

## The Pan-African Parliament of the African Union: An overview

*Konstantinos D Magliveras\**

Attorney (Athens); Assistant Professor of Law, Department of Mediterranean Studies, University of the Aegean

*Gino J Naldi<sup>†</sup>*

Senior Lecturer in Law, Norwich Law School, University of East Anglia

### Summary

*This article discusses the future Pan-African Parliament, one of the organs of the AU provided for under its Constitutive Act. The OAU adopted the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament in March 2001. Its purpose is to ensure the full participation of African peoples in the development and economic integration of the continent. So far only 15 states have ratified the Protocol; 24 out of 47 AEC member states must ratify the Protocol before it can enter into force. The Parliament, consisting of members elected or designated by national parliaments, will have an advisory function in the 'first stage'. It will later also have legislative power, which will be needed if the Parliament is to provide a credible democratic foundation for the AU.*

### 1 Introduction

The African Economic Community (AEC),<sup>1</sup> established by the Organization of African Unity (OAU), *inter alia* to promote economic

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\* LLB (Athens), LLM (Exeter), LLM (UEA), DPhil (Oxon); magli@eett.gr

<sup>†</sup> LLB, LLM, PhD (Birmingham, UK); g.naldi@uea.ac.uk

<sup>1</sup> The AEC Treaty, otherwise known as the Treaty of Abuja, was adopted on 3 June 1991, and entered into force on 12 May 1994. Reproduced in (1991) 30 *International Legal Materials* 1241; GJ Naldi (ed) *Documents of the Organization of African Unity* (1992) 203. See GJ Naldi & KD Magliveras 'The African Economic Community: Emancipation for African states or yet another glorious failure?' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 601.

development and the integration of African economies,<sup>2</sup> envisaged the establishment of a Pan-African Parliament as one of its organs.<sup>3</sup> The stated reason was to ensure the participation of the peoples of Africa in the running of the AEC.<sup>4</sup> The details were to be defined in a protocol at a future date.<sup>5</sup> However, no material progress was made until the OAU Assembly, meeting at its 4th extraordinary session in Sirte, Libya in September 1999 (adopting the Sirte Declaration), created the African Union (AU)<sup>6</sup> to replace the OAU and called for the speedy establishment of the institutions provided for in the AEC Treaty. According to article 5(1)(c) of the Constitutive Act of the AU, the Pan-African Parliament is one of the organs of the AU, which is established by virtue of article 17 thereof.

The Constitutive Act fails to address the composition, powers, functions and organisation of the Pan-African Parliament, again leaving the details to a future protocol. These have since been set out in the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted by the 5th extraordinary OAU Assembly session in Sirte on 2 March 2001.<sup>7</sup> Although the relationship between the Pan-African Parliament of the AEC and that of the AU is mentioned but briefly in the Constitutive Act,<sup>8</sup> the Sirte Declaration envisaged the establishment of the AU in conformity with the objectives of the OAU and the AEC. It was accepted that a single parliament would ultimately serve both the AEC and the AU, with indisputable advantages in terms of cost and expediency. The implementing Protocol, which was drafted in the context of the AEC, was amended to incorporate the necessary changes in order to become additionally an AU organ.<sup>9</sup>

<sup>2</sup> Art 4(1)(a) AEC Treaty.

<sup>3</sup> Art 7(1)(c) AEC Treaty.

<sup>4</sup> Art 14(1) AEC Treaty.

<sup>5</sup> Art 14(2) AEC Treaty.

<sup>6</sup> OAU Doc EHAG/Dec 1(IV). The Constitutive Act of the African Union was adopted by the 36th ordinary session of the OAU Assembly on 11 July 2000; CAB/LEG/23.15, reproduced in (2000) 8 *African Yearbook of International Law* 479; available at <<http://www.africa-union.org>> (accessed 31 July 2003). It entered into force on 26 May 2001. The AU effectively replaced the OAU as from 9 July 2002. See further art 33(1) of the Constitutive Act. The AU seeks to deal comprehensively with the political, social and economic integration of the continent. See KD Magliveras & GJ Naldi 'The African Union — A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415.

<sup>7</sup> OAU Doc EHAG/Dec 2(V). Available at <<http://www.dfa.gov.za/for-relations/multilateral/treaties/pap.htm>> (accessed 31 July 2003). The Protocol is not yet in force; discussed in more detail in para 5.1 below.

