

**The African Union's Economic, Social and Cultural Council: An
evaluation of its mandate of facilitating civil society participation in
the African Union**

**Submitted in partial fulfilment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa)**

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Declaration

I, Maindi Grace Wakio, hereby declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases quotations. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

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Dedication

To my family and friends, with great appreciation for your encouragement and support.

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Abbreviations

| | |
|-----------|---|
| AEC | African Economic Community |
| AU | African Union |
| AUCSPWG | African Union-Civil Society Organisations Provisional Working Group |
| CC | Credentials Committee |
| CEWS | Continental Early Warning System |
| CIDO | Citizens' Directorate |
| COJ | Court of Justice |
| COREG | Committee of the Regions |
| CSC | Conference on Security and Co-operation in Europe |
| CSO | Civil Society Organisation |
| CSSDCA | Conference on Security, Stability, Development and Co-operation in Africa |
| DPO | Deputy Presiding Officer |
| EC | European Commission |
| ECOSOCC | Economic, Social and Cultural Council |
| EGA | ECOSOCC General Assembly |
| EP | European Parliament |
| ER | ECOSOCC Rules |
| ES | ECOSOCC Statutes |
| ESC | Economic and Social Council |
| EU | European Union |
| IEGA | Interim General Assembly of ECOSOCC |
| IPO | Interim Presiding Officer |
| NEPAD | New Partnership for Africa's Development |
| NGO | Non Governmental Organisation |
| OAU | Organisation of African Unity |
| PAP | Pan-African Parliament |
| PO | Presiding Officer |
| PRC | Permanent Representatives Committee |
| PSC | Peace and Security Council |
| SC | Standing Committee |
| SCC | Sectoral Cluster Committee |
| STC | Specialised Technical Committee |
| UN | United Nations |
| UNDPI | United Nations Department of Public Information |
| UNECA | United Nations Economic Commission for Africa |
| UN ECOSOC | United Nations Economic and Social Council |

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CHAPTER 1 INTRODUCTION

1.1 Introduction

The principle that people should participate in public decision-making processes has been applied to varying degrees in different political systems. It is one of the cornerstones of Western liberal democracies. With the spread and consolidation of liberal democracy worldwide, this principle has been accepted as a prerequisite for public decision-making.¹

Participation in decision-making and governance has been discussed largely in the context of the state. However, governance is increasingly being undertaken at regional and international levels through, *inter alia*, frameworks such as the African Union (AU), the European Union (EU) and the United Nations (UN). It is no longer accepted that states are the only actors entitled to decide how national, regional and international spheres should be governed.² Individual citizens, civil society organisations (CSOs) and the private sector are now involved in the governance of these spheres.

The discussions on increasing people's participation in decision-making processes at all levels are related to the concept of civil society. Civil society is seen as another arena for expression of people's will in relation to how they want to be governed. At the state level, state-civil society relations have always been discussed because states have always faced competing non-state actors. Civil society in relation to regional and international decision-making is a more recent phenomenon and its discussion in relation to these spheres is also developing in the context of democratising decision-making processes.

Decision-making on governance of the African continent has been under the auspices of The Organisation of African Unity (OAU) and the AU. With the adoption in 1963, of the Charter of the OAU (the OAU Charter), a framework for co-operation

¹ The principle has been discussed as an imperative of human development in the UN's discourse on development; see United Nations Development Programme *Human development report 2002: Deepening democracy in a fragmented world* (2002) 51 61.

² This is evident from the discourse on the rise of non-state actors within these spheres; see K Nowrot 'Legal consequences of globalisation: The status of non-governmental organisations under international law' (1998 1999) 6 *Indiana Journal of Global Legal Studies* 579 646.

among African states was laid out.³ The OAU's main objectives were to fight against colonialism and apartheid but it also encouraged inter-African co-operation in the economic, science and technology sectors.⁴ With the eradication of colonialism, the fall of apartheid and changes in the world's economic and political order, the OAU had to reconsider its objectives. It had to develop strategies to ensure Africa benefits from globalisation and plays a key role in the new world order. As part of the reorientation of its role, in 1991, the OAU adopted the Treaty Establishing the African Economic Community (AEC or Abuja Treaty).⁵ The AEC Treaty set out a roadmap for Africa's integration, with the ultimate aim of creating a common African market and a political union.⁶ It created several organs through which these objectives would be realised.⁷

Despite concerted efforts to implement the AEC Treaty, African integration proceeded at a slow pace. The AEC Treaty was being implemented under the aegis of the OAU, a regional co-operation framework where member states retained sovereignty over their bilateral and multilateral relations.⁸ The OAU's highest decision-making body, the OAU Assembly could only issue non-binding resolutions and it lacked sanctions mechanisms against recalcitrant member states. The AEC Treaty's objectives could only be realised if it was implemented under the aegis of a continental body with the final authority over state parties and with the requisite powers to impose sanctions.⁹

It was against this background that, at the fourth extraordinary summit of the OAU Assembly held in Sirte, Libya from 8 to 9 September 1999 (OAU fourth extraordinary summit), the OAU Assembly decided to create the AU. Thereafter, the Constitutive

³ The OAU Charter was adopted in Addis Ababa, Ethiopia, on 25 May 1963 and entered into force on 13 September 1963; it is reproduced in (1964) 2 *International Legal Materials* 766 775.

⁴ GJ Naldi *The Organisation of African Unity: An analysis of its role* (2nd ed) (1999) 3.

⁵ The treaty was adopted on 3 June 1991 in Abuja, Nigeria and entered into force on 12 May 1994.

⁶ Naldi (n 4 above) 242.

⁷ Art 7(1) AEC Treaty sets out the organs of the AEC as the Assembly of Heads of State and Government (OAU Assembly), the Council of Ministers (Council), the Pan-African Parliament (PAP), the Economic and Social Commission, the Court of Justice (COJ), the General Secretariat (OAU Secretariat) and the Specialised Technical Committees (STCs).

⁸ This was in line with the OAU's sacrosanct principle of non-interference in the internal affairs of states set out in art 3 OAU Charter.

⁹ Naldi (n 4 above) 37.

Act of the African Union (the AU Act) was adopted in Lome, Togo on 11 July 2000 creating the AU as a framework for, *inter alia*, enhancing African integration.¹⁰ The AEC Treaty is part of the AU's legal framework. The AU Act entered into force on 26 May 2001. The AU was officially inaugurated in Durban, South Africa on 9 July 2002. The AU adopted the institutional structure set out in the AEC Treaty and created additional organs.¹¹

The OAU was a state-centric system. It is only in the last years of its existence and in the transition from the OAU to the AU that discussions on modalities for facilitating civil society participation in its activities commenced. The AU Act emphasises the need to build partnerships between governments and all sectors of civil society.¹² Enhancing civil society participation is one of the AU's objectives and principles.¹³ To achieve this objective, the AU Act created the Economic, Social and Cultural Council (ECOSOCC) as an AU organ.¹⁴

1.2 Conceptual framework

This study deals with civil society participation in the AU, as one of the means of enhancing democracy in this system. This necessitates the discussion of the concepts of civil society, deliberative democracy and associative democracy. The problems related with these concepts will be set out. The conceptualisation and role of civil society will be discussed in the context of regional integration.

¹⁰ The AU Act is reproduced in 2000 (12) *RADIC* 629 quoted in GJ Naldi and K Magliveras 'The African Union-A new dawn for Africa' in (2002) 51 *International and Comparative Law Quarterly* 415 425 415.

¹¹ The additional organs are the Peace and Security Council (PSC), the Economic, Social and Cultural Council (ECOSOCC) and the Financial Institutions; the AEC Treaty's Economic and Social Council was left out of the AU's institutional structure.

¹² Para 7 Preamble AU Act.

¹³ Arts 3(a) & 3(g) & arts 4(c) & 4(m) respectively AU Act.

¹⁴ Arts 5(1)(i) & 22 AU Act.

1.2.1 Conceptualisation of civil society

The different conceptualisations of civil society are a result of the different contexts in which civil society operates. This study discusses civil society's engagement in Africa's integration framework, the AU, through a specific mechanism, ECOSOCC. The discourse on civil society participation and its conceptualisation in the AU is almost non-existent, necessitating an examination of the conceptualisations of civil society in other regional integration settings. The EU will be the main reference point in this regard.

While discussing the concept of civil society in the EU context, Armstrong analyses the discourse on civil society that has been developed by EU institutions.¹⁵ He posits that civil society can be conceptualised in four ways:¹⁶

- (a) In terms of the nature or composition of its actors
- (b) As a differentiated social sphere characterised by its form and rationality
- (c) In terms of the relationship between civil society and the political system
- (d) In terms of the relationship between civil society and law

Though these four conceptualisations have similar elements, each emphasises civil society's particular characteristics. They are also not mutually exclusive. The four conceptualisations will be discussed in turn.

In terms of the nature or composition of its actors

The traditional conceptualisation of civil society defines it in terms of the public and private divide. The state is the public divide and is equated to the political sphere while all else falls under the private divide which is equated to the civil sphere. In this respect, civil society is composed of individuals and organisations that are not part of the state. This conceptualisation of civil society does not really define its identity. It also results in the equation of civil society to non-governmental organisations (NGOs).

¹⁵ KA Armstrong 'Rediscovering civil society: The European Union and the White Paper on Governance' (2002) 8(1) *European Law Journal* 102 132.

¹⁶ Armstrong (n 15 above) 106 133.

More contemporary approaches of this conceptualisation of civil society take this clear-cut differentiation between the public and the private spheres as being simplistic. The private sphere is further differentiated into the individual and the family (the intimate sphere) and organisational forms of civil society (the sphere of associations). This further differentiation is necessary because purely private functions are undertaken in the intimate sphere, while the associational sphere contributes to the development of a public sphere. In this regard, 'the corporations of Hegelian civil society are thought of as incorporating something of the public spirit in what is juridically the private sphere'.¹⁷ In this sense, civil society has a dual character, it is considered private, since it guards against excessive state power, while at the same time, it contributes to development of a public sphere in parallel to that developed by the state. The question arising from this conceptualisation is whether civil society should be held to the same standards of transparency, accountability and representivity as the state, since it is contributing to the development of the public sphere.

Some writers further distinguish civil society from the economic sphere.¹⁸ Under this approach, civil society consists of those actors, who do not fall within the state or the market spheres. One concern that arises from this conceptualisation is whether employers' associations and trade unions can be classified as civil society since they advocate for the economic interests of capital and labour respectively, within the market system. One view is that, since these organisations act solely in their interests, they do not contribute to the development of a public sphere and can therefore not be classified as civil society.¹⁹

Following the approach that civil society does not include economic actors, Habermas posits that its core comprises non-governmental and non-economic voluntary associations that constitute a civic space and act in the public interest. These associations identify issues that are the subject of decision-making and communicate them to their publics to facilitate opinion-formation on these issues. The

¹⁷ JL Cohen and A Arato *Civil society and political theory* (1992) Cambridge, MA: MIT Press 85 quoted in Armstrong (n 15 above) 107.

¹⁸ See A Ferguson *An essay into the history of civil society* Fama Oz-Salzberger (ed) (1995[1767]) Cambridge: Cambridge University Press quoted in D Curtin 'Private interest representation or civil society deliberation? A contemporary dilemma for European Union governance' (2003) 12(1) *Social and Legal Studies* 55-75 58.

¹⁹ Armstrong (n 15 above) 108.

opinions from these organisations' publics are then conveyed to the institutions that make rules and policy choices. Habermas links his concept of 'communicative action' with deliberation and civil society.²⁰ In making rules and policies, institutions are influenced by public opinion, which is concretised through the informal contexts of communication facilitated by civil society. Thus Habermas speaks of 'a communication structure rooted in the life world through the associational network of civil society'.²¹ Habermas's conceptualisation of civil society discards the public-private divide because civil society is part of the political public sphere where institutions make rules and policies after effective deliberation, taking into account the opinions channelled to them through public interest organisations, which are part of civil society. Therefore civil society facilitates deliberation between citizens and between citizens and their representatives.

As a differentiated social sphere characterised by its form and rationality

Armstrong's second categorisation of the conceptualisation of civil society is based on the different social spheres with their distinct forms of organisation and value systems. Civil society is differentiated from the economic and political systems. Civil society is organised through associations, the political system or the state, through the bureaucracy and the economic system through the market.²² The political system's value system is power, the economic system's is the exchange and civil society's is communication. Through communication, civil society facilitates the development and channelling of opinions for the political system to consider. This contributes to consensus-building between the state, the market and the individual. However, in undertaking this consensus-building role, civil society's organisational form and values can be undermined by political and economic forces.²³

In terms of the relationship between civil society and the political system

Though civil society is taken as that sphere which does not fall under the state or the market, it has to relate to these other two spheres. This relationship has been

²⁰ J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* (trans. W Rehg) (1996) Cambridge, MA: MIT Press quoted in Curtin (n 18 above) 58.

