

**THE ROLE OF THE PEACE AND SECURITY COUNCIL AND THE ASSEMBLY OF HEAD OF STATES AND GOVERNMENT OF THE AFRICAN UNION IN PURSUIT OF DEMOCRATISATION
IN AFRICA**

**Submitted in partial fulfilment of the Degree Master's of Laws
(LLM) in Human Rights and Democratisation in Africa**

By

Yao Armand TANOH

Prepared under the supervision of

Dr Patrice VAHARD

At the

Faculty of Law, Addis Ababa University, Addis Ababa, Ethiopia

October 2007

DECLARATION

I, Yao Armand TANO, declare that the present work is original. It has never been presented at any other University or Institution. Where other people's works have been used, references have been provided, and sometimes, quotation made. It is in this regard that I declare that this work is originally mine. It is hereby presented in partial fulfilment of the requirements of the Master's of Laws (LLM) Degree in Human Rights and Democratisation in Africa.

Signature:

Date:

Supervisor

Signature:

Date:

DEDICATION

To my father Tanoh Kouacou. Dad I promised you that you will not regret of having invested in my studies. I hope you are now proud of me,

My mother Konan Nguessan Clementine for the care and for having supported me during these years. I will always be grateful to you,

My brothers and sisters Roseline, Marc, Emmanuelle, Anne-Marie, Ange-Lydie, Pacome, Jean Yves

To my aunt Konan Ndri Odette for having facilitated my study at the Law Faculty. I will never forget what you did for me my dear auntie.

To all African people who are still suffering because of the lack of liberty and democracy in their different countries. May the dream of a peaceful and democratic continent be a reality for this generation and the upcoming.

ACKNOWLEDGEMENTS

I would like to take this opportunity to thank the following people:

Pr Meledje Djedjro, the Dean of the Faculty of Law of the University de Cocody Abidjan to have accepted to give me a recommendation letter to participate to the Master Programme

Mr Igange Desire for having accepted to give me a recommendation letter

To the whole staff of the Centre for Human Rights of the University of Pretoria for having facilitated my stay in Pretoria. I especially thank Norman Taku, Frans Viljoen, John Wilson, Jeremie and the Gurti Martin Nsibirwa. God bless you.

I also thank my tutors Mianko Ramaroson and Solomon Ebobrah also called 'le tutor des francophones' for the time allocated to edit my assignments.

Special thanks to the staff of the Office of the High Commissioner for Human Rights (OHCHR) in Addis Ababa: my supervisor Mr Patrice Vahard for the time allocated to me despite his busy schedule, Mr Frej Fenniche, the Regional Representative of the OHCHR for having accepted us as interns in his department, Senait Afework for her help during my stay and the rest of the staff (Mehret, Abdu, Selma, Morten, Linda and Emmanuel)

My acknowledgements go to Patrick Eba, Boris Tchoumavi for the guidance during the application process for the Master Programme

I also thank Coulibaly Dohotie my supervisor for the Moot Court Competition in 2005 and also my team mate Lassana Kone. Our adventure in Johannesburg was great!

My thanks to all the friends of the Faculty of Law of the University de Cocody especially: Gnami Wilson Fabrice, Kobenan Stephanie, Ake Narcisse, Eric Sombo, Nazert Adegue, Duverne, Diakite Sidi, Evelyne Kossia and everybody!

I finally thank all my classmates of the LLM 2007 especially Kameldy, Horace, Bizimana, Rino, Estelle, Ruth, Lola, Dejene, Tiki. I will never forget all of you!

LIST OF ABBREVIATIONS

AU	African Union
OAU	Organisation of African Unity
PSC	Peace and Security Council of the African Union
ECOWAS	Economic Community of West African States
NEPAD	New Partnership of African Development
APRM	African Peer Review Mechanism
THE ASSEMBLY	Assembly of Head of states and Government of the African Union
LOME DECLARATION	Lome Declaration on Unconstitutional Change of Government

TABLE OF CONTENTS

TITLE PAGE	i
DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
LIST OF ABBREVIATIONS	v
CHAPTER 1: INTRODUCTION	1
1.1 Background of the study	1
1.2 Research Questions	2
1.3 Rationale	2
1.4 Methodology	3
1.5 Limitation of the study	3
1.6 Literature survey	3
1.7 Outline of chapters	4
CHAPTER TWO: THE NORMATIVE FRAMEWORK AT THE AFRICAN UNION LEVEL	5
2.1 Introduction	5
2.2 From the founding treaty of the Organisation of African Unity to the Constitutive Act of the African Union	5
2.3 Assessment of the actions of the OAU	8
2.4 The creation of the African Union	9

2.5 The different organs of the Union dealing with democracy and Good governance	11
2.5.1 The Assembly of Head of States and Government	11
2.5.2 The Peace and Security Council (PSC) of the African Union	13
2.5.3 The Executive Council	15
2.6 African Union/ OAU Declaration and Convention relating to Democracy and Good Governance	16
2.6.1 The Lome Declaration	16
2.6.2 Durban Declaration on the Principles governing democratic elections in Africa and the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance	17
2.6.3 African Charter on Democracy, Elections and Governance	17
2.6.4 The African Union Convention on Preventing and Combating corruption	18
2.7 Conclusion	18
CHAPTER THREE: THE CHALLENGES TO DEMOCRATISATION IN AFRICA	19
3.1 Introduction	19
3.2 Africa: a long way to democracy	19
3.3 The problem of unconstitutional changes of Government	21
3.4 Amendment of Constitution to remain in power	23
3.5. Conclusion	28

CHAPTER FOUR: HOW CAN THE ASSEMBLY OF HEAD OF STATES AND THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION BE EFFECTIVE TO ADDRESS THESE CHALLENGES?	30
4.1 Introduction	30
4.2 Assembly of Head of States and Government of the African Union: what possible contribution for the advancement of democracy in Africa?	30
4.3 The Peace and Security Council: a taskforce to ensure the respect of democratic principles	35
4.3.1 Composition of the PSC: a composition very controversial	35
4.3.2 Possible role of the PSC	35
4.4 Conclusion	39
CHAPTER FIVE: GENERAL CONCLUSION AND RECOMMENDATIONS	40
5.1 Conclusion	40
5.2 Recommendations	41
BIBLIOGRAPHY	43

CHAPTER ONE: INTRODUCTION

1.1 Background of the study

Democratisation has been defined as an evolution towards democratic institutions¹. This envisages the movement of a state from authoritarian rule to the creation and consolidation of institutions that can ensure respect for freedom, political liberties. These different features of democracy are seen by all organisations (at national and international level) as the best way to maintain peace, stability and development.² With this background one can see that democracy is of prime importance. Regional and international organisations have realised the key role they can play in the achievement of democracy in the world.

As far as the African continent is concerned, two phases can be highlighted: firstly the era of the Organisation of African Unity (OAU) and secondly the establishment African Union (AU). In fact, after the independence of some African countries in the 1960s, African States met in 1963 and agreed to establish the Organisation of African Unity. This regional organisation aimed to liberate other countries which were still under colonial rule. Two key principles of the OAU were the affirmation of the sovereignty of the States and the non intervention in the internal affairs of state parties.³ By 1990, the context changed because all African countries had received their independence from former colonial masters.

From a review Charter of the Organisation of the African Unity, principles of democracy and good governance were not clearly mentioned in the principles of the OAU. Rather, the fight against colonialism and apartheid were expressed with a very strong wording.⁴ In 1990s, all African states were independent⁵ the apartheid regime in South Africa came to an end. From that standing point, the OAU reached its goals. However, issues related to democracy and good governance were still outstanding.⁶ The African countries are considered as those having very bad records in terms of democratic institutions.⁷ This situation made necessary the creation of a new institution in Africa

¹ Ottaway, Democracy in Africa, the hand road ahead (1997), Lynne Rienner Publishers, London 1

² For example the UN Charter, the Constitutive Act of the AU, the ECOWAS treaty, SADC treaty

³ Article 3 (1) and 3 (2) of the OAU Charter

⁴ Article 2 (1) (a) of the OAU

⁵ The last state African state who became independent was Namibia in 1990

⁶ According to a survey made by Freedom House, only 8 African countries can be considered as free, the other states are partly free or not free at all ,<http://www.freedomhouse.org/template.cfm?page=363&year=2007> (Accessed on 19 September 2007)

⁷ Ottaway, n 1 above

really able to catch up with the trend of democratisation after the end of the cold war.⁸ This led to the establishment of the African Union in 2002 by the African Head of States and Governments.

The new Union intends to 'build an integrated, prosperous and peaceful Africa, an Africa driven and managed by its own citizen and representing a dynamic force in the international arena'.⁹ For the realisation of this vision, democratic principles and good governance are considered as one of the tools.¹⁰ In this new wave, many organs have been created by the African Union, among which are, the Assembly of Head of Sates and Government and the Peace and Security Council whose role is to promote peace, stability and democratic principles on the continent.

1.2 Research Questions

1. What is the normative framework established at the AU level to deal with democracy and good governance in Africa?
2. Can the Peace and Security Council and the Assembly of Heads of State and Government of the African Union be effective in addressing the issues related to democratisation in Africa?

1.3 Rationale

The importance of this research is based on the fact that, as the second regional organisation created after the OAU, the African Union is expected to avoid the shortcomings of the previous organisation in order to reinforce democratic practice on the continent. The fact that the framework of the African Union is different from that of the Organisation of African Unity, is a clear indication of the change of policy from African states.

According to Zweifel 'the Constitutive Act of AU includes strong language on AU decisions to penetrate national boundaries of all member states'.¹¹ With this backing, the Union as a regional organisation should be able to contribute to the democratisation process of its member states. As mentioned by John Wiseman, democratic change is a result of internal and external pressure.¹²

⁸ Zweifel, International Organisations and democracy, Accountability, Politics and Power (2006), Lynne Rienner Publishers, London 148

⁹ Strategic plan of the commission of the African Union volume 2: 2004 – 2007 strategic framework of the commission of the African Union available at www.african-union.org

¹⁰ Article 4 h of the Constitutive Act of the Union

¹¹ See n 8 above

¹² Wiseman, the new struggle for democracy in Africa (1996), Aldershot, Avebury

This paper aims to assess the involvement of the African Union to address the issues of democratisation and to make appropriate recommendations to overcome these problems.

1.4 Methodology

To answer the research questions the following methodology will be applied. An analysis of the normative framework at the AU level and the different institutions and organs created will be undertaken. An emphasis will be placed on the Assembly of Heads of State and Government of the Union and the Peace and Security Council. On the other hand, qualitative research will be made through the selection of examples as an illustration of the global trend of democratisation in Africa. The actions of the two organs mentioned above will be analysed and some suggestions will be made to improve their effectiveness.

1.5 Limitation of the study

The concept of democratisation covers many aspects. However, this study will focus especially on the response of the AU to constitutional amendment by leaders to remain in power and also the issue of coup d'etat. In this research, an emphasis will be made on two organs (Peace and Security Council and the Assembly of Head of States) of the Union to find out the best way to address these specific issues. A comparison with the previous practice of the OAU will be made in order to see the prospects and the new challenges of the Union. This does not mean that the other issues not covered in this paper are not relevant in Africa. However, a clear focus on the two issues mentioned above will ease a deeper analysis on these points.

1.6 Literature survey

Many scholars have already written about the Union and its possible contribution to address human rights issues in Africa. Zweifel made an assessment of the role of the AU since its creation. For him, the Union is position to tackle the democratisation issue better than the OAU because the AU has more powers. However, he fears that the timid response of the Union is some countries such as Madagascar and Zimbabwe can defeat the efforts made by the states to give comprehensive provisions in the Constitutive Act. In the same vein, Muruthi, after analysing the reasons for the failure of the OAU, noted with satisfaction that the Union is taking a serious stand to maintain peace and security on the continent. However, as he mentioned, the Union should avoid to be called, like the OAU, a 'trade union of dictators'.¹³ In addition to that, this paper will analyse the ability of the organs to deal with the issues on their agenda by mentioning examples of the AU practice on the ground since its creation.

