

## A Normative Appraisal of the African Union's Membership Admission Rules

By Babatunde Fagbayibo\*

**Abstract:** The aim of this article is to place the African Union's (AU) membership admission approach within the context of the aspiration to deepen regional integration efforts in Africa. Put in more specific terms, to what extent should values such as democratic principles, good governance, rule of law, and free and fair elections impact on admission of members into institutional activities? Despite the fact that the AU Constitutive Act espouses these values in Articles 3 and 4, the AU has rather prioritised the lax requirements of geography, simple majority vote, and the ratification of its Act as conditions for membership. It is argued that these lax membership rules contradict the supranational aspiration of the organisation, and rather best suits an intergovernmental entity. In addressing this, the article recommends the need to include strict conditions for membership in the AU Constitutive Act, and the enhancement of the role of AU organs in regulating initiatives that promote democratic practises in member states.

\*\*\*

### A. Background

When the Organisation of African Unity (OAU) was transformed to the African Union (AU) in 2000, the issue of membership presented no serious challenge. There was an easy pass for the 53 member states of the OAU as they were all automatically admitted into the AU.<sup>1</sup> The three membership admission requirements, as contained in Article 29 of the AU

\* Associate Professor of Law, Department of Public, Constitutional and International Law, College of Law, University of South Africa, fagbabo@unisa.ac.za. This article is part of the author's research project entitled "Building continental supranationalism in Africa", funded by the South African National Research Foundation (NRF) through its Competitive Programme for Rated Researchers (CPRR) Grant.

1 Although not expressly stated, one argument in favour of this automatic admission is that the 53 member states were the original members of the AU as at 2000. While the distinction between "original" and "normal/new" members has no remarkable legal significance under international law, practise shows that member states at the time of the inception of a new organisation sometimes enjoy benefits such as the determination of who subsequently becomes a member of the organisation, and the exclusion from admission procedures. See e.g. *Ian Klabbers, An Introduction to International Institutional Law*, Cambridge 2009, pp. 94-95. See also *Konstantinos Magliveras, Membership in International Organizations*, in: Ian Klabbers / Asa Wallendahl (eds.), *Research Handbook on the Law of International Organizations*, Cheltenham 2011, pp. 85-86.

Constitutive Act, for subsequent members similarly provided no major scrutiny or due diligence approach. It is instructive to note that as at 2000, the Freedom House's "Freedom in the World" noted that out of 53 African countries, only nine were free (17%), 25 were partly free (47%), and 19 were not free (36%).<sup>2</sup> This factor clearly played no role in membership consideration at that time.

With regards to the three entry requirements into the AU, the first, which is the most important element, is that the applicant member state must be geographically located on the African continent.<sup>3</sup> The geographical criterion has ensured a reluctance to consider Haiti's application for full membership of the AU.<sup>4</sup> The second is that a simple majority of member states support the application.<sup>5</sup> The third mandates that the new member state signs and ratifies the AU Constitutive Act.<sup>6</sup> While the first and third requirements are the substantive elements, requirement two is procedural. Although the second requirement opens up the possibility of anchoring admission to the ability and readiness to implement democratic principles of the AU, little attempt has been done to build on this. The values and principles contained in Articles 3 and 4 of the AU Constitutive Act, and other treaties and protocols highlighting shared norms and values of democracy, good governance and fundamental rights have been largely absent in the calculus of membership admission. The admissions of South Sudan in 2011 and Morocco in 2017<sup>7</sup> to the AU were exercises that mainly rested on the geographical consideration.

- 2 Freedom House, *Freedom in the World 2001*, <https://freedomhouse.org/report/freedom-world/freedom-world-2001> (last accessed on 10 February 2017).
- 3 Article 29 (1) of the AU Constitutive Act. This position is the reaffirmation of the membership criterion under Article IV of the OAU Charter (1963).
- 4 In pursuant of the recognition of the African Diaspora as the "sixth region" of the AU, Haiti was granted an Observer Status in February 2012, and subsequently applied to become a full member in the same year. In May 2016, there were speculations in the media regarding the possibility of Haiti joining the AU as its 55<sup>th</sup> member state. The AU later came out to debunk the speculations regarding Haiti's full membership status, maintaining that only countries that are geographically located within Africa are allowed to become full members of the organisation. See Haiti will not be admitted as African Union Member State at next Summit in Kigali, Rwanda available online at <http://www.wa.int/web/en/pressreleases/20160518-0> (last accessed on 3 February 2017). For a detailed analysis of the politics of the relationship between African Diaspora and institutional Pan-Africanism, see e.g. *Rita Edozie*, *The Sixth Zone: The African Diaspora and the African Union's Global Era Pan Africanism*, *Journal of African American Studies* 16 (2012), pp. 268-299.
- 5 Article 29 (2) of the AU Constitutive Act.
- 6 Article 27 of the AU Constitutive Act. See also Article 9 (c) of the AU Constitutive Act.
- 7 Although Morocco was not subjected to any stringent admission criteria, 15 AU member states did not vote in support of its admission. One major reason for the objection was because of Morocco's continued occupation of about 75% of Western Sahara's territory, an issue that has for years been condemned by the OAU and then the AU. It was reported that South Africa had moved for a discussion of the independence of Western Sahara as a means of providing preconditions for Morocco's admission but the motion was defeated by the 39 countries in support of Morocco's admission. See

The seeming consensus on the criteria of admission of membership of the AU rests on a number of politico-normative positions. The first is the overarching ideology of Pan-Africanism, especially as it feeds into the design of transnational institutional projects. Within the context of this ideological framework, inclusivity is prioritised over forms of exclusive arrangements.<sup>8</sup> Even in situations where a group of member states have organised themselves to accomplish integration goals through sub-regional entities, the overriding aim is to eventually streamline those activities into a continental framework.<sup>9</sup> The second is the assumption, at least from the perspective of transnational political elites, that geography presupposes the readiness of new member states to implement organisational values and objectives. The third is that the enormity of security, governance, socio-economic, and human rights challenges facing the continent pushes the issue of membership criteria to the bottom of the priority list. Fourth is the lack of any serious incentive to put in place strict conditions for membership. The rampant violation of democratic values in many of the AU member states, low intra-African trade, and the lack of developed physical and human resources necessary for implementing integration policies are all structural deficiencies that limit the prospect of crafting sustainable strict conditions for membership.

