

**THE ROLE OF THE PAN-AFRICAN PARLIAMENT IN
THE PROMOTION OF HUMAN RIGHTS IN AFRICA**

by

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DECLARATION

I, Bonolo Ramadi Dinokopila, hereby declare that this thesis is my original work and it has not been previously submitted for the award of a degree at any other university or institution.

Signed: _____

Date: _____

Place: _____

DEDICATION

to my mother

Kebafitlhetsa Nkhabelele Dinokopila

1955 – 1999

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SUMMARY OF THESIS

This thesis highlights that Regional Parliamentary Assemblies (RPAs) and International Parliamentary Institutions (IPIs) are relevant to the promotion of human rights. They have consistently promoted human rights, in particular through committees responsible for handling issues of human rights. Their significance to the promotion of human rights lies in their position as oversight actors, legislators of human right oriented laws and their role in the ratification and domestication of human rights treaties. The thesis concludes that the Pan-African Parliament (PAP), as is the case with other RPAs and IPIs, is equally relevant to the promotion of human rights in Africa. Given its powers, the PAP's mandate is however limited to the promotion of human rights.

The thesis thus places particular focus on the Parliament's actual practice and potential role in relation to the promotion of human rights in Africa. In the main, the thesis illustrates that the role of the PAP in the promotion of human rights in Africa has thus far been negligible as the Parliament has done little to promote human rights in Africa. The thesis further reveals that the inadequate promotion of human rights by the PAP exists despite the fact that it should be occupying a unique position within the African human rights system. This state of affairs is a result of a host of factors that have been identified in the study as including the absence of full legislative powers, the limited budgetary powers and the undemocratic appointment of members of the PAP. The thesis further reveals that the Parliament's relationship with national parliaments, civil society, national human rights institutions sub-regional bodies and other AU institutions is also negligible. To that end, the Parliament has been described as a 'talk shop', a name befitting an institution that undertakes workshops, seminars and conferences largely for the benefit of its parliamentarians.

The thesis illustrates that the success of the PAP is dependent on several factors, such as its cooperation with member states, national parliaments, sub-regional parliaments, other AU organs, the larger network of civil society and national human rights institutions. This thesis concludes that the PAP is capable of using its current

consultative powers to become ‘an influential talk’ shop as regards the promotion of human rights and the decision-making process of the AU in general. The thesis further concludes that the Parliament must learn from the experiences of other international parliamentary institutions and must explore imaginative ways according to which it could deal more pragmatically with human rights issues.

Key terms

Pan-African Parliament – regional parliamentary assemblies - international parliamentary intuitions - Human rights and democracy – relevance of parliaments – regional parliamentary assemblies – promotion of human rights - African human rights system, relationship with - factors affecting effectiveness.

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LIST OF TREATIES AND INSTRUMENTS

African Charter on Democracy, Elections and Governance (2007)

African Charter on Human and Peoples' Rights (1981)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

African Charter on the Rights and Welfare of the Child (1990)

Charter of the OAU (1963)

East African Community (EAC) Treaty (1999)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Protocol to the Treaty establishing the African Economic Community to the Pan-African Parliament (PAP Protocol) (2001)

Rules of Procedure of the PAP (2004)

The Constitutive Act of the African Union (2000)

Treaty establishing the African Economic Community (1991)

UN Convention on the Rights of the Child (1989)

United Nations Charter (1945)

Universal Declaration of Human Rights (1948)

Vienna Convention on the Law of Treaties (1969)

LIST OF ABBREVIATIONS

ACJ	African Court of Justice
ACRWC	African Committee of Experts on the Rights and Welfare of the Child
ACtHPR	African Court on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights (African Commission)
AMIS	AU Mission to Sudan
APRM	African Peer Review Mechanism
ASF	African Standby Force
AU	African Union
CAFE	Committee on Finance, Evaluation and Administration
DAC	OECD Development Assistance Committee
EALA	East African Legislative Assembly
EC	European Commission
ECK	Electoral Commission of Kenya
ECOSOC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EEC	European Economic Community
ENHRC	Egyptian National Human Rights Council
EP	European Parliament
ESCRs	Economic Social and Cultural Rights
EU	European Union

FDI	Foreign Direct Investment
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IGAD	Intergovernmental Authority on Development
ILO	International Labour Organisation
IPI	International Parliamentary Institution
IPPF	International Planned Parenthood
IPU	Inter-Parliamentary Union
ISS	Institute for Security Studies
MNC	Multinational Corporation
MOU	Memorandum of Understanding
MEP	Member of the European Parliament
MPAP	Member of the Pan-African Parliament
NATO	North Atlantic Treaty Organisation
NATO-PA	Parliamentary Assembly of the North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NTC	National Transitional Council
OAU	Organisation of African Unity
PACE	Parliamentary Assembly of the Council of Europe
PAP	Pan-African Parliament
PARLACEN	Central American Parliament
PARLATINO	Latin American Parliament

PCJHR	Permanent Committee of Justice and Human Rights
PSC	Peace and Security Council
REC	Regional Economic Community
REPAC	Network of Parliamentarians of the Economic Community of Central African States
RPB	Regional Parliamentary Body
SADC PF	SADC Parliamentary Forum
SADC	Southern African Development Community
SAP	Structural Adjustment Programme
SCSL	Special Court for Sierra Leone
SEA	Single European Act
SICA	Central American Integration System
UEMOA	West African Economic and Monetary Union
UNDESA	United Nations Department of Economic and Social Affairs
UNIFEM	United Nations Development Fund for Women
USA	United States of America

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CHAPTER I

INTRODUCTION

I.1 Introduction and background to study

From the emergence of the Pan-Africanist movement at the start of the 20th century, the continental agenda and tentative attempts by African leaders have – at least to some extent – been aimed at ridding Africa of the colossal effects of underdevelopment, colonisation, racism and apartheid.¹ However, despite the promises of effective governance, sustainable development as well as effective human rights protection, much remains unchanged. Africa continues to be an unstable continent characterised by ethnic conflict, famine, war, mismanagement of resources and, above all, poor commitment by the leadership to the transformation of Africa.

The Organisation of African Unity (OAU), which was formed in 1963 to advance socio-economic development in Africa, failed to deliver on the promises made by the leaders in the organisation's objectives. Many reasons have so far been advanced as to why the OAU failed to deliver. Some of these reasons have been discussed in detail elsewhere.² It suffices here to point out that despite all the seemingly insurmountable challenges that the ideal of African unity faced, African leaders could not stay oblivious to the increasing need to establish an effective intergovernmental body that would contribute to addressing these problems.³ The political elite also had to take cognizance that there was a need for a governance structure in Africa which allowed for the participation of the people in decisions directly affecting them.⁴

¹ T Maluwa 'From the Organization of African Unity to the African Union: Rethinking the framework for inter-state cooperation in Africa in the era of globalisation' (2007) 5 *University of Botswana Law Journal* 10.

² See e.g M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights - The system in practice* (2002) 1 ; F Viljoen *International human rights law in Africa* (2012) 158 - 169; Maluwa (n 1 above) 5-48.

³ Maluwa (n 1 above) 10.

⁴ J Cilliers & P Mashele 'The Pan-African Parliament: A plenary of parliamentarians' (2004) 13 *African Security Review* 77.

In the light of this realisation, African leaders in September 1999 met in Sirte, Libya, to discuss the formation of the United States of Africa.⁵ This meeting was preceded by discussions surrounding the 1991 Treaty establishing the African Economic Community (AEC) or Abuja Treaty, which came into force on 12 May 1994.⁶ Although the AEC was set up in the first place to foster economic integration in Africa, the Abuja Treaty also called for the establishment of a more involved African community, the protection of human rights and establishment of the Pan-African Parliament (PAP).⁷ Some ten years after the adoption of the AEC Treaty, in March 2001, the Protocol to the Treaty establishing the African Economic Community (AEC) Relating to the Pan-African Parliament (PAP Protocol) was adopted in Sirte, Libya.⁸ The PAP Protocol came into force on 14 December 2003.⁹ Acknowledging and realising the need to have a platform where views of Africans could be aired, African leaders finally established the PAP, potentially offering Africans a platform where they can make inputs on how they should be governed.¹⁰

The creation of this political body is also fundamentally linked to the transformation of the OAU into the African Union (AU).¹¹ This is largely because the AU Assembly adopted, in 2000, the AU Constitutive with the PAP stipulated as one of the organs of the AU.¹² Under the AU Constitutive Act, the PAP is tasked with ensuring the full participation of African peoples in the

⁵ K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 99.

⁶ Treaty establishing the African Economic Community (1991/1994).

⁷ AEC Treaty, preamble; D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365; SF Masungu 'Economic Intergration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 92.

⁸ C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 14-17; see generally <http://www.au.int/en/treaties> (accessed 23 April 2013).

⁹ As above; see also <http://www.au.int/en/> (accessed 29 March 2013).

¹⁰ J Navarro 'Building of a regional parliamentary assembly in an international context: The creation and launching of the Pan-African Parliament' GARNET working paper No: 55/08, 10 (dated August 2008)

¹¹ Navarro (n 10 above) 10.

¹² T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' (2004) 4 *African Human Rights Law Journal* 54; AU Constitutive Act, art 5.

development and economic integration of Africa.¹³ The legal basis of the PAP is therefore located in the AEC Treaty, the PAP Protocol and the AU Constitutive Act.¹⁴

In a move that was hailed by many as a true sign of integration in Africa, 18 March 2004 saw the inauguration of the much anticipated continental parliamentary body in Africa - the PAP. The inaugural session of the PAP was held at the United Nations Economic Commission for Africa Conference Centre in Addis Ababa, Ethiopia.¹⁵ The then nascent parliamentary body was seen as bringing to life the ideals of Pan-Africanism once pursued by many, among them some of the great leaders of Africa such as Kwame Nkrumah.¹⁶ It was also seen as heralding the end of non-participation of Africans in the continental decision-making processes.

According to the Preamble of the PAP Protocol,¹⁷ the establishment of the PAP 'is informed by a vision to provide a common platform for African peoples and their grass-roots organisations to be more involved in discussions and decision-making on the problems and challenges facing the continent.'¹⁸ It would therefore be fair to say that the PAP was formed on the firm understanding that it would forge greater unity in Africa and would represent all Africans. It has since adopted a motto, 'one Africa, one voice,' to signify the fact that it is people-based and its vision is to provide a common platform for and to act as the voice of Africans.¹⁹

¹³ AU Constitutive Act, art 17; see also the African Charter on Democracy, Elections and Governance (African Charter on Democracy), art 4, putting forward participation through universal suffrage as an inalienable right for Africans.

¹⁴ PAP Protocol, arts 2(3)(i) & 11; F Viljoen (n 2 above) 184; KD Magliveras & GJ Naldi 'The Pan African Parliament of the African Union: An overview' (2003) 3 *African Human Rights Law Journal* 223.

¹⁵ Demeke (n 12 above) 61; Cilliers & Mashele (n 4 above) 74; T Murithi 'Institutionalising Pan-Africanism; Transforming African Union values and principles into policy and practice' Institute for Security Studies (ISS) occasional paper 143, June 2007, 2.

¹⁶ Pan-African Parliament 'The Pan-African Parliament – 'One Africa, one voice 2007-2008,' 19.

¹⁷ Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament EAHG/3(V) (2001) (Pan-African Parliament Protocol) reprinted in C Heyns & M Killander (eds) (n 8 above) 14-17.

¹⁸ PAP Protocol, preamble.

¹⁹ Pan-African Parliament (n 16 above) 19.

It is the participation of people in the decision-making process and in the resolution of disputes about human rights that is of significance to the very existence of the PAP.²⁰ This is so because people take part in politics on the basis of their desire to affect the way decisions are made and their need to take part in the collective decision-making process.²¹ It is through participatory democracy that the citizenry is given the right to participate in those decisions that affect it,²² and is given the opportunity to contribute to the process of reducing the social and economic inequalities that are inherent in societies.²³ As Ratner rightly points out, the demands for democracy and accountability have since become the ‘central forces in our millennial era.’²⁴

Despite objections from some quarters,²⁵ there is indeed growing acknowledgement of the position that human rights, democracy and development are interdependent. The Vienna Declaration and Programme of Action (Vienna Declaration)²⁶ for example states that ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.’²⁷ The African Peer Review Mechanism (APRM) framework documents also make reference to democracy and human rights as a means of fostering development.²⁸ The attention paid to human rights by the APRM process can only

²⁰ F Viljoen (n 2 above) 184; Cilliers & Mashele (n 4 above) 77.

²¹ P Lenta ‘Democracy, rights disagreements and judicial review’ (2004) 20 *South African Journal on Human Rights* 14.

²² T Roux ‘Democracy’ in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2007) 10-14.

²³ Roux (n 22 above) 10-15; Solemn Declaration on CSSDCA, para 21.

²⁴ SR Ratner ‘Democracy and accountability: the criss-crossing paths of two emerging norms’ in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000) 449; by accountability Ratner refers to ‘a process for holding individuals personally responsible for human rights abuses they have committed.’

²⁵ See J Donnelly ‘Human rights, democracy and development’ (1999) 21 *Human Rights Quarterly* 608-609, challenging ‘the comfortable contemporary assumption that democracy, development and respect for human rights are interpedently and mutually reinforcing.’

²⁶ Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 48th Session, 22nd plenary meeting, part I, UN Doc A/CONF.157/24(1993) available on < (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>) > (accessed 7 September 2013).

²⁷ Vienna Declaration, para 8.

²⁸ M Killander ‘The African Peer Review Mechanism and human rights: The first reviews and the way forward’ (2008) 30 *Human Rights Quarterly* 54-55.

serve to show that democracy is inseparable from fundamental human rights even when there is no use of rights language, as such.²⁹

The essential link between democracy and human rights is also captured in article 21 of the Universal Declaration of Human Rights (UDHR), which gives everyone the right to self-determination. This link can also be located within the provisions of article 25 of the International Covenant on Civil and Political Rights (ICCPR), where participation in public affairs is defined as a human right. Regional human rights instruments, such as the African Charter on Human and Peoples' Rights (African Charter),³⁰ acknowledge the right to self-determination. Some national constitutions³¹ also stipulate that any limitations should be placed on certain rights only when 'necessary in a democratic society.'³²

It can further be argued that because it is up to states to implement human rights norms, it is extremely important that they are democratic in nature. This is because, as experience has shown, states with the propensity to trample on human rights are to a large extent governed by unelected or illegitimate regimes.³³ Most of the human rights abuses in Africa can only be curbed or sufficiently addressed by democratic regimes with proper commitment to human rights norms.³⁴

There is enough evidence to suggest that liberal democracy has the potential to encourage political stability and accountability as well as respect for human rights,³⁵ hence, the widely held

²⁹ Killander (n 28 above) 55; positing that human rights are relevant in all the four governance areas that form the basis of the APRM reviews whether expressly mentioned in the APRM questionnaire or not.

³⁰ African Charter, art 13.

³¹ For example, Constitution of Botswana, sec 12(2)(c); Constitution of South Africa, sec 36(1).

³² Constitution of Botswana, sec 12.

³³ JR Hollyer & P Rosendorff 'Do human rights agreements prolong the tenure of autocratic ratifiers?' (2012) 44 *International Law and Politics* 793; JA Cheibub, J Gandhi & JR Vreeland 'Democracy and Dictatorship Revisited' (2010) 143 *Public Choice* 67; ZF Arafat *Democracy and human rights in developing countries* (1991) 9.

³⁴ SM Makinda 'Democracy and multi-party politics in Africa' (1996) 34 *Journal of Modern African Studies* 556.

³⁵ As above, 556.

view that human rights form the crux of democracy.³⁶ By implementing policies that encourage democracy there is simultaneous furtherance of human rights.³⁷ However, the stability of political democracy depends on the extent of the balance between civil and political and socio-economic rights.³⁸ For this reason, the PAP subscribes to fundamental human rights, social justice, gender equality and the democratic values of human dignity, equality and freedom as forming the basis of democracy in Africa.³⁹

Democracy is in fact compatible with human rights.⁴⁰ They both share a commitment to the idea of equality and dignity for all,⁴¹ and to placing more emphasis on the individual as an active participant in the decisions and policies that affect their lives.⁴² Further, so far, democracy provides the only political structure within which human rights can be easily and effectively guaranteed.⁴³ Waldron argues that there is natural congruence between rights and democracy.⁴⁴

It is important to note at this juncture that the existing human rights mechanisms in Africa are inaccessible and that their efforts do not trickle down to the citizenry as should be the case. The 'people-based' PAP may be envisaged as a deviation from this seemingly general practice or anomaly. The Parliament brought along the promise of having a bottom-up approach to the needs of Africans in so far as political and socio-economic development is concerned.⁴⁵

³⁶ MH Halperin 'Democracy and human rights: an argument for convergence' in S Power & C Allison (eds) *Realizing human rights* (2000) 249.

³⁷ As above.

³⁸ Arafat (n 33 above) 4.

³⁹ 2006-2010 PAP Strategic Plan, 5.

⁴⁰ J Waldron *Law and disagreement* (1999) 282.

⁴¹ Donnelly (n 25 above) 619; see further AJ Langlois 'Human rights without democracy? A critique of the separationist thesis' (2003) 25 *Human Rights Quarterly* 1013, arguing that human rights and democracy are inseparable because 'they both share the same philosophical ontology of liberalism, and because the observance of human rights is implicit within the idea of a properly functioning democracy.'

⁴² D Beetham 'Democracy and human rights: contrast and convergence', Seminar on the interdependence between democracy and human rights, Geneva, 25-26 November 2002,

⁴³ C Davenport 'Human rights and the democratic proposition' (1999) 43 *The Journal of Conflict Resolution* 92-116.

⁴⁴ Waldron (n 40 above) 282; Lenta (n 21 above) 14.

⁴⁵ One of the core values of the PAP is people-centeredness, that is, according to the core values that guide the PAP, it respects all the people of Africa, honour their integrity and is committed to representing and serving them, 2006-2010 PAP Strategic Plan, 5.

That being said, the objectives of the PAP indicate that the parliamentary body is meant to engage with the people of Africa.⁴⁶ However, the PAP continues to be labelled as being elitist, on the basis that it, in so far as it engages with civil society, largely deals with academics and the elite civil society to the exclusion of ordinary citizens ('people').⁴⁷ The question that begs discussion and which has so far escaped scrutiny relates to the implications of such inadequacies, and the disparity between the objectives of the PAP and what has obtained on the ground since its establishment. An interrogation of such issues becomes more important in the light of the decision by the AU Assembly, acting under the authority of article 2(3) of the PAP Protocol, deferring for further consultation revised parts of the PAP Protocol relating to the legislative powers of the PAP.⁴⁸

The PAP as one of the 'legislative' organs of the AU is supposed to have an oversight role over the AU executive.⁴⁹ However, as of now, its mandate is limited to deliberating on reports and coming up with resolutions and non-binding recommendations.⁵⁰ Until it attains full legislative powers, the PAP will merely advise and consult with other organs of the AU on issues concerning, among other things, the promotion of human rights and democracy, good governance, transparency as well as peace, security and stability in Africa.⁵¹ Considering its current mandate, one may be tempted to conclude that the PAP is nothing more than another

⁴⁶ Demeke (n 12 above) 54; Southern Africa Trust 'African Civil Society Organisations and the PAP Consultative Dialogue -Report on building effective mechanisms for civil society engagement with Pan African and Regional Institutions,' 7-8 May 2007, Gallagher Estate, Midrand, South Africa, 5-6.

⁴⁷ Southern Africa Trust (n 46 above) 5.

⁴⁸ Decision on the review of the Protocol relating to the Pan-African Parliament (PAP), Doc.EX.CL/459 (XIV), Assembly of the African Union, Twelfth Ordinary Session 1-3 February 2009 Addis Ababa, Ethiopia, Assembly/AU/Dec.223(XII).

⁴⁹ Resolution on Oversight (AU Doc PAP-Res 004/04); Viljoen (n 2 above) 186.

⁵⁰ Press statement, LLM students in human rights and democratization in Africa, Centre for human rights, University of Pretoria <www.chr.up.ac.za> (accessed 20 September 2008); see also Centre for human rights 'The role of the PAP in conflict resolution and peacemaking in Africa' <www.chr.up.ac.za> (accessed 7 September 2013).

⁵¹ PAP Protocol, art 2(3)(i).

duplication of institutions within the AU system as it merely provides space for deliberation rather than legislation.⁵²

However, as the legislative organ of the AU, the PAP is specifically mandated to ensure that there is adequate protection and promotion of human rights on the continent.⁵³ It might not have legislative powers but its current advisory role and its potential future legislative and oversight mandate may be utilised in diverse ways. It can be effectively used to address the violation of human rights – or at least the fostering of a human rights friendly politico-legal culture – by states. Combined with the growing participation of parliamentary institutions in the human rights struggle, the PAP presents both opportunities and challenges worthy of being subjected to scrutiny, especially in the context of participatory democracy at the supranational level.

The PAP is thus relevant to the promotion of human rights in a continent besieged by colossal disregard for human dignity. There is therefore a need to examine its actual and potential role in the promotion of human rights in Africa.

1.2 Objective of the study

The PAP's role in the AU is a topic of continuous debate.⁵⁴ Suggestions and criticisms are being put forward on ways in which the Parliament can better serve Africans, with particular emphasis being placed on the unfortunate fact that its establishment and eventual functioning has been mainly in the hands of the political elite.⁵⁵ That notwithstanding, as Viljoen puts it, 'the potential for the PAP to become a crucial forum on human rights issues is vast.'⁵⁶

This study aims at taking a critical look at the human rights mandate of the PAP. It does so from two perspectives. In the first instance, the study will situate the PAP within the African human

⁵² Viljoen (n 2 above) 184; Demeke (n 12 above) 58.

⁵³ PAP Protocol, art. 3; Demeke (n 12 above) 61.

⁵⁴ Viljoen (n 2 above) 187; Demeke (n 12 above) 53; Cilliers & Mashele (n 4 above) 73-83.

⁵⁵ Demeke (n 12 above) 54; Viljoen (n 2 above) 185; P Mashele 'The 3rd Pan-African Parliament session: Utility or futility' (2005) 14 *African Security Review* 107.

⁵⁶ Viljoen (n 2 above) 189.

rights system.⁵⁷ This is done by focusing on its present and potential relationship with other institutions with a human rights mandate within the African human rights system. Here, attention is paid to the actual practice of the PAP since its establishment in relation to the promotion of human rights. Concomitantly, the work of the Permanent Committee on Justice and Human Rights (PCJHR) of the PAP will be considered and factors that enhance or impede its effectiveness will be interrogated.

Secondly, the study will analyse how the 'legislative and oversight' mandate of PAP could be used as a tool to further the promotion of human rights in Africa. This will be achieved by looking at possible areas of collaboration between the PAP, member states and other stakeholders. Collaborative relationships are important for the success of the PAP, and are dependent on several factors, such as its cooperation with member states, other AU organs and the larger network of civil society.⁵⁸

This cooperation, where necessary, will be linked to both the strategic institutional and political objectives of the PAP as embodied in the 2006-2010 strategic plan of the PAP.⁵⁹ This will in essence be an assessment of the possible impact of the PAP on human rights protection in Africa in the eventuality that it attains legislative powers. To best illustrate the potential the PAP has in the realm of human rights promotion, examples will be drawn from the experience of other regional and sub-regional parliamentary assemblies such as the European Parliament (EP), the East African Legislative Assembly (EALA), Southern African Development Community Parliamentary Forum (SADC PF) and the Parliamentary Assembly for the Council of Europe (PACE).

⁵⁷ For a more detailed discussion of the African system see Viljoen (n 2 above) 157-418; VOO Nmehielle *The African human rights system- its laws, practices, and institutions* (2001); GW Mugwanya *Human rights in Africa- enhancing human rights through the African regional human rights systems* (2003); M Evans & R Murray *The African Charter on Human and Peoples' Rights - The system in practice* (2008); J Oloka-Onyango 'Beyond rhetoric: Reinvigorating the struggle for economic and social rights in Africa' (1995) 26 *California International Law Journal* 52.

⁵⁸ See Draft Report, *The Pan-African Parliament: Proposal on the Union Government of Africa* (2007) 14.

⁵⁹ 2006-2010 PAP Strategic Plan, 8; The PAP Strategic Plan embodies the strategic intent, ideals and objectives of the PAP for the next five years and beyond. It provides the vision, mission and strategic objectives. It also proposes the activities aimed at attaining the stated vision.

1.3 Research questions

Against the preceding background, the study raises the following main questions:

What is the PAP's actual and potential role in the promotion of human rights in Africa?

What are the factors that impede or enhance and are likely to impede or enhance the effectiveness of the PAP in utilising its human rights mandate?

The above questions raise similarly important questions, such as:

Should regional parliamentary assemblies, such as the PAP, concern themselves with issues pertaining to the promotion of human rights?

What is the significance or role of regional parliamentary assemblies in the promotion of human rights?

What is the PAP's mandate in relation to the promotion of human rights?

How has the PAP, since its establishment, interpreted and used its human rights mandate to foster the promotion of human rights in Africa?

What is and what should be the relationship between the PAP and states, national parliaments, sub-regional parliamentary assemblies and other African institutions with a human rights mandate?

What are the lessons that the PAP could learn from other parliamentary bodies concerning the promotion and protection of human rights?

What measures should be taken to enhance and more effectively utilise the PAP's human rights mandate?

1.4 Significance of the study

This study aims to contribute to the broader understanding of the human rights mandate of the PAP and to provide an in-depth analysis into the actual and potential role of this political body. It will further seek to explore the possible extension of the role of the PAP to improve the human rights situation in Africa. The study also provides a unique opportunity to reflect on the

work of the PAP with the view to ascertaining what it holds for Africans in so far as integration, good governance and respect for human rights in Africa are concerned. The study is equally an important contribution in relation to the development of the PAP as an institution. This is so because the study aims at identifying factors that impede or enhance the effectiveness of the PAP, augmenting the effectiveness of the PAP as regards its role in the promotion of human rights in Africa.

1.5 Terminology

Human rights

For the purpose of this study the term human rights refers to the human rights as mainly discernible from the human rights instruments of the African Union, in particular, the African Charter on Human and Peoples' Rights. As such, the term 'human rights' in this thesis will include both socio-economic rights and civil and political rights as obtainable under the various African regional instruments protecting and promoting the rights of the individual.

Promotion of human rights

By 'promotion of human rights,' this thesis refers to the use of various mechanisms – such as fact-finding missions, electoral observer missions, resolutions and recommendations – by the Parliament to educate, sensitise and raise awareness among the citizenry and governments in Africa about human rights and the importance of adopting a rights based approach at all levels of governance. The focus of this thesis is therefore, as will be fully explained later in this thesis, on the 'promotion of human rights'. This is in contradistinction to the 'protection of human rights,' which entails the use of protective mechanisms or remedial measures, for example, through individual communications of cases, with respect to violations of human rights.

1.6 Literature review

It is undisputable that the advent of the PAP stirred much interest among scholars in the region and abroad. Nonetheless, it appears that the excitement and the fanfare that surrounded the

arrival of the first African parliamentary body were short lived. This is evidenced by the sparse literature subsequently published on the PAP.⁶⁰

In the first two chapters, the study will draw from those studies that have been undertaken in respect of Pan-Africanism, integration in Africa and the metamorphosis of the OAU into the AU.⁶¹ They are important as they bring into perspective the reasons behind the establishment of the PAP. A few sources have actually sought to draw a nexus between the ideals of Pan-Africanism, the establishment of the AU, the PAP and human rights.⁶²

Most literature on the PAP goes back to its nascent years and do not reflect the current events. It appears that after the PAP seemed to take off, attention was diverted to seemingly more important issues relating to the promotion of human rights in Africa. Thus, most of the literature refers mainly to the establishment of the PAP, its powers and functions, and a few general issues such as the seat of the Parliament and membership of the Parliament.⁶³ This limited focus has resulted in a situation where the activities of the PAP have not been well documented, creating a gap in the literature.

⁶⁰ Navarro (n 10 above) 4.

⁶¹ Mulawa (2007); Murithi (2007); Kindiki (2003); P Mistry 'Africa's record of regional co-operation and integration' (2000) 99 *African Affairs* 553-573; GJ Naldi & KD Magliveras 'The African Union: A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415; J Akokpari 'Dilemmas of regional integration and development in Africa' in J Akokpari, A Ndinga-Muvumba & T Murithi (eds) 'The African Union and its institutions' (2008) 85-110; N Guettia Kouassi 'The itinerary of the African integration process: an overview of the historical landmarks' (2007) 1 *African Integration Review* 1-23.

⁶² Nmehielle (n 57 above) 68; T Murithi 'Institutionalising Pan-Africanism; Transforming African Union values and principles into policy and practice' Institute for Security Studies (ISS) occasional paper 143, June 2007, 1-12.

⁶³ Magliveras & Naldi (2003); Demeke (2004); Cilliers & Mashele (2004); Mashele (2005); G Manelisi, F Kornegay & S Rule 'Formation of the African Union, African Economic Community and Pan-African Parliament' in *African Union and Pan-African Parliament: Working papers*, available at <<http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN003885.pdf>> (accessed 7 September 2013).

Only a few sources – albeit in a brief and general manner – make an effort to take a look at the human rights mandate of the PAP and how it has utilised this mandate.⁶⁴ These are the sources that the study will rely on as secondary data. Otherwise, most reliance will be placed on primary sources.

The primary sources include the documents establishing the PAP and those concerned with the running of the Parliament,⁶⁵ recommendations and resolutions by the PAP,⁶⁶ reports of the activities of the PCJHR and other relevant permanent committees,⁶⁷ various reports of the PAP on the missions undertaken to various African countries,⁶⁸ reports on workshops and studies conducted for and commissioned by the PAP,⁶⁹ as well as the official reports of the debates of the PAP.⁷⁰

⁶⁴ Viljoen (2012); Demeke (2004); T Murithi (2005) *The African Union: Pan-Africanism, peace-building and development*; H Sehen 'The Pan-African Parliament: Its promise for human rights and democracy in Africa' (2006) Unpublished LLM thesis, University of Pretoria, South Africa.

⁶⁵ AEC Treaty; AU Constitutive Act; PAP Protocol; Rules of Procedure of the PAP; PAP Strategic Plan 2006- 2010.

⁶⁶ E.g, Recommendation on peace and security in Africa, 23 Novemebr 2006, PAP/RECOM.01 (VI)/06; Recommendation on the phenomenon of migration in Africa, 23 Novemebr 2006, PAP/RECOM.08 (VI)/06; Resolution on Central African Republic, November 2006 PAP/Res.01 (VI)/06; Resolution on the involvement of PAP on the phenomenon of migration in Africa, November 2006, PAP/RES.06 (VI)/06.

⁶⁷ E.g, Report of the Permanent Committee on Justice and Human Rights, May 2008, Ref. PAP/C.9/CJHR/RPT/30/08; Report of the Permanent Committee on Justice and Human Rights, November 2008, Rev. 3; Report on the work of the PAP: January 2007 to June 2008, presented to the African Union Summit, June/July 2008, Sharma El Sheik, Egypt.

⁶⁸ E.g, Interim statement of the PAP Election Observer mission to the Presidential run-off Elections in Ghana, 30 December 2008; Report of the PAP Elections Observer Mission to Swaziland 19 September 2008, Rev.1; Report of the PAP Election Observer Mission to Angola, 5 September 2008, PAP/S/RPT/81/08; Report of the PAP Elections Observer Mission to Zimbabwe, Presidential runoff elections and house of Assembly by-elections, 27 June 2008, PAP/S/RPT/76/09.

⁶⁹ E.g, Report of the PAP Seminar on the harmonisation of regional economic communities and regional parliamentary assemblies, Ngurdoto Mountain Lodge- Arusha, Tanzania, 22-23 September 2006; Report of the PAP Seminar on the harmonisation of regional economic communities and regional parliamentary bodies, Mowana Lodge-Kasane, Botswana, 12-13 March 2007; Report of the PAP Seminar on the harmonisation of regional economic communities and regional parliamentary fora, third consultative Seminar, National Assembly of Cameroon- Yaoundé, 8-9 September 2008, Ref: PAP/CS/REC.3/RPT/09/08; Guidelines on issues of democracy and human rights in Africa, project study submitted to the PAP, prepared by Suzan Elsadig Abdelslam, PAP/C.9/CHJR/WP/28/08; Professor

Being perceived as a tool of integration with a human rights mandate, most of the published works perused understandably tend to focus more on the role of the PAP as a tool of regional integration than as a tool for human rights protection.⁷¹ On the whole, the PAP is conspicuously absent, for example, in most works relating to the African human rights system. This is a point Navarro noted, and attributed to ignorance about the existence of the PAP and other African regional parliaments.⁷²

The study will also illustrate the significance of other parliamentary assemblies in the promotion and protection of human rights. At that juncture, the study will where necessary adopt a comparative approach to achieve the objective of the chapter. The study will be an appraisal of the work of other parliamentary assemblies in so far as human rights are concerned.⁷³ Here, there is substantial literature especially on the Parliamentary Assembly of the Council of Europe (PAPCE) and European Union's European Parliament (EP). Some of the work provides the history, powers, composition as well as the working structures of the EP,⁷⁴ and the influence of

Manassé Aboya Endong 'Role of Regional Parliamentary Forums in the promotion of democracy and human Rights.'

⁷⁰ Official report of the debates of the PAP, NO.1, Seventh Ordinary session of the first Parliament, May 7 to 18, 2007.

⁷¹ Mistry (2000); Navarro (n 10 above); Maluwa (n 1 above); EO Ijeoma 'Re-thinking Pan-Africanism: Dilemmas and Efforts towards African Integration' (2008) available at <http://repository.up.ac.za/bitstream/handle/2263/8167/Ijeoma_Rethinking%282008%29.pdf?sequence=1> (accessed 7 September 2013); Southern Africa Trust 'African Civil Society Organisations and the PAP Consultative Dialogue, Report on building effective mechanisms for civil society engagement with Pan African and Regional Institutions,' 7-8 May 2007, Ghalager Estate, Midrand, South Africa.

⁷² Navarro (n 10 above) 4.

⁷³ AB Johnsson 'Human rights mechanisms in international parliamentary institutions' in G Alfredson *et al* 'International human rights mechanisms; essays in honour of Jacob Th. Möller' (2001) 803-813; Sehen (n 64 above); Inter-Parliamentary Union 'Parliament: Guardian of human rights' Inter -Parliamentary Symposium organised by the Parliamentary Union, Budapest (Hungary) 19-22 May 1993 <<http://www.ipu.org/splz-e/budapest.htm>> (accessed 4 September 2013); National Democratic Institute for international Affairs (NDI) 'Parliamentary human rights mechanisms' (2004).

⁷⁴ M Shackleton 'The European Parliament' in J Peterson & M Shackleton (eds) *The institutions of the European Union* (2012) 124; R Corbett, F Jacobs & M Shackleton *The European Parliament* (2011); N Ringe *Who Decides, and How? Preferences, Uncertainty, and Policy Choice in the European Parliament* (2009); D Judge & D Earnshaw *The European Parliament* (2008); B Rittberger *Building Europe's Parliament: Democratic representation beyond the nation state* (2005); S Williams 'Human rights in Europe' in S Power & C Allison (eds) *Realizing human rights* (2000) 77; J Fitzmaurice *The European*

the EP in the decision-making process of the European Union.⁷⁵ The content of some of the literature ranges from the institutional development of various parliamentary assemblies,⁷⁶ their composition and their mandate as well as their role in the promotion and protection of human rights.⁷⁷ There is only one article that specifically discusses the PAP in the light of the mandate of the EP,⁷⁸ but it does so briefly and in general terms.

It should be noted that almost all of the cited sources do not critically address the issues that this study seeks to address. Most of them provide a general discussion of the activities of the PAP and do not attempt to unpack some of the issues relating to the human rights mandate of the parliamentary body. Issues such as situating the PAP within the African human rights system remain uncharted territory. The study will attempt to fill this gap in the literature by providing a detailed appraisal of the work of the Parliament in the field of human rights.

Parliament (1980); M Palmer (1981) *The European Parliament: what it is, what it does, how it works*. (1981); S Hix, T Raunio & R Scully 'Fifty years on: research on the European Parliament' (2003) 41 *Journal of Common Market Studies* 191-202.

⁷⁵ R Kardasheva 'The power to delay: The European Parliament's influence in the consultation procedure' (2009) 47 *Journal of Common Market Studies* 385-409; A Kreppel 'What affects the European parliament's legislative influence?' (1999) 37 *Journal of Common Market Studies* 521-38; R Scully 'Policy influence and participation in the European Parliament' (1997) 22 *Journal of Common Market Studies* 233-52.

⁷⁶ A Malamud & L de Sousa 'Regional Parliaments in Europe and Latin America: between empowerment and irrelevance' in AR Hoffmann & A van der Vleuten (eds) *Closing or widening the gap? Legitimacy and democracy in regional international organizations* (2007), ch 5; T Hughes (ed) *SADC Parliamentary-civil society engagement handbook* (2006); MM Saliah *Between governance and governments: African Parliaments* (2005).

⁷⁷ R Cutler 'The emergence of international parliamentary institutions: New networks of influence in world society' in G Smith & D Wolfish (eds) *Who is afraid of the state? Canada in a world of multiple centers of power* (2001), available at <http://www.robertcutler.org/download/html/ch01gs.html> (accessed 15 August 2013)); Z Šabic 'Building democratic and responsible global governance: The role of international parliamentary institutions' (2008) 31 *Parliamentary Affairs* 255-271; A Malamud & L de Sousa 'Regional parliaments in Europe and Latin America: Between empowerment and irrelevance' in AR Hoffmann and A van der Vleuten (eds) *Closing or widening the gap? Legitimacy and democracy in regional international organizations* (2007) 87-102; R Kardasheva 'The power to delay: The European Parliament's influence in the consultation procedure' (2009) 47 *Journal of Common Market Studies* 385-409; HG Schemers & NM Blokker *International institutional law* (2003) 397-426; R Corbett, F Jacobs & M Shackleton *The European Parliament* (2005); R Corbett 'Testing the new procedures: The European Parliament's first experiences with its new 'single Act' powers' (1989) 27 *Journal of Common Market Studies* 359-372.

⁷⁸ Demeke (n 12 above) 53-73.

1.7 Methodology

The study adopts a non-empirical methodology and will be largely based on the information obtained from primary and secondary sources, interviews and general discussions. In the first instance, the study embarks on a review of both primary and secondary literature on the subject. Study visits to the PAP and to the Max Plank Institute for International and Comparative Law in Germany were undertaken. The aim of the study visits was to gather information on the work of the Parliament and other RPAs. Interviews and general discussions with the relevant officials were conducted so as to inform the research, in a general sense. The information obtained from such research is largely descriptive and will mostly form the basis of the first three chapters of the study. This descriptive and analytical approach is, where necessary, punctuated by a comparative analysis of the PAP's work since its establishment and the experience of other RPAs.

The thesis starts off by putting the PAP into perspective by providing a narrative on the Parliament's historical context – tracing its genesis from the history of Pan-Africanism, the OAU, the advent of the AEC and eventually the AU. The earlier chapters further provide an examination of the Parliament as provided for by its founding documents. Legal issues surrounding the AEC Treaty, the PAP Protocol and the PAP Rules of Procedure are discussed. These include the membership to, withdrawal from the PAP Protocol and the question of whether there was 'fair and balanced representation' to the PAP was discussed. Throughout, the need for participatory democracy at a continental level is acknowledged as driving the creation of an institution that was created essentially to address the democratic deficit within the AU. By highlighting the link between democracy and human rights the thesis also brings to the fore issues of participation and representative democracy within the AU. Further that the PAP was envisaged by its designers as holding out the promise of a 'bottom up' approach to decision making processes affecting African peoples. The failure of the PAP to deliver in this regard is highlighted and the reasons for this interrogated. In particular, the implications thereof in respect of the promotion of human rights as provided for in the PAP Protocol and other relevant instruments are looked into in detail.

The information gathered was also used to highlight the relevance of these transnational parliaments with a view to highlighting that the PAP is also relevant to the promotion of human rights in Africa. The thesis looks at the role which the PAP currently plays and the potentially significant role which it may play in future with respect to the promotion (as distinct from the protection) of human rights in Africa. To that end, this study maintained a comparative approach as it drew lessons from other parliamentary institutions in the world with most examples drawn from the ACE and the EP. Reference was made to these two because the PACE has become influential despite the fact that there are no direct elections of its members whilst the EP provides the best model of an influential parliamentary institution in the world.

The study also combined descriptive, analytical and argumentative methods of thesis writing. This combination of approaches was used to be able to bring out the factors that are likely to influence or limit the effectiveness of the Parliament in the promotion of human rights. To a greater extent, the mixed approach was used during the discussion of the various tools that has been adopted by the PAP in the promotion of the human rights. An overtly optimistic approach to the role that the PAP should and could play in the promotion of human rights in Africa was thus eliminated. The thesis acknowledges the limitations within which the PAP works under chief among them being the Parliament's current lack of legislative powers and points out that the institution has been essentially relegated to a glorified 'talk shop'. From the various issues that have been brought to the fore, the thesis does point out the factors that affects the effectiveness of the Parliament.

After comparing the PAP with other RPAs such as the PACE and the EP which do have legislative powers an important point is made that the Parliament's 'let us wait for legislative approach' is not justified. The argument put forward is that most of the parliamentary assemblies have used their limited powers to influence the decision-making processes in their respective regions. The EP in particular used its limited influence to agitate and convince other stakeholders that it was important that it should be conferred with legislative powers. This gives rise to another important factor which is also aptly captured by the thesis, being that the experience of other RPAs point to the fact that the attainment of legislative powers is an

evolutionary process and that in this regard the PAP is not likely to be any different. That notwithstanding and before it attains full legislative powers the PAP may still and can better give effect to its human rights promotional mandate.

1.8 Delineations and limitations of study

The PAP has a wide ranging mandate. This study is inherently limited because it does not discuss the other aspects of the PAP's mandate in any depth, but rather focuses on its human rights mandate.

The PAP is at nascent stage of institutional development and is yet to attain full legislative powers. This study therefore focuses on these initial stages of its development. One of the striking limitations of the study is that the available literature on the PAP mainly deals with its role as a tool of integration in Africa. There is not much of a discourse on the human rights mandate of the PAP, thus limiting the material upon which reliance can be placed to analyse the human rights mandate of the PAP. To a large extent, the PAP's mandate is a moving target, which may be adjusted fundamentally in the future especially in the light of the process to review the PAP Protocol. However, this study aims to set out the position as it obtained as at 31 December 2012. By this date, the PAP still exercised consultative as opposed to legislative powers.

1.9 Chapter overview

This study is made up of seven chapters. This chapter highlights among other things the basis and significance of the study, the issues that are to be interrogated as well as the structure of the study.

Chapter 2 is an analysis of the link between democracy, law and human rights. The chapter seeks to answer the threshold question whether parliamentary assemblies – which are largely political assemblies – should concern themselves with human rights issues. This is achieved by looking at the concept of participatory democracy at the supranational level and its relevance to the promotion of human rights. The chapter argues that the human rights mandate of the PAP is relevant to the promotion of human rights in Africa.

Chapter 3 discusses the history behind the PAP's establishment and its composition, objectives, functions, powers, and some of the budgetary and legal issues surrounding the PAP. The chapter ascertains why the PAP was established, with particular emphasis placed on its human rights mandate. It discusses how the factors – such as election of members to the Parliament, the composition of the Parliament, functions and powers of the PAP, as well as other institutional dynamics – encourage or impede and are likely to encourage or impede the success of the PAP in the promotion of human rights.

Chapter 4 focuses on the actual work by the PAP in the field of human rights up to 31 December 2012. It ascertains the current role of the PAP in the promotion of human rights in Africa. The chapter provides an overview of the work of the PCJHR, other relevant committees and missions undertaken and resolutions adopted by the PAP of relevance to human rights. The chapter further highlights the manner in which the PAP has interpreted and applied its human rights mandate. The aim of the latter consideration is to ascertain whether the actual procedures of the PAP are conducive to the implementation of human rights norms on the continent.

Chapter 5 looks at areas of collaboration between the PAP and other human rights protection bodies within the African human rights system, other organs of the AU, civil society, sub-regional parliamentary bodies and national parliaments. This is done with reference to the manner in which the PAP has and is likely to co-ordinate its human rights activities through its PCJ.

Chapter 6 identifies the key factors, as discernible from the discussion in the previous chapters, which enhance or impede the effectiveness of the PAP in utilising its human rights mandate. It provides an analysis of how impeding factors could be overcome and how factors that could enhance the effectiveness of the PAP may be better utilised. Particular emphasis is placed on the Parliament's attainment of full legislative powers and how that will improve the manner in which the PAP could deal with human rights issues. Where necessary reference will be made to other parliamentary assemblies to highlight how – in respect of each of the identified factors – they have handled them to ensure the effective promotion of human rights.

Chapter 7 is a summary of the conclusions drawn from the study as a whole and makes some recommendations on steps that could be taken to address the factors that actually impede or the effectiveness of the PAP. Further, it identifies factors that enhance or are likely to enhance the effectiveness of the Parliament can be better utilised to achieve an effective contribution of the PAP to the promotion of human rights on the continent. The chapter also recommends modes of operation that are appropriate and most likely to enhance the effectiveness of the Parliament.

CHAPTER II

DEMOCRACY, LAW AND HUMAN RIGHTS: EXPLORING THE INTERFACE

2.1 Introduction

A host of factors are necessary for the promotion and protection of a human rights culture in a particular state. These factors include adherence to the rule of law and respect for the constitutional principles of a country, strong state institutions, and guaranteed independence of the judiciary, an active civil society as well as the promotion of democracy as the legitimate form of government. Such is the nature of democratic governance, a process which has been increasingly used together with the word 'Africa' since the first wave of democratisation hit Africa.¹ As the demand for good governance and democratisation processes gained momentum in Africa, so did the demand for the respect, promotion and protection of human rights.² This has in turn resulted in the demand for democracy and accountability becoming the 'central forces in our millennial era.'³

In the wake of such demands, democracy and human rights have been seen and, more often than not, conceptualized as being symbiotic.⁴ In his work *Democracy and human rights* (1999), Beetham investigates in great length the link between democracy and human rights. He concludes that the relationship between democracy and human rights is rather complex, derived from the enormous variation in the content of human rights.⁵ Against the backdrop of some of his conclusions, this chapter looks at the contentious link between democracy, law and human rights. The chapter sets out the background to the study by exploring the role of parliaments, as political bodies, in the promotion of human rights. The question that is later posed is whether parliaments do really matter in so far as the promotion of human rights is concerned.

¹ J Hatchard *et al* *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern perspective* (2004) 5; R Murray *Human rights in Africa: From the OAU to the AU* (2004) 7.

² As above.

³ SR Ratner 'Democracy and accountability: The criss-crossing paths of two emerging norms' in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000) 449; by accountability Ratner means 'a process for holding individuals personally responsible for human rights abuses they have committed.'

⁴ See generally T Evans 'If democracy, then human rights?' (2001) 22 *Third World Quarterly* 623.

⁵ D Beetham *Democracy and human rights* (1999) 114.

The chapter achieves this aim by briefly looking at the various components of democracy and the types of democracy as well as the definitional issues surrounding democracy. After a discussion of the nature of human rights, in particular their normative content, the chapter explores the ‘interface’ between human rights and democracy.⁶ The chapter then establishes the relevance of parliaments and Regional Parliamentary Assemblies (RPAs) – in particular the PAP – to the promotion of human rights.

2.2 Understanding, defining and justifying democracy

The concept of democracy has been a contentious term for a long time and when it is discussed in the context of Africa it becomes even more contentious. The fact that the term is more often than not fluid or contextual makes it even more problematic. Many reasons have been attributed to the problematic conception of democracy and as one reads more about ‘democracy’ as a concept, it is intriguing that no definitional consensus has been arrived at about such an important conception.⁷ Theorists disagree about whether democracy is anything more than a procedural idea.⁸ That notwithstanding, the pervasive nature of democracy in the general affairs of states continues to exist and democracy continues to occupy the minds of many.

As highlighted above, the definition of democracy is very problematic as it is defined by various people, from various perspectives and for various purposes. The concept of democracy is contestable and to that extent remains an indefinite concept. That is to say, democracy is largely defined by the specific political temperature of a particular state and its attendant institutional framework, explaining why to date there is no universal definition of democracy. It is therefore difficult to discuss democracy without indulging in qualifications. That is why Roux rightly pointed out that ‘democracy is a noun permanently in search of a qualifying adjective.’⁹ This, from the

⁶ Evans (n 4 above) 623.

⁷ BK Twinomugisha ‘The role of the judiciary in the promotion of democracy in Uganda’ (2009) 9 *African Human Rights Law Journal* 3.

⁸ J Waldron *Law and disagreement* (1999) 282.

⁹ T Roux ‘Democracy’ in S Woolman et al (eds) *Constitutional law of South Africa* (2006) 10-1.

writings on democracy, is a practice that has crystallised into a norm no longer puzzling or annoying to political scientists. It appears that there is somewhat a general consensus that democracy seem to be under threat and with Africa in mind one is easily tempted to conclude that that might actually be true. Further, there is a tendency on the part of theorists to focus on the capacity of institutions such as parliaments to entertain diverse ideas as an indication of democracy within a particular country. As a result, many states claim to be democratic, including states which are repressive in nature or have an intolerant and anti-democratic character traceable to the repression and lack of democratic preparation during colonial rule.¹⁰

Democracy has been defined as ‘a form of government in which, in contradistinction to monarchies and aristocracies, the people rule.’¹¹ According to Held, ‘democracy entails a political community in which there is some form of political equality among the people.’¹² Democracy is also usually characterised as a political lifestyle within which social and economic equality prevails, the press is free, where there is impartial politics and enjoyment of individual liberties with constitutional limitations placed upon those in power by the people.¹³ Democracy means different things depending on the individual, ideology, paradigm, culture and context.¹⁴ Diamond posits that democracy is usually reflective of the political climate of the time and is used to signify the desirable end-state of many social, economic and political pursuits, or to self-designate and legitimise existing structures.¹⁵ To some, democracy is synonymous with the equality of all citizens within a particular state in all areas of life, while to some democracy is an expression of the will of the people.¹⁶ Democracy has further been defined as ‘a political system with governments elected by popular majority, and with the rule of law enshrined to protect those not in the majority’.¹⁷ The Vienna Declaration and Programme of Action conclude that ‘democracy is based on the freely expressed

¹⁰ M Sithole ‘Zimbabwe: In search of a stable democracy’ in L Diamond et al (eds) *Democracy in developing countries* (1998) 240.

¹¹ D Held *Models of democracy* (1987) 1.

¹² As above.

¹³ SM Makinda ‘Democracy and multi-party politics in Africa’ (1996) 34 *Journal of Modern African Studies* 556.

¹⁴ Diamond (n 10 above).

¹⁵ As above.

¹⁶ KA Ninsifin & FK Drah (eds) *The search for democracy in Ghana: A case study of political instability in Africa* 9 (1987) 12.

¹⁷ Ratner (n 3 above) 449.

will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.¹⁸

As Beetham rightly points out, the various definitions of democracy sometimes overlap, but also tend to be inconsistent at times with each other.¹⁹ To overcome this definitional problem, Beetham argues that democracy should be defined, in the first instance, according to its underlying principle or principles²⁰ because an institutional definition on its own is incoherent while its conceptual definition cannot show why it should be called ‘democracy.’²¹ He concludes this argument by pointing out that ‘once we accept to define democracy by its underlying principle or principles, it will become clear that the many differences as to the meaning of democracy are but disputes about how much democracy is either desirable or practicable or both, rather than about the meaning of the concept itself.’²² To that end, Beetham finds support from Brand, who argues that democracy is a value based and discursive practice.²³ Brand also notes that ‘a collection of democratic institutions do not necessarily amount to democracy itself – it is simply a structure within which the democratisation process might take place.’²⁴ Finally, Beetham concludes by adopting the definition of democracy as ‘a mode of decision-making about collectively binding rules and policies over which the people exercise control and one which realises to the greatest conceivable degree the principles of popular control and equality in its exercise.’²⁵

Donnelly also points out that the substantive conceptions of democracy have inherent problems ‘ranging from naive overestimates of the goodness of real people to elitist paternalism that sees the people as needing to be directed by those with the virtue or insight needed to know their

¹⁸ Vienna Declaration and Programme of Action, United Nations GAOR, World Conference on Human Rights, para 8.

¹⁹ Beetham (n 5 above) 1.

²⁰ As above, 4.

²¹ As above, 26.

²² As above, 27.

²³ D Brand ‘Writing the law democratically: A reply to Theunis Roux’ in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 100.

²⁴ As above.

²⁵ Beetham (n 5 above) 33.

interests.²⁶ The tendency to stress procedural democracy in recent discussions, he argues, is therefore generally justified.²⁷

Democracy in its classical sense was interpreted to mean ‘rule by the masses, poor, ignorant, and unqualified, who would use the power of their economic interest against the propertied class which would cause concern among the elite.’²⁸ Democracy has also been defined as the rule of the people by the people; as a system within which there exists social equality.

Most definitions of democracy are however rooted in the etymology of the Greek term, *demokratia* which literally means rule or power (*Kratos*) of the people (*demos*).²⁹ It is worth noting that the *demos* or people for the Greeks did not literally mean the whole population but rather a particular social class that consisted of the males and excluded slaves and resident aliens.³⁰ As has been pointed out before, ‘the extraordinary innovations of Athenian democracy rested in large part on its exclusivity.’³¹ Accordingly, the Athenian political culture was an adult male culture and only Athenian men over the age of 21 had voting rights.³² Women had no political rights and their civil and political rights were somewhat strictly restricted.³³ The classical notion of democracy was based on the justification that ‘citizens should enjoy political equality in order to be free to rule and be ruled in turn.’³⁴ The key features of the classical notion of democracy were that there should be direct participation of the citizenry in the judicial and legislative functions of the state, coupled with the fact that the larger society had sovereign power.³⁵ The scope of that sovereign power was said to include all the common affairs of the city.³⁶ The problem that has been echoed by many is the exclusivity of ancient democracy. Despite being involved in the affairs of the citizens, the ancient

²⁶ J Donnelly ‘Human rights, democracy and development’ (1999) 21 *Human Rights Quarterly* 618.

²⁷ As above.

²⁸ ZF Arat *Democracy and human rights in developing countries* (1991) 16.

²⁹ Donnelly (n 26 above) 615.

³⁰ As above.

³¹ Held (n 11 above) 19.

³² PJ Rhodes (ed) *Athenian Democracy* (2004) 3.

³³ As above.

³⁴ Aristotle, *Politics*, Book VI, 1317b;

³⁵ Held (n 11 above) 27

³⁶ As above.

democracy nonetheless concerned itself with a small proportion of the citizenry.³⁷ As Held points out, ‘ancient democracy was a democracy of the patriarchs; women had no political rights and their political rights were strictly limited’ and further ‘the achievements of classical democracy were directly linked to the politically unrecognized work and domestic service of women (and children).³⁸

The classical Athenian democracy has been transformed into the largely representative democracy that obtains today,³⁹ resulting in many variants of democracy as developed by political theorists. These include deliberative democracy, constitutional democracy, participatory democracy, multiparty democracy, parliamentary democracy, representative democracy, social democracy and liberal democracy.

Many states and many societies are considered to be liberal societies because they aspire to respect the rights of persons and allow them to participate in the decision-making process. Liberal democracy is a form of representative democracy where elected representatives who hold the power to make decisions on behalf of the majority are placed under constitutional limitations.⁴⁰ These constitutional limitations normally emphasises protecting individual liberties, the rights of minorities and the separation of powers between the various arms of government.⁴¹ The dominant assumption(s) surrounding this concept of democracy is that democracy is likely to bring accountability and ensure autonomy of the individual and interests leading to the acceptance of liberal democracy as the form of government that can ensure effective participation of the citizenry in the decision-making process.⁴² Evans buttresses this point by highlighting that there is an assumption that the democratic state acts for the benefit of all the citizenry and not in the interests

³⁷ As above, 19; Rhodes (n 32 above) 3.

³⁸ Held (n 11 above) 19.

³⁹ J Norman *Human rights and democracy: conceptualization and application in Palestine* (2005) available at http://www.phrmg.org/human_rights_and_democracy.htm (accessed 24 January 2013).

⁴⁰ Beetham (n 5 above) 35.

⁴¹ As above.

⁴² Evans (n 4 above) 623.

of a particular section of the population.⁴³ This has led to the acceptance of democracy as the most appropriate form of government.

As direct participation in the decision-making process by the people became impossible over time, Arat argues that some form of representative democracy became inevitable. He argues further that the modern solution has been to move away from the 'ideal of democracy toward a realizable one, representative democracy.'⁴⁴ Representative democracy means that government must be representative of the people and the people should be able to participate in the politics of a given state and must elect those who govern through periodic elections. Representative governance has been defined by Mill as a system according to which 'the whole people, or some numerous portion of them exercise through deputies periodically elected by themselves, the ultimate controlling power which, in every constitution, must reside somewhere.'⁴⁵ For example, the South African jurisprudence acknowledges the importance of people's participation in politics through their elected representatives.⁴⁶ The importance of representative democracy in South Africa was underscored by the case of *De Lille v Speaker of the National Assembly*,⁴⁷ where the Constitutional Court held that a suspension of a member of the Assembly from Parliament for contempt is not consistent with the requirement of representative democracy. The Constitutional Court held that it could never be reasonable and justifiable in an open and democratic society based on human dignity and freedom for such punitive power to be exercised in violation of the rules of natural justice. The Constitutional Court further held that such a suspension deprived the unaffected and innocent members of the electorate of their representation in Parliament.⁴⁸

Closely linked to the concept of representative democracy is the accepted measure of democracy as participation, according to which the people are supposed to take part in the decision-making

⁴³ As above, 625.

⁴⁴ Arat (n 28 above) 17.

⁴⁵ JS Mill *Considerations on representative government* (1861) 269 quoted in S Woolman *et al* (n 9 above) 10-10.

⁴⁶ I Currie & J de Waal *The bill of rights handbook* (2005) 15.

⁴⁷ 1998 (3) SA 430 (CC) para 27.

⁴⁸ As above, at 455F - G/H.)

process⁴⁹ and that every man or woman has a right to participate equally in brokering consensus on issues that require resolution.⁵⁰ Participatory democracy has been described as a system of governance where democracy through the representative structures is enhanced by encouraging ‘direct and participatory forms of democracy’ or by encouraging the participation of the citizenry in the decision-making process. Accordingly, the justification for participatory democracy has been that

an equal right to liberty and self-development can only be achieved in a participatory society or a society which encourages political efficacy, nurtures a concern for collective problems and contributes to the formation of a knowledgeable citizenry capable of taking a sustained interest in the governing process.⁵¹

It is apparent from the above quote that participatory democracy is not only about citizens taking part in the political processes by way of elections. It is also important that there should be sufficient interest by all in the problems that affect a particular society. This, according to Held, can only be achieved where the institutions, those in power and the general public are empowered to have knowledge on issues that affect them.⁵² It has been suggested that, historically, participatory democracy could be viewed as a ‘[s]ocial Left that embraces the politics of difference (recognition) and equality (social justice/redistribution) through the mobilisation of the poor and excluded’.⁵³ Participatory democracy is about the question whether citizens should participate in the country’s decision-making processes, and if so, how they should be given the right to participate in such decision-making. It is in that regard that civil society plays a germane role, for the right of association has always been closely linked to the political struggle for democracy.⁵⁴ Social movements have also been critical in ensuring that civil society is politicised enough to be

⁴⁹ Arat (n 28 above) 23.

⁵⁰ Waldron (n 8 above) 283.

⁵¹ Held (n 11 above) 215.

⁵² As above.

⁵³ F Powell ‘Civil society, social policy and participatory democracy: Past, present and future’ (2008) 8 *Social Policy and Society* 49.

⁵⁴ As above, 49.

encompassing and embrace issues that affect the modern day world with a view of ensuring that there is no exclusion of any class of people in the various decision-making processes.⁵⁵

Consequently, the following have been identified as some of the key features of participatory democracy: the direct participation of citizens in the regulation of the key institutions of society, including the workplace and local community, and the direct accountability of party officials to the general membership. After all, the core idea of democracy is that of popular rule or popular control over the collective decision-making process.

In the case of *Doctors for Life International v Speaker of the National Assembly & Others*,⁵⁶ after confirming that the principle of participatory democracy was inherent in the South African Constitution, the Constitutional Court of South Africa discussed at length the importance of participatory democracy in the context of the South African democracy. The Court noted that the Constitutional Assembly was not content with the right to vote as the expression of the right to

⁵⁵ As above, 54.

⁵⁶ Case CCT 12/05 (main judgment); 2006 (12) BCLR 1399 (CC). The applicant's complaint was that during the legislative process leading to the enactment of the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004 and the Dental Technicians Amendment Act 24 of 2004, the National Council of Provinces (NCOP) and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the South African Constitution, respectively. The requirement to facilitate public involvement in the legislative processes of the NCOP is governed by section 72, which provides:

- “(1) The National Council of Provinces must –
- (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
 - b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –
 - (i) to regulate public access, including access of the media, to the Council and its committees; and
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
- (2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”
- Identical duties are imposed on the National Assembly by section 59 and on the provincial legislatures by section 118 of the Constitution.

political participation. Rather, it opted for a more expansive role of the public in the decision-making process of the country and called for a more involved participation of the citizenry in the law-making process.⁵⁷

The Court invalidated two pieces of legislation because Parliament had failed to uphold the principle of participatory democracy during the consideration of bills before it. Most importantly, Ngcobo J (as he then was), on behalf of the majority of the Court, described the relationship between representative democracy and participatory democracy in South Africa as not being in tension with each other but as mutually supportive.⁵⁸ It was also highlighted that general elections are the foundation of representative democracy and that they would be meaningless without massive participation by the voters. That ‘participation by the public on a continued basis provides vitality to the functioning of representative democracy,’ was also isolated as encouraging citizens to take part in the public affairs and the running of the government institutions.⁵⁹ Most importantly, the Judge highlighted that ‘[p]articipatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.’⁶⁰

The relationship between representative democracy and participatory democracy is aptly captured by the last quotation. This relationship does indeed exist in some African countries and like South Africa’s, some democratic systems in Africa provides – *de facto* or *de jure* – for representative, participatory and to a limited extent direct democracy elements. To that end, the constitutional conception of democracy in many jurisdictions demands that, when there is disagreement in a society about a matter on which a common decision is needed, all are entitled to equally participate in the resolution of that dispute, for example, through national referendums. It has further been argued that there cannot be democracy unless the people’s participation in the decision-making process has been guaranteed and effectively honoured so as to ensure that there is actual

⁵⁷ *Doctors for Life International v Speaker of National Assembly* 2006 (6) 416 (CC) at para 115; [2006] ZACC 11; 2006 (12) BCLR 1399 (CC).

⁵⁸ As above.

⁵⁹ As above.

⁶⁰ As above.

participation of the people in decision-making.⁶¹ Thus, in the case of *Thomas Sibanda v The Attorney General of Botswana & Others*,⁶² Justice Dingake pointed out that the ‘right to vote is the foundation of all democratic societies.’⁶³ The decision also noted that the right to vote was a universally acknowledged fundamental right and that it was time that Botswana considered protecting the right under chapter 2 of its Constitution, which deals with fundamental human rights. The case involved a challenge to a law (Section 6 of the Electoral Act) barring prisoners to vote.⁶⁴ The applicant (prisoner) contended that the section barring him from voting was unjust as it amounted to double punishment. The applicant further complained that the Act subjected prisoners in Botswana to unequal treatment with respect to the right to vote into power representatives of their choice. Even though the application in the *Thomas Sibanda* case was eventually dismissed, the words of Justice Dingake buttresses the point that participation is an important aspect of a democratic society.⁶⁵

It is perhaps in pursuit of this ideal that has seen the introduction and adoption of what has come to be commonly known as ‘democratic clauses’⁶⁶ by international organisations. The trend has been to include a democratic clause in the constitutive Act or founding treaty of a particular organisation⁶⁷ or to have a separate instrument or treaty providing for such democratic principles.⁶⁸

⁶¹ As above, para. 106.

⁶² *Thomas Sibanda v The Attorney General of Botswana & Others* case no. MAHLB-000347-09 (Unreported).

⁶³ As above, para. 68.

⁶⁴ As above, para. 3 & 4.

⁶⁵ Human Rights Committee General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art 25): 12/07/96, CCPR/C/21/Rev 1/Add 7 at para 5.

⁶⁶ I Kane ‘The implementation of the African Charter on Democracy, elections and Governance’ (2008) 17 *African Security Review* 43; Democratic clause(s) have been described as ‘a provision or set of provisions in an international conventional instrument, which subjects the admission, participation or permanence in certain organization, and/or the maintenance of diplomatic, economic or cooperation relations among signatory parties, to the obligation that each state party has a democratic system of government in place.’ J El-Hage ‘Under what circumstances may the OAS apply the democracy clause against a member state?’ *Working paper on International Democracy Law* (2010) 1 available at http://www.humanrightsfoundation.org/Democracy_Clause.pdf. (Accessed 7 September 2013).

⁶⁷ AU Constitutive Act, art 3(g) & 4(p); Organisation of American State (OAS) Charter as amended, arts 2(b) & 9; European Union Treaty, art 6.

⁶⁸ African Charter on Democracy, elections and Governance; Inter-American Democratic Charter (2011), art 1; The Declaration of Commonwealth Principles (1971) as read with the Harare Declaration (1991) and

This approach is now being identified as a mechanism for the protection and promotion of democratic principles by international organisations in their political, trade and economic relations.⁶⁹ As rightly noted by Piccone, these democratic clauses have been adopted by governments as a way of ensuring that the ‘democratic gains of the 1990s’ were not reversed and to ‘prevent the inherently destabilising effects of a return to autocratic rule.’⁷⁰ He further notes that

[t]ogether, they reflect a new international norm: Once established, the people’s right to live under democracy shall not be reversed, and attempts to do so obligate other governments to help restore democracy to that country.⁷¹

Democratic clauses are accordingly aimed at promoting the respect for democratic principles which include the participation of the society in the decision-making processes and seek to deter unconstitutional changes of government.⁷² Their importance to the consolidation of democracy and the participation of people to the governance of their countries is beyond doubt. They all indicate the commitment of states across all regions to the pursuit of democratisation.

In some instances it is a requirement of an international organisation that a country should fulfil the democratic requirement for it to be eligible for membership.⁷³ Democratic requirements have also formed part of development assistance agreements, with some international organisations requiring the fulfilment of certain democratic conditions by states before they could be afforded financial assistance.⁷⁴ The case on point is the Contonou Agreement of 2000 between the EU and states

the Millbrook Commonwealth Action Programme on the Harare Declaration (1995); Protocol on Democracy and Good Governance, Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001).

⁶⁹ TJ Piccone ‘International mechanisms for protecting democracy’ in MH Halperin & M Galic (eds) *Protecting democracy: International responses* (2005) 101.

⁷⁰ As above.

⁷¹ As above.

⁷² As above, 44; Kane (n 66 above) 43.

⁷³ OAS Charter, art 9; Additional Protocol to the Cartagena Agreement, art 4; EU Treaty, arts 6 & 49; see generally R Burchill ‘The future or failure of democracy in the EU’ (2001) 7 *European Public Law* 301; ND White *The law of international organisations* (2005) 201.

⁷⁴ Piccone (n 69 above) 101.

belonging to the African, Caribbean and Pacific Regions (ACP).⁷⁵ The Contonou agreement reiterates what was provided for by the Lomé Convention of 1989 as revised in 1995. They both provided that developmental aid will only be afforded to a state that satisfies ‘the respect of human rights, democratic principles and the rule of law’ requirements.⁷⁶ Additionally, democratic clauses are aimed at ensuring the respect for human rights and the rule of law.⁷⁷

With respect to Africa and the PAP, the African Charter on Democracy, elections and Governance provides the Parliament with a tool to use to promote democracy and human rights in the continent. It is therefore important to ascertain whether the African Charter on Democracy qualifies as a democratic clause. This is done in the light of the model democratic clause as put forward by Piccone.⁷⁸ He argues that a model democratic clause should include five most important elements. These elements are highlighted below with a brief discussion on whether the African Charter on Democracy satisfies each element. Accordingly, a democratic clause must provide for: First, the respect for democratic norms, human rights and the rule of law.⁷⁹ In fact the African Charter on Democracy provides that the member undertake to respect human right and democratic principles.⁸⁰ Even though it does not mention the African Charter, it is generally accepted that human rights in that context refers to the rights under the African Charter.⁸¹ Consistent with the aim of ensuring that democracy is not overturned in African states, the Charter focuses a lot on unconstitutional changes of government.

Second, there must be a body that is responsible for monitoring the implementation of such principles, which in the case of the African Charter is mainly the Commission of the African Union

⁷⁵ Contonou Agreement, art 96.

⁷⁶ MI Mbadinga ‘The Non-Execution Clause in the Relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)’ available at <http://www.germanlawjournal.com/print.php?id=210> (accessed 18 August 2013); Directorate-General for External Policies of the Union ‘Human Rights and Democracy Clauses in the EU’s International Agreements’ (2005) available at http://www2.law.ed.ac.uk/file_download/publications/3_568_humanrightsanddemocracyclausesintheusin.pdf (accessed 18 August 2013).

⁷⁷ Piccone (n 69 above) 122- 123.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ African Charter on Democracy, art 3.

⁸¹ Kane (n 66 above) 46.

(The Commission), and the AU Peace and Security Council.⁸² The AU Commission is tasked, under article 10 of the African Charter on Democracy, with the mandate of assisting member states with the implementation of principles under the Charter. Third, the democratic clause must set out clearly the consequences of any infraction by the member states and must ‘not simply suggest that ‘appropriate action’ must be taken. The African Charter on Democracy does set out the consequences of violations of the democratic principles set out therein. In the main, any unconstitutional change of Government will result in the immediate suspension of the member state from the activities of the AU.⁸³ Sanctions may be imposed on those member states which initiated or supported the unconstitutional change of government in another state.⁸⁴ However, the suspended member will be expected to continue observing the human rights obligations that obtains under the various AU instruments.⁸⁵ The Charter also makes provision for the prosecution of those who are deemed to be perpetrators of the unconstitutional change of government.⁸⁶ Article 46 also provides that appropriate sanctions may be imposed in accordance with the provisions of the AU Constitutive Act for any violation of the provisions of the Charter.⁸⁷ It is also discernible from the above that the possible sanctions under the Charter do not only envisage suspension of the member state but also envisages economic sanctions.⁸⁸ This satisfies the fourth requirement of a model democratic clause as suggested by Piccone which is that a breach of the democratic clause should not just attract a suspension from the organisation’s activities but should also include economic sanctions. Fifth, it appears that the sanctions imposed under article 25 will only be lifted once the situation that led to the suspension is resolved.⁸⁹ However, the Charter thus fails to put into place clear time lines within which the relevant institutions, such as the AU PSC

⁸² African Charter on Democracy, arts 3 & 25.

⁸³ As above, art 25(1).

⁸⁴ As above, art 25(6).

⁸⁵ As above, art 25(2) & (7).

⁸⁶ As above, art 25(5).

⁸⁷ See generally KD Magliveras ‘The sanctioning system of the African Union: part success, part failure?’, Revised version of a paper presented at an Expert Roundtable on “The African Union: The First Ten Years” which was organized by the Institute of Security Studies, Addis Ababa, Ethiopia, 11 – 13 October 2011, available at http://www.academia.edu/1103678/THE_SANCTIONING_SYSTEM_OF_THE_AFRICAN_UNION_PART_SUCCESS_PART_FAILURE (accessed 17 August 2013).

⁸⁸ African Charter on Democracy, art 25(2) & (7).

⁸⁹ As above, art 26.

and AU Commission, should have taken appropriate measures aimed at bringing to an end the situation that has caused the interruption of democracy in one of the member states.

As evidenced by the previous discussion, there exists a wide array of meanings attached to the term ‘democracy’. In its Universal Declaration on Democracy, the Inter-Parliamentary Union adopted eight principles⁹⁰ of democracy urging governments and parliaments all over the world to be guided by their content. According to principle I of the Universal Declaration on Democracy, ‘democracy is a universally recognised ideal as well as a goal, which is based on common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences.’⁹¹ Most importantly, principles 6 and 7 of the Declaration point out that democracy is inseparable from the rights acknowledged by the Declaration and that democracy is largely based on the ‘primacy of the law and the exercise of human rights.’⁹²

In this study, democracy therefore denotes a system of government that meets the following conditions:

- (i) Competition for political office by several groups or political parties through periodic elections;
- (ii) a system that ensures the participation of the governed in the selection of leaders through popular elections; and
- (iii) There is respect for civil and political rights such as freedoms of expression, freedom of the press, the right to form and join organisations sufficient to ensure the integrity of political competition and participation within a particular country, as well as socio-economic rights.

⁹⁰ Inter-Parliamentary Union, *Democracy: Its principles and achievements (2008)* available at www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf (accessed 7 September 2013).

⁹¹ As above.

⁹² As above.

Consequently, by ‘democratisation’ I mean a process of establishing a democratic political regime or achieving democracy.⁹³ It is a sequence of tasks each with its own logic, the ingredients of which are assembled one at a time.⁹⁴ Democratisation includes ingredients such as periodic elections, a free press, respect for human rights, an independent judiciary, the rule of law and a greater role for civil society in the decision-making process.⁹⁵ These elements of democracy translate into nothing else but principles of democracy which are essentially public participation, popular sovereignty, political equality, popular consultation as well as majority rule. It is submitted that a conception of democracy should be alive to the fact that neither ‘substantive’ nor ‘procedural’ conceptions of democracy takes or should take precedence over the other.⁹⁶

2.3 Understanding and defining human rights

So far, the discussion has been centred on the definition of democracy. There is no doubt that the definition of democracy is contentious and at best contextually understood. Surprisingly, the term ‘human rights’ has not escaped similar definitional problems. This is surprising for human rights talk has occupied the agenda of the world for many years now and one would have hoped that there will be consensus as regards the definition of the term ‘human rights’. The United Nations (UN) Charter also did not specifically define the term ‘human rights’ but rather presupposed it.⁹⁷ The conceptualisation of rights in that context becomes important because the term ‘human rights’ as invoked in the international human rights context is often treated as having a self-evident content resulting in emphasis always being placed on their implementation and enforcement.⁹⁸ The ‘internationally agreed’ definition of human rights is contained in the Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948. Accordingly human rights

⁹³ C Hauss ‘Democratisation’ available at <http://www.beyondintractability.org/essay/democratisation> (accessed 7 September 2013).

⁹⁴ PT Robinson ‘Democratisation: Understanding the relationship between regime change and the culture of politics’ (1994) 37 *African Review Studies* 43.

⁹⁵ R Ajulu ‘Thinking through the crisis of democratisation in Kenya: A response to Adar and Murunga’ (2000) 2 *African Sociological Review* 133.

⁹⁶ Norman (n 39 above).

⁹⁷ M Nowak *Introduction to the international human rights regime* (2003) 75.

⁹⁸ As above.

are defined as those rights that everyone is entitled to without distinction of any kind.⁹⁹ A lot of literature has revolved around the conceptualisation and debate regarding the nature and content of human rights.¹⁰⁰

As already indicated in chapter I, it suffices here to point out that this thesis adopts the meaning of human rights as those rights that are mainly codified and discernible from the human rights instruments of the African Union, as discussed below and in particular, the African Charter on Human and Peoples' Rights Rights (African Charter/Banjul Charter). As such, the term 'human rights' in this thesis will include both socio-economic rights and civil and political rights as obtainable under the various regional and international instruments purporting to protect and promote the rights of the individual.

2.3.1 The normative framework of the African human rights system

It is certainly beyond doubt that Africa has, for the last decade, been fraught with numerous human rights challenges.¹⁰¹ It is in recognition of this situation, created by the usual disregard for human rights by African leaders, that there has been continuous pressure from developments elsewhere for democratisation as well as targeted promotion and protection of human rights in Africa.¹⁰²

As has already been noted, the Organisation of African Unity (OAU) failed to deliver on the promises made by the leaders. Many reasons have so far been put forward as to why the now defunct OAU was a failure. Of importance here is the fact that following the establishment of the OAU there were several institutions and several inter-state instruments aimed at ensuring the promotion and protection of human rights on the continent. In that context, the African human

⁹⁹ UDHR, article 3.

¹⁰⁰ L Chenwi 'Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 *African Human Rights Law Journal* 23; AO Okeowo 'Economic, Social and Cultural Rights: rights or privileges' available at <<http://ssrn.com/abstract=1320204> or <http://dx.doi.org/10.2139/ssrn.1320204>> (accessed on the 7 September April 2013); J Shestack 'The philosophic foundations of human rights' (1998) 20 *Human Rights Quarterly* 201; Nowak (n 98 above) 75.

¹⁰¹ Human Rights Bulletin 44 ' The African human rights system' 2009.

¹⁰² As above.

rights system refers to the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), the OAU Refugee Convention and the African Charter on the Rights and Welfare of the Child (ACRWC/African Children's Charter).¹⁰³ Institutions forming part of the African human rights system include the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (ACtHPR) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).¹⁰⁴

It is important to highlight at the outset that the African Charter is the main instrument relating to human rights in Africa. In addition to the African Charter, the AU has adopted other thematic human rights instruments such as the African Charter on Democracy, Elections and Governance and the AU Convention for the Protection and Assistance of Internally Displaced Persons. Together these instruments provide the normative framework of the African human rights system through which the promotion and protection of human rights in Africa is undertaken. The discussion below sets out the normative framework of the African human rights system. A discussion of the institutions forming part of the African human rights system is captured in chapter 5 of this study.