²¹ Habermas (n 20 above) quoted in Curtin (n 18 above) 58.

²² Cohen & Arato (n 17 above) 130 quoted in Armstrong (n 15 above) 109.

²³ Armstrong (n 15 above) 109.

theorised differently under the political theories of liberalism, civic republicanism and 'third way' approaches.

For liberalism, civil society guards against excessive state intrusion into the private sphere, favouring an approach of facilitating civil society and the market to solve problems.²⁴ Under civic republicanism, civil society is a form of association driven by the need to enhance the public good. It provides another forum for representation.

'Third way' political theories also espouse civil society as a third mediating domain between the government and the market. Within these theories, there are different views on the relationship between government and civil society. Giddens contends that '... there are no permanent boundaries between government and civil society. Depending on the context, government sometimes needs to be drawn further into the civil arena, sometimes to retreat from it'.²⁵ Hirst presents a contrary view, since he contends that, as far as possible, government functions should be transferred to CSOs through decentralisation arrangements.²⁶ A more complex conceptualisation envisages the public sphere as composed of complex networks that cut across civil society and the state, with government functions being undertaken through these networks. Reference to civil society as non-governmental is therefore a misnomer. Instead, civil society becomes governmentalised since, through the complex networks, it undertakes public functions in association with the state.²⁷

In terms of the relationship between civil society and law

This relationship does not conceptualise civil society as such, but situates it within the law. Law facilitates the formation of associations and sets out these associations' rights and obligations. In influencing policy, CSOs can have the right to be consulted and to participate in the policy formulation process, otherwise, they can only hope that they will be consulted.

²⁴ Armstrong (n 15 above) 109.

²⁵ A Giddens *The third way: The renewal of social democracy* (1999) Polity Press 80 81 quoted in Armstrong (n 15 above) 111.

²⁶ P Hirst *From statism to pluralism: Democracy, civil society and global politics* (1997) Berkeley: University of California Law Press 31 32 quoted in Armstrong (as above).

²⁷ Armstrong (as above).

1.2.2 Deliberative and associative democracy

Deliberative and associative democracy are related to civil society since civil society is organised through associations, with communication as its main value. Through communicative action, civil society facilitates deliberation between citizens and between citizens and policy-making institutions towards developing the most acceptable and effective governance mechanisms.

Deliberative democracy

Deliberative democracy requires participants in decision-making processes to provide reasons for their policy preferences. In this regard, Cohen and Rogers describe deliberative politics as a process where the common good is achieved through deliberations, with participants providing rational arguments for their choices.²⁸ Deliberative democracy is tied to Habermas's discursive theory of democracy. This theory emphasises decision-making by means of rational and impartial arguments that are conveyed to public institutions through communication between different individuals and associations.²⁹ Such argumentation and discussion takes place in the civic sphere, in civil society, which is part of the wider political public sphere.

Associative democracy

Associative democracy is premised on the idea that the common good can only be achieved by curbing the power of the state, through empowering other groupings in society to undertake the functions of the state.³⁰ Following this argument, as many of the government's functions as possible should be delegated to CSOs because they are better placed to meet individuals' and the community's needs. CSOs are taken to be more accountable than state institutions since they are accountable to their publics and the state institutions that delegate their functions to them.³¹ Associative

²⁸ J Cohen and J Rogers 'Secondary associates and dramatic governance' in J Cohen and J Rogers (eds) *Associations and democracy* (1995) New York: Verso 22 38 quoted in I Michalowitz 'Analysing structured paths of lobbying behaviour: Why discussing the involvement of "civil society" does not solve the EU's democratic deficit' (2004) 26(2) *European Integration* 144 170 150 151.

²⁹ Habermas (n 20 above) quoted in Armstrong (n 15 above) 109.

³⁰ Cohen & Rogers (n 28 above) 44 quoted in Michalowitz (n 28 above) 151.

³¹ Michalowitz (as above).

democracy is tied to 'third way' conceptualisations of civil society, which argue that, public functions should, as far as possible, be transferred to civil society.³²

This study will identify what elements of deliberative and associative democracy have been retained in ECOSOCC's legal framework.

1.2.3 The role of civil society

The conceptualisation of civil society determines its role. As the conceptualisation of civil society by EU institutions is an important reference for the conceptualisation of civil society in the AU, an examination of civil society's role within EU institutions is also relevant to this study. In this regard, Smismans has identified three roles that EU institutions have attributed to civil society.³³

Firstly, civil society provides functional participation and representation. The role of civil society as providing functional participation involves CSOs availing their expertise for policy making and channelling the grassroots views to policymakers. In their role of providing functional representation, CSOs represent citizens' interests in addition to the representation of their interests through elected officials within the institutions of representative democracy.

Secondly, civil society plays a politicisation role by providing a sphere of deliberation and opinion-formation, which is connected to the political public sphere of decision-making. Civil society's politicisation role fits with Habermas's conceptualisation of civil society and the concept of deliberative democracy.

Lastly, civil society plays a decentralisation role. CSOs can take over the implementation of public welfare programmes since they are more suited to do so than governments because of their connection with the grassroots. This role of civil society fits with some 'third way' conceptualisations of civil society and associative democracy.

Using this framework of analysis, it is possible to identify what role ECOSOCC, being representative of civil society, will play within the AU's institutional structure.

³² Hirst (n 26 above).

³³ S Smismans 'European civil society: Shaped by discourses and institutional interests' (2003) 9(4) *European Law Journal* 473 495 486 489.

1.3 Research problem

With civil society participation being an important objective of the AU, there is need to examine whether and how, through ECOSOCC, civil society participation in the AU will be realised.

1.4 Significance of the study

The novelty of ECOSOCC as an institution means that this study will contribute to the development of a body of literature on ECOSOCC. The study will make recommendations that can be implemented and form the basis of further inquiry into civil society participation and discourse in the AU. These recommendations can also be applied in developing ECOSOCC's mandate and operationalising it.

1.5 Research questions

The study seeks to answer three questions. The main question is whether ECOSOCC's legal framework will facilitate effective civil society participation in the AU. Secondly, this study will examine whether ECOSOCC's linkages with the other AU organs will enhance its ability to undertake its mandate.³⁴ Lastly, this study will examine whether there are lessons ECOSOCC can learn from the EU's Economic and Social Council (ESC), the EU organ through which social and economic interest groups' concerns are channeled to EU institutions. It will also examine whether there are lessons ECOSOCC can learn from the process through which CSOs seek participation in the UN's Economic and Social Council (UN ECOSOC).

1.6 Methodology

The study will adopt a descriptive and analytic approach. Reference will be made to primary sources of information. These include the AEC Treaty, the AU Act, The Statutes of the ECOSOCC (ECOSOCC Statutes or ES) and ECOSOCC's Draft Rules of Procedure (ECOSOCC Draft Rules or EDR).³⁵ Reference will also be made

³⁴ Art 5(1) AU Act lists the organs of the AU as The Assembly of the Union (Assembly), The Executive Council (Executive Council), The Pan-African Parliament (PAP), The Court of Justice (COJ), The [AU] Commission, The Permanent Representatives Committee (PRC), The Specialised Technical Committees (STCs), The Peace and Security Council (PSC), ECOSOCC and The Financial Institutions.

³⁵ Reference to the EDR is to those dated March 2005 (on file with author); the EDR have not been adopted by the Interim ECOSOCC but the study assumes that the final rules will be based on the EDR.

to protocols and rules of procedure of other AU organs. Other than analysing these instruments, secondary sources such as books, journal articles and reports will also be analysed. In addition, interviews will be conducted with relevant personnel at the AU Commission.

Through a comparative analysis of the ESC and UN ECOSOC, the study will identify the lessons ECOSOCC can apply in undertaking its mandate, as ECOSOCC is modeled on the ESC.³⁶ UN ECOSOC will be examined because the granting of observer status to CSOs by ECOSOCC is to be based on guidelines similar to those used by UN ECOSOC to grant NGOs consultative status.³⁷ The provisions on eligibility for membership of ECOSOCC relating to CSOs' funding and ownership also follow UN ECOSOC's requirements for granting consultative status to NGOs.

1.7 Limitations of the study

There is a dearth of literature on civil society participation in the AU and ECOSOCC.³⁸ This necessitates that this study should undertake a comparative analysis of other similarly mandated and structured organs in regional integration and international settings.

Currently, it is the Interim ECOSOCC that is providing a forum for civil society participation in the AU. From its nature, the Interim ECOSOCC has a limited mandate and legitimacy, thus it has not undertaken much work that would inform this study. It also has not adopted the ECOSOCC Rules of Procedure, thus the study faces a limitation to this extent.

Another limitation of this study is that, though the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child are part of the AU's institutional structure, this study

³⁶ NJ Udombana 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western International Law Journal* 69 135 73; some AU organs such as ECOSOCC, the PAP and the COJ are modelled on similar organs in the EU.

³⁷ UN ECOSOC is one of the UN organs created out under art 7(1) UN Charter; art 71 UN Charter allows the UN ECOSOC to establish mechanisms for consultations with NGOs which are concerned with matters within its competence.

³⁸ See point 1.8.

will not examine ECOSOCC's linkages with these institutions.³⁹ The African Commission has developed its own linkages with CSOs and studies on these have been undertaken.⁴⁰

Though the study involves an analysis of ECOSOCC's and the AU's legal framework, it will also be informed by political science theories, as it is through these theories that conceptualisations of civil society's participation in policy-making have been advanced.

1.8 Literature review

Though Udombana and Naldi and Magliveras identify lack of civil society participation as one of the factors hindering African integration, they do not discuss the issue in an in-depth manner.⁴¹ This cursory examination of the lack of civil society participation in African integration is also evident in the UN Economic Commission for Africa's (UNECA) reports on regional integration in Africa.⁴²

Amani's study of the involvement of NGOs in the AU is in light of how this involvement has enhanced human rights promotion and protection.⁴³ This study will not examine whether the implementation of ECOSOCC's mandate will result in

³⁹ See ASS/AU/Dec1(I) *Decision on the Interim Period* 1st ordinary session of the Assembly, Durban, South Africa 8 to 10 July 2002.

⁴⁰ A Motala 'Non-governmental organisations in the African system' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights-The system in practice 1986-2000* (2002) 246 279.

⁴¹ NJ Udombana 'A harmony or a cacophony? The music of integration in the African Union treaty and the New Partnership for Africa's Development' (2002) 13 *Indiana International and Comparative Law Review* 185 236; GJ Naldi and KD Magliveras 'The African Economic Community: Emancipation for African states or yet another glorious failure?' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 601 631.

⁴² The first report on regional integration in Africa, United Nations Economic Commission for Africa *Assessing regional integration in Africa* (2004) does not identify lack of civil society participation as an obstacle to regional integration; the second report, United Nations Economic Commission for Africa and African Union *Assessing regional integration in Africa II: Rationalising regional economic communities* (2006) 88 89 merely acknowledges the need for civil society participation in African integration.

⁴³ E Amani *The role of human rights non-governmental organisations in the African Union and the New Partnership for Africa's Development* unpublished LLM dissertation, University of Pretoria 2003 14 15.

enhanced human rights protection but whether ECOSOCC will facilitate CSOs to channel their views to AU institutions.

In his analysis of the AU Act in institution-building in Africa, Maluwa does not deal with civil society participation in the AU system.⁴⁴ Naldi and Magliveras and Packer and Rukare discuss the role of civil society participation in the AU through ECOSOCC, in their general analysis of the AU's institutional architecture.⁴⁵ Lastly, the available literature on ECOSOCC was produced before the Interim ECOSOCC was launched.⁴⁶

1.9 Overview of the chapters

Following this introductory chapter, the second chapter will analyse ECOSOCC's legal framework and structure in relation to its facilitation of civil society participation in the AU. ECOSOC's legal framework's conceptualisation of civil society and the concerns it raises will be discussed. Linked to the conceptualisation of civil society is the role ECOSOCC will play within the AU institutional structure, therefore this will also be discussed. In addition, ECOSOCC's legal framework will be analysed to identify whether it is in line with associative or deliberative democracy. An examination of how ECOSOCC can utilise its linkages with the other AU organs to channel civil society's views will also be carried out. The discussion of the ESC and UN ECOSOC and the lessons to be learnt from them will be done in the third chapter. The fourth chapter will set out the study's conclusions and recommendations.

⁴⁴ See T Maluwa 'The Constitutive Act of the African Union and institution-building in post-colonial Africa' (2003) 16 *Leiden Journal of International Law* 157 170.

⁴⁵ Naldi & Magliveras (n 11 above); CAA Packer and D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365 379 375 and 378.

⁴⁶ See K Sturman and J Cilliers 'ECOSOCC bringing people's power back to the African Union?' (2003) 12(1) *African Security Review* 71 80.

