

RE-DEFINING LEGITIMACY: INTERNATIONAL LAW, MULTILATERAL
INSTITUTIONS AND THE PROBLEM OF SOCIO-CULTURAL FRAGMENTATION
WITHIN ESTABLISHED AFRICAN STATES

by

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ABSTRACT

This thesis has been pre-occupied with four major interconnected projects. The first of these was a search for an understanding of the nature of the crisis of structural legitimacy that currently afflicts the fragmented post-colonial African state, an enquiry that examines the nature of the very phenomena that the law has sought to regulate. The second was to understand the nature, and social effects, of the various doctrinal attitudes historically exhibited by international law and institutions toward the phenomenon of "socio-cultural fragmentation within established states". In this respect, I have sought to understand the ways in which certain doctrines of international law and institutions have provided powerful arguments, justifications or excuses for those states that have deemed it necessary to attempt to forge coercively, both a sense of common citizenship, and an ethos of national coherence, among their various component sub-state groups. The third was to chart the ongoing normative and factual transformation of the traditional approaches that international law and institutions have adopted toward that problem, and thereby map the extent to which these institutions have taken advantage of such innovations, enabling them to actually contribute to the effort to prevent and/or reduce the incidence of internecine strife in specific African contexts. And the last was to recommend a way forward that is guided by the conclusions of the thesis: a way in which these institution-driven transformations can be encouraged and consolidated in the specific context of African states. For purposes of brevity and the imperative need for focus, these enquiries have been conducted in the specific but somewhat allegorical context of Africa. It is hoped, however, that even this largely Africa-specific analysis has contributed to the advancement of knowledge regarding the general question of

the relationship among the doctrines of international law, the activities of multilateral institutions, and the management of the problems of socio-cultural fragmentation and internecine strife within established states.

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DEDICATION

I dedicate this thesis to:

Atugonza and Ojiako
(my loving wife and my infant son)

Lechi and Okwuegunam
(my wonderful parents)

and to the beloved memory of Mary and Amon Bazira
(my other parents who have since moved on)

This is a moment that each of you has made

CHAPTER ONE

The Conceptual Framework and Methodology of the Thesis

A. THE CONCEPTUAL FRAMEWORK:

(i) The Research Problem

Nearly everywhere in contemporary Africa¹, as in much of the rest of the world, the scourge of inter-group² violence takes its toll on millions of people and imposes all its

1. In this thesis the distinction between "Sub-Saharan" Africa and North Africa will not be made. Despite what may be important differences between its constituent sub-regions, the continent of Africa will be treated as a continuous whole. The reason is that such differences do not justify a bifurcation in this thesis between "Africa south of the Sahara" and "Africa North of the Sahara". As Professor Molefi Kete Asante has convincingly argued:

"There is neither an Africa north of the Sahara nor an Africa south of the Sahara...the Sahara is Africa and human populations have inhabited the Sahara for thousands of years. It is as useless to speak of Africa separated by deserts as it is to speak of separations by rain forests."

See M.K. Asante, Kemet, Afrocentricity and Knowledge (Trenton, N.J: Africa World Press, 1990) at 33. See also M. wa Mutua, "The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa" (1996) 17 Michigan Journal of International Law 591 at 593.

2. In this thesis, the term "inter-group" will be preferred over the term "inter-ethnic" for the reason that all-too-often what is popularly and even scholastically perceived and represented as "inter-ethnic violence" is not really inter-ethnic, or at least not exclusively so. In most cases, "ethnicity" is only one of the several factors at play in the dynamic which leads to inter-group tensions and/or violence.

Moreover, since I agree with Rhoda Howard, Mahmoud Mamdani, Okwudiba Nnoli, and Dickson Eyoh that the terms "tribe" and "tribalism" are not only incorrect as a description of the reality of contemporary African life, but has also become rather antiquated in enlightened discourse, I will not use those terms in this thesis. I will only use them when they appear in the title of a publication or in a quotation. See R. Howard, "Civil Conflict in Sub-Saharan Africa: Internally Generated Causes" (1995-96) LI International Journal 27 at 29; M. Mamdani, Politics and Class Formations in Uganda (New York: Monthly Review Press, 1976) at 3; O. Nnoli, Ethnic Politics in Nigeria (Enugu: Fourth Dimension, 1978) at 3; and D. Eyoh, "From the Belly to the Ballot: Ethnicity and Politics in Africa" (1995) 102 Queen's Quarterly 40.

obvious negatives on the drive for peace and development on that continent. Whether in Sudan or South Africa, Nigeria or Niger, Rwanda or Burundi, Sierra Leone or Somalia, Senegal or Liberia, Cameroun or Chad, the former Zaire or Zanzibar (Tanzania), the post-colonial African State continues to be weakened (even torn apart) by a multitude of dissociative forces. International legal and political scholarship is suffused with analysis and counter-analysis as to the causes of the present imbroglio, and numerous proposals have been made as to the possible solutions to this threat to international peace, security and development.³

Yet, in a way that the literature has not adequately noticed, multilateral African institutions, such as the African Commission on Human and Peoples' Rights (African Commission), the Organisation of African Unity (OAU), and the Economic Community of

3. See for example C. Young, The African Colonial State in Comparative Perspective (New Haven: Yale University Press, 1994); A. Irele, "The Crisis of Legitimacy in Africa: A Time of Change and Despair" (1992) *Dissent* 296; A. Selaissie, "Ethnic Identity and Constitutional Design for Africa" (1992) 29 *Stanford Journal of International Law* 1; R.H. Jackson and C.G. Rosberg, "Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood" (1982) *World Politics* 1; R.H. Jackson and C.G. Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis" (1986) 24 *The Journal of Modern African Studies* 1; M. wa Mutua, "Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State" (1995) 21 *Brooklyn Journal of International Law* 505; I.W. Zartman, ed., Collapsed States: The Disintegration and Restoration of Legitimate Authority (Boulder: Lynne Rienner, 1995); J. Herbst, "Challenges to Africa's Boundaries in the New World Order" (1993) 46 *Journal of International Affairs* 17; T.M. Shaw and C.E. Adibe, "Africa and Global Developments in the Twenty-First Century" (1995) *LI International Journal* 1; S. Forster, W.J. Mommsen and R. Robinson, eds., Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition (Oxford: Oxford University Press, 1988); A. Mazrui and M. Tidy, Nationalism and New States in Africa (Nairobi: Heinemann, 1984); P. Mutharika, "The Role of the United Nations Security Council in African Peace Management: Some Proposals" (1996) 17 *Michigan Journal of International Law* 537; and G.B. Helman and S. Ratner, "Saving Failed States" (1992/93) 89 *Foreign Policy* 3.

West African States (ECOWAS) have already begun to make as yet modest, but quite significant, contributions to the prevention of inter-group conflicts as well as to the reduction of the tendency for inter-group tensions to degenerate into catastrophic internecine conflict.

The OAU has begun to do so through the instrumentalities of its Mechanism for Conflict Prevention, Management and Resolution⁴, the proposed African Court of Justice and Parliament⁵, and the proposed African Court of Human and Peoples' Rights⁶. The African Commission on Human and Peoples' Rights has begun to do so largely through the utilisation of its crucial article 55 procedure⁷. This process allows sub-state groups (such as socio-culturally differentiated groups and NGOs) to bring petitions before it⁸. For its own

4. See the Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, done at Cairo, June 1993, reprinted in (1994) 6 *African Journal of International and Comparative Law* 158.

5. See the Treaty Establishing the African Economic Community reprinted in (1991) 3 *African Journal of International and Comparative Law* 792.

6. See the Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 6-12 September 1995, Cape Town-South Africa, OAU/LEG/EXP/AFC/HPR (I), reprinted in (1996) 8 *African Journal of International and Comparative Law* 493. See also G.J. Naldi and Konstantinos Magliveras, "The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison" (1996) 8 *African Journal of International and Comparative Law* 944.

7. See the African Charter on Human and Peoples' Rights, 26 June 1981, reprinted in (1982) 21 *ILM* 59; and the Revised Rules of the African Commission on Human and Peoples' Rights, 6 October 1996, reprinted in (1996) 8 *African Journal of International and Comparative Law* 978.

8. See for example Constitutional Rights Project (on behalf of Zamani Lekwot & Ors V Nigeria Communication No.60/91, reprinted in (1996) 3 *International Human Rights Reports* 132 (challenging the trial and imposition of a death sentence on the leadership of the Kataf ethnic group by a special tribunal); and Final Communiqué of the 2nd Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, 18th-19th December 1995, Kampala, Uganda, (concerning the trial and execution of leaders and activists of the

part, the ECOWAS has begun to do so through the instrumentality of its innovative policies and practices relating to its Conflict Prevention Mechanism⁹, the free movement of persons, and ECOWAS or West African citizenship.¹⁰ Again, its proposed judicial and parliamentary systems promise to begin the completion of the normative phase of this significant transition¹¹.

Moreover, each of these institutions possess the potential to make even more significant contributions in the extant direction.

It is now axiomatic that inter-group friction need not always degenerate into internecine violence¹². Based on this premise, this thesis will attempt to use existing evidence to map the actual and potential contributions of multilateral African institutions to the reduction of internecine violence within the post-colonial African state. The construction of this map will, however, involve and be preceded by a historically sensitive examination

Ogoni people of Nigeria and the situation of 19 others currently in detention while awaiting their trials) (on file with the present writer).

9. See Articles 56 and 58 of the Revised Treaty of ECOWAS, infra note 12.

10. See ECOWAS Protocol on the Free Movement of Persons, the Right of Residence, and the Right of Establishment, ECOWAS Doc. ECW/HSG/1/21, Rev.1. See also Article 59 of the Revised Treaty of the ECOWAS, infra note 12.

11. See Revised Treaty of the Economic Community of West African States, 24th July 1993, reprinted in (1996) 8 African Journal of International and Comparative Law 187; as well as Protocol A/P.1/7/91 on the Community Court of Justice, 4-6th July 1991, reprinted in (1996) 8 African Journal of International and Comparative Law 228.

12. See D. Horowitz, Ethnic Groups in Conflict (Berkeley: University of California Press, 1985); O. Nnoli, Ethnicity and Development in Nigeria (Aldershot: Avebury, 1995); O. Nnoli, Ethnicity and Democracy in Africa (Lagos: Malthouse Press, 1994); and R. Stavenhagen, The Ethnic Question: Conflicts, Development and Human Rights (Tokyo: United Nations University, 1990).

of the manner in which international law and institutions have responded to the problem of "socio-cultural fragmentation"¹³ within established states. This analysis will itself be preceded by an examination of the nature of the crisis of structural legitimacy that currently afflicts many post-colonial African states.

The sequence of analysis will therefore proceed as follows. First, an attempt will be made to understand the nature and roots of what is referred to in the thesis as the crisis of legitimate statehood in Africa, i.e., the crisis about the structure and composition of Africa's multi-national states. Emphasis will be placed on the question of the continuity of the crisis, and on whether the crisis can be understood in the ahistorical and acontextual ways in which it has hitherto been perceived in some of the relevant literature.¹⁴ That is, whether an analysis of the present crisis that concentrates too much on an exploration of the social dynamics of the contemporary era is capable of adequately identifying and characterising the extant problem.

Thereafter, an attempt will be made to discover the nature and history of the ways in which international law and institutions have dealt with intra-state fragmentation. More particularly, I will be interested in discovering whether this response has been characterised by an undue deference to certain legal-political doctrines, that arose out of foreign, not African, circumstances.

The first of such doctrines is that which holds that since *effectiveness ought*

13. Hereinafter referred to as "fragmentation".

14. For critiques of this ahistoricity and acontextualisation in African studies, especially in the treatment of the crisis currently being faced by many post-colonial African states, see M. wa Mutua, supra note 3; and R. Howard, supra note 2.

*automatically to confer legitimacy*¹⁵, international law and institutions ought not, in general, enquire into the legitimacy of the existence or of the internal structural organisation of an already established state.

The second is that which has been characterised by deference to the principle of exclusive external "*peer-review*". This doctrine holds that a state is legitimate as such only when other pre-existing states have endorsed its statehood.¹⁶ The doctrine is, however, opposable to an alternative doctrine, which might be styled "*infra-review*". This latter doctrine holds that the legitimacy of the state and of its internal structure is a function of the level to which that state or that internal structure is acceptable to the sub-state groups that constitute it.

The third is that which has been characterised by the glorification of the tendency of states to act like large "*centralised*" polities (or "*quasi-empires*") in their relationships with

15. This principle was axiomatic in traditional international law. See H. Kelsen, General Theory of Law and State (Cambridge, Mass: Harvard University Press, 1945). In this thesis, I use the term "legitimacy" in the sense of a prevalent sense amongst the relevant actors that an event which has occurred or a state of affairs which has come into existence, ought to be accepted as right. My understanding of the role of legitimacy in the international system has been indelibly marked by the erudite scholarship of Professor Thomas Franck. Yet, as I have demonstrated elsewhere, I am not completely wedded to his own views on this subject. For Professor Franck's approach to the question of the role of legitimacy in the international system, see T.M. Franck, "Why a Quest for Legitimacy?" (1988) U.C. Davis Law Review 535; "Legitimacy in the International System" (1988) 82 American Journal of International Law 705; The Power of Legitimacy Amongst Nations (New York: Oxford University Press, 1990); and Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995). For my own views on similar issues, see especially O.C. Okafor, "The Concept of Legitimate Governance in the Contemporary International Legal System" (1997) XLIV Netherlands International Law Review 33; and "Is There a Legitimacy Deficit in International Scholarship and Practice?" (1997) 13 (special issue) International Insights 91.

16. See for e.g T.M. Franck, Power of Legitimacy, ibid.

the groups that constitute them. This doctrinal tendency is opposable to the tendency of some states to devolve central authority to their constituent groups or sub-units.

The fourth is that which has been characterised by the "*domestication*" of sub-state groups by their parent states. Such domestication is achieved by the denial of access to the international fora, by confining such groups to the domestic arena.

The last doctrinal attitude is that which seems to have facilitated the "*coercive homogenisation*" of the differentiated groups that constitute states.

Under the rubric of the examination of these doctrinal attitudes, the extent to which there has been, or there promises to be, a historical movement toward more deference to legitimacy (as opposed to effectiveness) will be explored. The examination will also attempt to map the emerging turn of the law to infra-review (as opposed to peer review), decentralisation (as opposed to centralisation), and multi-cultural nationhood (as opposed to national homogeneity).

Following this extended analysis, the thesis will attempt to account for the various ways in which the response of international law and institutions to the question of intra-state fragmentation has, directly or indirectly, helped to frustrate Africa's search for peace and development.

Since I agree with John Gerard Ruggie¹⁷ that, as a strict epistemological or methodological stance, "causality" is by now far too discredited to ground most contemporary social science enquiry, the claim that is made in the thesis about the

17. See J.G. Ruggie, "Peace in Our Time? Causality, Social Facts and Narrative Knowing" (1995) American Society of International Law Proceedings 93 at 94.

relationship between international law and institutions and the violent conflicts that have characterised state/sub-state group relations in Africa is a limited one.

This limited claim is that the ways in which international law and institutions have historically responded to the problem of fragmentation within the post-colonial African state have contributed to the existence and/or intensity of the current crisis regarding the structural legitimacy of those states. This structural crisis has itself had a very negative effect on the circumstance of socio-economic development on the continent.

It is of course realised that some members of the school of thought customarily referred to as "realists" or "neo-realists", such as John Mearsheimer¹⁸, have attempted to show that international institutions are not a significant factor in the promotion of international peace. Of necessity, however, this thesis pitches itself against the stricter versions of this view, relying to a large extent on an alternative paradigm. This alternative is the so-called "institutionalist" paradigm. This latter allows that international institutions can sometimes make significant contributions to the securement of international peace. However, while endorsing this more optimistic view of international institutions, the thesis remains cautious as to the nature and extent of the contributions that can be made by such institutions in the area of international peace and security.¹⁹

Following this systematic linkage of certain doctrines of international law and institutions with the problem of internecine conflict within the post-colonial African state,

18. See J. Mearsheimer, "The False Promise of International Institutions" (1994/95) *International Security* 5.

19. See for e.g J.G. Ruggie, *supra* note 17 at 100. Professor Ruggie has also noted that "neo-realists" are right to warn that institutionalism can sometimes induce false promises.

the thesis will go on to examine the extent to which the traditional responses of international law and institutions have begun to experience fundamental change. This will involve a specific exploration of the various ways in which these established doctrines are being transformed in the African context by the provisions of normative texts and state/institutional practice. Emphasis here will be placed on the work of the OAU, the African Commission, and the ECOWAS. Evidence will be sought regarding the emerging turn in Africa toward more deference to the doctrines, principles and policies that facilitate normative legitimacy, infra-review, pluralism, access to the international arena, and de-centralisation (as opposed to effectiveness, peer-review, empire, encapsulation, and homogenisation). In particular, evidence will be sought that multilateral African institutions are beginning to afford sub-state groups limited forms of a more formalised access to the international arena, and that this is being offered to them in their capacity as sub-state groups. Evidence will also be sought in order to show that the historic dominance of the peer-review, homogenisation, over-centralisation, and effectiveness doctrines on international legal imagination is beginning to wane.

At the end of the above exercise, I will pause to reflect on the findings of the study, highlight my conclusions, and then examine the prospects for the re-configuration of the post-colonial African state in the various ways that the results of the inquiry have suggested. Finally, I will make policy recommendations based on my own view of whether these trends are proceeding in the right directions.²⁰

20. Even though I have argued that in this study it is important that Africa be considered as a continuous whole, I am also intensely aware of the tendency for such general studies of Africa to indulge in unjustifiable generalisations. I therefore agree with Professor Makau wa

(ii) Literature Review

Since no scholar known to the author has treated the issues that are addressed in this thesis in the same way, the originality of the project seems palpable. Still, as will become evident in the next few paragraphs, many important aspects of the thesis could not have been crafted without a heavy reliance being placed on the existing literature.

It is hardly original to theorise the relationship between the state and its sub-state groups; or to suggest that inter-group conflicts are a major obstacle to African development; or to assert that inter-group tensions need not ineluctably lead to internecine conflicts. The literature is replete with such theories and suggestions.²¹ Nor is it novel to suggest that there is a concept of statehood in international law. In our own time, Professor James

Mutua that, even though the many commonalities amongst African states often make it justifiable for a study to draw lessons for the whole of the continent from a narrow sample of countries or contexts, care should nevertheless be taken not to use the sample as a mirror of what occurs in the rest of the continent. Evidence from such samples should rather be used as a guide to understanding the reality of other African countries and contexts. See M. wa Mutua, "Politics", supra note 1, at 594.

21. For e.g B. Anderson, Imagined Communities (London: Verso, 1983); F. Barth, Ethnic Groups and Boundaries (Boston: Little, Brown and Co., 1969); R. Premdas, Ethnic Conflict and Development: The Case of Fiji (Aldershot: Avebury, 1995); R. Stavenhagen, supra note 13; H. Glickman, ed., Ethnic Conflict and Democratisation in Africa (Atlanta: The African Studies Association Press, 1995); D. Horowitz, supra note 13; D.P. Moynihan, Pandemonium: Ethnicity in International Politics (New York: Oxford University Press, 1993); J. Hutchinson and A.D. Smith, eds. Nationalism (Oxford: Oxford University Press, 1994); A.D. Smith, Nations and Nationalism in a Global Era (Cambridge: Polity Press, 1995); C. Young, supra note 3; U. Ra'anan et al, eds., State and Nation in Multi-Ethnic Societies (Manchester: Manchester University Press, 1991); O. Nnoli, supra note 2; L. Diamond, "Ethnicity and Ethnic Conflict" (1987) 25 *The Journal of Modern African Studies* 117; G. Gotlieb, Nation Against State (New York: Council on Foreign Relations Press, 1993); L. Ammons, "Consequences of War on African Countries' Social and Economic Development" (1996) 39 *African Studies Review* 67.

Crawford's pioneering work has indelibly marked this area of academic enquiry.²²

Again, it is not novel to turn to international institutions in search of "solutions" to the general problems of global order.²³ Nor is it novel to turn to such institutions in search of solutions for the very specific problems of managing the dissociative behaviour of discrete sub-state groups. International lawyers of the inter-war years were overt enthusiasts of this idea.²⁴ Indeed, contemporary international lawyers are again in pursuit of this idea.²⁵

What is original to this thesis are the various ways in which it:

(a) deduces the historical responses of international law and institutions to the question of sub-state fragmentation.

(b) reads these responses as an expression of the concept of legitimate statehood in

22. See for e.g. J. Crawford, The Creation of States in International Law (Oxford: Clarendon, 1979; A. James, Sovereign Statehood (London: Allen, 1986).

23. See D. Kennedy, "The Move to Institutions" (1987) 8 Cardozo Law Review 841.

24. See for e.g. N. Berman, "Nationalism Legal and Linguistic: The Teachings of European Jurisprudence (1992) 24 New York University Journal of International Law and Politics 1515; N. Berman, "A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Inter-War Framework" (1992) 33 Harvard International Law Journal 353; N. Berman, "Legalising Jerusalem, or Of Law, Fantasy and Faith" (1996) 45 The Catholic University of America Law Review 823; and N. Berman, "Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and 'Peaceful Change'" (1996) 65 Nordic Journal of International Law 421.

25. See A. Phillips and A. Rosas, eds., Universal Minority Rights (Turku/Abo and London: Abo Akademi University Institute for Human Rights and Minority Rights Group, 1995). More specifically, see P.H. Brietzke, "Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict" (1995) 14 Wisconsin International Law Journal 69 at 117 (arguing for the institutionalisation of the self-determination process); and H.J. Richardson, III, "Failed States', Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations" (1996) 10 Temple International and Comparative Law Journal 1 (arguing that the problem of "failed states" is better dealt with by the construction of arenas for essential, focused, preventive diplomacy).

international law.

(c) exposes the relationship among these responses and the character of internecine conflicts within the post-colonial African state

(d) exposes the actual and potential contributions of multilateral African institutions to the modification of these stated responses

(e) exposes the ways in which such on-going modifications might contribute to the prevention and/or reduction of the incidence of internecine conflicts in Africa.

(f) offers policy-oriented recommendations as to steps that might be taken to consolidate the departures that international law, multilateral African institutions, and African states seem to be making from their established attitudes toward the problem of fragmentation.

Surprisingly, it is still relatively novel for an international lawyer to turn to existing multilateral African institutions²⁶ for evidence about the actual and possible contributions of such bodies to the prevention of internecine strife within established states. In other words, only recently have international lawyers begun to seriously examine the efforts that have been made by both existing and emerging multilateral African institutions to prevent

26. For good discourses about the way such institutions think and behave, see A. Chayes and A.H. Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Cambridge, Mass.: Harvard University Press, 1995); M. Douglas, How Institutions Behave (Syracuse: Syracuse University Press, 1986); F.H. Gareau, "International Institutions and the Gramscian Legacy" (1996) 33 *The Social Science Journal* 223; R.O. Keohane, "International Institutions: Two Approaches (1988) 32 *International Studies Quarterly* 379; O. Young, "International Regimes: Review Article" (1988) 39 *World Politics* 104; J. Mearsheimer, supra note 18; J. Caporaso, "Toward a Sociology of International Institutions" (1993) 45 *International Social Science Journal* 479.

or gently de-escalate²⁷ the incidence of internecine conflicts among sub-state groups in Africa.

This is not without a global precedent for, hitherto, international lawyers have neglected to examine adequately the contributions of certain doctrines of international law and institutions to the formation and intensification of intra-state conflicts. Neither have they adequately explored the question of the capacity of international institutions either to prevent, or to reduce the intensity of, internecine conflicts.²⁸ Even the impressive theoretical work in this area that has been done by international lawyers such as Thomas Franck²⁹ and Nathaniel Berman³⁰ is neither focused on the possibility of utilising multilateral institutions in the ways I suggest, nor on the African context.

27. This term is used as an analogy of a term used by Martti Koskenniemi. See M. Koskenniemi, "The Place of Law in Collective Security" (1996) 17 *Michigan Journal of International Law* 455 at 489.

28. This does not mean that there has not been any work at all in the area by international lawyers. What is meant is that such work has not been comprehensive enough to illuminate the entire spectrum of knowledge that is of interest to me. For instance, Professor Makau wa Mutua has recently offered an excellent analysis of the contribution of international law to the crisis being experienced by the post-colonial state in Africa, but his brilliant expose stops short of documenting and analysing the on-going re-configuration of the relationship amongst the post-colonial African state and its constituent groups. See M. wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16 *Michigan Journal of International Law* 1113. On the other hand, John Packer has recently offered an interesting critique of the OAU Conflict Prevention Mechanism which, however, seems to have missed the larger theoretical significance of the transformation that has been on-going within the OAU. See J. Packer, "Conflict Prevention by the OAU: The Relevance of the O.S.C.E. High Commissioner on National Minorities" (1997) *African Yearbook of International Law* 279.

29. See T.M. Franck, "Clan and SuperClan: Loyalty, Identity and Community in Law and Practice" (1996) 90 *American Journal of International Law* 359.

30. See N. Berman, supra note 24.

On the other hand, while many social scientists interested in the study of inter-group relations and inter-group violence have focused on Africa³¹, and have sometimes hinted at or theorised the role of international society in the reduction of inter-group violence³², they have not to date examined adequately the specific roles of existing African supra-state institutions such as the OAU, the African Commission, and the ECOWAS in the on-going transformation of the doctrinal responses of international law to the phenomenon of fragmentation within states.

There is therefore at least one gap in the literature that I, as an international lawyer searching for knowledge about inter-group violence and the workings of international institutions, can help close. This is achievable through the fulfilment of a certain duty, what I prefer to refer to as the "duty of conversation" between the disciplines of "ethnic" conflict studies and international legal studies.

It is in these ways that this thesis seeks to make a contribution to knowledge. It is also in these same ways that the thesis will contribute to the scholarly understanding of some of the desiderata for peace within post-colonial African states.

(iii) Research Questions and Some Caveats

The thesis will ask, and attempt to answer, the following clusters of questions:

31. See for e.g. D. Horowitz, supra note 13; R. Stavenhagen, supra note 13; O. Nnoli, supra note 13; L. Diamond, supra note 21; D. Welsh, "Ethnicity in Sub-Saharan Africa" (1996) 72 International Affairs 477.

32. See for e.g. S. Ryan, "Explaining Ethnic Conflict: The Neglected International Dimension" (1988) 14 Review of International Studies 161; J.E. Spence, "Ethnicity and International Relations: Introduction and Overview" (1996) 72 International Affairs 439.

(a) What is the character of the crisis of sub-state fragmentation (and thus of legitimate statehood) in Africa? To what extent has there been continuity among the present crisis and situations that earlier on marked the African political landscape?

(b) How have international law and institutions historically responded to the problem of sub-state fragmentation? What were the roles of the doctrines of effectiveness; peer-review; centralisation; homogenisation; and domestication in the formation of those responses?

(c) Has the response alluded to in (b) above begun to alter in any way? If so, in what directions?

(d) In view of (b) and (c) above, what have been the concepts of legitimate statehood in the different epochs of the development of what we now know as international law and institutions?

(e) How have the responses of international law and institutions to the problem of fragmentation contributed to the nature, structure, and intensity of the larger crisis of peace and development in Africa? How does international law structure the political choices available to, and made by, aggrieved sub-state groups? Do particular international legal and institutional attitudes help generate violent outcomes in the relations among such groups and the state?

(f) Is there any evidence in the past and present behaviour of African states and of multilateral African institutions to support a conclusion that such institutions have significantly contributed to the prevention and/or reduction of the tendency of inter-group frictions to degenerate into internecine conflicts? Is there any evidence to support a

conclusion that such institutions have a significant potential to continue to make such contributions in the future?

(g) How is the capacity of multilateral African institutions to contribute to the prevention and/or reduction of the incidence of internecine conflicts in Africa to be harnessed and consolidated in the future?

In conclusion, it is important to enter some caveats as to the scope and content of the study. First, it must be noted that this thesis is neither about "ethnic" conflicts *per se* nor about statehood *per se*. Relying on the existing literature, the thesis assumes the occurrence of socio-cultural conflict in Africa, and regards as axiomatic the idea that inter-group tensions need not always degenerate into internecine conflicts. It also takes as a given the widely accepted attributes of a state.

It must also be emphasised that this thesis is not "empirical" in the way that that term is customarily understood in the non-legal social sciences. Rather, while it draws heavily upon existing social science information and knowledge, the thesis primarily embodies an interrelated set of legal analyses.

