

The role of African Union law in integrating Africa

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Abstract

This article traces how the development of regional law is linked to the state of regional integration in Africa. Given the prominent role European Union law plays in the functioning of the European Union, the question is posed whether there is similar scope for the development of 'African Union law', a term not established hitherto. Initially devoid from the necessary supranational elements required to adopt law that would automatically bind member states, the African Union is leaning towards a functionalist approach paving the way for transfer of sovereign powers to African Union institutions. It is argued that law-making capacity, be it through the activities of the Pan-African Parliament, the Peace and Security Council or the African court system are necessary requirements to accelerate the process of regional integration. African Union law will hold member states accountable to comply with international and continentally agreed standards on, *inter alia*, democracy, good governance and human rights.

Keywords: African Union; European Union; African Union law; African Union institutions; state-centrism; supranationalism; supremacy; regional integration

Introduction

European integration through the European Union (EU) and the development of European Union law can be regarded as parallel processes in many respects. All EU members are bound to follow EU law and their courts must provide a remedy for those who seek to enforce their rights under it. In the United Kingdom, EU law has been made a compulsory subject for students wanting to practice as lawyers¹ Teaching law in the United Kingdom, a reluctant EU member at most, enforces the realisation of just how deeply EU law impacts the national legal systems of members. EU law is, to a large extent, the glue that binds European integration together.

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Despite African integration being high on the agenda of African legal scholars, politicians and bureaucrats, the term 'African Union law' is largely unknown. The study of African Union (AU) institutions and comparative African legal systems abounds, with the latter focusing on the national legal systems of individual AU members. Within the context of the prominence of EU law, this article will address the question whether there is similar scope for development of law emanating from the AU. In other words, what is the capacity of the AU to adopt legally enforceable decisions that will bind its member states as a matter of supreme law? In doing so, this article will trace how the development of a regional legal system can be linked to the state of regional integration in Africa. It will suggest that the development of AU law is a necessary step for the deepening of continental integration by critically reflecting on the current and potential role of AU institutions.

Integration theories and terminology

Many political theorists have attempted to define supranationalism,² the holy grail of regional integration, and apparent touch stone for the creation of regional law. The concept of supranationalism was first used to characterise the high authority in the European Coal and Steel Community.³ While some regard it as referring to an institutional hierarchy, others relate it to unitary or federal structures⁴ or the demise of sovereignty. Haas supports the interpretation that supranationalism refers to a 'type of integration in which more power is given than is customary in the case of conventional international organisations, but less than is generally yielded to an emergent federal government'.⁵ More recently, authors such as Reinisch prefer to identify the following characteristic elements: majority voting in decision-making institutions; the power to bind outvoted members; a system of obligatory settlement of disputes; direct effect; and supremacy.⁶ These elements speak to the binding and enforceable nature of decisions and the supreme status they would enjoy in a hierarchy of norms which form the essence of law-making capacity and thus the requirement for the development of regional law. Essential elements of supranationalism can therefore be regarded as *sine qua non* for regionally enforceable law, be it in Europe or Africa.

The AU and its predecessor, the Organization for African Unity (OAU), have been classified as interstate as opposed to supranational by commentators such as Olivier *et al* in 2004.⁷ Interstate cooperation or state-centrism can be described as an altogether more modest form of integration where the focus remains on the participating units instead of the jointly established and overarching legal persona. According to O'Neill, the state-centric paradigm 'focussed theoretical attention on the durability of the nation state' and regards regionalism as another arena for international politics.⁸ Within a state-centric configuration the inability of taking enforceable decisions prevents the establishment of a regional legal system through institutional action. The question is whether such an assertion remains valid ten years later. Over the said period, the AU, spearheading African integration, has made significant progress to cement the building blocks of regional integration. Given the legal context of the present discussion, supranationalism in the AU will be determined by examining its institutions, their powers and decision-making capacity, as well as sovereign powers transferred from member states to these organs. The level of achievement in this regard will be indicative of the state of evolution of AU law. Institutional development will be traced through the tentative evolution of the Pan-African Parliament (PAP), the African Commission on Human and Peoples' Rights (ACHPR), and an AU courts system, as well as the African peace and security architecture and their concomitant decision making powers. Likewise AU institutional action and instruments directing action against absolute sovereignty by imposing democratic governance and human rights standards on member states, are discussed below.

Haas further regards the process of community formation and embracing of a separate identity as important integration criteria.⁹ Although the AU has not challenged nationalism through transcending existing nations in any way, it has succeeded in mainstreaming African unity and pan-Africanism at an ideological level. The political and ideological goals of the AU have been clearly communicated, although there has been limited success at the level of delivery through enabling treaty provisions, and most importantly, through actual institutional practice.

The AU is often compared to the EU but differs significantly at an institutional level.¹⁰ Similarly, their historic integration experiences and conditions differ vastly. Where the European integration process aimed to make economic interests of member states

mutually entwined,¹¹ African integration was built on the belief that strong and impenetrable sovereign states were desirable. While post-colonial ideology paid lip service to pan-Africanism, politicians stopped short of mustering the political will to move beyond interstate cooperation. African states expressed a strong commitment to sovereignty yet failed to produce the strong national institutions needed – creating instead national enclaves of failed governance.¹² Yet, certain similarities with the European integration experience can be identified. The latter was a slow and incremental process, as illustrated by Monet’s view that the European Coal and Steel Community was ‘integrating Europe by stealth’ for example.¹³ European integration, like African integration, has also experienced many setbacks and periods of stagnation, such as the recent Eurozone crisis, the decline in national economies within the EU and the recent threat of the UK either to withdraw from or to renegotiate its membership conditions. However, in Europe, problems have been dealt with through constitutional and functional innovations¹⁴ as reflected in a flexible integration paradigm. Functionalism promotes ‘functional cooperation between states, engaging them in cooperative ventures... to establish functionally specific agencies, transcending national boundaries, managed by technocrats, not influenced by political ideology or individual states.’¹⁵ Schuman and Monnet are regarded as proponents of this more pragmatic approach.¹⁶ The EU has followed a hybrid approach combining features of the two dominant integration theories, viz, supranationalism¹⁷ (federalist models) and state-centrism (intergovernmentalism and confederalism).¹⁸

A range of alternative or variant theories have emerged in the European context since the late 1980s, replacing the intergovernmental/supranational dichotomy by emphasising the interests of strategic actors and (constructivist) approaches driven by norms, ideas and principles.¹⁹

This article seeks to suggest that Africa is, despite formidable stumbling blocks, likewise being integrated by stealth through the adoption of functionalism and that the incremental development of AU law is an important tool in this process. Although state-centrism may still be regarded as the dominant integration paradigm within the AU, the AU has embraced a variety of supranational impulses responding to strategic needs that have influenced norms and principles, as will be indicated. To

illustrate how a regional legal system might function in relation to national legal systems of member states, it is useful to consider the EU model.

Hierarchy of norms within the EU

In order to understand the structure and imperative of EU law, it is important to consider the vertical order within the system, meaning that legal acts lower down the hierarchy will be subject to legal acts of a higher status.²⁰ In theory, different approaches may regulate the relationship between regional law as a form of international law and national legal systems of individual participating states. Under the traditional dualist model, international law and national law of a state belong to two distinctly different legal orders.²¹ When a state decides to become a party to a treaty, it must first obtain the necessary constitutional approval before it can proceed to bind the state at an international level. Dualist thinking holds that such a treaty must then be incorporated into the domestic or national legal system of states. Only then can national courts apply treaty law as transformed into the law of the land. Domestic application of international law depends on this act of transformation which theoretically eradicates the possibility of a conflict between international and domestic law. Customary international law obligations, which are by nature uncodified, are generally regarded as part of the law of the land unless inconsistent with national legislation and, should there be a conflict between custom and legislation, legislation will prevail.

