

# International dispute settlement in Africa: Dispute Settlement and Conflict Resolution under the Organization of African Unity, the African Union, and African Traditional Practices: A Critical Assessment<sup>1</sup>

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## Introducción

### 1. Problem Statement

International conflicts and disputes of different kind and intensity have plagued Africa over the last decades. The existence of such conflicts has been one of the most important factors impairing the development of the continent. First the Organization of African Unity (hereinafter OAU) and later the African Union (hereinafter AU) have created mechanisms for the settlement of disputes. Which were the shortcomings of the dispute settlement mechanisms created under the OAU and its successor, the AU? Can traditional dispute settlement and conflict management somehow contribute to the improvement of modern mechanisms under the African Union?

### 2. Approach

This essay examines both the OAU and AU mechanisms, compares them and assesses their adequacy for the settlement of African disputes. Once these shortcomings are identified, this dissertation looks into the common characteristics of traditional dispute settlement and conflict management to discuss whether

they can somehow contribute to the improvement of modern institutional mechanisms.

### 3. Terminology and Delimitation

This dissertation addresses dispute settlement mechanisms for the resolution of international disputes within the African regional system. In order to avoid confusion, it is necessary to make two *a priori* clarifications of the terms «dispute» and «international». First of all, this study will frequently use the terms «conflict» and «dispute». As such, it is necessary to clarify what, if any, difference is implied in these terms and establish whether they can be used interchangeably. Secondly, having said that focus will be on «international» dispute settlement, it is important to explain the criteria deciding whether a dispute is considered «international».

#### 3.1. DISPUTE OR CONFLICT

Etymologically, «conflict» is defined as «*state of opposition or hostilities; fight or struggle; the clashing of opposed principles; the opposition of incompatible wishes or needs in a person; clash; be incompatible; struggle or contend*»<sup>3</sup>, and «dispute» is

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<sup>3</sup> *The Concise Oxford Dictionary of Current English*, Oxford University Press 1990.

given the significance of «*debate, argue; quarrel; discuss, esp. heatedly; question the truth or correctness or validity of a statement, alleged fact, etc; contend for; strive to win, controversy; a debate or disagreement*»<sup>4</sup>. While both words describe a discrepancy, the main difference between them is the element of further seriousness or aggravation that «*conflict*» involves, generally interpreted as the use of violence by one or more of the parties.

From the political-science perspective, elements other than violence are often taken into account when defining what conflict is. This is for example the position of Johan Galtung, who introduced the element of socio-cultural violence in the study of the components of conflicts.<sup>5</sup> According to him, conflicts have three necessary components. The first is an incompatibility of interests. The second element is negative attitudes in the form of perceptions or stereotypes about others. The third element would be the existence of coercive or threatening behaviours.

Examined now from a legal perspective, according to Collier and Lowe, «*conflict*» is more related to a general state of hostility between the parties, and the term «*dispute*» signifies a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on.<sup>6</sup> They argue that «*conflicts are often unfocused, and particular disputes arising from them are often perceived to be as much the result as the cause of the conflict. Conflicts can rarely, if ever be resolved by the settling of the particular disputes which appear to constitute them: the feelings of hostility almost inevitably survive the settlement of disputes.*»<sup>7</sup>

Therefore, dispute settlement could be defined as the procedure to handle concrete disputes, while conflict management or resolution will be the adequate way of referring to the resolution of conflicts. This means that, while dispute settlement mechanisms tackle particular disputes, conflict resolution would be understood as the set of initiatives primarily aiming to stop the acts of hostility, and achieve a durable peace between the parties. In addition, the explanation of Collier and Lowe indicates a difference between solutions *a priori* and *ex-post*. Thus, while

dispute settlement attempts to resolve a disagreement before it escalates to violence, conflict resolution comprises the different actions primarily aiming at ending violence once attempts to settle the dispute peacefully had failed.

While acknowledging the theoretical distinction explained by Collier and Lowe, I consider that, from the practical perspective of the application of dispute settlement techniques the difference is virtually irrelevant. Dispute settlement mechanisms such as negotiation, conciliation, mediation or good offices are also used as conflict resolution techniques. Conflict resolution merely adds a new set of tools, such as peacekeeping forces or humanitarian intervention, to the toolbox used in dispute settlement. This study addresses both the settlement of disputes before conflict occurs, and the settlement of conflicts themselves by the application of dispute settlement mechanisms, thus excluding further tools as described above from its scope. Most of the literature referenced in this thesis adopts this same approach.

### 3.2. INTERNATIONAL DISPUTES

When delimiting the internationality of disputes, it is necessary to recognize that an international dispute can be more complex than a disagreement between two or more States regarding interests of their concern. This complexity derives from two different sources.

One element of complexity stems from the existence of different subjects of international law.<sup>8</sup> Disputes do not only exist between States. While States and insurgents remain as traditional subjects of international law, other entities, such as International Organizations, individuals, and national liberation movements, are increasingly gaining the same status. This paper will focus on disputes between States.

The second element to determine is whether an intra-state dispute or conflict can be considered international. In order to establish this it is necessary to examine its substance and its repercussions beyond the boundaries of the State. Vogt explains

<sup>4</sup> *Ibid.*

<sup>5</sup> Johan Galtung, «Violence, peace and peace research», *Journal of peace research*, Vol. 6, No. 3, 1969.

<sup>6</sup> Collier, John & Lowe, Vaughan, *The Settlement of Disputes in International Law*, Oxford University Press, 1999.

<sup>7</sup> *Ibid.*

<sup>8</sup> See generally Cassese, Antonio, *International Law*, Oxford University Press, 1999.

that «as seen from the prevailing conflict situation on the continent (...) the causes and scope of recent or current wars in Africa reveal that the once strict dichotomy between internal and international conflict no longer exists. While conflicts may have internal origins, they often do take on regional and international characteristics and dimensions, be it through the direct involvement of neighbouring countries in a conflict (like for example in the Democratic Republic of Congo conflict), neighbouring countries suffering the consequences (like in the case of the massive flows from the Rwanda conflict into Tanzania and the DRC and those from Sierra Leone and Liberia into Guinea), or the international concern generated by massive loss of life and human rights abuses generated by these conflicts.»<sup>9</sup>

This thesis applies this criterion broadly when considering the «internationality» of disputes and conflicts. A good example of an «internationalized» conflict is the ongoing war in Sudan. As this dissertation is being written, the conflict in Darfur escalated with the loss of an estimated 70.000 lives. Attacks against civilians have been incessant, and the humanitarian situation continues to deteriorate. Moreover, thousands of refugees have sought protection in neighbouring Chad.<sup>10</sup> Although the conflict develops within the border of one State, the violations of human rights make it a concern of the whole international community. The refugees already pose a problem to Chad, and the mere existence of such serious conflict threatens the stability of the region, becoming a concern of Africa as a whole.

#### 4. Conflict in Africa

In this section, I will examine the most common roots of African conflicts and give an overview of the «types» of conflicts in Africa according to their sources. Knowing the type of conflicts that a dispute settlement system most frequently tackles, contributes to the evaluation of the adequacy of such system.

Conflicts have had devastating consequences for the development of the African continent. In 1993, African Heads of State and Government agreed on the following statement: «No single factor has contributed more to the present socio-economic problems in the Continent than the scourge of conflicts in and among our countries. They have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and displaced persons, deprived of their means of livelihood, human dignity and hope. Conflicts have gobbed-up scarce resources and, and undermined the ability of our countries to address the many compelling needs of our people.»<sup>11</sup>

In its 1998 report «*The causes of conflict and the promotion of durable peace and sustainable development in Africa*», UN Secretary General Kofi Annan pointed out five main sources of conflict in Africa: historical legacies; internal factors; external factors; economic motives; and particular situations.

The first of these sources, historical legacies, refers to the colonial heritage and the impact of the Cold War in Africa. First, the colonial Powers divided Africa into new territorial and administrative units. This led to the arbitrary partition of African Kingdoms, States and communities, and the imposition of artificial ethnic mixtures. In addition, infrastructure and commercial relations instituted by the colonial powers were not designed for the benefit of the indigenous economy, but for the advantage of the metropolitan country. In addition, Annan explains how undemocratic and oppressive regimes were supported and sustained by the competing superpowers during the Cold War. After its end, Africa was suddenly left to fend for itself, destabilizing countries and generating conflicts.<sup>12</sup>

Internal factors constitute the second source of conflicts indicated in Annan's report. The Secretary General points out that «*the nature of political power in many African States, together*

<sup>9</sup> Muyangwa, M and Vogt, A, *An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution 1993-2000*. International Peace Academy, 2002, p. 26.

<sup>10</sup> See reports and updated information at <http://www.hrw.org/doc?t=africa&c=sudan> and <http://www.amnestyusa.org/countries/sudan/summary.do>.

<sup>11</sup> AHG/DECL.3 (XXIX) Declaration of the Assembly of Heads of State and Government on the establishment within the OAU of a mechanism for conflict prevention, management and resolution, para. 9.

<sup>12</sup> Secretary General's Report on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, Report of the Secretary General, A/52/871-S/1998/318, para. 8-11 (available at <http://www.un.org/ecosocdev/geninfo/afrec/sreport/>).

with the real and perceived consequences of capturing and maintaining power, is a key source of conflict across the continent.»<sup>13</sup> Insufficient accountability of leaders, lack of transparency, inadequate checks and balances, non-adherence to the rule of law, absence of peaceful means of leadership change and lack of respect for human rights, are all elements making political control become excessively important. In addition, in Africa, the State is the major provider of employment and political parties are largely either regionally or ethnically based. Secretary General Koffi Annan explains how, in such circumstances, «the multi-ethnic character of most African States makes conflict even more likely, leading to an often violent politicization of ethnicity. In extreme cases, rival communities may perceive that their security, perhaps their very survival, can be ensured only through control of State power. Conflict in such cases becomes virtually inevitable.»<sup>14</sup>

In third place, the report places external factors. This source of conflict comprises two situations; the intervention from non-African powers in African States and the intervention among African States. In the first case, this intervention has often been motivated by the interest of foreign powers in the exploitation of African natural resources. The second case refers to conflicts that have been aggravated by the support and instigation of other African States, which were interested on a certain outcome of the conflict.<sup>15</sup>

Economic motives are listed by the Secretary General as the fourth source of conflict. The report states: «Despite the devastation that armed conflicts bring, there are many who profit from chaos and lack of accountability, and who may have little or no interest in stopping a conflict and much interest in prolonging it. Very high on the list of those who profit from conflict in Africa are international arms merchants.»<sup>16</sup> Another example provided in the report is the traffic of diamonds and other valuable raw materials, whose control has been a constant root of clashes in places such as Liberia and Angola.<sup>17</sup>

Finally, Annan considers other sources of conflict especially important in certain regions. The report mentions a few examples, such as the competition for land and water in densely populated areas in Central Africa, or the tensions between strongly opposing visions of society and the State in North Africa.<sup>18</sup>

These being the most common roots of conflicts, the types of conflicts that they have led to have been grouped by Mwenti Munya into seven categories: inter-state conflicts arising from the colonial legacy of artificial borders; conflicts emanating from colonial State succession; conflicts involving illegitimate and racist regimes resulting from delayed decolonization; internal conflicts resulting from secessionist movements; internal conflicts resulting from challenges to the legitimacy of the authority in power; conflicts involving external intervention; and conflicts with strong religious or ethnic underpinnings.<sup>19</sup>

## I. Dispute Settlement under the Organization of African Unity

### 1. The Creation of the OAU and its Charter

In order to better understand the substantive issues of the Organization of African Unity it is important to start by mentioning the context in which its Charter was adopted. Following the achievement of independence by the African States in the 1950's and 1960's, African leaders voiced calls for unity. Those leaders agreed on the need for a pan-African body and unity as necessary elements for the eradication of colonialism and for the continent's economic and political development. While the African representatives concurred concerning some objectives of the organization, that is; decolonization of Africa, elimination of racial discrimination and apartheid, the furtherance of international peace and security, and an emphasis on the economic cooperation between African States<sup>20</sup>, significant differences emerged

<sup>13</sup> *Ibid.* at par.12.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at par. 13.

<sup>16</sup> *Ibid.* at par. 14.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at par. 15.

<sup>19</sup> Munya, P. Mwenti, «The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement», in *Boston College Third World Journal*, 1999, p. 555.

<sup>20</sup> J. Bowen, «Power and Authority in the African context: Why Somalia did not have to starve - The Organization of African Unity (OAU) as an example of the constitutive process». *National Black Law Journal*, Fall 1995, p. 97.

when it came to determining the type and level of unity that the future organization should embody.<sup>21</sup> The divergent opinions mainly collided while debating whether the union should become a cooperation-based or integration oriented organization. The underlying issue of this debate was the fact that the formal independence of the ex-colonies did not mean a complete rupture of political and economic ties. In fact, it is possible to argue that these ties were even stronger than the ones among African States. As a result, some countries advocated a total rupture with the colonial powers, while others supported a more moderate project of transitional change.

This discussion had direct impact on core substantive issues, such as the functions of the organization, the principles governing its actions and the capacities that it would enjoy regarding decision-making and the enforcement of decisions upon State members. All of those will be decisive aspects with far-reaching repercussions regarding the dispute settlement competences of the organization.

There were three major groups involved in the discussions preceding the formation of the OAU.<sup>22</sup> The first group was the so-called Casablanca Group (composed of Ghana, Guinea, Libya, Mali, Morocco, The United Arab Republic and the Algerian Provisional Government) supporting political and economic unity among the African States and seeking to rapidly discontinue the dependency on the colonial powers. A milder position was held by the Monrovia group (composed of Liberia, Somalia, Togo, Nigeria, Ethiopia, Sierra Leone, and Tunisia) which advocated a gradual union. The third and most conservative position was held by the Brazzaville group (consisting on former French colonies), which encompassed some members of the Monrovia Group, defending the continuance of the relationship with the French colonial power and in favour of an African Unity with limited functions.<sup>23</sup>

Regarding the outcome, there are different analyses of which were the prevailing views. On the one hand, some<sup>24</sup> consider that the OAU was designed as a compromise between

the different factions and therefore the obligations reflected in the Charter are rather «moral» than legal. On the other hand, Muyangwa and Vogt present a more pessimist view and state that the groups defending the prevalence of national sovereignty and a weak union finally imposed their position. They affirm; «*the Charter of the new organization revealed that those advocating the supremacy of national sovereignty had won the day. African countries had chosen to create an organization based on political and economic cooperation rather than on supranationalism*»<sup>25</sup>.

## 2. Dispute Settlement in the OAU Charter

In this section, I will describe the substantive and institutional aspects of the organization created by the OAU Charter. In order to make a critical assessment of the dispute settlement system created within the OAU, it is necessary to indicate how the OAU was configured as an organization. Therefore, we will examine which purposes and principles guided the OAU, what kind of obligations member States undertook and which organs were established.

### 2.1. PURPOSES AND PRINCIPLES

According to article II of the OAU Charter, the OAU endeavours to promote the unity and solidarity of the African States; coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; defend their sovereignty, their territorial integrity and independence: eradicate all forms of colonialism from Africa; and promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declarations of Human Rights.<sup>26</sup>

Article III contains, together with the Preamble, the guiding principles of the OAU that States undertake to observe. Those are; the sovereign equality of all member States; non-interference in the internal affairs of States, respect for the sovereign

<sup>21</sup> Muyangwa and Vogt (2002) at 4-5.