(v). Expected Findings:

The expected findings of this study are that:

(a) The character of the crisis of sub-state fragmentation (and thus of legitimate statehood) in Africa can only be understood fully if examined in a holistic, historical, and contextual way.³³ The historical approach³⁴ ensures that it is understood that the continuity

33. This is a crucial point of departure, for as Boaventura de Sousa Santos has argued in another context:

and persistence of the present crisis from the late 19th century pre-colonial era, through the early 20th century colonial era, to the mid and late 20th century post-colonial era, are all too evident from a detailed and intensive analysis of the facts. The holistic approach enables scholarship to move beyond the historical attraction of many scholars to some and not all of the reasons for the larger existential crisis currently facing Africa. It enables scholarship to acknowledge sufficiently the significant contribution of the crisis of sub-state fragmentation in Africa to the emergence of that continent's larger existential crisis. The contextual approach ensures that scholars remain open to the fact that social reality is multifaceted and complex. This ensures that scholarly enquiry realises that the more narrow the context of interpretation, the more valuable the evidence that may be derived from that interpretative effort. Therefore, efforts to understand the current crisis of legitimate statehood in Africa

"The way the crisis is identified conditions the direction of the epistemological turn...Knowledge, particularly critical knowledge, moves between ontology (the reading of crisis) and epistemology (the crisis of reading), and in the end it is not up to it to decide which of the two statuses will prevail and for how long."

See B. de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (New York: Routledge, 1995) at 7.

34. I agree with Professor Molefi Kete Asante that in African Studies, as in a number of other disciplines, history is the key discipline in providing a knowledge base. See M.K. Asante, supra note 1. See also Benita Parry's rhetorical question:

"Does revisiting the repositories of memory and cultural survival in the cause of post-colonial refashioning have a fixed retrograde valency?"

See B. Parry, "Resistance Theory/Theorising Resistance or Two Cheers for Nativism" in F. Barker, P. Hulme and M. Iversen, eds., Colonial Discourse/Postcolonial Theory (Manchester: Manchester University Press, 1994) at 174.

must pay great attention to the specific contexts of individual situations, and be wary of facile generalisations.

(b) International law and institutions have historically responded to the question of sub-state fragmentation in somewhat discontinuous ways. However, in nearly all epochs, the law has treated such fragmentation as something illegitimate, as something that ought to be effaced through vigorous and single-minded "nation-building". The nation-building project was designed to construct new "nation-states" out of existing territorially defined "multi-national states". This generic response was facilitated and reinforced by the doctrine that equated "effectiveness" with "legitimacy"; by the deference of the law to peer-review; by the law's glorification of centralisation; by the domestication doctrine; and by the doctrine of homogenisation.

(c) The international legal responses alluded to in (b) above have, however, slowly begun to suffer a wave of reversals. More than at any other time in the last two centuries, these responses have begun to lean, in their basic character, toward the greater (re)cognition of the reality of fragmentation within states. In our own time, this is the first formal, world-wide, turn toward this direction. The legal and institutional structures of the present international normative order are therefore re-orienting themselves in order to be able to live with the "fissiparous sub-nationalism and ethnic diversity"³⁵ that characterises the globe in which we live.

(d) These historic responses of international law and institutions to the problem of

35. I borrow this term from Professor Michael Chege. See M. Chege, "Remembering Africa" (1992) 71 Foreign Affairs 146 at 151.

fragmentation have contributed to the nature, structure and intensity of the crisis of peace and development in Africa. This has been possible because international law and institutions have helped structure the political choices available to, and made by, aggrieved sub-state groups. This influence of the law has, unfortunately, been partly responsible for the high levels of internecine strife that have been experienced within many post-colonial African states.

(e) There is some evidence that suggests that multilateral African institutions have already begun to make significant contributions toward the prevention and/or reduction of internecine strife in Africa. There is also evidence that these institutions are likely to continue acting in this fashion in the years ahead. They are likely to continue to act as relatively neutral fora for the adjustment of claims made by sub-state groups against their parent states. As such, they will likely be an important resource in the future of African politics. They will act as agents for the provision, to sub-state groups, of institutionalised alternatives to "communicative violence", and intra-state conflict.

(f) The capacity of multilateral African institutions to help prevent and/or reduce the incidence of internecine conflicts in Africa may be enhanced by the appointment of an OAU Special Commission on National Minorities.

B. THE METHODOLOGY OF THE STUDY:

At the outset it must be pointed out that even though this study is fundamentally steeped in what is customarily viewed as the legal method, it reaches out in an

interdisciplinary fashion to the other social sciences. In that process, it has benefited from the production of knowledge in those other fields.

The study is also critical. It is critical not in the sense of being confined within any particular established epistemological tradition, but in the sense of being continually interrogative of existing knowledge, epistemologies and methods. It is critical in the sense adopted by Professor Boaventura de Sousa Santos when he wrote of a "reconstructive critique" or the search for "a new common sense"³⁶. Thus, like Professor Santos, I am quite critical of the brand of critique that is more or less satisfied with the mere deconstruction of one or more aspects of the paradigm of modernity.³⁷ The kind of critique endorsed in this thesis is not enticed by the allure of side-stepping subsequent critiques of its own positions. It is a critique that does not avoid the difficult and really important task of pointing toward a way forward; of indicating what it considers a better and improved model for intra-state relations. This is a critique that is in the end a reconstructive one.³⁸

The thesis is also interdisciplinary. As an interdisciplinary enquiry, it relies on more

36. See B. de Sousa Santos, supra note 32. See also B. de Sousa Santos, "Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South" (1995) 29 Law and Society Review 569 at 572; where he argues that:

"Merely to criticize the dominant paradigm is not enough. We must also define the emergent paradigm, this being the really important and difficult task."

37. As Santos shows (see ibid at ix), the paradigm of modernity is seriously troubled, and it is important that contemporary scholars pay attention to its deficits. However, as David Held has shown, the most useful critiques of modernity such as those which have been offered from the Frankfurt school have not entailed the wholesale rejection either of modernity or of its fruits. See D. Held, Introduction to Critical Theory: Horkheimer to Habermas (London: Hutchinson, 1980).

38. See ibid at x.

than one method. For its social science component, it relies mostly on secondary data that is already present in authoritative studies such as the publications of the most widely recognised scholars. For its international legal component, it uses the legal method of interrogating the available data on the behaviour of states (state practice) and of international institutions. It also harnesses the data contained in treaties, cases, and the proceedings of relevant international institutions. The conclusions and predictions that are made in this thesis will be based on a deductive analysis of the past and on-going work of those African and global institutions relevant to this thesis. In this last respect, my data will consist largely of evidence on the behaviour of states, quasi-judicial and judicial bodies, international institutions, and NGOs.

When historical, the data will be accessed by collecting them from the relevant archives and depositories. When they are normative, they will be accessed by interrogating the relevant treaties and state practice. In each case, the data will be studied for patterns and/or relationships within it. This analysis will also act as a predictive tool, as a basis for reaching conclusions about the present capacities and future behaviour of the relevant actors.

In the present study, since the major thesis that is put forward relates to the possibility that multilateral African institutions can be used constructively in order to either prevent or reduce the incidence of internecine conflicts within established African states, it is important to discover whether the choices that have been made in the past by these multilateral institutions, states, and other actors tell us anything about the capacity of these state-constructed institutions to provide relatively neutral arenas for aggrieved sub-state groups to adjust their disputes. Does their past behaviour support the hypothesis that they

are likely, if well designed, to contribute significantly to the prevention or reduction of internecine strife in the African context? Is there evidence that such entities can foster the mutual learning process³⁹ that is required for states and their constituent groups to reach the kind of compromises that dissolve the impetus for internecine conflict? Is there anything that we can learn from the behaviour of similar contemporary institutions such as the OSCE High Commissioner on National Minorities?

The method used in this thesis is predominantly analytical. Thus, the question of the nature of the crisis of fragmentation in Africa will be studied by an analysis of secondary evidence collected by this researcher, as well as by an analytical examination of previous writing in this and related areas. The ways in which international law and institutions have historically responded to the present problem will be studied by an analysis of factual as well as normative documents and treatises. The next question, which relates to the relationship among this response of international law and institutions, and the nature and intensity of the crisis of peace and development in Africa, will be examined through deductive reasoning based on the existing factual and normative data. A similar method will also be used in the study of the last major question which relates to the nature of the treatment of the question of sub-state fragmentation by multilateral African institutions.

(C). THE BENEFITS OF THE STUDY AND THE THESIS:

Why is this thesis worth undertaking? Simply stated, the thesis poses research

39. T.M. Franck and M.M. Munansangu, The New International Economic Order: International Law in the Making? (New York: UNITAR, 1982) at 12.

questions that have either been neglected in the relevant bodies of literature or perhaps misunderstood in some way. The value of the research lies in its capacity to benefit those who seek to guide both scholarship and policy-making about the prevention and/or reduction of inter-group violence in Africa. The incidence of inter-group violence in Africa and other parts of the globe is one of the single greatest threats to international peace and international development in our emerging global neighbourhood.

In this way, the thesis will enrich both social science and international legal studies. Social science will be enriched by an understanding of the role of international law and institutions in the prevention and/or reduction of the dissociative tendency within nearly every African state, while international legal studies will be enriched by an understanding of the very phenomenon that the law seeks to regulate and contain, namely internecine strife. I submit that there thus emerges a mutually beneficial cross-fertilisation of ideas across the disciplines.

Both the South and the North are prospective beneficiaries of even the most modest reduction in the tendency for inter-group frictions within established states to spiral into internecine conflict. The North is dependent on the supply of raw material for its industrial complexes from Africa, and other parts of the South. It is also dependent on these areas for much of the markets for its industrial products⁴⁰. It therefore loses in economic terms when internecine strife negatively affect the economies of such states. Moreover, the flow of refugees to the North and its huge expenditure of financial capital on peacekeeping and

40. See I.L. Head, On a Hinge of History: The Mutual Vulnerability of South and North (Toronto: University of Toronto Press, 1991); and I.L. Head, "South-North Dangers" (1989) 68 Foreign Affairs 71.

humanitarian missions to Africa will not abate until internecine conflicts are nipped in the bud; or until such conflicts are successfully contained.

The South, including Africa, also stands to benefit too from the prevention and/or reduction of the incidence of internecine strife, its major source of war. Most of the millions of African refugees are hosted by other African countries. And some of these countries are themselves beset by serious problems which may sometimes be exacerbated by the massive and sudden influx of refugees. Moreover, the uprooting of people from their homes negatively affects productivity and often devastates the economic life of the affected country. Development is hindered, not just in that country, but in the entire region.⁴¹ Moreover, as the situation in the 1990s Great Lakes Region of Central Africa indicates, the diverse socio-cultural configuration of the African continent and the containment of sub-state groups within stifling political containers makes it easy for internecine conflict in one country to spread to nearby countries. This is especially the case in regions where most of the states in the area are similarly constituted. In such areas, it is quite easy for the zone of conflict to be expanded and internationalised.

41. Ibid.

CHAPTER TWO

On the Ontology of the Crisis of Legitimate Statehood in Africa

A. THE CRUX OF THE ARGUMENTS:

In order to do justice to the overarching concern of this thesis¹, it is important that the diagnostic component of the thesis as well as the prognosis be preceded by what is perceived to be a reasonably accurate analysis. It is crucial that such an analysis be informed by the state of contemporary knowledge. This is all the more important given the tendency in much of the existing literature to treat the problems of the post-colonial African state either as a sudden volcanic eruption, or as purely a function of domestic choices. Yet such an approach is increasingly unsustainable in our historically interconnected world.²

It is now widely accepted that the performance of many political administrators in Africa has been historically inadequate. Yet, a convincing argument can be made for an understanding of the root causes of the crisis of legitimacy that has beset the post-colonial African state as eminently (though not entirely) "structural". I suggest that a historical, holistic and contextual examination of the norms and practices of African state-building will reveal that many of the problems associated with the present worrisome situation in Africa have roots in the structure of African states, as well as in the frequent attempts by such states to amalgamate coercively Africa's multitude of pre-existing political formations.

1. This thesis is for the most part concerned with the contribution of certain international legal and institutional attitudes to the crisis of structural legitimacy that afflict post-colonial African states, as well as the on-going search within multilateral African institutions for ways to ameliorate the more pernicious effects of that crisis.

2. For a critique of this tendency, see I.L. Head, On a Hinge of History: The Mutual Vulnerability of North and South (Toronto: University of Toronto Press, 1991).

Again, I suggest that African states have in general been riven by similar problems in the pre-colonial, colonial, and post-colonial eras of the history of that vast continent. In all three momentous epochs, statecraft has been pre-occupied with the question of the domination exercised by empires or empire-like political formations over resistant sub-units. Such sub-units have usually been "socio-culturally differentiated groups"³. And just as the pre-colonial era of state-formation and disintegration, of domination and resistance, helped set the parameters for statecraft in the following (colonial) era, the colonial epoch of state formation and disintegration, of domination and resistance, also helped to configure the nature of the current post-colonial crisis. Today's struggles take place within normative and factual borders determined in part by pre-colonial and colonial political/military struggles over state and sub-state identity. There is thus an identifiable continuum in the crisis of structural legitimacy currently afflicting the post-colonial African state.

B. THE READING OF CRISIS AND THE CRISIS OF READING⁴:

Central to an understanding of the nature of the crisis⁵ of legitimacy that currently afflicts the post-colonial African state (i.e the crisis of legitimate statehood) is history,

3. Hereinafter referred to as "sub-state groups".

4. See infra note 11.

5. It must be emphasised that in this thesis, the term "crisis" is not used in the apocalyptic sense. Neither is it used to signify the existence of inordinate or untrammelled chaos. Instead, it is used as a sign of ferment, as indicative of the fundamental re-configuration of African political space that has been going on over the last one century and a half.

context, and holism⁶. Together, these three concepts serve as torches that illuminate the terrain that is the object of inquiry, and reveal the striking continuity of that crisis from about the 1850s to the present. This phenomenon of historical, holistic and contextual continuity, even amidst an atmosphere of apparent discontinuities⁷, allows us to realise that the contemporary crisis concerning the legitimacy of the post-colonial African State, far from being a sudden volcanic eruption, is the result of the accumulation, over at least two centuries, of centrifugal stresses directed at the very foundations of African states and political systems⁸. Thus, the continuity of the present crisis with other crisis situations of

6. In this connection, it is important to note that, like every other people, Africans do remember, and are moved by, the past. See R. Howard, "Civil Conflict in Sub-Saharan Africa: Internally Generated Causes" (1995) *LI International Journal* 27 at 29.

7. The crisis of legitimate statehood experienced by African polities in the late pre-colonial era is in one sense particularly discontinuous. This was because the crisis was as much "inter-state", i.e between separate self-governing entities, as it was "intra-state". Intra-state tensions were, however, mostly felt in the large expansionist empires which regularly sought to, and indeed did, forcibly bring distinct sub-state groups under their sway.

8. Thus, for example, this concept allows us to understand that the concept of "failed states" as applied to the post-colonial African state creates some conceptual confusion. For, in a very real sense, many of these states never really "began". Most of them were fundamentally defective at birth. For some examinations of the idea of failed states in Africa, see I.W. Zartman, ed., Collapsed States: The Disintegration and Restoration of Legitimate Authority (Boulder: Lynne Rienner, 1995); M. wa Mutua, "Humpty Dumpty" *infra* note 14; J.S. Wunsch and D. Olowu, "The Failure of the Centralised African State" in J.S. Wunsch and D. Olowu, eds., The Failure of the Centralised State; R. Gordon, "Some Legal Problems with Trusteeship" (1995) 28 *Cornell International Law Journal* 301; R.H. Jackson and C. Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis" (1986) 24 *The Journal of Modern African Studies* 1; R.H. Jackson and C. Rosberg, "Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood" (1982) *World Politics* 1; W. Pfaff, "A New Colonialism? Europe Must Go Back into Africa" (1995) 74 *Foreign Affairs* 1; G.B. Helman and S.R. Ratner, "Saving Failed States" (1992/93) 89 *Foreign Policy* 3; H. Richardson III, "Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations" (1996) 10 *Temple International and Comparative Law Journal* 1.

yesteryears, some more ancient than others, some as intense as the present, must be underscored.⁹

Yet, it must also be understood that the crisis of legitimate statehood as used in this thesis is a separate phenomenon from the existential crisis¹⁰ that also afflicts the post-colonial African state. This existential crisis¹¹ and "paradigmatic transition"¹² that the world currently undergoes have also had an impact on, and are themselves impacted by, the crisis of legitimate statehood in Africa.

In this chapter, the afore-mentioned and intriguing questions concerning what one scholar has described as the "reading of the crisis" (ontology) and "the crisis of reading"

9. See C. Young, The African Colonial State in Comparative Perspective (New Haven: Yale University Press, 1994).

10. Ibid at 8-9. For some excellent accounts of this existential crisis, see I.L. Head, "South-North Dangers" (1989) 68 *Foreign Affairs* 71; A. Sawyer, "Marginalisation of Africa and Human Development" (1993) 5 *African Journal of International and Comparative Law* 176; and H. Glickman, ed., The Crisis and Challenge of African Development (New York: Greenwood Press, 1988).

11. This global crisis is still evident even in Boaventura de Sousa Santos' account that:

"...[I]n the eighteenth century, 4.4 million people died from 68 wars; in the nineteenth century, 8.3 million people died in 205 wars; in the twentieth century, 98.8 million people have already died in 237 wars (and the counting has not yet closed). Between the eighteenth and twentieth centuries, the world population increased 3.6 times while the number of war casualties increased 22.4 times...In the twentieth century, more people died of hunger than in any of the preceding centuries..."

See B. de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (New York: Routledge, 1995) at 8.

12. Ibid.

(epistemology)¹³ will be examined in the hope of exposing and reinforcing a fresh, though not entirely novel¹⁴, approach to understanding the crisis of legitimate statehood in much of Africa. Such an interrogation is crucial to a thesis such as this one, that is ultimately concerned with the possibility of reducing the intensity and reach of the crisis. Without a thorough appreciation of the historical and contextual nature of the crisis, without a thorough diagnosis, the possibility of an effective prognosis will be remote, if not absent¹⁵. But

13. Ibid at 7.

14. Professor Makau wa Mutua has for instance established the continuity of the crisis from the colonial era to the present. See M. wa Mutua, "Putting Humpty Dumpty Back Together Again: Dilemmas of the Post-Colonial African State" (1995) 21 Brooklyn Journal of International Law 505 (hereinafter "Humpty Dumpty"); and "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16 Michigan Journal of International Law 1113 (hereinafter "Map of Africa"). See also M. wa Mutua, "Humpty Dumpty" ibid at 519. Equally interesting is Professor Abiola Irele's linkage of the crisis across the pre-colonial, colonial, and post-colonial divides. See A. Irele, "The Crisis of Political Legitimacy in Africa: A Time of Change and Despair" (1992) Dissent 296.

15. In this connection, J.E. Flint's classical exposition of the manner in which a misunderstanding of the nature of African nationalism has led to the concept of "tribalism" and obstructed the study of ethnicity and politics in Africa is most instructive. According to him:

"We are accustomed to regard the leaders of the movement against colonial rule and the post-colonial elite of independent Africa as the first movement of African nationalism because they couched their demands in terms drawn from European nationalist thought.

In contra-distinction, loyalties to pre-colonial political units or societies are described (often with a certain contempt) as "tribalism" ... Many of these so-called tribes number millions of people and are larger than the smaller nationalities of Europe. Contemporary "tribalism" may thus be regarded as the survival of pre-colonial [and sometimes colonial] sentiments of African forms of nationality.

Many of these pre-colonial nations were the result of centuries of development based on common language and culture, and were mature before 1790.

before the diagnosis, before I focus on the nature of the crisis in the three most recent epochs of African history, it is important to examine the factual evidence upon which the particular reading of the crisis that is offered has been premised. To that end, this chapter is sub-divided into three historical periods: the late pre-colonial, the colonial, and the post-colonial.

C. THE SITUATION IN 19TH CENTURY PRE-COLONIAL AFRICA:

In this section, I suggest that the crisis of legitimate statehood that was experienced in 19th century pre-colonial Africa is best understood as a crisis that was generated by the interplay of domination and resistance. I am of the considered opinion that this crisis was constituted by a drama that was played out among the empire-building, strong, centralised states of Africa and Europe, and the resistant but weaker political formations of Africa. It is my suggestion that in their drive to construct large multi-national empires, the stronger states forcibly suppressed many distinct self-governing peoples, incorporated them into their burgeoning empires, and often attempted, with varying degrees of success, to assimilate them into a particular socio-cultural way of life, or identity. It is also suggested that the resistance of the target peoples, and the resultant mutual fears and suspicions have had a remarkable longevity in some areas. Similarly, the constant threat of political extinction and socio-cultural assimilation that the strong expansionist states posed to their neighbours created

See J.E. Flint, ed., The Cambridge History of Africa vol. 5, From C. 1790 to 1870 (Cambridge: Cambridge University Press, 1976) at 4. See also N.L. Wallace-Bruce, Claims to Statehood in International Law (New York: Carlton Press, 1994) at 44; and J.S. Coleman, Nationalism and Development in Africa (Berkeley: University of California Press, 1994) at 97.

animosities which have in many cases survived to this day.

In this section, I intend to map this expansionism and its effects. I also intend to explore the link between the inter-African crisis of this era and the advent of European colonial expansionism in Africa following at least three centuries of Euro-African contact along the coast.¹⁶

The section will start with a brief genealogy of African state-building, before going on to an examination of the allegorical cases of the expansionist and consolidating campaigns of the old empires of Sokoto, Zulu, Oyo, Buganda, and Ashanti. This will be followed by a short account of the European scramble for Africa and the intensity of local resistance to that process. The last sub-section will attempt to synthesise the factual evidence and suggest a reading of the nature of the crisis in 19th century pre-colonial Africa which organically links it to the two later periods of great unrest that Africa has experienced.

(i) A Brief Genealogy of African State-Building:

"The state as an analytical quarry is an elusive and complex prey. In part our conceptual grasp arises by perhaps unconscious empiricism through inductive contemplation of the political entities in the modern world which have borne that name."

-Crawford Young¹⁷

In the context of the academic search for an understanding of Africa, an area in

16. The first Europeans came down the West African Coast in the 15th century; formal colonialism did not begin until the mid-19th century. See A. Boahen, Topics in West African History (Essex: Longman, 1986).

17. See C. Young. The African Colonial State in Comparative Perspective (New Haven: Yale University Press, 1994) at 13.

which myth has only just given way to maze¹⁸, an appreciation of the genealogy of African state-building seems crucial to an accurate diagnosis of the nature of the crisis of legitimate statehood in today's Africa. The principal point to be made in this regard, as the famed historian Cheikh Anta Diop has demonstrated, neither the idea nor the operation of large centralised states is alien to Africa¹⁹. Indeed, that idea seems to have been familiar to the ancient inhabitants of the continent. According to Diop:

"The notion of state as a 'territory' comprising several cities or that of empire without question came ... from the southern world, and in particular from the example of Egypt [or Kemet; as the ancient Egyptians called themselves]."²⁰

Support for Diop's position may also lie in the fact that, almost continuously, for the last ten thousand years, large centralised states have existed in Africa²¹.

It is important to emphasise this point in view of the recent resurgence of the prevalent 19th century idea that somehow hypothesises an inherent incapacity of Africans to run complex polities as the root of the current crisis on the continent²². The point that I seek to make here is that since Africans had run complex polities for thousands of years

18. See B. Davidson, "For a Politics of Restitution" in A. Adedeji, ed., Africa Within the World: Beyond Dispossession and Dependence (London: Zed Books, 1993) at 17.

19. See C.A. Diop, Pre-Colonial Black Africa, Tr. H.J. Salemson (Westport, Conn: Lawrence Hill, 1987).

20. Ibid at 21. In this connection, it is important to note that African civilisation flourished for over four thousand years in the area now known as Egypt prior to the coming of the Arabs. See for example, M.K. Asante, Kemet, Afrocentricity and Knowledge (Trenton, N.J.: Africa World Press, 1990) at 34.

21. See B. Davidson, Modern Africa: A Social and Political History (London: Longman, 1989) at 3.

22. See for example G.B. Helman and S. Ratner, supra note 8.

before colonialism, the causes of the current crisis cannot be entirely attributed to their so-called inability to administer effectively their post-colonial states. The crucial factor cannot then be their agency as such, but the operation of that agency in a certain structural environment.²³ If this is a correct conclusion, a more convincing explanation for the crisis of legitimacy being experienced by the post-colonial African state must be sought primarily in the arena of structure and not agency. The historic ability to run large complex polities must, however, first be demonstrated.

The earliest of the ancient African states known to contemporary history are Kemet (which we now know as Egypt)²⁴; Kush and Meroe (both of which sprung up in the area known as Nubia)²⁵; and the Northern Ethiopian Kingdom of Axum²⁶.

Kemet, Kush and Meroe rose, flourished, and fell in the area around the river Nile (from the city of Gizeh to the sixth cataract on the Nile). It is now well accepted that it was

23. At this point, it is important not to give the impression that the establishment of empires is or ought to be the test of human agency or political sophistication. The limited claim that is made here is that those who point to the incapacity of Africans to run empires or large states as the source of the crisis of legitimate statehood in present-day Africa are more often than not off the mark.

24. See C.A. Diop, supra note 19.

25. The Kingdom of Kush reached its peak in the 17th century B.C. Kerma, the capital of Kush continuously existed from 3,400 to 2,400 B.C. See J.H. Taylor, Egypt and Nubia (Cambridge, Mass: Harvard University Press, 1991) at 21-25. After the invasion of Kush about 591 B.C. by Kemet, the Kushite King Aspelta moved his capital to Meroe, near the sixth cataract, in order to lengthen the distance between his kingdom and Kemet. Meroe flourished for several centuries until about 330 A.D. See F.J. Nothling, Pre-Colonial Africa: Her Civilisations and Foreign Contacts (Johannesburg: Southern Book Publishers, 1989) at 40-48.

26. Axum was situated northeast of the Upper Nile on the Highlands of Ethiopia, and was first mentioned by Roman and Greek writers in the first century AD. It declined and fell from about the sixth century AD. See, F.J. Nothling, ibid at 49-54.

in this fertile valley that the idea of a state as a collection of cities or large towns was first developed and practised by a human population over a long period of time.²⁷ Political suzerainty over this area, which is about the same size as western Europe, alternated between the Kings of Nubia and the Pharaohs of Kemet. While the area was for the most part under the political overlordship of the Pharaohs of Kemet²⁸, four of the Kings of Meroe²⁹, the most sophisticated of the Nubian states, were for about fifty years able to unify the entire area under their rule³⁰. Thus, for much of the period between BC 3200 and about 330, this area was under the control of one or two large states.

Most historians are now agreed that one attribute was common to the political systems of all four states, i.e Kemet, Kush, Meroe and Axum: strong political centralisation³¹. Each of them was a large, centralised, multi-national state, composed of a number of provinces welded and kept together by a combination of military force and a measure of "divine" legitimacy. Many of these provincial outposts were home to large numbers of sub-state groups who were culturally differentiated from the group(s) that conquered them.³² Again, each of them eventually collapsed under the weight of a combination of internal and external

27. See C.A. Diop, supra note 19.

28. Kemet's (i.e Egyptian) domination of the region which lasted for five thousand years ended in the 5th century B.C in the reign of Pharaoh Ramesses XI, when Panehesy, the Viceroy of Nubia, rebelled against the throne. See J.H. Taylor, supra note 25 at 37.

29. These Kings were known as Shabaquo, Shabitquo, Taharqo and Tanutamani.

30. See P.L. Shinnie, Ancient Nubia (London: Kegan Paul, 1996) at 99.

31. See F.J. Northling, supra note 25 at 22-54.

32. Ibid at 26.

stresses³³.

This capacity of Africans to run large centralised states did not disappear with the decline and fall of Kemet, Kush, Meroe, and Axum. As has been pointed out earlier in this section, this historic ability continued to be demonstrated almost continuously for thousands of years before the advent of European colonialism in Africa. The Empires and Kingdoms of Ghana, Mali, Songhai, Bunyoro-Kitara, Sokoto, Zimbabwe, Buganda, Ashanti, Kanem-Bornu, Rwanda, Burundi, AmaZulu, Oyo, Benin, Dahomey, Kanem-Bornu, and Ethiopia are only some of the largest and most expansionist of the many hundreds of kingdoms that were established and run by Africans in the centuries that followed the fall of the four empires already discussed. Indeed, one of them, the Soninke Empire of Ghana was so large that at its height it covered a territory as vast as the present day European Union. It antedated Charlemagne's Holy Roman Empire by at least 500 years and lasted for over twelve centuries³⁴. Others, like the Ankole and Toro Kingdoms of present-day Uganda, the Hausa and Niger-Delta states of what is now Nigeria, and the Akan states of contemporary Ghana, were much smaller, but perhaps as well organised³⁵.