This approach is followed by many former British colonies, as was the case in South Africa before the adoption of the 1993 Constitution²² which abolished the Westminster system.²³ The 1993 Constitution replaced parliamentary sovereignty with constitutional supremacy, a notion that is again reflected in section 2 of the 1996 Constitution.²⁴ Sections 231 and 232 of the 1996 Constitution provide that incorporated treaties and customary international law must comply with the constitution above all as the ultimate yardstick for legality. The idea that legislation (including legislation incorporating treaties) can be judicially reviewed to comply with constitutional requirements is not part of the British legal tradition. Similarly, customary international law will only form part of the law of the land as long as it complies with both the constitution and acts of Parliament.

Monist thinking, on the other hand, regards international and domestic law as different components of the same system. Once a state has decided to become a party to a treaty, that treaty will automatically become part of its national law and courts will apply it as such. In some systems it will enjoy the same status as legislation, while in others it might even override conflicting legislation.²⁵ The South African Constitution of 1996 introduces elements of monism through section 231(4) which provides that 'a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. 'Self-execution' means that relevant treaty provisions will enjoy 'direct effect' in domestic law. No incorporating legislation will thus be required to make such provisions part of domestic law although it would remain subject to the constitution and parliamentary legislation. Kirsch identifies a trend of 'creeping monism' in many common law countries, provoking a globalisation of national constitutions on the basis of international or regional norms.²⁶

The monist approach is the most directly linked to the 'direct effect' component of supranationalism: Norms must be sufficiently clear, precise and unconditional to be invoked before national courts.²⁷ Normally the constitutional law of states will govern the status international law enjoys in the national legal order. However, if legislative powers are granted in terms of the constitutive treaty of a regional integration regime, such acts will enjoy direct effect by virtue of sovereign powers voluntarily transferred by member states to that effect. In the case of the EU, the European Court of Justice (ECJ) developed case law endorsing the direct effect of Union Law as an inherent characteristic of EU law.²⁸ In the case of *Costa v. Enel*,²⁹ the ECJ underlined the autonomous and supreme nature of Community Law,³⁰ which will – in case of conflict between a directly applicable community norm and a norm of national law – prevail. The primacy or supremacy of European Community (EC) law places it at the apex of a hierarchy of international and national norms as envisaged by Reinisch's understanding of supranationalism.

Within the EU, the principle legal instruments are regulations, directives and decisions. The EU treaties stipulate the conditions for the legality of such instruments. Regulations bind and are directly applicable in all member states. Directives do not necessarily address all member states, and provide flexibility by leaving some choice as to the form and method of implementation to such states. They are binding in

respect of the end to be achieved. A decision binds only those states to which it is addressed in its entirety. All these instruments presuppose supranationalism to some degree. The Lisbon Treaty operates as a constitutional treaty and stipulates the following tiers of norms in descending order: the Constituent Treaties (ie, Treaty on the European Union, Treaty on the Functioning of the European Union) and the Charter of Rights; general principles of law; legislative acts; and implementing acts.³¹

The *raison d'être* for EU law lies in the transfer of powers from member states to EU institutions. Such powers are not open-ended but limited to specific areas identified in treaties. The primary sources of EU law are thus the main treaties establishing the EU (originally the European Economic Community, EURATOM, and the Maastricht Treaty, which were amended by the Treaties of Amsterdam, Niece and Lisbon). It is against this background that the focus will now turn back to the AU in an effort to address the dual questions: Have member states transferred sovereign powers to the AU; and is the AU endowed with law-making capacity?

Legal nature of the AU and its ability to create law

The legal nature of the AU and its capacity to create law are separate yet interlinked questions. The AU and its institutions are established under international law by means of treaty. Such treaties determine the AU's structures, powers and functions but do not establish AU law as such. A second requirement must be complied with: Does the AU have the power to take binding and enforceable decisions? Direct effect and supremacy of such decisions will point to elements of supranationalism needed to create AU law.

It is a well-settled principle of international law that international organisations such as the AU might enjoy international legal personality. Whether such personality exists will hinge on the actual constitutional status of the organisation. An important indicator of personality will be the capacity of the organisation to conclude treaties with states and other organisations and the status it has been given under municipal law.³² In the *Reparations* case³³ the International Court of Justice confirmed that the United Nations had indeed the necessary legal personality to bring actions against states. Although the Constitutive Act of the AU is silent on the matter, the fact that the AU has entered into treaties, adopted a vast number of treaties and been a party

to international disputes are indications of the acceptance of its international legal personality.

Both the OAU and the AU were established by means of multilateral treaties open to accession by African states. As treaties, the Charter of the Organization of African Unity³⁴ and the Constitutive Act of the African Union³⁵ are law-creating instruments listed as a source of international law by Article 38(1) of the Statute of the International Court of Justice. These treaties are categorised as constitutive instruments similar to the UN Charter, with the purpose to establish and act as constitutions for the institution at hand.³⁶ The legality of all actions by the AU organs will have to fall within the scope of the constitutive treaty in order to comply with requirements of legality.³⁷

The rules underlying national constitutional law, the necessary changes having been made (*mutatis mutandis*), inform the interpretation of international constitutive instruments. It implies the presence of bodies with authority in the legislative, executive and judicial domains. Material elements such as human rights or economic and trade regulation often appear in separate treaties. Neves acknowledges that highly diverse models of 'global domestic politics' will be reflected in the international order. Consequently he suggests that certain supranational powers are presupposed when examining constitutionalisation of the international order.³⁸ Constitutionally speaking, a key condition for the construction of supranationality would entail broad norms and decisions directly binding citizens and organs of state.³⁹ The AU institutions and powers under the Constitutive Act will be assessed against this background with a view to establish the capacity to bind its member states and their citizens.

Constitutive instruments of the OAU and AU: Purpose and powers

The OAU was established in 1963 to consolidate unity and lead the struggle against all forms of colonialism. The recognition of an 'inalienable right of all people to control their own destiny' as expressed in the preamble of the OAU Charter is reflected in the importance attached to sovereignty and territorial integrity. The purposes of the OAU identify the defence of sovereignty, territorial integrity and independence, regarding these as preconditions for the eradication of colonialism.⁴⁰

Absolute sovereignty developed into a mantra that shielded Africa from many instances of foreign intervention under the OAU.

The charter is silent about regional law and the taking of binding decisions but does call on member states to harmonise their policies in order to achieve the purposes set out for the OAU.⁴¹ No mention is made of legal harmonisation, the transferring of any sovereign powers or endowing AU institutions with binding decision-making capacity. The OAU thus fits the definition of an interstate organisation devoid from supranational powers. The purposes of the OAU, set out in article 2, are echoed in the OAU's principles (article 3) listing sovereign equality, non-interference and territorial integrity and linking them to independence. Here too, no scope is allowed for any form of external law, including supranational law of African origin, onto the domestic legal systems of member states. Freed from the yoke of colonialism but besieged with new challenges at a continental level, the OAU became defunct. Replaced by the AU in 2001, continental priorities shifted to uniting Africa through increased regional integration. The AU's integration agenda was driven by efforts towards economic cooperation but also a new political emphasis on democratisation, human rights, good governance and the rule of law.⁴²

The AU is 'guided by a common vision for a united and strong Africa'.⁴³ The preamble of its Constitutive Act contains broad indicators permitting the development of continental law by referring to the promotion and protection of human rights, consolidation of democratic institutions and provisions to ensure good governance and the rule of law. Though one might argue that these goals can be achieved only through law, no direct and few indirect references are made in the act to the possibility of enforceable action.