¹³ Muruthi, the AU, Pan-Africanism, Peace building and development (2005), Ashagate Publishing Ltd 31

1.7 Outline of chapters

Chapter 1: Introduction

Chapter 2: The normative framework at AU level

This chapter will focus on the normative framework of the Union. Before the African Union, the organisation of African Unity was the only one representing all African states at the regional level. Therefore, I will try to analyse the move from the OAU to the AU and the different institutions put in place to deal with democracy and good governance. Thus, an overview of all treaties and declarations adopted by the new Union will be made.

Chapter 3: The challenges of Democratisation in African states (with focus on specific countries)

In this chapter, an emphasis on the challenges faced by many African countries. The list is not exhaustive. An emphasis will be made on the issue of *coup d'état* and amendment of constitution to remain in power.

Chapter 4: How can the Assembly of Head of States and the Peace and Security Council be effective to address these challenges?

In this Chapter, I will focus on the possible role of the Assembly of head of states and government in respect of democracy and good governance. I will also make some propositions for the real effectiveness of the Union.

Chapter 5: General Conclusion and Recommendations

This chapter will serve as a general conclusion of this paper and recommendations will be made in order to address the issues mentioned in the previous chapters.

CHAPTER TWO: THE NORMATIVE FRAMEWORK AT THE AFRICAN UNION LEVEL

2.1 Introduction

The setting up of the new framework of African Union has been the result of an analysis. As mentioned above, at the end of the years 80s the Organisation of African Unity reached the goals existing in its founding treaty.

In fact, the period of creation of the Organisation of African Union was a time dominated by the fight against colonialism, apartheid and discrimination. The Organisation of African Unity was established on the 25th of May 1963, few years after many African states got political independence from their colonial masters.¹⁴ At that time the need to establish a strong organisation able to liberate the whole continent from western domination was crucial. From the normative framework of the OAU to the one of the African Union, many differences can be highlighted. The African Union appears as a revolution because of the content of the new Constitutive Act and the different institutions that have been put in place. The aim of this chapter is to analyse firstly the move from the Organisation of the African Unity to the African Union and also the different declarations, conventions and organs adopted to be in line with the new vision of the African Heads of State and Government.

2.2 From the founding treaty of the Organisation of African Unity to the Constitutive Act of the African Union

The context of adoption of the founding treaty of the Organisation of African Unity is really particular. On the one hand, one has the willing of some African head of states to reconsider the boundaries designed at the Berlin Conference of 1885. In fact, many African academics and politicians considered these boundaries as arbitrarily designed because the division was more motivated by economic reasons than the cultural diversity of African people. Among the leaders who were challenging the partition of the African continent, Kwame Nkrumah from Ghana, Julius Nyerere from Tanganyika and Nasser from Egypt appeared were the most vocal. Their plan was to enable the African Continent to have at least a political unity. Therefore, the boundaries designed for the African states were no longer relevant. This group was called the Casablanca group¹⁵. Thus, as observed by Breytenbach 'the Casablanca Group favoured immediate unity through regional and continental integration....'.¹⁶ This group was competing with another group called the Monrovia

¹⁴ Most of the African countries got their independence in 1960

¹⁵ The Casablanca comprises United Arab Republic, Ghana, Guinea, Mali and Morocco

¹⁶ Breytenbach, the history and destiny of national minorities in African renaissance: the case for better boundaries in Makgoba, African Renaissance (1999) Mafube Publishing 95

Group, which 'opted for hard boundaries and state sovereignty'.¹⁷ Leaders such as Houphouët-Boigny represented this group.¹⁸ For them, there was no need to change the configuration of the states as designed by European countries. In fact, many African Head of States did not want to lose the portion of sovereignty they got after the independence. That is why the attempt at making a confederation between African states after the independence failed.¹⁹ After many conferences and meetings held by the two conflicting groups, the African head of states and government finally met in Addis Ababa to create what was called the Organisation of African Unity in Lome on the 25th May 1963. The principles of the OAU were the followings:

1. The sovereign equality of all Member States.
2. Non-interference in the internal affairs of States.
3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.
4. Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.
5. 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.
6. Absolute dedication to the total emancipation of the African territories which are still dependent.
7. Affirmation of a policy of non-alignment with regard to all blocs.²⁰

From the reading of these principles, some important points can be highlighted: first of all, the idea of a strong economic integration and political unity promoted by the Casablanca group does not appear in the Charter. In others words, the African leaders might have found the idea unrealistic for that time. Therefore, the boundaries designed by the colonial masters could not be changed or modified. By maintaining colonial borders, the African Head of states and government endorsed the principles of *uti possidetis*²¹ which was designed 'to prevent the chaos that inevitably would result from attempts to redraw boundaries to coincide with ethnic groupings'²².

Secondly, the African leaders were strongly attached to the sovereignty of their territories fearing any intervention of the colonial masters. They also feared any action from the neighbouring that

¹⁷ Breytenbach n 16 above

¹⁸ President of Cote d'Ivoire from 1960 to 1993

¹⁹ Senegal alone established confederation with Mali (la Federation du Mali) and later with Gambia (Senegambia). Both federations broke up

²⁰ Article 3 of the OAU Charter

²¹ Dugard 'uti possidetis principle is a principle according to which colonial boundaries, however arbitrarily drawn by the imperials powers are to be respected'

²² Dugard, International law, A South African Perspective third edition, Juta Law (2005) Lansdowne, South Africa 131

could threaten their powers. Even though the practice was in contradiction with these principles, it was at least worded in the Charter.²³ In the same vein, the context of the cold war was not favourable to relying on the neighbouring countries. The Heads of State and Government of the OAU also stressed the necessity of non-alignment on all blocs.²⁴ The independence of many African countries occurred during the period of the cold war.²⁵ At that time, the world was divided in two blocks: the East and the West. The African states through the Charter of the Organisation of the African Unity claimed not to belong to any of these blocks. But the truth is, the cold war expended in Africa and led to war in many countries such as Angola, Zaire and Mozambique. From this standing point one can say that the principles enshrined in the Charter were completely different from the reality on the ground.

In the principles enshrined in the OAU Charter, a very important element was missing. This was the respect of democratic principles and human rights. This does not mean that the African Head of States were not aware of human rights²⁶ and democracy. This situation can be seen as consistent with the principles they developed above: the African leaders did not want any kind of interference in their domestic affairs. Recognising the rights of OAU members to comment on the Human Rights situation in their respective countries could have been interpreted as an excessive interference. This situation really prevented the Organisation from intervening in some cases of human rights violations and hard dictatorship.²⁷

The Organisation of African Unity had four key organs: the Assembly of Head of States and Government, the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration. Among these organs, the Assembly of Head of States and Government was the most powerful. Thus, the Assembly of Heads of State and Government's role was to:

²³ The truth is many African states were used to destabilise their neighbours. This was the Case of Cote D'Ivoire which was used to destabilise its neighbour Liberia in Chataigner, *Le modele de l'effondrement liberien ou la tentation de la deconstruction en Afrique de l'Ouest*, available at http://www.cairn.info/article.php?ID_REVUE=AFCO&ID_NUMPUBLIE=AFCO_206&ID_ARTICLE=AFCO_206_0205 (Accessed on the 2nd November 2007)

²⁴ Article 3 (7) of the OAU Charter

²⁵ Period during which the East led by the former Union of the Soviet and Socialist Republic (USSR) and the West led by the United States of America had different ideologies. They were conflicting through many satellites countries to impose their domination in the world

²⁶ Many African States ratified in the years 1960s many human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR)

²⁷ The System of repression in Uganda under Idi Amin Dada or the repression of demonstration organised by the regime of Jean Bedel Bokassa were not receiving any response from OAU members. See Ojo & Sesay, *the OAU and Human Rights: Prospects for the 1908s and beyond*, Human Rights Quarterly Vol 1, 1986 John Hopkins University Press

'...discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization. It may in addition review the structure, functions and acts of all the organs and any specialized agencies which may be created in accordance with the present Charter.'²⁸

The Assembly of Head of States was determining the general policy of the Organisation that the Council of Ministers and the General Secretariat should implement. The OAU also established three specialised commissions: the Economic and Social Commission, Educational, the Scientific, Cultural and Health Commission and the Defence Commission. Basically, this was the nomenclature of the organisation.

2.3 Assessment of the actions of the OAU

The Charter of the OAU was adopted after the settlement of some ideological differences between the first African leaders.²⁹ With the international context of this time, some issues seem more important than other problems. In fact, the principal objective of the OAU leaders was to liberate the African continent from any form of domination (apartheid and colonialism). In line with this objective, all countries are now independent. As mentioned above, the last African country became independent in 1991. At least it can be said that the African countries got political independence. From this standing point, one can say that the objectives have been met. With the end of the cold war, the international context completely changed. The western states and the USSR no longer supported dictatorships in Africa. This new trend made necessary the adaptation of the OAU Charter to the new context.

However, as already mentioned above, there are some issues that the OAU members did not adequately address. Even though, the Charter did mention 'due respect to the Universal Declaration on Human Rights'³⁰ African states were not well known for their good human rights records.³¹ The human rights aspect is very relevant to this discussion because without democracy human rights cannot be respected. A country cannot be democratic without due consideration to Human Rights. Therefore human rights violations are a serious indicator of lack of democracy. For many years, the OAU did not respond to human rights violations that occurred in many African countries. Some Human Rights violators even chaired the Assembly of Head of States and Government.³² Thus, the

²⁸ Article 8 of the OAU Charter

²⁹ Conflicting views between the Monrovia Group and the Casablanca Group

³⁰ Article 2 (e) of the OAU Charter

³¹ The OAU only started taking steps after the repression of a demonstration in the former Central African Empire led by Jean Bedal Bokassa in 1979. See Ojo & Sesay n 27 above

³² This was the case of Idi Amin Dada who chaired the Assembly of Head of States and Government (from 28 July 1975 to 2nd July 1976) when serious human rights violations were alleged against his regime or Mobutu from 11th September 1967 to 13th September 1968 (See the list of the chairmen of the OAU at http://www.upto11.net/generic_wiki.php?q=chairman_of_the_african_union accessed 2nd November 2007). Under

Genocide in Rwanda happened during the era of the OAU. It is true that many voices were raised to condemn the genocide. However, the OAU did not have the habit to intervene in such kinds of cases or to even have a reaction.³³ Therefore, there was an urgent need to reform the African institution due its several shortcomings.

2.4 The creation of the African Union

The African Union was launched in Libya at the fourth extraordinary session of the Assembly of Heads of State and Government.³⁴ At this meeting, the OAU leaders emphasised the need to strengthen the Organisation to be able to meet the challenges of the 21st century. One of the objectives of this meeting was to develop and to reinforce the goal of economic integration between African Countries. That is why one of decisions of OAU leaders was to

'Establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organisation and the provisions of the Treaty establishing the African Economic Community.'³⁵

As mentioned by Murray, Libya was a key actor in the establishment of the Union³⁶. The leader of Libya still has the vision to create the United States of Africa. From the analysis of this declaration, it can be noticed that the AU leaders were coming back to the ideology defended at the creation of the OAU, which was to strengthen the unity between African states. Those who were called the 'Casablanca Bloc' represented by Nkrumah, Nasser, Nyerere and others supported this ideology.

The African Union was finally established in Lome, Togo on the 11th of July 2000. The African Union appears as an institution completely different from the Organisation of African Unity with different institutions and a new architecture. The new dimension taken by the African Union can be seen from its Preamble, which says for instance:

'Determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'³⁷

the AU this tendency changed. Recently the Union refused to appoint the President of Sudan as chairman of the AU because of allegation of human rights violations

³³ The OAU headquarters was in Ethiopia at the time of the 'red terror' under the regime of Mengistu. No vigorous condemnation was heard from OAU members.

