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Human rights enforcement in Africa: Enhancing the Pan-African Parliament's capacity to promote and protect human rights

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Summary: *To realise the promises and obligations emanating from various human rights frameworks that set regional normative standards, regional organisations have created organs and agencies with clear mandates. The Pan-African Parliament is one such organ in the context of the African Union. Indeed, article 3(2) of the Protocol establishing the Parliament lists the promotion of 'the principles of human rights and democracy in Africa' as one of its core objectives. However, the status quo clearly shows that the Parliament lacks the capacity to contribute meaningfully to the human rights agenda on the continent. Despite this deficiency, this article explores other avenues through which the organ can effectively contribute to its human rights mandate. However, the contribution questions the wisdom in adopting model laws in the absence of mechanisms to ensure the buy-in of member states as well as the adoption of these laws in national jurisdictions. Finally, the article proposes enhanced cooperation between the Parliament and various AU organs burdened with a human rights mandate to ensure that these organs 'speak the same language' and advance collective positions in furtherance of the broad AU human rights framework.*

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1 Introduction

When the Universal Declaration of Human Rights (Universal Declaration)¹ was adopted in 1948, there was no doubt that the promotion of the wide-ranging rights that it espoused was to be pursued through the United Nations (UN) and its specialised agencies. More than 70 years later, regional organisations such as the European Union (EU) and the African Union (AU) have adopted impressive human rights instruments, most of which reflect core human rights values as enunciated in the Universal Declaration. To realise the promises and obligations emanating from these human rights frameworks, these regional groupings have further created organs and agencies with clear mandates. The Pan-African Parliament (PAP) is one such organ in the context of the AU.² However, since the inauguration of its first parliamentarians in 2004, the PAP has attracted scathing criticism as scholars and commentators question its utility and relevance. Many studies on its structure and capacity indicate a consensus that the organ is weak.³ Indeed, the Parliament has been labelled a 'glorified talk-show' and a 'toothless bulldog', descriptions suggesting that it must do more to be accorded some respect as a role-player in the continent's affairs. Sadly, at the heart of the PAP's criticism is a weakness that is not of its own making, namely, its lack of legislative powers and concrete oversight over other AU organs, particularly the African Commission on Human and Peoples' Rights (African Commission).

In light of the glaring limitations in the PAP's legal framework, this contribution argues for an activist approach by the Parliament's President and its Committee on Justice and Human Rights. Accepting that the progressive evolution of the PAP is unlikely to be realised in the near future, the article explores how the organ can be made an effective tool in the protection and promotion of human rights while operating within its current legal framework. Importantly, the article questions the wisdom of adopting model laws in the absence of functional and effective mechanisms to ensure the buy-in of member

1 Adopted by the UN General Assembly on 10 December 1948.

2 Constitutive Act of the African Union adopted on 11 July 2000 in Lomé, Togo and entered into force on 26 May 2001.

3 See eg 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* 197; S Mpanyane 'Transformation of the Pan-African Parliament: A path to a legislative body' (2009) ISS Paper 181.

states, as well as the adoption of these laws in national jurisdictions. Finally, the contribution proposes enhanced cooperation between the Parliament and various AU organs burdened with a human rights mandate to ensure that relevant organs 'speak the same language' and advance collective positions in furtherance of the broad AU human rights framework.

2 Pan-African Parliament as a continental organ

Article 5 the Constitutive Act of the AU⁴ lists the Pan-African Parliament as one of the primary organs of the organisation.⁵ PAP has its genesis in the 1991 Treaty Establishing the African Economic Community (AEC) which was adopted in Nigeria's capital, Abuja.⁶ Also known as the Abuja Treaty, the AEC Treaty provided for the establishment of a parliament, noting that such an organ was necessary to 'ensure that the peoples of Africa are fully involved in the economic development and integration of the continent'.⁷ Article 14(2) the Abuja Treaty provided that the composition, functions, powers and organisation of the Parliament would be defined in a separate Protocol. However, it was not until March 2001 that the fifth extraordinary session of the Organisation of African Unity (OAU) Assembly finally adopted the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (AEC PAP Protocol).⁸ In a little under three years, this Protocol received the requisite ratifications and came into force in December 2003, subsequent to which the PAP's first parliamentarians were sworn in, in March 2004.

Based in Midrand, South Africa, the PAP consists of five parliamentarians from each member state, one of whom must be a female.⁹ Further, the candidates from each state are required to 'reflect the diversity of political opinions in each National Parliament or other deliberative organ'.¹⁰ Clothed with immunity, these parliamentarians vote in their personal and independent capacities.¹¹ According to Magliveras and Naldi, the Parliament gives

4 AU Constitutive Act (n 2).

5 See art 5(c) Constitutive Act.

6 The AEC Treaty, otherwise known as the Treaty of Abuja, was adopted on 3 June 1991 and entered into force on 12 May 1994.

7 Arts 7(1)(c) & 14(1) AEC Treaty (n 6).

8 For a detailed account on the background to the establishment of the PAP, see KD Magliveras & GJ Naldi 'The Pan-African Parliament of the African Union: An overview' (2003) 3 *African Human Rights Law Journal* 222. See also BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 13 *African Human Rights Law Journal* 302.

9 Art 4(2) AEC PAP Protocol (n 6).

10 Art 4(3) AEC PAP Protocol.

11 Art 6 AEC PAP Protocol.

further impetus to the desire and vision of some Africans to provide a democratic foundation to the AU.¹² In accordance with its Rules of Procedure, the organs and structures of the PAP are the Plenary, the Bureau, the Permanent Committees,¹³ the regional Caucuses and the Secretariat.

