that this development took more than 50 years. It was clear since the very beginning that ‘L'Europe ne se fera pas d’un coup, ni dans une construction d’ensemble’ [Europe will not be made all at once, or according to a single plan].\textsuperscript{443} Like any other international body seeking to stake its place in the international arena, the AU still has a long way to go. ‘The AU should strive to achieve […] the ideal, but it should also be prepared to strike a balance between the ideal and the reality that may not always measure up to the ideal.’\textsuperscript{444}

It is highly unlikely that the AU will succeed unless the principle of power-sharing is accepted and practised.\textsuperscript{445} It is the only way that the new AU and the existing sub-regional initiatives can create a workable co-operation.\textsuperscript{446} ‘Furthermore, if the African Union is to succeed, nationals governments must agree to give up some of their sovereignty for the common good of Africa as a whole.’\textsuperscript{447} Only then will the AU be able to effectively implement the objectives of its Act and meet the challenges of globalisation, democratisation and popular participation.

The EU’s strong point has been the numerous treaties that govern its operations. What Africa needs are treaties among African nations on various the goals it wants achieved, such as human rights and conflict prevention or a common market, with the AU setting standards for

\textsuperscript{442} Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 134
\textsuperscript{443} Schumann Declaration, May 9, 1950 in Lenaerts, Koen and Gerard, Damien, The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed, European Law Review, June 2004, Volume 29, p. 290
\textsuperscript{444} Nsongurua, J. Udombana, the Institutional Structure of the African Union: a Legal Analysis, California Western International Law Journal, Fall 2002, Volume 33, p. 134
\textsuperscript{446} Ibid.
\textsuperscript{447} Ibid.
members to meet. Africa has a lot of international, regional and sub-regional institutions with various mandates for promoting everything from economic integration, human rights and conflict and peace keeping matters.\footnote{Prof. Maria Nzomo, The Architecture and Capacity of the African Union, AU/ADF Symposium, 3-8 March 2002, speech available at: http://www.uneca.org/eca_resources/Speeches/2002_speeches/030702prof_maria.htm, accessed January 10, 2005} How will the AU relate to existing institutions and initiatives in these areas?\footnote{Ibid.} One of the greatest challenges faced by the AU will be to develop partnerships and linkages with these institutions. In this context NEPAD is a good example. Although it is not integrally linked to the AU, and it seems to have become a completely independent institution with support from the Breton Woods Institutions, it is clear that it shares many of the same objectives as the AU.\footnote{Ibid.} ‘Both the AU and NEPAD are charged with the articulation of African aspirations for integration both within the continent and on a global level and the pursuit of economic development within the continent.’\footnote{Ibid.} 

Originally NEPAD was not perceived as a program of the AU and was instead viewed as a separate initiative.\footnote{Ibid.} However, with the creation of the AU, NEPAD has been categorised as a project for the realisation of the AU’s goals.\footnote{Ibid.} But the mandate of the AU to oversee activities of NEPAD remains unclear and attempts to regulate the latter’s activities may be met with hostility or simply ignored.\footnote{Ibid.} In this context, Professor Maria Nzomo suggests ‘[…] that the AU should take on ownership of NEPAD so that the latter can serve as an economic framework for implementing AU objectives rather than working at cross-purposes.’\footnote{Ibid.} Moreover, any association of independent states can only function if all its members have a sense of belonging. None should feel left out, as was the case with East and Central African Countries that were not consulted when Nigerian, South African, Senegalese, and Algerian

\footnote{Ngamau, Renee, The Role of Nepad In African Economic Regulation and Integration, Law and Business Review of the Americas, Summer 2004, p. 516}
presidents met leaders of the G–8 nations to seek support for NEPAD in June 27, 2002.\textsuperscript{456} Not a single East African State was on its steering committee.\textsuperscript{457}

The AU should strengthen its relationship with the UN and other international organisations. ‘The UN Security Council currently spends about half of its time dealing with Africa.’\textsuperscript{458} Other UN Organisations such as UNDP, UNICEF, UNCHR, WHO and FAO are also, along with financial institutions such as the World Bank, supporting Africa.\textsuperscript{459} They have taken the lead on issues such as poverty reduction strategies.\textsuperscript{460} Hence, the AU will need to identify ways of working more effectively with these institutions.

Europe, like Africa, shows major differences in the lifestyle and cultures of its people. As the European Union dismantles geographical barriers for the free movement of people and goods, others are taking their place. Fearing floods of immigrants from the East taking jobs from locals and overwhelming social services, governments across the continent have hastily erected restrictions against the incoming members of their European family. Germany and France, among others, have barred such workers from seeking jobs for periods ranging from three to seven years.\textsuperscript{461} Despite these national impulses, European countries share more cultural similarities than African countries. At the very least, they have far more experience negotiating the tension between sovereignty and integration. Therefore, contrary to the European Union, the African Union should remain a multi-layered organisation in which different countries adopt different levels of political integration and experiment with different economic models. If the African Union were preserved as an overarching framework, it could actually benefit from such diversity.