<sup>22</sup> It is complicated to clearly identify the groups involved in the debate. While some identify only two groups, Casablanca and Monrovia, others add a third one, Brazzaville, and still some researchers identify a fourth one, the Pan-African Freedom Movement of Eastern, Central and Southern Africa.

<sup>23</sup> Bowen (1995) at 95-96

<sup>24</sup> Munya (1999) at 542

<sup>25</sup> Muyangwa and Vogt (2002) at 5

<sup>26</sup> Charter of the Organization of African Unity (hereinafter OAU Charter), reprinted in *Basic Documents of African Regional Organizations*, (Louis B. Sohn ed., 1971) art. II.

and territorial integrity of each State and for its inalienable right to independent existence; peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration; unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States; absolute dedication to the total emancipation of the African territories which are still dependent; and affirmation of a policy of non-alignment with regard to all blocs.<sup>27</sup>

These principles can be grouped into three categories, based on their teleological and philosophical foundations. The first category encompasses those principles aimed at safeguarding the sovereignty and territorial integrity of member States. The principles belonging to this category are; sovereign equality, non-interference, respect for the territorial integrity of each State and for its inalienable right to independent existence and the peaceful settlement of disputes. The second category comprises principles which are aimed at the decolonization and emancipation of territories under the oppression of colonialism. Principle VI belongs to this category as it proclaims «absolute dedication to the total emancipation of the African territories which are still dependent». Principle VII; «affirmation of a policy of non-alignment with regard to all blocks», constitutes by itself the third category; principles which attempt to create a uniform policy of neutrality in foreign policy issues. Finally, Principle V, condemning political assassination and subversive activities, can either be regarded as a principle seeking to safeguard the sovereignty and territorial integrity of member States, or constitute the independent category; «measures trying to protect and perpetuate the elites holding the power within member States».<sup>28</sup>

## 2.2. RIGHTS AND OBLIGATIONS OF THE OAU MEMBER STATES

According to the OAU Charter, all member States shall enjoy equal rights and equal duties. The obligation adopted by member States is to «pledge themselves to observe scrupulously the principles enumerated in Article III»<sup>29</sup>. This duty constitutes an obligation of result. Rather than imposing specific conducts on the member

States, the Charter establishes that member States' actions shall be in accordance with the principles.

Consequently, it can be stated that, by becoming members of the OAU Charter, member States undertake the obligation of settling their disputes peacefully by negotiation, mediation, conciliation or arbitration. However, the OAU Charter solely compelled States to achieve a peaceful settlement, without obliging them to submit the dispute to the Commission of Mediation, Conciliation and Arbitration (organ created by the OAU for the settling of inter-states disputes).

Bowen opines that, considering that the principles States undertook to respect were not commonly accepted rules in the continent prior to their inclusion in the Charter, the commitment for their respect was a major accomplishment.<sup>30</sup>

## 2.3. ORGANS OF THE OAU

The OAU Charter formed four institutions to carry out its mandate: The Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration.<sup>31</sup>

### 2.3.1. The Assembly of Heads of State and Government

Among the four organs, the Assembly was the supreme one<sup>32</sup>, consisting of Heads of State and Government. It met at least once a year, and —at the request of any member and upon the approval of two-thirds of the member States— it could also meet in extraordinary sessions.<sup>33</sup> Its resolutions were adopted by a two-thirds majority of the members except in the case of procedural questions, which were decided by simple majority. The quorum was two-thirds of the total members.<sup>34</sup>

The mandate of the Assembly was to discuss matters of common concern to Africa with the view of coordinating and harmonizing the general policy of the Organization.<sup>35</sup> The Assembly could discuss any matter, including disputes among

<sup>27</sup> OAU Charter art. III.

<sup>28</sup> Munya (1999) at 544-545.

<sup>29</sup> OAU Charter art. V.

<sup>30</sup> Bowen (1995) at 101.

<sup>31</sup> OAU Charter art. VII.

<sup>32</sup> OAU Charter art. VIII.

<sup>33</sup> OAU Charter art. XI.

<sup>34</sup> OAU Charter art. X.

<sup>35</sup> *Ibid.*

States or situations that endangered peace and security in the continent, and adopt resolutions and decisions. However, its capacity of coordination and harmonization was restricted to the OAU's own policy. Because of the principle of unrestricted sovereignty, the Assembly could not coordinate or harmonize domestic policies of the member States.

The Assembly also enjoyed a supervisory power to review the performance of other organs and specialized agencies and the capacity of interpreting the Charter.<sup>36</sup> This implied entrusting the Assembly with judicial competence.<sup>37</sup>

Although the Assembly could adopt resolutions by two-thirds majority, those were not binding on States. Consequently, «realizing that action could not be imposed on the member States, efforts were increasingly made to draft resolutions that satisfied all of them or at least were not strongly objected by any».<sup>38</sup> This made more likely that the Assembly's decisions were followed by the member States.

Woronoff considers that «*The fact that the Charter did not make the Assembly's resolutions binding (...) left the supreme organ in a difficult position.*»<sup>39</sup> Although the Assembly could discuss any conflict and adopt resolutions proposing plans of settlement, these decisions of the Assembly could not be enforced by the OAU. Therefore, the implementation of the Assembly's decisions was dependent on the political will of the States. For this reason, highly controversial issues were often avoided and resolutions were in practice adopted by unanimity. Due to the lack of enforcement powers, the broadest possible consensus was sought.<sup>40</sup>

### 2.3.2. The Council of Ministers

The Council of Ministers was composed of ministers designated by member States. The Council of Ministers met twice a year, although the Charter provided the possibility of calling

extraordinary sessions.<sup>41</sup> The role of the Council consisted on preparing conferences to the Assembly, implementing its decisions, and coordinating the inter-African cooperation in accordance with the instructions of the Assembly<sup>42</sup>. The Council of Ministers adopted its decisions by simple majority, two-thirds being again the necessary quorum.

In relation to dispute settlement, the Council of Ministers exercised in practice certain functions which were not attributed by the Charter. The Assembly entrusted it with almost all questions of decolonization, non-alignment and the peaceful settlement of disputes. Therefore, it became «*a sort of specialized commission on political questions*».<sup>43</sup> According to Woronoff «*During the formative period of the OAU the CoM took the initiative and met often to deal with critical issues. During the first year the Council met three times in ordinary session, but also twice in an emergency to deal with the Algero-Moroccan border dispute, in the disputes between Somalia and its neighbours and the mutinies in Tanganyika.*»<sup>44</sup> In case of the conflict confronting Somalia against Kenya and Ethiopia the Council of Ministers held an extraordinary meeting in 1964. However, for reasons related to the principle of territorial integrity examined below, it refused to go into the merits of the dispute and concentrated on reducing tension.<sup>45</sup>

In addition, the Council could also play a role in dispute settlement when a case was transferred by the Commission of Mediation, Conciliation and Arbitration, following the refusal of a disputant to submit to its jurisdiction.<sup>46</sup> While the Council could not adopt any binding decision or force the parties neither to submit their dispute to the Commission nor to accept any other means of settlement, the fact that the case would be referred to it implied that the Council was entitled to play a role discussing and mediating in inter-state disputes.

Furthermore, the Council of Ministers could also participate in dispute settlement through the preparation of Assembly summits,

<sup>36</sup> *Ibid.*

<sup>37</sup> OAU Charter art. XXVII.

<sup>38</sup> Woronoff, Jon, *Organizing African Unity*, The Scarecrow Press, 1970, p. 161.

<sup>39</sup> Woronoff (1970) at 160.

<sup>40</sup> Woronoff (1970) at 161.

<sup>41</sup> OAU Charter art. XII.

<sup>42</sup> OAU Charter art. XIII.

<sup>43</sup> Woronoff (1970) at 165.

<sup>44</sup> *Ibid.*

<sup>45</sup> K. van Walraven, *Dreams of Power. The Role of the Organization of African Unity in the Politics of Africa 1963-1993*. African Studies Research Centre, 1999, p. 288.

<sup>46</sup> Protocol of the Commission of Mediation Conciliation and Arbitration (hereinafter CMCA Protocol), reprinted in *Basic Documents African Regional Organizations* (Louis B. Sohn ed., 1971) pp. 69-76 art. XIII.

its flexible agenda and its power to establish ad hoc committees with which to form groups of mediators.<sup>47</sup>

### 2.3.3. The Secretariat

The Secretariat functions were merely administrative, and had no potential impact on dispute settlement. At the time of drafting the Charter, the main concern was whether the Secretary General was to play either a political or an administrative role. Some members<sup>48</sup> regarded the role assumed by the United Nations Secretary General, Dag Hammarskjöld, as a dangerous precedent.<sup>49</sup> The OAU Charter did not entrust any political functions to the Secretary General.<sup>50</sup> The role of the Secretary General was enhanced during the 1990's, as it is explained below, enabling him to play a more relevant role in dispute settlement.

### 2.3.4. The Commission of Mediation, Conciliation and Arbitration

The Commission was the organ created by the OAU for the settlement of inter-state disputes. Article XIX of the OAU Charter provides for the creation of the Commission, establishing that the detailed regulation of this Commission would be defined in a separate Protocol. The Protocol defining the constitution and powers of the Commission was adopted in Cairo, Egypt, on July 196 and became integral part of the Charter.<sup>51</sup> The Protocol consists of six parts and provides in elaborate detail the modes, procedures and types of disputes to be submitted for settlement. According to the Protocol, States could choose three alternative modes of dispute settlement: mediation, conciliation and arbitration. These methods constitute traditional types of dispute settlement in international law and their significance did not differ here.<sup>52</sup>

Articles XIII(2), XIV and XX of the Protocol established that the jurisdiction of the Commission was not compulsory but

dependent upon the consent of the parties.<sup>53</sup> This is because, although States undertook the obligation to settle their disputes through peaceful means, it was not determined that this settlement should be made through the Commission. In many cases, States could prefer direct negotiations or good offices through another State or the OAU itself. The jurisdiction of the Commission was restricted to disputes between States.

A dispute could be jointly referred to the Commission by the parties concerned, by a single party to the dispute, the Council of Ministers or by the Assembly.<sup>54</sup> When a dispute was referred to the Commission, and one or more parties refused to submit to its jurisdiction, the Commission could refer the matter to the Council of Ministers for consideration. It is not clear what happened after referral to the Council, but the Charter seems to indicate that the Council could make a recommendation to be submitted to the Assembly for further approval.<sup>55</sup> However, still if the Assembly passed a resolution this one would merely have recommendatory value.

In addition, the Commission had no jurisdiction to be seized with a conflict between a State and the Organization, interpret the Charter of the OAU, or serve as advisory body for the OAU.<sup>56</sup>

The Commission was composed of 21 members appointed by the OAU's Assembly of Heads of State and Government from a list provided by the Secretary-General, of names of persons of recognized professional qualifications (what does not necessarily imply legal training) who were previously nominated by the States. States could nominate two candidates but just one could be finally elected as it was forbidden to include more than one member from a member State in the Commission.<sup>57</sup> The mediators, conciliators etc to act in a particular case could only be chosen from among the members of the Commission.<sup>58</sup> States

<sup>47</sup> Van Walraven (1999) at 276.

<sup>48</sup> The members of the Brazzaville group were especially contrary to the idea of a strong political Secretary-General who could «water down» the moderate consensus-oriented spirit of the Charter through his independent actions.

<sup>49</sup> Bowen (1995) at 103.

<sup>50</sup> OAU Charter art. XVIII.

<sup>51</sup> OAU Charter art. XIX.

<sup>52</sup> Munya (1999) at 549. For an overview of the different types of dispute settlement see generally Merrils, J. G., *International Dispute Settlement*,

Cambridge University Press 1998, and Collier, John & Lowe, Vaughan, *The Settlement of Disputes in International Law*, Oxford University Press 1999.

<sup>53</sup> Maluwa, Tiyanjana, «The Peaceful Settlement of Disputes among African States, 1963-1983: Some Conceptual Issues and Practical Trends», *38 International & Comparative Law Quarterly* 299, 1989, p. 300.

<sup>54</sup> CMCA Protocol art. XIII.1.

<sup>55</sup> OAU Charter Article XIII.

<sup>56</sup> Woronoff (1970) at 177.

<sup>57</sup> CMCA Protocol art. II.

<sup>58</sup> CMCA Protocol art. XX, XXIII and XXVII.1.



were not entitled to appoint persons selected by them for a concrete dispute. The position of the Commission members was dependent upon the Assembly, which was the only one entitled to remove them from office through a decision adopted by two-thirds majority on the grounds of inability to perform the functions or proven misconduct.<sup>59</sup>

African States welcomed the adoption of the Protocol establishing the Commission. They had the hope that the new organ would act as the vehicle to achieve the conditions of security and peace that would enable the OAU to realize the purposes of the Charter. The Commission was supposed to help to avoid «fratricidal wars» and interstate polemical battles.<sup>60</sup> Although, it was clear from the very beginning that the Commission would have neither compulsory jurisdiction nor the right to impose enforce its decisions. However, there was the hope that it would be able to generate enough confidence to make States voluntarily make use of it.

In relation to the Commission an early commentator stated; *«What Africa wanted was justice of a kind it felt and trusted and it was assumed that, among other things, the Commission could provide justice for and among Africans and gradually form a body of African law. For this reason, much attention was paid to less binding methods in which a “palaver” would lead the parties to agree. By not demanding legal qualifications for members, it was possible to leave room for a “village elder” type of judgment. And there was far greater likelihood that the parties would invoke either customary African law or the principles of the OAU.»*<sup>61</sup>

### 3. Dispute Settlement by the OAU: Normative and Institutional Approach

Having seen how dispute settlement was considered at the theoretical level, under the OAU Charter, the present section outlines how this system worked in practice. In the first part, we analyze the OAU role in dispute settlement from the normative point of view. The aim is to examine which norms ruled the

practice of dispute settlement attempts by the OAU. This issue is intimately related to the principles the organization upheld in its Charter, which would have great impact on its capacity to contribute to the peaceful settlement of disputes. The second part addresses dispute settlement by the OAU from the institutional point of view, revising the organs of the OAU that played a role in dispute settlement and the way they carry out this function. In addition, examples are provided to illustrate both sections.

#### 3.1. NORMS UNDERPINNING THE OAU'S APPROACH TO DISPUTE SETTLEMENT

According to Foltz, three fundamental norms underpin OAU's approach to conflict situations: non-interference in the internal affairs of African States; territorial integrity and inviolability of the colonial boundaries; and «African solutions for African problems».<sup>62</sup> Similarly, Walraven, considers that the OAU normative approach to conflict was guided by «African solutions for African problems», the sanctity of colonial borders and the prohibition of subversion.<sup>63</sup> The cornerstone of both classifications is the unrestricted embracement of State sovereignty and the craving for maintaining dispute of settlement within the OAU's system, avoiding external intervention. This unrestricted sovereignty is reflected in the principles embedded in the OAU Charter. Non-interference, the respect for territorial integrity and the prohibition of subversion, although explicitly mentioned in the OAU Charter, are corollaries of the principle of sovereignty. Furthermore, the principle of «African solutions for African problems», although not explicitly embedded in the Charter, was the practical attitude of the OAU towards dispute settlement. This principle derives from the OAU's longing for «emancipation» and autonomy and its fear of external intervention. This intervention from outside of African was considered as having the potential effect of weakening the already frail union among African States created under the OAU.

Taking into account the two above mentioned criteria I will classify the norms governing the OAU's approach to dispute settlement as being «African solution for African problems»,

<sup>59</sup> CMCA Protocol art. IV.