³⁴ Fourth extraordinary session of the Assembly of Heads of State and Government 8-9 September 1999 Sirte, Libya eahg/draft/decl. (iv) rev.1 available at http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/Sirte_Declaration_1999.pdf (accessed on 5th October 2007)

³⁵ Article 8 (i) of the Sirte Declaration

³⁶ Murray, Human Rights in Africa: From the OAU to the African Union (2004), Cambridge University Press

³⁷ Paragraph 9 of the Preamble of the Constitutive Act of the African Union

The African Union inspired itself from the shortcomings of the OAU. Thus, the Constitutive Act developed new principles and purposes to be in line with the new trends. The principles of the new Union are the followings:

- (a)**sovereign equality and interdependence among Member States of the Union;
- (b)**respect of borders existing on achievement of independence;
- (p)**participation of the African peoples in the activities of the Union;
- (d)**establishment of a common defence policy for the African Continent;
- (e)**peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- (f)**prohibition of the use of force or threat to use force among Member States of the Union;
- (g)**non-interference by any Member State in the internal affairs of another;
- (h)**the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;
- (i)**peaceful co-existence of Member States and their right to live in peace and security;³⁸

An analysis of these new principles shows a radical change from the OAU to the African Union. First of all, it can be said that some principles are similar to the principles of the OAU.³⁹ On the other hand, new principles are contemplated in the Constitutive Act. For instance, article 4 (h) of the Constitutive Act which gives the right of the Union to intervene in case of gross Human Rights violations such as war crimes, crimes against humanity and genocide were not expressed in the treaty founding the African Union. The inclusion of this new provision is a response to some massive human rights violations that took place in the era of the OAU. The Constitutive Act also establishes eight organs with an open-ended clause.⁴⁰ The Organs of the Union are:

- (a) The Assembly of the Union;
- (b) The Executive Council;
- (c) The Pan-African Parliament;
- (d) The Court of Justice;
- (e) The Commission;
- (f) The Permanent Representatives Committee;
- (g) The Specialized Technical Committees;
- (h) The Economic, Social and Cultural Council;
- (i) The Financial Institutions⁴¹

³⁸ Article 4 of the Constitutive Act

³⁹ Article 4 (a), (b),(d) of the Constitutive Act

⁴⁰ Article 5 (2) of the Constitutive Act: the Union may decide to establish others organs if need be

⁴¹ Article 5 (1) of the Constitutive Act

All these organs constitute the nomenclature of the new Union. However, for the purposes of this study an emphasis will only be made on the Assembly of Head of States and Government of the Union and on the Peace and Security Council which are in our view key institutions for the promotion of democracy, rule of law.

In addition, the AU adopted a Protocol to the Constitutive Act⁴² of the African Union. This Protocol is a complement to the existing framework in the AU Constitutive Act. As far as the Principles are concerned, article 4(h) says:

‘..the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of graves circumstances namely: war crimes, genocide and crimes against humanity as well as serious threat to legitimate order to restore peace and stability to the member state of the Union upon recommendation of the Peace and Security Council’⁴³

The Protocol also added the Peace and Security Council as one of the organs of the new Organisation.⁴⁴ Many observers are impatient to see how the new Protocol will be implemented. Article 4 (h) provides the possibility for African states to intervene directly in case of threat to legitimate order (*coup d’etat*, rebellion and so forth).

2.5 The different organs of the Union dealing with democracy and Good governance

2.5.1 The Assembly of Head of States and Government

The Assembly of the Head of States and Government is provided by article 5 of the Constitutive Act. The powers and the role of the Assembly are defined from article 6 to article 9 of the Constitutive Act. The Assembly of Head of States and Government of the Union is the equivalent of the Assembly of Head of States of the OAU.⁴⁵ The Assembly of Head of States and Government can be considered as the most powerful of the Union. It is the political organ comprising Head of States. Their role in the Union structure is very important. As defined by article 9 of the Constitutive Act, their role is to:

- (a) determine the common policies of the Union;
- (b) receive, consider and take decisions on reports and recommendations from the other organs of the Union;
- (c) consider requests for Membership of the Union;
- (d) establish any organ of the Union;

⁴² Protocol on Amendments to the Constitutive Act of the African Union, Adopted in Maputo, Mozambique on the 11th of July 2003. the Protocol had not yet entered into force

⁴³ Article 4 (h) of the concerned Protocol

⁴⁴ Article 5 (f) of the Constitutive Act

⁴⁵ Article 7 of the OAU treaty

- (e) monitor the implementation of policies and decisions of the Union as well ensure compliance by all Member States;
- (f) adopt the budget of the Union;
- (g) give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;
- (h) appoint and terminate the appointment of the judges of the Court of Justice;
- (i) appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.

The Assembly appears as the central organ in charge of the adoption and implementation of all decisions of the different organs of the Union. Composed by all African Head of States and Government⁴⁶, the Assembly is the 'think tank' where all major decisions are taken and policies are adopted. The Assembly coordinates the different activities of the various organs of the Union and gives the directions that should be followed. With this role, the Union is the only organ which is really able to put pressure on the Head of States against whom decisions have been taken. As we can see the role of the Assembly is very important in the nomenclature of the Union. In the past, under the OAU, the Assembly of Head of States and Government was usually criticised because many analysts and even Heads of State were considering the Assembly as 'a trade union of criminals or dictators'.⁴⁷

In fact, the Assembly was criticised in respect of human rights violations and non respect of democratic rules of some of its members. Even in that case, the concerned leaders were welcome at the OAU session. Thus, many leaders who came in power by undemocratic means attended the OAU sessions⁴⁸ and were involved in the discussions and the decision process. Such an attitude compromised any chance of the Assembly to condemn practices of bad governance and serious dictatorships. The principle of non-interference in the internal affairs was seen as a way to prevent others states or the Assembly from intervening⁴⁹ even when the situation was highly critical.

In the Constitutive Act of the Union respect for democratic rules and good governance is one of the key principles⁵⁰ that the Union should refer to if need be. With this framework, the Union should in principle move straight forward. More than 6 years after the establishment of the Union, can one

⁴⁶ Only Morocco is not member of the Union due to the recognition by the OAU of the western sarahoui Republic

⁴⁷ Muruthi n 13 above

⁴⁸ Case of Egypt under Gamal Abdel Nasser or Uganda under Idi Amin Dada

⁴⁹ Many African leaders were really comfortable with this situation because the absence of reaction in others states matters in case of human rights violations was a guarantee that prevent the other states to intervene in their internal matters in respect of democracy and good governance. This principle was misunderstood by the OAU members because the principle of non interference only works between states and not between states and the OAU as a whole. This will be explained in the next chapter

⁵⁰ Article 4 (m) of the AU Constitutive Act

really say that its principles are being implemented? This point will be developed in the next chapters.

2.5.2 The Peace and Security Council (PSC) of the African Union

The Constitutive Act of the AU does not provide the Peace and Security Council. However, article 5 (2) gives room for the creation of others organs if necessary.⁵¹ The Peace and Security Council of the African Union⁵² can be compared to the Security Council of the United Nations⁵³ in terms of its mandate and objectives. The objectives of the Peace and Security Council are as follow:

'a. promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development;

b. anticipate and prevent conflicts. In circumstances where conflicts have occurred, the Peace and Security Council shall have the responsibility to undertake peace-making and peace building functions for the resolution of these conflicts;

c. promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence;

d. co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects;

e. develop a common defence policy for the Union, in accordance with article 4(d) of the Constitutive Act;

f. promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.⁵⁴

The last objective of the Peace and Security Council raises a specific interest for the purposes of this study. In fact, as inferred in the objectives, lack of democracy and good governance are factors that aid crises and wars in many African countries. Therefore, it will be useless for the Council to meet its objectives without any mention or reaction to non democratic practices. I submit that this

⁵¹ Article 5 (2) ' Other organs that the Assembly may decide to establish'

⁵² Adopted at the first ordinary session of the African Union on 9th of July 2002 in Durban, South Africa, ASS/AU/Dec. 1-8 (I) ASS/AU/Decl. 1 (I)

⁵³ The UN Security Council was establish to ensure the maintenance of international peace and security and to deal with the crises and wars that were going on which can affect the global stability of the world. The Peace and Security Council of the African Union has a similar mandate but only has a regional focus

⁵⁴ Article 3 of the Protocol establishing the Peace and Security Council

was one reason of the failure of the OAU and to the existence to many conflicts in Africa.⁵⁵ It is true that conflicts have diverse origins. However, an immediate response to cases of dictatorship can be really helpful for the promotion of peace and security in Africa.

The Peace and Security Council appears as a task force for the prevention and the resolution of conflicts on the continent. Since its establishment, the PSC has been very busy with many crises going on in the continent.⁵⁶ The African head of states understood that the best way to achieve peace and security on the continent also implies the respect of democratic institutions. That is why some commentators said:

'further rationale for its establishment (Peace and Security Council) was found in the firm awareness that the development of strong democratic institutions, the observance of human rights and the rule of law, as well as the implementation of post-conflict recovery programs are essential for the promotion of collective security, durable peace and stability, as well as for the prevention of conflicts.'⁵⁷

To fulfil its mandate the PSC is composed of 15 members' states elected by the Assembly: 10 members for a term of two years and five members for 'a term of three years to assure continuity.'⁵⁸ Further comments on the PSC will be made in chapter four.

The Peace and Security Council has been really ambitious in trying to settle once the entire conflict problem in Africa. That is why in the Protocol establishing the PSC the creation of a standby force has been provided.

As mentioned in article 13 of the Protocol establishing the Peace and Security Council, the African Standby Force shall perform the different functions:

- 1.Observation and monitoring missions;
- 2.Other types of peace support missions;
- 3.Intervention in a Member State in respect of grave circumstances or at the request of a Member State in order to restore peace and security, in accordance with Article 4(h) and (j) of the Constitutive Act;
4. Preventive deployment in order to prevent (i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighbouring areas or States, and (iii) the resurgence of violence after parties to a conflict have reached an agreement.;
5. Peace-building, including post-conflict disarmament and demobilization;

⁵⁵ For instance the Structure of the Peace and Security Department: the Peace and Security Council, available at http://www.iss.co.za/indssex.php?link_id=3893&slink_id=3070&link_type=12&slink_type=12&tmpl_id=3 (Accessed on the 8th of October 2007)

⁵⁶ Cote d'Ivoire, Sudan, Democratic Republic of Congo

⁵⁷ Solomon & Swart, Defending African Unity: Can the Peace and Security Council of the African Union Succeed? in Bujra & Solomon, Perspective on the OAU/AU in conflict management in Africa (2004) by ACARSTOD, CENSAD and DPMF

⁵⁸ Article 5 (1) of the Protocol on the PSC

6. Humanitarian assistance to alleviate the suffering of civilian population in conflict areas and support efforts to address major natural disasters; and
7. Any other functions as may be mandated by the Peace and Security Council or the Assembly.'

The African standby force is a revolution on the African continent because many authors attributed the lack of prompt reaction to serious crises in Africa as a result of the absence of a permanent force able to restore peace stability, order in countries in crisis. The Standby Force appears as a response to this concern. The standby force is a component of the general framework set up to ensure peace and stability in Africa. This force is supposed to be operational by 2010.⁵⁹

In that case, the Peace and Security Council can be considered as a good tool for the achievement of Peace and Stability on the continent. Besides these two key organs (Peace and Security and the Assembly of Head of States), declarations and conventions have been adopted dealing with democracy and good governance.

2.5.3 The Executive Council

The Executive Council is composed of the ministries of foreign affairs of member states or other ministers or authorities designated by the different government.⁶⁰ The Executive Council raises a particular interest because it has among others functions the responsibility 'to consider issues referred to it and monitor the implementation of policies formulated by the Assembly'.⁶¹ Therefore,, the Executive Council can be considered as the organ backing the Assembly of Head of States and contributing at the same time to the implementation of the decisions and policies designed by the Head of States. in its formulation under the OAU, the Council of Ministers (which is now called the Executive Council) was criticised by some leaders because too liberal in their views and were taking decisions without consulting on a permanent basis their respective Governments.⁶² In the new framework, their accountability to the Assembly puts the Assembly at the top of the hierarchy of the AU.