A. The African Charter on Human and Peoples' Rights

In the main, it is beyond doubt that the African Charter remains at the core of the African human rights system¹⁰⁵ with almost all members of the AU (save for South Sudan) having ratified the Charter indicating their desire to be bound by its provisions. The African Charter came into force in 1986. It enumerates the rights that Africans should enjoy, which includes not only civil and

¹⁰³ See generally F Viljoen *International human rights law in Africa* (2012) 391.

¹⁰⁴ Viljoen (n 103 above) 391; OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 1- 2.

¹⁰⁵ Viljoen (n 103 above) 213; G Wachira 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it to effectively meet the needs of the African population' in F Viljoen (ed) *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006) 16; AA An-Na'im 'Human rights protection in Africa: Toward effective mechanisms' (1997) 3 *East African Journal of Peace and Human Rights* 1-31.

political rights, but also encompasses economic, social and cultural rights,¹⁰⁶ as well as the so-called ‘third generation rights’ such as the right to peace, solidarity and the right to a healthy environment and development.¹⁰⁷ The Charter has been deemed to have an African ‘fingerprint’, and its normative uniqueness is centred on the fact that the Charter promotes the indivisibility of rights, places emphasis on individual duties, captures the concept of peoples’ rights, and omits a derogation clause.¹⁰⁸

The Charter incorporates both economic, social and cultural rights and civil and political rights. Specific civil and political rights provided for under the Charter include, the right to life,¹⁰⁹ the right to personal liberty,¹¹⁰ fair trial rights,¹¹¹ protection from torture and other cruel, inhuman, or degrading treatment or punishment,¹¹² the right to receive, express and disseminate information and opinions,¹¹³ protection from discrimination,¹¹⁴ and protection from deprivation of property.¹¹⁵ The effective promotion, protection and fulfilment of these rights have been subjected to intense scrutiny over the years by commentators on the African Charter and in the jurisprudence of the African Commission.¹¹⁶ The Charter is usually celebrated for its ‘corrected historical asymmetries’¹¹⁷

¹⁰⁶ Murray (n 1 above) 50.

¹⁰⁷ Bondzie-Simpson ‘A critique of the African Charter on Human and Peoples’ Rights’ (1988) 31 *Howard Law Journal* 657.

¹⁰⁸ Viljoen (n 103 above) 214; See also generally M Mutua ‘The African Human rights system: A critical evaluation’ (1999) available at <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 7 September 2013).

¹⁰⁹ African Charter, art 4.

¹¹⁰ As above, art 6.

¹¹¹ As above, art 7.

¹¹² As above, art 5.

¹¹³ As above, art 9.

¹¹⁴ As above, art 2.

¹¹⁵ As above, art 6.

¹¹⁶ B Manby ‘Civil and political rights in the African Charter on Human and Peoples’ Rights: Articles 1-7’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice 1986-2006* (2009) 171; K Olaniyan ‘Civil and political rights in the African Charter on Human and Peoples’ Rights: Articles 8- 14’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: the system in practice 1986-2006* (2009) 213-243; MK Mbondenyi ‘Improving the substance and content of civil and political rights under the African Human Rights system’ (2009) available at http://works.bepress.com/morris_mbondenyi/6 (accessed 7 September 2013).

¹¹⁷ L Chenwi (n 100 above) 23.’

by 'including rights from all three generations in one document.'¹¹⁸ To that end socio-economic rights have found protection under the African Charter. The adoption of the African Charter gave a tremendous boost to the promotion and protection of socio-economic rights in Africa. The African Charter makes no distinction as to the type of rights, makes no indication as to which of the rights is of lesser importance than the other and has 'theoretically' made no distinction as to their implementation.¹¹⁹ This explains why the Charter is seen as a leap beyond ideological cleavages and disputes that lead to the subjugation of socio-economic rights as being of lesser value to civil and political rights.¹²⁰ It protects a wide range of socio-economic rights¹²¹ and is supplemented by thematic regional instruments such as the African Women's Protocol¹²² and the ACRWC.¹²³ Socio-economic rights are protected under articles 15 to 24 of the African Charter. They include the right to health,¹²⁴ the right to education,¹²⁵ the right to self-determination,¹²⁶ the right to economic social and cultural development,¹²⁷ and the right to a satisfactory and stable environment.¹²⁸ These rights are free of claw back clauses¹²⁹ as they are unequivocally justiciable like all other rights enshrined under the Charter¹³⁰ and states are enjoined to give immediate

¹¹⁸ As above.

¹¹⁹ See the African Commission decision in *Purohit and Another v The Gambia*, wherein the African Commission in acknowledgement of the lack of resources in Africa read into the right to health the qualification of availability of resources; Viljoen (n 103 above) 217.

¹²⁰ C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 338; CA Odinkalu 'Analysis of paralysis or paralysis by analysis - Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.

¹²¹ Mbazira (n 120 above) 340.

¹²² African Women's Protocol, arts 12-18;

¹²³ ACRWC, arts 11, 12, 14, 18.

¹²⁴ African Charter, art 16.

¹²⁵ As above, art 17.

¹²⁶ As above, art 20.

¹²⁷ As above, art 22.

¹²⁸ As above, art 24.

¹²⁹ S Ibe Beyond 'Justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 229.

¹³⁰ Viljoen (n 103 above) 214.

implementation of these rights.¹³¹ The normative content of socio-economic rights enshrined under the African Charter has been laid out in several decisions of the African Commission.¹³²

As I have earlier indicated, the Charter also provides for peoples' rights such as the right to self-determination, the right to existence, the right to international peace and security as well as the right to a satisfactory environment.¹³³ The fact that the African Charter has made this 'departure from the individual rights orientation of all most human rights instruments, by entrenching collective rights of peoples', is seen by commentators as a significant and unique feature of the African Charter.¹³⁴ It is beyond doubt that the inclusion of these collective rights within the African Charter has gone a long way in promoting such collective rights despite the fact that there are various meanings ascribed to the term 'peoples' as used in the African Charter. Further to the above, another distinctive feature of the African Charter is the fact that it recognizes and incorporates individual duties as well a phenomenon that is not present in other human rights systems.

This novelty has been accredited to the then President of Senegal Léopold Sédar Senghor in his 1979 speech during the meeting of African Experts preparing the Draft African Charter in Dakar, Senegal.¹³⁵ On that occasion, Senghor called for the inclusion of 'individual duties within the African

¹³¹ Mbazira (n 120 above).

¹³² *Social and Economic Rights Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Free Legal Assistance Group and Another v Zaire* (2000) AHRLR 74 (ACHPR 1995); *Purohit and Another v The Gambia* (2003) AHLR 96 (ACHPR 2003); *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

¹³³ African Charter, arts 19-24; see generally SA Dersso 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' (2006) 6 *African Human Rights Law Journal* 358 and Viljoen (n 103 above) 219, on the understanding of the term 'peoples' in the context of the African Charter, KN Bojosi & GM Wachira, 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal*, 382-406; C Baldwin & C Morel 'Group rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2009) 244- 288.

¹³⁴ Dersso (n 134 above) 358; Viljoen (n 103 above) 219.

¹³⁵ J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of article 31 of the African children's Charter' (2008) 52 *Journal of African Law* 165.

Charter.¹³⁶ As it has been rightly noted, the limits to which individual rights may be asserted are sometimes overlooked with more emphasis usually being placed on the rights of the individual.¹³⁷ To cure this anomaly the drafters included individual duties within the African Charter and in a way asserted the notion that ‘the African human rights conception, both traditional and contemporary, recognizes the importance of the group simultaneously with the significance of the individual.’¹³⁸

Another distinctive feature of the African Charter is the absence of a derogation clause in terms of which certain rights may be suspended during national emergencies.¹³⁹ The African Commission has, as a result, established that member states cannot suspend rights enshrined in the African Charter in case of emergencies.¹⁴⁰ The absence of a derogation clause within the African Charter has been cited as likely to have both beneficial and perverse consequences. However, when one has regard to the latent danger of derogation clauses, in particular their susceptibility to abuse, they are bound to conclude that the absence of such a clause is indeed a welcome departure from the general norm.¹⁴¹

B. The OAU Refugee Convention and the AU Convention for the Protection and Assistance of Internally Displaced Persons

As already alluded to above, the African human rights system is anchored on the African Charter. However, there are other thematic instruments of the AU aimed at ensuring that specific groups are substantively and sufficiently protected. The OAU Refugee Convention addresses specific aspects of refugee issues in Africa and specifically calls on states to ensure that measures that will

¹³⁶ Viljoen (n 103 above) 219.

¹³⁷ Sloth-Nielsen & Mezmur (n 135 above) 164.

¹³⁸ As above.

¹³⁹ See generally Viljoen (n 103 above) 333-334; L Sermet ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights: A critical discussion’ (2007) 7 *African Human Rights Law Journal* 142-161; R Murray *The African Commission on Human and Peoples’ Rights and international law* (2000); BF Tessema ‘A critical analysis of non-derogable rights in a state of emergency under the African system: The case of Ethiopia and Mozambique’ Unpublished LLM thesis, University of Pretoria (2005).

¹⁴⁰ *Commission Nationale des Droits de l’Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

¹⁴¹ Viljoen (n 103 above) 253; Sermet (n 139 above) 151.

solve the problem of refugees in Africa are taken.¹⁴² This is in light of the fact that the plight of refugees in Africa is indeed of growing concern and, as rightly noted by Oloka-Onyango, ‘the issue of establishing a mechanism for the protection of persons dispossessed from their countries of origin was high on the OAU agenda.’¹⁴³ Following the OAU Refugee Convention was the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons (IDP Convention), the first international treaty on internally displaced persons.¹⁴⁴ The IDP Convention seeks ‘to ensure that internally displaced persons are provided with an appropriate legal framework to ensure their adequate protection and assistance as well as with durable solutions.’¹⁴⁵ The IDP Convention further seeks to address issues relating to the persistent and recurring conflicts and natural disasters that normally result in internal displacements.¹⁴⁶ It does so by setting out the general duties of states, non-state actors and the AU in combating internal displacement.¹⁴⁷

C. The African Charter on the Rights and Welfare of the Child

Another important instrument of the AU is the African Charter on the Rights and Welfare of the Child (ACRWC/African Children’s Charter). The African Charter is identified as a reaction ‘against a perception of exclusion or marginalisation of African states in the drafting process of the CRC.’¹⁴⁸ Viljoen points out that, one may identify the political reasons behind the adoption of the African Children’s Charter.¹⁴⁹ The African Children’s Charter is an attempt to address several issues that

¹⁴² OAU Refugee Convention, Preamble; see generally G Okoth-Obbo ‘Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20 *Refugee Survey Quarterly* 79-138; S Swart ‘Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law’ (2009) 9 *African Human Rights Law Journal* 103-128; Viljoen (n 103 above) 253- 260; J D Mujuzi ‘The African Commission on Human and Peoples’ Rights and the promotion and protection of refugees’ rights’ (2009) 9 *African Human Rights Journal* 11; R Murray ‘Refugees and internally displaced persons and human rights: The African system’ (2005) 24 *Refugee Survey Quarterly* 56.

¹⁴³ J Oloka-Onyango ‘Human rights, the OAU Convention and the refugee crisis in Africa: Forty years after Geneva’ (1991) 3 *International Journal of Refugee Law* 454.

¹⁴⁴ C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 143.

¹⁴⁵ AU Convention for the Protection and Assistance of Internally Displaced Persons, Preamble.

¹⁴⁶ Viljoen (n 103 above) 247.

¹⁴⁷ J Biegon & M Killander ‘Human rights developments in the African Union during 2009’ (2010) 10 *African Human Rights Law Journal* 230.

¹⁴⁸ Viljoen (n 103 above) 391.

¹⁴⁹ As above.

have not been addressed by the CRC which are mostly peculiar to Africa such as the issue of child soldiers.¹⁵⁰ The African Children's Charter protects several rights such as the right to education,¹⁵¹ protection of the family,¹⁵² protection against harmful social and cultural practices,¹⁵³ and the administration of juvenile justice.¹⁵⁴ Similar to the African Charter, it also imposes corresponding duties on children.¹⁵⁵ Thus, the African Children's Charter has been deemed to envision a child who

[i]s conscious of his or her place in the community in which he or she is being raised, who is socially concerned, with a strong sense of morality and justice, and who strives to use to the best of her abilities the opportunities that arise...proud of his culture, but at the same time is respectful of the culture of others. He or she has a natural respect for those who gave him or her life, and is keen to make a contribution not only to his or her own growth and development, but also to the family and the community at large.¹⁵⁶

D. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

In addition to the above, on 11 July 2003, during the second ordinary session of the Assembly of the African Union held in Maputo, Mozambique, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted. It entered into force on the 25 November 2005. This Protocol is part of efforts to foster the dignity and rights of women in Africa.¹⁵⁷ Although the African Women's Protocol is not the first instrument that protect the rights of women, its greatest strength lies in the fact that it tackles a

¹⁵⁰ As above.

¹⁵¹ African Children's Charter, art 11.

¹⁵² As above, art 18.

¹⁵³ As above, art 21.

¹⁵⁴ As above, art 17.

¹⁵⁵ As above, art 31; see generally Viljoen (n 103 above) 393; F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199; T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009).

¹⁵⁶ Sloth-Nielsen & Mezmur (n 135 above) 188.

¹⁵⁷ D Chirwa 'Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 64.

wide range of critical issues that are peculiar to women in Africa. In the main, the African Women's Protocol reaffirms the principle of gender equality as enshrined in the AU Constitutive Act,¹⁵⁸ recognises the right to dignity inherent in a human being,¹⁵⁹ recognise the right to education,¹⁶⁰ the right to health¹⁶¹ and provides for the right to participate in the government of one's country.¹⁶² An extensive discussion of the African Women's Protocol is also not attempted here. It must suffice here to point out that the African Women's Protocol has made a significant contribution to the promotion and protection of women in Africa.¹⁶³

A brief overview of the instruments of the AU has been attempted in order to place into context the norms that the PAP is called on to protect. Certainly there are other instruments of the AU that are of relevance to the promotion and protection of human rights in Africa. The above brief detour to the normative framework of the African human rights system sought to highlight the main human rights instruments of the AU forming the human rights normative framework of the AU.

2.4 Democracy, law and human rights: An interface?

Since World War II, protecting human rights has become more and more prominent to the world. In the period since World War II, a growing number of democracies have empowered the courts to enforce constitutional norms that mirror international human rights standards.¹⁶⁴ Democracies have also sought to create an environment within which they will effectively guarantee these rights.

¹⁵⁸ African Women's Protocol, Preamble.

¹⁵⁹ As above, art 3.

¹⁶⁰ As above, art 12.

¹⁶¹ As above, art 14.

¹⁶² As above, art 19.

¹⁶³ See generally Chirwa (n 157 above) 63-96; Viljoen (n 103 above) 266-268; CE Welch Jr 'Human rights and African Women: A comparison of protection under two major treaties' (1993) 15 *Human Quarterly* 550; MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40-63.

¹⁶⁴ S Gardbaum 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 711-18.

Democratization and the respect for human rights have come to be known as the two main goals that should be adhered to by democracies.¹⁶⁵

It is not at all surprising to find that in most supranational instruments and in international, regional and national policies or strategies, the words ‘democracy’ and ‘human rights’ appear together in one sentence. There is growing concern for democratization in Africa, respect for rule of law, adherence to principles of good governance and the protection and promotion of human rights by states. On the face of it, this might seem insignificant. When seriously analyzed, the concern signifies a growing understanding of the interdependence of human rights, development and democracy.

Growing discourses of democracy and human rights continue to struggle to situate the one within the other as there is some form of urgency in ensuring that leaders appreciate the interdependence of the two concepts. Unfortunately, such discourses raise more questions than answers. For example, the question arises as to whether there is really a link between human rights and democracy. Perhaps this is because democracy and human rights have historically been considered to be two distinct concepts ‘occupying different area of political sphere: the one a matter of the organization of government, the other a question of individual rights and their defence.’¹⁶⁶ Beetham points out that these distinctions have been further reinforced by an academic division of labour which saw the study of democracy being relegated to political science and that of human rights as falling within the confines of law and jurisprudence, two disciplines which Beetham argues, had very little connection in the Anglo Saxon world.¹⁶⁷ This assertion by Beetham is buttressed by Landman when he points out that ‘political science has not always been interested in human rights, even though in my view the kinds of questions that human rights scholars and practitioners pose are at the core of what the discipline has been studying since the days of Aristotle.’¹⁶⁸

¹⁶⁵ AJ Langlois ‘Human rights without democracy? A critique of the separationist thesis’ (2003) 25 *Human Rights Quarterly* 990.

¹⁶⁶ Beetham (n 5 above) 89.

¹⁶⁷ As above.

¹⁶⁸ T Landman ‘Empirical political science and human rights’ (2008) 5 *Essex Human Rights Review* 1.

Proponents of what has come to be known as the ‘separationist thesis’ have vigorously opposed the argument that there exists a link between democracy and human rights. This is not surprising considering that the internationalization of democracy and human rights has been met, in some instances, with considerable resistance in many forms and for different reasons.¹⁶⁹ The separationist thesis posits that ‘detaching human rights from democratization and Western values can avoid stimulating culturally conservative and reactionary nationalism.’¹⁷⁰ It has been argued further that the United States of America (USA) should separate human rights from democratization and that ‘it was important to separate human rights from democratization and treat it as the international idea that it is, not as a code word for Westernization.’¹⁷¹ The main proposition of the separationist thesis is that democracy is not necessary for the promotion and protection of human rights.¹⁷² Hence, the argument goes, if one assumes that democracy has to come before or alongside the observance of human rights then there will be an indefinite delay in the enjoyment of human rights.¹⁷³

Underlying the debate as to the existence or lack thereof of the link between human rights and democracy is the attitude of foreign policies, particularly as directed towards Africa, of the major economies in the world such as China and the USA.¹⁷⁴ While the Chinese foreign policy – it appears – is not influenced by any human rights connotations, the foreign policy of the USA is largely influenced by human rights considerations.¹⁷⁵ It is now well known that China’s aid to Africa is free from conditions. For example, China has continuously engaged in trade with the Zimbabwean regime despite that there have been continuous reports of colossal abuse of human rights by President Robert Mugabe’s regime. Thus, strict adherence to the foreign policy of non-

¹⁶⁹ Langlois (n 165 above) 993.

¹⁷⁰ As above, 994; see also RE Howard ‘Human rights and the culture wars: Globalisation and the universality of human Rights’ (1997-8) 53 *International Journal* 94.

¹⁷¹ M Monshipouri & CE Welch ‘The search for international human rights and justice: Coming to terms with new global realities’ (2001) 23 *Human Rights Quarterly* 385; See further AJ Nathan ‘China: Getting human rights right’ (1997) 20 *The Washington Quarterly* 137-40.

¹⁷² Langlois (n 165 above) 1000.

¹⁷³ As above.

¹⁷⁴ I Taylor ‘Sino-African relations and the problem of human rights’ (2008) *African Affairs* 64.

¹⁷⁵ As above; DP Forsythe ‘US Foreign Policy and Human Rights: Situating Obama’ (2011) 33 *Human Rights Quarterly* 767.

interference has allowed China to trade with regimes such as Zimbabwe despite indications that its investment has allegedly resulted in the systematic violation of human rights in those countries.¹⁷⁶ Such an approach disregards the *Action-oriented Policy paper on Human Rights and Development (AOPP)* adopted in February 2007 by the OECD Development Assistance Committee (DAC).¹⁷⁷ This policy paper emphasised that human rights and aid effectiveness frameworks should inform each other, rather than progressing on separate, disconnected tracks.¹⁷⁸

The use of aid to promote political change and the attitude of states towards human rights – through the funding of governance and democratisation initiatives in countries undergoing political transition or through negative sanctions to induce adoption of democratic procedures – has been at the very most contentious.¹⁷⁹ Commentators are in disagreement as to the exact effectiveness of these political conditions.¹⁸⁰ While it is argued that political conditions that accompany foreign aid to developing countries may sometimes be said to be aiding democratic movements in Africa, they might at the same time undermine states' policies essential for the move towards the consolidation of democracy.¹⁸¹

It must be noted at this juncture that Africa is bedevilled with the problem of lack of good governance or the exercise of political power to manage nations' affairs. International finance bodies are therefore convinced that to accomplish both poverty reduction in Africa and engender good governance, attention has to be paid to the strengthening of institutions concerned with the

¹⁷⁶ Taylor (n 174 above) 64.

¹⁷⁷ <http://www.oecd.org/development/governanceanddevelopment/38713028.pdf> (accessed 6 September 2012).

¹⁷⁸ As above.

¹⁷⁹ See generally W Hout *The politics of aid selectivity: Good governance criteria in the World Bank, US and Dutch development assistance* (2007).

¹⁸⁰ See generally T Killick *Aid and the Political Economy of Policy Change* (1998).

¹⁸¹ S Adejumobi 'Africa and the challenges of democracy and good governance in the 21st century' (2004) Addis Ababa.

promotion of good governance.¹⁸² As a result many of these institutions have started to emphasize and promote issues of democracy, human rights and good governance.

Evans argues that we should treat the relationship between democracy and human rights with caution more particularly because states are continually losing their power due to decisions made globally or from above, globalisation in general and the growing economic power of Multinational Corporations (MNCs).¹⁸³ He posits that the effort to demonstrate the dominant version of democracy has more to do with maintaining order that only seeks to advance particular economic interests instead of fostering the interests of those whose human rights are being threatened.¹⁸⁴ Hence, human rights and democracy do not necessarily share a symbiotic relationship as it is often assumed.¹⁸⁵

The demand for separation between democracy and human rights is puzzling, considering that liberalism dating back to the times of John Locke has at one point invoked the danger of the tyrannical majority and put forward the importance of human rights.¹⁸⁶ The reasons as to why democracy and human rights should be maintained as distinct and separate concepts should be rejected. In the first instance it appears that the separationist thesis does not recognize the effects and demands of globalization as well as the international standards agreed upon by world leaders as a result of the universal nature of human rights. As long as the separationists put forward arguments akin to those raised during the cultural relativism debates, they should be interrogated further to ascertain whether they are worthy of being endorsed as exhibiting the true nature of world affairs.¹⁸⁷

¹⁸² See generally S Herz, Bank Information Center 'The role and responsibilities of international financial institutions with respect to human rights and their relevance to the private sector' (2007) available at <http://198.170.85.29/Bank-Information-Ctr-submission-to-Ruggie-Feb-2007.pdf> (accessed 7 September 2013).

¹⁸³ Evans (n 4 above) 626.

¹⁸⁴ As above, 633.

¹⁸⁵ As above, 639.

¹⁸⁶ J Habermas 'Remarks on legitimation through human rights' (1998) 24 *Philosophy and Social Criticism* 159.

¹⁸⁷ It should be noted also that those who criticize human rights as nothing more than a claim for power by the Westerners (during the cultural relativism debates) do not totally reject human rights but they argue that there is need to uphold national human rights standards while resolving the apparent conflict between them and the dominant cultural traditional of the constituent communities within the state. The reason for

Beetham has also pointed out that the perceived conflict or contradiction between human rights and democracy is based on a misunderstanding of democracy.¹⁸⁸ After exposing a number of misconceptions which have haunted discourses on the relationship between human rights and democracy, he asserts that the collapse of the communist regimes under popular pressure has shown democracy and human rights to be a universal aspiration.¹⁸⁹ Further, that if the meaning of human rights is rightly understood or defined by its key principles of popular control and political equality and secondarily by the institutions through which the principles are actualized, then the convergence between human rights and democracy can be greatly appreciated.¹⁹⁰

Admittedly, the idea of human rights and the concept of democracy were kept mutually exclusive for centuries. Africa saw colossal abuse of human rights because African leaders were of the view that issues of human rights were matters better left to the discretion of the state.¹⁹¹ Apart from the fact that the classic conception of international law is of the view that states hold unfettered powers within their respective jurisdictions, save for a few exceptions, Africa strictly adhered to the policy of non-interference in the affairs of other African states.¹⁹² The OAU was crippled by the jurisdiction clause and essentially considered issues of human rights as limited to matters of self-determination.¹⁹³ During that period Africa was replete with colossal violations of human

non-rejection of human rights standards by non-Western critics according to Habermas;...is that other cultures and world religions are now also exposed to the challenges of social modernity, just as Europe was in its day, when it in some sense 'discovered' or 'invented' human rights and constitutional democracy' As above, 163.

¹⁸⁸ Beetham (n 5 above) 90.

¹⁸⁹ As above; Beetham notes that the characterisation of the relationship between human rights and democracy is usually wrongly put forward 'either as an empirical correlation or as a matter of complementarity, rather than as an organic unity.'

¹⁹⁰ D Beetham 'Democracy and human rights: contrast and convergence', Seminar on the interdependence between democracy and human rights, Geneva, 25-26 November 2002, para 52.

¹⁹¹ Murray (n 1 above) 16.

¹⁹² C Welch Jr 'The Organisation of African Unity and the promotion of human rights' (1991) 29 *Journal of Modern African Studies* 537.

¹⁹³ As above; see generally UO Umozurike, 'The domestic jurisdiction clause in the OAU Charter' (1979) 78 *African Affairs* 197-209.

rights.¹⁹⁴ Uganda, the Central Republic Empire and Equatorial Guinea were marred with politically sanctioned repression and extra-judicial killings.¹⁹⁵ Worse, Idi Amin became the chairman of the OAU despite his undoubted contempt for human rights.¹⁹⁶ However, a new era was ushered in when some of Africa's dictators were forcefully removed from power. In the years following the overthrow of some of Africa's worst leaders, African heads of states and government have recognised and pointed out the fact that democracy, good governance, respect for human rights as well as the rule of law are necessary for the security, stability and development of Africa.¹⁹⁷

It is therefore submitted that there exist a link between democracy and human rights. This is arguably of utmost importance to ordinary Africans, the concept of leadership in Africa, issues of governance, poverty alleviation, eradication of gender inequalities, the prevention of conflicts and conflict resolution in Africa and the participation by Africans in the decision-making processes in the continent. It is further submitted that the contentious part in the whole democracy-human rights link should be the extent to which such link exists. That is, the issue should be whether democracy is a prerequisite to the protection and promotion of socio-economic rights.¹⁹⁸ Further, another question should be aimed at ascertaining aspects of democracy that are necessary for the attainment and enjoyment of greater portion of human rights.¹⁹⁹

The link between democracy and human rights can be located in article 21 of the Universal Declaration of Human Rights (UDHR), article I of the ICCPR and the ICESCR as well as article 25 of the ICCPR. The link can also be located in regional human rights instrument such as the African Charter²⁰⁰ and the American Convention on Human Rights.²⁰¹ National constitutions have also

¹⁹⁴ As above.

¹⁹⁵ As above.

¹⁹⁶ As above.

¹⁹⁷ Solemn Declaration on the Conference for Security, Stability, Development and Cooperation in Africa (CSSDCA), 10-12 July 2000, Lome, Togo, Para 9(h), 11 & 14(f); African Charter on Democracy, Elections and Governance, art 2(1).

¹⁹⁸ Beetham (n 5 above) 95.

¹⁹⁹ B De Mesquita *et al*, 'Thinking inside the box: a closer look at Democracy and human rights' (2005) 49 *International Studies Quarterly* 439.

²⁰⁰ African Charter, art 13

²⁰¹ American Convention on Human Rights, art 23.

stipulated that any limitations placed on certain rights should be done only when ‘necessary in a democratic society.’²⁰² As a result, it has been argued that there exists a right to democracy under international law.²⁰³ This international dimension of democracy is also captured by the Universal Declaration of Democracy through which it is declared that:

Democracy must also be recognised as an international principle, applicable to international organisations and to States in their international relations. The principle of international democracy does not only mean equal or fair representation of States; it also extends to the economic rights and duties of States.²⁰⁴

It was further declared that the principles of democracy should also be applied to the decision-making process at the international level²⁰⁵ and that the decision of members of the international community must be in conformity with international law.²⁰⁶ Accordingly, this presupposes that states must avoid any conduct that may be interpreted as undemocratic in nature, respect human rights, support those who face violations of human rights at the hands of undemocratic states and fight impunity through international criminal justice.²⁰⁷ The proliferation of democracy clauses in international treaties also indicates the international dimension of democracy. An understanding that there is a right to democracy under international law has been said to entail the prescription of the basis of legitimate authority by international law, the requirement of legitimate authority for democratic government and the recognition of democratic government as being an entitlement under international law.²⁰⁸ It can thus be concluded that there is an understanding that any action

²⁰² For example, Constitution of Botswana, sec. 2(2)(c); Constitution of South Africa, sec 36(1).

²⁰³ Evans (n 4 above) 631; T Franck ‘The emerging right to democratic governance’ (1992) 86 *American Journal of International Law* 61.

²⁰⁴ Universal Declaration on Democracy adopted by the Inter-Parliamentary Council at its 161st session, Cairo, Egypt, 16 September 1997, para. 24 – 27.

²⁰⁵ As above, para. 25.

²⁰⁶ As above, para. 26.

²⁰⁷ As above, para. 27.

²⁰⁸ S Marks ‘Democracy, right to in international law’ in P Cane & J Conaghan (eds) *The new oxford companion to law* (2008) 304.

that does not fulfil these conditions, even at the global level, is deficient.²⁰⁹ As rightly pointed out by Rich, the incorporation of democracy in international law through international consensus varies, in terms of nomenclature, from "the right to democracy" to "democratic entitlement" to "the right to democratic governance."²¹⁰ For some, it is beyond doubt that the right to democracy, or the right to live under democratic governance exist.²¹¹

Of course, there are those who are of the opinion that there is no entitlement to democratic governance under international law considering that it is estimated that one third of states might be deemed to be undemocratic.²¹² As a result, this arguments goes, in the absence of state practice it will be difficult to locate an entitlement to democratic government under international law.²¹³ It should be noted that while there may not be consensus that there is an entitlement to democratic government or governance under international law, there is a strong movement towards such and state practice is of late consistent with the understanding that legitimate authority must be exercised democratically. That is why Wheatley confirms that the right to democratic entitlement does exist in Europe.²¹⁴

With respect to Africa it has been rightly observed by Udombana that the right to democratic governance does obtain in Africa.²¹⁵ Further that it should follow that 'any state that denies its citizens the right to any to any of the elements of democratic entitlement – such as free and open

²⁰⁹ R Rich 'Bringing Democracy into International Law' (2001) 12 *Journal of Democracy* 20.

²¹⁰ As above.

²¹¹ CM Cerna 'Universal democracy: An international legal right or the pipe dream of the West' (1994 – 1995) 27 *New York University Journal of International Law and Politics* 290 – 291, arguing that the '[d]emocracy, or the right to live under a democratic form of government, became an international legal right in 1948, 3 although for decades it was honored more in breach than in observance.' Further, arguing that 'democracy has achieved universal recognition as an international legal right. The new international rhetoric celebrates the linkage between democracy, development, and human rights.'

²¹² S Wheatley 'Democracy in international law: An European perspective' (2002) 51 *International and Comparative Law Quarterly* 233.

²¹³ As above.

²¹⁴ As above, 234.

²¹⁵ NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1270.

elections – is violating a fundamental right, which should attract responsibility.²¹⁶ Further, the African Peer Review Mechanism (APRM) documents also make reference to human rights as a means of fostering development.²¹⁷ The attention paid to human rights by the APRM process can only serve to show that democracy is inseparable from fundamental human rights.²¹⁸ The Declaration on the Principles Governing Democratic Elections in Africa provides for the principles that enable democratic elections in Africa.²¹⁹ The Declaration also confirmed other rights such as the right to participate in the country's electoral process and freedom of association²²⁰ all of which are necessary for the enjoyment of the right to democratic governance.

At the heart of democracy lies the right of all citizens to a voice in their own affairs and their ability to take part in the decision-making process of the government.²²¹ As already highlighted, participation in the electoral process has been identified as one of the building blocks in the construction of the 'entitlement to democracy.'²²² Over the years, the right to participate in elections has gained recognition as one of the most important rights that most states adhere to. There is also no doubt that participatory rights have since emerged as central to the democratisation processes of many states. It is important to reiterate that participation is an essential component of democracy and democratic governance.²²³ The link between democracy and human rights is therefore best exemplified by the now extensive entrenchment of participatory rights in the various international human rights instruments.²²⁴ That is why the African Charter on Democracy, Elections and Governance (African Charter on Democracy) is aimed at ensuring

²¹⁶ As above.

²¹⁷ M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 54-55.

²¹⁸ Killander (n 217 above) 55; positing that human rights are relevant in all the four governance areas that form the basis of the APRM reviews whether expressly mentioned in the APRM questionnaire or not.

²¹⁹ Udombana (n 215 above) 1268.

²²⁰ As above.

²²¹ Beetham (n 5 above) 92.

²²² TM Franck 'The emerging right to democratic Governance' (1992) 86 *The American Journal of International Law*, 63.

²²³ GH Fox 'The right to political participation in international law' in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000) 87.

²²⁴ TM Franck 'Legitimacy and the democratic entitlement' in Fox & Roth (n 3 above) 25.

respect for democracy and respect for human rights.²²⁵ Perhaps recognizing the importance of participation rights, it entrenched participation as a right of all people.²²⁶ The African Charter on Democracy places an obligation on the part of government to protect and promote human rights.²²⁷ It further goes on to prohibit unconstitutional changes of government.²²⁸

Kent-Brown also highlights that the essential components of any human right anywhere in the world are liberty and equality,²²⁹ concepts which forms the very essence of human rights. As I have already indicated in chapter I, there is enough evidence to suggest that liberal democracy has the potential to encourage political stability and accountability as well as respect for human rights,²³⁰ hence the widely held view that human rights form the crux of democracy.²³¹ Democracy and human rights share a commitment to the idea of equality and dignity for all,²³² with democracy placing emphasis on the individual as an active participant in the decisions and policies that affect their lives.²³³

²²⁵ African Charter on Democracy, Elections and Governance., art 2, 3 & 4.

²²⁶ Art 4(2) of the African Charter on Democracy, Elections and Governance provides that ‘State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.’

²²⁷ African Charter on Democracy, Elections and Governance, art 5.

²²⁸ As above; See generally ST Ebobrah ‘The African Charter on Democracy, Elections and Governance: a new dawn for the enthronement of legitimate governance in Africa’, (2007) Open Society Institute, Africa Governance Monitoring & Advocacy Project (AfriMaP), available at http://www.afriMAP.org/english/images/paper/ACDEG%26ECOWAS_Ebobrah.pdf (accessed 14 September 2012); ST Ebobrah ‘Is democracy now an issue in Africa? An evaluation of the African Charter on Democracy, Elections and Governance’ (2007) 1 *Malawi Law Journal* 13.

²²⁹ D Kent-Brown ‘Freedom and liberty: The essence of democracy’ (2003) 38 *Journal of Public Administration* 150.

²³⁰ Makinda (n 13 above) 556.

²³¹ MH Halperin ‘Democracy and human rights: An argument for convergence’ in S Power & C Allison (eds) *Realizing human rights* (2000) 249.

²³² Donnely (n 26 above) 619; see further Langlois (n 165 above) 1013, arguing that human rights and democracy are inseparable because ‘they both share the same philosophical ontology of liberalism, and because the observance of human rights is implicit within the idea of a properly functioning democracy.’

²³³ D Beetham ‘Democracy and human rights: Contrast and convergence’, Seminar on the interdependence between democracy and human rights, Geneva, 25-26 November 2002,

Further to the above, so far democracy provides the only political structure within which human rights can be easily and effectively guaranteed.²³⁴ Waldron argues that there is natural congruence between rights and democracy.²³⁵ He argues that this is on the basis that the identification of someone as having rights shows the acknowledgement of that person's ability to make moral decisions pertaining to his interests and the interests of others.²³⁶ I am therefore compelled to agree with the argument that 'the connection between democracy and human rights is an intrinsic rather than extrinsic one; human rights constitute a necessary part of democracy.'²³⁷ This is so 'because the guarantee of basic freedoms is a necessary condition for people's voice to be effective in public affairs, and for popular control over government to be secured.'²³⁸

Having concluded that there exist a link between human rights and democracy, the following section looks at how in reality that link is actualised. This will be done by looking at participatory democracy and parliaments in democracies and the relevance of parliamentary bodies to the promotion of human rights.

2.5 Do parliaments matter? The relevance of parliamentary bodies in the promotion of human rights

As already mentioned, it is participation in the decision-making process and in the resolution of disputes about rights²³⁹ that is of utmost significance to democracy. It is this significance that prompted Waldron to describe participation as 'the rights of rights',²⁴⁰ because it provides a rights based approach to the resolution of disputes about rights.²⁴¹ Waldron calls participation 'the rights of rights' because he believes that democracy is about collective binding decisions, the autonomy

²³⁴ C Davenport 'Human rights and the democratic proposition' (1999) 43 *The Journal of Conflict Resolution* 92-116.

²³⁵ Waldron (n 8 above) 282; P Lenta 'Democracy, rights disagreements and judicial review' (2004) 20 *South African Journal on Human Rights* 14.

²³⁶ Waldron (n 8 above) 282.

²³⁷ Beetham (n 5 above) 92.

²³⁸ Beetham (n 5 above) 93.

²³⁹ Waldron (n 8 above) 254.

²⁴⁰ As above.

²⁴¹ As above, 254.

and the person's ability to make moral decisions pertaining to his interests and the interests of others.²⁴² Political participation has also been found to be more important than other dimensions in reducing human rights.²⁴³ Most importantly, Beetham has argued that assemblies – parliamentary assemblies in the present context – are

only kept accountable if the citizens are directly active at a number of different ways, beyond election time, and that such activity can and should include a residual right of referendum on legislation both to ensure to ensure popular control and to limit the inequalities of the representative system.²⁴⁴

As earlier mentioned, the South African Constitutional Court has highlighted the importance of participation of the citizens in the decision-making process.²⁴⁵ Further, there is growing interest in areas of 'participatory development' and 'deliberative democracy' as imperatives. There is an increasing demand for the participation of citizens in the policy-making processes of the state, be they economic, political or social. This growing demand for the participation of the people has made it possible for African leaders to appreciate the importance of people participation in democracies. There is now an appreciation that political or economic integration in Africa will remain an elusive goal.

Central to the participation of citizens in democracies are parliaments' legislatures or national assemblies.²⁴⁶ The role of parliaments in the democratisation of states has been the subject of many scholarly works. According to Doorenspleet, legislatures are deemed, at least in theory, 'to have

²⁴² As above, 282.

²⁴³ B De Mesquita *etal* (n 199 above) 439.

²⁴⁴ Beetham (n 5 above) 28.

²⁴⁵ *Doctors for Life International v Speaker of the National Assembly* (2006) BCLR 1399 (CC).

²⁴⁶ Legislatures have been over the years ascribed many names and vary from jurisdiction to jurisdiction. In the United Kingdom and in Commonwealth countries the word 'parliament' is usually preferred. Some as the French use the term National Assembly whilst the United States of America uses the term National Congress; P Norton *Does Parliament Matter* (1993) 1.

important latent or symbolic functions for the consolidation of democratic regimes.²⁴⁷ That national assemblies of parliaments are important players in the democratisation process admits of no doubt. It has been noted further that parliaments partly derive their mandate from their capacity to reflect the general spectrum of the society.²⁴⁸ Ideally the representative nature of parliaments should make them the pinnacle of democratic consolidation in Africa. However, 'the fact that elected members of parliament are *representatives* of the people does not mean that they are necessarily *representative* of the people.'²⁴⁹ As Doorenspleet rightly notes, how they contribute to the democratisation process has become more controversial over the years.²⁵⁰

It has been correctly noted that legislatures are

[o]ne of the crucial elements in a democratic society and essential in ensuring the law and protection of human rights. In fact, their daily work of transforming the will of the people onto law and in controlling the executive and public administration, parliaments and parliamentarians are often the unsung heroes of human rights.²⁵¹

It has further been noted that

Parliament – legislator and overseer of government action – is a principal guardian of human rights. It is parliament which adopts the laws that enshrine human rights standards and

²⁴⁷ R Doorenspleet 'Citizen's support for legislature and democratic consolidation: A comparative study with focus on Mali' in MA Mohammed Salih (ed) *Between governance and government: African parliaments* (2005) 79.

²⁴⁸ Inter-parliamentary Symposium, 'Parliament: Guardian of Human Rights', Inter-Parliamentary Union, Place Du Petit-Saconnex 1211 Geneva 19., Switzerland, summing-up of the deliberations by the President of the symposium 1-13, available at <http://www.ipu.org/splz-e/budapest.htm> (accessed on the 7 September 2013)

²⁴⁹ J Hatchard *et al* (n 1 above) 124.

²⁵⁰ Doorenspleet (n 247 above) 79.

²⁵¹ Parliament: Guardian of Human Rights, International Parliamentary Union, Geneva, 1993, 5 quoted in J Hatchard *et al* (n 1 above) 123.

which provides the legal framework for the judiciary to administer justice and uphold human rights and fundamental freedoms.²⁵²

Parliaments have an oversight role and are responsible for ensuring that the activities of the government are in accordance with the aspirations of the country or community. They are supposed to ensure that governments comply with their human rights obligations. Parliaments essentially oversee or ideally should oversee the activities of the other organs of the state. They are a forum where members discuss important issues relating to the management of the state, make known the grievances of their constituents and advise those holding leadership positions.²⁵³

The never ending tussle between parliaments' role as oversight mechanisms and that of the executive has to a larger extent undermined efforts to ensure the smooth maintenance of democracy through these formal rules and institutions. Political leadership in Africa continues to be based on selfish interests as well as tyrannical tendencies caused by the lack of sufficient constitutional, political and social restraint upon the power vested on the head of state.²⁵⁴ Wanjala calls this 'presidentialism', a term he uses to describe the centralisation of state power in the hands of presidents or their office. This state power is often constituted by absolute power which African traditional rulers exercised over primitive society and the modern executive authority derived from the deficient Lancaster-type constitutions.²⁵⁵ These leaders are responsible for the continuous mismanagement of the continent's institutions. The hopes and aspirations of African people have thus been dashed not by any conspiracy between hostile international forces but by Africans themselves.²⁵⁶

²⁵² AB Johnsson 'human rights mechanisms in international parliamentary institutions' in G Alfredson *et al* 'International human rights mechanisms; essays in honour of Jacob Th. Möller' (2001) 803.

²⁵³ DN Nsereko *Constitutional law in Botswana (2002)* 110.

²⁵⁴ J Hatchard *et al* (n 1 above) 57.

²⁵⁵ S Wanjala 'Presidentialism, ethnicity, militarism and democracy in Africa: The Kenyan example' in J Oloka-Onyango *et al* (eds) *Law and the struggle for democracy in East Africa* (1996) 88.

²⁵⁶ As above.

Since the 1990's, many African states introduced clauses in constitutions addressing civil and political rights often associated with democratisation.²⁵⁷ Fombad notes that these constitutions purport to protect the people against the government by ensuring that checks and balances are in place.²⁵⁸ However, they are easily abrogated, subverted, suspended or brazenly ignored by the leadership.²⁵⁹ Many of the constitutions vests too much power in the president, thereby creating a suitable environment for tyranny. It is not the aim of this study to look at the nature of the African state or the nature of African parliaments, an area which has been subjected to enough scrutiny.²⁶⁰ The study notes, however, the fact that many African national parliaments are generally weak²⁶¹ and that such weakness may put the PAP in a rather precarious position as regards its contribution to the consolidation of democracy and equally in relation to the promotion of human rights in Africa.

One of the traditional duties of parliaments is to pass laws for a particular country. This has been considered to be the most important aspect of parliaments and often it has been said that it is difficult to conceive an institution as a parliament if it does not have any legislative powers. It is this argument that has been used by critics of the PAP in concluding that the PAP is nothing else but a façade. Parliaments are responsible for passing laws and are expected to enact laws that are alive to human rights values to which many countries adhere to. In most countries it is the parliament which is responsible for the ratification and domestication of international human rights instruments and it is therefore responsible for the legal framework for human rights at the national level.

²⁵⁷ CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 1.

²⁵⁸ As above.

²⁵⁹ As above.

²⁶⁰ J Hatchard *et al* (n 1 above) 123-149; MA Mohammed Salih (ed) *Between governance and government: African Parliaments* (2005); Diamond (n 10 above); R Jackson & CG Rosberg 'Democracy in tropical Africa: Democracy versus autocracy in African politics' *Journal of International Affairs* 38 (1985) 296; B Chourou 'The challenge of democracy in North Africa (2002) *Democratisation* 4; M Crowder 'Twenty-five years of African independence' (1987) 86 *African Affairs* 14-15.

²⁶¹ As a former speaker of the House of Assembly in Zimbabwe once reportedly remarked; 'I do not think that the calibre of members is very good; that is why parliament is meaningless. I wonder if some MPs read newspapers and books or even discuss with friends before coming to parliament' *Mutasa v Makombe* [1997] 2 LRC 314 quoted in J Hatchard *et al* (n 1 above) 123.

It is undisputable that national parliaments have always played an important role in so far as the ratification of international instruments and domestication are concerned. Parliaments have since accepted the fact that human rights are cross-cutting and should be integrated in most of their activities. They have used their role as lawmakers to ensure that international human rights norms are translated into domestic legislation and find domestic favour. National parliaments have used their oversight role to ensure the implementation of the country's international obligations.²⁶² Some have also ensured that the rights of the citizenry are protected by requiring that mechanisms be set up for the protection and promotion of human rights. Such institutions include ombudspersons and national human rights institutions. Most national human rights institutions are required by law to submit yearly reports to the parliament on their work on human rights, findings of human rights as well as recommendations to the government on measures necessary to ensure effective protection of human rights. The problem has been the fact that the reports are not debated in parliament and if debated, they are not given sufficient attention by the members. The recommendations made by the national institution largely ignored by the legislature, the very same body that demanded that they report their activities and findings on human rights abuses. Most importantly, parliaments have established parliamentary committees with an exclusive human rights mandate. Such human rights committees have been viewed by countries or parliaments themselves as a means of sending out a political message to the people, to the government and other state bodies that they are committed to the promotion and protection of human rights.²⁶³ These committees are to a large extent responsible for ensuring that there is effective protection of human rights at the domestic level as well as ensuring that 'specific human rights knowledge exists within parliament, making it more independent from governmental expertise.'²⁶⁴

Apart from these parliamentary committees, parliaments have to a large extent used parliamentary petition committees to deal with issues relating to human rights. It has been argued that the right

²⁶² J Hatchard *et al* (n 1 above) 139.

²⁶³ The national Democratic Institute for international affairs '*Parliamentary human rights Committees*' (undated) 9 available at http://www.accessdemocracy.org/files/1905_gov_parlhrcscommittees_080105.pdf (accessed 14 August 2012).

²⁶⁴ As above.

to petition parliament for redress of grievances is at least as old as the institution of parliament.²⁶⁵ Petition committees can be viewed as the first human 'rights committees' as their main aim was to address and arrest injustice.²⁶⁶ With due recognition being given to the importance of parliaments and the powers that they actually possess, petitioning parliament became the most effective way of airing grievances and seeking recourse for violation of human rights.²⁶⁷ The petition procedure was further a method through which the interface between the elected and the elector was maintained.²⁶⁸

As evidenced by the previous discussion, the role of national parliaments in the promotion of human rights has been enabled by democratic practices adopted by national parliaments. In that context, the question that begs attention is whether RPAs are better suited to perform this function regard being had to their nature and functions. The definition of democracy adopted in this study is that a system of democratic governance should allow for meaningful and extensive competition among individuals and political parties for position of government power, it should cater for a highly inclusive level of political participation in the selection of leaders and policies through regular and fair elections, and it should respect fundamental human rights. If this definition of democracy is adopted and used as a yardstick for ascertaining whether RPAs, including the PAP, are democratic, we will immediately be faced with a litany of problems.

It is beyond doubt that these bodies are committed to the ideals of democracy, principles of good governance and commitment to the human rights agenda. Whether they are in themselves democratic is not as easily discernible as one might expect. While representatives to national parliaments are elected through widely held elections the same is not true for most RPAs. The EP's first direct elections were held in June 1979 and since then the EP has derived its legitimacy from direct universal suffrage and has been elected every five years.²⁶⁹ However, the elections of the EP

²⁶⁵ As above, 10.

²⁶⁶ As above.

²⁶⁷ As above.

²⁶⁸ As above.

²⁶⁹ A Malamud & L de Sousa 'Regional parliaments in Europe and Latin America: Between empowerment and irrelevance' in A R Hoffmann & A Van der Vleuten (eds) *Closing or Widening the Gap? Legitimacy and democracy in regional international organizations* (2007) 85.

have not been without challenges and are mostly characterized by low voter turnout.²⁷⁰ Deputies to the Central American Parliament (PARLACEN), which is the deliberative body of Central American Integration System (SICA), are elected through direct universal suffrage every five years with the people of each member states having the right to elect twenty representatives.²⁷¹ The Latin American Parliament (PARLATINO), which is made up of twenty-two national parliaments of Latin America and the Caribbean, is composed of national delegations sent by member parliaments.²⁷² As far as composition of the various regional parliaments is concerned, only the EP and the PARLACEN appoints the majority of its members through direct popular elections.²⁷³ In most regional parliaments, representatives are chosen from those who are members of national assemblies at the time of such elections. The PAP falls within the latter category.. Representatives to the PAP are designated by national assemblies or other deliberative organs of the member states, from among their members.²⁷⁴

Even though representative democracy became the ultimate choice for many, it has not avoided challenges that saw the decline of direct democracy. This anomaly is evidenced by the concept of regional parliaments, IPIs and the fact that representatives to these bodies are not directly elected by the people. It is an anomaly in the sense that it is normally assumed that for parliaments to be representative there has to be some form of popular elections of members. Focus is as a result usually directed to the success or not of popular elections of representatives to parliaments. Understandably, direct elections have been used as the only appropriate measurement of democracy. Unfortunately it has become apparent that elections only are not enough to determine whether a particular system of governance is democratic or not.

Just like parliaments at the national level, RPAs or International Parliamentary Institutions (IPIs) are geared towards ensuring the participation of the citizenry in decision-making process. For example, the objectives of the PAP indicate that the Parliament is geared towards ensuring the participation

²⁷⁰ R Corbett *The European Parliament* (1990) 12 – 21.

²⁷¹ Malamud & de Sousa (n 269 above) 85.

²⁷² As above.

²⁷³ As above.

²⁷⁴ PAP Protocol, art 5(1)

of Africans in the decision-making process. That is why the PAP Protocol provides, among other things, that the objectives of the PAP shall be to promote the principles of human rights and democracy in Africa²⁷⁵ and shall also be to familiarise the peoples of Africa with the objectives and policies aimed at integrating the African continent within the framework of the establishment of the African Union.²⁷⁶

The Inter-Parliamentary Union²⁷⁷ has set out, in what they called a framework for a democratic parliament, the key characteristics of a democratic parliament.²⁷⁸ According to the framework, a democratic parliament is one that is socially and politically representative, transparent, accessible, accountable and effective.²⁷⁹ It is therefore submitted that once an RPA satisfies this criteria it could and should be viewed as being democratic notwithstanding that its representatives are not elected through direct elections. Hence, a blanket dismissal of RPAs as undemocratic is no longer justified.²⁸⁰

Against the preceding background, this study considers whether these parliamentary bodies, are necessary and effective actors within the human rights sphere.

2.6 Regional Parliamentary Assemblies (RPAs): Guardians of human rights?

The emergence of international and regional parliaments as global actors has increasingly grabbed the attention of many scholars and commentators. Interestingly, although these parliamentary

²⁷⁵ PAP Protocol, art 3(2).

²⁷⁶ As above, art 3(4).

²⁷⁷ The Inter-Parliamentary Union, an international organisation of Parliaments of sovereign States, which serves as a focal point for worldwide parliamentary dialogue

²⁷⁸ Inter-Parliamentary *Union Parliament and democracy in the twenty-first century: A guide to good practice* (2006) 7.

²⁷⁹ As above.

²⁸⁰ R Cutler 'The emergence of international parliamentary institutions: New networks of influence in world society' in Gordon Smith and Daniel Wolfish (eds) *Who is afraid of the state? Canada in a world of multiple centres of power* (2001) 2 available at http://www.academia.edu/272628/The_Emergence_of_International_Parliamentary_Institutions_New_Networks_of_Influence_In_World_Society (accessed 7 September 2013).

bodies have now started to increase in numbers,²⁸¹ they have been in existence for more than a century, with the first among them, the Inter-Parliamentary Union (IPU), founded in 1889.²⁸² More than 70 RPAs and IPIs have been established, thus demonstrating a considerable interest of parliamentarians in being involved in the development of such institutions.²⁸³ To date, the EP remains the best-known example of a regional parliament.

It should be noted at the outset that RPAs are unique actors, because their members usually come from democratically elected legislatures or other deliberative organs of member states.²⁸⁴ Additionally, RPAs demand and encourage representation of their member states to be representative of the various sections of the society which is one of the reasons behind direct elections.²⁸⁵

The term(s) 'regional parliamentary assemblies,' 'regional parliaments,' 'transnational parliaments' and 'international parliamentary institutions' are more often than not used interchangeably with the term 'international parliamentary institutions' leaning towards generality. This is largely because the description that is normally ascribed to IPIs can also be ascribed, with necessary modifications, to RPAs. This modification of course will be in cognizance of the fact that the extent of the influence of RPAs is regional in nature and is usually connected to the region's desire to establish a supranational organization. Klebes used the term 'international parliamentary institutions' to refer to all categories of inter-parliamentary bodies²⁸⁶ and these 'categories were associations, assemblies and integrated assemblies.'²⁸⁷ Even though the use of the term 'international parliamentary institutions' has been widely accepted, this definition has been described as being inadequate

²⁸¹ As above.

²⁸² As above.

²⁸³ Z Šabić 'Building democratic and responsible global governance: the Role of international parliamentary institutions' (2008) 31 *Parliamentary Affairs* 256.

²⁸⁴ As above, 263.

²⁸⁵ For example, art 4(3) of the PAP Protocol directs 'the representation of each Member State must reflect the diversity of political opinions in each National Parliament and other deliberative organ.'

²⁸⁶ H Klebes 'The development of international parliamentary institutions' in Constitutional and parliamentary information No. 1591, Association of Secretaries General of Parliaments, 1990, 78 quoted in Šabić (n 283 above) 257.

²⁸⁷ As above.

considering that IPIs have been increasing in number as well as in the variety of forms in which they are being set up, resulting in the need to have a more comprehensive working definition.²⁸⁸ These parliamentary bodies are usually established under different circumstances as ‘they come from varying political origins, and their respective founding documents establish them as having different demarcations of authority’²⁸⁹ Some of these parliamentary bodies are established as parliamentary bodies for an organisation that is a supranational institution or seeks to achieve supra-nationality. These are in general parliamentary organs of international organisations such as the EP under the EU and the PAP under the AU. These types of parliamentary bodies are made up of member states of that particular regional body. Member states of that particular organisation are usually expected to obtain membership with the view to consolidate and achieve supra-nationality. Others are established devoid of any connection to states or international organisations but are sometimes made up of national parliaments who voluntarily choose to take part in their activities and agenda to establish independent multilateral institutions. Examples of such institutions include the African Parliamentary Union (APU)²⁹⁰ and the Inter-Parliamentary Union (IPU). The APU is an inter-parliamentary organisation of forty national parliaments that have freely elected to participate in the association with the view to expanding their cooperation networks and to contribute to the realisation of the principles of the objectives of the AU.²⁹¹ The IPU is described as ‘the international organization of Parliaments’ and acts ‘as the focal point for world-wide parliamentary dialogue ‘ and it promotes cooperation, peace as well as the establishment of representative democracy.²⁹²

According to Šabić, Robert Cutler has been the first to proffer an expanded definition of IPIs geared towards capturing this proliferation of IPIs.²⁹³ Cutler identified four types of IPIs, namely: congress, assembly, parliament and legislature. According to him, these types refer to the stages of institutional development and not necessarily to the specific names these institutions may have.²⁹⁴ Accordingly, he identifies a congress as a meeting that is made up of national parliaments or their

²⁸⁸ As above.

²⁸⁹ Cutler (n 280 above) 210 – 211.

²⁹⁰ Previously known as the Union of African Parliaments.

²⁹¹ <http://www.africanpu.org/about.php> (accessed 7 September 2013).

²⁹² <http://www.ipu.org/english/whatipu.htm> (accessed 7 September 2013).

²⁹³ Šabić (n 283 above) 257

²⁹⁴ Cutler (n 280 above) 214.

members and need not have a secretariat,²⁹⁵ and an assembly as the next level of development after a congress. An assembly is not merely a single gathering but a group of participants brought together by a common situation that compels them to form such an alliance.²⁹⁶ Then there is the parliament, a place ‘where there is talk’ with a regular functioning of the parliament resulting in the possible establishment of a legislature.²⁹⁷ Cutler asserts that ‘an IPI of a legislature type deliberates with some juridical or statutory authority, proposes laws for approval by member states, and may assist in the implementation and oversight, should member states adopt recommended laws.’²⁹⁸ Hence, by IPIs in this study I refer to an institution ‘of a parliamentary nature, whether legislative or consultative in nature, and has three or more member states of which the parliamentarians are largely selected from national legislatures and it is a regular forum for multilateral deliberations on an established basis.’²⁹⁹

The work of national parliaments as regards human rights is sometimes not limited to the national level but also extends to the international level.³⁰⁰ At least their role at the national level is acknowledged and is at most not questioned. The same, however, cannot be said about the role of IPIs in relation to the human rights. The emergence of international and regional parliamentary institutions has been described as a ‘phenomenon that needs comprehensive evaluation’³⁰¹ and the enthusiasm surrounding their establishment also described as puzzling.³⁰² Slaughter has pointed out that these parliamentary institutions are generally weak and enjoy success in certain areas such as in addressing the ‘democratic deficit’, in trade organizations and as drivers for regional co-operation.³⁰³ Even though the work of international parliamentary institutions is sometimes

²⁹⁵ As above.

²⁹⁶ As above.

²⁹⁷ As above.

²⁹⁸ As above, 215.

²⁹⁹ As above, 209.

³⁰⁰ Johnsson (n 252 above) 804.

³⁰¹ Šabić (n 283 above) 255; C Kissling ‘The Legal and Political Status of International Parliamentary Institutions’ in G Finizio, L Levi & N Vallinoto (eds) *The democratisation of international organisations – international democracy report* (2011) 3

³⁰² As above.

³⁰³ A Slaughter *A new world order* (2004) 105 quoted in Šabić (n 283 above) 256.

acknowledged, their emergence as international actors is viewed by many with general ambivalence. This is not at all surprising considering the prevalent perception that parliaments are in decline.³⁰⁴

That notwithstanding, parliaments have played a significant role in the promotion of human rights both at the domestic and international levels. Westlake is of the opinion that ‘parliaments may have suffered relative decline, but they have persisted. Proof of their hardiness and attractiveness has come in the consequences of the political upheaval following the fall of the Berlin Wall and the collapse of the post-war consensus.’³⁰⁵ He further points out that the most encouraging sign of the persistence of parliamentary assemblies is the growth in the role and powers of the EP.³⁰⁶ It is beyond doubt that parliamentary assemblies or legislatures – as the case may be – are increasingly becoming important in the promotion of human rights.³⁰⁷ One can thus safely conclude that parliaments do matter and this is largely due to their centrality in matters of governance. Their participation in issues of human rights is well documented. Perhaps the words of Westlake correctly sum it up when he rightly points out that

[n]o student of modern democracy can fail to be struck by the ubiquity of parliamentary assemblies. They are indispensable to our vision of democracy, practical recognition of the basic tenet that the people and their differing views should be fed into, and hence reflected in, the political process. If ubiquity was the sole measure of the effectiveness of political institutions, then no other representative system could claim such overwhelming success.³⁰⁸

The work of the EP has occupied the minds of scholars for some time now. The EP has undoubtedly made significant strides, since its establishment, in the promotion of human rights. It has shown itself to be capable of immense growth and has over the years built up a parliamentary

³⁰⁴ Norton (n 246 above) 1.

³⁰⁵ M Westlake *A modern guide to the European Parliament* (1994) 14.

³⁰⁶ As above, 5.

³⁰⁷ See generally C Evans & S Evans ‘Evaluating the human rights performance of legislatures’ (2006) 6 *Human Rights Law Review* 548; JD Barkan ‘Progress and retreat in Africa: Legislatures on the rise?’ (2008) 19 *Journal of Democracy* 125, arguing that legislatures are an ‘essential component’ in any democracy; MS Fish ‘Stronger legislatures, stronger democracies’ (2006) 17 *Journal of Democracy* 5.

³⁰⁸ Westlake (n 305 above) 1.

tradition and as such has been described as the ‘political institution of the community par excellence’ and is said to be ‘the last hope of the community in obtaining a real political dimension.’³⁰⁹ It has continued to provide the necessary articulation of issues relating to human rights within the European Community.³¹⁰ This is notwithstanding the fact that when it was established it was essentially for the promotion of economic integration among the EU member states with the 1952 Treaty of Paris and the 1957 Treaty Rome not explicitly making reference to human rights.³¹¹ The European Parliament has continued to rally for the respect and fulfillment of rights contained under the European Convention for the Protection of Human Rights and Fundamental Freedoms and has adopted several resolutions on human rights, monitored the implementation of human rights norms by member states and has condemned on several occasions specific cases of grave violations of human rights.³¹² The EP has also used its powers in the co-decision-making process to ensure that agreements concluded by the Community are in compliance with their general obligations under the human rights agreements concluded by members of the Community.³¹³

The EP has also been instrumental in the promotion of human rights and has been said to have taken an ‘activist’ stance in its approach in the promotion and protection of human rights.³¹⁴ Through its Committee on Foreign Affairs and Subcommittee on Human Rights, the EP has greatly promoted and protected human rights within and outside the EU.³¹⁵ Its human rights activities have been said to include the resolutions, recommendations, delegations and public hearings, specialized

³⁰⁹ Norton (n 246 above) 4.

³¹⁰ D Tsegaye ‘The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament’ (2004) 4 *African Human Rights Law Journal* 61.

³¹¹ As above.

³¹² As above, 61- 62.

³¹³ K Archick ‘The European Parliament’, Congressional Research Service (2012) 10 available at <http://www.fas.org/sgp/crs/row/RS21998.pdf> (accessed 7 September 2013).

³¹⁴ European Inter-University Centre for Human Rights and Democratisation (2006) *Beyond Activism: the impact of the resolutions and other activities of the European Parliament in the field of human rights outside the European Union* 7; The promotion of human rights by the EP dates to many years ago as evidenced by the discussion on the EP and human rights in 1989, see generally E Boumans & M Norbart ‘The European Parliament and Human Rights’ (1989) 7 *Netherlands Human Rights Quarterly* 36.

³¹⁵ http://www.europarl.europa.eu/aboutparliament/en/0039c6d1f9/Humanrights.html#infography_defendinghumanrights (accessed 18 September 2013).

instruments and activities as well as the power to assent to international agreements.³¹⁶ It has been rightly noted that these activities have a high potential to reinforce the promotion of human rights.³¹⁷ The EP has been said to be involved in human rights activities that are aimed at securing a better promotion and protection of human rights. This at one point included the EP's involvement in a campaign that sought to secure the release of a journalist who was imprisoned by the Moroccan officials for insulting the person of the King through satirical articles and cartoons.³¹⁸ The EP's assent procedure somehow sets it apart from other parliamentary intuitions such as the PACE. This procedure has been instrumental in the EP's promotion of human rights.³¹⁹ For example, the EP has at one point used its assent powers to refuse assent to the 'protocols concerning Israel and Turkey on the grounds of human rights violations.'³²⁰ In 2013 the EP adopted a resolution relating to the free trade agreement (FTA) between the European Union, Colombia and Peru. The Resolution called for the measurement of the impact of the trade agreement with human, environmental and labour rights.³²¹ The EP through its main initiatives being the Sakharov Prize for Freedom of Thought, Office for Promotion of Parliamentary Democracy and election observation,³²² the petition procedure and the human rights debate has made all attempts to promote human rights in Europe. The EP has undertaken more than thirty election observation missions for the period 2009-2014 which included missions in Chad, Sudan, Tanzania, Uganda, Nigeria and Zambia.³²³ The EP's petition procedure and its human rights debates deserve specific mention because they indicate the extent to which the EP is prepared to go in its quest to promote

³¹⁶ European Inter-University Centre for Human Rights and Democratisation (n 314 above) 7.

³¹⁷ As above, 8.

³¹⁸ A Jünemann 'The European Parliament and its impact on the promotion of democracy and human rights in the Mediterranean' (2004) 8 *Dossier El Parlamento Europeo en la Política Exterior* 3 – 4.

³¹⁹ As above, 4.

³²⁰ As above.

³²¹ See generally <http://www.fidh.org/The-European-Parliament> (accessed 18 August 2013).

³²² See generally http://www.europarl.europa.eu/intcoop/election_observation/default_en.htm (accessed 18 September 2013), it is pointed out that 'the European Parliament's election observation aim at strengthening, in the third countries concerned by elections or referendums, the legitimacy of national electoral processes, increasing public confidence in elections, avoiding electoral fraud, better protecting human rights and contributing to conflict solution. Members of the European Parliament provide a particular political perspective, expertise and experience in election observation.'

³²³ http://www.europarl.europa.eu/intcoop/election_observation/missions20092014_en.htm (accessed 18 September 2013).

and protect human rights. The former has been indicated as having played a major in affording Europeans the opportunity to bring to the attention of the Parliament the violations of their human rights.³²⁴ With respect to the human rights debates, the EP has earmarked Thursday afternoon of each Strassbourg plenary sessions to discuss issues of human rights and ‘to highlight flagrant violations of human rights across the world.’³²⁵ The promotion of human rights by the EP remains though, despite its efforts, a mammoth task. With respect to effectiveness of these human rights activities, it has been noted that:

We find that the EP has carved out a clear and distinct role within the field of human rights. It has achieved significant visibility when highlighting the plight of individuals and denouncing instances of human rights violations. However, our in-country empirical research suggests that systematically translating this human rights profile into a tangible improvement in the situation of individuals or human rights policies remains a largely unmet challenge.³²⁶

Issues of human rights are usually discussed by most, if not all, RPAs and IPIs. Most of them have set up committees to deal with human rights issues like the Juridical Committee of the Andean Parliament, Political Committee of the International Assembly of French-Speaking Parliamentarians.³²⁷ The Parliamentary Assembly of the Council of Europe (PACE) has by far the longest, most reputable and most experienced of permanent committees on human rights.³²⁸ Over the years the work done by the respective human rights committees have had significant impact on the level of human rights protection in various parts of the country.

³²⁴ The EP’s 2012 activity report indicates that the ‘EP received 1,985 petitions in 2012, mostly from German, Spanish, Italian, Romanian and British citizens. The Committee further highlighted that fundamental rights, the environment and the economic and social crisis were the topics most often raised by petitioners.’ See generally <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bIM-PRESS%2b20130916IPR20027%2b0%2bDOC%2bPDF%2bV0%2f%2fEN> (accessed 21 September 2013).

³²⁵http://www.europarl.europa.eu/aboutparliament/en/0039c6d1f9/Humanrights.html#infography_defendinghumanrights (accessed 19 September 2013).

³²⁶ European Parliament, Directorate –General for External Policies, Policy Department, ‘The Impact of the resolutions and other activities of the European Parliament in the field of human rights outside the EU’ (2012) 6.

³²⁷ Johnsson (n 252 above) 805.

³²⁸ As above.

An assessment of the activities of the various parliamentary institutions indicates their continued engagement with various issues of human rights. As already indicated, this is normally through committees that are established for the purpose of promoting and protecting human rights. Sometimes this is usually through the various commissions that are established to look into a particular human rights issue or through parliamentary debates following any question relating to human rights that has been asked by one of the members of the parliament. The issues that are dealt with by these parliamentary bodies range from minority rights, sexual minority rights, the state of human rights in a particular country, human rights of irregular migrants,³²⁹ human rights and foreign policy³³⁰ as well as human rights and business.³³¹ The various resolutions and reports adopted by the various parliamentary bodies are indicative of the diversity of human rights issues addressed.

The periodic reports of the PACE reveal that the Assembly, through its various committees, continuously monitors the human rights situations in its member states. The PACE Monitoring Committee's report, for example, captured the human rights situation in the countries such as Almeria, Bulgaria, Russia, Turkey and Ukraine.³³² The periodic reports by the Monitoring Committee addresses a number of human rights critical areas such as the state of the judiciary in that particular country,³³³ the right to a fair trial within a reasonable time,³³⁴ the ratification of Council of Europe human rights Conventions by member states under review,³³⁵ promotion of

³²⁹ Parliamentary Assembly for the Council of Europe 'Human Rights of irregular migrants,' Report by the Committee on Migration, Refugees and Population, Doc. 10924, 4 May 2006.

³³⁰ Parliamentary Assembly for the Council of Europe 'Human Rights and foreign policy,' Report by the Committee on Political Affairs and Democracy, Doc. 13020, 14 September 2012, 9, the report highlighting that 'respect for the principles of democracy and human rights must also constitute an essential element of foreign policy' in the relations between the member states.

³³¹ Parliamentary Assembly for the Council of Europe 'Human Rights and business,' Report by the Committee on Legal Affairs and Human Rights, Doc. 12361, 27 September 2010.

³³² Parliamentary Assembly for the Council of Europe 'The state of human rights in Europe and the progress of the Assembly's monitoring procedure', Report by the Committee on the Honouring of obligations and Commitments by Members States of the Council of Europe (Monitoring Committee), Doc. 11941 (8 June 2009).

³³³ As above, 7.

³³⁴ As above, 9.

³³⁵ As above, 11.

equality,³³⁶ and the protection of children.³³⁷ These Reports are drawn up by the Committee after a process of monitoring that is geared towards contributing to the Assembly's debate on the state of human rights in Europe.³³⁸ From these reports, it has become clear that the PACE has established a mechanism for monitoring human rights. The reports by its Committees are not a once off activity. They constitute of a sustained process of monitoring and evaluation. Moreover, the reports are produced through public assessments for all countries.³³⁹

The human rights issues that are addressed by the PACE are indeed varied and date back to many years. For example, its discussions and position with respect to the promotion and protection of sexual minority rights date back to 1981. The PACE's report on the discrimination against homosexuals submitted to the Parliamentary Assembly in 1981 by Mr Joop Voogd resulted in several resolutions that sought to improve the protection of homosexuals.³⁴⁰ This was followed by a resolution in 1983 that talked to issues of HIV/AIDS which was voted on by the PACE once again reaffirming 'its unshakeable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters.'³⁴¹ Another resolution on the same issue was adopted by the Parliamentary Assembly in 1992.³⁴² In 2013 the PACE also adopted a Recommendation on issues of discrimination on the basis of sexual orientation.³⁴³ The PACE is also aware of its obligation to promote issues relating to socio-economic rights and it has adopted recommendations that speak to the promotion of socio-economic rights in Europe. These include the Recommendation on equal access to health care.³⁴⁴ As it is usually the case with most

³³⁶ As above, 23.

³³⁷ As above, 22.

³³⁸ As above, 1.

³³⁹ As above, 29.

³⁴⁰ D Sanders 'Getting Lesbian and Gay issues on the international human rights agenda' (1996) 18 *Human Rights Quarterly* 81 - 82.

³⁴¹ As above.

³⁴² As above.

³⁴³ Parliamentary Assembly for the Council of Europe, Recommendation 2021 (2013) on tackling Discrimination on the Grounds of Sexual orientation and Gender Identity, adopted on the 26 June 2013.

³⁴⁴ Parliamentary Assembly for the Council of Europe, Recommendation 2020 (2013) on Equal Access to Health Care, adopted on the 26 June 2013; Parliamentary Assembly for the Council of Europe, Recommendation 838 (1978) on Widening the Scope of the European Convention on Human Rights adopted on the 27 September 1978.

Parliaments, the recommendations by PACE are always preceded by a motion on that particular issue. A search of the PACE website reveals that a total of 166 motions relating to human rights have been recorded.³⁴⁵ As is the case with most parliamentary assemblies, the PACE has, for some time now, been involved in election monitoring geared towards ensuring compliance with the Union's principles by the member states.³⁴⁶ Following such missions, reports are usually prepared on the observations made during the elections which are then submitted to the Parliamentary Bureau and eventually to the Assembly through the Bureau's progress report.³⁴⁷ The PACE's recommendations, resolutions, opinions, committee reports, motions and written declarations all indicate that there is a sustained commitment to the promotion of human rights by the Parliamentary Assembly.

Perhaps it is the recognition that the PACE gives to those who promote human rights, through its human rights prizes, that should be considered as an innovative way of encouraging the promotion and protection of human rights. The Václav human rights prize is aimed at rewarding 'outstanding civil society action in the defence of human rights in Europe and beyond.'³⁴⁸ The award is made yearly by the Parliamentary assembly in partnership with the Václav Havel Library to individuals, non-governmental organisations or institutions working to defend human rights.³⁴⁹ The gender equality prize of the PACE is awarded every five years in recognition of political parties that have encouraged and improved the participation of the PACE and the EP.³⁵⁰ The gender equality prize is in effect established to recognise political parties that have promoted gender equality.³⁵¹

The Southern African Development Committee Parliamentary Forum (SADC PF) and the Economic Community of West Africa Parliament (ECOWAS Parliament) have also indicated their

³⁴⁵ See generally <http://semanticpace.net/default.aspx?search=dHlwZV9zdHJfZW46lkIvdGlubiBmb3JlYSByZXNvbHV0aWV9ulg==&lang=en> (accessed 16 September 2013).

³⁴⁶ See generally http://website-pace.net/en_GB/web/apce/election-observations.

³⁴⁷ As above.

³⁴⁸ http://website-pace.net/en_GB/web/apce/prizes (accessed 18 September 2013).

³⁴⁹ As above.

³⁵⁰ http://assembly.coe.int/Communication/Campaign/EqualityPrize/default_EN.asp (accessed 18 September 2013).

³⁵¹ As above.

commitment to the promotion of human rights. The objectives of the SADC PF include the ‘promotion of human rights, gender equality, good governance and democracy.’³⁵² This has resulted in the attempts to promote human rights through election observer missions. The SADC PF recent election observer mission was to Zimbabwe for the 2013 harmonised general elections held on 31 July 2013.³⁵³ The SADC PF has also made efforts to enhance the participation of women in national parliaments by encouraging the participation of women in national politics.³⁵⁴ The Forum’s Model Law on HIV and AIDS, which encourages the promotion and protection of human rights of people living with HIV/AIDS, provides the member states with a framework to align their internal laws with.³⁵⁵

Similarly, the East African Legislative Assembly (EALA)’s founding documents mandates the Assembly to promote and protect human rights. Being the only sub-regional Parliament with legislative powers, the EALA has tackled issues that are relevant to the promotion and protection of human rights. Through its legislative bills, motions, petitions and questions and answers, the EALA has indicated the commitment, by its member states, to the promotion and protection of human rights in the region. Its resolutions include the resolution urging Summit to institute mechanisms to stop perpetuation of Genocide ideology,³⁵⁶ resolution on the provision of sanitary facilities and protection for girls in the East African Community (EAC) region³⁵⁷ and the Resolution on domestic violence³⁵⁸ are examples of the human rights related resolutions that the EALA has adopted. It is perhaps the roundtable on the EALA’s role in strengthening the implementation of human rights

³⁵² Constitution of the SADC Parliamentary Forum, art 5(c), (g); T Musavengana ‘The proposed SADC Parliament: Old wine in new bottles or an ideal whose time has come?, Monograph 181 by the Institute for Security Studies , July 2011, 22.

³⁵³ Interim mission statement by the SADC Parliamentary Forum election observation mission to the 2013 Zimbabwe harmonised general elections held on 31st July 2013.

³⁵⁴ As above.

³⁵⁵ As above.

³⁵⁶ Resolution urging Summit to institute machanisms to stop perpetuation of Genocide ideology and Denial in the Region and to take appropriate action, EALA/RES/3/12/2013.

³⁵⁷ Resolution of the Assembly to provide sanitary facilities and protection for girls in the EAST African Community Region, EALA/RES/3/10/2013.

³⁵⁸ Resolution of the Assembly urging the Eat Afrian Community and Partner States to take urgent and concerted action to end violence against women in the EAC Region and Particularly members States (by the Hon. Safina Kwekwe Tsungu).

standards in the EAC Region, the recommendations adopted at the end of the roundtable and the launch of the 'Handbook on human rights and Parliaments' that shows the EALA's positive attention towards the promotion and protection of human rights.³⁵⁹

The ECOWAS Parliament is also mandated by the Protocol A/P2/8/94 to address issues relating to human rights and to offer its opinions with respect to human rights and fundamental freedoms.³⁶⁰ Similar to the PAP, the ECOWAS Parliament has the mandate to address issues of human rights through its parliamentary debates and to bring any human rights infractions to the attention of other organs and institutions of ECOWAS.³⁶¹ The ECOWAS Parliament's Human Rights and Child Protection and Gender, Employment, Labour and Social Welfare committees are perhaps two committees that are responsible for the promotion and protection of human rights by the ECOWAS Parliament.³⁶² The ECOWAS Parliament's Gender strategy stands out as one example of the Parliament's efforts to advance the promotion of human rights, in particular, the rights of women.³⁶³ The strategy was adopted in order to create an energizing platform for mapping gender issues and consideration into the regional co-operation and integration processes in West Africa.³⁶⁴

It is therefore one thing to question the commitment of parliaments in the protection of human rights, but it is totally another to question their relevance to the cause. That is, the commitment of parliaments may be questioned while their relevance to the human rights cause admits of no doubt. The position adopted herein is fortified by the fact that, while in principle parliaments are the implementers of human rights – especially in the light of their legislative and oversight mandate – in practice they sometimes shy away from issues of human rights. For example, some national and

³⁵⁹ Roundtable on strengthening the implementation of human rights standards in the EAC Region: The role of the East African Legislative Assembly, 27th May 2011, The East African Hotel, Arusha, Tanzania.