The aim of this article is to place the AU's membership admission approach within the context of the aspiration to deepen regional integration efforts in Africa. Put in more specific terms, to what extent should values such as democratic principles, good governance, rule of law, and free and fair elections impact on admission of members into institutional activities? It is important to state from the outset that the position of this article is that unregulated membership fundamentally undercuts the seriousness of advancing and deepening continental integration efforts in Africa. The AU's lax membership rule is at variance with the supranational aspiration of the organisation, and rather best suits an intergovernmental entity. However, this article does not advocate for the dismantling of the current AU so as to allow for fresh application by all the 55 member states on the basis of newly formulated strict requirements.<sup>10</sup> Such position is unrealistic as it ignores the *Realpolitik* underlining

*Carien du Plessis*, SA is the Biggest Loser at the AU, <http://www.news24.com/SouthAfrica/News/sa-is-the-biggest-loser-at-au-20170204> (last accessed on 6 February 2017). *Pham*, however, noted that as on 31 December, 2009, only 22 of the 52 AU member states formally recognised Western Sahara. Furthermore, 15 AU member states had either cancelled or suspended the recognition previously extended to Western Sahara. See *Peter Pham*, Not Another Failed State: Towards a Realistic Solution in the Western Sahara, *The Journal of the Middle East and Africa* 1 (2010), p. 10.

- 8 See e.g. *Babatunde Fagbayibo*, Flexibility Arrangements in the African Union: A Way Out of the Integration Conundrum?, *Africa Review* 8 (2016), pp. 161-162.
- 9 Article 3 (1) of the AU Constitutive Act mandates the AU "to coordinate and harmonise the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union". Not much has been done to achieve this fundamental objective since the trigger Protocol is yet to become operational.
- 10 Some writers have advocated for the complete dismantling and/or reconstitution of the current AU. See, e.g. *George Ayittey*, African Leaders Should Admit that a Caricature of the European Union Can't Possibly Work for Africa, <http://foreignpolicy.com/2016/07/10/disband-the-african-union> (last accessed on 3 February 2017). *William Gumedé*, It's Time for a New African Union, <http://gl>

the establishment of transnational institutions in Africa.<sup>11</sup> Rather, it attempts to construct a normative policy position that balances current reality with aspirations by indicating the extent to which Article 29 can be better enhanced to facilitate the deepening of regional integration in Africa. The article begins with a brief discussion of the idea of membership admission to transnational bodies. It then moves to the discussion of some of the challenges of not anchoring membership admission to normative shared values. The last section deals with some of the fundamental issues that should guide the re-evaluation of membership criteria in the AU.

## B. Conceptualising membership admission rules in transnational institutions

It is a trite position under international law that the constitutive instruments of transnational institutions determine the nature and scope of membership admission.<sup>12</sup> While there is no consensus on the normative content,<sup>13</sup> one common thread is that organisational values and aspirations typically inform the design of admission requirements. In other words, admission requirements provide the prism for assessing the direction the organisation intends to pursue. In conceptualising the requirements for membership, three interrelated features will be considered: geographical, conditionality and procedural.

In terms of the geographical feature, the main issue relates to the extent to which membership admission links territorial space to organisational aspirations.<sup>14</sup> In this regard, functionality of the organisation is built on its universal or regional or identity/cultural membership composition. For example, the United Nations (UN) Charter, and the Constitutions of the International Labour Organisation (ILO), World Health Organisation (WHO), and the Agriculture Organisation (FAO) are all universal as they open up membership to all countries.<sup>15</sup> Other constitutive instruments expressly limit membership to a specific geographical area. The references to “any European state” by Article 49 of the Treaty of the European

obalpublicsquare.blogs.cnn.com/2011/07/05/its-time-for-a-new-african-union/ (last accessed on 3 February 2017). Babatunde Fagbayibo, Rethinking the African Integration Process: A Critical Politico-legal Perspective on Building a Democratic African Union, *South African Yearbook of International Law* 36 (2011), pp. 220-225.

11 Fagbayibo, note 10, pp. 219-220. See also, Edozie, note 4, p. 298.

12 Klabbers, note 1, p. 94.

13 Linking admission to the recognition of statehood, Hillgruber argued that Article 4 (1) of the UN Charter provides the minimum international law standards: the ability and willingness to carry out international obligations. He noted that international organisations such as the EU have built on these minimum requirements by providing for more stringent criteria. *Christian Hillgruber*, The Admission of New States to the International Community, *European Journal of International Law* 9 (1998), pp. 499-501.

14 Magliveras, note 1, p. 86.

15 See Article 4 (1) of the UN Charter; Article 1 of the ILO Constitution; Article 3 of the WHO Constitution; and Article II of the FAO Constitution.

Union (TEU),<sup>16</sup> “any African state” by Article 29 (1) of the AU Constitutive Act,<sup>17</sup> “location in the recognised geographical region of Southeast Asia” by Article 6 (2) (a) of the Charter of the Association of Southeast Asian Nations (ASEAN), and “any independent American state” by Article 6 of the Charter of the Organisation of American States (OAS) all indicate the geographical delimitation of membership admission. Other organisations such as the League of Arab States and the Organisation of Islamic Cooperation (OIC) base membership on a specific identity or cultural/religious similarity.<sup>18</sup>

The conditionality feature builds on the geographical element as it provides additional qualifications or steps an applicant state must fulfil in order to be accepted into the organisation.<sup>19</sup> Kelly noted that membership rules will determine whether an organisation operates as a “convoy” or a “club”.<sup>20</sup> “Convoy” denotes the lack of conditions for admission into a transnational institution while “club” signifies strict admission rules for aspiring members.<sup>21</sup> In the context of regional integration, the idea of strict membership is based on the understanding that it enhances the certainty of cooperative behaviour and compliance to norms by member states.<sup>22</sup> The EU is a typical “club” organisation as aspiring members are expected to fulfil the three conditions specified in the Copenhagen criteria (1993): strict adherence to the principles of democracy (political criteria); a functioning market economy (economic criteria); and an effective public administration (institutional criteria).<sup>23</sup>

The procedural feature speaks to the process to be followed in admitting new members.<sup>24</sup> In essence, it implies the stipulated voting procedure member states adopt once the geographical and conditional features have been objectively assessed. As Magliveras observed, the admission procedure adopted by transnational institutions generally follows three patterns.<sup>25</sup> The first is the admission process that involves only one organ or all exist-

16 The EU had rejected Morocco’s admission application in 1986 on the ground that it was located outside of Europe’s geographical zone. See e.g. *Iver Neumann*, *European Identity, EU Expansion, and the Integration/Exclusion Nexus, Alternatives* 23 (1998), pp. 400–401.

17 See note 4 on Haiti’s application to become a full member of the AU.

18 Article 1 of the Statutes of the League of Arab States restricts membership to “any independent Arab State”. Article 3 (2) of the OIC Charter restricts membership to “any state...having Muslim majority”.

19 *Magliveras*, note 1, p. 86.