⁵⁹ Kent & Malan, the African Standby Force, Progress and Prospects, available at www.iss.co.za/pubs/ASR/12No3/EKent.pdf (Accessed on the 25th of October 2007)

⁶⁰ Article 10 of the Constitutive Act

⁶¹ Article 13 (2) of the Constitutive Act

⁶² Zweifel n 8 above

2.6. African Union/ OAU Declaration and Conventions relating to Democracy and Good Governance

2.6.1 The Lome Declaration

Besides the normative framework under in the Charter founding the OAU and the Constitutive Act of the AU, some important declarations were adopted to deal with the issues of democracy, governance and human rights.

Under the OAU, the African leaders adopted the Lome Declaration on Unconstitutional change of government⁶³. This declaration was a response to regular undemocratic change of government on the African continent. Adopted in 2000, this declaration can be considered as a late response to the coups that started in Africa just after the independence in 1960.⁶⁴ Even though some commentators⁶⁵ refute this view, it is clear that African leaders were reluctant to adopt this view because many of them did not have very good democratic records.

The declaration considers the followings cases as unconstitutional change of government:

1. Military coup against a democratically elected government
2. intervention by mercenaries to replace a democratically elected government
3. replacement of democratically elected government by armed dissidents groups and rebels movements
4. the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections

This list is not exhaustive in our view because there are others ways to stay in power undemocratically. For instance the case of regular amendment of the provisions of the constitutions to extend the terms of the incumbent leaders can also be considered as non democratic. This point will be elaborated in the next chapter.

⁶³ Adopted in Lome by the OAU Assembly of Heads of State and Government in 2000 available at www.african-union.org

⁶⁴ The first coup took place in 1963 in Togo. During this coup, the first president of Togo Sylvanus Olympio was assassinated.

⁶⁵ Ibok, the OAU/AU: Records, Challenges and Prospects in Bujra & Solomon n 57 above 13

2.6.2 Durban Declaration on the Principles governing democratic elections in Africa and the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance

These two declarations have two focuses: one dealing specifically with elections and the second one discussing broadly about democratic principles and the rule of law. The Durban Declaration⁶⁶ tries to set up the framework that must be respected for the organisation of elections in Africa. Elections in African are most of the time characterised by violence or allegation of fraud. That is why this declaration was adopted to give the basis of good and fair elections especially in Africa. The NEPAD declaration⁶⁷ recalled the African States attachment to democracy, rule of law and respect of human rights. Thus, Point 7 of the Declaration says:

'At the beginning of the new century and Millennium, we reaffirm our commitment to the promotion of democracy and its core values in our respective countries.'

The two declarations mentioned above express the commitment of African states to democracy and good governance.

2.6.3 African Charter on Democracy, Elections and Governance

The Charter on Democracy and Governance is the last convention adopted by the AU.⁶⁸ It can be considered as the first binding instrument ratified by African leaders. This convention sums up the different Declarations adopted by the OAU/AU on democracy and good governance. For the purposes of this study, the focus will not be made on this Charter giving that it is not yet entered into force. However, the charter was really necessary in the African context giving that the continent is still facing problems related to democracy.

The charter is a very good tool that can be used by the relevant organs of the Union once entered into force. The challenge will now be the implementation of the provisions of the Charter in the different state members of the Union.

⁶⁶ Adopted in Durban, South Africa in July 2002 available in Heyns & Killander, Compendium of key Human Rights documents of the African Union, third edition 2007, Pretoria University Law Press (PULP)

⁶⁷ Adopted by the NEPAD implementation committee in Rome, Italy, in June 2002. Endorsed by the Assembly of Head of State and Government of the AU, Durban, South Africa in July 2002 in Heyns and Killander n 66 above

⁶⁸ Adopted in Addis Ababa, Ethiopia on the 30th of January 2007. the Charter is not yet entered into force

2.6.4 The African Union Convention on Preventing and Combating corruption

The African Union recently adopted the Convention on Preventing and Combating Corruption.⁶⁹ The different acts considered as corruption are listed in article 4 of the convention. Basically, this convention is backing the existing framework adopted at the regional and international level to combat corruption.

2.7. Conclusion

In conclusion, it can be said that the move from the OAU to the AU was really important for the advancement of democracy and good governance in Africa. The normative framework is now existent and the Constitutive Act of AU is the first step to achieving this objective. However, in Africa the most important is not only the adoption of instruments but their implementation. The implementation is possible only if African leaders are committed to respect treaties and declaration they freely adopt. The willingness of the AU members is necessary because beyond the Union, one firstly has states. The Union is only conveying the different views of the leaders. Therefore, a common commitment from the AU members will be indispensable.

⁶⁹ Adopted in Maputo, Mozambique on 11 July 2003 and entered into force on the 5th of August 2006

CHAPTER THREE: THE CHALLENGES TO DEMOCRATISATION IN AFRICA

3.1 Introduction

The challenges the African continent is facing are very important and crucial for its development. Poverty, high rate of illiteracy, HIV/AIDS, *coup d'état*, corruption and lack of democracy are problems that one is still observing in some African countries. For the purposes of this research, all the issues and challenges of the African Continent cannot be covered. Therefore there is a need to limit the scope of this study by focusing on specific problem the continent is facing. In this way, *Coup d'états* and constant amendment of constitution by some African leaders will be analysed. It is true that the OAU and after the AU adopted some declarations and conventions in this respect.

But as mentioned above, the most important is not only the adoption of instruments rather the commitment of African states to implement these instruments. To illustrate this point, one can say that even the adoption of the Constitutive Act of the African Union and the Lome Declaration on Unconstitutional Changes of Government, there were many attempts to amend constitutional provisions for the extension of presidential terms and also *coup d'états* on the continent. Therefore, the problems are still there. This chapter will be dedicated to the analysis of the problems mentioned above with specific examples on African countries at the time of the OAU and after the creation of the African Union.

3.2 Africa: a long way to democracy

The African continent is still in the process of acquiring democratic institutions. Up to now most of the African countries are regarded by many institutions as those reluctant to ensure respect of democracy, rule of law and good governance.⁷⁰ Even though, specific examples in Africa tend to prove the contrary; the majority of the African states are not viewed as democratic enough. Many authors and researchers inquired about the prospects and challenges to democracy in Africa. Diamond for instance identified five reasons of the failure of democracy in Africa after the independence⁷¹. These reasons are: colonial legacy, ethnicity, the political culture, the political leadership, the political institutions and structures, the state and the society, the civil society and the external environment. After analysing the situation with scrutiny, she came up with this conclusion. As far as the colonial legacy is concerned, she argues that African countries inherited from colonial empires who were dictatorial and authoritarian. This situation was an obstacle to the emergence of democracy. As she rightly quoted Crowder:

⁷⁰ Freedom house survey demonstrated that 2/3 of the African states were not democratic see n 6 above

⁷¹ Diamond, Roots of failure, seeds of hope in Diamond, Linz & Mour & Lipset, Democracy in developing countries, Africa (1998) Lynne Rienner Publishers, USA

'The colonial state was convinced in violence rather than by negotiation, and it was maintained by the free use of it. Resistance and protest were forcibly, and often bloodily, repressed, although the colonial military machine was quite small by present standards. It must be remembered too that the colonial rulers set the example of dealing with...opponents by jailing or exiling them, as not a few of those who eventually inherited power knew from personal experience. As Sithole argues for Zimbabwe, the intolerant and antidemocratic character of post independence politics must be traced, in part, to the repressiveness and lack of democratic preparation during colonial and settler rule.'⁷²

Her argument might be valid because after a serious analysis, it can be noticed that colonial powers were characterised by repressive and organised violence. Therefore, it can be difficult to expect from the newly independent states to change this trend giving that they were used to that.

On the other hand, the colonial heritage cannot be considered as a justification of the policy of repression organised by many African States. In fact, many African leaders of the independence were educated and had been exposed to the basic principles and rules of democracy. This means that they had the possibility to change the situation instead of repeating the mistakes of the colonial rulers. In addition to that, colonial rulers and new African leaders were in two different situations. First of all, the only concern of the colonial masters was to find the best way to exploit the resources of their respective colonies and to keep people of their colonies under their control. In this case, the only way they found to rule was to establish a repressive system. This concern should have been different from the concern of the new elected leaders who were leading their own people. The purpose of the different fight for independence (peaceful or armed fight) was to liberate the continent and enable the different populations to enjoy freedom and get control over their resources. Therefore, it was unexpected to have various kinds of dictatorship and authoritarian to replace the colonial masters.⁷³

Another other reason put forward by Diamond to explain the failure of democracy in Africa is the lack of political culture of democracy. Thus, she contented that:

'Another obvious source of democratic decay has been the lack of commitment to democratic principles and procedural norms. Where democracy has failed, the abuse of power and failure to play the rules of the game have been prominent and even pervasive features of political life'⁷⁴

The history of the African continent seems to confirm the opinion of Diamond. The number of dictatorships and non democratic government is really impressive.⁷⁵ When one knows that the

⁷² Crowder, 'Whose dream was it anyway? Twenty five years of African independence' *African Affairs* 86 no 342 cited by Diamond n 71 above

⁷³ Diamond is highly critical about Kwame Nkrumah, one of the proponents of Panafricanism. She accused him of having installed dictatorship in the new independent state of Ghana.

⁷⁴ Diamond n 71 above 13

African countries are regularly pointed out by international organisations to ensure respect of democratic rules, the opinion developed by Diamond found its expression.

In fact, many African countries were dominated by one party system for at least three decades. At that time, there was no possibility to have different views or opinions on the incumbent African leaders. The problem of respect of democratic rules is expressed by two main problems: unconstitutional changes of government and amendment of constitution to remain in power.

3.3 The problem of unconstitutional changes of Government

The problem of unconstitutional changes of government is not really new to the African continent. In fact, few years after the independence the military intrusions in the political matters became a permanent feature.

In 1976, Cas de Villiers contented that, more than one third of the people in Africa live under military dictatorship: the consequence of more than 30 successful *coup d'état* since the independence era came to the continent.⁷⁶ African people are used to seeing the involvement of military in civilian matters. The military appears as the regulators of the politic scene in case of disagreement between the political actors.

But, most of the time the reasons put forward by the military to justify their intervention are not well grounded. In fact, the military rulers try to justify their actions by accusing the previous government of corruption and bad governance with promises to return power to civilians as soon as possible. However, history clearly demonstrates that, the military rulers are even worse than the previous civilian dictatorship. That is why Cas de villiers says that:

'A paradoxical situation often arises in Africa is that military leaders intervene in a genuine bid to end undemocratic civilian (or even military) dictatorship: but their very intervention and subsequent establishment of a military dictatorship is equally undemocratic and often assumes a harsher form than the old civilian dictatorship'⁷⁷

So in these circumstances, what can be the real motivations of military for seizing the power? In order to answer to that question Roger Tangri⁷⁸ has another approach. Basically he states that the military seize power to increase their financial gain and for individual and psychic needs of power. In addition to that, the military rulers who seize power are very reluctant to return to the civilian rule.

⁷⁵ Cas de Villiers (1976) African Problems and Challenges, South Africa, Valiant Publishers

⁷⁶ See generally Cas de Villiers

⁷⁷ Madison, the Federalist, No 37 internet: usinfo.state.gov/journals/itdhr/0800/ijde/barker.htm (accessed on the 11th of May 2007)

⁷⁸ Tangri, Politics in Sub Saharan Africa (1985), London & New Hampshire James Currey

On that basis the theory of Roger Tangri is confirmed. An interesting illustration in many African countries is the creation by the new leaders of political parties or more they present themselves as the only alternative to a sustainable peace and stability.⁷⁹ As explained by De Villiers

‘the military rulers invariably seek to explain their continued control of government machines by saying that it is impossible to remedy overnight the chaotic situation they inherited from their civilian predecessors.’⁸⁰

Thus many military dictators successfully stay in power for many years. All of these dictators were sitting at the different summits of the Organisation of the African Unity. That is why Maloka said:

‘The historical record of misbehaviour of the state in Africa, of its non compliance with the norms of good governance as they are understood and accepted by the institutionalised international public opinion is well known. It may nevertheless be worthwhile to outline various aspects of this phenomenon. One of the most obvious of these is the fact that, until recently, democratically elected governments have been an exception rather than a characteristic feature of the political scene on the African continent.’⁸¹

As also contended by Maloka many western scholars are of the view that drastic turn of African countries to democracy will definitely improve their economic situation. In fact, it cannot be said with certainty that the outcome of democracy is economic development because there are examples that confirm this theory⁸² and examples that contradict this theory.⁸³ One of the proponents of the inextricable link between economic development and democracy says:

‘if people have a legitimate and peaceful means of changing their governors, theoretically those governors –wishing not to be turned out of the office- have no reasons not to steal, not to install their relative and ethnic kin exclusively at the trough and not to abuse human and civil rights or otherwise torment the governed. Instead, the governors will rule wisely and will pursue constructive long-term economic policies.’⁸⁴

As already discussed above, the OAU adopted a Declaration to face the regular change of democratically elected Government on the continent. Still, after the adoption of this Declaration and the Constitutive Act of the African Union many coups have taken place successfully.⁸⁵

⁷⁹ The idea of a leader who is the only able to guarantee peace and stability was really spread in Africa. See for instance in Togo where many people believed that only Eyadema could have guaranteed peace and stability in the country.