CHAPTER 2 THE CREATION OF ECOSOCC AND AN EVALUATION OF ITS LEGAL FRAMEWORK

2.1 Introduction

This chapter discusses the processes leading to the creation and launching of ECOSOCC. Following this, ECOSOCC's objectives, composition, functions, structures and working methods will be discussed. Drawing on the study's conceptual framework, this chapter will analyse how civil society has been conceptualised in ECOSOCC. The positive and negative aspects of these conceptualisations will be identified. ECOSOCC's role in the AU institutional structure will also be discussed. This chapter will examine ECOSOCC's linkages with the other AU organs to assess whether there are opportunities for it to enhance its work.

2.2 The processes leading to the creation of ECOSOCC

The launching of the Interim ECOSOCC in March 2005 was the culmination of efforts to involve CSOs in the work of, first, the OAU and later, the AU, in a more structured manner. These efforts were underpinned by African leaders' recognition of the imperative of involving civil society in African integration. This recognition can be discerned from African declarations, charters and treaties and in the OAU and AU initiatives for consultation with CSOs.

2.2.1 The OAU declarations and treaties

In 1990 the OAU Assembly adopted the Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World.⁴⁷ This declaration emphasised the importance of involving African people in decision-making at all levels. The African Charter for Popular Participation in Development and Transformation adopted by the OAU Assembly in Arusha, Tanzania reiterated this principle.⁴⁸ The AEC Treaty mandated the AEC to establish

⁴⁷ *AHG/Decl.1(XXVI)* 26th sixth ordinary session of the OAU Assembly, Algiers, Algeria 11 July 1990.

⁴⁸ Document *A/45/427* of 1991.

relations of co-operation with African NGOs.⁴⁹ The AEC was also to establish relations of co-operation with socio-economic organisations and associations.⁵⁰

The Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA) also gave a prominent role to civil society. It was modelled on the Conference on Security and Co-operation in Europe (CSCE). The proposals for the initiative were set out in the Kampala Document on the CSSDCA (Kampala Document), which was adopted in Kampala in 1991. It set out recommendations in the four interrelated 'calabashes' of security, stability, development and cooperation. Popular participation and democratisation would be promoted under the stability and development calabashes where collaboration between the OAU and CSOs would fall. In the year 2000, the OAU Assembly adopted the OAU Solemn Declaration on the CSSDCA (CSSDCA Declaration), which was based on the Kampala Document.⁵¹ A CSSDCA Unit was to be established within the OAU Secretariat to, *inter alia*, provide the interface between CSOs and the OAU.⁵² The CSSDCA Unit was restructured and is now the Citizens' Directorate (CIDO) within the Bureau of the Chairperson of the AU Commission.⁵³

At around the same time the CSSDCA Declaration was adopted, there were discussions on the New Partnership for Africa's Development (NEPAD), which culminated in its adoption by the OAU Assembly at its thirty seventh ordinary session in Lusaka, Zambia from 9 to 11 July 2001.⁵⁴ NEPAD also recognised the role of civil society in African integration.

By the time the AU Act was adopted, it was accepted that civil society was a key actor in African integration, thus provisions to this effect in the AU Act and the creation of ECOSOCC as a body to facilitate civil society participation in the AU.

⁴⁹ Art 90 AEC Treaty.

⁵⁰ Art 91 AEC Treaty.

⁵¹ *AHG/Decl.4(XXXVI)* 36th ordinary session of the OAU Assembly, Lome, Togo 10 to 12 July, 2000; paras 11 and 12 are instructive.

⁵² Para 15(d) CSSDCA Declaration.

⁵³ One of CIDO's mandate is to involve civil society and the African Diaspora in the AU's affairs; CIDO is in the process of recruiting officers to provide secretariat support for ECOSOCC; interview with Dr Jinmi Adisa, Principal Co-ordinator, CIDO, Bureau of the Chairperson, AU Commission held on 30 August 2006 at the AU Commission (interview with Dr Adisa) (notes on file with author).

⁵⁴ *AHG/Decl.1(XXXVII)*.

2.2.2 The OAU/AU-civil society conferences

Proposals for more structured consultation between the OAU and CSOs were first made by the OAU Secretary-General in 1997, within the context of reforming the OAU.⁵⁵ However, it was only until the transition from the OAU to the AU that these proposals were implemented through the holding of OAU/AU-civil society conferences.

The first OAU/AU-civil society conference was held in Addis Ababa, Ethiopia from 11 to 15 June 2001. The meeting made recommendations on the structuring of consultations between the OAU and CSOs and adopted a framework for co-operation in this regard.⁵⁶ To facilitate the consultations, CSOs were to organise themselves at national, regional and continental levels while the OAU was to consider creating a focal point for CSOs within the OAU Secretariat. Consequently, the OAU created a CSO focal point within the CSSDCA Unit.

The second AU-civil society conference was also held in Addis Ababa, Ethiopia from 11 to 14 June 2002. This meeting discussed the progress of implementation of the recommendations of the first conference and made suggestions on strengthening the AU-CSOs co-operation framework. In particular, it was felt necessary to develop criteria for accreditation and affiliation of CSOs to the AU (CSOs' Accreditation Criteria) and a code of ethics for CSOs (CSOs' Code of Ethics).⁵⁷ The conference also recommended the creation of an AU-Civil Society Organisations Provisional Working Group (AUCSPWG).

2.2.3 The AU-Civil Society Provisional Working Group

The AUCSPWG was created in 2002. Its membership was drawn from the five African regions of Central, East, North, South and West and from the African Diaspora. It was composed of three members from each region, one member each, representing the African Diaspora in Europe and America, respectively and three

⁵⁵ Interview with Mr Ben Kioko, Director, Office of the Legal Counsel, AU Commission held on 4 September 2006 at the AU Commission (interview with Mr Kioko 1) (notes on file with author); Sturman & Cilliers (n 46 above) 74; OAU *OAU-civil society conference 11 15 June 2001 Addis Ababa, Ethiopia general report of the conference* (2001) para 7 (OAUCS conference report) (on file with author).

⁵⁶ paras 144 149 OAUCS conference report (n 55 above).

⁵⁷ OAU *OAU/civil society.3(II) Rev.1 second OAU civil society conference 11 14 June 2002 Addis Ababa, Ethiopia general report* (2002) (OAUCS conference report 2) para 98.

members nominated by the AU Commission.⁵⁸ The AUCSPWG had a mandate of two years. It was to, *inter alia*, prepare the CSOs' Accreditation Criteria, the CSOs' Code of Conduct and modalities for the operationalisation of ECOSOCC.⁵⁹

Article 22(2) of the AU Act necessitated the drafting of ECOSOCC Statutes before their adoption by the Assembly.⁶⁰ The AUCSPWG developed the ECOSOCC Draft Statutes and participated in the experts' and PRC meetings that considered them before their adoption by the Assembly.⁶¹ It also developed the CSOs' Accreditation Criteria which were adopted by the Executive Council.⁶² In addition, the AUCSPWG developed a Draft CSOs' Code of Ethics to be considered by ECOSOCC.

2.2.4 The operationalisation of the Interim ECOSOCC

The Assembly adopted the ECOSOCC Draft Statutes and requested the Chairperson of the AU Commission to take urgent measures to launch and operationalise ECOSOCC.⁶³ The operationalisation of ECOSOCC required the holding of elections as envisaged in article 5 of the ECOSOCC Statutes, yet this exercise would have taken a long time. Before the operationalisation of ECOSOCC an Interim ECOSOCC was to be created. Its mandate would be to facilitate the holding of national, regional and continental elections and undertake other preparations towards full operationalisation of ECOSOCC.

⁵⁸ paras 94 96 OAUCS conference report 2 (n 57 above); it appears that some members were drawn from the CSOs that participated in the first and second OAU/AU-civil society conferences and others were nominated through other channels; the focus was on CSOs' expertise rather than their representivity.

⁵⁹ para 98 OAUCS conference report 2 (n 57 above).

⁶⁰ To enhance the operationalisation of ECOSOCC its legal framework was to be set out in Statutes to be adopted by the Assembly, as doing so would avoid the delay that would arise if its legal framework was to be set out in a Protocol to the AU Act which would require ratification by member states; interview with Mr Ben Kioko 25 October 2006 (notes on file with author).

⁶¹ T Muriithi *The African Union: Pan-Africanism, peace-building and development* (2005) 121.

⁶² *Criteria for granting observer status and for a system of accreditation within the African Union Doc EX.CL/195(VII)* 7th ordinary session of the Executive Council (7th session EC), Sirte, Libya 28 June to 2 July 2005 adopted through Decision *EX.CL/Dec.230 (VII)* and endorsed by the 5th ordinary session of the Assembly, Sirte, Libya 4 to 5 July 2005.

⁶³ As per *Assembly/AU/Dec.48(III) Decision on the Economic, Social and Cultural Council (ECOSOCC)* 3rd ordinary session of the Assembly, Addis Ababa, Ethiopia 4 to 5 July 2004.

The AU Commission was to convene a General Civil Society Conference, which was to serve as the Interim General Assembly of ECOSOCC (IEGA) under the Interim ECOSOCC, pending the election and appointment of the ECOSOCC General Assembly (EGA).⁶⁴ To ensure continuity between the AUCSPWG and the IEGA, some members of the AUCSPWG became members of the IEGA. The Interim ECOSOCC was launched in Addis Ababa, Ethiopia on 24 March 2005 with Nobel Laureate Professor Wangari Maathai as its Interim Presiding Officer (IPO). It has a two-year mandate. Thus far it has produced a strategic plan for ECOSOCC but it has not made progress on the elections of ECOSOCC members.⁶⁵

2.3 ECOSOCC's legal framework

2.3.1 Objectives

ECOSOCC is a statutory organ of the AU created under articles 5(1)(i) and 22 of the AU Act. It is an advisory organ composed of 'different social and professional groups of the member states of the Union'.⁶⁶ CSOs from the African Diaspora are also eligible for membership.⁶⁷ In undertaking its mandate, it is to be guided by several principles.⁶⁸ ECOSOCC is to forge partnerships between all segments of civil society.⁶⁹ ECOSOCC is to promote civil society participation in implementation of the AU's policies and programmes.⁷⁰ It is also to strengthen the capacity of civil society.⁷¹ These principles acknowledge that CSOs are involved in different activities towards achieving different objectives.

⁶⁴ See the Decision on transitional arrangements for the launching of ECOSOCC annexed to the ES.

⁶⁵ From the interview with Dr Adisa (n 53 above) this is due to the AU's budgetary constraints.

⁶⁶ Art 22(1) AU Act.

⁶⁷ The African Diaspora is composed of people of African origin, living outside the continent, regardless of their citizenship or nationality, who are willing to contribute to the development of the continent and the AU; see *EX.CL/Dec.221(VII) Decision on the definition of the African Diaspora Doc EX.CL/164(VII)* adopted by the 7th session EC.

⁶⁸ Art 2 ES.

⁶⁹ Art 2(2) ES.

⁷⁰ Art 2(3) ES.

⁷¹ From the interview with Dr Adisa (n 53 above) CSOs need to develop the expertise and negotiation skills required to influence policy processes in supranational institutions such as the AU.

2.3.2 Composition

Following the provisions of the AU Act, the ECOSOCC Statutes set the categories of social and professional groups that ECOSOCC is to be composed of.⁷² The variety in the categories of CSOs eligible for election as members of the EGA recognises that civil society is multi-dimensional, in that, it includes organisations representing a diversity of social and professional interests. ECOSOCC will be composed of 150 CSOs. Its membership will be drawn from CSOs in AU member states and the African Diaspora.⁷³ The AU Commission will, in consultation with AU member states, nominate some members to represent special interests.

2.3.3 Functions

Being an advisory organ, ECOSOCC's functions are geared towards supporting the other AU organs to undertake their mandates. This is through undertaking studies that the other organs deem necessary.⁷⁴ ECOSOCC is also to contribute to the popularisation of the AU's objectives.⁷⁵

Some of its functions can enable ECOSOCC develop its role beyond its current advisory one. For instance, ECOSOCC is to contribute to the translation of the objectives of the AU into concrete programmes.⁷⁶ This is supported by the provision that it can, on its own initiative, undertake studies that it deems necessary.⁷⁷ Its function of forging '... Pan African values in order to enhance an African social model and way of life' envisages ECOSOCC's involvement in the development of the concept of African citizenship. Following this, there will be need to develop an African public opinion, in which ECOSOCC can be involved through undertaking its function of '... effective public enlightenment [sic], mobilization and feedback on the activities of the Union'.⁷⁸

⁷² Art 3(2) ES.

⁷³ Art 4(1) ES; art 6(1) ES sets out one of the requirements of eligibility for ECOSOCC membership a CSO has as being, a 'national, regional, continental or African Diaspora CSO'.

⁷⁴ Art 7(2) ES.