The objectives of the AU to defend the sovereignty, territorial integrity and independence of its member states, coupled by a commitment to accelerate (only) political and socio-economic integration⁴⁴ leave little room for an interpretation that legal integration is included as an objective. Although most of the objectives and principles⁴⁵ are phrased as soft commitments of promoting and advancing such integration, instead of regulating and exercising powers, one might argue that some measure of legal regulation would be inevitable to shoulder the burden. A clear authorisation of AU intervention in a member state, in principle a violation of

sovereignty and territorial integrity, is provided for by paragraph (h) of article 4, and may take place pursuant to an assembly decision in respect of war crimes, genocide and crimes against humanity. The question that needs to be considered now is whether the AU, as an international legal person, has the power to create law through its organs?

The purpose of this article is not to discuss the individual AU organs in detail, but rather to assess whether their powers and functions endow them with law-making capacity. Powers granted by the Constitutive Act, as the constitution of the AU, can be regarded as original powers flowing from an original source of law. The validity of a particular measure taken by an AU institution must be established by considering the source document. The Constitutive Act refers to nine organs (or categories of organs in the case of financial institutions):⁴⁶ the Assembly of the Union; the AU Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representatives Committee; the specialised technical committees; the Economic, Social and Cultural Council; and the financial institutions. Some organs are however regulated by separate or secondary treaties as pointed out below. The power granted to the assembly to establish additional organs is an important aspect.⁴⁷ In 2002, the Peace and Security Council was established and added as an organ of the AU.⁴⁸

The AU Assembly

The AU Assembly is the 'supreme organ'⁴⁹ of the AU, composed of heads of state and government or accredited representatives, and is empowered to take a wide range of decisions.⁵⁰ Despite the absence of any clarification provided on the meaning of 'supreme organ', one can assume it enjoys the highest position in the hierarchy of AU organs, or that its decisions cannot be challenged by other organs which would include the Court of Justice, as in the case of a supreme or sovereign national parliament.⁵¹ The assembly has powers that might have legal consequences, such as the monitoring of AU policies and decisions; the responsibility to ensure compliance by all member states;⁵² and giving directives to the executive council on the management of conflicts.⁵³ Additionally, failure to comply with decisions and policies may be subjected to sanctions determined by the assembly.⁵⁴ It is interesting to note that non-compliance with policies might

potentially carry the same penalty as non-compliance with decisions. Implementation of such sanctions can be regarded as binding on all member states and therefore present a supranational element to the assembly's powers. The assembly may also impose a range of 'soft' sanctions on a member state that is in default of paying its contributions to the AU, such as the denial of the right to speak at meetings, to vote or to present a candidate for an AU position. Governments which come to power through unconstitutional means may also be suspended from participation in AU activities.⁵⁵ The sanctions associated with non-payment of contributions are therefore similar to penalties faced by a new government taking power outside the scope of the constitution in force at the time. These penalties are devoid of supranational legal content, as they do not have any tangible effect on member states. The assembly further holds the power to determine the structure and functions of the Commission, which is also the secretariat of the AU.⁵⁶

The AU Executive Council

The AU Executive Council (hereafter the council), is composed of ministers of foreign affairs or other ministers or authorities designated by member states to take decisions on policies in common areas of interest.⁵⁷ As indicated by its title, the council is designed to operate at an executive level, being responsible to the assembly under article 13(2) of the AU Constitutive Act. The council is also empowered to monitor implementation of assembly policies.⁵⁸ This is a much more limited and focussed responsibility compared to the assembly's power to monitor implementation of AU policies and decisions as well as to ensure compliance. It can be concluded that the assembly is entrusted with much stronger, potentially enforceable powers within the AU, but also externally among member states, compared to the council.

Specialised technical committees

The specialised technical committees created under article 5(1) are, *inter alia*, responsible to prepare and oversee AU projects, but lack any original decision-making power.

Analysis will focus on the PAP⁵⁹, the ACHPR and the Court of Justice,⁶⁰ which have been established by separate treaties, as well as the Peace and Security Council (PSC) of the AU. The PSC will be the standing decision-making organ for

the prevention, management and resolution of conflicts⁶¹ and was added as an AU organ under the Protocol on Amendments to the Constitutive Act of the African Union adopted in 2003, which will come into operation once ratified by two thirds of AU member states.⁶² The Protocol Relating to the Peace and Security Council of the African Union was adopted and entered into force on 26 December 2003, after being ratified by the required majority of member states of the AU.

The Pan-African Parliament

The Pan-African Parliament (PAP) was adopted through a protocol that entered into operation in 2003.⁶³ Despite claiming to represent all African peoples⁶⁴, the PAP currently has only advisory and consultative powers.⁶⁵ Article 2 states as an ultimate aim the evolvement into an institution with full legislative powers, where members are elected by universal adult suffrage. However, this can only be brought into effect when members agree to amend the said protocol and a separate agreement is thus required. Article 11 further states that the advisory and consultative powers will last for the first five years of its existence, after which legislative powers are to be defined by the AU Assembly.⁶⁶ Initial advisory and consultative powers include possible efforts directed towards legal harmonisation or co-ordination between the member states. Efforts aimed at harmonisation would presumably be governed by separate treaties and would, at most, contribute to a harmonising of domestic legal systems in Africa and thus not lend credibility to the creation of AU law. Moreover, harmonisation efforts are mostly directed towards private and commercial law regimes. This falls outside the scope of enforceable AU decision-making powers.

The evolving of a parliament in the traditional constitutional sense of the word with legislative powers is thus a possibility if certain conditions are met. It is foreseen that the continental parliament will oversee the executive structures of the AU (including the assembly, executive council, the commission and the permanent representative committee) once it is granted legislative power in its second term.

In 2009 a review of the protocol establishing the PAP was requested by the commission as required by article 25 of the protocol. A draft amendment was approved with reservations by the executive council in 2012 for tabling at the 20th ordinary session of the assembly in January 2013, where it was decided that more in-depth consultation was needed.⁶⁷ Bethel Amadi, the president of the PAP, has

commented that 'the PAP is consolidating a revised protocol pertaining to its legislative authority, and looking forward to playing a part in the increased legitimacy of AU institutions'.⁶⁸ These powers are needed to develop 'transnational accountability' and ensure effective implementation of AU policies – thus fully fledged AU law.