20 *Judith Kelly*, *The Role of Membership Rules in Regional Organizations*, Asian Development Bank (ADB) Working Paper Series on Regional Economic Integration 53 (2010), <https://www.adb.org/sites/default/files/publication/28527/wp53-membership-rules.pdf> (last accessed on 6 February 2017).

21 *Kelly*, note 20, p. 1.

22 *Kelly*, note 20, p. 4. See also *Phillip Pettit*, *Institutional Design and Rational Choice*, in: Robert Goodin (ed.), *The Theory of Institutional Design*, Cambridge 2006, pp. 77–78.

23 EUR-Lex, *Accession criteria (Copenhagen criteria)*, [http://eur-lex.europa.eu/summary/glossary/accession\\_criteria\\_copenhagen.html](http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html) (last accessed on 6 February 2017).

24 *Magliveras*, note 1, p. 86.

25 *Magliveras*, note 1, p. 90.

ing members if decisions are reached by all members directly (e.g. the AU, where the AU Assembly votes on admission).<sup>26</sup> The second is where two or more organs have to make the decision, of which at least one organ only has recommendatory powers (e.g. the UN, where the General Assembly recommends admission and the Security Council has the final veto power).<sup>27</sup> The third is more complex as it requires not only the consent of one or more organs but also stipulates that the new member(s) conclude(s) a treaty of accession (e.g. the EU).<sup>28</sup>

The procedural feature remains the most political of the elements of admission. The reason behind this is that even if an aspiring member objectively meets all the stated requirements (e.g. geography and strict conditions for admission), membership can still be refused by the majority of member states or an influential member state.<sup>29</sup> The stipulation that subjects admission to a majority vote or the exercise of veto allows member states to exercise their political and economic preferences in deciding whether or not to admit new members. Twice in the 1960s, 1963 and 1967, the French president Charles de Gaulle unilaterally vetoed Britain's entry into the European Economic Community (EEC). This was mainly seen as a move "to prevent any loss of French leadership in the EEC and to defend the institution from exposure to American influence via the British."<sup>30</sup> In the 1940s and 1950s, the UN Security Council largely conducted the admission of new member states through the prism of the Cold War.<sup>31</sup> Divided along the lines of Western and Eastern Blocs, each of the sides used their veto powers to block the admission of member states that were seen as belonging to the other side.<sup>32</sup> Another example was the politics that surrounded Venezuela's admission into the Southern Common Market (Mercosur). Venezuela had applied for full admission into Mercosur in 2006, having being an associate member of the body since 2004.<sup>33</sup> The Brazilian and Paraguayan parliaments, however, delayed ratification for a number of years. In Brazil's case, the parliament decided against ratification because the then president of Venezuela, Hugo Chavez, had referred to the Brazilian Senate as a "parrot that just mimics Washington".<sup>34</sup>

26 *Magliveras*, note 1, p. 90.

27 *Magliveras*, note 1, p. 90.

28 *Magliveras*, note 1, p. 90.

29 *Magliveras*, note 1, p. 86. See also *Klabbers*, note 1, p. 96.

30 *James Ellison*, *Separated by the Atlantic: The British and de Gaulle, 1958-1967, Diplomacy & Statecraft* 17 (2006), p. 854.

31 *Magliveras*, note 1, p. 87.

32 *Magliveras*, note 1, p. 87.

33 *Magliveras*, note 1, p. 89.

34 *Kristin Brown*, *Venezuela Joins Mercosur: The Impact felt Around the Americas*, *Law and Business Review of the Americas* 16 (2010), p.91. *Kelly* remarked that another reason behind the hesitation to admit Venezuela was its philosophical opposition to free trade and its insistence on nationalisation of the economy. See *Kelly*, note 20, p. 7. Venezuela was, however, officially admitted as a full member to Mercosur in 2012.

The interplay between law and politics is one that has shaped and continues to shape the framing of membership rules in transnational institutions. In exercising their powers to determine admission, member states have not always prioritised law over politics. The fact that objective requirements still have to be subjected to ratification by member states lends the admission process to political considerations. The legality of this position is one that is yet to be settled under international law.<sup>35</sup> As shown in the preceding paragraph, national and regional dynamics are never absent from the consideration of the substantive elements of admission and in some cases even play an overbearing role.

### C. A normative assessment of the challenges of lax membership rules to continental integration

#### *1. The non-consideration of stipulated shared values*

The substantive elements of admission in the AU, as contained in Articles 29 (1) and 27 of the Constitutive Act, tilt the organisation towards what Kelly referred to as a “convoy” arrangement.<sup>36</sup> The AU’s soft admission criteria contradict its supranational aspirations as it reinforces intergovernmental tendencies. One of the clearest indications is the inability to link values espoused in Articles 3 and 4 of the Constitutive Act, and other instruments reinforcing these values, with both the substantive and procedural elements for admission. As already indicated, when member states adopted the Constitutive Act in 2000, only nine out of the 53 states were considered as “free” in the democratic sense.<sup>37</sup> This was the first misstep mainly because it limited the consideration of democratic factors not only as a precondition for entrance but also as an organisational principle. This point is one of the main reasons why the punitive measures stipulated in Articles 23 and 30 of the Constitutive Act have done very little to entrench democratic practises in the AU. Although the AU has suspended member states in cases where there have been military coups<sup>38</sup> or where an incumbent refused to step down after losing an election,<sup>39</sup> there has been no suspension in cases where incumbents have clearly manipulated electoral rules to remain in power. Similarly,

35 In 1948, the International Court of Justice (ICJ) in its first Advisory Opinion on “Conditions of Admission of a State to Membership in the United Nations: Article 4 of the Charter”, failed to provide a definitive position on this matter. While it acknowledged on one hand that political considerations cannot be substituted for stipulated conditions for admission (pp. 62-64), it, on the other hand, noted that every application should be examined on its own merits, allowing member states to exercise their judgment with complete liberty (p. 65). This position more or less affirmed the underlining political currents that inform the exercise of veto power by the Security Council, available online at <http://www.icj-cij.org/docket/files/3/1821.pdf> (last accessed on 8 February 2017).

36 Kelly, note 20, p. 1.

37 Freedom House, note 2.

38 Madagascar (2002), Mauritania (2005), Guinea (2008), Egypt (2013), and the Central African Republic (2013).

39 Cote d’Ivoire (2010).

the AU is yet to suspend any member state that has engaged in proven acts of suppression of civilians or activated its Article 4 (h) to avert humanitarian crises.<sup>40</sup> Although Article 23 (5) of the African Charter of Democracy, Election and Governance (ACDEG) regards this as an “unconstitutional change of government”, the lack of specifics on time frames makes this provision impossible to implement.<sup>41</sup> In other words, there is no threshold for determining the point at which the revision or amendment of the constitution becomes an “unconstitutional change of government”.<sup>42</sup> The AU can learn from the Economic Community for West African States (ECOWAS) in this respect. In Article 2 (1) of the ECOWAS Protocol on Democracy and Good Governance, it is stipulated that “no substantial modification shall be made to the electoral law in the last six months before the election, except with the consent of a majority of Political actors”.