⁸⁰ Madison n 77 above

⁸¹ Maloka, A United States of Africa, Africa Institute of South Africa, May 2001, Pretoria

⁸² See for instance Bostwana

⁸³ See for instance China

⁸⁴ Simpson, ‘Afterward: the best hope for now’ in Ottaway, Democracy in Africa cited by Maloka n 81 above

⁸⁵ See the case of Mauritania, Cote d'Ivoire

However it will be unfair to paint a very bad picture of military intervention in Africa. Some contemporary examples in Africa show that, sometimes the military intervention is necessary to help the country to find the way of democratic rule. Mali is a very good where Amadou Toumani Toure⁸⁶ seized power from the dictator Moussa Traore and ensured that democratic elections were organised in 1992 and a civilian President has been elected. Another example is Mauritania, where the military seized the power and organised democratic elections.

In sum one can say that, the military intervention in Africa have more negative effects than positive effects. The solution in Africa is a permanent dialogue between political actors in order to find peaceful means to settle dispute. The important issues that the continent needs to address require a minimum of political stability to enable the continent to move towards a sustainable development

3.4 Amendment of Constitution to remain in power

In many democracies, the constitution plays a key role in the functioning of the different organs of the state. In fact, the constitution also known as the supreme law of the country determines the extent and the scope of the powers of different institutions such as the presidency, the parliament, the judiciary and the others branches of the state.⁸⁷

As a result, the constitution is supreme to all laws in the country. Any domestic law or Act inconsistent with the constitution is null and void. That is why a commentator says:

'the first principle, constitutional supremacy, dictates that the rules and the principles of the constitution are binding on all branches of the state and have priority over any rules made by the Government, the legislatures or the courts. Any law or conduct that is not in accordance with the Constitution either for procedural or substantive reasons, will therefore not have the force of law'⁸⁸

Therefore, the constitution is a kind of 'holy book' to which all rules and regulations within the state should comply with. The process of drafting and adoption a constitution depends on the nature of the system where one is. In some countries, a constitutional assembly⁸⁹ receive mandate to draft and adopt the constitution. In that case the assembly is sovereign. In other countries, the Assembly drafts the constitution but does not have the power to adopt the constitution.⁹⁰ Therefore, a referendum is necessary to give effect to the constitution.

⁸⁶ The incumbent President of Mali

⁸⁷ For instance the army, the Constitutional Court

⁸⁸ Alexander Bickel, *the Least Dangerous Branch* (1962) 16-17 cited by Currie & de Waal in the *Bill of Rights Handbook*, fifth edition 2005, Cape Town South Africa

⁸⁹ Also known as constitution making-body

⁹⁰ For instance the process of drafting the constitution of 2000 in Cote d'Ivoire. The Assembly was not sovereign

Again, depending on the countries, the adoption of the constitution is not an easy process. The new South African constitution is a very good illustration in this matter. The Constitution of 1996 went through two certifications process. Firstly, the South African Constitutional Court refused to validate the first draft of the new constitution.⁹¹ Then, the constitutional assembly met again and made several changes to comply with the judgement of the Constitutional Court. The Constitutional Court ultimately approved the new draft.⁹² Finally, the new constitution was signed into law on the 10th December 1996.⁹³

As mentioned above, the constitution is very important in a democracy because it provides the check and balances in a democratic system. With this background, any amendment of the constitution can affect the effectiveness of a democracy if the concerned amendment does not follow the rules of amendment or if it may affect the balance between the different powers.

In Africa, this concern is not taken into account in many countries. In fact, the constant and permanent amendment of constitution to remain on power is a concern for the African continent. Before going into details, there is a need to explain the different types of constitution and the process of their amendment. There are two categories of constitutions: flexible constitutions and fixed constitutions.

The process of amendment of fixed constitutions is very long and complex. Generally, in these constitutions, not all provisions are difficult to amend. However, the provisions related to the number of terms of the Chief of the executive, the nature of the state, the form of the government should be amended through a referendum.⁹⁴

Flexible constitutions are very easy to amend. An Act can be passed by the Parliament to amend the constitution.⁹⁵ There is no need to use the way of the referendum to amend the provisions of the constitution. In a situation where the same political party controls the executive power and the legislative power, the amendment is very easy to put in place.

⁹¹ The Court held that the provisions of the draft constitution related to provincial powers, local government, entrenchment of the bill and the Public service Commission did not comply with the constitutional principles. See Currie & de Waal n 88 above

⁹² Certification of the Amended text of the Constitution of the Republic of South Africa, 1996 (Second certification judgement) 1997

⁹³ Currie & de Waal n 88 above

⁹⁴ For instance articles 120 to 125 of the Ivorian constitution

⁹⁵ See the example of Togo where the constitutional provisions were constantly amended by the Parliament

An overview of the African constitutions shows that constitutions have been constantly amended to enable leaders to remain in power.⁹⁶ For instance, the constitution of Ethiopia does not provide any limitation of terms for the Prime Minister who is the Chief of the Executive.⁹⁷ Like Ethiopia many others African leaders amended the constitutions of their respective countries. This is the case of The Gambia, Guinea Conakry⁹⁸, Equatorial Guinea, Guinea Bissau, Gabon⁹⁹, Egypt¹⁰⁰, Cameroon, Zimbabwe, Chad, Togo¹⁰¹, Burkina Faso¹⁰², Tunisia and Congo Brazzaville. On the other hand the list of attempts to amend the constitution to remain in power is also very long.¹⁰³

With these examples, the lack of democratic culture described by Diamond found its expression.¹⁰⁴ This state of affairs in Africa makes difficult a democratic change of the presidents or head of states through open, free and fair elections. In that case, what are the available options for democratic change?

This does not mean that the *coup d'état* should be the solution to oust undemocratic regimes from power. But the available options to create drastic change are limited.¹⁰⁵ For the reasons mentioned above, the Lome Declaration on Unconstitutional Change of Government needs to be improved.

⁹⁶ Packer & Rukare in the New African Union and its Constitutive Act in the American Journal of International Law, (2002) vol 96, No 2 (2002) 374, American Society of International Law. The authors said: 'Undemocratic elections and unconstitutional changes of government have plagued African states and persistently challenged human rights and good governance in the region. Under the OAU Charter, repeated constitutional amendments aimed at maintaining power-a tactic most evidently abused formerly by Jerry Rawlings of Ghana and currently by Daniel Arap Moi of Kenya-could go unchecked'

⁹⁷ Article 72 (3) of the Ethiopian Constitution: 'Unless otherwise provided in this Constitution the term of office of the Prime Minister is for the duration of the mandate of the House of Peoples' Representatives'

⁹⁸ In Guinea, the constitution was amended through a referendum in November 2001. The referendum was voted with over 98% of votes. This referendum was contested by the opposition who considered it as fraudulent.

⁹⁹ Amendment of article 9 of the Constitution of Gabon in July 2003 which suppresses the limitation of the number of terms

¹⁰⁰ Amendment of article 77 of the Egyptian constitution in 1980

¹⁰¹ In Togo, the constitutional amendment took place on the 30th of December 2002 to amend article 59 of the constitution which limited the number of terms to two.

¹⁰² In January 1997, Burkina Faso modified the constitution to make the president indefinitely eligible. This provision was amended in 2000 to finally limit the numbers of terms to two terms. The same happened in Senegal where the constitution was amended in 1998 to suppress the limitation of terms and finally reinstated in 2000.

¹⁰³ See for instance the example of Nigeria where the President Obasanjo tried to amend the constitution or the example of Algeria where the Algerian president was about to amend the constitution to allow unlimited number of terms in Jeune Afrique N0 2440 du 14 au 20 October 2007 or the example of Zambia where the President failed in his will to amend the constitution

¹⁰⁴ Diamond n 71 above

¹⁰⁵ Conac, Quelques réflexions sur le nouveau constitutionnalisme africain. He said: 'En l'absence de successions unilatéralement programmées, puis démocratiquement sanctionnées, le continuisme au temps des partis uniques ne pouvait être interrompu que par la violence. Il en résultait une psychose du complot qui, pendant longtemps, a fait obstacle à la libéralisation des régimes politiques, portant au contraire les Chefs d'État en place à renforcer leur autoritarisme.' Available at <http://democratie.francophonie.org/IMG/pdf/bamako.297.pdf> (Accessed on the 24th of October 2007)

First of all, the declaration talks about unconstitutional change of government and not undemocratic change of Government. The fact that the change of government should follow the rules and the procedures enshrined in the constitution cannot be denied. However a question remains: what happened if the constitutional provisions are not democratic? Should one support an African leader even when his power is not based on democratic rules and principles?¹⁰⁶

The Lome Declaration listed the case of unconstitutional change of government as follow:

- '1 military coup d'etat against a democratically elected government
2. Intervention by mercenaries to replace a democratically elected government
3. Replacement of democratically elected governments by armed dissidents and rebel movements
4. The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections¹⁰⁷

From a review of this list, it can be noticed that an emphasis was made on the democratic nature of the government as one of the condition to give effect to the provisions of the Declaration. In other words, a non democratic (elected) government may be overthrown without the reaction of the African Union or at least may be tolerated. Implicitly, the OAU leaders recognise that a *coup d'etat* can be an option against undemocratic government.¹⁰⁸

In brief, the Lome Declaration does not give any room to deal with regimes that amend constitutional provisions to remain in power.¹⁰⁹ This lack was predictable because most of the leaders who adopted this Declaration were in power for a very long period. In the 21st century, this concern remains a challenge to democratisation in Africa. The concept of 'father of the nation'¹¹⁰ can no longer be accepted. The long presence in power does not give the opportunity of any change in the way of directing the affairs of the country. The renewal of the 'political staff'¹¹¹ gives the opportunity to people to have new options with new contestant able to provide a serious alternative for the development of the country.

¹⁰⁶ See Naldi & Magliveras, the African Union, a new dawn for Africa?, international and comparative law quarterly, vol 51, April 2002, 424

¹⁰⁷ Even in that case the African Union was reluctant to recognise the new democratically elected government of Madagascar, see Zweifel n 8 above

¹⁰⁸ It is true that the Declaration mentioned 'democratically elected government'. In others words, during the term the Government shall not be overthrown

¹⁰⁹ The new Charter on Democracy and Good Governance addresses the lacks of the Lome Declaration but it is not yet enforceable

¹¹⁰ Concept generally used to describe the leaders who fought for the independence and also the first presidents after the independence in Africa

¹¹¹ Meaning political actors

In fact, it can be said that permanent amendment of the constitutional provisions in order to remain on power is the perpetuation of the system of one single party adopted by many African countries after the independence. After the independence in the 1960s, many African countries alleged the need to consolidate unity within the countries to promote and impose the one party system. The system was characterised by the absence of elections or credible elections.¹¹²

After multipartism in 1990s and due to constant pressure to democratise, many leaders accepted to open the country to democracy. However, the need to perpetuate their presence in power was still present. In fact, during the era of one party system, leaders were staying in power over 20 or 30 years regularly elected by fake elections where there was generally one candidate.¹¹³

In a so-called democratic system, leaders have to be smart. All candidacies (or almost) are allowed. Then, the elections organised under the supervision and the control of the ruling party most of the times led to the victory of the ruling party. In fact, the political change in Africa is very seldom. Since the multipartism arena in 1990s, only few of incumbent leaders relinquished power after elections.¹¹⁴ In that case, when the incumbent leader is still leading the country, there is no way in which the opposition parties can take over after elections.