As yet, this has not occurred and the debate on the role that the PAP should play continues to rage.⁶⁹ Having reached the end of its first term, commentators express doubt about the PAP's ability to realise the vision of becoming a full legislative body.⁷⁰ The absence of legislative powers with concomitant enforcement capacity, coupled with the fact that members are not directly elected but nominated, are crucial factors standing in the way of the PAP's transformation. Many are sceptical that the wish to accelerate regional integration by addressing the factors identified will ever go beyond political summits and that the PAP will remain an assembly of national parliamentarians. One view identifies the fact that states are 'increasingly resentful of interference in their domestic matters' as a reason for the reluctance of leaders to put their money where their mouths are.⁷¹

If the PAP is to become 'a model of true parliamentary democracy',⁷² which is needed for further regional integration and to present a consolidated continental voice in global politics, it will need to make inroads into the previously sacrosanct domains of national parliaments. Therefore, it is important that the evolving of law-making powers includes the ability to infringe on the sovereignty of member states, in the same way that EU membership qualifies the sovereign rights of members not to legislate contrary to EU Law. Such law-making capacity will require a qualified interpretation of the commitment to the sovereignty of member states pledged by the Constitutive Act of the AU. This tension is well expressed in the words of the Clerk of the PAP when he notes that 'there are still some Member States that see the PAP as a bit of a nuisance, largely because the stronger we become the more we challenge their unfair practices'.⁷³

A further factor to consider is that the PAP may only be vested with law-making powers as defined by the assembly. In effect the assembly, as executive body, will decide on the powers to grant to a body which will end up overseeing the executive. This can result in a competition over competencies and powers where the executive

is reluctant to agree to legislative powers which will counter the current executive dominance.⁷⁴ The need that the PAP and the rest of the AU to speak with one voice underlines the importance that the hierarchy of institutions is settled.⁷⁵

National parliaments of member states are often perceived as natural allies for enhanced regional integration and the expansion of the PAP's powers,⁷⁶ led by the belief that they would be empowered through engaging at a continental level with other parliaments. However, this consideration may not be of much relevance as a factor to speed up the PAP's legislative evolution; majority parties in national parliaments will not have the same influence in a continental parliament and end up unable to influence decisions in ways that will suit national interests and political agendas.

When considering the evolution of legislative powers, one must keep the possible theoretical relationship between the continental parliament and national parliaments in mind within federal or confederal configurations. The nature and extent of legislative powers granted will determine whether a parliament will evolve into a supreme parliament, overriding national parliaments on certain matters, or add an additional layer of legislative authority. Given the lengthy period it took the European Parliament to develop its legislative powers and the low level and slow pace of integration in Africa, it is difficult to see how the PAP will ever develop into a 'supra parliament'. That is however not a requirement for the existence of African Union law, which would merely need some form of, albeit limited, legislative capacity. To pave the way towards law-making powers, the president of the PAP has pointed to efforts by the PAP to assure member states that a transformed parliament will 'coexist with national and regional parliaments in a manner that will not derogate from or erode their powers or national sovereignty'.⁷⁷ Further steps will, however, be needed before the PAP and the rest of the AU can speak with one voice.

In addition to the PAP, regional economic communities (RECs) in Africa have parliaments of their own that contribute to regional integration. These are: the Economic Community of West African States (ECOWAS)⁷⁸, the East African Legislative Assembly (EALA)⁷⁹, the SADC Parliamentary Forum⁸⁰ and the Network of Parliamentarians of the Economic Community of Central African States⁸¹ (ECASS). Generally speaking, the powers of these parliamentary bodies are weak

and limited⁸² and the PAP's relationship with the different regional parliaments remains undefined.

Having considered the PAP's current lack of legislative capacity, analysis will now consider whether the Commission on Human and Peoples' Rights and the Court of Justice are endowed with the capacity to shape AU law.

The African Commission on Human and Peoples' Rights

An African notion of human rights as reflected in various human rights instruments has steadily gained recognition since the adoption of the African Charter on Human and Peoples' Rights in 1981. The Charter recognises a full spectrum of human rights and establishes the ACHPR (not to be confused with the Commission established under article 20 of the Constitutive Act of the AU) to act as a supervisory mechanism. The enforceability of these rights by AU institutions will provide an important indicator of the existence of supranational law.

The ACHPR Commission is a quasi-judicial body charged with monitoring the implementation of the charter and promoting and protecting human and peoples' rights in Africa.⁸³ As part of the African human rights system, the ACHPR has a very broad mandate,⁸⁴ ranging from studies on human and peoples' rights to formulating rules and principles aimed at resolving human rights problems. Although not explicitly stated, it may be argued that the ACHPR's broad mandate to achieve the promotion and protection of human rights includes a possible derivative collective human security mandate.⁸⁵ It may receive communications from state parties about charter violations by other state parties, but also from individuals and non-governmental organisations (NGOs) who are not necessarily aggrieved parties.⁸⁶ Although incapable of making binding decisions, the ACHPR is well placed to act as a human rights watch-dog by interpreting charter provisions; considering interstate and other complaints; and analysing the reports submitted by state parties on their implementation of the charter and other African human rights conventions.⁸⁷

The utopian-sounding right of 'all peoples to national and international peace' referred to in article 23 of the charter, together with the broad spectrum of human as well as peoples' rights, casts the net for the commission's work on human rights very wide. Resolutions adopted by the ACHPR seek further to define provisions of the

charter and, as such, provide an important normative resource. Examples include resolutions urging Rwanda to prevent acts of reprisal and vengeance in the post-genocide period;⁸⁸ condemning anti-personnel landmines;⁸⁹ condemning the 2006 *coup d'état* in The Gambia⁹⁰ and reinforcing peace agreements; and declaring maternal mortality a violation of women's rights to life, dignity and equality, including calls on governments to address the issue,⁹¹ and to provide access to health care.⁹²

These resolutions are not intended to have binding force, as they merely call on states to follow a certain course of action. They are phrased in a similar vein to UN General Assembly resolutions, putting pressure on states to promote and protect human rights. Resolutions have the character of soft law even if there are examples where condemnation has been phrased in very bold language,⁹³ and where the ACHPR was willing to read-in socio-economic rights (housing and food)⁹⁴ not explicitly protected in the charter. Decisions by the ACHPR dealing with complaints by individuals against governments under article 55 are likewise not binding but contain declarations and recommendations by the ACHPR directed at the government. These are again phrased in soft language. The decision in *Malawi African Association and Others v Mauritania*⁹⁵ illustrates this point. The case dealt with accusations of slavery and other human rights violations following a *coup d'état* in Mauritania in 1984. After analysing Mauritania's international human rights obligations, the ACHPR identified and condemned discriminatory practices against black Mauritians. It declared that there were grave or massive human rights violations as proclaimed by the AU Charter. The ACHPR concluded by making a number of recommendations to the government including that it conduct an independent inquiry into disappeared people; take diligent measures to replace confiscated national identity documents; take appropriate measures to compensate widows of the victims; and take appropriate measures to enforce the abolition of slavery in Mauritania.

An assessment of how effective the ACHPR has been in advancing human rights can only be made within the context of its mandate. Okafor regards the outputs of the ACHPR as 'resources to be mobilized by other actors (such as states, non-governmental organizations, sub-state groups and individuals)'.⁹⁶ Much has been written about the ACHPR's limitations which include various operational factors such as a lack of resources, institutional problems, and importantly, a weak state

compliance record.⁹⁷ The benefit of entertaining individual petitions is rendered almost worthless if set off against low compliance. One may speculate whether the compliance is low because the decisions are non-binding to start with, or whether states are not persuaded because they do not recognise the authority of the ACHPR to pass judgment on their domestic violations.

The work of the ACHPR clearly establishes the importance of its role in developing and interpreting human rights at a normative level. The non-binding nature of decisions serves to highlight the shortcomings in the role of the African Commission to produce outputs, as one would expect from a supranational dispute resolution institution.⁹⁸ Given these shortcomings in the role of the ACHPR and the massive scale of human rights abuses in Africa, the Protocol on the Establishment of an African Court on Human and Peoples' Rights was adopted by the OAU in 1998. The mandate of the Court, which was established in 2006, is to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (hereafter 'the Court') has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the charter, the protocol, and any other relevant human rights instrument ratified by the states concerned. Under article 4 of the protocol, the court may, at the request of a member state of the AU, any of the organs of the AU or any African organisation recognised by the AU, provide an opinion on any legal matter relating to the charter or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter under examination by the commission. As of 24 February 2015, the protocol had been ratified by twenty-seven AU members while twenty-seven states have signed but not ratified. Of the state parties to the protocol, only seven have deposited the declaration accepting the jurisdiction of the court to receive cases from individuals and NGOs.⁹⁹ The low level of ratifications and declarations threaten to limit the court's role as a human rights watchdog within the AU.