<sup>60</sup> Bowen (1995) at 105.

<sup>61</sup> Woronof (1970) at 181.

<sup>62</sup> William J. Foltz, «The Organization of African Unity and the Resolution of Africa's Conflicts», in *Conflict Resolution in Africa*, F.M. Deng and I. W. Zartman (eds.), 1991, p. 352.

<sup>63</sup> Van Walraven (1999) at 279-286.

non-interference in the internal affairs of the member States, the prohibition of subversion and the sanctity of colonial borders.

### 3.1.1. «African Solutions for African Problems»

The rationale behind the role of the African regional system in dispute settlement is to be found in the UN Charter. Art.52 of the UN Charter, establishes that members of regional organizations «shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council». <sup>64</sup> Art. 33 reiterates this principle indicating that «the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.» <sup>65</sup>

However, these provisions need to be interpreted in connection with UN Charter Articles 24 and 34. According to the first provision, the Security Council is entrusted with «primary responsibility for the maintenance of international peace and security». <sup>66</sup> In addition, Article 34 determines that «the Security Council may investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security». <sup>67</sup> Therefore, the African regional system (OAU/AU) enjoys a competence of initial or preferential but not exclusive concern with inter-African conflicts. <sup>68</sup>

In the 1992 Agenda for Peace, UN Secretary General Boutros-Gali stated: «Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining interna-

tional peace and security, but regional action, as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.» <sup>69</sup>

The OAU tried to exercise this faculty of initial competence to address inter-state disputes to the greatest possible extent. The reasons behind this attitude of the OAU could be primarily found in the general theory of dispute settlement. According to certain interpretations of mediation, a mediator (broadly understood as any third party conducting dispute settlement) intervenes not so much for altruistic reasons as for realizing his self-interest. <sup>70</sup> This interest can consist of a wish to extend his influence with one or two parties or to prevent a rival power to assume the mediating role. <sup>71</sup>

The reasons behind the OAU's attempts to exclude non-Africans from the role in settling African disputes were the belief that African action would be substantively more effective in resolving African disputes and designing stable solutions, and that the intrinsic quality of the resolution was less important than the fact Africans did it themselves. <sup>72</sup>

States members to the nascent OAU realized that extra-African intervention in African affairs through the conduction of dispute settlement proceedings had the potential of deepening the already existing African divisions <sup>73</sup> and make intra-African cooperation impossible. This would have the effect of intensifying conflicts and consolidating rival inter-African coalitions. But, as explained by van Walraven, the impact of this external interference could go even further, weakening African influence in world politics and thus jeopardizing the global influence of Africa and its component States. <sup>74</sup> African countries realized that, in order to be able to play a role beyond the African continent, the OAU would have to be capable of settling intra-African conflicts by itself.

<sup>64</sup> UN Charter art. 52.

<sup>65</sup> UN Charter art. 33.1.

<sup>66</sup> UN Charter art. 24.1.

<sup>67</sup> UN Charter art. 34.

<sup>68</sup> Van Walraven (1999) at 281.

<sup>69</sup> Report of the Secretary General, An Agenda for Peace: Preventing Diplomacy, Peacemaking and Peacekeeping, 17 June 1992, UN A/47/277, S/2411. par. 61.

<sup>70</sup> I. William Zartman, «Conflict Reduction: Prevention, Management and Resolution», in *Conflict Resolution in Africa*, F.M. Deng and I. W. Zartman (eds.), 1991, p. 312.

<sup>71</sup> Van Walraven (1999) at 269.

<sup>72</sup> Foltz (1991) at 355.

<sup>73</sup> Foltz (1991) at 355.

<sup>74</sup> Van Walraven (1999) at 269.

A similar analysis was made by El-Ayuouty who stated that «Without OAU mechanisms in place and effectively functioning, the OAU would miss in this global burden sharing.»<sup>75</sup>

An example of the application of this principle of initial competence was seen in the context of the conflict between Somalia, on one side, and Ethiopia and Kenya on the other. During the early 1960's Somali guerrillas supported by the government raided targets inside Kenya's Northern Frontier District and Ethiopian Ogaden territory. Early in 1964, this escalated into clashes between the regular armies of Somalia and Ethiopia. Somalia preferred to have the matter discussed by the Security Council, as it did not expect the OAU, with its fierce commitment to *uti possidetis*, to be very sympathetic. However, African delegations at the UN wanted to keep the settlement of the dispute within the African system. Finally, the Secretary-General referred the dispute to the OAU.<sup>76</sup>

### 3.1.2. Non-interference in the Internal Affairs of Member States

This principle of non-interference constricted the role of the OAU in the mediation of domestic conflicts.<sup>77</sup> In the case of civil struggles in which massive loss of life or violations of human rights occurred, the affirmation of the principle of non-interference on the domestic affairs of other States inhibited the OAU from stepping in the conflict. This was the case in the Nigeria civil war, started in 1966.<sup>78</sup>

### 3.1.3. Prohibition of Subversion

The prohibition of subversion was a logical corollary of the principle of territorial integrity, but still was explicitly mentioned among the principles embedded in the OAU Charter.<sup>79</sup> However, it has been stated that no norm was so frequently violated as the prohibition of subversion.<sup>80</sup> In most cases, acts of subversion took the form of armed support to foreign nationals.<sup>81</sup>

However, the concept of subversion was controversial. In 1965 an extraordinary session of the Council of Ministers was held to discuss Niger's accusations of Ghana's complicity in the activities of the Sawaba guerrilla. The conference ended with a resolution that gave a broad definition of the term.<sup>82</sup>

### 3.1.4. Sanctity of Colonial Borders

The respect for the international boundaries was not explicitly mentioned by the OAU Charter, which just established the general principle of territorial integrity.<sup>83</sup>

However, in the first year of its existence, the OAU adopted a resolution reaffirming the sanctity of the boundaries inherited from the colonialism by the adherence to the doctrine of *uti possidetis*.<sup>84</sup> This doctrine was formulated in Latin America State practice and asserts the territorial continuity of the countries in spite of the transfer of sovereignty and irrespective of the international legal merits of their original demarcation. During its first summit, the Assembly was confronted with a serious territorial conflict between Somalia on the one hand and Ethiopia and Kenya on the other. Somalia demanded sovereignty over the border territories of Ethiopian Ogaden and the Kenyan «Northern Frontier District» The Assembly adopted a resolution which emphasized in the preamble that the border of African States formed «on the day of independence», a «tangible reality».<sup>85</sup> The resolution reaffirmed the «strict respect» by all member States for Article 3.3 of the Charter and declared that «all member States pledge themselves to respect the borders existing on their achievement of national independence».<sup>86</sup> Those boundaries were the ones delimited by the largest unit of effective colonial administration, and thus the largest unit of effective nationalist political organization. Usually these boundaries had more juridical and administrative reality than social or economic content.<sup>87</sup>

<sup>75</sup> El-Ayuouty, Yassin, «An OAU for the Future: An Assessment», in Yassin El-Ayuouty (Ed.), *The Organization of African Unity after Thirty Years*, 1994, p. 185.

<sup>76</sup> Van Walraven (1999) at 288.

<sup>77</sup> Van Walraven (1999) at 270.

<sup>78</sup> Munya (1999) at 573.

<sup>79</sup> OAU Charter art. III.5.

<sup>80</sup> Van Walraven (1999) at 285.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> OAU Charter art. III.3.

<sup>84</sup> Zartman (1991) at 304.

<sup>85</sup> AHG/Res.16 (I).

<sup>86</sup> Van Walraven (1999) at 282.

<sup>87</sup> Foltz (19991) at 348.

The *raison d'être* for the adoption of this principle was to avoid opening a Pandora's Box. Once a country successfully claimed the revision of its borders, the same claim would be raised by virtually every single African State. Thus, the doctrine was adopted in order to contribute to stability within Africa. This is proved by the fact that *uti possidetis* was violated without raising criticism by voluntary border revisions, such as the one performed by Senegal and Gambia. Such voluntary revisions did not jeopardize the inter-African order.<sup>88</sup>

In its ruling on the Aouzou strip dispute, confronting Libyan and Chad, the International Court of Justice confirmed that African States had recognized and confirmed the principle of *uti possidetis*. Its purpose, according to the Court was, *to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.*<sup>89</sup>

### 3.2. ROLE OF OAU INSTITUTIONS AND PROCEDURES IN THE PEACEFUL SETTLEMENT OF DISPUTES

Although the OAU Charter entrusted the Commission with the settlement of disputes, this organ never became operational. After the initial enthusiasm on the work of the Commission showed by the member States, their practice soon revealed a complete lack of interest on making the commission function. Finally, the Commission was never seized with any dispute, as member States preferred to settle their disputes through other means. As stated, the member States' obligation of settling inter-states disputes peacefully was not requested to be fulfilled within the context of the commission, nor even within the OAU.<sup>90</sup>

However, this does not imply that the OAU had no role in dispute settlement. There were two ways in which dispute settlement was carried out; through the rest of organs of the OAU and *ad hoc* committees.

The role played by the Assembly derived from its entitlement to discuss «matters of common concern to Africa».<sup>91</sup> In addition, the Protocol of the Commission provided for the transfer of a case to the Council when one of the parties to a dispute refuses to submit to the jurisdiction of the Commission.<sup>92</sup> The Council could also be involved in the settlement of disputes through the preparation of the Assembly summits, its flexible agenda and its powers to establish *ad hoc* committees.<sup>93</sup> Furthermore, both Council and Assembly sessions offered a convenient forum to settle conflicts. This forum facilitated the very crucial step of restoring communications. Extraordinary sessions could be called like in the case of the border conflict between Algeria and Morocco. According to Walraven «*as such plenary mediations take place at the highest or second highest level and involved a large number of States, disputants may experience considerable pressure to settle.*»<sup>94</sup>

Nevertheless, the potential of discussions within the plenary organs was undermined by the embarrassment that the open discussion could produce in the member States, which in general preferred «*bargaining under the protection of face-saving formulas.*»<sup>95</sup>

However, Walraven considers that Council and Assembly had more to offer than plenary proceedings. They provided a great array of diplomatic facilities, principal among which is the opportunity for behind-the-scenes negotiations and mediation initiatives. Most summits were marked by attempts to mediate in conflicts that were not part of the formal agenda and some have witnessed a temporary or permanent reconciliation of disputants. International Organizations, and particularly the OAU, operate based on the principle of flexibility. In the OAU it was seen as more important that a conflict was settled within the organizational framework than that settlement was effectuated by concrete institutions. For example, mediation by a head of State who is also Assembly chairman was regarded a form of OAU mediation.<sup>96</sup>

<sup>88</sup> Van Walraven (1999) at 284.

<sup>89</sup> Kessing's Records of World Events, at [www.keesings.com](http://www.keesings.com). See May 1975 - Chad, May 1988 - Chad, December 1989 - Chad and February 1994 - Chad. Visited 30 June 2004. See also Gino J. Naldi, «The Aouzou Strip Dispute—a legal analysis», *Journal of African Law*, Vol. 33, No. 1, 1989.

<sup>90</sup> However the OAU pursued the settling of African disputes within Africa, as a strategy of self-preservation of the organization.

<sup>91</sup> OAU Charter art. VIII.

<sup>92</sup> CMCA Protocol art. XIII.

<sup>93</sup> Rules 15 and 36 of the Rules of Procedure of the Council of Ministers.

<sup>94</sup> Van Walraven (1999) at 276.

<sup>95</sup> Van Walraven (1999) at 277.

<sup>96</sup> Van Walraven (1999) at 277.

With regard to the Secretary General, one can only say that his involvement in dispute settlement could not be seen until 1993, when its role was reformed and it gained some political power.

With the Commission in a deadlock, *ad hoc* committees were created to conduct dispute settlement initiatives. Heads of State were usually appointed as mediators. If the policy organs decided to appoint an *ad hoc* committee of several mediators, care was taken to achieve a balanced composition. Mediation committees would therefore include various countries, including States from inside and outside the region and countries influential in inter-African relations, such as Algeria, Nigeria or Ethiopia.<sup>97</sup> The Western Sahara conflict and the Aouzou Strip Dispute are two examples of conflicts in which *ad hoc* committees were set.

In 1978, during the Fifteenth Summit Conference held in Khartoum, an Ad Hoc Committee was formed for the resolution of the Western Sahara Dispute.<sup>98</sup> This was preceded by various frustrated attempts to call an extraordinary meeting of the Assembly. This Committee, also known as the Committee of Wise Men was composed of the Heads of State of Sudan, Nigeria, Guinea, Mali and Tanzania. Its mandate consisted on studying the problem and recommending a solution<sup>99</sup>. In 1980 eight new elected members were added to the Committee, which proposed a decision based on the following points; cease-fire, referendum for the indigenous population of the Western Sahara and that a UN peacekeeping force being invited to maintain peace<sup>100</sup>. A year later, in 1981, an implementation Committee was appointed with the mandate of bringing the parties to comply with the resolutions adopted by the Wise Men Committee. Unfortunately, the Committee was unable to bring the parties to the negotiation table and the hostilities continued. Finally, the UN assumed the leading role of the conflict.

The Aouzou strip dispute was a conflict between Libya and Chad over a band of their common border in which valuable

natural resources were found. In 1984, an Ad Hoc Reconciliation Committee composed first at the ministerial level and later by Heads of State was set. The efforts of this Committee did not bring to a settlement, partially because Libya refused to take part in the procedures. Finally, both parties consented referring the dispute to the International Court of Justice. The final decision, adopted one year later, ruled in favour of Chad, recognizing its sovereignty over the strip.<sup>101</sup>

In the 1970's, the impossibility of operating the Commission being proved, the first attempts of institutional reforms started. The members of the Assembly realized that, while the Commission remained inactive, disputes had been tackled through the mediation efforts of *ad hoc* committees set up by the Assembly. In 1997, Nigeria proposed to establish a permanent «Ad Hoc Committee» for the settlement of inter-state disputes. This Committee was composed of Central African Republic, Gabon, Gambia, Madagascar, Togo, Tunisia, Zaire and Zambia with Nigeria as Chairman. In addition other three members whose participation was considered useful in the concrete dispute could be appointed by the chairman of the Assembly. The Committee's rationale was based on the consideration that, as the frequency of inter-state disputes was threatening inter-African co-operation and the Commission could not operate spontaneously, a standing committee was needed that would be able to convene at short notice. However, this was considered a temporary solution until the Commission was reformed.<sup>102</sup>

By the early 1980's and 1990's conflicts, mainly of intra-state nature increased and the overall situation of security worsened. In addition, the deterioration of the situation had a negative impact on the already weak African economy.<sup>103</sup>

In 1990, African leaders realized that the predominance of conflicts had seriously damaged the political and economic development of their own countries and of Africa in general.<sup>104</sup> The Assembly therefore adopted the «Declaration on the Political and

<sup>97</sup> *Ibid.*

<sup>98</sup> See generally Joffe, George, «The Conflict in the Western Sahara», in Oliver Furley (Ed.), *Conflict in Africa*, 1995.

<sup>99</sup> Resolution AHG/Res. 92 (XV).

<sup>100</sup> Resolution AHG/Dec. 114(XVI).

<sup>101</sup> Kessing's Records of World Events, at [www.keesings.com](http://www.keesings.com). See May 1975 - Chad, May 1988 - Chad, December 1989 - Chad and Feb-

ruary 1994 - Chad. Visited 30 June 2004. See also Gino J. Naldi, «The Aouzou Strip Dispute-a legal analysis», *Journal of African Law*, Vol. 33, No. 1, 1989.