The unlimited number of terms for presidential elections has been criticised by some authors who believe that in the African context these provisions are necessary in order to avoid long term presidency of only one leader. As presented by Loada¹¹⁵

'In most of the African countries, the political scene is dominated, and is still dominated in some countries by unmovable Head of States who seized the power taking advantage of the lack of democratic culture of the population. Also, the proponents of the limitations of the number of presidential terms would facilitate the circulation of the elite as a replacement of real political change...'¹¹⁶

As finally contended by the author, the limitation of the number of presidential terms in Africa presents more advantages than drawbacks. In fact, the rotation of power will definitely enable other competent and educated people to show another alternative to the people. In the African context,

¹¹² Case of Cote d'Ivoire where the one party system lasted from 1960 to 1990

¹¹³ See the example of Zaire during the presidency of Mobutu when he was the only candidate and was winning the election with over 90% of the votes

¹¹⁴ See the example of Benin which is one of the rare examples of political change. After the national conference organised in 1990, the elections organised were won by Nicephore Soglo who replaced Mathieu Kerekou

¹¹⁵ In his paper Loada was presenting the two opposite views: the proponents of the limited number of terms and the opponents

¹¹⁶ Loada, limitation du nombre de mandats présidentiels en Afrique francophone available at <http://www.afrilex.u-bordeaux4.fr/pdf/3doc8loada.pdf> (Accessed on the 24th of October 2007) free translation from French

where the states' structures are still fragile and dominated by the cult of personality, a long service in power will affect the ability of the leader to lead the country in line with democratic principles.¹¹⁷ In sum violence and *coup d'état* can be avoided, if leaders take the decisions to relinquish the power in the appropriate time.

The constant amendment of constitutional provisions is inevitably a denial of the multiparty system adopted by many African countries in 1990. This raises an important issue which whether the African continent is ready for democratic change. As a result, attempts to improve the democratic records of many African countries have always been undermined by attitude contradicting the principles of democracy and good governance.¹¹⁸

3.5 Conclusion

In sum, it can be said that the African continent is still on the road to democracy. The challenges described above do not reflect completely the whole issue of democratisation in Africa. An issue like corruption continues to prevent African people from benefiting from the exploitation of the resources of their different countries. However, unconstitutional change of government and amendment of constitution to remain in power are among the issues that the Peace and Security Council of the Union and the Assembly of Heads of State and Government can easily deal with. In fact, as this will be explained in the next chapter, the mandate received by the Peace and Security Council to resolve conflicts in Africa has also a prevention component. Therefore, there is a need to anticipate the existence of conflicts by constant and regular interventions and warning if the basic rules of democracy are not respected. The Lome Declaration is a good step in this respect. However, the inconsistencies and the issues not covered by the Declaration undermined its application.¹¹⁹ On the other hand, the OAU leaders adopted the Declaration more than 40 years after the independence. This is really late when one knows that some countries were permanently under military rules.¹²⁰ The new trend characterised by the adoption of the Constitutive Act of the Union can give serious reasons for hope. This will be analysed in the next chapter.

¹¹⁷ See also Duhamel who contented that: 'a prolonged stay in power corrupt. A man of power tends to keep it, a man in power want to perpetuate his power.' In Load n 117 above (free translation from french)

¹¹⁸ Peleket, *Alternance politique en Afrique*, Paris 26 Novembre 1998 available at <http://www.sangonet.com/FichPartisRCA/AlternanceAfriqueJB.html> (accessed on the 22nd of October 2007)

¹¹⁹ Another problem is that in international law a Declaration is not legally binding

¹²⁰ For instance Nigeria where the country did not have 10 years of continuous civilian rule until 1999

CHAPTER FOUR: HOW CAN THE ASSEMBLY OF HEAD OF STATES AND THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION EFFECTIVELY ADDRESS THESE CHALLENGES?

4.1 Introduction

The need to take serious steps for democratic change is now a reality in Africa. From different countries, voices are raised to ask for political and democratic change. In this way, different declarations and conventions were adopted at the OAU/AU level to improve African records as far as democratic principles are concerned. The new framework adopted at the African Union level is supposed to deal with this issue. From the Constitutive Act of the African Union to the Protocol establishing the Peace and Security Council of the African Union, democratic principles and good governance are always mentioned. The African Union in strengthening economic and regional integration is of the belief that democratic principles and good governance are a key component to achieve these goals. On the other hand, the Peace and Security Council received mandate to ‘... anticipate and prevent conflicts’ and also to ‘...protect and encourage democratic practices, good governance and rule of law’.

Therefore, there is a need to see how the Assembly of Heads of State and Government which is the political organ of the Union and the Peace and Security Council of the African Union, can ensure respect of democratic principles and good governance. In this Chapter, focus will be made on the practical role the Assembly of Heads of State and the Peace and Security Council can play in achieving the objectives mentioned above. This study will be undertaken through the analysis of the different actions of the PSC and the Assembly of Head of States and Government of the AU. In this regard recommendations and suggestions will be made to improve the African system of promotion of democracy and good governance.

4.2 Assembly of Heads of State and Government of the African Union: what possible contribution for the advancement of democracy in Africa?

In the new framework of the Constitutive Act of the AU, the Assembly of Heads of State and Government is still the prominent organ with the largest powers and a great capacity of action. Almost all decisions taken by the others organs of the Union have to be endorsed by the Assembly.¹²¹ Therefore, the role of the Assembly in determination of policies and practical measures is very important. Thus, when the Assembly of Head of states of the OAU was qualified

¹²¹ In fact all the organs and institutions of the AU rely on the decisions, policies and recommendations of the Assembly

as a 'trade union of criminals'¹²², it portrays clearly the existing fear of their ability to realise all the objectives enshrined in the Constitutive Act. As already mentioned above, the African Leaders were not likely in the past to interfere in the internal affairs of the other countries. At least, this was the reason put forward to refuse any involvement in the states' affairs even in case of serious human rights violations or violations of basic democratic principles. The Constitutive Act of the African Union at least allows intervention in case of war crimes, genocide or crime against humanity. One also has the Protocol on Amendments of the Constitutive Act which provides in its article 4 the right of the Union to intervene in case of threat against the legitimate order to restore peace and stability.

The Assembly of Heads of State and Government has already been involved in many crises going on in Africa. Over the elections protest in Madagascar¹²³ in 2002, the Union which was facing for the first time such a situation held a very critical position. In fact, the Union tended to support the incumbent president who manifestly lost the elections before recognising later the victory of his challenger.¹²⁴

This example illustrates what the Union can be if the Heads of state do not take seriously the implementation of the objectives enshrined in the Constitutive Act. The Assembly of Heads of State is an organ which is more political than anything else because composed of political leaders. They cannot monitor daily the issues as the Peace and Security Council of the Union does. However at every meeting of the Union, important issues related to the peace and stability in Africa should be discussed as it is already done.

Another very important point is the democratic records of members of AU. Up till now, many African countries are criticised in the world for their lack of commitment to democracy and good governance. How in these circumstances, are they able to address the issue of democratisation in other African countries? For the challenges mentioned in the previous chapter, the phenomenon of unconstitutional change of Government and the constant amendment of constitutional provisions to remain in power have been highlighted. African leaders already took the step by refusing to allow any president who came in power by a coup to seat at their meeting and also the issue related to constant amendment of constitutional provisions. As far as constant amendments of constitution to remain on power are concerned, the African Union adopted the new Charter on Democracy and Governance. This new Charter which is yet to be ratified developed has a very comprehensive framework to deal with constant amendment of constitution to remain on power. Two articles can be highlighted in the Charter. Article 10 (2) provides that:

¹²² Muruthi n 13 above

¹²³ Protest went on in Madagascar in 2002 after the proclamation of the results of the elections which opposed Marc Ravalomanana and Didier Ratsiraka

¹²⁴ Zweifel n 8 above

'State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum'.

Article 23 of the same Charter expanded the meaning of unconstitutional change of Government included in the Charter by including:

'Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.'¹²⁵

This new Charter is a response to the issues mentioned above. Unfortunately, up till now no states have ratified the concerned Charter.¹²⁶ The Charter imposes on the Assembly the obligation to 'to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.'¹²⁷

In fact, most of the leaders seating at the AU conferences and meetings are in power for over 20 years. How in this case, can they really criticise the practice of democracy in other countries? This Charter is a real revolution in Africa. However, one has some doubt about the effective applications of the sanctions provided in this Charter because as mentioned above many African states are still led by leaders who are in power for more than 20 years. The non ratification of the Charter by any of the members of the AU can therefore be understood.

In addition, many of founding leaders of the new African Union have acquired or maintain their power by undemocratic principles. At the same time, it was clearly written in the constitutive Act that democratic principles and good governance shall be the objectives of the Union. It can be seen that there is a big discrepancy between the principles and the actions of the ground. That is why, there is a need to take the necessary measures in order to force the African leaders to force them to comply with the objectives and principles they freely adopted. It is true some mechanisms have been adopted such New Partnership for African Development (NEPAD).¹²⁸ Inside the NEPAD, the African Peer Review Mechanism (APRM)¹²⁹ was adopted. As explained by Heyns and Killander:

¹²⁵ Article 23 (5)

¹²⁶ Only 8 states signed the new Charter: the different states are Benin, Burkina Faso, Burundi, Congo Brazzaville, Djibouti, Guinea, Mali, Namibia, Nigeria and Rwanda

¹²⁷ Article 25 (7)

¹²⁸ Adopted as the New African Initiative by the OAU Assembly in Lusaka in Zambia and renamed as the New Partnership for African Development at the first meeting of the implementation committee in Abuja, Nigeria in October 2001, available at www.nepad.org in Heyns and Killander n 66 above

¹²⁹ Adopted by the NEPAD implementation committee in March 2003 in Abuja in Nigeria

'The APRM is a system to which states may submit themselves and receive feedback on their compliance with governance standards, including political governance and human rights. To participate to this voluntary process states must sign this Memorandum of Understanding.'¹³⁰

The APRM is a very good step, however it is voluntary. For African states who are unwilling to respect democracy, this cannot be enough to achieve the objective of democracy in Africa.¹³¹ Therefore, some means of pressure are necessary in achieving this goal.

The mechanism of sanctions is a mean that can be used by the Assembly of Head of States and government to force its members to comply with democratic principles. While many authors and commentators argued that the mechanisms of effective sanctions that imply the use of force cannot work some believe that sanctions are a viable option in the African context. The second option can really be effective in Africa. The sanctions of the type that the African Union is using against the Anjuan Island are an illustration. Refusing the outcome the elections organised in the Anjuan Island in June 2007 because of their unfairness and their lack of transparency, the African Union decided to impose sanctions such as interdiction to travel, the freeze of accounts and the Union is planning to use maritime and air blockade if the Anjuan authorities refuse to reorganise new elections after 45 days. Truth be told, this kind of measures can have a great impact on the behaviour of the concerned leaders. Generally, leaders are not likely to change if there is not any pressure on them.¹³² That is why as a regional organisation, the Union through the Assembly of Head of States and Government should be the external voice for the respect of democratic principles on the continent.¹³³

These series of measures can be considered as unprecedented in Africa and show clearly the difference between the OAU and the AU. In the past nobody could have imagined the OAU taking such kind of measures against a government or any authority knowing that some leaders who came on power by *coup d'état* were even appointed chairman of the OAU. However, there are still some apprehensions about the effectiveness of these measures against big and powerful countries such as Nigeria, South Africa and others.