The Court has finalised in the order of twenty-four cases and five advisory opinions since it started functioning in 2006.¹⁰⁰ These deal with a wide range of human rights issues. Article 31 of the protocol establishing the court requires the Court to submit a

report to each regular session of the assembly of heads of state and government on its work during the previous year, specifying, in particular, cases in which a state has not complied with the Court's judgment.

In 2008, the AU merged this court with the Court of Justice of the African Union to form a single court by adopting the Protocol on the Statute of the African Court of Justice and Human Rights. As of February 2015, the protocol has received thirty signatures and only five ratifications¹⁰¹ falling well short of the fifteen ratifications required for entry into force.¹⁰² Although practical considerations played a role in bringing the two courts together,¹⁰³ the strengthening of AU institutions lacking the necessary powers to effectively carry out their mandate is paramount.

The promotion and protection of human rights should be advanced by the Court, by remedying what Naldi¹⁰⁴ describes as one of the basic weaknesses of the African human rights system, namely, 'the lack of an authoritative, robust and effective supervisory and enforcement mechanism'. The reluctance of AU members to ratify the protocol may be indicative of their unwillingness to achieve just that – robust enforcement of human rights by a supranational African body which might infringe on national sovereignty and the concomitant impunity of political elite. Be that as it may, even a fully functional court cannot be expected to solve all Africa's human rights problems. Judicial resolution is but one method by which to address the problem; the many others include a change of attitudes, dispute resolution through effective diplomacy, enforcement of democracy and good governance practices, and economic growth that benefits all components of society.

The Peace and Security Council

The PSC was, as indicated above, added as an AU organ by the Protocol on Amendments to the Constitutive Act of the African Union¹⁰⁵ in 2003. It is designated as 'the standing decision-making organ for the prevention, management and resolution of conflicts' according to article 9 of the said protocol with powers to be determined by the assembly in a separate protocol. Furthermore, a Protocol relating to the Establishment of the Peace and Security Council of the African Union,¹⁰⁶ duly adopted in 2002 and entered into force in 2003, singled out continuing armed conflicts as the most important reason for socio-economic decline and civilian suffering on the continent.¹⁰⁷ The collective security structure seeks to address the

scourge of conflict; however, it focuses on security from armed conflict which presents but one narrow dimension within the broader human security context. The wider context of security is recognised by referring to the importance of building strong democratic institutions, the observance of human rights and the rule of law in the promotion of durable peace and security. Without these, security in both the narrow and wide senses would remain elusive. The PSC, seen as a regional equivalent of the UN Security Council, is tasked with the promotion of peace, but also conflict prevention, peace building, and post-conflict reconstruction.¹⁰⁸ The protocol introduces a continental early warning system (CEWS)¹⁰⁹ to anticipate and prevent conflicts; a Panel of the Wise¹¹⁰ to support the PSC in matters such as conflict prevention and an African Standby Force (ASF)¹¹¹ to be deployed in missions supporting peace and intervention. The effectiveness of the CEWS and ASF is widely questioned in the light of the AU's inconsistent track record in dealing with regional conflicts since the PSC's inception.¹¹² These can, *inter alia*, be attributed to tension and a lack of communication within regional systems, the withholding of intelligence by national states, and differences between African leaders on the nature and composition of the ASF.¹¹³ Clarity as to when and what form intervention should take is a complicated matter and remains elusive.

The powers of the PSC, listed under article 7 (a-r), cover a wide scope. They include strong powers to be exercised in conjunction with the chairperson of the commission such as the institution of sanctions in cases of unconstitutional changes of government,¹¹⁴ ensuring the implementation of AU and international conventions aimed at combatting terrorism,¹¹⁵ and taking appropriate action where the independence and sovereignty of a member state is threatened by acts of aggression.¹¹⁶ The notion of supranational powers is reinforced by sub articles 2 and 3 of article 7:

2. The member states agree that in carrying out its duties under the present Protocol, the Peace and Security Council acts on their behalf.

3. The member states agree to accept and implement the decisions of the Peace and Security Council, in accordance with the Constitutive Act.

These provisions indicate the transfer of sovereign powers to an international institution and moreover, a commitment to accept the binding nature of decisions by

undertaking to implement them. This is perhaps the best example of supranationalism as a source of AU law within current AU institutions.

The protocols introduce a number of expansions to AU powers. Importantly it adds a principle that provides for AU intervention in a member state, pursuant to an assembly decision, in respect of grave circumstances including war crimes, genocide, crimes against humanity and restoring peace and stability where the legitimate order is under threat.¹¹⁷ If operative, this provision has the potential to grant powers to the assembly that could be compared to the UN Security Council. The power of intervention and the endowment of the PSC with decision-making power hold the potential for law creation at a supranational level.

Having analysed the nature of the original powers granted by the AU Constitutive Act to AU organs, it is now necessary to turn to secondary instruments, namely treaties adopted by the AU to establish whether it permits enforceable action. For purposes of the present discussion, the African Charter on Democracy, Elections and Governance,¹¹⁸ which was adopted and entered into force in 2012, will be the focus here. This particular treaty is selected because it ties in with the creation of a sense of community and development of mutual values that the founding fathers of European integrations valued as building blocks for supranationalism.

The AU's commitment to democratic governance

'Democratic entitlement' as the preferred system of government gained international support in the post-Cold War period,¹¹⁹ prompting western states to use the demand for democracy and 'structural change' as bargaining chips in their engagement with Africa. Such conditions were actively opposed by African states and the AU, insisting that Africa will embrace democracy on its own terms and conditions and advocating 'African solutions for African problems'.¹²⁰

The AU has taken up the challenge to build democracy through a series of initiatives assisting transformation from the dictatorships of the 1990s. Its Constitutive Act refers to the importance of human rights protection, consolidation of democratic institutions and culture, good governance, and the rule of law. It also provides that governments that come to power through unconstitutional means shall not be

allowed to participate in AU activities. Major challenges the AU faces include disputed elections, rigged election results, and an unwillingness of the ruling party to relinquish power after electoral defeat.¹²¹ Democracy appears to have been embraced by African leaders - provided that they remain in power. Roughly one fifth of the elections in sub-Saharan Africa since 1990 have led to violence.¹²² This causes conflict and mob violence to erupt as can be seen in the cases of Zimbabwe, Kenya, Ethiopia, Ghana, Guinea and Cote d'Ivoire.¹²³ Usually, the violence results from members of the ruling party seeking to intimidate the opposition and the opposition, in turn, challenging unfair election results.¹²⁴