³⁶⁰ ST Ebobrah, *Legitimacy and feasibility of human rights realisation through regional economic communities in Africa : the case of the economic community of West African states* 126, Unpublished LLD thesis, University of Pretoria, Pretoria, South Africa.

³⁶¹ As above.

³⁶² <http://parl.ecowas.int/English/committees.html> (accessed 21 September 2013); E U Kizito & UN Patrick 'The Role of Parliament on Economic Integration in Africa: Evidence from ECOWAS Parliament' *IOSR Journal of Humanities and Social Science* 8.

³⁶³ ECOWAS Parliament Gender Strategy 2010 – 202, available at http://www.agora-parl.org/sites/default/files/gender_strategy_ecowas_parl_en.pdf (accessed 21 September 2013).

³⁶⁴ As above,

regional parliaments are mere talk shops, with executive dominance of the legislature making some less effective and ‘rubber stamp’ bodies.³⁶⁵ This general lack of parliamentary autonomy has led to failure of parliaments to facilitate popular participation in the political process³⁶⁶ and in the same vein failure of the citizenry to influence human rights oriented policies. However, as already pointed out, the resilience of the EP and its acquisition of powers of influence within the EU have shown that indeed RPAs are relevant to the promotion of human rights.

2.7 The advent of the Pan-African Parliament and the relevance of its human rights mandate

While it is a given that parliaments are relevant to the promotion of human rights, it does not follow that a particular parliament or national assembly is indeed committed to the promotion of human rights. Further – and at the expense of being accused of self-contradiction – its relevance to the promotion of human rights within a particular system may indeed be questionable. Of particular interest here is the fact that national parliaments do exert some form of influence on their national governments while in respect of RPAs it is not clear, maybe with the exception of the EP, whether that is actually the case. Mashele rightly questions whether the executive would allow ‘the PAP the critical space to take positions that are radically incongruent with those held by the PRC, the EC and the AU Summit’³⁶⁷

It is important to reiterate that the existing human rights mechanisms in Africa or within the African human rights system are elitist, inaccessible and their impact on the lives of Africans questionable. The ‘people’ based PAP is supposed to be a deviation from this situation. The PAP Protocol brought promises of having a bottom-up approach to the needs of Africans in so far as political and socio-economic development is concerned. It promises to address the needs of

³⁶⁵ Hatchard *et al* (n 1 above) 123.

³⁶⁶ As above, 315.

³⁶⁷ P Mashele ‘The 3rd Pan-African Parliament session: The first teeth of a child or the roaring of tamed lion’ Sowetan , 5 April 2005, 11.

Africans by being an ‘accessible, transparent and caring institution of and for the peoples of Africa and beyond.’³⁶⁸

Above I have highlighted the truism that participation in the decision-making process by the people is important. Without taking part in the decision-making process of a particular system, the rights of citizens will not be adequately catered for. I have also highlighted the position held by Waldron that participation is not only important because of the right to vote, but also because ‘what happens in the political process determines not only what our social goals are, but also the content and distribution of individuals’ rights.’³⁶⁹ It is this position, to which I fully subscribe, that cements the argument that the relevance of the human rights mandate of the PAP is and should be seen as the fulcrum of all the other aspects of the mandate of the PAP. The inevitability of achieving the ideals embodied in various instruments relating to the establishment and functioning of the PAP through a human rights approach will become apparent when its various human rights activities are discussed. The relevance of the human rights mandate of the PAP also becomes important in so far as the achievement of the wider objectives of the PAP, such as the promotion of democracy, encouraging good governance, transparency and accountability, is concerned. The relevance of the human rights mandate of the PAP also becomes distinct in the light of the role parliaments in the promotion of human rights, as discussed above. As it will also become clear once the activities of the PAP are fully laid out in the following chapters, RPAs, including the PAP, are involved in many issues of global importance such as corruption, women’s rights, conflict resolution initiatives and other general issues relating to the welfare of the citizenry.³⁷⁰

Furthermore, the fact that the PAP has a human rights mandate is important because of the pervasive weakness of African parliaments. It has been noted that most legislatures in Africa seem to have limited institutional capability to fully represent their citizens, make laws and call strong presidents to account.³⁷¹ The human rights mandate of the PAP becomes even more important in

³⁶⁸ 2006-2010 PAP Strategic Plan 10, 1.

³⁶⁹ Waldron (n 8 above) 243.

³⁷⁰ Šabić (n 283 above) 267.

³⁷¹ N Lia *et al* ‘Parliaments and the enhancement of democracy on the African continent: An analysis of institutional capacity and public perceptions’ (2006) 12 *Journal of Legislative Studies* 314.

so far as the strengthening of national parliaments is concerned and the infusion of a rights-based approach in the policy or decision-making processes of African governments. Most national parliaments are regarded as potential agents for democratic change in Africa.³⁷² Whether they are indeed a vehicle for effective change, including advancing the promotion of human rights, is indeed questionable. Acknowledging that not all African parliaments are weak, it is nonetheless worth noting that Africa's human rights record lends support to the assertion that national parliaments in Africa are failing Africans due to their failure to adopt a rights based approach in their decision-making process and in discharging their legislative functions. The PAP may as well be a fair attempt to address this limitation as it has a specific human rights mandate that could be used to influence national parliaments. Through its members who are elected from national parliaments, the PAP could adopt strategies that will create a synergy capable of promoting human rights in Africa.³⁷³

The same goes for sub-regional parliaments such as the East African Legislative Assembly, the SADC Parliamentary Forum and the ECOWAS Parliament. It is particularly important to note that these legislative bodies do have human rights either expressly provided for or impliedly discernible from their founding documents. They could, as a result, benefit from the work of the PAP in so far as the promotion of human rights is concerned. The PAP could provide the necessary reference point to sub-regional Parliaments in relation to the promotion of human rights. In a nutshell, the human rights mandate of the PAP is necessary in enhancing the effectiveness of sub-regional and national parliaments in Africa.

2.8 Concluding remarks

The issues surrounding the role of parliaments in the promotion of human rights are legion. These issues range from these parliaments' role as effective tools of democracy or as implementers thereof to actually situating their role within the human rights struggle. These issues, combined with the often self-created and unnecessary uncertainty by theorists as to whether there is a link

³⁷² As above, 311.

³⁷³ In terms of art 5 as read with art 4(3) of the PAP Protocol, PAP members are elected by their respective parliaments or by any other national authority vested with such competence and are supposed to be representative of the political spectrum.

between human rights and democracy, detracts from the important question, which is, how can parliaments play a critical role in the promotion of human rights? This chapter has shown that the question should not be whether parliaments should really be protectors of human rights. In this chapter, I highlighted that even though controversial, there is indeed sufficient evidence to suggest that there is indeed a link between human rights and democracy and further as a result of that link, parliamentary bodies are necessary actors in the promotion of human rights. The chapter answered in the affirmative the question whether IPIs are or should be guardians of human rights. It concluded that the human rights mandate of the PAP could be used to the immense benefit Africa. That fact alone makes the specific mandate invaluable in so far as the promotion of human rights in the continent is concerned.

CHAPTER III

THE RELEVANCE OF THE STRUCTURE AND MANDATE OF THE PAN- AFRICAN PARLIAMENT TO THE PROMOTION OF HUMAN RIGHTS

3.1 Introduction

The advent of the African Union (AU) and the Pan-African Parliament (PAP) has been considered as part of the efforts of institutionalising Pan-Africanism in Africa. The establishment of the two has been seen as a sign of commitment to the ideals of Pan-Africanism as well as the enduring quest for deeper African unity. The PAP is one of the 11 organs of the AU, as provided for under article 5 of the AU Constitutive Act and under article 2 of the Protocol to the Treaty Establishing the African Economic Community (AEC) Relating to the Pan-African Parliament (PAP Protocol). The continental Parliament was formed on the understanding that it will forge greater unity in Africa and will ‘represent’ all the peoples of Africa. The PAP has since adopted a motto, ‘one Africa, one voice’, to signify its professed people-based nature. An analysis of the workings of the PAP to date is thus called for to ascertain whether the Parliament has lived up to its objectives.

The designers of the AU have put forward the PAP as part of a larger project of integration in Africa that will ensure the participation of Africans in the decision-making process. This intention on the part of the AU is evidenced by the reasons behind the metamorphosis of the OAU into the AU. As Mpanyane rightly points out, ‘[t]he PAP forms part of the ambitious process of strengthening the institutional framework for achieving Africa’s political and economic integration.’¹ Over and above the fact that the PAP is an ambitious political project for African integration, the Parliament is seen as yet another step towards bringing to an end the days of dictatorship that reigned during the days of the OAU.² Democratisation in Africa will, in that context, be achieved through popular participation, respect for the rule of law as well as the promotion and protection of human rights by the Parliament. However, as put by

¹ S Mpanyane ‘Transformation of the Pan-African Parliament: A path to legislative body?’ (2009) ISS Paper 181, 3.

² K van Walraven ‘From union of tyrants to power to the people? The significance of the Pan-African Parliament for the African Union’ (2004) 39 *Africa Spectrum* 200.

Van Walraven, the questions to be answered is ‘whether the Pan-African Parliament is such a significant institutional development as it is made out to be by contemporary observers,’ and whether the Parliament can ‘change the nature of the African Union.’³

Against this background, this chapter looks at the establishment, composition, objectives and functions of the PAP. The chapter assess whether the institutional framework of the PAP and its actual procedures are conducive to the promotion of human rights by the Parliament in Africa.

3.2 The process towards the establishment of the Pan-African Parliament

The trajectory of the PAP can be traced back to the Treaty Establishing the African Economic Community (Abuja Treaty), adopted in Nigeria on 3 June 1991. The Abuja Treaty came into force in May 1994. Although the AEC was mainly set up to foster economic integration in Africa, the Abuja Treaty also called for the establishment of a more integrated African community, the protection of human rights and the establishment of the PAP.⁴ In September 1999, African leaders met in Sirte, Libya, to discuss, among other things, the formation of the United States of Africa. The Sirte Declaration of 1999⁵ was later adopted,⁶ calling for the speedy establishment of the institutions, including the PAP, provided for in the AEC Treaty.⁷ The Draft Constitutive Act of the African Union (AU), including the establishment in principle, of the PAP as part of the AU’s institutions, was finally approved in Lomé, Togo on 11 July 2000.

³ As above, 199.

⁴ AEC Treaty, preamble; D Rukare ‘The new African Union and its Constitutive Act’ (2002) 96 *American Journal of international Law* 365; SF Masungu ‘Economic integration and human rights in Africa: A comment on conceptual linkages’ (2003) 3 *African Human Rights Law Journal* 92.

⁵ OAU Doc EAHG/DECL (IV) REV I, reprinted in (1999) 7 *African Yearbook of International Law* 411.

⁶ K Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal’ (2003) 3 *African Human Rights Law Journal* 99.

⁷ KD Magliveras & GJ Naldi ‘The Pan African Parliament of the African Union: An overview’ (2003) 3 *African Human Rights Law Journal* 223.

The PAP Protocol was adopted on 2 March 2001⁸ and entered into force on the 14 December 2003.

It was eventually decided that the seat of the PAP will be Midrand, South Africa, where the buildings of the PAP are now located. In March 2004, the inauguration of the PAP was held in at the United Nations Economic Commission for Africa Conference Centre in Addis Ababa, Ethiopia, where 202 legislators from 41 countries were sworn in by the then President of Mozambique, Joaquim Chissano. The inaugural session of the PAP, which lasted for three days, was held amidst great fanfare.⁹ Rightly so, it could be argued, for the event could be seen as ushering in a new era of participatory democracy in the continent and was also viewed by many as a symbol of commitment to the ideals of integration in Africa. Its eventual take-off remains a very welcome development in the history of Africa. The parliamentary body is seen as bringing to life the ideals of Pan-Africanism once pursued by many, amongst them some of the great leaders of Africa.¹⁰ Pan-Africanism thus provided them with the hope for a better and more united Africa. The influence of Pan-Africanism should not be seen in isolation. It must be viewed also from the perspective of the larger AU grand scheme of integration. Perhaps the words of Chacha properly articulate the significance of Pan-Africanism in modern day Africa, with particular reference to African unity, when he points out the following:

The patriarchs of pan-Africanism may be gone but the fire they ignited is still burning. The issue pan-Africanism has generated more rhetoric and literature and dominated political discourse perhaps more than any other issue. Though the achievements of

⁸ C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 14-17; <http://www.au.int/en/treaties> (accessed 30 March 2013).

⁹ J Cilliers & P Mashele 'The Pan-African Parliament: A plenary of parliamentarians' (2004) 13 *African Security Review* 74; T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' (2004) 4 *African Human Rights Law Journal* 54; T Murithi 'Institutionalising Pan-Africanism: Transforming African Union values and principles into policy and practice' Institute for Security Studies (ISS) occasional paper 143, June 2007 2.

¹⁰ Pan-African Parliament *The Pan-African Parliament: One Africa, one voice 2007-2008*, 19; PG Adogamhe 'Pan-Africanism revisited: Vision and reality of African unity and development' (2008) 2 *African Review of Integration* 1.

the movement can be said to be modest, this has not killed the spirit, desire and belief in getting strength out of unity. It is generally recognised, and therefore need not be overemphasized that, unity remains an objective worth pursuing if Africa is to benefit from economies of scale in her industrialisation process.¹¹

The PAP was also in that context seen as heralding an end of the days of non-participation of Africans in the continental decision-making processes. It should be mentioned here that Pan-Africanism was and remains ‘a movement with as its common underlying theme the struggle for social and political equality and freedom from economic exploitation and racial discrimination.’¹² Pan-Africanism thus came about as a result of the realisation that Africans were, from a global perspective, a marginalised group ‘and that they are not only culturally related but also share similar problems and aspirations.’¹³ To the ‘patriarchs’ of Pan-Africanism it not only made sense but was necessary that Africans come together for mutual support for liberation and effective participation in the global and regional decision-making processes. Accompanying the quest for unity has always been the concern that Africans have always been side-lined when it came to decision-making processes and as such they could not fully decide how their problems should be addressed or dealt with.¹⁴

It is in that context that the creation of the PAP has been described by some as forming part of the institutionalisation of Pan-Africanism, following as it does the Pan-African Congress and the OAU.¹⁵ It should be highlighted that the idea of the Pan-African Union as distinct and separate

¹¹ DM Chacha ‘Julius Nyerere: the intellectual Pan-Africanist and the question of African unity’ *African (2002) 5 Journal of International Affairs* 20. available at <http://www.ajol.info/index.php/ajia/article/viewFile/57195/45585> accessed (30 March 2013).

¹² Murithi (n 9 above) 1.

¹³ Chacha (n 11 above) 29

¹⁴ As above.

¹⁵ Murithi (n 9 above) 3; T Maluwa ‘From the Organization of African Unity to the African Union: Rethinking the framework for inter-state cooperation in Africa in the era of globalisation’ (2007) 5 *University of Botswana Law Journal* 5; F Viljoen *International human rights law in Africa* (2012) 173; NJ Udombana ‘A harmony or a cacophony? The music of integration in the African Union treaty and the New Partnership for Africa Development’ (2002) 13 *Indiana International and Comparative Law Review* 228.

from the OAU began with the vision of a ‘United States of Africa’ of Libyan Leader Muammar-Gadhafi and that explains why the process towards establishing the AU started in Sirte, Libya.¹⁶ Whether the PAP should be viewed as an ‘incarnation’ of the principles of Pan-Africanism could be discernible from the various documents conferring legitimacy on the Parliament, its objectives, functions and powers.

It has come to be widely known that as a result of these Pan-Africanism aspirations several key institutions were created with the specific aim of addressing the needs of Africans. The OAU is among the institutions that were established with the aim of championing the cause of continental or regional cooperation.¹⁷ The principles of the now defunct OAU were largely informed by the principles of Pan-Africanism as African leaders took up the challenge of liberating Africans from colonialism and racial discrimination. While the OAU Charter of 1963 does not make specific reference to Pan-Africanism by name, it locates itself in the ‘aspirations of peoples for brotherhood and solidarity’.¹⁸ The road to African solidarity and integration has not been without challenges as can be seen from the debates that followed as the idea of continental unity grew. There was obvious disagreement as to the form African cooperation should take, giving rise to the emergence of ‘groupings’, that is, the Brazzaville Group (associated with the former French colonies, except Guinea) which did not want to be part of the whole united Africa project, the Casablanca Group (associated with the agenda to transform and re-integrate Africa) and the Monrovia Group (associated with states which wanted a compromise for these two extremes).¹⁹

¹⁶ Para 7 of the Sirte Declaration highlights the vital role played by the Libyan Leader in fostering the integration process in Africa and by necessary implication the establishment of the PAP in the following words ‘in our deliberations, we have been inspired by the important proposals submitted by Colonel Muammar al-Qadhafi, Leader of the Great Al Fatah Libyan Revolution and particularly, by his vision for a strong and united Africa, capable of meeting global challenges and shouldering its responsibility to harness the human and natural resources of the continent in order to improve the living conditions of its peoples.’

¹⁷ As above.

¹⁸ OAU Charter, Preamble; Viljoen (n 15 above) 157.

¹⁹ Viljoen (n 15 above) 160.

The successes of the OAU have been overshadowed by its reported legacy of failure to integrate and bring unity to Africa, its failure to address extensive and serious human rights abuses that continuously plagued Africa, as well as the over-adherence to the concept of state sovereignty by the then African leaders. Indeed, after four decades, the influence or impact of the OAU remained extremely limited, to the extent that it is almost impossible to argue that the ideals of Pan-Africanism were, to any degree of significance, realised through the OAU. It appears that African leaders could not stay oblivious to this shortcoming and decided to double the efforts of the OAU by transforming it into the AU. The positive efforts of the OAU should not, however, be forgotten and indeed were not ignored. That is why the Preamble of the Constitutive Act of the AU highlights that

considering that since its inception, the Organisation of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our continent and has provided a unique framework for our collective action in Africa and our relations with the rest of the world.²⁰

The underlying purpose of the AU is to promote solidarity, cooperation and support among Africans in order to address the problems of the continent together, informed by a common purpose. Several reasons for the establishment of the PAP can be derived from the Preamble of the Protocol to the AEC Treaty Establishing the Pan-African Parliament (PAP Protocol) and the AU Constitutive Act. The PAP was established with a vision to provide a common platform for Africans and their grass-roots organisations to be more involved in the decision-making processes geared towards the problems and challenges facing Africa.²¹ It was to promote democratic principles and popular participation as well as to cultivate the culture of good governance in Africa.²² The PAP was also established to further deepen unity and integration in Africa with the aim of consolidating the aspirations of Africans ‘for greater unity, solidarity and cohesion in a larger community transcending cultural, ideological, ethnic, religious and national

²⁰ AU Constitutive Act, Preamble.

²¹ PAP Protocol, Preamble.

²² As above.

differences.²³ The PAP was also established with a firm determination to promote human rights in accordance with the African Charter on Human and Peoples' Rights and other relevant AU instruments.²⁴

The PAP is supposed to operate within the broader institutional framework of the AU, with the eventual aim to become the main oversight body of the AU. As mentioned, the PAP is one of the 11 organs that constitute and are meant to reinvigorate the AU.²⁵ Once it evolves into a legislative body, the PAP will become the fully fledged legislative organ of the AU responsible for legislation and adoption of laws, in addition to its advisory role to other organs of the AU.²⁶ The AU organs are mainly the judiciary made up of the African Court of Justice (ACJ) and the African Court on Human and Peoples' Rights (ACtHPR),²⁷ and the Executive composed of the Assembly of the Heads of State and Government, Executive Council, the Specialised Committees, the Financial Institutions of the AU, the AU Commission, the Peace and Security Council, the Permanent Representative Committee and the Economic, Social and Cultural Council (ECOSOC).

3.3 The establishment of the Pan-African Parliament

As mentioned earlier, the establishment of the PAP is linked to the AEC Treaty and to the transformation of the OAU into the AU. This was an indication that there were indeed

²³ As above.

²⁴ As above.

²⁵ P. Mashele 'The third Pan-African Parliament session: The first teeth of a child or the roaring tamed lion' *Sowetan* 5 April 2005, 11; AU Constitutive Act, art 5.

²⁶ Viljoen (n 15 above) 181.

²⁷ Article 5 of the AU Constitutive Act, explicitly listing the aforementioned organs of the AU, does not mention the African Commission at all. However, the transformation of the OAU into the AU left the ACHPR and its Commission intact. This is due to several reasons, chief among them being the fact that the African Commission is a creature of a separate treaty (the African Charter) distinct and independent from the Constitutive Act as it was in relation to the OAU Charter; see Viljoen (n 15 above) 217; see further *Opinion to the African Commission on Human and Peoples' Rights on its legal position under the African Union (AU) (2008)* prepared by the Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa (on file with the author).

prospects of deeper integration in Africa and that the vision the Libyan leader had garnered support amongst other African leaders. The PAP draws its mandate from Article 7 of the AEC Treaty, according to which one of the organs of the AU to be established so as to foster African integration was the Parliament. The PAP was the only institution to receive specific mention as requiring speedy establishment and it was the aim of African leaders that the PAP be established by the year 2000.²⁸ This, according to the Sirte Declaration, was to provide a common platform for Africans to participate in discussions and decision-making for ordinary Africans on problems and challenges facing Africa.

The AU Assembly adopted, in 2000, the Constitutive Act of the Union with the PAP as one of the organs of the newly formed continental body.²⁹ Thus, the legal basis of the PAP is located in the AEC Treaty, the AU Constitutive Act and most importantly the PAP Protocol.³⁰ It is perhaps necessary to highlight that the AU and the AEC continues to co-exist³¹ and the PAP is established as the parliamentary assembly for both organisations.³² The AEC Treaty defines 'community' as referring to the organic structure for economic integration established under Article 2 of this Treaty and constituting an integral part of the OAU.³³ This provision simply indicates that the AEC forms part of the AU. It does not provide that members of the AEC may be considered as being automatically AU member states as this will fall short of international law and the principle of state consent to treaties. Such member states will only, in my opinion, be considered AU member states once they have ratified the AU Constitutive Act.

Both treaties then go on to provide that the composition, functions, powers and organisation of the Pan-African Parliament are to be set out in a protocol.³⁴ In the case of the AEC Treaty it is clear that such protocol is the PAP Protocol while in the case of the AU Constitutive Act it has been assumed that the protocol referred to under article 17(2) refers to the PAP Protocol

²⁸ Sirte Declaration, para 8(ii)(b).

²⁹ AU Constitutive Act, art 5.

³⁰ PAP Protocol, arts 2(3)(i) & 11; Viljoen (n 15 above) 184; Magliveras & Naldi (n 7 above) 223.

³¹ Viljoen (n 15 above) 173.

³² AEC Treaty, arts 7 & 14; AU Constitutive Act, arts 5 & 17.

³³ AEC Treaty, art 14; AU Constitutive Act, art 17.

³⁴ AEC Treaty, art 14; AU Constitutive Act, art 17.

even though that the article does not make such a specific reference. It appears that this is a correct assumption because the review process has revealed that the PAP Protocol is likely to be named the ‘Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament.’ However, it is clear from the drafts that this will not be a new and separate treaty adopted under the AU Constitutive Act but will by all means remain a protocol to the AEC Treaty. With this status quo in mind, it is therefore safe to conclude that the renaming of this Protocol is unnecessary as it is illegal.

Even though no major contradictions have been noted so far between the AEC Treaty and the AU Constitutive Act, the transitional arrangements and final provisions of the Constitutive Act clearly provides that the provisions of the Constitutive Act ‘takes precedence and supersede any inconsistent or contrary provisions of the’ AEC Treaty.³⁵ The PAP Protocol being a separate treaty, yet an addition to the AEC Treaty, it is not clear whether the transitional and final provisions of the AU Constitutive Act are also applicable to it. This question may be considered as academic sophistry, considering that the AEC has, as a matter of actual practice, been replaced by the AU. However, there are provisions of the PAP Protocol that make reference to the OAU (AU) and AEC. For example, the provisions relating to the budget of the PAP provides that ‘the annual budget of the Pan-African Parliament shall constitute an integral part of the regular budget of the OAU/AEC.’³⁶ A conflict is likely to arise in the event that there is movement towards strengthening the AEC and allowing it to function or operate independently of the AU.

The above notwithstanding, the following discussion is an exposition of the legal nature of the PAP as discernible from these instruments.

3.3.1 The Treaty Establishing the African Economic Community (AEC Treaty)

Essentially the AEC Treaty provided the modalities for the establishment of the African Economic Community in the light of the Lagos Plan of Action and was an echo of the

³⁵ AU Constitutive Act, art 33 (2).

³⁶ PAP Protocol, art 15(1).

commitment of African leaders to have, by the year 2000, an African Economic Community. The aim of the Community was to foster economic, social and cultural integration, increased economic self-reliance and self-sustained development in Africa.³⁷ In order to attain the objectives of the Community as set out in the AEC Treaty and in accordance with the relevant provisions of the Treaty, it was resolved that the Community would, by stages, strengthen the existing of regional economic communities, harmonisation and coordination of policies among existing regional and future sub-regional or regional economic communities, harmonisation of national policies in order to promote Community activities, particularly in the fields of agriculture, industry, transport and communication and human resources.³⁸

The objectives of the Community, as aforementioned, were to be implemented through stages and at each stage, specific activities were assigned and implemented concurrently.³⁹ With respect to the PAP, it was agreed that it was to be set up and its membership determined by universal suffrage within five years after the establishment of an African common market.⁴⁰ The 1991 AEC Treaty provides that the sixth stage would include the final setting up of the structure of the PAP and the election of its members by continental universal suffrage.⁴¹ In other words, the AEC Treaty did not in any way elaborate on the form or the nature of the envisaged Parliament. Instead, it simply provided that the PAP's powers, composition, organisation and functions were to be set out under the Protocol to be adopted at a later stage.⁴²

3.3.2 The African Union Constitutive Act

When the AU replaced the OAU, the AU Constitutive Act left intact the AEC Treaty as long as it did not run contrary to the provisions of the AU Constitutive Act.⁴³ With respect to the

³⁷ AEC Treaty, art 4(1).

³⁸ As above, art 4(2)(e).

³⁹ As above, art 6(2).

⁴⁰ As above, art 6(2)(f)(iv).

⁴¹ As above, art 6 as read with art 7.

⁴² As above, art 14(2).

⁴³ AU Constitutive Act, art 33(2).

PAP, the Constitutive Act listed the PAP as one of the organs of the AU⁴⁴ and proceeded to echo the provisions of the 1991 AEC Treaty,⁴⁵ for example, by underscoring the relevance of the participation of Africans in the development and economic integration of the continent.⁴⁶

After the adoption of the AU Constitutive Act, the AU Heads of State and Government requested the OAU Secretary-General to convene a meeting of Parliamentarians to examine the draft Protocol to the 1991 AEC Treaty Relating to the Pan-African Parliament (PAP Protocol) and to submit the draft Protocol to subsequent sessions of the Council of Ministers and for subsequent adoption by the Assembly of Heads of State and Government.⁴⁷ Prior to that, a meeting of Legal Experts and Parliamentarians was held in Addis Ababa from 17 to 21 April 2000, during which the draft Protocol to the AEC Treaty Relating to the Pan-African Parliament was considered. It was in Sirte, Libya, on 1 March 2001 that the PAP Protocol was adopted,⁴⁸ and eventually came into force on 14 December 2003.⁴⁹

3.3.3 The Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (PAP Protocol)

3.3.3.1 Signatures, ratifications and accession to the PAP Protocol

As already mentioned earlier, the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU – which was held from the 10 to 12 July 2000 in Lomé, Togo – led to the approval and adoption of the AU Constitutive Act. Almost a year later, on 1 March 2001, the PAP Protocol was adopted in Sirte, Libya,⁵⁰ and was opened to all member states of the African Union for signature.⁵¹ The instruments of ratification or accession were deposited with the Secretary-General of the defunct OAU.⁵² The PAP Protocol came into force after the 24th

⁴⁴ As above, art 5(c).

⁴⁵ AEC Treaty, art 14.

⁴⁶ AU Constitutive Act, art 17.

⁴⁷ As above.

⁴⁸ C Heyns & M Killander (n 8 above) 14-17.

⁴⁹ As above.

⁵⁰ As above.

⁵¹ PAP Protocol, art. 21.

⁵² As above, art 21(2).

ratification instruments was deposited by Senegal.⁵³ By 31 December 2012, 49 member states had signed the PAP Protocol, with 47 member states ratifying and depositing the ratification instruments with the AU Commission.⁵⁴ The PAP Protocol allows for accession to the Protocol and any member state may notify the Secretary-General of its intention to accede to the Protocol after its entry into force.⁵⁵ The Protocol comes into force on the date of the deposit of the instrument of accession for those state parties that accede to the Protocol subsequent to its entry into force.⁵⁶

Not all member states of the AU and the AEC have ratified the PAP Protocol. In 2013, seven AU member states had not ratified the PAP Protocol. These are: Côte d'Ivoire, the Democratic Republic of Congo, Eritrea, São Tomé and Príncipe, Somalia, Liberia and South Sudan.⁵⁷ Of the seven, Eritrea, Somalia and South Sudan are also not members of the AEC.⁵⁸ All the seven countries have ratified the AU Constitutive Act meaning that they have accepted and agreed, under article 5, that the PAP is one of the organs of the AU. Having become part of the AU in 2011, it remains to be seen whether South Sudan will ratify the PAP Protocol in the near future. For São Tomé and Príncipe it is puzzling why it has not moved to ratify the PAP Protocol and this may be an indication of the importance it attaches to the Parliament. Unlike the other five countries (Côte d'Ivoire, the Democratic Republic of Congo, Eritrea, Somalia and Liberia) the country has done relatively well in terms of human rights and corruption issues.⁵⁹ São Tomé and Príncipe is rated as free by Freedom House and it is considered as one of the countries in Africa that allows for political participation.⁶⁰

⁵³ This is because article 23 of the PAP Protocol provides that the Protocol will enter into force after the deposit of the instruments of ratification by a simple majority of the 42 member (AEC) states; <http://allafrica.com/stories/200311210503.html> (accessed 16 February 2011)

⁵⁴ See the status list for signature and ratification of the PAP Protocol, <http://www.au.int/en/treaties> (accessed 30 December 2012).

⁵⁵ PAP Protocol, art 23.

⁵⁶ As above.

⁵⁷ C Heyns & M Killander (n 8 above) 503 – 508.

⁵⁸ As above.

⁵⁹ <http://www.freedomhouse.org/report/freedom-world/freedom-world-2013> (accessed 9 September 2013)

⁶⁰ As above.

It is perhaps not surprising that Côte d'Ivoire, the Democratic Republic of Congo, Eritrea, Somalia and Liberia have not ratified the PAP Protocol considering what it stands for. As already indicated, the PAP intends to foster participation of the people in the decision-making process, to promote the rule of law and to engender the respect for human rights in Africa. Côte d'Ivoire and Liberia were ranked by Freedom House as being partly free. The domestic situation as regards the protection and exercise of civil liberties and political rights is regarded by Freedom House as insufficient.⁶¹ The rest of the countries, that is, the Democratic Republic of Congo, Eritrea and Somalia have been ranked as not free and are characterised as not making room for political participation of the people.⁶² Further, given the general human rights situation in these countries and their struggle towards ensuring the respect for the rule of law and human rights it is not surprising that they have not ratified the PAP Protocol. It is perhaps safe to argue that, and given the little incentive afforded to member states upon joining the PAP, the promise of greater participation of Africans in the decision-making process was the main incentive availed to member states at the time that they were encouraged to become part of this ambitious project. Concomitantly, a conclusion can be made that countries that value participatory democracy and encourage the involvement of the people in running the state have ratified the PAP Protocol. This will be despite the fact that they may be doing badly in so far as those ideals are concerned. Conversely, another conclusion may be that there is little significance placed upon the desire to have an inclusive governance structure in Africa by the prodigal seven.

Before concluding on this point, it is worth noting that there is a rather puzzling membership to the PAP by Djibouti and Madagascar. Both are parties to the PAP Protocol and the AU Constitutive Act. They are however not parties to the AEC Treaty. The question therefore is whether they are legitimate members of the PAP. Put differently, the question may be whether member states of the AU but not of the AEC are eligible to sign, ratify or accede to the PAP Protocol. As aforementioned the legal basis of the PAP is located in both the AEC Treaty and the AU Constitutive Act with the Parliament being a parliamentary assembly for both organisations. On the face of it, the PAP Protocol may only be ratified, acceded to or signed by

⁶¹ As above.

⁶² As above.

members of the AEC Community.⁶³ This will in essence exclude Djibouti and Madagascar both of which are not members of the AEC Community.

The question that follows therefore is the basis upon which the membership of these two countries to the Parliament is founded. As pointed out earlier (para. 3.3 above) the PAP finds its legal basis under two legal instruments being the AEC Treaty and the AU Constitutive Act. What this translates into is that members of the AEC Community may sign, accede to and ratify the PAP Protocol. Likewise, AU member states may sign, accede to and ratify the PAP Protocol so long as the words ‘protocol relating to’ under article 17(2) of the AU Constitutive Act are interpreted to mean the ‘Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament.’ This will explain why Djibouti and Madagascar are members of the PAP even though they are not members of the AEC Community. The apparent connection between the AEC, the AU and the PAP indeed support this interpretation. As already indicated above, a literal interpretation of the PAP Protocol leading to the exclusion of Madagascar and Djibouti from membership of the PAP should be avoided. A purposive interpretation of these instruments should be adopted, which interpretation will lead to the conclusion that Madagascar and Djibouti’s membership to the PAP is legitimate.⁶⁴

The situation with respect to the membership of the PAP stands in stark contrast with that of the European Parliament (EP) and that of the Parliamentary Assembly for the Council of Europe (PACE). All countries forming the EU are also part of the two institutions and are bound by the decisions that are carried out by these two bodies with respect to issues that are within the

⁶³ PAP Protocol, arts 21 & 23 as read with arts 1(f) & (c).

⁶⁴ See generally M Ajevski ‘Interpretation and the Constraints on International Courts (June 13, 2012). MultiRights Research Paper No. 12-05. Available at SSRN: <http://ssrn.com/abstract=2083616> or <http://dx.doi.org/10.2139/ssrn.2083616> (accessed 17 August 2013); M Swart ‘Is there a text in this court? the purposive method of interpretation and the ad hoc tribunals’ (2010) 70 *Journal of Comparative Public Law and International Law* 780, highlighting that the interpretation of treaties in light of their ‘object and purpose’ is ‘intertwined with the principle of effectiveness and specifically with “*la regle del’efficacite*”, i.e. the rule that the instrument as a whole, and each of its provisions must be taken to have been intended to achieve some end and that an interpretation that would make the text ineffective to achieve the object in view is prima facie suspect.’; M Waibel ‘Demystifying the Art of Interpretation’ (2011) 22 *European Journal of International Law* 581.

spheres. The fact that all EU member states are also part of these two institutions has made legislating and adopting economic and other policies for the region less cumbersome. It is thus going to be difficult for the PAP to act as a full continental parliament if not all states have ratified the Protocol. The Parliament will possibly legislate for all the member states less the seven. The non-ratification of the PAP Protocol by these seven countries has in a way limited the integration process and movement towards supranationalism in Africa.

3.3.3.2 Withdrawal from the PAP Protocol and membership of the Parliament

Withdrawal from the PAP Protocol is governed by the provisions of article 19 of the Protocol, which provides that '[t]he Pan-African Parliamentarians from a member state which withdraws from the Community shall automatically cease to be Pan-African Parliamentarians.'⁶⁵ The article appears not to confer on the member states the right to withdraw from being part of the PAP, in particular secession from the PAP Protocol.⁶⁶ Instead it indicates that a member state can only cease to be a MPAP once it withdraws from the AEC.⁶⁷ The article suggests that the withdrawal of the member state from the AU, but not from the AEC, does not affect the status of its parliamentarians.⁶⁸ This 'anomaly' has been somehow addressed by the PAP Rules of Procedure, which provide that a seat of a parliamentarian must become vacant if he or she 'ceases to be a Member due to the withdrawal from the Union of the member state which elected or designated the Member.'⁶⁹ 'Union' in the PAP Rules of Procedure means the African Union established by the AU Constitutive Act.⁷⁰ This essentially means that for a member state to withdraw from the PAP Protocol it can only do so if it withdraws from the AEC Treaty, as provided for by the PAP Protocol, and if it is a member of the AU they would need to have withdrawn from the AU as well.

⁶⁵ Magliveras & Naldi (n 7 above) 230.

⁶⁶ As above.

⁶⁷ As above.

⁶⁸ As above.

⁶⁹ PAP Rules of Procedure, rule 8.

⁷⁰ As above, rule 1.

The content of the withdrawal clause in the PAP Protocol raises several issues, one of them is whether at the time that it was drafted it was taken into account that the PAP will be acting for both the AEC and the AU.⁷¹ Most importantly, it raises the issue of whether a member state is allowed to decide to discontinue being a member of the Parliament by way of withdrawing from the PAP Protocol without necessarily withdrawing from the AU or the AEC. The possibility of withdrawal of a member state is likely to occur where the Parliament is not taking off as envisaged and a member state will decide that it is not beneficial to continue being a member of the Parliament. Member states opting to discontinue their PAP membership without necessarily withdrawing from the AU and the AEC will be faced with the huge task of proving to the other contracting states that the PAP Protocol admits of the possibility of withdrawal or that the right of denunciation or withdrawal may be implied by the nature of the treaty.⁷² This will only be necessary where the member state is unable to establish that it is, by operation of law, entitled to withdraw from the PAP Protocol.⁷³ This is so because where a treaty does not contain a withdrawal provision, it is generally accepted that the treaty is not subject to withdrawal.⁷⁴

It has been noted that in drafting the PAP Protocol, it should have been taken into account that it was a separate treaty from the AEC Treaty.⁷⁵ Hence, the argument proceeds, it would have been preferable for the drafter of the PAP Protocol to provide in clear terms that member states have the right to withdraw from the PAP Protocol.⁷⁶ Another argument could very well be that in general states have the inherent right to withdraw from treaties.⁷⁷ However, a positive aspect of the absence of a withdrawal clause in the PAP Protocol is that the Protocol is likely to safeguard the stability of the Protocol and in consequence thereof the existence of the Parliament

⁷¹ Magliveras & Naldi (n 7 above) 230.

⁷² Vienna Convention on the Law of Treaties (VCLT), art 56(1).

⁷³ Situations where a contracting party is allowed to withdraw from a treaty by operation of law are detailed in articles 46 through 62 of the VCLT.

⁷⁴ L Brilmayer & IY Tesfalidet 'Treaty denunciation and 'withdrawal' from customary international law: An erroneous analogy with dangerous consequences' (2011) 120 *Yale Law Journal* 217.

⁷⁵ Magliveras & Naldi (n 7 above) 230.

⁷⁶ As above.

⁷⁷ Brilmayer & Tesfalidet (n 74 above) 218.

3.3.3.3 Procedure for amendment and revision of the PAP Protocol

The Protocol can be amended by a simple majority of the members of the Assembly of Heads of State and Government of the AU⁷⁸ consequent to a written proposal by a member state party to the Protocol or the Parliament itself.⁷⁹ Article 24(4) of the PAP Protocol also provides that where a proposal for an amendment is not sought by the Parliament, the Secretary-General of the AU is supposed to request the opinion of the PAP on the proposal for amendment and transmit the opinion, if any, to the Assembly. Once the opinion of the Parliament is transmitted to the Assembly, the latter may adopt the proposal, while taking into account the opinion of the Parliament.⁸⁰ It has been rightly noted ‘that the Parliament is not required to offer its opinion and, if it does, the Assembly is not obliged to follow it.’⁸¹ The decision to allow the Parliament to make proposals on the amendment of the Protocol is perhaps an acknowledgment that it is important that the body that depends and operates on the basis of the Protocol be able to seek an amendment whenever it becomes necessary for it to do so. A closer reading of the first parts of article 24(4) of the PAP Protocol reveals that the Secretary-General ‘shall’ request the opinion of the PAP on any proposal for amendment. This suggests that it is mandatory that the opinion of the Parliament be sought notwithstanding the fact that it might not be taken into account when a decision is made by the Assembly.

Once an amendment is approved by the requisite number of members of the Assembly, the amendment or revision enters into force 30 days after the deposit of the instruments of ratification of the amendment or the revised Protocol, with the Secretary-General of the AU, by two-thirds of the member states.⁸²

⁷⁸ PAP Protocol, art 24(1).

⁷⁹ PAP Protocol, art 24(2)

⁸⁰ PAP Protocol, art 24(4)

⁸¹ Magliveras & Naldi (n 7 above) 232.

⁸² PAP Protocol, art 24(5)

3.3.3.4 Objectives, powers and functions of the Pan-African Parliament

The Preamble of the PAP Protocol does no more than highlight what has been previously mentioned in relation to the process of integration in Africa. In the first instance, it highlights the vision of the establishment of the PAP and points out that it was to provide a common platform for African peoples' and their grass-roots organisations to participate in the decision-making process of the continent. Second, it recognises an imperative and urgent need to further consolidate the aspiration of the African peoples for greater solidarity, transcending all differences that Africans might have. The Preamble goes on to highlight that the PAP was established in the light of the principles of the now defunct OAU and the determination by African leaders to foster democracy and good governance in Africa. Most importantly, the Preamble highlights that the contents of the PAP Protocol were 'to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.'⁸³

The PAP Protocol provides details relating to how the Parliament functions. It provides for the establishment of the PAP, the objectives of the PAP, the composition of the PAP, the election, tenure and vacancies of parliamentarians, voting by PAP Parliamentarians, incompatibility with the exercise of executive or judicial functions of member states, privileges and immunities of Pan-African Parliamentarians, parliamentary immunities and functions and powers of the PAP. These and other matters provided for by the PAP Protocol will be discussed below with reference to how such matters, as well as other institutional dynamics, may encourage or impede and are likely to encourage or impede the effectiveness of the PAP in the promotion of human rights in Africa.

3.3.3.5 Objectives of the PAP

Article 3 of the PAP Protocol sets out nine objectives of the PAP and reflect what African leaders had in mind especially in so far as integration in Africa is concerned.⁸⁴ The essence of

⁸³ PAP Protocol, art 21.

⁸⁴ PAP Protocol, art 3.

the objectives of the PAP as set out under article 3 of the PAP Protocol is first and foremost to facilitate the effective implementation of the policies and objectives of the then OAU/AEC and ultimately those of the AU. Its objectives are further to educate the peoples of Africa about objectives and policies aimed at integrating the African continent within the larger framework of the AU, promote self-reliance and cooperation in general in Africa and to promote peace and security in Africa. Most importantly, the objective of the PAP is to encourage good governance and to promote the principles of human rights and democracy in Africa.⁸⁵ The objectives mirror, in substance, the Preamble of the PAP Protocol and the provisions of the 1991 AEC Treaty in that they mention the same aspects, save that the PAP Protocol expands on what is mentioned in both Preambles by setting out in specific terms the powers and functions of the PAP.

Upon closer inspection of these objectives, two aspects immediately stand out. First, the objectives confirm that the PAP is part of the larger scheme of Pan-Africanism and possibly an example of institutionalisation of Pan-Africanism during Africa's integration process under the new AU regime. Arguably, the objectives of the PAP mirrors the ideals of Pan-Africanism considering that one of the core issues that concerned African leaders during post-colonial times was regional integration and African development, both of which were poised to lead to

⁸⁵ Article 3 of the PAP Protocol provides that '[t]he objectives of the Pan-African Parliament shall be to:

1. facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union;
2. promote the principles of human rights and democracy in Africa;
3. encourage good governance, transparency and accountability in Member States;
4. familiarize the peoples of Africa with the objectives and policies aimed at integrating the African Continent within the framework of the establishment of the African Union;
5. promote peace, security and stability;
6. contribute to a more prosperous future for the peoples of Africa by promoting collective self-reliance and economic recovery;
7. facilitate cooperation and development in Africa;
8. strengthen Continental solidarity and build a sense of common destiny among the peoples of Africa;
9. facilitate cooperation among Regional Economic Communities and their Parliamentary fora.

the emancipation of the people.⁸⁶ Further and as already mentioned, the establishment of the PAP is closely connected to that of the AU, making it unsurprising that the ideals of Pan-Africanism, which have largely influenced the formation of the AU, found their way into the PAP Protocol.⁸⁷

Second and most important, the objectives confirm that the PAP is intended to 'promote the principles of human rights and democracy in Africa.'⁸⁸ The importance of this objective will become clearer in the following chapters when the role of the PAP in the promotion of human rights is interrogated. Unlike the European Parliament (EP), the PAP has been mandated specifically to promote human rights in Africa.⁸⁹ The EP was set up without a specific mandate to promote or protect human rights and none of the founding treaties of the EP makes specific reference to human rights.⁹⁰ Both treaties, the 1952 Treaty of Paris⁹¹ and the 1957 Treaty

⁸⁶ D Olowu 'Regional integration, development, and the African Union Agenda: Challenges, gaps, and opportunities' (2003) 13 *Transnational Law & Contemporary Problems* 216.

⁸⁷ See generally Olowu (as above) 216, when he argues that even though some commentators 'have found it convenient to locate the foundation of current pace of regional integration in the Sirte declaration, important as it has come out to be, it was a continuation of what was already set in motion many years ago as part of erstwhile efforts to accelerate regional cooperation and integration for development in Africa.

⁸⁸ PAP Protocol, art 3(2).

⁸⁹ Demeke (n 9 above) 62. Between the EP, the PAP and the PACE, it appears that the PACE's commitment to human rights issues is more pronounced as it is rooted in the founding documents of the Council of Europe. It has been observed that the PACE 'set the protection of human rights as its priority.' Further that '[t]he Assembly's attitude has always been favourable to the extension of rights and the strengthening of democracy, and it has brought pressure to bear on governments in matters such as racism and intolerance, the rights of peoples, minority languages, and in particular the abolition of the death penalty.' That is why one of the membership requirements to the Council of Europe is that the state should be a democratic country governed by the rule of law and human rights; See generally LM de Puig *International Parliaments* (2008) 52 – 53; B Haller *Assembly for Europe* (2006) 66 – 101.

⁹⁰ As above.

⁹¹ The Treaty establishing the European Coal and Steel Community (ECSC) was signed in Paris by Belgium, France, Italy, the Federal Republic of Germany, Luxembourg and the Netherlands. It entered into force for a 50-year period. <http://www.europarl.europa.eu/parliament/archive/staticDisplay.do?id=77&pageRank=13&language=EN> (accessed 26 June 2010).

Establishing the European Economic Community (EEC) (Treaty of Rome),⁹² are silent about human rights. Before the significant amendment was made by the Maastricht Treaty, which introduced the co-decision procedures of the EU, the EP had to operate with the little powers that were conferred upon it by the founding treaties.⁹³ It can be concluded that compared to the EP, the PAP stands in a better position in so far as the promotion of human rights is concerned. In that sense, the PAP is more like the PACE, which also has an explicit human rights mandate.

3.3.3.6 Functions and powers of the PAP

The PAP Protocol provides that the PAP

shall be vested with legislative powers to be determined by the Assembly. However, during the first term of its existence, the Pan-African Parliament shall exercise advisory and consultative powers only.⁹⁴

The Protocol further provides that during its first five years, the PAP will be able to discuss or express an opinion on any matter raised by its members or at the request of one of the other policy organs.⁹⁵ After deliberations, the PAP is free to make such recommendations as it deems appropriate and is mandated to make such recommendations on ‘any matter’ including issues pertaining to the respect of human rights, consolidation of democracy, the promotion of good governance in Africa and the promotion of the rule of law.⁹⁶

⁹² Also known as the Treaty of Rome, signed March 25 1957. Original Founding treaty of the EEC, since renamed the European Community (EC), and integrated as part of the European Union (EU). The main provisions of the treaty still apply, but it has been amended by later treaties so should not be regarded as a current version. Various provisions have been reworded and renumbered. <http://www.britannica.com/EBchecked/topic/508886/Treaty-of-Rome> (accessed 13 March 2011).

⁹³ M Shackleton ‘The European Parliament’ in J Peterson & M Shackleton (eds) *The institutions of the European Union* (2003) 107.

⁹⁴ PAP Protocol, art 11.

⁹⁵ PAP Protocol, art 11(1)

⁹⁶ As above.

The PAP as one of the 'legislative' organs of the AU is supposed to have an oversight role over the AU executive.⁹⁷ As of now, its mandate is limited to deliberating on issues and adopting reports and non-binding recommendations.⁹⁸ However, 'its evolution into a legislative organ is anticipated as regional integration is strengthened and the need for the harmonisation of laws in Africa increases.'⁹⁹ The legislative mandate of the PAP remains one of the most important mandates of the continental body and, as such, is important in so far as the promotion of human rights in Africa is concerned. The acceptance of this mandate is also highlighted by the debates surrounding its functions and powers after it had concluded its inaugural five year term.¹⁰⁰ These and other aspects of the legislative mandate of the PAP will be discussed further in the assessment of the PAP's ability and capacity to be afforded legislative powers.

The PAP is mandated to discuss its budget and the budget of the AEC/AU and to make recommendations before the approval of the budget by the Assembly.¹⁰¹ It is further mandated to work towards the harmonisation and coordination of laws of the member states,¹⁰² policies, measures, programmes and other activities of Regional Economic Communities (RECs)¹⁰³ as well as the parliamentary *fora* and to promote the programmes and objectives of the AU in the constituencies of the member of member states. The PAP can make recommendations aimed at contributing to the attainment of the objectives of the AEC/AU and draw attention to the challenges facing the integration process in Africa as well as make recommendations on how to deal with such challenges.¹⁰⁴ It can also request officials of the AU to attend its sessions, produce documents or assist in the discharge of its duties, adopt its rules of procedure, elect its president and decide on such matters as the size of the AU Assembly as well as on the required

⁹⁷ Resolution on Oversight (AU Doc PAP-Res 004/04); Viljoen (n 15 above) 186.

⁹⁸ Press statement, LLM students in human rights and democratization in Africa, Centre for Human Rights, University of Pretoria <www.chr.up.ac.za> (20 September 2008); see also Centre for Human Rights 'The role of the PAP in conflict resolution and peacemaking in Africa' <www.chr.up.ac.za> (20 September 2008).

⁹⁹ Viljoen (n 15 above) 184.

¹⁰⁰ South African Institute of International Affairs (2009) *Pan African Parliament: Evaluating an Evolution*.

¹⁰¹ PAP Protocol, art 11(2).

¹⁰² As above, art 11(3).

¹⁰³ As above, art 11(7).

¹⁰⁴ As above, art 11(4).

staff of the PAP. The PAP is also allowed to undertake such duties that it might deem to be necessary or appropriate to achieve the objectives set out in Protocol.¹⁰⁵

The powers of the Parliament as provided for by the PAP Protocol can be grouped or categorised in the light of the traditional functions of parliaments as discussed in chapter 2 above. These include the power to make laws, the harmonisation of such laws and policies, the oversight or advisory functions of the parliamentary body on budgetary issues of the AEC/AU. As Demeke points out, the exercise of legislative, budgetary and supervisory powers by parliaments allows them to properly participate in the relevant AEC/AU's decision-making process and are common to most parliaments, be they national or regional.¹⁰⁶ The classification of the powers of the PAP in the above manner is in line with the traditional functions of parliaments which are generally to legislate and to advise other branches of the government on pertinent policy issues and matters affecting their constituents including the budget.

If the traditional demarcation of the functions of parliaments into legislative or non-legislative functions is adopted, the advisory and consultative powers or functions of the PAP would best be described as non-legislative in nature.¹⁰⁷ The task of the PAP in that respect has been to allow and create space for the democratic input into the AU's decision-making processes. The PAP is supposed to deliberate on issues affecting the welfare of the citizenry with the aim of coming up with informed solutions to the problems that bedevil Africa. These debates take place during the ordinary sessions of the Parliament and are held in Midrand, South Africa, which is the seat of the PAP. The Parliament usually holds two ordinary sessions in a year, usually not exceeding a period of a month per session.¹⁰⁸ At the moment, the Parliament meets twice a year and its sessions normally last for a period of about seven days. The length of the sessions and the work that is supposed to be done by the Parliament within that one week may cause one to question the effectiveness of the Parliament. It seems doubtful that all relevant decisions, debates and resolutions could be adequately dealt with within that one week.

¹⁰⁵ PAP Protocol, art 11(9) as read with art 3.

¹⁰⁶ Demeke (n 9 above) 55.

¹⁰⁷ PAP Protocol, art 11.

¹⁰⁸ PAP Protocol, art 14; PAP Rules of Procedure, rule 28.

The PAP may hold an extraordinary session if two-thirds of the Pan-African Parliamentarians, or the Assembly or the Council, through the Chairperson of the African Union, by written notification to the President of the Parliament, request that an extraordinary session be convened.¹⁰⁹ Such a request must be accompanied by a motivation for and details of the matters to be discussed at the proposed extraordinary session.¹¹⁰ If an extraordinary session is convened, only matters included in the agenda will be discussed at that session. To date no extraordinary session has been convened. This is perhaps due to the fact that a two-thirds majority is required to call an extraordinary meeting and garnering the support of two-thirds of members of the Parliament may be an onerous task. Issues such as the geographic location of the various PAP Parliamentarians, intermittent internet connection necessary for communication, as well as insufficient financial resources, may possibly also have acted as hindrances to convening an extraordinary session.

The business of the Parliament during its ordinary sessions is rather straightforward. Members of the Parliament table motions to be deliberated by the House, debate over such issues as well as ask questions relating to the various thematic issues that may be presented to the Parliament. They further '[e]xamine, discuss or express an opinion on any matter'¹¹¹ during these sessions. Following such deliberations, Parliament may make recommendations it deems fit in relation to respect for human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of democracy in Africa.¹¹² Such recommendations are not binding on the AU Assembly or any AU policy organ, since they are mere recommendations or opinions to the relevant body affected by the Parliament's deliberations.

In furtherance of such powers, the Parliament may request AU officials to attend its meetings or produce documents or assist in the discharge of its functions, adopt rules of procedure that will govern the running of the Parliament, appoint the President, propose to the Council

¹⁰⁹ PAP Protocol, art 14(3) as read with Rule 29 of the PAP Rules of Procedure.

¹¹⁰ PAP Rules of Procedure, rule 29.

¹¹¹ PAP Protocol, art 11(1).

¹¹² As above.

Parliament's staff complement and perform such other functions as it deems appropriate to achieve its objectives.¹¹³

Since its establishment, the PAP has undertaken several activities pursuant to fulfilling or performing its functions under the PAP Protocol. The Parliament has held two ordinary sessions per year since its inauguration in 2004. It is during these sessions that the Parliament debate motions and questions tabled before it. As a result of these debates, recommendations and resolutions have been passed by the Parliament on issues such as elections, economy, culture and cooperation. Some of these resolutions and recommendations are country-specific. Several fact-finding missions have been undertaken by the PAP to a number of countries, with reports of such missions tabled before the Parliament once the mission has been completed.

3.4 The Rules of Procedure of the Pan-African Parliament

During its second ordinary session in 2004, the PAP adopted its Rules of Procedure.¹¹⁴ The Rules of Procedure were adopted in order to provide for the proper running of the Parliament as well as to cater for such matters as would not have been adequately provided for under the Protocol such as the conduct of the sittings and debates of the Parliament,¹¹⁵ order in the chamber,¹¹⁶ issues pertaining to motions,¹¹⁷ questions during parliamentary debates,¹¹⁸ petitions to the Parliament,¹¹⁹ relations with regional and national parliaments,¹²⁰ and relations with other organs of the AU.¹²¹

¹¹³ PAP Protocol, arts 11(5), (8) & (9).

¹¹⁴ This was pursuant to article 17 of the Constitutive Act of the AU, which provides that the composition and powers of the PAP shall be defined in the protocol related thereto, and article 12 of the PAP Protocol which provides that 'the Pan-African Parliament shall adopt its own Rules of Procedure on the basis of a two-thirds majority of all its members.'

¹¹⁵ PAP Rules of Procedure, rule 38 - 48.

¹¹⁶ As above, rule 49 – 54.

¹¹⁷ As above, rule 60 – 66.

¹¹⁸ As above, rule 67- 71.

¹¹⁹ As above, rule 72.

¹²⁰ As above, rule 77.

¹²¹ As above, rule 73 – 76.

To provide for such matters in detail, the Rules of Procedure of the PAP are divided into twenty parts. The Rules deal with the preliminaries and functions of the PAP, thus reiterates what the PAP Protocol provides for in so far as the functions and powers of the Parliament are concerned.¹²² The Rules also provide for issues relating to the MPAPs, in particular, issues relating to tenure and mandate of members, vacation of seat of the members, oath, privileges and immunities, waiver of such immunity and the code of conduct of the Parliament according to which the behaviour of the members should be guided in all matters pertaining to the Parliament.¹²³

The Rules also deal with issues relating to the composition of the Bureau of the Parliament and parliamentary committees.¹²⁴ These will be discussed in detail below when a discussion of the institutional structure of the PAP is provided. Matters relating to the way the meetings of the PAP will be regulated, in particular, the order of the business, the conduct of sittings and debates, order in the chamber, quorum, debates and motions are also provided for under the Rules.¹²⁵ The Rules then go on to provide for the way petitions by any citizen of a member state and any natural person or legal person residing or having their registered office in any member state, may be submitted to the Parliament.¹²⁶

Statements to be made by the chairpersons of the Assembly, Executive Council or the Commission are also provided for under the Rules.¹²⁷ These statements may, but do not necessarily have to be, explanations about the decisions of the Assembly. These statements must be followed by a debate by MPAPs. The Rules under this part further provides for the debates of the annual reports and other reports of other organs of the AU.¹²⁸ The Rules make provision for the relationship of the PAP with regional and national parliaments, with particular

¹²² PAP Rules of Procedure, Part I and II.

¹²³ As above, Part III.

¹²⁴ As above, Part IV and V.

¹²⁵ As above, Part VI, VII, VIII, IX, X, XI and XII.

¹²⁶ As above, Part XIII; The petition procedure has been discussed in detail in chapter IV.

¹²⁷ As above, Part XIV.

¹²⁸ These and other issues relating to the relationship of the PAP with other organs of the AU will be discussed later in the study.

emphasis being placed on the exchange of information, contacts and reciprocal facilities by the Rules under this part.¹²⁹

The Rules also provide that the modalities of putting together official verbatim reports of proceedings, journals and records of the House and Permanent Committees will be produced, handled and stored.¹³⁰ The drafting and procedure of considering the budget of the Parliament by the Plenary is provided in the following part of the Rules.¹³¹ It is further provided under this part that the PAP must discuss the budget of the Union and make recommendations through the Permanent Committee on Monetary and Financial Affairs to the AU Assembly.¹³²

The Rules also provides for miscellaneous matters such as public access to the documents of the Parliament, maintenance of the attendance register for the MPAPs at each sitting of the Parliament or Permanent Committees, leave of absence of Members, the annual parliamentary programme, accounts and audit.¹³³ Rule 91 provides for the application of these Rules and it is provided therein that one of the functions of the Permanent Committee on Rules, Privileges and Discipline should be responsible for making any necessary clarifications on the interpretation and application of the Rules.¹³⁴

3.5 The institutional framework of the Pan-African Parliament relevant to the promotion of human rights

The previous discussion was focused on the main documents of the PAP, with a specific bias towards the PAP Protocol, and concomitantly the powers of the Parliament as discernible from such documents. The following discussion deals with the institutional structure, powers and functions of the organs of the PAP, which are the Plenary, the Bureau and its various Permanent

¹²⁹ PAP Rules of Procedure, Part XV.

¹³⁰ As above, Part XVI.

¹³¹ Part XVII.

¹³² The budgetary power of the PAP has been discussed in detail, under part 3.6.2 below.

¹³³ Part XIX.

¹³⁴ The functions of the Permanent Committee on Rules, Privileges and Discipline will be discussed in detail under the discussion of the Institutional structure of the Pan-African Parliament below.

Committees.¹³⁵ This part further discusses how the PAP fits or is supposed to operate within the AU institutional machinery as a whole. This discussion on PAP will further assess whether indeed the PAP may play an oversight function over other AU organs.

3.5.1 The Plenary

As already highlighted, membership of the PAP is open to those countries who are members of the AU or state parties to the AEC Treaty. Each member state is represented by five representatives usually elected from the respective national parliaments or deliberative organ, whichever is applicable to a particular country. All member states' representatives to the PAP, together make up the Plenary, which remains the cornerstone and central organ of the Parliament.

None of the founding documents of the PAP makes any specific reference to the word 'Plenary' because the Plenary is in essence the Parliament. All the functions and powers of the PAP, as elaborated and specifically provided for under the PAP Protocol, are carried out by the Plenary.¹³⁶ One specific function of the Plenary is to debate the various issues and questions tabled before the Parliament. The Plenary addresses various issues of concern to Africans and passes resolutions which are taken to be the voice of Africans through the PAP.

Further to the above, the Plenary is tasked with the duty of taking all decisions pertaining to the workings of the Parliament. For example, the Plenary is responsible for adopting or approving the Parliament's budget prior to its presentation to the AU Assembly. It is also responsible for the adoption and amendment of the Rules of Procedure of the Parliament. Additionally, the Plenary is responsible for examining and debating the budget of the AU and make recommendations thereon prior to its approval by the Assembly.¹³⁷

¹³⁵ PAP Rules of Procedure, rule 3.

¹³⁶ PAP Protocol, art 11, read with Rule 4 of the PAP Rules of Procedure.

¹³⁷ PAP Protocol, art 11.

3.5.2 The Bureau

The management and administration of the PAP are the responsibility of the PAP Bureau, which is ultimately responsible for the organisation and operation of the Parliament as an institution.¹³⁸ The Bureau is composed of the President and four Vice-Presidents representing the five African regions. The President and the Vice-Presidents are responsible for the management and administration of the affairs and facilities of the Parliament and its organs.¹³⁹ They are under the control and direction of the President and are subject to such directives as may be, from time to time, issued by the Parliament.¹⁴⁰ The President and the four Vice-Presidents are assisted by the clerk and two deputy clerks¹⁴¹ who, supported by the other management and support staff, constitute the PAP Secretariat.¹⁴²

The PAP Rules of Procedure outlines the duties of the Bureau in detail and it provides that the Bureau is responsible for the management and administration of the affairs and facilities of Parliament and its organs.¹⁴³ The Bureau is further responsible for regulating the procedures relating to the financial, organizational and administrative needs of the PAP in accordance with the financial rules of the AU.¹⁴⁴ It is in that context that the Bureau is tasked with the preparation of the draft budget and its presentation to the Committee on Monetary and Financial Affairs.¹⁴⁵ Some functions of the Bureau include the day to day running of the Parliament and its support structures and the harmonization and coordination of the functions of the permanent committees. Most importantly, the duty of the Bureau has been to determine the establishment of the PAP Secretariat and to lay down regulations for the staff, including their terms and conditions of service.¹⁴⁶ As already mentioned the PAP Bureau is tasked with ensuring that the Parliament operates effectively and therefore remain one of the crucial organs

¹³⁸ 2006-2010 PAP Strategic Plan, 21.

¹³⁹ PAP Protocol, art 12(5); PAP Rules of Procedure, rule 3.

¹⁴⁰ PAP Protocol, art 12(5).

¹⁴¹ As above.

¹⁴² As above, art 12(6)

¹⁴³ PAP Rules of Procedure, rule 17.

¹⁴⁴ As above, rule 3.

¹⁴⁵ As above, Rule 17(g).

¹⁴⁶ As above, rule 3.

of the PAP. It has seen to the effective establishment of the PAP Secretariat at its seat in Midrand, has overseen the recruitment of the necessary personnel, and has developed their terms of conditions of service. As it has been noted, 'the Bureau of PAP is ultimately responsible for the organization and operation of the Parliament as an institution.'¹⁴⁷

3.5.3 The Pan-African Parliament Permanent Committees, with focus on the Pan-African Parliament's Permanent Committee of Justice and Human Rights (PCJHR)

To assist with dealing with issues that are placed before the Parliament the PAP initially created ten Permanent Committees.¹⁴⁸ It appears that the ten Permanent Committees were created in order to allow the Parliament to coordinate the various activities of the PAP on the continent dealing with different aspects of life in Africa. In particular, the PAP established the following committees: the Committee on Rural Economy, Agriculture, Natural Resources and Environment; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Co-operation, International Relations and Conflict Resolutions; the Committee on Transport, Industry, Communication, Energy, Science and Technology; the Committee on Health, Labour and Social Affairs; the Committee on Education, Culture, Tourism and Human Resources; the Committee on Gender, Family, Youth and People with Disability; the Committee on Justice and Human Rights; and the Committee on Rules, Privileges and Discipline.

A closer look at the committees will reveal that they are modelled around the AU specialised technical committees as provided for under the AU Constitutive Act.¹⁴⁹ In fact, the PAP Rules of Procedure provides that the respective committees will carry out work that is handled by the corresponding Specialised Technical Committee responsible to the Executive Council of the AU.¹⁵⁰ However, further scrutiny of the Specialised Technical Committees of the AU and the

¹⁴⁷ 2006-2010 PAP Strategic Plan, 3.

¹⁴⁸ PAP Rules of Procedure, rule 22.

¹⁴⁹ AU Constitutive Act, art 14.

¹⁵⁰ PAP Rules of Procedure, rule 25(2).

Permanent Committees of the PAP reveals that there are some Permanent Committees of the PAP that are without any corresponding Specialised Technical Committees. These are the PAP Permanent Committee on Cooperation, International Relations and Conflict Resolutions; the Permanent Committee on Gender, Family, Youth and People with Disability; the Permanent Committee on Justice and Human Rights; and the Committee on Rules, Privileges and Discipline. Therefore, the impression created by the PAP Rules of Procedure that there are corresponding technical committees for all the PAP Permanent Committees is misplaced.

Permanent Committees are made up of not more than thirty members, with each region appointing at least three members to the Committee.¹⁵¹ When making such an appointment, the Rules of Procedure enjoins the region to take into account gender balance.¹⁵² However, the Rules do not provide for any quota for the women that are expected to be appointed by the region to any of the Permanent Committees. One of the limitations imposed on membership to the various Permanent Committees is that one member is not allowed to serve in more than one Committee at the same time.¹⁵³

The general functions of the Permanent Committees are set out under the PAP Rules of Procedure,¹⁵⁴ which provide at the outset '[t]hat the President shall, on the advice of the Bureau, determine the business to be handled by the Committees' and that the Parliament may allocate any other matter to any Committee it deems appropriate.¹⁵⁵ The specific functions of the Committees are then set out in Rule 26 of the PAP Rules of Procedure. Even though the activities of the various Permanent Committees of the PAP are important, for the purposes of this study, emphasis will be placed on the work carried out by the Permanent Committee on Justice and Human Rights and, where necessary, the Permanent Committee on Gender, Family, Youth and People with Disability and the Permanent Committee on Cooperation, International Relations and Conflict Resolutions. These are the Permanent Committees which are, regard

¹⁵¹ PAP Rules of Procedure, rule 22(5).

¹⁵² As above.

¹⁵³ As above, rule 22(11).

¹⁵⁴ As above, rule 22(11).

¹⁵⁵ As above, rule 25 (3).

being had to their functions as spelt out by the PAP Rules of Procedure, most likely to be carrying out the bulk of the human rights work of the Parliament.

The Permanent Committee on Justice and Human Rights is responsible for assisting the PAP in its role of harmonising and coordinating the laws of member states.¹⁵⁶ The Committee is also responsible for promoting the respect and development of sound principles of freedom, civil liberties, justice, human and peoples' rights and fundamental rights within the Union.¹⁵⁷ The Permanent Committee on Gender, Family, Youth and People with Disability is largely responsible for considering issues relating to the promotion of gender equality, and the Committee is supposed to oversee the development of policies and activities of the Union relating to family, youth and people with disabilities. One notable function of the Permanent Committee on Cooperation, International Relations and Conflict Resolutions is to assist the Parliament in its efforts of conflict prevention and resolution.¹⁵⁸

As mentioned earlier, the Parliament operates through specialised permanent committees, mainly to assist with issues that are placed before the Parliament. The Permanent Committee on Justice and Human Rights (PCJHR) is primarily responsible for assisting the PAP in its role of harmonising and coordinating the laws of member states.¹⁵⁹ The PAP Protocol provides that the 'Pan-African Parliament may establish such committees, as it deems fit, for the proper discharge of its functions and in accordance with its Rules of Procedure.'¹⁶⁰ The above provision also gives the Parliament the flexibility to establish additional committees. That is why the Parliament was able to establish an additional Committee. In 2010 the PAP resolved, through a resolution, to establish an eleventh Committee, being the Committee on Finance, Evaluation and Administration (CAFE). It is not clear from the resolution establishing this Committee whether it will also be permanent. The composition of the Committee will be in accordance with the PAP Rules of Procedure comprising of at least two members from each regional caucus. The

¹⁵⁶ As above, rule 26(9)(a).

¹⁵⁷ As above, rule 26(9)(b).

¹⁵⁸ As above, rule 26(4)(d).

¹⁵⁹ As above, rule 26(9)(a).

¹⁶⁰ PAP Protocol, art 12(13).

Committee is responsible for carrying out the evaluation of normal and regular operation of the PAP at the administrative and financial level.¹⁶¹

In consequence of the above provisions, the PAP established several permanent committees including the PCJHR, under its Rules of Procedure.¹⁶² The PCJHR is made up of 30 members with three members from the various regions of the continent. It is expected that it should be ordinarily gender balanced.¹⁶³ Like the rest of the Committees, the PCJHR is led by the President, a Vice-President and a Rapporteur who are elected from among the members of the Committee.

There are no further rules relating to the composition of the Committees of the PAP. For example, even though the Rules of Procedure provides that the composition of the Committee should take into account gender balance, it does not specifically set out the number of women expected to be appointed to a particular Committee.¹⁶⁴ The issue of gender representation to the PAP in general has been identified as insufficient and one wonders whether the same problem is likely to extend even to the Committees. The logic behind ensuring that there is enough representation of women in the PCJHR or any other committee for that matter, is perhaps the fact that a sufficient representation of women in these committees is likely to ensure that strategies, policies and decisions of the Committee will be gender sensitive taking into account the challenges faced by women on the continent.¹⁶⁵ Additionally, this could be to conform to international standards as regards the representation of women in various positions of leadership.¹⁶⁶

There is neither mention nor any requirement that the Parliamentarians appointed to those committees should have experience in the field of speciality of that Committee. As the rules

¹⁶¹ Resolution on the Establishment of a Committee on Administrative and Financial Evaluation of the Pan-African Parliament.

¹⁶² PAP Rules of Procedure, rule 22(5).

¹⁶³ As above.

¹⁶⁴ As above.

¹⁶⁵ See generally L Wangnerud 'Women in parliaments: Descriptive and substantive representation' (2009) 12 *Annual Review of Political Science* 51.

¹⁶⁶ As above.

stand now, there is no guarantee that those appointed to the PCJHR have knowledge on pertinent issues of justice and human rights. This is so, despite that the duties the PCJHR will be expected to perform require a particular level of experience, and the fact that human rights issues may be quite technical.

The composition of the PAP Permanent Committees has been afforded little attention, in so far as the rules relating to their composition is concerned. Normally, practices of representativeness require that there exist a solid normative framework within which such practice will rest. It is therefore insufficient to assert that even though there are no rules ensuring that the composition of the committees is equitable, the Parliament will ensure that there is representation of diverse views within that committee. Even though the Rules of Procedure of the EP on the composition of committees does not provide for such issues as gender representation, it nonetheless provides that the composition of the committees shall, as far as possible, reflect the composition of Parliament.¹⁶⁷ They further provide a mechanism of ensuring that the representativeness of the Committees is not compromised by members of Parliament who change political party affiliations.¹⁶⁸ In the main, members of Parliament who change political parties are allowed to hold their seat provided that their change of political group does not have the effect of disturbing the fair representation of political views in a committee.¹⁶⁹

Thus the appointment of members of Committees is as important as the appointment of MPs to the Parliament by member states. This is so because Committees are in essence the ‘heart of the internal attempt by the Legislature to cope with external factors’.¹⁷⁰ They are in fact the focal points of the parliaments and as such ‘[c]ommittees, by their very existence, raise all of the questions within parliament that are commonly expressed about parliament itself, or representation, accountability, accessibility, and of rights and obligations.’¹⁷¹ Unfortunately, it

¹⁶⁷ Rules of Procedure of the European Parliament, rule 177.

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ DM Olson & WE Crowther (eds) *Committees in post-communist democratic parliaments: Comparative institutionalisation* (2002) 5.

¹⁷¹ As above, 6.

appears that this otherwise crucial point was missed by the drafters of the Rules of Procedure of the PAP.

Parliamentary permanent committees are usually the machinery of the parliament and it is through them that the work of the parliament is carried out. They have been described as ‘ubiquitous for parliamentary institutions’¹⁷² and as indicators of institutionalisation.¹⁷³ The Rules of Procedure of the PAP established the PCJHR for the purpose of coordinating all activities of the PAP aimed at promoting human rights.

The more general functions of the PCJHR are to handle business as determined by the President of the Parliament on the advice of the Bureau.¹⁷⁴ Further to ‘handle business that is ordinarily handled by the corresponding specialised Technical committee responsible to the executive Council in accordance with article 14 of the Constitutive Act. More specifically, the PCJHR must, amongst others, (a) assist Parliament in its role of harmonising and coordinating the laws of the member states and (b) promote the respect and development of sound principles of freedom, civil liberties, justice, human and peoples’ rights and fundamental rights within the Union.¹⁷⁵ The foregoing are the provisions pertaining to the mandate of the PCJHR as discernible from the Rules of Procedure.

A cursory look at the functions of the PCJHR as provided for under the PAP Rules of Procedure¹⁷⁶ is likely to lead one to the conclusion that the mandate of the PCJHR is somewhat limited. However, upon closer inspection, the Rules of Procedure reveal that the Committee is empowered to do more as regards human rights issues. Most importantly, the Rules provides for the two most important functions of the PCJR: the harmonisation and coordination of the laws of the member states; and the promotion of human rights on the continent. The Rules further reinforces my earlier submission that the PAP is only mandated to ‘promote’ human rights on the continent.¹⁷⁷ If purposively interpreted the Rules of Procedure, as regards the role

¹⁷² As above.

¹⁷³ Olson & Crowther (n 170 above) 6.

¹⁷⁴ Rules of Procedure of the PAP, rule 25.

¹⁷⁵ As above, rule 26(9)(b).

¹⁷⁶ As above, rule 29.

¹⁷⁷ As above.

of the PCJHR, allows the PCJHR to address various issues relating to human rights as well as perform various functions as regards the promotion of human rights in Africa.

Considering what the PAP has done as regards human rights, it is not clear what exactly the architects of the PAP envisaged in relation to the duty of the PCJHR to harmonise the laws of the member states. It is however conceivable that they referred to harmonisation not in any different context than to the duty of the PAP to ensure consistency amongst the laws of the member states with a view of ensuring a common standard across the continent. This conception of harmonisation envisages the possibility of having uniform laws on the continent.

To date, the Committee has been involved in several activities that are aimed at furthering the respect for human rights in Africa. The activities of the Committee are largely characterised by workshops, fact-finding missions, elections observer missions as well as lobby work in relation to the ratification of human rights instruments as well as capacity building. A perusal of the Committee's 2009 action plan and budget for the years 2007 to 2010 for example indicates that the Committee has classified its activities as observation, fact-finding activities, institutional exchange and partnership activities, promotion activities, research, study and documentation activities and activities relating to international justice.¹⁷⁸ This is clearly in line with the mandate of the Committee which is essentially to act as a vehicle for the Parliament to promote the respect of human rights and justice in Africa. A further perusal of the available Committee reports reveal that there is no particular format that the report follow so as to make more nuanced the above demarcation of its mandate. The end result is that the reports come across as incoherent and in the process failing to really make known the important work that the Committee undertook.

3.5.4 Other Permanent Committees of the Pan-African Parliament relevant to the promotion of human rights

Admittedly, most of the committees of the PAP are in some way tasked with addressing human rights issues. For example, the Committee on Education, Culture, Tourism and Human

¹⁷⁸ The budget for the years 2007 – 2010 of the Committee on Justice and Human Rights relating to the Work Plan on the basis of the Strategic Plan of the Pan-African Parliament; Committee on Justice and Human Rights – Action Plan 2008 – 2009 (both on file with the author).

Resources is tasked with the duty of preserving culture and promoting access to education.¹⁷⁹ The Committee on Rural Economy, Agriculture, Natural Resources and Environment is responsible for promoting and assisting with the harmonisation of policies for rural and agricultural development which is likely to foster food security on the continent.¹⁸⁰ The Committee on Health, Labour and Social Affairs is mandated to consider strategies and programmes for the ‘improvement of the lives of African peoples’.¹⁸¹ This is largely because human rights is a cross-cutting issue and will generally be dealt with by other permanent committees of the Parliament.