<sup>8</sup> It should be observed that according to art 33(2) of the Constitutive Act, the provisions of the Constitutive Act prevail over any inconsistent or contrary provisions of the AEC Treaty.

<sup>9</sup> This is made clear by art 3(1) of the Protocol. Note that art 99 of the AEC Treaty stipulates that this Treaty and the Protocols 'shall form an integral part of the OAU Charter'. It should be observed that the Protocol is one of the many OAU Treaties that have devolved to the AU.

## 2 Objectives, functions and powers

The purpose of the Pan-African Parliament is to ensure the full participation of African peoples in the development and economic integration of the continent.<sup>10</sup> The expectation is that the Pan-African Parliament will provide a common platform for African peoples and grass-roots organisations to become more involved in discussions and decision-making on the problems and challenges facing Africa.<sup>11</sup> Its objectives include facilitating the implementation of the policies of the AU/AEC, promoting human rights and democracy, encouraging good governance, transparency and accountability in member states, promoting peace, security and stability, promoting economic recovery, facilitating co-operation among regional economic communities, and facilitating co-operation and stability in Africa.<sup>12</sup> To this end, the Pan-African Parliament has the power to discuss and make recommendations on issues relating to human rights, democracy and good governance, to harmonise the laws of member states, make recommendations contributing to the objectives of the AU/AEC, promote the AU/AEC in the member states, and to harmonise the policies and programmes of regional economic communities.<sup>13</sup> The Pan-African Parliament exercises some democratic accountability over the AEC, not only by discussing the budget and making recommendations thereon,<sup>14</sup> but also by drawing up the budget.<sup>15</sup> In addition, it can question AU/AEC officials.<sup>16</sup> The Pan-African Parliament may also perform such other functions as it deems appropriate to achieve its objectives.<sup>17</sup> This is of enormous potential significance since, if used boldly, the Pan-African Parliament will be able to assume and exercise considerable powers.<sup>18</sup>

<sup>10</sup> Art 17(2) of the Constitutive Act. It should additionally be noted that, according to art 4(c) of the Constitutive Act, one of the AU's founding principles is the 'participation of the African peoples in the activities of the Union'.

<sup>11</sup> Preamble para 4 of the Protocol.

<sup>12</sup> Art 3 Protocol.

<sup>13</sup> Art 11 Protocol.

<sup>14</sup> Art 11(2) Protocol.

<sup>15</sup> Art 15(2) Protocol. This provision implies that the Pan-African Parliament will have the power to approve the budget, currently held by the Assembly, once it accrues legislative powers.

<sup>16</sup> Art 11(5) Protocol.

<sup>17</sup> Art 11(9) Protocol. Under art 12(13) thereof, the Pan-African Parliament may establish such committees as it deems necessary.

<sup>18</sup> It should be noted, however, that if the Pan-African Parliament were to misuse its powers, then any member state or the Assembly could bring an action before the Court of Justice on grounds of lack of competence or abuse of powers under art 18(3)(a) of the AEC Treaty. Additionally, an action could be brought against the Pan-African Parliament before the Court of Justice of the African Union under art 19(1)(d) of the Protocol of the Court of Justice of the African Union.

The powers of the Pan-African Parliament have been enhanced by the Protocol of the Court of Justice of the African Union,<sup>19</sup> adopted by the AU Assembly in Maputo in July 2003.<sup>20</sup> Under article 18(1)(b) thereof, the Pan-African Parliament is entitled to submit cases to the Court relating to, for example, the interpretation and application of the Constitutive Act, the interpretation, application and validity of all Union treaties, and acts, decisions, regulations and directives of Union organs.<sup>21</sup>

The Pan-African Parliament will not have legislative powers initially, but shall instead have consultative and advisory powers only.<sup>22</sup> However, it is envisaged that it will evolve full legislative powers.<sup>23</sup> Although the staggered achievement of this objective appears dictated by considerations of pragmatism given the state of democracy in many African countries, its fulfillment nevertheless seems imperative, as the Pan-African Parliament confers democratic legitimacy to the AU project. Responsibility for the achievement of this end lies with the AEC, although the Protocol is not a model of clarity on this point. According to article 2(3), the onus appears to lie with the member states, since it provides that the Pan-African Parliament shall have consultative and advisory powers 'until such time as the member states [of the AEC] decide otherwise by an amendment to this Protocol'. However, according to article 11, the Pan-African Parliament 'shall be vested with legislative powers to be defined by the Assembly [of the AEC]'. It should be observed that, although it is true that the Assembly is composed of the member states, not all member states are at the same time contracting parties to the Protocol.