However, for the effectiveness of the sanctions, those who are pronouncing and implementing should have grounds to do so meaning that they should be recognised by the international

¹³⁰ Heyns & Killander n 66 above 34

¹³¹ To date 27 countries accepted to be scrutinised through the APRM mechanism

¹³² The Union held the same position following the unconstitutional change that took place in Togo after the death of Gnassingbe Eyadema. The transfer of power to Faure Eyadema was considered unacceptable by the ECOWAS and the rest of the AU members as well. After constant pressure of the African and western leaders, Faure Eyadema agreed to relinquish power until the organisation of free and fair elections

¹³³ In fact, article 23 of the Constitutive Act provides sanctions in case of non respect of the Assembly policies and decisions.

community of states as democratic government. How can a dictator tell another the best way to lead his country? This cannot be possible at all.

As far as the sanctions are concerned, sub regional organisations such as the Economic Community of West African States (ECOWAS) developed clear and comprehensive sanctions to be applied to those neglecting the basic principles of democracy.¹³⁴ Thus temporary suspension from participating to the activities of the organisation and very active pressure on the undemocratic leaders (coming to power by *coup d'état*) are regularly used. All of these sanctions are in fact inherited from the practice of the Security Council of the United Nations. The Security Council of the Nations already imposed such kind of sanctions on countries that did not comply with its rules or countries that are considered as a threat to international peace and security. The Assembly of Head of States and Government can really take inspiration and insights from the UN practice even if this has been criticised by some authors. In fact, the sanctions imposed by the United Nations such as embargo may affect the people instead of the leaders themselves.¹³⁵ However, the rationale behind this kind of sanctions is that people will ultimately oust the illegal government.¹³⁶

That is why targeted sanctions against the leaders themselves is better than general sanctions against the country in general. Anyway, only the circumstances determine the appropriate sanctions at a certain time.

The African Union has adopted a Protocol amending and completing the provisions enshrined in the Constitutive Act of the Union. The Protocol provides the possibility for the Union to intervene in case of serious threat to legitimate order in order to restore peace and stability to the member state but fails in determining the exact measures that will be adopted. Even if it is not clearly mentioned the military option can be envisaged in case of *coup d'état*. In fact, the ultimate solution to deal with the matter after prior negotiations remains the military option.

¹³⁴ ECOWAS enforced its sanctions mechanisms against Cote D'Ivoire during the military rule and in other countries such as Sierra Leone and Liberia where it intervened militarily

¹³⁵ Terindrazanarivelo, les sanctions des Nations Unies et leurs effets secondaires (2005) Presses Universitaires Francaises, France

¹³⁶ This kind of sanctions have yet to prove their efficiency in countries like Zimbabwe where the President Mugabe is still in power in spite of international sanctions against his regime

4.3 Possible role of Peace and Security Council: a taskforce to ensure the respect of democratic principles?

4.3.1 Composition of the PSC: a composition very controversial

The PSC is composed of 15 members which are the followings: South Africa, Algeria, Cameroon, Congo Brazzaville, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Libya, Mozambique, Nigeria, Senegal, Sudan and Togo.

The Protocol on the PSC lists the criteria that should guide the states in determining the members of the PSC. Among these criteria, the commitment to the Union's principles will be discussed in this paper. One of the principles of the Union is the commitment to democracy, good governance and the rule of law.¹³⁷ From the list detailed above, it can be said that many of the states composing the Union do not reflect the principles of the Union. In fact, these countries are among those who constantly amended their constitutional provisions to perpetuate their presence in power. How in these circumstances can they be considered as states respecting democracy? Secondly, the new Charter on Democracy and Good Governance emphasises democratic change of government in order to prevent African leaders from staying in power for a long period and even mandates the PSC to monitor the implementation of the provisions of the new Charter. How can these members states respond to this concern with the current composition of the PSC? Form this point of view, it can be said that the way the PSC is currently composed is an impediment to address the challenges mentioned in chapter three.

4.3.2 Possible role of the PSC

The Peace and Security Council is unique in its kind as far as regional organisations are concerned.¹³⁸ The persistent crises in Africa made necessary the creation of such an organ which was not provided in the Constitutive Act of the African Union.¹³⁹ The absence of this organ in the Constitutive Act does not mean that the AU leaders were not interested in conflict resolution in Africa giving that conflicts are an obstacle to an effective development.¹⁴⁰ Rather, the extent and

¹³⁷ Article 4 of the Constitutive Act

¹³⁸ ECOWAS also has a PSC. However ECOWAS is considered as a sub regional organisation

¹³⁹ The Peace and Security Council has been established by a Protocol

¹⁴⁰ It can be read from the Preamble of the Protocol establishing the PSC : 'Concerned about the continued prevalence of armed conflicts in Africa and the fact that no single internal factor has contributed more to socioeconomic decline on the Continent and the suffering of the civilian population than the scourge of conflicts within and between our States;... aware also of the fact that the development of strong democratic institutions and culture, observance of human rights and the rule of law, as well as the implementation of post-conflict recovery programmes and sustainable development policies, are essential for the promotion of collective security, durable peace and stability, as well as for the prevention of conflicts'

the complexities of its mandate might explain this omission in order to draft a separate treaty determining its mission.

As mentioned in its objectives, the Peace and Security Council shall

'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts'¹⁴¹

The Peace and Security Council of the AU has two main tasks: preventing and resolving conflicts in Africa by peaceful means. But, it can be said that since its establishment in 2003, the PSC was most of the time busy trying to settle crises in Africa. Therefore one can say that the PSC was fulfilling the part of its mandate dealing with conflict resolution. Thus, the PSC intervened in the crises in Darfur, Democratic Republic of Congo, Chad, Cote d'Ivoire and other countries in Africa. The PSC adopted many resolutions to deal with the issues those countries were facing.

However, the mission of the Peace and Security Council emphasised excessively on conflict resolution. It is true that the resolutions of conflicts are more urgent than the prevention. The prevention means that the conflict is yet to come so at least the situation is still peaceful. In this respect, a logical sequence has to be followed. Lack of respect of democratic principles most of the time leads to conflicts. Therefore, in the fulfilment of its mandate, the PSC should also put the accent on conflict prevention. As mentioned by a commentator:

'further rationale for its establishment (Peace and Security Council) was found in the firm awareness that the development of strong democratic institutions, the observance of human rights and the rule of law, as well as the implementation of post conflict recovery programs are essential for the promotion of collective security, durable peace and stability, as well as the prevention of conflicts'¹⁴²

In fact, the crises are the manifestations of the internal problems going on in the different African countries. So the most important is not to resolve the conflict but to find the way to prevent them from occurring by addressing their root causes. Up to know, all the crises that are going on in Africa continent did not find satisfactory definitive solutions from the PSC. The Peace and Security Council was only expressing its concern about a situation in the concern country and was making recommendations in order to settle the issues.¹⁴³ The settlement of a matter is more difficult than its

¹⁴¹ Article 3 (f) on the Protocol on the Peace and Security Council of the African Union

¹⁴² Solomon & Swart n 57 above

¹⁴³ For instance to respond to the coup d'etat that took place in Sao Tome and Principe the PSC 2. 'Strongly condemns the occupation, on 2nd June 2004, of the city of Bukavu by dissident soldiers of the new Congolese National Army, as well as the acts of looting, rape and massive violations of human rights that accompanied the

prevention. That is why there is a need to re orientate the priorities of the Peace and Security Council to make conflict prevention as one of the important issues on its agenda. One of the principles of the Union consists of making early warning and preventing diplomacy¹⁴⁴ to avoid the break out of crises.

Conflict prevention shall be based on capacities and abilities of the PSC to undertake some risk assessment due to the deterioration of a particular situation in one country. As mentioned by a commentator:

'Most African states and regional actors do not have systems in place either to warn them of conflict or to undertake risk assessment. African regional actors such as the OAU are, however, attempting to develop systematic conflict prevention capacities. One problem is their inability to adequately predict and respond to conflict. This has, in contravention of the spirit of the OAU Refugee Convention of 1969, inhibited their ability to provide protection to displaced persons and prevent population displacement.'¹⁴⁵

However, the risk of out break of conflict does not come from the expressed will of the political actors to fight at a certain period of time. Most of the time, the conflicts are the result a long political crisis due to the non respect of the democratic rules. Therefore, the early warning mentioned in the Protocol establishing the PSC must come from the date when a given leader will start posing act inconsistent with democratic principles. In other words, a very interventionist policy shall be applied in case of violations of democratic principles because non prompt reaction can lead to conflict. In fact, by so doing, the AU is not violating its principles namely the non intervention another state affairs.¹⁴⁶

Therefore, the PSC can in line with its mandate perform this task without violating the principle of non interference in any other state affairs. In fact, the non interference in the state affairs provided in the Constitutive Act of the AU only concerns a member state to another member state. The PSC can use this opportunity to strengthen its position as far as the prevention is concerned. The achievement of the United States of Africa as promoted by many African Leaders cannot take place without such a strong involvement of the different members of the Union for the purposes of democratisation.

occupation of the city;' see the communiqué of the Peace and Security Council at the 11th meeting on the 4th June 2004 in Addis Ababa, Ethiopia

¹⁴⁴ Article 6 (b) of the Protocol on the Peace and Security Council

¹⁴⁵ Maxted & Zegeye, Human Stability and Conflict in the Horn of Africa in Goucha & Cilliers, Peace, Human Security and Conflict prevention in Africa (2001), Institute of Security Studies, South Africa 52

¹⁴⁶ In fact article 4 (g) talks about the 'non interference of any member state in the internal affairs of another'. In other words the AU can intervene in case of non respect of democratic principles

In this regard, the example of the European Council can serve as guidance to the members of the Union in respecting and applying the decisions of the PSC. In fact, the application of the decisions of the European Court of Human Rights is based on the mobilisation of shame meaning that the state that does not comply with the decisions of the Court faces constant questioning and by the Council of the Ministers¹⁴⁷ of the European Council the state of application of the decisions of the Court. This system adopted by the Council of Ministers has proved its effectiveness because most of the cases decided by the European Court of Human Rights based in Strasbourg have been implemented by the concerned countries. Similarly, the decisions of the Peace and Security Council can follow the same process. The establishment of such an important organ (the PSC) in the African system shall receive full attention from the member states. As already mentioned above, the most important is not only the creation of institutions or organs, but the way the decisions taken by the concerned institutions or organs should be implemented. Therefore, a strong commitment from all members is necessary to make the PSC fully operational and respected.

In the same vein, the recent Charter on Democracy and Good Governance extended a bit more the mandate of the Peace and Security Council in dealing with the issues already mentioned above. Thus article 24 of the Charter provides:

'When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, hereinafter referred to as the Protocol'

The Charter engages the PSC to take the appropriate and immediate sanctions against the countries that will violate the provisions of the Charter. Again, the Charter is very good in its wording and in the mechanism put in place. However, many criticisms can be made on this new charter. First of all, from the reading of article 24, it is clear that this provision does not apply if the amendment already took place. Giving that, many African constitutions have already been amended to enable to incumbent leader to remain on power, what can be done for these countries?

Secondly, to be enforced in a given country, the concerned state has to ratify the treaty in order to be bound by the treaty. How can the PSC act if a given state does not ratify the treaty? These are the problems to the immediate enforcement of the new Charter that the provisions of the Charter did not address.

The expectations formulated on the PSC are very important. That is why some authors contented that the lack of financial resources can be an impediment to the realisation of the objectives of the

¹⁴⁷ In fact, the Council of Ministers is in charge of the implementation of the decisions of the European Court of Human Rights

PSC. It is true that many African economies depend on the financial contribution of western donors. However, the matter discussed is of a great importance for the economic development of Africa. No development can take place in a context of instability, war or bad governance. On the other hand, much more money is spent on conflict resolution than the conflict prevention itself. Thus, the actions of the PSC if supported in the earliest time can contribute to avoid most difficult situations.