Although the stated long-term objective of the PAP is to 'evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage', the Parliament currently enjoys only consultative and advisory powers.¹⁴ This no doubt constitutes a limitation which restricts the capacity of the organ to set standards. In its 2013-2017 Strategic Plan, the PAP noted that it needs greater legislative power if it is to transform itself into a more effective and specialised organ of the AU, adding that this will provide it with the requisite institutional and political legitimacy within its mother body.¹⁵ Although all AU organs, with the exception of the Court of Justice, are subject to the oversight, investigative, consultative and advisory functions of the PAP, their actions are not overseen by the Parliament. For example, the AU Assembly has the sole mandate on budgetary issues as well as the appointment of AU officials. The PAP has bemoaned this limitation and charged that it has been restricted in its work 'to only attending AU meetings'.¹⁶ In addition to this criticism, Sesay argues that 'many African countries are not yet truly democratic and even those that profess to be so, present us with a split image as they are ruled by governments whose democratic credentials are dubious'.¹⁷ He further reasons that if individuals become parliamentarians in their home countries through flawed electoral processes, their subsequent membership of the PAP brings into question the Parliament's claim to being representative of the majority of Africans.¹⁸ In conclusion, Sesay charges that the PAP

12 Magliveras & Naldi (n 8) 233.

13 Currently there are 11 Committees, namely, the Committee on Rural Economy, Agriculture, National Resources and Environment; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Cooperation, International Relations and Conflict Resolutions; the Committee on Transport, Industry, Communications, 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 Disabilities; the Committee on Justice and Human Rights; the Committee on Rules, Privileges and Discipline; and the Committee on Audit and Public Accounts.

14 Art 2(3) AEC PAP Protocol (n 6).

15 Pan-African Parliament (PAP) Strategic Plan 2014-2017 (January 2014) (PAP Strategic Plan 2014-2017) 6.

16 PAP Strategic Plan 2014-2017 (n 15) 5.

17 AY Sesay 'The African Union: Forward march or about face-turn?' (2008) 3 *Claude Ake Memorial Papers* 22.

18 Sesay (n 17) 22.

‘would not mean much to a people who, by and large, still do not have much say in the choice of those who govern them’.¹⁹

Because the AEC PAP Protocol makes provision for its review and amendment to ensure that its objectives and purposes are realised,²⁰ the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (AU PAP Protocol)²¹ was adopted in June 2014 to replace the AEC PAP Protocol. This new Protocol will come into force once it has been ratified by at least 50 per cent of AU member states.²² In addition to the objectives listed in the AEC PAP Protocol, the new Protocol envisages a PAP burdened with the duty to ‘encourage National and Regional Parliaments to ratify and integrate treaties adopted by the AU into their legal systems’.²³ More importantly, there is recognition of the importance of civil societies and community-based organisations in Africa’s integration and development.²⁴ Another significant addition is the objective to ‘invite and encourage the full participation of African diaspora as an important part of the African peoples in the building of the African Union’.²⁵ In relation to membership, the new Protocol increases the number of female parliamentarians from each member state from one to two.²⁶ Recognising the importance of cooperation and coordination, the AU PAP Protocol also defines the relationship between the Parliament and other organs of the AU.²⁷ This is in addition to working closely with national parliaments and regional parliaments, a position provided for in both Protocols.²⁸ Sadly, as of June 2020 the Protocol has been signed by only 21 states and has been ratified by 12, a far cry from the 28 it requires to enter into force.

3 Pan-African Parliament’s human rights mandate

In a paper on the possible establishment of a United States of Africa, Musila notes that ‘the protection of human rights and the promotion of democracy [are] at the core of parliaments in general

19 As above.

20 Art 25 AEC PAP Protocol (n 6).

21 Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (AU PAP Protocol).

22 Art 23 AU PAP Protocol (n 21) art 23.

23 Art 3(k) AU PAP Protocol.

24 Art 3(i) AU PAP Protocol.

25 Art 3(m) AU PAP Protocol.

26 Art 4(3) AU PAP Protocol.

27 Art 20 AU PAP Protocol.

28 Art 18 AEC PAP Protocol (n 6) and art 19 AU PAP Protocol (n 21).

and indeed the objectives of the present AU'.²⁹ This statement is relevant for two reasons. First, it suggests a functional parliament for the Union, complete with legislative powers and an oversight mandate over other organs of the AU. Second, it places a human rights mandate at the heart of such an organ. Drafters of the AEC PAP Protocol no doubt were alive to such expectations *vis-à-vis* a continental parliament. With reference to utility, the Preamble to the AEC PAP Protocol notes that the establishment of the Parliament was driven 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'.³⁰ With reference to human rights, the eleventh preambular paragraph records member states' determination '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'.³¹

Viljoen, an expert on African human rights law, asserts that 'the PAP has a clear human rights mandate'.³² This bold assertion no doubt is based on a simple textual reading of the Protocol establishing the Parliament. In article 3, which lists the objectives of the organ, the promotion of the principles of human rights and democracy in Africa stands out.³³ Together with the preambular paragraph referred to above, this provision confirms a clear intention by the continent's leaders at the time to have a parliament with a significant role to play in the continent's human rights agenda. Based on this provision alone, the organ's human rights mandate is unquestionable. Of relevance in article 3(2) is the reference to human rights and democracy in the same sentence. Over time, democracy has become synonymous with good human rights records, the converse being true in dictatorships and autocratic states. On this basis, one may argue, correctly so, that on any interpretation article 3(2) suggests the promotion of human rights as a means to an end, and that end is democratic governance.