While it could be argued that the 53 member states were original member states in 2000, admission requirements for subsequent member states could still have been crafted by including strict conditions in Articles 29 and 27. In addition, member states could also have tightened post-admission rules especially as they relate to participation in integrative arrangements on security, trade, immigration and governance. The absence of this has ensured that in the two post-inception admission cases, the AU largely relegated the role of democratic values in shaping admission matters to the bottom of the priority list. The normative organs responsible for providing the AU with early warning and situational assessments such as the AU Peace and Security Council (PSC), the African Peer Review Mechanism (APRM), the Pan-African Parliament (PAP), the African Commission on Human and Peoples' Rights (AfCHPR) are expressly excluded from admission issues.<sup>43</sup> Another issue

- 40 Article 4 (h) of the Constitutive Act allows the AU to intervene in any member state in order to prevent crimes against humanity, war crimes, genocide, and a yet to be adopted 2003 amendment, “a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council”. Since its inception, the AU has never invoked this provision.
- 41 However, Article 10 (2) of the ACDEG stipulates that “State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum”.
- 42 In 2015, the following leaders elongated their terms of office through controversial constitutional amendments: Paul Kagame (Rwanda), Pierre Nkurunziza (Burundi), and Denis Sassou Nguesso (Congo).
- 43 The PSC is the institution at the heart of AU's conflict management strategy. Made up of 15 member states, three member states from each of Africa's five sub-regions, it has the powers to authorise the mounting and deployment of peace missions, approve modalities for intervention, institute sanctions, and recommend intervention under Article 4 (h) of the AU Constitutive Act (see Article 7 (1) of the PSC Protocol). As part of its mandate, the PSC has the power to request other AU organs to carry out fact-finding missions in order to assess human rights violations (see note 55 below). The APRM was established in 2003 as a voluntary, peer review mechanism for assessing the state of governance in participating AU member states. The APRM is currently made up of 35 AU member states, and 20 member states have completed the APRM Country Review Mission thus far. The APRM reviews four standards in participating member states: democracy and political governance; economic governance; socio-economic development; and corporate governance.

is that the lack of pre-entry processes ensures that there is no opportunity to integrate assessments done by the aforementioned agencies, and also associated agencies such as the United Nations Economic Commission for Africa (UNECA), and the African Development Bank (AfDB) as organisational guidelines for shaping the behaviour and understanding the peculiar challenges of member states.<sup>44</sup>

In the case of South Sudan in 2011, it took the AU a mere 18 days from the independence of South Sudan (9<sup>th</sup> of July 2011) to its admission into the AU (27<sup>th</sup> of July 2011).<sup>45</sup> The AU prioritised geography rather than properly examining the multitudinous problems facing the new state and how it directly hampers its ability to observe the basic values of the AU. Not only did the new state lack the most rudimentary administrative capacity to comply with AU norms on human rights and democracy, but the security situation even pointed towards a possible civil war.<sup>46</sup> In less than six years after its independence, South

The APRM process is the most comprehensive review undertaken under the AU and has over the years provided robust situational assessments of countries under review. See e.g. African Peer Review Mechanism, Strategic Plan 2016-2020, <http://aprm-au.org/view-publication?nxtpbdi=31&pubId=190> (last accessed on 16 February 2017). Within the context of its mandate to promote and protect good governance and fundamental rights, the PAP has the power to engage in fact-finding missions to member states. To this effect, PAP has undertaken fact-finding missions to countries such as Central African Republic, Mali, Libya, Tunisia, Western Sahara, Zimbabwe, Kenya and Cote d'Ivoire. As part of its mandate to promote and protect human rights in Africa (Article 45 and 46 of the ACHPR), the African Commission has engaged in a number of fact-finding missions, either initiated by it or mandated by other organs of the AU. These include Senegal (1992), Mauritania (1996), Zimbabwe (2002), Sudan (2004), Mali (2013), and Burundi (2013).

- 44 Through its “Country Profile” initiative, UNECA assists member countries in achieving effective strategic planning. The assessment mainly focuses on policy analysis, move towards regional integration and economic transformation. Available online at <http://www.uneca.org/country-profiles-2016> (last accessed on 15 February 2017). The AfDB has a number of review mechanisms. These include the Country Governance Rating (CGR), Country Policy and Institutional Assessment (CPIA) and Country Performance Assessment (CPA). For example, the CPIA has five clusters of assessment: economic management; structural policies; policies for social inclusion/equity; governance; and infrastructure and regional integration. See online at <https://www.afdb.org/en/documents/document/2004-2013-country-policy-and-institutional-assessment-cpia-47411/> (last accessed on 16 February 2017).
- 45 In contrast, South Sudan had made an application to join the East African Community (EAC) in 2011, but was only admitted in 2016. The main reason was that it lacked the necessary legal and institutional mechanisms to fulfil EAC obligations. See e.g. *Christine Mungai*, S.Sudan joins the EAC, despite mass atrocities: Why this is part of a ‘War of Definitions’ – and about big money, <http://mgafrica.com/article/2016-03-03-south-sudan-joins-the-east-african-community-why-this-is-good-and-confusing> (last accessed on 15 February 2017).
- 46 South Sudan has a population of 8.26 million people combines the size of Uganda, Kenya, Burundi, and Rwanda (644,329 sq. km). As at the time of its independence, the entire country had only about 50 kilometres of paved roads, and the highest infant mortality rates and the lowest education indicators in the world. In addition to the many violent conflicts around the country, 42% of civil servants had no more than primary school education and the bloated security sector consumed one-quarter of the total budget. See e.g. UNDP in South Sudan, About South Sudan, [http://www.ss.undp.org/content/south\\_sudan/en/home/countryinfo.html](http://www.ss.undp.org/content/south_sudan/en/home/countryinfo.html) (last accessed on 15 February 2017).