<sup>102</sup> Van Walraven (1999) at 296.

<sup>103</sup> Muyangwa and Vogt (2002) at 8.

<sup>104</sup> *Ibid.*

Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World», which announced the commitment of the OAU towards the settlement of «all conflicts in the continent». This announcement was particularly important, as it would implied the restriction of the principle of non-interference in order to entitle the OAU with jurisdiction to intervene, through dispute settlement in domestic conflicts.<sup>105</sup>

During the 1992 summit meeting in Dakar, Secretary General Ahmed Salim submitted his proposals for the reform of the OAU mechanisms to settle disputes in Africa. In this report, he argued that the OAU's ad hoc approach to conflict had proven inadequate and that there was an urgent need for the OAU to adopt a new security agenda, as well as develop an institutional framework within which African conflicts could be addressed. In 1993, during the Cairo summit, the Mechanism for Conflict Prevention, Management and Resolution (hereinafter OAU Mechanism) was adopted.<sup>106</sup>

The primary goal of the OAU Mechanism was the anticipation and prevention of conflicts.<sup>107</sup> Its structure was composed of two main bodies: The Central Organ and the Conflict Management Centre. An already existing organ, the Bureau of the Assembly, was appointed as the Central Organ of the OAU Mechanism.<sup>108</sup> This Bureau was composed of 16 States elected annually. As decision-making body of the OAU Mechanism, the Central Organ was responsible for examining issues affecting peace and security on a continuous basis, and providing the OAU Secretary (whose role gained relevance) with the political leadership necessary to initiate appropriate actions to address these issues. However, the Bureau did not have the faculty of adopting binding decisions. The Secretary General and the Conflict Management Centre were planned to work as the operational arm of the Mechanism. The OAU also decided to establish an Early Warning System responsible for the identifying and gathering information on the causes of conflicts.<sup>109</sup>

Following the establishment of the Mechanism, the OAU faced several critical conflicts such as the war and genocide in

Rwanda and Burundi, the secession within the Comoros, the war in Congo, and the violent border dispute between Eritrea and Ethiopia. In the case of Rwanda, between 1990 and 1992, the OAU launched a mediation effort that resulted in cease-fire. However, in 1994, the situation deteriorated and the OAU begged the UN to intervene. As regards to the Burundi conflict, the OAU Central Organ limited itself to endorse the decisions adopted by the regional States. Nelson Mandela was appointed chief mediator in 1999, after 200,000 deaths. Both Rwanda and Burundi were conflicts marked by ethnic violence. In the case of the Comoros separatist conflict, the OAU started its intervention by sending a ministerial delegation. Later, when the separatists drafted their own constitution, the OAU stated that they were violating the territorial integrity of the Comoros. After a new eruption of violence in 1998, the OAU called for an inter-island conference, in which an OAU-mediated agreement, granting greater autonomy to the secessionist islands was proposed. However, the secessionists refused this settlement. In 1999, the Central Organ reiterated its commitment to the unity and territorial integrity of the Comoros and reaffirmed its vow to persevere on the peaceful solution of the conflict. In Congo, the Central Organ asked both sides to achieve a peaceful solution to the conflict. In addition, the OAU supported the efforts of the Southern African Development Community (SADC) and the UN to settle the conflict. In the case of the conflict between Eritrea and Ethiopia, the OAU established a high-level delegation that studied the problem and submitted proposals. In the case of this conflict the role of Algeria's President Bouteflika, Chairman of the Assembly, was determinant to achieve a settlement.<sup>110</sup>

#### 4. Assessment

The aim of this section is to address the role of the OAU in conflict resolution and dispute settlement. The analysis first addresses the conceptual and normative shortcomings and secondly the institutional and structural limitations.

<sup>105</sup> Van Walraven (1999) at 298.

<sup>106</sup> Muyanwa and Vogt (2002) at 8.

<sup>107</sup> AHG/DECL.3 (XXIX) Declaration of the Assembly of Heads of State and Government on the establishment within the OAU of a mechanism for conflict prevention, management and resolution, par. 15.

<sup>108</sup> AHG/DECL.3 (XXIX) para.18.

<sup>109</sup> Muyanwa and Vogt (2002) at 9.

<sup>110</sup> Muyanwa and Vogt (2002) at 10-28.

During the first thirty years of the OAU's existence, Africa experienced numerous challenges to its peace and security, including struggles for independence, civil wars and inter-state conflicts. Some of the most important conflicts during this period included those in Nigeria, Chad, Sierra Leone and Somalia; the liberation struggles in Zimbabwe, Namibia and the former Portuguese colonies of Angola and Mozambique, and the subsequent civil wars; the fight to end the racist regime in South Africa; and the security situation in the Horn.<sup>111</sup>

#### 4.1. CONCEPTUAL AND NORMATIVE LIMITATIONS

Muyanwa and Vogt consider that «during the first years of its existence, the organization had some successes in conflict management».<sup>112</sup> They point to the OAU's mediation in the border disputes raised during the 1960's and 1970' as the core of this success. The conflicts between Algeria and Morocco, Mali and Upper Volta, Somalia and Kenya and Ethiopia and Somalia were successfully defused.<sup>113</sup> In the case of the Algerian-Moroccan border conflict the OAU Council transferred the controversial issue to an ad hoc committee designed to create the definitive settlement of the conflict. After several rounds of negotiations, parties signed a temporary treaty of cooperation and solidarity that avoided the escalation of a conflict where military force had already been used. Nevertheless, the ad hoc committee merely facilitated the negotiation between the parties, who were also the ones taking the initiative towards the adoption of the final agreement.<sup>114</sup>

The same moderately positive assessment of the role played by the OAU in the resolution of border disputes is made by Munya, noting the adherence of the OAU to the doctrine of *uti possidetis*. According to Munya «*the maintenance of the status quo has proven more prudent than attempting to revise borders*».<sup>115</sup>

Thus, the doctrine of *utis possidetis* is regarded by the doctrine as a «lesser evil», a principle that consolidated an arbitrary and unfair reality that lacked a plausible alternative and became an important stabilizing factor for inter-states relations in Africa.

Malraven makes an interesting and somewhat different analysis of the role played by *uti possidetis* as a stabilizing factor; he affirms that this principle was also a symbol of the OAU's inclination to protect the interests of the elites to the detriment of the people at large.<sup>116</sup> This opinion is shared by Foltz, who considers that one of the factors supporting the rule of *uti possidetis* was the «need for ruling elites to control their boundaries».<sup>117</sup>

Nevertheless, the principle of respect for the colonial boundaries inhibited the OAU's capacity to conduct dispute settlement. As explained by Foltz, «*by giving absolute priority to the maintenance of existing borders over the otherwise compelling norm of self-determination of peoples —a norm in practice reserved for “peoples under colonial domination”— the territorial integrity principle prohibits the organization and inhibits its members from intervening to resolve regional, ethnic, or other conflicts within African States*».<sup>118</sup>

Furthermore, I consider that the doctrine of *uti possidetis* indirectly played another important role in African conflicts. According to Walraven «*[r]igid adherence to uti possidetis hardly contributed to an alleviation of the problems of peoples living in frontier regions. The high degree of arbitrariness of inter-state boundaries can be deduced from the fact that in many cases they cut across ethnic and even family ties. Although boundaries are far more permeable than regulations suggest, Africa's strict border regimes hinder communication, especially in the case of nomadic communities*».<sup>119</sup> It is possible to argue that the maintenance of borders that fragmented and altered the indigenous ethnic divisions had the effect of increasing the risk of ethnic conflicts. Concerning this question, El-Ayouty suggested considering functional solutions to the question of tribal and clan division by inherited national frontiers. According to him, the solution to this issue could be co-sovereignty over certain areas for purposes of tribal unity or natural resources exploitation.<sup>120</sup> This could be an adequate solution with a great potential on conflict prevention, as ethnic differences and the control over natural resources are two of the main sources of conflict in Africa.

<sup>111</sup> Muyanwa and Vogt (2002) at 5.

<sup>112</sup> *Ibid.*

<sup>113</sup> Muyanwa and Vogt (2002) at 6.

<sup>114</sup> Munya (1999) at 556-558.

<sup>115</sup> Munya (1999) at 579.

<sup>116</sup> Van Malraven (1999) at 284.

<sup>117</sup> Foltz (1991) at 353.

<sup>118</sup> Foltz (1991) at 354.

<sup>119</sup> *Ibid.*

<sup>120</sup> El-Ayouty (1994) at 188.

Overall considered, the doctrine of *uti possidetis* seems to have had both positive and negative consequences. Zartman considers that the OAU's observance of *uti possidetis* has had two different effects on conflict. On the one hand, it prevented it by signalling to potentially revisionist States that their case would be difficult, costly and unsure. On the other hand, it limited action without eliminating the conflict.<sup>121</sup>

In my opinion, the adhesion to the principle of *uti possidetis* can be considered as a reasonable option to avoid further destabilization. However, it could be moderated through a flexible application allowing, not only voluntary revisions of borders, but also the application of new notions of sovereignty, more considerate with the ethnic composition of border regions. If the main purpose underlying the doctrine of *uti possidetis* is to achieve stability, it would not be reasonable to apply it so rigidly that it leads to the opposite effect. An absolute embracement of this principle could lead to further ethnic disputes.

Secondly, the principle of sovereignty and its corollary of non-intervention hampered the OAU's role in resolving intra-State conflicts. This principle of non-interference was «*conservatively interpreted and applied so that conflicts within a State were placed beyond the purview and jurisdiction of the OAU*».<sup>122</sup> Munya indicates that the result of the rigid application of this principle was «*an artificial and conceptually unrealistic dichotomy between inter-state and intra-state conflicts, with the OAU having jurisdiction only to deal with the former*».<sup>123</sup> Munya believes that within Africa, all intra-state conflicts have a cross-border spillover effect that other States cannot ignore.<sup>123</sup>

El-Ayouty also criticises the sanctity of domestic jurisdiction, pointing out that the absolute formulation of this principle became outdated over the years. While following the struggle for independence it was comprehensible that African States sought to secure their sovereignty, domestic jurisdiction progressively lost ground.<sup>124</sup> With the development of the doctrines of human rights and humanitarian intervention, limitations to the old concept of absolute sovereignty of the State were established.

The concepts of non-intervention and non-interference in the internal affairs of states are fundamental principles of the UN Charter.<sup>125</sup> However, the UN Security Council has interpreted these concepts restrictively and utilized its powers under Chapter VII (action with respect to threats to the peace, breaches of the peace and acts of aggression) to deal with internal situations within member states. An example of this is the resolution adopted by the Security Council in 1992 authorizing humanitarian intervention in order to «*restore, peace, stability, and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia*».<sup>126</sup>

Therefore, the absolute formulation and interpretation of the principle of non-interference seriously impeded the OAU's role in resolving internal conflicts and consequently, in dispute settlement. In addition, it is important to acknowledge the great human devastation caused by these conflicts. The fact the OAU remained inactive, while the UN and even African sub-regional organizations<sup>127</sup> led the conflict resolution and the peacekeeping operations, did little for the objective pursued by the principle «*African solutions for African problems*». The aim of playing an increasing role in the world politics and being taken into account as an emancipated, mature and solid organization was severely undermined by this inactivity.

#### 4.2. INSTITUTIONAL AND STRUCTURAL SHORTCOMINGS

As stated above, none of the four organs set by the OAU Charter enjoyed powers to make their decisions enforceable among member States. As explained by Woronoff, «*the Organization of African Unity was created by a community of States extremely jealous of their sovereignty and attributes. It was therefore not surprising that the Charter emphasized the powers of the States while restricting those of the Organization. This made the section on rights and duties of members States somewhat lopsided and left considerable doubt as to the actual extent to which the member States were bound to support the Organization they created*».<sup>128</sup>

<sup>121</sup> Zartman (1991) at 317.

<sup>122</sup> Munya (1999) at 578.

<sup>123</sup> *Ibid.*

<sup>124</sup> El-Ayouty (1994) at 186.

<sup>125</sup> UN Charter, art. 2, par. 4.7.

<sup>126</sup> Munya (1999) at 585 (quoting Security Council Resolution 794).

<sup>127</sup> A good example was the ECOMOG intervention of the Liberian civil war, which restored the order and stability in the country.

<sup>128</sup> Jon Woronoff (1970) at 135.



Because the OAU lacked the power to enforce decisions or impose sanctions upon its members, it had to rely on their willingness to comply with the resolutions and decisions adopted by the Assembly. Knowing that the enforcement of the implementation of decisions and resolutions was impossible, the Assembly usually tried to adopt resolutions on the lowest possible common denominator. As stated by El-Ayouty, «*Since the Assembly of Heads of State and Government is the highest decision-making body in the OAU, it is difficult to see such a cumbersome machinery acting on African crises with the requisite cohesiveness, the needed expedition, and the necessary submission to sanctions in case of disregard of whichever decision is taken*»<sup>129</sup>.

The existence of a merely «administrative Secretary General» until the reform of 1993, did neither have a positive impact on dispute settlement. The OAU lacked an UN-like Secretary General capable of bringing to the attention of the other organs «any matter which in his opinion may threaten the maintenance of international peace and security.»<sup>130</sup> The powers of the UN Secretary General allow him to assume an active role in the peaceful settlement of disputes.<sup>131</sup>

Special consideration deserves the failed Commission of Medication, conciliation and Arbitration. There are various and sometimes contradictory explanations for why the Commission became dormant. Only one year after the creation of the Commission, Secretary General Boutros-Ghali stated that the inactivity of this body was due to its infancy. Conversely, time proved him erroneous. Consequently, some argued that the problem had to be in the character of the Commission itself. Among them, Munya argues that the very nature of the Commission was its greatest weakness, as it could only be moved to action through the consent of the disputants, thus preventing its function. He also states that, because there was not machinery for the enforcement of decisions, disputants had hardly any incentive to submit to the Commission's jurisdiction.<sup>132</sup>

Woronoff already highlighted the issue of consent in 1970. In his opinion, there were two preliminary barriers to the effective

functioning of the commission. First, the consent of the parties was required for the Commission to exercise jurisdiction. Secondly, unless arbitration was chosen, even after lengthy proceedings the proposed solutions could be rejected.<sup>133</sup>

However, conversely to the above-mentioned explanations, which demand further enforcement powers and compulsory jurisdiction, Maluwa makes a different analysis of the causes behind the failure of the commission. Maluwa points at concurrent lack of political will and legal «*unworkability*» as the reasons,<sup>134</sup> due to the distrust of the States regarding the issues of confidence and control.

In relation to the aspect of confidence, some States<sup>135</sup> pointed out the unnecessary character of the Commission since almost all countries preferred to have their disputes settled by eminent personalities in which they had confidence. According to Maluwa, the Commission had two drawbacks for the disputants; although jurisdiction would depend on the consent of the parties, once the consented to, the parties had limited control over the process. In addition, the right of the parties to choose the mediators, conciliators or arbitrators was restricted, as the Protocol did not allow parties to a dispute to choose anybody from outside the Commission.<sup>136</sup> As such, the Commission did not entitle the parties the «*unfettered right to retain control over the settlement process.*»<sup>137</sup> Hence, States preferred to submit their disputes to *ad hoc* committees.

Bowen, concurring with Maluwa, considers that States preferred to submit their important disputes to «*certain renowned and mutually trusted leaders*» rather than to an institutionalized mechanism. The reason for this lack of trust seemed to be that States felt they had too much at stake to trust an unknown mechanism.