Besides the EU, Africa has other potential models to follow such as the Mercado Comun del Sur (Mercosur) in Latin America and the Association of South East Asian Nations (ASEAN). The Mercosur is focused on sub-regional economic integration and was created by Argentina,
Brazil, Paraguay and Uruguay in March 1991 with the signing of the Treaty of Asuncion.\textsuperscript{462} The Treaty of Asuncion has 24 articles with a strong inter-governmental component, which gave Mercosur international personality.\textsuperscript{463} It was set up to create a common market / customs union between the participating countries on the basis of various forms of economic co-operation and thus opening up a window of opportunity for Latin American countries to have independent foreign economic policies.\textsuperscript{464} The Argentinean and Brazilian governments describe Mercosur as a “strategic alliance”, and Mercosur has become “extremely important to Brazil’s overall economic and foreign policy goals and the countries in the region are increasingly committed to developing a specifically South American international policy.\textsuperscript{465} In contrast to the EU, Mercosur does not apply the principle of supremacy of EC law and is therefore not an independent legal order, supreme over the national legal systems.

Another example is ASEAN, which has sought sub-regional integration and a rather different path than the EU. This association was established on 8 August 1967 in Bangkok by the five original member countries, namely, Indonesia, Malaysia, the Philippines, Singapore and Thailand.\textsuperscript{466} Its fundamental objectives are to accelerate economic growth, social progress and cultural development in the region. One of the guiding principles is to respect the independence, sovereignty and national identity of all nations. It also seeks to liberalise trade and investment and to pursue regional economic integration through the development of a Trans-ASEAN transportation network consisting of major inter-state highways and airways networks, principal ports and sea lanes for maritime traffic, inland waterway transport and major civil aviation links.\textsuperscript{467} Thus, “[n]ational sovereignty and non-interference are the twin pillars of ASEAN integration”.\textsuperscript{468} ASEAN regionalism covers the creation of a common value and basing decision making on consultation and consensus rather than building supra-national structures.\textsuperscript{469} Furthermore, ASEAN lacks a supra-national decision-making or law-making

\begin{itemize}
  \item Lay Hong Tan, Will ASEAN Economic Integration Progress beyond a Free Trade Area?, International & Comparative Law Quarterly, October 2004, Volume 53, p. 948
\end{itemize}
organ for legislating community law, or for the enforcement of any ASEAN protocol or the resolution of disputes.\textsuperscript{470}

The institutional systems of ASEAN and Mercosur are far more limited than the mechanisms established in Europe, resting mostly on the personal interaction of heads of states and senior government officials from the member states. So what would be the preferred role model for the African Union? The answer could be a regional union with a strong enforcement mechanism based on governmental co-operation rather than on regional integration. While on paper the AU resembles the EU in many ways, it could be more appropriate for it to follow the Mercosur / ASEAN model, since they are based on governments whose immediate priority is to preserve their national sovereignty, not to pool it. The relative immaturity of African national sovereignty makes this an enticing model.

Total economic integration means unification of monetary, fiscal, and certain other policies amongst members and setting up of supranational authorities whose decisions are binding on the member states.\textsuperscript{471} It can be doubted if the AU is ready for this EU - style economic union. A defining difference between the operational framework of the EU and the AU is that the AU has not created any supranational bodies with executive, legislative or judicial functions. In Africa, political constituencies and economic interests backing integration are relatively weak.\textsuperscript{472} The reason for this is the low quality of governance and low level of economic development.\textsuperscript{473} The most democratic countries, such as South Africa, are those who support integration and who are already actively promoting it by region wide investment strategies.\textsuperscript{474} This process needs to be accelerated.

\textsuperscript{470} Ibid.
\textsuperscript{473} Ibid.
\textsuperscript{474} Ibid.
In light of this analysis, the AU should focus on:

- a free trade area, where tariffs and quotas are eliminated between members who still retain national tariffs and quotas against third countries
- ultimately evolving from the free trade area, a customs union with no discrimination among members relating to product origin and with a common external tariff structure against non-members
- a common market that abolishes restrictions on the movement of persons
- an economic union that practices some degree of harmonisation of national economic policies in order to remove discrimination that results from disparity in these policies

Another reason why Africa faces greater challenges than the EU is the fact the EU has only 25 member countries while the AU has 53 nations loaded with complicated problems and security needs. While the EU was formed after the countries of Western Europe had made peace following World War II, the AU has been created during a period when some countries are still fighting (Rwanda and the Democratic Republic of Congo) each-other or are experiencing protracted civil wars (Cote d’Ivoire and Sudan).