Sudan has descended into a chaotic entity, with political elites turning the new state into one of Africa's most devastating theatres of war. According to the United Nations High Commission on Refugees (UNHCR), about 1.5 million refugees have fled South Sudan, and more than 2.1 million people are internally displaced.<sup>47</sup>

Morocco's admission into AU, having exited the OAU in 1984 as a result of the organisation's recognition of Western Sahara, is another example. Morocco officially submitted its application for admission to the AU on the 23<sup>rd</sup> of September 2016, and was fully admitted on the 30<sup>th</sup> of January 2017, meaning that the entire "consideration process" was done within four months and seven days. Similar to the case of South Sudan, no assessment was conducted within these four months to see the extent to which Morocco is able to effectively comply with the values of the AU, and its commitment to processes such as the AU Agenda 2063, especially as it relates to implementation mechanisms. Another omission was the very important Western Sahara question. Although Morocco was able to exert its considerable diplomatic force to get 39 AU member states to vote in favour of its admission, the issue remains that the AU officially recognises Western Sahara's statehood and objects to Morocco's occupation of its territory.<sup>48</sup> However, McNamee *et al* averred that Morocco's admission was an affirmation of the AU's lackadaisical approach to the Western Sahara question since 2002.<sup>49</sup> The move by South Africa, at the 28<sup>th</sup> AU Summit in January 2017, to force this point into the equation of Morocco's membership consideration, and in a way place commitment to AU values at the fore, was defeated.<sup>50</sup> Without a proper official assessment by the AU on Morocco's readiness to fulfil organisational obligations, much of the discussion around the political and economic benefits its admission will bring to the AU has largely been done within the realm of conjectures.<sup>51</sup>

47 Catherine Wachiaya, Number of refugees fleeing South Sudan tops 1.5 million, <http://www.unhcr.org/news/stories/2017/2/589dba9f4/uganda-shelters-thousands-15-million-refugees-south-sudan.html> (last accessed on 11 February 2017). In addressing the conflict in South Sudan, Mamdani has proposed an "African Union Trusteeship", composed of the members of the AU High Level Implementation Panel for Sudan and South Sudan, to be jointly mandated by the AU PSC and the UNSC. The panel should then be responsible for appointing a new transitional executive committee. *Mahmood Mamdani*, Can the African Union Save South Sudan from Genocide?, <https://www.nytimes.com/2017/01/08/opinion/can-african-union-save-south-sudan-from-genocide.html> (last accessed on 14 February 2017). See also *Mahmood Mamdani*, Who's to Blame in South Sudan?, <http://bostonreview.net/world/mahmood-mamdani-south-sudan-failed-transition> (last accessed on 14 February 2017).

48 See note 7.

49 Terrence McNamee / Greg Mills / Peter Pham, Morocco wrong-foots its African critics, <https://www.dailymaverick.co.za/article/2017-02-01-op-ed-morocco-wrong-foots-its-african-critics/#.WJ6-MVDRbqA> (last accessed on 1 February 2017). See also note 7.

50 See *du Plessis*, note 8. See also *Simon Allison*, Morocco's Big African Union win comes at the expense of Western Sahara and South Africa, <https://www.dailymaverick.co.za/article/2017-01-31-analysis-moroccos-big-african-union-win-comes-at-the-expense-of-western-sahara-and-south-africa/#.WJhiDVN96Uk> (last accessed on 31 January 2017).

51 See e.g. *Allison*, note 50. See also, *McNamee et al*, note 49.

## II. *The implications of unregulated membership*

The discussion above indicates a number of normative challenges for AU's drive towards deepened integration. First is that the unregulated membership eliminates the possibility of having a common approach to the understanding and implementation of normative rules. An example is the continued violation of the principles of electoral democracy across the continent. As Fombad observed, while there exist formal rules on multiparty democracy across the continent, the legal process of making the process acceptable and meaningful remains a major contention.<sup>52</sup> Post-election violence in Kenya (2008), Zimbabwe (2010), Cote d'Ivoire (2010), Burundi (2015), and Gabon (2016) all point to the wilful disregard of basic norms governing electoral rules by incumbents, especially as stipulated in the ACDEG.<sup>53</sup> The lack of convergent understanding of norms usually plays out in the following ways. One is that some member states rush to congratulate the "winner" of elections, and even attend inauguration ceremonies, in spite of reports showing widespread manipulations of electoral rules.<sup>54</sup> Another example is where a group of member states pushes for the ratification of electoral irregularities by advancing a "Government of National Unity" option, as in the cases of Zimbabwe (2008) and Kenya (2010). Where there have been regional interventions, such as Cote d'Ivoire (2010) and Gambia (2017), to correct unconstitutionality, the initiatives have been mostly driven by sub-regional organs. The recommendation of sanctions in situations of unconstitutionality has also not always enjoyed consensus support among member states. Examples are the refusal by Senegal and Libya to support the imposition of sanctions on Mauritania as a result of the coup in 2009, and the stance against sending troops to Burundi by the AU in 2016.<sup>55</sup>

Another problem that flows from lack of common understanding of democratic norms is the election of member states or incumbent presidents that have violated, or continue to violate, the sacrosanct principles into leadership positions in the AU. The elections of the

- 52 Charles Fombad, *Conceptualising a Framework for Inclusive, Fair and Robust Multiparty Democracy in Africa: The Constitutionalisation of the Rights of Political Parties*, *Verfassung und Recht in Übersee* 1 (2015), p. 24.
- 53 Articles 17-22 of the ACDEG affirm the centrality of democratic elections by providing a range of basic requirements for conducting of national elections in Africa. The role of the AUC, and PAP, in monitoring the national elections, and reporting on quality of such process, is stipulated in Articles 18-21.
- 54 Recent examples include Sudan (2015), Djibouti (2016), and Uganda (2016).
- 55 The AU had initially agreed to deploy 5,000 peace-keeping troops to put a stop to the onslaught by President Pierre Nkurunziza's government on protesting civilians. In a dramatic shift, the AU decided not to invoke its normative right to intervene in order to prevent crimes against humanity, war crimes and genocide by highlighting the need for more dialogue with the Burundian government. Some analysts viewed that the reason behind this was the fact that the AU Assembly remain divided on this position, and as such could not garner the required two-thirds vote for exercising this right. See e.g. *Simona Foltyn*, African Union shelves proposal to deploy troops to Burundi, 02 February 2016, available online at <http://www.dw.com/en/african-union-shelves-proposal-to-deploy-troops-to-burundi/a-19014899> (last accessed on 15 February 2017).

likes of Robert Mugabe of Zimbabwe and Teodoro Obiang Nguema of Equatorial Guinea as Chairmen of the AU are examples that show the inability to link democratic norms to institutional processes. Another example was the re-election of Burundi into the PSC for another two years at the 26<sup>th</sup> Summit of the AU in January 2016. This election was in spite of reports showing the involvement of President Pierre Nkurunziza in massive violation of human rights after the controversial July 2015 elections.<sup>56</sup> The fact that Burundi's case was on PSC's agenda, in particular the consideration on whether to send an AU troop to protect civilians from deadly attacks by government backed agents played no role in this consideration.