### 3 Composition

The Pan-African Parliament, which represents the peoples of Africa,<sup>24</sup> will be composed of five members per member state, at least one of whom must be a woman.<sup>25</sup> They shall either be elected or designated by national legislatures, that is national parliaments or other deliberative bodies, from among their members.<sup>26</sup> Holders of executive or judicial

<sup>19</sup> AU Min/Draft/Prot/ACJ/2 (I).

<sup>20</sup> AU Assembly/AU/Dec 25 (II), not yet in force.

<sup>21</sup> Art 19(1) Protocol of the Court of Justice of the African Union.

<sup>22</sup> Arts 2(3)(i) & 11 Protocol.

<sup>23</sup> Arts 2(3) & 11 Protocol. The precise time scope is unclear, although art 11 does specify that its advisory powers are limited to its first term (probably five years), which is to be determined once the Parliament is in session.

<sup>24</sup> Art 2(2) Protocol.

<sup>25</sup> Art 4(2) Protocol. This reflects the AU's commitment to adequate gender representation; see art 4(l) of the Constitutive Act.

<sup>26</sup> Art 5(1) Protocol. No uniform procedure is envisaged. According to art 5(2), the term of a member of the Pan-African Parliament shall run concurrently with his or her term of office in the national legislature.

posts in a member state are specifically excluded from membership of the Pan-African Parliament.<sup>27</sup> It is ultimately envisaged that the Pan-African Parliament will be elected by universal adult suffrage,<sup>28</sup> but there is no guarantee that the Pan-African Parliament will evolve into a fully democratically elected body.<sup>29</sup> This calls into question the AU's own stated commitment to democracy, popular participation and good governance, enshrined in articles 3(g) and (h) of the Constitutive Act. Although the representation of each member state must reflect the diversity of political opinions in the national legislatures,<sup>30</sup> there appears to be no restraint on an autocrat manipulating the nomination process. Regrettably, Africa has witnessed too many elections that cannot be characterised as free and fair. Members will nevertheless vote in an independent capacity.<sup>31</sup>

The Protocol also makes provision for the vacancies of seats.<sup>32</sup> These are through death,<sup>33</sup> resignation,<sup>34</sup> inability to perform one's duties for reasons of physical or mental incapacity,<sup>35</sup> removal on grounds of misconduct,<sup>36</sup> ceasing to be a member of the national legislature,<sup>37</sup> being recalled by the national legislature,<sup>38</sup> and withdrawal of the parliamentarian's member state from the AEC.<sup>39</sup> The filling of vacant seats is not addressed, but it should reasonably be expected that it would be covered in the Parliament's Rules of Procedure.

Parliamentarians enjoy immunity in the territories of the member states while exercising their functions in accordance with the General Convention on the Privileges and Immunities of the OAU and the Vienna Convention on Diplomatic Relations.<sup>40</sup> Parliamentarians shall therefore not be liable to civil or criminal proceedings, arrest, imprisonment or damages for anything said or done within or outside Parliament in the

<sup>27</sup> Art 7 Protocol.

<sup>28</sup> According to art 2(3) of the Protocol, the transition to universal suffrage is not automatic but will necessitate an amendment to the Protocol to this effect.

<sup>29</sup> Nevertheless, the European Court of Justice's *dictum* in Case 138/79 *Roquette Freres v Council* [1980] ECR 3333 para 33, that the 'fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly' appears to be met.

<sup>30</sup> Art 4(3) Protocol.

<sup>31</sup> Art 6 Protocol.

<sup>32</sup> Art 5(4) Protocol.

<sup>33</sup> Art 5(4)(a) Protocol.

<sup>34</sup> Art 5(4)(b) Protocol.

<sup>35</sup> Art 5(4)(c) Protocol.

<sup>36</sup> Art 5(4)(d) Protocol.

<sup>37</sup> Art 5(4)(e) Protocol.

<sup>38</sup> Art 5(4)(f) Protocol.

<sup>39</sup> Arts 5(4)(g) & 19 Protocol. On withdrawal, see further para 5.2 below.