Ghana, the oldest of the states that sprung up on the huge West African savannah (grasslands) was already firmly established as a vast empire by 400 AD.³⁶ It was ruled by

33. Ibid.

34. See C.A. Diop, supra note 19 at 89-92.

35. See J.F.A. Ajayi and M. Crowder, eds., History of West Africa Vol One (New York: Columbia University Press, 1976).

36. See F.J. Northling, supra note 25 at 168-173. Ghana fell after its defeat by the Kingdom of Sosso in 1200 AD.

a divine King and organised as a loose confederation of lesser states. Mali, which was once a province of the Ghana empire, was created about 1000 AD.³⁷ At its height, it covered an area of land that was larger than all of Western Europe.³⁸ It was a federal state constituted by a core of lesser Mandingo kingdoms, and a periphery made up of several semi-autonomous vassal states.³⁹ The Songhai Empire, which lasted for at least 1200 years, was similarly organised.⁴⁰ The same can be said for the Kanem-Bornu empire.⁴¹ Similar states also developed in the forest regions of West Africa⁴², as well as elsewhere on the continent. Further south, in the area between the Zambezi and Limpopo rivers in Southern Africa, from about the fourteenth century AD and earlier, the Kingdoms of Great Zimbabwe and Mutapa developed and flourished. These two states are well known for the vast network of stone towns constructed all over the area, estimated at over 150 in number.⁴³

Having used this sample of states to demonstrate the historic capacity of Africans to organise large centralised expansionist states, usually by a combination of military coercion and the power of a divine King, it remains to make one further relevant point concerning the nature of these pre-colonial African states.

37. Ibid.

38. Ibid at 173.

39. Ibid at 173-174.

40. Ibid at 178-183.

41. Ibid at 183-185.

42. See A. Boahen, Topics in West African History (Essex: Longman, 1986) at 74-82.

43. See F.J. Nothling, supra note 25 at 188-203. See also A.J. Wills, An Introduction to the History of Central Africa (London: Oxford University Press, 1973).

These states were not "nation-states" in the sense of the types of states that Europe eventually imposed on the continent. Thus, one crucial distinction to be made is between the genealogy of state-building and the genealogy of the "nation-state". While the idea and practice of states, in the sense used by Diop, was obviously African, the particular form of unitary modern states commonly referred to as "nation-states" is thought to be of European pedigree⁴⁴. Indeed, many pre-colonial African states have been characterised by specialist political anthropologists as "segmentary states" (as distinguished from "unitary" European type states)⁴⁵. In the former, unlike in the latter, political power extends widely toward a flexible, changing periphery and the spheres of "ritual suzerainty" and "political sovereignty" do not coincide; constant political power was more or less confined to the central, core domain⁴⁶.

In the next sub-section, I will attempt to show that not only have Africans historically built and maintained complex states, these processes of state-building have had a lasting effect on the nature of the crisis of legitimate statehood in Africa. Rarely have these pre-colonial processes not impacted on the structural dynamics of state-building in the contemporary African era.

44. For this view that the modern unitary "nation-state" is European, see R.H. Jackson and C. Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis" (1986) 24 *The Journal of Modern African Studies* 1. See also E.A. El-Obaid and K. Appiagyei-Atua, "Human Rights in Africa-A New Perspective on Linking the Past to the Present" (1996) 41 (special issue) *McGill Law Journal* 819 at 851.

45. See for example, A. Southall, "The Segmentary State in Africa" (1988) 30 *Comparative Studies in Society and History* 52.

46. Ibid.

(ii) The Expansion of Some 19th Century Pre-Colonial African States and Its Effects:

The 19th century expansionism of African as well as European states contributed in no small measure to the nature of the present political configuration of, and crisis situation on, the African continent. In this sub-section, I want to offer a brief account of a sample of these inter-African expansionist campaigns before moving on in a following sub-section to the expansionist campaigns of Europeans in 19th century Africa. I also want to show that this tendency amongst certain African peoples to forcibly build and administer empires and large states, a tendency that I have demonstrated in the last sub-section, has had a lasting impact on intra-state relationships within Africa's fragmented⁴⁷ post-colonial states. I will do this by examining seriatim, but in brief, the cases of the Sokoto, Oyo, Zulu, Ashanti, and Buganda expansionist campaigns.

The Sokoto Caliphate was a theocratic state established as a confederation of several forcibly conquered and forcibly islamised Hausa states which had existed, and still exist, in the area now known as Northern Nigeria⁴⁸. Named for its capital at Sokoto, this huge empire at its zenith covered a vast area of land that stretched across the entire gamut of Northern Nigeria.⁴⁹ Its founder and first Caliph was Usman dan Fodio who was born in the Hausa state of Gobir in 1754, and who waged a relentless Islamic jihad against the non-Muslim Hausa states. He later incorporated the Nupe, parts of Oyo (particularly Ilorin), and

47. The term "fragmentation" is used here to signify the concept of "socio-cultural fragmentation", a concept that is sometimes referred to as "ethnicity".

48. See A. Boahen, supra note 42 at 46-50.

49. Ibid.

parts of Borno, into the empire⁵⁰. This jihad thus resulted in the destruction of several states and in the forcible subjugation of others, creating in many cases deep-seated resentment amongst the conquered peoples.⁵¹ Where the jihadists attacked but could not subdue their neighbours, the attack created or reinforced deep-seated animosities against the attackers amongst the attacked peoples⁵². Dan Fodio's expansionist campaigns also helped to weaken and dis-aggregate the Oyo empire of the Yorubas, facilitating their conquest by the British.⁵³ Needless to say, this process, which was reinforced and consolidated by the colonial system of indirect rule, continues to this day to have an impact on inter-group relations within Nigeria, and therefore on the structural legitimacy of the Nigerian state.

A similar, but in many ways quite different, historical process took place in the southern part of Africa. According to James O. Gump:

"The Nguni people of southern Africa remember the emergence of Shaka's Zulu Kingdom between 1816 and 1828, as a time of dispersal, famine, and human suffering. Scholars in the twentieth century have characterised the Shakan era as the mfecane ... unmistakably, the mfecane encompasses a period of significant human suffering in Zululand, Natal and Transkei. Furthermore, the chaotic movement of refugee Nguni groups westward during this era set off similarly catastrophic processes among the Sotho-Tswana peoples of the highveld interior."⁵⁴

This is an apt description of the intensity of the disruptions which were in part occasioned

50. Ibid.

51. Ibid.

52. See O.C. Okwu-Okafor, "Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems" (1994) 6 ASICL Proc. 88.

53. Ibid at 70.

54. See J.O. Gump, The Formation of the Zulu Kingdom in South Africa 1750-1840 (San Francisco: Edwin Mellen, 1990) at 1.

by the expansion and consolidation of the Zulu empire in the early and mid 19th century AD; effects which are still being felt in various ways amongst the peoples of the contemporary Southern African Region.⁵⁵ Such effects include the fear of Zulu militancy by some of their neighbours, the formation of new but related socio-cultural groups such as the Ndebele of Zimbabwe, the development of political solidarity around the leadership and symbols of the traditional Zulu state, and the manipulation of that solidarity by the South African apartheid order. Each of these has had a bearing on the legitimacy of many of the states of the Southern African region.

That the process of the expansion and consolidation of the East African Kingdom of Buganda in the 19th century was, like that of the other states already discussed, a great threat to its neighbours is evident from the historical record. According to Peter Gukiina:

"It is important to note that at that time Mutesa I was in the process of militantly expanding the kingdom, particularly at the expense of [the] Bunyoro Kingdom. Meanwhile small kingdoms like Koki voluntarily affiliated themselves with Buganda to avoid military conflicts with and conquest by Buganda."⁵⁶

This historic process, consolidated and reinforced by the colonialist system of indirect rule, and by the British alliance with Buganda against other Ugandan Kingdoms, has had a persistent negative impact on the character of inter-group relations within the post-colonial Ugandan state⁵⁷.

Another example of the way in which the expansionism of a pre-colonial African state

55. Ibid at 3-4.

56. See P.M. Gukiina, Uganda: A Case Study in African Political Development (Notre Dame: University of Notre Dame Press, 1972) at 42.

57. Ibid at 54-70.

has had a continuing impact on the character of inter-group relations in the successor post-colonial state is the 19th century expansionism of the Ashanti Empire in what is now known as the Republic of Ghana⁵⁸. One of the most powerful of the states that rose from the West African forest belt (the other was Oyo), the Ashanti established control over all the Akan people and their neighbours, and ruled the emergent confederation from their capital at Kumasi⁵⁹. This domination of an area covering much of what is now Ghana continued well into the twilight of the 19th century despite the challenge posed by the British presence along the coast⁶⁰.

The preceding passages have developed the point that the 19th century expansionism of a number of imperial African states had a lasting impact on the character of inter-group relations within their successor post-colonial states. In the next section, I will attempt to show how the expansionist campaigns of, and colonialist rule by, some European states on the African continent also had a crucial impact on the nature of inter-group relations within these new states.

(iii) The Scramble for, and Partition of, Africa:

The famous historian, Kenneth Onwuka Dike, has demonstrated the intensity and effectiveness of over four centuries of African resistance to European attempts to seize

58. See R. Howard, supra note 6 at 40 (arguing that pre-colonial Ashanti was an imperial power).

59. See J.O. Sagay and D.A. Wilson, Africa-A Modern History (1800-1975) (Ibadan: Evans, 1978) at 6.

60. See F.J. Nothling, supra note 60 at 303.

control of trade and politics on the Nigerian coast⁶¹. It is no longer a matter of conjecture that, despite the presence of European forts and trading posts along the coast, for four centuries the coastal states of West Africa, such as Ashanti, Lagos, Opobo, and Bonny, intensely and successfully resisted all attempts by the Europeans to remove them from their control of the hinterland trade in slaves, palm oil and the like.⁶² According to Professor Dike:

"It became a recognised fact that the sovereignty of the African states was unimpaired by the presence of Europeans. On the whole the political power of the African states reigned supreme over aliens and natives, for the strong and despotic governments provided by the coastal principalities suited the semi-military society of the time."⁶³

The reasons for this are not far-fetched. As Professors Robert Jackson and Carl Rosberg have suggested:

"During earlier periods of contact with non-Europeans, when differences in power and technology were not as great, there was a disposition to treat with non-western governments on a basis of rough equality."⁶⁴

But why at all did the Europeans begin to desire the control of the African coast and its trade? And how did the Africans come eventually to lose control of the coast and the hinterland?

The first question as to the origins of European imperialist desire for Africa has been

61. See K.O. Dike, Trade and Politics in the Niger Delta (London: Oxford University Press, 1956) (arguing inter alia that the history of modern West Africa is largely the history of five centuries of trade with European nations).

62. Ibid at 8-10.

63. Ibid at 8.

64. See R.H. Jackson and C. Rosberg, supra note 8 at 5.

shown to be explainable by reference to a number of related factors such as love of adventure, missionary zeal, a dramatic increase in relative European power, feelings of cultural superiority, national rivalry, and economics⁶⁵. But as Professor Dike has thoroughly demonstrated, all these diverse factors merged into one channel due to economic factors⁶⁶. In particular, the urge to gain access to the resources and markets of the African hinterland, a reflex reaction against the protectionism of smaller powers in the African trade, as well as the depression in Europe between the 1870s and the 1890s, were the decisive factors that gave great impetus to the European imperial expansion in Africa which began in the late 19th century⁶⁷.

The answer to the second question as to why the coastal and hinterland African states almost suddenly lost their political autonomies to the Europeans after four centuries of largely non-colonial trade with the Europeans is also suggested by the explanations offered

65. See A. Porter, European Imperialism, 1860-1914 (Houndmills: Macmillan, 1994) at 18.

66. See K.O. Dike, supra note 61 at 13. See also A. Porter, ibid at 20 (arguing that national prestige as an explanation for European imperialist desire for Africa had its economic buttresses).

67. See A. Porter, ibid at 30-75. He argues that while socio-economic determinism is no longer favoured as an explanation for European imperialism in Africa, the importance of economic interests and calculation in the expansion of European influence and control over the extra-European world is undeniable. In his view it is significant that this imperialist expansion coincided inter alia with striking fluctuations in the economies of European states. He further argues that the colonisation of West Africa occurred partly in the context of a struggle for secure profit or revenue and dependable if not favourable trading conditions. See also C.A. Leeds, European History 1789-1914 (Plymouth: MacDonald and Evans, 1979) at 336-339. For a reinforcement of this view based on an analysis of the Portuguese and Spanish cases, see G. Clarence-Smith, "The Portuguese and Spanish Roles in the Scramble for Africa: An Economic Interpretation" in S. Forster, W.J. Mommsen, and R. Robinson, eds., Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition (Oxford: Oxford University Press, 1988)(hereinafter referred to as "Bismarck") at 215.

for the advent of European expansionism into Africa. Two of the relevant reasons have been offered by Professors Jackson and Rosberg. According to them:

"During the latter half of the nineteenth century, European power had increased dramatically in relation to non-western peoples, and Europeans had become convinced of their cultural superiority and manifest destiny to rule the world."⁶⁸

Again, as Professor Dike has suggested, at the same time, the coastal states of West Africa were becoming quite weak due to the turn away from the slave trade, which had for centuries provided the income from which much of their military and other hardware was purchased⁶⁹. Moreover, as has already been shown in the last sub-section, all over Africa, the militaristic process of empire-formation and disintegration was at this time causing widespread political problems in much of the continent, leaving a lot of strategic space for would-be conquerors to manoeuvre. And this they did: they played warring African states and peoples against each other, and in the end, subjugated all of them.

Whatever the reasons were for the advent and success of European expansionism into Africa, the Berlin Conference of 1884-1885 and its associated bi-lateral proceedings made it clear that the relationship between Europe and Africa had taken a new formally colonialist

68. See R.H. Jackson and C. Rosberg, supra note 8 at 5. See also A. Porter, supra note 65 at 22-23, who contends that:

"There is no doubt at all that from mid-[19th]century the general outlook of Europeans rapidly became more critically dismissive of other societies, doubtful of non-European capacity for change and progress, and far more readily insistent on their own objectives and inclinations. Such attitudes were certainly not new, but were far more strident and general in our period [i.e as from the mid 19th century AD] than ever before."

69. See K.O. Dike, supra note 61 at 12-13.

turn⁷⁰. The conference, the General Act of the Conference⁷¹, and its associated bi-lateral proceedings, purported to create an international "free trade" regime over the Congo and Niger basins, and to partition Africa into exclusive spheres of influence or "proto-colonial" territories⁷². As A.D. Nzemeke has noted:

"The conference was to be a kind of court that would be responsible for an orderly management of the process of territorial acquisition in West Africa. Pious protestations ... were beside the point and were merely face-saving devices for the international respectability of the grand assembly that the Conference really was."⁷³

All in all, as John Hargreaves has also demonstrated, the Conference provided European governments with a procedure for legitimising and regulating a process of encroachment upon African autonomy which had already begun, and was soon to engulf nearly every part of the continent.⁷⁴

70. For a thorough examination of the events around this conference and its decisions from a variety of perspectives, see S. Forster, W.J. Mommsen, and R. Robinson, eds., Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition (Oxford: Oxford University Press, 1988)(hereinafter referred to as "Bismarck"). Even though this conference did not formally focus on the partition of the parts of Africa that were not in the basin of the Rivers Congo and Niger, i.e "Central Africa", the "rules" made there were in practice applied to most parts of Africa.

71. See the General Act of the Berlin Conference, 26 February 1885, reprinted in R.J. Gavin and J.A. Betley, eds., The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884-1885 (Ibadan: Ibadan University Press, 1973) at 288.

72. See R. Robinson, "The Conference in Berlin and the Future in Africa, 1884-1885" in "Bismarck", ibid at 1.

73. See A.D. Nzemeke, "Free Trade and Territorial Partition in Nineteenth Century West Africa: Course and Outcome" in "Bismarck" at 67.

74. See J.D. Hargreaves, "The Berlin Conference, West African Boundaries and Eventual Partition" in "Bismarck" ibid at 317. See also J. Fisch, "Africa as terra nullius: The Berlin Conference and International Law" in ibid at 347.

This brief narrative has been offered as an insight into the nature of the advent of European imperialist expansion into Africa, and as a prelude to mapping the contribution of that enterprise to the crisis of structural legitimacy that currently afflicts the post-colonial African state. This enterprise indelibly marked the African political landscape with its militant refashioning of inter-African life, and its imposition of a colonial order on the continent. It was this same Colonial order that was to lay the foundation and set the parameters for the politics of state-building and inter-group relations within post-colonial African states.

(iv) The Nature of the Crisis in 19th Century Pre-Colonial Africa:

Why was the latter half of the 19th century an era of great socio-political turbulence in Africa? What was it that occurred in that epoch that made it a time of great difficulty for the sustenance of the legitimacy of the then-existing African states and polities? Having already demonstrated the historic capacity of Africans to establish and administer all kinds of states (large, centralised, small etc), having shown the great difficulties and suspicions that resulted from both African and European expansionism, it remains to be shown how both of these expansionist campaigns generated such intense and widespread resistance amongst the target states and peoples as to turn the pre-colonial African political terrain into a venue for a major crisis of state legitimacy.

Before going on to that point, however, it must be remembered that the late 19th century was the century in which "positivism" and the "might is right" paradigm became hegemonic. It was in this era that the influence of this paradigm and cosmology rose to the

point that the legitimacy of a state came to depend almost entirely on its ability to resist both external and internal threats to its independence and integrity.⁷⁵ It was during this epoch that, more than ever before, effectiveness was thought by the victorious side to confer legitimacy. Thus, under this paradigm, a state that could not effectively defend and maintain its integrity or independence was viewed as having lost its legitimacy as such.

The vast number of intense conflicts⁷⁶ that resulted either from the imperialist expansion of African and European states, or from the dis-aggregating resistance of subject sub-state groups and vassal states were a good indicia of the crisis of legitimate statehood that had beset much of the African continent by the close of the 19th century. Pre-colonial resistance of African peoples to the expansion and hegemony of African empires gave rise to a rich tradition of indigenous resistance and resultant conflicts which directly or indirectly aided the process of European imperialist penetration into the hinterland of the continent.⁷⁷ For a vast number of sub-rulers and vassal states, the advent of European imperialism was a rare opportunity to shake off the overlordship of their various suzerains.⁷⁸ A good example was the case of the many Hausa groups in Northern Nigeria who saw the British campaign to subjugate the Fulani-dominated Sokoto Caliphate as a signal to rebel against their Fulani rulers. For some Empires, such as the Buganda Empire, alliances with the

75. See R.H. Jackson and C. Rosberg, supra note 8.

76. The conflicts were as much "intra-state" as they were "inter-state".

77. See A.D. Nzemeke, supra note 73.

78. Ibid.

Europeans meshed well with their own imperialist designs on neighbouring states and peoples⁷⁹. As Ashiwaju has put it, the advent of European expansion became a veritable instrument for the continuation of the existing pre-colonial African struggles both to impose and resist domination. This was a lengthy and militant process.

For instance, in the allegorical case of Nigeria, it took the British about twenty-four traumatic years to impose a semblance of colonial authority on the area. Beginning with its declaration of a Protectorate over the Oil Rivers in 1885 and its intervention to secure an inter-Yoruba peace treaty in 1886 through its three year campaign to defeat the Sokoto Caliphate (between 1900-1903⁸⁰), it was not until 1918 that it took control of the hinterland of the Niger delta. Even then, all through this period, and even beyond, the British continued to face stiff resistance to their attempts to impose through violence their suzerainty on the area⁸¹.

As such, the late 19th century crisis that beset much of Africa was a crisis regarding the structure and composition of African states, a crisis of structural legitimacy or legitimate statehood. This was because that crisis was primarily constituted by internal and external challenges to the continued survival and integrity of existing African states. It was also constituted by a struggle over the legitimacy of the suzerainty of some of these states over

79. See P.M. Gukiina, supra note 56 at 54.

80. A.H.M. Kirk-Greene says the campaign was longer. In his view, it began in 1897 and ended in 1906. See A.H.M. Kirk-Greene, "Crisis and Choice in the Nigerian Emirates: The Decisive Decade, 1897-1906" in "Bismarck" supra note 67 at 491.

81. See O. Ikime, "Nigerian Reaction to the Imposition of British Colonial rule, 1885-1918" in "Bismarck" supra note 67 at 453-454 (arguing that a testimony to the stiffness of this resistance was the forcible deportation of King Jaja of Opobo from his capital in the late 1880s).

other African states and peoples. Even the European invasion and occupation of the continent, which was clearly motivated by mostly European factors⁸², and which undoubtedly intensified the crisis, must be understood in this context.

In the next section, I will attempt to show how these pre-colonial inter-African organic processes of state-formation and state-preservation were complicated, intensified, and in many cases permanently disrupted, by the colonial African state, thereby preventing the "ageing in the wood" of the pre-existing African states⁸³. By destroying pre-existing political entities and states, and forcibly amalgamating or dis-aggregating these entities into entirely new ones, colonial statecraft permanently reversed centuries of organic political development and forced African peoples to begin almost entirely afresh to build organic and legitimate states. And such states had to be built within new political boundaries that had been imposed arbitrarily during the European partition of Africa⁸⁴. As we shall soon see, this was to be a tall order in the context of the international legal and political order and time-frame within which such "nation-building" was to take place.

D. THE SITUATION IN THE COLONIAL AFRICAN STATE:

"Africa had an especially rich endowment of state forms before they were submerged by the territorial grid of colonialism: the quasi-feudal monarchy of Ethiopia, the mameluke states of the Nile valley, monarchies of various

82. See T.M. Shaw and C. Adibe, "Africa and the Global Developments in the Twenty-first Century" (1995-96) *LI International Journal* 1 at 2.

83. See R. Emerson, "Nation-Building in Africa" in K.W. Deutsch and W. Foltz, eds., Nation-Building (New York: Alberton Press, 1963).

84. See M. wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16 *Michigan Journal of International Law* 1113 at 1115.

descriptions..., military conquest states, mercantile polities, jihad theocracies, as well as many interstices where societal organisation operated without the benefit or burden of state institutions."

-Crawford Young⁸⁵

"No attention was paid to pre-colonial inter-state/community relations in the creation of the new states."

-Makau wa Mutua⁸⁶

"[The colonial era] ... was a very short period in Africa's long development. But it was a time of profound upheaval and irreversible change for all of Africa's peoples. Nothing would ever be the same again."

-Basil Davidson⁸⁷

The fore-going statements culled from the works of three of the keenest students of African affairs succinctly demonstrate the significance of the relative indifference of the creators of the colonial African state to the pre-existing political allegiances of Africans, to the nature and legitimacy of the post-colonial African state. In this sub-section, I suggest that the colonial African state, and the struggles waged within it, defined the nature of the structural crisis that later afflicted the post-colonial African state. The imposition of European domination over most of Africa and local resistance to, or collaboration with, that process is to a large extent definitive of the character of the subsequent struggles waged by sub-state groups in Africa for the control of the reins of post-colonial African states, as well as over the identity and organisation of such states.

85. See C. Young, The African Colonial State in Comparative Perspective (New Haven: Yale University Press, 1994) at 15.

86. See M. wa Mutua, "Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State" (1995) 21 Brooklyn Journal of International Law 505 at 519.

87. See B. Davidson, Modern Africa: A Social and Political History (London: Longmans, 1989) at 4. Emphasis supplied.

The colonial African state was thus the incubus on which the integral or absolutist, overdeveloped, post-colonial African state was built⁸⁸. What then was the nature of this incubus, this colonial African state?

(i) The Nature of Colonial Statehood in Africa:

The colonial African state lacked three attributes of the modern state. It was not sovereign because it was, in reality, merely a province of an European metropolis⁸⁹. It was not a nation because it had just forcibly assembled varying numbers of resistant nations into a single political container⁹⁰. It was not an international actor because its external relations were conducted on its behalf by the relevant colonial power⁹¹. Nevertheless, to the native African population, the colonial African state was, at its apogee, a Bula Matari (crusher of rocks) or Leviathan that enjoyed a high degree of autonomy and hegemony⁹².

The brutality of this leviathan state has been so notorious that even the most passionate defenders of empire admit to it⁹³. Founded in part on 19th century notions of

88. See C. Young, supra note 85 at 288.

89. Ibid at 43.

90. Ibid.

91. Ibid.

92. Ibid at 45. See also H.W.O. Okoth-Ogendo, "Constitutions Without Constitutionalism: The Challenge of Reconstruction of the State in Africa" in C.M. Zoethout, M.E. Pietermaat-Kros and P.W.C. Akermans, eds., Constitutionalism in Africa: A Quest for Autochthonous Principles (Deventer: Gouda Quint, 1996) at 50.

93. See L.H. Gann, "The Berlin Conference and the Humanitarian Conscience" in "Bismarck" supra note 67 at 330.

European superiority, the colonial African state still had to assert and maintain its authority against a resistant African population more or less by military force.⁹⁴

Another vital characteristic of this type of state was its somewhat ambivalent centralised/unitary/homogenising character. While colonialists clearly aimed to weld the various African states and peoples that made up each colonial state into new "nations" and set up the institutions of state that were supposed to move these states in that direction, they invariably had to resort to "divide-and-rule" tactics both to establish and to maintain their political authority over the restive African populations that composed the new states.⁹⁵ For instance, in Nigeria, the South and the North were ruled as different countries until the amalgamation of 1914, creating fictional but powerful ideas of "authentic" Northern Nigerian and Southern Nigerian identities. A similar, but even firmer, north-south divide was also imposed by the British colonialists in the Sudan.⁹⁶

Again, these colonial regimes were regimes of bureaucratic authoritarianism, in which government was generally viewed as the initiator of all public policy, as well as the source

94. The brutality of the sacking of the capitals and towns of the many African states and peoples which resisted the onset of the colonial state is attested by a few examples. Benin, the capital of the Benin empire was most brutally burnt down and pacified in 1897; Sokoto was destroyed over a period of ten years despite the intense armed resistance put up by that empire; the Herero of Namibia and Hehe of Tanzania were all but exterminated by the Germans; Eko (Lagos) was attacked and destroyed when Dosunmu, its king, refused to give up his kingdom; and King Jaja of Opobo was forcibly exiled when he refused to accept British authority over the Oil Rivers. See A.H.M. Kirk-Greene, *supra* note 80 and M. wa Mutua, *supra* note 84 at 1131-1133.

95. See G.N. Uzoigwe, "The Results of the Berlin West Africa Conference: An Assessment" in "Bismarck" *supra* note 67 at 548.

96. See generally, F.M. Deng and P. Gifford, eds., The Search for Peace and Unity in the Sudan (Washington D.C.: The Wilson Center Press, 1987).

of all amenities and of most good jobs⁹⁷. Yet many of these same regimes practised policies of indirect rule, using established or even contrived local institutions to administer the colonial state in an atmosphere of scarcity of colonial manpower⁹⁸. It must be understood, though, that the homogenising trend was predominant because even the local structures of indirect rule were quite centralised and authoritarian, just like the central colonial administrations to which they themselves answered⁹⁹.

For reasons of expediency, these institutions of indirect rule often extended the power of pre-existing African empires, such as the Sokoto Caliphate and the Buganda Empire, to the territory of peoples who had otherwise successfully resisted their suzerainty, thereby raising the intensity of already existing inter-group animosities¹⁰⁰. In other cases, the colonial state froze the existing but fluid inter-group boundaries, thereby transforming dynamic clientship systems into rigid ethnic-like divides¹⁰¹.

97. See J.S. Coleman, Nationalism and Development in Africa (Berkeley: University of California Press, 1994) at 93. The French were the most centralised. For instance, they ruled all their West African colonies as one unit. See A. Boahen, supra note 42 at 124.

98. See for example, J.O. Sagay and D.A. Wilson, supra note 59 at 240.

99. See D. Welsh, "Ethnicity in Sub-Saharan Africa" (1996) 72 *International Affairs* 477 at 479.

100. This was what occurred in the cases of the Sokoto and Buganda Empires. The authority of the Sokoto Caliphate was extended to many parts of the middle belt region of Nigeria by the British for reasons of administrative convenience. See O.C. Okwu-Okafor, "Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems" (1994) 6 *ASICL Proc.* 88. In the case of the Buganda Empire, its authority was extended to parts of the Bunyoro Empire that the British had eventually conquered with the active support of Buganda. See P.M. Gukiina, supra note 56 at 54.

101. This was the case in Rwanda and Burundi, where the pre-existing Hutu-Tutsi divide had been largely a class/status divide instead of an ethnic one. The colonial system of classification of the population and of indirect rule through the existing state structures meant

The colonial state was an institution through which forcible rule could be maintained over vast territories of hostile populations often anxious to regain their independence, and as such could not have been anything but what it actually was: militaristic, authoritarian, over-centralised, and alienating. As such, it was, more often than not, widely viewed as illegitimate amongst the African population¹⁰².