Closely connected to human rights issues are two permanent committees, the Permanent Committee on Cooperation, International Relations and Conflict Resolutions; and the Permanent Committee on Gender, Family, Youth and People with Disability. The mandate of the former is specifically to assist the Parliament in matters pertaining to conflict resolution as well as to periodically review the various instruments of the Union. As will become apparent later in the chapter, it is this permanent committee which has carried out a number of activities on the continent. The mandate of the Committee on Gender, Family, Youth and People with Disability is to assist the Parliament on issues relating to the ‘family, youth and people with disabilities’,¹⁸² and to promote gender equality on the continent.¹⁸³ Both these permanent committees are necessary and have been instrumental in the various attempts by the Parliament to achieve its objectives related to the promotion of human rights in Africa.

3.6 Main features of the Pan-African Parliament

3.6.1 The advisory and consultative powers of the Pan-African Parliament

One of the traditional functions of parliaments the world over is to make laws and to monitor or supervise other branches of government. As a result, the government is usually vested with the power to make laws for it to do more than deliberate over issues of national interest. It is

¹⁷⁹ Rules of Procedure of the PAP, rule 26(7).

¹⁸⁰ As above, rule 26(1).

¹⁸¹ As above, rule 26(6).

¹⁸² As above, rule 26(8).

¹⁸³ As above.

through the exercise of its legislative powers that policies of a particular government are implemented. Even though parliaments have come to be ascribed more roles than was traditionally envisaged – such as being conceived as custodians of democracy – they are nonetheless still expected to pass laws and act as oversight mechanisms.

Regional Parliamentary Assemblies (RPAs), such as the PAP and the EP, are thus expected to act as an oversight mechanism for the respective communities. It has, however, come to pass that the position of supranational parliaments is not as straightforward as is the case with national parliaments. While at the national level the distinction between the executive, the legislature and the judiciary is mostly maintained quite clearly, the division of power at the regional level remain contentious and is always politicised in the absence of a clear distinction between the executive, the legislature and the judiciary. As a result, whether a regional parliament exercises legislative powers does not come as a matter of course, but is dependent on the provision of such powers under the enabling statute. In the case of the PAP, these powers are as set out under the PAP Protocol.

The ultimate aim of the PAP is to evolve into an institution with full legislative powers and it will, until such time as the AU Member states decide otherwise by amendment to the Protocol, have consultative and advisory powers only.¹⁸⁴ Until it attains full legislative powers, the PAP will merely advise and consult with other organs of the AU on issues concerning, among other things, the promotion of human rights and democracy, good governance, transparency, as well as peace, security and stability in Africa.¹⁸⁵ Accordingly, the PAP presently does not possess any legislative powers.¹⁸⁶

The PAP's lack of legislative has over time generated intense debates as to the effect of the absence of such powers on the effectiveness of the PAP and, concomitantly, on the PAP's potential once it has achieved those powers. In fact the demand for the PAP to have legislative

¹⁸⁴ PAP Protocol, art 11 as read with art 2(3)(i).

¹⁸⁵ PAP Protocol, art 2(3)(i).

¹⁸⁶ Demeke (n 9 above) 55; Magliveras & Naldi (n 7 above) 225.

powers has been made since the establishment of the PAP, dating as far back as 2004.¹⁸⁷ Demeke points out that the PAP ‘does not possess important legislative and supervisory powers to participate in important decision-making processes of the AU pertaining to the budget of the organisation’¹⁸⁸ and concludes by arguing that, considering the limited powers of the PAP, ‘one may be tempted to conclude that the Pan-African Parliament is not a powerful institution.’¹⁸⁹ Even though Demeke acknowledges that the PAP is part of a rather ambitious process of strengthening the institutional framework necessary for the political and economic integration of Africa,¹⁹⁰ Mpanyane is of the view that, because of the PAP’s lack of legislative powers, coupled with its weak decision-making role within the AU, the PAP is bound to remain less effective than it could be.¹⁹¹ Navarro points out that even though the PAP Protocol widens the scope and competences of the PAP beyond what the AEC Treaty and the Constitutive Act of the AU had anticipated,¹⁹²

[t]he PAP does not yet have the ability to constrain the internal decision-making process or the budget of the AU: its competencies are exclusively deliberative and advisory. The PAP has no power whatsoever in nominating or censuring the Commission.¹⁹³

Mashele also highlights the anomaly in the following terms:

During its interim period, the Pan-African Parliament will effectively be an assembly of parliamentarians – not dissimilar to the various regional parliamentary bodies in Southern, Western and Eastern Africa that have been established in recent years. Inevitably, the initial impact of the continental body on the political landscape traditionally dominated by strong men

¹⁸⁷ O Nzewi ‘Rapid or incremental change: Assigning greater legislative powers to the Pan African Parliament’ Research Report 123, Centre for Policy Studies, Johannesburg, March 2010, 1.

¹⁸⁸ Demeke (n 9 above) 55.

¹⁸⁹ As above, 58.

¹⁹⁰ As above.

¹⁹¹ Mpanyane (n 1 above) 3.

¹⁹² J Navarro ‘The Creation and transformation of regional parliamentary assemblies: Lessons from the Pan-African Parliament’ (2010) 16 *The Journal of Legislative Studies* 201.

¹⁹³ As above, 202.

(no women yet) and executive diktat will be limited – but its ability to make an impact will grow.¹⁹⁴

Nzewi is also of the view that the fact that the PAP does not have legislative powers is indicative of the reluctance of the AU to turn the PAP into a fully-fledged legislative body in Africa.¹⁹⁵

It admits of no doubt that the ability of the PAP to perform its oversight function over the AU is important and is likely to bring transparency in the decision-making process of the AU. A more involved participation of the PAP in the decision-making processes of the AU will be a step towards greater accountability and participatory democracy in Africa. However, the PAP at the moment can only deliberate and make recommendations to other policy organs of the AU. To some the PAP is not yet a Parliament in the classical sense as it does not have legislative powers. Indeed, considering its current mandate, one may conclude that the PAP is nothing more than another duplication of institutions within the African system providing yet another forum for deliberation, as opposed to offering action or implementation of the ideals of the people.¹⁹⁶ Two pertinent issues can therefore be distilled from the foregoing discussion on the ‘advisory and consultative’ functions of the PAP.

First, the Rules of Procedure and most importantly the PAP Protocol and the Sirte Declaration do not use the words ‘oversight’ or ‘supervisory’ to suggest that the PAP will automatically become an oversight or supervisory body within the AU system. It can be argued that since there is no reference in the aforementioned documents of the exercise of any supervisory powers by the PAP, any expectation that the Parliament would immediately upon establishment play an oversight function is misplaced. An immediate exercise of oversight powers cannot be read into or derived from the PAP Protocol as it clearly provides that the Parliament will, until its powers are reviewed, play a consultative role.

¹⁹⁴ Cilliers & Mashele (n 9 above) 78.

¹⁹⁵ Nzewi (n 187 above) 12.

¹⁹⁶ Viljoen (n 15 above) 184; Demeke (n 9 above) 58.

An analysis of the few writings on the PAP indicates that most authors have missed this critical point and have dismissed the PAP as another ineffectual institution created by the AU architects, without showing cognizance of the longer term possibilities. In fact, it has been argued by some that the ‘PAP is largely a political project to build legitimacy and support for the larger pan-African integration scheme rather than a serious tool for integration itself.’¹⁹⁷ However, Mashele rightly points out – in response to calls for the Parliament to play an oversight role – ‘legally, this power configuration is not possible during the current interim period of the Parliament. That will only be possible once it has evolved into an institution with real legislative powers’.¹⁹⁸

Second, a worrisome issue that arises from the previous discussion on the ‘advisory and consultative’ powers of the PAP is that, by design, it has been relegated to an opinion-sharing forum and in the words of Viljoen, ‘into nothing more than a mere talk shop.’¹⁹⁹ This is so because during the drafting of the PAP Protocol the drafters avoided the use of any wording that would suggest the exercise of actual oversight within the AU by the Parliament, at least in the initial five years of its existence.

The perception of the PAP as an oversight body over the AU may have been influenced by the practice of other continental and sub-regional parliaments around the world, especially the EP. Some of them have an oversight role in the decision-making processes of their respective regions. Another reason could be that the PAP itself has interpreted its mandate to be supervisory in nature.²⁰⁰ The Parliament has categorically affirmed that it has an oversight mandate and that the Rules of Procedure of the PAP will assist the Parliament in the exercise of that function.²⁰¹ Within the background of the existing literature on the legislative powers of the PAP, the following two parts discuss the possibility of the PAP attaining legislative powers.

¹⁹⁷ Cilliers & Mashele (n 9 above) 79.

¹⁹⁸ As above, 77.

¹⁹⁹ Viljoen (n 15 above) 185.

²⁰⁰ Pan-African Parliament Resolution on Oversight, PAP-Res 004/04.

²⁰¹ As above.

3.6.1.1 Exploring the possibilities: The attainment of legislative powers by the PAP

In accordance with the provisions of the PAP Protocol itself, the PAP Protocol was to be subjected to review at the end of its five year initial term to ascertain the ‘operation’ and ‘effectiveness’ of the Protocol.²⁰² The AU Assembly took a decision to review the PAP Protocol during its 12th Ordinary Session in February 2009.²⁰³ The review process was initiated in June 2010 by the PAP in conjunction with the AU Commission. The launch was followed by a meeting that was attended by officials from various AU organs, the Regional Economic Communities (RECs) and the Regional Courts as well as other relevant institutions.²⁰⁴ A study that was conducted in 2010 on the PAP and the Protocol was tabled before the participants of that workshop for deliberation.²⁰⁵ The controversial article 8 of the Draft Revised PAP Protocol thus indicates that the PAP will have the power to make laws on areas identified by the AU Assembly.²⁰⁶ The Parliament is also given the power to propose areas in which it can legislate or make model laws.²⁰⁷ With respect to the consultant’s presentation on the proposed powers of the PAP, the participants highlighted that the Parliament’s areas of competence needed to be narrowed down due to the fact that ‘most member states were not willing to cede their sovereignty.’²⁰⁸ Other valid issues that were highlighted were that the PAP was not in a position to legislate and enforce laws,²⁰⁹ the effect of legislative powers of the PAP on the constitutional provisions of the member states and that the PAP could be given the power to make model

²⁰² PAP Protocol. art 5(1).

²⁰³ Decision Assembly/ AU/Dec, 223 (XII).

²⁰⁴ Draft Report of the Validation Workshop on the Expansion of the Jurisdiction of the Court of Justice and Human Rights and on the Review of the Pan-African Parliament Protocol, Legal/ACJHR-PAP/Draft/Rpt (I), 15.

²⁰⁵ The study was conducted and submitted to the PAP by Professor Kofi Kumado, Accra, Ghana (on file with the author).

²⁰⁶ Draft Revised PAP Protocol, 201 I, Legal/ACJHR- PA/4(II) Rev. I, art 8(1)(b).

²⁰⁷ As above, art (8)(1)(c).

²⁰⁸ Draft Report of the Validation Workshop on the Expansion of the Jurisdiction of the Court of Justice and Human Rights and on the Review of the Pan-African Parliament Protocol, Legal/ACJHR-PAP/Draft/Rpt (I), 15.

²⁰⁹ As above.

laws so as to assist the member states ‘who do not have the technical capacity.’²¹⁰ Following the validation workshop referred to above, the consultant reviewed report indicated that it was befitting that the Parliament should be given full legislative powers.²¹¹ The consultant also suggested the following:

Further consideration of the issues since the first Validation Workshop has led to the conclusion that the limitation should be dropped. Instead PAP should be given full recognition as the legislative organ of the AU. This conclusion and its consequences have been reflected in the new Draft Protocol. In this regard, the Study concludes that PAP’s connection to the Community should be severed. It should now be fully anchored in the Constitutive Act as an organ of the AU. This has been recognized in the title to the Draft Protocol.²¹²

The report indicates that the consultant was initially of the view that the Parliament should be given limited legislative competence while the participants at the validation workshop felt that it was time that the Parliament was conferred with full legislative powers.²¹³ The limited legislative powers approach was therefore abandoned and in its place, it was recommended that the Parliament should be fully recognised as the ‘legislative organ of the AU.’²¹⁴

The revised Report was approved by the AU experts and was presented to the Ministers of Justice of the AU member states in May 2012. This resulted in the Draft Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (Draft Revised PAP Protocol).²¹⁵ With respect to legislative powers, the meeting of experts decided and recommended to the AU Assembly that ‘more in-depth consultations should be undertaken’ with respect to the provisions dealing with the legislative powers of the Parliament.²¹⁶ A reading of the provisions of both the existing PAP Protocol and the Draft Revised PAP Protocol makes

²¹⁰ As above.

²¹¹ Revised Study Report on the Review of the Protocol to the Treaty Establishing the African Economic Community Relating to the Establishment of the Pan African Parliament, Legal/ACJHR-PAP/6 (II), 3 - 4.

²¹² As above.

²¹³ As above, 17.

²¹⁴ As above, 18.

²¹⁵ On file with the author, dated 11 November 2011.

²¹⁶ Decision on the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament – Assembly/AU/Dec. 428 (XIX).

several additions to the former. Such changes are not significant and are not in any way directed to empowering the PAP to become fully fledged Parliament. At the onset, it is clear that the name of the Protocol will change, perhaps to show its greater affinity to the AU. All indications are that this is a move to de-link the Parliament from the African Economic Community (AEC). The Draft Revised PAP Protocol adds four objectives to the already existing one. In particular the Draft Revised PAP Protocol indicates that PAP aims to ‘give a voice to the African Peoples and the Diaspora’.²¹⁷ It further indicates that the Parliament would be tasked with encouraging member states and regional bodies to ratify and domestic AU treaties, encouraging cooperation between national and regional parliaments and similar bodies as well as civil society,²¹⁸ community based organisations and grassroots organisations.²¹⁹ Provisions relating to other matters such as the budgetary powers of the Parliament²²⁰ and elections of MPAPs are most likely to remain the same. An interesting addition though, if it comes to pass, will be the abolition of dual membership to the PAP. The Revised PAP Draft Protocol provides that any member who contests and wins elections to the PAP shall be required to resign from the national parliament or deliberative body.²²¹

The decision of the AU Assembly may be interpreted as being an approval of other parts of the Draft Revised PAP Protocol except article 8 which deals with the legislative and oversight powers of the Parliament.²²² This decision confirms that it will not be easy for the Parliament to be conferred with any actual legislative powers. The decision is also indicative of the fact that the integration process in Africa is likely to be a protracted one. The AU decision does not mention the time frame within which such ‘in-depth consultations’ should be concluded. The issue of the PAP being conferred with legislative powers thus remains uncertain. As the review of the PAP Protocol continues, one remains curious as to the nature of powers that will

²¹⁷ Revised PAP Draft Protocol, art 3(a).

²¹⁸ As above, art 3(l).

²¹⁹ As above, art 3(l).

²²⁰ As above, art 16.

²²¹ As above, art 5(6).

²²² Decision on the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament - Assembly/AU/Dec. 428 (XIX).

eventually be conferred on the continental Parliament once deliberations on article 8 of the PAP Draft Protocol are concluded.

In the main, the attainment of legislative powers by the PAP entails that states relinquish their sovereignty to allow the PAP to legislate for them and on their behalf. That is likely to be objectionable to some member states as conferring legislative powers on the PAP would be tantamount to welcoming interference from the AU into their domestic affairs, and by necessary implication, other member states. One needs to appreciate that the issue of sovereignty is still at the heart of African leadership and statecraft. Most decisions taken at the regional level to some extent demonstrate the unwillingness on the part of African leaders to relinquish their powers to a body such as the PAP. Unwillingness by states to cede their sovereignty is probably one of the most important factors that have limited the integration process in Africa and the growth of the AU into a supranational body that ideally it should.²²³

As it has been rightly noted,

the political importance of national sovereignty is both a crucial factor and hurdle in the establishment of transnational entities, for African states and their political leaders, sovereignty has always been paramount, and therefore the prospect of integration based on the ceding of sovereignty powers to a supranational entity is dismal.²²⁴

Sovereignty entails that states have the ultimate control and final decision-making power to govern themselves and those within their territory.²²⁵ The costs of over-adherence and abuse of state sovereignty in Africa have been considered in detail elsewhere.²²⁶ The promises that

²²³ M Welz 'The Africa Union: integration vs. sovereignty' (undated) | available at http://www.uni-leipzig.de/~ecas2009/index.php?option=com_docman&task=doc_download&gid=1549&Itemid=24 (accessed 7 August 2012).

²²⁴ Nzewi (n 187 above) 9.

²²⁵ OA Hathaway 'International delegation and state sovereignty' (2008) 71 *Law and Contemporary Problems* 116.

²²⁶ JI Herbst 'A new approach to sovereignty in Africa' (2001) 21 *SAIS Review* 219-223; L Henkin 'That S word: Sovereignty, and globalization, and human rights, et cetera' (1999-2000) 68 *Fordham Law Review*. 1; SN Grovogui 'Regimes of sovereignty: International morality and the African condition' (2002) 8 *European Journal of International Relations* 315.

will be made by African states if the PAP is conferred with legislative powers will no doubt lie in direct conflict with this understanding of state sovereignty.²²⁷

Judging by the commitment exhibited by African states towards integration in Africa, one can safely conclude that the PAP might not easily attain legislative powers. In fact, it is becoming clear that the idea of an African Parliament with oversight powers is rendered unfruitful because the AU is currently more of an intergovernmental as opposed to a supranational organisation as is the case with the EU.²²⁸ The mismatch of institutions within the AU suggests that the PAP will not be conferred with any legislative powers during the current review process. This is a real likelihood because once the PAP is able to legislate in the areas that would be identified, such competence would affect the policies, programmes and legislation of the various member states and in turn encroach on state sovereignty. In the event that the PAP attains any legislative powers, it is highly unlikely that such powers will make the Parliament an AU oversight body. Chances are that any such powers will be greatly limited in nature.

One of the envisaged functions of the PAP will be to evolve into a legislative body of the AU that will be one of the engines of facilitating regional integration through the harmonisation of policies and laws. The success of the PAP is definitely dependent on cooperation between states, regional legislative bodies and, to a large extent, other international actors. However, cooperation 'requires that the actions of separate individuals or organisations – which are not in pre-existent harmony – be brought into conformity with one another through a process of policy coordination.'²²⁹ In essence, this means that AU member states will have to adjust their laws and policies so as to accommodate the work of the PAP. As a result, an enquiry should be made as to whether the continent is ready for the harmonisation of laws and policies by a legislative body. This enquiry is pertinent for it is likely to play a vital and pivotal role in the decision-making process of states when called to decide whether the PAP should be afforded

²²⁷ Nzewi (n 187 above) 9.

²²⁸ See generally BA Fagbayibo 'A supranational African Union? Gazing into the crystal ball' (2008) 3 *De Jure* 9- 99, highlighting that the AU remains an intergovernmental organisation considering the 'absence of normative supranationalism within the institutional framework.'

²²⁹ RO Keohane 'Cooperation and international regimes' in R Little & M Smith (eds) *Perspectives on world politics* (2007) 81.

legislative powers. The current debates surrounding the conferment of legislative powers on the PAP seem to have avoided or missed this critical point.

In addition to the above, the process of integration in Africa has been fraught with challenges and, with the PAP tied to the integration process, it is impossible to imagine that the PAP will be conferred with legislative powers that easily. Some of the problems that continue to hinder the integration process in Africa and may hinder the development of the PAP into a legislative body include issues of political and institutional constraints.²³⁰ Further, the continent has a problem of duplication of RECs²³¹ with the rules of the various RECs conflicting or in some instances entailing competing obligations.²³² Perhaps one factor that is going to be critical in the decision to grant the PAP legislative powers is the question whether, once conferred with such powers, the Parliament is able to deal effectively with the powers it has been given.

It is in the light of the foregoing that the question posed by Nzewi becomes relevant, when she asks whether in assigning the PAP 'greater legislative powers' there should be rapid or incremental change.²³³ This question becomes relevant when one has regard to the challenges that the PAP will face in its quest to be clothed with legislative powers. The question whether the PAP should be clothed with legislative powers rapidly or incrementally becomes relevant if one also has regard to the history of the EP and other parliamentary bodies similar to the PAP. The history of other RPAs will thus go a long way towards informing the expectations of PAP enthusiasts on the possible outcomes of the review process.

²³⁰ See generally A Geda & H Kebret 'Regional Economic Integration in Africa: A review of problems and prospects with a case study of COMESA, <http://www.soas.ac.uk/economics/research/workingpapers/file28853.pdf> (accessed 13 March 2011).

²³¹ See generally A Hammerstad 'Domestic threats, regional solutions? The challenge of security integration in Southern Africa' (2005) *Review of International Studies* 69–87; M Chingono & S Nakana, 'The challenges of regional integration in Southern Africa' (2009) 3(10) *African Journal of Political Science and International Relations*, 396–408.

²³² Study commissioned by GTZ 'Regional Economic Communities in Africa: A Progress Overview (2009) 10, available at http://www2.gtz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf (accessed 5 June 2012).

²³³ Nzewi (n 187 above) 11.

3.6.1.2 Perpetual struggle, steady advance²³⁴ for the PAP?

In Europe, the 1951 Treaty Establishing the European Coal and Steel Community (ECSC) did not immediately assign the EP with any legislative powers but initially established it as a purely consultative assembly. Even though its powers were limited, it was a parliamentary assembly which was both representative and sovereign in nature and it was the first inter-governmental assembly based on a parliamentary model.²³⁵ Having created this parliamentary assembly, member states were extremely cautious about giving it full legislative powers.²³⁶ That is why the EP first saw a glimpse of legislative powers only in 1957, seven years after its inception, and this explains why it has been argued that ‘the growth in the role and powers of the European Parliament was one of the most encouraging signs in the renewal of the European tradition of parliamentary democracy’.²³⁷

Even though the Rome Treaty of 1957 saw a significant change in the powers of the EP, the changes were not immediate for it took over 20 years for direct elections to be organised and EP’s formal legislative powers were not altered for nearly 30 years.²³⁸ The development of supranational parliaments is usually slow and this may be attributable to the fact that their expansion, in particular the expansion of their powers, has a large bearing on the sovereignty of member states. The Single European Act (SEA), which did not confer upon the EP the powers that it demanded, brought about some frustrations for the EP. It was remarked in that context that the EP

was born hungry and frustrated and has developed into a habitual struggler. Where it has powers, it tries to exploit them as fully as possible and is always urging that these powers be extended. Where it has no powers, it is forever trying to exploit precedent, ambiguity and

²³⁴ This phrase was coined and used by Martin Westlake in the book *A modern guide to the European Parliament* (1994) 28.

²³⁵ <http://www.ena.lu/> (accessed 24 October 2010)

²³⁶ F Jacobs *The European Parliament* (1990) 6.

²³⁷ Westlake (n 234 above) 28.

²³⁸ B Rittberger ‘The creation and empowerment of the European Parliament’ (2003) 41 *Journal of Common Market Studies* 217; R Harmsen & J Schild (eds) *Debating Europe: The 2009 European elections and beyond* (2011).

custom, applying a sort of creative accountancy of its rules of procedure and the treaties themselves.²³⁹

From the above, it comes to light that the EP was not instantaneously as effective as it appears to be at the present. Literature on the evolution of the EP indicates that its powers have steadily grown and it emerged from being an ineffective assembly to the robust body that it is today.²⁴⁰ Consequently, one may be forced to come to the conclusion that it is misplaced for one to expect that the PAP should be as effective as the EP is currently. This conclusion is based on both the infancy and current powers of the PAP.

Perhaps the evolution of the EP into what it is now fortifies Cutler's assessment of the development of IPIs. In the main, Cutler asserts that it is important to develop a framework for evaluating the growth and decline of IPIs as that would immensely contribute to how we understand 'the evolving arrangements of global governance by helping to determine what leads some IPIs to respond to demands.'²⁴¹ Using complexity science as the basis of his analysis, Cutler notes that 'IPIs come from varying political origins, and their respective founding documents establish them as having different demarcations of authority.'²⁴² He then moves on to highlight that the Parliamentary Assembly of the North Atlantic Treaty Organisation (NATO – PA)²⁴³ has no formal statutory relations with NATO and was created to facilitate harmonisation of laws amongst member states and to facilitate debates among the parliamentarians and their constituents.²⁴⁴ He also notes that the Parliaments of Estonia, Latvia and Lithuania over a period of time established the Baltic Assembly, which evolved into a body with formal powers to advise the member states on various issues.²⁴⁵ It is in that context that

²³⁹ Westlake (n 234 above) 28.

²⁴⁰ As above.

²⁴¹ R Cutler 'The Emergence of International Parliamentary Institutions: New networks of influence in world society', in G Smith and D Wolfish (eds), *Who is afraid of the state? Canada in a world of multiple centers of power* (2001) 215. Latest version available at <http://www.robertcutler.org/ch01gs.htm> (accessed 13 March 2011).

²⁴² Cutler (n 241 above) 209.

²⁴³ Now the North Atlantic Assembly (NAA).

²⁴⁴ Cutler (n 241 above) 210.

²⁴⁵ As above.

Cutler identifies four types of IPIs, namely, 'congress', 'assembly', 'parliament' and 'legislature'.²⁴⁶ According to him, these types in essence reflect the various stages of development of IPIs.²⁴⁷

According to him, 'congress' describes instances '[w]hen various national parliaments, or members of them, come together in meeting' and without the need for the establishment of a congress.²⁴⁸ 'Assembly' signifies the next level of development. An 'assembly' 'is not merely a single gathering, as is a congress, but rather represents its participants' recognition of a common situation that motivates them to meet on a regular basis even if they are not institutionalized.'²⁴⁹ Cutler asserts that assemblies are usually able to make common decisions and perhaps move in the same direction.²⁵⁰ To that end, he asserts, an assembly will be more effective once it has established a limited secretariat or some form of informal institutional continuity. According to Cutler, a 'Parliament' normally lays the foundation for the creation of a legislature and generally describes a platform or forum where there is talk or sharing of ideas.²⁵¹ In the end, he asserts that the path through which parliament evolves into a legislature is called a 'spillover', normally resulting in a body that will deliberate 'with some juridical or statutory authority, proposes laws for approval by member states, and may assist in implementation and oversight should member states adopt recommended laws.'²⁵² He notes that when an IPI starts to propose laws for adoption by member states, the transformation to a legislature is completed.²⁵³ It is during this phase that the IPI will undertake activities that may arise from the deliberations of parliament.²⁵⁴

²⁴⁶ Cutler (n 241 above) 214.

²⁴⁷ As above.

²⁴⁸ According to Cutler, a 'congress' is when 'various national parliaments, or members of them, come together in a meeting. A Congress does not require a permanent secretariat; Cutler (n 227 above) 214 - 215.

²⁴⁹ As above.

²⁵⁰ As above.

²⁵¹ As above.

²⁵² Cutler (n 241 above) 216.

²⁵³ As above, 220.

²⁵⁴ As above.

Cutler uses the EP to explain the chronology of the institutional development of the EP.²⁵⁵ According to him, the following is discernible if the above typology is used to track the epigenesis of the EP: the ‘pre-congress’ and ‘congress’ stages of the EP was when the Parliamentary Assembly of the European Coal and Steel Community (ECSC) met for the first time in September 1952 and the Treaty of Rome establishing the EP as a congress in March 1957 respectively. The ‘initiation to assembly’ to the EP was according to him sparked by the inaugural meeting in March 1957, quickly followed by informational and normative activities sparking the initiation stages. The EP ‘having acquired a secretariat and a nominal international juridical personality, reached the level of Assembly by 1958’,²⁵⁶ and immediately proceeded to establish rule-creating as well as supervising activities. Cutler notes that, with respect to the rule-supervisory activities, the EP encountered considerable resistance from other institutions within the EEC²⁵⁷ and it was not until 1970 that it achieved regular consultation with member states with respect to the budgetary issues of the EEC.²⁵⁸

Despite this progress, the EP still did not become a ‘parliament’ until nearly a decade later, and well after its first direct elections in June 1979, when it was empowered to oversee the EEC executive.²⁵⁹ According to Cutler, ‘[t]he European Parliament’s willingness and ability to oversee other institutions mark its attainment of the level of Parliament.’²⁶⁰ The final stage of an IPI development with respect to the EP or the ‘spill over to legislature’ was when the EP emerged now as a fully-fledged legislature.²⁶¹ This was after the legitimisation of the EP’s authority over other bodies of the integration organization, following the signing of the European Parliament’s Single European Act of 1986, which improved procedures and introduced regular legislative co-operation between the European Parliament and the European Council.²⁶²

²⁵⁵ Cutler (n 241 above) 221.

²⁵⁶ As above, 222.

²⁵⁷ As above.

²⁵⁸ As above.

²⁵⁹ As above.

²⁶⁰ Above, A220.

²⁶¹ As above.

²⁶² As above.

The discussion on the evolution of the EP above highlights the point that the development of an IPI is part of a process that usually takes time and more often than not, such time will be a period numbering years. It is submitted that the process of IPI development as described by Cutler is relevant and necessary to the understanding of the development of any IPI. Such a process of the development of an IPI could also be used to understand how an IPI is evolving and to gain insight into what to expect from the body, regard being had to its stage of development.

It could be argued that the ‘pre-congress’ stage of the PAP is marked by the period beginning June 1991 to July 2000, when the Abuja Treaty was signed by the African leaders and the Sirte Declaration was adopted by the Assembly of Heads of State and Government in Sirte, Libya. This period marks some of the preparatory meetings and discussions leading to calls for the speedy establishment of the PAP. The period spanning from November 2000 to July 2003 essentially marks the period when the member states or the delegates from African countries came together for the purpose of establishing the PAP. This, according to Cutler, marks the *Congress* stage in terms of the ladder of development in the potential life of an IPI.

The ‘*initiation to assembly*’ stage of the PAP can be said to be within the period of March 2004 when the inauguration of the PAP took place and 202 legislators from 41 countries were sworn in. According to Cutler, this stage is characterised by the ‘[f]irst regularised meeting following the establishment of the secretariat, a requisite for acquisition of international jurisdictional personality permitting autonomous proactive initiative.’²⁶³ As regards the establishment of a Secretariat, the PAP Secretariat was established in Midrand, South Africa, where the PAP currently holds all its ordinary sessions and meetings of its various permanent committees. According to Cutler, [a]n IPI that undertakes rule creating-activities enter the phase of take-off by ‘rule-creating activities’ Cutler refers to the creation of rules of order of the IPI necessary to ensure the orderly conduct of the Assembly during its meetings.²⁶⁴ Applying the criterion adopted by Cutler, the PAP would have entered the ‘takeoff phase’ immediately when it adopted its Rules of Procedure, its 2006 – 2010 Strategic Plan as well as its Standing Orders.

²⁶³ As above.

²⁶⁴ As above.

Through the fully functional secretariat, also situated in Midrand, South Africa, the PAP has over the period undertaken activities that are generally informative, providing member states and international organisations with information as regards the mandate as well as the activities of the PAP. These activities include the various meetings held by the PAP and civil society.

From the above discussion on the various development stages of IPIs, it may be argued that the PAP is within the ‘takeoff’ to Parliament stage. Even though members of the Assembly of the PAP have over time deliberated and passed resolutions on matters of continental interest, including, issues of elections in Africa, economic and cultural development of Africans as well as issues pertaining to migration in Africa, it cannot be confidently said that the PAP has been involved in the affairs of the AU. It is therefore submitted that the PAP is currently nowhere near the ‘spillover’ phase, a phase which normally involves the IPI undertaking operational activities that will eventually ensure its smooth operation. With regard to the EP and its ‘spillover’ phase, Cutler noted that ‘operational activities at this level refer not only to the European Parliament’s relations with external bodies that were part of the European communities system, but also to its participation in Europe’s foreign affairs.’²⁶⁵ The participation of the PAP in the workings of the AU alone – as would become apparent in the following chapters – is not sufficient to suggest that it holds some form of influence in the decision-making processes of the Union. Unlike the EP, the Parliament has not moved to boldly assert its position within the AU and to use its limited influence in securing a position that will eventually lead it to the attainment of legislative powers. This will in essence translate into a longer period within which the Parliament will attain legislative powers. This is quite understandable, for the PAP currently lacks the necessary powers to exert some form of influence in relation to Africa’s foreign relations.

The above discussion on the ladder of development of the PAP illustrates, albeit in a more systematic way, the position held by other scholars writing on the PAP, namely, that it is highly unlikely that the PAP will attain any legislative powers in the near future. The issue of sovereignty has once again become the focus of discussions surrounding the possibility of conferring legislative powers upon the PAP. The concern is that the PAP is unlikely to attain any

²⁶⁵ Cutler (n 241 above) 222.

legislative powers in the near future as African leaders are generally unwilling to subject themselves to governance oversight. This is so because the attainment of full legislative powers by the PAP will transform it into an oversight body of the Union with the capacity to influence the decision-making processes of the Union in a more profound way. African leaders are therefore likely to be unwilling to turn the PAP into an oversight body with powers to legislate for the continent on issues such as governance and human rights out of fear of strict governance control mechanisms as may be imposed by the Parliament.

Further, the PAP is relatively new and to expect that it will be conferred with legislative powers in the near future is too ambitious. It is still in its nascent years, making it too early to expect that it could be vested with such legislative powers. This position is perhaps fortified by the fact that it took the EP around 27 years to have attained extensive legislative powers.²⁶⁶ It is clear that it was in the period between establishing the EP and the time that it was finally conferred with legislative powers that it developed itself into the formidable force that it is now.

Another impediment to the attainment of legislative powers by the PAP is the fact that the PAP is established within an equally evolving system. The AU institutional framework is a system made up of the article 5 organs of the AU that are still establishing themselves, with a complex cooperation record. Because of the unrefined nature of the relationship between the PAP and other AU organs as well as between other AU organs *inter se*, it is difficult to perceive the Parliament as a legitimate oversight body. From that perspective, conferring the PAP with legislative powers might not seem important at this juncture. As Nzewi rightly puts it, 'the issue of unresolved institutional relationships within the AU system is seen as a factor militating against the rapid allocation of greater legislative powers to the PAP.'²⁶⁷

These and other issues will be discussed fully in chapter 5, when factors that enhance or impede the effectiveness of the PAP in utilising its human rights mandate will be fully considered. It is then that an extensive analysis will be made of how impeding factors could be overcome and how such factors could be exploited. Particular emphasis will then be placed on the attainment of full legislative powers and how that could improve the PAP's engagement with

²⁶⁶ Nzewi (n 187 above) 24

²⁶⁷ As above, 22.

human rights issues. All indications are that the AU supports the idea that the PAP should attain legislative powers gradually, and not instantaneously.²⁶⁸

3.6.2 Limited budgetary powers

One of the traditional functions of parliaments is to participate in the allocation of the state's financial resources necessary to ensure that the government will be able to carry out the agreed policies.²⁶⁹ Most parliaments are mandated to monitor how government spends the national financial resources and concomitantly ensure that there is no mismanagement of the country's financial resources. To that end, parliaments usually have the power to participate in the budget-making processes, both at national level and regional level.

The participation of parliaments in the drawing up of budgets has not been without controversy. However, the existence of such controversy does not detract from the fact that the role of parliaments in the budgetary process best illustrates the dictates of participatory democracy. Over the years, the participation of parliaments in the budgetary processes has been bolstered by the inclusion of clauses in constitutions conferring the power upon parliaments to have a proactive role in the budget-making process of a particular country or union.²⁷⁰ Through these 'fiscal constitutions' parliamentary organs have come to ensure that there is a proper balance of power between the legislature and the executive with regards to the allocation of financial resources.²⁷¹ With particular reference to Africa, this trend is growing and there is ample evidence to suggest that parliaments are now alive to the demand that they are to take part in the budgetary process.²⁷² This is in clear contradistinction with early African parliamentary organs, many of which did not wield any influence over the preparation and

²⁶⁸ As above.

²⁶⁹ Joint European Parliament – Pan African Parliament Statement on the Joint EU- Africa Strategy to be adopted by the EU and African Heads of State and Government, 8 December 2007, http://www.ansafrica.net/index.php/views/pub_view/joint_eu_africa_strategy_to_be_adopted_by_the_eu_and_african_heads_of_state/ (accessed 13 March 2011).

²⁷⁰ J Wehner 'Parliament and the power of the purse: The Nigerian Constitution of 1999 in comparative perspective' (2002) 46(2) *Journal of African Law* 216-231.

²⁷¹ As above, 218.

²⁷² As above.

approval of budgets.²⁷³ Still, the degree of participation in the budget process varies from one parliamentary organ to another.²⁷⁴ For example, in the Council of Europe, the role of the PACE is consultative in nature, whereas the role of the EP has evolved over the years culminating in the final right of approval of the budget being granted to the EP.²⁷⁵

The PAP has been given the power by the PAP Protocol²⁷⁶ to discuss its budget and the budget of the AU and make recommendations on both budgets before their approval by the Assembly. The budget of the PAP constitutes an integral part of the regular budget of the AU and is drawn by the PAP in accordance with the Financial Rules and Regulations of the AU.²⁷⁷ The budget will continue to be approved by the Assembly until such time that the Parliament starts to exercise legislative powers.²⁷⁸ The procedure of adopting the budget is that the PAP Bureau draws the draft budget at least three months before the start of the financial year of the AU.²⁷⁹ This draft budget is then examined by the Permanent Committee on Monetary and Financial Affairs. The Committee then tables its report on the budget before Parliament for adoption,²⁸⁰ and eventual submission to the AU Assembly for approval.²⁸¹

The PAP can only suggest what its estimated budget is. The final and approved budget of the PAP is made by the AU Assembly. The involvement of the PAP in the budget process is very limited. At present the PAP does not exercise any influence over the way the financial resources of the AU are disbursed. What currently obtains as regards fiscal matters within the AU and the PAP is that the PAP draws up the draft budget and submits that proposed budget to the AU Assembly where, together with budgets of other AU organs, it is considered. There is no indication that there is any exchange of information between the PAP and the Assembly leading to the drafting and adoption of the PAP budget.

²⁷³ As above, 216.

²⁷⁴ As above, 218.

²⁷⁵ Jacobs (n 236 above) 8.

²⁷⁶ PAP Protocol, art 15.

²⁷⁷ PAP Protocol, art 15; PAP Rules of Procedure, rule 82(4).

²⁷⁸ PAP Protocol, art 15.

²⁷⁹ PAP Rules of Procedure, rule 82(1).

²⁸⁰ As above, rule 82(2) and (3).

²⁸¹ As above, rule 82(5).

Unlike the PAP, the EP forms one of the two arms of the budgetary authority of the EU and during the budgetary process the EP is given the opportunity to review and approve the EU budget as proposed by the Commission.²⁸² Even though the budgetary process of the EP 'is extremely complex due to its intricate checks and balances of article 203 of the EEC Treaty',²⁸³ the EP is nonetheless involved in the budgetary process and may reject the budget as a whole.²⁸⁴ In such cases the budgetary process or procedure must be recommenced.²⁸⁵ Notwithstanding the fact that the EP has the power to reject the budget for serious reasons, it is the EU Council that adopts the budget drafts or proposals. The EP's right to amend such drafts is limited by provisions relating to time limits, restrictions on the content of proposed amendments as well as provisions relating to the requisite majorities for amending the budget.²⁸⁶ Exercising its powers, the EP has rejected the entire draft budget on two occasions before 2013, in 1979 and 1984. It rejected the supplementary budget in 1982.²⁸⁷

With regards to the PAP, it appears that its function as regards fiscal matters, is to 'discuss its budget and the budget of the Community and make recommendations thereon prior to its approval by the Assembly'²⁸⁸ at least until such time that the PAP will start to exercise legislative powers.²⁸⁹ As Navarro rightly points out, '[t]he PAP does not yet have the ability to constrain the internal decision-making process or the budget of the AU: its competences are exclusively deliberative and advisory.'²⁹⁰ Without any control over its budget, 'the PAP clearly

²⁸² Demeke (n 9 above) 58; G Hugo 'The Pan African Parliament: Is the glass half full or half empty' (2008) ISS Paper 168.

²⁸³ J Fitzmaurice *The European Parliament* (1978) 11.

²⁸⁴ As above; In fact on the 13 March 2013 the EP rejected the EU proposed long term budget for 2014- 2020 citing several concerns among them being the fact that there was need to ensure that the 'deficits for 2012 and 2013 are covered so that the new budget cycle starts without any funding gaps.' *European Parliament News* 'The battle for the EU's long-term budget' 19 March 2013 available at <http://www.europarl.europa.eu/news/en/headlines/content/20110429FCSI8370/html/The-battle-for-the-EU's-long-term-budget> (accessed 31 March 2013)

²⁸⁵ Fitzmaurice (n 283 above) 12.

²⁸⁶ As above; N Nugent *The Government and politics of the European Union* (2010) 185.

²⁸⁷ Westlake (n 234 above) 25.

²⁸⁸ PAP Protocol, art 11(2).

²⁸⁹ As above, art 15.

²⁹⁰ Navarro (n 192 above) 16.

remains powerless and subservient to the institutions that make the final decision on the allocation of resources, even if it can exercise advisory powers on the budget of the AU.²⁹¹

The absence of a well-tailored budgetary process has resulted in the PAP not being able to exercise any significant input in the decision-making process of the AU in so far as fiscal issues are concerned. It is beyond doubt that the budgetary power is one of the crucial instruments to any parliamentary institution²⁹² and the fact that the PAP is unable to exert some form of influence in the budget process weakens the very foundation on which PAP is built: the idea that it is an agency for Africans' participation in the affairs of the AU. This immediately highlights that if the PAP as a 'participatory' body of the AU does not participate in monetary issues of the AU, then Africans are not represented in so far as decisions concerning resource allocation are concerned. Combined with the above, is an equally worrisome issue of elections of representatives to the PAP to which the discussion now turns.

3.6.3 Indirect elections to the Pan-African Parliament

3.6.3.1 Appointment and composition

One of the most talked about issues relating to the PAP remains the composition of the PAP, in particular the appointment of members of the Parliament. In this part, I discuss this controversial subject and highlight the dynamics that may be associated with participatory democracy at the supranational level. It is in this context that a discussion of the various provisions of the PAP Protocol and other relevant instruments as regards the appointment of MPAPs is undertaken.

The PAP is constituted to ensure that all member states are represented in the Parliament by an equal number of parliamentarians. This principle of equal representation means that the population size of member states does not result in an increased number of parliamentarians.²⁹³ Accordingly, the Parliament is comprised of five MPs per member state, one of whom should be

²⁹¹ Mpanyane (n 1 above) 10.

²⁹² Demeke (n 9 above) 58-59.

²⁹³ PAP Protocol, art 4(1).

a woman.²⁹⁴ Each of the member states is also enjoined to ensure that the elected members of Parliament reflect the country's diversity of political opinions.²⁹⁵ Cabinet ministers, their assistants or members of the executive and persons exercising judicial functions in their respective countries are excluded from being nominated to the PAP.²⁹⁶

The provisions of the PAP as regards the composition of the PAP have been highlighted above. On the face of it and ideally, the composition of the PAP should not be raising any problems since the provisions are straight-forward. However, and as will be highlighted below, that is not the case.

3.6.3.2 Gender representation

The mandatory requirement that at least one of the five members elected to the Parliament by a member state should be a woman has been viewed by some as inadequate.²⁹⁷ The argument is that the number should be higher.²⁹⁸ Recent studies indicate that some national parliaments in Africa have managed to gradually improve the number of women representatives in their national parliaments. Rwanda stands out with more than 50 per cent of women MPs and South Africa comes close with more than 40 per cent of women holding seats in the National Assembly.²⁹⁹ Even though a majority of national assemblies or representative bodies in Africa are doing less favourably in so far as the representation of women is concerned, it is no justification for the PAP to encourage the low representation of women (of 20 per cent) in its own ranks. Compared to other regional parliaments, the PAP is not doing well either. In the Central American Parliament, women make up more than 21 per cent of the MPs, while

²⁹⁴ As above.

²⁹⁵ As above, art 4(3).

²⁹⁶ As above, art 7.

²⁹⁷ PAP Protocol, art 4(2); Gender issues in the African Union, NEPAD and the Pan African Parliament: two perspectives, Two papers from the Regional Strategy Meeting on Women's Political Participation and Gender Mainstreaming in AU and NEPAD, Nairobi, Kenya (2003), 14–15, available at http://www.sarpn.org/documents/d0000608/P622-Gender_NEPAD-AU.pdf (accessed 6 June 2012).

²⁹⁸ As above.

²⁹⁹ See generally the statistics as compiled by the Inter-Parliamentary Union, at <http://www.ipu.org/wmn-e/classif.htm> (accessed 7 August 2012).

women constitute 35 per cent of that of the EMP.³⁰⁰ The PAP's quota of 20 per cent also falls short of the standards that are imposed by member states in other fora. For example, the Southern African Development Community (SADC) Protocol on Gender and Development puts the quota at 50 per cent by 2015 at the national level for its member states.³⁰¹

Other scholars have argued that the quota system has the potential to create a glass ceiling for women making it difficult for women to have sufficient representation of women in legislatures especially where the wording of the law establishing quotas is not carefully worded.³⁰² It should be noted, however, that there is no ceiling on the number of women representatives to the PAP. Member states are therefore not prevented from sending as many as five women as MPAPs. In practice, the limited representation of women in national parliaments has in fact resulted in the under-representation of women in the PAP. For example, in Botswana there are only four women representatives in the national assembly. All of them occupy cabinet positions and are therefore not eligible to be elected to the PAP.

In response to the criticism levelled against the imposed quota regarding the PAP women MPs, the Draft Revised PAP Protocol makes one addition. It is proposed that upon election of MPs to the Parliament, at least two of them should be women.³⁰³ To ensure that the quota is adhered to by member states it was suggested – in the earlier drafts of the PAP Draft Protocol – that where at the end of the elections in member states, the representation of women in PAP is less than 30 per cent of the total membership of the Parliament, the Clerk will advise the Assembly to appoint two women per region of Africa.³⁰⁴ This provision was to be invoked only in the event that the PAP elections produced gender imbalance to the disfavour of women in

³⁰⁰ As above; Nugent (n 286 above) 199.

³⁰¹ http://www.unifem-saro.org/index.php?option=com_content&view=article&id=10&Itemid=21 (accessed 7 August 2012).

³⁰² S Tamale 'Introducing quotas: discourse and legal reform in Uganda, A paper presented at the International Institute for Democracy and Electoral Assistance (IDEA)/Electoral Institute of Southern Africa (EISA)/Southern African Development Community (SADC) Parliamentary Forum Conference/IDEA, available at http://www.quotaproject.org/CS/CS_Uganda_Tamale-6-6-2004.pdf (accessed 24 August 2013).

³⁰³ Draft PAP Protocol (n 206 above) art 5.

³⁰⁴ As above, art 5(1).

the PAP.³⁰⁵ However, the latest Draft Revised PAP Protocol seems to suggest, instead, that a member state will not be given accreditation for representation in the Parliament if it has not complied with the suggested gender requirement of two women.³⁰⁶ These amendments, if carried forward, will perhaps help address some of the complaints that the currently required one woman out of five representatives is insufficient.

It is important also for the Parliament to take into account the criticisms that are generally levelled against the use of quotas for the purpose of enhancing the participation of women in legislatures. It has been argued by some that the use of quotas amounts to reverse discrimination and that this has the potential to lead to the under-representation of men in Parliaments.³⁰⁷ This approach has also been criticised as wrong to the extent that it presupposes that men are not able to address and tackle issues relating to women.³⁰⁸ Further, it has been pointed out that it is important that the focus should shift from the number of women elected to parliament, towards focusing on what do they do once they are elected.³⁰⁹ A notable feature of the Parliament's position as regards representation is the fact that there is a continued under-representation of women in the Parliament. Therefore, there is need to put in place measures that would secure a more representative Parliament and the quota system presents us with a better tool to achieve this objective. Tamale rightly notes that:

[t]he use of quotas has sparked controversy and public debate. Here, the debate centred on two main issues. First, because affirmative action is misconstrued to mean 'reverse' discrimination, the tendency is to rebuff quotas. The policy is often perceived as a permanent

³⁰⁵ Study report on the review of the Protocol to the Constitutive Act establishing the African Union Relating to the establishment of the Pan African Parliament since the validation workshop held at Midrand, South Africa, 9-13 August, 2010, para 7

³⁰⁶ Draft Revised PAP Protocol, 2011, Legal/ACJHR- PA/4(II) Rev. I, art 4(3).

³⁰⁷ RB Levinson 'Gender-based affirmative action and reverse gender bias: beyond *gratz*, *parents involved*, and *ricci*' (2011) 34 *Harvard Journal of Law & Gender* 1.

³⁰⁸ VM Mkilanya 'The substantive representation of women in the Tanzanian Parliament', thesis presented to the School of Law and Government, Dublin City University (2011), available at http://doras.dcu.ie/16636/1/Veronica_Mkilanya_MA.pdf (accessed 24 August 2013), 14.

³⁰⁹ As above, 1.

occurrence, isolated from the struggle within the wider social movement to emancipate oppressed groups.³¹⁰

The argument that through the quota system women are guaranteed representation to the detriment of men is ignorant of the inherent inequalities in most societies that often lead to the low presence of women in political platforms. Considering the large number of men in the various national assemblies and concomitantly to the PAP, a concern that the quota system amounts to reverse discrimination is therefore misplaced. While many measures have been taken to correct the historical asymmetries relating to gender and representation of women in parliaments, there is some indication that there is a slight but still inadequate improvement of their representation. The PAP's current approach is therefore justified and will be until such time there exist sufficient evidence that affirmative action, such as its membership quota requirement, amounts to 'reverse discrimination'.³¹¹ The EP has been hailed as a domain more open to women's political participation than many of the parliaments in the member states of the EU.³¹² One can only hope that the PAP will follow suit. Greater efforts at the national level, for countries like Botswana, are also imperative if significant changes are to take place in so far as the representation of women to the PAP is concerned.

3.6.3.3 Fair, balanced and diverse political representation

The principle of equal representation by AU member states is different from other parliamentary institutions where the number of representatives to the house per member states may be dependent on such factors as the size of population of a particular member state.³¹³ Accordingly, the approach 'accords Djibouti as much say as Nigeria'³¹⁴ in the decision-making process and as Viljoen rightly points out, this 'may be easy to observe while the stakes

³¹⁰ Tamale (n 302 above).

³¹¹ See generally S Franceschet & JM Piscopo 'Equality, democracy, and the broadening and deepening of gender quotas' (2013) 9 *Politics & Gender* 314, highlighting that '[q]uotas are thus justified in terms of their empirical consequences transforming policy outcomes or improving firm performance and as symbols of equality and progress. Moreover, the gendering of leadership empowers women, even when quotas are implemented for strategic rather than principled reasons.'

³¹² J Freedman 'Women in the European Parliament' (2002) 55 *Parliamentary Affairs* 179.

³¹³ Viljoen (n 15 above) 185;

³¹⁴ As above.

are low, but the position is bound to change if the PAP becomes more than a deliberative forum.³¹⁵ From the time that it was established, the membership of the PACE was such that the number of representatives was not based on equal representation as is the case with the PAP, nor on strict mathematical proportion to the country population.³¹⁶ At the time that the PACE was established, France and Italy had 18 representatives, while Luxembourg and Netherlands each had 3 and 4 representatives, respectively.³¹⁷ Accordingly, 'representation varies roughly according to the population with the smaller countries having larger representation than would be allotted on a strictly proportional basis.'³¹⁸ During the revision of the PAP Protocol, it is important that this issue of representation should be considered and if possible other methods of appointing representatives to the Parliament be applied.³¹⁹

The PAP Protocol emphasizes that the representation of MPAPs must reflect the diversity of political opinions in the national assemblies or other deliberative bodies of the PAP member states.³²⁰ Save for emphasising the need for diversity of representation to the Assembly, the PAP Protocol does not make any provision of how that balanced representation is going to be gauged or enforced by the Parliament. It appears that this is a matter that lies within the preserve of a particular member state. The wording of the PAP Protocol only serves to encourage member states to appoint to the continental Parliament persons who mirror the political and social spectrum of the country and nothing more. There is no understanding of what diversity means considering that various national assemblies or deliberative bodies are constituted differently. Most are largely dominated by the ruling party of a particular country, as is the case with Botswana, for example. African states also differ radically in terms of their

³¹⁵ As above.

³¹⁶ P Evans & P Silk *The Parliamentary Assembly: Practice and procedure* (2008) 87-89.

³¹⁷ As above.

³¹⁸ As above, 89.

³¹⁹ As early as in 1790 Thomas Jefferson proposed the apportionment formula, which is now known as D'Hondt method in most of the world. Several other methods have been used over the past two centuries and currently, Hill method is used. For the complete overview of the methods and the history of their use see M L Balinski & H Peyton Young *Fair representation: Meeting the ideal of one man, one vote* (2001).

³²⁰ PAP Protocol, art 4(3).

colonial experiences, they differ according to ideology, electoral systems³²¹ and most importantly these differences include, but are not limited to, 'the extent to which the local, provincial and national government operate.'³²² This is bound to create some problems or predicaments and anomalies from which even the EP did not manage to escape.³²³ With respect to the EP, it has been noted that its political representation depended much on the policy of national parliaments in nominating their representatives to the Parliament.³²⁴ As a result of the way political representatives were appointed to the EP, some of the political parties were excluded from the EP, thus making it less representative.³²⁵

The PAP, in its present state, is far from being politically representative of the peoples of Africa. This is because 'a state without a democratically elected parliament assigns members to the PAP, as the Protocol allows'³²⁶ countries without a national assembly to send representatives. In theory the PAP Protocol demands that countries should send MPAPs from representative bodies if they are not elected from the country's national assembly. Viljoen's view that some MPAPs are not democratically elected to their respective representative bodies, as was the case in Libya before the uprising in 2012, brings into question the Parliament's quest to become peoples-based.³²⁷ To a certain extent, this brings to the fore the question whether the Parliament is a democratic and representative body.

3.6.3.4 Political groupings within the Pan-African Parliament

Diverse political representation entails and is likely to ensure a well-balanced representation of opinions within a particular parliament. To ensure that there exist diverse political

³²¹ Proceedings of a roundtable discussion on: 'Fostering integration among Africa's diverse parliaments: The prospects and challenges for the Pan-African Parliament', Hosted by The Centre for Governance in Africa, The institute for Democracy in South Africa (IDASA), Town House Hotel, Cape Town, South Africa, 12 November 2003.

³²² As above.

³²³ Demeke (n 9 above) 66.

³²⁴ G Oudenhoue *The political parties in the European Parliament: The first ten years (September 1952 – September 1962)* (1965) 12.

³²⁵ As above.

³²⁶ Viljoen (n 15 above) 185.

³²⁷ As above.

representations within the EP, the EP has seen over the years the development of political groupings as opposed to national groupings.³²⁸ Political groupings within the EP have since gained legal recognition and are now viewed as an integral part of the organisational makeup of the EP.³²⁹ The groups represent several political ideologies with political parties that have similar ideologies or policies grouped together.³³⁰ It has been argued that the reason why these political groups were established is that they were formed within the then Common Assembly as a symbolic stand against nationalism.³³¹ It has been concluded that even though in reality political groupings may have negative consequences, the EP experience has been that the groups ‘in the EP constitute a highly developed, relatively stable, and reasonably competitive system,’³³² the development of which bodes well for the future of the EP.³³³

With the PAP it can be highlighted that it is in its nascent stages and except for passing resolutions and making recommendations, it has not transacted ‘sufficiently important’ business necessitating that member states through their delegates exert influence over the PAP’s activities. Apart from the fact that it will be premature for the MPAPs to form such political groupings – considering the nature of the business of the PAP at present – the accountability of the MPAPs to their respective countries has not caused them to form such groupings in order to influence policy. In particular, MPAPs at present vote in their personal and independent capacity.³³⁴

It thus remains to be seen whether the MPAPs will prefer to follow the political groupings route as the EP has done or whether they will prefer to establish alliances on regional basis with the former already having been provided for under the Rules of Procedure of the PAP. The Rules of Procedure of the PAP provides for the establishment and composition of regional

³²⁸ Demeke (n 9 above) 66.

³²⁹ S Hix *et al* ‘The party system in the European Parliament: Collusive or competitive?’ (2003) 41 *Journal of Common Market Studies* 313.

³³⁰ As above, 314.

³³¹ As above, 313.

³³² As above.

³³³ As above, 328.

³³⁴ PAP Protocol, art 6.

caucuses.³³⁵ Each region has a regional caucus consisting of all the countries from that region.³³⁶ The functions of such regional caucuses as provided for under the Rules of Procedure appears to be to appoint the President, the Vice-President and Rapporteur of the caucus groups, select members of such caucus groups to membership of permanent committees as well as to select members of the caucus group who will participate in other parliamentary bodies or proceedings.³³⁷ Additionally, the caucus groups are to perform such other functions as assigned to it by the Bureau or the Permanent Committee on Rules, Privileges and Discipline or by resolution of Parliament.³³⁸ Currently, beyond being used as electoral colleges, it is not clear what other purpose such regional caucuses serve and it will be highly ambitious to suggest that they actually serve as something akin to political groupings of the EP. The potential of regional caucuses as vehicles of change within the Parliament cannot be ignored though.

It is going to be difficult for MPAPs to form any alliances by way of ideological underpinnings considering the differences in ideologies amongst African states. Apart from these ideological differences of African countries, in particular political leadership approaches, many African countries seem not to have a clear alignment to political forces and in consequence political ideologies. Thus, while the EP political groupings are either aligned to ideologies such as the Liberal, Socialist, the Socialist Democrat, the Green, the Conservative or any political ideology, in Africa the situation has been different. Even at the national level, elections are not fought principally on an ideological basis, but more often based on issues of identity and personality.³³⁹

For example, In Kenya, Kenyatta was quick to vest political and economic power in his Kikuyu tribe.³⁴⁰ When he took over power, Moi transferred control to his *Kalenjin* tribe.³⁴¹ This negative manipulation of ethnicity continues to play a major role in Kenyan politics as it is the

³³⁵ PAP Rules of Procedure , Part XVIII.

³³⁶ PAP Rules of Procedure , rule 83.

³³⁷ PAP Rules of Procedure , rule 84.

³³⁸ As above.

³³⁹ Demeke (n 9 above) 65; <http://www.dst.gov.za/media-room/speeches/the-development-of-political-african-leadership-and-its-legacy/> (accessed 27 December 2010).

³⁴⁰ D Throup 'Elections and political legitimacy in Kenya' (1993) 63 *Africa: Journal of the International African Institute* 371.

³⁴¹ As above.

main means of getting support during elections.³⁴² The underlying distribution of ethnic groups has had a fundamental impact on the electoral geography of Kenya.³⁴³ A similar position is also found in the case of Botswana where the ruling party, the Botswana Democratic Party (BDP) is centred and largely draws support from the Central and Northern parts of Botswana where the founder of the party was a chief. The party has since enjoyed large support from the Central and Northern parts of Botswana with its political growth and survival largely dependent on the support from these regions.³⁴⁴

It will be difficult for African states to form political groupings based on ideology within the PAP. Currently there is no concrete proof that the various countries and or the member states' representatives to the PAP acknowledge the existence of such ideologies. Even those who have argued that 'African socialism is the ideology of Africa',³⁴⁵ have equally acknowledged that '[d]ifferences in back-ground tradition and social circumstances among the African states, together with a history of differing colonial philosophies, combine to produce differing styles or types of African socialism.'³⁴⁶ Notwithstanding the perceived obstacles to ideological based groupings within the PAP, in addition to regional caucuses, MPAPs may form caucuses around issues of common interest as and when they deem it necessary.³⁴⁷

3.6.3.5 Future appointment of members to the Pan-African Parliament: Indirect or direct elections?

MPAPs are currently not directly elected to the PAP. They are elected or designated by the respective national parliaments or any other deliberative organs of the member states from among their members.³⁴⁸ This is not at all peculiar to the PAP since representatives of most international parliamentary institutions are not directly elected to those institutions. Of the 40

³⁴² As above.

³⁴³ Afrobarometer Briefing paper no 48, 'Ethnicity and Violence in 2007 Elections in Kenya, (2008) 3 www.afrobarometer.org (accessed 5 April 2008).

³⁴⁴ R Nengwekhulu 'Some findings on the origins of political parties in Botswana' (1989) 6 *Pula Journal* 71.

³⁴⁵ JA McCain 'Ideology in Africa: Some perceptual types' (1975) 18 *African Studies Review* 61.

³⁴⁶ As above, 63.

³⁴⁷ PAP Rules of Procedure, rule 85.

³⁴⁸ PAP Protocol, art 5.

parliamentary institutions identified by Maria de Puig as ‘satisfying the basic conditions for being considered as true international parliamentary assemblies,’³⁴⁹ only three are elected by universal suffrage, namely the EP, the Central American Parliament, and the Andean Parliament.³⁵⁰

The PAP has not set any criteria or procedure for the election of MPAPs at the national level. For example, the practice in Botswana is that MPs are seconded to the PAP without any election of sorts while in Uganda elections are held to nominate members who will represent Uganda in the PAP from the Uganda National Assembly.³⁵¹ The reality of the situation is that most candidates for these seats are members of the ruling parties and are usually agreed upon at party caucuses.³⁵²

Until such time as the member states decide otherwise by way of amendment to the PAP Protocol, the MPAPs will be elected or appointed as MPs from the various national parliaments and where there are no such bodies, they will be selected from the relevant deliberative organs of the member state concerned.³⁵³ It is not stated when citizens of AU member states will be able to vote MPAPs directly into Parliament³⁵⁴ and it is conceivable that at least in the short to medium term, MPAPs will not be elected by ordinary voters to the PAP.

Traditionally there are two methods employed to elect MPs to parliamentary institutions. Representatives could be directly or indirectly elected to Parliament. In the case of indirect elections to the international parliamentary assembly an electoral college is set up or determined for the purposes of electing a candidate to Parliament.³⁵⁵ With respect to direct

³⁴⁹ De Puig (n 89 above) 33 – 34.

³⁵⁰ As above.

³⁵¹ UG Pulse ‘NRM to elect Pan-African MPs next week’ available at <http://www.ugpulse.com/uganda-news/government/nrm-to-elect-pan-african-mps-next-week/20775.aspx> (accessed 7 August 2012).

³⁵² As above.

³⁵³ As above.

³⁵⁴ Demeke (n 9 above) 67.

³⁵⁵ P Wanyande ‘The role of the East African Legislative Assembly’ in R Ajulu (ed) *The making of Region: The revival of the East African Community* (2005) 67.

elections to the parliamentary institution, electorates will vote a candidate of their choice to parliament.³⁵⁶ It has been noted as follows:

Usually, direct elections confer more legitimacy on a representative, and therefore an institution, than recruitment through appointment. On the other hand, the choice of one or the other method of election is really a matter of what is practical, and should take into account the costs involved and the sophistication of the public, among other considerations. A particular electoral method may thus work in some cases or countries and not in others.³⁵⁷

The PAP Protocol has adopted the indirect method of appointing members to the Parliament. Some view this arrangement as unsuitable and argue that in order for the Parliament to appear or become a legitimate body, its members need to be elected directly by the citizens of the AU member states.³⁵⁸ Mongella, the former President of the PAP, has pointed out the following:

The decision was to start with representation from each state and the easiest way to achieve this was to get representation from national parliaments so that people would have a mandate from their own parliament and from their constituencies....For the time being we will use this system, which is itself democratic, while looking into the expense and the practical difficulties of constituencies for direct election.³⁵⁹

From the above quotes it appears that practicality and costs seem to be some of the considerations that may be taken into account when a decision is made as to whether a particular method of appointing representatives to parliament should be adopted. That is why it took the EP over 20 years to finally have MPs directly elected to the EP.³⁶⁰ The Rome Treaty of 1957 saw significant change in the powers of the EU Common Assembly as a specific provision

³⁵⁶ As above.

³⁵⁷ As above.

³⁵⁸ Hugo (n 282 above) 8.

³⁵⁹ A dialogue with Ambassador Gertrude Mongella, President of the Pan African Parliament, A discussion hosted by Southern African Regional Poverty Network (SARPN) and the Southern African Catholic Bishops' Conference, Pretoria, 14 September 2004 available at <http://www.sarpn.org.za/documents/d0001076/index.php> (accessed 27 December 2010).

³⁶⁰ Westlake (n 234 above) 23.

was made for direct elections.³⁶¹ At the time that such changes were made they did not have immediate effect until the first direct elections to the EP were held in June 1979.³⁶²

In my view, direct elections of MPAPs will have an immeasurable impact in Africa and other AU institutions. In the main, direct elections will introduce the PAP to the people and will at most secure the PAP's political independence as it would henceforth be clear that the elected MPs represent the citizens of the AU member states and they would have to be accountable to them. Further, since MPs would be elected directly to the Parliament and will be accountable to the citizenry it will be easy to avoid cases of co-opting MPs by member states and MPs will be encouraged to participate in the debates of the Parliament without fear of sanction from member states. However, it is important to remind those involved in the PAP project that direct elections to the Parliament will not be a panacea to its problems of effectiveness and impact. Neither is it a pre-requisite for ensuring a regional parliament's impact. The PACE is not constituted through universal suffrage, yet it has extensive influence on the decisions and activities of the Council of Europe.³⁶³ The fact that the PACE exercised extensive influence in the affairs of the Council of Europe puts in perspective the notion that the PAP will necessarily have considerable influence once its members are directly elected through universal suffrage.

It is perhaps apposite to note that intense discussions preceded the EU's decision to hold direct elections to the EP. It was expected that the direct elections will increase the independence of the EP from the member states,³⁶⁴ and will foster political independence and legitimacy based on the accountability of its representatives.³⁶⁵ It was further envisaged that direct elections will render the Parliament independent from the EU Commission.³⁶⁶ Indeed, direct elections

³⁶¹ M Shackleton (n 93 above) 106.

³⁶² As above.

³⁶³ De Puig (n 89 above) 55; P Evans & P Silk *The Parliamentary Assembly: Practice and procedure* (2008) 36.

³⁶⁴ As above.

³⁶⁵ As above.

³⁶⁶ As above.

rendered the EP independent from the Commission, with the Commission eventually depending on the EP for the legitimization of its actions and policies.³⁶⁷

It is true that it will take the PAP a considerable period of time before it could hold direct elections. Direct elections may only be carried out after extensive consultations with all the relevant stakeholders, as that will entail logistical arrangements as well as financial burdens that will involve the member states. Apart from the financial and logistical difficulties that are likely to arise in the event that member states decide that it is time for the PAP to hold direct elections, there is still the troubling issue of whether Africa could pull off such an enormous task of holding direct elections regard being had to the history of elections in Africa. Elections and elections results in Africa are often fiercely contested. Post-elections violence as has been witnessed with Kenya in 2007, Zimbabwe in 2008, Madagascar in 2009 and Côte d'Ivoire in 2011, frequently characterise elections in Africa. The fact that a sizeable number of African countries have held elections that are marred by irregularities and violence has caused commentators like Hugo to question '[w]hether principles and values for holding free and fair elections will ever take root in Africa; if not, what is the implication for extending the suffrage to the whole continent?'³⁶⁸

Further to the above, it has become clear that many African countries do not have structures or institutions in place that could hold credible direct elections to the PAP.³⁶⁹ 'Independent' electoral institutions in Africa continue to be weak and are proving to be costly to the consolidation of democracy in Africa.³⁷⁰ For example, the Electoral Commission of Kenya (ECK) has been held responsible for what happened with the Kenyan 2007 elections.³⁷¹ This is due to their failure to put in place proper mechanisms necessary for ensuring prompt and accurate

³⁶⁷ Westlake (n 234 above) 24.

³⁶⁸ Hugo (n 282 above) 9.

³⁶⁹ As above, 8.

³⁷⁰ See generally T Musarurwa 'Creating sustainable democracy in Africa - an African supranational body for the effective supervision of elections in Africa' (2008) unpublished LLM thesis, University of Pretoria.

³⁷¹ Commonwealth Secretariat, Kenya General Election report 2007 by the Commonwealth Observer Group, (2008) 28, www.thecommonwealth.org/document/34293/35144/152078/149095/35148/Kenya_commonwealth_observer_group_report_general.htm (accessed 27 December 2010).

reporting of election results.³⁷² Under these circumstances, it is highly unlikely that we will witness the emergence of Africa with the ability to provide structures necessary to successfully hold direct elections to the PAP in the immediate future. This is a reality considering that even though the EP finally managed to hold direct elections, the road has not been easy.³⁷³ The EP has had to contend with issues such as low voter turnout in some states, different electoral systems, financial challenges, and whether someone should vote based on residency or by virtue of nationality.³⁷⁴ All these resulted in a set of EP elections held so far being characterised by different rules and processes as determined by the various member states with reference to their set of circumstances.³⁷⁵

Another relevant yet ignored issue – as regards direct elections and the PAP – is the issue which was raised by the Vedel Report at the time that there was an attempt to give life to the provisions of the Rome Treaty on direct elections to the EP.³⁷⁶ The Committee of experts, which was chaired by senior parliamentarian Georges Vedel, submitted a report to the EP on 25 March 1972, following their appointment and instruction to consider all the implications of extending the powers of the EP.³⁷⁷ The Report indicated the following:

If one cannot imagine a parliament with real powers which does not draw its mandate from direct universal suffrage, it is even more difficult to imagine the election through direct universal suffrage of a parliament without extended powers. In this way, two equally desirable objectives are making each other's implementation impossible.³⁷⁸

³⁷² As above.

³⁷³ See generally R Corbett *The European Parliament* (1990) 12 – 21.

³⁷⁴ As above.

³⁷⁵ As above.

³⁷⁶ Report of the Working Party examining the problem of the enlargement of the powers of the European Parliament (Vedel Report) 25 March 1972, 2, available at http://www.cvce.eu/obj/Vedel_Report_25_March_1972-en-a4f5b134-99b9-41b3-9715-41769dfea12a.html (accessed 7 September 2013).

³⁷⁷ As above.

³⁷⁸ G Vedel (1972), Report of the Working Party examining the Problem of the Enlargement of the Powers of the European Parliament (Vedel Report), Brussels: Bulletin of the European Communities, Supplement 4/72, 59 quoted in Shackleton (n 93 above) 106.

In our case, the dilemma highlighted by the Vedel Report will continue to play itself out until such time that the PAP is given legislative powers or a decision to hold direct elections is arrived at by the member states. This chicken-or-egg conundrum necessitates one to enquire as to what the desirable sequence of events is: direct elections first, and then full legislative powers; or full legislative powers first, and then direct elections? In order to resolve the dilemma posed by the Vedel Report, the Paris Summit decided to hold elections after 1978. These elections were eventually held in June 1979.³⁷⁹ The decision to hold direct elections has been described as having paved the way for the extension of the EP's legislative powers.³⁸⁰ There is therefore no convincing reason why the same sequence of events should hold true for the PAP.

The above exposition is not an argument for maintaining the status quo. Desirable as it may be, any decision to have the PAP Protocol make provision for a continent-wide universal suffrage requires careful attention to detail. Any decision to provide for direct elections also requires a very thorough assessment of whether the African environment or political climate is ready to take on such a challenge. Perhaps it is in recognition of this fact that the latest Draft Revised PAP Protocol does not make provision for direct elections. Instead, the proposed article 5(3) provides that until a code is developed for election to PAP by direct universal suffrage the procedure for election to PAP is to be determined by the national parliament or other deliberative body of each member state which must notify the PAP President of such elections.³⁸¹

In its efforts to set in motion the review process of the PAP Protocol, and following the decision of the AU Assembly to review the PAP Protocol,³⁸² a study was commissioned by the PAP in 2010 (the Study Report).³⁸³ The Study Report did not suggest that the PAP Protocol be

³⁷⁹ Shackleton (n 93 above) 106.

³⁸⁰ As above, 107.

³⁸¹ Proposed article 5(3) of the Draft Revised PAP Protocol.

³⁸² The decision was taken by the Assembly at its 12th Ordinary Session held in Addis Ababa, Ethiopia in February, 2009 [AU/Dec, 223 (XII)].

³⁸³ Study report on the review of the Protocol to the Constitutive Act establishing the African Union Relating to the establishment of the Pan African Parliament since the validation workshop held at Midrand, South Africa, 9-13 august, 2010 (on file with the author).

amended to allow for direct elections. Instead, the Study Report recommended that a shift be made from the manner that MPAPs have been elected under the present Protocol and in its place a system of indirect election with national legislatures acting as electoral colleges should be adopted.³⁸⁴ The Study Report highlighted that a similar method of elections is being used to elect members to the East African Legislative Assembly (EALA). According to the East African Community (EAC) Treaty, the National Assembly of each member state is obligated to elect, not from among its members, nine people who will become members of the East African Legislative Assembly.³⁸⁵ The Treaty further demands that the elected persons must reflect, as much as it is feasible, the various political parties represented in the member state's national assembly, various shades of opinion, gender balance and other special interest groups in that member state.³⁸⁶

The election of representatives to the East African Legislative Assembly is done in accordance with a procedure determined by the member state.³⁸⁷ For example, the East African Legislative Assembly MPs in Kenya and Tanzania are elected by members of their respective parliaments from lists presented to them by the various political parties.³⁸⁸ As expected, there is no uniform manner of identifying those eligible of being elected to the Assembly. The only requirement is that elections to the EALA by member states must conform to the requirement of the EAC Treaty as regards elections to the EALA.³⁸⁹ This is why there have been controversies

³⁸⁴ As above, para 7

³⁸⁵ East African Community (EAC) Treaty, art 50.

³⁸⁶ As above.

³⁸⁷ As above.

³⁸⁸ Wanyande (n 355 above) 68.

³⁸⁹ As above; see generally *Peter Anyang' Nyong'o & Others v The Attorney General of Kenya*, East African Court of Justice Reference No. 1 of 2006 ; *Christopher Mtikila v The Attorney General of Tanzania and the Secretary General of the East African Community*, East African Court of Justice Reference No 2 of 2007; *Democratic Party & Mukassa Mbidde v The Secretary General of the East African Community & The Attorney General of the Republic of Uganda* East African Court of Justice Reference No 6 of 2011, 18. all highlighting that the essential requirements for EALA elections provided in article 50 of the EAC Treaty are that:

- the National Assembly shall conduct an election;
- sitting members of the Assembly are not eligible;
- elected members shall be nine;
- the elected members shall represent, as much as is feasible:-
 - a)the political parties in the National Assembly;

surrounding the election of representatives to the EALA as evidenced by the several cases lodged with the East African Court of Justice (EACJ).³⁹⁰

It is important to note that the EAC Treaty does not allow any member of the national assembly of the member state to be elected to the East African Legislative Assembly. This is perhaps out of recognition that allowing dual membership will affect the effectiveness of the MPs and that they are unlikely to pay undivided attention to the workings of the East African Legislative Assembly. In fact, this is an argument that was raised by those who were against dual membership when the issue presented itself before the EP. The argument was that membership of the EP had become a full time job, such that it could no longer be combined with another job without undercutting the member's performance and attendance in both parliaments.³⁹¹

Another interesting aspect to the issue of dual membership has been the issue of accountability. To whom are MPAPs accountable if they are not members of their respective national assemblies? It is submitted that in the main MPAPs are accountable to the citizens of their respective countries. Requiring that MPAPs should be accountable to their national assemblies will only serve to complicate matters as it is bound to encourage states to co-opt MPs knowing fully well that they will in the long run be able to control or censor their participation at the PAP. That MPAPs cannot and should not be accountable to their respective national assemblies is fortified by the explicit requirement that the MPAPs must vote in their personal and independent capacity.³⁹²

Those who support the dual mandate have argued that dual membership if properly used could assist in promoting the EP in that well-known politicians – already elected to the national assembly – could be elected to the Parliament and in the process attract publicity to the

-
- b)shades of opinion;
 - c)gender; and
 - d)other special interest groups;

- the procedure for elections shall be determined by the National Assembly. Further that Any election, or rule of procedure for election, of EALA members that departs from the above clear requirements risks contravening the EAC Treaty.

³⁹⁰ As above.

³⁹¹ Jacobs (n 236 above) 19.

³⁹² PAP Protocol, art 6.

parliament.³⁹³ It is further argued that dual membership could be used to foster strong links between the EP and national parliaments by way of improving communication between the national assembly and the EP.³⁹⁴

While dual membership was forbidden in some EU countries, prior to 2002, the EP had restricted but had not completely abolished dual membership as some member states were against its total abolition.³⁹⁵ This was particularly so because the European Union Council's 1976 Act allowed members to serve both at the EP and at the national level.³⁹⁶ Following the Council Decision of 25 June and 23 September 2002, amending the Act concerning the election of the representatives of the EP by direct universal suffrage, a member of the EP could no longer be a member of the legislature of the member state.³⁹⁷ This decision came into effect for the first time during the 2004 EP elections and since then the EP has completely abolished dual membership.

It is unfortunate that the Study Report on the Draft Revised PAP Protocol alluded to the above issues does not explain the reason(s) behind the recommendation that the method of electing MPs similar to that of the East African Legislative Assembly should be adopted. No reasons have been put forward to support the proposal to abolish dual membership at the PAP. Considering that dual membership has both negative and beneficial consequences, it is possible for the PAP to develop a hybrid system wherein a certain number of people elected to represent a member state at the PAP will have a dual mandate and the rest be drawn from the public. This could work the very same way that a quota system has been imposed on the

³⁹³ As above.

³⁹⁴ As above; Archive and Documentation Centre (Cardoc) Directorate General for the Presidency European Parliament, Towards direct elections to the European Parliament Paper written to mark the 30th anniversary of direct elections (June 1979)17 available at http://www.europarl.europa.eu/pdf/cardoc/Direct_elections.pdf (accessed 7 June 2012).

³⁹⁵ Jacobs (n 236 above) 20.

³⁹⁶ As above, 19.

³⁹⁷ Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/EEC, EEC, Euratom, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0772:EN:NOT> (accessed 29 December 2010).

number of women that are elected to the PAP. That way, the Parliament will enjoy the benefits that accrue if one adopts either of the methods. It thus remains to be seen how the member states will resolve this issue.