<sup>40</sup> Art 8(1) Protocol.

discharge of their duties.<sup>41</sup> However, immunity may be waived by the Pan-African Parliament in accordance with its Rules of Procedure.<sup>42</sup>

The Pan-African Parliament shall meet in ordinary session at least twice a year<sup>43</sup> and in extraordinary session at the request of two-thirds of parliamentarians, the Assembly or the Council.<sup>44</sup> The quorum for a meeting is a simple majority.<sup>45</sup> Notwithstanding the fact that each parliamentarian has one vote, the general rule is that decisions shall be made by consensus.<sup>46</sup> Failing that, however, decisions are taken by a two-thirds majority of all the members present and voting.<sup>47</sup> The Pan-African Parliament reflects the position adopted by the AU, providing for a majority vote if consensus cannot be achieved.<sup>48</sup> Procedural matters are decided by a simple majority of those present and voting.<sup>49</sup> In the event of a tie, the presiding official has the casting vote.<sup>50</sup> The African commitment to consensus did not serve the OAU well, proving a recipe for inaction. It can only be hoped that the appropriate lessons will have been drawn from that experience.

#### 4 The relationship between the Pan-African Parliament and the parliamentary organs of other African organisations

As has been mentioned, one of the objectives laid down in article 3 of the Protocol is to facilitate co-operation among the regional economic communities that are active on the African continent<sup>51</sup> and their parliamentary fora. This objective is elaborated upon in article 18, which provides that the Pan-African Parliament shall work in close co-operation

<sup>41</sup> Art 9(1) Protocol.

<sup>42</sup> Arts 8(2) & 9(2) Protocol.

<sup>43</sup> Art 14(2) Protocol. These sessions may last a month. It should be noted that, according to art 16 of the Protocol, the Parliament may convene in the territory of any member state at its invitation.

<sup>44</sup> Art 14(3) Protocol.

<sup>45</sup> Art 12(11) Protocol.

<sup>46</sup> Art 12(12) Protocol.

<sup>47</sup> Unless stipulated to the contrary in the Rules of Procedure; art 12(12) Protocol.

<sup>48</sup> Art 7(1) Constitutive Act. It should be observed that the Rules of Procedure of the OAU provided for majority voting; see Rule 29 of the Council of Ministers and Rule 25 of the Assembly in Naldi (n 1 above) 23 and 29 respectively.

<sup>49</sup> Unless stipulated to the contrary in the Rules; art 12(12) Protocol.

<sup>50</sup> As above.

<sup>51</sup> Note that the AEC envisages co-operation with regional economic communities. See eg arts 4(2)(a) & 6(2) of the AEC Treaty. Such co-operation was formalised by the Protocol on the Relationship between the African Economic Community and the Regional Economic Communities of 25 February 1998, reproduced in (1998) 10 *African Journal of International and Comparative Law* 157.

with the parliaments of the regional economic communities. It should be noted that the ambit of article 18 is considerably broader, as it envisages that the co-operation shall also cover national parliaments or other deliberative organs of member states. Currently, at supranational level, there are five parliamentary entities in Africa, four of which function in the context of regional economic communities: the East African Legislative Assembly operating within the East African Community (EAC),<sup>52</sup> the Southern African Development Community (SADC) Parliamentary Forum,<sup>53</sup> the Economic Community of West African States (ECOWAS) Parliament,<sup>54</sup> and the Economic and Monetary Community of Central Africa (CEMAC) Parliament.<sup>55</sup> The fifth entity, the African Parliamentary Union (APU), is a continental interparliamentary organisation, which was set up in February 1976 and brings together 35 national parliaments.<sup>56</sup>

The only qualification that the term 'close co-operation' has received in the Protocol is the possibility that the Parliament convene annual consultative meetings with the other entities to 'discuss matters of common interest'. To that extent, it would appear that the meetings will be among equal partners and that the Parliament will not assume a superior role. On the other hand, the scope of co-operation appears to be rather limited and it is doubtful whether in the long run any concrete results will come out of these meetings. The limited scope of co-operation envisaged is striking, considering that one of the Parliament's functions enumerated in article 11 is the promotion of the co-ordination and harmonisation of the regional economic communities' policies and activities.<sup>57</sup> Therefore, it could have been expected that the parliamentary organs of the regional economic

<sup>52</sup> This organ, which commenced its operations on 30 November 2001 and convened its first session on 21 January 2002, is the continuation of the namesake organ, which was set up under art 56 of the Treaty for East African Co-Operation of 6 June 1967.