(ii) The Nature of the Crisis in Colonial Africa:

The crisis in the colonial African state was to a great extent a crisis of legitimate statehood. It was a crisis about the legitimacy of the form, organisational structure, and behaviour of the state in the eyes of its component peoples. It was a crisis that was partly precipitated by local resistance to violently imposed and maintained external domination. It was a crisis about the loss of autonomy of many previously independent pre-colonial polities and their enforced co-existence in the single unitary political container that was the colonial state. This crisis was further complicated by the attempts made by the colonial powers to make these new, deeply-divided, geographical expressions that were colonial states into unitary "nation-states". This complication resulted from their attempt to forcibly weld the populations of the emergent multi-national territories into single nationalities, while resorting to divide and rule tactics to suppress African resistance to colonial rule.¹⁰³

that since only Tutsis (the high class) ruled; those who were Hutu at the onset of colonial rule were then relegated to a position of perpetual servitude with no chance of escape from that status unlike in the past. See R.H. Howard, supra note 6 at 33-37.

102. See M. wa Mutua, "Map of Africa" supra note 84 at 1137.

103. See G.N. Uzoigwe, supra note 95 at 548.

Similar tasks of "nation-building" had of course been attempted over great periods of time with varying degrees of success in pre-19th century Europe¹⁰⁴, but the relatively short time-frame, the different international human rights climate, the relative intensity of the socio-cultural divides, and the specific activities of the colonial powers in these territories dictated against success in the African context. In the African context, while it endeavoured to construct new states, colonialism set the clock back on the organic political development of existing African states. Apart from destroying political authority and replacing it with its own, the colonial state set entirely new parameters and boundaries within which new states were to be built almost from scratch by the rapid amalgamation of scores, if not hundreds, of diverse nations and populations into unified nationalities.

It was this highly problematic situation, these deeply divided societies, that the post-colonial African leaders inherited at the onset of independence. This crisis was alleviated only so briefly by the euphoria of the nationalist success at regaining indigenous control of African political life.

E. THE SITUATION IN THE POST-COLONIAL AFRICAN STATE:

"...there are no authentic nations: nationhood is a consequence of political and ideological *struggle*."

104. As Robert Jackson and Carl Rosberg have noted, in the case of Europe, the number of independent polities was forcibly and violently reduced from over 200 in 1648 to less than 50 in 1900. See R.H. Jackson, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis" (1986) 24 *The Journal of Modern African Studies* 1 at 4. See also V.L. Burke, The Clash of Civilisations: War Making and State Formation in Europe (Cambridge: Polity Press, 1997).

-Martti Koskenniemi¹⁰⁵

"The question today in Africa is how to form nation-states and forge a sense of citizenship among people from many disparate ethnic groups *without violating human rights*".

-Rhoda Howard¹⁰⁶

It was perhaps inevitable that the colonial system would founder under the combined stress of local resistance and an international paradigm shift. But while colonialism eventually became unfashionable from the early 1900s, the structures of the colonial states that had been imposed on the African geo-political space survived intact, to be directly inherited and in most cases preserved, by the successor African political elite. This direct inheritance and preservation of the legacy of the colonial state, as well as the continuing construction of the post-colonial state on the incubus of its predecessor, has had important implications for the legitimacy of the post-colonial African state. In most cases, the illegitimacy of the colonial state, in the eyes of the populations and groups that composed it, was inherited by the post-colonial state¹⁰⁷, and intensified by the dismal performance of many post-colonial African states. How did this happen, and why was this so?

In this section, I will attempt to show that some of the structural illegitimacy of the post-colonial African state is the consequence of the direct inheritance of the structures of

105. See M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 *International and Comparative Law Quarterly* 241 at 269. Emphasis supplied.

106. See R. E. Howard, "Civil Conflict in Sub-Saharan Africa: Internally Generated Causes" (1995-96) *LI International Journal* 27 at 29. Emphasis supplied.

107. See A. Irele, "The Crisis of Legitimacy in Africa: A Time of Change and Despair" (1992) *Dissent* 296 at 297. See also P. Kunig, "The OAU and the Nation Building Process: The International Legal Context" (1984) 29 *Law and State* 23 at 23-25.

the colonial state by its successor. I want to show that having inherited these flawed structural organisations, the post-colonial state failed either to re-configure itself or to attract the widespread adherence of its constituent sub-state groups. It lost an opportunity to shed its inherited illegitimacy when it performed rather inadequately in the years following the success of the African independence project. In other words, one major reason for the continued illegitimacy of the post-colonial African state is its inability to shed its colonial past, re-configure itself, and attract the primary allegiance of its constituent socio-cultural groups.

(i) Independence, Uti Possidetis, and the "Nation-Building" Project:

The decade of the 1960s was the age of African independence¹⁰⁸. During that epoch, African leaders were confronted with the complex problems of ensuring the rapid political cohesion and sustained socio-economic development of the newly independent, but deeply divided, states that they had inherited. This is the kind of process that is often styled "nation-building"¹⁰⁹. As heirs to the colonial legacy, African political leaders were confronted, amongst others, with the crucial question of what to do with Africa's inherited colonial borders. Because these borders were mostly arbitrary, they had resulted in the forcible aggregation of diverse pre-colonial polities into single political containers. All-too-

108. See J.O. Sagay and D.A. Wilson, *supra* note 59; and R. Oliver and A. Atmore, *Africa Since 1800* (Cambridge: Cambridge University Press, 1994); and M. Crowder, ed., *The Cambridge History of Africa* vol. 8, From C. 1940 to C. 1975 (Cambridge: Cambridge University Press, 1984).

109. See G.N. Uzoigwe, *supra* note 95 at 548.

often these borders also resulted in the division of one cohesive group among two or more of the new states¹¹⁰.

It was generally accepted amongst these leaders that the boundary situation was far from ideal, but having only just won their independence from colonial rule and viewing their most urgent mission as the construction of organic nation-states out of the arbitrarily imposed territorial-states that had been bequeathed to them by the colonialists, African leaders were, in their cautious pragmatism, content to maintain the status quo ante independence¹¹¹. This they did, pursuant to a Resolution of the Assembly of Heads of States and Governments of the Organisation of African Unity of 1964¹¹², which affirmed the sanctity of the inherited colonial borders.¹¹³

This was a somewhat paradoxical posture.¹¹⁴ According to Jeffrey Herbst:

"A paradox is central to the nature of political boundaries in Africa: there is

110. On the partition of African polities and peoples between the new states, see A.I. Ashiwaju, ed., Partitioned Africans (London: C. Hurst, 1985). As John Hargreaves has noted, the European colonialists drew the border lines with little or no knowledge of the specific terrain or space; colonialist geography was a geography that was more concerned with "maps rather than chaps". See J. Hargreaves, "The Making of the Boundaries" in A.I. Ashiwaju, ed., ibid at 23.

111. Indeed, as Sadia Touval has noted, only four African states have formally challenged their inherited colonial boundaries. See S. Touval, "Partitioned Groups and Inter-State Relations" in A.I. Ashiwaju, ed., ibid at 223.

112. See OAU Resolution of Border Disputes, 1964, reprinted in I. Brownlie, ed., Basic Documents on African Affairs (Oxford: Clarendon Press, 1971) at 360.

113. See A. Kirk-Greene, supra note 80 at 233; and T.M. Franck and P. Hoffman, "The Right to Self-Determination in Very Small Places" (1976) *New York University Journal of International Law and Politics* 331 at 334.

114. See J. Herbst, "The Creation and Maintenance of National Boundaries in Africa" (1989) *43 International Organisation* 673.

widespread agreement that the boundaries are arbitrary, yet the vast majority of them have remained virtually untouched since the late 1800s, when they were first demarcated."¹¹⁵

In Herbst's view, the reasons for the almost total sanctification of these boundaries by the post-colonial African leadership are partly pragmatic and partly ideological. The pragmatic reason was, of course, the fear of the conflict potential of a wholesale re-drawing of the borders.¹¹⁶ The ideological reason was the desire of the relatively weak new leaders to protect their territorial domains from the constant threat of the many centrifugal forces that the deeply divided new states had inherited at independence.¹¹⁷

As has been much celebrated in the African and international studies literature, this historic approach to the boundaries question has had the notable merit of dramatically and almost totally eliminating inter-state conflict in Africa¹¹⁸. But, despite this remarkable record in the area of inter-state conflicts, the post-colonial African state has been crisis-ridden virtually since the very moment of its independence. By the end of the 1960s, when the euphoria of independence had subsided, the little legitimacy that the new states had secured from the deeply embedded commonality of the anti-colonial struggle had already begun to fade¹¹⁹. The moment of independence was for many African states also at once

115. Ibid.

116. Ibid.

117. Ibid at 676. See also W.J. Foltz, "Political Boundaries and Political Competition in Tropical Africa" in S.N. Eisenstadt and S. Rokkan, eds., Building States and Nations: Analyses by Region (Beverly Hills, California: Sage, 1973) at 365.

118. See T.M. Shaw and C. Adibe, "Africa and the Global Developments in the Twenty-First Century" (1995-96) LI International Journal 1 at 19.

119. See M. Koskeniemi, supra note 105 at 259.

the moment of crisis.¹²⁰ For, after all, was not the post-colonial state a direct successor and inheritor of the colonial state?

That this crisis was relatively masked until the intense moments of the late 1980s and early 1990s is in large measure attributable to the cold war and the consequent superpower patronage of many ailing post-colonial African states, the most notable of which are Zaire, Somalia, and Ethiopia¹²¹. The coincidence of the massive political eruptions in Africa of the late 1980s and early 1990s with the end of the cold war is instructive in this regard.¹²²

This continuing crisis in the post-colonial African state is in part attributable to the somewhat understandable obsession of the new post-colonial elite with the elimination of

120. See A.R. Zolberg, "The Specter of Anarchy: African States Verging on Dissolution" (1992) *Dissent* 303.

121. See M. wa Mutua, "Map of Africa" *supra* note 84 at 1160-1161; and M. wa Mutua, "Humpty Dumpty" *supra* note 86 at 505-507. See also J. Herbst, "Challenges to Africa's Boundaries in the New World Order" (1993) 46 *Journal of International Affairs* 17 at 19. Contrary to this analytical model which sees the crisis as a series of related crisis moments traceable to the pre-colonial and colonial period, distinguished Africanists such as William Zartman have treated the present crisis as if it were entirely a post-colonial phenomenon. In Zartman's view, what he refers to as the crisis of state collapse in Africa occurred in two waves; in the second decade of independence (for example Uganda, Chad and Ghana), and in the third decade of independence (for example Somalia, Ethiopia, Rwanda, Burundi, Zaire, Algeria, Angola, Mozambique, and Liberia). See I.W. Zartman, ed., Collapsed States: The Disintegration of Legitimate Authority (Boulder: Lynne Rienner, 1995). What Zartman fails to point out is that Zaire, Nigeria, Ethiopia, Ghana, Liberia, Somalia and virtually every other African state have been in varying and even fluctuating degrees of crisis almost from the very moment of their independence. The eruptions of the 1990s are only the culmination of a much longer build-up. It is not hyperbolic to state that these states didn't really collapse, because they never really began cohesive national life in the first place.

122. See P. Brietzke, "Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict" (1995) 14 *Wisconsin International Law Journal* 69.

socio-cultural cleavages within the new states and the construction of *nation-states*¹²³ from the raw material of the *nations-states/territorial-states* that they had inherited from the departing colonial powers.¹²⁴ This process of "nation-building" as it came to be known was largely the product of a somewhat inordinate pre-occupation with the homogenisation of intra-state (mostly socio-cultural) differences.¹²⁵ This trend toward homogenisation and coercive nation-building is related to the intense effort that African leaders and their foreign sympathisers have put into exorcising the "demon" of ethnicity; an intensity that is exemplified by the slogan of the ruling Mozambiquan party, FRELIMO, which in the 1970s had solemnly pledged to "kill the tribe [i.e the socio-cultural group] to build the nation".¹²⁶

It must be remembered though that most of these leaders had been nationalist activists who were under no illusions as to the limitations of the nation-state model as is illustrated by some early mainly textual efforts at federalism and even integration.¹²⁷ These leaders

123. Another way of framing this problem is to think of the vast majority of post-colonial African states as "territorial nations" rather than "cultural nations" in the way that states like Canada, the USA, Australia, and most European states are. A cultural nation need not be made up only one ethno-cultural group. In fact, very few cultural or other nations are so constituted. The crucial feature is that the cultural motifs of one nation dominates the structures of the state, as is the case in the afore-mentioned examples. For an extended explanation of this analytical framework, see R.H. Jackson, "Negative Sovereignty in Sub-Saharan Africa" (1986) 12 *Review of International Studies* 247 at 248-253.

124. See B. Davidson, The Black Man's Burden: Africa and the Curse of the Nation-State (London: James Curry, 1992) at 162.

125. Ibid.

126. Emphasis supplied. See M. Chege, "Remembering Africa" (1992) 71 *Foreign Affairs* 146 at 150. See also A.G. Selassie, "Ethnic Identity and Constitutional Design for Africa" (1992) 29 *Stanford Journal of International Law* 1 at 5.

127. For instance, Nigeria has been a formal federation from the very moment of its independence, while Tanganyika and Zanzibar merged to form the Republic of Tanzania.

were more or less fired by pragmatism and an instinct of survival rather than by any ideas similar to romantic nationalism¹²⁸. As Basil Davidson has noted:

"What fired the activists, in short, was never an imagined spectacle of the beauties of the sovereign nation-state, but the promise that the coming of the nation-state would strike away the chains of foreign rule and all that these had meant in social and moral deprivation... Their poverty of thought about the implications of accepting the sovereign nation-state on the European pattern may be held against the activists; but this poverty was not without its advantages."¹²⁹

As we shall soon see, this sanctification of the colonial inheritance also had its disadvantages and peculiar difficulties. These disadvantages have ensured that the process of nation-building in Africa would be a long and tortuous one. For example, while the requirement that these multi-national and deeply divided states be forged into nations by weak central regimes using non-violent means and respecting human rights is a desirable feature of an international order, few states, if any, have ever been required to engage in this kind of nation-building. The African effort has been further complicated by the rapidity with which the post-colonial African state wanted, in the most difficult of circumstances, to forge the new nations¹³⁰. As Paikiasothy Saravanamuttu has pointed out:

"The task of nation-building in the south, essentially that of state-nations attempting to become nation-states, contrasts with the European experience and is compounded by the contemporary international environment. The nation-state building process in Europe was spread over centuries, relatively uninterrupted by colonial conquest and external intervention. Its more sordid features were [in general] not held up to public scrutiny or subject to censure by an international community of states in the manner that southern regimes

128. *Ibid* at 165.

129. *Ibid* at 164-165.

130. See R.E. Howard, *supra* note 6 at 29-30.

are today."¹³¹

Thus, it was the stresses that resulted from the attempt of post-colonial African states to assert their suzerainty over their sub-state groups largely by military force and other forms of coercion, as well as the capture of such states by one or more of their sub-state groups, that prevented African states from gradually shaking off their inherited illegitimacy amongst all groups of its citizenry. In this way, the crisis of legitimacy that faced the colonial African state was extended into the post-colonial era.

(ii) The Nature of the Crisis of Legitimate Statehood in Post-Colonial Africa:

"In all too many instances, recent events remind us, the interactive patterns of ethnic and national groupings are oppressed by structures of human organisation grounded in the modern system of states."

-James Anaya¹³²

"Leaders of Northern Nigeria have told us several times that what our former colonial masters made into 'NIGERIA' consisted of an agglomeration of peoples, distinct in every way except the colour of their skins, and organised as a unit for their own commercial interests and administrative convenience. The name 'Nigeria' was regarded as a mere 'geographical expression'."

-Proclamation of the Republic of Biafra¹³³

"It should be understood that, while statehood needs to be reconstituted...the restoration of the state to health may require the amputation of an infected member...the case for reshaping the restored state has to be made, in each instance, rather than assumed, and some hard questions must be asked about

131. See P. Saravanamuttu, "Introduction to the Problem of the State and Instability in the South" in C. Thomas and P. Saravanamuttu, eds., The State and Instability in the South (New York: St. Martin's Press, 1989) at 3.

132. See S.J. Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims" (1991) 13 Human Rights Quarterly 403.

133. See the Proclamation of the Republic of Biafra, 30th May 1967 (Enugu: Government Printer, 1967) at 1.

the viability of the severed member and the popular basis of support for its continued separate existence."

-William Zartman¹³⁴

"A state is not an end in itself but a means to the creation of the conditions for the happiness of the highest possible number of people. When that basic premise is violated, and is no longer the rationale for the existence of the state, then it becomes questionable why anyone would advocate the 'redemption' of such an entity."

-Makau wa Mutua¹³⁵

A survey of the African continent reveals a multitude of crisis-ridden states. All over that vast continent, and for far-too-long, crisis situations of varying types and proportions have afflicted the post-colonial African state. A look at a cross-section of African states suffices to illustrate this point.

The crisis in Zaire has continued throughout its existence as a territory. In Nigeria, attacks against certain socio-cultural groups led to the unsuccessful but two year-long secession of their home region¹³⁶. In the same country the suppression of national minority groups, such as the Ogoni, the Atyab, and the Bajju, is now endemic¹³⁷. In the case of Chad, decades of internecine strife which was the result of an active revolt against the

134. See I.W. Zartman, "Putting Things Back Together" in I.W. Zartman, ed., supra note 121 at 268.

135. See M. wa Mutua, "Humpty Dumpty", supra note 84 at 509.

136. See D. Ijalaye, "Was Biafra at any Time a State in International Law?" (1971) 65 *American Journal of International Law* 551. See also the Proclamation of the Republic of Biafra, 30 May 1967 (Enugu: Government Printer, 1967).

137. See O.C. Okwu-Okafor, supra note 52.

overbearing Chadian state has all but destroyed the body politic¹³⁸. In Uganda, there is an on-going attempt to reconstruct a state fabric that continues to be ripped to shreds by dissociative forces¹³⁹. In Liberia, government was for about a decade restricted to the capital, Monrovia; the state was absent, society was shattered, and the nation was extremely fragmented¹⁴⁰. Ethiopia seems to be on the path to redemption with its new approach to the nationalities question and its support for the independence of Eritrea¹⁴¹. The Hutu and Tutsi of Rwanda and Burundi have had a long history of internecine conflict in their competition for state power¹⁴². In Somalia, a country which is often seen as homogenous, sub-national identities have been manipulated by the state to such an extent that, almost from the very moment of independence, the country has faced severe political crisis.¹⁴³ In the

138. Chad is like most African countries a very complex society made up of five million people divided into between 72-110 language groups. The largest of these groups, the Sara, are made up of 12 sub-groups. See W.J. Foltz, "Reconstructing the State of Chad" in I.W. Zartman, supra note 121 at 15-17.

139. See G. Khadiagala, "State Collapse and Reconstruction in Uganda" in I.W. Zartman, ed., ibid at 33.

140. See M. Lowenkopf, "Liberia: Putting the State Back Together" in I.W. Zartman, ed., ibid at 91.

141. Ethiopia is a country of more than 40 different ethnic groups historically dominated by the Amhara and Tigre. The Oromo, Afar and Somali continue to claim a right to self-determination. See E. Keller, "Remaking the Ethiopian State" in I.W. Zartman, ibid at 125.

142. See P. Mutharika, "The Role of the United Nations Security Council in African Peace Management: Some Proposals" (1996) 17 Michigan Journal of International Law 537 at 546.

143. Somalia is still a very complex and diverse society even though virtually all of its 8-10 million people speak the same language, are Muslim, look somewhat alike, and share a similar culture. Somalia is composed of 5 major sub-groups, the Hawiye, Darod, Isaq, Dir, and Digil-Mirifle, with each sub-divided into six or more clans. See H.M. Adam, "Somalia: A Terrible Beauty Being Born" in I.W. Zartman, ed., ibid at 69-77.

Sudan, religious bigotry, the dominance of one socio-cultural group over the rest, and the legacy of the divide and rule tactics of their former colonial rulers has left the country ravaged by virtually incessant strife¹⁴⁴.

These examples clearly reflect the crisis-prone and crisis-ridden nature of many post-colonial African states. In each case, diversity has not been the strength that it ought to be, but has led to centrifugal stresses. In each case, the state has been a contestant in the battle for power, privilege, and even survival.

But while most scholars now seem to recognise that this sort of crisis pervades the African milieu, they are not as agreed about its genesis, and thus about its nature¹⁴⁵. Neither are they agreed as to the value of reconstructing the post-colonial African state in its own old image¹⁴⁶.

As we have already seen in the preceding sections, the colonial practice of establishing political institutions and states with very low levels of domestic institutionalisation and legitimacy left the newly de-colonised states very weak in terms of

144. The Sudan, a large and complex country the size of the entire European Union, is made up of over 22 million people with 115 distinct languages. See C. Gurdon, "Instability and the State: Sudan" in C. Thomas and P. Saravanamuttu, eds., supra note 131 at 66-73. See also F.M. Deng and P. Gifford, Ed., The Search for Peace and Unity in the Sudan (Washington DC: The Wilson Center Press, 1987).

145. See section B of this chapter.

146. For example this seems to be the bone of contention between Professors William Zartman and Makau wa Mutua. See I.W. Zartman, supra note 121; and M. wa Mutua, "Humpty Dumpty" supra note 84 at 508 (arguing that he does not share Zartman's fundamental assumption that, as presently constituted, the post-colonial African state must be saved at all cost).

the measure of their non-coercive hold on their many component peoples¹⁴⁷. Few, if any, of these colonial states were popular among their African population. Furthermore, this structural situation was not altered at independence. The newly independent states were merely the direct descendants of the states that the Europeans had initially carved out of the continent¹⁴⁸. Subsequently affirmed by the post-colonial African elite¹⁴⁹, these states were also what Makau wa Mutua has described as the uncritical successors of the colonial state¹⁵⁰. Indeed, the effect of the otherwise understandable sanctification of the structure of each and every one of these post-colonial states by the Organisation of African Unity (OAU), even when it was clear that the reach of some of these new states was quite limited, was to send a signal to the African people and the rest of the world that control of the capital by a regime confers on that regime the legitimate right to control the rest of the nation-state. The other message that seemed to have been sent was that any challenge from those who controlled the peripheries of these states to the domination of those who controlled the central regimes of such states was to be, as a general rule, forcibly crushed on the basis that such rebellions are inexorably illegitimate.¹⁵¹ This was the very same norm that guided the colonial enterprise in Africa.¹⁵² Not much had really changed in the structure of the post-

147. See J. Herbst, supra note 114 at 683.

148. Ibid at 686.

149. See M. wa Mutua, "Map of Africa" supra note 86 at 1119.

150. Ibid at 1117.

151. See J. Herbst, supra note 114 at 687-688.

152. Ibid.

colonial African state since the heyday of colonialism.

The point is not to attribute the present crisis entirely to the structure of the colonial and post-colonial states in Africa for, after all, structures are made and re-made by human agency. Indeed, the performance of many post-colonial African leaders such as Mobutu Sese Seko of the former Zaire has been rather abysmal when judged as a discrete category¹⁵³. Yet, others such as the Tanzanian and Botswanian leadership have been relatively more successful at managing socio-cultural cleavages within their new states¹⁵⁴.

The point is that although other factors have contributed to the current problems in Africa, they cannot be neatly divorced from the enduring crisis of internal legitimacy that the post-colonial African state has always experienced¹⁵⁵. One cannot treat the problem solely as a function of domestic political choices¹⁵⁶. And even though all states and borders are a product of conflict, consensus, and contrivance, it must be remembered that the states of Africa are by far the most contrived of all¹⁵⁷. In very few circumstances were the new states formed on the basis of internal dynamics; this has made them especially vulnerable to fragmentation and re-configuration¹⁵⁸.

153. See M. wa Mutua, supra note 84 at 1142-1143.

154. See generally, P. du Toit, ed., State-Building and Democracy in Southern Africa (Pretoria: HSRC, 1995); and H. Othman, I.K. Bavu and M. Okema, Tanzania: Democracy in Transition (Dar es Salaam: Dar es Salaam University Press, 1990).

155. Ibid at 1118.

156. See T.M. Shaw and C. Adibe, supra note 82 at 11.

157. B. Schutz, "The Heritage of Revolution and the Struggle for Governmental Legitimacy in Mozambique" in I.W. Zartman, ed., supra note 121.

158. Ibid.

Assessed as a problem of both structure and agency, the performance of the post-colonial African state has been quite problematic. So problematic has this performance been that Professor Ali Mazrui has referred to the post-colonial African state as a "political refugee"¹⁵⁹. The crisis being experienced by the African state is due to the fact that the state in Africa has all-too-often not been primarily used for legitimation or development purposes. Rather, just like the colonial state before it, it has been consistently manipulated for the accumulation of wealth for those who control it and for other similar purposes.¹⁶⁰ And like the colonial state, the post-colonial state in Africa has been excessively coercive and exploitative.

It is no wonder, therefore, that the current crisis of legitimate statehood in Africa can be best described as the relative failure of the post-colonial African state to come to terms with the depth of its inherent structural cleavages. In Makau wa Mutua's words, "there is no mystery here because the state would have had to be more benign, which it has not been, to dilute pre-colonial identities."¹⁶¹ Always a good index of measuring the legitimacy of the African state, the strengthening of the attraction of the sub-state socio-cultural group, the pre-colonial entity from which most Africans have primarily sourced their identity and citizenship, has become even more intensified as the contemporary basis for inter-personal solidarity. Ironically, this has happened in spite of, indeed in the face of, frenzied attempts

159. See A. Mazrui, "The African State as a Political Refugee: Institutional Collapse and Human Displacement" (1995) special issue-*International Journal of Refugee Law* 21.

160. See J. Ihonbvere, "The 'Irrelevant' State, Ethnicity, and the Quest for Nationhood in Africa" (1994) 17 *Ethnic and Racial Studies* 42 at 45.

161. See M. wa Mutua, "Humpty Dumpty" *supra* note 84 at 533.

by the overarching post-colonial African state to eliminate forcibly the sway of such groups over the consciousness of their members.

F. SUMMARY OF THE ARGUMENTS:

In this chapter, an attempt has been made to demonstrate systematically, the continuity of the structural crisis of legitimacy that afflicts the post-colonial African state. It has been shown that there has been a remarkably continuous structural turbulence in Africa from the late 19th century onwards to the present day. It has also been shown that this structural and continuous nature of the crisis can only be appreciated by the application of the historical, contextual, and holistic methods of enquiry in the study of that subject.

Having exposed the nature of this crisis and identified its historic roots in the structure and organisation of Africa's fragmented states, the next Chapter will offer an account of the nature and character of the attitudes that have been historically exhibited by international law and institutions to such fragmentation. This account will be followed in Chapter Four by an analysis of the effects of such international legal and institutional attitudes on intra-state peace, and on development, in Africa. Thereafter, in Chapter Five, I will explore the various ways in which multilateral African institutions have begun to re-configure the relationships among African states and their sub-state groups, and have begun to create a climate that facilitates the prevention and reduction of the incidence of internecine strife in Africa. Following that, I will, in Chapter Six, conclude the thesis with a recommendation for institutionally driven ways of consolidating the emerging re-configuration of intra-state relations within African states.

CHAPTER THREE

The Concept of Legitimate Statehood in the International System and the Question of Socio-Cultural Fragmentation Within States

A. THE CRUX OF THE ARGUMENTS:

In this chapter, I will explore the nature of the concept of legitimate statehood in both traditional and contemporary international law. I will do so by interrogating international law with a view to understanding its historical responses to the problem of socio-cultural fragmentation within established states¹. Here, my major concern will be to identify and explain the various attitudes that international law has exhibited toward that problem. I will also be interested in how these attitudes have affected the concept of legitimate statehood in international law.²

This thesis is largely concerned with three overarching subjects-matter. The first is the question of the contribution of certain international legal and institutional attitudes to the incidence of internecine strife and underdevelopment within post-colonial African states. The second is the manner in which these attitudes are currently being altered, both normatively and in practice, and how such modifications are facilitating the prevention and reduction of the incidence of internecine strife in African states. The last concerns the question of devising ways to consolidate the on-going transformation as a way of furthering the capacity of international law and institutions to contribute to the prevention and reduction of

1. The phrase "socio-cultural fragmentation" is hereinafter referred to as "fragmentation".

2. This is a separate question from the question of the international legal and institutional attitude to the legitimacy of governments, and governance.

internecine strife in Africa. The subject-matter of this chapter is thus central to the thesis. This is especially so, given the unfortunate relationship that seems to exist among the international legal and institutional attitudes that will be examined in this chapter, and the crisis of internecine strife and underdevelopment that currently afflicts many post-colonial African states.

My understanding of the combined effect of the relevant international legal norms, rules, state practice, and the international legal and political studies literature suggests that international law's attitude to the problem of socio-cultural fragmentation within established states, and thus, to the question of legitimate statehood, has for the most part been characterised by several distinct but related attitudes. These attitudes may be styled as follows: "persistent oscillation and deference to peer review", "deference to the effectiveness principle", "the glorification of empire", "homogenisation", and "domestication".