⁷⁵ Art 7(4) ES.

⁷⁶ Art 7(1) ES.

⁷⁷ Art 7(3) ES.

⁷⁸ Art 7(7) ES.

2.3.4 Internal structure

ECOSOCC has an EGA, a Standing Committee (SC), Sectoral Cluster Committees (SCCs) and a Credentials Committee (CC), each with different competencies.⁷⁹

The EGA is the final authority on ECOSOCC's decisions and policies. It is composed of all ECOSOCC members.⁸⁰ The term of office of the EGA is four years and members can be re-elected only once.⁸¹ Its functions include electing members of the Bureau and the SC, preparing and submitting advisory reports and opinions, submitting proposals on ECOSOCC's budget and activities and approving and amending the CSOs' Code of Ethics.⁸² The EGA ordinary sessions will be held once every two years.⁸³ The Bureau, composed of a Presiding Officer (PO) and five Deputy Presiding Officers (DPO) who serve a term of two years, provides the political leadership of the EGA.⁸⁴ The Bureau is eligible for re-election only once.⁸⁵

The eighteen-member SC is elected by the EGA and serves for two years.⁸⁶ It will coordinate ECOSOCC's work, prepare the EGA's meetings and submit ECOSOCC's annual reports to the Assembly.⁸⁷ The EGA will follow up on the implementation of the CSOs' Code of Ethics and set criteria for granting observer status to ECOSOCC.⁸⁸ The SC is to meet as often as circumstances require.⁸⁹

The ten SCCs will draft ECOSOCC's advisory opinions and reports.⁹⁰ Through them, CSOs will provide their expert input into the formulation, implementation and monitoring of AU policies.⁹¹ The SCCs are organised along the same lines as the AU Commission's portfolios.

⁷⁹ Art 8 ES.

⁸⁰ Art 9(1) ES.

⁸¹ Art 9(4) ES.

⁸² Art 9(2) ES.

⁸³ Art 9(3) ES.

⁸⁴ Art 9(4) ES & rule 11(a) EDR.

⁸⁵ Rule 7 EDR.

⁸⁶ Arts 10(1) & 10(4) ES respectively.

⁸⁷ Art 10(2) ES.

⁸⁸ Arts 10(2)(c) & 10(3) ES respectively.

⁸⁹ Rule 16(1) EDR.

⁹⁰ Art 11(3) ES.

⁹¹ Art 7(1) & 7(4) ES.

The nine-member CC is established by the EGA.⁹² The members of the CC serve a term of two years.⁹³ Its function is to examine the credentials of ECOSOCC members and those of their representatives.⁹⁴

2.4 Relating ECOSOCC's legal framework to conceptualisations of civil society, deliberative and associative democracy

From the conceptual framework set out in the introductory chapter and an examination of ECOSOCC's legal framework, it is possible to identify the conceptualisations of civil society that ECOSOCC has adopted. These conceptualisations will be linked to an examination of ECOSOCC's role. In addition, ECOSOCC's legal framework will be related to the concepts of deliberative and associative democracy. The concerns arising from these conceptualisations, as highlighted in the introductory chapter, will also be related to ECOSOCC's legal framework.

2.4.1 Conceptualisations of civil society, deliberative and associative democracy

ECOSOC's legal framework does not define civil society, thus its conceptualisation of civil society is deduced from its provisions.

In terms of the nature or composition of its actors

From some of the categories of CSOs eligible for ECOSOC membership, it is evident that ECOSOCC has adopted the conceptualisation of civil society as being the associations that contribute to the development of a public sphere.⁹⁵ However, ECOSOCC's composition includes 'business organisations, national chambers of commerce, workers, employers and industry and agriculture as well as other private sector interest groups'.⁹⁶ These are economic actors who are not interested in the development of a public sphere. Their categorisation as part of civil society could result in tensions within ECOSOCC. There is also the contention that though civil

⁹² Art 12(1) ES.

⁹³ Rule 17(2) EDR.

⁹⁴ Art 12(2) ES.

⁹⁵ Art 3(2) ES.

⁹⁶ Art 3(2)(c) ES.

society exists separately from the state and the market, the political and economic spheres can dominate it. By ECOSOCC categorising these economic actors as CSOs, there is a danger that they will dominate ECOSOCC, thus turning it into a forum for representing economic actors' interests. ECOSOCC's representivity and legitimacy will then be questioned.

Since ECOSOCC has adopted the conceptualisation that civil society are those associations that contribute to the development of a public sphere, should its members then be held to the same standards of transparency, accountability and representivity as states? Though there is emerging consensus that CSOs should strive to be accountable, transparent and representative, there are no indicators for assessing these concepts in the context of CSOs. It has been argued that though these principles are useful for fostering NGOs' legitimacy, stringent standards of democracy and representivity akin to those applied to states may not be suitable for them.⁹⁷ There is a view that these standards should only be applied to NGOs directly involved in policy-making and implementation at national and international levels.⁹⁸

On transparency and accountability, the provisions on eligibility for election to ECOSOCC membership require CSOs' full disclosure of their sources of funding.⁹⁹ The CSOs should also be owned and managed by at least fifty per cent of Africans and at least fifty per cent of their basic resources must be derived from members' contributions.¹⁰⁰

Further, CSOs have to meet the general requirements of CSOs' Accreditation Criteria for them to be eligible for ECOSOCC membership.¹⁰¹ The criteria emphasise that CSOs should be representative and accountable to members.¹⁰² It is not clear how

⁹⁷ See P Wapner 'Defending accountability in NGOs' (2002) 3 *Chicago Journal of International Law* 197 205 who argues that states and NGOs have different systems of accountability.

⁹⁸ See R Lehr-Lehnardt 'NGO legitimacy: Reassessing democracy, accountability and transparency' (2005) Paper 6 *Cornell Law School LLM Papers* 2 3, 24 26 & 49 50.

⁹⁹ Arts 6(6) & 6(7) ES.

¹⁰⁰ Art 6(6) ES.

¹⁰¹ Art 6(3)(b) ES.

¹⁰² Sec I, para 6(c) CSOs' Accreditation Criteria; the study assumes that the CSO accreditation criteria will be used as a guideline since, from art (6(3)(b) ES, it is not clear whether the general conditions for eligibility for the granting of observer status to NGOs refers to the CSOs' Accreditation Criteria, applicable throughout the AU, or whether it refers to the conditions for eligibility to be developed by ECOSOCC's SC in granting CSOs observer status to ECOSOCC, pursuant to art 10(3) ES & sec IV para 1 of the CSOs' Accreditation Criteria.

representivity will be measured. In addition, it may be onerous for grassroots CSOs to demonstrate their compliance with indicators of transparency, accountability and representivity, once these are developed, compared to the more established national, regional and continental CSOs.¹⁰³ Given civil society's multi-dimensional, multi-level and multi-functional nature, different indices of measuring transparency, accountability and representivity among CSOs should be developed, as these principles are key requirements of eligibility for ECOSOCC membership. This way, assessment of compliance with these eligibility criteria will be carried out in a clear manner, therefore enhancing ECOSOCC's legitimacy.

ECOSOCC's function of '... public enlightenment [sic], mobilisation and feedback on the activities of the Union' is in line with Harbermas's conceptualisation of civil society as part of the wider political public sphere in which rules and decisions for ordering public life are made.¹⁰⁴ It is through ECOSOCC's communicative action that deliberation between civil society and the AU will occur. Further, following Harbermas's conceptualisation of civil society, through its advisory reports and opinions, ECOSOCC will be availing its members' expertise to the other AU organs, thus engaging in rational and impartial argumentation in outlining policy preferences. As this conceptualisation of civil society fits in with the concept of deliberative democracy, ECOSOCC's legal framework leans towards the concept of deliberative democracy.

As a differentiated sphere characterised by its form and rationality

In its mediating role between the individual, the state and the market, civil society may lose its associational form and communicative values because it has to conform to the organisational form and values of the political and economic spheres. Since the SCCs are structured along the AU Commission's portfolios, they could end up being an extension of the AU Commission instead of a mechanism for channelling civil society's views to AU organs. Again, the SCC'S operations could become compartmentalised along the AU Commission's portfolios. Should this happen, ECOSOCC will lose its associational structure and communicative values and its work will be hampered. In developing linkages with the other AU organs, ECOSOCC should strive to maintain its independence.

¹⁰³ Lehr-Lehnardt (n 98 above) 25 states that the cost of generating a membership base and securing formal representation of the masses is expensive, thus unattainable for smaller NGOs.

¹⁰⁴ Art 7(7) ES; Harbermas (n 20 above).

In terms of the relationship between civil society and the political system

ECOSOCC's legal framework accommodates liberalism's conceptualisation of civil society as, guarding against excessive exercise of state power. It provides that ECOSOCC will promote human rights and the rule of law. These are principles that guard against state intrusion into the private sphere.

Civic republicanism regards civil society as facilitating participatory democracy as an adjunct to the participation in public decision-making through institutions of representative democracy. From its legal framework, ECOSOCC has the leeway to develop and maintain contacts with civil society and by doing so, CSOs will see it as a forum through which they can participate in the AU in addition to, for instance, through the PAP.

ECOSOCC's legal framework has not adopted the 'third way' conceptualisations of civil society, which envisage CSOs undertaking public functions either alone or in association with the AU or its member states. Therefore, associative democracy cannot take root within the AU since it presupposes that CSOs are the best placed to undertake public functions.

In terms of civil society's relationship with law

There is no indication of the stage of the policy-making process at which ECOSOCC will be consulted, and on the matters it is to be consulted.¹⁰⁵ There is also no indication of what ECOSOCC's entitlements are in following up on consultations between it and the other AU organs.¹⁰⁶ In addition, it has no powers to compel the availing of information from the other AU organs.

2.4.2 ECOSOCC's role in the AU's institutional structure

Having analysed ECOSOCC's functions and its conceptualisation of civil society, its role within the AU's institutional structure can be deduced.¹⁰⁷ Firstly, ECOSOCC will provide CSOs with a forum for functional participation. Through ECOSOCC, CSOs

¹⁰⁵ From the interview with Mr Kioko (n 55 above) he expressed the opinion that it will be difficult for the obligations on the other AU organs to consult ECOSOCC to be framed in legal terms, since policy makers will see this as encumbering their powers.

¹⁰⁶ Rule 22(2) EDR provides that the modalities for follow up on advisory opinions and reports will be formulated by the ECOSOCC's SC.

¹⁰⁷ This is drawn from the analysis by Smismans (n 33 above) on the role of civil society in the EU context.

will channel their expertise, towards achieving the AU's objectives. By maintaining linkages and continuous dialogue with civil society, ECOSOCC will be able to perform a functional representation role for CSOs. Secondly, ECOSOCC is envisaged as a medium of politicisation of CSOs on the AU and its work. This politicisation will be achieved by ECOSOCC enlightening CSOs on issues being addressed at AU level and facilitating them to voice their opinions on these issues.¹⁰⁸ In doing so, it will facilitate the development of an African public opinion. ECOSOCC's role of politicisation of CSOs also stems from its function of developing the concept of African citizenship.¹⁰⁹

2.5 Provisions in ECOSOCC's legal framework requiring review

ECOSOCC's legal framework contains provisions that will hinder the implementation of its mandate. These provisions deal with membership-related issues, the tenure and working methods of ECOSOCC's structures and amendment of ECOSOCC's legal framework.

2.5.1 Membership-related provisions

In line with article 5(1) of the ECOSOCC Statutes, elections of ECOSOCC members will be conducted by a 'competent CSO authority'. Accordingly, ECOSOCC should adopt clear guidelines on what qualifies as a 'competent CSO authority'.

Article 6(1) of the ECOSOCC Statutes sets out one of the eligibility criteria for election to ECOSOCC membership as requiring that the CSOs should 'be national, regional, continental or African Diaspora CSOs, without restriction to undertake regional or international activities'. This provision could be problematic for CSOs based in AU member states, which restrict CSO activities to the national or sub-national level. Since it will be difficult for grassroots and national CSOs to demonstrate that they have no restrictions to undertake regional and international activities, they may be locked out of ECOSOCC membership.

Another ambiguous eligibility criterion is set out at article 6(3)(b) which requires that a CSO 'meet the general conditions of eligibility for the granting of Observer Status to non-governmental organisations'. It is unclear whether the criteria referred to in this

¹⁰⁸ Art 7(7) ES.