<sup>53</sup> Its Constitution was approved by the parliaments of the member states of SADC in May 1995 and it was launched in July 1996. The latest session met in November 2002.

<sup>54</sup> It was inaugurated in November 2000 and its last ordinary session was in May 2002.

<sup>55</sup> CEMAC was established in 1994. Its parliament has only a supervisory role.

<sup>56</sup> By virtue of Resolution 109/25/02 on the Establishment of the Pan-African Parliament, adopted at its 25th Conference on 24 October 2002, APU requested that the process of establishing the parliament be sped up in order to achieve the African integration objectives and to consolidate good governance and democracy.

<sup>57</sup> Note that pursuant to art 6(2)(f)(v) of the AEC Treaty, this harmonisation and co-ordination process was to be achieved during the Community's final (fifth) stage of establishment, which ought to be completed by 2034. However, the Cairo Agenda for Action, adopted by the OAU Assembly at its 31st ordinary session in June 1995 (OAU Doc AHG/Res 236(XXXI)), considered the achievement of regional economic integration a top priority. See further the Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities 1998 (n 51 above).

communities would have been invited to participate, at least as observers, at the Parliament's sessions discussing issues affecting them. However, there would appear to be no obstacle for the Parliament to increase their involvement in its operations.

## 5 Legal issues surrounding the Protocol

### 5.1 Signature, ratification and entry into force of the Protocol

Pursuant to article 21, the Protocol is open for signature by the member states of the AEC, which must ratify it in accordance with their respective constitutional provisions. The instruments of ratification are to be deposited with the Secretary-General of the AU. By mid-March 2002, 31 member states had signed the Protocol and only three had ratified it, while by November 2002 nine member states had ratified it. Currently, it has been signed by 34 member states and 15 countries have deposited their instruments of ratification.<sup>58</sup> Considering that article 22 stipulates that its entry into force requires ratification by a simple majority of the AEC membership,<sup>59</sup> currently numbering 47 states, it follows that 24 instruments of ratification must be deposited before the Protocol enters into force. Naturally, one cannot predict how soon the Protocol will enter into force. However, the fact that only 15 instruments of ratification have been deposited in the two years that have elapsed since its adoption is anything but encouraging.<sup>60</sup>

Once the Protocol enters into force and the Pan-African Parliament commences its deliberations, it does not mean that all member states of the AEC will be represented in it, pursuant to article 4(1), but only those that have already ratified the Protocol. The drafters could have opted for the Protocol to enter into force when all member states had ratified it.<sup>61</sup> This would have ensured that all member states would have been represented from its first session. Probably driven by considerations of pragmatism, the drafters chose a simple majority, which, however, means that only half the membership will be initially represented in the Parliament. Considering that, as has already been mentioned, the

<sup>58</sup> Namely Botswana, Ethiopia, Lesotho, Libya, Malawi, Mali, Mozambique, Namibia, Rwanda, Sahrawi Arab Democratic Republic, Seychelles, South Africa, Sudan, Tanzania and Togo. See *Report of the Interim Chairperson of the Commission on the Status of AU Treaties*, AU Doc EX/CL/14 (II) (3 March 2003).

<sup>59</sup> By way of comparison, note that art 101 of the AEC Treaty required a two-thirds majority for its entry into force.

<sup>60</sup> The AU Assembly has urged states to ratify the Protocol by the end of 2003 so as to enable the Parliament to meet in 2004, Assembly AU/Dec.12 (II) (10–12 July 2003).

<sup>61</sup> Note that art 23 stipulates that, after its entry into force, any member state may notify the Secretary-General of its intention to accede to the Protocol. In such cases, accession requires that the instrument of accession be deposited.



Parliament has not been endowed with legislative powers during the first stage of its existence but only with advisory and consultative functions, the fact that not all member states shall be represented might not be that crucial. On the other hand, the meaning of the term 'first stage' has not been defined in the Protocol and indeed there is no provision to that effect. However, it could reasonably be expected that the first stage will not expire before all members have ratified the Protocol.