In general, the argument put forward in this chapter is that at traditional international law, these attitudes together constituted the dominant response of the law to the problem of fragmentation. It is also suggested that there is ample evidence to support the claim that contemporary international law is gradually and steadily shedding the traditional dominance, in their purer forms, of each of these attitudes. Yet, it is also recognised that this emerging situation, this ongoing transformation, is neither guaranteed to endure nor as yet completely accepted by the international society of states. It may well be an extremely delicate question whether or not the observed phenomena point to an on-going progressive transformation of international legal imagination in this area, or is merely evidence of a temporary oscillation of the pendulum of international law in that direction. It is, however, in the next chapter,

not in the present one, that the concrete effects of the application of these doctrinal attitudes within the post-colonial African state will be explored. These attitudes will be examined one after the other. I will treat the last two under the same rubric.

B. INTERNATIONAL LAW'S PERSISTENT OSCILLATION AND DEFERENCE TO PEER-REVIEW:

Peer review is used here as the process of the determination of the legitimacy of a state (i.e legitimate statehood) according to the *ipse dixit* or say-so of a given pre-existing society of states without necessary reference to the standpoint of the would-be state, or of any of its constituent sub-state groups.³

Infra-review is the process of determination that acknowledges the acceptability or otherwise of a state (including its structure and composition) amongst its constituent groups. Thus, this latter process is one that takes account of the reality of fragmentation within the state, and *requires* that the process of making decisions as to the legitimacy of a state pays significant attention to the say-so of sub-state groups. In the case of the infra-review approach, the important point is that the *ipse dixit* of an established state is not regarded as conclusive of the question of the appropriateness of its continued suzerainty over the contested territory or peoples. The "consent" of the relevant peoples and the state's behaviour toward them become important factors to be considered in the process of determination.

International law's persistent oscillation between peer- and infra-review is used here

3. The term "sub-state group" refers to each of the "socio-culturally differentiated groups" that constitute African states.

to refer to the swings that the pendulum of international law has historically made between these two opposing points; between deference to peer-review and deference to infra-review.

In the next few pages, an attempt will be made to explain in greater detail what I mean by the concepts of "peer-review" and "infra-review", before going on to explore the historical development of these two concepts. In the course of this examination, an account of the historic oscillation of international law and institutions between the two competing approaches will be rendered. Following this, the gradual but on-going turn that is being made by international law and institutions toward the greater use of the infra-review approach will be examined. Thereafter, I will conclude the section with a brief explanation of the relevance of these interpretations of the evidence to the international legal treatment of the problem of fragmentation, and as such to the concept of legitimate statehood in contemporary international law.

Throughout the recorded history of international law's treatment of fragmentation, the peer-review approach has reigned dominant. Other states, the so-called peers of the would-be or established state, have always been the ones that decided, at their discretion, whether or not to admit the candidate to membership in whatever community that was held out at the relevant time as *the* family of nations.⁴ Whenever this approach was adopted, it did not really matter that the would-be state exhibited all the characteristics of its pre-existing peers, or that it claimed equality with those peers. What really mattered was the *ipse-dixit* of the pre-existing states. In the same vein, it did not matter how the candidate state treated

4. See J.D.B. Miller, "Sovereignty as a Source of Vitality for the State" (1986) 12 *Review of International Studies* 79 at 80. See also E. Osieke, Constitutional Law and Practice in the International Labour Organisation (Dordrecht: Martinus Nijhoff, 1985) at 22-24.

its sub-state groups, or for that matter, any other section of its population. In the result, a would-be or established state that failed peer-review was automatically deemed to be "illegitimate". A state which passed such peer-review was, by contrast, automatically deemed "legitimate". It did not matter that, as a function of the level of acceptance that a state enjoys among its sub-state groups, the state that failed peer-review may in fact have a better claim to corporate statehood than the one that passed. Thus, the fact that a candidate state had passed infra-review was, under the strict peer-review approach, not the crucial consideration. The crucial question was whether or not the candidate state was accepted or recognised as such by the states that made up *the* family of nations?

The infra-review approach has been weakly applied in a few scattered cases and epochs, but never on a universal basis, and always in the shadow of the peer-review approach. Under the infra-review approach, the crucial consideration is the level of acceptance enjoyed by the state amongst its own constituent groups. As such, if this approach is adopted, peer-review will still be important to the process of evaluating the legitimacy or otherwise of a state, but will on its own neither be paramount nor sufficient. But how has this peer-review approach been historically developed?

The pendulum of international law has constantly swung between peer- and infra-review. From its anchor on the side of a kind of infra-review (in the sense of the reliance on the say-so of the established or would-be state, or of any portion of it which could demonstrate its independence) during the period before the 19th century, the pendulum swung to the side of strict and exclusive peer review in the 19th century. It, however, swung back to the side of a kind of infra-review during the early 20th century life of the League

of Nations when the League guaranteed the rights of the minority peoples of Eastern and Central Europe, and then swung back again to the side of a nearly exclusive peer-review during the first fifty or so years of the existence of the United Nations (i.e between 1945 and the present). Even today, international law seems to be anchored still on the latter side. The difference is that the pendulum is once again showing signs of movement toward a kind of infra-review, one that pays significant attention to the say-so of the groups that often constitute established and even would-be states.

The early European naturalist international lawyers, and even some of the early positivists of the 18th century such as Vattel⁵, did not see any disjuncture between the actual independence of a community and its status as a state⁶. The former meant the latter, and *vice versa*.⁷ In this sense, therefore, since actual independence was co-extensive with

5. See E. de Vattel, The Law of Nations (London: Robinson, 1797) at 2.

6. See J. Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979) at 5-7. For instance, Vittoria, who lived and worked in the period between the late 1400s and the early 1600s, defines a state thus:

"The state properly so called is a perfect community, that is to say, a community which forms a whole in itself, which, in other words, is not part of another community, but which possesses its own laws, its own council, and its own magistrates.

See F. de Victoria, De Indis et de Ivre Belli Reflectiones (Washington: Carnegie Institution of Washington, 1917) at 92. Alberico Gentili, who was Regius Professor of Civil Law at Oxford and who lived and worked between 1552 and 1608 agreed with this view. See A. Gentili, De Libre Belli Libri Tres, Trans. J.C. Rolfe (New York: Oceana, 1964) at 25A.

7. Note, however, that even in this era European international lawyers had already begun to view the society of European states as the society of states; the sole arbiters of the question of which states were legitimate and which were not. This is shown by the mere fact of the many treatises produced on this question in Europe at that time. The point is easily illustrated by the very fact of the occurrence of the famous debate between two Spanish jurists, Juan Gines de Sepulveda (a Cordoban Theologian) and Bartolome de Las Casas (the

statehood, there was really no significant question as to the legitimacy of a factually independent state or other polity. The state's legitimacy depended on the fact of its separate existence and independence, not upon the outcome of the peer-review process. For there was no need for peer-review at all. Indeed, Crawford tells us that *naturalists of this period rejected the very notion of the recognition of states on the basis that sovereignty was located in the supreme power within any given territorial unit, and that this precluded the recognition of states by other states.*⁸ At the same time though, a state's legitimacy did not also depend on infra-review in the sense of the level of acceptance enjoyed by the state amongst its constituent socio-cultural fragments. It was a very different kind of infra-review which might be more accurately viewed as "auto-review" by the candidate state itself.

This naturalist position changed during the 19th century, in the heyday of international legal positivism. Perhaps under the influence of Hegel, European scholars such as Wheaton came to posit a disjuncture between actual independence and statehood.⁹ In Wheaton's view, actual independence was by itself insufficient to justify a claim to statehood. A state was not a state *properly* so-called unless the fact of its actual independence had been recognised by the society of pre-existing states. Only by recognition could

then Bishop of Chiapa) at the Council of Valladolid, the very point of which was to determine the basis for the legitimacy or otherwise of the kingdoms and polities of the natives of the Americas. Says Las Casas in reply to Sepulveda's attack on the legitimacy of the states built by the natives of the Americas "[r]ather, long before they heard the word Spaniard they had properly organised states, wisely ordered by excellent laws, religion, and custom." See B. de Las Casas, In Defence of the Indians, trans. S. Poole (De Kalb: Northern Illinois University Press, 1992) at 42.

8. See J. Crawford, supra note 6 at 10-12.

9. Ibid at 7-10.

membership in the "family of nations", and thus legitimacy as a state, be secured. The exponents of this viewpoint argued that when pre-existing states turned a blind eye to the fact of the actual independence of a certain state and refused to recognise it, they denied it the status of legitimacy amongst its peers. The history of international relations is replete with examples of occasions where this has happened.¹⁰ This was peer-review *par excellence*. But it was also a form of peer-review that operated on an *ad-hoc* basis, such that a would-be or established state could have been legitimate in the eyes of a number of its would-be peers while at the same time being illegitimate in the eyes of the other members of the family of nations that existed at the time.¹¹

While, all-too-often, 19th century European international lawyers assumed that the law that they studied and sought to apply was indeed factually universal at the time, it was in reality still merely inter-European in the extent of its reach.¹² Accordingly, the group of states which they held out to be *the* "family of nations" and which exclusively exercised the function of peer-review was throughout this era almost entirely European. This leads to the important point that the type of peer-review that was mandated by traditional international law, at least before the era of the League of Nations, was basically eurocentric in nature.

10. In the late 19th century, this happened to many established African and Asian states as colonialism swept most of them away. Somaliland, a country that used to be British Somaliland and later part of the Somali Republic, has been de facto independent since the early 1990s. It has, however failed to attract the recognition of the vast majority of states.

11. I cannot but agree with Professor James Crawford that Positivism created much of the current problems that international lawyers now encounter with respect to the concept of statehood and the theory of recognition. See J. Crawford, supra note 6 at 10.

12. See J. Crawford, supra note 6 at 9. See also S.N. Grovogui, Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law (Minneapolis: University of Minnesota Press, 1996) at 16.

This peer-review process was conducted almost entirely by European states. These states decided amongst themselves which states qualified as legitimate states and which did not. To put it differently, nearly all the examining peers were European, while nearly all of the actual and potential candidates for review were non-European. The importance of this point will be appreciated if it is realised that because of their own peculiar historical experience these European states ineluctably based their peer-reviews on a particular set of criteria which were not necessarily generalisable. An example of these criteria was the assumption that states ought to be foreign images of the relatively homogenous¹³ European "nation-states", and if they were not, it was thought that they ought to be encouraged to become so. This philosophical disposition and cosmology formed the basis for the launching of the "nation-building" project in most African and Asian states during the colonial era. Its fundamental source may be what Professor Thomas Franck has referred to as:

"[European] modernity's core belief of an ever-widening circle of human sociality; of the inevitability of the *homogenisation* of culture; and of the advent of a humanist ecumenism".¹⁴

While some non-European states eventually passed this kind of European peer-review, most did not.¹⁵ States such as Japan, Korea, Thailand (Siam), China, the Maratha Empire

13. It must of course be understood that no European state was homogenous in the absolute sense, hence my reference to relative homogeneity. Indeed, some were more homogenous than others. The important point to note, though, is that even though these states were not absolutely homogenous, homogeneity in the name of building the nation-state was always their ideal. And this was an ideal that was exported to the rest of the world partly via this process of eurocentric peer-review, in which Europeans decided that only states that looked like their own states were worthy of legitimate statehood.

14. See T.M. Franck, *infra* note 32 at 140-141. Emphasis supplied.

15. See N.L. Wallace-Bruce, Claims to Statehood in International Law (New York: Carlton Press, 1994) at 23.

in India, the Ottoman Empire, Afghanistan, Swaziland, Morocco, Algeria, Tunisia, Hawaii, Tonga, Samoa, Ethiopia¹⁶, and Zanzibar, are amongst the most notable of the privileged few that to varying degrees eventually passed the peer-review conducted by the European family of nations, but which were still treated as somewhat inferior to the European states¹⁷. Others such as the Sokoto Caliphate, Tripoli, the Oyo Empire, the Ashanti Empire, Benin, Dahomey, Buganda, Bunyoro-Kitara, Kanem-Bornu, and Amazulu, were never admitted into the narrow club of "legitimate" members of the European family of nations. It must be noted though that some of these states such as the Sokoto Caliphate, Kanem-Bornu, Dahomey, Tripoli, and the Somali Chieftains were listed in an 1872 Handbook prepared for European diplomats as sovereign or semi-sovereign entities.¹⁸ But the point remains that most Afro-Asian states never participated in the peer-review process up till the end of the 19th century. Indeed, most of them were treated as illegitimate states during this period, and saw their status ebb to its lowest at the time of the Berlin Conference of 1884-1885 and the partition of Africa.¹⁹

The early twentieth century did, however, see a slight shift away from the

16. See M. wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16 Michigan Journal of International Law 1113 at 1122.

17. For a similar but shorter list, see J.M. Mossner, "The Barbary Powers in International Law: Doctrinal and Practical Aspects" in C.H. Alexandrowicz, ed., Studies in the History of the Law of Nations (The Hague: Martinus Nijhoff, 1972) at 198-201.

18. See C.H. Alexandrowicz, "The Role of Treaties in the European-African Confrontation in the Nineteenth Century" in A.K. Mensah-Brown, ed., African International Legal History (New York: UNITAR, 1975) at 28.

19. For a detailed study of this conference and its effects, see S. Forster, W.J. Mommsen, and R. Robinson, Bismarck, Europe, and Africa: The Berlin Africa Conference and Onset of Partition (Oxford: Oxford University Press, 1988).

eurocentricism of what was held out to be the family of nations, and even in the nature of the form of peer-review that was used. The establishment of the League of Nations following the end of World War I in 1919 led to the admission of a number of non-European states into the formerly exclusive club of the full members of the family of nations that sat in judgement over the legitimacy of would-be and existing states. Thus, because the category of peer-reviewers was expanded to include a substantial number of non-European states, states outside Europe were no longer limited to playing the role of "the reviewed". Some of them, like Cuba, Bolivia, Ethiopia, Peru, Haiti, Ecuador, and Liberia became part of the peer-reviewer's club.

The process of peer-review was, however, also transformed in another way. It was also formally expanded to go beyond the *ad hoc* process of review to include a limited form of collective peer-review under the doctrine of collective non-recognition. The operation of this doctrine in traditional international law is best illustrated by the 1939 endorsement by the League of Nations of international non-recognition of the establishment in Manchuria of the puppet Japanese state of Manchukuo. This collective approach was adopted following the espousal and acceptance of the Stimson doctrine of non-recognition.²⁰ The doctrine of collective (non)recognition has also been applied, at least implicitly, under the present UN order.²¹ Indeed, it has been argued by a number of reputed scholars that (collective)

20. See J. Crawford, *supra* note 6 at 59.

21. The ouster of Iraq from its control of Kuwait was partly informed by principles similar to that espoused under the Stimson doctrine.

admission to the UN presupposes statehood²². A number of scholars have also argued in favour of the general principle of collective non-recognition.²³

At this point, it must be emphasised that even though, as it functioned in the period before and during the life of the League, the peer-review process was, true to type, a process that left far too much discretion in the hands of a narrow circle of reviewing states, and hardly *required* them to justify their decisions according to a coherent set of globally accepted principles or rules, it was nevertheless not completely arbitrary in nature. The reviewing states did set for themselves, by their own practice, at least two guidelines for the acceptance of states into their exclusive club of "legitimate" states. Professor James Crawford tells us that in the era before the League, states which were regarded as "uncivilised" by European states failed peer-review.²⁴ So did states regarded by the same group of states as lacking "coherent and organised governments".²⁵

Another shift that international law experienced during the League era was that for the first time, even if over a limited portion of the globe, an international law that was relatively general explicitly took on the challenge of reconciling fragmented (Eastern and

22. See P.C. Jessup, A Modern Law of Nations: An Introduction (New York: Macmillan, 1948) at 47; S. Rosenne, "Recognition of States by the United Nations" (1949) 23 British Yearbook of International Law 437 at 445-447; H. Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems (London: Stevens, 1951) at 79.

23. For example, see J. Crawford, supra note 6 at 319.

24. See J.M. Mossner, supra note 17 at 206. See also J. Crawford, supra note 6 at 13.

25. Ibid at 177-179. To paraphrase John Westlake, a coherent and organised government was a government such as Europeans are used to in their homeland. See J. Westlake, Chapters on the Principles of International Law (Cambridge: Cambridge University Press, 1894) at 143.

Central European) states to their various component sub-state groups.²⁶ The League system for the protection of minorities in Europe was established precisely because the law of nations acknowledged the fact of fragmentation within the target states. Pursuant to norms such as that which favoured the self-determination of peoples, the law also sought to ensure the effective protection of such groups. In a limited way, the "say-so" of sub-state groups began to matter, and thus, even though the peer-review principle still dominated international relations, the infra-review principle received some of the law's attention.

It was not, however, very long before the effective demise of the League in 1939 forced another turn by international law to a somewhat exclusive kind of peer-review. From 1945, when World War II ended, to the present, this aspect of international relations has continued to be dominated by the peer-review approach. The literature on the subject is quite clear. Professor Louis Henkin has argued that in today's world of international relations, an unrecognised state is "a child very much alive and well, *but illegitimate*".²⁷ Similarly, Professors Robert Jackson and Carl Rosberg have argued that many post-colonial third world states have been sustained more by the recognition and legitimacy conferred on them by their peers (peer-review), than by the support and recognition that they have received at home

26. This is not to say that there was not an earlier period when attempts were made to protect socio-cultural minorities in an unsystematic way. For example, the early naturalist international lawyer, las Casas made strenuous efforts to protect the natives of the Americas in the doctrines of pre-19th century law of nations; the Treaty of Westphalia of 1648 granted rights to German Protestants; and the treaty of Olivia of 1660 attempted to protect Catholics in Livonia which had been ceded by Poland to Sweden. See N. Lerner, Group Rights and Discrimination in International Law (Dordrecht: Martinus Nijhoff, 1991) at 7. See also R. Mullerson, Human Rights Diplomacy (London: Routledge, 1997) at 16-19.

27. See L. Henkin, International Law: Politics and Values (Dordrecht: Martinus Nijhoff, 1995) at 13. Emphasis supplied.

(infra-review).²⁸

Despite this post-League turn to peer-review, contemporary international law may now be moving away from the *exclusive* peer-review approach in favour of a *limited* kind of infra-review. Professor Henkin may be correct when he argues that the term "recognition" no longer belongs in the language of international law because, aside from the case of an entity which achieves statehood in violation of the law of the United Nations Charter, states can no longer refuse to treat as such, entities that are in fact states.²⁹ Professor Crawford has detailed the various situations when it would be lawful not to recognise an entity which otherwise qualifies as a state. These include states created in violation of the norm in favour of self-determination, or of the norm proscribing apartheid, or in violation of any other jus cogens norm.³⁰ For my own part, I will add the norms proscribing genocide and mass population transfers.³¹

Thus, even though it cannot be denied that the peer-review approach still dominates the field of international law's treatment of the question of legitimate statehood, it is safe to observe that *states are no longer as free to use their discretion in the peer-review process*

28. See R.H. Jackson and C. Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis" (1986) 24 *The Journal of Modern African Studies* 1; R.H. Jackson and C. Rosberg, "Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood" (1982) *World Politics* 1; and R.H. Jackson, Quasi-States: Sovereignty, International Relations and the Third World (Cambridge: Cambridge University Press, 1990) at 25.

29. See L. Henkin, supra note 27 at 14. The cases of Taiwan and Somaliland seem to belie this general trend.

30. See J. Crawford, supra note 6.

31. For an exploration of the law relating to genocide, see N. Lerner, supra note 26 For that relating to the mass transfer of populations, see A. de Zayas, infra note 45.

as they once were. They are now *beginning* to be limited by a set of legal norms/rules which must guide their decisions. And as we shall soon see, the emergence of some of these norms/rules seem to indicate that international law may yet again be altering its approach in favour of the greater inclusion of the infra-review approach in the making of determinations as to the legitimacy of states.

In a similar vein, Professor Thomas Franck has noted that:

"International law has matured into a complete legal system covering all aspects of relations among states, and also, more recently, *aspects of relations between states and their federated units ... international legal standards may govern conflicts between citizens, or factions, and their own government*."³²

Is there, however, evidence for the suggestion that there is indeed an on-going turn to infra-review (in the sense of a peer-review process that is informed by a significant enquiry into the wishes of sub-state groups), as well as an on-going turn away from the exclusive operation of the peer-review approach? It is my contention that evidence in support of this proposition can be found in the character of certain international legal norms as well as in state practice.

One of such norms is the norm in favour of the self-determination of peoples.³³

32. See T.M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995) at 5.

33. This norm is stated in the UN Charter, in the common articles 1 of the International Covenant on Civil and Political Rights (ICCPR) and the international Covenant on Economic, Social and Cultural Rights (ICESCR), and articles 19-23 of the African Charter on Human and Peoples' Rights. For an interpretation of the self-determination clause common to the ICCPR and the ICESCR, see the General Comment of the Human Rights Committee on Article 1 of the International Covenant on Civil and Political Rights, General Comment 12(21) paragraph 6, U.N. Doc. A/39/40 (1984) at 143. See also R. McCorquodale, "Self-Determination: A Human Rights Approach" (1994) 43 International and Comparative Law Quarterly 857 at 860-861.

Perhaps the most succinct of the many statements of this norm is the statement of Judge Dillard in his separate opinion in the *Western Sahara Case*, that, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people".³⁴

In traditional international law, the application of the norm of self-determination to established states was generally disfavoured if it was expected to lead to the break-up of the relevant state.³⁵ This was particularly so with regard to the self-determination claims of the sub-state groups. The society of states virtually refused to recognise the right of such entities to secede from their parent states, notwithstanding the justice or persuasiveness of their claims to independence.³⁶

But the norm itself is "a richly textured form of argument"³⁷ that can be deployed by both sides of a secessionist or other dispute. The norm is both normalising and stabilising, in the sense of its use as a justification for the statehood and sovereignty of the entire population contained within a state. It is also revolutionary and de-stabilising, in the sense of its use to launch formal challenges to the structures of statehood as well as to protect the minority or dominated socio-culturally differentiated fragments of established states.³⁸

In contemporary times, the traditional position is no longer rigidly asserted. For

34. (1975) ICJ Rep. 12 at 122.

35. See G.H. Fox, "Self-Determination in the Post-Cold War Era: A New Internal Focus" (1995) 16 Michigan Journal of International Law 733.

36. Ibid.

37. See N. Berman, "Sovereignty in Abeyance: Self-Determination and International Law" (1988) 7 Wisconsin International Law Journal 51 at 56.

38. See M. Koskeniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 International and Comparative Law Quarterly 241 at 245-258.

example, acclaimed scholars such as Hurst Hannum³⁹, Thomas Franck⁴⁰, and John Dugard⁴¹ have felt able to argue that, at the very least, contemporary international law neither endorses nor prohibits the secession of a sub-state group from an established state. Indeed, Franck goes even further to show that nothing in international law prevents the UN from recognising a successful secession except perhaps when it has been achieved largely through the military intervention of a third party.⁴² Professor Hannum even goes as far as acknowledging what seems to be a persistent reality: that accomplishing the goals of self-determination may, in some cases, require the creation of separate states.⁴³ Thus, the state of international law in this area can be summarised by quoting from a recent paper written on the subject. According to that author:

39. See H. Hannum, "Rethinking Self-Determination" (1993) 34 Virginia Journal of International Law 1 at 42.

40. See T.M. Franck, supra note 32 at 159.

41. See J. Dugard, "Secession: Is the Case of Yugoslavia a Precedent for Africa?" (1992) 5 African Journal of International and Comparative Law 163 at 165.

42. See T.M. Franck, supra note 32 at 158-footnote 46. He cites the examples of Syria, Singapore, and the Northern part of British Camerouns which joined Nigeria in 1960. One may add that numerous other examples now exist, such as Eritrea, The Slovak Republic, the new states of the former Yugoslavia, the Baltic states, and the new states of the former Soviet Union. For a discussion of some legal issues raised by some of these cases, see S. Massa, "Secession By Mutual Assent: A Comparative Analysis of the Dissolution of Czechoslovakia and the Separatist Movement in Canada" (1995) 14 Wisconsin International Law Journal 183; and T.N. Tappe, "Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims" (1995) 34 Columbia Journal of Transnational Law 255. For a case for the recognition of another recent secession, see A.J. Carroll and B. Rajagopal, "The Case for the Independent Statehood of Somaliland" (1992/93) 8 American University Journal of International Law and Policy 653.

43. Supra note 39 at 64.

"The evidence, which includes recent successful secession movements, international declarations, and a reading of current scholarly literature, suggests that *international law is in a process of metamorphosis*, characterised by a slow acceptance of some right of self-determination in the form of secession, both in textual and customary forms."⁴⁴

What this may mean for the review process through which states gain international legitimacy is that other states may in fact be obliged to recognise a state which is formed by a breakaway sub-state group of an existing state in so far as the would-be state did not secede in a way that violates any other fundamental norm of international law. One case that comes to mind of a successful secession that would still be illegal and illegitimate is a case where separation has been achieved by "ethnic-cleansing"⁴⁵. In other words, even though the review-process by which states are certified or decertified as legitimate is still being conducted by the pre-existing community of states, the determination of the expressed wishes of sub-state groups has now been forced into the review criteria by a fundamental norm of international law. This is a relatively new development that is only just emerging in international law and practice.

Another norm that has had a similar effect is the^o general norm in favour of the

44. See T.N. Tappe, *supra* note 42 at 258-259. Emphasis supplied.

45. For the international law related to the prohibition of mass population transfers, the right to one's homeland, and the phenomenon of "ethnic cleansing" see A. de Zayas, "The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context" (1990-91) 6 *The Palestine Yearbook of International Law* 17; A. De Zayas, "The Illegality of Mass Population Transfers: The German Experience" (1978) 12 *East European Quarterly* 1; A. De Zayas, "International Law and Mass Population Transfers" (1975) 16 *Harvard International Law Journal* 207; A. De Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia" (1995) 6 *Criminal Law Forum* 257; and E. Kolodner, "Population Transfer: The Effect of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994) 27 *New York University Journal of International Law and Politics* 159.

protection of minority socio-cultural groups, for it is against claims to legitimate sovereignty over such groups that minority rights are often asserted. I agree with Professor Thomas Franck that, *inter alia*, contemporary international law recognises a right to cultural autonomy that can be pressed into the service of the protection of those sub-state groups that are minorities.⁴⁶ There is also a soft international law that guarantees other rights to such groups.⁴⁷ Such rights include the rights to use their own language, to participate in their own governance, to enjoy their own culture, to assemble peacefully, and to practice their own religion. This position can be gleaned from an interpretation of a number of international agreements that establish these and related rights for minority populations.⁴⁸

46. See T.M. Franck, supra 32 at 130-145.

47. See J. Pejic, "Minority Rights in International Law" (1997) 19 Human Rights Quarterly 666.

48. It must be noted that in this thesis, minority rights are not treated as constituting, in and of themselves, a panacea. Rather I treat them as just one of the many resources that might be deployed to actually protect socio-cultural minority populations. In this way I avoid what Professor Shadrack Gutto has described as the fetishisation of rights. See S.B. Gutto, Human and Peoples Rights for the Oppressed (Lund: Lund University Press, 1993) at 41. In a sense my treatment of socio-cultural minority rights is analogous to the treatment of the right to development by Wade Mansell and Joan Scott who are convinced that recourse to the language of rights provides an effective means of rendering visible a challenging and innovative conception of an idea such as the development imperative. See W. Mansell and J. Scott, "Why Bother About a Right to Development?" (1994) 21 Journal of Law and Society 171. In the present case, recourse to the language of the rights of socio-cultural minorities provides a rather effective way of re-ordering the relationships among established states and their sub-state groups, and therefore of reading the changes that these new kinds of relationships may have brought to the concept of legitimate statehood in contemporary international law. In a similar vein, I agree with Patrick Thornberry that a progressive concept of the protection of socio-cultural minorities ought not to entail the "museumification of cultures". Rather it ought to be one which locates the agents of change in the target culture(s). See P. Thornberry, infra note 61 at 21.

These include article 27 of the ICCPR,⁴⁹ and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities⁵⁰. It must be noted though, that arguably, these two agreements do not confer rights on minority groups *qua* group, but on *persons* belonging to such groups.⁵¹ Needless to say, protections conferred in that way are still a useful resource in the struggle to protect minority populations. Similar protections are accorded by articles 19-23 of the African Charter on Human and Peoples' Rights; article 30 of the Convention on the Rights of the Child⁵²; and the European Framework Convention for the Protection of National Minorities⁵³. The Vienna Declaration and Programme of Action is also a general international "agreement" which, in paragraphs 25-27, affords protection to socio-cultural minority groups.⁵⁴ Relevant

49. For a discussion of this provision as a socio-cultural minority protection clause, see J. Packer, "On the Content of Minority Rights" in J. Raikka, ed., Do We Need Minority Rights (The Hague: Kluwer Law International, 1996) at 121.