¹⁰⁹ This is deduced from art 7(6) ES.

article are those to be developed by the SC pursuant to article 10(3) of the ECOSOCC Statutes or whether they refer to the CSOs' Accreditation Criteria applicable within the AU. If the provision refers to the CSOs' Accreditation Criteria, from the requirement that the NGO be '... of recognised standing within the particular field of its competence', the criteria are geared towards granting observer status to CSOs that can provide specific expertise.¹¹⁰ The criteria also favour umbrella organisations as NGOs working in a similar area are urged to form joint committees for the purpose of obtaining observer status.¹¹¹ In addition, the criteria's special provisions on observers in the work of ECOSOCC indicate that observer status will be granted only to 'Inter-African NGOs and NGOs of the Diaspora'.¹¹² If the reference to general conditions of eligibility for the granting of observer status is to the CSOs' Accreditation Criteria, then CSOs that have special expertise, umbrella CSOs and those operating at continental and African Diaspora levels will dominate ECOSOCC, as only they will be eligible for its membership. The categories of organisations eligible to be granted observer status to ECOSOCC should be as inclusive as possible.

With regard to articles 6(5) and 6(6) of ECOSOCC Statutes, dealing with the ownership, management and funding of CSOs, ownership and management of CSOs are not defined. The requirement that at least fifty per cent of a CSO's resources be derived from members' contributions indicates that, ECOSOCC will be composed mainly of membership-based organisations.

2.5.2 Provisions on the amendment of ECOSOCC's legal framework

To ensure ECOSOCC's autonomy and independence, where proposals for amendment to its statutes are made by an AU member state in line with article 20 of the ECOSOCC Statutes, ECOSOCC must give its views on such proposals and the Assembly must take these into consideration. A provision in the statutes that these should be reviewed regularly will provide ECOSOCC with the leeway to expand its role.¹¹³

¹¹⁰ Sec I para 4 CSOs' Accreditation Criteria.

¹¹¹ As above.

¹¹² Sec IV para 1 CSOs' Accreditation Criteria.

¹¹³ See Sturman & Cilliers (n 46 above) 77.

2.5.3 Provisions on ECOSOCC's structures and working methods

The provisions on the tenure, frequency of meetings and working methods of ECOSOCC's structures will be discussed. Provisions on ECOSOCC's advisory reports and opinions will also be analysed because it is mainly through these opinions that ECOSOCC will channel civil society's views to the other AU organs.

Tenure of ECOSOCC members and ECOSOCC's structures

Article 5(5) of the ECOSOCC Statutes sets out the term of ECOSOCC members at four years and that they may be re-elected only once. The tenure of the ECOSOCC PO and Bureau is two years.¹¹⁴ The SC's and CC's tenure is two years.¹¹⁵ The SCC's term runs for four years.¹¹⁶ Following article 10(1)(b) of the ECOSOCC Statutes, the chairpersons of the SCCs are members of the SC, therefore the chairpersons of the SCCs in their capacity as members of the SC will have a longer term than the other SC members.

The ECOSOCC Bureau, the SC and CC serve for two years while the ordinary session of the EGA is to be held once every two years in line with article 9(3) of the ECOSOCC Statutes. This means that there will be elections for the ECOSOCC Bureau, the SC and the CC at every ordinary session of the EGA.

Furthermore, as the ordinary session of the EGA is to be held once every two years, there is no mechanism to hold the different ECOSOCC's structures to account once they are elected. ECOSOCC members have to wait until the next ordinary session of the EGA to do so, unless extraordinary sessions of the EGA are convened.

The tenures of ECOSOCC's structures should be harmonised. Since the members of these structures are drawn from the wider ECOSOCC membership who serve a four-year term and are eligible for re-election once, for consistency, ECOSOCC's structures should also have a four-year term and their members should be eligible for re-election only once. This will avoid ECOSOCC having to constantly hold elections. It will also facilitate the development of ECOSOCC's institutional memory.

¹¹⁴ Art 9(4)(b) ES; following rule 7(1) EDR, the Bureau shall be eligible for re-election only once.

¹¹⁵ Art 10(4) ES and rule 17(2) EDR respectively; there is no indication of whether members of the SC and the CC are eligible for re-election.

¹¹⁶ Rule 14 EDR.

Frequency of meetings of ECOSOCC's structures

If the ordinary session of the EGA is to be convened once every two years, it would follow that ECOSOCC's other structures must meet as frequently as possible before the EGA ordinary sessions. The Bureau is to meet whenever its PO directs or when at least two of its members request a meeting.¹¹⁷ Other than providing that the SC shall meet as often as circumstances require, the only other provisions on the SC's frequency of meetings are those related to ECOSOCC's issuance of advisory reports and opinions.¹¹⁸ This lack of provisions on ECOSOCC's structures' frequency of meetings is a major gap. Each ECOSOCC structure should hold a minimum number of sessions within a given period.

Ordinary sessions of the EGA

With the silence on the frequency of meetings of ECOSOCC's structures, at a minimum, the ordinary sessions of the EGA should be held as frequently as possible. It would therefore not be practical for ECOSOCC to undertake its work if the ordinary sessions of the EGA will be once every two years.¹¹⁹

In addition, since some of ECOSOCC's functions can only be performed by the EGA, these will only be undertaken once every two years. The EGA cannot question the SC on its work once every two years. The EGA will adopt the draft advisory reports and opinions prepared by the SCCs after the SC considers them.¹²⁰ If these opinions and reports are required within a specific time, they will be submitted late since the EGA can only adopt them every two years.

The EDR provide that where advisory reports and opinions have to be delivered urgently, either an extraordinary session of the EGA can be convened to consider the draft advisory report or opinion or it can be considered under urgency procedures.¹²¹ With the EGA meeting once every two years, it is foreseeable that most of ECOSOCC's advisory reports and opinions issued at the request of other AU organs will be adopted at either extraordinary sessions of the EGA or under urgency procedures. This will not reflect well on ECOSOCC. Furthermore, ECOSOCC could

¹¹⁷ Rule 12 EDR.

¹¹⁸ Rules 16(1), 18(1) & 18(4) EDR.

¹¹⁹ From the interview with Mr Kioko (n 55 above), this provision was influenced by the AU's budgetary constraints.

¹²⁰ Arts 9 & 11 ES read with rule 22(1) EDR.

¹²¹ Rule 23(1) EDR.

end up undertaking most of its work mainly through the extraordinary sessions of the EGA.

The EGA will also adopt ECOSOCC's annual reports before they are submitted to the Assembly. Though article 10(2)(d) of the ECOSOCC Statutes provides that the SC prepares and submits the annual reports of ECOSOCC to the Assembly, it is logical to assume that these will be adopted by the EGA before submission to the Assembly. This means that in a year when there is no ordinary session of EGA, ECOSOCC will have to adopt its annual report at an extraordinary session of the EGA. An official from the AU Commission has expressed the desirability of the ordinary session of EGA being held before the Assembly sessions so that the report of the ordinary session of EGA can form part of ECOSOCC's annual report to the Assembly.¹²²

The preceding arguments provide a strong basis for recommending that the ordinary session of the EGA be held at least once a year before the Assembly summits.

Preparation and adoption of advisory reports and opinions

ECOSOCC can issue advisory reports and opinions at the request of any AU organ or on its own initiative. The EDR only sets out the procedures to be followed when preparing advisory reports and opinions arising from referrals from other AU organs. Rules on how ECOSOCC will prepare and submit its own-initiative reports and opinions should be formulated.

ECOSOCC's advisory reports and opinions will be more authoritative if they reflect the consensus of ECOSOCC and the opinions of the wider CSO community.¹²³ There are several ways of ensuring that this consensus and diversity of opinions is achieved. Firstly, it is expected that CSOs' wide expertise and views on different matters affecting the AU will be channelled through the SCCs, when they are drafting advisory reports and opinions. Attention must therefore be paid to the composition of the SCCs. There is no indication of the SCCs' composition other than the requirement that every representative of a member of ECOSOCC must belong to at least one SCC.¹²⁴ There should be a balance between CSOs' expertise and CSOs'

¹²² Interview with Mr Kioko (n 55 above).

¹²³ The requirements for consensus ensure that ECOSOCC's members do not represent their interests, but those of the broader civil society and the AU.

¹²⁴ Rule 13(3) EDR.

representivity in the composition of the SCCs.¹²⁵ This will ensure the SCCs' reports and opinions are technically sound and representative of the views of different levels and segments of CSOs. In this regard, ECOSOCC should develop guidelines for the composition of SCCs.

Secondly, the procedures for adopting advisory reports and opinions are geared towards ensuring ECOSOCC adopts these reports and opinions by consensus.¹²⁶ ECOSOCC should, as much as possible, follow these procedures, so long as they do not hamper its work.

Thirdly, ECOSOCC's advisory reports and opinions will be representative of civil society's views if, in their preparation, the SCCs consult CSOs. According to the ECOSOCC Rules, the SCCs' advisory reports and opinions will be based on its members' views and, where necessary, on experts' advice.¹²⁷ The provisions on preparation of advisory reports and opinions should give the SCCs the discretion to consult CSOs. Such consultations are necessary because, although the SCCs are made up of different CSO members, the SCCs may not be aware of the prevailing CSOs' views on the matters under consideration. These consultations will facilitate the SCCs to ground their work in civil society.

2.6 ECOSOCC's linkages with other AU organs

2.6.1 The AU's institutional structure

The AU's institutional structure envisages policy-making, legislative and adjudicatory organs. It also includes financial institutions to deal with the AU's monetary and economic policies. The PSC, an executive organ, deals with peace and security issues.

The Assembly, the Executive Council, the STCs and the PRC are the AU's policy-making organs. The Assembly is the supreme organ of the AU, composed of AU member states' Heads of State and Government.¹²⁸ It makes general policy recommendations to be followed by the AU. It can delegate any of its powers to the

¹²⁵ This is a balance between the functional participation and functional representation roles of ECOSOCC.

¹²⁶ Rules 20(8), 21, 71 & 72 EDR.

¹²⁷ Rules 20(2) & (3)(a) EDR.

¹²⁸ Art 6 AU Act.

Executive Council.¹²⁹ The Executive Council is composed of Ministers of Foreign Affairs or other Ministers or authorities designated by AU member states.¹³⁰ It coordinates the AU's policies and takes decisions on policies in common areas of interest to AU member states.¹³¹ It is responsible to the Assembly, dealing with issues referred to it by the Assembly and monitoring implementation of policies adopted by the Assembly.¹³² Pursuant to article 13(3) of the AU Act, The Executive Council can delegate its powers to the STCs, which are established under article 14 of the AU Act. The STCs are responsible to the Executive Council. They are composed of senior government officials working in the STC's policy areas.¹³³ They are charged with developing the AU's projects and programmes in specific policy areas.¹³⁴ The PRC is set up as an advisory organ to the Executive Council and is charged with preparing the Executive Council's work.¹³⁵ The AU Commission is the bureaucracy of the AU.¹³⁶

The PAP was created to, *inter alia*, '... ensure the full participation of African peoples in the development and economic integration of the continent'.¹³⁷ It is the AU's legislative organ, but currently, it exercises consultative and advisory powers only.¹³⁸ The COJ of the AU will be its adjudicatory organ. The African Central Bank, the African Monetary Fund and the African Investment Bank are the AU's Financial Institutions.¹³⁹

All the organs except the COJ, the STCs and the Financial Institutions have been operationalised. The legal frameworks for the COJ, the STCs and the Financial Institutions have not been finalised.

¹²⁹ Art 9(2) AU Act.

¹³⁰ Art 10 AU Act.

¹³¹ Art 13(1) AU Act.

¹³² Art 13(2) AU Act

¹³³ Art 14(3) AU Act.

¹³⁴ Art 15 AU Act.

¹³⁵ Art 21 AU Act.

¹³⁶ Art 20(1) AU Act.

¹³⁷ Art 17 AU Act.

¹³⁸ Art 2(3) of the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (PAP Protocol).

¹³⁹ Art 19 AU Act.

2.6.2 Linkages with the Assembly, the Executive Council, the PRC, the STCs and the AU Commission

ECOSOCC's relationship with these policy organs will be based on its power to submit advisory reports and opinions, to propose agenda items for these organs' ordinary sessions and through its PO participating in these organs' meetings.¹⁴⁰

The Assembly, The Executive Council and the PRC are empowered to consider reports of other AU organs. The Assembly is so empowered through rule 4(1)(o) of the Assembly Rules, the Executive Council through rule 5(1)(m) of the Executive Council Rules and the PRC through rule 4(1)(k) of the PRC Rules.¹⁴¹ In addition, any AU organ can propose agenda items for these organs' ordinary sessions. This is set out in rule 8(2)(b) of the Assembly Rules, rule 9(2)(f) of the Executive Council Rules and rule 7(5) of the PRC Rules.

Regarding the ECOSOCC's PO's participation in the meetings of the other AU organs, firstly, under the AU Act, the Chairperson of the Assembly can convene meetings of all chairpersons or chief executives of AU organs.¹⁴² Secondly, the ECOSOCC PO can attend the ordinary sessions of the Assembly and the Executive Council in line with rule 17(2)(b) of the Assembly Rules and rule 18(2)(b) of the Executive Council Rules respectively. Using these provisions, ECOSOCC should produce timely and relevant advisory reports and opinions and propose relevant agenda items.