As stated by Woronoff, «*even with an African Commission whose rulings were usually not binding, it was not certain whether the independent States would relax their grip on sovereignty sufficiently to permit the Commission to function.(...).* In many cases they might well prefer direct negotiations or good

<sup>129</sup> El-Ayouty (1994) at 185.

<sup>130</sup> UN Charter art. 99.

<sup>131</sup> Munya (1999) at 588.

<sup>132</sup> Munya (1999) at 552.

<sup>133</sup> Woronoff (1970) at 181.

<sup>134</sup> Maluwa (1989) at 313.

<sup>135</sup> Kenya expressed this point of view during the tenth ordinary session of the Council of Ministers in Addis Ababa in February 1968.

<sup>136</sup> Maluwa (1989) at 315.

<sup>137</sup> Maluwa (1989) at 316.

offices through another State or the OAU itself. This was certainly the only way in which they would handle political disputes and for some time almost every dispute might seem politically loaded.»<sup>138</sup>

In practice, the inactivity of the Commission led to the creation of ad hoc arrangement to conduct dispute settlement. These kind of ad hoc committees fulfil the two requirements pointed out by Maluwa; confidence and control. According to Foltz African States «prefer informal to formal mechanisms of dispute settlement. Ad hoc committees are less disruptive and less expensive than formal inquiries. They can proceed flexibly and discreetly to work out arrangements specifically tailored to the situation at hand, and since they have no continuous existence, they avoid setting precedents, which might later be applied to any of the fifty-one member States.»<sup>139</sup> States did not want to set precedents, as they want to retain as much freedom as possible to negotiate the terms of the settlements. This is mainly the reason why States preferred ad hoc committees, which satisfied their requirements regarding the aforementioned issues of confidence and control.

However, it is possible to argue that the discontinuance of the ad hoc committees rather than an advantage soon turned into a drawback, as it raised numerous coordination difficulties and impeded the continuance of the settlement process. In addition, the establishment of the OAU Mechanism in 1993 did not substantially improve the OAU's role in dispute settlement. It merely entitled it with further reactive capacity.<sup>140</sup>

In conclusion, it is possible to find two types of evaluations regarding the role of the OAU in the settlement of international dispute in Africa. The first kind of evaluation focuses on indicating the limitations posted by the principle of sovereignty to the dispute settlement capacities of the OAU. This is, for example, the position undertaken by Munya, who considers that «[t]here is an inherent tension between the need to create a strong and effective organization and the desire to jealously guard the sovereignty of the member states. It is this tension that it is at the heart of the ineffectiveness of the OAU as a regional arbiter and stabilizer»<sup>141</sup>. Similarly, El-Ayouty considers

that at the centre of the problem was the need for replacing the old concept of sovereignty with a new concept based on democratization and human rights.<sup>142</sup> This is also the opinion of Woronoff or Walraven, who, concerning the institutional dimension of dispute settlement, criticise the lack of enforcement powers of the OAU and the establishment of a voluntary-jurisdiction-based dispute settlement organ. This line of analysis implies to assume that mediation should be based on the use of «sticks and carrots» and that, as stated by Walraven, «strict neutrality on the part of the mediator is not necessary». According to Walraven, «for the mediator leverage over the parties is the crucial element» and affirms that «the main source of this leverage is stalemate between the disputants».<sup>143</sup>

On the contrary, the second type of assessment demands more flexibility for the dispute settlement system and claims that States prefer methods such as the ad hoc committees, which fulfil their requirements of control over the process and confidence on the third party. This is the opinion held by Maluwa and Foltz.

In my opinion, both evaluations are partially right. I agree with the criticism made of the absolute formulation of the principle of sovereignty. It is also true that a more integrated African regional system, where States would cede further sovereignty to the supranational organization would probably prove more effective regarding dispute settlement. Automatic jurisdiction of the organization over international disputes and enforcement powers to implements its decisions will greatly improve its capacities for the conduction of dispute settlement. However, it is important to acknowledge that the OAU was a product of its time. Demanding such powers for the OAU in the context of early de-colonization was pure «wishful thinking». Considering this, one acknowledges the realism stemming from Maluwa and Foltz's analysis. As the creation of leverage-based system was impossible, the adoption of a confidence and flexibility-based approach became necessary. However, it is still necessary to question whether is possible to combine both approaches. As explained in the next Chapter, it might be feasible to find new formulas that combine

<sup>138</sup> Woronoff (1970) at 181.

<sup>139</sup> Foltz (1991) at 356,

<sup>140</sup> Van Walraven (1999) at 301-302,

<sup>141</sup> Munya (1999) at 545,

<sup>142</sup> El-Ayouty (1994) at 188-189,

<sup>143</sup> Van Walraven (1999) at 272,

the establishment of dispute settlement mechanisms based on confidence with the use of enforcement powers by the organization.

was implicit that the newly created African Union inherited the legal personality of the OAU.<sup>149</sup>

## II. Dispute settlement under the African Union

### 1. Introduction

This Chapter analyses the substantive and structural aspects of the recently created African Union, the objective being to establish the differences between the OAU and the AU and evaluate whether the Africa Union will overcome the shortcomings of its predecessor regarding its capacities for conducting dispute settlement.

The Constitutive Act (CA) of the new African Union was adopted in Lome, Togo, on July 11<sup>th</sup> 2000, and entered into force May 26<sup>th</sup> 2001, abrogating the 1963 OAU Charter.<sup>144</sup> The creation of the African Union would not have been possible without the efforts of Libyan President Colonel Gaddafi. His influence on the adoption of the Union was so great that many assert the organization is his «*brainchild*».<sup>145</sup>

The OAU adopted the decision to transform itself into the AU in accordance with Article 28 of the Constitutive Act, which required ratification by two-thirds of the OAU members.<sup>146</sup> Once the new Constitutive Act entered into force it replaced the OAU Charter, although it was decided that the OAU would remain operational for a transitional period of one year.<sup>147</sup> The terms and conditions contained in the Constitutive Act were extracted from the Treaty establishing the African Economic Community, signed in Abuja in 1991 and into force since 1994.<sup>148</sup> It

### 2. Objectives and Principles Endorsed by the African Union

Article 3 of the CA comprises fourteen objectives designed to enhance political cooperation and economic integration. According to Naldi and Magliveras, these objectives are not «*over-ambitious, though they are more expansive than those in the OAU Charter*».<sup>150</sup> Moreover, the objectives reflect current developments, including respect for human rights and democracy. The main common characteristic of these objectives is the upgrading of Africa's position in the international plane. Through them, African countries expressed their intention of playing an increasingly important role in global issues.<sup>151</sup> Overall, they constitute an improvement on the OAU Charter, which remained silent regarding these aspects.

The abovementioned objectives are intended to be realised through the observance of the principles embedded in Article 4 of the Constitutive Act. Maluwa considers that this provision incorporates «*new, radically expanded principles with potentially far-reaching implications*».<sup>152</sup> Some are recognized principles in international law, such as prohibition of the use of force, peaceful coexistence among member States; and their right to live in peace and security; and the respect for democratic principles, human rights, the rule of law and good governance. Other principles reveal a new approach among African States: the principles of participation by African peoples in the activities of the organization; establishment of a common defence policy for the African continent; the right of the African Union to intervene in member States under certain conditions where war crimes, genocide and

<sup>144</sup> Constitutive Act of the African Union (hereinafter CA), at <http://www.africa-union.org/home/Welcome.htm>, art. 33.1.

<sup>145</sup> K.D. Magliveras and G.J. Naldi, «The African Union, A new dawn for Africa?», *International Comparative Law Quarterly*, Vol. 51, 2002, p. 415. The immediate precedent of the Constitutive was indeed the Sirte Declaration, signed in the Libyan city under the auspices of Gaddafi in The leading role of Gaddafi has made many, especially foreign states, suspicious about the outcome of the Union.

<sup>146</sup> CA art. 28.

<sup>147</sup> CA art. 33.1.

<sup>148</sup> Treaty establishing the African Economic Community (hereinafter AEC Treaty), June 3, 1991, also at <http://www.africa-union.org>. The purpose of the Treaty is to optimize the use of African resources in order to achieve continental self-sufficiency.

<sup>149</sup> Magliveras and Naldi (2002) at 415.

<sup>150</sup> Magliveras and Naldi (2002) at 416.

<sup>151</sup> *Ibid.*

<sup>152</sup> Tiyanjna Maluwa, «The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa», *Leiden Journal of International Law*, Vol. 16, 2003, p. 163.

crimes against humanity have been committed; the right of member States to request intervention from the AU in order to restore peace and security; promotion of self-reliance, gender equality and social justice so as to ensure balanced economic development; and the condemnation and rejection of unconstitutional changes of government.<sup>153</sup>

According to Maluwa, the inclusion of these new principles «would have been unthinkable or unacceptable a decade or so ago». He also states that the commitment to human rights democracy and the rule of law points out a progressive recognition of the «emerging right to democratic governance.»<sup>154</sup> However, Magliveras and Naldi maintain a pessimistic attitude towards the actual applicability of some of these principles. As an example, they point to routine discrimination of women by customs and personal law regarding various legal fields, especially in relation to family and inheritance law. They also contrast the assertion of respecting the sanctity of human life with the maintenance of capital punishment by the majority of African States.<sup>155</sup>

However, an important distinction between the principles embedded in the CA and those of the OAU, is that the CA establishes the principle of «peaceful solution of conflicts among Member States through such appropriate means decided by the Assembly.» Although the OAU contained the principle of peaceful settlement, it left to the States the decision of how to carry out this settlement. This can be considered as an attempt by the African Union to retain the exercise of dispute settlement under its control.

Previously, we noted how the absolute principle of sovereignty and subsequent principles of territorial integrity and non-interference affected the competences of the OAU to handle border disputes and internal conflicts. The inclusion of such strict principles of sovereignty was due to the context and purpose of the OAU's creation. The OAU was established, not exclusively, but mainly so, to eradicate colonialism and lead Africa into an

independent future. The emancipation of the African countries needed protection and thus the principles of non-interference and non-intervention became key principles of the organization. As explained by Packer and Rukare, «experts agree the OAU Charter needed revision the most, specifically with regard to the principles of sovereignty and non-interference (...). Not surprisingly, the African leadership came under stern criticism for its unwavering deference to exclusive domestic jurisdiction and for its silence regarding internal disputes and systematic violations of human rights.»<sup>156</sup>

Article 4 of the Constitutive Act contains the principles of sovereign equality<sup>157</sup>, respect for post-independence borders<sup>158</sup> and non-interference in the internal affairs of other States<sup>159</sup>. However, the «right of the Union to intervene in a Member State pursuant to a decision of the Assembly due to grave circumstances such as war crimes, genocide and crimes against humanity»<sup>160</sup> limits these principles. Packer and Rukare disapprove of the formulation of this exception to the rule of non-interference by arguing, «the fact that intervention will require a decision by the Union's Assembly of Heads of State and Government arguably raises the risk of inaction. Indeed, the history of African leaders' reluctance to involve the OAU in an internal conflict for fear that it would do the same in the event of conflict in their own countries confirm the risk.»<sup>161</sup>

During the Darfur crisis, we saw a clear example of this inaction. During the Third Ordinary Session, the Assembly adopted a decision noting, «that even though the humanitarian situation in Darfur is serious, it can not be defined as a genocide. The Assembly further notes that the crisis should be addressed with utmost urgency to avoid further escalation».<sup>162</sup> This application of the term genocide results from a political decision.

The principle of «condemnation and rejection of unconstitutional changes of government» constitutes the so called «democracy clause», a limitation of the principle of non-interference.

<sup>153</sup> *Ibid.*

<sup>154</sup> Maluwa (2003) at 165.

<sup>155</sup> Magliveras and Naldi (2002) at 417.

<sup>156</sup> C. Packer and D. Rukare, «The New African Union and its Constitutive Act», *American Journal of International Law*, Vol. 96, 2002, p. 367.

<sup>157</sup> CA art. 4(a).

<sup>158</sup> CA art. 4(b).

<sup>159</sup> CA art. 4(g).

<sup>160</sup> CA art. 4(h).

<sup>161</sup> Packer and Rukare (2002) at 373.

<sup>162</sup> Decision on Darfur, Assembly of the African Union, Assembly/AU/Dec.54(III) par. 2, Third Ordinary Session, 6-8 July Addis Ababa, Ethiopia. Available at [www.africa-union.org/DARFUR/homedar.htm](http://www.africa-union.org/DARFUR/homedar.htm)

Change of government within a country, when unconstitutional, becomes a concern of the AU and its members. According to Magliveras and Naldi, the inclusion of this democracy clause reflects a trend towards limiting absolute sovereignty of States and moving in the direction of permitting the involvement of the Union in the domestic affairs of participating countries.<sup>163</sup> However, the unconstitutionality of a government is a political decision. Additionally, the principle does not reject undemocratic governments but unconstitutional ones, all constitutional governments not being democratic. The clause can ultimately be used to avoid considering the claims of insurgents rebelling against an undemocratic government, which has perpetuated itself in the government through undemocratic changes of the constitution and, consequently, prolong the life of such regimes, hardly surprising considering the merits of the Libyan regime, more an authoritarian regime than a democracy. It is entirely possible that States will misuse the clause to, yet again, avoid dealing with internal disputes.

As the African Union has adapted limitations on sovereignty, it gains greater capacity to launch dispute settlement and conflict resolution initiatives for internal conflicts. The AU is now in a better position to incorporate internal conflicts and disputes to its agenda. However, the question pending is whether it will actually do so.

Overall, incorporating human rights and democratic values as principles of the AU is a positive step, through which, the new AU departs, at least theoretically, from the rigid principle of sovereignty that immobilized the old OAU.

Finally, it is important to note that the African Union maintains the respect for national borders.<sup>164</sup> Hence, secessionist demands will be as rejected by the AU as they were by the OAU. Concerning this issue Packer and Rukare consider that «*although the Union's position on reconsidering the inherited colonial borders of Africa is clear, it is also clear that, like its predecessor, the African Union will be saddled with serious internal conflicts arising from these boundaries.*»<sup>165</sup>

### 3. Organs and Structure

The African Union's structure is composed of nine organs established by the Constitutive Act and any other organ that the Assembly may decide to establish (e.g. the later established Peace and Security Council).<sup>166</sup> The Assembly, composed of Heads of State and Government, is the supreme organ of the Union,<sup>167</sup> meeting once a year in ordinary session, but also extraordinarily at the request of any member State with the approval of a two-thirds majority.<sup>168</sup> Decisions within the Assembly are adopted preferably by consensus, but formally by a two-thirds majority.<sup>169</sup> Simple majority decides procedural matters, but also the question of whether a matter is procedural.<sup>170</sup> Among the functions of the Assembly are those consisting of decision-making regarding the common policies of the Union; the monitoring and implementation of its policies and decisions; and the management of all other organs.<sup>171</sup> Included in this last category is giving directives to the Executive Council on the management of conflicts, war and other emergencies and the restoration of peace; the appointment of judges of the Court of Justice and of the Commission Chairman and deputies.<sup>172</sup> The Assembly has the capacity of delegating any of its powers to any organ of the Union.<sup>173</sup>

The Executive Council is the second organ in importance and it is composed of the Ministers of Foreign Affairs of the Member States. It is essentially identical to its predecessor within the OAU, the Council of Ministers. The Council follows the same voting system as the Assembly.<sup>174</sup> Its main function is to coordinate and monitor the implementation of the Union policies adopted by the Assembly.