The PAP is also mandated to 'encourage good governance, transparency and accountability in member states'.³⁴ This objective permeates every facet of human rights and suggests a broad, cross-cutting mandate for the Parliament. In encouraging good governance, transparency and accountability, the PAP inevitably

29 GM Musila 'United States of Africa: Positioning the Pan-African Parliament and Court in the political union debate' (2007) *ISS Paper* 142 6.

30 Preamble para 3.

31 Preamble para 11 AU PAP Protocol (n 21).

32 F Viljoen *International human rights law in Africa* (2012) 174.

33 Art 3(2) AU PAP Protocol (n 21).

34 Art 3(3) AU PAP Protocol.

has to adopt human rights standards as a measure of where and when to direct its attention. The mandate to set a human rights standard and to keep an eye on those member states that fall below the accepted threshold places the PAP in a position of potential influence on the continent. Linked to this broad mandate is the duty to 'promote peace, security and stability'.³⁵ Africa's reputation for incessant civil wars and violent conflicts is common cause. Often, at the heart of these conflicts are grievances linked to either political or socio-economic rights. The objectives listed in articles 3(2), 3(3) and 3(5), therefore, are interwoven and designed to give certainty to the PAP's mandate. Human rights, democracy, good governance, transparency, accountability, peace, security and stability all converge on a human to guarantee either her physical security or her social security. In the language of human security discourse, they address one's fears and wants.

From the provisions referred to above, the Parliament's human rights mandate is clear, at least on paper. This mandate is further clarified in the organ's Rules of Procedure. Explaining the powers of the PAP as outlined in articles 3, 11 and 18 of the AEC PAP Protocol, rule 4(1)(b) provides that the Parliament shall '[p]romote human and peoples' rights, consolidate democratic institutions and the democratic culture, good governance, transparency and the rule of law by all Organs of the Union, Regional Economic Communities and Member States'.³⁶

Although at face value the wording of this rule sounds like a repetition of what is contained in the Protocol, a closer reading reveals that there is more to it. The rule explains two perspectives, the first being the organ's mandate *vis-à-vis* member states, and the second being its mandate *vis-à-vis* other organs of the continental body. Both are important for human rights. In relation to member states, the rule does not refer to democracy but to 'democratic institutions and a culture of democracy'. This suggests a constant engagement between the Parliament and member states – including those whose human rights records are not questionable – just to ensure that the good governance debate does not fall off the agenda. In relation to other organs of the Union, the rule burdens the PAP with the mandate of promoting transparency and the rule of law, demands that no doubt contribute to the way in which these organs address human rights issues. This mandate likewise extends to regional economic communities (RECs).

35 Art 3(5) AU PAP Protocol.

36 Pan-African Parliament Rules of Procedure, as revised Rule 4(1)(b).

In addition to the provisions discussed above that expressly reference human rights, the AEC PAP Protocol also handed the Parliament a blank cheque regarding its powers and functions. Among others, the organ has powers to

examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.³⁷

That the Parliament has powers to discuss 'any matter' clears the way for the organ to be creative in executing its human rights mandate. As Viljoen notes, although there is reference to 'any matter', this competence 'is illustrated by a list of specific substantive issues that include human rights, democracy, good governance, and the rule of law'.³⁸

4 Making the most of the *status quo*: The PAP's challenges and opportunities

4.1 Challenges and limitations

The transformation of the OAU into the AU was received with widespread optimism and hope for a better continental organisation. Indeed, the OAU did not endear itself to those it claimed to represent or the broader international community. 'Union of Tyrants' was and remains one common description of the gathering of African heads of state at the time, a perception which barely was challenged. While discussing the significance of the PAP in the broad AU institutional architecture, Van Walraven notes that 'the question 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'.³⁹ Although this question betrays Van Walraven's pessimism, it also casts the spotlight on the challenges the PAP faces, as well as the weaknesses inherent in the legal framework within which it operates.

As noted above, at the heart of the criticism against the PAP is a weakness that is not of its making, namely, its lack of legislative powers. Although the drafters of the PAP's founding document were

³⁷ Art 11(1) AU PAP Protocol (n 21).

³⁸ Viljoen (n 32) 175.

³⁹ Van Walraven (n 3) 199.

aware of the need to equip the Parliament with legislative powers, this was deferred to such a time that the Assembly of Heads of State will decide to extend its competence. Writing in 2003, barely a year before the PAP's first parliamentarians were inaugurated, Magliveras and Naldi noted that the Parliament gave impetus to the desire and vision of some Africans to provide a democratic foundation to the AU.⁴⁰ However, they cautioned that the Parliament 'ought to have a significant role to play in shaping an organisation that has elements of a people's union' and to play this role effectively, it ought to be equipped with legislative powers.⁴¹ They added that legislative powers will enhance the organ's credibility with the people and 'even help to encourage and develop democratic reforms in some countries'.⁴²

The apprehension aroused by the PAP's lack of legislative powers is exacerbated by two factors. First, parliaments in Africa are viewed with suspicion. As Mpanyane notes, perceptions on their capacity to further democracy often are far from positive as they are commonly viewed as powerless, useless, ineffective, redundant or 'just talk-shops'.⁴³ This view is shared by Magliveras and Huliaras who argue that in post-colonial Africa most parliaments 'were mere appendages to the executive branches of government' and 'their role was at best that of rubber-stumping institutions'.⁴⁴ While such perceptions abound, the fear is that the AU will simply replicate the impotent model of a parliament, only this time at the continental level. Second, because of the successes of the EU Parliament, critics are appalled by the creation of a semi-useless organ when there is an example elsewhere of how such an institution can be made effective. Indeed, many studies on the PAP are quick to juxtapose the organ and the EU Parliament, with the latter being passed as a model to emulate. As Buyoya notes, the AU's organisational structure is mostly guided by the model of the European Union (EU),⁴⁵ hence when the AU decides to deviate from what has been proven to work, in the absence of sound justifications the outrage is understandable. While urging the AU to empower the PAP, Musila explains that the EU has managed

40 Magliveras & Naldi (n 8) 233.

41 As above.

42 As above.

43 Mpanyane (n 3) 1.

44 K Magliveras & A Huliaras 'Understanding success and failure in the quest for peace: The Pan-African Parliament and the amani forum' (2016) 11 *The Hague Journal of Diplomacy* 278. See also D Jancic 'Regional parliaments and African economic integration' (2019) 30 *European Journal of International Law* 227.