3.6.4 Tenure of membership of the PAP

The method of appointing MPAPs has a bearing on issues such as the tenure of MPAPs. At present there are fears that there is uncertainty surrounding the future of MPAPs. The PAP Protocol does not provide for a fixed term for the MPAPs. The PAP Protocol provides that membership to the Parliament will run concurrently with his or her term in the National Parliament or other deliberative organ.³⁹⁸ Compounding such problems is the fact that the PAP Protocol provides that the seat of a MPAP will become vacant if he or she ceases to be a Member of the National Parliament or other deliberative organ.³⁹⁹ The seat of the MPAP also becomes vacant if he or she dies,⁴⁰⁰ is appointed to their country's executive arm of the government,⁴⁰¹ resigns in writing to the President of the Parliament,⁴⁰² is unable to perform his or her functions for reasons of physical or mental incapacity,⁴⁰³ is removed on grounds of misconduct,⁴⁰⁴ is recalled by the national parliament or other deliberative organ⁴⁰⁵ or ceases to be an MPAP by virtue of withdrawal from the Union by his or her member state.⁴⁰⁶ The end result is that there is no uniformity or consistency in terms of the period of one being a MPAP. This is likely to affect continuity of membership of the PAP and eventually the work of the Parliament, especially if members are appointed to perform certain tasks and then it turns out that they are not available in the next session of the Parliament to continue the work.⁴⁰⁷ Perhaps the practice of having substitutes MPs, as is the case with the PACE, will reduce the

³⁹⁸ PAP Protocol, art 5(3) as read with rule 7(2) of the PAP Rules of Procedure.

³⁹⁹ PAP Protocol, art 5(4)(e).

⁴⁰⁰ As above, art 5(4)(a).

⁴⁰¹ As above.

⁴⁰² As above, art 5(4)(b).

⁴⁰³ As above, art 5(4)(c).

⁴⁰⁴ As above, art 5(4)(d)

⁴⁰⁵ As above, art 5(4)(f)

⁴⁰⁶ As above, art 5(4)(g) as read with art 19.

⁴⁰⁷ Nugent (n 286 above) 199, highlighting that change and turnover in personnel has an effect on the operations of an organization and that the European Parliament has not escaped this problem.

negative impact of this problem.⁴⁰⁸ This will certainly guarantee continuity of membership to the PAP and concomitantly improve the PAP's institutional memory.

3.7 Concluding remarks

The PAP is still in its infancy. It is likely to go through various developmental stages and changes before it could eventually fully play its envisaged oversight and legislative function within the AU. The Parliament is, however, relevant to the regional integration and consolidation of democracy in Africa, and, most importantly, the PAP has been mandated to promote the principles of human rights and democracy.

This chapter discussed the establishment of the PAP and concludes that the Parliament was established in recognition of the need to have Africans participate in the decision-making processes of the Union. That is why the Parliament is supposed to be people-driven, representative of the peoples of Africa and, most importantly, facilitate the participation of Africans in the political life of the community. However, it is doubtful that the PAP is representative as it ought to be or as it purports to be. This is due to several factors which include the limited participation of people in the election of representatives to the PAP. As already highlighted, MPAPs are not directly elected to the Parliament but are chosen and appointed from the various national assemblies or other deliberative bodies at the domestic level. That certain countries, such as Libya under Gadhafi, were allowed to become part of the PAP is an indication of the failure by the PAP to be representative as those MPs elected to the PAP are elected from bodies which are not representative. It has also come to light that the PAP founds its legitimacy on the various treaty texts, in particular the AEC Treaty, the AU Constitutive and the PAP Protocol. There is a possibility that states parties might encounter problems in relation to the application of these instruments. The ambiguity surrounding the possibility of withdrawal from the PAP Protocol and the manner according to which such withdrawal should be done is a case on point.

⁴⁰⁸ See generally P Evans & P Silk *The Parliamentary Assembly: Practice and procedure* (2008) 90, the practice is that the PACE allows member states to appoint substitutes who are generally active in the work of the Parliamentary Assembly and its Committees. In such circumstances, a substitute will take over the representation of a fellow country delegate in the event that they are appointed to Cabinet for example.

The PAP does not have legislative powers and as such it has been labelled as a mere ‘talk shop.’ Further, the PAP does not have control over its budget and can only suggest, for both the AU and the PAP budgets, what in its opinion the budgets should look like. Without any budgetary powers the PAP is unlikely to sufficiently determine its own future or that of the continent. Until the PAP Protocol is reviewed to vest the PAP with legislative powers it will remain a mere deliberative body. It may be implied from their adoption of the PAP Protocol that most states are agreed that the PAP should be given extended powers at some point but there is no evidence of consensus as to the time that the PAP ideally should be conferred with such legislative powers. In light of the practice of the EP and the period it took for it to have substantial powers, the argument that the PAP should have incremental powers is likely to attract sympathy from the member states and the AU as an institution. That is why it is advisable that there should be a move towards incremental extension of the powers of the Parliament as opposed to its immediate full legislative empowerment. The experience of the EP has shown that the issue of direct elections to the Parliament will go a long way in making the PAP known to the public. In that context, it is advisable that there should be discussions within the AU towards holding national elections of some sort to identify individuals to serve on the PAP.

CHAPTER IV

THE PAN-AFRICAN PARLIAMENT AND HUMAN RIGHTS IN AFRICA: AN ASSESSMENT OF THE RECORD SO FAR

4.1 Introduction

This chapter focuses on the various mechanisms and strategies that the Parliament has used to promote human rights. This discussion provides a background to the analysis of the human rights mandate of the PAP, which occupies the remainder of this chapter.

Even though the term ‘human rights’ in the context of this study has been highlighted, it is imperative to understand the human rights system in which the Pan-African Parliament (PAP) operates in so far as the promotion of human rights in Africa is concerned. As indicated in chapter 2, the meaning of human rights adopted in this study is the same as that espoused in several international and regional human rights treaties, in particular the African Charter on Human and Peoples’ Rights (African Charter) and other relevant African Union (AU) instruments. As such, the term ‘human rights’ in this thesis include socio-economic rights as well as civil and political rights as found in the various regional instruments. It is posited that even though there are various international human rights instruments that the PAP could use for the promotion of human rights, the legitimacy of the PAP’s work will largely be drawn from the human rights instruments of the African Union. The following section is a discussion of the human rights mandate of the Parliament. It thus discusses the PAP’s normative and institutional framework for the promotion of human rights in Africa. This is followed by a discussion of the Parliament’s mechanisms and strategies for the promotion of human rights.

4.2 Understanding the human rights mandate of the Pan-African Parliament

It has come to pass that the words ‘promote’ and ‘protect’ are associated with the word ‘human rights’ and are usually used together to indicate that a particular body has both a protective and promotional mandate. The PAP Protocol might be interpreted by others as suggesting that the Parliament has both a promotional and protective human rights mandate. In particular, the Preamble to the PAP Protocol highlights that

[f]urther determined to *promote and protect* [my emphasis] human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments the contents of the PAP Protocol were agreed upon.¹

The PAP is mandated to 'promote the principles of human rights and democracy in Africa'.² This is despite the fact that the the Preamble of the PAP Protocol hints at the possibility of the PAP actually 'protecting' human rights. The Parliament's power to promote human rights is further buttressed by the provisions of the PAP Protocol in so far as the PAP is free to make such recommendations it deems appropriate and may make recommendations on 'any matter including issues pertaining to the respect of human rights, consolidation of democracy, the promotion of good governance in Africa and the promotion of the rule of law.'³

The above conclusion is also supported by the role or work of parliaments in general. It is impossible to put forward parliaments as human rights 'protectors' *per se*. Parliaments are usually associated with the development of policies, oversight on distribution of wealth, social justice, review legislative proposals and budget scrutiny. Above all, parliaments are responsible for enacting legislation that is aimed at protecting human rights in a particular country. However, after passing such legislation the parliament can only assist with the promotion of human rights. The fact that parliaments establish agencies that play a protective role, such as National Human Rights Institutions (NHRIs) and 'ombudspersons', should not be viewed as indicative of the fact that parliaments have a protective human rights mandate.

At the same time, it is not totally correct to say that parliaments do not play a role in the *protection* of human rights. It is submitted that parliaments do play a protective role, albeit in a limited way, for example through the petition procedure. The power to receive petitions from citizens by parliaments is one of the traditional functions of parliaments. Grievances forwarded to parliament are normally attended to and the parliament is usually expected to assist in providing solutions to problems that may be brought before it for recourse. Such petitions give

¹ PAP Protocol, art 21.

² As above, art 3(2).

³ As above, art 11(1).

the parliament the opportunity of calling attention to any infringement of the aggrieved citizen's rights to local authorities or some other responsible institution.⁴ That is why it was submitted earlier that the protective role played by parliaments is somehow limited and by necessary extension would not qualify them as 'protective' bodies.⁵

A proper understanding of the mandate of the PAP as only being promotional is important to averting the expectation that the PAP may exercise such a protective mandate. For example, and unlike the PAP, the mandate of the African Commission is clearly demarcated into 'protective' and 'promotional', attracting certain duties in relation to a particular mandate.⁶ Viljoen identifies the protective mandate of the African Commission to include the submission of individual communications to the Commission, the submission of inter-state communications as well as conducting on-site protective and fact-finding missions.⁷ He identifies the promotional mandate of the African Commission as including the state reporting procedure, the workings of special rapporteurs or working groups, the adoption of resolutions, promotional visits, seminars and conferences, publication and dissemination of information as well as the creation of synergies and partnerships with the various stakeholders such as non-governmental organisations (NGOs) and NHRIs.⁸

Despite the wording of the Preamble of the PAP Protocol it should be emphasised, especially for the purposes of this study, that the PAP is primarily mandated to 'promote,' and not to 'protect' human rights in Africa. This is indeed an important factor to keep in mind when assessing the Parliament's role in matters of human rights on the continent.

⁴ P Lynch & S Birrell 'Linking Parliament to the people: The public petitions process of the Scottish Parliament' (2001) 37 *Scottish Affairs* 8.

⁵ Arguing that as a result, the mandate of the Parliament is 'promotional' as opposed to 'protective.'

⁶ F Viljoen *International human rights law in Africa* (2012) 295; C Heyns & M Killander 'The African regional human rights system' in F Gómez Isa & K de Feyter (eds) *International protection of human rights: Achievements and challenges* (2006) 509.

⁷ Viljoen (n 6 above) 300.

⁸ Viljoen (n 6 above) 349; see generally SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 191.

As indicated in the introductory chapter, the main aim of this thesis is to analyse the human rights mandate of the PAP. As Okafor has asked in relation to international human rights institutions;

Aside from their weak attempts at commanding obedience and their very modest success at cajoling compliance, are there other significant ways in which international human rights institutions (IHIs), such as the African human rights system, can matter to those who wage domestic social struggle?⁹

His question becomes relevant when one focuses on the human rights mandate of the PAP and thereby attempts to highlight the importance of such mandate. This question also becomes relevant to those who consider the PAP as part of a larger framework of the African human rights system. The successes and failures of the African human rights system and of the AU system in general are well documented and as Okafor has highlighted, the ‘virtual consensus in both mainstream and non-mainstream literature is that the African system (and each of its component entities) is ‘weak’ and ‘ineffectual’.¹⁰ He further notes that this ‘has become a sort of organising thematic among most scholarly observers of the workings of the system’.¹¹ As I have indicated in chapter 1, many reasons have so far been suggested to explain the OAU’s alleged failure to effectively protect human rights. In contrast, the AU has focused more on the promotion and protection of human rights with human rights having been made an explicit part of its mandate.

The African human rights system was designed to protect Africans from excessive violation of their basic human rights and to ensure compliance, by African states, with the norms set out under the various human rights instruments adopted by the AU. The advent of the Parliament in Africa’s democratisation process has the potential to improve the level of compliance by African states, not only with human rights norms, but also with the dictates of the rule of law, accountability and transparency. Even though the PAP is deemed to be a political body, it has

⁹ OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 1- 2.

I.

¹⁰ As above.

¹¹ As above, 67.

become clear that institutions like the PAP are increasingly becoming important to the promotion of human rights.

Perhaps the answer to the question posed by Okafor above is the PAP, especially when one proceeds from the premise that parliaments are better placed, than many other AU organs, to address issues of human rights. The human rights mandate of the PAP, albeit primarily promotional, is therefore very important and should be explored or exploited to achieve even better results in so far as the promotion of human rights in Africa is concerned.

4.3 The Pan-African Parliament's mechanisms and strategies for the promotion of human rights

The following discussion, making up the bulk of this chapter, deals with the actual human rights activities of the PAP. Since its inception in 2004, the PAP has undertaken various activities with respect to the various mandate(s) of the Parliament. Clearly, not all the activities it undertook were human-rights related. As is the case with many parliamentary bodies, the work undertaken by the PAP is largely carried out by its permanent committees. This section assesses the work of the various permanent committees of the PAP with the aim of ascertaining their role in the promotion of human rights in Africa.

It is also necessary to assess whether the work of the Parliament in that respect is carried out in a manner that will ensure that its work is beneficial to its constituents. For example, the Parliament has undertaken various fact-finding missions and election observer missions, and one would be interested in finding out whether there is a specific investigative method of gathering information. Further, the question arises whether methods that it has adopted in fact ensure that its mission reports are helpful to the PAP Plenary during the parliamentary debates.

With respect to the impact of the Parliament on the promotion of human rights, the words of Bradley sum up the complexities of measuring impact when he highlights, in the context of the role of the EP in the promotion and protection of human rights, that

[t]hough its activity is both considerable as to its volume and extensive as to its subject matter, the impact of its positions is not always easy, or even possible, to evaluate; while the evidence is necessarily anecdotal, a parliamentary resolution condemning violations

of human rights in some far-flung corner of the globe, for example, may have effects which bear no discernible relation to the Union's general influence in that region.¹²

This chapter does not therefore attempt to measure the impact of the PAP's activities, for example, its resolutions or the recommendations. As highlighted by Bradley, it is a difficult if not an almost impossible task to achieve. In the following discussion, an attempt is made to highlight the work of the Parliament relating to human rights as may be discernible from its activities. These include: resolutions, recommendations, fact-finding missions, elections' observer missions, the Parliament's petition procedure, questions raised during parliamentary debates, human rights related symposia, the Parliament's promotional activities and exchange activities.

4.3.1 Resolutions by the Pan-African Parliament specific to human rights

The role of the PAP is to discuss issues affecting the continent and to 'take resolutions' on such matters.¹³ Even though the PAP Protocol does not make reference to resolutions, the PAP Rules of Procedure have adopted the term 'resolutions' as a way of referring to the decisions that the Parliament has taken. This step has been taken in the light of the fact that the PAP is allowed to adopt its Rules of Procedure for the purpose of managing the business of the Parliament. Traditionally, resolutions follow parliamentary debates on a particular motion, or a proposal on a particular issue that requires that a decision be taken. Accordingly, a resolution refers to '[t]he decision of a meeting of any other assembly, such as the United Nations General Assembly.'¹⁴ Decisions taken by parliamentary bodies are thus usually in the form of resolutions.

Generally and as is the case with all resolutions at the international level, resolutions of the PAP are not binding on any member states or any organ of the AU. As it has been concluded, '[a]

¹² KC Bradley 'Reflections on the human rights role of the European Parliament' in P Alston *et al* (eds) *The EU and human rights* (1999) 839.

¹³ Rules of Procedure of the PAP, rule 5(d).

¹⁴ Oxford dictionary of law, 476.

resolution is 'binding' when it is capable of creating obligations on its addressee(s),¹⁵ and so far the resolutions of the Parliament do not have any binding legal effect on the addressees. However, it could be argued that some of the resolutions of the PAP have an internal binding effect. Organs of the Parliament are bound by resolutions of the Parliament with respect to the day-to-day running of the Parliament or the establishment of an additional committee, for example.

It has been rightly pointed out that 'despite their non-binding nature, resolutions, especially of political organs, have a normative value in international law.'¹⁶ Resolutions can also provide an important 'source of reference for human rights defenders, governments, academics, journalists and civil society actors'¹⁷

To date, the PAP has passed numerous resolutions or decisions over issues that have been presented and debated by the Parliament's Plenary or debated at Committee level. From the practice of the Parliament it appears that resolutions are adopted after the debate of the various reports tabled before the Parliament's Plenary or as a result of the debates over questions or motions that have been presented by MPs. The same applies to resolutions of the Parliament's various Permanent Committees. It is therefore necessary to highlight that since resolutions are essentially decisions of a particular parliamentary body, they follow no particular order or fashion as the decisions that the Parliament is supposed to make or makes differ from session to session.

With respect to the general nature of the resolutions of the PAP, it appears that the Parliament usually adopts its resolutions during and at the end of its parliamentary sessions. Perhaps the description of the resolutions of the African Commission bears similarity to those of the PAP. It has been pointed out, in relation to the resolutions of the African Commission, that

¹⁵ MD Öberg 'The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' (2006) 16 *The European Journal of International Law* 880.

¹⁶ Centre for Human Rights 'Opinion to the African Commission on Human and Peoples' Rights on the impact of the resolutions of the Commission' (2008) 3; *The legality of the threat or use of nuclear weapons* 1996 ICJ Reports 226.

¹⁷ As above.

[t]he nature and content of these resolutions tend to vary. Occasionally they focus on procedural issues, i.e. requesting the particular state to create the modality of working with the Commission in investigating certain human rights violations in that country. At times, its resolutions take a stand on allegations of certain human rights violations and incorporate statement of condemnation. On other occasions, the Commission use[s] resolutions to create special mechanisms or working groups for the implementation of its broad mandate by adopting resolutions.¹⁸

The Parliament has to date adopted varying resolutions ranging from those expressing gratitude,¹⁹ those dealing with continental issues such as peace and security,²⁰ those dealing with specific areas of human rights protection,²¹ country specific resolutions,²² to resolutions in respect of other organs within the AU²³ and on other areas or issues that the Parliament considers appropriate. The following discussion will focus on the various resolutions of the Parliament that are of relevance to human rights. The discussion will be divided into thematic resolutions, country-specific resolutions and procedural resolutions that are related to human rights.

The practice with respect to resolutions at the international level is that they are adopted or passed by a particular body in order to define the normative content of a particular right. Most of the Parliament's resolutions usually end up as recommendations or at the very least, lead to the adoption of a particular recommendation by the Parliament. In essence and in most

¹⁸ EX. CL/279 (IX) Annex III Submission by the Federal Democratic Republic of Ethiopia Concerning the 16th Activities Report of the African Commission on Human and Peoples' Rights 43.

¹⁹ Eg, Resolution Thanking the Republic of South Africa for Hosting the Pan-African Parliament, PAP-Res 001/04 adopted by the PAP during its Second Ordinary Session, 16 September – 1st October 2004, Midrand, South Africa.

²⁰ Eg, Resolution on Peace and Security: Women and Children in Armed Conflict, PAP-Res 003/04 adopted by the PAP during its Second Ordinary Session, 16 September – 1st October 2004, Midrand, South Africa.

²¹ Resolution on the Violation of Human Rights on Women and Children in the Darfur Region of the Sudan, PAP-Res 003/04 adopted by the PAP during its Second Ordinary Session, 1 – 12 May 2006, Midrand, South Africa.

²² Eg, Resolution on Central African Republic, PAP-Res 01(VI)/06.

²³ Eg, Resolution for the Popularisation and Evaluation of NEPAD, adopted by the PAP during its Second Ordinary Session, 13 – 24 November 2006, Midrand, South Africa.

instances the resolutions of the PAP seem to be espousing the position taken by the Parliament on a particular issue. As it will appear later in this chapter, under the discussion of recommendations of the Parliament, there has been a deliberate move to make a distinction between ‘resolutions’ and ‘recommendations’ of the Parliament. That is, while ‘[t]he term ‘resolution’ as used in UN practice has a generic sense, including recommendations and decisions,²⁴ the PAP has sought to make the distinction with respect to the terms ‘resolution’ and ‘recommendation’. The importance of such a distinction lies not in the binding effect of the two, but in the addressees to whom they are directed. While ‘resolutions’ of the PAP can take any form, could be addressed to any entity, including governments or could point to the position of the Parliament or be used to thank someone, ‘recommendations’ are directed to the AU, governments, international organisations or other organs of the African Union.

The wording of most of these resolutions testifies to the above assertion. It has been noted that ‘a resolution, as a formal instrument, may combine different provisions that, substantively, respectively recommend, decide or declare.’²⁵ Most of the PAP’s resolutions are couched in such a manner that they ‘encourage’ or ‘call upon’ the government of a particular member state or the AU Assembly to take certain measures with respect to a particular issue. Other resolutions of the PAP are concluded by indicating that the Parliament undertook a certain decision with respect to a particular issue. Such resolutions are usually concluded with words that indicate that the Parliament ‘therefore resolves’ to do something or has taken a certain position with respect to a particular continental issue.

Some of the resolutions of the Parliament are related to certain human rights issues or thematic human rights areas. The various issues that are addressed by these resolutions range from gender to peace and security matters on the continent. Because of their specific nature, they may be referred to as thematic resolutions. It should be noted that even though the resolutions of the PAP may be deemed to be thematic in nature unlike those of the African Commission, for example, they are not usually geared towards defining or setting out the normative content of a particular right. On the contrary, and as indicated under the general

²⁴ Öberg (n 15 above) 880.

²⁵ As above.

discussion of resolutions of the PAP, they serve different purposes. It appears that this is largely as a result of the fact that these resolutions are passed by the Parliament in order to convey a message to a particular organ of the AU or to a member state. They are thematic in the sense that they discuss a particular issue or area of human rights.

As already indicated, the focus of this following discussion will be on some of the resolutions of the PAP relevant to the promotion of human rights in Africa.

4.3.1.1 Resolution on Peace and Security, Women and Children in Armed Conflicts

During its second ordinary session of the Parliament in November 2006, several resolutions were passed and adopted. One of the resolutions concerned itself with peace and security, women and children in armed conflicts.²⁶ It appears that the adoption of this resolution was necessitated by how conflict affects the potential for socio-economic development in Africa.²⁷ The resolution proceeded to note the study conducted by Mrs Graca Machel as an Expert of the Secretary-General of the United Nations, which underscored the need to treat the issue of children in armed conflict with the necessary seriousness the situation deserved.²⁸

With respect to children, the Parliament noted that it was also necessary to take into account 'Africa's past commitments in global and continental instruments,'²⁹ and continued to cite UN Security Council Resolution 1314 on Children and Armed Conflict.³⁰ Resolution 1314 addressed issues relating to the treatment of children in times of war and called upon member states to 'respect fully international law applicable to the rights of and protection of children in armed conflict, in particular the Geneva Conventions of 1949', their additional protocols, as

²⁶ Resolution on Peace and Security: Women and Children in Armed Conflicts, PAP-Res 003/04 adopted by the PAP during its Second Ordinary Session, 13 – 24 November 2006, Midrand, South Africa.

²⁷ UNICEF *Impact of armed conflict in children (1996)* Report of the expert of the Secretary-General, Ms. Grac'a Machel.

²⁸ Resolution on Peace and Security: Women and Children in Armed Conflicts, PAP-Res 003/04 adopted by the PAP during its Second Ordinary Session, 13 – 24 November 2006, Midrand, South Africa, para 2.

²⁹ PAP-Res 003/04, para. 3.

³⁰ S/RES/1314 (2000) Security Council Resolution on the Protection of Children in Armed Conflicts.

well as the UN Convention on the Rights of the Child (CRC).³¹ Resolution 1314 also called on member states to take cognisance of the provisions of the Rome Statute of the International Criminal Court (ICC).³² It should be noted that Resolution 1314 continues to be cited as one of the important resolutions of the UN Security Council in so far as the protection of the rights of children in armed conflict is concerned.³³ The importance of Resolution 1314, or generally resolutions of the UN Security Council, is that they provide a normative framework of standard for the protection of a particular human right or group such as children.³⁴ An appreciation of this fact by the Parliament, as evidenced by its reference to these documents, is encouraging indeed.

With respect to women PAP Resolution 003/04 makes reference to the UN Security Council Resolution 1325, which cautioned and urged states to address the issues of women, war and peace³⁵ and also called on all parties to an armed conflict to protect women and girls from gender-based violence.³⁶ The Resolution continues by indicating that ‘the report of a study done as a follow up to this resolution highlights the need to see women not only as victims of wars.’³⁷ There is no mention of the title of the study that the Resolution makes reference to. However, one may conclude that the study that is referred to in this resolution is the 2002 UN study on women, peace and security since the UN Secretary-General was authorised to conduct a study and submit a report to the UN Security Council on the issue.³⁸ However, the later paragraph of the Resolution makes reference to the Report by UNIFEM, entitled ‘Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-building.’³⁹ Considering that the Resolution is meant for various

³¹ As above, para 3.

³² As above.

³³ CW Greenbaum *et al* *Protection of children during armed political conflict: A multidisciplinary perspective* (2006) 275.

³⁴ As above.

³⁵ S/RES/1325 (2000) Security Council Resolution calling for broad participation of women in peace building, post-conflict reconstruction.

³⁶ As above.

³⁷ PAP–Res 003/04, para 3.

³⁸ UN (2000) *Women, peace and security study submitted by the Secretary-General pursuant to Security Council resolution 1325*.

³⁹ PAP–Res 003/04, para 3.

purposes and it is to be used by various stakeholders, it was necessary that it maintained a certain level of specificity and precision. Further, it should have provided an insight as to the reasons behind the decision to mandate the Committee to follow up on the recommendations of the latter report as opposed to the report that was commissioned by the UN Secretary-General.

It is commendable that PAP Resolution 003/04 makes reference to other instruments that are necessary for the protection of women and children. It reaffirms that the Parliament is aware of some of the various instruments that have sought to deal with the issue of women and children in armed conflict. At another level, especially where PAP Resolution 003/04 is used as an advocacy tool, it could sensitise the public or the member states on the commitment made by the Security Council in so far as the protection of women and children in situations of armed conflicts are concerned. Further, it indicates the position of the Parliament with respect to the role of women in peace and security. Such is succinctly captured by the Resolution when it concludes that women should not only be viewed as victims of wars but as 'survivors, peacemakers and leaders during the phase of reconstructing their societies.'⁴⁰ This position of the Parliament will go a long way in ensuring that women are treated as partners to the resolution of conflicts as well as the maintenance of peace and security in Africa.

However, one notable anomaly is the fact that the Resolution does not make any reference to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), the African Charter, the African Children's Charter or any instrument of one of the African Regional Economic Communities (RECs). Such an omission may hardly be explained by the argument that instruments of the AU are inadequate and are unable to sufficiently respond to the needs, in the present context, of women and children in Africa. In fact, there are several instruments within the AU that contain provisions that are most likely to provide sufficient basis for the promotion of women's rights.

The Resolution concludes by highlighting that the 'representatives of the African people meeting under the banner of the Pan-African Parliament' resolves that the Committee on Cooperation, International Relations and Conflict Resolution, the Committee on Gender,

⁴⁰ As above.

Family, Youth and People with Disability and the Committee on Justice and Human Rights should

be mandated to study the recommendations of the Report by UNIFEM, entitled *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building*, with the view to monitor and ensure follow-up work in Africa.⁴¹

These committees were to make known their findings to the Parliament on or before its third ordinary session in 2005.⁴² However, it appears that this has not been done for reasons that cannot be established easily. The importance of this Resolution is undermined by the failure of the PAP Committees to study the recommendations of the Report by UNIFEM on Women, War and Peace so as to make appropriate resolutions to the PAP Plenary.

4.3.1.2 Resolution on the Violation of the Rights on Women and Children in the Darfur Region of the Sudan

To some extent, connected to the Resolution on Peace and Security, Women and Children in Armed Conflicts adopted by the Parliament in 2004, was the Resolution on the Violation of Human Rights on Women and Children in the Darfur Region of the Sudan.⁴³ The latter Resolution was adopted by the Parliament during its 2006, fifth ordinary session. In a one-page resolution, the PAP noted the massive violation of human rights of women and children in the Darfur Region of the Sudan. In furtherance of the Parliament's determination to 'promote the principles of human rights in all parts of Africa,' it was resolved that a mission should be sent to conduct a gender assessment Darfur.

The Resolution does not indicate the urgency behind its adoption. Despite the fact that the PCJHR is also mandated to promote human rights principles and some can argue that it should be given primacy over human rights issues of the PAP, it was not included as part of the delegation that was to be sent to Darfur to carry out a gender assessment. The findings of this

⁴¹ PAP-Res 003/04, para 4.

⁴² PAP-Res 003/04, para 5.

⁴³ PAP-Res 003/2006 adopted by the PAP during its Second Ordinary Session, 13 – 24 November 2006, Midrand, South Africa.

mission will be discussed in detail later in this chapter focusing on the fact-finding missions of the Parliament.

4.3.1.3 Resolution on the Ratification of the Protocol on Women's Rights in Africa

During its second ordinary session in 2004, the Parliament also passed a resolution on the ratification of the African Women's Protocol. The African Women's Protocol was adopted in 2003 and sought to advance the rights of women in Africa. The Resolution highlighted the content of the Protocol, in particular the categories of the rights protected by the Protocol,⁴⁴ and proceeded to acknowledge that the African Women's Protocol will be a powerful new tool that could be used to address the issue of gender parity by African nations.⁴⁵ It was also a call for African states to integrate 'gender perspective in their policies, legislation, development plans and activities to ensure the overall well-being of society.'⁴⁶ The Parliament also appealed to member states that have not done so to promptly ratify the African Women's Protocol.⁴⁷

It appears that this Resolution was a clarion call for African states to ratify the African Women's Protocol. Following the call, several symposia and workshops were held to discuss issues surrounding the Protocol and these included encouraging states to ratify the Protocol. The most notable of the conferences or seminars is the 2005 strategy workshop of the Permanent Committee on Gender, Family, Youth and People with Disabilities involving collaboration between the Parliament and Oxfam.⁴⁸ The end result of the workshop was that a draft strategy was designed.⁴⁹ The strategy highlighted areas that needed to be pursued in order to ensure effective promotion and protection of women's rights.⁵⁰

⁴⁴ Resolution on Ratification of Protocol on Women's Rights in Africa, PAP-Res 006/04 adopted by the PAP during its Second Ordinary Session, 13 – 24 November 2006, Midrand, South Africa.

⁴⁵ PAP-Res 006/04, para. 1- 3

⁴⁶ PAP-Res 006/04, para 6.

⁴⁷ PAP-Res 006/04, para 5.

⁴⁸ R Gaway & RS Mukasa 'The African Women's Protocol: A new dimension for women's rights in Africa' (2005) 13 *Gender and Development* 49.

⁴⁹ As above.

⁵⁰ As above.

4.3.1.4 Resolution on the Audit of Constitutions of Member States of the AU

The Resolution on the Audit of Constitutions of member states of the AU is one of the resolutions that indirectly touched on the promotion of human rights on the continent. The Resolution highlighted the function of the PCJHR, and its role in the harmonisation and coordination of laws of member states, and its role in the promotion of human rights on the continent.⁵¹ The Resolution then notes the Parliament's concern with the 'violation of human rights and suppression of civil liberties in African countries.'⁵² The Parliament resolved to audit the constitutions, not only of PAP member states, but of all AU member states. The Resolution does not indicate the reasons behind its adoption and leaves one to speculate as to these reasons. Apart from the generally expressed concern of human rights violations, it is not clear why this resolution was adopted.

To date, the PCJHR has not undertaken the audit of African constitutions as was resolved by the Parliament. This is perhaps attributable to a lack of human and financial resources. However, it is apposite to note the failure on the part of the PCJHR to collaborate and seek assistance from civil society or academic research institutions so as to undertake such a project. There is need therefore, to have a proper follow up mechanism and proper coordination and cross-referencing of the resolutions of the PAP if there is any hope that the Parliament will achieve the desired impact.

4.4 Recommendations by the Pan-African Parliament relating to Human Rights

In addition to the resolutions discussed above, the Parliament always makes recommendations 'to the African Union and its organs, Regional Economic Communities and their respective organs, Member States and their organs and institutions.'⁵³ This modus operandi is in accordance with the provisions of the PAP Protocol which empowers the Parliament to 'make recommendations that are aimed at contributing to the attainment of the objectives' of the AU.⁵⁴ The PAP is also empowered to discuss its budget and the budget of the AU and to make

⁵¹ Resolution No. PAP – Res 002/006.

⁵² As above.

⁵³ PAP Protocol, art 11(4).

⁵⁴ As above.

consequent recommendations.⁵⁵ It is expected that, through these recommendations, the Parliament will make known challenges facing the integration in Africa and means necessary to overcome such challenges.

Just emerging from the first years of the Parliament's existence, it is rather difficult to characterise the recommendations of the PAP. Recommendations of the PAP do not have any binding effect and unlike those of the African Commission they are not eventually adopted as decisions of the AU Assembly.⁵⁶ This is not surprising considering the fact that the Parliament does not have any legislative powers and is thus unable to make laws aimed at directing the integration project in Africa. That is, the PAP is entitled to make strategic suggestions on the future of integration in Africa. These suggestions may or may not be accepted by the Parliament's addressees. The fact that the PAP can only make recommendations or suggestions remains a major challenge to any planned assessment of compliance with such recommendations.

There are few recommendations which have been adopted by the Parliament that are specifically concerned with human rights issues on the continent. The PAP Recommendation on the Situation of Human Rights in Saharawi Republic⁵⁷ and the Recommendation on the situation in Niger⁵⁸ are two of the few recommendations adopted by the Parliament that make specific mention of human rights.

4.4.1 Recommendation on the Situation of Human Rights of Saharawi Republic

The brief committee Recommendation on the Situation of Human Rights of Saharawi Republic was that the AU should move 'to guarantee the safety and freedom of the Saharawi people and

⁵⁵ As above, art 11(2)

⁵⁶ Viljoen (n 6 above) 339, highlighting that there is a general debate as to the 'binding nature of the Commission's decisions'; see generally F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1.

⁵⁷ PAP Recommendation on the Situation of Human Rights in Saharawi Republic, PAP/2P/P/Rec.02 (II) adopted by the PAP during its Sixth Ordinary Session, October 2011, Midrand, Johannesburg South Africa.

⁵⁸ PAP Recommendation on the Situation in Niger, PAP/2P/P/Rec.01 (II) adopted by the PAP during its Sixth Ordinary Session, October 2011, Midrand, Johannesburg South Africa.

to exercise serious pressure on Morocco to stop the flagrant violation of the human rights committed against the defenceless civilians in Western Sahara.⁵⁹ It further calls on the UN to include a human rights monitoring mechanism in its mission in Western Sahara.⁶⁰

As is the case with many of the Parliament's recommendations, this recommendation also fails to provide sufficient background information on the specific human rights violations occurring in the Saharawi Arab Democratic Republic. It also does not provide sufficient background to events leading to its adoption nor does not make reference to previous resolutions and recommendations on related matters.

4.4.2 Recommendation on the Situation in Niger

With respect to Niger, the Parliament appealed to the AU acting together with ECOWAS to put pressure on the military junta to commit to ensuring peace and security during the elections. It went on to specifically call on the military junta to respect the rights and freedoms of the citizenry, detainees and the rights of President Tandja.⁶¹ This recommendation is similar to the one on the human rights situation of the Saharawi Republic. Not only is the recommendation brief as is the one on the Saharawi Arab Democratic Republic but it also fails to provide sufficient information on why it was adopted and previous recommendations, if any, on the crisis in Niger.

4.4.3 Recommendation on the Situation in the Israel-Lebanese crisis

Another interesting recommendation is the one relating to the human rights situation in the Israeli-Lebanese crisis.⁶² It is surprising that the Recommendation was adopted by the Committee on Rules, Privileges and Discipline. This Committee should ordinarily be responsible for the interpretation and implementation of the Rules of Procedure of the

⁵⁹ PAP Recommendation on the Situation of Human Rights in Saharawi Republic, PAP/2P/P/Rec.02(II) adopted by the PAP during its Sixth Ordinary Session, October 2011, Midrand, Johannesburg South Africa.

⁶⁰ As above.

⁶¹ n 58 above.

⁶² Adopted by the PAP during its Sixth Ordinary Session, First Parliament, 20 January 2012, Addis Ababa, Ethiopia.

Parliament. Its main purpose notwithstanding, the recommendation highlights that the hostilities between Israel and its neighbours have caused serious violation of human rights.⁶³ The Parliament further highlights that due to its commitment to the protection of human rights, it denounces the human rights violations that are occurring as a result of the conflict. It also encourages the United Nations to make considerable efforts to bring to an end the conflict.

Two issues immediately arise with respect to this recommendation. Firstly, it was inappropriate for the recommendation to have been initiated by the Committee on Rules, Privileges and Discipline. The Committee does not have the mandate to consider such matters and as a consequence does not have the mandate to initiate such a recommendation. Secondly, it is doubtful whether the Parliament itself has the mandate to make such a recommendation. It should be recalled that the Parliament is only empowered to make recommendations that will contribute to the attainment of the objectives' of the AU. It is accepted that the Parliament has the mandate to promote human rights in Africa and this mandate is generally construed to include the protection of human rights. However, it was inappropriate for the Parliament to have adopted a Recommendation of this kind without drawing a nexus between the concerns raised in the Recommendation and the protection of human rights in Africa. The Recommendation is not even addressed to the African Union Assembly, which is the proper body to have made such a recommendation to the UN.

Some of the Recommendations of the Parliament are geared towards encouraging member states to ratify AU treaties which are relevant to the promotion and protection of human rights in Africa. For example, through its Recommendation on the Advocacy, Ratification and Domestication of the African Charter on Democracy, elections and Governance (African Charter on Democracy),⁶⁴ the Parliament encouraged AU member states to ratify the African Charter on Democracy.

⁶³ As above.

⁶⁴ Adopted by the PAP during its Sixth Ordinary Session, Second Parliament, 20 January 2012, Addis Ababa, Ethiopia.

4.4.4 Recommendation on the Role of the Pan-African Parliament

The PAP Recommendation on the Role of the PAP which was adopted during the Parliament's Second Ordinary Session on its role is possibly one of its most important recommendations to date. It is through this Recommendation that the Parliament sought to assert its place within the AU and, most importantly, the Parliament's place in relation to the promotion of human rights on the continent.⁶⁵ It appears that the Recommendation came about as a result of a presentation by Professor Shadrack Gutto to the PAP Assembly on the role of the Parliament in Africa.⁶⁶ Beyond that, the Recommendation does not shed light on the events preceding the presentation that eventually led to the adoption of this recommendation. The Recommendation briefly addresses issues that affect good governance and democratization in Africa. It discusses and approves the merger of the ACtHPR with the African Court of Justice and 'urges' that the process of integration should not compromise the operation of the ACtHPR. It further recognises the responsibility that has been vested in the Parliament and highlights that pursuant to the 'principles of effective, responsible accountable democratic governance,' the various institutions of the AU should 'strive to respect the doctrines of separation of powers and mutual oversight roles.'⁶⁷ One may expect that the Parliament would have clearly set out its role in Africa. It was also an opportunity for the Parliament to have elaborated further on its role in relation to the promotion and protection of human rights on the Continent. It is correct therefore to conclude that the title is misleading as the Recommendation failed to sufficiently set out the role of the PAP.

4.4.5 Recommendations of the Pan-African Parliament relating to peace and security in Africa

A considerable amount of resources and attention of the Parliament has so far been expended on issues relating to peace and security on the continent. Considering the state of peace and security in Africa it does make sense that the focus should be on Africa's stability. However,

⁶⁵ PAP–Rec. 005/04 adopted by the PAP during its Second Ordinary Session, 16 September – 1 October 2004, Midrand, South Africa.

⁶⁶ As above.

⁶⁷ As above.

that does not warrant the neglect of other important issues such as the promotion and protection of human rights. Indeed, it is well documented that most of the conflicts in Africa are caused by the massive violation of human rights by African governments. Addressing poverty related issues, repression of minorities, silencing of critics, democracy, elections and democracy issues in a more nuanced manner by the Parliament could assist in ensuring that causes of conflicts in Africa are identified and eliminated. At a more practical level, the Parliament's bias towards peace and security might rob the Parliament of improving good governance in countries with a relatively good peace and human rights record.

The Parliament's Recommendation on Peace and Security in Africa⁶⁸ is one of the many recommendations that the Parliament has adopted addressing the issue of peace and stability in Africa. In the main the Parliament was concerned with the continued conflicts on the continent and their effects 'on the poor, families, women and children.'⁶⁹ It noted the efforts made by the Union in ensuring peace and stability such as the establishment of the Peace and Security and the Panel of the Wise.⁷⁰ The Parliament made three important recommendations. The PAP recommended that in addition to having the AU intensify its efforts to bring peaceful resolutions to conflicts in Africa, the reports of the Peace and Security Council (PSC) on conflict resolution should be presented to the PAP Plenary on a regular basis.⁷¹ It also recommended that the President of the Parliament should be appointed as a member of the Panel of the Wise.⁷²

The above recommendations were adopted after the Parliament's debates on on peace and security. The recommendations are viewed as having the potential to improve the manner in which the Union mechanisms respond to conflicts. The Panel of the Wise is made up of five highly-respected members from diverse backgrounds of the society who have made

⁶⁸ PAP–Rec. 003/04 adopted by the PAP during its Second Ordinary Session, 16 September – 1 October 2004, Midrand, South Africa.

⁶⁹ As above, para b.

⁷⁰ As above, para c.

⁷¹ As above, para 1-3.

⁷² As above, para 1-3.

considerable input in the maintenance of peace and security on the African continent.⁷³ A closer reading of the provisions of the PSC Protocol indicates that membership to the Panel of the Wise is based on one major consideration. People appointed to the Panel of the Wise should be persons ‘who have made outstanding contribution to the cause of peace, security and development on the continent.’⁷⁴ Appointment to the Panel of the Wise is therefore not based on the type of position or office that a person holds. The recommendation that the President of the PAP should be a member of the Panel of the Wise by virtue of his position is therefore misinformed.

One of the most important functions of the Panel of the Wise is to advise the Peace and Security Council and the Chairperson of the Commission on all issues pertaining to peace and security.⁷⁵ If the President of the PAP was to be a member of the Panel of the Wise, the Parliament would be able to easily pass on its advice to the PSC. A closer relationship was likely to ensue between the PAP, the Panel of the Wise and consequently the PSC. Perhaps that explains why the PAP, oblivious to the qualifications for someone to be a member, recommended that the President of the PAP should be a member of the Panel of the Wise. It is not surprising that the AU Assembly did not accept and implement the recommendation by the Parliament.

The most appropriate recommendation would have been for the Parliament to indicate that the Committee on Co-operation, International Relations and Conflict Resolutions establish stronger links with the PSC Situation Room. The latter, which is located at the Conflict Management Directorate of the Union, is tasked with collecting and analysing data so as to facilitate the anticipation and prevention of conflicts.⁷⁶

The Parliament also recommended that the AU should move to finalise the establishment of the African Standby Force (ASF). It has since transpired that the establishment of the ASF will take

⁷³ Protocol on the Peace and Security (PSC), art 11(2); see generally A Jegede ‘The African Union peace and security architecture: can the Panel of the Wise make a difference’ (2009) 9 *African Human Rights Law Journal* 417.

⁷⁴ PSC Protocol, art 11 (2).

⁷⁵ As above, art 11(3).

⁷⁶ As above, art 12.

a while to be fully established, due to several factors ranging from lack of political will to financial constraints on the part of the Union.⁷⁷ That notwithstanding, the decision by the AU to have an ASF is a clear indication that the Community is committed to ensuring peace and stability on the continent.⁷⁸ It is indeed laudable that the Parliament has supported this important initiative.

The other recommendation made by the Parliament was that the reports of the PSC on their conflict resolution efforts should be tabled and discussed by the PAP. Further, the Parliament wanted to have an opportunity to consider the reports, make observations and recommendations.⁷⁹ This has been achieved as the Parliament has since made sure that they have as an agenda item the presentation on peace and security. It is under this head that a presentation may be made by a representative of the PSC on issues relating to security in Africa. It is also under this agenda item that the PAP Committee on Co-operation, International Relations and Conflict Resolutions informs the parliament on its activities and the state of peace and security in Africa.

A similar recommendation was adopted by the Parliament during its 6th ordinary session of the first parliament in November 2006.⁸⁰ Having highlighted the effects of conflicts in Africa, the Parliament proceeded to make recommendations to the AU, African governments and parliaments. It recommended that the capacity of AU organs should be strengthened in order to allow them to play a meaningful role in the conflict resolution efforts in Africa.⁸¹ The recommendation then emphasised the need to have countries resolve disputes peacefully and denounced the use of military action in the resolution of disputes.⁸² The Recommendation also called on all member states to ratify and implement all instruments adopted by the AU relating

⁷⁷ See generally T Neethling 'Realizing the African standby force as a Pan-African ideal: Progress, prospects and challenges' (2005) 8 *Journal of Military and Strategic Studies* 15, 25; J Cilliers & M Malan 'Progress with the African standby Force' (2005) ISS Occasional Paper 98 available at <http://www.iss.co.za/pubs/papers/98/Paper98.htm> (accessed 31 January 2012).

⁷⁸ Neethling (n 77 above).

⁷⁹ PAP–Rec. 003/04, para 3.

⁸⁰ PAP Recommendation on Peace and Security issues in Africa, PAP–Recom. 01(VI)/06 adopted by the PAP during its Second Ordinary Session, 16 September – 1 October 2004, Midrand, South Africa.

⁸¹ PAP–Recom. 01(VI)/06, para 1.

⁸² PAP–Recom. 01(VI)/06, para 6.

to peace and security, unconstitutional change of government and democracy.⁸³ It was in that light that the Recommendation stressed the importance of presidential term limits and the maintenance of such term limits for the smooth transfer of power.⁸⁴ It also recommended that all attempts to grant heads of state and government unlimited mandates should be opposed by national and regional parliaments.⁸⁵ The Parliament also recommended that in the event that there is a peace agreement, all parties to such an accord should respect its spirit and letter and should not undermine the peace process.⁸⁶ The Parliament further recommended that a final decision should be taken as to when the decolonisation of Western Sahara would take place in accordance with the stated time frames.⁸⁷

An earlier Recommendation of the Parliament, adopted during its fifth ordinary session of the first Parliament in May 2006, had made similar recommendations.⁸⁸ The latter Recommendation, discussed above, does not make reference to this May 2006 Recommendation or 'recall' its contents as is usually the practice with other recommendations. It was recommended that the AU should develop a mechanism to enforce the provisions of its Constitutive Act relating to peace and security in Africa⁸⁹ and intensify efforts to secure sustainable peace in Côte D'Ivoire, The Sudan, Chad, the Democratic Republic of Congo and the Great Lakes.⁹⁰ Further, the Parliament recommended that the conflict prevention established under the African Caribbean Pacific (ACP) should be operationalized.⁹¹ The Parliament further recommended that the all peace accords, such as the Darfur Peace Agreement, should be respected by all parties.⁹² Further that the on-going peace efforts

⁸³ PAP–Recom. 01(VI)/06, para 2.

⁸⁴ As above, para 3.

⁸⁵ As above, para 4.

⁸⁶ As above, para 7.

⁸⁷ As above, para 9.

⁸⁸ PAP Recommendation on Peace and Security issues in Africa, PAP–Recom. 001/06 adopted by the PAP during its Second Ordinary Session, 16 September – 1 October 2004, Midrand, South Africa.

⁸⁹ As above, para 1.

⁹⁰ As above, para 2.

⁹¹ As above, para 3.

⁹² As above, para 4

spearheaded by the AU supported by the UN should be intensified to secure sustainable peace.⁹³

The Parliament was at the same time concerned with the security and humanitarian issues surrounding the dispute in the Darfur Region in the Sudan. In its Recommendation on the Peace Process in Darfur⁹⁴ the Parliament called on the AU to take measures that will put to an end the crisis in the Darfur Region so as to avert the ‘humanitarian disaster’ as well as attain peace stability in the region.⁹⁵ The PAP also recommended that the AU and the UN should ensure that the conflict does not affect Sudan’s neighbouring countries.⁹⁶ Above all, the Parliament urged all parties to the conflict who had not signed the Darfur Peace Accord to sign the same.⁹⁷ In order to encourage parties who had not signed the agreement to become party to the accord, the Parliament recommended that the UN and the AU should consider ensuring compliance with the Accord.⁹⁸

Apart from highlighting its concerns over the dispute, the Recommendations of the PAP do not indicate the role the Parliament was going to play in resolving the dispute in issue. In fact, the recommendations of the PAP on the conflicts in Côte d’Ivoire, Chad and Somalia were rather too general and lacked the necessary strategic direction that should have been given to the AU and those involved in the resolution of the disputes. The PAP recommendations usually encourage parties to a conflict to enter into a peaceful settlement of the dispute, the AU or UN to initiate consultative processes or negotiation processes. In some instances it is recommended to the AU that it should establish mechanisms geared towards strengthening peace and security in Africa or reinvigorate measures taken to address peace and security on the continent. Beyond that the recommendations do not provide any substantial solutions to the problems that the AU or the UN may be facing in resolving a particular conflict. It is

⁹³ PAP–Recom. 001/06, para 5.

⁹⁴ PAP Recommendation on the Peace Process in Darfour [sic], PAP/Recom. 03(VI)/06 adopted by the PAP during its Sixth Ordinary Session, 23 November 2006, Midrand, Johannesburg South Africa.

⁹⁵ As above.

⁹⁶ As above

⁹⁷ As above.

⁹⁸ As above.

therefore fair to conclude that the recommendations mostly restate the obvious and recommends those efforts that are likely to have been tried.

4.5 The nature and content of the Pan-African Parliament's resolutions and recommendations

There are several issues one can raise with regards to the nature and content of recommendations and resolutions of the PAP. These observations are generally concerned with the content, quality, relevance, consistency as well as drafting or stylistic considerations.

A closer look at the manner in which the resolutions and recommendations have been drafted will reveal a number of inconsistencies as regards style and format. First, the identification, by way of numbering them, is not consistent and does not exhibit any desire to have a chronological arrangement of the resolutions and recommendations. For example, the Recommendation on the Pan-African Peace Mission to Darfur bears the same recommendation number as the Parliament's Recommendation on the solution on the creation of the University of Africa. They both bear the same number which is PAP-Rec 001/05. Apart from the fact that it is generally difficult to access the resolutions and recommendations, failure on the part of the Parliament to have a fixed and consistent identification of resolutions and recommendations makes their accessibility even more complicated. In turn, it is bound to be difficult for members of civil society, for example, to access and use them. Secondly, the resolutions and recommendations fail to notify the reader as to the period of their adoption, that is, the session during which they were adopted. Considering that the Parliament holds two sessions per year, one would have expected that the resolutions and recommendations will capture that time factor satisfactorily. Instead, they only make reference to the year of adoption.

As regards the quality of resolutions and recommendations, their general format and content of appears to be hurried. Some recommendations fail to make reference to the previous recommendations adopted on the same or similar issue. There is general lack of detail or background to the adoption of a particular recommendation. Considering that it is difficult to access the Parliament's Hansard it is advisable that the recommendations should be as detailed

as may be possible. Such an approach will allow those who are unable to have access to the Hansard to have an insight as to the reasons behind the adoption of that recommendation.

The hurried nature of these resolutions and recommendations could be due to a number of reasons, chief among them being a shortage of skilled personnel to assist with the research and drafting of the proposed recommendations. Further, this could be due to the time frame within which the Parliament is supposed to draft and adopt the resolutions. The Parliament sessions always lasts for about fourteen to twenty one days during which time the parliamentarians are expected to attend to all the business of the Parliament. The business of the Parliament usually ranges from attending the plenary sessions, the permanent committee meetings, symposia, regional caucus meetings as well as other functions on the side of the Parliament's session. Amid these numerous activities the Parliament is also expected to adopt resolutions, reports of the various permanent committees, fact-finding missions as well as elections observer missions, consider reports on the situation in Africa and sometimes reports from the African Commission, the African Court or NEPAD. It is therefore not surprising that little attention is paid to issues such as formatting and style which are sometimes considered secondary. In the end however, the quality of the resolutions and recommendations will affect their usefulness or their accessibility necessitating that stylistic and formatting issues be afforded the necessary attention.

Most of the resolutions and recommendations of the PAP address issues of peace and security in Africa. Where the Parliament deals with issues of human rights, it is usually done in a rather brief and hurried manner. As already indicated, the resolutions and recommendations of the Parliament indicate a certain level of lack of detail and this has affected those that addresses issues of human rights on the continent. There are a few resolutions that directly speak to issues of human rights. Considering that the debates of the Parliament indicate a concern for human rights issues on the continent, it is not clear why recommendations and resolutions that have been adopted do not reflect the urgency and seriousness with which such issues are discussed. Mere reference or an expression of concern by the Parliament rather than a resolution or recommendation on a particular issue during the plenary sessions is not enough.

This is so considering that the position of the parliament on continental matters should be better espoused through its recommendations and resolutions.

The end result is that the Parliament has not sufficiently and directly addressed equally important human rights issues on the continent such as the position of socio-economic rights, the promotion of human rights in general, the rights of indigenous people, the rights of people with disabilities, the rights of the youth, sexual minorities' rights, as well as issues pertaining to freedom of expression and access to information. It is hoped that that the Parliament will eventually recognise that its mandate goes beyond issues of peace and security and will henceforth focus on other human rights issues.

4.6 Fact-finding and elections observer missions of the Pan-African Parliament

One of the mechanisms that the Parliament has adopted so that they can respond to allegations of human rights and promote human rights on the continent is that of fact-finding and observer missions. In fact such missions are not peculiar to the Parliament and have been adopted by others bodies such as the African Commission as part of their tools for the promotion and protection of human rights on the continent.⁹⁹ As is the case with the African Commission, some of the missions of the Parliament are undertaken in response to a continental crisis or, in the case of elections observer missions, during the elections of a member state. It is perhaps apposite to point out here that there appears to be no formal approach to these fact-finding missions. Once again, just like the African Commission, the Parliament has not taken the time to 'clearly distinguish' between the types of fact-finding missions.¹⁰⁰ In the following two sections I look at the practice of the PAP in relation to fact-finding and election observer missions respectively.

The general nature and functions of fact-finding missions was aptly captured and restated by Mutangi. He notes that fact-finding missions 'emanated from the Hague Conventions of 1899

⁹⁹ See generally T Mutangi 'Fact-finding missions or omissions? A critical analysis of the African Commission on human and Peoples' Rights' (2006)12 *East African Journal of Peace and Human rights* 1-48.

¹⁰⁰ Viljoen (n 6 above) 344.

and 1907 respectively, wherein the concept was simply known as an inquiry.¹⁰¹ Bassiouni underscores the problem inherent in understanding the true nature of fact-finding missions of the UN, and notes that ‘Shakespeare wrote that a rose by any other name is still a rose. But in the United Nations (UN), a fact-finding mission, notwithstanding its name, is not necessarily a fact-finding mission.’¹⁰² The same definitional problem arises with respect to fact-finding missions and Parliaments. This is the difficulty that one has with respect to the fact-finding missions of the PAP. The question being whether it is appropriate to consider the Parliament’s fact-finding missions as human rights fact-finding missions or as the traditional fact-finding missions otherwise known as ‘enquiries.’ This is more so that the Parliament is not a human rights body per se and considering its political objectives its missions might be misinterpreted. The traditional function of fact-finding missions was to establish facts and to leave it to the parties to decide what to make out or conclude with respect to such facts.¹⁰³ The main objective was in that context the ‘the elucidation of facts’ by the international commission of enquiry.¹⁰⁴ It was not to affix blame.¹⁰⁵ Fact-finding missions through international commissions of enquiries were thus considered to be a neutral exercise undertaken to inform the decision-makers about a particular issue.¹⁰⁶

Fact-finding missions are historically part of parliamentary business. That is why the PAP has the mandate to undertake fact-finding missions in pursuance of its objectives and the larger aspirations of the community. This is despite that there is no explicit reference to fact-finding missions in the PAP Protocol or PAP Rules of Procedure. It is submitted that the totality of the provisions of the PAP Protocol and the Rules of Procedure as well as parliamentary practice fortifies the assertion that the Parliament indeed does have the mandate to undertake fact-finding missions.

¹⁰¹ Mutangi (n 99 above) 5.

¹⁰² MC Bassiouni ‘Appraising UN justice-related fact-finding missions’ (2001) 5 *Journal of Law & Policy* 35.

¹⁰³ BG Ramacharan *International law of fact-finding in the field of human rights* (1982) 4; H Thoolen & B Verstappen *Human rights missions: A study of the fact-finding practice of non-governmental organizations* (1986).

¹⁰⁴ Ramacharan (n 103 above) 2.

¹⁰⁵ As above, 2.

¹⁰⁶ As above.

With regards to observer missions, the issue as to whether the PAP has the mandate to send out election observer missions indirectly arose during the PAP's Third Ordinary Session in 2005. During the consideration of the recommendations and resolutions to be adopted by the PAP, PAP MP Kantuntu from Uganda highlighted that sending an observer mission for election purposes is within the ordinary course of the Parliament's business.¹⁰⁷

Historically, parliamentary visitations, representation and fact-finding missions are general in nature. This is so because they are usually sent out by the Parliament's committee of the whole in reaction to a particular crisis or area of concern. Such missions investigate issues relating to energy, education, health, and security issues, issues of maternal health as well as investment and trade. To that end it is difficult to categorise parliamentary fact-finding missions as strictly 'human rights oriented fact-finding missions.' Problems associated with the categorisation and nature of fact-finding missions is not peculiar to parliamentary fact-finding missions. Viljoen thus notes the problem of categorisation of fact-finding missions of the African Commission.¹⁰⁸ In the end, it becomes necessary to pigeonhole parliamentary fact-finding missions in order to fully understand their nature and functions.

Ramacharan highlights that even though fact finding missions are the heart of human rights activity, rules applicable to fact-finding in the field of human rights are far from clear.¹⁰⁹ Perhaps explaining why it has been suggested that the different forms of fact-finding missions are dependent on the purpose for which they have been carried out.¹¹⁰ To that end, Mutangi identifies the features of human rights fact-finding missions to be that they are by nature remedial, far from being neutral as they are biased in favour of human rights, inquisitorial and generally do not apply the same rules of procedure applicable to traditional fact-finding.¹¹¹ He goes on to indicate that human rights fact-finding missions fall in the general categories of

¹⁰⁷ *Parliamentary Debates*, Pan-African Parliament, 8 April 2005, 610.

¹⁰⁸ Viljoen (n 6 above) 345.

¹⁰⁹ Ramacharan (n 103 above) 1.

¹¹⁰ See generally F Viljoen 'Fact-finding by UN Human Rights Complaints Bodies' (2004) 8 *Max Planck Yearbook of United Nations* 49 – 100; Ramacharan (n 103 above) quoted in Mutangi (n 99 above) 7.

¹¹¹ Mutangi (n 99 above) 7-8.

investigative fact-finding, indirect fact-finding which includes fact-finding through state reporting, complaints fact-finding, fact-finding by ad hoc bodies and fact-finding by rapporteurs.¹¹²

The distinction between conflict resolution related fact-finding missions and election observer missions should not, in my opinion, be problematic. The former are undertaken pursuant to the Parliament's objective to address issues relating to peace and security, while the latter are undertaken under the auspices of the provisions of the PAP Protocol¹¹³ and PAP Rules of Procedure¹¹⁴ relating to the promotion of human rights and justice. While the distinction between the 'election-observer missions and 'conflict resolution' missions of the PAP are clear, the same cannot be said of difference between the 'human rights-fact-finding' missions and 'conflict resolution' missions. This is, perhaps, traceable to the overlapping nature of conflict and human rights issues in the region.

Below is a discussion of some of the fact-finding missions of the PAP that are human rights oriented or related. The PAP has, since its inauguration in 2004, undertaken several fact-finding missions. To date, it has undertaken about ten missions to different countries in Africa. Countries to which these fact-finding missions have been undertaken include the Democratic Republic of Congo, Mauritania, Sudan, Côte d'Ivoire, Rwanda, Chad, Central African Republic, Tunisia and Libya. These missions are sent out for various reasons and some are preceded by a resolution or recommendation of the Parliament. For example, the Parliament's mission to the Darfur, Sudan, carried out by the Parliament between October 2004 and September 2005 was as a result of the Parliament's resolution.¹¹⁵ So was the Parliament's fact-finding mission to the Chad, Côte d'Ivoire, Mauritania and Central African Republic.¹¹⁶

¹¹² Mutangi (n 99 above) 9 - 14.

¹¹³ Article 3(2).

¹¹⁴ Rule 4(1)(b) & 26(9)(b).

¹¹⁵ See PAP-RE 002/04 which resolution 'provided for the commissioning of a fact-finding mission to visit the Darfur, to acquaint itself to the realities on the ground and report to the parliament', Report of the Pan-African Parliament Fact-finding mission on Darfur, The Sudan, AU/PAP/RPT/CIRCR.CTTEE , 23 February 2005, 5.

¹¹⁶ As above.

4.6.1 Mission to Darfur, the Sudan

In 2004, the Parliament for the first time passed a resolution directing that a mission should be undertaken, particularly to the Darfur region of the Sudan. The reasons for such a mission were that there was need for the Parliament to take measures that will assist in the resolution of conflicts on the continent. The delegation was fairly constituted. The mission was made up of members of Parliament from the Gambia, Guinea, Libya, Mauritania, Rwanda, South Africa and Uganda.

Following the mission, a 37 page report was submitted to the Parliament which essentially set out the findings of the delegation. It must be pointed out that the report does not set out the terms of reference for the mission. It will be assumed therefore that the mission, once in the Sudan, was to 'acquaint itself to the realities on the ground and report to the Parliament.'¹¹⁷ The methodology of the delegation was simple in that the

mission relied on briefings from the Commission of the African Union and the AU mission in Sudan, random interviews with all stakeholders, focus group discussions and literature review to make its findings.¹¹⁸

As a result, a list of institutions and personalities consulted includes government workers, politicians, members of the civil society as well as members of the national human rights institution.¹¹⁹

The report, among other things, attempted to highlight the cause of the conflict in the Sudan. It noted that the Government of Sudan was confident that 'the low level of infrastructural development in Darfur and the poverty of the people'¹²⁰ was not the cause of the dispute. The report notes that the Sudanese Government was of the view that the war in the South undermined its efforts to develop the Darfur and other parts of the country.¹²¹ The report also noted that the armed opposition attributes the cause of the dispute 'to a deliberate policy by

¹¹⁷ As above.

¹¹⁸ As above, 5.

¹¹⁹ As above.

¹²⁰ As above, 8.

¹²¹ As above, 8.

the government to keep Darfur economically and politically marginalised.¹²² The mission report does not indicate what is and what could be, from the perspective of the delegates, the cause of the conflict in the Darfur.

What is clear from the report though is that the conflict has resulted in the ‘proliferation of weapons’, ‘a climate of insecurity’ which had resulted in a situation where people are ‘unable to cultivate land or take care of their animals’, internal and external displacement of over 1.5 million to 2.5 million people,¹²³ with one third of the population of Darfur being reported to have been displaced.¹²⁴ Apart from the displacement of many people from the Darfur region the report catalogued that there was indication that there were massive human rights violations by all parties involved in the conflict. The mission report indicates in this respect that the ‘conflict in Darfur has resulted in a humanitarian disaster.’¹²⁵ It notes that there was evidence of rape and violence against women as well as other form of violence against the people of Darfur,¹²⁶ lack of enough food and that

[I]t is not clear whether the children in the camps are receiving proper education and proper nutrition. Their appearance leaves much to be desired. Skin diseases, bare footedness, poor clothing, lack of proper sanitation indicate inadequacy of care.¹²⁷

Even though the report noted all these human rights violations, it did not highlight whether there were any efforts on the part of all parties involved in the conflict or anyone to address them. For example, even though the report acknowledged the participation of the AU Mission to Sudan (AMIS), it failed to capture the extent to which AMIS assisted in the amelioration of the human rights abuses.

The recommendations of the mission to the Parliament are general in nature. It was recommended that a conference of all stakeholders be convened to allow the parties to

¹²² As above, 9.

¹²³ As above, 10.

¹²⁴ As above, 10.

¹²⁵ As above, 20.

¹²⁶ As above, 19.

¹²⁷ As above, 19.

‘prepare a strategic document for the sharing of power and wealth among regions.’¹²⁸ Further, that there was need to mobilise all resources to ensure that the Cease-Fire Agreement was respected with ‘Janjaweed, whom all parties described as bandits’ being disarmed.¹²⁹ It is disheartening to note that, even though the report highlighted that there was a humanitarian crisis in the Darfur, no sense of urgency is discernible from the recommendation of the mission to the Parliament. There was no recommendation that was made to the Parliament that showed that people in the Darfur region was suffering or were being displaced *en masse*. The closest the mission report was to addressing issues of human rights violations in the Darfur was through its two last recommendations to the Parliament. Firstly, it was recommended that there the committees of the PAP should ‘develop and maintain a policy of constructive engagement with all sectors in Darfur,’ and that the PAP ‘Committee on gender, family, youth and people with disability should keep track of the situation in Darfur by organising a visit in collaboration with the relevant specialised urgency [sic] of the AU and other NGOs or UN urgencies [sic].’ Secondly, it was suggested that the Parliament should establish a trust fund ‘for humanitarian assistance to populations in conflict situations in Africa.’¹³⁰ Apart from that the mission report did not adequately address issues of human rights violations that they recorded.

4.6.2 Missions to Mauritania

In October 2005, the Parliament also undertook its second fact-finding mission this time to Mauritania. This was approximately three months after the military *coup* that saw the removal of the then Mauritanian President Maaouiya Ould Taya.¹³¹ Unlike the mission to Sudan discussed above, the fact-finding mission to Mauritania was not preceded by a resolution or recommendation of the Parliament. The delegation was appointed by the PAP Bureau to undertake this fact-finding mission.¹³² The delegation was composed of members of the PAP

¹²⁸ As above, 34.

¹²⁹ As above.

¹³⁰ As above.

¹³¹ Report of the Pan-African Parliament fact finding mission to Mauritania, 10- 26 October 2005.

¹³² *Parliamentary Debates*, Pan-African Parliament, April 5, 2005, 478.

from Guinea Bissau, Sierra Leone and Djibouti¹³³ which composition of the delegation might be considered as not reflecting and representing the various sub-regions of Africa.

Findings by the delegation were reduced to a 12 page report to the Parliament. There is no discussion of the methodology adopted by the mission in the report. Instead, the report starts by highlighting the programme that was followed by the delegation. It is apposite to note that just like the report on the mission to Sudan there are no terms of reference that are indicated nor is there any attempt to set out concisely the mandate of the delegation. It appears however that the delegation was interested in finding out, or ‘curious to know’, about the situation in Mauritania prior and post the military coup,¹³⁴ conditions under which the military coup took place,¹³⁵ the positions and directions¹³⁶ taken by the new military leaders and the credibility of such undertakings to the Mauritians,¹³⁶ the positions taken by various organizations on the coup as well as the recommendation made by those organizations to the PAP and the AU.¹³⁷

The report then proceeds to capture the situation as it obtained prior to 3 August 2005 and records that following the bloody military coup of 12 December 1984 Mauritania ‘witnessed the consolidation of a one Party state’¹³⁸ which was a state characterised, among other things, by the adoption of a tailor made constitution,¹³⁹ organisation of fake elections, arbitrary arrests of those who criticised the leadership of Colonel Maaouiya Ould Sidi Mohamed Taya¹⁴⁰ as well as a crumbling economy.¹⁴¹ The report proceeds to note that the coup was bloodless,¹⁴² was not characterized by any chaos or ‘struggle for powers between the former and new authorities’¹⁴³ and ‘assured new democratic directions.’¹⁴⁴ The report highlights the various efforts of the new

¹³³ Report on Mauritania (n 131 above) 2.

¹³⁴ As above, 3.

¹³⁵ As above, 3.

¹³⁶ As above, 3.

¹³⁷ As above, 3.

¹³⁸ As above, 3.

¹³⁹ As above, 4.

¹⁴⁰ As above, 4.

¹⁴¹ As above, 4.

¹⁴² As above.

¹⁴³ As above, 5.

¹⁴⁴ As above.

authorities such as the ‘naming of the new team,’¹⁴⁵ ‘the creation of an environment favouring national dialogue,’¹⁴⁶ as well as the creation of three inter-ministerial committees responsible for the process of democratic transition, justice reform and good governance.

Perhaps the fact that the delegation found out that the coup was bloodless ruled out the need for the mission to specifically address issues of human rights. What is clear from the recommendations of the delegation to the Parliament is that those who were involved in the coup, were to be thanked for and encouraged to respect the ‘consensual’ transition programme.¹⁴⁷ It was further recommended by the delegation that the Parliament should encourage the AU Chairmanship and the PSC Chairmanship to take all necessary steps to facilitate a quick return to constitutional order in Mauritania.¹⁴⁸

In August 2008 another coup took place in Mauritania and the Parliament resolved to send yet another fact-finding mission to look into the situation in the country. The mission was carried out in almost the same manner as the 2005 mission. While the 2005 fact-finding mission was undertaken by the Permanent Committee on Cooperation, International Relations and Conflict Resolution alone, the 2008 mission was undertaken by the Committee on Cooperation, International Relations and Conflict Resolution and the PCJHR. The delegation met with several actors in Mauritania who identified, among others, corruption, abuse of power by then President Sidi Mohamed Ould Cheikh Abdellahi as well as the marginalisation of the Parliament in the exercise of its oversight function.¹⁴⁹ The Mission Report does not make reference to the impact of the coup on issues such as human rights. It appears that the focus of the Mission had been to look at the political situation in the country despite its wide mandate.

Two other things immediately comes to light upon reading the 2008 Report of the Mission to Mauritania. The first being that the 2008 Report does not make any reference to the 2005 Report of the Fact-finding mission to the country under the same circumstances. Secondly and

¹⁴⁵ As above.

¹⁴⁶ As above, 6.

¹⁴⁷ As above, 6.

¹⁴⁸ As above, 11.

¹⁴⁹ Report of the Pan-African Parliament fact finding mission to Mauritania, September 14 – September 20, 2008, 10 -16.

connected to the first issue is the position adopted by the 2008 delegation and recommended to the Parliament as appropriate. The 2008 Report concludes by emphasising that the ‘position of the delegation was informed by the principles that underpin the identity, operation and activities of the Pan-African Parliament.’¹⁵⁰ Further that the position recommended to the Parliament by the delegation was ‘anchored on principle.’¹⁵¹ It was on that basis that the delegation recommended that the Parliament should condemn the Mauritanian coup d’état of 6 August 2008.¹⁵²

The difference between the two military coups is that the 2005 one received the blessing of the Parliament while the 2008 was condemned by the Parliament. The 2005 coup d’état which was considered by some as a ‘gentle revolution’ culminated in Presidential elections in the country in 2007. It was at the end of these elections that the then 69 year old President Sidi Mohamed Ould Cheikh Abdallahi came to power. Perhaps this explains why the Parliament, even though it had endorsed the 2005 ‘bloodless’ coup d’état, was justified in condemning the 2008 coup d’état as it might be deemed to be an unconstitutional change of government. It must also be noted that both coups did not affect the membership of Mauritania to the PAP prompting one to question whether the Parliament did not set a bad precedent by not suspending the membership of Mauritania to the Parliament following the unconstitutional change of government

4.6.3 Mission to Chad

The mission to Chad was also preceded by a resolution of the Parliament to send a delegation to Chad on a fact-finding mission. This mission was authorised following the political disturbances that occurred in the country in April 2006. According to the mission report, this was in consequence of the PAP’s desire to promptly find a solution to the problem(s) in Chad.¹⁵³ Accordingly, the

¹⁵⁰ As above, 20.

¹⁵¹ As above.

¹⁵² As above.

¹⁵³ Report of the Pan-African Parliament fact-finding mission to Chad, May 25 – June 4, 2006, 3.

objective of the Mission was to gather the maximum of information from all the national political forces involved in the conflict, from civil society organisations, international, African organisations and others in order to enlighten PAP on the political situation prevailing in the country and thus enable it to make strong recommendations, in collaboration with other AU bodies, for the prompt restoration of peace and security in our sister country.¹⁵⁴

In furtherance of this objective the delegation consulted a number of local actors in Chad. These included the President of the Republic of Chad, the Minister of Human Rights, responsible for National Assembly relations, the President of the Supreme Court and its cabinet, members of the political parties as well as various civil society actors. The mission report starts off by noting the history of Chad and highlights that the fact that the Constitution of 31 March 1966 had initially set a term limit of presidential mandates to two.¹⁵⁵ According to the mission report, this was however changed through a referendum to a term limit of presidential mandate for three. This allowed President Idriss to run for presidential office for a third time, a move which 'caused an outcry from certain political forces of the opposition' who later called for a boycott of the presidential elections scheduled for the 3 May 2006.¹⁵⁶ Shortly thereafter, it is reported that on the 13 April 2006, two small towns around N'djamena, Gassi and Gaoui, were attacked by mercenaries.¹⁵⁷

The report then proceeds to record that as a result of the various meetings held with those involved in the conflict, 'it became clear to the Mission that the origins, consequences and solutions of the latter are interpreted differently, depending on whether one was generally affiliated to the Presidential party or the radical opposition.'¹⁵⁸ The Mission Report captured that the Chadian conflict resulted from both external and internal factors.¹⁵⁹ These factors included the inter-Sudanese Conflict in the Darfur which from the report it appears destabilised

¹⁵⁴ As above.

¹⁵⁵ As above, 8.

¹⁵⁶ As above.

¹⁵⁷ As above.

¹⁵⁸ As above, 11.

¹⁵⁹ As above.

things in Chad.¹⁶⁰ That is why it was alleged that the attack on Gassi and Gaoui town on 13 April 2006 was ‘fuelled by Khartoum undoubtedly to stop the presidential elections of 3 May from taking place and to put people it controls in power.’¹⁶¹ The report continues to capture the position of the Presidential Party and the authorities, who notified the delegation that during the incident of the 13 April 2006 ‘hundreds of Sudanese, Chadians, Nigerian and other nationalities, most of them children, were taken prisoner; tens of all-purpose vehicles were recovered, sophisticated weapons seized and precious documents taken from these attackers.’¹⁶² The report further highlights that the authorities lamented the fact that all the above were presented to the AU with the AU subsequently failing to take a clear stance ‘against the flagrant violation by Khartoum of the international conventions it subscribed.’¹⁶³ The report highlights that the N’djamena authorities identified the external causes to the conflict to be, among others, the obstacles to the democratic process and its slow pace.¹⁶⁴

The report notes that the causes of the Chadian problem according to the Radical Civil Opposition ‘are essentially internal’¹⁶⁵ characterised by the disorganisation of the country’s administrative bodies, the malfunctioning of public services, bad governance, the democratic deficit in Chad and the general political and institutional uncertainties.¹⁶⁶ The report indicates that the civil society identified that the conflict was due to the fiscal crisis caused by the misappropriation of funds by those in power. Accordingly, this explained the poor living conditions of the people despite that the oil revenues would have allowed the population to have a better standard living.¹⁶⁷ The civil society also identified the transnational nature of the

¹⁶⁰ As above, 11 – 13.

¹⁶¹ As above.

¹⁶² As above.

¹⁶³ As above.

¹⁶⁴ As above.

¹⁶⁵ As above, 13.

¹⁶⁶ As above.

¹⁶⁷ As above.

conflict in Darfur as a contributing factor.¹⁶⁸ They further identified the lack of dialogue between the national political forces as one of the causes of the conflict.¹⁶⁹

The conclusion by the Mission is non-committal about the causes of the conflict or the actors who should be held responsible for the atrocities committed. In the summary, it is indicated that 'from the talks held..., a certain number of ideas came to the forth.'¹⁷⁰ Among others, there was an 'idea' that Darfur was a fertile ground to form Chadian rebellions, most armed movements were formed and trained from Darfur and that the risks that the Chadian conflict will flare up again are high.¹⁷¹ It is in that light that the delegation was of the view that the situation in Chad called for an urgent, short-term and medium term solution.¹⁷² According to the recommendation of the delegation to the Parliament, there was an urgent need to initiate dialogue, with the AU as a mediator, between the Chadian Government, civil society, the political and armed opposition.¹⁷³ For a short-term solution it was recommended that there was need to control the Janjaweed militia as well as to ensure 'the re-establishment and normalisation, through AU mediation, of the relations between Chad and Sudan.'¹⁷⁴ The medium-term solution envisaged by the delegation was that there was need to bring together the governments of countries neighbouring Chad, the relevant organisations and the civil society in those countries.¹⁷⁵ It is not clear from the report what the forum will be convened for.¹⁷⁶ However, it is safe to assume that the forum will be convened to discuss among other things possibilities for the resolution of the conflict in Chad.

¹⁶⁸ As above, 13.

¹⁶⁹ As above.

¹⁷⁰ As above.

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ As above, 24.

¹⁷⁴ As above.

¹⁷⁵ As above, 25.

¹⁷⁶ As above.

4.6.4 Mission to the Central African Republic

Following a Resolution of the PAP another fact-finding mission was sent to the Central African Republic in April 2007.¹⁷⁷ The aim of the mission was to collect information about the security situation in the Central African Republic, in particular, in the north-east of that country.¹⁷⁸ The mission was necessitated, among other things, by the occupation of Birao and other nearby villages by rebel forces.¹⁷⁹ It must be highlighted that the delegation included an expert, David Smith, from the Institute for Security Studies (ISS).¹⁸⁰ The information was gathered through several meetings, working sessions with members of government, political parties, the media and the civil society as well as a visit to Birao.¹⁸¹

The report also starts off by capturing the history of the country and its geographical situation.¹⁸² The report at the outset notes that the new Constitution in the Central African Republic was promulgated in 27 December 2004, which Constitution contained measures aimed at enhancing and consolidating the democratic process in the country.¹⁸³ The mission identified, among others, the instability and insecurity in the northeast and northwest areas of the country, the extensive damage to buildings and homes in Birao, the fragile political stability on the southern border in the Democratic Republic of Congo and the presence of armed rebels from neighbouring states, notably Chad and Sudan.