50. U.N. Doc. A/Res/47/135 of 18 December 1992, reprinted in (1993) 32 I.L.M. 911. See also U.N. Doc. A/Res/48/138 and U.N. Doc. A/Res/49/192 (on the implementation of the provisions of the Declaration). For a history of the drafting process of this declaration, see G. Alfredsson and A. de Zayas, "Minority Rights: Protection by the United Nations" (1993) 14 Human Rights Law Journal 1. On the content of national minority rights, see J. Packer, *ibid.* See also J. Packer, "United Nations Protection of Minorities in Times of Public Emergency: The Hard Core of Minority Rights" in C. Stenersen, ed., Non-Derogable Rights and States of Emergency (Brussels: Association of International Consultants on Human Rights, 1996) at 501.

51. See P. Thornberry, *infra* note 61 at 28. See also M.R. Geroe and T.K. Gump, "Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe" (1993) 32 Columbia Journal of Transnational Law 673.

52. (1989) 28 I.L.M. 1448.

53. See Council of Europe Doc. H(94) 10 of 8 November 1997.

54. (1993) 32 I.L.M. 1661.

OSCE political agreements include principle VII of the Helsinki Final Act of 1975⁵⁵; paragraph 9 of the Vienna Concluding Document of 1986-89⁵⁶; paragraphs 30-39 of the Copenhagen Document of 1990; and the Charter of Paris of 1990⁵⁷. Important Council of Europe documents include article 14 of the European Convention on Human Rights⁵⁸, the Draft European Convention for the Protection of Minorities of 1990 (which was rejected by the Council of Europe), and the European Charter for Regional or Minority Languages.⁵⁹

These are, however, recent developments in the post-1945 or UN era of world politics.⁶⁰ Until very recently, fragmentation was not so *overtly* considered to be a part of the deep structure of the modern state.⁶¹ Minority issues were relegated to the back seat by the UN in contrast to the attitude of the League of Nations which was very much concerned

55. (1975) 14 I.L.M. 1292.

56. (1988) 28 I.L.M. 527.

57. (1990) 29 I.L.M. 1305; and (1991) 30 I.L.M. 190, respectively.

58. 213 U.N.T.S. 221.

59. (1992) Eur. T. S. No. 148. See J. Symonides, *infra* note 61 at 315-319.

60. Even before the 1990s, a number of the Constitutions of African States had for example made some textual provisions that did incorporate various ideas of minority protection, but rarely were these protections respected in practice. For a brief account of this phenomenon, see H.W.O. Okoth-Ogendo, *infra* note 123 at 50.

61. See P. Thornberry, "The UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update" in A. Phillips and A. Rosas, eds., University Minority Rights (Turku/Abo and London: Abo Akademi Institute and Minority Rights Group (International), 1995) at 14. See also S. Trifunovska, "Issues of Minorities in the European Peace and Security Context" (1996) 3 International Journal on Group Rights 283-299; and J. Symonides, "The Legal Nature of Commitments Related to the Question of Minorities" (1996) 3 International Journal on Group Rights 301-323.

with the issue in the limited geo-political context of Europe.⁶² The rather hostile attitude of post-1945 international law and institutions to the issue of minority protection, and its exclusive turn to individual rights as *the* only panacea for both intra-state and inter-state conflict is in part traceable to the abuse of the minority protection issue by Nazi Germany, and that regime's eventual destabilisation of the Versailles settlement on the pretext that it was protecting German populations who were minorities in neighbouring states.⁶³ Indeed, the stream of international concern for the protection of threatened minority groups had been so poisoned by this debacle of the so-called German pretext that the UN Charter makes no reference to minority protection as such. Moreover, the UN General Assembly rejected early proposals by Denmark, Yugoslavia and the Soviet Union for the inclusion of articles on minority protection in the Universal Declaration on Human Rights.⁶⁴ This attitude of international law and institutions seems, however, to be changing in the 1990s towards the open acknowledgement of fragmentation within established states, as well as the generation of constructive and less repressive ways of dealing with the problems associated with this

62. Nathaniel Berman has cited a passage from Kunz which aptly illustrates this point. According to Kunz:

"At the end of the first world war, 'international protection of minorities' was the great fashion ... recently this fashion has become nearly obsolete. Today the well-dressed international lawyer wears 'human rights'".

See J.L. Kunz, "The Present Status of the International Law for the Protection of Minorities" (1954) 48 American Journal of International Law 282. See also N. Berman, "The International Law of Nationalism: Group Identity and Legal History" (Unpublished draft paper on file with the present writer).

63. Ibid at 17.

64. Ibid.

phenomenon.

Apart from this normative turn, several practical measures have been taken to deal with the problem. For example, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities has done a huge amount of work in this area. In particular it has appointed a Special Rapporteur to study the problem and report to it on the matter.⁶⁵ And the Special Rapporteur has produced a number of reports and papers.⁶⁶ Again, in 1992, the Organisation for Security and Cooperation in Europe (OSCE) appointed Max van der Stoep as the first High Commissioner on National Minorities, as a kind of "mediator" amongst socio-cultural groups and the states of which they are a part.⁶⁷ This is a major innovation in the field of intra-state relations. A similar office, the Commissioner for Human Rights and Minorities Questions, has also been created by the Council of the Baltic Sea States (CBSS).⁶⁸ Ole Espersen was appointed as the first Commissioner.⁶⁹ It must be noted, however, that despite its widespread acceptance amongst states, the UN

65. Francesco Capotorti and Asbjorn Eide has been Special Rapporteur. See G. Alfredsson and A. de Zayas, supra note 50 at 83. See also F. Capotorti, Study on the Rights of Persons Belonging to Ethnic and Linguistic Minorities (New York: United Nations, 1991).

66. For example, see U.N. Doc. E/CN.4/Sub.2/1993/34, U.N. Doc. E/CN.4/Sub.2/1993/34-Add.1, U.N. Doc. E/CN.4/Sub.2/1993/34-Add.2, U.N. Doc. E/CN.4/Sub.2/1993/34-Add.3, U.N. Doc. E/CN.4/Sub.2/1993/34-Add.4, as well as his working paper contained in U.N. Doc. E/CN.4/Sub.2/1994/36 (all on the possible ways and means of preventing the outbreak of violence between the state and any of its sub-state groups, or between such groups inter se).

67. See A. Bloed, "The OSCE and the Issue of National Minorities" in A. Phillips and A. Rosas, eds., supra note 61 at 113.

68. See G. Alfredsson, supra note 50 at 79.

69. Ibid at 85.

Declaration on the Rights of Minorities was adopted without a monitoring mechanism.⁷⁰

At this juncture, it must also be noted that minority and other sub-state groups are also protected by the international legal norms proscribing racial and other forms of discrimination against them and outlawing genocide. Both rules are now well-established in international law.⁷¹ And both have been respectively codified in the United Nations Convention Against Genocide⁷², and the United Nations Convention on the Elimination of All Forms of Racial Discrimination⁷³.

The operation of the emerging norm in favour of the protection of minority groups that are a part of established or would-be states is therefore evidence that the legitimacy of states must now be assessed against the background of their behaviour toward any or all of their sub-state groups.⁷⁴ And this is one way in which the concept of legitimate statehood in international law is being transformed toward greater deference to, and concern for, the internal reality of states, as well as toward the greater incorporation of the infra-review approach in the process of international decision-making regarding the legitimacy of states.

A note of caution must, however, be sounded at this juncture in view of the fact that

70. Ibid at 82.

71. See N. Lerner, supra note 26 at 24.

72. 78 U.N.T.S. 277.

73. 660 U.N.T.S. 195. Reprinted in (1966) 5 I.L.M. 352.

74. European states have actually codified this emerging norm in what may be described as a "soft law" document. The document makes it clear that the protection of the right of minorities is a condition precedent to the conferment of legitimacy on emergent European states. See Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, reprinted in (1993) 9 European Journal of International Law 46, annex at 72.

the emerging turn to infra-review is still being greatly impeded by a fundamental norm of international law that favours the territorial integrity of established states, as well as by a variant of this norm that favours the continued integral existence of the newly de-colonised states of Africa and Asia (i.e the *uti possidetis* norm).⁷⁵ In its pure form, the principle that favours the territorial integrity of states demands that decisions on the political fate of a territory must respect the indivisible unity of that territory.⁷⁶ Thus, even though the principle is not fatal to the minority protection principle, it nevertheless imposes a severe limitation on the choices available to sub-state groups that might sometimes legitimately wish to re-configure their relationship with, or sever their allegiance to, the state of which they are a part. A similar argument can also be made with respect to the operation of the *uti possidetis* principle, especially in Africa. At independence, having decided that the ideal of a continent-wide nation was then premature, African leaders were faced with a choice between scylla and charibdis. They were faced with the hard choice of either re-drawing Africa's internal borders on a massive scale (in which case the continent faced the risk of cataclysmic destabilization at a time when it had just begun to secure its autonomy from colonial rule), or of maintaining what were extremely arbitrary and problematic inter-African borders (in which case they faced the risk of internecine strife among the rather alienated sub-state groups that composed the newly independent states). As I have already pointed out in Chapter two, they chose the latter.

75. See B. Driessen, The Concept of Nation in International Law (The Hague: TMC Asser Instituut, 1992) at 67.

76. Ibid.

At the 1964 Assembly of Heads of States and Governments of the Organisation of African Unity (OAU), a decision was taken which⁷⁷, according to Professor Makau wa Mutua, "sanctified the colonial state by ratifying its borders and forbidding even idle speculation about reconsideration of the issue".⁷⁸ Since then, official ideology against secession, border changes, separatism, or sub-state self-determination within an established African state has been incredibly strong.⁷⁹ Since the era of the Katangese and Biafran secession attempts, the OAU has taken a very strong stance in favour of the *uti possidetis* norm, and African state practice was, for over thirty years after that, nearly uniform in its commitment to the territorial integrity of states and opposition to secession.⁸⁰ To borrow a phrase once used in a different context by Professor Ivan Head⁸¹, the "normal" has since become "normative".⁸²

Thus, it is rather too early to celebrate either the edification of the wishes of sub-state groups by international law or the triumph of the *infra-review* approach over the *peer-review*

77. See M. wa Mutua, *infra* note 78.

78. See M. wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Enquiry" (1995) 16 Michigan Journal of International Law 1113 at 1119. See also M. Koskenniemi, *supra* note 38 at 259.

79. *Ibid.*

80. See J. Dugard, *supra* note 41 at 164; and D.A. Ijalaye, "Was Biafra at Any Time a State in International Law?" (1971) 65 American Journal of International Law 551.

81. See I.L. Head, *Book Review* (1990) 28 The Canadian Year Book of International Law 635 at 636.

82. This is evident from two fairly recent international judicial and quasi-judicial decisions. See *the Guinea v Guinea-Bissau Maritime Delimitation Case* (1988) 77 International Law Reports 636; the *Case Concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) (1986) ICJ Rep 1.

approach. Indeed such a complete triumph is unlikely to occur in the near future. What can be celebrated, however, is the gentle swing that the pendulum of the law is making toward the recognition of the need for the law to acknowledge overtly the existence of fragmentation within states, and to accommodate sub-state groups in the law's imagination of the nature and future of legitimate statehood. But the pendulum could yet swing in the reverse direction.

Moreover, as Gudmundur Alfredsson has observed, the post-1945 international law turn to minority protection is still at its earliest stages⁸³. For that reason, this momentum is hardly irreversible. As Professor Nathaniel Berman has noted:

"Conventional accounts ignore the discontinuities in the history of the international law of nationalism [and minority protection]: rather than a smooth process of customary law 'ripening', this history has been one of construction, denunciation, rupture, and resumption."⁸⁴

Nevertheless, in this particular epoch of international legal history (i.e the period between the late 1980s and the present), there is much evidence to support the proposition that increasingly the law *universally* expects that a legitimate state must recognise the rights of its constituent groups, as well as treat them according to minimum standards set by the law.⁸⁵ While this is, in our own time, certainly a whole new way of imagining legitimate

83. See G. Alfredsson, "Minority Rights: A Summary of Existing Practice" in A. Phillips and A. Rosas, Eds., supra note 61 at 77. Nigel Rodley seems, however to be much more optimistic in his own assessment. See N. Rodley, "Conceptual Problems in the Protection of Minorities: International Legal Developments" (1995) 17 Human Rights Quarterly 48.

84. Supra note 62 at 2.

85. This has sometimes included the recognition in some form or the other of such groups as legitimately equal bargaining parties with the states of which they are part. For example, see the Agreement on the Gaza Strip and the Jericho Area (Isreal-Palestine Liberation Organisation), 4 May 1994, (1994) 33 I.L.M. 622. Reference may also be made to the Dayton Agreements on peace in Bosnia. See the General Framework Agreement for Peace in Bosnia and Herzegovina (1996) 35 I.L.M. 75.

statehood (a new concept of legitimate statehood), it is not entirely unprecedented in the history of international law. This is the basis of my claim that the law's treatment of fragmentation has been characterised by a persistent oscillation between opposing approaches to that problem, and yet has on the balance deferred to the peer-review approach.

The next chapter of this thesis will attempt to map the relationship between this attitude, this deference to peer-review, and the internecine strife that afflicts many post-colonial African states. Before that, however, an attempt will be made in this chapter to expose the identity and nature of the other attitudes that international law and institutions have exhibited toward the problem of fragmentation. The reader is urged to keep in mind the fact that while what I have described as international law's persistent oscillation and deference to the peer-review approach has been particularly evident in the context of the contest for supremacy between peer- and infra-review. To varying degrees, this oscillation has also featured in the development of the other doctrinal attitudes exhibited by international law to sub-state groups. However, brevity dictates against a repetition, in the other sections of this chapter, of this argument about international law's tendency to oscillate between opposing positions.

C. INTERNATIONAL LAW'S DEFERENCE TO THE EFFECTIVENESS PRINCIPLE:

In this section, I will explore yet another emergent shift in the attitude of international law and institutions toward the question of fragmentation within states, as well as indicate how that shift is currently affecting the international legal concept of legitimate statehood. I will also attempt to show how the emerging decline of the effectiveness doctrine is

currently creating normative space for the protection of cohesive sub-state groups under international law, thereby altering the concept of legitimate statehood in international law in a particular way. The traditional deference of international law to the doctrine of effectiveness is slowly giving way to the incorporation of normative requirements in decision-making regarding the legitimacy or otherwise of states.

The gravamen of the doctrine of effectiveness as it relates to the international law of statehood has been ably re-stated by Professor James Crawford. According to him, that doctrine, which has enjoyed the support of a wide spectrum of legal opinion, asserts that where a state actually exists, the legality or legitimacy of its creation must be a purely abstract question since the law must take account of the new situation despite its legality.⁸⁶ Equally, so it is said, where a state does not actually exist, norms or rules requiring it to exist can only be pointless, a denial of reality, for the criterion must be *effectiveness* not *legitimacy*.⁸⁷ Well then did Timothy Christian write that, in the past, traditional international law was little more than a self-serving crystallisation of state practice which was based on the notion that when once an act had been effectively done, it was *ipso facto* lawful and legitimate.⁸⁸ Put differently, the doctrine of effectiveness is a reflection of a trend in international law in which the law consists of responses to social events, and reflects social

86. See J. Crawford, supra note 6 at 3-4. See also H. Kelsen, Principles of International Law (New York: Holt, Rinehart and Winston, 1966) at 424.

87. Ibid at 4.

88. See T.J. Christian, "Introduction" in L.C. Green and O. Dickason, eds., The Law of Nations and the New World (Edmonton: The University of Alberta Press, 1989) at X.

power⁸⁹; a trend that Professor Franck has perceived as beginning to wane.⁹⁰

That this principle has also been traditionally important in the discipline and practice of international relations as the test for the legitimacy of a state is evidenced by the approach taken with regard to that principle in the work of Professors Robert Jackson and Carl Rosberg, two very important international relations scholars.⁹¹ According to these scholars, the effectiveness principle is not just a fundamental principle of international relations, it is indispensable to the success of the developmental and state-building project.⁹² The bent of their thesis is also indicative of the crucial role that the doctrine of effectiveness still plays even in the present international system.⁹³ And the international legal and institutional treatment of sub-state groups, whether of independent status or part of a larger more extensive polity has, historically speaking, not escaped the reach of this principle.

Even though traditional international law started out with a generous and open-minded idea of statehood which ascribed statehood to every independent community, by the 19th century the dominant European idea of statehood had become exceedingly positivistic. So much so that the question of the legitimacy of a state became virtually coincident with the question of the ability of a state to defend itself from military conquest. For example, even

89. See M. Koskenniemi, "The Wonderful Artificiality of States" (1994) ASIL Procs. 22 at 24.

90. According to him, "a systems reach should exceed its grasp, or what's a heaven for?". See T.M. Franck, supra note 32 at 7.

91. One of the most distinguished Africanists of his time, Professor Rosberg is now of blessed memory.

92. See R.H. Jackson and C. Rosberg, supra note 28 at 14-15.

93. Ibid at 4.

though it had been a large state for many centuries, the legitimacy of Ethiopia as a state in the traditional international society was only confirmed when it defeated the invading Italian Army at the Battle of Adowa in 1896.⁹⁴ Indeed, the Sultanate of Zanzibar was allowed by European powers to sign the Berlin Act which was produced at the Berlin Africa Conference for the partitioning of Africa only after it had demonstrated its ability to match the military might of the Belgians and the Germans in the eastern Congo basin.⁹⁵ Comparable states such as Buganda, Sokoto, Lesotho, Dahomey, and Benin which were defeated in battle were not accorded the same treatment.

This parallels the way in which legitimacy or acceptance has hitherto been accorded to sub-state entities by the international society. Such entities were, in general, treated as states once they had demonstrated their independence by matching the military capacity of their would-be conquerors.⁹⁶ If such an entity was otherwise legitimate according to then existing rules of international law and institutions, but was ineffective, in the sense that it was unable to *forcibly* demonstrate its independence, it was not, in general, treated as a legitimate state. The reverse was also true. In general, if a state was effective in the sense that it was able to forcibly demonstrate its independence, such a state was considered

94. See N.L. Wallace-Bruce, supra note 15 at 24. See also N.L. Wallace-Bruce, "Africa and International Law-The Emergence to Statehood" (1985) 23 *The Journal of Modern African Studies* 575.

95. See J. Fisch, "Africa as Terra Nullius: The Berlin Conference and International Law" in S. Forster, W.J. Mommsen, and R. Robinson. eds., Bismarck, Europe, and Africa: The Berlin West Africa Conference 1884-1885 and the Onset of Partition (Oxford: Oxford University Press, 1988) at 361.

96. Here the rules relating to secession, civil wars, and belligerency are instructive. On belligerency, see W.E. Hall, A Treatise on International Law (Oxford: Clarendon Press, 1917) at 29-30.

legitimate, regardless of the fact that it may in fact be illegitimate under the then existing rules of legitimate statehood. A good contemporary example is the legitimacy that was for a long time accorded to the Soviet states of the Baltic region.

As has been shown in the last section, at traditional international law, the secession of a sub-state group from an established state was at the very least neither prohibited nor authorised. An effective secessionist state was, in general, considered legitimate whereas a non-effective secessionist state was not. In effect, therefore, in the case of those socio-cultural groups that wished to secede from established states, the continued existence of such entities as part of their parent states was basically dependent on the ability of that state to forcibly retain them within the confines of the state. In other words, in most cases, these groups remained part of the established state not because they so *chose* or *acquiesced*, but because that state forcibly and effectively controlled their lands and their peoples.

There has, however, been a late 20th century turn away from the strict application of the doctrine of effectiveness toward a greater attempt to establish a gap between facts and norms, between effectiveness and legitimacy, in such a way that effectiveness no longer automatically translates to legitimacy. While this is, admittedly, a rather slow, limited and slight turn, it is all the same such a significant turn that it is worthy of being explored. This decline in the extent of the "stranglehold" of the doctrine of effectiveness and related principles on the international legal treatment of the problem of fragmentation, and in the international legal imagination of legitimate statehood, is evidenced by the emergence of a normative concept of legitimate statehood steeped in textual prescriptions and "ought" propositions, as opposed to one that is based on the mere fact of effectiveness or otherwise

of the relevant situation. According to one author:

"...if an entity emerges onto the international scene through the acts which are illegal under international law, no matter how effective it might be, its claims to statehood could not be maintained. It...cannot be clothed with legitimacy by the international community."⁹⁷

And so a fact-law dichotomy is emerging in this area of the law so much so that the leading authority in the field has written of his firm conviction that:

"...in recent practice, effective separate entities have existed which have, universally, been agreed not to be states - in particular Rhodesia and Formosa. Moreover, non-effective entities have also been generally regarded as being, or continuing to be, states...*the proposition that statehood must always be equated with effectiveness is not supported by modern practice.*"⁹⁸

Recent state practice relating to Kuwait and Bosnia is also in point.⁹⁹

The effectiveness doctrine is further eroded by many of the current norms and doctrines of international law, ranging from the doctrine of non-recognition of title to territory acquired by conquest¹⁰⁰ or other illegal means¹⁰¹, to norms in favour of self-

97. See N.L. Wallace-Bruce, supra note 15 at 67.

98. See J. Crawford, supra note 98 at 77. Emphasis supplied.

99. See for example M. Koskenniemi, "The Future of Statehood" (1991) 32 Harvard International Law Journal 397.

100. See H. Lauterpacht, Oppenheim's International Law (London: Longmans, 1955) at 141-143. See also article 2(4) of the UN Charter which proscribes the use of force among states in a manner which impairs the territorial integrity of the target state.

101. This norm seems to date back to 19th century Latin America, in particular the Montevideo Convention of 1933. But see article 5 of the Resolution on the Definition of Aggression, A/Res/3314 (XXXX) (1974) reprinted in (1975) 69 American Journal of International Law 480 and the Declaration on Friendly Relations, A/Res/2625 (XXV) of 4 October 1970. See P.K. Menon, "Some Aspects of the Law of Recognition" (1991) 4 Revue de Droit International 237 at 239-241; and P.K. Menon, The Law of Recognition in International Law: Basic Principles (Lewiston: The Edwin Mellen Press, 1994) at 234. See also T-C. Chen, The International Law of Recognition (London: Stevens, 1951) at 417; and

determination and the proscription of genocide.¹⁰² Indeed, the Guidelines for the Recognition of New States in Eastern Europe and in the Soviet Union¹⁰³ make no reference whatsoever to the actual effectiveness of the new states to be recognised. Instead, it contains a long list of *normative requirements* to be met by aspirant states before legitimacy can be conferred upon them by their would-be peers. Moreover, Robert Jackson and Carl Rosberg have gone as far as to argue that most post-colonial African states have been exceptions to the norm that effectiveness confers legitimacy on states, and have survived primarily by means of international legitimacy rather than effectiveness, and that their sovereignty derives more from "right" than from "might".¹⁰⁴ For the present purposes, the important point to be gleaned from this argument is that, increasingly, norms and a sense of "right" have become important elements in the determination of the legitimacy of states. They have also become important considerations in the formulation of international legal and institutional responses to the separatist aspirations of certain sub-state groups. International law and institutions have thus gone beyond their traditional indifference to the normative legitimacy of established and effective states. They have even begun to prescribe norms and rules that attempt to regulate what a legitimate state is or is not, and how sub-state groups might or might not acquire statehood. Professor Alan James has offered us a list of the kinds of states

J. Dugard, International Law: A South African Perspective (Kenwyn, South Africa: Juta, 1994) at 74-75.

102. See infra section B.

103. Supra note 74.

104. See R.H. Jackson and C. Rosberg, supra note 28 at 2. See also D. Turk, "The Dangers of Failed States and a Failed Peace in the Post Cold War Era" (1995) 27 New York University Journal of International Law and Politics 625 at 626.

that might sometimes be considered illegitimate under the rules of contemporary international law and politics. These include states created illegally, puppet states under the control of another power, apartheid homelands, racist states, and splinter states.¹⁰⁵ Of all of these kinds of states, the most clearly illegitimate under the current law would be racist, apartheid¹⁰⁶, puppet, and illegally created states. It is no longer true that all splinter states are necessarily illegitimate, as witness Eritrea and the new states of Eastern Europe.

It must be noted, though, that there is something to be said in favour of the stabilising impact that the doctrine of effectiveness has sometimes had. Indeed, very few, if any, scholars have advocated the total elimination of this doctrine from the language of international law. Most have merely urged that it not be the sole determinant of legitimacy in all contexts and for all time. Arguments that might be offered in favour of the principle include pointing to the absence of a central authority to adjudicate a norm/rule-driven evaluation of the legitimacy of the internal organisation of states. Another might be to contend that international law risks losing its credibility if it challenges effective but illegal situations and fails to alter them.¹⁰⁷ To these arguments Crawford replies that the evaluation of the legitimacy of states is as subject to the adjudication of a central regime as most other areas of international law; that the law also risks becoming ineffective when it

105. See A. James, Sovereign Statehood (London: Allen and Unwin, 1986) at 150-161.

106. But see the difference in opinion between H.J. Richardson, III, "Self-Determination, International Law and the South African Bantustan Policy" (1978) 17 *Columbia Journal of Transnational Law* 185, and D.E. deKieffer and D.A. Hartquist, "Transkei: A Legitimate Birth" (1978) 13 *New England Law Review* 429. The overwhelming evidence and scholarly opinion seems, however, to point in the direction of the illegitimacy of such states. See J. Crawford, supra note 6 at 222-227.

107. See J. Crawford, supra note 6 at 79.

does nothing about illegal though nevertheless effective acts or situations.¹⁰⁸

The latter argument is evidence of the paradox described by Hans Kelsen. This is the choice between either bringing the law into contempt through recognising illegal situations or doing the same by advertising its impotence in the face of effective though nevertheless illegal changes.¹⁰⁹ While there is no simple solution to this riddle, no alchemy by which to escape the clutches of what is a perennial paradox, it seems that the law need not always be impotent in the face of illegality, and so need not always confer legitimacy on effective but illegal situations just so that the law might seem potent. It was, after all, the total absence of international legitimacy that reinforced local resistance and eventually deprived the South African Bantustans of their ambitions to legitimate statehood. Professor Thomas Franck correctly suggests that the *reality* of Bantustan statehood was averted by the refusal to invest any of them with the *symbols* of state legitimacy.¹¹⁰

Be that as it may, it is again still too early to declare an absolute victory for the principle of legitimacy over the strict version of the doctrine of effectiveness. While effectiveness no longer automatically confers legitimacy, the doctrine is still an important element of international law and practice. The pendulum of international law may yet swing back to the side of the effectiveness principle, especially if the costs of de-legitimising effective but illegal situations become too heavy for the system to bear. That the last word has not been said on this subject can be demonstrated by reference to a relatively recent

108. Ibid.

109. See H. Kelsen, supra note 22 at 430-431.

110. See T.M. Franck, The Power of Legitimacy Amongst Nations (New York: Oxford University Press, 1990) at 112.

debate between Professors Francis Boyle and James Crawford on the legality and legitimacy of the state of Palestine. While Professor Crawford felt that it was difficult to see how Palestine could constitute a state under international law when neither the Palestine Liberation Organisation (PLO) nor the Palestine National Council was effectively in charge of the relevant territory¹¹¹, Professor Boyle felt that the state satisfied all the criteria for statehood, especially the requirement of effectiveness, since the PLO already exercised control over large amounts of territory and people in the relevant area.¹¹²

All in all, it must be kept in mind that, even today, the doctrine of effectiveness remains the *dominant* criterion for the evaluation and acceptance of the statehood by the members of the international community. Nevertheless, under contemporary international law, states which are created as a result of illegal conduct can no longer claim an *automatic* right to be accepted and incorporated by the law. As the international system approaches the turn of the millennium, an identifiable momentum seems to be becoming ever more visible; a momentum that seeks to limit the excessive influence of the doctrine of effectiveness on the processes of international decision-making. Increasingly, the law is turning to its own norms, turning to itself, in order to provide the criteria for the evaluation of the legitimacy of states. In this way, the law has also begun to alter the way it traditionally treated the question of fragmentation. I suggest that international law will no longer keep completely

111. See J. Crawford, "The Creation of the State of Palestine: Too Much too Soon?" (1990) *European Journal of International Law* 307. But see Y. Osinbajo, "Legality in a Collapsed State: The Somali Experience" (1996) 45 *International and Comparative Law Quarterly* 910.

112. See F. Boyle, "The Creation of the State of Palestine" (1990) *European Journal of International Law* 301.

silent in the face of the forcible suppression of a sub-state group by the power of the established state of which it is a part. The law now requires that for a state to be legitimate, it must be much more than merely effective. States must also treat their constituent groups according to the dictates of the norms of international law that govern such relationships. In this sense is the decline of the hegemony of the doctrine of effectiveness heralding the onset of a trend toward the normative protection from state power of sub-state groups.