45 P Buyoya 'Toward a stronger African Union' (2006) 12 *The Brown Journal of World Affairs* 171.

to be what it is because as it progressed, states were willing to cede sovereignty to it and its organs.⁴⁶

In addition to the lack of legislative powers, the PAP is also criticised on the basis that it lacks a formal mandate to oversee other organs of the AU and to hold them to account. Although the Parliament can discuss its own budget as well as that of the Union, it can only make recommendations as it is powerless to direct and enforce amendments.⁴⁷ Similarly, the PAP is empowered to 'make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC ... as well as the strategies for dealing with them',⁴⁸ but these can be ignored. As Mpanyane states, 'the AU policy-making institutions are not obliged to consult with the PAP or seek its input in the decision-making processes'.⁴⁹ This impediment is a consequence of strong sentiments of national sovereignty, attitudes that hamper the AU's efforts to be perceived as a credible political entity.⁵⁰ It has been observed that since its establishment in 2004, the PAP has adopted numerous recommendations and resolutions on a variety of issues, including critical issues on the continent, and yet there is little evidence that the policy-making structures of the AU have taken the Parliament's decisions into consideration.⁵¹ However, Viljoen sees a glimmer of hope, noting that 'although PAP members only raised administrative and financial matters when the Chairperson of the AU Commission appeared at the PAP, the engagement could serve as a precedent for oversight on more substantive issues, including human rights in the future'.⁵²

4.2 Opportunities and prospects

As noted above, criticisms raised against the PAP are both necessary and justified. The inevitable comparison with the European Parliament is inescapable. During the PAP's first session Musila charged that 'there is no need to retain a PAP without utility in the AU'.⁵³ While legislative powers would be the ultimate price for the Parliament, there is also a need to focus on that which the organ can do within the current framework. This part focuses on the PAP's Justice and Human Rights Committee as well as the Office of the President *vis-*

46 Musila (n 29) 10.

47 Art 11(2) AEC PAP Protocol (n 6).

48 Art 11(4) AEC PAP Protocol.

49 Mpanyane (n 3) 4.

50 Buyoya (n 45) 172.

51 Mpanyane (n 3) 4.

52 Viljoen (n 32) 175.

53 Musila (n 29) 8.

à-vis what they contribute in furthering the Parliament's human rights mandate. The part furthermore analyses the PAP's model law mandate and how this can be used creatively to enhance the organ's effectiveness.

4.2.1 *Pan-African Parliament's Committee on Justice and Human Rights*

In its Rules of Procedure the PAP established 11 committees the functions of which correspond with those of the AU Specialised Technical Committees.⁵⁴ Among these committees is the Committee on Justice and Human Rights.⁵⁵ According to the Rules of Procedure, the Committee among other functions shall⁵⁶ –

- (a) assist Parliament in its role of harmonising and coordinating the laws of member states;
- (b) promote respect for and develop sound principles of freedom, civil liberties, justice, human and peoples' rights and fundamental rights within the Union.

Since the inauguration of the first parliamentarians in 2004, the Committee on Justice and Human Rights has deliberated and engaged in robust debates on pertinent human rights issues in Africa. Although the ultimate decisions on whether or not to adopt certain resolutions and positions are the prerogative of the Plenary, the Committee can do much to bring important human rights issues to the fore. For example, at its meeting held on 8 May 2018 at its seat in Midrand, the Chairperson of the Committee reported back to the members on the progress on the Resolution on Albinism.⁵⁷ This report was a culmination of earlier efforts in search of a permanent solution to the plight of people living with albinism across the continent. While in some parts of the world threats faced by people living with albinism are mainly medical, such is not the case in Africa. Based on myths and traditional beliefs, people living with albinism are often targeted for killings and mutilations, where their body parts are reportedly used in rituals. In her presentation to the

⁵⁴ Rule 22(1).

⁵⁵ Rule 22(1)(i). The other committees are 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 Cooperation, International Relations and Conflict Resolutions; the Committee on Transport, Industry, Communications, 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; and the Committee on Rules, Privileges and Discipline.

⁵⁶ Rules 26(9)(a) and (b).

⁵⁷ Minutes of the Meeting of the PAP's Committee on Justice and Human Rights held on 8 May 2018 in Midrand, South Africa 3 (on file with author).

Committee at a workshop designed to conscientise its members on the magnitude of the problem, Ikonwosa Ero, the United Nations Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, reported that since 2006 over 600 cases had been reported.⁵⁸ This process culminated in the adoption of the Resolution on Persons with Albinism in Africa on 18 May 2018.⁵⁹ This move was applauded by the University of Pretoria's Centre for Human Rights, which underscored the need to publicise the Regional Action Plan on Albinism in Africa⁶⁰ which has been endorsed by the AU Commission on Human and Peoples' Rights.