The AU’s Security Council will play a crucial role in the future in order to sustain peace on the continent since it has the authority to send troops to stop war crimes and genocide. In this context, South Africa has and will continue to play a major role in the conflicts in Sudan and Cote d’Ivoire. Of course it cannot police the whole continent. Other counties will have to follow this role model instead of intervening in each other’s conflicts for selfish reasons such as the Rwandan, Ugandan and Zimbabwean troops exploiting Congo in lieu of pacifying it.

A look at all the conflicts on the continent shows that this will not be easy to deal with for the AU. These challenges could ultimately threaten what most agree is its central goal: Peace and stability in Africa.

477 Ibid.
### Annex I

<table>
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<tr>
<th>Union name</th>
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<th>African Union (AU)</th>
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<td>53 countries</td>
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<td>US$1.515 trillion (year 2003)</td>
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<td>Each member state has its own currency.</td>
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### Source:
Annex II

The following steps under the banner of the OAU paved the way for the establishment of the AU:¹

- Lagos Plan of Action (LPA) and the Final Act of Lagos (1980), incorporating programmes and strategies for self reliant development and cooperation among African countries.


- OAU Declaration on the Political and Socio – Economic Situation in Africa.


- The Constitutive Act of the African Union was adopted in 2000 at the Lomo Summit (Togo) and entered into force in 2001.

¹ [http://www.african-union.org](http://www.african-union.org), accessed December 2, 2004
Annex III

Summary of the Sirte Declaration:¹

Fourth Extraordinary Session of the Assembly of Heads of State and Government,
8-9 September 1999,
Sirte, Libya

➢ Effectively addressing the new social, political and economic realities in Africa and the world;

➢ Fulfilling the peoples' aspirations for greater unity in conforming with the objectives of the OAU Charter and the Treaty Establishing the African Economic Community;

➢ Revitalising the Continental Organisation to play a more active role in addressing the needs of the people;

➢ Eliminating the scourge of conflicts;

➢ Meeting global challenges; and

➢ Harnessing the human and natural resources of the continent to improve living conditions.

To achieve these aims Summit, inter alia, decided to:
Establish an African Union in conformity with the ultimate objectives of the Charter of the Continental Organisation and the provisions of the Treaty establishing the African Economic Community.

Annex IV

Objectives of the AU according to Article 3 of the Constitutive Act:

➢ To achieve greater unity and solidarity between the African countries and the peoples of Africa;

➢ To defend the sovereignty, territorial integrity and independence of its Member States;

➢ To accelerate the political and socio-economic integration of the continent;

➢ To promote and defend African common positions on issues of interest to the continent and its peoples;

➢ To encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;

➢ To promote peace, security, and stability on the continent;

➢ To promote democratic principles and institutions, popular participation and good governance;

➢ To promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;

➢ To establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;

➢ To promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

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1 [www.african-union.org](http://www.african-union.org), accessed December 2, 2004
➢ To promote co-operation in all fields of human activity to raise the living standards of African peoples;

➢ To coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;

➢ To advance the development of the continent by promoting research in all fields, in particular in science and technology;

➢ To work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.
Annex V

Article 3 of the Treaty of the European Community:

1. For the purpose set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

   (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
   (b) a common commercial policy;
   (c) an internal market characterised by the abolition, as between Member States, of obstacles to free movement of goods, persons, services and capital;
   (d) measures concerning the entry and movement of persons as provided for in Title IV;
   (e) a common policy in the sphere of agriculture and fisheries;
   (f) a common policy in the sphere of transport;
   (g) a system ensuring that competition in the internal market is not distorted;
   (h) the approximation of the laws of Member States to the extend required for the functioning of the common market;
   (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
   (j) a policy in the social sphere comprising a European Social Fund;
   (k) the strengthening of economic and social cohesion;
   (l) a policy in the sphere of environment;
   (m) the strengthening of the competitiveness of Community industry
   (n) the promotion of research and technological development;
   (o) encouragement for the establishment and development of trans – European networks;
   (p) a contribution to the attainment of a high level of health protection;
   (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
   (r) a policy in the sphere of development cooperation;

the association of the overseas countries and territories and in order to increase trade and promote jointly economic and social development;

a contribution to the strengthening of consumer protection;

measures in the sphere of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.
Annex VI

List of the Specialized Technical Committees:¹

1) The Committee on Rural Economy and Agricultural Matters;

2) The Committee on Monetary and Financial Affairs;

3) The Committee on Trade, Customs and Immigration Matters;


6) The Committee on Transport, Communications and Tourism;

7) The Committee on Health, Labour and Social Affairs; and

8) The Committee on Education, Culture and Human Resources.

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IV. Cases