It is against this background that the African Charter on Democracy, Elections and Governance¹²⁵ was adopted and entered into force in 2012. The charter aims to foster a political culture of change of power based on regular, free and fair elections. It sets out an AU understanding of democracy. Despite the legal character obtained through entry into force, the charter provisions are in the main phrased in non-prescriptive language. The aims refer to undertakings to develop, promote and enhance various democratic principles. There is, however, a direct obligation to 'prohibit, reject and condemn unconstitutional change of government as a serious threat to stability, peace, security and development.'¹²⁶ Article 23 provides for sanctions in cases of unconstitutional change of government which include 'any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections.'¹²⁷ This provision makes it very clear that clinging to power illegally by a ruling party after loss of an election, or indefinitely perpetuating its government, are grounds for sanction. When the PSC considers that this has happened, it has the power to suspend the offending state from AU activities, though still not releasing it from AU related obligations such as human rights.¹²⁸ The AU shall then take the initiative in restoring democracy to the state in question, and the perpetrators may be tried under a competent African court. Other forms of sanction and punitive measures may also follow, and AU parties may not harbour perpetrators of unconstitutional changes of government – a very comprehensive approach in dealing with the phenomenon if ever enforced. African leaders are, however, known to change their constitutions to prolong their grip on power, making their illegitimate and undemocratic rule 'constitutional' as in the cases of Zimbabwe, Uganda, and Nigeria.¹²⁹ After adoption, but prior to entry into force of

this declaration, the AU refused to suspend either Zimbabwe or Kenya in 2007 and 2008 respectively, despite refusal of the ruling party to accept the opposition's electoral victories. This constituted a violation of the AU Charter according to Abass.¹³⁰ The AU has shown that it is prepared to act differently when other examples of unconstitutional changes take place such as a putsch, *coup d'état* or mercenary intervention.¹³¹

There are definite indications that AU practice under the African Charter on Democracy, Elections and Governance has entered the domain of supranationality. The charter certainly provides the theoretical possibility of enforceable AU action that would limit state sovereignty. The action does stop short of obligatory settlement of disputes and direct effect of AU decisions in member states, which falls outside the mandate of this particular instrument.

Is it premature to coin the term 'African Union law'?

A fully fledged regional legal system can only take root where participating states agree to move beyond the confines of interstateism. Although EU integration and EU law cannot be regarded as a blueprint for similar practices elsewhere, it does present the best developed example providing guidance of how a regional legal system may function within an integrated community of sovereign states. It is suggested that the theories on the development of law of regional integration assessing EU law underpins regional integration globally, be it in Europe or Africa. It grapples with the essential requirement for supranational law-making, namely the surrendering of some sovereign powers to a representative regional institution. Following theorists of European integration, supranationalism, or at least core elements within particular functional domains, is required before a supranational legal system can take root. There is no reason why the AU cannot in principle develop an AU legal system. It is a continental organisation with the required international legal standing. What is required are the necessary mechanisms set up through the primary constitutional agreements, and for these to be upheld by both AU institutions and member states. The core elements needed to foster a supranational African legal system include direct effect and supremacy over national legislation. These must be supported by a sense of community and willingness to transfer some sovereign powers to a supranational decision-making body. Elements of supranationalism where the AU

currently clearly falls short include institutional decision-making within the AU and obligatory settlement of disputes, and were not considered in establishing the development of AU law. Although core supranationality is par for the course as far as the development of AU law is concerned, its development does not follow a particular model but instead appears to be rather functionally dependent on strategic needs.

Institutional development within the AU coupled with a commitment to democracy and human rights have contributed to a slow but steady integration process in Africa. AU institutions were expanded to include the PAP, PSC and the African Court of Justice; the role of the court and the ACHPR have gained more prominence; and the AU became more bold, even if inconsistently so, in dealing with electoral irregularities, human rights and governance issues. Integration measures must however be backed up by law, giving the AU the necessary powers to take and enforce decisions. Examples where supranational decision-making powers already exist include hard powers of the assembly and powers to be exercised by the PSC particularly through articles 7(2) and (3). Although indicative of an emerging trend, the limited cases referred to above might not be enough to justify the existence of a continental legal system as of yet. A further concern is the absence of consistent enforcement of existing powers by AU institutions. However, what is essential from a legal perspective is the granting of legislative powers to the PAP backed up by an effective court system to enforce treaties and deal with disputes. This will take AU law beyond the confines of dealing with security issues to embrace a broader scope of legal regulation. More comprehensive law-making powers will inevitably also impact on participating nation states by adding another source of law and placing national law within a broader hierarchy of norms.

One must accept that regional integration, once it is accepted as a political objective, is a slow and arduous process; it has been particularly so in the case of Africa. This is due to a variety of mostly political factors. Regional integration challenges nationalism and it challenges an absolute view of state sovereignty where states and their leaders are shielded from outside intervention. Sovereignty and non-intervention are notions firmly embedded in post-colonial African culture. Following pan-African thinking, African leaders are keen to unite against outside efforts to influence them. These influences can come from the International Criminal Court, the

United Nations, the EU or international financial institutions. Enforcement of international treaty norms, which African states are party to, are often regarded as singling out Africa as a target. Pan-African ideals do not seem to include critical engagement with politically deviant behaviour by individual African states and leaders. This culminates in the often noted lack of political will of African leaders to pay more than lip service to strengthening regional institutions that might be able to call members to account. There seems to be a huge divide between the philosophical objective to unite Africa, and the creation of an essential institutional regime on the ground needed for such unification. An emerging African Union law is an important step in bridging the gap.

Conclusion

The discussion above showed a slow but steady development in African integration over the past ten years which takes it beyond the confines of pure state-centrism to include definite supranational and functional elements driven by strategic interest. It also illustrated the close link between law and integration; and supranationalism and law. Despite many differences, much can be learnt from the European experience and the role played by EU law in this regard. As in Europe, legal rules need to emerge in Africa to structure integration and to introduce clear guidelines in various spheres of activity. Using law within a pan-African context will serve to counter absolute sovereignty of AU members by introducing shared objectives and accountability. In the foreseeable future African Union law might be an accepted component in the training of African lawyers.

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¹ One can do a law degree in the UK without studying EU law but it will not be considered a 'qualifying law degree' which will enable students to enter legal practice.

² Haas EB, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957*. Stanford: Stanford University Press, 1958, pp. 32-59.

³ *Ibid.*, p. 32.

⁴ Monet equates supranationalism to a federal institution see Mason HL, *The European Coal and Steel Community*. The Hague: Nijhoff, 1955, p.123.

⁵ Haas EB, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957*. Stanford: Stanford University Press, 1958, p. 34.

⁶ Reinisch A, *Essentials of EU Law*. Cambridge: Cambridge University Press, 2012, pp.6-7; Harrison RJ, 'Integration theory: context, scope and method', in O'Neill M, *The Politics of European Integration*. London: Routledge, 1996, p.158.

⁷ Olivier GC and ME Olivier, 'Models of regional Integration: The European Union and The African Union', *Griffen's View on International and Comparative Law*, 5,1, Jan 2004, pp. 44-46; Olivier GC and ME Olivier, 'Models of regional integration' *South African Public Law (SAPL)*, 19, 2, 2004, pp. 351-364; and Olivier GC, 'Regional integration in Africa: Cooperation without integration', *Strategic Review for Southern Africa*, XXXII, 2, Nov 2010, p.17. Another African scholar commenting on regional integration theories is Schoeman M, 'Imagining a Community – the African Union as an Emerging Security Community', *Strategic Review for Southern Africa*, 24, 1, June 2002.

⁸ O'Neill M, *The Politics of European Integration*. London: Routledge, 1996, p.80.

⁹ Haas EB, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957*. Stanford: Stanford University Press, 1958, pp. 3 - 19.

¹⁰ Olivier GC and ME Olivier, 'Models of regional Integration: The European Union and The African Union', *Griffen's View on International and Comparative Law*, 5, 1, Jan 2004, pp.43-50.

¹¹ Turpin C and A Tomkins, *British Government and the Constitution*. Cambridge: Cambridge University Press, 2011, pp. 288-289.