The Pan-African Parliament constitutes one of the major innovations of the new Union. The establishment of this institution is an important development because it promotes participation of African peoples in the development and integration of the continent. However, it is also important because it builds on experience gained by institutions like the European Union

<sup>163</sup> Magliveras and Naldi (2002) at 418.

<sup>164</sup> CA art. 4(b).

<sup>165</sup> Packer and Rukare (2002) at 374.

<sup>166</sup> CA art. 5.

<sup>167</sup> CA art. 6.

<sup>168</sup> *Ibid.*

<sup>169</sup> CA art. 7.

<sup>170</sup> *Ibid.*

<sup>171</sup> CA art. 9.

<sup>172</sup> CA art. 9.1.

<sup>173</sup> CA art. 9.2.

<sup>174</sup> CA art. 11.

and the Organization for Security and Cooperation in Europe, respectively having instituted the European Parliament and the Parliamentary Assembly.<sup>175</sup>

The fifth organ is Court of Justice, whose composition and functions are determined in a Protocol.<sup>176</sup> This Protocol was adopted during the 2<sup>nd</sup> Session of the Assembly in Maputo on 11 July 2003.<sup>177</sup> However, its has not entered yet into force pending its ratification by 15 States.<sup>178</sup> The Protocol enables State Parties; the Assembly, the Parliament and other organs of the Union authorised by the Assembly; the Commission; and third parties under certain circumstances to submit cases to the Court.<sup>179</sup> The Court will have no jurisdiction to deal with disputes involving a State that is not party to the Protocol.<sup>180</sup> The jurisdiction of the Court is established in article 19:

1. The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to:

- (a) the interpretation and application of the Act;
- (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union;
- (c) any question of international law;
- (d) all acts, decisions, regulations and directives of the organs of the Union;
- (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court;
- (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
- (g) the nature or extent of the reparation to be made for the breach of an obligation.

2. The Assembly may confer on the Court power to assume jurisdiction over any dispute other than those referred to in this Article.<sup>181</sup>

This ameliorates on the OAU Charter, which entrusted the Assembly with the judicial competence of interpreting the Charter. In addition, the Assembly could empower the Court to assume

jurisdiction over a few disputes, and its decisions would be binding on the parties.

In July 2004, the AU Assembly decided at its 3rd Ordinary Session in Addis Ababa, to integrate the African Court and the Court of Justice into one Court. While the Court of Justice established under the AU Constitutive Act has jurisdiction to resolve disputes between member states that have ratified the Court's Protocol, the African Court is empowered to hear cases challenging violations of the civil and political rights as well as economic, social and cultural rights guaranteed under the African Charter. Furthermore, unlike the judges of the African Court who are required to possess competence in human rights, the judges of the Court of Justice are only required to «possess the necessary qualifications required in their respective countries for appointment to the highest judicial offices.» Additionally, while the instrument elaborating the framework for the Court of Justice, has not yet entered into force, the African Court's Protocol entered into force in January 2004.

When considering the role the Court of Justice is meant to play in dispute settlement, Packer and Rukare opine that the AU did not rescue the old Commission of Mediation, Conciliation and Arbitration because «*the more integrated African Union contemplates the settlement of disputes mainly by the Court of Justice*».<sup>182</sup> This would constitute a «legalization» of dispute settlement procedures, meaning that political means of settlement would be abandoned in favour of judicial adjudication to the Court or arbitration. This seem a rather hard statement if we consider that member States might still prefer the political and more flexible methods that allow them to retain greater control over the process. Without knowing that later, the Security Council and its panel of the Wise would be set, Packer and Rukare stated: «*This process will bring the Union more success in settling disputes than the OAU ever had. It remains unfortunate, however, that no formal body of the new Union is expressly tasked with counselling or assisting in the resolution of differences by nonjudicial means, particularly since there is no mechanism to respond to claims of self-determination. This omission does not bar the possibilities of authorising the Chairman of*

<sup>175</sup> Magliveras and Naldi (2002) at 421.

<sup>176</sup> CA art. 18.

<sup>177</sup> Protocol of the Court of Justice of the African Union 11 July 2003.

<sup>178</sup> Protocol of the Court of Justice art. 60.

<sup>179</sup> Protocol of the Court of Justice art. 18.1.

<sup>180</sup> Protocol of the Court of Justice art. 18.3.

<sup>181</sup> Protocol of the Court of Justice art. 19.

<sup>182</sup> Packer and Rukare (2002) at 376.

*the Union to offer good offices, mediate, arbitrate, or otherwise act in specific cases.»<sup>183</sup>*

The remaining organs of the Union are the Financial Institutions, which are the African Central Bank, the African Monetary Fund and the African Investment Bank, The Commission, which plays the role of Secretariat of the Union, the Permanent Representatives Committee and the Economic, Social and Cultural Council.

An organ that is not regulated in the CA but that later became an organ of the African Union is the Peace and Security Council. The Peace and Security Council was incorporated through a Protocol adopted in July 2002 and following what established in article 5 of the Constitutive Act regarding the creation of new organs. This Protocol replaces the Cairo Declaration establishing the OAU Mechanism for Conflict Prevention, Management and Resolution.<sup>184</sup>

The Security Council constitutes a standing decision-making organ for the prevention, management and resolution of conflicts. This organ is also a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crisis in Africa.<sup>185</sup> According to the Protocol, the Peace and Security Council shall be composed of 15 members elected by the Assembly.<sup>186</sup> The voting system replicates the one of the Assembly and the Executive Council of the Union, that is; consensus and when impossible, adoption of the decision by a two-thirds majority. Procedural issues are decided by simple majority.<sup>187</sup>

The functions of the Council are; the promotion of peace, security and stability, early warning and preventive diplomacy, peace-making, including the use of good offices, mediation, conciliation and enquiry, intervention operation, peace building and post-conflict reconstruction, humanitarian action, and any other function decided by the Assembly.<sup>188</sup>

According to Article 9 of the Protocol, the Council shall take the initiatives and actions it deems appropriate with regard to situations of potential and full-blown up conflict.<sup>189</sup> To that end, it shall use its discretion to effect entry, whether through the collective intervention of the Council, or through its chairperson and/or the Chairperson and/or the Chairperson of the Commission, the Panel of the Wise, and/or in collaboration with Regional Mechanisms.<sup>190</sup>

The Chairperson of the Commission plays a distinguished role within the Peace and Security Council. He is entitled to bring issues to the attention of the Council or the Panel of the Wise and also, at his own initiative or when requested by the Council, use his good offices either personally or through special envoys, special representatives, the Panel of the Wise or the Regional Mechanisms, to prevent potential conflicts, resolve actual conflicts and promote peace-building and post-conflict reconstruction.<sup>191</sup> Therefore, the effectiveness of the system, largely, will depend on the personal character of the elected Chairman.

Regarding the relation with sub-regional organizations, the Protocol establishes that the Union has primary responsibility for promoting peace, security and stability in Africa. It is the Chairperson of the Commission who is entrusted with harmonization and coordination of the activities of the two systems.<sup>192</sup> Concerning the relationship with the UN the protocol states that «the Peace and Security Council, which has the primary responsibility for the maintenance of international peace and security (...).»<sup>193</sup> Thus, the Protocol establishes a clear relation of hierarchy between the three systems

### 3.1. THE PANEL OF THE WISE

This organ has been established to support the Peace and Security Council and the Chairperson of the Commission, particularly in the area of conflict prevention.<sup>194</sup>

<sup>183</sup> *Ibid.*

<sup>184</sup> Protocol relating to the establishment of the Peace and Security Council of the African Union (hereinafter PSC Protocol), Durban 10 July 2002, into force since 26 December 2003, available at <http://www.africa-union.org>, art. 22.1.

<sup>185</sup> PSC Protocol at art. 2.

<sup>186</sup> PSC Protocol at art. 5.

<sup>187</sup> PSC Protocol at art. 8.

<sup>188</sup> PSC Protocol at art. 6.

<sup>189</sup> PSC Protocol at art. 9.1.

<sup>190</sup> PSC Protocol at art. 9.2.

<sup>191</sup> PSC Protocol at art. 10.2.

<sup>192</sup> PSC Protocol at art. 16.1(a), (b).

<sup>193</sup> PSC Protocol at art. 17.1.

<sup>194</sup> PSC Protocol at art. 11.1.

The Panel of the Wise is composed of five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development of the continent. The Chairperson of the Commission selects them after consultation with the Member States concerned, with regard to regional representation. They are appointed by the Assembly to serve for a period of three years.<sup>195</sup>

The main function of this organ is to advise the Peace and Security Council or the Chairperson of the Commission, on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa.<sup>196</sup> The Protocol establishes that the Panel of the Wise can act either at the request of the Peace and Security Council and the Chairperson of the Commission, or at its own initiative.<sup>197</sup>

According to its regulation by the Protocol, the Panel of the Wise appears as a support organ without a role of its own but helping the Peace and Security Council to fulfil its functions.

Following the opinion expressed by Laurie Nathan, I consider that the Panel of the Wise should have been instituted as «the expert mediation unit of the Peace and Security Council».<sup>198</sup>

Nathan bases this suggestion on three propositions: mediation should be regarded as a specialised activity that requires extensive experience and a high level of proficiency; an experienced mediator is far more likely to be successful than an inexperienced one; and a confidence-building, approach to mediation is more likely to yield a positive outcome than coercive diplomacy.<sup>199</sup>

According to Nathan, «*unlike an arbitrator who might rule in favour of one of the disputants, and unlike a partisan actor whose interest are inimical to those of a disputant, a mediator seeks to facilitate agreements in an even handed fashion and on terms acceptable to the parties.*»<sup>200</sup>

Therefore, what she proposes is the establishment of a confidence-building mediation system. This system is defined as a process of facilitated dialogue and negotiations during which a third party helps the adversaries, with their consent, to manage or resolve their conflict by accommodating each other's fears and needs. «*The consensual and voluntary nature of mediation is so fundamental that it can be regarded as defining feature of the process.*»<sup>201</sup> Thus, her opinion is favourable to the thesis sustained by Maluwa regarding the Commission of Mediation, Conciliation and Arbitration of the OAU and supporting the creation of a dispute settlement system based on the parties' confidence and control.

Concerning the question of the use of «sticks and carrots», Nathan opposes the use of punitive action by mediators. She acknowledges that «*violent conflict is usually characterised by the problem of one or more of the belligerents being implacably opposed to negotiations. International or regional organisations might decide to apply enforcement measures against a party that persistently refuses to enter into negotiations, is guilty of human rights violations...etc.*»<sup>202</sup> However, she states that «*mediators can succeed where their credibility and authority emanate from moral rather than formal power.*»<sup>203</sup> In addition, once the process of mediation has started she considers that a mediator will lose its credibility and become party to the conflict if it threatens or punishes with sanctions.<sup>204</sup> Finally, she proposes a distribution of roles between «good cop and bad cop» by saying that, «*if different kinds of leverage are required in a particular case they do not have to be exercised by the mediator.*»<sup>205</sup> In the case of the African Union's this would mean that if the Assembly considers necessary imposing enforcement measures, this decision should never involve the Panel of the Wise.<sup>206</sup> In addition, Nathan considers that the panel's credibility should derive from the mediation expertise of its members. The panel should thus comprise people with a proven record of accomplishment as mediators, what would inspire confidence to the States.

<sup>195</sup> PSC Protocol at art. 11.1, 11.2.

<sup>196</sup> PSC Protocol at art. 11.3.

<sup>197</sup> PSC Protocol at art. 11.4.

<sup>198</sup> Nathan, Laurie, «Mediation and the AU's Panel of the Wise», in Shannon Field (Ed.), *Peace in Africa: Towards a Collaborative Regime*, 2004, p. 64.

<sup>199</sup> *Ibid.*

<sup>200</sup> Nathan (2004) at 66.

<sup>201</sup> *Ibid.*

<sup>202</sup> Nathan (2004) at 69.

<sup>203</sup> Nathan (2004) at 69.

<sup>204</sup> Nathan (2004) at 70.

<sup>205</sup> Nathan (2004) at 71.

<sup>206</sup> *Ibid.*



This proposal is particularly interesting because, as anticipated at the end of the previous chapter, it combines the two types of assessments that, regarding the OAU, were made by different authors. While it proposes the use of a confidence-based dispute settlement system, it acknowledges the advantages provided by the existence of enforcement powers. In addition, by being a permanent organ, the Panel of the Wise would overcome the problem of continuance posted by the use of ad hoc arrangements.

Nathan rightly states that mediation should be performed in a dynamic fashion, adapting to the changes experimented within the different conflicts. Therefore, mediators should be expected to be flexible, creative, and responsive to changing conditions. In order to complement their skills the Panel of the Wise could be assisted by a group of technicians who provide with expertise in the legal and other areas.<sup>207</sup>

However, Nathan anticipates the possible limitations to the establishment of the Panel of the Wise as the expert mediation unit of the African Union. First, it is unclear whether the leaders of the AU expect the panel to perform a predominantly mediation or advisory function. Secondly, the Protocol of the Peace and Security Council indicates that mediation could be undertaken by a range of actors other than the panel, such as the Peace and Security Council itself, the Chair of the Commission, special envoys and representatives of the chair, and ad hoc committees.<sup>208</sup>

#### 4. Enforcement of Obligations

One of the main differences between the OAU and the African Union is that the latter enjoys certain enforcement capacities. The Constitutive Act comprises three different cases in which the African Union can adopt punitive measures. These measures are regulated in Articles 23 and 30 and consist of sanctions and suspension respectively.

Article 23.1 provides that if a member State defaults in the payment of its contributions to the Union budget, the Assembly shall determine the appropriate sanctions to be established.

These sanctions can consist of the denial of the right to speak at meetings; to vote; to present candidates for any Union position or post; and to benefit from the Union commitments. Magliveras and Naldi have criticized these provisions by saying it is excessively harsh pointing out several reasons, such as the fact that «a large number of African Countries face difficult and pressing financial problems threatening their very existence.»<sup>209</sup> While acknowledging the harshness of the sanction it is also important to remember that the lack of funding was a permanent and harmful challenge the OAU endured. Financial trouble would impede the African Union carry out its functions, among them dispute settlement and conflict resolution. Mediation and other dispute settlement initiatives require adequate financing and are expensive. In addition; if the African Union wants to correct the deficiencies of the OAU and accomplish its fail goal of emancipation and «African solution for African problems» economic independence is a «*conditio sine qua non*». Furthermore, while it is a fact that many African States undergo extremely serious economic hardship it is also true that many States did not pay their contributions to the OAU because of their lack of commitment with the organization. Although it could maybe advisable to establish an exception allowing deferral of payment in very special cases, I consider Article 23.1 will generally contribute to the empowerment of the African Union, correcting a deficiency of its predecessor.

Secondly, Article 23.2 establishes the imposition of sanctions in case of failure by any member State to comply with the decisions and policies of the Union. The consequence of this provision is that while the organs of the OAU (mainly the Assembly) had no possibilities of enforcing its decisions, the African Union, theoretically, is given «teeth» to implement its decisions. However, one should notice that, while Article 23.1 said that in case of payment failure «the Assembly *shall* determine the appropriate sanctions», Article 23.2 provides that member States «*may* be subject to other sanctions». These other sanctions, according to Article 23.2, can take the form of denial of transport and communication links with other member States and other measures of political and economic nature.

Magliveras and Naldi point out several shortcomings in the formulation of this second group of sanctions. First, it is not clear

<sup>207</sup> Nathan (2004) at 74.

<sup>208</sup> Nathan (2004) at 77.