4.4 Conclusion

In conclusion, it can be said that the respect of democratic principles in Africa is a possibility because the institutions in charge of its respect are already existent. Now, the concerned institutions have to fully play their role. The Peace and Security Council especially should avoid the shortcomings of the previous Commission of Mediation and Reconciliation of the OAU. This means that its members have to be independent and fulfil their mandate in respect of the ongoing crises. In addition, the PSC has to understand that it has two main missions: prevention and resolution of conflicts. The current crises and wars in Africa already orientated the choice of the PSC on conflict resolution. However, conflict prevention should not be neglected. The challenges mentioned above which are the unconstitutional changes of government and constant amendment of constitution to remain on power must receive a clear response of the African Union. Both the Peace and Security Council and the Assembly of the Head of States and Government should involve themselves in addressing these issues. As a political organ the Assembly of Head of States and Government should play a key role in this respect. As far as the *coup d'états* are concerned the Assembly and the Assembly already took steps by issuing declaration to condemn and suspend the concerned state from participating in the activities of the Union. However, this is not enough. Decisions like those taken in the case of the Anjuan Island should be privileged. On the other hand the composition of the PSC should be reviewed because most of the members states composing this organ did not have good democratic records.

For constant amendment of constitution to remain in power, the Assembly and the PSC have to be more active because many African leaders are unfortunately in this situation. Therefore, these organs should have the courage to take the stand when such situation occurs even if this option will be more difficult in practice because of the non democratic nature of many African regimes.

CHAPTER FIVE: GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

At the end of this study, it can be said that democratisation is not a process that cannot be completed over night. Therefore the purpose of this paper was to explain the democratisation process in Africa and explain the best way to achieve it by using regional organisations. As explained by John Wiseman¹⁴⁸, the democratisation process started in Africa in the year 1990s was the result of two factors: internal and external meaning that internally there was an increasing demand of democracy. Thus, many countries mainly in francophone Africa organised national conferences in order to move towards the establishment of democratic institutions.¹⁴⁹

The democratisation process started in Africa was also the result of external factors: international pressures of western governments who stopped supporting many dictatorships in Africa because of the end of the cold war. As a result many African countries decided to take the way to have democratic institutions or it can be said that they have been dragged into it.

Therefore, a regional institution such as the African Union can play a role in strengthening the democratisation process already started. In fact the establishment of the Union with the new principles enshrined in its Constitutive Act can adequately been used to foster the establishment of democratic institutions in Africa. The Union taking note of the shortcomings of the OAU in this matter can have a different adventure. The OAU cannot be completely blamed because its priority was to liberate the African countries which were still under colonial rule. However, this argument is not sufficient to neglect the responsibility of the OAU as far as democracy is concerned. In the Charter establishing the OAU, the African leaders clearly made reference to the United Nations Charter and to the Universal Declaration of Human Rights.¹⁵⁰

By making reference to these instruments, the African leaders were committed to have consideration for democracy because human rights violations are the result of the lack of democracy. The failure of the OAU should be avoided by the AU. That is why, non democratic behaviour noticed during the time of the OAU should not be accepted in the 21st century. Unfortunately these problems are still occurring in Africa: *coup d'etat* and constant amendment of constitution to remain in power. By so doing, the African leaders seem to confirm what many commentators said. They contend that the establishment of democratic institutions as one of the

¹⁴⁸ Wiseman n 12 above

¹⁴⁹ See of the example of Benin the first country to have organised a national conference in Africa

¹⁵⁰ See the Preamble of the OAU Charter

prerequisite to get funds by international institutions could not be avoided by many African leaders at least on the paper. This statement can be true to some extent but not entirely because some African Leaders showed their willingness to relinquish power without any form of pressure.¹⁵¹

5.2 Recommendations

In the respect of the role of the AU, the following recommendations can be suggested:

Firstly, the members of the Assembly of Heads of States and Government of the Union should have domestically good democratic records. Being able to put pressure on specific for non respect of democratic rules and principles suggests that most of the members of the Assembly should have democratic records. In that case, the Assembly will be able to criticise and put pressure without the risk that any of its members can be pointed out or being considered as a dictator.

Secondly, the principle of non interference of any other member state affairs should be clearly understood. It only works from a state against another one meaning that the Union can get involved and criticise the lack of democracy in other countries. Now in international law, a state cannot rely on its sovereignty to violate international human rights law or customary international law. Seemingly, a state should not rely on the principle of non interference of internal affairs to violate democratic rules.

Thirdly, the sanctions similar to those taken against Anjuan Island should be encouraged and promoted because sometimes the use of force is necessary to ensure the respect of the rules. In this regard the African Standby Force established in the Protocol creating the Peace and Security Council can perform this task.¹⁵² It is true that this option can only work for small countries because for big countries which are generally contributor to AU forces it is unthinkable.

Fourthly, the Peace and Security Council in charge of the prevention and the resolution of conflicts should be more active in conflict prevention. The prevention of conflict as mentioned above should start when a leader begins infringing democratic rules. For instance, in case of amendment of constitution provisions to extend the number of terms of a long term president, the PSC should promptly react by issuing a declaration condemning it and then refer the matter to the Assembly of Heads of States and Government. This option supposes that the most of the members of the Union are not in the similar situation. That is why a commitment of members' states to democracy is

¹⁵¹ See Amadu Toumani Toure and Alpha Omar Konare in Mali, Julius Nyerere in Tanganyika (now Tanzania), Nelson Mandela in South Africa

¹⁵² For instance the standby force can intervene in case of *coup d'etat* against a democratic regime

necessary. In addition, the PSC should enforce the provisions of the Charter on Democracy and Good Governance as soon as the Charter enters into force.

Lastly, the composition of the PSC itself should be reviewed and include some countries that have better democratic records.

If followed, these recommendations can help to make a difference on the African continent. The African continent has suffered a lot from the lack of democracy which leads to many human rights violations. To date, one of the most important genocide in the world history took place in Africa.¹⁵³ The continent now needs to move forward. The link between democracy and development is not yet incontestably established. However, a strong commitment to democracy will lead to stability which is a prerequisite to development. In a context of political instability the priorities are not the same. Money supposed to be allocated to important sectors is spent in buying military equipment.¹⁵⁴

The African Union only has few years of existence. However, the determination to implement its principles has to start now to avoid the Union becoming a second OAU.

Word Count: 17833 (including footnotes)

¹⁵³ Genocide in Rwanda which killed over one million people in 3 months time

¹⁵⁴ For instance the case of Cote d'Ivoire after the war started in September 2002

BIBLIOGRAPHY

Books

Ottaway, Democracy in Africa, the hand road ahead (1997), Lynne Rienner Publishers, London 1

Zweifel, International Organisations and democracy, Accountability, Politics and Power (2006), Lynne Rienner Publishers, London

Wiseman, the new struggle for democracy in Africa (1996), Aldershot, Avebury

Muruthi, the AU, Pan-Africanism, Peace building and development (2005), Ashagate Publishing Ltd

Breytenbach, the history and destiny of national minorities in African renaissance: the case for better boundaries in Makgoba, African Renaissance (1999) Mafube Publishing

Dugard, International law, A South African Perspective third edition, Juta Law (2005) Lansdowne, South Africa

Solomon & Swart, Defending African Unity: Can the Peace and Security Council of the African Union Succeed? in Bujra & Solomon, Perspective on the OAU/AU in conflict management in Africa (2004) by ACARSTOD, CENSAD and DPMF

Murray, Human Rights in Africa: From the OAU to the African Union (2004), Cambridge University Press

Currie & de Waal in the Bill of Rights Handbook, fifth edition 2005, Cape Town South Africa

Compendium of key Human Rights documents of the African Union, third edition 2007, Pretoria University Law Press (PULP)

Cas de Villiers, African Problems and Challenges(1976), South Africa, Valiant Publishers

Diamond, Roots of failure, seeds of hope in Diamond, Linz & Mour & Lipset, Democracy in developing countries, Africa (1998) Lynne Rienner Publishers, USA

Tangri, Politics in Sub Saharan Africa (1985) London & New Hampshire James Currey

Maloka, A United States of Africa, Africa Institute of South Africa (2001) Pretoria, South Africa

Terindrazanarivelo, les sanctions des Nations Unies et leurs effets secondaires (2005) Presses Universitaires Francaises, France

Articles

Ibok, the OAU/AU: Records, Challenges and Prospects in Bujra & Solomon Perspective on the OAU/AU in conflict management in Africa (2004) by ACARSTOD, CENSAD and DPMF

Kent & Malan, the African Standby Force, Progress and Prospects, available at www.iss.co.za/pubs/ASR/12No3/EKent.pdf (Accessed on the 25th of October 2007)

Madison, the Federalist, No 37 internet: usinfo.state.gov/journals/itdhr/0800/ijde/barker.htm (accessed on the 11th of May 2007)

Conac, Quelques reflexions sur le nouveau constitutionalisme africain. Available at <http://democratie.francophonie.org/IMG/pdf/bamako.297.pdf> (Accessed on the 24th of October 2007)

Loada, limitation du nombre de mandats presidentiels en Afrique francophone available at <http://www.afrilex.u-bordeaux4.fr/pdf/3doc8loada.pdf> (Accessed on the 24th of October 2007)

Peleket, Alternance politique en Afrique, Paris 26 Novembre 1998 available at <http://www.sangonet.com/FichPartisRCA/AlternanceAfriqueJB.html> (accessed on the 22nd of October 2007)

Maxted & Zegeye, Human Stability and Conflict in the Horn of Africa in Goucha & Cilliers, Peace, Human Security and Conflict prevention in Africa (2001), Institute of Security Studies, South Africa

Journals

Packer & Rukare in the New African Union and its Constitutive Act in the American Journal of International Law, (2002) vol 96, No 2, 2002, American Society of International Law

Naldi & Magliveras, the African Union, a new dawn for Africa?, international and comparative law quarterly, vol 51, April 2002

Ojo & Sesay, the OAU and Human Rights: Prospects for the 1908s and beyond, Human Rights Quaterly Vol 1, 1986 John Hopkins University Press

Other Internet sources

Structure of the Peace and Security Department: the Peace and Security Council, available at http://www.iss.co.za/index.php?link_id=3893&slink_id=3070&link_type=12&slink_type=12&tmpl_id=3 (Accessed on the 8th of October 2007)

List of Chairmen of the Organization of African Unity (OAU) & African Union (AU) available at http://www.upto11.net/generic_wiki.php?q=chairman_of_the_african_union (Accessed 2nd November 2007)

Freedom House survey, <http://www.freedomhouse.org/template.cfm?page=363&year=2007> (Accessed on 19 September 2007)

Strategic plan of the commission of the African Union volume 2: 2004 – 2007 strategic framework of the commission of the African Union available at www.african-union.org

Fourth extraordinary session of the Assembly of Heads of State and Government 8-9 September 1999 Sirte, Libya eahg/draft/decl. (iv) rev.1 available at http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/Sirte_Declaration_1999.pdf (accessed on 5th October 2007)

Conventions and Declarations

Charter of the Organisation of African Unity

Constitutive Act of the African Union

International Covenant on Civil and Political Rights (ICCPR),

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

Charter on Democracy, Governance and Elections

African Convention on Preventing and Combating Corruption

Charter on Democracy, Governance and Elections

African Convention on Preventing and Combating Corruption

Protocol on Amendments to the Constitutive Act of the African Union

Protocol related to the establishment of the Peace and Security Council of the African Union

Lome Declaration on Unconstitutional Change of Government

Durban Declaration on the principles governing democratic elections in Africa

NEPAD Declaration on democracy, political, economic and corporate governance

New Partnership for African Development

Constitutions

Constitution of Ethiopia

Constitution of Guinea

Constitution of Gabon

Constitution of Egypt

Constitution of Togo

Constitution of Burkina Faso

Constitution of Senegal

Constitution of Tunisia

Constitution of Congo

Constitution of the Gambia

Constitution of Cameroon

Others sources

Communiqué of the Peace and Security Council at the 11th meeting on the 4th June 2004 in Addis Ababa, Ethiopia

Certification of the Amended text of the Constitution of the Republic of South Africa, 1996 (Second certification judgement) 1997

Websites

www.african-union.org

www.iss.co.za

www.freedomhouse.org

www.issafrica.org

www.upto11.net

www.usinfo.state.gov

www.democratie.francophonie.org

www.afrilex.u-bordeaux4.fr

www.sangonet.com