Clearly, whether or not certain human rights issues receive the Plenary's attention will depend largely on the activism of the Committee and its Chairperson. Commenting on the power to 'examine, discuss or express an opinion on any matter',⁶¹ Magliveras and Naldi argue that 'this is of enormous potential significance since, if used boldly, the Pan-African Parliament will be able to assume and exercise considerable powers'.⁶² Indeed, this blank cheque, whether it was by design or omission, is a welcome position. At its meeting on 7 August 2018, a member of Parliament from Libya bemoaned the tragic deaths witnessed as scores of people attempt to voyage across the Mediterranean into Europe. He warned that there were widespread human rights abuses by human smugglers and other illegal groups and, as such, the Committee must 'do something about it'.⁶³ In response, the Chairperson remarked that indeed it is tragic that 'Africa is emptying itself into the Mediterranean'. He went on to assure members that a request would be made to the President to undertake a fact-finding mission in Libya so as to make representations to the Parliament from an informed basis.⁶⁴ If this proposed fact-finding mission materialises and the Plenary finally debates the situation in Libya, it will serve as a good example of what an active committee can achieve. As its Chairperson noted, once findings are concluded and presentations are made to the President, the committee would have discharged its mandate and will be powerless on how the matter proceeds.⁶⁵ Sadly, close to two

58 Minutes of the Committee on Justice and Human Rights (n 57) 4.

59 PAP.4/PLN/RES/05/MAY.18.

60 See Centre for Human Rights 'Pan-African Parliament adopts a Resolution on Persons with Albinism in Africa (PAP.4/PLN/RES/05/MAY.18)' 1 June 2018, https://www.up.ac.za/en/faculty-of-law/news/post_2689958-pan-african-parliament-adopts-a-resolution-on-persons-with-albinism-in-africa-pap.4plnres05may.18 (accessed 30 August 2018).

61 Art 11(1).

62 Magliveras & Naldi (n 8) 224.

63 Author attended the Committee's sitting.

64 As above.

65 As above.

years after this sitting, the PAP has not undertaken this fact-finding mission.

The power to undertake fact-finding missions indeed is a powerful tool in terms of what the Committee can achieve. For example, during the so-called Arab Spring which engulfed a number of countries in North Africa, the Committee on Cooperation, International Relations and Conflict Resolution undertook a fact-finding mission in Libya and also went on goodwill missions to Tunisia and Egypt. Magliveras and Huliaras acknowledge these efforts but are quick to caution that, unfortunately, 'the most that they can do is to report back [and] any meaningful liaison with the citizens of the affected countries is clearly missing'.⁶⁶ Although this caution is not without reason, it must be noted that even in the absence of any concrete action, the PAP's involvement sends a message, first to the parties involved and, second, to the population or civilians affected, that what is happening has not gone unnoticed. One only needs to look at what is currently happening in Southern Cameroon to appreciate the dangers of having a situation unfold away from the scrutiny of the international community and the glare of news cameras. For more than two years, the English-speaking South's fight for independence has morphed into a full-blown armed conflict, yet very little action has come from any international organisation, particularly the AU which preaches African Solutions to African Problems.⁶⁷ In attempting to explain the organisation's lack of action in Cameroon, Hendricks and Kiven reason that perhaps the AU is hamstrung by the fact that the grievances and conflict in that country are separatist in nature.⁶⁸ They add that because Cameroon's territorial integrity is at stake, the AU has simply aligned its attitude to that of its predecessor, the OAU, on the inviolability of national borders and has characterised the conflict as an internal affair.⁶⁹

If availed with the external support it requires, the Committee on Justice and Human Rights no doubt is in a position to spearhead robust debates on human rights issues affecting the continent. Although issues of high turnover have been noted, the Secretariat

⁶⁶ Magliveras & Huliaras (n 44) 285.

⁶⁷ See *News24* 'The crisis in Southern Cameroon' 6 April 2018, <https://www.news24.com/MyNews24/the-crisis-in-southern-cameroon-20180406> (accessed 1 August 2018). See also K Betek & E Etchi 'Southern Cameroon's crisis: Granting Southern Cameroons independence one day at a time' 4 May 2018, <http://www.cameroonintelligence.com/southern-cameroons-crisis-granting-southern-cameroons-independence-one-day-at-a-time/> (accessed 1 August 2018).

⁶⁸ C Hendricks & G N Kiven 'African Union needs a more robust response to conflict in Cameroon' *The Conversation* 2 March 2020, <https://theconversation.com/african-union-needs-a-more-robust-response-to-conflict-in-cameroon-132449> (accessed 20 June 2020).

⁶⁹ Hendricks & Kiven (n 68).

has also endeavoured to keep parliamentarians informed about various aspects that have a bearing on how they discharge their mandate. For example, the Secretariat organises committee-specific workshops so as to enable parliamentarians to debate from an enlightened position.⁷⁰ These workshops are the equivalent of public consultations in national legislatures.⁷¹ Further, the Secretariat also invites relevant stakeholders to make presentations and this goes a long way in equipping members of parliament for their tasks. For example, at its sitting on 7 August 2018, the Committee on Justice and Human Rights was briefed on the African Peer Review Mechanism (APRM)⁷² where the Mechanism's objectives, operations and challenges were shared. More importantly, the presentation also outlined the role of parliamentarians in the APRM processes.⁷³ The following day the Committee sat through a presentation by Amnesty International on 'The Status of Human Rights in Africa'.⁷⁴ These efforts by the Committee and the Secretariat indicate a strong willingness to deliver on the PAP's human rights mandate. While awaiting legislative powers for the PAP as an organ, the Committee on Justice and Human Rights can – through activism by its members – manoeuvre within the limited space available and, by so doing, cast the spotlight on human rights issues of concern to the Plenary and the AU as a whole.