Though the legal framework for STC's has not finalised, it is evident from the AU Act, that the STCs will prepare the AU's projects and programmes. ECOSOCC's SCCs should establish linkages with the STCs and the AU Commission because they will all be dealing with the technical aspects of the AU's policies and programmes.

¹⁴⁰ See these organs' Rules of Procedure *Assembly/AU/2(I)-a* Rules of Procedure of the Assembly of the Union (Assembly Rules), *Assembly/AU/2(I)-b* Rules of Procedure of the Executive Council (Executive Council Rules) and *Assembly/AU/2(I)-C Rev.1* Rules of Procedure of the Permanent Representatives Committee (PRC Rules) adopted by the Assembly at its 1st ordinary session Durban, South Africa, 9 to 10 July 2002.

¹⁴¹ For the Assembly, this is in line with its function set out in art 9(1)(b) AU Act.

¹⁴² Art 7 AU Act.

2.6.3 Linkages with the PAP

The PAP is a forum for African peoples and their grassroots organisations to be involved in discussions and decision-making on the problems facing the African continent.¹⁴³ Some of ECOSOCC's objectives are similar to those of the PAP's. The PAP's objectives include facilitating the implementation of the policies and objectives of the AU, promoting human rights and democracy in Africa and familiarising African peoples with the objectives and policies aimed at African integration.¹⁴⁴ The PAP also has the objective of strengthening continental solidarity and building a sense of solidarity among the peoples of Africa.¹⁴⁵ It is empowered to undertake several functions in pursuit of these objectives.¹⁴⁶ Just like ECOSOCC, the PAP can also issue advisory opinions, either on its own initiative, or at the request of any AU organ.¹⁴⁷

There are opportunities for ECOSOCC to create linkages with the PAP. The PAP can invite representatives of any AU organ to furnish explanations on issues affecting the AU.¹⁴⁸ It can also question any AU organ on AU matters.¹⁴⁹ ECOSOCC can suggest items to be placed on the Order Paper for the PAP's sessions.¹⁵⁰ ECOSOCC members can also attend the PAP's session at the PAP's invitation as envisaged under rule 38(1)(g) of the Rules of Procedure of the PAP (PAP Rules). The PAP is required to deliberate on the annual reports and other reports of other AU organs submitted to it and after such deliberations, pass resolutions on them for consideration by the Executive Council.¹⁵¹

With the similarity in ECOSOCC's and PAP's objectives, it will be necessary for ECOSOCC to distinguish its role from that of the PAP's.

¹⁴³ Para 4 Preamble PAP Protocol.

¹⁴⁴ Art 3 PAP Protocol.

¹⁴⁵ As above.

¹⁴⁶ Art 11 PAP Protocol & rule 4 PAP Rules.

¹⁴⁷ Art 11 PAP Protocol & rule 5(c) PAP Rules.

¹⁴⁸ Rule 5(e) PAP Rules.

¹⁴⁹ Rule 67(1) PAP Rules.

¹⁵⁰ Rule 36(2) PAP Rules.

¹⁵¹ Rule 75 PAP Rules.

2.6.4 Linkages with the PSC

The Protocol Relating to the Establishment of the Peace and Security Council of the AU (PSC Protocol) and the Rules of Procedure of the PSC (PSC Rules) gives the PSC wide powers to collaborate directly with CSOs.¹⁵²

In the conduct of its business, the PSC can hold open meetings where it can invite CSOs to participate, without the right to vote.¹⁵³ The PSC can hold informal consultations with CSOs on situations under its consideration.¹⁵⁴ Representatives of CSOs with observer status to the AU can also address the PSC at any of its meetings.¹⁵⁵ Article 12 of the PSC Protocol sets out the Continental Early Warning System (CEWS) as a support structure for the PSC. The AU Commission is empowered to collaborate with CSOs in facilitating the effective functioning of CEWS.¹⁵⁶ The African Standby Force, also created under article 12 of the PSC Protocol as a support structure for the PSC, is empowered to cooperate with CSOs.¹⁵⁷

Pursuant to article 3(e) of the PSC Protocol, one of the PSC's objectives is to develop a common defence policy for the AU. Article 7(h) of the PSC Protocol sets out one of the PSC's functions as implementation of this common defence policy. To this end, the Assembly adopted the Solemn Declaration on a Common Defence and Security Policy (Solemn Defence Declaration).¹⁵⁸ One of the objectives of the common defence policy is to provide a framework for 'African civil society to function with regard to conflict prevention, management and resolution.'¹⁵⁹

ECOSOCC's only direct linkage with the PSC is based on rule 19 of the PSC Rules, which allows the PSC to invite other AU organs to participate in its meetings. For ECOSOCC to create strong linkages with the PSC, it will have to demonstrate that it is more effective for the PSC to consult CSOs through it than for the PSC to collaborate directly with CSOs.

¹⁵² Art 20 sets out the PSC's relationship with CSOs.

¹⁵³ Art 8 (10)(c) PSC Protocol & rule 15(2)(b) PSC Rules.

¹⁵⁴ Art 8(11) PSC Protocol & rule 16 PSC Rules.

¹⁵⁵ Rule 21 PSC Rules.

¹⁵⁶ Arts 12(3) & 12(7) PSC Protocol.

¹⁵⁷ Art 13(4) PSC Protocol.

¹⁵⁸ Adopted by the 2nd extraordinary session of the Assembly Sirte, Libya 28 February 2004.

¹⁵⁹ Para 13(w) Solemn Defence Declaration.

In conclusion, the AU legal framework sets out few provisions on which ECOSOCC can establish linkages with other AU organs. These linkages will have to develop through practice by ECOSOCC providing quality advice to the other AU organs. ECOSOC can also demonstrate to the other AU organs that they can draw on its members' broad-based expertise and that consulting CSOs through it provides these organs with an easily accessible forum for the diversity of interests requiring representation in the AU.

2.7 Concluding remarks

The general principles setting out ECOSOCC's legal framework acknowledge civil society's multi-form, multi-level and multi-dimensional nature. However, due to the ambiguous and inconsistent provisions in its legal framework, ECOSOCC may be dominated by specialist, umbrella and membership-based CSOs and those operating at the continental and African Diaspora levels, contrary to its intended inclusive nature.

Though ECOSOCC's legal framework has adopted the more contemporary conceptualisations of civil society, it has not addressed the concerns raised by these conceptualisations. For instance, categorising economic actors as CSOs could lead to these actors dominating CSOs, yet ECOSOCC's legal framework does not provide safeguards against this. This may hamper ECOSOCC's ability to undertake its mandate and limit its representivity and legitimacy. On the role of ECOSOCC, its legal framework envisages it as a forum for functional participation and representation for CSOs and a mechanism for politicising CSOs on AU issues.

For ECOSOCC to function effectively, the tenure of its internal structures needs to be harmonised and the frequency of their meetings clearly spelt out. Its ordinary sessions should be held at least once a year. Since there is a very narrow legal basis on which ECOSOCC can develop its linkages with the other AU organs, ECOSOCC will have to develop these through practice.

CHAPTER 3 LESSONS FOR ECOSOCC FROM THE EU'S ESC AND UN ECOSOC

3.1 Introduction

This chapter discusses the role of an organ of the EU, the Economic and Social Committee (ESC), on which ECOSOCC is modelled. It will discuss how the ESC has performed within the EU's institutional framework and what factors have influenced its performance. This discussion will highlight the lessons for ECOSOCC from the ESC. At the UN level, a discussion of the UN ECOSOC's process of facilitating civil society participation will be undertaken. Similarly, lessons that could be learned by ECOSOCC will be outlined.

3.2. Background to the ESC

Europe's economic elites and technocrats drove the EU integration process. European integration targeted the main socio-economic actors in specific sectors, to build trans-national coalitions in support of EU policies. In this regard, it was felt that it was necessary to create a consultative committee composed of representatives of employers, workers, consumers and other socio-economic groups, to advise on the integration process.¹⁶⁰ Thus the ESC was created in 1957 by the Treaty of Rome, as an advisory committee, comprising social and economic interest groups.

3.2.1 Composition

The ESC is composed of 222 members who serve a four-year term, representing national socio-economic groups, professional occupations and the general public. Its membership is divided among EU member states in proportion with their population, but with a higher representation for smaller EU member states. EU member states propose candidates for appointment by the EU's Council of Ministers (the Council).¹⁶¹

¹⁶⁰ See S Smismans 'The European Economic and Social Committee: Towards deliberative democracy via a functional assembly' (2000) 4 *European Integration online Papers* No 12 4 available at <http://eiop.or.at/eiop/texte/2000-012a.htm> (accessed 20 July 2006).

¹⁶¹ Smismans (n 160 above) 2 quoting W van der Voort 'In search of a role: The Economic and Social Committee in European decision making' unpublished PhD thesis, Universiteit van Utrecht 1997 196 199.

Following the ESC Rules of Procedure, the ESC is divided into three Groups. Group I represents employers organisations, Group II represents trade unions while Group III represents various interests outside Groups I and II. The ESC is further divided into six sections which address specific policy areas, akin to ECOSOCC's SCCs.¹⁶²

All structures of the ESC are organised along these three functional groups. The ESC's organisational functions are undertaken by a Bureau. The ESC is headed by a President elected every two years, with the Presidency rotating among the three groups. Two Vice Presidents, drawn from the groups not holding the Presidency, assist the President.

3.2.2 Functions

The ESC's main work is rendering advisory opinions following referrals from the European Commission (EC). The Council and the European Parliament (EP) also have the right to consult it. There are matters on which the ESC must be consulted, through compulsory consultation. Since its creation, the policy areas on which the ESC must be consulted have increased.¹⁶³ Through optional consultation, the EC, the Council and the EP may consult the ESC where these organs consider it appropriate. Compulsory and optional consultations take place after the other organs have developed legislative proposals.

In addition to opinions issued following compulsory and optional consultations, the ESC issues two other types of opinions, the own-initiative and exploratory opinions. The own-initiative opinion is issued when the ESC regards an issue as important but its opinion has not been sought through compulsory or optional consultation. The ESC issues exploratory opinions when the EC and the EP request it to make recommendations on action to be taken at EU level.¹⁶⁴ It receives from the EC, on a quarterly basis, and from the Council, on an annual basis, reports on the impact of its opinions.¹⁶⁵

¹⁶² See A Warleigh 'The Economic and Social Committee' in A Warleigh (ed) *Understanding European Union institutions* (2002) 163 176 164.

¹⁶³ Warleigh (n 162 above) 166 167.

¹⁶⁴ Warleigh (n 162 above) 166.

¹⁶⁵ Warleigh (n 162 above) 165 166.

3.2.3 The ESC's performance

At the time the ESC was created, it was envisaged that it would develop into a key actor in European integration, linking Europe's political leaders with the key economic and social actors. The shift in the approach of EU decision-making from a technocratic and elitist one to one involving a plurality of actors and geared towards enhancing the EU's democratic credentials has impacted adversely on the ESC.¹⁶⁶ The ESC's marginal role in EU decision-making led some writers to conclude that it could become obsolete.¹⁶⁷ Despite the expansion of the policy areas in which the ESC must be consulted, it is still on the periphery of EU decision-making. This is due to several factors, which will be discussed in turn.

The increasing powers of the EP

At its creation, the ESC was envisaged to be more influential than the General Assembly, the EP's predecessor, because the consensus of the key economic and social players represented through the ESC was considered more important than that of national legislators appointed to the EP by EU member states. Like the ESC, the EP had only an advisory role.

With the EU's elitist and technocratic decision-making being increasingly criticised as being undemocratic, EU institutions sought ways of enhancing the system's legitimacy. The answer was sought in increasing the EP's oversight and legislative powers, particularly since its democratic credentials had increased because, from 1978, its members were being directly elected. With these increased powers, the EP, once the ESC's competitor, became its superior.

The ESC tried to enhance its democratic credentials by shifting its focus from representing the social and economic interests to representing the citizens of EU member states. However, this led it to encroach onto the EP's mandate.¹⁶⁸ The ESC therefore shifted its focus from representing European citizens to representing organised civil society. The ESC used the problem of the lack of legitimacy plaguing

¹⁶⁶ W van der Voort 'The Economic and Social Committee' in MPCM van Schendelen (ed) *EU committees as influential policymakers* (1998) 250 273.

¹⁶⁷ J Lodge and V Herman 'The Economic and Social Committee in EEC decision making' (1980) 34 *International Organisation* 265 284 266 267.

¹⁶⁸ Smismans (n 33 above) 482.