The next chapter will deal squarely with the costs of this waning, yet still influential, doctrine to international peace and development, but not before brief discussions of the other attitudes of international law to the question of fragmentation within states.

D. INTERNATIONAL LAW'S GLORIFICATION OF EMPIRE:

That traditional (especially, 19th century) international law glorified or, at the every least, facilitated the construction of empires and large centralised states, is now axiomatic and does not require extensive demonstration. Suffice it to state simply that, as Professor James Anaya has noted, traditional international law did not frown upon the "empire-building" that led to the current political configuration of the Americas, Asia and Africa.¹¹³ However, it is noteworthy that formal colonialism is *passe* in our time¹¹⁴.

Despite the fact that international law has never formally outlawed de-centralised states, certain of its norms continue to this day to facilitate the construction, sustenance, and

113. See S.J. Anaya, "The Capacity of International Law to Advance Ethnic or Minority Rights Claims" (1991) 13 Human Rights Quarterly 403 at 405.

114. See the Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/Res/1514(XV), U.N. Doc. A/4684 (1961).

survival of large, centralised, post-colonial states. This has been so, even though some of such states are to many of their constituent groups just as "imperial" as the formally colonial empires of yesteryears.

The essence of this later-day quasi-imperialism is partly captured by Professor John Dugard's definition of sovereign independent states as "territorial units with strong centralised governments".¹¹⁵ Implicit in the image of a strong centralised state are images of "quasi-empire"; centralisation, scale and power over its inhabitants. This has to be so because, as an empirical matter, most of the independent polities that exist in today's world and enjoy the benefits afforded by certain norms of the law, are relatively larger and relatively more centralised than the majority of states that existed at any other epoch in the history of the world. In any case, there would not be as much need for strong central authority in any polity if it was not spread out over a considerable amount of geographic space. Neither would there be a need for so much centralisation were not most states internally fragmented. For are not the vast majority of contemporary states composed of a number of sub-state groups? As an axiomatic fact, the overwhelming majority of states in the world cover a considerable area of land, have centralised governments, exercise considerable power over their populations, and are composed of a number of sub-state

115. See J. Dugard, *supra* note 41 at 9. As used here, the term "centralisation" is not meant to discount the existence of federal and confederal states the world over. Rather, the point that is being made is that even in these federal and confederal states, the existence of a relatively strong central regime, of a relatively centralised state, has been viewed as indispensable to the maintenance of the integrity of the "union".

groups.¹¹⁶

It is true that the international legal order has, as a general rule, never imposed a lower limit on the size of a state. It is also true that a number of micro-states dot the international political landscape. What must be kept in mind, though, is that despite the existence of empires and multi-city states even in the ancient world; at no time in the recorded history of state-formation has there been so few independent city-states and one-village polities. At no time has it been as difficult to conceive of a one-village, or one-town, state as now. Indeed, one major trend in world politics has been toward larger political formations such as the European Union. And many of the sub-state groups that have recently established their own states have eventually indicated their desire to accede to larger regional political formations. Good examples are Croatia's impending admittance to the European Union and Eritrea's impending accession to the African Economic Community.

Thus, quite apart from the facilitation of empire, scale and centralisation by such international legal norms as those in favour of *uti possidetis* and the maintenance of the territorial integrity of established states¹¹⁷, the reality of international politics has been that since the time of the ancient state of Kemet (i.e Egypt), states have, in general, always been

116. Only few states such as Monaco, the Vatican, Singapore, and Liechtenstein do not share these characteristics.

117. These norms tend to discourage secession within large centralised states and disclose a general desire on the part of the law for the continued integral existence of such large states. While these norms do not require states to refrain from de-centralisation, it is only of recent that the law has begun to require states to de-centralise. Fragmented states are now generally required by the norms of international law in favour of the self-determination of peoples, and the protection of minorities, to grant some measure of political autonomy to their sub-state groups. For instance, see article 1 common to both the ICCPR and the ICESCR.

imagined as geographical entities with at least two cities.¹¹⁸ This fact is captured in the following excerpt from the work of Alexandrowicz where he stated that:

"Many of these units [i.e some African polities], often of a nomadic character, were united, prior to the arrival of the Europeans, by great political leaders who converted them into *bigger* territorial units of a *sovereign* character."¹¹⁹

The implicit assumption is of course that only the bigger entities could be sovereign, and therefore qualify as states or legitimate states. Based on this image or criterion of statehood, neither the small one-town, or even smaller one-village, polities common at the time would have been viewed as states by commentators on the pre-colonial era of African history. The point that is being made is, of course, not that such small polities have never been accepted by the international community as legitimate states. The point is that the criteria of scale and centralisation have been generally dominant in the evaluation of legitimate statehood in recent international legal and institutional imagination. For the last century and half at least, the state has been, in general, imagined as a large centralised entity.

118. Alexandrowicz has offered an excellent account of the possible origins and spread throughout Africa of the idea of statehood which glorified the large, centralised state or empire. In his view the idea is Egyptian, and it was probably spread by the dispersal of the Royal Family of ancient Kush (a Nubian civilisation) after Kush had been sacked by invading Ethiopian forces. Indeed, as Alexandrowicz has himself noted, Hugo Grotius had classified Egypt and Ethiopia as highly centralised sovereign states. He has also offered a sophisticated account of the differences amongst African states. While the idea of the large centralised state was modified by the large confederate empires of Oyo and Ashanti who set up checks and balances and granted their provincial kingdoms autonomy, Dahomey and some others remained military dictatorships up to the days of their confrontation with the European colonialists. See C.H. Alexandrowicz, supra note 18 at 31-33.

119. Ibid at 32.

This has, however, not always been true of the international legal concept of legitimate statehood. For example, amongst early international lawyers, scale was not such an important factor in the determination of a legitimate state, or of the legitimacy of the states constructed by groups that have severed their ties with their parent states. As the early 18th century international lawyer Christian Wolff aptly puts it:

"The society which exists in the greater number of [wo]men united together, is the same as that which exists in the smaller number. Therefore just as the tallest [wo]man is no more a [wo]man than the dwarf, so also a nation, however small, is no less a nation than the greatest nation."¹²⁰

Again, both 19th and 20th century international lawyers are agreed that an entity is not disqualified from statehood merely on account of its diminutive size.¹²¹ But even though international law has oscillated between deference and indifference to large scale, in the end, as the current position of the law and state practice indicates, it has generally speaking always deferred to large scale as the ideal, desirable, referent. While the practical pursuit of this ideal has not always succeeded, the ideal itself has retained its hold on international legal and political imagination.

This trend in international law which saw the licensing of large centralised states, and which has enjoyed a significant persistence in international legal and institutional imagination, has had important consequences for international relations in general¹²², and

120. See C. Wolff, Jus Gentium Ethodo Scientifica Pertractatum (Oxford: Clarendon Press, 1934) at 15.

121. See H. Lauterpacht, supra note 100 at 118; and J. Dugard, supra note 41 at 59-65.

122. For example Wesseling has told us that the excuse offered by European scholars for the non-balkanisation of China was that it was a highly centralised state at the time of its 19th century contact with Europeans. See H.L. Wesseling, "The Berlin Conference and the Expansion of Europe: A Conclusion" in S. Forster, W.J. Mommsen, and R. Robinson, eds.,

for the international legal treatment of the fragments that compose states in particular. Socio-cultural groups have, in some cases such as the case of the Ogoni, Kataf and Bajju of Nigeria, been brutally suppressed in the drive to impose the power of the central authority on them. This situation has long persisted without significant attention being paid to the matter by international law. In effect, whatever the intention of those who made international law and policy in this area, was norms of international law such as *uti possidetis* and the maintenance of the territorial integrity of established states which have, perhaps understandably, served to protect the *status quo*, have created an environment in which international law could, in all fairness, be viewed as partly implicated in the ill-treatment of sub-state groups. In the past, states could, in the name of the internationally-accepted excuse of state-building, mindlessly suppress any of their constituent socio-cultural groups with little fear of condemnation or sanction.¹²³ While, as I have argued in the last two sections of this

supra note 19 at 527. Again, we also know that one of the images that drove and continues to drive external interventionist impulses in relation to Africa is that of "excessive fragmentation" and the absence of sufficiently effective "central authority" on the continent which, in the view of those who cultivate this image, automatically translates to a strife-ridden continent. See I. Geiss, "Free Trade, Internationalisation of the Congo Basin, and the Principle of Effective Occupation" in S. Forster, W.J. Mommsen, and R. Robinson, eds., supra note 19 at 270-275. While this view is, of course, not novel and reflects a view of African peoples and their polities which is widely shared by peoples who live outside of the continent, it is important for the way it played on the image of excessive fragmentation (the flip side of which is the absence of scale and centralisation) in order to justify the often violent colonial conquest of Africa.

123. The centralisation project has been particularly important in African statecraft, and the continent is now widely recognised to be populated by massively centralised states. See H.W.O. Okoth-Ogendo, "Constitutions Without Constitutionalism: The Challenge of Reconstruction of the State in Africa" in C.M. Zoethout, M.E. Pietermaat-Kros, and P.W.C. Akermans, Constitutionalism in Africa: A Quest for Authochtonous Principles (Deventer: Gouda Quint, 1996) at 53.

chapter, this attitude seems to be changing in favour of the protection of the rights of minorities by international law and institutions, it is yet too early to declare that the movement toward change is irreversible. To some extent only the passage of time will confirm this tendency.

In the next chapter, a full analysis of the costs of the old attitude to international peace and development will be offered, but not before an examination in this chapter of two other doctrinal attitudes that international law has exhibited toward the problem of fragmentation within established states.

E. INTERNATIONAL LAW'S HOMOGENISATION/DOMESTICATION OF SOCIO-CULTURALLY DIFFERENTIATED GROUPS:

The erstwhile confusion in some quarters of the existence of "states" with one of its many historical expressions, the "nation-state"¹²⁴, is important in the understanding of the development of the concept of legitimate statehood in the international system. Exhibiting a characteristic sensitivity toward history, Crawford Young has traced the historical diversity of state-types from today's nation-states to the earliest states of the Nile Valley. According to him:

"The state as a form of human organisation goes back at least 5000 years; like mankind itself, it is quite probably an African innovation, first germinating in the rich soil of the Nile valley. Many different forms of the state may be discerned in the centuries since 3000 BC...[t]he Greek city-state, the world [sic] empire of Rome, the bureaucratic-empire of China, the military-patronage state of medieval Islam, the Mercantile trading state of Venice, are

124. See G. Nzongola-Ntalaja, Nation-Building and State-Building in Africa (Harare: Sapes Books, 1993) at 11.

suggestive of the range of variations."¹²⁵

It is widely accepted among political scientists that the specific form of the nation-state created in Europe over the course of the 17th, 18th and 19th centuries, was defined by a qualitatively tighter territorial demarcation than other state-types as well as by an extremely formalist institutionalisation that dictated allegiance to an abstract phenomenon known as the state, instead of to a person. Also, this form of statehood all-too-often required *mono-cultural* or homogenous nationhood.¹²⁶ It is this last characteristic that is most important for the argument being made here.

The European ideal of the construction of relatively homogenous nation-states in which nation and state coincided, as opposed to territorial-states that are composed of many distinct nations or sub-state groups, has dominated the imagination of international lawyers and policy-makers for far too long. Until recently, there had not been much serious re-thinking or actual re-making of the very basis of the nation-state. Since the Peace of Westphalia in AD 1648, the idea of the nation-state has remained ascendant. Social scientists still look to the age of John Locke for solutions about today's political complexities. Yet, few, if any, physical scientists still regard the age of Locke's contemporary, Isaac Newton, as the determining age of their discipline.

125. See C. Young, "Ethnicity and the Colonial and Post-Colonial State in Africa" in P. Brass, ed., Ethnic Groups and the State (London: Crom Helm, 1985) at 61. Indeed, Thomas Baty has even suggested that the term state itself (as opposed to the idea of statehood) seems to have originated in the sanskrit root word sthana, which signifies physical standing or stability. See T. Baty, International Law in Twilight (Tokyo: Matuzen, 1954) at 304.

126. Ibid at 61. See also M. Horsman and A. Marshall, After the Nation-State (London: Harper Collins, 1994) at 44; and J.R. Strayer, On the Medieval Origins of the Modern State (Princeton: Princeton University Press, 1970) at 5-9.

Since the globalisation of that state-building model *via* the instrumentality of colonial rule, it has become the fashionable model for statehood the world over.¹²⁷ In the case of international law's apparent normative desire for *upwardly* homogenous statehood¹²⁸, Asbjorn Eide has noted that:

"From the standpoint of international law, the 'permanent population' [which is stated to be a requirement for statehood in the Montevideo Convention], is synonymous with 'the nation'. From a social or anthropological perspective...this is not always so."¹²⁹

Stabilising norms of international law such as those which favour *uti possidetis* and the maintenance of the territorial integrity of established states are important expressions of this desire by the law to "upwardly" homogenise the populations of states contained within set borders. Both norms forbid the break-up of fragmented states into smaller separate states. Therefore, the law seems to expect that all such populations will become large cohesive groups or "nations" with varying degrees of rapidity. Thus, international law has traditionally facilitated, or at least not frowned upon, the attempt by established states to upwardly homogenise their populations into larger unified nations, despite the fact that the overwhelming majority of states are in fact fragmented. The law has historically provided a powerful argument and justification for the coercive homogenisation of the fragmented populations that compose states.

127. *Ibid* at 12.

128. By this is meant the homogenisation of diverse nations or groups into a single, larger, nation. This is very different from downward homogenisation which is achieved by the withdrawal of a distinct group from their parent state as was attempted in Bosnia, or through the perpetration of genocide on other groups as happened in Rwanda and Bosnia.

129. See A. Eide, "Minority Protection and World Order: Towards a Framework for Law and Policy" in A. Phillips and A. Rosas, eds., *supra* note 61 at 96.

That this tendency persists till this day, albeit in a milder form, is evidenced by the proscription of secession, and the relative immaturity of the norms of international law that seek to protect the very minority socio-cultural groups that are the usual victims of forcible homogenisation¹³⁰. Indeed, even under the contemporary law of the United Nations, perceived threats to national unity and the territorial integrity of established states still outrank the protection of the rights of minority populations.¹³¹ Again, it is important to note that states have sometimes been prepared to go to extremes in order to consolidate their homogenisation projects. For instance, France has entered a declaration relating to the ICCPR, which has been interpreted by the Human Rights Committee (HRC) to be in fact a reservation to article 27 of the ICCPR (which guarantees some rights to members of minority socio-cultural groups).¹³² The French declaration was to the effect that no minority groups in fact exist in France¹³³; an attitude that may have been inadvertently encouraged by the HRC. The HRC may have done so by rejecting a communication brought before it by

130. Note, however, that, in effect, article 27 of the ICCPR may be read as constituting a mild prohibition of the forced assimilation of socio-cultural minority groups. This provision is capable of interpretation as a counter-homogenising tendency in international law. In practice, however, the contents of this provision have been largely ignored by those engaged in the construction of the new states of Afro-Asia. In any case, the provision only came into effect as recently as 1976 and may thus be read as a part of the on-going normative transformation of post-1945 international law and institutions.

131. This is a logical deduction from the continuing dominance of the doctrines of effectiveness and the maintenance of the territorial integrity of states under international law.

132. See T.K. v France and M.K. v France Report of the Human Rights Committee, Vol. II GAOR, Forty-fifth Session, Supp. No.40, U.N. Doc. A/45/40 at 118-126 and 127-134.

133. But see the HRC's insistence in its general comment on article 27 that the existence of socio-cultural minorities in a state is a factual matter establishable by objective criteria. See General Comment 23(50) on Article 27, Report of the Human Rights Committee, Vol. I GAOR Forty-ninth Session, Supp. No. 40, U.N. Doc. A/49/40 at paragraph 5.2.

speakers of the Breton language alleging violations of their language rights under article 27 of the ICCPR by the French state.¹³⁴ Turkey, Venezuela, and France have also entered similar reservations to article 30 of the United Nations Convention on the Rights of the Child.¹³⁵

It must be noted, however, that contemporary international law is even now renewing itself, and discarding its tendency to licence every type of nation-building (no matter how repressive or violent). It is doing so through its slow, but on-going, turn toward emphasising the international protection of minority groups. As already discussed in Section B of this chapter, it is also modifying its attitude to secession. Thus, the law is presently transforming its concept of legitimate statehood by making significant changes in the ways in which it treats sub-state groups. While this is not entirely novel in the history of international law, since the League of Nations also had a system for the international protection of Eastern and Central European minority groups¹³⁶, it is a novelty both because of its potentially global application and also because it comes a half-century after the rupture of the League system.

Of the two kinds of movement away from the ideal of the upwardly homogenous state, it appears that the trajectory of minority protection is, in general, to be preferred over that of secession. The character of recent events might lead one to suppose that even while exhibiting their best qualities, both trajectories show little else but the potential to renew the state-system as the primary form of human social organisation, while protecting 'difference'.

134. *Ibid.*

135. Reprinted in (1989) 28 I.L.M. 1457.

136. See A. Phillips and A. Rosas, *supra* note 61 at 15-16

Thus, though Professor David Kennedy has noted that, "it is puzzling that those asserting their difference should so often sound out of date..."¹³⁷, it seems to me that, in the end, the international protection of minorities within established states renews and reinvigorates the position of statehood as the "ideal" unit of international relations. So also the success of secession. If that is correct, if both trajectories lead to the same theoretical denouement, then there is something to be said for a general preference for the less destabilising, yet quite progressive, approach of minority protection. For, in general, the "heaven" that both established states and secessionist groups so often desire is already here with us; i.e. the state. And this is one of the many paradoxes of this area of the law: that the upward homogenisation of a number of socio-cultural groups into a larger cultural community or nation, and the downward homogenisation of one such group when it secedes from a multinational state, in order to escape the clutches of repressive nation-building, are both homogenising. Both tendencies reach for the very same "heaven"; i.e. the homogenous nation-state.

Another attitude that is also exhibited by international law and organisation to the problem of fragmentation within established states, and as such another element of the concept of legitimate statehood in international law, is the doctrine that favours the normative and factual domestication of sub-state groups. Sub-state groups are currently allowed little, if any, formal access to the international arena. This is an attitude that is closely related to the homogenisation project, in the sense that since the populations that make up states are

137. See D. Kennedy, "Some Reflections on the Role of Sovereignty in the New International Order" (1992) CCIL Procs 237 at 238.

imagined by international law as a unity, states are represented in the international arena by the nominees of the central regime, no matter how unpopular or unrepresentative that regime is among the peoples of the relevant sub-state group. For instance, the Nigerian government is assumed to represent the interests of Ogonis at international fora, even when it has become clear that that regime enjoys very little, if any, support or adherence among the Ogoni people. This is the phenomenon that Professor Franck has aptly styled "the single voice organising principle of international relations".¹³⁸ This is, needless to say, a convenient fiction invented by the law so as to substitute continual and incessant enquiry as to the adequacy of representation afforded a particular population, with formalist certainty as to who is entitled to represent any relevant group of people. Put differently, at a fundamental level, the law has not, in the past, troubled itself with the relevance of the question of fragmentation to the question of the capacity of governments to represent all sections of the population of the state they rule over.

Sub-state groups that claim to represent some of the very citizens that a state claims and is assumed to represent have, in general, been factually and normatively shut out from the centres of international negotiation, law-adjudication, policy-formulation, or law-making. Such groups have traditionally had little or no access to international judicial or quasi-judicial fora. This was somewhat understandable in the past, given the fact that many of such groups are in direct competition with established states, and given the need for some measure of

138. See T.M. Franck, *supra* note 32 at 481.

stability in the international system.¹³⁹

However, it is precisely because exceptions have been made to the application of the general rule in cases where there has been severe and prolonged violence between a state and one or more of its constituent groups, as in the cases of the Palestinians, the Croats in Bosnia, and the Eritreans, that there is need to alter this attitude of international law in this regard. The law needs to create more peaceable avenues for sub-state groups to gain formal access to the international sphere. More often than not, the signal that has been sent to sub-state groups by international law is that the use of force usually authorises voice; that one of the most effective ways to secure an international voice is to launch an armed struggle. Rarely have such groups ignored this message.¹⁴⁰ More often than not, violence has characterised state/sub-state group relations the world over.

Happily though, this attitude of the law has been slowly changing in the last few years. It is increasingly being recognised by international lawyers and diplomats that the present normative order is largely intolerable in this regard.¹⁴¹ Even the relevant state practice on the matter is no longer absolute. Quite apart from the access to the international arena that has been historically afforded to those socio-cultural groups that have been involved in prolonged violence with their parent states, international law and institutions have

139. See D. Whippman, "Hearing Voices Within the State: Internal Conflicts and the Claims of Ethno-National Groups" (1995) 27 New York University Journal of International Law and Politics 585 at 586.

140. The break-up of Czechoslovakia into the Czech and Slovak Republics is one of the rare instances when this message was more or less ignored by the disputants in a struggle for secession.

141. See T.M. Franck, *supra* note 32.

been making small but significant efforts to provide such access to groups who have not been involved in such violence. For example, at the global level, some non-violent groups and/or their members have been able to access the Human Rights Committee established by the ICCPR.¹⁴² At the regional level, ethnic groups now have some form of access to the OSCE High Commissioner on National Minorities,¹⁴³ as well as to the African Commission on Human and Peoples' Rights, a semi-autonomous arm of the Organisation of African Unity (OAU).¹⁴⁴ Equally important is the emerging tendency for established states to recognise the importance of negotiating with their aggrieved sub-state groups at fora that are controlled either by an international organisation or a third party. An example of this is the mediation of the OAU in a number of intra-state conflicts in Africa.¹⁴⁵

The nature of this emerging shift has been well stated by Professor Louis Henkin. In his view:

"Modern states are treated as impermeable and monolithic by international law. Its relations to its citizens [including groups of them] was regarded as beyond the reach of other states. For centuries, what transpired between a state and its inhabitants, as once between a prince[ss] and subject, was no other state's business. *While this is still a general characteristic of statehood,*

142. For example, see Bernard Ominiyak, Chief of the Lubicon Lake Band v Canada, Communication No. 167/184 reproduced in Report of the Human Rights Committee, Vol II, GAOR, Forty-fifth Session, Supp. No.40 (A/45/40), at 1-30.

143. See Fact Sheet on the Work of the OSCE High Commissioner on National Minorities (on file with the present writer).

144. For instance, see CRP (on Behalf of Zamani Lekwot and ors) v Nigeria Communication No. 87/93.

145. See C. Bakwesegha, "The Role of the Organisation of African Unity in Conflict Prevention, Management and Resolution" (1995) special issue-International Journal of Refugee Law 207.

it is no longer absolute."¹⁴⁶

The implications of the this turn toward the provision of limited access to the international arena for sub-state groups, and for the concept of legitimate statehood in the international system, are two-fold. The first is that a state which represses any of its socio-cultural groups is, because of the increasing access of such groups to the international arena, even more exposed to the possibility of being embarrassed and de-legitimated by some or all of its peers. This is because, under contemporary international law, an assessment of the legitimacy of a state must now reflect a concern for the way a state treats its constituent groups. The second is that the "ideal state" will no longer be generally imagined as if it were, or ought to be, a cultural unity, or homogenous nation-state. The visibility at international fora of the representatives, or of the claims of its constituent socio-cultural groups, will be a constant reminder to such states of the fallacy of that posture.

It is important to note, though, that, since it is almost impossible to accommodate every sub-state group by the grant of a separate voice (or, more problematically, seat) at the United Nations, credible and fair criteria ought to be found against which the desire of such groups for an international voice will be evaluated. It may be that the international community might be aided in its search for such criteria by looking to the law and practice of the various international and regional human rights implementative mechanisms. Some of these mechanisms, such as the African Commission on Human and Peoples' Rights have a

146. See L. Henkin, supra note 27 at 12. Emphasis supplied.

long practice of allowing sub-state groups to petition them.¹⁴⁷

F. THE SUMMARY OF THE ARGUMENTS:

The nature of the attitudes that international law and institutions have exhibited toward the question of fragmentation within established states has been analysed and exposed in the present chapter. Additionally, it has been suggested that the characteristics of all those doctrinal attitudes are currently undergoing slow, but on-going, transformations. This emerging transformation is leading, it is perceived, to an international legal and institutional treatment of the question of fragmentation within states that is much more cognisant of the dangers of either ignoring or forcibly suppressing the problem.

In the following chapter, the socio-economic and political costs of the old, but slowly receding, attitudes of the law to the instant problem will be examined in detail. The purpose will be to identify explicitly the effects of the old attitudes on the peace and development of African states, and to explain the reasons that make the trajectory of the emerging transformation of these attitudes a welcome development.

147. See the Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, 6 October 1995, reprinted in (1996) 8 African Journal of International and Comparative Law 978.

CHAPTER FOUR

The Contribution of Certain International Legal and Institutional Attitudes to the Problem of Internecine Violence Within Established African States

A. THE CRUX OF THE ARGUMENTS:

The major issue that is discussed in this chapter relates to the extent to which certain international legal and institutional attitudes have *contributed*¹ to the problem of internecine strife and underdevelopment on the African continent. Put differently, it relates to the ways in which many African governments seem to have been encouraged by certain doctrines of the law to resort to the use of excessive force in order to homogenise the populations of their states, and maintain the territorial integrity of such states. The law has all-too-often provided a ready and powerful justification for such projects, and has thereby contributed to the tensions and conflicts that have been produced by efforts to advance these projects. The chapter is therefore concerned with the *outcomes* of the interaction amongst these normative attitudes, and governmental attempts to respond to the concrete reality of socio-cultural fragmentation within post-colonial African states². It is suggested that the excessive use of force that has characterised the response of many African regimes to the phenomenon of fragmentation within their states has hindered past efforts to achieve sustainable peace and development on that continent.

Before I demonstrate this point, however, I will attempt to understand the nature of

1. The choice of this term does not imply the allocation to international law and institutions, of the principal responsibility for the problems currently being experienced by the post-colonial African state.

2. Hereinafter referred to as "fragmentation".

the phenomenon of fragmentation within African states. This is an important part of the overall enquiry, since it is this latter phenomenon that creates a fertile environment for the occurrence of internecine conflicts within these states. Without its entrenched presence in the fundamental configuration of the post-colonial African state, the application in Africa of the relevant international legal and institutional doctrines may have produced entirely different socio-economic and political effects. For instance, an attempt to further homogenise a relatively cohesive population is not as likely to produce as much internecine conflict as an attempt to homogenise a deeply fragmented society.

B. THE PROBLEMATIC OF SOCIO-CULTURAL FRAGMENTATION WITHIN AFRICAN STATES:³

The Neglect and Slight of an Important Subject

The neglect and slight with which "modernity" and modern scholarship have treated the twin subjects of differentiation and fragmentation within states (otherwise collectively termed "ethnicity")⁴ has been palpable in this post-World War II era. In nearly every modernist tradition, liberal, marxist or otherwise, the fundamental nature of the multi-

3. By emphasising Africa as the focus of my enquiry in this chapter, I do not mean to give the impression that fragmentation (or conflict) is the preserve of African states, or of the developing world. Fragmentation and conflict have always been global phenomena. See D. Horowitz, *infra* note 3 at 3.

4. In this chapter as in other chapters of this thesis, I use the term "fragmentation" advisedly. While, for the most part, it is used to signify the same concept as "ethnicity", the former does not carry the same baggage as the latter. Unlike the latter, the former allows the theorist to imagine internecine strife as basically social, economic and political. The expression "socio-culturally differentiated fragments" shall hereinafter be referred to as "sub-state groups".

national or multi-cultural state, and its relations with its constituent groups, has been, until quite recently, largely ignored by both "state" and "'ethnic' relations" theorists.⁵

Thus, state theorists have tended to deal with the question of statehood without incorporating the problem of "ethnic" or socio-cultural relations, while theorists of socio-cultural relations have tended to deal with their primary occupation mostly outside the sphere of the state.⁶ Yet the relationship between the state and sub-state groups is an extremely important one.⁷

Similar attitudes have also been exhibited by development theorists. Neither the "modernisation" nor the "marxist" paradigms of development studies have until recently paid much attention to fragmentation as a factor in the development process, or to the dynamics of the intra-state conflicts that are generated by such fragmentation.⁸ From the discipline of peace research⁹ through that of international relations¹⁰, to that of international law¹¹, the

5. See R. Stavenhagen, The Ethnic Question: Conflicts, Development, and Human Rights (Tokyo: United Nations University, 1990) at 10.

6. Ibid.

7. Ibid.

8. Ibid at 74-75.

9. See K. Rupesinghe, "Theories of Conflict Resolution and their Applicability to Protracted Ethnic Conflicts" in K. Rupesinghe, ed., Ethnic Conflict and Human Rights (Oslo and Tokyo: Norwegian University Press and United Nations University, 1988) at 37. See also E. Krippendorff, Minorities, Violence and Peace Research (Bologna: John Hopkins University, 1980) at 1.