<sup>209</sup> Magliveras and Naldi (2002) at 423.

whether, within the context of Article 23.2, it is possible to apply also the sanctions provided in Article 23.1. Thus, the question is whether the sanctions contained in article 23.2 are cumulative or alternative in relation to the ones provided in Article 23.1. Second, it is unclear who would determine when non-compliance has taken place. As this determination is legal rather than political, it could correspond to the Court of Justice.<sup>210</sup> However, if the Assembly makes this determination, the risk would be sanctions are used politically. However, it is also true that, in this case the capacity of prompt reaction to violations would be enhanced.

Concerning dispute settlement the possibility of establishing sanctions is controversial. In general, it can be considered a positive step, as it enhances the capacities of the African Union to force member States to settle their disputes peacefully. However, as stated earlier, sanctions should be kept separated from the mediation process. I think than rather than to impose a concrete settlement, sanctions could be used to, first, oblige a country to initiate the process of settlement and to, later, make it respect its commitment to a certain settlement. I think it could be counter-productive to entrust the application of these sanctions to the organs conducting dispute settlement to «threat» one of the parties and make it accept a certain settlement. Such a usage of sanctions would harm the ultimate goal of durability that settlement seeks. In addition, next Chapter considers the importance of reconciliation as part of the settlement of disputes. Without discussing it further in here, it is possible to state that this objective would also suffer from that practice.

Finally, Article 30 establishes the possibility of suspending a government that has come to power through unconstitutional means from taking part in the activities of the Union. This provision is related to the democratic clause included in the principles established in article 4. It is important to highlight that it is not the State the one affected by this suspension but the unlawful government. This could constitute an improvement from the OAU. The African Union gets «teeth» to act against unconstitutional governments by excluding them from taking part in its activities.<sup>211</sup> However, we have already stated that constitutional cannot be understood as a synonym of democratic. In addition,

the determination of the applicability of this sanction would probably be made again at the political level, risking both inapplicability and political use.

### 5. Assessment

While the African Union does not create an integration-based organization, it has significantly advanced towards a more limited formulation of the principle of sovereignty. The introduction of the democracy clause, the principle of intervention under serious circumstances, the existence of enforcement powers and the obligation to settle disputes through such appropriate means decided by the Assembly are positive steps towards the establishment of an integrated African economic and political space.<sup>212</sup> However, the possibility of these powers being curtailed by political decisions makes the creation of a coercive-diplomacy system of dispute settlement unlikely. Thus, I consider that the application of Nathan's proposal would be adequate. By establishing a confidence-based system of mediation, through the Panel of the Wise, the African Union would be able to considerably satisfy State's yearn for confidence and control. At the same time, the other organs of the African Union could be in charge of keeping the dispute within the AU system by using its «sticks» or enforcement capacities. However, the system could again fail if States refuse to submit their disputes to the Panel of the Wise or to implement the settlement and the Assembly does not make use of its enforcement powers.

### III. Traditional means of dispute settlement

In this chapter I will present an overview of the way in which traditional dispute settlement was carried out within African traditional societies, and analyze whether some of these practices and values can be applied to modern mechanisms of dispute settlement under the African regional system. Zartman asserts that the questions to address are; what is the role of traditional conflict management practices today? Should they take over the field, should they be combined with modern and

<sup>210</sup> Magliveras and Naldi (2002) at 424.

<sup>211</sup> Packer and Rukare (2002) at 374.

<sup>212</sup> Maluwa (2003) at 169.

foreign methods, or should they make way for newer and better methods?<sup>213</sup>

### 1. *Characteristics of African Society as Reflected in the African Charter of Human and Peoples Rights*

The African Charter on Human and People's Rights, sometimes referred to as the «Banjul Charter», was adopted by the OAU in 1981 and entered into force in 1986. The Charter contains human rights also embedded in other human rights instruments. In addition, it also presents some particularities reflecting values and principles pertaining to African society.

The three main characteristics found in the Charter defining African society, relevant in relation to dispute settlement are: respect and protection of African values and traditions; the importance of the elders; and the prevalence of collectivist over individualist attitudes.

The first characteristic to be examined is the concern for protecting and promoting African traditions. The emphasis on African traditions is evident in the preamble, which establishes the need to take «into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights». In relation to the right to education and to participate in cultural life, that Charter also establishes the duty of the States to promote and protect «moral and traditional values recognized by the community.»<sup>214</sup> A similar consideration is made in connection to family rights, stating that «the state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.»<sup>215</sup>

The second characteristic of African society of importance to us is the highly valued role of the elders, which is reflected within the duties comprised in the Charter. Individuals have the duty to respect his parents at all times and to maintain them in case

of need.<sup>216</sup> These duties correspond to the distinctly positive perception of the elders in African tradition. Elders are traditionally associated with authority and importance derived from the wisdom obtained through experience. These considerations also play a role in dispute settlement. As we will see in the following sections, a council or board of elders will usually play a central role when conducting dispute settlement by traditional means. As we saw in the previous Chapter, the African Union has somehow reflected this tradition by incorporating the Panel of the Wise to the newly created Peace and Security Council.

The third characteristic is collectivism, which is reflected in the inclusion of collective human rights (called Peoples' Rights) and duties in the African Charter. Among these Peoples' Rights, we find the rights to self-determination and full sovereignty over natural resources. Furthermore, there is the right to development, the right to peace, and «the right to a general satisfactory environment favourable to their development».<sup>217</sup> The counterpart to these rights, are the duties, which derive from the fact that in Africa, rights and duties are regarded as being two facets of the same reality: two inseparable realities. All the duties contained in the Charter respond to the general obligation of contributing to community, and therefore convey the value of solidarity and acting in a way that considers the community's well-being. All those aspects are also important in relation to the way disputes are settled in African society. In addition, communitarianism is also the root of the reconciliation-oriented procedures that are traditional in Africa. As we will see, the well-being of the group and the reestablishment of the normal relations within the community are the main goals to be achieved through the settlement, rather than placing blame and imposing punishment. According to African conception of the law, disputes are not settled by contentious procedures but through reconciliation. Reconciliation generally takes place through discussions, which end in a consensus leaving neither winners nor losers. Trials are always carefully avoided. They create animosity, and therefore hamper the well functioning of society.

<sup>213</sup> I. William Zartman, «African Traditional Conflict "Medicine"», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 9.

<sup>214</sup> African Charter of Human and People's Rights (hereinafter African Charter), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3, at <http://www.africa-union.org>, art. 17.3.

<sup>215</sup> African Charter at art. 18.2.

<sup>216</sup> African Charter at art. 29.1.

<sup>217</sup> African Charter at art. 20, 23 and 24.

## PRELIMINARY CONSIDERATIONS

It is important to keep in mind that most of the mechanisms that we will see in this section were applied at the tribal, inter-ethnic and, occasionally, national rather than at the international level. Yet, I will consider the possibility of applying some of the underlying values and procedures to the more complex context of international disputes.

Due to space constrictions it is not possible to make an in-depth assessment of all examples of traditional settlement. The focus is to find common characteristics in order to later address their limitations and possible applicability, as well as the way in which they can play a role in international dispute settlement within the modern African system.

The definition of what constitute traditional methods is not easy. During the colonization, customary law and traditional practices were «contaminated» by western concepts. Still, the objective is to focus on the *indigenous content*<sup>218</sup> of the practices, trying to find what content is different from, and can improve on, current strategies.

### 2. Common Characteristics of Traditional Dispute Settlement

Commonly, traditional settlement stems from a pragmatic notion; the need to settle disputes and comply with the terms of the settlement is motivated by the fact that the members of the community are in ongoing social and economic relationships and must necessarily deal with each other in the future.<sup>219</sup> This assertion loses some of its power when applied at the international level. Obviously, within the small micro-cosmos of a tribe or ethnic group, where individuals maintain all the aspects of their lives, the sociological pressure for settlement is higher than at the national level or between States. Even so, in an increasingly

globalised world, countries are also to a certain extent dependent on each other economically and politically, particularly in the context of a region, in this case Africa.

In many cases the sources of conflict in traditional societies has been, as it is today, related to natural resources. This was for example the case among the Fulbe of West Africa. As explained by Wendy Wilson-Fall, «*most state-level conflicts in the Shaelian and savannah pasture zones resulted from power struggles over natural resources and labour*».<sup>220</sup>

The «communitarism» or collectivism is one of the main characteristics of African traditional settlement. Kiplagat defines the process of settlement as a «*community in discussion*»<sup>221</sup>; as the settlement is always carried out open to all community members. Several philosophical conceptions of the community, present in most African traditional societies, reflect this collectivism. One example is the idea of *Ubuntu*, which is particular to South Africa. *Ubuntu* translates into «*collective personhood*» and the fundamental idea is that one can only be a person through others. Human existence is conceived as unified and integrated. *Ubuntu* influences conflict management by its spirit of cooperation. Members of a society are meant to work together in order to solve the problems that emerge, and this is why Masina states that «*managing conflicts in African communities becomes an open process, in the sense that it includes the nuclear and extended families, and even the elders of the village, chiefs, and headmen as well*».<sup>222</sup> The institution of conflict management among indigenous South Africans receives the name of *inkundla* or *lekgotla* and it has a communal character, the entire society is involved at various levels of the conflict resolution.

Some scholars have pointed out the difference between individualistic exclusivist Westerns, who prefer to apply win/lose tactics of dispute settlement, and Africans, who, being communal

<sup>218</sup> Eghosa E. Osaghae, «Applying Traditional Methods to Modern Conflict: Possibilities and Limits», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 204.

<sup>219</sup> Ben K. Fred-Mensah, «Bases of Traditional Conflict Management Among the Buems of the Ghana-Togo border», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 34.

<sup>220</sup> Wendy Wilson-Fall, «Conflict Prevention and Resolution Among the Fulbe», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 49.

<sup>221</sup> Bethuel Kiplagat, «Is Mediation Alien to Africa?», *Online Journal of Peace and Conflict Resolution* 1.3 at [www.trinstitute.org/ojpcr/1\\_3tt1.htm](http://www.trinstitute.org/ojpcr/1_3tt1.htm), visited 16 June 2004.

<sup>222</sup> Nomonde Masina, «Xhosa Practices of Ubuntu for South Africa», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 170.

inclusivist, favour open processes where the community establishes a dialogue based on moral values.<sup>223</sup>

The leader or chief of a community and/or a council of elders usually head the procedure of settlement. They regard their own dispute-settling role as a service to the welfare of the community. Hence, their goal is to achieve reconciliation, preserving the physical existence and spiritual well-being of the entire society.<sup>224</sup> Buems elders, for example, believe that the failure to comply with the settlement undermines the social order and is equivalent to an assault on the community as a whole.<sup>225</sup> As Uwazie explains in relation to the Nigerian Igbo (but applicable to all traditional systems); «*In this cultural context, a sense of reconciliation is the paramount goal, not necessarily punishment. Even when fault is attributed, punishment is aimed at reintegration.*»<sup>226</sup>

These influential individuals count with the confidence of the community. This is the case within the Buem, where lineage elders, medicine men, priests and influential individuals, known for their wisdom, skills, and trustworthiness in dispute settlement dominates mediation (called *benyaogba ukpikato*). In some cases, the reputation of these individuals extends outside their communities, often being called upon to mediate conflicts within other groups.<sup>227</sup>

Within the Oromo, who enjoy a unique indigenous democratic system called Gada, the elders (*jarsa biya*) also enjoy a predominant role in the process of settlement. In order to qualify as *jarsa biya* and take part in the settlement they must be committed to the Oromo societal ideology of conflict resolution, composed of five major elements: effort, truth, justice, punishment (understood as restoration or compensation) and reconciliation. They must also have knowledge of the law and customs, have integrity of character and command the trust of the other elders and the community. To conduct the process a judge (*haiyu*) is

electd from among the *jarsa biya*. This person must have superior ability to use proverbs and metaphors, possess leadership, the ability to steer the discussion and keep tempers cool, as well as a record of success in making peace in the community.<sup>228</sup>

Similar requirements are demanded from the clan elders conducting dispute settlement in Somalia. These elders may be notable religious leaders. Their influent position is not the result of a hereditary status, but rather based on their earned reputation as effective negotiators, trusted mediators, moving orators, or wise and pious men.<sup>229</sup> These considerations are also applicable to the members of the council of elders within the Xhosa in South Africa.<sup>230</sup>

One of the most developed individual figures of traditional dispute settlement found within the Ouatchi, in Western Africa, is the *Du Nku*. This figure symbolises the community eye, and can be found in other traditional communities under different names. It is a person with exceptional qualities who is perceived as especially influential and trustworthy by the group. His qualities are summarized by Kouassi as *amenkuta* (personality), *ametohe* (exceptional character), *ngonola* (the one who is at the community's service), *du mega* (great experience and credibility), and *dunya gblola* (the spokesman who also remains faithful to the given or spoken word).<sup>231</sup> Because of his knowledge and personality, the *Du Nku* is the conciliator, the adviser and the confidant of the community.<sup>232</sup>

Kouassi proposes to «institute *du nku* at the level of State relations.» He adds, «*In this case a structure could be established that goes from the tribes to the major national communities. Each state could identify its own *du nku*. In the case of regional organizations like ECOWAS (...), a board of *du nku* could be put in charge of promoting honourable agreements in order to solve conflicts in the region.*»<sup>233</sup> Kouassi recommends that each

<sup>223</sup> *Ibid.*

<sup>224</sup> Ernest E. Uwazie, «Social Relations and Peacekeeping among the Igbo», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 29.

<sup>225</sup> Fred-Mensah (2000) at 33.

<sup>226</sup> Uwazie (2000) at 18.

<sup>227</sup> Fred-Mensah, (2000) at 35.

<sup>228</sup> Hamdesa Tusso, «Indigenous Processes of Conflict Resolution in Oromo Society», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 88.

<sup>229</sup> Ken Menkhaus, «Traditional Conflict Management in Contemporary Somalia», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000, p. 185.

<sup>230</sup> Masina (2000) at 171.

<sup>231</sup> Kouassi (2000) at 72-75.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

country identify among its citizens persons who would be morally recommendable and able to retain their independence. The international du nku should be somebody whose prominent personality is recognized at both the international and the African level. He suggests, among others, Nelson Mandela.<sup>234</sup>

Within traditional settlement of disputes, the issue of confidence and trust in the individuals conducting it is a very important element. Also, the fact that the elders are the ones enjoying a central role, suggests the existence of a dispute settlement system based on the authority of the wisest and the most experienced and talented. The elders are clearly not the strongest members of society, but still society relies on their authority to conduct the settlement, rather than resorting to warriors or other powerful members of the group. The predominant role of the elders within African society, asserted above, is corroborated by their important position in the field of dispute settlement.

Another key feature of traditional dispute settlement is the importance of truth as the base of the settlement. This is a constant element within all the different groups. Finding the truth about what has happened is the «*conditio sine qua non*» for a resolution to be suggested by the chief, the elders or the assembly.

Establishing the truth leads to the final objective of traditional dispute settlement; reconciliation and healing. It is a common belief that punishment does not contribute to rehabilitating of the harmony of the community and, thus, it is generally substituted by some sort of restoration or compensation. However punishment is contemplated for marginal cases in which the «*the offence was beyond the pale of acceptable behaviour*».<sup>235</sup>

There are usually symbols that seal the reconciliation and, although they vary from one group to another, they are invariably based on the idea of sharing. They can consist on the community eating together<sup>236</sup>, a celebration with dancing and poetry<sup>237</sup>, or the conflicting parties drinking from the same calabash<sup>238</sup>.