4.2.2 *Office of the President*

In his first session after having been sworn in as a member of the PAP, Julius Malema, leader of South Africa's radical opposition, the Economic Freedom Fighters (EFF), challenged what had been presented as the President's report.⁷⁵ He queried the presentation of what he termed 'the President's visits' as activities of the office of the President and added that through such reports, Plenary must be 'getting the State of Africa'.⁷⁶ While these remarks may seem harsh, there indeed are justifications for demanding more than merely an activities report. In the Rules of Procedure the Parliament's President is burdened with the duty to 'follow up the implementation of the

70 Interview with PAP Secretariat staff member, 8 August 2018, Midrand, South Africa.

71 As above.

72 Author attended the Committee's sitting.

73 As above. The presentation, titled 'African Peer Review Mechanism processes and the Pan-African Parliament' was made by APRM legal officer, Ms Mary Izobo.

74 Author attended the Committee's sitting.

75 See <https://www.youtube.com/watch?v=9m2T76j4w14> (accessed 30 September 2018).

76 As above.

decisions of the Bureau and Parliament'⁷⁷ as well as to 'represent Parliament in its relations with outside institutions'.⁷⁸ The wording of these duties does not prescribe how they must be exercised, thus leaving ample room for the President to manoeuvre. While acknowledging that in the absence of concrete powers the PAP risks being a useless organ, Van Walraven adds that, however, 'much depends here on the diplomatic abilities of the Parliament's President'.⁷⁹

Indeed, in the absence of explicit limitations on how the President must go about following up on the decisions of the Parliament or promoting its resolutions, much can be achieved through an 'activist' President. Writing in the context of the United Nations' Secretary-General (UNSG), Chesterman notes that the difficulty in carrying out the duties of UNSG lies in the fact that the UN Charter does not clearly define the duties of the office.⁸⁰ However, adopting the same argument, Traub adds that the positive aspect of this ambiguity in powers and functions is that 'the political space available to a Secretary-General varies according to his or her ambitions and diplomatic gifts'.⁸¹ Although the analogy between the UNSG and the PAP President is not entirely accurate, Chesterman and Traub's reasoning may be extrapolated to the Pan-African Parliament's President.

Because the President is also empowered to 'rule on the admissibility of draft resolutions and amendments thereto in consultation with the Bureau',⁸² he plays an essential role in determining what ends up before the organ's plenary. Although political considerations will always play a role in organisations of an international nature, the Parliament can also benefit from being led by an individual who is 'generous' in letting 'sensitive' resolutions onto the plenary's agenda. Beyond presiding over debates, the President also is responsible for advocacy, particularly in relation to model laws. This is discussed in detail below.

77 Rule 18(1)(e).

78 Rule 18(1)(f).

79 Van Walraven (n 3) 214.

80 S Chesterman 'Introduction: Secretary or General' in S Chesterman (ed) *Secretary or General? The UN Secretary-General in world politics* (2007) 1.

81 J Traub 'The Secretary-General's political space' in Chesterman (n 80) 186.

82 Rule 18(1)(d).

4.2.3 *Making sense of the model law mandate*

On 6 and 7 August 2018 parliamentarians participated in a workshop on 'Continental Disability Legislation and Other Policy Instruments'. This was conducted at the PAP's seat in Midrand, South Africa.⁸³ At this workshop the PAP's legal officer took parliamentarians through the organ's mandate to make model laws. That the PAP is meant to evolve 'into an institution with full legislative powers', elected by universal suffrage, is not in question. However, prior to this emancipation being achieved, it is mandated to 'work towards the harmonisation or coordination of the laws of member states'.⁸⁴ While this function no doubt would be effectively discharged by a parliament with full legislative powers, it still provides an opportunity for the PAP to contribute to Africa's human rights agenda.

Through its model law function, the Parliament can set normative standards relating to pertinent human rights issues such as the protection of political prisoners, the rights of women, the conduct of elections and police accountability. Even in the absence of legislative powers, one wonders whether there is an argument to be made that perhaps in the long term such model laws may, even in the absence of domestication, become soft law. According to the PAP's legal officer, once adopted, a model law has persuasive force.⁸⁵ This assertion, however, is not entirely correct and is based more on hope than on fact. The advocacy and promotion of model laws among member states rest on the Office of the President. Because countries have no obligations to 'pay attention' to the PAP's model laws, this is not an easy task. One does not need to look further to note that in undertaking this task, notions of sovereignty will always constitute the most significant challenge to the President. Countries with poor human rights records seldom entertain any external influences on how to manage their 'internal affairs'. Hence it will be interesting to observe how the President will navigate these murky waters.

In light of the overwhelming probability that the PAP's model laws, particularly those with serious human rights implications, will be ignored, one wonders whether there is wisdom in attempting to exercise the 'harmonising laws' mandate just yet in the current political climate. To date, the PAP has adopted two model laws, the African Union Model Law on the Protection of Cultural Property and Heritage, and the Model Law on the Medicines Registration

⁸³ Author attended the workshop.

⁸⁴ Art 11(3) AU PAP Protocol (n 21).

⁸⁵ Interview with PAP Secretariat staff member, 9 August 2018, Midrand, South Africa.

and Harmonisation in Africa. While it is easy for the organ to adopt laws that are unrelated to human rights, it remains to be seen how proposals to debate and adopt purely human rights model laws will be dealt with.