Unlike the previous reports of the Parliament's fact-finding missions, this delegation reported on several human rights issues. Even though the mission was undertaken within the context of peace and security, it had become apparent to the members of the delegation that besides security issues, it was necessary that the Parliament be informed about the human rights conditions in the country. The report highlights that 'it was evident from the consensus at the

¹⁷⁷ Resolution on Central African Republic, PAP/Res.01(VI)/06 adopted by the PAP during its Sixth Ordinary Session, 13th - 24th October 2006, Midrand, South Africa.

¹⁷⁸ Report of the Pan-African Parliament fact-finding mission to the Central African Republic, April 15 – April 21, 2007, 2.

¹⁷⁹ As above, 4.

¹⁸⁰ As above.

¹⁸¹ As above.

¹⁸² As above, 3 – 4.

¹⁸³ As above, 5.

various meetings held that the principal problem confronting the Central African Republic is poverty; a poverty that exposes its youth to the temptation of unsavoury actions rendered by the circumstances of the day...'¹⁸⁴ It was also noted that there were reported acts of violence as being perpetrated by the armed forces with ten people having been arrested.¹⁸⁵ The violence allegedly caused the displacement of more than three hundred thousand people, of which more than two thirds were internally displaced.¹⁸⁶ The collapse of the education system in the country,¹⁸⁷ acute malnutrition and reduced agricultural output were also underlined as areas of concern.¹⁸⁸

With respect to these human rights issues, the only recommendation made by the delegation was that the PAP should urge the AU to encourage and assist in organising a National Forum so as to bring together all actors in the humanitarian field.¹⁸⁹ It was suggested that it is at that forum that the challenge of internal displacement and return of displaced persons will be dealt with.¹⁹⁰ No other recommendation was made to the Parliament with respect to the human rights problems identified by the delegation.

This report was presented to the Parliament, during the debate on peace and security in Africa by the Rapporteur of the delegation PAP MP Bazoum from the Republic of Niger.¹⁹¹ Following the presentation of the report, not many members made reference to the situation in the Central African Republic. It is encouraging to note that in her contribution to the debate PAP MP Mokole Jean Marie from the Central Africa Republic described the mission report as a 'faithful and accurate report of activities' in the country.¹⁹² She further endorsed the recommendations made by the delegation and urged members of the PAP to adopt them.¹⁹³

¹⁸⁴ As above.

¹⁸⁵ As above, 7 -8.

¹⁸⁶ As above,8.

¹⁸⁷ As above, 9.

¹⁸⁸ As above,10.

¹⁸⁹ As above, 13.

¹⁹⁰ As above.

¹⁹¹ *Parliamentary Debates*, Pan-African Parliament, May 10, 2007, 71.

¹⁹² As above, 98.

¹⁹³ As above.

However, PAP MP Gonda Jean-Benoit also from the Central African Republic had reservations about the time taken by the delegation in its fact-finding mission. He cautioned as follows:

[W]e need actually to state whether it is a fact-finding mission which needs to enlighten the Parliament and this is a good thing. There was recently one fact-finding mission in Central African Republic and a number of facts emerged because a number of things had been said about the Central African Republic and we went there with our fact-finding mission. What we found on the ground was totally different.

For instance, they were talking about Birao and they were saying that there were various camps of displaced people. Of course, there was fighting in the town and people came back. When we talk about an enquiry, it cannot take place in a period of one week or ten days; one needs time and I think the Parliament is ill-equipped to carry out the enquiry.¹⁹⁴

Certainly, the PAP MP raised a very important issue that appears to be one of the factors that limits the effectiveness of the Parliament in the promotion of human rights in Africa. These issues will be discussed later in the chapter when dealing with issues relating to the nature of the PAP's fact-finding missions and the contents of the reports compiled thereafter.

4.6.5 Mission to Tripoli, Libya

Following the Resolution of the PAP on the security situation in Libya, a fact-finding mission was dispatched to Libya composed of members of the Committee on Cooperation, International Relations and Conflict Resolution and the Committee on Justice and Human Rights.¹⁹⁵ The Resolution on the Security situation in Libya started off by condemning 'the military 'aggression' of North Atlantic Treaty Organization (NATO) forces in the bombing of public facilities, infrastructure and residential sites and the targeted assassination of national leaders.'¹⁹⁶ It further called on the 'international community to stop the aggression immediately to allow the people of Libya the chance for better understanding and opening dialogue.'¹⁹⁷ The Parliament

¹⁹⁴ As above, 123.

¹⁹⁵ PAP (2)/ P / RES / 01 (IV), 18 May 2011.

¹⁹⁶ As above, para. 1.

¹⁹⁷ As above, para. 2.

further condemned the ‘disinformation’ about the conflict in Libya and called ‘on all media organs in the African continent and all over the world to play their part in the transfer of the true reality of the events in Libya.’¹⁹⁸ As it was noted, the fact-finding mission to Libya ‘proceeded against the backdrop of armed confrontation between the Government forces and protestors resulting in the deteriorating peace, security and humanitarian situation in Libya.’¹⁹⁹

The delegation was made up of four people. Present amongst them was the then Vice – Chairperson of the PCJHR, Abdelmajid Azzedine of Algeria. The objective of this mission was to gather information from various parties on the peace and security situation in Libya. This was to allow the ‘PAP to play its consultative and advisory role.’²⁰⁰ The Report was allegedly based on the observations of the delegation and the various discussions they had with the various parties while in Tripoli, Libya. However, a close reading of the Report will reveal that most of the issues and facts reported could have been easily obtained through a desk-top research. This is largely information concerning the resolution of the UN and the Security Council.

The delegation reported that the intervention by NATO in Libya was characterised by what can only be described as a colossal violation of human rights. The delegation pointed out that at the time that they undertook the mission

despite the UN Security Council Resolutions which purported to protect civilians, many had been killed by NATO bombs and missiles. NATO also blocked shipments of food items, medicines, fuel and all items listed by the UN as exempt from embargo.²⁰¹

The effects of NATO action in Libya were identified as having caused a considerable number of people to flee to Tunisia from Libya.²⁰² The effects of this action were identified as including acute shortage of fuel and food, freezing of assets and damage to the telecommunications system.²⁰³ An increasing number of pupils and students suffering psychological and emotional

¹⁹⁸ As above, para. 7.

¹⁹⁹ Report of the Pan-African Parliament fact finding mission to Tripoli, Libya, June 6 – June 10, 2011, 2.

²⁰⁰ As above, 3.

²⁰¹ As above, 10.

²⁰² As above.

²⁰³ As above.

disturbances was also recorded.²⁰⁴ It was further highlighted by the delegation that the situation on the ground was worsening each day on both side with the number of the wounded and dead increasing at an alarming rate, there was destruction of property, civilians had been killed with the black being mistaken for mercenaries and killed.²⁰⁵ While acknowledging that there was fighting and killing of Libyans, noting that such could be viewed as a civil war,²⁰⁶ the report emphasised that NATO deviated from the United Nations Security Council's initial objective of protecting civilians. Instead, the report noted, their intervention killed many people due to the bombings.²⁰⁷

The report further noted that 'the fall of Gadhafi, also created suitable conditions for the emergence of divisions on the basis of religious ideologies between Islamists and secularists.'²⁰⁸ With respect to governance issues post Gadhafi, the report highlighted that one of the major challenges was the protracted task of transforming Libya from 'its autocratic past to democracy based on the rule of law and human rights for Libyans'.²⁰⁹ Further, due to Gadhafi's 'Third Universal Theory' the justice and security institutions were also fragmented.²¹⁰

In the end, the delegation was of the opinion that there was need to ensure that Libya was not treated as Afghanistan and Iraq and must remain a sovereign state.²¹¹ The Report somehow echoes the position of the Parliament as regards the intervention in Libya and the recognition of the National Transitional Council (NTC) as the legitimate authority in Libya.²¹² In the end, the delegation made the usual recommendations about the cessation of war in accordance with the AU roadmap. Further that it was imperative that all those who are involved in the Libyan conflict should come together to negotiate and decide on Libya's future.²¹³ The delegation also

²⁰⁴ As above, 10.

²⁰⁵ As above, 11.

²⁰⁶ As above.

²⁰⁷ As above.

²⁰⁸ As above, 12.

²⁰⁹ As above.

²¹⁰ As above.

²¹¹ As above, 13.

²¹² Resolution on the security situation in Libya, PAP (2)/P/RES/01(IV).

²¹³ As above, 12.

recommended that the Parliament should be more involved in the resolution of the dispute in Libya.²¹⁴

In conclusion the delegation recommended that the Parliament's response to peace and security concerns on the continent should be made 'within a reasonable time.'²¹⁵ The Report further noted that 'it was embarrassing for the PAP Mission to arrive in Tripoli three months after the conflict had started and worsened.'²¹⁶ It further noted that in contrast 'similar missions from Europe and the United States of America had visited Libya less than one month after the conflict had started.'²¹⁷ Unfortunately, the report failed to bring to the fore the various human rights issues such as those reported by the media during the conflict. Consequently, the report failed to indicate how such problems were to be resolved.

4.6.6 Mission to Tunisia

The Parliament also undertook similar missions to Rwanda, Sierra Leone, The Saharawi Republic and Tunisia. The mission to Tunisia was undertaken by the Cooperation, International Relations and Conflict Resolution and the Justice and Human Rights committees within 'the framework of the promotion of the principles of Human Rights and Democracy in Africa'.²¹⁸ The Resolution by the Parliament to send a mission to Tunisia came after the Tunisian revolution in January 2011 and the objective of the Parliament's mission was to gather information about the situation in Tunisia after the revolution.²¹⁹ With respect to the impact of the revolution on human rights, the Report noted that the Tunisian National Commission on Violations of Human Rights informed them that they had carried out investigations in most parts of Tunisia.²²⁰ Further that the Commission had 'received 1608 cases, including 193 murder cases, 100 injuries, 314 cases of vandalism, and there were 60 people who died in prisons' and that the Commission compiled a list of people who carried out the assaults on victims, with the

²¹⁴ As above.

²¹⁵ As above.

²¹⁶ As above.

²¹⁷ As above.

²¹⁸ Report of the Pan-African Parliament fact finding mission to Tunisia, June 10 – June 15, 2011, 2.

²¹⁹ As above, 2.

²²⁰ As above, 9.

victims bringing forward photos of the attackers and killers.²²¹ Some of the cases were allegedly referred by the Commission to the Prosecutor General.²²²

The delegation concluded that the Tunisian revolution was carried out by young people who did not have a leadership structure.²²³ Further that the reasons behind the revolution 'were corruption of the ruling family, in addition to underdevelopment in some areas within Tunisia.'²²⁴ The delegation further reaffirmed 'that the AU and PAP's role remains critical in the democratisation process.'²²⁵ The delegation noted that the:

AU and PAP should be more proactive and responsive to events on the continent. For example, the PAP delegation arrived in Tunisia on June 10, 2011 almost six months after the revolution. The delegation was confronted with such questions as does PAP belong to Africa because Parliamentary delegations outside Africa such as EU and US Congress had paid a visit less than a month after the revolution.²²⁶

It was in light of the foregoing that the delegation recommended that the Parliament should urge the AU 'to assist Tunisia in its endeavour to achieve democratic governance and respect of human rights for its citizens.'²²⁷ The mission also recommended that the Parliament should send an election observer mission to Tunisia and to appeal for urgent economic support to arrest issues of unemployment and poverty so as to avoid a 'counter-revolution.'²²⁸ There was no substantive discussion of the human rights issues that might have been affected by the situation then in Tunisia.

4.6.7 Mission to the Saharawi Arab Democratic Republic

The Parliament's fact finding mission to the Saharawi Arab Democratic Republic was one of the few missions undertaken by the Parliament that was not preceded by an armed conflict or a

²²¹ As above.

²²² As above.

²²³ As above, 12.

²²⁴ As above, 12.

²²⁵ As above.

²²⁶ As above, 13.

²²⁷ As above.

²²⁸ As above.

military *coup*. The objective of the mission was to gather information on the issue of the country's decolonisation.²²⁹ It was emphasised that the 'position of the PAP with regard to the issues of the decolonisation of Western Sahrawi [sic] should be based on a comprehensive and evidence based report.' Following its consultations with various stakeholders in the country, the delegation observed that 'Western Sahara was a clear-cut case of self-determination for a people struggling against foreign military occupation.'²³⁰ It was further noted that Morocco has managed to delay the referendum that will perhaps see the independence of the Saharawi Republic.²³¹ With respect to the human rights situation in the Saharawi Arab Democratic Republic, the delegation only noted that there were human rights violations by the Moroccan authorities that were being reported 'to be ongoing [sic] unabated and that there was a complete media blackout imposed on the Saharawi people in these areas.'²³² The report does not state anything related to efforts that have been taken by the various stakeholders in addressing issues related to the violation of such human rights.

The recommendations by the delegation on the position that the Parliament should take with respect to the continued colonisation of the Saharawi was unequivocal. The delegation started by emphasising that the right of the people of Saharawi people to hold a referendum should not be subject to any negotiations.²³³ It is on that basis that they recommended, among other things, that the Parliament condemn the violations of human rights that were alleged to have been perpetrated by the Moroccan authorities in the occupied territories.²³⁴ Further that the PAP should ensure that the plight of the people of the Saharawi receives prominence on all discussion items of the African Union.²³⁵ Perhaps the interesting recommendation that was made by the delegation was that the Parliament should encourage the AU member states, through the Peace and Security Council, 'to impose sanctions or other appropriate leverage to

²²⁹ Report on the fact-finding mission of the Committee on Cooperation, International Relations and Conflict Resolution to the Saharawi Arab Democratic Republic, July 11 – July 16, 2011, 5.

²³⁰ As above, 9.

²³¹ As above, 9-10.

²³² As above 10 – 11.

²³³ As above, 11.

²³⁴ As above.

²³⁵ As above.

force the Moroccan regime to abide by the UN mandates that it has up until now disregarded.²³⁶

4.6.8 Missions to Rwanda and Sierra Leone

The Parliament also undertook similar fact-finding missions to Sierra Leone and Rwanda in 2008 with the aim of looking into the state of education in post-conflict societies.²³⁷ The missions were carried out by the Permanent Committee on Education, Culture, Tourism and Human Resources. One notable thing with respect to the two fact-finding missions is that 'prior to the commencement of the mission, the education expert drafted a four page document that sought to highlight key issues and challenges confronting education systems in post-conflict societies.'²³⁸ The end result was that the Reports are more focused as they both address some of issues that could be easily identified as possible challenges to the realisation of the right to education in post-conflict societies.

With respect to Rwanda it was observed that the impact of the genocide on education had 'been severe, affecting the system from the infrastructure to human resources with many people having been emotionally affected.'²³⁹ Further that the education of children and refugees was affected in the process as schools were vandalised, teachers and students targeted and killed.²⁴⁰ Some of the challenges to the Rwandan education system identified by the delegation were related to training of teachers, rehabilitation of existing school infrastructure as well as the provision of adequate teaching and learning materials.²⁴¹ The mission report noted that despite these challenges, the Government of Rwanda was able to put measures in place so as to effectively confront these challenges.²⁴² These measures included free primary school education,

²³⁶ As above.

²³⁷ Report on the fact-finding mission of the Permanent Committee on Education, Culture, Tourism and Human Resources to Sierra Leone, July 27 – August 2, 2008, 1; Report on the fact-finding mission of the Permanent Committee on Education, Culture, Tourism and Human Resources to Rwanda, March 16 – March 21, 2008, 1.

²³⁸ As above, 2 & 1 respectively.

²³⁹ PAP Mission Report to Rwanda (n 237 above) 9.

²⁴⁰ As above.

²⁴¹ As above.

²⁴² As above, 10 – 15.

subsidized secondary education, a specific policy aimed at educating orphans as well as the establishment of teacher training institutions.²⁴³

The challenges that were identified as confronting the education system in Rwanda, such as lack of resources and shortage of teachers, were also identified as having affected access to education in Sierra Leone.²⁴⁴ The delegation noted that ‘education has become the alternative strategy for reconstruction of post-conflict societies’ and that Sierra Leone was committed to rebuilding the nation through such efforts.²⁴⁵ It was noted however that ‘Sierra Leone capacity to meet the Universal Primary Education goal for all by 2015 is uncertain.’²⁴⁶ The Mission observed that this was due to the financial and human resource constraints as well as the challenge of rehabilitating child soldiers and victims of war.²⁴⁷ Even though the Report was not couched in human rights terms, upon perusal of the Mission Report one immediately becomes aware that issues of accessibility and availability of education in Sierra Leone were highlighted.

4.7 Reflections on the Pan-African Parliament’s fact-finding missions

Missions, whether fact-finding or election observer, are by their nature very complex and usually difficult to successfully undertake. That is why Bassiouni suggests that it is important, when one is assessing them, to take into account factors such as the institutional context of the body undertaking such missions, the issues at play and the processes within the organisation.²⁴⁸ Most importantly he highlights, in the context of the UN, that

[t]he UN was established as a political organisation, and, as such, it is largely governed by political considerations. Unlike individuals who may be motivated by enduring values, governments are motivated by shifting interests.²⁴⁹

Missions by international organisations are usually fraught with issues pertaining to logistics, personnel and the methodology. The absence of internationally accepted standards for fact-

²⁴³ As above.

²⁴⁴ PAP Mission Report to Sierra Leone (n 237 above) 28 - 30.

²⁴⁵ As above, 32.

²⁴⁶ As above, 28.

²⁴⁷ As above.

²⁴⁸ Bassiouni (n 102 above) 37.

²⁴⁹ As above.

finding missions has also contributed to this complex. There are some guidelines, however, that may guide the Parliament when carrying out its missions. Guidelines such as the Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions, the UN Draft Model Rules for United Nations bodies and recently the Guidelines for International Fact-Finding Visits and Missions (Lund-London Guidelines)²⁵⁰ may be instructive. These are mere guidelines which may be used by the PAP to design its rules of procedure for fact-finding missions.²⁵¹ Alternatively, the PAP should develop fact-finding and most importantly, election observer missions guidelines. The precedent in this respect will be the Code of Good Practice in Electoral Matters that was developed by the PACE and other stakeholders as

a reference document to, *inter alia*, harmonise the standards for the organisation and observation of elections, and to reinforce the impact and credibility of election observation and monitoring missions organised by the Council of Europe.²⁵²

What is common to these guidelines is that a fact-finding mission should be comprised of people who are and are seen to be unbiased,²⁵³ who have the competence, experience and expertise relevant to the subject matter of the fact-finding mission.²⁵⁴ As it has been correctly stated, adherence to the above is likely to ensure the success of a particular fact-finding mission.²⁵⁵ In particular, it is bound to ensure that the information discovered during the fact-finding mission will be trusted and used by a wide range of actors in the field of human rights.

It is important to highlight that the fact-finding missions of the PAP are undertaken by the PAP MPs themselves. From the composition of the various missions undertaken so far, there appears to be an attempt to have a fair representation of Africa's sub-regions. Unfortunately

²⁵⁰ G Robertson 'Human Rights fact-finding: some legal and ethical dilemmas' (2010) *UCL Human Rights Review* 15.

²⁵¹ Mutangi (n 99 above) 17.

²⁵² B Haller 'Election observation by the Parliamentary Assembly of the Council of Europe (PACE)' (2005) 26 *Human Right Law Journal* 162.

²⁵³ Robertson (n 250 above) 22.

²⁵⁴ As above; see also Haller (n 252 above) 163 highlighting that elections observer missions of PACE are composed of parliamentary observers who are knowledgeable on issues of democratic systems and 'who are therefore well placed to give a knowledgeable political assessment of the elections.'

²⁵⁵ As above.

this has not been consistent as in some instances the delegation did not make an attempt to have representation of Africa's sub-regions. For example, the Parliament's mission on Darfur, Sudan was undertaken by a delegation that was made up of PAP MPs from Rwanda, Uganda, South Africa, Libya, the Gambia, Mauritania and Guinea.²⁵⁶ This composition could be singled out as being fairly representative of Africa's sub-regions as compared to the delegation on the mission to Mauritania, which was composed of PAP MPs from Guinea Bissau, Sierra Leone and Djibouti.²⁵⁷ As a result of this inconsistency it is difficult to ascertain whether there is any pattern or formula adopted by the Parliament when appointing the delegates for the missions. The composition of a delegation is important. While it is necessary for the delegation to include MPs from countries with a connection to the state under scrutiny, it is equally important to consider MPs from other sub-regions who are unlikely to be under the influence of politics from their respective regions. Such a balance will reduce distortion of facts which is likely to arise from political pressure or influence on members of delegation

One of the problems that can be identified as affecting the effectiveness of the Parliament's fact-finding missions is the limited participation of experts in these missions. As already indicated, there is no requirement that a particular MP should possess certain qualification except that they should be members of the national parliament or other deliberating body. For example, even though the Parliament undertook what could be perceived as a technical mission on toxic waste dumping in Côte d'Ivoire there is no indication that they were supported by experts on the field.²⁵⁸ It should be acknowledged however that there are a few instances where the PAP delegation is assisted by people with extensive knowledge on matters under investigation. In its missions to Sierra Leone and Rwanda, on the state of education in post-conflict societies, the Parliament was assisted by an expert in developing a guide for the mission.²⁵⁹ The Parliament's mission to the Central African Republic was undertaken by a delegation that included an expert

²⁵⁶ Report on Darfur, The Sudan, (n 115 above) 5.

²⁵⁷ Report on Mauritania (n 131 above) 2.

²⁵⁸ Report of the Pan-African Parliament Fact-finding to Cote d'Ivoire on toxic dumping, PAP/C.6/CREANRE/RPT/27/07, 10 – 21 December 2006, 5.

²⁵⁹ Report on the fact-finding mission of the Permanent Committee on Education, Culture, Tourism and Human Resources to Sierra Leone, 27 July – 2 August, 2008, 2; Report on the fact-finding mission of the Permanent Committee on Education, Culture, Tourism and Human Resources to Rwanda, 16 March – 21 March, 2008, 1.

from the ISS.²⁶⁰ The ISS is a well renowned institute that specialises on matters of peace and security on the continent.

It appears that there has been a lot of freelancing by the Parliament when undertaking its fact-finding missions. There is no indication that the Parliament has adopted a consistent method of undertaking these fact-finding missions. A perusal of the various fact-finding missions' reports undertaken so far does not indicate that the Parliament is even aware of the existence of the Guidelines for International Fact-Finding Visits and Missions for those fact finding missions carried out post 2009. It is imperative that the Parliament adopt guidelines for its future fact-finding missions. This will go a long way in ensuring the credibility and integrity of the missions as well as address some of the concerns raised by the MPAPs in their debates of the various fact-finding missions.²⁶¹

4.8 Pan-African Parliament elections observer missions

Since it came into operation, the Parliament has carried out election observer missions to the Democratic Republic of Congo, Ghana, Kenya, Swaziland and Zimbabwe. The criterion used to send an election observer mission to any particular country missions is not at all clear. Other countries, such as Botswana, South Africa and Nigeria, also held elections in the intervening period but no election observer missions were sent to these countries. The election observer mission reports perused all indicate that the Parliament was invited by the respective country's electoral body. It cannot be ignored also that, coincidentally, most elections to which the PAP sent observer missions were characterised by some form of electoral violence or disputes.

Election observer missions are undertaken by the Parliament in furtherance of its overall mandate of promoting the principles of human rights and democracy as well as encouraging good governance and transparency on the continent. The present discussion will be limited to highlighting the human rights implications of the elections as observed and recorded by the Parliament's election observer missions in the selected countries.

²⁶⁰ Report of the Pan-African Parliament fact-finding mission to the Central African Republic, 15 April – 21 April 2007.

²⁶¹ See generally Mutangi (n 99 above) 17, arguing that fact-finding guidelines are important as they help measure the credibility and integrity of the 'whole exercise.'

The PAP Observer Mission to the Democratic Republic of Congo was undertaken by the Parliament in 2006, immediately after the violence that broke out in the country following the announcement of the results of the first round of the August 2006 elections.²⁶² The election observer mission report addressed issues relating to the security situation in the country, preparations for the elections and factors affecting the elections. It appears that there was no intention on the part of the mission to look into issues of human rights resulting in no mention of human rights issues in the Report. This is despite the fact that the elections were characterised by violence in the country before and during the elections.²⁶³ Peace keeping missions were deployed to arrest the situation in the country.²⁶⁴

The Report of the election observer mission to Kenya is interesting.²⁶⁵ The Report notes that the then constitutional and legal framework of Kenya guaranteed fundamental freedoms and good governance.²⁶⁶ In the same fashion as the Report on the Election Observer Mission to the Democratic Republic of Congo, the report on Kenya only highlighted issues relating to the political climate, the constitutional and legal framework, the institutional framework as well as issues relating to preparations for the elections.²⁶⁷ A summary of activities of the mission by the report indicates that there was no attempt by the Mission to visit the Kenya National Commission of Human Rights or other members of the civil society to discuss possible human rights implication of the elections. In sum, the report concluded that the electoral process in Kenya was peaceful and that the 'remarkable feature of the 2007 elections was how the people of Kenya had claimed ownership of the electoral process and had actually involved themselves in seeing to it that these polls were successfully conducted'.²⁶⁸ In the same breath, the Mission Report noted allegations of rigging, acts of violence incidents of intimidation and violence

²⁶² Report of the Pan-African Parliament observer mission to the Democratic Republic of Congo, 27 October - 1 November 2006, I (undated).

²⁶³ As above, 2.

²⁶⁴ As above, 4.

²⁶⁵ Election Observer Mission Report of the Pan-African Parliament Observer Mission on the 2007 general elections in Kenya, 22 October - 30 December 2007, PAP/C.8/CCIRCR/RPT/3907, I.

²⁶⁶ As above, 7.

²⁶⁷ As above.

²⁶⁸ As above, 14.

involving supporters of the main political parties.²⁶⁹ The mission delegation was unfortunately forced to leave Kenya urgently, as ‘the political and security situation in the country was becoming volatile.’²⁷⁰ Considering the circumstances surrounding the 2008 Kenya elections, in particular the post-electoral violence, one would have expected that this Report would have captured the human rights issues leading up to the day of the elections.

With respect to the Presidential run-off elections and House of Assembly bye-election in Zimbabwe,²⁷¹ the mission report did not adequately capture the human rights situation during the elections. The report only noted the escalation of election related violence.²⁷² The report also noted that there was an abuse of the state media and that ‘the main Government newspapers aired no advertisement of the opposition, giving an impression of a deliberate total black out.’²⁷³

The Reports of the PAP election observer missions to Ghana²⁷⁴ and Swaziland²⁷⁵ also did not satisfactorily highlight the human rights situations in those countries during the elections. The Parliament’s election observer mission reports should have sufficiently captured the implications of these elections on the human rights situation of the concerned countries. The reports only captured issues relating to media freedom and generally whether the electorates were able to cast their votes without experiencing some form of political intimidation. Whether the country was running properly during the elections with sufficient access to water and health care facilities, for example, may be important in ascertaining whether there was no violation of human rights of those areas that might have indicated their support to a candidate who does not belong to the ruling party.

²⁶⁹ As above, 12.

²⁷⁰ As above, 17.

²⁷¹ Report of the Pan-African Parliament Election Observer Mission, Presidential Run-off Election and House of Assembly by-elections, Republic of Zimbabwe, 27 June 2008, PAP/S/RPT/76/08.

²⁷² As above, 11.

²⁷³ As above, 13.

²⁷⁴ Report of the Pan-African Parliament (PAP) Election Observer Mission on Ghana Presidential and Parliamentary Elections, December 2008, PAP/CCIRCR/Doc.08/Rpt(XIV).

²⁷⁵ Report of the Pan-African Parliament Election Observer Mission to Swaziland, elections, Republic of Zimbabwe, 19 September 2008.

Failure to pay particular attention to human rights issues during election observer missions by the PAP is a grave error. This is so for two simple but crucial reasons. First human rights are indeed the human face of the elections as opposed to the mechanics or the manner in which the elections have been handled. Second, the AU Elections Observation and Monitoring Guidelines dictate that election observers should be aware of human rights conventions, that prior to the elections the observer mission should meet with various stakeholders for the purpose of collecting information necessary for the mission and these should include human rights activists.²⁷⁶ The Guidelines further requires that the atmosphere during the campaign should be carefully observed with factors to consider including the persistent or reported cases of human rights violations. Additionally, the international criterion for free and fair elections is derived from the Universal Declaration of Human Rights (UDHR) and most international human rights instruments.²⁷⁷ The rights warranting respect during these elections should not only be limited to civil and political but must of necessity include socio-economic rights. It is therefore disappointing to note that the Parliament's election observer missions do not make reference to other equally important human rights issues.

The Parliament's failure to pay attention to the human rights situation post-elections is also disappointing. For countries that the PAP sent election observer missions to and they eventually experienced post-elections violence, one expected that the Parliament would take a prominent position in addressing the situation as it relates to those countries. The Parliament's approach to post-electoral violence and the violation of human rights that ensues is not any different from its lukewarm approach to many other issues that come before it. An example will be the 2007 Kenyan and 2008 Zimbabwe elections, which were reported to have been marred with extreme political violence. The human rights atrocities that were visited upon civilians came as a shock to the continent and to the world over. Reports on these observer missions were presented to the Plenary on 7 May 2008 by the mission leaders and MPAPs were given the

²⁷⁶ See generally Haller (n 252 above) 162 – 163, highlighting the nature and methodology of the PACE election observer missions.

²⁷⁷ For an in-depth discussion of these principles see generally the Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Venice Commission, CDL-AD(2003) 23, 7 – 14, available at [http://www.venice.coe.int/webforms/documents/CDL-EL\(2002\)005-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-EL(2002)005-e.aspx) (accessed 7 September 2013).

opportunity to comment on the reports. Most of the MPAPs were, as it would be expected, concerned with the political violence that took place immediately following the elections. There was no reference to human rights nor was there any inquiry into the human rights implications of the post-elections violence in Zimbabwe and Kenya. In fact, this seems to be the case with instances where there was electoral violence such as in Madagascar, Nigeria, Mali and Guinea Bissau. A discussion of the Parliament's reaction to peace and security issues in Africa is beyond the purview of this study. Suffice it to point out that the Parliament has not paid sufficient attention to the human rights aspect of electoral violence in Africa. While peace and security issues in Africa are supposed to be addressed by the AU Peace and Security Council (AU PSC), the PAP is well within its mandate to highlight the human rights violations that have occurred and refer the matter to the AU PSC for appropriate action. Beyond debating these issues, making resolutions and recommendations, the PAP is largely constrained to take any action on these issues.

4.9 The Parliament's petition procedure

One of the traditional functions of parliaments is to receive petitions from citizens who are aggrieved by certain decisions, most of the time concerning their welfare. As highlighted in chapter 2, the right to petition parliament is an old practice through which citizens submit cases to parliamentary committees in order for them to deal with such complaints.²⁷⁸ Parliaments are usually vested with the power to receive petitions from the public and petitioning parliament has become the most effective way of airing grievances and obtaining redress.²⁷⁹ Such powers are mostly specifically provided for in the founding documents of the relevant parliament or the founding documents of the community.²⁸⁰

For example, any citizen, acting individually or jointly with others, may at any time exercise their right to petition the EP.²⁸¹ The subject of the petition must be concerned with issues of

²⁷⁸ P Lynch & S Birrell (n 4 above) 1 – 18.

²⁷⁹ As above.

²⁸⁰ See generally CEE Bankwatch Network 'Citizens' guide to European complaint mechanisms' (2006) 15, available at http://bankwatch.org/documents/complaint_mechanisms.pdf (accessed 26 September 2012).

²⁸¹ As above.

European Union interest or responsibility such as the rights of European citizens set out in the various treaties, environmental matters, consumer protection, free movement of persons, goods and services, internal market, employment issues and social policy as well as other problems related to the implementation of EU law. Such petitions are said to give the EP the opportunity of calling attention to any infringement of a European citizen's rights by member state or local authorities or other institution.²⁸²

The PAP Protocol does not include the power to receive petitions from citizens as is the case with the EP. The PAP Rules of Procedure however empowers it to receive such petitions.²⁸³ Possibly because the Parliament is mandated to perform such other functions as it deems appropriate to achieve the objectives set out in the PAP Protocol.²⁸⁴ Further, the PAP is mandated to adopt its rules of procedure to ensure the smooth running of the Parliament.²⁸⁵ As a result, the Rules of Procedure of the PAP provides that any citizen, person residing or having a registered office in any member state can petition the PAP.²⁸⁶ The petitions may be on any issue that relates to any activity of the AU and affect the petitioner directly.²⁸⁷

Once the petition is submitted to the Parliament and accordingly registered it will be forwarded to the relevant or responsible permanent committee.²⁸⁸ That is, if the petition is in relation to human rights it will be forwarded to the PCJHR upon which the Committee will decide whether the complaint falls within the activities of the AU.²⁸⁹ The relevant permanent committee seized with the petition will consider and make appropriate recommendations. The recommendations will then be forwarded to the Assembly. Once adopted by the Assembly, the President of the PAP will inform the petitioner of the decisions taken and the reasons thereof.²⁹⁰

²⁸² As above.

²⁸³ PAP Rules of Procedure, rule 76.

²⁸⁴ PAP Protocol, art. 11(9).

²⁸⁵ As above, art 11(8).

²⁸⁶ PAP Rules of Procedure, rule 72.

²⁸⁷ As above, rule 72(1).

²⁸⁸ As above, rule 72(4).

²⁸⁹ As above, rule 72(9).

²⁹⁰ As above, rule 72(9).

It appears that citizens of member states are already taking advantage of the PAP petition procedure. For example, the PCJHR of the PAP has already considered the appeal presented by the refugees and displaced persons of Ogoni, in Nigeria.²⁹¹ In its petition, the Ogoni Group denounced the violations of human rights to which the group has been subjected.²⁹² They called upon the PAP to intervene and to get Nigeria to respect the rights of the Ogoni people as well as to set up a commission of enquiry on a number of allegations contained in the petition. The Committee also looked into the appeal of the Kanjiti South Africa Group.²⁹³ The Group presented a petition on the status of the civil and political rights of the opposition in Ethiopia in the aftermath of the parliamentary elections of 15 May 2005.²⁹⁴ They mentioned the arrests of some opposition and civil society leaders as well as journalists in Ethiopia following the May 2005 elections.²⁹⁵ They recommended measures to resolve the crisis in their country, particularly liberalization and equitable access to the media, independent judiciary, impartial security forces and the establishment of an independent commission of enquiry into the violence that occurred after the elections.²⁹⁶

The two petitions, forwarded by the Bureau of the PAP to the Committee on Justice and Human Rights for consideration, concerned cases of human rights violations by the member states concerned.²⁹⁷ The periodical reports of the PCJHR highlights that two working sub-committees were formed, each considering one petition. Upon consideration of the petitions, the Committees noted that the documents provided were not sufficient, in particular there was no covering document from the Bureau of the PAP.²⁹⁸ Additionally, the petitioners did not provide information as to their full addresses, as required by the PAP Rules of Procedure, to

²⁹¹ Report of the Permanent Committee of Justice and Human Rights, May 2008, PAP/C.9/CJHR/RPT/30/08, 6.

²⁹² As above.

²⁹³ As above.

²⁹⁴ As above.

²⁹⁵ As above.

²⁹⁶ As above.

²⁹⁷ As above.

²⁹⁸ As above.

enable the Committee to locate them. With that, the Committees deferred the consideration of these appeals until full information was provided.²⁹⁹

It thus remains to be seen how the petition procedure will evolve over the years and whether it will be of any use to Africans and civil society in Africa. It may turn out to be the most appropriate advocacy tool capable of effectively promoting human rights on the continent.

4.10 Other promotional activities

The PAP through the PCJHR has also undertaken to carry out activities geared towards promoting human rights on the continent. These activities are in the form of awareness-raising campaigns or ‘human rights promotion seminars.’³⁰⁰ It is perhaps appropriate to note that this human rights awareness raising has been carried out both internally and externally.

Internally, the Committee has since 2006 held workshops aimed at exposing members of the Committee to human rights issues and to ‘enhance the capacity building of its members.’³⁰¹ The Committee resolved, within the context of the PAP Strategic Plan 2006 – 2010, to organise five regional workshops so as to train its members about human rights issues.³⁰² The first of the proposed workshops was convened in May 2007 and was held in South Africa.³⁰³ One of the objectives of this workshop was to raise awareness of the Committee members about international and AU human rights instruments relating to the mandate and functions of the Committee.³⁰⁴ The workshop was attended by members of the Committee, members of the Committee on Cooperation, International Relations and Conflict Resolutions, members of the Committee on Rules, Regulation and Privilege as well as members of the Committee on Gender, Family, Youth and Disabled.³⁰⁵ Among other things, the workshop dealt with issues relating to the OAU/AU, the African Charter as well as other relevant instruments relating to

²⁹⁹ As above.

³⁰⁰ Committee on Justice and Human Rights – Action Plan 2008 – 2009, 2.

³⁰¹ Draft report of the Committee on Justice and Human Rights, October 2007, 2 (on file with the author).

³⁰² As above.

³⁰³ As above.

³⁰⁴ As above.

³⁰⁵ As above, 3.

human rights.³⁰⁶ Conclusions drawn from the deliberations include the need to harmonise human rights legislation, laws and instruments in Africa aimed at ensuring the protection of the rights of marginalised people such as children, people with disability and women.³⁰⁷

Externally, the Committee further decided to hold seminars in Egypt and another in Gabon.³⁰⁸ The seminar in Egypt was to focus on the African Charter on Democracy, Elections and Governance.³⁰⁹ The conference was held in August 2008 and was hosted by the Egyptian National Human Rights Council (ENHRC) in Cairo to mark the 60th anniversary of the UDHR. The conference was also convened in order to review the progress made in the implementation of the Declaration.³¹⁰

Another notable platform is the international conference on the African Commission on Human and Peoples' Rights held in 2006 in Banjul, the Gambia. Among other things, the deliberations of the seminar captured the relationship of the Committee and other organs of the AU, in particular the African Commission. The representative of the Committee at the Conference noted that the Parliament, through the Committee, was committed to the respect of human rights and the continued solidarity and co-operation by the Parliament with other organs of the AU.³¹¹ Most interestingly, and perhaps underlining the Parliament's commitment to becoming a full legislative body, it was noted that the Parliament will upon becoming a legislative body, continue working with the African Commission on issues relating to legislation, policy regulations as well as on matters relating to their harmonisation.³¹²

In May 2007, the ISS, in collaboration with the PAP Secretariat, held a workshop on strengthening the role of the Parliament in promoting democracy, good governance and

³⁰⁶ As above.

³⁰⁷ As above.

³⁰⁸ As above, 2.

³⁰⁹ As above.

³¹⁰ Report of the work of the Pan-African Parliament; July – December 2008, presented to the Twelfth Ordinary Assembly of the African Union, January 2009, Addis Ababa, Ethiopia, 13.

³¹¹ Report, Brainstorming on the African Commission, International Conference on the African Commission on Human and Peoples Rights (10 May 2006), 12 (On file with the author).

³¹² As above, 13.

accountability.³¹³ Another workshop was organised and convened by the Committee in collaboration with the Centre for Human Rights, University of Pretoria and the Commission on Gender Equality in South Africa.³¹⁴ The workshop was attended by members of the Committee, a number of members of the Committee on International Relations, Cooperation and Conflict Resolution, members of the Committee on Rules, Regulations and the Committee on Gender, Family, Youth and Persons with Special Needs.³¹⁵ The aim of the workshop was to brief members of the Committee about the relevant documents of the African Union that deal with issues of human rights and to inform members about the institutions working in the field of human rights in South Africa.³¹⁶ Some of the documents that were discussed at the workshop included the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights and Welfare of the Child.³¹⁷ With respect to the institutions that promote and protect human rights in Africa, the African Court on Human and Peoples' Rights, the African Commission and the African Committee on the Rights and Welfare of the Child were discussed during the workshop.³¹⁸ The role of the Parliament in the promotion of human rights on the continent was also identified. In particular, it was suggested that the Parliament could assist by urging member states to ratify the basic human rights instruments at the regional, continental and international level and equally assist in the implementation of the decisions of the Court.³¹⁹

As will be highlighted below, most of these promotional activities are carried out by the Parliament in conjunction with other human rights institutions. The PAP has since forged, through the Committee, institutional links with several organisations on the Continent.

³¹³ Summary Report, ISS Seminar on the PAP's Role in Promoting Democracy, Good, Governance and Accountability, Pretoria, 25 August 2008, available at <http://www.iss.co.za> (accessed 31 May 2012).

³¹⁴ The Committee on Justice and Human Rights, Draft report on workshop on human rights, 11-12 May 2007, PAP/C.7/CJHR/RPT/28/07.

³¹⁵ As above, 3.

³¹⁶ As above, 2.

³¹⁷ As above, 5 – 6.

³¹⁸ As above, 6 – 7.

³¹⁹ As above, 7, 11.

4.11 Institutional exchange and partnership activities

The Committee has also devoted a significant amount of time in activities that could be deemed as capacity building. This is apposite considering that the nature of the job that the Committee is billed to undertake may be technical at times requiring that those undertaking such activities should at least have knowledge on human rights issues. From a perusal of the reports of the Parliament as well as the activity reports of the Committee, it appears that work in this area was mostly internal capacity building as well as forging links between the Committee and other equally important institutions such as the African Commission, the ACtHPR, the International Committee of the Red Cross (ICRC/ Red Cross), the International Criminal Court (ICC) as well as the Special Court for Sierra Leone (SCSL).

That is why in 2008, the Regional Legal Advisor to the ICRC made a presentation on the activities of the Red Cross on International Humanitarian Law.³²⁰ In essence the presentation by the Legal Advisor made reference to the Geneva Conventions, the Ottawa Convention against anti-personnel mines of 1997 as well as the Rome Treaty Relating to the ICC.³²¹ In particular, emphasis was placed on the state of the implementation by AU member states of these protocols relating to the victims of armed conflicts.³²² It was also brought to the attention of the Committee members that States Parties to the ICC Rome Statute are responsible for its implementation.³²³ This presentation was followed by a discussion of the activity report of the African Commission which report made reference to the operations and challenges, such as insufficient funding and human resource, faced by the African Commission.³²⁴ One notable challenge that was also highlighted was the 'conflicting mandates of the organs of the AU in the field of human rights such as the PAP, the African Court of Human and Peoples' Rights and the Peace and Security Council.'³²⁵

³²⁰ Report of the Permanent Committee on Justice and Human Rights, May 2008 (on file with the author).

³²¹ As above, 2.

³²² As above.

³²³ As above.

³²⁴ As above, 3.

³²⁵ As above, 4.

Another briefing was done by a representative of the ICC on the challenges faced by the Court in the implementation of the mandate of the Court.³²⁶ It was during this briefing that the Committee was informed that the ICC considers the PAP to be a crucial partner in the execution of its mandate under the Rome Statute.³²⁷ Further that there was need for the members to encourage countries which are party to the Rome Statute to pass enabling legislation pieces as well as to ‘accelerate the process of cooperation and harmonisation of their legal regimes to meet the requirements of the ICC.’³²⁸

During the 5th Ordinary Session of the Parliament, the President of the ACtHPR made a presentation to the Committee and later to the Assembly on the role, functions and challenges faced by the Court.³²⁹ It was during this presentation that the President highlighted the possible role of the Parliament in the promotion of the activities of the Court. Areas of cooperation envisioned by the President of the Court include the role of the Parliament in the ratification of the Court’s Protocol. The President of the Court noted that in so far as the ratification of the Court’s Protocol is concerned, the Parliament occupies a unique position ‘of providing oversight, advisory and consultative services’ and therefore

[t]hrough its committees on Justice and Human Rights, and Cooperation, International Relations and Conflict Resolution, PAP appears to have the necessary muscle in this regard and the Court is particularly interested to see the Parliament assisting the Court to ensure that member states take seriously the treaties and conventions that they have adopted and make concrete advances to implement.³³⁰

Other areas necessitating the participation of the Parliament in the promotion of the activities of the Court, as noted by the Court President, include the deposit of the declaration allowing

³²⁶ As above, 5.

³²⁷ As above.

³²⁸ As above, 5 – 6.

³²⁹ The African Court on Human and Peoples’ Rights and the Possible Role of the Pan-African Parliament in Promoting the Court, presentation by the Honourable Justice Gerard, President of the African Court on Human and Peoples’ Rights, During the 5th Ordinary Session of the Second Parliament, 6 October 2011, Midrand, South Africa, 1 – 6 (report on file with the author)

³³⁰ As above, 7.

individuals and non-governmental organisations (NGOs) access to the Court,³³¹ raising awareness about the Court among members of national parliaments and among the public at national level.³³² With respect to the harmonisation of laws in Africa, the Court's President noted that the PAP could develop and establish policies and guidelines that can assist national parliament in the harmonisation of laws on the continent.³³³ He further informed the Committee on how they can participate in the activities of the Court through requests for advisory opinions from the Court.³³⁴ The President also took the opportunity to highlight the challenges faced by the Court and urged the Parliament to make the Court visible in other African countries. A plan to organise and hold a joint conference on international justice was then hatched during the Court's President Presentation to the Committee.

Prior to this presentation, in March 2008, the African Commission had made a presentation to the Committee on its work and operational modalities relating to the mandate of the African Commission.³³⁵ The presentation also addressed issues relating to the challenges arising from the emergence of other AU institutions with a human rights mandate including the Pan-African Parliament.³³⁶ With respect to the last issue, the presentation noted that there was an overlap between the human rights responsibilities of AU Organs.³³⁷ Further that there was need to have a dialogue that will set out an agreed plan on how these organs can 'collaborate and harmonise their work, so as to synergise and reinforce each other.'³³⁸ This is certainly an important consideration and a factor that will be discussed in detail in chapter 5 when discussing possible areas of collaboration between the PAP and other human rights protection bodies within the African human rights system. The African Commission has also submitted and presented its

³³¹ As above, 8.

³³² As above.

³³³ As above, 9.

³³⁴ As above.

³³⁵ The African Commission on Human and Peoples' Rights – work and operational modalities, paper presented at the meeting of the human rights committee of the Pan-African Parliament, Midrand, South Africa, 12 – 14 March, 2008, PAP/C.8/CJHR/WP/29/07 (on file with the author).

³³⁶ As above, 2.

³³⁷ As above, 12.

³³⁸ As above.

activity reports to the Committee so as to keep it apprised of the activities of the African Commission.³³⁹

Other non-governmental organisations that have made presentations and undertook to partner with the Committee include the Federation of African journalists. The Committee indicated its willingness to partner with national governments considering that it has the necessary expertise to provide such governance. It indicated its commitment to partnering with the Parliament to address policy and safety issues of journalists as well as the domestication of treaties that member states have ratified.³⁴⁰

4.12 Research, study and documentation activities

Inherent in these institutional exchange and partnership activities of the Committee are research study and documentation activities. A perusal of the Committee's 2006 Action Plan indicates that this aspect of the activities of the Parliament is linked to the promotion and harmonisation of continental, regional and national laws geared towards fostering continental integration.³⁴¹ The Action Plan indicated that the Committee will, among other things, compile a list of member states that have ratified relevant protocols and conventions and to compile a list of pieces of legislation of member states relating to human rights and justice. It was also planned that a research study will be undertaken aimed at identifying member states that contravene even their own legislation, and to evaluate the African Peer Review Mechanism (APRM) after a country has undergone the review (with respect to justice and Human Rights).³⁴²

Pursuant to this objective, the Human Rights Committee and the Committee on Cooperation and International Relations and Conflict Resolution participated on 18 May 2007 in Midrand in a joint workshop on how to strengthen the supervisory capacity of the members of the PAP.³⁴³

³³⁹ Report of the Permanent Committee of Justice and Human Rights, May 2008, PAP/C.9/CJHR/RPT/30/08, 3.

³⁴⁰ As above.

³⁴¹ Human rights and justice committee action plan (report), fifth ordinary session, Midrand South Africa, 2 May -12 May, 2006.

³⁴² Draft Report of the Committee on Justice and Human Rights, October, 2007, PAP/C.8/CJHR/RPT/29/07, 4.

³⁴³ Human rights and justice committee action plan (n 342 above) 7 – 8.

This workshop was organised by the ISS in collaboration with the Secretariat of the PAP.³⁴⁴ The workshop dealt with issues relating to the supervisory role of the Parliament within its oversight function at the regional and continental,³⁴⁵ the role that could be played by the Parliament in relation to issues of good governance as well as the active contribution of the Parliament in the peace and security of Africa.³⁴⁶ A consultant was also engaged by the Committee to report on the directives relating to human rights and democracy in Africa.³⁴⁷ The consultant's report touched on principles of good governance, basic laws on human rights, the independence of the judiciary and the freedom of the press, all of which were highlighted as playing a crucial role in strengthening democracy.³⁴⁸

4.13 Concluding remarks

The participation of Parliaments, the PAP in particular, in the promotion of human rights on the continent is beyond doubt. More particularly, it should be acknowledged that the PAP is one of the important actors in the promotion of human rights in Africa. This is because the Parliament is specifically tasked, among other things, with the promotion of human rights enshrined under the various human rights treaties of the AU. This chapter highlights that it is important to understand that the Parliament primarily has a 'promotional' as opposed to a 'protective' human rights mandate. This distinction is important as it will encourage an appreciation of the Parliament's limitations in so far as issues of human rights are concerned on the continent.

The work that the PAP has undertaken with respect to human rights to date underlines the fact that the parliamentary body has properly interpreted its human rights mandate. In particular, the Parliament is empowered to promote human rights through capacity building, parliamentary debates, fact-finding and election observer missions, the adoption of resolutions and recommendations. Admittedly, the PAP has gone to certain lengths to promote human rights

³⁴⁴ Committee on Justice and Human Rights, Draft report of the Committee on Justice and Human Rights, 11- 12 May 2007, PAP/C.8/CJHR/RPT/29/07.

³⁴⁵ As above.

³⁴⁶ As above.

³⁴⁷ Report of the Permanent Committee of Justice and Human Rights, May 2008, PAP/C.9/CJHR/RPT/30/08, 5.

³⁴⁸ As above.

on the continent as has been captured in this chapter. However, it has also become clear through this chapter that the Parliament has not effectively used all that is available to it to promote human rights in Africa. What is also clear is that the Parliament has failed to provide Africans with a participatory platform that the Parliament promised. A review of the activities of the Parliament will reveal that the Parliament is far from being a participatory body. Consequently, it would be difficult to put it forward as a truly democratic institution of the AU that will be able to eliminate questions about the democratic deficit within the AU.

The PAP has so far failed to become a visible and robust actor in the human rights sphere. The PAP has failed to organise its activities properly so as to make a direct impact on the lives of ordinary Africans. So far, it is very difficult for one to ascertain its priority human rights areas. There is no indication that the PAP has a specific human rights agenda nor are there any concerted efforts to ensure that the Parliament adopts such an agenda. The PAP's methods of operation are therefore not conducive to the effective promotion of human rights. Once these issues are addressed the Parliament will be able to come across as a robust and important actor in the human rights arena.

CHAPTER V

THE RELATIONSHIP OF THE PAN-AFRICAN PARLIAMENT WITH AFRICAN UNION AND OTHER AFRICAN INSTITUTIONS DEALING WITH HUMAN RIGHTS

5.1 Introduction

At the time that the Pan-African Parliament (PAP) was established, it was perhaps established with a view that it would play an oversight function within the AU. The intention was very clear that the Parliament would eventually become the legislative organ of the African Union (AU). Against this background one may conclude that the PAP is instrumental to Africa's integration process and its effectiveness is germane to the success of this integration process. Africa's integration process has not been without challenges. Equally, the Parliament's take-off has not been without problems. An acknowledgement of the relevance of the PAP to Africa's integration project gives rise to the question whether the present position of the Parliament has not affected the advancement of the AU into a supranational organisation.

As it turns out, the PAP has also placed value in its cooperation with international organisations to which some of its member states belong. The Parliament has as a result collaborated with several AU institutions, sub-regional bodies, national parliaments and civil society. As discernible from its various activities, there is also pronounced collaboration between the Parliament and various international organisations such as the International Committee of the Red Cross (ICRC), the International Planned Parenthood for Africa (IPPF), the International Criminal Court (ICC), the International Labour Organisation (ILO), the United Nations Economic Commission for Africa (UNECA) and the United Nations Department of Economic and Social Affairs (UNDESA).

In some instances the PAP has signed a memorandum of understanding (MOU) with a particular international organisation to ensure smooth cooperation. In the case of the ICRC, for example,

such a memorandum of understanding was signed in September 2009.¹ The MOU not only aims to strengthen relations between the Parliament and the ICRC, but also confers upon the ICRC delegation official recognition before the Parliament.² The MOU further indicates that the ICRC would assist the Parliament with capacity-building and support the establishment of a human rights assistance desk within the PAP.³

As is the case with some members of civil society, the relationship between the PAP and international organisations is characterised by international workshops, seminars and conferences, presentations to the PAP Assembly on issues affecting the PAP member states, and information exchange institutional links. These promotional activities are usually aimed at improving the knowledge of members of the PAP on topical issues. For example, the International Labour Organisation (ILO) in 2009 made a presentation to the Parliament on employment figures in 2009 and enlightened members of the PAP on issues relating to unemployment, vulnerability and poverty, as well as the role of macroeconomic policies and trade.⁴ The International Criminal Court (ICC) also made a presentation to the PAP on issues relating to international criminal justice in Africa.⁵ During this presentation, issues regarding the prosecution and punishment of international crimes in Africa were discussed. The representative of the ICC reminded the members of Parliament that many of the member states were involved in the formation of the ICC and therefore should assist the Court in the execution of its mandate.⁶ Members of the PAP raised issues relating to the 'selective justice' by the ICC and highlighted that the majority of the cases handled by the ICC involved Africans.

¹ Newsletter of the ICRC Pretoria Regional Delegation, 4, available at <http://www.icrc.org/eng/assets/files/other/south-africa-themba-1st-quarter-2010.pdf> (accessed 21 August 2012).

² As above.

³ Draft Memorandum of Understanding on the establishment of Partnership between the Pan African Parliament and ICRC, 2, available at <http://www.pan-africanparliament.org/Controls/Documents.aspx?DID=503> (accessed 21 August 2012).

⁴ Activity Report of the Pan-African Parliament for the period January to June 2010, Kampala, Uganda, 22 to 23 July 2010, 7.

⁵ Report of the work of the Pan-African Parliament for the period July to December 2008, Addis Ababa, Ethiopia, January 2009, 10.

⁶ As above.

Some members of Parliament also unequivocally indicated that it was best that these cases be handled by an African court.⁷

The PAP has also collaborated with other international parliamentary institutions such as the European Parliament (EP). The relationship between the parliamentary institutions date back to 2006 and since then the EP has sent delegations to the ordinary sessions of the PAP.⁸ The PAP has concluded an MOU with the EP and the Parliamentary Assembly for the Council of Europe (PACE). The memorandum aims to secure a more focused approach to the relationship between the PAP and the two parliamentary bodies.

While the cooperation of the PAP with the aforementioned institutions appears good and necessary on paper, it is not clear what purpose they have served to date in furthering the interests of ordinary citizens. This cooperation obviously entails that delegations of the PAP and of the various international organisations will be flying to and from Midrand, South Africa, to discuss the modalities of their partnerships. The benefits that will accrue to those whom the Parliament seeks to advocate for, from these international relationships remain unclear. In so far as the promotion of human rights by the Parliament is concerned, one can safely conclude that these partnerships have made negligible impact on the relevance of the PAP to the human rights agenda. The memorandum of understanding between the PAP and the ICRC is one example of such an unfruitful but well intended exercise.

In order for the PAP to maximise the benefits that should accrue from its international relations, there is need to have a more focused approach to its activities. It is important that the PAP design activities that are more people-centred. As much as there is need for capacity-building among members of Parliament, caution must be taken that the Parliament does not give credence to its alleged 'elitist' status.

This chapter therefore takes a look at the relationship between the PAP and other organs of the AU, in particular other human rights protection bodies within the African human rights

⁷ As above.

⁸ As above.

system, civil society, sub-regional parliamentary bodies and national parliaments in AU member states. The discussion focuses on the manner in which the PAP has and is likely to co-ordinate its human rights activities. In essence, the chapter looks at the approach that has been adopted by the PAP in the execution of its human rights mandate to date and ascertains whether the PAP is accessible to ordinary people. The following section achieves this by highlighting the role of the PAP in the integration process in Africa, the PAP and institutions dealing with human rights at continental, sub-regional and national levels.

5.2 The AU, regional integration and the Pan-African Parliament

5.2.1 Regional integration and the Pan-African Parliament

Over the years there has been focus on Africa's integration process and its possible impact on Africa's socio-economic development.⁹ This interest has been generated at the very most by the transformation of the now defunct Organisation of African Union (OAU) into the AU. One major task that Pan-Africanism set for itself was to see Africa free from the prejudices that were allegedly brought along by colonialism.¹⁰ Pan-Africanism was and still remains a movement that is aimed at ensuring equality across all divides, be it social status, political equality or economic equality.¹¹ Pan-Africanism was thus an agitation for political, economic independence and cultural unity among Africans.¹² The development of Pan-Africanism has been sufficiently catalogued elsewhere and this study does not in any way seek to repeat the history of Pan-

⁹ Unpublished: BO Fagbayibo, 'A politico-legal framework for integration in Africa: exploring the attainability of a supranational African Union' (2010) Unpublished LLD thesis, University of Pretoria, available at <http://upetd.up.ac.za/thesis/available/etd-10092010-143207> (accessed 18 July 2012); BO Fagbayibo 'A supranational African Union? Gazing into the crystal ball' (2008) 3 *De Jure* 493.

¹⁰ J Nyerere 'A United States of Africa,' (1963) *Journal of Modern African Studies* 1.

¹¹ T Murithi 'Institutionalizing Pan-Africanism: Transforming African Union values and principles into policy and practice' Institute for Security Studies (ISS) occasional paper 143, June 2007 1.

¹² K Nkrumah *Africa must unite* (1970); K Mathews 'Reinassance of Pan-Africanism: The AU and the new Pan-Africanists' in J Akokpari, A Ndinga-Muvumba & T Murithi (eds), *The African Union and its institutions* (2008) 27; DZ Poe Kwame Nkrumah's contribution to Pan-Africanism: An Afrocentric analysis (2003) 13.

Africanism.¹³ It appears that alongside the growth of Pan-Africanism and the increasing pressure on African leaders to forge links, there was a gradual movement towards acceptance, albeit limited, of the apparent need to establish some form of unity by African leaders.

It is therefore safe to conclude that the OAU was borne out of desperation – or at the very least the desire – by African leaders to rid the continent from colonialism, racism and apartheid. The creation of OAU is also due, to a larger extent, to the possibility that some of the African leaders – such as Kwame Nkrumah – ‘had already been closely involved in the Pan-African movement, and associated their own achievement of independence with broader aspirations to continental liberation and union.’¹⁴ Despite that the OAU Charter does not expressly refer to Pan-Africanism, it nonetheless gives credence to arguments pertaining to the ‘reincarnation’ of Pan-Africanism. This is so because it finds its foundations in the hopes and ideals that can be identified with those of the Pan-Africanism movement.¹⁵

Even though it was generally agreed by African leaders that there was a great need for unity amongst African states, there existed serious disagreements as to the very nature of that unity.¹⁶ The OAU was a compromise between those who wanted instantaneous African unity, on the one hand, and those who believed that such a radical approach was not prudent and advocated for a ‘cautious and pragmatic, or even slow, evolutionary process’, on the other.¹⁷

The OAU was thus formed on 25 May 1963 as the ‘first Pan-African intergovernmental organisation taking the form of a loose association (a ‘United Africa of Independent States’).’¹⁸

¹³ As above.

¹⁴ C Clapham *Africa and the international system: The politics of state survival* (2005) 106.

¹⁵ F Viljoen *International human rights law in Africa* (2012) 151.

¹⁶ T Maluwa ‘From the organization of African Unity to the African Union: Rethinking the framework for inter-state cooperation in Africa in the era of globalisation’ (2009) 9 *University of Botswana Law Journal* 11.

¹⁷ As above; T Murithi *Introduction: contextualising the debate on a Union government of Africa I*, available at http://mercury.ethz.ch/serviceengine/Files/ISN/104959/ichaptersection_singledocument/89fef234-85f2-4069-9670-4d255bbe3c47/en/M140CHAPI.pdf (accessed 31 March 2013).

¹⁸ Viljoen (n 15 above) 162.

Even though the OAU was a loose association of sovereign African states,¹⁹ it embraced the principle of Pan-Africanism and sought mainly to liberate Africans from colonialism and racial discrimination.²⁰ Additionally, the OAU was established to promote common understanding among Africans, cooperation among states in the light of the spirit of togetherness as well as advancing peoples' interest in all spheres of human development.²¹ Unfortunately, for the most part, the OAU was criticised by many as ineffectual and as having failed to foster the very same integration that it was formed to achieve. The OAU has also been criticised for its inability to save Africa from poverty, conflict and human rights violations.²²

Much of the criticism levelled against the OAU was necessitated by its inability to deliver what it promised to bring: liberation, peace and development in Africa.²³ It is beyond doubt that the most prominent barrier to complete integration through the OAU was the authoritarian, dictatorial and non-accountable rule that was then prevalent among African leaders.²⁴ The OAU was rightly described by Nyerere as a 'committee of dictators',²⁵ and was stifled by many factors chief among them the unwillingness of African leaders to cede their autonomy to a united and supra-national Africa.²⁶ The OAU has been perceived as a failed project – especially in addressing issues related to human rights – because of the entrenchment of the principle of non-interference in the internal affairs of states in its founding instrument and to a larger extent the failure of the OAU Charter to make specific reference to human rights.²⁷ African leaders could not stay oblivious to the fact that there was, over the decades since the establishment of

¹⁹ As above.

²⁰ OAU Charter, Preamble.

²¹ OAU Charter, Preamble; Murithi (n 11 above) 2.

²² T Mkandawire 'Rethinking Pan Africanism' paper delivered at the first conference of intellectuals from Africa and the Diaspora, Dakar Senegal, 6-9 October 2004 quoted in Maluwa (n 16 above) 12; Viljoen (n 15 above) 163-4.

²³ Clapham (n 14 above) 116.

²⁴ EO Ijeoma 'Re-thinking Pan-Africanism: Dilemmas and efforts towards African integration' (2007) 42 *Journal of Public Administration* 185.

²⁵ As above.

²⁶ CE Welch Jr 'The Organisation of African Unity and the promotion of human rights' (1991) *The Journal of Modern African Studies* 535.

²⁷ Ijeoma (n 24 above) 185.

OAU, an increasing need to establish an effective intergovernmental body that will address the problems that continued to bedevil Africa.²⁸ It in the light of this realisation and perhaps out of the ‘wisdom’ of Libyan leader Muammar Gadhafi, that on the 8 and 9 September 1999 African leaders met in Sirte Libya to discuss the formation of the United States of Africa as union of African states.²⁹ The Sirte Extraordinary Session of the OAU Assembly saw the adoption of the Sirte Declaration by the African leaders. This Declaration called for the establishment of the AU and for the speedy establishment of the Pan-African Parliament (PAP).³⁰

It is the adoption of the African Union (AU) Constitutive Act on 11 July 2000 replacing the OAU Charter that has been hailed as a milestone in so far as integration in Africa integration is concerned.³¹ The AU which was officially inaugurated in 2002 at Durban offered a new beacon of hope to the continent. As a successor to the OAU, it was seen by some as a panacea to the problems that continued to haunt Africa.³² It was a closer step to some form of African Unity that was envisaged by the likes of Kwame Nkrumah.

The AU Constitutive Act reflected a marked improvement and acknowledgment of the importance of principles relating to good governance, human rights and the rule of law to the overall integration process in Africa.³³ Of particular relevance to the study is that the transition – from the OAU to the AU – brought along renewed hope for effective human rights promotion and protection in Africa. This is so because – unlike the OAU – one of the objectives of the AU as espoused in its Constitutive Act is the promotion and protection of human rights in Africa in accordance with the African Charter on Human and Peoples’ Rights

²⁸ Maluwa (n 16 above) 10.

²⁹ K Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal’ (2003) 3 *African Human Rights Law Journal* 99.

³⁰ As above; Para 8(ii) Sirte Declaration.

³¹ Maluwa (n 16 above) 14; Murithi (n 11 above) 3; Viljoen (n 15 above) 164; NJ Udombana ‘A harmony or a cacophony? The music of integration in the African Union treaty and the New Partnership for Africa Development’ (2002) 13 *Indiana international and Comparative Law Review* 228.

³² Murithi (n 11 above) 3.

³³ Viljoen (n 15 above) 164.

(African Charter).³⁴ As discernible from its principles, the AU envisioned the acceleration of political and socio-economic integration,³⁵ greater unity and solidarity between the African countries and the peoples of Africa.³⁶ Further, the AU maintained its commitment to defending the sovereignty, territorial integrity and independence of its member states.³⁷ The overall purpose of the AU is to promote solidarity, cooperation and support among African countries and as such it can be perceived as an attempt to bring to life the ideals of Pan-Africanism.³⁸ The shift from treating state sovereignty as sacrosanct to allowing intervention in other states to avert human rights abuses creates hope that the AU will not fail Africans as the OAU did. Most importantly, the commitment to principles of human rights and stronger regional integration by the AU member states is likely to prevent a repeat of the OAU episode of indifference to human rights abuses.

The PAP is one of the organs of the AU³⁹ that was established as part of the larger structure of the transformed AU and poised to be involved in the decision-making process of Union. This was perhaps to address the perceived democratic deficit within the AU. Thus, 'the creation of the PAP is fundamentally linked to the transformation of the old OAU into AU: it is indeed one of the only prominent institutions which resulted from this transformation.'⁴⁰ It is by and large out of the realisation that there is need for a governance framework that allows for a more participatory environment that the PAP came along.⁴¹ Maluwa captures this aptly when he highlights that

³⁴ As above; K Stefiszyn 'The African Union: Challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 361.

³⁵ AU Constitutive Act, art 3(c).

³⁶ AU Constitutive Act, art 3(a).

³⁷ AU Constitutive Act, art 3(b).

³⁸ Murithi (n 11 above) 3.

³⁹ T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' (2004) 4 *African Human Rights Law Journal* 54; AU Constitutive Act, art 5.

⁴⁰ J Navarro 'Building of a Regional Parliamentary Assembly in an international Context: The creation and Launching of the Pan-African Parliament' GARNET working paper No: 55/08, 10.

⁴¹ Viljoen (n 15 above) 173; J Cilliers & P Mashele 'The Pan-African Parliament: A plenary of parliamentarians' (2004) 13 *African Security Review* 77.

[t]he African Union can be understood, at least, at two levels: first, as a manifestation of Africa's collective response to the twin-challenges of globalism/globalisation and regionalism/regional integration; secondly, as an expression of a resurgent commitment to the ideology of Pan-Africanism and the enduring quest for deeper African unity.⁴²

5.2.2 The Pan-African Parliament, integration and human rights

Nzewi has highlighted in great detail how the Parliament is relevant to institutional regional integration in Africa.⁴³ Having traced the history of Pan-Africanism in Africa, the emergence and the demise of the OAU as well as the advent of the AU, she made several observations. She observed, in particular, that in pursuing integration 'the causal interaction between institutions and policy outcomes is important.'⁴⁴ Having underscored the possibility of having the PAP stagnate, she further observed that 'the origins and the intents of PAP designers' were germane to understanding the possibility of having the PAP move towards supranationality.⁴⁵ She concludes her discussion by highlighting – rightly so – that issues pertaining to sovereignty and political non-interference continue to play a significant role in determining the integration process in Africa.⁴⁶

The feasibility of having a supranational African organisation has been the subject to intense interrogation over the years.⁴⁷ Most studies conclude that the AU was established with the

⁴² Maluwa (n 16 above) 49.

⁴³ OI Nzewi 'The role of the Pan-African Parliament in African regionalism (2004-2006): An institutional perspective', unpublished Phd thesis, University of Pretoria, 2009, 100.

⁴⁴ As above, 158.

⁴⁵ As above, 211.

⁴⁶ As above.

⁴⁷ Nzewi (n 43 above) 100; BO Fagbayibo 2010, A politico-legal framework for integration in Africa: exploring the attainability of a supranational African Union, LLD thesis, University of Pretoria, Pretoria, available at < <http://upetd.up.ac.za/thesis/available/etd-10092010-143207/> >; B Fagbayibo 'A supranational African Union? Gazing into the crystal ball' (2008) 3 *De Jure* 493; C Ayangafac & K Mpyisi Institute for Security Studies Situation Report 'The proposed AU Authority: Hybridisation, balancing intergovernmentalism and supranationalism' (2009); AP van de Mei 'The ordeal of African Unity – Past, Present and future of the African Union', Maastricht Working Papers, Faculty of Law (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345732 (accessed 30 June 2012); G Olivier 'Regionalism in Africa: Cooperation without integration' (2010) 32 *Strategic Review for Southern Africa* 17,

view that it will evolve into a supranational organisation but that currently it ‘remains a typical intergovernmental organization.’⁴⁸ Fagbayibo notes that

[i]n gauging the existence of normative supranationalism within an organisation, the legal inquiry should be based on whether – in respect of specific areas of common interest and competence – the policies and laws of such an organisation have direct effect in member states; the laws of the organisation are superior to the laws of the member states and member states are pre-empted from enacting contradictory legislation. While the answer to these questions is affirmative in the case of the EU, the AU is yet to attain such feat.⁴⁹

The Parliament should be playing an oversight function and should not only serve as a ‘talk shop’. It should be able to play an active and effective role in the affairs of the AU. However, it is equally important to highlight what the PAP is unable to achieve under the present dispensation. It is through exposing its present ineffectiveness of the Parliament to the member states that the idea of having a true legislative body will eventually prevail. It is not difficult to observe that the PAP has so far failed to effectively promote human rights in Africa. Most importantly, the Parliament does not qualify to be called a democratic institution if one were to adopt the definition of democracy as articulated in chapter 2. Simply put, there is no competition for positions of power, no inclusive level of political participation and no indication that the Parliament is committed to the promotion and protection of human rights.

In sum, the PAP is not making any discernible impact on the lives of the ordinary Africans partly because the continental integration process is stalling. A stalled integration process means that the PAP will not be able to play its envisaged oversight function and in turn will not be empowered to legislate for the continent. The stalled integration process in Africa is a factor

RF Frimpong ‘A relational theory of regional economic integration - implications for Africa’, paper presented at the inaugural conference of the Society of International Economic Law, Geneva, Switzerland, 15-17 July 2008 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1160282 (accessed 1 July 2012); M Forere ‘Is discussion of the “United States of Africa” premature? Analysis of ECOWAS and SADC integration efforts’ (2012) 56 *Journal of African Law* 29 – 54; Viljoen (n 15 above) 168.

⁴⁸ van der Mei (n 47 above).

⁴⁹ Fagbayibo (n 9 above) 496.

that needs to be acknowledged and addressed if one is to agitate for an effective Parliament.⁵⁰ It has been observed that

supranational legal integration and increasing economic integration have systematically triggered demands to commit European law to the protection of human rights, to tame the internal market with social rights, and to complement economic integration with non-discrimination rules.⁵¹

Several major conclusions may be drawn from the previous discussion and Fagbayibo's observations. The first is that the PAP is one of the organs of the AU organs central to the integration process in Africa. Considering that there is need to have a legislative body, designed to pass uniform laws that will be binding on member states, it is difficult to see how the Parliament may be excluded from the integration process. This gives rise to the second conclusion: The stagnation of the PAP, highlighted by Nzewi in 2008 as a possibility, is no longer a mere possibility but has become a stark reality. Unfortunately, since its inauguration in 2004, the PAP's mandate has been limited to the deliberation of continental issues. Inevitably, the third conclusion is that the stalling integration process in Africa has a very distinct bearing on the democratisation process in Africa and along with it, the growth of the PAP. Concomitantly, the PAP's failure to achieve its objectives will have a negative impact on the integration process

⁵⁰ See generally N Nwogu 'Regional integration as an instrument of human rights: Reconceptualizing ECOWAS' (2007) 6 *Journal of Human Rights* 346, arguing that 'the global economic positioning of the African continent in conjunction with its human rights framework as codified in the African Charter for Human and Peoples' Rights (hereinafter "African Charter") defuses the human rights-globalization tension.' Further, 'that the unique standing of Africa as the least developed region of the world creates an instance where the human rights principle is not at odds with globalization as manifested in regional economic integration nor are human rights distinct imperatives that need to be incorporated into African economic integrations regimes.'; see further DJ Devine 'The protection of human rights in the case of supranational economic integration' (1990) 6 *South African Journal on Human Rights* 48 – 59; 48, pointing out the possible ways in which human rights may be protected 'where economic integration takes place between states.'

⁵¹ B Rittberger & F Schimmelfennig 'The parliamentarization and institutionization of human rights: A qualitative comparative analysis,' Paper presented at the DVPW Sektionstagung 'Internationale Beziehungen', Mannheim, 6-7 October 2005, 36 available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2006/wp06_07.pdf (accessed 1 July 2011).

in Africa. Until it attains its proposed full legislative powers, the PAP will merely advise and consult with other organs of the AU on issues concerning the promotion of human rights and democracy, good governance, transparency, peace, security and stability in Africa.

The following discussion ascertains the place of the PAP within the larger framework of the AU, with emphasis placed on its human rights mandate. Particularly, the discussion highlights the areas of collaboration between the Parliament and other institutions of the AU dealing with human rights.

5.3 The Pan-African Parliament and AU institutions dealing with human rights

Most of the documents of the AU emphasise extensive collaboration between the various institutions within the African human rights system. In short, the designers of the AU human rights system demand institutional cooperation and linkages. Unfortunately, one of the most terrible institutional mishaps that the AU human rights system has witnessed is the failure by these architectures of the AU to clearly and succinctly provide for the relationship between the AU institutions. For example, the relationship between the African Court of Human and Peoples' Rights and the African Commission remained unclear until well after 2010. This lack of attention to detail of the synergies continues to characterise the AU system and it is a feature that is likely to inhibit the growth of the AU system. That is why it is not only important to put forward the PAP as a human rights actor within the AU but also, to explain how it can effectively work with other human rights institutions to promote human rights.

To date the African Commission perhaps remains one of the most progressive institutions in the promotion of human rights in Africa. Its mandate is clearly set out under the African Charter.⁵² As far as promotion is concerned, the African Commission may collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, and disseminate information.⁵³ It is also expected that in the execution of its mandate, the African Commission will work with African and other

⁵² African Charter art 45,

⁵³ As above, art 45(1)(a).

International institutions concerned with the promotion of human and peoples' rights.⁵⁴ This obviously includes the PAP. The mandate of the African Children's Committee also includes the promotion of children's rights as enshrined in the African Children's Charter.⁵⁵ The African Children's Committee is also mandated to cooperate with other African institutions and organisations concerned with the human rights.⁵⁶

Over the years, both the African Commission and the African Children's Rights Committee have been engaged in activities that are geared towards the promotion of human rights in Africa. These activities include state reporting, collaboration with non-governmental organisations (NGOs), the use of special mechanisms such as special rapporteurs and working groups, undertaking promotional visits, convening seminars and workshops as well as adopting resolutions. The African Commission has done particularly well in the execution of its promotional mandate. This is evidenced by the Commission's involvement in the dissemination of information and the organisation of conferences, workshops, seminars and symposiums on the continent as well as its appointment of special rapporteurs on thematic issues such as prisons and other conditions of detention and women's rights.

As already canvassed in detail in the previous chapters, the mandate of the PAP is primarily promotional. A closer collaboration between the PAP and these institutions could result in marked improvement in the promotion of human rights. The collaboration would also be relevant with respect to the future African Court of Justice and Human Rights. Collaboration could be in one or more of the promotional activities highlighted above. A general reflection of the work of the PAP in Chapter IV above has revealed that the PAP is already involved in some of these promotional activities. So far, the Parliament has been involved in numerous fact-finding missions, election observer missions and has carried out a number of human rights oriented workshops and symposia. The PAP's resolutions and recommendations have over the years encouraged member states to ratify some of the African human rights treaties. The PAP

⁵⁴ As above, art 45(1)(c).

⁵⁵ African Children's Charter, art 42 (a)(i).

⁵⁶ As above, art 42 (a)(iii).

thus offers these institutions the platform to disseminate and encourage member states to ratify and domesticate the human rights treaties. In that sense, the possible areas for collaboration between the PAP and other institutions is vast and should be nurtured.

The long term benefits of the collaboration envisaged here are that the PAP will provide other institutions with the platform to agitate for the protection and promotion of human rights at the domestic level. The Parliament will benefit from the expertise offered by these bodies and this will improve its efforts in the promotion of human rights. For example, the African Commission could assist the PCJHR on such issues as handling the parliamentary petitions submitted to it whilst the African Children's Human Rights Committee may prove to be useful to the Committee on Gender, Family, Youth and People with Disability. The exchange of ideas on areas such as fact-finding and election observer missions will go a long way in improving the PAP's efforts in those areas.