¹² See Geldenhuys D J, 'Brothers as keepers: Africa's new sovereignty regime', *Strategic Review of Southern Africa*, 28, 1, May 2006, pp. 1-2, 9-14.

¹³ O'Neill M, *The Politics of European Integration*. London: Routledge, 1996, pp. 27-28. See also Monnet J, 'A ferment of change', 1, 1963, pp. 204-208, 210-211.

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- ¹⁴ See Haas EB, 'The study of regional integration: Reflections on the joy and anguish of pre-theorizing', in Lindberg LN and SA Scheingold (eds), *Regional integration: Theory and Research. International Organization*. Cambridge, MA: Harvard University Press, 1971, pp. 23-24.
- ¹⁵ Lodge J, 'The European Community and the Challenge of the Future', 1993 as quoted by P Craig and G de Burca, *EU Law Texts, Cases and Materials*. Oxford: Oxford University Press, 2011, p. 2.
- ¹⁶ Reinisch A, *Essentials of EU Law*. Cambridge: Cambridge University Press, 2012, p. 4.
- ¹⁷ Ladeur K, 'Towards a Legal Theory of Supranationality – The viability of the Network Concept', *European Law Journal*, 3, 1, 1997, p. 33.
- ¹⁸ Mc Cormick J, *Understanding the European Union: A concise introduction*. New York: Palgrave MacMillan, 2011, pp. 4-12.
- ¹⁹ Craig P and G de Burca, *EU Law Texts, Cases and Materials*. Oxford: Oxford University Press, 2011, p. 3; Checkel JT, 'The Constructivist Turn in International Relations Theory', *World Politics*, 50, 1998, p. 324.
- ²⁰ Craig P and G de Burca, *EU Law Texts, Cases and Materials*. Oxford: Oxford University Press, 2011, p. 103.
- ²¹ Most standard international law text books provide a discussion on monism and dualism as theories explaining the relationship between international law and domestic law. See for example Evans MD, *International Law*. Oxford: Oxford University Press, 2014, p.417; and Shaw MN, *International Law*. Cambridge: Cambridge University Press, 2014, p. 21.
- ²² The South African Constitution, Act 200 of 1993.
- ²³ Olivier ME, *International law in South African municipal law: Human rights procedure, policy and practice*, LLD thesis, University of South Africa, Pretoria, 2002, pp. 114-135.
- ²⁴ The South African Constitution, Act 108 of 1996.
- ²⁵ For examples of how monism and dualism are reflected in national constitutions, see Evans MD, *International Law*. Oxford: Oxford University Press, 2014, p.418- 425.
- ²⁶ Kirsch N, *Beyond Constitutionalism: The pluralist structure of postnational law*. Oxford: Oxford University Press, 2010, p. 8.
- ²⁷ Fairhurst J, *Law of the European Union*. Essex: Pearson, 2012, p. 269.
- ²⁸ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECHR 1.
- ²⁹ Case 6/64 *Flaminio Costa v. Enel* [1964] ECR 585.
- ³⁰ European Community Law emanated from the European Community, predecessor of the EU.
- ³¹ Craig P, 'The Hierarchy of norms' in Tridimas T and P Nebbia (eds), *European Union Law for the Twenty-First Century, Rethinking the New Legal Order*. Oxford: Hart, 2004, pp. 75-93.
- ³² Shaw MN, *International Law*. Cambridge: Cambridge University Press, 2003, pp. 241-245.
- ³³ *Reparation for Injuries*, ICJ Reports 1949, p.174; 16 AD at 179.
- ³⁴ Entered into force 13 September 1963.
- ³⁵ Adopted in 2000, entered into force in 2001.
- ³⁶ Dugard J, *International Law: A South African perspective*. Lansdowne South Africa: Juta, 2005, p. 28-29.
- ³⁷ Sands P and P Klein, *Bowett's law of international institutions*. London: Thomson Reuters, 2005, p.297.
- ³⁸ Neves M, *Transconstitutionalism*. Oxford: Hart publishing, 2013, p.56.
- ³⁹ *Ibid.*, p. 65.
- ⁴⁰ Art 2(1).
- ⁴¹ Art 2(2).
- ⁴² Olivier M, 'The emergence of a right to democracy – An African perspective', in Panara C and G Wilson (eds), *The Arab spring: New patterns for democracy and international law*. Leiden, Boston: Martinus Nijhoff, 2013, pp.39-44.
- ⁴³ Preamble of the Constitutive Act of the African Union (2000/2001).
- ⁴⁴ Art 3.
- ⁴⁵ Art 4.
- ⁴⁶ Art 5(1).
- ⁴⁷ Art 5(2).
- ⁴⁸ Protocol relating to the Establishment of the Peace and Security Council of the African Union, adopted by the AU Assembly, Durban, South Africa 10 July 2002 under art 5(2) of the Constitutive Act, entered into force 26 December 2003.
- ⁴⁹ Art 6(2).

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- ⁵⁰ Art 9.
- ⁵¹ Wade HWR, 'The basis of legal sovereignty', *Cambridge Law Journal*, 1995, pp. 172, 187-9.
- ⁵² Art 9(1)(e).
- ⁵³ Art 9(1)(g).
- ⁵⁴ Art 23 (2).
- ⁵⁵ Art 23(1).
- ⁵⁶ Art 20.
- ⁵⁷ Art 13(1) includes a list of such areas.
- ⁵⁸ Art 13(2).
- ⁵⁹ Art 17.
- ⁶⁰ Art 18.
- ⁶¹ Art 9 of Protocol on Amendments to the Constitutive Act of the African Union.
- ⁶² On 24 February 2015 ratifications stood at 28 out of a possible 54.
http://www.au.int/en/sites/default/files/Amendments%20to%20the%20Constitutive%20Act_0.pdf
- ⁶³ Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament 2001. The Pan-African Parliament's 235 Parliamentary representatives are elected by the legislatures of 47 of the 54 AU Member States rather than being directly elected in their own capacity.
- ⁶⁴ Art 2(2).
- ⁶⁵ Articles 2(3)(i) and 11.
- ⁶⁶ http://www.pan-africanparliament.org/DocumentsResources_DocumentIntroduction.aspx. The Pan African Parliament held its inaugural session on 18 March 2004.
- ⁶⁷ Amadi BN, 'A Decade of Achievement', 19/03/2014, <http://www.pan-africanparliament.org/News.aspx>
- ⁶⁸ *Ibid.*
- ⁶⁹ See Cilliers J and P Mashele, 'The Pan-African Parliament' *African Security Review*, Published online 21 July 2010, 73, <http://dx.doi.org/10.1080/10246029.2004.9627321>.
- ⁷⁰ Mpanyane S, 'Transformation of the Pan-African parliament; a path to a legislative body?', *Institute for Security Studies Papers*, 181, March 2009; Hugo G, 'The Pan-African Parliament: is the glass half full or half empty' *Institute for Security Studies Papers*, 168, September 2008 ; and Terlinden U, 'African Regional Parliaments – Engines of Integration and democratisation?', *Hintergrundinformation aus der internationalen Entwicklungszusammenarbeit*, September 2004,1, <http://www.ulf-terlinden.de/reports.htm>.
- ⁷¹ See Cilliers J and P Mashele, 'The Pan-African Parliament' *African Security Review*, Published online 21 July 2010, 75, <http://dx.doi.org/10.1080/10246029.2004.9627321>.
- ⁷² View expressed by Zwelethu Madasa, clerk of PAP in an article by Dimmer K, 'Leading the Continent by Example', *Celebrating 10 Years*, 19 March 2014, www.panafricanparliament.org.
- ⁷³ *Ibid.*
- ⁷⁴ *Ibid.*
- ⁷⁵ Amadi BN, 'A Decade of Achievement', 19/03/2014, <http://www.pan-africanparliament.org/News.aspx>.
- ⁷⁶ Terlinden U, 'African Regional Parliaments – Engines of Integration and democratisation?' *Hintergrundinformation aus der internationalen Entwicklungszusammenarbeit*, September 2004, 13, <http://www.ulf-terlinden.de/reports.htm>.
- ⁷⁷ Amadi BN, 'A Decade of Achievement', 19/03/2014, <http://www.pan-africanparliament.org/News.aspx>.
- ⁷⁸ The ECOWAS Parliament was introduced in 1993.
- ⁷⁹ Created by the East African Community treaty of 2001.
- ⁸⁰ Formally launched in July 1996, it is the oldest regional parliamentary structure.
- ⁸¹ Adopted in 2002.
- ⁸² Terlinden U, 'African Regional Parliaments – Engines of Integration and democratisation?' *Hintergrundinformation aus der internationalen Entwicklungszusammenarbeit*, September 2004, 6, <http://www.ulf-terlinden.de/reports.htm>.
- ⁸³ Rules and Procedure of the African Commission on Human and Peoples' Rights, 2010, rule 3.
- ⁸⁴ African Charter on Human and Peoples' Rights, 1986, art 45.
- ⁸⁵ Okafor OC, 'The African Commission on Human and Peoples' Rights as a collective human security resource: Promises, performance and prospects', in Abass A, *Protecting human security in Africa*. Oxford university press, 2010, p.10, www.oxfordscholarship.com.
- ⁸⁶ Art 55.