5 General observations

The PAP is exactly what its architects intended it to be. That a provision was inserted clarifying that the organ will only exercise legislative powers when the Assembly so decides is the clearest indication that the *status quo* is not accidental. To underscore the fact that the Parliament will have a controlled evolution, the wording of article 2(3),⁸⁶ as Mpanyane notes, 'indicates an aim to which to aspire, rather than providing a definite objective to be achieved within a specific timeframe'.⁸⁷ On this evidence, the fate of the PAP lies in the hands of member states,⁸⁸ by design, and any changes will have to be initiated from the top, by the Assembly of Heads of State. With a hint of frustration, Van Walraven remarks that, put differently, the Parliament has been subjected to an unlimited spell of probation.⁸⁹

The frustration exhibited by Van Walraven is a common theme in a majority of publications on the PAP. However, the appropriate organ to direct such criticism of the Parliament is the AU Assembly. From the evidence, the Assembly is unwilling to cede power to other organs, or at the very least share. The relationship between the organisation's Peace and Security Council (PSC) and the Assembly is instructive in this regard. Despite the PSC's reputation as the premier organ in peace and security matters on the continent, its decisions authorising the use of force – which are an embodiment of peace and security matters – remain subject to the approval of the Assembly prior to implementation.⁹⁰ On this point, Mpanyane argues that policy organs of the AU must cede more power to the PAP to increase its autonomy.⁹¹ While this partly is true, in reality the Assembly is the only organ wielding all the power, and this is not about to change.

86 It provides that the ultimate aim of the Pan-African Parliament is to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage.

87 Mpanyane (n 3) 3.

88 Art 2(3).

89 Van Walraven (n 3) 212.

90 In December 2015 the PSC decided to send an intervention force to Burundi but this was thwarted by the Assembly.

91 Mpanyane (n 3) 1.

At the heart of how the AU Assembly behaves are yesteryear notions of sovereignty upon which most member states design their foreign policy. The AEC Treaty came into force shortly after its adoption, yet for close to 10 years the idea of a Parliament never saw the light of day. Although much has been written about the change of attitude that came with the transformation of the OAU to the AU, the same factors that hindered the immediate creation of a PAP close to three decades ago remain, and are the same factors that stand in the way of the PAP's transformation into a full legislative body. Because of these outdated notions of sovereignty, Fagbayibo even asserts that contrary to the view that the power lies with the Assembly, in reality member states simply have not empowered any organ, including the Assembly.⁹² He therefore concludes that, for this reason 'the AU remains a mere intergovernmental forum, where real decision making powers are held by member states'.⁹³

Sadly, beyond the Assembly, state-centric attitudes are also evident even at the PAP. Viljoen observes that in its operations and priorities, the Parliament has 'too often reflected interests of its members, rather than the people of Africa, whom they represent'.⁹⁴ This is a serious indictment because parliamentarians are supposed to represent 'all the peoples of Africa'.⁹⁵ Indeed, the fourth preambular paragraph to the Parliament's founding Protocol records that 'the expectation is that the Pan-African Parliament will provide a common platform for African peoples ... to become more involved in discussions and decision-making on the problems and challenges facing Africa'.⁹⁶ This criticism is linked to the observation that beyond their attitudes while in parliament, the criteria for choosing members of parliament themselves are not representative of Africans in a meaningful sense.⁹⁷ Again, the EU Parliament is used as a measure and the direct election of parliamentarians is singled out for praise. However, Viljoen cautions, correctly so, that although the EU Parliament indeed is an example to emulate, it must also be recalled that its members only became directly elected from 1979.⁹⁸ In the same vein, Mpanyane adds that the Parliament acquired all of these prerogatives 'over a long period of time and through a fair amount of struggle'.⁹⁹ While these are fair points, Magliveras and Huliaras add another dimension

92 B Fagbayibo 'The (ir)relevance of the office of the Chair of the African Union Commission: Analysing the prospects for change' (2012) 56 *Journal of African Law* 16.

93 As above.

94 Viljoen (n 32) 174.

95 Art 2(2).

96 Preamble para 4 AEC PAP Protocol (n 6). See also Magliveras & Naldi (n 8) 224.

97 Viljoen (n 32) 174.

98 As above.

99 Mpanyane (n 3) 5.

to the question of membership. They argue that in instances where a national parliament is the outcome of rigged elections or where national delegates are sent by non-democratic regimes, such members of parliament cannot be viewed as representing their countries, let alone the peoples of Africa.¹⁰⁰ They conclude that in their view, parliamentarians elected by means of fraudulent, violent or highly-undemocratic elections, or appointed following a *coup d'état*, should be excluded from the PAP.¹⁰¹ While there are merits to this argument, the AU's interpretation of the principle of sovereign integrity poses a stumbling block to such proposals being adopted.

Also worth mentioning in relation to the membership of the PAP is the composition of members of parliament from member states. While requiring that one of the five is female,¹⁰² the AEC PAP Protocol also demands that the composition reflects the diversity of political views in the said country.¹⁰³ This entails the inclusion of members of parliament from opposition benches. In the sphere of human rights, this diversity gives opposition members of parliament, who usually are victims of human rights abuses in their respective states, the opportunity to get some issues on the agenda of the PAP and, ultimately, publicising cases that risk going unnoticed.

While the PAP indeed is inadequate on its own, close cooperation with other AU organs will go a long way in enhancing its stature and increasing its influence. By banding together to speak with one voice, such organs will be in a better position to influence member states as well as the Assembly to adopt certain decisions relevant to the promotion and protection of human rights. The impact of lack of coordination is summed up by Dinkopila who states:¹⁰⁴

Unfortunately, one of the most regrettable institutional mishaps of the AU human rights system is the failure of these architects to clearly and succinctly provide for the relationship between the various AU institutions. For example, the relationship between the African Court on Human and Peoples' Rights (African Human Rights Court) and the African Commission on Human and Peoples' Rights (African Commission) remained unclear until well after 2010. This lack of attention to detail continues to characterise the AU human rights system and is likely to inhibit its growth. 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.