The above sections offered a rendition of the institutional makeup of the PAP and an introduction of its capacity as an institution within the larger framework of the African regional architecture. However, what the previous discussion did not do was to locate the PAP within the AU regional architecture. There is need to understand the role, powers and functions of the PAP within that institutional context. With particular emphasis on the promotion of human rights in Africa, the following discussion highlights the relations or potential relations of the PAP with the main organs of the AU. It highlights that the PAP is part of a growing system made up of article 5-organs of the AU that are still establishing themselves, with a complex cooperation record.

The PAP Rules of Procedure makes provision⁵⁷ for the relationship between the Parliament and other organs of the AU. The other article 5-organs of the AU are: the Assembly of the AU, the Executive Council, the Court of Justice, the Commission, the Permanent Representatives' Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council

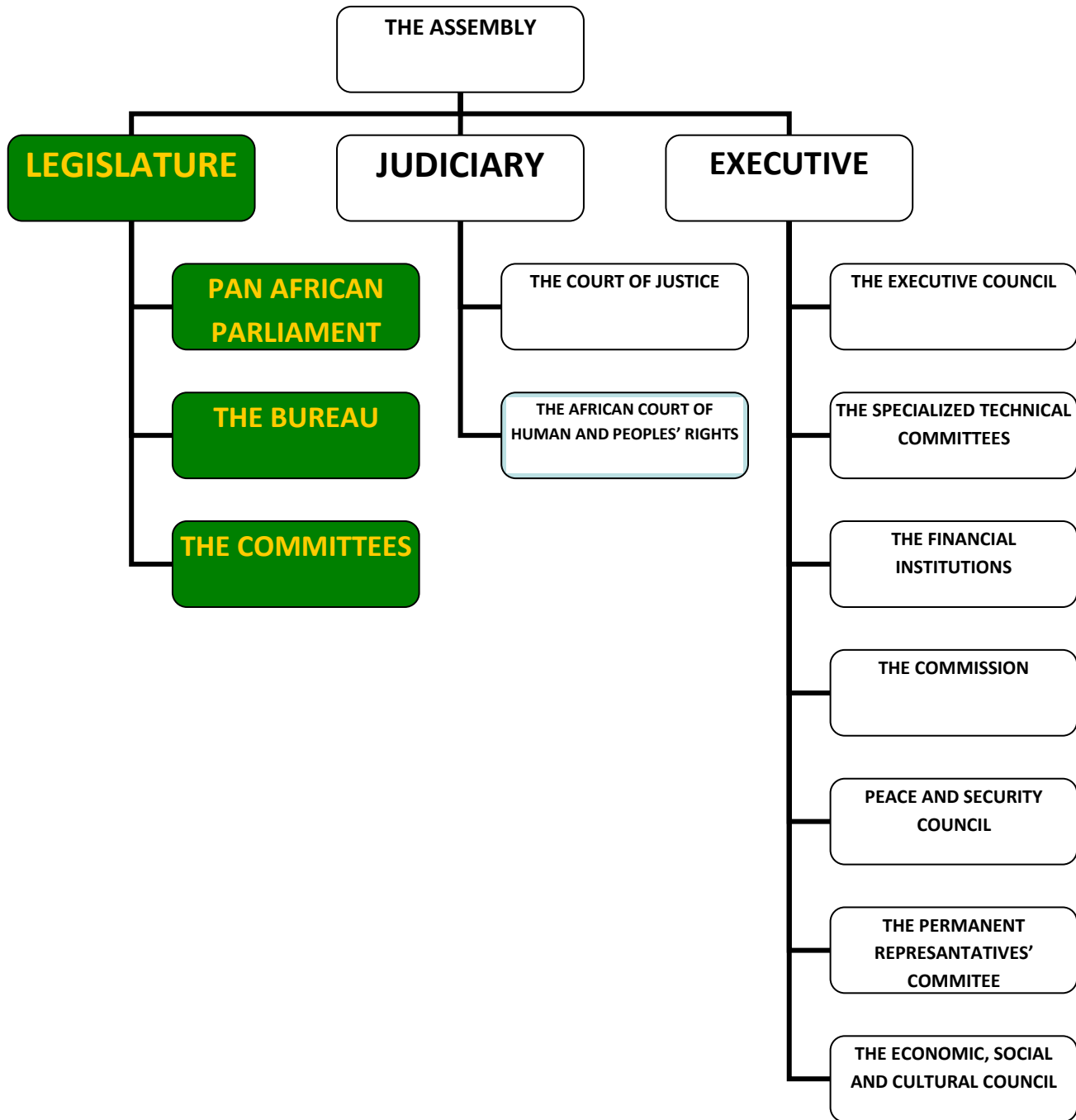
⁵⁷ PAP Rules of Procedure, Part XIV.

and the financial institutions.⁵⁸ There is general debate as to the allocation or separation of power within the AU and therefore disagreements as to how such allocation of power should be captured by the AU organogram.⁵⁹ This debate is outside the purview of the present discussion. The AU has not officially issued an organisational chart that reflects the official position of its various organs.⁶⁰ It is not surprising therefore to have various interpretations of the positions within the AU. The Parliament's understanding of its place within the larger framework of the AU is captured by the organogram in the next page.

⁵⁸ AU Constitutive Act, art 5(1)(a) – (j).

⁵⁹ See generally Nzewi (n 43 above) 198; Vlijoen (n 15 above) 170.

⁶⁰ Nzewi (n 43 above) 196.



Source: AU organogram as represented in the PAP Strategic Plan 2006 – 2010.

In addition to the article 5 institutions, there are those which can be referred as AU treaty-based institutions, namely: the African Commission on Human and Peoples’ Rights (African Commission) and the Committee of Experts on the Rights and Welfare of the Child. These are

protective bodies aimed at monitoring the implementation of the rights established under the African Charter and the African Charter on the Rights and Welfare of the Child. Therefore, the African human rights system is primarily made up of the African Court on Human and Peoples' Rights, the African Commission and the African Children's Right Committee.⁶¹ These are not the only organs with a human rights mandate or which assist in the promotion and protection of human rights. As Viljoen puts it:

The primary bodies with a human rights-related mandate are the African Human Rights Court, the African Commission, and the African Commission, and the African Children's Rights Committee. Even if the primary responsibility for human rights falls on these three institutions, other AU organs have to complement and support the primary human rights institutions in the exercise of their mandates.⁶²

Granted, the PAP has a promotional human rights mandate. It is thus important for us to acknowledge that despite its limited use of its mandate, the Parliament must be perceived as forming part of those organs of the AU specifically mandated to deal with human rights. Understanding the mandate of the PAP in that fashion has its advantages, chief among them being the recognition from other AU human rights institutions of the Parliament's strategic position, value or potential. Further, it will create more room for the creation of synergies likely to ensure augmented human rights promotion and protection in Africa. With a brief discussion on the relationship between the PAP, the AU executive and legislative bodies the following discussion will attempt to locate the PAP within the African human rights system.

5.3.1 The Pan-African Parliament and the executive organs of the AU

The executive organs of the AU consist of the AU Commission, the Assembly of Heads of State and Government (the Assembly), the Executive Council, the Peace and Security Council and the Permanent Representatives' Committee.⁶³ In a nutshell, these are the organs which are

⁶¹ Viljoen (n 15 above) 169.

⁶² As above, 173.

⁶³ As above, 179.

mandated to implement the policies, decisions and laws of the AU.⁶⁴ They are responsible for exercising what would traditionally be referred to as the executive functions of the AU. A general discussion of the relationship between the PAP and these institutions is beyond the purview of this thesis. What is clear is that the Parliament should be exercising some form of oversight function over these institutions. However, due to the limited mandate of the Parliament, it does not play such an oversight function.⁶⁵ This anomaly is linked to the question whether the Parliament will be clothed with any legislative powers any time soon. As a result, the relationship between the PAP and the executive organs of the AU has always been ambiguous.⁶⁶ This ambiguity emanates from the PAP Protocol and the AU Constitutive Act⁶⁷ as they have not categorically set out the hierarchy, if any, of the institutions. At the very least, the two instruments should have set out the proposed hierarchy of the AU organs and the relationship between these institutions and the PAP pending its transformation into a full legislative body.

Perhaps the displeasure of the PAP over the North Atlantic Treaty Organization's (NATO) intervention in Libya and the approach by the AU executive organs best exemplifies the awkward position in which the PAP finds itself.⁶⁸ The PAP was strongly opposed to the intervention in Libya by NATO, but the AU Executive appeared to be in support of the intervention.⁶⁹ During the Parliament's debate, following NATO's intervention in Libya, it was apparent that the MPAPs were frustrated by these developments.⁷⁰ During the parliamentary

⁶⁴ As above, 179 – 204.

⁶⁵ See generally Viljoen (n 15 above) 175.

⁶⁶ See generally G Manelisi, F Kornegay & R Stephen 'Formation of the African Union, African Economic Community and Pan-African Parliament' (2000) African Institute Research Paper, available at <http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN003885.pdf> (accessed 7 July 2012).

⁶⁷ As above.

⁶⁸ 'PAP blasts AU over Libya' *The Herald online* 29 October 2011.

⁶⁹ As above.

⁷⁰ As above.

debates, most of them questioned and demanded to know where the AU executive organs obtained the authority to recognise the Transitional Council (TNC), then in control of Libya.⁷¹

The PAP Recommendation adopted in 2012 also underscores the Parliament's strained relations with other organs of the AU.⁷² Citing the provisions of the PAP Protocol,⁷³ the Parliament recommended that the Chairperson of the AU Commission should implement the provisions of the PAP Protocol by gracing the Parliament with his presence.⁷⁴ Unfortunately, there is nothing in that provision that compels the Chairperson to attend the PAP sessions. The provision simply indicates that the PAP has the power to 'request officials of the OAU/AEC to attend its sessions, produce documents or assist in the discharge of its duties.'⁷⁵ To that end the Parliament cannot *summon* the Chairperson of the AU Commission or any official of any of the organs of the AU to attend its sessions. All it can do is to make a request, which may or may not be accepted. The Parliament's Recommendation on Relations with the African Union Commission⁷⁶ serves to expose the extent to which the Parliament is powerless in relation to other AU organs.

The most obvious point of contact between the PAP and some of these organs will be with respect to matters of the budgets of the Parliament and that of the AU. With respect to human rights it is obvious that some of the resolutions and recommendations discussed in the earlier chapter were directed to one or more of the AU executive organs. More resolutions and recommendations will continue to be adopted by the PAP, with the hope that the AU executive organs will take heed of suggestions. For example, since its inauguration in 2004, the Parliament

⁷¹ As above.

⁷² PAP Recommendation on Relations with the African Union Commission, PAP(2)/RECOMS/(VI) adopted by the PAP during its Sixth Ordinary Session, Addis Ababa, Ethiopia, 16 – 20 January 2012.

⁷³ PAP Protocol, art 11(5).

⁷⁴ PAP Recommendation on Relations with the African Union Commission, PAP(2)/RECOMS/(VI) adopted by the PAP during its Sixth Ordinary Session, Addis Ababa, Ethiopia, 16 – 20 January 2012, para.3.

⁷⁵ PAP Protocol, art 11(5).

⁷⁶ PAP(2)/RECOMS/(VI) adopted by the PAP during its Sixth Ordinary Session, Addis Ababa, Ethiopia, 16 – 20 January 2012.

has been referred to only a few times in the decisions of both the AU Assembly and AU Executive Council. An audit of these decisions suggest that the Parliament was only referred to in passing,⁷⁷ when making purely administrative decisions⁷⁸ or when the Parliament is being ‘urged’ to further or participate in some of the Union’s initiatives.⁷⁹ The decisions of the two organs do not contain any indication that the recommendations by the PAP are implemented or taken into account in the decision-making process. Even the AU Executive Council decisions on

⁷⁷ Assembly/AU/Dec.199 (XI), Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction – (Doc. Assembly/ aU/14 (XI)), 30 June – 1 July 2008, Sharm El-Sheikh, Egypt which made reference to or ‘recalled’ the Johannesburg Declaration of the Pan-African Parliament dated 15 May 2008; Assembly/AU/Res.1 (XI) , Resolution on Zimbabwe, 30 June – 1 July 2008, Sharm El-Sheikh, Egypt, which Resolution made reference to the report by the PAP as an election observer on the Zimbabwean Presidential run-off elections of 2008.

⁷⁸ Assembly/AU/Dec.223(XII), Decision on the Review of the Protocol Relating to the Pan African Parliament (PAP) Doc. EX.CL/459 (XIV) ; EX.CL/Dec.98 (V), Decision on the Budget of the Pan-African Parliament for the period July to December, 25 June – 3 July 2004; EX.CL/Dec.235VII), Decision on the Improvement of the Operations of the Pan-African Parliament 2004, 28 June – July 2005, Sirte, Libya.

⁷⁹ Assembly/AU/Dec.75 (V), Decision on Accelerating Action for Child Survival and Development in Africa to meet the MDGs – (Doc. Assembly/AU/2 (V)), 4- 5 July 2005, Sirte, Libya, requesting the African Commission to bring to the attention of the PAP and other AU institutions countries ‘violating children's rights and endangering their well-being, through conflict, poor governance, abuse, neglect, marginalisation and other forms of exclusion’, para 9(c) ; Assembly/AU/Dec.269(XIV), Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage such Situations - Doc.Assembly/AU/4(XIV), 31 January – 2 February 2010, requesting the involvement of the PAP in raising awareness about the African Charter on Democracy, Elections and Governance, para. 6(i)(a); Assembly/AU/Dec.275 (XIV), Decision on the Year of Peace and Security in Africa - Doc. Assembly/AU/5(XIV), 31 January – 2 February 2010, Addis Ababa, Ethiopia, requesting the Chairperson of the AU Commission to mobilise the participation and support of the PAP in celebrating the year of the Year of Peace and Security; Assembly/AU/Dec.344(XVI) Decision on the Africa-European Union Dialogue – Doc.Assembly/AU/13(XVI), 30 – 31 January 2011, calling upon the PAP to participate the implementation of the Africa-European Union Dialogue process, para. 4; EX.CL/Dec.315 (X), Decision on the Report of the Status of the OAU/AU Treaties - Doc. EX.CL/296 (X), 25 – 26 January 2007, appealing to the PAP to assist with advocacy and sensitisation of member states to quickly ratify or accede to the OAU/AU treaties, para 4.

the report of the PAP do not say much except to take note of the recommendations contained in the report.⁸⁰

Of the twenty decisions of the two organs that made reference to the PAP, only one decision appeared to be suggesting some form of consultation between the PAP and other AU organs.⁸¹ This AU Assembly decision requested the Chairperson of the AU to consult the PAP and other stakeholders on measures that could be adopted by the AU so as to effectively deal with the ‘scourge of unconstitutional changes of government.’⁸²

Possibly, the AU executive organs will continue to ignore the Parliament’s resolutions and recommendations. It is expected that a more robust relationship will emerge as between the PAP and the Peace and Security Council. Having indicated its strong bias towards addressing, or discussing, issues of peace and security, the PAP envisages such a relationship.⁸³ The Protocol Relating to the Establishment of the Peace and Security Council (PSC Protocol) of the African Union also envisages a strong relationship.⁸⁴ The robust relationship is most likely to be manifested through joint fact-finding missions, closer collaboration between the PAP’s Committee on Co-operation, International Relations and Conflict Resolutions as the primary link. The Parliament is also encouraged to work closely with the Panel of the Wise.⁸⁵ They will

⁸⁰ EX.CL/Dec.448 (XIII), Decision on the Report of the Pan-African Parliament - Doc. EX.CL/423 (XIII), 24 – 28 June 2008 ; EX.CL/Dec.642(XVIII), Decision on Report of the Pan-African Parliament (PAP) - Doc. EX.CL/647(XVIII).

⁸¹ Assembly/AU/Dec.253(XIII), Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations - Doc. Assembly/AU/7(XIII), 1 – 3 July 2009, Sirte, Great Socialist People’s Libyan Arab Jamahiriya, para 2.

⁸² As above.

⁸³ See Chapter 4 discussion on the PAP’s recommendations relating to peace and security in Africa and the various resolutions adopted on the issue.

⁸⁴ Article 18 of the PSC Protocol is titled ‘Relationship with the Pan-African Parliament’ and it sets out the possible areas of collaboration between the two organs.

⁸⁵ See generally A Jegede ‘The African Union peace and security architecture: Can the Panel of the Wise make a difference’ (2009) 9 *African Human Rights Law Journal* 417.

thus be able to forward peace and security issues to the Chairperson of the Panel of the Wise for inclusion in the agenda of the Panel.⁸⁶

Viljoen argues for a more augmented relationship between the African Commission and the PSC.⁸⁷ In particular he suggests that the African Commission should be involved in all activities of the PSC, share any relevant information as may be discernible from, among others, state reports and mission reports and with PSC acting as the Commission's political arm exerting pressure whenever it is necessary.⁸⁸ There is absolutely no reason why the same approach should not be adopted for the PAP and the PSC. Considering the inherent overlap between human rights and peace and security matters, the advantages of such an approach is captured by Viljoen, even though in the context of the African Commission, in the following words:

A reciprocal relationship between the PSC and the African Commission on Human and Peoples' Rights is envisaged, reinforcing the role of human rights as a "key tool for promoting collectively security, durable peace and sustainable development", on the one hand, and the need for peace and stability as a necessary condition for sustainable realization of especially socio-economic rights, on the other.⁸⁹

5.3.2 The Pan-African Parliament and the other legislative bodies of the AU

The traditional and indeed narrow understanding of the role of the legislature is that it is the branch of government that only makes laws. Viljoen has, in relation to the AU legislative role, adopted an expansive interpretation of the 'AU legislative role' to refer 'to both the adoption of binding standards ('law-making') and to the expression of 'advisory' views and recommendations (elaboration of 'soft law' norms).⁹⁰ It is within that context that he identifies the AU Assembly Heads of State and Government (AU Assembly or the Assembly), the

⁸⁶ As above, 419.

⁸⁷ Viljoen (n 15 above) 193 – 198.

⁸⁸ As above.

⁸⁹ As above, 195.

⁹⁰ Viljoen (n 15 above) 171.

Permanent Representatives' Committee (PRC) and the PAP as 'the AU organs principally responsible for 'legislation.'⁹¹

The PAP is an addition to the legislative bodies of the AU, with the potential to bring about substantial changes to the power dynamics within the AU. With the Parliament still in its nascent years, the relationship between the PAP and other AU legislative bodies is still in its developmental stages. At present the Parliament is playing an advisory and consultative role within the AU system. It will only begin to play a supervisory role once it has been conferred with legislative powers. Thus, the dominant legislative bodies are at present the AU Assembly which makes decisions and adopts legally binding instruments for the Union and the PRC.⁹²

The AU Assembly which is composed of the Heads of State and Government is considered as the 'supreme organ' of the AU.⁹³ This may be because it is in fact the decision-making body of the AU for according to article 9 of the AU Constitutive Act it is mandated to determine the policies of the AU. Further, the AU Assembly is also responsible for the adoption of the AU's budget,⁹⁴ monitoring the implementation of policies and decisions of the Union by all member states,⁹⁵ giving directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace,⁹⁶ and the AU Assembly is responsible for considering and taking decisions on reports and recommendations from the other organs of the Union.⁹⁷ Most importantly the AU Assembly is responsible for the adoption of legally binding instruments for the AU.⁹⁸

With respect to the relationship between the PAP and the AU Assembly, article 3(1) of the PAP Protocol provides that one of the objectives of the Parliament is to ultimately facilitate the

⁹¹ As above.

⁹² Viljoen (n 15 above) 183.

⁹³ AU Constitutive Act, art 6(2).

⁹⁴ As above, art 9(1)(f).

⁹⁵ As above, art 9(1)(e).

⁹⁶ As above, art 9(1)(g).

⁹⁷ As above, art 9(1)(b).

⁹⁸ Viljoen (n 15 above) 172.

effective implementation of the policies and objectives of the African Union. Article 3 of the PAP Protocol therefore envisages a robust relationship between the PAP and the AU Assembly. This is so because article 3 highlights that the PAP must be in a position to facilitate the effective implementation of the policies and objectives of the Union and, as I have indicated above, the AU Assembly is the one mandated to make decision for the Union. It follows that, if such policies and decisions are to be effectively implemented, the PAP should be involved in the process of implementation. This will in turn result in the greater participation of Africans, through the PAP, in the affairs of the AU. Of course, at the moment this is an ideal as opposed to a reality since the powers of the Parliament are rather limited. Its recommendations, resolutions or decisions can be easily ignored by the Assembly because at the moment the decisions of the Parliament are not binding on the AU Assembly or any other organ of the AU. Further to the above, article 3 must be interpreted as envisaging a robust relationship between the PAP and the AU Assembly. Apart from section 3 and the provisions relating to the budget of the PAP and that of the Union, which is discussed more fully below, the PAP Protocol does not mention the AU Assembly anywhere else.

The Rules of Procedure of the AU Assembly refers to the PAP as the parliament of the union under the definitional section.⁹⁹ Only once after that, under Rule 17, does it provide for the attendance and participation of the President of the PAP in the sessions of the AU Assembly. Beyond that, the Rules of Procedure of the AU Assembly do not mention or indicate the actual or envisaged participation of the PAP in the workings of the Assembly.

The budgetary powers of the PAP have been discussed in chapter 3. I have indicated that, in so far as the budget is concerned, the PAP can only suggest what its estimated budget is to the AU Assembly and it is then that a final decision on the approved budget will be made by the AU Assembly. I pointed out further that the involvement of the PAP in the budget process is therefore very limited. Apart from the exercise of its advisory functions, there is no indication of a more involved cooperation between the PAP and the AU Assembly. At the moment it

⁹⁹ Rules of Procedure of the Assembly of the Union, rule 1.

appears that the PAP is excluded in the major roles that the Assembly plays as the ‘executive’ and ‘*de facto* grand legislator’ despite its envisaged position as the central organ of the Union.

The Rules of Procedure of the PAP have made provision for the relations of the PAP with other organs of the AU. Rule 74 of the PAP Rules of Procedure provides that the President of the Parliament may invite the Chairperson of the Assembly to explain the decisions of the Assembly. Such an explanation or statement will be followed by a debate of members of Parliament. Rule 76, titled ‘Relationship between Parliament and the Assembly,’ provides that the President ‘shall present’ to the Assembly the resolution and reports of the parliament. The provision, although it alludes to the relationship between the two, only makes mention of the abovementioned duty and do not elaborate further.

As already indicated above, another organ of the AU performing legislative functions is the PRC, which is undoubtedly ‘the most active of the AU institutions.’¹⁰⁰ It has been noted that

[t]he PRC is perhaps the most important AU institution in the preparation of decisions that will be adopted at AU summits: it is where the political deals are made that turn technical drafting into formal policy. However, member states’ permanent representatives in Addis Ababa do not only prepare for summits; they are critical players in bringing the AU agenda into the day to day reality of government business in capital cities around the continent. The permanent representatives in Addis Ababa are engaged in a variety of deal-making that is not directly linked to summits, as well as formally taking part in the PRC meetings.¹⁰¹

It is due to the significance of this organ of the AU that a close relationship between the PAP and the PRC is of outmost importance. It is unfortunate that all the enabling documents of the PAP do not make reference to this important organ whilst the Rules of Procedure of the PRC only makes reference to the PAP under Rule I. This certainly leads one to conclude that apart from the implicit requirement that all organs of the AU are expected to work together towards

¹⁰⁰ Viljoen (n 15 above) 183.

¹⁰¹ African Network on Debt and development, Open Society Initiative for Southern Africa and Oxfam GB, ‘Towards a People-Driven African Union: Current Obstacles and New Opportunities’ (2007) 14, available at <http://www.opensocietyfoundations.org/reports/towards-people-driven-african-union-current-obstacles-new-opportunities> (accessed 7 September 2013).

a common goal, there is no normative framework within which the PRC together, with its subcommittees, and the PAP are expected to cooperate, collaborate in the quest to make the AU more people-driven. It is beyond doubt that the PRC is the most important organ of the AU and the absence of any indication how the two bodies relate and are likely to relate in the future is worrisome.

5.3.3 The Pan-African Parliament and the quasi-judicial and judicial institutions of the AU

The African human rights system is made up of the African Commission, the African Children's Committee and the African Human Rights Court. These institutions are the primary custodians of human rights in Africa and on which considerable academic energy has been expended to shed some light on the work that they do.¹⁰² Considering that the PAP has a human rights mandate it remains to be seen how it will effectively work with these institutions for the

¹⁰² ANM Abdullahi 'Human rights protection in Africa: Toward effective mechanisms' (1997) 3 *East African Journal of Peace and Human Rights* 1-31; EEO Alemika 'Protection and realisation of human rights in Africa' (2001) 1 *The Constitution – A Journal of Constitutional Development* 41; DM Chirwa 'The merits and demerits of the African Charter on the Rights and welfare of the child' (2002) 10 *International Journal of Children's Right* 157; SA Dersso 'The jurisprudence of the African Commission with respect to peoples' rights' (2006) 6 *African Human Rights Law Journal* 358; SBO Gutto 'The reform and renewal of the African Regional Human and Peoples' Rights System' (2001) 1 *African Human Rights Law Journal* 175; SBO Guto 'The legal status and implications of the decision by the assembly of heads of state and government to integrate the African Court of Justice and the African Court on Human and Peoples' Rights into one court' (2004) *Africa Legal Aid* 15; C Heyns 'African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; MW Mutua 'The African human rights system in a comparative perspective: The need for urgent reformulation' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 31; GJ Naldi & K Magliveras 'The proposed African Court of Human and Peoples' Rights: Evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 944; OC Okafor 'The African system on human and peoples' rights, quasi-constructivism, and the possibility of peacebuilding within the African states' (2004) 8 *International Journal of Human Rights* 413; NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45; F Viljoen 'The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 198; F Viljoen & E Baimu 'Courts of Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 254.

effective promotion of human rights on the continent. The following discussion will be speculative, considering that currently there is little, if any, relationship between the PAP and these institutions. It is possible that the drivers of these institutions are not aware that the Parliament has a promotional human rights mandate. It is argued here that the relationship between the PAP and other organs of the African human rights system may be manifested in two ways. Firstly, the relationship may manifest itself through the litigation powers of the PAP, that is, instances where the Parliament is able to seek recourse before those institutions with a quasi-judicial or judicial mandate. Secondly, the promotional mandate of the PAP may be exercised primarily in conjunction with the AU's quasi-judicial bodies. It is therefore befitting to highlight how the PAP may become an effective component of the African human rights system.

The provisions of the PAP Protocol relating to the functions and powers of the Parliament do not make any reference to the ability of the PAP to submit any matter for adjudication by the quasi-judicial or judicial bodies of the AU. Without belabouring the point, it appears that the PAP cannot submit any communication or any request for an advisory opinion to the African Commission and the African Children's Rights Committee. Considering that both institutions predated the PAP, it is not at all surprising that the Parliament is not able to submit any communications to these two bodies. Individual communications to the African Commission are limited to individuals, group of persons or by an NGO.¹⁰³ Communications to the African Children's Committee may be submitted by individuals, group or non-governmental organisations, NGOs recognised by the OAU/AU, member states and the United Nations (UN).¹⁰⁴

The PAP Protocol only makes reference to the African Court of Justice. Considering that the African Court of Justice and the PAP both emanate from the AEC Treaty of 1991 this should not be surprising. The PAP Protocol provides that the African Court of Justice will be

¹⁰³ Viljoen (n 15 above) 304.

¹⁰⁴ African Children's Charter, art 44.

empowered to adjudicate over matters relating to the interpretation of the PAP Protocol.¹⁰⁵ Following the decision of the AU to merge the African Court on Human and Peoples' Rights and the Court of Justice into the African Court of Justice and Human Rights¹⁰⁶ and pending the entry into force of the Protocol Establishing the African Court of Justice and Human Rights such matters will be submitted to the AU Assembly for resolution.¹⁰⁷

The Parliament is at liberty to seek advisory opinions from the African Court on matters relating to the Charter or any other relevant human rights instruments.¹⁰⁸ Such advisory opinions however may not be sought with respect to cases that are placed before the African Commission for adjudication.¹⁰⁹ This is due to the fact that in addition to its contentious jurisdiction, the African Court has been vested with advisory powers.

While it is clear that the PAP at the moment cannot institute matters against other organs of the AU before the African Court, a reading of the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights indicates otherwise. Once the merged court becomes operational, it will be able to receive and consider cases relating to, among other things, the interpretation of the AU Constitutive Act, all acts, decisions, regulations and

¹⁰⁵ PAP Protocol, art 20.

¹⁰⁶ For a detailed discussion on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice see F Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged Court Protocol' (posted 23 May 2012) <http://africlaw.com/tag/african-court-on-human-and-peoples-rights/> (accessed 31 January 2013); F Viljoen & E Baimu (n 97 above) 241; CM Peter, 'The proposed African Court of Justice- Jurisprudential, Procedural, Enforcement Problems and Beyond' (1993) 1 *East African Journal of Peace and Human Rights* 117; NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication' (2003) 28 *Brooklyn J of International Law* 811. The List of Countries which have signed, ratified/ acceded to The Protocol on the Statute of the African Court of Justice and Human Rights, downloaded from the website of the African Union (www.africa-union.org) on 19th April 2010, shows that as at that date, 21 States had signed the Protocol, but only two States had ratified/ acceded and deposited their instruments with the African Union Commission (AUC) i.e. Libya and Mali.

¹⁰⁷ As above.

¹⁰⁸ Court Protocol, art 4(1).

¹⁰⁹ As above.

directives of the organs of the AU.¹¹⁰ Further, the Court will be able to adjudicate over disputes pertaining to a breach of an obligation owed to a state party or to the Union.¹¹¹ The PAP alongside the AU Assembly and other organs of the AU will be able to submit cases to the Court for adjudication.¹¹² With the notable exception of the AU Assembly and the PAP, other organs of the AU will have to seek authorisation from the Assembly to submit cases before the African Court of Justice and Human Rights.¹¹³ Thus, a holistic interpretation of the aforementioned provisions clothes the African Court of Justice and Human Rights with jurisdiction to entertain matters, once it becomes operational, submitted by the PAP as against member states and other AU organs.

The position adopted under the Protocol on the Statute of the African Court of Justice and Human Rights is similar to the position adopted by the EU with respect to the EP's power of litigation. The ability of the PAP to submit cases before the African Court of Justice and Human Rights is particularly important as it will, in the long term, allow the Court to interpret and where necessary delineate the powers of the PAP as well as define the relationship between the PAP and other organs of the AU. As aforementioned, the EP was vested with the power to litigate by the Lisbon Treaty so as to ensure that the consultation procedure is adhered to by other members of the EU in particular the Commission.¹¹⁴ The consultation procedure of the EU is an oldest method of consultation that ensures the involvement of the EP in EU legislation.¹¹⁵ According to this procedure the EU Commission and the Council consult the EP by submitting to it whatever piece of legislation under consideration before it is made law.¹¹⁶ The EU Commission and the Council have no duty to follow, or even read, the response of the

¹¹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Statute of the African Court of Justice and Human Rights, art 28(a) - (h).

¹¹¹ As above.

¹¹² As above, art 29(1)(b).

¹¹³ As above.

¹¹⁴ N Neill *The government and politics of the European Union* (2006) 242.

¹¹⁵ As above.

¹¹⁶ As above.

EP but they are under a duty to respect the co-decision procedure and thus to wait for the response of the EP on the proposed law.¹¹⁷

In the famous *Isoglucose* case¹¹⁸ the EU Commission and Council failed to wait for the EP's opinion under the consultation procedure. The gist of the case submitted before the Court was that the Council had not exhausted all the possibilities open to it for getting the EP's opinion, and in particular, it had not requested an extraordinary parliamentary session, as it had the right to. It was in that context that the EP got the EU Court to annul the decision which was made without the consultation procedure having been properly followed. It is this decision that perhaps ensured that the consultation procedure of the EU is not watered down by failure to adhere to the process by organs of the EU that were involved. The decision has been criticised as being too open-ended, the argument being that the Court did not spell out what would have been the final outcome if the Council had made such a request and the EP had still failed to deliver an opinion.¹¹⁹ It is these general pronouncements in the *Isoglucose* case that somehow encouraged the parliament and also underlined the importance of the EP's democratic role in the Community.

From the above it is discernible that the PAP will be able to submit cases to the African Court of Justice and Human Rights as against member states but not as against other AU organs. Even though the Protocol on the Statute of the African Court of Justice and Human Rights vests the PAP with the capacity to submit disputes for adjudication between it and other organs of the AU, it should be noted that the Protocol has not come into force yet. Therefore, currently the PAP does not have the power to submit communications as against other organs of the AU.

The PAP Protocol is currently undergoing review with particular emphasis being placed on the possibility of expanding its legislative competence. The Draft Revised Protocol does not clothe the PAP with the power to submit contentious disputes before any judicial organs of the AU

¹¹⁷ As above.

¹¹⁸ *SA Roquette Freres v Council* [1980] ECR 3333 at 3424.

¹¹⁹ M Westlake *The Commission and the Parliament: partners and rivals in the European policy-making process* (1994) 34.

against any of the AU organs. It only makes provision for the relations between the PAP, Parliaments of the Regional Economic Communities and National Parliaments or other deliberative Organs and the African Court of Justice and Human Rights. The Draft Revised Protocol further provides that the PAP may solicit interpretation of legal instruments of the AU by the African Court of Justice and Human Rights. Such interpretation, when rendered, it is envisaged will be binding on the Parliament. In essence the provision of this Draft Revised PAP Protocol mirrors, in so far as the advisory jurisdiction of the Court is concerned, the provision of the Protocol of the Statute of the African Court of Justice and Human Rights. These additions to the Draft Revised PAP Protocol, if they are to be carried forward, are unlikely to make any significant changes to the status quo. This is because it appears that the Draft Revised PAP Protocol merely mentions that the PAP may solicit interpretation of the legal instruments of the AU by the African Court of Justice and Human Rights. This is a matter which has already been provided for by the Protocol to the African Court of Justice and Human Rights.

The PAP Protocol should have specifically spelled out the PAP's ability to launch proceedings before the Union's judicial bodies as against other AU organs as is the case with the EP. Demeke argues that due to the problem of violation of human rights in Africa it is significantly important that the PAP should be 'granted locus standi to bring a case against other institutions of the AU before the two regional Courts.'¹²⁰ Unfortunately, the current Draft Revised Protocol does not seem to address this lacuna.

5.3.4 The Pan-African Parliament and the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM)

The African Peer Review Mechanism (APRM) and the PAP have both been identified as being geared towards ensuring an Africa that respects and protects the rights of its citizens. Both appear as a sign of Africa's commitment to governance. As already elucidated in the previous chapters, the PAP is clearly mandated to promote human rights on the continent. The APRM

¹²⁰ Demeke (n 39 above) 60.

was established to 'monitor and assess the compliance of African governments with the norms of governance and human rights.'¹²¹ The APRM, which was conceived by NEPAD,¹²² is in essence a voluntary exercise where members of the AU subject themselves to assessment by other member states on issues of democracy, good governance and socio-economic development.¹²³

An extensive discussion of the processes and procedures of the APRM is beyond the remit of this study. In fact a large body of scholarly work has been dedicated to the establishment,¹²⁴ the processes and procedure of the APRM,¹²⁵ as well as its effectiveness.¹²⁶ Only a few of these authors discuss the relationship between the APRM and the PAP. A few mention the PAP in passing, but no one fully explores the potential of the relationship between the APRM and the PAP. As it has been rightly noted the APRM 'is arguably the strongest tool for Members of

¹²¹ Murithi (n 11 above) 143.

¹²² See generally O Jonas 'The quest to achieve African Renaissance: reflections on NEPAD' (2012) 5 *The Journal of Pan African Studies* 83.

¹²³ M Killander 'The role of the African Peer Review Mechanism in inducing compliance with human rights' Unpublished LLD thesis, University of Pretoria, (2009) 7.

¹²⁴ R Kanbur 'The APRM: An assessment of concept and design' (2004), www.arts.cornell.edu/poverty/kanbur/APRM.pdf (accessed 16 August 2012); Z Kebonang 'African Peer Review Mechanism: An assessment' (2005) 61 *India Quarterly* 138; R Herbert & S Gruzd *The African Peer Review Mechanism – Lessons from the pioneers* (2008) available at <http://unpan1.un.org/intradoc/groups/public/documents/amdin/unpan036022.pdf> (accessed 8 January 2013).

¹²⁵ See generally M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41; F Gaer 'A voice not an echo: UPR and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109; A Abebe 'Of shaming and bargaining of African States: African states and the UPR of the UN Human Rights Council' (2009) 9 *Human Rights Law Review* 1.

¹²⁶ J Akokpari 'Policing and preventing human rights abuses in Africa: the OAU, the AU, the NEPAD Peer Review' (2004) 32; AMB Mangu 'What future for human and peoples' rights under the African Union, New Partnership for Africa's Development, African Peer Review Mechanism and the African Court?' (2004) 29 *South African Yearbook of International Law* 136; M Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: Opportunities and constraints in implementation' (undated), <www.sarpn.org.za/documents/d0003007/APRM_review_Hansungule.pdf> (accessed 16 August 2012) 6.

Parliament to promote and monitor governance in Africa.¹²⁷ This fact has been appreciated by the Parliament, and was codified into the PAP's strategic plan 2006 – 2010.¹²⁸ This plan identified 'the consolidation of the APRM process in all Member States'¹²⁹ as an opportunity worth pursuing. The PAP has even adopted resolutions and recommendations on the APRM highlighting the importance of the APRM and the relevance of the Parliament to the APRM, processes and urging member states to be part of the process.¹³⁰ In particular the Parliament emphasised that the adherence to the process was a sign that a state was committed to democracy and good governance.¹³¹

The Economic Commission for Africa has highlighted that the participation of Parliaments in the APRM is important for the success of the process.¹³² This is so because parliamentarians are in a suitable position to influence government decisions and policies and enhance the public ownership of the APRM.¹³³ Parliamentarians are able to act as a bridge between the citizens, civil society and the APRM processes thereby creating space for improved public participation.¹³⁴

¹²⁷ S Gruzd 'PAP and Peer Review: enhancing involvement, adding value' South African Institute of International Affairs available at <http://www.saiia.org.za/governance-and-aprm-opinion/pap-and-peer-review-enhancing-involvement-adding-value.html> (accessed 16 August 2012).

¹²⁸ 2006-2010 PAP Strategic Plan, 7.

¹²⁹ As above.

¹³⁰ Resolution on Signing of Adherence of the African Peer Review Mechanism - PAP-RES 001/05; Resolution for the awareness building of activities of the APRM Secretariat, the establishment of a working platform for PAP and the APRM Secretariat and the taking into account of the specific characteristics of each country in their evaluation - PAP/RES.04(VI)/06; Recommendations [sic] on the new Partnership for Africa's Development and the African Peer Review Mechanism – PAP – Rec 002/04 ; New Partnership for Africa's Development (NEPAD), Recommendation No. PAP – Rec. 003/2006 ; Recommendation on Peace and Security issues in Africa, PAP/Recom.01(VI)/06, para. 5 ; New Partnership

¹³¹ PAP-RES 001/05.

¹³² Economic Commission for Africa *The Role of the Parliament in APRM: information on how parliamentarians can participate in APRM* (2011) 10.

¹³³ As above.

¹³⁴ As above; M Hansungule 'Malawi and the African Peer Review Mechanism: A bold step towards good governance?' (2008) 2 *Malawi Law Journal* 14.

The PAP is enjoined to promote the harmonisation and coordination of the AU programmes.¹³⁵ This obviously includes the activities of NEPAD and the APRM. Perhaps recognising the importance of the eventual participation of the PAP in the activities of the APRM, the base document provided that ‘six months after [each Country Review Report (CRR)] has been considered by the Heads of State and Government of the participating member countries, it should be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament.’¹³⁶ It is expected that the report will not only be tabled but will be debated upon by the PAP MPs before adoption.

The activity reports of the PAP indicate that there is little participation of the PAP in the work of the APRM. In fact it has been observed that the PAP’s interaction with the NEPAD has ‘been peripheral. Although these institutions are housed within a few kilometres in Midrand, they appear miles apart.’¹³⁷ Living up to its ‘talk shop’ status or perhaps utilising its promotional mandate, the Parliament has held workshops with UNECA which workshops were aimed at teaching MPAPs their role in the APRM process.¹³⁸ The Report of the work of the Pan-African Parliament for the period January to June, 2009, without any details records that the Parliament has a ‘good working relationships with the NEPAD and APRM’¹³⁹ and that the ‘last NEPAD – PAP dialogue meeting held in April 2009, set the way forward for the two institutions to strengthen their collaboration mechanisms.’¹⁴⁰

¹³⁵ PAP Protocol, art 11(7) & PAP Rules of Procedure, rule 5.

¹³⁶ APRM Base Document 2001, para 25.

¹³⁷ Herbert & Gruzd (n 124 above).

¹³⁸ The workshop which was held in Addis Ababa, Ethiopia from May 12 to 14 targeted parliamentarians from Francophone and Portuguese speaking countries and was titled *Enhancing the role and effective participation of parliamentarians in the African Peer Review Mechanism (APRM) Process*, Activity Report of the Pan-African Parliament for the period January to June 2010, Kampala, Uganda, 7.

¹³⁹ Report of the work of the Pan-African Parliament for the period January to June 2009, Sirte, Libya, June/July 2009, EX.CL/526(XV) Rev.1, 2.

¹⁴⁰ As above.

The PAP occasionally receives reports on the status of the implementation of the assessment missions in the countries that have undergone the APRM review.¹⁴¹ The PAP has received Malawi's APRM report.¹⁴² In the case of Ghana, Rwanda and Kenya, it is indicated that 'the PAP, upon, extensive deliberations, exhorted African leaders to accede to the APRM review and implement its findings.'¹⁴³ It has been said that the reports 'were tabled without much preparation, analysis or debate.'¹⁴⁴ The representative nature of the PAP considered, the expectation perhaps was that the reports would be presented and thoroughly debated by the MPAPs. Through such debates the position of the Parliament on the issues contained in the reports would become known and used in the future by the countries concerned to improve their systems. Also, such debates would enable the country representatives to make a valuable input when the reports are debated at the national level.¹⁴⁵

An improved participation of the PAP in the APRM process is therefore necessary. UNECA has indicated that the PAP can participate in the APRM process in four major ways, namely: by regularly engaging in debates surrounding the APRM process; by engaging in capacity building; by undertaking APRM mission; and by making the APRM a regular item in its agenda for debate during the plenary sessions.¹⁴⁶ It is suggested that the PAP should adopt a more focused strategy in its interaction with the PAP so as to ensure that its participation in the APRM process is relevant and useful.

¹⁴¹ Report of the work of the Pan-African Parliament for the period January to December 2007, Addis Ababba, Ethiopia, January 28 - 29, 2008, PAP/S/RPT/72/08, 9.

¹⁴² Hansungule (n 134 above) 14.

¹⁴³ Report of the work of the Pan-African Parliament for the period January to December 2007, Addis Ababba, Ethiopia, January 28 - 29, 2008, PAP/S/RPT/72/08, 9.

¹⁴⁴ Herbert & Gruzd (n 124 above).

¹⁴⁵ For example, during the debate on the Report of the Pan-African Parliament by the Kenya National Assembly Member of Parliament Oparanya head of the PAP delegation from Kenya noted that during the PAP debates on the APRM, negatives about Kenya were highlighted and these included corruption, and marginalisation of tribal minorities; Kenya National Assembly Official Report, Tuesday, 12th June 2007, Motion on the adoption of Report on Sixth Session of Pan-African Parliament, 1705 – 1718.

¹⁴⁶ Herbert & Gruzd (n 124 above).

5.4 The Pan-African Parliament and sub-regional parliamentary bodies

The PAP is enjoined to encourage ‘the coordination and harmonisation of policies, measures, programmes and activities of the Regional Economic Communities and the parliamentary fora of Africa,’¹⁴⁷ The cooperation between the PAP and sub-regional parliamentary bodies (SRPBs) as well as national parliaments or other deliberative organs is provided for under the PAP Protocol according to which the Parliament may act as a convener of SRPBs when discussing issues that affect all parties.¹⁴⁸

The SRPBs that the PAP identified as possible partners include the Economic Community of West African States Parliament (ECOWAS Parliament), the East African Legislative Assembly (EALA), the SADC Parliamentary Forum (SADC PF). Other assemblies that can be found in Africa and may partner with the PAP include the Inter-Parliamentary Union of Intergovernmental Authority on Development (IGAD), the Network of Parliamentarians of the Economic Community of Central African States (REPAC) and the West African Economic and Monetary Union (UEMOA).¹⁴⁹ While the EALA, the SADC PF and the ECOWAS Parliament meet regularly and are more active, the other assembly bodies do not meet regularly and their activities are therefore not visible to the general public.

Most of these parliamentary bodies are usually empowered or take upon themselves to deal with human rights issues. For example, one of the fundamental principles of the ECOWAS is adherence, recognition and protection of human and peoples’ rights as enshrined under the African Charter on Human and Peoples’ Rights.¹⁵⁰ The ECOWAS Parliament is empowered to offer opinions on matters relating to the respect of human rights by member states.¹⁵¹ The ECOWAS Parliament is also mandated to make recommendations to the institutions and

¹⁴⁷ PAP Protocol, art 11(7).

¹⁴⁸ PAP Protocol, art 18 as read with rule 77(1) of the PAP Rules of Procedure.

¹⁴⁹ See generally U Terlinden ‘African Regional Parliaments – Engines of Integration and Democratisation?’ available at <http://library.fes.de/pdf-files/iez/02581.pdf> (accessed 12 August 2012).

¹⁵⁰ The Economic Community of West African States (ECOWAS) Revised Treaty (1993), art 4(g).

¹⁵¹ Protocol Relating to the Community Parliament, art 6(1).

organs of the community on issues relating to human rights.¹⁵² Likewise, the EALA is empowered to address any issue pertaining to the Community and to make the necessary recommendations thereafter.¹⁵³ The SADC PF has also undertaken to advance and defend human rights throughout the SADC Region.¹⁵⁴ To that end, it is clear that the SADC PF will be concerned with and will be willing to collaborate with the PAP in the promotion of human rights. Prior to the establishment of the PAP, there were fears that the

[e]xisting regional formations, such as the Economic Community of West African States (ECOWAS) and Southern Africa Development Community (SADC), might not be compatible with the Pan-African Parliament. These bodies are primarily concerned with economic rather than political issues. Moreover their protocols may be incompatible with those of the AU. It is thus unclear what role already-existing regional formations will play with regards to the AU and specifically the PAP.¹⁵⁵

It is therefore reassuring to note that, just like the PAP, these sub-regional parliamentary bodies are expected to promote human rights in their respective regions. With such a common goal there is no reason why collaboration between these institutions should not be pronounced. Additionally, the fact that the institutions are representative in nature makes it worthwhile to have them collaborate on matters pertaining to the promotion of human rights in the continent. Possible areas of collaboration between sub-regional parliamentary bodies and the PAP also include the undertaking of fact-finding and election observer missions, dissemination and implementation of the resolutions and recommendations of the various parliamentary bodies, institutional exchange activities, human rights promotion activities and research activities.

The collaboration between the PAP and sub-regional parliamentary bodies is likely to improve the promotion of human rights in Africa. However, thus far collaboration between the various

¹⁵² As above, art 6(1)(b).

¹⁵³ The Treaty for the Establishment of the EAC (1999), art 49 as read with arts 3(3), 6(d) & 123(3)(d),

¹⁵⁴ SADC Parliamentary Forum - Strategic Plan 2006-2010, 13.

¹⁵⁵ Idasa, Proceedings of a roundtable discussion on: 'Fostering Integration among Africa's Diverse Parliaments: The prospects and challenges for the Pan-African Parliament (12 November 2003) Cape Town, South Africa; report available at <http://www.yumpu.com/en/document/view/6063674/challenges-facing-the-pan-african-parliament-idasa> (accessed 7 September 2013).

SRPBs has not been encouraging. It is unfortunate that the collaboration between the PAP and sub-regional parliaments has not been visible. While there is evidence of the desire to cooperate, on the part of both the Parliament and the SRPBs, such cooperation has not materialised. A few activities have been carried out by the PAP in a bid to close this implementation gap. For example, in May 2010 the then 4th Vice President of the PAP MP Joram Gumbo participated in the 27th Plenary Assembly of the SADC held in Livingstone, Zambia.¹⁵⁶

In collaboration with the SRPBs the PAP has organised and participated in workshops, seminars and conferences relating to the integration project in Africa.¹⁵⁷ For example, the PAP convened consultative workshops with stakeholders in East and Southern Africa to solicit their views on how best to accelerate the process of harmonising and rationalising RECs. Recommendations that were made during these consultative workshops were that the PAP should establish a continental integration and harmonisation project and should encourage member states of RECs to equip their parliamentary bodies with legislative powers.¹⁵⁸ Another recommendation was that the PAP should be given the powers to ‘propose model laws to regional and national parliaments on certain sectors such as trade/commerce, defence, good governance, and gender equality.’¹⁵⁹ Another suggestion has been that the PAP should study the legal systems and instruments regulating sub-regional bodies so as to identify those that impede the integration process.¹⁶⁰ It has been suggested that ‘the PAP and SRPBs should be more vocal in protecting

¹⁵⁶ Activity Report of the Pan-African Parliament for the period May to September 2010, Midrand, South Africa – 6 October 2010, 4.

¹⁵⁷ This is in line with the PAP’s mandate to work towards the realisation of integration in Africa pursuant to arts 3(c) of the AU Constitutive Act and 3(4) of the PAP Protocol.

¹⁵⁸ Report of The Pan-African Parliament/ SADC Parliamentary Forum Seminar on the harmonisation of Regional Economic Communities and Regional Parliamentary Bodies, *Ngurdoto Mountain Lodge, Arusha, Tanzania, 22–23 September 200*, 6 – 7.

¹⁵⁹ As above.

¹⁶⁰ Report of The Pan-African Parliament/ SADC Parliamentary Forum Seminar on the harmonisation of Regional Economic Communities and Regional Parliamentary Bodies, *Mowana Lodge - Kasane, Botswana 12–13 March 2007*, 2.

and promoting good governance, in respect of democracy, human rights and economic governance.¹⁶¹

The role of SRPBs in the promotion of human rights was again highlighted at the third consultative workshop held in Yaoundé, Cameroon¹⁶² on the harmonisation of regional economic communities and regional parliamentary fora. It was also highlighted that RPBs could, among other things, initiate debates on issues of women's rights, child protection and corruption, carry out fact-finding missions if there are any allegations of violations of human rights, and promote extensive discussions 'on the periodic reports of human rights mediators and commissions and implement such reports.'¹⁶³ In addition to this work that is being carried out by SRPBs, the PAP occasionally invites representatives from the member states, national and regional parliamentary bodies to address the house on issues that are affecting the continent.¹⁶⁴ Most of the presentations by the representatives are messages of solidarity and rarely deal with issues of human rights in a more critical manner. The PAP should follow the example presented by other RPAs.

The EP, the PACE and the Parliamentary Assembly of the OSCE occasionally meet to discuss issues of common concern.¹⁶⁵ These meetings, which are normally referred to as a 'parliamentary troika', are usually in the form of successive meetings, conferences or workshops.¹⁶⁶ For example, there has been a troika on the Stability Pact for South East Europe and one on the consolidation of democracy in Belarus.¹⁶⁷ This is in addition to the continuous

¹⁶¹ As above.

¹⁶² Report of The Pan-African Parliament/ SADC Parliamentary Forum Seminar on the harmonisation of Regional Economic Communities and Regional Parliamentary Bodies, Third consultative Seminar, National Assembly of Cameroon – Yaoundé, 8 – 9, September 2008.

¹⁶³ As above, 15.

¹⁶⁴ Report of the work of the Pan-African Parliament for the period January to June 2009, Sirte, Libya, June/July 2009, 5.

¹⁶⁵ P Evans & P Silk *The Parliamentary Assembly: Practice and procedure* (2008) 311.

¹⁶⁶ As above.

¹⁶⁷ As above.

formal collaboration between these institutions,¹⁶⁸ which collaboration is even expected to take place at committee level.¹⁶⁹

5.5 The Pan-African Parliament and institutions at the national level

5.5.1 The Pan-African Parliament and national parliaments

As already indicated, the PAP Protocol makes specific reference to national parliaments with the relationship being described envisaged 'to be complementary as these institutions are interdependent.'¹⁷⁰ Even though the report does not state how, it highlights that as a result of this relationship, the unstable nature of some national parliaments is to affect the effectiveness of the Parliament.¹⁷¹ Unfortunately, the relationship between the PAP and national parliaments has not moved beyond rhetoric. In some member states national parliaments are only relevant when they designate those who will represent the country at the PAP. Beyond that there is not much in terms of practical collaboration. This is despite the importance of Parliaments to the country's foreign policy. National Parliaments 'fulfil an important role in shaping the country's foreign policy, ratifying treaties (incorporation, amending and accession) and international agreements concluded with other countries.'¹⁷²

However, it is encouraging to highlight that in some of the member states the reports of the Pan-African Parliament are tabled and discussed by the country's national assembly for adoption. A perusal of the Kenya National Assembly Official Record (*Hansard*)¹⁷³ shows that the PAP's reports are put to the House and debated by the members prior to their adoption. This is also indicative of the fact that the PAP's reports are availed to the rest of the members of the

¹⁶⁸ As above, 310.

¹⁶⁹ As above, 11.

¹⁷⁰ Draft Report, Meeting of African Parliaments on the Pan-African Parliament (undated) 42, available at <http://info.worldbank.org/etools/docs/library/108347/5pap.pdf> (accessed 14 August 2012).

¹⁷¹ As above.

¹⁷² J Marszałek-Kawa 'Relations between European Parliament with the national Parliaments of the EU member States' (2010) *Polish Political Science Yearbook* 47.

¹⁷³ Kenya National Assembly Official Report, Tuesday, 12 June 2007, Motion on the adoption of Report on Sixth Session of Pan-African Parliament, 1705 – 1718.

Kenya National Assembly for consideration. It is interesting to note that during the debate on the adoption of the Report on the sixth session of Pan-African Parliament by the Kenya National Assembly MP Muite was of the view that the PAP should be accessible to the people and should not be an elite institution that has a top-down approach.¹⁷⁴ According to him, 'members go to South Africa and other places to discuss things that are esoteric and have no practical meaning and which do not change the day to day lives of African people'.¹⁷⁵ Although the debate was not lengthy, members of the Kenya National Assembly were informed about the work of the Parliament.

There is no indication that national parliaments directly participate in the activities of the PAP, for example institutional exchange activities, research activities and promotional activities. Many joint activities may be undertaken along those lines. National parliaments are better suited to play a pivotal role in the promotion of the activities of the Parliament at country level. More can be done on the promotion of human rights through the collaboration of the PAP, SRPBs and national parliaments. The PAP is encouraged to follow the strategies adopted by the EP in reaching out to national actors. In a bid to ensure targeted collaboration between the EP and national representative bodies, the EU established the Conference of Community and European Affairs Committees of the Parliaments of the European Union (COSAC).¹⁷⁶ COSAC, which is not a decision making body, is a platform for unofficial exchange of ideas and views on matters affecting the EU.¹⁷⁷ COSAC acts as a coordinating and consultative forum where the representatives 'indicate the priorities approved by the parliaments of the EU representation'.¹⁷⁸ The PAP could establish a similar forum because there is an urgent need to establish a forum for engagement between the national parliaments and the PAP.

The relationship between the Parliament and national parliaments should be encouraged and nurtured. This is because such a relationship goes to the root of participatory democracy on

¹⁷⁴ As above, 1714.

¹⁷⁵ As above.

¹⁷⁶ K Marszalek-kawa 'Relations between (n 172 above) 48.

¹⁷⁷ As above, 49.

¹⁷⁸ As above.

the whole continent. While it is acknowledged that national parliaments in Africa are weak there is much that can be achieved by the Parliament together with national parliaments to influence regional integration and democratisation in Africa. A strong partnership between the PAP and national parliaments will ensure that Africans are able to have issues addressed at both national and regional level. Similar issues and problems may be isolated and addressed uniformly by the Parliament and national assemblies.

5.5.2 The Pan-African Parliament and civil society

Civil society has emerged as one of the most important actors in the human rights agenda.¹⁷⁹ The participation of non-governmental organisations (NGOs) and international non-governmental organisations in the promotion and protection of human rights in Africa is impressive.

The importance of civil society in the human rights agenda is evidenced by their participation in the work of the African Commission, the African Court on Human Rights and the Children's Committee.¹⁸⁰ Civil society has straddled the promotional and protective human rights mandate. They have thus managed to submit cases involving the violation of human rights by AU member states. Civil society in Africa has also shown tremendous commitment towards the promotion of the various human rights mechanisms that exist in Africa. Their promotion of human rights is meritorious and has shaped them into one of the best vehicles to champion the human rights cause in Africa.

¹⁷⁹ AE Rice & C Ritchie 'Relationships between international non-governmental organisations and the United Nations' (1995) 47 *Transnational Associations* 254.

¹⁸⁰ Viljoen (n 15 above) 405; BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 549; BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights (2010) 10 *African Human Rights Law Journal* 26; R Murray *The role of national human rights institutions at the international and regional levels: The experience of Africa* (2007).

The ever vigilant civil society is usually more informed about the actions of the government and in turn the government is also aware of their agenda.¹⁸¹ The promotion and protection of human work done by civil society is usually carried out by experts or experienced people in the field of human rights. It is also worthy to note that some members of civil society are donor funded and are not financially constrained to carry out human rights promotional activities. It does come as a surprise that the PAP Protocol and the PAP Rules of Procedure make no provision for the participation of civil society in its activities.¹⁸² The ECOWAS Parliament,¹⁸³ the EALA,¹⁸⁴ the PACE¹⁸⁵ and the EP¹⁸⁶ are all mandated to cooperate with civil society in their respective jurisdictions by clear and unambiguous provisions in the founding treaties or their rules of procedure. The absence of a similar provision – specific to the cooperation of the PAP with civil society – has not prevented the Parliament from engaging civil society, though. The PAP Strategic Plan clearly earmark cooperation with civil society and trade unions as one of the measures that will be adopted to ensure that ‘the peoples’ voices are represented, heard and listened’¹⁸⁷ to. The PAP has also indicated that cooperation between civil society and the Parliament is undertaken within the larger framework of cooperation as envisaged by the AU. It

¹⁸¹ SA Yeshanew ‘Utilising the promotional mandate of the African Commission on Human and Peoples’ Rights to promote human rights education in Africa’ (2007) 7 *African Human Rights Law Journal* 202.

¹⁸² Southern Africa Trust 2007 — Establishing a Civil Society Support Mechanism with the Pan-African Parliament (PAP), the New Partnership for Africa’s Development (NEPAD) and the African Peer Review Mechanism (APRM), 29, available at http://www.southernafricatrust.org/docs/CSO_Interface_Report_2007.pdf (accessed 18 August 2012).

¹⁸³ ECOWAS Treaty, art 81.

¹⁸⁴ EALA Strategic Plan 2010 – 2012 available at http://www.eala.org/key-documents/doc_details/13-eala-strategic-plan-2010-2012.html (accessed 7 September 2013).

¹⁸⁵ Rules of Procedure of the PACE, art. 44(5) see generally Parliamentary Assembly, Council of Europe Report, Political Affairs Committee on Co-operation between the Assembly and the Conference of INGO, 7 available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOCI1441.pdf> (accessed 23 August 2012).

¹⁸⁶ Rules of Procedure of the European Parliament, rule 25 and ANNEX XIX (to the European Parliament Rules of Procedure): Communicating Europe in partnership, para 7.

¹⁸⁷ PAP Strategic Plan, 12.

has cited provisions of the AU Constitutive Act¹⁸⁸ and objectives of the Parliament in support of the collaboration between the Parliament and civil society.

As can be discerned from the previous chapters, the collaboration of the PAP and civil society is largely confined to workshops and conferences, most of which mainly benefit the MPAPs. The workshops are usually preceded by presentations to the relevant committees for purposes of sharing with them the activities of a particular NGO. Most NGOs approach the PAP to indicate how they can assist and it is only then that they participate in the relevant committee sittings. In fact, it has been correctly noted that the PAP has largely collaborated ‘with research institutes and think tanks’¹⁸⁹ and has not widened its network of partners in civil society.

There are no clear efforts by the PAP to establish a permanent civil society forum as is the case with the African Commission. No interaction between the Parliament and civil society is visible when one visits the Parliament’s website. It must be pointed out that ‘thirty-five African and international civil society organisations working in over forty African countries participated in the first Consultative Dialogue with the Pan-African Parliament.’¹⁹⁰ The recorded impressive participation of civil society in this forum should have been the start of a robust relationship between the Parliament and civil society. However, on the contrary, an audit of the PAP Activity Reports from 2007 onwards indicates that the PAP and civil society have not fully implemented the recommendations that were adopted at the end of that consultative dialogue. It was recommended that the Parliament should invite more members of civil society to its

¹⁸⁸ AU Constitutive Act, art 17; African Civil Society Organization and the Pan-African Parliament Consultative Dialogue *Report on building effective mechanisms for civil society engagement with the Pan African and Regional Institutions*, 7 – 8 May 2007, Gallagher Estate, Midrand, South Africa, 4, available at <http://www.southernafriatrust.org/docs/PAP%20Dialogue-dft5.pdf> (accessed 18 August 2012).

¹⁸⁹ As above, 5.

¹⁹⁰ Submission from Civil Society Organisations to the Pan African Parliament on the Proposal for Continental Government 14 May 2007, Gallagher Estate, Midrand, South Africa, available at http://www.afriap.org/english/images/research_pdf/CSO_Submission_PAP_May2007.pdf (accessed 18 August 2012).

sessions, publicize its activities, encourage civil society to participate in the work of the various permanent committees of the Parliament and have more joint activities.¹⁹¹

The PAP is yet to successfully secure greater participation of civil society in its activities. This buy-in is more than necessary and will most certainly improve the work of the Parliament. It will assist in taking the Parliament to the people. Such joint activities may include seminars, collaboration in elections observer and fact-finding missions, participation in the petition procedure, presentations before the various Permanent Committees, as well as in monitoring the progress of member states on issues earmarked by the Parliament as necessitating their attention. The Parliament should then develop a normative framework within which it is to cooperate with civil society. This will in essence formalise the relationship between the two actors. The normative framework should be able to take into account the diversity of civil society, the parameters within which some members of civil society work as well as the varying expertise that civil society possesses. Further, the PAP should reach out more and invite members of civil society to participate, jointly coordinate activities and to publicise the work of the Parliament. The Parliament should move towards creating better synergies with members of civil society. The creation of a forum where the Parliament and civil society can consult each other consistently will certainly improve the promotion and protection of human rights in Africa. The West African Civil Society Forum and the African Commission NGO Forum¹⁹² may serve as possible models in the event that the PAP establishes such a forum. The former has greatly participated in the activities of the ECOWAS Parliament whilst the latter is well known for its contribution to the work of the African Commission.

¹⁹¹ Southern Africa Trust 2007 — Establishing a Civil Society Support Mechanism with the Pan-African Parliament (PAP), the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), 12, available at http://www.southernafricatrust.org/docs/CSO_Interface_Report_2007.pdf (accessed 18 August 2012).

¹⁹² For more information visit the African Commission NGO Forum at <http://www.ishr.ch/african-commission/ngo-forum> (accessed 20 August 2012).

5.5.3 The Pan-African Parliament and national human rights institutions (NHRIs)

A reflection on the Principles Relating to the Status of National Institutions for the promotion and protection of human rights (The Paris Principles) adopted by the UN General Assembly resolution of 20 December 1993 reveals an opportunity for cooperation between the PAP and NHRIs. The nature, duties and functions of NHRIs have been discussed in detail elsewhere.¹⁹³ Here, reasons for the involvement of these institutions in the activities of the PAP are identified.

First, the Paris Principles envisage collaboration between NHRIs and a wide spectrum of actors at country level. The Paris Principles encourage NHRIs to consult other bodies with a similar mandate. Considering that NHRIs are now regarded as a bridge providing a practical link between the governing and the governed,¹⁹⁴ their relationship with the PAP is more than necessary. The role of NHRIs is no longer considered as only limited to the national arena. They have proven that their relevance to the regional and international levels can no longer be ignored.¹⁹⁵

Second, the unique position of NHRIs at the national level makes them suitable partners with the Parliament. They are neither state actors nor members of civil society. It is therefore easier for them to address issues of public concern without being accused as being biased. That is why the 'Belgrade Principles' on the Relationship between NHRIs and Parliaments (Belgrade

¹⁹³ OC Kafor & SC Agbakwa 'On legalism, popular agency and "voices of suffering": The Nigerian National Human Rights Commission in context' (2002) 24 *Human Rights Quarterly* 663; International Council on Human Rights Policy 'Performance and legitimacy; national human rights institutions' (2004) 3; CESCR General Comment No.10, *The role of NHRIs in the protection of economic, social and cultural rights* (1998) Doc. E/1999/22; LC Reif 'Building democratic institutions: the role of national human rights institutions in good governance and human rights protection' (2000) 13 *Spring Harvard Human Rights Journal* 2; S Cardenas 'Emerging global actors: the United Nations and National Human Rights Institutions' (2003) 9 *Global Governance* 23.

¹⁹⁴ A Smith 'The unique position of National Human Rights Institutions: A mixed blessing?' (2006) 28 *Human Rights Quarterly* 904.

¹⁹⁵ See generally Dinokopila (n 180 above) 33, making a case for the acceptance of NHRIs as regional and international actors.

Principles) adopted in February 2012 provide a useful framework for cooperation between the two.¹⁹⁶ The Belgrade Principles provides for four main areas of cooperation between NHRIs and Parliaments.¹⁹⁷ These are cooperation in relation to: legislation, international human rights mechanisms, the education, training and awareness raising of human rights as well as monitoring the executive's response to judgement of judicial and quasi-judicial bodies.¹⁹⁸ Even though the Belgrade Principles do not make specific reference to International Parliamentary Institutions, they provide a useful framework for a closer and more nuanced relationship between the PAP and NHRIs. A closer reading of the Belgrade Principles also reveals that the areas of cooperation indicated therein mirrors most of the activities of the Parliament. A normative framework for cooperation between the Parliament and NHRIs will thus be easier to craft.

The PAP has not made sufficient efforts to collaborate with national human rights institutions (NHRIs) in the promotion of human rights. Likewise, NHRIs have not made any effort to collaborate with the Parliament. This is perhaps due to limited knowledge of the activities of the Parliament by NHRIs and vice versa. However, it is imperative that a stronger relationship between the two be established and nurtured.

5.6 The Pan-African Parliament and parliamentary diplomacy

The current and future relationship of the Parliament and other institutions is, even though not spectacular, commendable. The PAP has opened a sustained dialogue with various stakeholders such as civil society, international organisations, regional and sub-regional institutions and other parliamentary organisations. This approach is in fact consistent with that of many parliamentary bodies and has in fact existed for many years and has come to be known as Parliamentary Diplomacy. Stavridis ascribes the increase in the Parliaments' participation in international affairs to certain factors such as democratisation of politics, domestication of foreign policy,

¹⁹⁶ Available at <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments> (accessed 1 February 2013).

¹⁹⁷ As above.

¹⁹⁸ As above.

integration process and the various technological developments.¹⁹⁹ Due to its varying usage, the term 'Parliamentary Diplomacy' has no precise definition and it is usually used in a contextual sense. It has been rightly noted that:

[e]mpirical observation suggests that it [parliamentary diplomacy] is a number of different and varied things. One could group them under the general label of all activities and actions that parliamentary bodies and their members take in international relations.²⁰⁰

Parliamentary diplomacy perhaps is an epitome of parliaments' international relations. As it has been rightly observed, parliamentary diplomacy has gained momentum over the years and its relevance has rapidly increased.²⁰¹ The various international activities undertaken by members of parliaments, national, regional and international alike, have come to be simply known as 'parliamentary diplomacy'²⁰² more often highlighting the role of these institutions in international relations. These activities have been identified as including the various parliamentary fact-finding and elections observer missions undertaken by members of parliaments, their participation in national and international fora as well as motions, questions, resolutions and recommendations on international issues.²⁰³ Other activities have been listed to include the international agreements between Parliaments and the activities of the foreign affairs parliamentary committees.²⁰⁴ These activities have further been characterised as formal and

¹⁹⁹ S Stavridis 'Parliamentary Diplomacy': some preliminary findings' (2002) Jean Monet Working papers in comparative politics no. 48, 2 available at <http://www.fscpo.unict.it/EuroMed/jmwp48.htm> (accessed 26 August 2013).

²⁰⁰ As above, 3.

²⁰¹ FW Weisglas & G de Boer 'Parliamentary diplomacy' (2007) 2 *The Hague Journal of Diplomacy* 93.

²⁰² As above.

²⁰³ Stavridis (n 199 above) 4; Inter- Parliamentary Union, communication from Mr G. Hamilton, Clerk of the National Assembly of the States General of the Netherlands on Parliamentary Diplomacy: diplomacy with a democratic mandate (2012).

²⁰⁴ Stavridis (n 199 above) 46

informal means that are adopted by parliamentary bodies in their cooperation with many of the external stakeholders.²⁰⁵

Following the proliferation of parliamentary bodies, parliamentary diplomacy has been on the rise. This perhaps is an indication of the current position that parliamentary bodies are claiming and are willing to occupy in the international community. It is further proof that these institutions are no longer limited to the national arena but are set to further shift their focus on affecting international policies and the democratisation processes. The advantages of parliamentary diplomacy are manifold and have been said to include the fact that 'parliamentary diplomacy implies the use and deployment of parliamentary contacts to promote international democratic legal order'.²⁰⁶ It has also been pointed out that parliamentary diplomacy allows members of such bodies to 'transcend their own government's interests by providing principled support for democracy and human rights' largely because at that level members are not acting for their governments.²⁰⁷

The activities that the PAP has undertaken in collaboration with national, regional and international institutions as highlighted above only serves to show that the Parliament has also, even without explicitly saying so, contributed to the growing recognition of parliamentary diplomacy as a tool for parliamentarians. These activities include the Parliament's collaboration with the International Committee of the Red Cross (ICRC), the African Commission and Court on Human and Peoples' Rights, the International Criminal Court, civil society members such as the Institute for Security Studies (ISS) and other international parliamentary bodies. The Parliament's promotional activities and the institutional links that have been created so far indicate that there is ample room for the PAP to take advantage of the opportunities that are presented by parliamentary diplomacy to engender change.

²⁰⁵ As above.

²⁰⁶ Inter- Parliamentary Union, communication from Mr G. Hamilton, Clerk of the National Assembly of the States General of the Netherlands on Parliamentary Diplomacy: diplomacy with a democratic mandate (2012).

²⁰⁷ As above.

Perhaps the question that will remain is whether the practice of the Parliament that amounts to parliamentary diplomacy will be deemed to be diplomacy with a democratic mandate. As noted by Stavridis, one of the criticisms that have been levelled against parliamentary diplomacy over time and, most particularly relevant to Africa, is ‘whether or not parliamentary dialogue can take place without a real democratic context.’²⁰⁸ Parliamentary diplomacy has thus been criticised as being insufficient considering that for most of these parliamentary bodies, their members are not directly elected to the Parliament.

Consequently, whether members of Parliament are democratically elected to the parliamentary assembly remains an important question. For the PAP, and in fact for most parliamentary assemblies, the question becomes even more important when one considers the fact that the MPAPs are not directly elected. The fact that parliamentary diplomacy has seen significant growth only goes to show that it has not been crippled by the absence of direct elections. The fact that parliamentary diplomacy is now part of life²⁰⁹ perhaps only goes to show that the absence of direct elections to those parliamentary bodies does not necessarily signify the absence of ‘democratic interlocutors.’²¹⁰ To that extent the PAP must be encouraged to continue to engage in the activities that signify the commitment to dialogue and perhaps influence the outcome of many decisions by international actors. This is over and above the fact that parliamentary diplomacy is generally considered as being complimentary to traditional diplomacy.

5.7 Concluding remarks

The PAP has the potential to become one of the important actors in the promotion of human rights in Africa. Before one can confidently assert that the PAP is such an important actor, it is important that the issue of integration and the envisaged role of the PAP in such a process be understood. The PAP is one of the institutions that are central to the integration process in Africa as it will play an oversight role within the AU. What is not obvious, though, is that the

²⁰⁸ Stavridis (n 199 above) 11.

²⁰⁹ As above.

²¹⁰ As above.

slow pace of integration process in Africa has thus far been a factor that continues to limit the effectiveness of the Parliament in the promotion of human rights. This is so because the Parliament lacks legislative powers, and only once the Parliament is conferred with legislative powers will it pass legislation that binds member states. It is expected that the laws that will be eventually enacted by the Parliament will be based on the various human rights treaties that the AU has so far adopted. This fortifies the position adopted above on the importance of the PAP. Consequently, the PAP will be in a position to ensure that the other organs of the AU are acting within the confines of the standardised law and with regard to the respect and protection of human rights. The integration process in Africa has stalled. So has the growth of the PAP. Its effectiveness in the promotion of human rights has been affected negatively.

This chapter concludes that despite the fact that the PAP can effectively operate with the AU human rights system with its present powers, it has not been able to do so. The level of cooperation between the PAP and other continental institutions is best described as negligible. Each institution acknowledges the existence of another without actually taking advantage of the strategic position of the other. With respect to the promotion of human rights, it can be concluded that the current role of the PAP is unsatisfactory. This is because the PAP has so far neither utilised any of the existing human rights mechanisms to promote human rights nor has it moved to create strong partnerships with institutions with a human rights mandate like the African Commission. The Parliament's collaboration with other relevant stakeholders has so far failed to successfully assist the PAP in becoming a champion of human rights promotion. The ineffectiveness of the Parliament in the promotion of human rights is perhaps due to the poor coordination of its human rights activities. Other factors such as the fact that most of members of civil society are unaware of the various mechanisms within the PAP could also be contributing factors to the ineffectiveness. For the PAP to become a strong human rights actor within the AU, it is necessary that it creates strong institutional partners amongst members of civil society, SRPBs, and other human rights bodies within the AU.

CHAPTER VI

FACTORS AFFECTING THE EFFECTIVENESS OF THE PAN-AFRICAN PARLIAMENT TO PROMOTE HUMAN RIGHTS IN AFRICA

6.1 Introduction

This chapter sets out the factors that impede and enhance or are likely to enhance the effectiveness of the Pan-African Parliament (PAP) in its quest for the promotion of human rights. Most importantly, the chapter ascertains the measures that should be taken by the PAP to enhance and effectively utilise its human rights mandate.

The discussion in the previous chapters has revealed that the PAP is faced with a myriad of challenges. In the few years of its existence, the Parliament is yet to emerge as an actor, within the African Union (AU), that will be taken seriously by all relevant stakeholders and that plays a distinct and meaningful role in the promotion of human rights in Africa. From the experiences of the European Parliament (EP), it has become clear that the evolution of a legitimate regional parliament is bound to be a lengthy process. It is therefore necessary that one should understand the various challenges, reasons or factors that appear to be stalling the transformation of the PAP into a fully-fledged and widely accepted legislative body and vehicle for human rights promotion that Africa is hoping for. These factors may indeed be deduced from the previous discussion on the formation and the work of the Parliament in relation to matters of human rights.

It is equally important for one to establish how the Parliament could become more useful to the continent despite its limited powers. The current political climate and political commitment in Africa does not support the idea that the Parliament will attain legislative powers in the foreseeable future. There is no indication whatsoever that the process of reviewing the PAP Protocol, which was initiated more than a year ago, will be completed any time soon. It is in that light that one should be weary of waiting for the PAP to be conferred with legislative powers as a prerequisite for its meaningful role in respect of human rights.

6.2 Key internal and external factors affecting the effectiveness of the Pan-African Parliament to promote human rights in Africa

As already alluded to above, a number of factors have so far affected the effectiveness of the PAP to promote human rights in the continent. These factors can be best categorised as internal or 'endogenous' and external or 'exogenous' factors. In fact, this categorisation is consistent with studies done on national legislatures and is adopted here for the purposes of assessing how well the PAP has been able to achieve its intended objectives. Norton, in his study of European legislatures, suggests that the overall ranking of the parliaments 'is determined by exogenous factors, that is, factors that are external to them – (1) constitutional, (2) political and (3) cultural.'¹ He identifies these factors as 'environmental' variables, as they are outside or beyond the control of the legislature.² Wang also notes that external factors 'determine the basic relationship of the legislature to the executive and its capacity to affect the policy process.'³ He identifies core external or 'exogenous' factors as including constitutional powers, external actors and social legitimacy.⁴ It has been suggested that these external factors or variables play an important role in the determination of the institutionalisation of the legislature.⁵ From the previous discussion on the nature, powers and the establishment of the PAP, and to the actual activities of the Parliament with respect to human rights, a number of external factors were identified as impacting on the effectiveness of the PAP to promote human rights. These factors include the low level of popular understanding of the role of the PAP; the elitist nature of the Parliament; the lack of legislative powers; the absence of political will to empower the Parliament; the absence of budgetary powers; the insufficient of financial resources; the limited time for session and the business of the Parliament; the method of

¹ See P Norton 'The legislative powers of the parliament' in C Flinterman, AW Heringa and L Waddington (eds) *The Evolving Role of Parliaments in Europe* (1994) 15-32 quoted in V Paskalev 'Institutionalization of parliamentary control over the administration' *LLM Thesis, Central European University, Revised June 2002*;

² As above.

³ V Wang 'The accountability function of parliament in new democracies: Tanzanian perspectives' WP Michelson Institute. Chr. Michelsen Institute Development Studies and Human Rights (2005) 3. Available at <http://bora.cmi.no/dspace/bitstream/10202/94/1/Working%20paper%20WP%202005-2.pdf> (accessed 22 November 2012).