EU institutions to redefine its role by contending that, involving civil society more in EU decision-making would contribute to solving the EU's democratic deficit.¹⁶⁹

The strategy for reducing the EU's democratic deficit has largely been pegged on enhancing the influence of EU's territorially-based representatives such as, the EP and national parliaments, in EU decision-making.¹⁷⁰ The ESC's strategy of reducing the EU's democratic deficit is linked to the concept of functional representation, which has emerged as an adjunct to territorial representation. Functional representation is premised on the idea that citizens have plural interests. Parliaments may not be able to represent the whole range of citizens' interests, therefore, citizens get involved in interest groups where their interests other than political ones are addressed. Through their involvement in interest groups, citizens address their functional interests.¹⁷¹

The ESC has argued that functional representation complements the EP's legitimacy, which flows from its territorially-based representative nature. The ESC's position is strengthened by the fact that the heterogeneity of EU member states has hindered the development of a European public opinion and citizenship. Since there is no European citizenship there can be no European democracy, therefore addressing the EU's democratic deficit by increasing the influence of territorially-based representatives will not solve the problem. Further, transplanting the parliamentary democracy model found at the state level to the EU may not reduce the EU's democratic deficit.¹⁷² This necessitates the search for additional means of legitimating EU policies, thus the importance of functional representation. Using functional representation, the ESC has defined its role as contributing to the democratisation of the EU system.

The EP has maintained that though organised civil society is important in the EU, it cannot be regarded as having its own legitimacy and that, it is only through territorially-based representatives that the democratic deficit of the EU will be solved.¹⁷³

¹⁶⁹ Smismans (n 33 above) 481 484.

¹⁷⁰ Smismans (n 160 above) 5.

¹⁷¹ Smismans (n 33 above) 486 487; Smismans (n 160 above) 7.

¹⁷² See M Jachtenfuchs 'Democracy and governance in the European Union' (1997) 1 *European Integration online Papers* No 0002 7 9 available at <http://eiop.or.at/eiop/texte/1997-002a.htm> (accessed 20 July 2006).

¹⁷³ Smismans (n 33 above) 484.

The creation of the Committee of the Regions (COREG)

With the progress in EU's regional integration, it was felt necessary to create a body where representatives of regional and local authorities could channel their opinions to EU institutions. COREG was created in 1992 as a channel for territorially-based representatives other than those at the national level, to influence EU policies. COREG was to contribute to solving the EU's democratic deficit.

Like the ESC, it is an advisory body with specific areas where it must be consulted, though these are fewer than the ESC's. It is perceived to be more influential than the ESC.¹⁷⁴ Its status is enhanced by its composition. COREG members must hold an electoral position in their home countries. They are usually high-ranking influential politicians and they use this influence to achieve COREG's objectives.

Like the EP, COREG has also reacted to the ESC's redefinition of its role as a forum for functional representation by reiterating that territorial representation is the only source of democratic legitimacy in the EU.¹⁷⁵

The ESC's unrepresentative nature

The ESC is seen as unrepresentative in many respects. The appointment of its members following their nomination by EU member states means that it is not fully representative of the social and economic interest groups. In addition, the national quotas prevent member states from nominating representatives from a broad range of interest groups.

The ESC's composition has resulted in internal differences within it. The trade unions group considers the ESC dominated by the employers group, who they see as controlling the various interests' group. In addition, the various interests' group covers such a wide range of interests that it is hard for many of those interests' voices to be heard within the group and the ESC as a whole.¹⁷⁶ Due to this lack of representivity, the employers and trade unions groups prefer to use channels other than the ESC to influence EU decision-making. Since these two groups dominate the ESC, the views they express through channels other than the ESC are the same as

¹⁷⁴ FB Calussi 'The Committee of the Regions: An atypical influential committee?' in van Schendelen (n 165 above) 225 249 247.

¹⁷⁵ Smismans (n 33 above) 485.

¹⁷⁶ Warleigh (n 162 above) 169.

the ESC's opinions, making the ESC's opinions irrelevant. Where they have an option, the other EU organs do not see the need to seek the ESC's opinion.

The ESC's reliance on outside experts to develop its opinions also negates its claim to be an organ whose work is rooted within the social and professional groups it represents.¹⁷⁷

The creation of rival bodies within the ESC's field of competence

The ESC's lack of influence in the EU is evidenced by the creation of several bodies mandated to undertake functions falling within its field of competence. In many cases these bodies are composed of representatives drawn from the same pool as that from which ESC members are drawn, particularly the social partners, composed of employers' organisations and trade unions. Examples of such rival bodies are the Social Dialogue and the Employment Committee.

The Social Dialogue facilitates pre-legislative consultations between EU policy-makers and the social partners on employment issues. Despite the social partners forming the ESC's two main groups, the ESC has been left out of the Social Dialogue.¹⁷⁸

In 1997, the Amsterdam Treaty created the Employment Committee to help the EU undertake its increased competencies in employment and social policy matters, yet this was a function that the ESC could undertake. The creation of these rival bodies has deepened the ESC's marginalisation within the EU institutional structure.

The nature of EU policy-making

Firstly, because EU policy-making is done through a myriad of policy networks, the ESC's diverse membership has hindered its ability to join these networks. Secondly, EU policy-making is still compartmentalised. EU institutions prefer creating specialised committees to guide policy processes. These include interest committees, and advisory committees also known as 'little ESCs'.¹⁷⁹ The ESC's broad-based composition results in the perception that it lacks specialisation, thus its exclusion from EU policy-making.

¹⁷⁷ Smismans (n 33 above) 482; Smismans (n 160 above) 6.

¹⁷⁸ Armstrong (n 15 above) 123 125.

¹⁷⁹ See Curtin (n 18 above) 62.

Thirdly, the pluralist nature of EU policy-making, involving different institutions at different times, necessitates the adoption of multiple strategies in influencing policy makers. Lobbyists prefer direct and individual contacts with EU institutions to the ESC, as the ESC's diverse composition may not accommodate their specific concerns.

Lastly, though highly valued by the ESC, its method of working by consensus, results in delays in delivering opinions, yet the EU policy-making environment is constantly changing. The ESC's opinions end up not making an impact, particularly since it is consulted after legislative proposals have been made.

Other factors

The ESC lacks an institutional sponsor from among the EU institutions to advance its proposals.¹⁸⁰ Its advisory opinions are taken on board only when they do not differ with the EU policy organs' legislative proposals. ESC members prefer to use channels other than the ESC to influence EU policy, thus they pay more attention to representing their interests through these other channels than through the ESC. The part-time nature of the ESC's work means that its members do not have sufficient time to develop contacts with each other and with the EU's policy networks. Due to the ESC's perceived low influence, it is not composed of personalities who can speak with authority in their fields. Its members' representatives therefore lack the standing to make relevant demands on other EU organs. Its members also view the ESC as an information-gathering forum.¹⁸¹

3.2.4 The ESC's successes

Though the ESC's perceived influence in the EU institutional framework is low, it has undertaken some commendable work. It has developed competence in monitoring the workings of the internal market. It has established relations with economic and social interest groups in EU member states and third countries. Through its work in these areas, the ESC has developed expertise, which is recognised by the other EU organs.

¹⁸⁰ Warliegh (n 162 above) 168 and 173.

¹⁸¹ van der Voort (n 166 above) 269.

3.2.5 Lessons for ECOSOCC from the ESC

There are two main differences between ECOSOCC and the ESC. The Assembly appoints ECOSOCC members after they are elected by CSOs while ESC members are appointed following their nomination by EU member states. The ESC has clear policy areas in which it is consulted by other EU organs while ECOSOCC has no such specification. Other than these differences, these two organs are similar, therefore, the ESC's experiences are valuable for ECOSOCC. The following recommendations for ECOSOCC have been drawn from the ESC's experiences.

- (a) ECOSOCC should enhance its envisaged representative nature by ensuring that it is not dominated by any category of CSOs, particularly those representing economic interests. Its structure and rules should provide opportunities for participation to CSOs representing weaker interests, which usually would lack other channels of influencing the AU.¹⁸²
- (b) ECOSOCC should lobby for the specification of areas where it must and may be consulted by other AU organs.
- (c) ECOSOCC should ground its role on clear theoretical bases such as the concepts of functional representation and deliberative democracy.¹⁸³ This will enable it demarcate its role vis-à-vis the other AU organs, particularly the PAP.
- (d) ECOSOCC should create strong linkages with regional and national CSOs through capacity-building and information-sharing and through this, politicise them on issues being addressed at the AU level.
- (e) ECOSOCC should avoid over-reliance on experts to develop its advisory reports and opinions. In this regard, it should develop a methodology for consulting a wide range of CSOs so that its advisory reports and opinions will be viewed as representative of CSOs' views and will be treated more authoritatively by the other AU organs.

¹⁸² Sturman & Cilliers (n 46 above) 77 78.

¹⁸³ ECOSOCC's deliberative character will be enhanced by its method of working by consensus, rooting its work in civil society, providing reasoned advisory reports and opinions and ensuring continuous feedback to CSOs.

- (f) ECOSOCC is not envisaged as the only mechanism for consultation between the AU organs and CSOs. ECOSCC should strategically position itself within the AU's policy-making processes to ensure that its advisory reports and opinions contribute to AU policies. This includes finding ways to join the AU's policy networks and developing contacts within these networks. In this regard, ECOSOCC's structuring of its SCC's along the AU Commission's portfolios is encouraging. ECOSOCC should create strong linkages between its SCC's, the STCs, the PAP's Committees and the AU Commission. It can also urge AU policy makers to consult CSOs through it, by emphasising its members' broad-based expertise and its open and transparent working methods, which will contribute to enhancing the legitimacy of the other AU organs' policy processes and the resulting policies.¹⁸⁴
- (g) ECOSOCC should develop some expertise in specific policy areas. In addition, it should identify other AU organs that will champion its proposals during policy-making processes because its reports and opinions are merely advisory.
- (h) ECOSOCC should develop a strategy to ensure that its method of working by consensus will not hamper its work. In this regard, its SCCs, SC and EGA should have more frequent meetings.
- (i) ECOSOCC members should send to ECOSOCC high-ranking representatives who will command respect within the AU policy-making circles.

3.3 The UN and CSOs

There are four mechanisms by which CSOs can participate in the UN.¹⁸⁵ The first is by obtaining consultative status with UN ECOSOCC, the second is by obtaining associate status with the UN Department of Public Information (UNDPI) and the third is, by obtaining accreditation for special UN conferences or special sessions of the UN General Assembly. Lastly, CSOs can establish working relations with the UN's specialised agencies, funds and programmes. With consultative status with UN

¹⁸⁴ Curtin (n 18 above) 62.

¹⁸⁵ See JD Aston 'The United Nations Committee on Non-Governmental Organisations: Guarding the entrance to a politically divided house' (2001) 12(5) *European Journal of International Law* 943 962 944; Nowrot (n 2 above) 623 626.

ECOSOC, CSOs gain participatory rights in its work, while associate status with UNDP grants CSOs access to UN documents, facilities and communication materials only.¹⁸⁶ CSOs' linkages with the UN arising from the latter two mechanisms grant varying degrees of participatory rights. The UN NGO Liaison Service promotes partnerships between the UN and NGOs.¹⁸⁷

This study is restricted to discussing the granting of consultative status under UN ECOSOC, which is an organ created under the UN Charter and to this extent, provides a fair comparison between ECOSOCC and the ESC. Additionally, the eligibility criteria for membership to ECOSOCC and the CSOs' Accreditation Criteria are largely modelled on UN ECOSOC's criteria for granting NGOs consultative status.¹⁸⁸

3.4 CSOs' consultative status with UN ECOSOC

UN ECOSOC grants consultative status to CSOs on the basis of article 71 of the UN Charter. By Resolution 3(II) of 21 June 1946, UN ECOSOC created the UN Committee on NGOs (NGO Committee) and charged it with examining and making recommendations on NGOs' applications for consultative status. The NGO Committee is composed of 19 representatives of UN member states elected on the basis of equitable geographic representation.¹⁸⁹ In deciding on applications for consultative status, the NGO Committee is guided by ECOSOC Resolution 1996/31 on the Consultative Relationship between the UN and Non-governmental Organisations (Res 1996/31).¹⁹⁰

International, regional, sub-regional and national organisations can be granted consultative status, but for national organisations, this is done after consultation with the concerned member state.¹⁹¹ The NGO must be undertaking work on matters of competence to UN ECOSOC, of direct relevance to the UN and in line with the purposes of the UN Charter.¹⁹² It must also be of recognised standing within its field

¹⁸⁶ NGOs associated UNDP must have strong public information programmes since their key obligation is to disseminate information about the UN to their publics.

¹⁸⁷ See <http://www.un-ngl.org/index.html>. (accessed 24 October 2006).

¹⁸⁸ See para 69(1) OAUCS conference report (n 55 above).

¹⁸⁹ See <http://www.un.org/esa/coordination/ngo/committee.htm> (accessed 24 October 2006).

¹⁹⁰ UN *Doc.E/1996/31* of 31 July 1996, which replaced ECOSOC Resolution 1296(XLIV) of 23 May 1968.