The disparate understanding of normative values further lends itself to delayed ratification and/or obstructionist tendencies to legal frameworks that undergird supranationalism.<sup>57</sup> There are three major examples in this regard. One such was the decision taken at the 12<sup>th</sup> AU Summit in January 2009 to transform the African Union Commission (AUC) to the AU Authority.<sup>58</sup> This idea was effectively abandoned as soon as Muammar Gaddafi, the major proponent of this move, died in 2011.<sup>59</sup> Without offering any cogent reason, member states reversed a plan that could have repositioned the AUC to play a more assertive role in implementing programmes on immigration, peace and security, international trade negotiations, and infrastructure development.<sup>60</sup> The second example is the continued refusal to

- 56 In April 2016, the PSC received the final report of the fact-finding mission of the African Commission on Human and Peoples' Rights to Burundi. See AU Peace and Security Council, Communiqué PSC/PR/COMM/2.(DXCV) 28 April 2016, <http://www.peaceau.org/en/article/the-595th-meeting-of-the-aupsc-on-the-report-of-the-african-commission-on-human-and-peoples-rights-achpr-on-its-fact-finding-mission-to-burundi> (last accessed on 15 February 2017). As the report highlighted, "Government security personnel and affiliated groups perpetrated wide range of violations. Not only that these violations were perpetrated repeatedly but also they overtime have become part and parcel of the response of security forces to the violent expressions of opposition to the government. The violations have thus been pervasive and systematic". One of its key recommendations is that the AU should deploy military observers and an international police unit to maintain peace and order in Burundi. Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-finding Mission to Burundi, 7-13 December 2015. [http://www.achpr.org/files/news/2016/05/d218/achpr\\_report\\_fact\\_finding\\_eng.pdf](http://www.achpr.org/files/news/2016/05/d218/achpr_report_fact_finding_eng.pdf) (last accessed on 15 February 2017).
- 57 For a detailed discussion of the problem of delayed or non-ratification of treaties by AU member states, see e.g. *Tiyanjana Maluwa*, Ratification of African Union Treaties by Member States: Law, Policy and Practise, *Melbourne Journal of International Law* 13 (2012), pp. 1-49.
- 58 African Union, Decision on the Special Session of the Assembly on the Union Government, Assembly/AU/Dec. 233 (XII) (2009), [https://www.au.int/web/sites/default/files/decisions/9559-assembly\\_en\\_1\\_3\\_february\\_2009\\_auc\\_twelfth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion.pdf](https://www.au.int/web/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf) (last accessed on 24 May 2017).
- 59 As Welz noted, the majority of member states and the AU had little regret about jettisoning the idea of reinforcing the AUC once Gaddafi exited the continental political space. See *Martin Welz*, A 'Culture of Conservatism': How and Why African Union Member States Obstruct the Deepening of the Integration, *Strategic Review for Southern Africa* 36 (2014), p. 12.
- 60 African Union, note 58.

transfer full legislative powers to PAP. While the PAP Protocol indicated that the advisory status will be up for review five years after its establishment in 2004, there has been no significant measure aimed at achieving this.<sup>61</sup> The most recent effort has been the adoption of an amended PAP Protocol in 2014, which merely granted PAP the right to “propose draft model laws”.<sup>62</sup> The simple fact is that a draft model law is merely recommendatory and has no binding effect. What this shows is that member states have rather engaged in a patronising act that does little to enhance the relevance of PAP. The third example is the delayed establishment of the General Affairs section of the African Court of Justice and Human Rights as a result of the lack of the required 15 ratifications of the Protocol since 2008.<sup>63</sup> The role of the General Affairs section in deepening continental integration cannot be understated as it is tasked with functions such as the interpretation of the Constitutive Act, disputes between states, and disputes arising from the interpretation of the functions and competencies of the organs of the AU.<sup>64</sup> Rather than speeding up the process of ensuring that the General Affairs section becomes functional, AU member states have decided to amend the unratified Protocol by adding a third section: the International Criminal Law section.<sup>65</sup> At the heart of the International Criminal Law section is the blanket immunity - from acts of genocide, war crimes and crimes against humanity - granted to heads of state or government or other senior government officials during their tenure of office.<sup>66</sup> This approach of prioritising immunity over impunity further reinforces the problematic delink between espoused values and expectations from member states.<sup>67</sup>

- 61 See Article 2 (3) Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (2001).
- 62 See Article 8 (1) Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament (2014). While this amendment to an amended and unratified Protocol is aimed at encouraging the mass withdrawal of AU member states from the International Criminal Court (ICC), as at 13 February 2017, no single member state has ratified it.
- 63 Protocol on the Statute of the African Court of Justice and Human Rights (2008). As at 15 June 2017, only six member states have ratified the Protocol. These are Benin, Burkina Faso, Congo, Liberia, Libya, and Mali. Available online at: [https://au.int/web/sites/default/files/treaties/7792-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights.pdf](https://au.int/web/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf) (last accessed on 27 June 2017).
- 64 See Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights (2008).
- 65 See Article 16 (1) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).
- 66 Article 46A of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).
- 67 For a critical perspective on this controversial protocol, see e.g. *Chacha Murungu*, Towards a Criminal Chamber in the African Court of Justice and Human Rights, *Journal of International Criminal Justice* 9 (2011), pp. 1067-1088. *Ademola Abbas*, The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects, *Netherland International Law Review LX* (2013), pp. 27-50. *Makau Mutua*, African Union got it wrong, continent needs the ICC, <http://www.standardmedia.co.ke/mobile/article/2000191609/african-union-got-it-wrong-continent-needs-the-icc> (last accessed on 15 February 2017).

Lastly, lax admission requirements eliminate the possibility of making AU organs play a more influential role in the regional integration process. One of the key problems of the AU since its inception is the lack of political will to transfer powers to critical organs such as the AUC, PAP, and the AfCHPR.<sup>68</sup> If the AU had a strict pre-admission process, it would have been able to designate structures such as the AUC, APRM, and PAP in engaging potential members as supranational entities. Through these engagements, the AU organs would be in a position to provide guidelines on implementing AU norms, and also make the final recommendation, subject to approval, to the AU Assembly on whether or not to admit the aspiring state. In addition, this process would also have ensured that AU organs are well acquainted with national structures and actors, and also able to build on this for future engagements. The current situation where all an aspiring member state needs to do is to make an official submission to the Chairperson of the AUC, which will then be communicated to the AU Assembly, makes the AUC nothing more than a handmaiden in the admission equation.