⁴ Wang (n 3 above) 3; Norton (n 1 above) 1 – 15.

⁵ As above.

elections to the Parliament; the duplicity of institutions within the AU; low levels of participation in the activities of the Parliament; inadequate cooperation and support between the PAP and other relevant stakeholders; the slow and faltering AU integration process, as well as the nature of democracy and status of human rights in Africa.

Internal factors are those factors that are largely within the control of the legislature.⁶ By their very nature, these factors are complementary to the external factors. Norton highlights that the institutionalisation of the legislature itself, or ‘endogenous factors,’ also affects the ranking of national legislatures.⁷ These internal factors are according to him those factors which are within the control of the legislature.⁸ With regard to national parliaments, these factors include the activities of the committee system within the legislature, and the work of the plenary and party groups.⁹ For the PAP the following internal factors were identified: interpreting and understanding its own human rights mandate; the normative framework; the institutional structure; coordination of the human rights activities of the Parliament; the nature and content of its resolutions and recommendations; capacity and expertise within the PAP; peace and security versus human rights; lack of prioritisation of human rights concerns by the Parliament; visibility and dissemination of quality information; issues surrounding membership to the PAP; as well as monitoring and evaluation.

Even if this categorisation of internal-external factors is adopted in this chapter, it has been noted that in practice it is generally difficult ‘to make a straightforward distinction between external and internal variables.’¹⁰ However, it has also been noted that even in the absence of a clear demarcation of factors, ‘the external-internal’ distinction cannot be completely adhered to, it may serve as a tentative guideline and a useful means of comparison.’¹¹ For example, while it may be true that the membership of the Parliament is largely determined by member states, and can be described as an external factor, it is also an internal factor considering that the

⁶ Wang (n 3 above) 8.

⁷ Norton (n 1 above) 1 – 15.

⁸ As above.

⁹ Wang (n 3 above) 8.

¹⁰ As above, 3.

¹¹ As above.

composition of the various committees, missions and delegations of the Parliament is constituted from the representatives that are appointed to the Parliament by the member states.

This study has revealed that it is only fair to understand the nature of these factors so as to make an informed assessment of the effectiveness of the PAP in the promotion of human rights. In particular, it is important to understand that while some of the factors or challenges are within the control of the PAP, some are totally outside the control of the PAP. That way, the Parliament may be able to address some of the challenges that arise as a result of its operations, its strategies and largely the interpretation of its human rights mandate. Those factors that are outside its control, such as the budget and financial resources, the attainment of legislative powers and the issues of integration in Africa, are here identified as external factors. It may prove to be a challenge for the PAP to overcome them since they are generally outside its control.

The following discussion elaborates on the identified internal and external factors. It also explores ways in which the PAP and other relevant stakeholders can address these challenges.

6.2.1 Key internal factors affecting the effectiveness of the Parliament to promote human rights in Africa

6.2.1.1 Interpreting, understanding and implementation of the PAP's human rights mandate

The Parliament's interpretation of its mandate, specifically its human rights mandate, is a relevant 'internal factor,' as it shows that as an organisation it has a separate opinion or will form the aggregate will of its member states.¹² The following has rightly been noted by Klabbers:

In order to distinguish the international organisation from other forms of cooperation, another often-mentioned form characteristic holds that the organization must possess at least one organ which has a will distinct from the will of its member states. Where the

¹² J Klabbers *An introduction to international institutional law* (2009) 11.

collectivity merely expresses the aggregate opinion of its members, giving it a legal form of an international organisation would, in the extreme, be a useless act. One might as well have appointed a spokesperson.¹³

A careful and accurate interpretation of the PAP's mandate is also important because the Parliament is a treaty organ. Treaty organs are particularly challenged because they are usually embedded within the structure of a pre-existing international organisation, in this case, the AEC/AU.¹⁴ They are usually sponsored by the intergovernmental organisation and they benefit from the 'regular' budget of the pre-existing international organisation.¹⁵ Failure on its part to fully appreciate or interpret its mandate is likely to result in a situation where it is unable to achieve its objectives.

The PAP has provided some evidence that it is able to interpret and understand its human rights mandate. A discussion of the activities of the Parliament pursuant to this objective leads one to the conclusion that the Parliament is indeed aware that it has an important role to play in the promotion of human rights in the continent. It is for this reason that it has carried out several activities that are aimed at promoting human rights, such as fact-finding missions, the adoption of resolution and recommendations on issues of human rights and the hosting of seminars and international conferences. The human rights issues that the PAP attempted to tackle through these activities include issues relating to elections, peace and security Africa, as well as AU integration matters. In some instances, the PAP also addressed issues relating to the promotion of women and children's rights.

However, the mandate of the PAP is very broad, demanding that the PAP should have dealt with a much wider array of human rights issues. Even though the PAP has briefly addressed or dealt with the main AU human rights instruments, it has not sufficiently dealt with them to suggest that it fully appreciates its promotional mandate. Most of these instruments were dealt with in the context of workshops or symposia for MPAPs, and not in a manner that will benefit ordinary Africans. Further, with respect to the promotion of certain rights such as sexual

¹³ As above; HG Schermers & NM Blokker *International institutional law* (2003) 34; J Klabbers 'Two concepts of international organization' (2005) 2 *International Organisations Law Review* 277- 93.

¹⁴ Schermers (n 13 above) 34.

¹⁵ As above.

minority rights, the rights of indigenous people and the rights of women, the Parliament has done little to support their plights. Additionally, the Parliament's petition procedure has not been fully taken advantage of. This is possibly due to the fact that the procedure and its availability to the public remain largely unknown. The haphazard or sporadic nature of the human rights activities of the Parliament goes to show the extent to which the Parliament has understood its mandate. Thus, it appears that the PAP is holding back, possibly in anticipation of being afforded legislative powers before it appreciates that it has been conferred with the power to make any real impact.

The PAP has so far attempted to undertake some of the activities that can be deemed to be promotional in nature. It has attempted to collect documents, undertake studies and research on certain human rights issues, has held conferences as well as symposia on certain human rights issues.¹⁶ However, the quality, the methods, the target audience and most importantly the reach of its activities all but nullifies the PAP's efforts towards the promotion of human rights in Africa. As already mentioned, the target audience of most of these activities are the members of the Parliament. It is therefore impossible for one to conclude that the PAP has fully understood its mandate. Although the PAP holds the map for the promotion of human rights, it has gone astray in its journey.

The PAP must first appreciate that it occupies a unique position as regards the promotion of human rights in the continent. Yeshanew has correctly highlighted, in the context of the African Commission on Human and Peoples' Rights (African Commission), that

[u]nder the African human rights system, as elsewhere, an interest in protection mechanisms overshadows efforts of promoting human rights. However, it was found that the protection of human rights through 'blaming and shaming' governments or states does not yield much fruit. This suggests that the promotion of human rights, especially through education, should be given much more weight.¹⁷

¹⁶ See generally Chapter 4 for an extensive discussion of the work of the PAP in these areas.

¹⁷ SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 199.

The PAP, as it has been concluded in the previous chapters, mainly possesses a promotional mandate in relation to human rights. This unique position of the PAP is important as the inadequacy of African human rights protective bodies continues to come to light. As Yeshanew has cautioned, there is need to place emphasis on the promotion of human rights.¹⁸

The PAP must fill this human rights implementation gap and must ensure that whatever human rights activities are carried out, do 'have a direct impact on the knowledge of the ordinary public.'¹⁹ A plethora of workshops, conferences and symposia carried out by the PAP to date fail to satisfy this expected objective. That it has failed to fully appreciate its target audience has resulted in its inability to address issues that directly affect the majority of the ordinary public. Possibly, the Parliament has been unable to ascertain whether its efforts benefit the right people because of the absence of a more targeted follow up mechanism. Apart from the reports that are compiled and submitted to the PAP Assembly, there is no indication that there is a strong follow up mechanism as is necessary to ensure that all the issues that the PAP addresses are acted upon.

There is therefore a crucial need, in the future, for the Parliament to promote the various human rights treaties and take full advantage of the opportunities provided by the various provisions of these treaties.. In fact, many instruments adopted under the auspices of the AU offer ample opportunity for the Parliament to play a more prominent role and occupy a more visible space in the AU human rights architecture. For example, the AU Convention on Internally Displaced Persons (IDP Convention) provides an opportunity for the PAP to address issues relating to internally displaced persons in Africa. The IDP Convention sets out the obligations of the member states, as does most AU human rights treaties, and enjoins the AU to cooperate with member states and other institutions in all activities geared towards realising the ideals set out under the IDP Convention.²⁰ The Parliament's Committee on Cooperation, International Relations and Conflict Resolution and the Committee on Justice and Human Rights should be in a position to assist states, through activities such as fact-finding missions, in

¹⁸ As above.

¹⁹ As above.

²⁰ AU Convention on Internally Displaced Persons, arts 8 & 9; F Viljoen *International human rights law in Africa* (2012) 247.

their protection and assistance to internally displaced persons. Considering that the IDP Convention requires that the domestic laws and practices should be adjusted so that they could prevent internal displacements, the Parliament could start off by adopting a model law on IDPs. This will certainly encourage the member states to align their domestic situations with the principles and provisions of the IDP Convention.

The Permanent Committee on Justice and Human Rights (PCJHR) must be seen to be participating in the promotion of human rights at the continental level in order for the Parliament to achieve this objective. This participation can be achieved by fostering cooperation between the PAP and various actors at national and regional levels concerned with the promotion of human rights.

6.2.1.2 Peace and security versus human rights: Prioritisation of human rights concerns

Connected to the above is the Parliament's apparent bias towards peace and security. As has been pointed out earlier in the thesis, there is an apparent bias towards issues of peace and security by the PAP. Given the state of peace and security on the continent, there is of course a need for the PAP to address security concerns on the continent. However, given the appalling nature of human rights in Africa, it is equally imperative that the Parliament should also pay attention to human rights issues such as the rights of indigenous people and the rights of other marginalised members of society. A parallel argument to the effect that that by focusing on issues of security in Africa, the Parliament is actually addressing human rights issues may however be made. The connection between human rights, peace and security even necessitates that the Parliament, even if addressing issues of security, must also be seen to be simultaneously addressing issues of human rights. Attention should therefore be brought to the fact that human rights and security issues in Africa invoke similar but normatively different issues. The Parliament must therefore adopt a systematic and pragmatic way of addressing human rights and security issues without coming across as being biased in favour of the latter. That is assuming that the Parliament's current approach is deliberate.

Most of the PAP's resolutions and recommendations are adopted from the perspective of peace and security. That is, it is usually after discussing peace and security issues that the Parliament will adopt a resolution that addresses human rights issues. Most of the fact-finding missions undertaken by the Parliament are primarily concerned with issues of peace and security, with only a few of them having been mandated to look into human rights issues as such. An assessment of the fact-finding missions of the Parliament lends credence to the assertion that there is no indication that – even though the Parliament understands its mandate – it has appreciated the potentially broad nature of human rights issues that it may, and should, include in its mandate.

The Parliament's reach and articulation of its position on several human rights issues is absent. For example, the position of the PAP with respect to the rights of sexual minorities, indigenous people and children has so far not been articulated and disseminated properly. It is in fact quite difficult to ascertain the human rights priorities of the Parliament as it treats peace and security issues simultaneously with human rights matters. As a result, it becomes impossible for one to categorically point to human rights issues that are not incidental to peace and security among issues which the Parliament has pursued. The Parliament has much on its plate and it is not advisable that it should focus only on 'politically consensual issues,' avoiding what could be identified as 'impossible' areas such as sexual minority rights and reproductive health issues, including abortion.²¹ Just like the EP, the PAP 'has just as many priority definition problems'²² and must move towards clearly setting out its human rights intervention agenda. Otherwise it is going to be seen as another AU project that has and is failing to live up to its potential.

6.2.1.3 Absence of an integrated normative framework

Apart from the various PAP Strategic Plans, the PAP has been guided by the PAP Protocol, the Rules of Procedure and the various activity plans of the permanent committees. At the time of this study, there was no noticeable integrated normative framework within which the PAP

²¹ European Inter-University Centre for Human Rights and Democratisation (2006) *Beyond Activism: the impact of the resolutions and other activities of the European Parliament in the field of human rights outside the European Union*, 205.

²² As above.

undertook its human rights activities. It is the absence of such a normative framework that lends credence to the position adopted above that the Parliament has not fully appreciated its human rights mandate. The absence of a normative framework has resulted in the haphazard nature of the Parliament's human rights activities. For the purposes of consolidating and positioning itself as a robust continental actor, the PAP needs to have a normative framework that encapsulates both internal and external dynamics of cooperation. This could be in the form of guidelines that will set out, for example, areas of strategic interest between the Parliament, civil society, national human rights institutions and other relevant stakeholders. Lessons can be learnt from the Abuja Guidelines on the relationship between parliaments, parliamentarians and Commonwealth NHRIs,²³ which guidelines sets out the manner according to which parliaments, parliamentarians and NHRIs could work together. Any normative framework that is adopted should also set out the manner according to which the various Committees of the Parliament could carry out collaborative work. With respect to external stakeholders, the Parliament may take that opportunity to set out areas of strategic interest relating to human rights. It is important also that the Parliament should consider the establishment of a focal point for the collaboration between the Parliament and external actors.

The importance of such a normative framework is relevant to the successful implementation of the organisation's mandate. In particular, such a framework will ensure that the Parliament's efforts are directed at the appropriate audience so as to achieve the intended results. The normative framework will in that context identify which human rights issues should be promoted in the continent. It is through this normative framework that the Parliament will communicate to the ordinary people the various human rights issues it aims to promote.

²³ Abuja Guidelines on the relationship between parliaments, parliamentarians and Commonwealth NHRIs. The African Commission adopted the Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa (1998 Resolution on Affiliate Status), adopted at the Commission's 24th session, Banjul, the Gambia, 22-31 October 1998 and the Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission adopted at the 4th Ordinary Session from 22nd to 31st October 1998, in Banjul, The Gambia.

6.2.1.4 Coordination of the Pan-African Parliament's human rights agenda

One fundamental shortcoming of the Parliament is the apparent lack of coordination of its activities. This lacuna is exemplified by the overlap of the mandates of the Committee on Justice and Human Rights and that of the Committee on Cooperation, International Relations and Conflict Resolutions. It is admitted that there is an almost inevitable overlap with respect to the mandate of the two committees. However, there is no conflict and as such no conflict should be created by reason of implementation or exercise of the mandates of the PAP. The work of the Parliament catalogued above suggests that there are certain instances where the various committees collaborate to carry out human rights promotional work. However, there is no evidence that there is a sustained way of undertaking these joint activities in terms of how they are managed or how they are to be managed in the future. There is no normative framework for the cooperation of the various committees so as to map out how the committees are supposed to work and support each other in carrying out or implementing their activities for and on behalf of the Parliament. The absence of such a normative framework has resulted in an almost haphazard cooperation between the various committees of the Parliament. The sustainability of such cooperation has, in turn, been rendered questionable.

Not only is this normative framework necessary to ensure a sustainable cooperation within the Parliament, it is in fact necessary to foster any cooperation between the Parliament and external actors. As is the case with internal cooperation, there exists no mechanism, procedures or any normative framework for external cooperation between the Parliament and such actors as the civil society, national parliaments and other international parliamentary bodies. The cooperation between the Parliament and these actors is infrequent and at best *ad hoc* in nature. The much needed external support from the civil society is lacking. This creates a problem for the Parliament in that it makes it difficult for it to ascertain whether its interventions are structured and targeted to the appropriate populace. There is also no evidence that there exists a clear strategy for interaction between the Parliament and the various stakeholders that are likely to or should collaborate with the PAP to promote human

rights. Considering that '[a] systemic approach to human rights activities presupposes different elements operating contemporaneously,'²⁴ it is desirable that the Parliament should look into having an all-encompassing strategy. This is necessary considering that the PAP Strategic Plan 2006 – 2010 and beyond does contain, among its strategic political objectives, a vision to have positions designated to handle networking activities at the PAP²⁵ which ordinarily include human rights activities.

Currently there is little internal and external synergy, thereby creating a situation whereby more nuanced internal and external cooperation is absent and the Parliament appears to be unfocused. The absence of such a properly tailored collaboration between the Parliament and other relevant stakeholders has created an implementation gap in its promotional human rights mandate. Thus, while the Parliament, to some extent, appreciates and has properly interpreted its mandate in so far as the promotion of human rights is concerned, it has failed to fully implement its activities to properly fulfil its mandate.

6.2.1.5 Nature and content of the resolutions, recommendations, resolutions and motions

An assessment of the resolutions and recommendations of the PAP has revealed certain inherent inadequacies. In the main, the recommendations and the resolutions of the PAP have not been used extensively by civil society, other AU organs, sub-regional parliamentary bodies or national parliaments. While the limited dissemination of these recommendations and resolutions may be the cause of such inadequate use, their content should also be put under scrutiny. As reflected in chapter 4, there are many inconsistencies in the resolutions and recommendations of the PAP. Apart from being inaccessible due to their unavailability on the Parliament's website, it appears that they are usually prepared in haste resulting in these inconsistencies. There is also very little reference to previous resolutions or recommendations by the Parliament itself in subsequent recommendations and resolutions. This leaves one with

²⁴ As above, 200.

²⁵ 2006-2010 PAP Strategic Plan, 17.

the distinct impression that the Parliament is not keeping track of its previous recommendations and resolutions. One fatal shortcoming of the PAP's recommendations and resolutions is their inability to contain information that could give background information on the recommendation and resolution, justifying or explaining the particular decision. As a result, one is mostly left to guess or speculate why the Parliament adopted a particular recommendation or resolution. The end result is that these documents are not well understood and hardly used.

The Parliament's motions relating to human rights have been far and few between. For example, for the period May 2009 to May 2012, there were only two motions relating to human rights.²⁶ It is worth pointing out that some of the recommendations and resolutions adopted by the Parliament are adopted after a motion has been presented and carried by the PAP Plenary. Just as is the case with the PAP's resolutions and recommendations, the motions are also generally inaccessible to the public. This state of affairs in essence denies civil society and other human rights actors the opportunity to access and use the motions as advocacy tools.

The Parliament must start paying attention to the nature and content of its recommendations, resolutions and motions if it desires to make any meaningful impact. The PAP should ensure that there is clear articulation of issues and should provide sufficient background information. A methodical approach or treatment of these documents will most likely lead to an improvement of their use by the academia, policymakers and civil society. This will in turn make up for the fact that the recommendations and resolutions of the Parliament are not binding as they will be used to lobby and encourage governments to adopt the position articulated by the Parliament on the issues concerned.

Considering the circumstances surrounding the PAP's human resources, it could be beneficial that the PAP should have *ad hoc* interns who are attached to the various committees during the sessions of the PAP. The interns should ordinarily be people with expertise on the work of the

²⁶ Pan-African Parliament, Report of the Department of Legislative Business – May 2009 to 2012, 3 (undated).

various committees who would be in a position to assist the Parliament in the research leading up to the drafting and adoption of these documents. The internships may be donor funded or may be based on institutional cooperation agreements between the PAP and various organisations.

6.2.1.6 Visibility and dissemination of quality information

Over time, one thing that has become apparent is the obscure nature of the Parliament, its activities and its presence as an important continental actor. This lack of visibility is largely attributable to the poor nature of the strategies adopted by the Parliament in the dissemination of information. One can easily observe from the coverage of the Parliament's sessions throughout Africa that not enough public awareness campaigns have been undertaken to inform the populace about its presence, its mandate and – most importantly – its relevance to their socio-economic development. Even though there is information on the Parliament's website, such information is placed there on a piece-meal basis. It is not properly collated and it is sometimes inaccessible. Viljoen identified the absence of 'web-based accessibility' to the Parliament's documents and the publication of the PAP's *Hansard* without any translation as some of the problematic areas that threatens the evolution of the Parliament into a fully-fledged continental Parliament.²⁷

Further, it has been shown that the internet as a source of information is greatly limiting in the sense that it will presuppose a certain level of knowledge about the activities of the body by the user.²⁸ Certain activities of the Parliament, such as public hearings, petition hearings and missions are sometimes not reported.²⁹ No information about the Parliament has been forthcoming from other organs of the AU. To that end, it is very difficult to access the information and use information on the activities of the Parliament. The lack of information

²⁷ Viljoen (n 20 above) 178.

²⁸ European Inter-University Centre for Human Rights and Democratisation (2006) *Beyond Activism: the impact of the resolutions and other activities of the European Parliament in the field of human rights outside the European Union*, 184.

²⁹ As above, 185.

dissemination persists, despite the fact that more information will improve the role of the Parliament in the promotion of human rights activities.³⁰ This dearth of information greatly limits the research on and access to the Parliament's activities as regards human rights.

The dissemination of the Parliament's press releases is also worth considering as it may improve the manner in which the Parliament's information is made readily available to the public. As is the case with most international actors, the PAP also assumes that once its work is undertaken it will become available to members of the public.³¹ Unfortunately with respect to the Parliament, this is not the case. As a result, the Parliament remains challenged by the absence of sufficient media coverage of its sessions and activities.. It should therefore endeavour to make its activities visible to the members of the public through a communication strategy that is alive to the challenges faced by the continent such as lack of access to the internet.

A cumulative result of the above issues is the invisibility of the Parliament in matters relating to the promotion of human rights. Due to this factor, combined with the haphazard nature of its activities in general, it is difficult to ascertain with any level of particularity areas of human rights that the Parliament seeks to promote or emphasise. Crudely put, one is currently unable to deduce from its activities any sense of urgency, direction, purpose or vision as regards the promotion of human rights in Africa. To date, the Parliament has not been able to come across as a serious or robust human rights actor, despite the fact that the mandate of the Parliament demands its extensive involvement in the promotion of human rights in the continent.

³⁰ As above, 181.

³¹ As above, 182.

6.2.2 Key external factors affecting the effectiveness of the Pan-African Parliament to promote human rights in Africa

6.2.2.1 Absence of budgetary powers and insufficient financial resources

The AU's lack of political will to establish an effective Parliament is exemplified by the PAP's continued lack of financial resources. Over the years it has become apparent that the funds which have been allocated to the PAP are insufficient. The mandate of the Parliament dictates that it should carry out activities across the continent, some relating to the promotion of human rights and some relating to other mandates. The Parliament is therefore supposed to carry out costly fact-finding missions, election observer missions, symposiums and engage consultants to carry out work on its behalf in the event that it is unable to do it in-house due to lack of expertise. For example, the Report of the PAP Election Observer Mission to the 2007 General Elections in Kenya recommended that there was a need to make sufficient budgetary provisions to cater for logistical essentials such as mission office space, communication allowance and equipped local transport during the mission.³²

At the centre of the PAP's lack of sufficient funds for its activities, and in turn insufficient funds for human rights promotional activities, is the AU decision pertaining to funding of the activities of the Parliament.³³ In particular, the AU executive decided that the member states should, as of July 2004, bear expenses for the participation of members in the activities of the Parliament, the Committees and the Bureau.³⁴ This arrangement was to continue during the first five years of the existence of the PAP.³⁵ However, at the time of this study the arrangement had not been revised. The Parliament in its 2006 report to the AU, decried the implementation of this decision as it was 'negative' and as hampering 'due execution / operation of PAP.'³⁶ In connection to the above, it has been noted that the activities of the PAP are further hampered

³² Report of the PAP Election Observer Mission to the 2007 General Elections in Kenya (2007), 17.

³³ Decision on the Budget of the Pan-African Parliament for the period July to December 2004, EX.CL/Dec.98 (V).

³⁴ As above.

³⁵ As above.

³⁶ The Pan-African Parliament: Report of the President for the Period January – June, 2006, presented at the Ninth Ordinary Session of the Executive Council, Banjul, The Gambia , July 28 – 29, 2006, 6.

by the fact that member states are unable to meet costs of their members for scheduled meetings in a year or for one such meeting.³⁷ It should be noted that the activities of the Parliament are planned and executed by the Permanent Committees. These Committees meet during the sessions of the Parliament. Failure by members of the Parliament to attend the Committee meetings, due to lack of funds, is most likely to affect the effectiveness of these Committees. Undoubtedly, over time, it will become difficult for the PAP to carry out its activities as a result of the inconsistent attendance of members to the Committees' meetings.

The PCJHR has not gone unaffected by the lack of financial resources. The Committee has over the years asked for the budget to establish a permanent post of Human Rights Desk Officer.³⁸ It was envisioned by the Committee that the Human Rights Desk officer would be in a position to undertake a thorough and comprehensive research on the items that it listed as warranting research.³⁹ Due to lack of financial resources, to date the Committee has been unable to establish a Human Rights Desk Officer as planned. Instead the Committee opted to include, in its financial budget, costs for a human rights expert or consultant.⁴⁰ That such an arrangement is costly and reduces the amount of work that could be undertaken by someone occupying a permanent position of a Human Rights Officer as suggested by the Committee is beyond doubt.

Apart from the fact that the PAP is greatly incapacitated by its lack of legislative powers, it also suffers from lack of and direct or unfettered access to funding. As already highlighted in chapter 3, the Parliament does not have a final say over its budget and it is, as far as budgetary allocations are concerned, at the mercy of the AU policy organs. The budget of the Parliament will continue to be controlled by the AU policy organs until such time that it is conferred with legislative powers. Once again the role of the PAP with respect to the budget of the AU and its own budget is consultative and advisory. Without any control over its financial resources the

³⁷ As above.

³⁸ Committee on Justice and Human Rights, Proposed Activity for 2007, PAP/C.6/CJHR/PW/26/07.

³⁹ Committee on Justice and Human Rights, Proposed Activity for 2007, PAP/C.6/CJHR/PW/26/07, 3.

⁴⁰ The budget for the years 2007 – 2010 of the Committee on Justice and Human Rights relating to the Work Plan on the basis of the Strategic Plan of the Pan-African Parliament; Committee on Justice and Human Rights – Action Plan 2008 – 2009, 4 (both on file with the author).

Parliament is unable to direct the available resources to areas which it considers appropriate. For example, even though the Parliament may be desirous of carrying out more fact-finding missions, it might be prevented from doing so because of the AU fiscal regulations as regards the distribution or use of funds.

This arrangement, where the budget of the Parliament is largely controlled by the AU Executive is not desirable as it affects the effectiveness of the PAP in more ways than one. As it has been rightly noted by Bradley, in the context of the EP,, '[i]n order to pursue an effective human rights policy, it seem logical that the Parliament would need the human and material resources, and decisional capacity, to match its appetite.'⁴¹

6.2.2.2 Inadequate time for the activities of the PAP

Connected to the above factor is the lack of sufficient time for the Parliament to carry out its activities. As already indicated, the 2004 decision of the AU policy organs on the budget of the PAP has had a negative impact on the work of the Parliament. Not only has it resulted in the reduced participation of MPAPs from countries unable to meet the budget for their five MPAPs to attend the sessions of the PAP. It has also led to reduced time spent by the MPAPs in deliberating and carrying out the business of the Parliament. The PAP Rules of Procedure pegs the time that could be taken by each session of the Parliament to a maximum period of one month.⁴² The decision by the AU Executive was that the 'duration of sessions should be reviewed downwards.'⁴³ In the end the duration of sessions of the Parliament was reduced to a period of 14 to 21 days. As earlier mentioned, this has largely affected, for example, the quality of the resolutions and recommendations of the Parliament. They are drafted in a hurried manner and this can be attributed to, among other things, lack of sufficient time to undertake rigorous research and drafting. My attendance of the sessions of the Parliament has revealed that MPAPs work intensively, as the Committees race against time to compile their reports,

⁴¹ KC Bradley 'Reflections on the human rights role of the European Parliament' in P Alston *et al* (eds) *The EU and Human Rights* (1999) 851.

⁴² PAP Rules of Procedure, Rule 28(2).

⁴³ Decision on the Budget of the Pan-African Parliament for the period July to December 2004, EX.CL/Dec.98 (V).

resolutions and recommendations for adoption by the Plenary. As a result, there is little time for the MPAPs to identify and plan the execution of their interventions in a more organised manner.

Apart from the duration of the sessions of the Parliament, the lack of sufficient funds has also resulted in little time being allocated to the Parliament's fact-finding and elections observer missions. Considering that it usually takes well-resourced NGOs and INGOs long periods of time and prolonged presence in a particular country to reveal human rights abuses, this is indeed a genuine concern. It is not disputed that the delegations might be able to identify human rights violations, if any, in a country that is under such an investigation. The Parliament's missions undertaken so far have proven that it is possible for a mission undertaken within such a period of time to shed light on the human rights situation in that country. However, the Parliament's fact-finding and observer missions' reports do not sufficiently highlight some of the critical areas of human rights. For example, the reports provide little, if any, information on the status and recognition of socio-economic rights and the rights of marginalised groups. This is notwithstanding that these are some of the important areas of social development and welfare in Africa. An argument to the effect that the mandate of these missions perhaps did not include addressing these issues is rejected. This argument is rejected mainly on two grounds. First, the mandate of these missions is never clearly defined and it is often left to those forming part of the mission to interpret the terms of reference. They should therefore interpret their mandate to include highlighting socio-economic rights and welfare issues. Second, the interconnectedness of human rights and the move towards addressing human rights issues holistically demands that issues relating to socio-economic rights should also be addressed by the Parliament's missions.

That little time is spent by the delegations during investigative fact-finding missions is likely to affect the legitimacy of their reports. Consequently, the reports are not relevant to civil society, the international community and fatally, the member states themselves.

6.2.2.3 Capacity and expertise among the MPAPs

One of the factors that has and is likely to continue to affect the effectiveness of the PAP in the promotion of human rights is the lack of the necessary expertise, which may be both external and internal. That is, expertise can be brought into the Parliament through cooperation with external actors so as to attain and use information of the highest quality. However, it has been noted that the advantages of developing ‘in-house expertise where necessary leads to increased perception of real commitment.’⁴⁴ There is generally a lack of human resource within the Parliament. The Committees are self-sustained as they operate most of the time without any technical support that includes experts in the area(s) falling within the mandate of the committee. They are nonetheless expected to plan, organise and implement activities of the Committee regardless of their knowledge with respect to that particular area of work. By the look of things, the lack of expertise within the PAP is also connected to its lack of sufficient funds. Connected to the above is the problem of continuity of membership to the Parliament. That there is no uniformity or consistency in terms of the period of one being a member of the PAP has been discussed in detail in Chapter 3. Lack of continuity in membership to the PAP is likely to affect the work of the Parliament, especially if members are appointed to perform certain tasks and then it turns out that they are not available in the next session of the Parliament to continue the work. There is no indication that appointments to a particular committee are done in a staggered manner. The appointment of MPAPs to the permanent committees may avoid situations where the work of the Committee is affected by the departure of MPAPs who lost national elections or appointed as members of the executive in their countries.

The issue of expertise at the PAP has so far not received sufficient attention from the critics of the Parliament or the PAP itself. It is however an important consideration when assessing the

⁴⁴ European Inter-University Centre for human rights and Democratisation (2006) *Beyond Activism: the impact of the resolutions and other activities of the European Parliament in the field of human rights outside the European Union*, 173.

effectiveness or potential effectiveness of the Parliament. As such, it is imperative that the permanent committees are composed of people who are knowledgeable in the respective committee's thematic area. For example, it is easier and more advantageous for someone who has knowledge on human rights issues to be able to – where they are chairing the PCJHR – steer it in the proper direction. As already indicated there is no requirement that a person elected to the PAP as an MP should possess certain qualifications apart from the requirement that he should be a member of that country's national assembly or other deliberative body. Whilst considering the possibility of amending the PAP Protocol and the Rules of Procedure member states could be encouraged to consider the expertise of the people they elect to represent their countries at the PAP. This would go a long way in ensuring that the PAP becomes an effective institution with the necessary expertise to carry out its mandate.

We should, while lamenting over the lack of expertise of the MPAPs, take cognizance of the efforts of the Parliament to have its MPAPs trained on the relevant issues that affect Africa. This is done through the workshops, symposia as well as on the job training done when the MPAPs undertake fact-finding missions. There have been concerns that the Parliament loses, during each session, MPAPs who have gained knowledge or experience on its workings. This has been exacerbated by the fact that the tenure of MPAPs is directly linked to their tenure in their national assemblies. As a result of the synchronisation of tenure of MPAPs as well as the fact that several countries in Africa hold elections around the same time, a considerable amount of time is spent on swearing in new MPAPs during the opening ceremony of the Parliament's session. This transient nature of PAP membership is bound to inhibit the effectiveness of the Parliament. It thus becomes necessary to de-link the tenure of MPAPs from their tenure in national assemblies to avoid the possible disruptions to the work that may be undertaken by MPAPs who might lose elections in their respective countries before their term at the PAP elapse.

With respect to human resources it is still arguable whether the Parliament is able to meet the demands of a contemporary parliamentary institution. Considering the powers of the PAP – which excludes any legislative exercise – it is still difficult to conclusively assess whether the Parliament has the capacity to efficiently carry out parliamentary business. Currently the

Parliament operates through permanent committees constituted by the MPAPs. Formally there is no requirement by the PAP Protocol or the PAP Rules of Procedure that an MP who seek to be elected to a particular permanent committee must possess certain qualifications relevant to the area handled by the committee. It appears that at the moment the main consideration is the geographical location of the MPAPs constituting a particular committee. There is also insufficient evidence to suggest that the practice of the PAP is that MPAPs possessing particular qualifications should constitute a committee that is concerned with issues surrounding their areas of expertise. Such a practice is generally far in between and cannot be said to have found full favour with the PAP.

6.2.2.4 The elitist nature of the Pan-African Parliament

The PAP is often described as an elitist institution.⁴⁵ The argument is that in essence the Parliament is not representative of the views of Africans since there is little, if any, participation of Africans in its processes or activities. This has been attributed largely to the manner in which the Parliament was established. Agreeing with this proposition, Van Walraven notes that

[c]ritics have pointed out that the whole process of introducing the African Union and its Parliament was very much a “top down” affair, in which governmental interests were firmly in the driver’s seat. Members of Africa’s national assemblies – and by extension of the Pan-African Parliament – are themselves part of societal elites.⁴⁶

Indeed this-top down approach has resulted in a situation where the Parliament has been relegated to an obscure institution inaccessible to the general African populace. That it has so far remained obscure to the academia, researchers and to the designers of prestigious courses on human rights is beyond doubt. Such an acknowledgement can only lead one to conclude that the Parliament is not as ‘people based’ as it professes to be. Concomitantly, its general impact and its effectiveness are likely to be reduced as many people will not be aware of what is capable of doing, or what it ought to be doing.

⁴⁵ See e.g K van Walraven ‘From union of tyrants to power to the people? The significance of the Pan-African Parliament for the African Union’ (2004) 39 *Africa Spectrum* 218.

⁴⁶ As above.

One need not belabour this point, except to reiterate that an inaccessible parliament means that the constituents cannot communicate with their representatives. These representatives will in turn fail to communicate and represent their views properly. The end result of such an anomaly is that only human rights challenges or problems so perceived by the Parliamentarians will be addressed by the Parliament while real human rights issues will receive little, if any, attention. It is therefore a foregone conclusion that due to its failure to properly identify the problems affecting the continent, the effectiveness of the Parliament as a human rights body has been greatly limited.

6.2.2.5 Absence of legislative powers

Another key factor likely to limit the effectiveness of the PAP is the fact that it only has advisory and consultative powers, as opposed to full legislative powers. In fact, critics of the PAP have focused on this aspect and have continuously argued that without any legislative powers the continental Parliament is of little use to Africans.⁴⁷ It has also been argued, rightly so, that the PAP is likely to remain ineffective due to this particular reason. That the continental Parliament – the term parliament used loosely here without ascribing to it all the traditional functions of a parliament – is clamouring for legislative functions is evidenced by the frustration-loaded contributions by MPAPs during the Parliament's sessions. An example of such frustration-loaded debates is the one concerning the intervention of NATO in Libya. With legislative powers it can pass laws on the affected human rights areas, call on the AU executive to take appropriate decisions as regards human rights issues in the continent and ensure that the views of the citizenry are taken into account when making AU policy decisions. Without any legislative powers the Parliament is thus largely unable to play a visible role in shaping the human rights agenda in Africa and in the process it is rendered ineffective in the eyes of the public. The co-decision procedure of the EP, its history prior to and after the time that it was

⁴⁷ See generally Viljoen (n 20 above) 174 – 178; Van Walraven (n 45 above) 207 – 209; KD Magliveras & GJ Naldi 'The Pan African Parliament of the African Union: An overview' (2003) 3 *African Human Rights Law Journal* 224–225; T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' (2004) 4 *African Human Rights Law Journal* 28.

conferred with legislative powers, indicates the possible difference that could be achieved by clothing the PAP with some form of legislative powers.

There is a rather worrisome development in so far as the powers of the Parliament and the execution of its mandate are concerned. This is what I can only describe as 'the-let-us-wait-for-legislative-powers' attitude. This attitude has, unfortunately, not only afflicted the Parliament but other institutions of the AU as well, and it is in the main evidenced by the failure of the Parliament to fully utilise its limited powers to advance the human rights agenda on the continent. This attitude is also evidenced by the apparent lack of cooperation between the various institutions of the AU and the PAP. It was noted on the part of the EP that

[l]ess rhetorically, and more realistically, it has been suggested that the Parliament has used the issue of human rights protection to 'expand its powers and responsibilities' beyond its 'normal remit.'⁴⁸

There is absolutely no reason for barring the PAP's activities to cause its critics to hold a similar view. Specifically, the limited powers of the Parliament that allows it to co-operate with other AU institutions with a human rights mandate have not been fully exploited and the petition procedure of the Parliament has not been made known to the people and it is currently underutilised. To date, such avenues have not been sufficiently and vigorously pursued by the Parliament, necessitating one to conclude that it has not fully utilised its limited powers. Limited usage of the Parliament's available avenues for asserting human rights has affected and is likely to continue affecting, negatively, its general institutional effectiveness.

Of course it is imperative to acknowledge the fact that the role of the Parliament in the promotion of human rights is undermined by its lack of legislative powers. This is a factor which will forever haunt the Parliament and may possibly continue to undermine the potential of the Parliament. It is therefore not necessary to belabour this point. As already indicated, there are already undertones of frustration from members of the Parliament with respect to this anomaly. The legitimate concern from the MPAPs is that unless the Parliament is imbued with legislative powers, it remains incapacitated to do anything more beyond mere rhetoric.

⁴⁸ Bradley (n 41 above) 842.

This is unfortunate for in the end, the Parliament is identified as a mere talk shop that has failed to advance the cause of human rights, among other things, in the Continent. An appropriate observation will be that there appears to be a desire to have a Parliament that is robust. However, there is absence of sufficient political commitment on the AU member states, the AU and to a certain extent the Parliament itself to achieve this dream. This lack of political will is exemplified by the general reluctance on the part of the executive organs of the AU to initiate in earnest the review process of the PAP Protocol to empower the Parliament to legislate for Africa. Fatally, we have witnessed no concrete support from African leaders for the speed take off of this review process lending credence to the above assertion that there is lack political will.

6.2.2.6 Manner of elections to the Parliament

The manner in which MPAPs are elected to the Parliament and the absence of direct elections has had a negative impact on the effectiveness of the PAP, and its potential as a human rights promoter in Africa. The experience of the EP and PACE suggests that there is no guarantee that direct elections to the PAP will render the PAP a more influential parliamentary institution.⁴⁹ However, it should be understood that direct elections to the Parliament are likely to make the Parliament more visible. This is so considering that once direct elections are held Africans will have to be informed by those who are campaigning for election to the PAP about the importance of having representation at Parliament. It is during such campaigns that the people will, one anticipates, get to know the objectives of Parliament and how it could be of use to them. As earlier alluded to, the Parliament is currently an obscure institution that is not really well known on the continent. It is beyond doubt that the popularity and relevance of the Parliament to the ordinary citizens will grow once the manner of elections is changed to direct elections of MPAPs.

The number of MPAPs representing a particular country does not correlate to the population of their respective countries. This is largely because MPAPs are not directly elected to the

⁴⁹ Viljoen (n 20 above) 174.

Parliament, thus making it impossible to adopt the proportional representation electoral system as is the case with the EP.⁵⁰ It may also be as a result of issues relating to sovereignty. As noted by Viljoen

[i]n line with the principle of sovereign equality of states, each state party is represented by five members. This principle, which for example accords Djibouti as much of a say as Nigeria, may be easy to observe whilst the stakes are low, but the position is bound to change if the PAP becomes more than a deliberative forum.⁵¹

The current scheme of things, where there is no proportionality in the number of MPAPs elected to the PAP and their country populations, may be interpreted by some as a failure on the part of the PAP to fulfil its objectives.⁵² In fact, it was argued that the capacity of the EP to democratise the EU was compromised by the fact that the parliamentary seats were not distributed proportionally amongst the member states prior to its electoral reforms.⁵³ It was further argued that a situation in which the population size of a particular country was irrelevant violated the 'democratic principle of equal representation.'⁵⁴ The manner of elections to the Parliamentary currently puts to question the capacity of the PAP to democratise the AU, and in the process compromises its image as a democratic institution. If the PAP is unable to fulfil its objectives, generally, it is unlikely that it will be able to fully and effectively utilise its human rights mandate. This is particularly so because democracy and human rights are

⁵⁰ Proportional Representation (EP) is an electoral system in which the division of seats by different political parties corresponds to their proportion of the total number of votes cast. In the case of a continental parliamentary institution such as the PAP or the EP it will mean that the number of seats per country will be proportional to the population size of that particular country. Currently the EP has adopted this electoral system and 'the seats are, as a general rule, shared out proportionately to the population of each member state. Each member state has a set number of seats, the maximum being 99 and the minimum five'. Currently Germany has the largest individual representation of 99 MEP's whilst Cyprus, Estonia, Latvia and Malta Have six MEPs each; <http://www.europarl.europa.eu/delegations/en/home.html> (accessed 21 December 2011).

⁵¹ Viljoen (n 20 above) 174.

⁵² G Ress 'Democratic decision-making in the European Union and the role of the European Parliament' in D Curtis & T Heukels (eds) *Institutional dynamics of European integration: Essays in honour of Henry G. Schemers, volume II* (1994) 175.

⁵³ As above.

⁵⁴ As above.

substantively linked. Thus, failure to achieve one is likely to result in failure to achieve the objectives set out in relation to the other.

Another factor which is likely to militate against the PAP becoming an effective institution is the dual membership of the MPAPs. Under the current situation, members of Parliament are drawn from the national parliaments or other national deliberative bodies. The dual membership of the MPAPs is likely to affect their effectiveness and in turn affect the work that might be carried out by the Parliament. The level of commitment demanded by the two institutions, the national parliament and the PAP, and the contending priorities likely to arise once a Member of Parliament is elected to the PAP, are manifold.

As indicated above, the negative effect of the dual nature of the membership of the MPAPs is likely to play out in the future, particularly because of the current business of the Parliament. Currently, members are 'fully' engaged by the business of the Parliament during its two ordinary sessions. These two sessions are far apart, with one held during the first part of the year and the other towards the end of the year. This is an arrangement that no doubt negatively affects the continuity of the work of the Parliament. Sometimes the business of the Parliament is stalled by the lack of a quorum. One cannot confidently assert that even during these two ordinary sessions of the Parliament that ground-breaking work is done to advance the human rights agenda of the Parliament. There is also very little indication of, beyond the few isolated instances such as scheduled fact-finding missions and symposia, the engagement of MPAPs in the activities of the Parliament beyond its ordinary sessions. Further, it appears that the budget of the Parliament does not cater for a continuously active Parliament. That is why the Parliament was unable to comment timeously on the Libyan situation, for example. This is indeed a major setback considering that there is a need for continuity if the Parliament was to become an effective institution.⁵⁵

This dual membership may not be overly cumbersome now, but it is bound to become increasingly time-consuming and taxing once the business of the PAP is extended to include legislating for the continent, handling legislative proposals from the AU Commission, supervising

⁵⁵ Interview with M Khumalo, Member of the Pan-African Parliament, Swaziland, January 2011, Midrand, Johannesburg, South-Africa.

the work of the AU Executive and adopting the AU budget. The extension of the powers of the Parliament will require that the MPAPs should spend more time in handling issues presented before it. This will certainly require that the MPAPs also spend more time attending to the business of the Parliament. The dual nature of the membership of the MPAPs will undoubtedly affect the effectiveness of the Parliament at the implementation level.

6.2.2.7 The stalled AU integration process

The progress of the PAP has been affected by the slow pace of the integration process in Africa, which may be described as stalled or as stalling. A perusal of the revised Draft PAP Protocol indicates that the PAP is far from being afforded full legislative powers. This stalled integration process and absence of legislative powers means that the PAP will not be able to effectively play any meaningful role it is supposed to be playing. The Parliament will not be able to pass any binding legislation that is informed by the human rights principles to which the AU subscribes. This anomaly has affected the Parliament's effectiveness in the promotion of human rights. However, it should be acknowledged that the conferment of legislative powers on the PAP will not necessarily address all the factors highlighted in this chapter as affecting its effectiveness. Such a move will no doubt improve, but not heal all ailments affecting, the work of the Parliament and, consequently, also its effectiveness.

6.3 Optimism versus pessimism: What future for the Pan-African Parliament?

It is important that one should reflect on the work that the Parliament has done so far in order to allow one to ascertain whether it has made any significant contribution to the promotion of human rights in Africa. Basically, any assessment that has not taken into account the work that the Parliament has done since its inception and the circumstances under which the Parliament has had to perform its functions is incomplete. Therefore, the question should be what the PAP – under the present circumstances and within its limited powers – can do and has done to promote human rights in Africa.

One key factor which has sometimes been overlooked by commentators, in so far as the positive future of the PAP is concerned, is the issue pertaining to the establishment of the

Parliament. The Parliament was established with positive and good intentions for governance structures within the Union. If that was anything to go by, one would be tempted to conclude that political will to propel the Parliament into a continental parliamentary institution with sufficient powers to play an oversight role in the AU exists. From that perspective, the Parliament has an added advantage compared to other institutions of the AU such as the African Court on Human and Peoples' Rights. The political will surrounding the establishment of the PAP could be exploited to advance the work of the Parliament and to agitate for it being granted full legislative powers. Of course, it will be naïve for one to assume that by virtue of the fact that its establishment received tremendous support it is by necessary implication an indication that all member states are in favour of having a full-fledged continental parliament. That the PAP was established with a view to foster participatory democracy at the continental level, foster continental integration and to promote good governance and principles of human rights in Africa should be used as an impetus for convincing African leaders to build a more robust Parliament.

Closely linked to the above is the fact that in the greater scheme of things, traceable back to the AEC Treaty, there is an indication that African leaders had or still have ambitious plans for the Parliament. That is why the PAP Protocol provided for the possibility of review and assessment of its powers conferred on the Parliament so as to align them with the aspirations of the AU. The PAP has initiated the review process and it is after the completion of the review process that the transformation of the PAP is expected. Thus, until the review conference of member states is held to determine the future of the Parliament it is premature to write off the Parliament as yet another failing AU project.

Admittedly, the future of the PAP is uncertain but it is encouraging to note that there is a general move towards real integration and the consolidation of democracy in the continent. This may be sufficient enough to secure the success of the Parliament. As already alluded to, parliaments are necessary players in the promotion of human rights and democratic principles. Quite clearly, the PAP stands for principles of good governance, democracy and human rights promotion. This alone should be enough to ensure that the Parliament is treated as an

important institution of the AU more or so that it is capable of providing a proper platform for advancing the continent's integration process.

Slightly remote but not altogether irrelevant are the experiences of the EP and the EALA. That the two have been able to consolidate into legislative bodies for their respective communities is an encouraging precedent for the PAP. Their experiences suggest, in particular, that the metamorphosis of parliamentary institutions into full-fledged legislative bodies is a protracted and evolutionary process as it is proving to be the case with the PAP. The experiences of the two legislative bodies indicate that concerted efforts to have the PAP become an effective oversight body may produce results in the future.

Another factor which is likely to accelerate the effectiveness of the PAP is the nature and composition as well as the institutional structure of the Parliament. As it has been rightly noted by Van Walraven, 'the Parliament's composition also has a bearing on its potential effect on the member states, and hence its impacts beyond the structures of the Union itself.'⁵⁶ At the moment the Parliament is composed of seasoned politicians from their respective countries, at least from countries which have a parliamentary body or a similar body. They possess a wealth of expertise and knowledge over the various issues that are being dealt with by the Parliament. In the same vein it has been noted that 'the fact that national delegations sitting in the PAP must reflect the diversity of political opinions of their home countries is crucial.'⁵⁷ It is the envisaged diversity of the Parliament that could be singled out as an important feature of the Parliament poised to enhance its effectiveness in the future.

It has been argued that Parliaments are the most appropriate forum for handling complaints regarding human rights violations, especially where the issues involved are unlikely to find recourse through judicial means.⁵⁸ It has been argued further that 'sometimes it is more

⁵⁶ Van Walraven (n 45 above) 215.

⁵⁷ As above.

⁵⁸ Bradley (n 41 above) 847 positing that 'recourse to the judiciary may not always provide a practical or efficient remedy.' Further that '[b]eneficiaries may not be aware of their rights, the breach of a right may give rise to a fragmented damage no individual has *locus standi* to challenge, or a right may be inherently inadequate or impossible to enforce', citing JHH Weiler 'Methods of protection: Towards a

appropriate that human rights issues or complaints are handled by public representatives who are answerable to an electorate, rather than by unelected bureaucrats.⁵⁹ It is discernible from the discussion of the mandate of the PAP that it was established with the view to ensure, among other things, that the problems of the continent are identified, discussed and addressed by a seemingly political body. In that light, augmenting the human rights mandate of the PAP is likely to enhance the promotion of human rights in Africa. This position is well articulated by Bradley when he argues that

[p]arliament is, however, particularly well placed, given its relative accessibility by the public and its variegated composition, to exercise a certain *a priori* control of the legislative proposals for possible fundamental rights problems, and to respond to the concerns, for example, of NGOs and other interest groups.⁶⁰

As it has already been noted, the existing human rights mechanisms in Africa are criticised for being inaccessible and that their efforts do not trickle down to the citizenry as it should be the case. The 'people' based PAP is supposed to be a deviation from this seemingly general practice. It brought along the promise of having a bottom-up approach to the needs of Africans in so far as political and socio-economic development is concerned. In particular, the Parliament's petition procedure could be used as a tool that drives the relevance of the Parliament to the human rights struggle and agenda in Africa.

Over and above the aforementioned factors, that the PAP has an explicit human rights mandate will go a long way in enhancing its effectiveness. As already alluded to, unlike the EP, the PAP was conferred with a human rights mandate from the time it was established.⁶¹ That in itself is indicative of the potential the Parliament has in relation to the promotion of human rights. In the main, it should not struggle to legitimise its actions as regards human rights activities since its founding documents sanctioned it to promote human rights. Overall, problems associated

second and third generation of Protection' in A Cassese *et al* (eds) *Human rights and the European Community: methods of protection* (1991).

⁵⁹ Bradley (n 41 above) 847.

⁶⁰ As above.

⁶¹ See generally Bradley (n 41 above) 841 noting that the EP operated in a system of government limited as to the scope of its powers. He further noted that 'the powers of the Union to take action in relation to the protection and the promotion of fundamental rights were not clearly until recently...'

with social legitimacy may not arise as frequently as they would if the Parliament was not conferred with any human rights mandate. It is therefore safe to conclude that where the Parliament is recognised as the appropriate body to address human rights issues, its potential as a source of significant efforts to promote human rights may become immeasurable. This is so because it would not be met with great resistance from those who are of the view that Parliaments are irrelevant to human rights promotion.

6.4 Concluding remarks

The reality is that the Parliament is faced with many challenges which over time negatively affected its effectiveness in the promotion of human rights. Internal factors such as the lack of a clearly defined human rights agenda, poor coordination of human rights activities by the Parliament, a low level of visibility and inadequate dissemination of information are within the control of the PAP. Internal factors are indicative of the fact that it is not only the lack of full legislative powers alone that has made the Parliament obscure and ineffective. The manner with which it has carried out its human rights mandate has also contributed to the lacklustre performance of the Parliament. Its methods of operation are not conducive to the effective promotion of human rights. If the Parliament aims to become an effective human rights promotion body, it needs to address these internal factors. External factors, such as the conferment of legislative powers and the budgetary power of the Parliament, are outside the control of the Parliament. It is therefore incumbent upon the architects of the AU to address these factors and to fulfil the dream of having a continental Parliament that will play an oversight role in the decision-making processes of the AU.

CHAPTER VII

CONCLUSION AND RECOMMENDATIONS

7.1 Summary of findings and conclusions drawn from the study

The proliferation of Regional Parliamentary Assemblies (RPAs) and international parliamentary institutions (IPs) serves to indicate that many nations desire not only to secure democracy but also to secure participatory democracy. In that sense the symbiotic relationship between and relevance of democracy to human rights and the relevance of human rights to democracy cannot go unnoticed. Concomitantly, Parliaments as custodians of democracy necessarily have a role in the promotion of human rights. That is why the PAP and parliamentary institutions are concerned with the respect of human rights. Chapter 2 has shown that Parliaments have become necessary actors in the promotion of human rights worldwide.

The study has revealed that the PAP was established or created on the understanding that it will become a medium through which the wishes and views of 'ordinary Africans' will be communicated to the AU leadership. The idea was also to eventually have a parliamentary institution that will play an oversight function within the AU. That is why the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (PAP Protocol) provided for its revision within five years of its coming into force. However, there was no guarantee from the member states that once the review is undertaken, the PAP will be conferred legislative powers.

This study has shown that the Pan-African Parliament (PAP) is an important and welcome addition to the AU institutions. The PAP is one of the institutions of the African Union (AU) that is both dependent on and indicative of the course and extent of integration in Africa. Its future evolution will indicate whether Africa's leadership is ready to commit to the ideal of having a truly continental supranational body. At the same time, its growth into a legislative body is inextricably linked to the AU's possible but by no means inevitable development into a supranational, rather than a mere intergovernmental institution. The otherwise deliberately

delayed transformation of the AU into a supranational body perhaps explains why the PAP is not being transformed into a full legislative body. At the moment, there is no political will on the part of the member states to cede some of their control to the AU and concomitantly, no political will to confer the Parliament with legislative powers. The PAP was perhaps designed to fail due to the fact that it was established with no direct elections, absence of any legislative powers and no control over its budget.

The study has established that the Parliament has limited powers and its consultative powers only allow it to make non-binding recommendations and resolutions to other organs of the AU. For example, an audit of the AU Executive Council and AU Assembly decisions in chapter 4 revealed no evidence to suggest that resolutions and recommendations of the PAP to these two AU organs are being implemented. With respect to human rights, the Parliament has a 'promotional' as opposed to a 'protective' human rights mandate. To that end, the Parliament has undertaken capacity building workshops, human rights seminar or symposia, parliamentary debates, fact-finding and electoral observer missions, and has adopted resolutions and recommendations.

After an assessment of the work that the Parliament has done with respect to the promotion of human rights, this study concludes that the PAP has not successfully discharged its promotional mandate. This can be attributed to some of the factors that are captured in Chapter 6, such as the poor coordination of its human rights activities, the lack of visibility and dissemination of information and the lack of an integrated approach in its human rights interventions. On another level, it became clear that while the Parliament may be making valid and fair attempts to carry out its mandate, the beneficiaries of its efforts remain members of the PAP and not the 'ordinary African' it seeks to represent. The PAP has therefore failed to effectively utilise its human rights mandate to the benefit of the citizenry. For now, it is clear that it is wrong to conclude that the PAP is representative in nature, considering the manner of elections of PAP representatives as well as the limited participation of people in the Parliament's activities.

The study also revealed that while it is true that the Parliament has not been creative enough to effectively utilise its human rights mandate, some external environmental factors have

contributed to inhibit its effectiveness. These external factors are those that are beyond the control of the PAP such as the absence of legislative powers, lack of financial resources, lack of human resources and the absence of political will on the part of member states. It is clear that these external factors, if addressed, will improve the capacity of the PAP to effectively promote human rights on the continent. Once these issues are addressed the Parliament will be able to come across as a robust and important actor in the human rights arena.

As already indicated, the PAP has consultative powers and is not able to exercise the powers and functions of a traditional legislative organ. While the AU recognises its existence, there is no indication that the Parliament is afforded any recognition beyond that of being an article 5 organ. This in essence means that there is little collaboration between the Parliament and other organs of the AU. Even in respect of activities such as fact-finding missions and electoral observer missions, there is a negligible collaboration between the PAP and other African human rights institutions. At the time of this study there was no collaboration, beyond workshops and seminars, between the PAP and the human rights organs of the AU. To that end, the Parliament has been described as a ‘talk shop’ – a name befitting an institution that only undertakes workshops, seminars and conferences.

The existing framework of the AU, in general, and more particularly the African human rights system is not conducive to the operation of the Parliament as a human rights actor. The study has revealed that the poor relationship between the Pan-African Parliament and other African human rights institutions is due to: (a) poor coordination of activities aimed at promoting human rights in Africa by institutions making up the African human rights system; (b) poor knowledge of the mandate, relating to human rights, of other African human rights institutions and; (c) limited space for collaboration as delineated by the treaties or documents establishing these institutions. With respect to the last reason, it will appear that even if there were willingness on the part of the Parliament to collaborate with the African Court on Human and Peoples’ Rights (African Court) for example, the relationship would only be limited to collaboration on workshops and symposiums.

There is also no evidence of a fruitful relationship between the Parliament, national parliaments, members of civil society, regional parliamentary bodies (RPBs) and international institutions. The PAP and these institutions are supposed to have a strong relationship in their quest to advance human rights in Africa. There is willingness on the part of the Parliament to collaborate with these institutions. However, the Parliament has not effectively exploited its relationship with these stakeholders. The current relationship is ad hoc and has not been formalised. The PAP Protocol and the PAP Rules of Procedure do not adequately make room for the participation of other stakeholders in the activities of the Parliament. In that respect, the absence of a normative framework within which the Parliament can collaborate with other stakeholders has greatly limited the Parliament in the execution of its mandate.

One of the main features of the Parliament is that it does not have any legislative powers. It only has consultative and deliberative powers. Its level of influence within the African human rights system is as a result very limited. This study has revealed that while it may be true that the mandate of the Parliament is limited, the Parliament has further restricted its mandate due to the nature and content of its resolutions and recommendations. In particular, an assessment of these resolutions and recommendations indicates that their focus is very narrow in nature. The Parliament is currently more concerned with formalistic issues such as the ratification and domestication of treaties by AU member states. The resolutions and recommendations do not speak to the substantive issues such as the continuing violations of human rights in many African countries. Their content – in so far as human rights issues are concerned – is lacking as revealed in their various electoral or fact-finding missions. It is therefore imperative that the Parliament should refocus its approach and as a continental ‘parliament’ address broader, sensitive human rights issues. This will most certainly improve its role in the promotion of human rights.

The PAP cannot pass any binding legislation so as to set minimum standards to which member states should adhere. With respect to the decisions that are made at the Union level, the PAP is not in a position to participate in such decision-making processes. In that context, the PAP stands in stark contrast to other Parliamentary organs such as the Parliamentary Assembly for the Council of Europe (PACE), the European Parliament (EP) and the Latin American

Parliament (PARLITINO). Even though some of these parliamentary bodies do not have legislative powers, their participation in the decision-making processes is quite pronounced.

The review process of the PAP Protocol has indicated that it is unlikely that the Parliament will be conferred full legislative powers in the near future or even on the medium term. This study has indicated that the attainment of legislative powers by the PAP is most likely to improve the effectiveness of the Parliament in the promotion of human rights in Africa. While conferral of legislative powers may be a very significant step in the evolution of the Parliament, it is important to consider such issues as the readiness of the continent to have such a law-making body. Most importantly, it is the political will of member states that will ultimately decide whether the PAP will achieve its intended objectives and not whether it is endowed with legislative powers. It is in that context important to concede that the attainment of powers, important as they are, should not be deemed as a panacea to all the problems that the Parliament is facing. The PAP must therefore strive to use its limited powers to effectively promote human rights in Africa.

Many commentators on the work of the Parliament have also linked the PAP's effectiveness with the manner of appointment of its representatives. Some decry the absence of direct elections to the Parliament as a major hindrance. However, the successes and the gains of the East African Legislative Assembly (EALA) and the PACE, both not comprising directly elected members, are often overlooked. The study also concludes that the fact that there are no direct elections to the Parliament is not a major hindrance to the Parliament's effective promotion of human rights. It is admitted that the PAP at the moment is not sufficiently representative in nature. Even though direct elections to the PAP will improve its participatory nature there is no evidence to support the assertion that the absence of direct elections is a bar to its effective promotion of human rights. In essence, direct elections, significant as they may be, are not a *sine qua non* to the effectiveness of the PAP in the promotion of human rights. While it may be correct to conclude that the absence of direct elections is a contributing factor to the Parliament's ineffectiveness, it is incorrect to anchor the effectiveness of the PAP, and its potential to promote human rights, on the direct elections of its MPAPs.

This study has also revealed that there are other issues connected to the appointment of members of the PAP which over time have affected the effectiveness of the Parliament. In particular the study has revealed that the composition and representation to the PAP need to be seriously reviewed. There is absolutely no ‘fair, balanced and diverse political representation’ to the Parliament. Due to the indirect appointment of MPAPs, most member states appoint members of the ruling party to the PAP to the exclusion of other political parties within their respective national assemblies. Botswana is a case on point. The lack of fair and balanced representation limits the effectiveness of the Parliament in that it deprives Africans’ differing views on issues that may be raised by fact-finding or electoral observer reports. Still connected to the issue of fair representation to the PAP is the fact that despite all efforts to bridge the gender divide, the Parliament has not taken sufficient measures to ensure that not only do member states comply with the requirement that of the five MPAPs at least one should be a woman but that member states should send more than the requisite number of female MPs. As it has also emerged, the tenure of members of the PAP has resulted in a situation where continuity of membership is challenged. The sessions of the Parliament are always preceded by the swearing in of new members. There is a need to secure continuity of membership if there is any hope that the Parliament will preserve any institutional memory.

A different conclusion will have to be reached with respect to the budgetary powers of the PAP. The study has revealed that the Parliament does not have any influence on the nature of its budget. As is the case with everything else, the PAP also plays a consultative role on decisions regarding the AU budget, including its own budget. This means that the Parliament is not in a position to effectively operate as it works within the limits of the budget as decided by the AU executive organs. The limitation comes to light when it becomes clear that the Parliament cannot reprioritise its activities at any time due to the limitations placed by the AU financial rules. The Parliament is not in a position to respond to major events on the continent, such as the Libyan situation, when it is not in session. Convening extraordinary sessions of the Parliament will have budgetary implications and therefore seem to be far-fetched. Reports of fact-finding and elections observer missions of the Parliament record concerns of limited financial resources to carry out all the necessary activities and to obtain the necessary logistical

support. Thus, the PAP is not only limited by its insufficient budget but also by the fact that it does not have exclusive control over its budget.

Perhaps one of the most critical issues that this study has revealed is that the PAP is invisible. In particular, its activities remain limited to the MPAPs and do not reach the public. The activities of the Parliament have not received extensive coverage in the media at the national level. Many of the local newspapers in Botswana and South Africa, for example, provide sporadic coverage of the Parliament's events. These include the Parliament's sessions, fact-finding and elections observer missions as well as the resolutions and recommendations of the Parliament. The invisibility of the PAP therefore means that the people are not aware of the potential use of the Parliament to their lives. For example, the petition procedure thus remains unknown to the general public due to the invisibility of the PAP's activities. Consequently, there is no political mass clamouring for PAP reforms, more so that the PAP does not feature prominently on the national agenda.

7.2 Recommendations

In order for the PAP to move from a *mere talk-shop* to – at the very least – an *influential talk-shop*, it needs to use its existing framework and limited mandate more effectively. For the Parliament to play a meaningful role as an 'influential talk-shop' it must ensure that it holds meaningful and less emotional deliberations on issues affecting Africa. For example, the PAP's discussions on the International Criminal Court (ICC) and its prosecution of international crimes in Africa should not be a blame game and labelling of the West as perpetuating neo-colonialism. The PAP must therefore address issues holistically and not selectively so as to show that its discussions are for the benefit of the citizenry and not necessarily for the benefit of governments or PAP member states. The issue on the addition of a criminal chamber to the future African Court of Justice and Human Rights presented a perfect opportunity for the PAP to be at the forefront of cutting edge issues. The PAP must have led the debates or discussions in a very thoughtful manner which will enrich and set the tone for the debates in the continent. The PAP must realise that it occupies a unique position in so far as participation of the people in the affairs of the AU are concerned. This is because proceedings and debates are open to the

public debates as opposed to the more closed proceedings of the policy organs of the AU such as the AU Executive and Assembly.

The Parliament must therefore explore imaginative ways in which it could adjust and adopt to deal more pragmatically or meaningfully with human rights issues. The previous chapters have highlighted the various challenges that the Parliament is faced with. It is unfortunate that the challenges faced by the PAP are not only with respect to the promotion of human rights but its mandate in general. The following discussion seeks to reiterate some of the suggestions made in the previous chapters so as to emphasise their relevance to the Parliament and how it can address the challenges it is faced with.

As already indicated, some of the challenges are within the control of the Parliament. For these challenges, the Parliament should be able to address them. For those that are not within the Parliament's control, the political will of the architects of the PAP and the AU generally, is once again brought to the fore.

7.2.1 Strengthening the PAP's consultative powers

The review process of the PAP Protocol has thus far not resulted in an amendment of the status quo. The Parliament will thus not be conferred with full legislative powers in the near future. There is also evidence to suggest that the Parliament does not have the capacity to legislate for the continent even if it was to be conferred with such legislative powers. The Parliament has not even crafted a model law on any areas of concern to the AU, even if already has the competence to do so. One is therefore compelled to conclude that what is important at this stage is that the PAP's current consultative powers should be strengthened. There is therefore need to strengthen the consultative powers of the Parliament and to increase its present influence in the decision-making process of the AU. To begin with, the Parliament could be involved in the appointment of the key positions of the AU such as the AU Chairperson, the appointment of the various commissioners, including, in particular the appointment of members of the quasi-judicial and judicial human rights institutions of the AU. The participation of the Parliament in these processes is likely to improve the quality of people who are appointed and, concomitantly, the quality of the outputs of the AU's human rights protective mechanisms.

Further, the resolutions and recommendations of the PAP should be taken into account in the decision-making process of the AU so as to ensure the relevance of the Parliament in the management of the affairs of the Union. The participation of other AU organs in the activities of the Parliament should be encouraged. In particular, the participation of the AU Assembly through the Chairperson of the AU and AU organs with a human rights mandate in the activities of the PAP should be enhanced.

There is nothing preventing the various AU organs, particularly the AU Executive, AU Commission and AU Assembly, from consulting the Parliament in continental decisions and to adopt a resolution or decision to this effect. Such a mandatory consultation procedure may exist pending the decision of the AU Assembly to confer the PAP legislative powers. The significance of such an approach has the effect of ensuring that the influence of the PAP in the decisions of the various organs of the AU is at least present. A strong consultative relationship between the Parliament and other AU institutions will allow the PAP to influence and persuade these institutions to make certain policy decisions.

For the promotion of human rights this might result in the increased promotion of human rights as the activities, officers appointed to hold positions in AU human rights institutions and decisions of the AU dealing with human rights will be subjected to scrutiny. While it may be difficult to require that the ideas of the Parliament following such consultation be binding, it is important to realise that that consultation is important and will eventually lead to an improved respect for the Parliament by other AU institutions. This is likely to obtain if the PAP makes informed and useful suggestions in the exercise of this improved consultative powers.

Of course, in the long term the AU will not be able to avoid conferring the PAP with legislative powers. There is no denying that this is an ideal situation which will improve the quality of the decision-making process in Africa. Once the PAP is able to legislate for the continent it may improve the level of participation on Africans in the affairs of the Community. However, for now, it appears that such a situation remains a distant dream and far from becoming a reality in the short term.

7.2.2 Shedding the elitist status

A parliament that is inaccessible to its constituents is unlikely to benefit them. One of the very important issues that the PAP will need to address is the perception that it is an ‘elitist’ institution. At the time of the study, the PAP was not really accessible to the people. This must change. The Parliament will have to make its activities visible to the whole of Africa and not only to the few AU bureaucrats and academics. This should be done by the PAP’s Public Relations Office and could be achieved by way of having country visits, as is the case with the African Court on Human and Peoples’ Rights. Most significantly, the PAP will have to develop a website that is user friendly with accessible documents of the PAP such as the *Hansard* (translated), its activity reports, all its mission reports resolutions, and recommendations and human rights activities. An improved communication strategy and collaboration with the press will most definitely improve the accessibility of the PAP to the citizens.

7.2.3 Choice of issues and agenda setting

The Parliament must identify its human rights priority areas and perhaps explain to all stakeholders why its focus on those issues is important. While there is nothing wrong with addressing a wide range of human rights issues, given its mandate, it is not advisable for the PAP to adopt such an overbroad approach. The Parliament is likely to be limited by its budget and human resource if it were to adopt such an all-encompassing approach. The Permanent Committee on Justice and Human Rights (PCJHR) should be tasked with facilitating an assessment of human rights issues that the Parliament may pursue with a view to make an impact on the continent.

It is important though that the Parliament should appreciate that it has a wide human rights mandate. The PCJHR must embark on an exercise that will inform the rest of the MPs about the various AU human rights instruments, the activities of the various human rights organs of the African human rights system. The promotional campaign can be done by way of presentations to the various PAP Committees during their sittings. Alternatively, the campaign can be done during the times when the Parliament is not in session and presented to the MPAPs in groups composed of members from countries of the various AU regions. To achieve both, agenda setting and dissemination of information about the various human rights activities

within the AU, the PAP must partner with civil society organisations that are well versed with matters pertaining to the African human rights system. The involvement of national human rights institutions (NHRIs) in that respect is also important and must be given priority.

7.2.4 Improved participation in and coordination of the Parliament's human rights activities

Tied to the above recommendation, is the unavoidable fact that the haphazard nature of the work of the Parliament has diluted its relevance to the promotion of human rights. There is therefore an urgent need for the Parliament to execute its promotional human rights mandate more effectively. This can be achieved by proper coordination of its human rights activities both internally and externally. This should be done by strengthening collaboration between the Parliament, through the PAP's Permanent Committee on Justice and Human Rights (PCJHR), and other AU human rights institutions with a similar mandate as that of the African Commission on Human and Peoples' Rights (African Commission). Its promotional mandate and its petition procedure must be made known to other human rights institutions. Even though most of the PAP committees deal with human rights issues, the PCJHR must coordinate these activities as its mandate already entails dealing with other human rights institutions within the AU. This coordination should be done with agreed guidelines that will limit the Parliament's focus on what would be outside the Parliament's identified priority areas.

For a productive collaboration between the PAP and other stakeholders, the Parliament should introduce guidelines to serve as the normative framework within which the collaboration will take place. The guidelines will give direction to the partnerships within which the PAP will collaborate with the relevant stakeholders. Such guidelines could be designed in such a way that all the committees of the PAP will be able to rely on them to design cooperation guidelines specific to their mandates. These guidelines should elaborate on what the PAP can do to support their work and conversely, what the other institutions can do to support the work of the Parliament. The guidelines should identify areas of strategic interest, which should include the promotion of human rights and, where possible, a plan of action be drawn for the engagement. There are a myriad ways of promoting human rights, including the submission of cases or requests for advisory opinions to the relevant human rights bodies, follow-up of

decisions of decisions of the human rights institutions, collaboration in fact-finding and elections observer missions, inspection of prisons and detention facilities, organising symposia and workshops, as well as human rights promotional visits.

To ensure that the activities of the Parliament are relevant to all, it is necessary that the Parliament should establish stronger links with national parliaments, regional parliamentary bodies (RPBs), members of civil society and national human rights institutions (NHRIs). There is an urgent need for the PAP to establish forums for interaction with different actors at different levels. To ensure that issues of human rights are given the necessary attention, it is important that there should be a permanent agenda item on human rights for these forums.

The above approach should also obtain with respect to international organisations. However, the cooperation agreements that the Parliament concludes with these international organisations and international parliamentary institutions should be informed by the Parliament's desire to become a robust human rights actor. The PAP should strive to ensure that the agreements are in conformity with its human right agenda and are fully implemented so as to take advantage of the expertise and financial assistance that may accrue as a result.

7.2.5 Election of representatives to the PAP

The manner of elections to the PAP should be reconsidered and improved. There is a necessary complete nexus between direct elections to the Parliament and its general effectiveness. This is largely because direct elections to the Parliament will perhaps result in improved participation of Africans in the activities of the Parliament. An improved participation in the activities of the Parliament will in turn ensure that the efforts of the Parliament will trickle down to the constituents. This is perhaps a long-term solution considering that direct elections do not appear to be a likely and feasible solution at present.

What is clear though is that there is need to reconsider and improve the method of electing MPAPs so as to bridge between the representatives and their 'constituents'. The present situation where the members of the Parliament are elected from the countries' legislative assemblies or other representative bodies is not ideal. Pending the decision to hold direct elections to the PAP, the approach followed by the EALA could be adopted where the national

Parliament only acts as the electoral college for elections to the Parliament with MPAPs elected from the general public.

Tied to the issue of direct elections is the issue of fair and balanced representation to the Parliament. As already indicated in the previous chapters, there is need to ensure that there are other voices, apart from those of the ruling national parties, in the Parliament. The current situation where country delegations may be comprised of men only is undesirable. The PAP Protocol should be revised to make it compulsory for the PAP member states to respect the requirements of diverse representation, fair gender representation and plurality of views. Member states should be compelled to ensure that they elect two or more women to the PAP with the view to eventually attaining equal representation of women in the Parliament.

7.2.6 Improved participation in the AU budget process

The position of the Parliament could also be strengthened by involving it in the AU budgeting process and to giving it some form of autonomy over its budget. A better alternative will be to relax the AU financial rules so as to allow the PAP to reprioritise its activities and its budget whenever it becomes necessary to do so. The amendment of AU financial rules should, of course, be in addition to an increased budget from the AU.

Such an approach will allow the Parliament to respond to human rights issues timeously, especially those issues which emerge when the Parliament is not in session. Furthermore, the increased budget of the Parliament will allow it to increase the duration of their sessions, and will allow it to engage more personnel and human rights experts. In particular, the increased budget will also allow the Parliament to employ a human rights desk officer.

7.2.7 Implementation and follow-up of human rights activities of the PAP

It does not serve any purpose for any institution to make resolutions, recommendations and adopt activity reports without them being implemented. Further, once they are implemented there should be a proper follow-up mechanism that is put in place. This will ensure that the Parliament's objectives and commitments are indeed carried out. Follow-up of the activities of the Parliament may be carried out by the Parliament itself or by the PAP and members of civil society, NHRIs and international actors or by other relevant stakeholders. A follow-up model

that is cooperative in nature will allow the Parliament to obtain financial and human resource assistance from other stakeholders.

The African Commission may provide a follow-up model that is proposed and may be adopted and improved to suit the needs of the Parliament. There are also various examples of follow-up mechanisms and strategies that have been adopted by various international organisations including those of the United Nations treaty monitoring bodies. The experiences of other international parliamentary institutions will also be instructive in this regard. Examples of follow-up strategies include the identification by the Parliament of those who are responsible for following up on the identified issues, establishing a follow-up committee or establishing a follow-up reporting procedure and where possible fixed deadlines.

7.2.8 Improved quality of information

The relevance of the Parliament to the promotion of human rights and to the activities of civil society is also dependent on the nature and content of information produced by the Parliament. The usefulness of the resolutions and recommendations of the PAP is thus dependent on whether they are well written, provide sufficient background to their adoption, make reference to previous resolutions and recommendations, articulate issues of concern properly and are referenced in a more organised manner. The absence of a methodical approach to the manner in which the resolutions, recommendations and reports of the Parliament are drafted will most likely jeopardise their usefulness to other human rights actors.

At a more practical level it has become imperative that the debates of the Parliament should evince a certain level of appreciation of the complexities of issues of human rights, peace and security and democratisation in Africa. While it may be true that debates are carried out by MPAPs, it is critical that their content be improved. Prominent and unnecessary features of these debates is that they are always emotionally charged and taken as a platform for pointing fingers by MPAPs as to who is to blame for our problems. The PAP's debates relating to the intervention of North Atlantic Treaty Organisation (NATO) in Libya is a case on point.

Considering that the Parliament is a platform for different views, it may be difficult to and even unwise to regulate what the MPAPs should say in contribution. That notwithstanding, there are

two things that can be done to improve the quality of the PAP's debates. First, as obvious as it may seem, MPAPs should be educated on the importance of such debates and their eventual consumption by the general populace. Second, the Speaker of the PAP must attempt to encourage relevance during these debates. Perhaps that may slightly improve the debates of the PAP to the extent that they will result in useful resolutions and recommendations.

7.2.9 Developing and improving expertise within the Parliament

Overall, this study has revealed that the Parliament is limited in the discharge of its mandate by the lack of expertise. It is necessary that the PCJHR should be composed of people who are knowledgeable in issues of human rights. In fact, it should be a requirement by the PAP Rules of Procedure that the permanent committees should be comprised of a certain number of people qualified as experts in that area. This will encourage member states to elect people to the PAP who possess certain qualifications and in turn will improve the capacity of the Parliament to produce reliable human rights information.

The Parliament should also obtain the expertise from the outside community. This will be in addition to the support rendered by national delegates during, for example, the Parliament's sessions. This could be sourced from civil society, sub-regional parliaments and universities. The external support to the Parliament is also necessary and is most likely to improve the ability of the Parliament to deal with complex human rights issues.

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