¹⁹¹ Paras 5 & 8 Res 1996/31.

¹⁹² Paras 1 3 & 8 Res 1996/31.

of competence, have established headquarters and a democratically adopted constitution.¹⁹³ It should have a representative and accountable internal structure and the authority to speak for its members. The organisation must have been in existence for at least two years at the date when its application for consideration for consultative status is received.¹⁹⁴

There are three categories of consultative status. General consultative status is granted to organisations whose work covers most of UN ECOSOC's competencies. These organisations have wide participatory rights within UN ECOSOC, such as, the right to be invited to, and speak at UN ECOSOC meetings, to designate representatives to UN ECOSOC and to propose its agenda items. Special consultative status is granted to organisations whose work covers some of UN ECOSOC's competencies. These organisations cannot propose agenda items and speak at ECOSOC meetings but can circulate written statements for consideration in UN ECOSOC meetings. Organisations that make periodic contributions to UN ECOSOC's work are placed on a list known as the 'Roster' and are only entitled to receive invitations to attend UN ECOSOC meetings and to designate representatives.¹⁹⁵

Other than those on the Roster, all NGOs that have consultative status with UN ECOSOC are required to submit, every four years, reports, known as the quadrennial reports, on their activities in relation to UN ECOSOC. If from these reports it is clear that an NGO is not undertaking its obligations as required, its consultative status can be revoked or suspended. There are two other instances in which an NGO's consultative status can be revoked or suspended.¹⁹⁶ The first is, if the organisation uses its consultative status to engage in unsubstantiated or politically motivated attacks against UN member states and the second is, if there is evidence that the organisation is being influenced by proceeds from internationally recognised criminal activities.

¹⁹³ Paras 9 &10 Res 1996/31.

¹⁹⁴ Para 61(h) Res 1996/31.

¹⁹⁵ See Aston (n 185 above) 947-948; see <http://www.un.org/esa/coordination/ngo/about.htm> which indicates that by the end of 2005, 2719 NGOs had consultative status with UN ECOSOC (accessed 24 October 2006).

¹⁹⁶ Para 57 Res 1996/31; Aston (n 185 above) 962.

3.4.1 Concerns arising from UN ECOSOC's granting of consultative status

There are two main problems related to UN ECOSOC's granting of consultative status. The first one is that Resolution 1996/31 has ambiguities and gaps and this delays the NGO Committee's work since it has to undertake lengthy debates on the appropriate procedures to follow.¹⁹⁷ The second problem arises from the composition of the NGO Committee. Since it is made up of UN member states, the process of granting consultative status is highly politicised.¹⁹⁸ Some of its members block the granting of consultative status or urge the revocation or suspension of such status where the organisations involved are critical of their regimes.

3.4.2 Lessons for ECOSOCC from UN ECOSOC

- (a) Because ECOSOCC's composition is different from that of the NGO Committee, the process of granting CSOs observer status to ECOSOCC will not be politicised. However, ECOSOCC should ensure that there are no avenues for AU member states to interfere with its process of granting observer status to CSOs.
- (b) ECOSOCC should ensure that the guidelines for granting observer status are clear and should define concepts such as transparency, accountability and representivity.
- (c) ECOSOCC should develop these guidelines in appreciation of the multi-dimensional and multi-level nature of CSOs, to guard against, only CSOs operating at continental and African Diaspora levels obtaining observer status. In addition, it can develop different indicators to assess the eligibility of CSOs operating at different levels, to obtain observer status.
- (d) The process of granting observer status should be transparent, with CSOs provided reasons for refusals to grant observer status or allowed to request a reconsideration of ECOSOCC's decision. The records of meetings for consideration of requests for observer status should be made available. In addition, ECOSOCC should widely disseminate the guidelines for

¹⁹⁷ Aston (n 185 above) 946.

¹⁹⁸ Aston (n 185 above) 956.

consideration of observer status to CSOs, indicating the rights and obligations that this status entails.

- (e) ECOSOCC should devise effective mechanisms to monitor CSOs that it grants observer status.

3.5 Concluding remarks

It is evident that ECOSOCC has some lessons to learn from the ESC and UN ECOSOC. ECOSOCC can incorporate these lessons through the amendment of the ECOSOCC Statutes and Draft Rules of Procedure and by developing its guidelines and practice accordingly.

CHAPTER 4 CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

ECOSOCC's legal framework appreciates the multi-form, multi-dimensional and multi-level nature of civil society. In addition, its legal framework envisages ECOSOCC's membership to be as representative and as inclusive as possible of civil society. However, there are provisions in its legal framework that negate this envisaged representivity and inclusiveness and these have to be reviewed. ECOSOCC could be dominated by CSOs representing economic actors. Further, it could end up being composed of mainly membership-based, specialist and umbrella CSOs. Its membership is also geared towards continental and African Diaspora CSOs.

ECOSOCC's mandate envisages it supporting other organs to undertake their mandates. However, it can develop its role, particularly in developing the concept of African citizenship and an African public opinion. ECOSOCC's role within the AU's institutional structure is one of providing functional participation and functional representation to CSOs. Through it, CSOs will avail their expertise to AU policymakers and facilitate them to deliberate on the AU's policies and programmes. ECOSOCC will also provide CSOs with a forum to represent their interests. This role of ECOSOCC is underpinned by its legal framework's orientation towards deliberative democracy. ECOSOCC should use these concepts to define its place in the AU's institutional structure. ECOSOCC will also be a forum for CSOs' politicisation and opinion-formation on AU-related issues.

ECOSOCC's position in the AU's institutional structure will be determined by its ability to provide sound advice and suggest workable proposals on the AU's policies through its advisory reports and opinions. The narrow legal bases for its linkages with the other AU organs means that, ECOSOCC will have to develop these through practice. These linkages are important for ECOSOCC because it will have to find champions for its proposals.

Given the stage of institution-building the AU is at, ECOSOCC has an opportunity to apply its mandate towards facilitating civil society participation in the AU. Most of the AU organs are relatively new and may not have entrenched policy-coalitions in place, thus they would be open to accommodating diverse opinions, which ECOSOCC

would facilitate. Given AU member states' tenuous relationship with CSOs, the AU's policy organs could look favourably on ECOSOCC as the legitimate body for CSO consultation. Further, the PAP is not yet being elected, and to this extent it has limited legitimacy, therefore ECOSOCC should use this window of opportunity to advance its position in the AU. Another important factor that works in ECOSOCC's favour is that the legitimisation of the AU system requires more urgent attention because discussions on the AU moving to a political union are underway.¹⁹⁹ ECOSOCC can advance its role as one of the strategies for legitimising the AU. Despite these opportunities, ECOSOCC's legal framework should be reviewed. It should also develop some guidelines and practices to enhance its role as the forum for civil society participation in the AU.

4.2 Recommendations

Paragraph ten of the Preamble of the AU Act provides that the AU will provide African institutions with the requisite powers to enable them discharge their mandates effectively. It is on this basis that the following recommendations on reviewing ECOSOCC's legal framework are made.

4.2.1 Amendments to ECOSOCC Statutes and Draft Rules of Procedure

The following recommendations, not listed in their order of importance, should be considered in relation to ECOSOCC's legal framework.

- (a) The ECOSOCC Statutes should define the concept of civil society to clearly indicate what conceptualisation of civil society is envisaged in ECOSOCC and generally in the AU.

- (b) The terms 'competent CSO authority' in article 5(1) and 'ownership and management of CSOs' in article 6(5) of ECOSOCC Statutes should be defined.

¹⁹⁹ See *Assembly/AU/Dec.123(VII)* 7th ordinary session of the Assembly, Banjul, Gambia 1 to 2 July 2006, *Assembly/AU/Dec.99 (VI)* 6th ordinary session of the Assembly, Khartoum Sudan 23 to 24 January 2006 and *Assembly/AU/Dec.90(V)* 5th ordinary session of the Assembly, Sirte, Libya 4 to 5 July 2005.

- (c) There should be a clarification of the conditions of eligibility for granting of observer status that CSOs have to meet because, from article 6(3)(b) of the ECOSOCC Statutes, it is not clear which conditions this article refers to.
- (d) The requirement that, to qualify for membership of ECOSOCC, CSOs should not have restrictions to undertake regional or international should be reviewed, as it could be used to lock out national and grassroots CSOs from ECOSOCC membership.
- (e) The policy areas or issues on which ECOSOCC must and may be consulted by the other AU organs and the stage at which such consultation should take place should be specified. ECOSOCC's entitlements in following up on how its advisory reports and opinions have been taken into consideration by other AU organs should also be set out in the ECOSOCC Statutes.
- (f) ECOSOCC should have the power to compel the availing of information, particularly from the other AU organs, where this information is relevant to its work. It should also be able to invite representatives of the other AU organs to its sessions or for them to furnish explanations on AU issues.
- (g) ECOSOCC views on AU member states' proposals regarding amendments to the ECOSOCC Statutes must be sought before such amendments are effected.
- (h) To harmonise the tenure of ECOSOCC's internal structures, they should all have a term of four years and be eligible for re-election only once.
- (i) There should be a minimum number of sessions each ECOSOCC structure should hold within a given period, for instance, quarterly or biannually, but these should be as frequent as possible. This will enhance its members' access to the AU's policy-making organs.
- (j) To avoid the EGA undertaking its functions through extraordinary sessions or urgency procedures, the ordinary sessions of the EGA must be held at least once a year, preferably before the Assembly summits.

- (k) The procedures ECOSOCC will follow in producing its own-initiative advisory reports and opinions should be specified.
- (l) There should be express provisions that the SCCs may consult CSOs when drafting ECOSOCC's advisory reports and opinions. With this legal basis, it will be able to ground its work in civil society.

4.2.2 Guidelines ECOSOCC should develop

In addition to the amendments to ECOSOCC's Statutes and Rules of Procedure, ECOSOCC should develop guidelines on various issues, as these will enhance its legitimacy, representivity, inclusiveness and the authority of its advisory reports and opinions.

- (a) ECOSOCC should develop different indicators for assessing transparency, accountability and representivity within different levels and organisational forms of CSOs.
- (b) ECOSOCC should develop guidelines for granting observer status to CSOs. These should be geared towards ensuring that CSOs from different levels of civil society are eligible for observer status with ECOSOCC. ECOSOCC can consider developing different categories of observer status that accord different rights to the CSOs granted such status. This will therefore necessitate ECOSOCC to develop different conditions for eligibility for obtaining observer status.
- (c) ECOSOCC should develop guidelines for the composition of SCCs. These should be geared towards achieving a balance between CSOs' expertise and their representivity. It should also develop guidelines for SCCs to use in consulting CSOs when drafting advisory reports and opinions.
- (d) ECOSOCC's structure and rules should be geared towards ensuring that CSOs representing weaker interests such as the disabled, women and children, have opportunities to participate in ECOSOCC since it is more likely that these CSOs lack other opportunities to influence AU policy-making.

4.2.3 Practices ECOSOCC should develop

- (a) ECOSOCC should build its role as a forum for functional representation of CSOs, as an adjunct to their representation through territorially-based representative organs such as the PAP. It should link this role to contributing to enhancing the legitimacy and democratic nature of the AU's decision-making processes and policies.
- (b) ECOSCC should create linkages with regional and national CSOs thus politicising them on issues being addressed at the AU level and providing them with a sphere for deliberation on these issues.
- (c) ECOSOCC should develop links with the other AU organs by demonstrating the advantages for these organs, of undertaking consultations with CSOs through it. These advantages include its broad-based expertise pool and its representative nature, which will enhance the legitimacy of these organs' decision-making processes and their resulting policies.
- (d) ECOSOCC should ensure that its SCCs do not become an extension of the AU Commission or that their work does not become compartmentalised along the AU Commission's portfolios.
- (e) In drafting its advisory reports and opinions, ECOSOCC should consult CSOs as, through such consultations, it will have a larger deliberative basis for drafting its opinions.
- (f) ECOSOCC can prioritise areas for action so that it can develop relevant expertise. This practice will be useful in developing its own-initiative advisory reports and opinions.
- (g) In granting observer status, ECOSOCC should ensure that there is no opportunity for AU member states to influence this process and that the process is independent and transparent. It should also devise an effective mechanism for monitoring CSOs that it has granted observer status.

(h) ECOSOCC should encourage the AU and its member states to enter into collaboration arrangements with CSOs, whereby they implement policies and programmes and policies together.

It is only by effecting these amendments to ECOSOCC's legal framework, and by ECOSOCC developing the recommended guidelines and practices that, it will facilitate civil society participation in the AU. Failure to do so will make ECOSOCC a body underpinned by the commendable principle of enhancing civil society participation in the AU, but lacking the requisite powers and tools to undertake its mandate. This will relegate ECOSOCC and civil society to the periphery of decision-making within the AU, therefore losing an opportunity to enhance the AU's democratic credentials.

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