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- ⁸⁷ Rules and Procedure of the African Commission on Human and Peoples' Rights, 2010, rule 73.
- ⁸⁸ African Commission, Resolution on Rwanda, 16th Ordinary Session (25 October – 3 November 1994) 28.
- ⁸⁹ African Commission, Resolution on Anti-Personnel Landmines, 13th Ordinary session (13 -22 March 1995) 37.
- ⁹⁰ Resolution on Human Rights situation in Gambia, 2008.
- ⁹¹ Resolution on Maternal Mortality in Africa, 2008.
- ⁹² Resolution on Access to Health Care and Needed Medicines in Africa, 2008.
- ⁹³ See for example the *Ogoni* case where the African Commission in 2001 considered a communication under Article 55 of the African Charter on Human Rights and Peoples' Rights which dealt with alleged violations of human rights of the Ogoni people in Nigeria. This communication presented the Commission with the opportunity to deal in a substantive way with alleged violations of economic, social and cultural rights which formed the substance of the complaint. The decision has been published at <http://www.cesr.org/ESCR/africancommission.htm> It was communicated to the parties on 27 May 2002.
- ⁹⁴ See Coomans F, 'The Ogoni Case before the African Commission on Human and Peoples' Rights', *International and Comparative Law Quarterly*, 52, July 2003, pp. 749-760.
- ⁹⁵ (2000) ACHPR 2000.
- ⁹⁶ Okafor OC, 'The African Commission on Human and Peoples' Rights as a collective human security resource: Promises, performance and prospects', in Abass A, *Protecting human security in Africa*. Oxford university press, 2010, p.23, www.oxfordscholarship.com.
- ⁹⁷ *Ibid.*, p.25.
- ⁹⁸ Kufuor KO, 'Safeguarding human rights: A critique of the African Commission on Human and Peoples' Rights', *Africa Development*, 18, 1993, p. 65; Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal Analysis' , *Virginia Journal of International Law*, 1982,22, p. 667.
- ⁹⁹ http://au.int/en/sites/default/files/achpr_1.pdf. Accessed 24 February 2015.
- ¹⁰⁰ <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions>, accessed on 24 February 2015.
- ¹⁰¹ <http://au.int/en/treaties>, accessed 24 February 2015.
- ¹⁰² As per Art 9. See also Viljoen F and E Baimu, 'Courts for Africa: Considering the Co-Existence of the African Court on Human and People's Rights and the African Court of Justice', *Netherlands Quarterly of Human Rights*, 2004, p.243.
- ¹⁰³ Naldi GJ, ' The Role of the Human and Peoples' Rights Section of the African Court of Justice and Human Rights ' , in Abass A , *Protecting human security in Africa*. Oxford university press, 2010, p.3. www.oxfordscholarship.com.
- ¹⁰⁴ *Ibid.*, p. 19.
- ¹⁰⁵ Note 62 above.
- ¹⁰⁶ Protocol relating to the Establishment of the Peace and Security Council of the African Union, adopted by the AU Assembly, Durban, South Africa 10 July 2002 under art 5(2) of the Constitutive Act, entered into force 26 December 2003.
- ¹⁰⁷ Preamble.
- ¹⁰⁸ See Objectives, Art 3.
- ¹⁰⁹ Art 12.
- ¹¹⁰ Art 11.
- ¹¹¹ Art 13.
- ¹¹² See Francke B, *Security cooperation in Africa: A reappraisal*. Boulder; Lynne Rienner, 2009, pp. 153-212.
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- ¹¹⁴ 7(1)(g).
- ¹¹⁵ 7(1)(i).
- ¹¹⁶ 7(1)(o).
- ¹¹⁷ Art 4(h).
- ¹¹⁸ Adopted Addis Ababa, Ethiopia, 30 January 2007, entered into force 15 February 2012.
- ¹¹⁹ Franck TM, 'The emerging right to democratic governance', *American Journal of International Law*, 86, 1992, pp. 46-91.52; Fox, GHR and BR Roth,' Democracy in international law', *Review of International Studies*, 27, 2001, pp.327-52.

¹²⁰ 'African solutions for African problems' has become a well-accepted principle of the AU calling for authentic African solutions free from foreign interference.

¹²¹ To assist in this respect the [African Commission on Human and Peoples' Rights](http://www.achpr.org/instruments/guide-elections/) adopted Guidelines for African Union Electoral Observations and Monitoring Missions. Available at <http://www.achpr.org/instruments/guide-elections/>, accessed on 29 June 2015.

¹²² Bekoe DA, 'Introduction: The scope, nature and pattern of electoral violence in Sub-Saharan Africa' in Bekoe DA (ed), *Voting in Fear: Electoral violence in Sub-Saharan Africa*, Washington: US Institute of peace press, 2012, pp. 1-15.

¹²³ *Ibid.*

¹²⁴ Following 2014 elections in Mozambique, the main opposition Renamo, refused to take up its parliamentary seats protesting alleged widespread fraud and irregularities in the electoral process including ballot stuffing.

¹²⁵ See note 118.

¹²⁶ Art 2(4).

¹²⁷ This provision also appears in the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, adopted by the OAU in 2000.

¹²⁸ The PSC suspended Egypt following the ouster of former president Mohamed Morsi on 3 July 2013.

¹²⁹ Kiuwa DE, 'Democracy and the politics of power alternation in Africa', *Contemporary Politics*, 19, 3, 2013, available at <http://www.tandfonline.com/loi/ccpo20>.

¹³⁰ Abass A, 'African peace and security architecture and the protection of human security' in Abass A, *Protecting human security in Africa*. Oxford university press, 2010, p. 36.

¹³¹ See examples of the 2008 military takeover in Guinea and 2009 *coup* in Madagascar. Madagascar's suspension was lifted after instalment of a democratically elected leader in 2014.