## 5.2 Withdrawal from the Protocol

Withdrawal is dealt with in article 19, which provides that the parliamentarians from a member state seceding from the AEC shall automatically cease being parliamentarians.<sup>62</sup> The wording of this provision raises a number of pertinent questions. First, it does not specifically confer upon states the right to withdraw from the Protocol, but only sets out the consequences when a member state secedes from the AEC. The Protocol should be understood as a legal document separate from the AEC Treaty and this is confirmed by the fact that members may, if they wish to do so, not become contracting parties to it. Therefore, article 19 ought to have stipulated the possibility of withdrawal from the Protocol independent of secession from the AEC Treaty. Secondly, the Pan-African Parliament will also act as the parliamentary organ of the AU. This has apparently not been taken into account by the drafters and, consequently, if a member withdraws from the AU, this would not seem to affect the status of its parliamentarians. Indeed, participation in the AEC is quite distinct from participation in the AU and currently there are six countries that are member states of the latter but not of the former.<sup>63</sup> However, it is difficult to visualise a situation where a state that withdrew from the AU would nonetheless seek at the same time to maintain representation in the Pan-African Parliament.

This raises the broader question of whether the Protocol in its present form is properly drafted to allow the Parliament to act for both the AEC and the AU. The answer should be in the negative but this view seems academic. Although the Protocol fails to deal with such fundamental issues as to whether the Parliament shall hold separate sessions when dealing with issues pertaining to the AEC and when dealing with the AU,

<sup>62</sup> Secession from the AEC is regulated in art 104 of the AEC Treaty, which provides that any member state wishing to withdraw must notify the Secretary-General in writing by giving one year notice. Upon expiration of this period, the membership of the state in question shall cease. So far, no member state has seceded from the AEC.

<sup>63</sup> Namely Djibouti, Equatorial Guinea, Eritrea, Gabon, Somalia and Swaziland; see List of Countries which have Signed, Ratified/Accessed to the Treaty Establishing the African Economic Community as at 26 September 2002, AU Doc CAB/LEG/28.1.

especially in view of the fact that the membership in both organisations does not presently coincide, perhaps the assumption was that this would indeed be ultimately the case, the practice of the OAU was that all the member states of the OAU participated in discussions relating to the AEC. Moreover, the Constitutive Act of the AU contains clauses permitting the organisation to suspend a member's right to participation in its activities if its government has come to power through unconstitutional means,<sup>64</sup> and to deny its right to speak at meetings, to vote and to present candidates for any position or post within the AU when it has defaulted in the payment of budgetary contributions.<sup>65</sup> It is submitted that the operation of this clause would result in the suspension of participation of a recalcitrant member state in the Parliament as well.

### 5.3 Interpretation of the Protocol

The question of the interpretation of the Protocol is laid down in article 20, which stipulates that the Court of Justice of the AEC shall be the competent organ to examine 'all matters of interpretation emanating from the Protocol'. This provision is in line with article 18(2) of the AEC Treaty, according to which the Court of Justice has the jurisdiction to interpret the Treaty. Pending its establishment, article 20 provides that any issues of interpretation shall be submitted to the AEC Assembly, which shall determine them by a two-thirds majority. Although this is a pragmatic approach, it fails to take into account the fact that the Assembly is composed of representatives of all member states, which may not be at same time contracting parties to the Protocol and, consequently would not have a manifest interest in voting for or against a specific mode of interpretation. It should also be observed that the Court of Justice of the African Union will have jurisdiction to interpret the Protocol.<sup>66</sup>

### 5.4 Amendment, revision and review of the Protocol

Pursuant to article 24(1), the Protocol may be amended or revised by the decision of a two-thirds majority of the AEC Assembly. The procedure for amendment or revision is laid down in paragraphs (2) to (5) of article 24: Any member state, which is also a contracting party to the Protocol, or the Parliament itself, may propose in writing any amendment or revision and address the same to the Secretary-General. The latter shall notify the proposal to all other member states at least 30 days before the meeting

<sup>64</sup> See art 30 of the Constitutive Act of the African Union.

<sup>65</sup> As above, art 23(1). Both clauses are analysed in Magliveras & Naldi (n 6 above) 423–4.

<sup>66</sup> Art 19(1)(b) Protocol of the Court of Justice of the African Union.

of the Assembly, which shall consider the proposal.<sup>67</sup> If the proposal has not emanated from the Parliament, the Secretary-General is required to seek its opinion and, if one is delivered, to transmit it to the Assembly, which 'may adopt the proposal, taking into account the opinion of the Pan-African Parliament'.<sup>68</sup> This wording would signify that the Parliament is not required to offer its opinion and, if it does, the Assembly is not obliged to follow it. Finally, the adopted amendment or revision shall enter into force once two-thirds of the AEC membership has deposited their instruments of ratification. The latter provision should be considered problematic, because the entry into force of amendments becomes an issue also for those member states that have chosen not to become contracting parties to the Protocol. This is clearly an oversight by the drafters, since it is not possible for a state to ratify amendments to an international agreement to which it is not a contracting party. In conclusion, article 24 ought to have read that the amendments would enter into force once ratified by two-thirds of participating states.