The discussion above shows the trends that have emerged as a result of the lack of strict entry requirements for AU membership. The inability to conceptualise admission issues within the context of the democratic principles that informed the establishment of the AU has led to a dysfunctional relational experience in the organisation. The overriding question then is how to redress this problem. As already indicated in the introduction, it is logically impossible to disband the AU and call for a fresh admission process. In spite of all its faults, the AU has come to represent what Edozie referred to as

*a vehicle through which Africans are marking their own impact on globalization as they forge a trans-cultural social network of African values, identities and cultures embodied in the symbol of Pan Africa for Africans and African descendants.*<sup>69</sup>

The legitimacy of the AU, even if it remains a contested one, rests on major factors such as the inclusion of all African states (making it the largest regional organisation in the world), and institutionalisation of the integrative aspiration through the development of key integration policies and frameworks, and institutions.<sup>70</sup> Even its dysfunctionality is positive to the extent that it affirms the legitimacy of political elites who may lack such legitimacy at the national level, but continue to enjoy political protection from the AU Assembly. It is this political protection that has resulted in the inconsistent application of rules and also the wilful disregard of AU norms, without any serious sanctions. As a result of this, moving forward will require balancing these realities with the need for deepening the democratic practices in the AU. This point is considered in the next section.

68 See e.g. *Babatunde Fagbayibo*, Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union, *South African Journal of International Affairs* 20 (2013), pp. 414-415.

69 *Edozie*, note 4, p. 298.

70 *Fagbayibo*, note 10, pp. 219-220.

## D. Options for re-evaluating pre and post admission matters in the AU

Although the idea of re-evaluating AU admission requirements has not enjoyed significant attention in literature, some writers over the years have provided views on how to confront this conundrum. For example, Ayittey noted that the AU should be replaced by a loose confederacy.<sup>71</sup> He noted that

*Such a confederacy should also have strict membership requirements, to ensure there is sufficient common ground for political and economic coordination and a common vision of the future. At a minimum, each member state should be democratic and respect Africa's heritage of free markets, free enterprise, and free trade. Such a confederacy could begin with the 15 or so African countries that arguably qualify as democracies, and then add new members as they make the necessary reforms<sup>72</sup>*

Gumede advocated for a “three-track system”.<sup>73</sup> The first would consist of member states that have passed the strict membership requirements.<sup>74</sup> The second would be made up of those that are still in the process of meeting the strict pre-conditions but have shown serious determination to achieve the AU objectives.<sup>75</sup> The third would consist of dictatorships that have shown no interest in acceding to strict requirements.<sup>76</sup> Similarly, Fagbayibo advanced the idea of a two track AU.<sup>77</sup> One track, the “Axis of democratic African states” will require strict membership requirements while the other track will be made up of those that are not prepared to go through stringent entry requirements.<sup>78</sup> The discussion of the normative policy position will be done under two rubrics: pre- and post-admission architectures. These two rubrics depart from Ayittey’s position on the total dismantling of the AU and lean towards the restructuring of the existing operational context of the AU.

### I. Pre-admission architecture

Haiti’s application to join the AU is an indication of the prospect of extending membership to African Diaspora, also known as the “sixth region”.<sup>79</sup> Other factors such as a member state withdrawing from the AU and later applying to re-join the organisation or the emergence of a new African state as a result of secession all point to the possibility of dealing with admission issues in the future. Even if these situations never happen, it is still impera-

71 Ayittey, note 10.

72 Ayittey, note 10.

73 Gumede, note 10.

74 Gumede, note 10.

75 Gumede, note 10.

76 Gumede, note 10.

77 Fagbayibo, note 10, pp. 220-225.

78 Fagbayibo, note 10, pp. 220-225.

79 See note 4.

tive that the AU links its stipulated values to entry requirements. In addition, this will positively reinforce post-admission measures. This implies that democratic values will become pre-conditional elements for organising “club” arrangements that may have to be formed for advancing and deepening regional integration measures with the AU.

A good starting point is the amendment of Article 29 of the Constitutive Act. There are two options in this respect. One is to provide specific entry requirements in the Constitutive Act by either expanding Article 29 or creating a separate section in the Constitutive Act. The other option is to stipulate a protocol that deals with admission matters in the Constitutive Act. The latter appears to be the better option as it allows for a more elaborate presentation of the steps that need to be taken. Such protocol should then indicate the centrality of the values espoused in Articles 3 and 4 of the Constitutive Act, ACDEG, and ACHPR in considering a prospective state. In this regard, four issues should frame membership admission exercise. These are the quality of national institutions (independent judiciary, separation of powers, and a durable public service); democratic measures (free and fair elections, gender equality, and respect for fundamental rights); economic matters (inclusive economic environment, predictable and transparent economic policies, sound public finance management, and anti-corruption policies); and cultural development (policies on the promotion and protection of indigenous knowledge systems, inclusion of traditional authorities in governance, and issues of diversity management).

Another important element is the quality of the interface between such state and AU organs. In this regard, the following issues are worth noting. First is the importance of establishing a robust screening team that includes the AUC, PAP, APRM and technical partners such as UNECA, AfDB and ACBF, to assess the readiness of the applicant state. The existing APRM process should be utilised for examining the four indicators highlighted above.<sup>80</sup> Assisted by UNECA and AfDB as technical partners, the APRM process should also include representatives of PAP. The roles of UNECA, AfDB and ACBF in this process is imperative as these organisations have a wealth of experience in assessing, and providing technical assistance to governance structures in many African countries.<sup>81</sup> Another leveraging factor is that because these institutions already offer loans and grants to many African countries, they are able to exert some influence in encouraging these states to engage in democratic reforms. Furthermore, this process should engage in extensive interaction with all sectors of the society in the applicant state in order to increase the awareness of continental integration and also gauge the support for the application. The report of the process should then be submitted to the Chair of the AUC, who should engage with the applicant state before drawing a final report for consideration by the AU Assembly. The engagement

80 See e.g. *Fagbayibo*, note 10, p. 223. In August 2016, the APR Forum adopted the Statute of the African Peer Review Mechanism in Nairobi, Kenya. The aim is to make the voluntary APRM process binding on member states. In the context of membership admission, the ratification of this instrument should be one of the preconditions for AU membership.

81 See note 44.

between the AUC and the applicant state should include the discussion of remedial measures,<sup>82</sup> with stipulated time-frames for addressing the short-comings, and also the possibility of association membership as a transitional option.