100 Magliveras & Huliaras (n 44) 282.

101 As above.

102 Art 4(2).

103 Art 4(3).

104 Dinokopila (n 8) 303.

Interestingly, the only cooperation provided for in the PAP's founding Protocol relates to cooperation with similar organs. Titled 'The Relationship between the Pan-African Parliament and the Parliaments of Regional Economic Communities and National Parliaments or Other Deliberative Organs', article 18 is silent on the PAP's possible cooperation with other AU organs, particularly those burdened with a human rights mandate. Worse still, the close cooperation referred to in article 18 is explained to mean convening annual consultative *fora* to discuss matters of common interest. Magliveras and Naldi explain that these meetings will be between equal partners, meaning that the PAP's ability to exert its influence will be significantly diminished.¹⁰⁵

When the PAP was inaugurated in 2004, 'the occasion was marked by optimistic speeching, in which stress was laid on issues like the implementation of NEPAD and a potential role for the Parliament in the latter's peer review mechanism'.¹⁰⁶ Unbelievably, for more than ten years thereafter, there was no formal contact between the APRM and the PAP's Committee on Justice and Human Rights until some time in 2015 when the former was invited to make presentations to the Committee.¹⁰⁷ What can be achieved through cooperation cannot be underestimated. When the APRM had no chief executive officer and was struggling with budgetary issues, it undertook a joint visit to the AU Commission by the Mechanism and the Committee on Justice and Human Rights to eventually have a chief executive officer appointed.¹⁰⁸ Prior to this appointment, the APRM at times was unable to convene its mandatory meetings.¹⁰⁹ Further, since this formal engagement began, the Committee established a sub-committee, the Pan-African Parliament Network on the African Peer Review Mechanism. Through this sub-committee, the Committee on Justice and Human Rights facilitates the tabling of APRM reports before the plenary.¹¹⁰ Based on this evidence, the PAP must do more to engage with other AU organs so as to ensure that all continental organs with a human rights mandate speak the same language. Further, this will present an opportunity to pool resources, something that the AU does not have in abundance.

Another important observation to make is that although critics and commentators are quick to point fingers at parliamentarians, these members of parliament are also frustrated by the organ's lack

105 Magliveras & Naldi (n 8) 228.

106 Van Walraven (n 3) 211.

107 Interview with Secretariat staff member, 8 August 2018.

108 Interview with Committee's clerk, 7 August 2018.

109 As above.

110 As above.

of meaningful powers. Fabricius comments that the Parliament is just a 'talk-shop discussing ... many serious African issues but in a bubble divorced from the real world'.¹¹¹ However, this statement is not entirely correct. While it indeed is correct that the PAP discusses serious issues, it is incorrect that parliamentarians do so in a bubble divorced from the real world. On his own version, Fabricius indirectly admits as much. He quotes parliamentarians from Benin, South Africa and Uganda complaining about the PAP's lack of oversight and legislative powers.¹¹² If these members of parliament indeed were discussing issues 'in a bubble', and were convinced that the Parliament's powers are sufficient, they would not brand the organ 'a waste of money' or remark that '[i]f we are not making laws, then what's the point of being here?'¹¹³ That the PAP has a sub-committee on transformation is evidence that members of parliament acknowledge their limitations and desire changes. The PAP identified six strategic objectives in its 2013-2017 Strategic Plan corresponding with its priority areas and, notably, strengthening its legislative functions stood out as an objective.¹¹⁴

6 Conclusion

The Pan-African Parliament's capacity to contribute to the continent's human rights agenda is weak. This is not a novel observation. Indeed, the organ's lack of oversight and legislative powers is almost 'fatal' to its intended function. Clearly, the PAP was deliberately created as a skeleton, with an intention to progressively add flesh as and when the AU Assembly decides to do so. However, although this may be understandable given Africa's political and financial realities, there is a danger that for a very long time the skeleton will remain just that. In light of this conclusion, there is value in exploring how the Parliament can enhance its capacity *vis-à-vis* human rights even in the absence of amendments to its legal framework. The article argued that the answers to this inquiry are two functionaries of the organ, namely, the Committee on Justice and Human Rights and the Office of the President. Armed with the power to 'examine, discuss or express an opinion on any matter', the two can, through an activist approach, venture beyond the powers expressly defined in the PAP's founding Protocol. Similarly, attempts can be made to influence human rights trajectories in member states through the 'harmonisation of

111 P Fabricius 'Does Africa really want a continental parliament?' 19 October 2017, <https://www.dailymaverick.co.za/article/2017-10-19-iss-today-does-africa-really-want-a-continental-parliament/> (accessed 30 September 2018).

112 As above.

113 As above.

114 PAP Strategic Plan 2014-2017 (n 15) 25.

laws' function. However, this avenue is weak, as the Parliament's model laws simply may be ignored without consequence. While comparisons between the PAP and the European Parliament are irresistible, criticism of the former based on what the latter has become is harsh. Considering the journey that the EU Parliament has travelled, perhaps it is too early to write off its African counterpart. Finally, the article has also demonstrated that the perception that parliamentarians operate under the illusion that the organ's legal framework is sufficient is false and must be challenged. The PAP is weak and the members of parliament know this. That the organ has a sub-committee on transformation in itself is a clear statement that parliamentarians are not content with the *status quo*.