The fact that the Parliament shall also act as a primary organ of the AU has once again not been taken into account, since there is no involvement of the AU Assembly in the amendment or revision procedure. Although this was to be expected (after all, the Protocol has been annexed to the AEC Treaty and not to the Constitutive Act as well), the fact remains that the need might arise for amendments to be made regarding solely the AU. Should this eventuality arise, it seems rather inappropriate to expect that the AEC Assembly will deliberate and decide on amendments concerning exclusively the AU. To that extent, it would have made more sense if the amendments or the revision were to be approved by the Assembly of the relevant organisation.

Article 25(1) envisages a compulsory procedure for the review of the Protocol. In particular, five years after its entry into force, a conference of state parties shall take place to review not only the operation and the effectiveness of the Protocol, but also the system of representation in the Parliament. The aim of this exercise is to ensure that the objectives and purposes as well as the vision underlying the Protocol<sup>69</sup> are being achieved and 'that the Protocol meets with the evolving needs of the African continent'.<sup>70</sup> While the holding of this review is mandatory, the holding of further review conferences is optional. According to article 25(2), these further conferences may be convened at intervals of

<sup>67</sup> Note that, according to art 9(1) of the AEC Treaty, the Assembly meets once a year in regular session.

<sup>68</sup> Art 24(4) Protocol.

<sup>69</sup> Note that the realisation of the vision underlying the Protocol, a vague term probably referring to the promotion of democratic principles and popular participation, was not included in the draft of November 2000.

<sup>70</sup> Art 25(1) Protocol.

ten years or at shorter periods, if so decided by the Parliament itself. Article 25 fails to lay down what form the conclusions of the review conferences shall take, whether the adoption of the conclusions will require unanimity, consensus or some type of majority voting, how they are to be implemented and to be given effect, etc.<sup>71</sup>

What appears to be certain is that the review mechanism is distinct from the process of amending or revising the Protocol. The former occurs by operation of the Protocol itself and is materialised through the conference of the state parties (ie irrespective of the wishes of individual participating countries), whereas the latter remains a matter for the AEC Assembly. Although the existence of a compulsory review mechanism after five years is welcomed, one cannot but wonder on its practical significance, because it is a moot point whether the Parliament would have commenced exercising its legislative powers, the *raison d'être* of its existence. As will be recalled, article 11 stipulates that during the (temporally undefined) first term of existence, the Parliament will only exercise advisory and consultative powers.

## 6 Conclusion

The Pan-African Parliament gives further impetus to the desire and vision of some Africans to provide a democratic foundation to the AU. The Pan-African Parliament ought to have a significant role to play in shaping an organisation that has elements of a people's union. In this context, the Pan-African Parliament must realistically acquire some legislative powers in the near future if it is to have any credibility with the people. Perhaps it will even help to encourage and develop democratic reforms in some countries. Much will depend on the quality of the delegates. Will the members of the Pan-African Parliament be independent and courageous or will they turn out to be yes-men? In an ideal world it might exercise some democratic oversight over the institutions of the AU. It should also contribute to the adoption of common policies coming within the scope of the AEC and the AU, probably acquiring at some stage certain supranational powers. Will this prove too much for some of Africa's 'strong men'?

<sup>71</sup> The provisions of the Vienna Convention on the Law of Treaties are not of assistance in this instance, since they do not envisage the review as a means of treaty modification but only refer to amendment (arts 39–41). See art 109(2) of the UN Charter providing that a Review Conference may recommend alterations by a two-thirds vote, which will take effect when ratified by two-thirds of the membership, including all permanent members of the Security Council.

From the perspective of legal drafting, it seems that the Protocol would have benefited from greater precision. It seems curious, given the imminent demise of the OAU, that the Protocol was drafted in its shadow. Nevertheless, the Protocol is now an AU treaty and all references to the OAU in the Protocol should now be read as referring to the AU. This appears to have been anticipated by the drafters of the Protocol, who envisaged the Parliament assisting the AU in the achievement of its policies.<sup>72</sup>

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<sup>72</sup> Art 3(1) Protocol.