## II. *Post-admission architecture*

The post-admission process is as important as the pre-admission measures as it ensures that member states continue to comply with shared norms. In addition, it provides an avenue for “club” arrangements, where member states can operate under different groupings in order to deepen and speed up the integrative process.<sup>83</sup> In building an effective post-admission architecture, the AU will have to consider a number of measures that ensure the strict adherence of member states to AU norms. This further speaks to the provision stipulated under Article 45 (c) of the ACDEG, which mandates the AUC to coordinate the evaluation and implementation of the Charter with other transnational national stakeholders. Three main safeguard mechanisms are discussed below.

The first is the need to develop national platforms through which domestic stakeholders can properly engage with democratic values of the AU. Such platform should include the judiciary, parliamentarians, political parties, civil society organisations, academia, and public servants. This should be geared towards assessing the relationship between national dynamics and transnational commitments to AU treaties and protocols that speak to good governance and the promotion of democracy. In addition, member states should be encouraged to translate the documents governing this process into local languages so as to ensure more broad based participation. These engagements should also include representatives of the AU and the relevant Regional Economic Community (REC) for three main reasons. One is to ensure that the AU is abreast of national issues and dynamics that aid or detract from the compliance with its norms. Through these engagements, the AU will not only understand some of the obstacles to delayed or non-ratification of important treaties or protocols, but will also be able to efficiently promote the need for quick and smooth ratification. Two is to provide relevant information on institutional position and ongoing efforts to realise the subject(s) under discussion. This point is important policy coordination and effective synergy of operations between the AU and its member states. Third is that it will contribute to in-

82 The case of the EU is instructive in this regard. When it embarked on the first enlargement process after the adoption of the Copenhagen criteria in 1993, the EU incentivised the promotion of democratic practise in Central and Eastern European Countries (CEECs) that had shown interest in joining the Union. Under the Programme of Community aid to the countries of Central and Eastern Europe (PHARE), financial aid is targeted towards developing national administrative and institutional capacity; democracy programme for NGOs; grants for fellowships, exchange programmes and research; and the development of Small and Medium scale Enterprises (SMEs). See European Parliament, Briefing No 33: The PHARE Programme and the enlargement of the European Union, [http://www.europarl.europa.eu/enlargement/briefings/33a2\\_en.htm#5](http://www.europarl.europa.eu/enlargement/briefings/33a2_en.htm#5) (last accessed on 17 February 2017).

83 *Fagbayibo*, note 8.

creasing the awareness of the AU and RECs among broader civil society and also encourage their ownership of the integrative process.

The second point is the role of the AUC in assisting member states to strengthen institutions that are tasked with ensuring compliance with the democratic norms of the AU. International organisations such as the EU, ILO, and the WHO all have technical assistance programmes to shape the behaviour of member states.<sup>84</sup> A number of steps are important in effectively achieving this task. As a first step, a technical coordination unit has to be established within the AUC. Member states should then be mandated to enter into binding agreements with the AUC in order to allow this unit to engage with national structures. Member states that refuse to enter into such agreement should be sanctioned through measures such as exclusion from participation in Union activities and/or prevented from nominating their nationals for positions in the Union. The unit should liaise directly with respective member states in addressing specific issues that emerge from the assessment, and then agree on timelines for fixing the problems. Where the issue requires financial assistance and/or technical expertise, the AUC should take the lead in organising fundraising activities and also the mobilisation of required expertise from other member states or international organisations to address the problem.

The third measure is the need to include differentiated or flexible integration in the AU integration framework. This allows for member states with similar interests in deepening regional integration to proceed under different arrangements without exiting the organisation.<sup>85</sup> The proposals for a “three track system” or the creation of an “Axis of democratic African states” in the AU are examples of this approach.<sup>86</sup> While the requirement of adherence to democratic norms remains the prerequisite for belonging to the AU, member states

84 One of the EU's post-accession technical assistance measures is the Cooperation and Verification Mechanism (CVM) programme. The European Commission adopted this programme in 2007, after the accession of Bulgaria and Romania, as a transitional measure to strengthen judicial reform, anti-corruption programmes and fighting organised crimes. The Commission provides an annual technical and progress report on the CVM to the European Parliament and the Council. The programme is funded through the European Structural and Investment Funds (ESIF) and technical expertise is provided by the Commission. Available online at [https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm\\_en](https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm_en) (last accessed on 16 February 2017). The ILO's technical assistance programme is conducted through two measures: advisory and direct contacts missions, and promotional activities. Through its advisory and direct contacts missions, the ILO interacts with government officials, employers and trade unions in order to assist with ratification and reporting obligations, and also assist with ensuring that legislation conforms to ILO standards. Under its promotional activities, the ILO organises workshops and seminars to enhance the understanding of labour standards. Available online at <http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/technical-assistance-and-training/lang-en/index.htm> (last accessed on 16 February 2017). In the WHO, National International Health Regulations (IHR) Focal Points was established in 2005 as the office in charge of implementation coordination, reporting and notification of health events to the WHO. See <http://www.who.int/ihr/nfp/en/> (last accessed on 17 February 2017).

85 Kelly, note 20, p. 32- 34.

86 Gumede, note 10; Fagbayibo, note 10, pp. 220-225.

that intend to speed up other integrative objectives should not be hindered. In the spirit of entrenching democratic values in the AU, one of the pre-conditions for establishing or joining an existing flexible arrangement should be the strict adherence to values espoused in Articles 3 and 4 of the Constitutive Act. In this respect, aspiring members should be mandated to ratify the APRM Statute. As suggested elsewhere, flexibility integration in the AU should be allowed under the condition that the AUC manages the process.<sup>87</sup> The idea behind this is to ensure that such arrangements align with broader institutional goals, and also the transparency of such process. This implies that the AUC will provide the criteria for setting up such arrangements, quality assurance measures, and the communication of activities to the AU Assembly.<sup>88</sup> This is similar to the role the EU plays in the management of flexibility arrangements.<sup>89</sup>

### E. Conclusion

The discussion above shows the mismatch between the espoused shared values and membership requirements in the AU. The article illustrates some of the consequences of the absence of placing democratic norms at the heart of admission issues in the AU. The lack of convergent understanding of norms regulating electoral practises, election of serial violators of fundamental rights into influential AU positions, and the delayed ratification and/or obstructionist tendencies towards legal frameworks undergirding supranationalism are major examples. Moving forward, the article recommends the need to include strict conditions for membership in the AU Constitutive Act, and the enhancement of the role of AU organs in regulating initiatives that promote democratic practises in member states. Re-positioning the AU for achieving effective continental integration will require bold steps. Without an active commitment from member states to place the respect for fundamental values at the heart of the continental integration drive, the process will continue to falter.

87 *Fagbayibo*, note 8, pp. 164-165.

88 *Fagbayibo*, note 8, pp. 164-165.

89 See Article 20 of the Treaty on the European Union.