A practical example of contemporary application of the concepts of truth, reconciliation and *ubuntu* is the Truth and Reconciliation Commission established in 1995 to address the actions

committed by the two sides fighting in South African for liberation and the apartheid system respectively. The primary concern of this Commission was the healing of the feelings of those who lost their loved ones during the conflict. The TRC did not intend to punish those who had committed criminal actions but to bring the truth of what happened to the victims. Telling the truth was the requirement for the perpetrators to qualify for obtaining amnesty. The offenders would confess their appalling actions and the victims would have the opportunity of expressing the pain they suffered as a consequence. Understanding and forgiveness were meant to bring reconciliation. The purpose was to see to that the crimes committed would never be repeated again. However, there have been some problems in the achievement of this goal. Some perpetrators refused to appear before the TRC or to apologize for what they did.<sup>239</sup>

There have also been some attempts of applying traditional means to the settlement of contemporary disputes although, in general, traditional means have been disregarded in the African context, considered old-fashion and ineffective by African themselves. Menkhaus makes an analysis of the role in dispute settlement of the elders in Somalia since the beginning of the Civil War in 1988. The elders were mostly excluded from all peaceful initiatives to reach a peaceful solution to the conflict. However, between 1991 and 1992 some successful traditional conflict resolution initiatives were undertaken in Northern Somalia. The initiatives consisted of several traditional peace talks, where clan elders negotiated the establishment of peace in the region. The most important feature of these talks was that the initiative successfully combined old and new processes, later repeated in other Somali peace talks, putting the elders in charge of the general negotiations, while the intellectuals, organized in committees, took care of the more technical aspects. Nevertheless, despite such achievements in the north, traditional mechanisms failed in the south. Menkhaus points out to the modification in the relationship between the elders and the young ones, who at that point of the conflict were, in most cases, possessing and using automatic weapons to provide themselves and their families with basic products. According to Menkhaus «*local clan elders found themselves attempting to negotiate with young militiamen and*

<sup>234</sup> *Ibid.*

<sup>235</sup> Masina (2000) at 172.

<sup>236</sup> Kiplagat (2004).

<sup>237</sup> *Ibid.*

<sup>238</sup> Fred-Mensah (2000) at 41.

<sup>239</sup> Masina (2000) at 177 and 178.

*bandits from distant clans rather than with "peer" clan elders. Local elders were, moreover, negotiating from positions of extreme weakness, as their communities typically had few weapons or organized defence forces. The teenage gunmen of the conquering clans had little respect for traditional peace building, nor did they desire such mediation.»<sup>240</sup>*

Traditional methods were excluded from most internationally sponsored initiatives in Somalia. Militia leaders were invited under the consideration that they were effectively holding the power, while the elders and traditional Somali assemblies were disregarded as ineffective and too time-consuming. It is especially regrettable that the UN decided to invite only political representatives to the meetings it organized. The political factions and militias had no interest in ceding some political power to traditional authorities. The UN itself felt more comfortable with modern processes. However, the greater opposition to the inclusion of traditional methods came from African leaders themselves, who contemplated the elders as an anachronism and disregarded their potential as mediators.

Nevertheless, traditional methods were given a chance in Southern Somalia in the period between 1993 and 1994. For political reasons the UN decided to provide support to traditional conflict management. The Jubaland Peace Accord of 1993 emerged as the result of an innovative initiative in which traditional processes and contemporary procedures were combined. Clan elders, intellectuals and other civil leaders were in charge of different tasks, assisted by international agencies. According to Menkhaus *«broad principles of the reconciliation were handled by a daily plenary session of elders, while specific technical aspects of implementation were farmed out to committees formed by intellectuals, who generated proposals for the elders' consideration.»<sup>241</sup>*

We have seen how conflicts are managed by the community. As explained by Zartman this is because the objective is the reintegration of the normality of relationships in the community. It does not matter if the conflict only takes part among a few members of the community. What westerners might interpret as a private affair is dealt with by the whole community in Africa, because it has breached the community's peaceful order. The

parties of the dispute must admit their wrongdoing and seek the forgiveness of the community. Therefore, the decision on the dispute reconciles the parties and the community as a whole while avoiding punishment.

### 3. Limitations

#### 3.1. TRADITIONAL MEANS IN A NEW AND COMPLEX REALITY

One of the first challenges that traditional practices of dispute settlement would face if applied in the international arena is the disputes and conflicts to be address being far more complex than the ones these methods were traditionally applied to. Although some of the traditional practices were use beyond the local level that is; at the inter-ethnic or national stage, there are several limitations to the adaptation of this traditional strategies to modern international relations. As stated by Osaghae; *«the applicability of traditional strategies to modern conflicts is determined, among other factors, by the extent to which the nature of modern conflicts can be shown to be comparable to conflicts in traditional societies.»<sup>242</sup>*

Osaghae identifies three main limitations to the use of traditional dispute settlement means. The first limitation is the absence of a generalised model of traditional conflict management. Despite of the existence of common values and principles, traditional management strategies are localised and particularistic. Therefore, in case these traditional methods were going to be applied at the international level it would be necessary to find a common denominator. Building up this common system would involve a process of selection between the various and particularistic traditional strategies, what constitute a sensitive task, as it is likely to arouse suspicions among the different ethnic groups. The same consideration would apply to the task of selecting the relevant figures (elders or dukus) to take part in settlement at the international level. The second limitation is related to the lack of moral and customary cohesion within and between African States. This opinion is shared by Zartman, who underlines the difficulty of applying traditional strategies in a context (such as the inter-state) where

<sup>240</sup> Menkhaus (2000) at 191.

<sup>241</sup> *Ibid.*

<sup>242</sup> Osaghae (2000) at 206.

the conflicting parties are not tied together by shared values and interdependence.<sup>243</sup> He concludes that creating shared values and interdependence is necessary to obtain durable conflict management agreements.<sup>244</sup> The third constraint is that most struggles and disputes occur at the high level, between political or military factions or powerful groups, instead of at the level of the more basic social structures.<sup>245</sup>

We could also add the consideration made by Menkhaus in relation to Somalia, where he pointed out to the fact that the respect and submission to the opinion of the elders cannot be taken for granted in modern society. This might undermine the implementation of decisions adopted by traditional means among the militias and pseudo-political factions.

However there are also some other limitations which are practical rather than substantive but which I consider essential. As we have seen, traditional practices or rituals of settlement are lengthy and involve the participation of the whole community. The application of traditional methods is usually free of time constrictions and lasts as long as it takes to achieve reconciliation. The truth is uncovered and recognized, the victims or parties explain their claims and feelings, and there is poetry, singing, dancing. Even when the chief, council of elders, or mediator has adopted a decision still the settlement and subsequent reconciliation need to be sealed with symbols like religious rituals, shared meals or communal gatherings. One of the principles inspiring modern relationships is that «time is money». While conducting these processes in a small community is quite inexpensive, organizing it at the international level within an international organization would become unaffordable. This is especially true within the African context, where most countries suffer serious economic struggles, what obstacles the payment of their contributions to organizations. In addition, this is especially important in situations of armed conflict or human right violations, where the life of many people depend on the rapid adoption of a peaceful settlement. There is also the problem of getting the whole community involved in the processes.

There is no need to stress how implausible would be to factually apply this feature at the intra-state or inter-state level.

### 3.2. WOMEN'S HUMAN RIGHTS CRITIQUE

It is possible to make a critical assessment of the traditional mechanisms of dispute settlement on the light of women's human rights. It is important to highlight that although all the community takes part in the procedures, the central figures of mediators, chiefs, *du nkus*, etc... are usually men. Women have performed a leading role in marginal cases. Furthermore, in several cases women have been accused of acting as instigators of conflict. Referring to role of women in conflict in Western Sudan, Mohamed describes a situation where women from nomadic communities (Hakkamas) have traditionally foster conflict and inter-community revenge by mocking the men and questioning their courage when they refused to retaliate with violence to preceding aggressions or offences by other tribes.<sup>246</sup> Mohamed points out the existing contradiction between the existing subordination of women to men in society and their great influence in the men's behaviour.<sup>247</sup> Because women are denied an «official» role at the community's decision-making level, they ultimately resort to this type of informal manipulative power to influence in the decision process. Mohamed's view is that only economic and cultural development, including the sedentarization, is likely to change the Hakkamas into contributors to peace.<sup>248</sup> However, there are also examples of positive contributions of women into conflict resolution processes at the tribal level. Kiplagat provides the example of the Wajir women (northeastern Kenya), who successfully initiated a process of traditional settlement to conclude a violent conflict over natural resources in the region.<sup>249</sup> Another example is related to the Oromo community, where women are considered as sacred humans. According to Tuso, «*women play important roles as messengers of peace; they organize themselves and physically intervene between the conflicting parties in case of violence; they mobilize the community to respond to the situation of conflict quickly and appropriately; and they serve a*

<sup>243</sup> I. William Zartman, «Conclusions: Changes in the New Order and the Place of the Old», in *Traditional Cures for Modern Conflicts*, ed I. William Zartman, SAIS African Studies 2000 at 226

<sup>244</sup> *Ibid.*

<sup>245</sup> Zartman (2000) at 214-216.

<sup>246</sup> Adam Azzain Mohamed, «From instigating violence to building peace: The Changing role of women in Darfur region of western Sudan», *African Journal on Conflict Resolution*. Vol. 4, No. 1, 2004, p. 14.

<sup>247</sup> Mohamed (2004) at 23.

<sup>248</sup> Mohamed (2004) at 25.

<sup>249</sup> Kiplagat (2004).



*moral voice in times of social turmoil.*»<sup>250</sup> However neither case did women perform the central role of mediation, which was adjudicated to the elder men. Therefore, we cannot talk of equality but in the best cases, of equity. There is an adjudication of roles according to which men and women perform different functions allegedly corresponding to their gender. The fair evaluation of that kind of system would require a lengthy discussion on women's rights in which the debate between universalist and relativist approaches to human rights would be at the centre. Although interesting, the discussion is placed beyond the scope of this thesis. Therefore, I would just say that, when considering the application of traditional methods to modern disputes within Africa, it would be necessary to take into account the general prohibition of discrimination based on sex contained in all international human rights instruments, including the African Charter.<sup>251</sup> In addition, since 2000, the United States has devoted specific attention to the role of women in conflict resolution. In that regard, it is necessary to recall Security Council Resolution 1325 on Women, Peace and Security, which calls on the adoption of «*measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements*».<sup>252</sup>

The importance of including women in conflict resolution and peace initiatives is not a simple matter of representation for the sake of taking part, but a necessary step for integrating women's specific interests and views in processes and institutions governed by men.<sup>253</sup>

### 3.3. INTERNATIONAL CRIMINAL LAW CRITIQUE

We have stated that truth and reconciliation are paramount values of traditional dispute settlement. However, it is questionable that punishment should also be avoided in the cases where genocide, ethnic cleansing and massive human rights violations have been committed. In some cases the establishment of criminal tribunals, like the one set in Rwanda, can be used to bring justice and avoid impunity.

<sup>250</sup> Tusó (2000) at, 88.

<sup>251</sup> African Charter at art. 2.

<sup>252</sup> (S/RES/1325) of 31 October 2000.

### 4. Applicability of Values: Cultural Legitimacy

Having seen the serious limitations to the application of traditional methods, it is now time to consider whether they should be left outside the modern institutionalized practice of dispute settlement or if they can contribute to it to some extent.

The first question to be answered is whether traditional or customary dispute settlement can make its best contribution simply by continuing to exist and being used in its original way. It is clear that the way in which a conflict is resolved needs to be shaped to the nature of such conflict. In the first chapter of this thesis, we have seen the most frequent characteristics of modern African conflicts. It is possible to say that, *per se*, traditional dispute settlement mechanisms could not simply be «copied» to be applied at the international level. These practices are not designed to be applied by such an enormous community, as «Africa» would constitute. It would be necessary to go through a process of selection and combination of traditional procedures, what would create a final artificial model that African people would probably not recognize as traditional.

I consider that, within the local or inter-community level, traditional dispute settlement needs to be protected and promoted as an important contribution to conflict prevention. Osaghae explains this faculty by saying that «*one lesson to be learned from the social fabric approach to conflicts and their management that characterizes traditional management in Africa is that simple and larger scale or complex conflicts are actually two sides of the same coin and mutually reinforcing. Consequently, resolution of day-to-day conflicts helps to ensure the stability needed for the prevention or resolution of more serious and expansive one-in short, resolution of more serious conflicts is impossible without management of less serious conflicts at the lower levels.*»<sup>254</sup>

However, I consider that what is not only possible but also necessary to take into account the underlying values of traditional strategies and try to, as far as possible, incorporate them to the modern structures of dispute settlement. In my opinion,

<sup>253</sup> See Louise Vincent, «Engendering peace in Africa: A critical inquiry into some current thinking on the Role of African Women in Peace Building», *African Journal on Conflict Resolution*. Vol. 2, No. 1, 2001.

<sup>254</sup> Osaghae, (2000) at 213, 214.

a modern system that tries to respect the traditional principles of dispute settlement will have the potential of becoming more effective as it would be culturally legitimate. A culturally legitimate system is a system that incorporates the principles and values that society itself has upheld as valid. I consider possible to integrate the principles of community participation, central role of the elders, truth and reconciliation and use of symbols into modern mechanisms of dispute settlement and conflict resolution.

I consider that the values of true and reconciliation should be formulated as an objective of dispute settlement and conflict resolution within the African Union. Similarly, the African Union could promote the use of symbolism for the celebration and visibility of settlements.

Furthermore, the system created by the African Union seems to have acknowledged the need for selecting mediators, arbitrators or other third parties who count with the trust and confidence of the disputants. In this section, we have seen how mediators act in Africa based on their personal characteristics and the legitimating recognition of their special influence by the community. Zartman formulates this idea saying that «*In traditional African mediation, the agent is a neutral and powerless third party, armed with personal characteristics such as wisdom and integrity but without the means for providing inducements and sanctions—a moral mediator rather than a mediator with muscle or in more standard terms, a mediator as formulator but not as manipulator.*»<sup>255</sup> This statement concurs with the thesis of Maluwa and Nathan examined above. When evaluating how to integrate these principles into the current system of the African Union I consider that the establishment of a Panel of the Wise as the expert mediation group of the organization would be a good option for the incorporation of the traditional type of formulator-mediator.

I also consider interesting the proposal from Kouassi of using «*the concept of du nku and the philosophy sustaining it (...) as a key element in defining or elaborating strategies of conflict resolution in the context of interstate relations*».<sup>256</sup> Kouassi proposes that each country identifies its own du nku and the subsequent creation of a board or du nkus for the promotion of

peaceful agreements.<sup>257</sup> This idea could be used at the sub-regional and regional level as integrated in the institutions of the African system. In the case of the African Union, such board could be embedded within the Security Council, similarly to the Panel of the Wise.

A very inspiring proposal is the model that successfully combined traditional mediation through the elders and the examination of the more detailed aspects by intellectuals. This kind of system produced the Jubaland Peace Accord of 1993 and I think could be implemented at the regional institutional level. I consider possible to create parallel bodies that would work together in the settlement. While the elders or du nkus would define the broader principles of the agreements, a technical body could analyse the more concrete aspects of the settlement and its implementation. These technicians could supply the specific knowledge about the background of a dispute, its legal merits or its political dimension.

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<sup>255</sup> Zartman (2000) at

<sup>256</sup> Kouassi (2000) at 77.

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