10. See S. Ryan, "Explaining Ethnic Conflict: The Neglected International Dimension" (1988) 14 Review of International Studies 161.

11. See V. Segesvary, "Group Rights: The Definition of Group Rights in the Contemporary Legal Debate Based on Socio-Cultural Analysis" (1995) 3 International Journal on Group

problem of fragmentation within states was, until recently, largely ignored by scholars.

The existence of this attitude has been ascribed by a number of scholars to a number of reasons. Dov Ronen has, for instance, suggested that the attitude can be traced to a certain perspective. This is the viewpoint that holds that since the nation-state must be seen as an integral part of modernity, and socio-cultural groups must be seen as existing in competition with the nation-state, the fragmentation of states must, invariably, be undesirable, a disintegrative factor, an obstacle to be overcome.¹² Thus, even though such views have become untenable today, for the most part of the fifty-two or so years after the end of World War II many important scholars believed that "modernisation" and "democratisation" would *somehow* eliminate self-assertion and conflict in the relationships among sub-state groups.¹³ This "liberal expectancy", as Daniel Patrick Moynihan has styled it, was matched by a similar marxist prediction that, sooner than later, "proletarian internationalism" would sweep away socio-cultural cleavages within states.¹⁴ Together, these two systems of thought seemed to produce widespread contempt for the subject of "ethnic" relations among post-World War II social scientists.¹⁵

Rights 89.

12. See D. Ronen, "Ethnicity, Politics and Development: An Introduction" in D.L. Thompson and D. Ronen, eds., Ethnicity, Politics and Development (Boulder: Lynne Rienner, 1986) at 4.

13. See U. Ra'anan, "Nation and State: Order out of Chaos" in U. Ra'anan, M. Mesner, K. Armes and K. Martin, eds., State and Nation in Multi-Ethnic Societies (Manchester: Manchester University Press, 1991) at 3.

14. See D.P. Moynihan, Pandaemonium: Ethnicity in International Politics (New York: Oxford University Press, 1993) at 27-28.

15. Ibid.

In the discipline of international relations, a major reason for the prevalence of this attitude was the perspective that maintained that the study of the relations *among* states (the principal focus of the discipline), was very different from the study of relations *within* particular states (a seeming extraversion).¹⁶ In other words, while *inter*-state politics was a legitimate field of enquiry for international relations scholars, *intra*-state politics (such as the dynamics of sub-state relations and fragmentation) was not.

Another reason that has been offered for the obvious neglect of this subject in the past, as well as for the consequent lack of understanding of its nature and effects, is what Professor Donald Horowitz has characterised as the apparently "episodic character" of conflict among sub-state groups. According to him, "[i]t comes and goes, suddenly shattering periods of *apparent* tranquillity...As scholarship is reactive, the spilling of ink awaits the spilling of blood."¹⁷ While the episodicity of such conflict is more apparent than real, and less fleeting than it seems, the important lesson to be drawn from the point that Horowitz makes here is that this area of enquiry has in the past been relatively lacking in incisive, holistic, and convincing scholarship mainly because of the neglect of the subject by scholars.

This situation has, however, changed considerably since Horowitz wrote. Most scholars have since recognised the harmful consequences of the slight and neglect with which they have treated the subject, and have, along with Benedict Anderson, come to realise that the end of the era of nationalism and fragmentation, so long prophesied, is not remotely in

16. See S. Ryan, *supra* note 10 at 162-163.

17. See D. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985) at 9.

sight.¹⁸

On the Nature of Socio-Cultural Fragmentation Within States

This thesis is not largely concerned with the nature of fragmentation (or of "ethnic" conflict). It is much more concerned with the ways in which international law and institutions have dealt with that question. It is also concerned with the effects of such international legal and institutional attitudes on peace and development in Africa, as well as with the possibility of ameliorating the more negative effects of such attitudes. It is nevertheless important that some space be devoted to a brief enquiry into the nature of fragmentation itself.

In this section, I will explore the major debates in the area, and attempt to expose the fundamental properties of the dynamic that constitutes the phenomenon of socio-cultural fragmentation within established states.

In the next section, the developmental path of the contemporary forms of fragmentation within the post-colonial African state will be traced. This will be done as a prelude to an exposition of the ways in which the *structural* fact of intense fragmentation provides the background against which the application of certain doctrinal attitudes or policies of the law almost inevitably result in the production or escalation of the use of excessive force within the post-colonial African state. In other words, this enquiry is crucial because were it not for the particular character of fragmentation in Africa, the relevant international legal and institutional attitudes might not have been relied on by African governments to justify their resort to the use of excessive force against dissident or rebellious

18. See B. Anderson, *Imagined Communities* (London: Verso, 1983) at 12.

sub-state groups.

An important point of departure in the search for an understanding of the nature of the instant phenomenon is to realise that both the state and its constituent groups are "imagined communities".¹⁹ Benedict Anderson has offered us a specific account of the ways in which a "nation" is always imagined as "a deep horizontal comradeship", regardless of the actual inequality and hierarchy that may prevail within it.²⁰ This is also true of all the other kinds of communities that are included in the expression "sub-state groups". Such groups are also communities of shared cultural memories.²¹

The second important point to note is that fragmentation is best imagined as a function of inter-group competition for the control of some *resource* that is present within the confines of the relevant state.²² Thus, fragmentation is the outcome of a form of competitive relations between social groups, and can only exist within societies that consist of at least two cohesive sub-state groups.²³ Therefore, a socio-cultural group which is a nation-state unto itself cannot produce this phenomenon. It can only do so in the event of its

19. I borrow this term from the work of Benedict Anderson. See B. Anderson, supra note 18 at 15.

20. Ibid at 16.

21. See A.D. Smith, "Chosen Peoples: Why Ethnic Groups Survive" (1992) 15 *Ethnic and Racial Studies* 436 at 451.

22. This resource need not be exclusively economic. It may also be social or political. See O. Nnoli, Ethnicity and Development in Nigeria (Aldershot: Avebury, 1995) at 1.

23. Ibid at 2.

subsequent fragmentation.²⁴

The role of the state as a participant in inter-group competition is also crucial. Often, the state is the principal allocator of the values that are the object of inter-group competition, and itself becomes a participant in the struggle over them. This can happen when the state acts much like an agent or instrument of the dominant group(s).²⁵

Another important point to note is that while a sub-state group may have finite, limited boundaries, in the sense that no "nation" or other cohesive group imagines itself as co-extensive with humankind, such boundaries are always dynamic, always flexible and changing. Though never cast in stone, socio-cultural group boundaries persist despite a flow of "personnel" across them.²⁶ This element of dynamism is recognized by Horowitz even when he suggests that though group affiliations are located along a continuum between voluntary membership and membership at birth (the birth-choice continuum), sub-state groups consist mostly of those born into them.²⁷ He also recognises this point when he asserts that the boundaries that separate the sub-state groups from among themselves grow wider or narrower by processes of assimilation or differentiation, as for instance when a small group is absorbed by a large one, or when a large group sub-divides or is abandoned

24. Such a mono-cultural nation-state may, however, be concerned by the phenomenon of sub-group fragmentation. See *ibid* at 1.

25. See M.J. Esman and S. Telhami, "Introduction" in M.J. Esman and S. Telhami, eds., International Organisations and Ethnic Conflict (Ithaca: Cornell University Press, 1995) at 10.

26. See F. Barth, "Introduction" in F. Barth, ed., Ethnic Groups and Boundaries (Boston: Little, Brown and Company, 1969) at 9-10.

27. See D. Horowitz, *supra* note 19 at 55.

by a portion of it.²⁸ It must be kept in mind, though, that while such boundaries may be dynamic and flexible, they are not entirely malleable.²⁹

The importance of understanding the flexible and dynamic nature of these boundaries, is that, as Fredrick Barth has demonstrated, boundaries are the most defining characteristic of sub-state groups.³⁰ Thus, the critical feature of such groups is the *social* boundaries that define them, and not so much the cultural stuff that the boundaries enclose.³¹

Even though most scholars now recognise the dynamism and flexibility of the boundaries that separate the socio-cultural fragments that compose states, scholarship in this area is still quite divided. This area of study has become an arena of intense multi-faceted, even partisan, debate with the effect that far less agreement is present than would be expected as to some fundamental questions relating to the subject of enquiry.³² For instance, there is no general agreement amongst scholars as to whether the phenomenon of fragmentation within states is fomented by mainly economic/materialist/political factors as opposed to mainly psychic factors. Agreement is also absent as to the question whether such fragmentation is perennial or transient, instrumental or atavistic, positive or negative. While it is impossible in a thesis such as this to deal with all of these debates in any detail, an

28. Ibid at 65.

29. Ibid at 66.

30. See F. Barth, supra note 26 at 14-15.

31. Ibid. See also G. Buellens, "Beyond Ethnicity?" (1989) 23 Journal of American Studies 315 at 316.

32. See V.D. Volkan and M. Harris, "The Psychodynamics of Ethnic Terrorism" (1995) 3 International Journal on Group Rights 145.

attempt will be made to highlight some of the important insights that they have produced.

One of these is the understanding that has been achieved in the course of the instrumentalism/ativism debate.

Instrumentalist theories are usually economistic too. The classic instrumentalist thesis basically states that fragmentation is produced when elite elements within a sub-state group manipulate the common consciousness of the members of their group with the aim of achieving some political, economic or other material gain. Harvey Glickman and Peter Furia are among the leading advocates of this viewpoint in the western academy.³³ For them, the formation of identity and the production of conflict within states cannot be understood outside a largely instrumentalist paradigm which views these phenomena as created by active elites who organise and lead their followers around instrumentally created identities.³⁴ While they have not subscribed to more pure instrumentalist views such as Robert Bates' "rational-choice" theory³⁵, and indeed do make some room for emotional attachment to the group, as well as "masses-to-leader" pressure, in their theory, *when pressed*, they seem to lean decidedly on the side of instrumentalism.

Other neo-instrumentalists (i.e those who recognise other possible explanations, but who when pressed, lean on the side of instrumentalism) include Okwudiba Nnoli³⁶, Peter

33. See H. Glickman and P. Furia, "Issues in the Analysis of Ethnic Conflict and Democratisation Processes in Africa Today" in H. Glickman, ed., Ethnic Conflict and Democratisation in Africa (Atlanta: ASA Press, 1995) at 3.

34. Ibid at 8-9.

35. See R.H. Bates, "Ethnic Competition and Modernisation in Contemporary Africa" (1974) 6 Comparative Political Studies 457.

36. See O. Nnoli, supra note 22 at 10-15.

Ekeh³⁷, and Larry Diamond³⁸. Diamond, for instance, is convinced that even though Horowitz may be right in holding the view that the struggle for "relative group worth" is often important in the generation of conflict among sub-state groups that are part of the same state, without attention to the political and class interests of their elites it is often impossible to explain why socio-cultural group sentiments and attachments come to dominate politics and erupt into violent conflict.³⁹

The classic primordialist or atavistic view, which is, in general, much less sophisticated than the instrumentalist view, is that the phenomena of identity-formation and conflict production among sub-state groups are the expression of some inner inherent nature of humankind which can be disposed of as our species modernises and advances.⁴⁰ While few, if any, scholars still adhere to this paradigm in its classic form, the much more sophisticated views of scholars who attach great importance to the explanatory power of the pursuit of "psychic rewards" seem at times to draw inspiration from this tradition. This is so, despite their recognition of the role of instrumentalism, and of economics, in the shaping of relations among sub-state groups. Scholars such as Horowitz have, for instance, offered an explanation for the phenomena of identity-formation and conflict-production within states which, while not atavistic as such, emphasise the pursuit of psychic rewards, such as relative

37. See P. Ekeh, "Social Anthropology and Two Competing Uses of Tribalism in Africa" (1990) 32 *Comparative Studies in Society and History* 600.

38. See L. Diamond, "Book Review" (1987) 25 *The Journal of Modern African Studies* 117 at 118-120.

39. *Ibid.*

40. For more on this school of thought, see R. Stavenhagen, *supra* note 3.

group worth, in the formation of group competition and conflict.⁴¹ Manning Nash emphasises the value of such psychic rewards in a world of rootlessness, deracination and alienation⁴², while Vamik Volkan and Max Harris point out the relevance of stressful group experiences.⁴³ Others such as John Ayoade have pointed to the psychological as well as material insecurity of the urban center as an important element in ethno-genesis and the emergence of conflict.⁴⁴

Neither the instrumentalists nor the primordialists, have sufficiently explained the dynamics of socio-cultural fragmentation within states and the increased visibility which the claims of sub-state groups have achieved in the late 1980s and early 1990s.⁴⁵ Also, neither those who assert that conflict between sub-state groups is largely fomented by economic and/or political factors, nor those who assert that it is largely caused by the pursuit of psychic rewards, have sufficiently explained the nature and dynamics of the phenomenon.

Similarly, neither the school of thought that views such conflict as mostly perennial, nor that which sees it as essentially transient is entirely convincing. The same can be said with respect to the debate between those who view the phenomenon as eminently negative and those who see it as largely positive. A careful examination of the literature leaves the

41. See D. Horowitz, supra note 17 at 131-146.

42. See M. Nash, The Cauldron of Ethnicity in the Modern World (Chicago: University of Chicago Press, 1989) at 4.

43. See V. Volkan and M. Harris, supra note 32 at 151-152.

44. See J.A.A. Ayoade, "Ethnic Politics in Nigeria: A Conceptual Reformulation" in D.L. Thompson and D. Ronen, supra note 12 at 107.

45. See T.R. Gurr, "Peoples Against States: Ethnopolitical Conflict and the Changing World System" (1994) 38 *International Studies Quarterly* 347 at 348.

reader with the sense that the phenomenon is neither entirely instrumental nor completely primordial⁴⁶; that it is neither entirely fomented by economic/political factors nor entirely produced by the pursuit of psychic rewards;⁴⁷ that it is neither completely perennial nor entirely transient;⁴⁸ that it is neither entirely positive nor completely negative.⁴⁹ The important lesson is that the phenomenon is *complex* and *contextual*.

The phenomenon is complex because of its obvious tendency to be produced or intensified by a complex array of interacting factors, each contributing, in a way that is difficult to quantify exactly, to the character exhibited by the phenomenon in each particular instance. The phenomenon is contextual because, despite some possible commonalities, each situation in which inter-group relations occur, or in which fragmentation is present, is unique in one way or the other. That is why the question of fragmentation is an intense "problematic".

While many contemporary theorists realise this, most of them, when pressed for explanations for a particular course of events, seem to lean on the side of one or the other factor as a *general* explanation for the dynamics of fragmentation within every state. They

46. See A.D. Smith, "Culture, Community and Territory: The Politics of Ethnicity and Nationalism" (1996) 72 *International Affairs* 445 at 446.

47. See N. Berman, "A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework" (1992) 33 *Harvard International Law Journal* 353. See also L. Diamond, "Ethnicity and Ethnic Conflict" (1987) 25 *The Journal of Modern African Studies* 117 at 123.

48. See A.D. Smith, *Nations and Nationalism in a Global Era* (Cambridge: Polity Press, 1995) at 54-57. Even though he seems to have treated the term "nation" as coterminous with the term "state", his point that nations are not necessarily perennial fixtures is still useful here.

49. See O. Nnoli, *supra* note 22 at 4-8.

often seem to overestimate the predictive power of any one factor as a general explanation good for all contexts. This is not, however, the same as saying that the phenomenon of fragmentation is simply beyond the pale of human understanding. Rather, it is a suggestion that convincing explanations of the occurrence of that phenomenon in any particular instance must be *context-specific*. Therefore, while economic factors might dominate in the context of a particular conflict, the pursuit of psychic rewards might be a bit more relevant than other factors that contribute to the generation of conflict in another context. Both are possible in differing contexts.

As Rodolfo Stavenhagen has noted, it is plausible to argue that "ethnic" conflict does not as such exist. What exists is social, political and economic conflict between groups of people who identify each other in socio-cultural terms: color, race, religion, language, national origin.⁵⁰ This belies the "ethnic" determinism that has characterised a good deal of the study of intra-state conflict in the developing world.⁵¹ As Stavenhagen has also convincingly put it:

"If and when ethnic hostility or rivalry occurs, there is generally a specific historical reason for it that relates to political struggles over resources and power. Thus, for example when superficial observers attribute conflicts in, say Africa, to some abstract "tribal rivalries" as if rivalry and conflict were something inherent in the [outdated] concept of 'tribe' itself, they probably miss the point and more often than not confuse the issues."⁵²

50. See R. Stavenhagen, "Ethnic Conflict and Human Rights: Their Interrelationship" in K. Rupesinghe, ed., supra note 9 at 17.

51. See G. Nzongola-Ntalaja, "The National Question and the Crisis of Instability in Africa" in E. Hansen, ed., Africa: Perspectives on Peace and Development (London: Zed, 1987) at 56.

52. See R. Stavenhagen, "Ethnic Question", supra note 5 at 39.

The Historical Development of the Contemporary Forms of Socio-Cultural Fragmentation Within African States

In opposition to the atavistic school of thought, most students of African affairs agree with Okwudiba Nnoli that the colonial state was the cradle of the contemporary forms of fragmentation in Africa. This does not, however, mean that the colonial state created this phenomenon "out of whole cloth".⁵³ Rather the colonial state helped to create a certain form of fragmentation from the raw material provided by pre-existing pre-colonial sets of identities and relationships. Each colonial state agglomerated various distinct linguistic-cultural groups in one political container. Each colonial state improved transportation and facilitated greater inter-group contact. Also, each of such states rapidly increased urbanisation which in turn provided an impersonal arena within which competition for scarce resources (jobs, trades, amenities, etc) went on. Furthermore, each of these states introduced centrally directed, but uneven, development.⁵⁴

The most important factor in the generation of fragmentation within the colonial African state ("ethno-genesis") was, however, not the fact of the agglomeration of distinct polities in one political container, for that had been a feature of many number of African states for centuries. The most important factor was the structure and degree of socio-

53. See R.H. Jackson and G. Maddox, "The Creation of Identity: Colonial Society in Bolivia and Tanzania" (1993) 35 *Comparative Studies in Society and History* 263 at 264.

54. See O. Nnoli, *supra* note 22 at 10-13. See also E.E. Osaghae, "Ethnicity in Africa or African Ethnicity: The Search for a Contextual Understanding" in U. Himmelstrand, K. Kinyanjui and E. Mburugu, eds., *African Perspectives on Development* (London: James Currey, 1994) at 142; and V.A. Olorunsola, ed., *The Politics of Cultural Sub-Nationalism in Africa* (Garden City, New York: Anchor, 1972).

economic competition that existed in the context of this colonial contact.⁵⁵ Increased contact went on amidst the insecurity of the new urban centres and this engendered a resort to the sub-state group for mutual trust and aid. At the same time, the colonial state was a partisan leviathan⁵⁶ which concentrated nearly all of the new social goods in its hands.⁵⁷ Moreover, the colonial African state was coercive and exploitative, a characteristic that effectively trumped its ability to secure genuine widespread allegiance among the majority African population.

The post-colonial state, the inheritor of the colonial state, has not been much different from its predecessor.⁵⁸ It has largely been as over-centralised, partisan, and coercive. It has controlled the bulk of the resources available in the polity, and has distributed it in an uneven manner.⁵⁹ It has in general acted quite poorly in its appointed role as the primary solver of problems within the polity. It has all-too-often relied more on coercion than co-option. This has ensured that in much of Africa inter-group relations have been much focused around the struggle to control the central government of particular states and their awesome resources.⁶⁰ In Nigeria, for instance, the huge economic and social power of the federal government has ensured that regional leaders have fiercely competed for its control; control

55. Ibid.

56. See C. Young, "Ethnicity and the Colonial and Post-Colonial State in Africa" in P. Brass, ed., Ethnic Groups and the State (London: Cromhelm, 1985) at 61.

57. Ibid at 104.

58. Ibid.

59. Ibid.

60. See E.E. Osaghae, supra note 54 at 141.

that would enable them, among other things, to appropriate a disproportionate share of the resources of the state.⁶¹ This character of the post-colonial African state has also ensured that it has neither been able to shed its inherited internal illegitimacy, nor harness the goodwill that was offered to it by the majority African population in the years following the euphoria of independence.

It must be emphasised though, that, like elsewhere, fragmentation in Africa is a very complex phenomenon, perhaps even much more complex and intense there than in the comparatively more homogenous societies of the west.⁶² Aside from the presence of such fragmentation from the time of the colonial state, there have been other complicating factors. One of them has been that the new states of Africa, unlike the pre-colonial states of Africa and the contemporary European states, are to a large extent imposed political agglomerations that did not continuously and organically develop from the more suitable dynamic of internal politics.⁶³ In Europe, nation and state have, for the most part, developed side by side.⁶⁴ In Africa, the new states were imposed long before the search for nationhood even began.⁶⁵ This is a factor which has made historical cleavages salient, and ensured the fragility and fragmentation of the post-colonial African state.

Moreover, the dismal performance of the many post-colonial governments in terms

61. See O. Nnoli, supra note 22 at 95.

62. Ibid at 253.

63. See A.D. Smith, State and Nation in the Third World (Sussex: Wheatsheaf, 1983) at 123.

64. Ibid.

65. Ibid.

of ensuring the provision of social goods for their citizens, and their coercive and exploitative nature, have led the populations to retain loyalty to their own pre-existing political formations and sub-state groups. This also explains their continued turn to such groups for hope, leadership, self-expression, and support.⁶⁶ In other words, the resilience of post-colonial fragmentation in Africa is in part a function of the inability of the colonial and post-colonial state to replace adequately the functional relevance of the pre-colonial African states/polities. This is what Professor Julius Ihonvbere has dubbed the 'irrelevance' of the post-colonial African state⁶⁷. This idea has also been captured in Professor Makau wa Mutua's statement that "the African post-colonial state never really began".⁶⁸

In this section of the chapter, the problematic of fragmentation within African states has been developed at length. The reason for this is that it is thought that it is the concrete existence of this problematic that in the end transforms the international legal and institutional attitudes (already discussed in Chapter Three) into norms that indirectly contribute to the pandemic use of excessive force in an attempt to resolve disputes regarding the legitimacy of post-colonial African states.

In the following sections, the various ways in which certain doctrinal or normative attitudes of international law contribute to the formation, sustenance, or intensity of

66. See J.O. Ihonvbere, "The 'Irrelevant' State, Ethnicity, and the Quest for Nationhood in Africa" (1994) 17 *Ethnic and Racial Studies* 42 at 43.

67. *Ibid.* See also M. Lowenkopf, "Liberia: Putting the State Back Together" in I.W. Zartman, ed., *Collapsed States: The Disintegration of Legitimate Authority* (Boulder: Lynne Rienner, 1995) at 91.

68. See M. wa Mutua, "Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State" (1995) 21 *Brooklyn Journal of International Law* 505 at 509.

internecine conflicts within the post-colonial African state will be analysed and exposed. Following what will be a four-step analysis, I will conclude this chapter by exploring the interesting relationship among international law, internecine violence, and the problem of underdevelopment within African states. The successful demonstration of these relationships ought not to come as a surprise, for have not law and politics been part of the causes of (civil and inter-state) wars for ages?⁶⁹

C. THE CONTRIBUTION OF THE HOMOGENISATION PRINCIPLE AND THE GLORIFICATION OF EMPIRE TO INTERNECINE VIOLENCE IN AFRICA:

In Chapter Three, the question of the nature of the specific attitude of international law and institutions that encouraged, or at least did not frown upon, the homogenisation of fragmented populations of established states was explored. This attitude is expressed in the law's traditional facilitation of coercive nation-building in the newly de-colonised states of Africa⁷⁰ and Asia, as well as in the older states of Europe and the Americas⁷¹. It combines

69. See S.B.O. Gutto, "The OAU's New Mechanism for Conflict Prevention, Management and Resolution and the Controversial Concept of Humanitarian Intervention in International Law" (1995) 7 ASICL Procs. 348 at 349.

70. Ibid at 348.

71. For instance, the uti possidetis principle, the "single voice" principle, the underdevelopment of the international minority protection regime, the norm in favour of the territorial integrity of states, and the general scepticism of international law and institutions toward secession have all combined to produce an international legal environment that, in general, facilitates the homogenisation of the populations that compose states, and discourages their fragmentation. The effect has been that both international lawyers and diplomats often act as if the populations of states were undifferentiated in a sociological and political sense. For example, states have a unitary, undifferentiated voice in international legal, diplomatic, and institutional arrangements.

with the law's tendency to facilitate the construction of empire-like political formations⁷² to produce a fertile environment for internecine strife in Africa. This has been so because these doctrinal attitudes have been applied in the context of the existence of the intense socio-cultural cleavages that have characterised the short span of life of the post-colonial African state⁷³.

The questions that then arise are: how have actual attempts to homogenise the populations of post-colonial African states, and to make them into strong centralised states, contributed to the incidence of internecine strife within those states? What exactly is the contributory role of international law and institutions in that process? In this section, I briefly describe the nature of the actual attempts made by African states to homogenise their populations in the name of nation-building, and to turn themselves into strong centralised states. This is course a separate question from that of the nature of the doctrine of homogenisation itself. Following that, I will explore the relationships among these two projects and the incidence of internecine strife within African states. In my stride, I will identify and explain the role of the law in all of this.

The attempt by the leadership of post-colonial African states to homogenise the

72. By this I mean the tendency of international law and institutions to facilitate the construction and survival of large centralised states which encompass a number of differentiated sub-polities. The international legal norms responsible for this effect include the norms in favour of uti possidetis and that which favours the maintenance of the territorial integrity of established states.

73. Like most states in the world, most post-colonial African states are not socio-culturally homogenous. See K. Rupesinghe, supra note 9 at 38. But unlike European states, most African states are composed of a number of recently agglomerated, yet very differentiated, peoples. The process of "ageing-in-the-wood has only just begun.

diverse and differentiated polities/peoples that were agglomerated to form these states is often aptly described in the literature as "nation-building"⁷⁴. The idea that animated that enterprise was the felt need to construct single unitary "nationhoods" out of the multifarious and diverse "nationhoods" that composed the new states. As Benjamin Neuberger has correctly noted, in the dominant streams of European and African thought, the unitary unfragmented nation has come to be thought of as the optimal state-form, as the ideal-type.⁷⁵ Diverse nationhood has been historically viewed as almost invariably negative (always divisive, always centrifugal). Thus, the intense fragmentation of the new states was also seen as quite negative, extremely divisive, and intolerably centrifugal.

Consequently, most African states became somewhat obsessed with the repression of socio-cultural differences,⁷⁶ a move that was often characterised as a turn away from

74. See G. Nzongola-Ntalaja, Nation-Building and State-Building in Africa (Harare: SAPES Trust, 1993).

75. See B. Neuberger, "State and Nation in African Thought" in J. Hutchinson and A.D. Smith, eds., Nationalism (Oxford: Oxford University Press, 1994) at 232.

76. Nigeria (a country of over 250 major and distinct ethnic/language groups), has had the notable distinction of openly acknowledging its intense diversity in law and fact. This has been done through its attempt to practice the "federal character" principle. The country has also been organised under a formally federal structure since independence. Yet, Nigeria has also participated in this kind of repressive nation-building. In the first place, it has been ruled by a military regime for most of its post-colonial life. This has led to the severe dilution of its federalism by the unitary command structure of the military. In the second place, it has found it necessary to crush a secessionist revolt by the Biafrans, as well as suppress many of its minority populations, both legally and otherwise. On the Nigerian question, see O. Nnoli, supra note 22 at 95-213 and B. Neuberger, supra note 75 at 232. On the conception and practice of the "federal character" principle in Nigeria, see A. Afigbo, "Federal Character: Its Meaning and History" in P.P. Ekeh and E.E. Osaghae, eds., Federal Character and Federalism in Nigeria (Ibadan: Heinemann, 1989) at 15.

"tribalism".⁷⁷ As David Welsh has put it:

"In the heydays of [African] independence, begun in Ghana in 1957 and accelerating in the 1960s and beyond, 'nation-building' was assumed to be the priority of all the newly emerging states."⁷⁸

This repression of socio-cultural differences was not, however, a simple manoeuvre in which differences were sought to be stamped out in one straightforward push. It was a more complex manoeuvre which was executed *via*, either the strategy of maintaining the fiction of the state as a mono-cultural entity, or that of paying only lip service to the reality of socio-cultural pluralism within the relevant state.⁷⁹ In many cases, such lip service included the entrenchment of clauses in the constitution prohibiting discrimination on the grounds of racial, ethnic, or other kinds of socio-cultural difference.⁸⁰ In other cases, it included the adoption of federalism as the basis of nation-building. Yet, rarely has the promise of federalism been realised in Africa. In most states, the rash of military and civilian coups against the constitution ensured that such federal arrangements were overridden by the

77. Beholden to this cosmology, it did not matter to the new leaders or to their external supporters that many of the historical communities they now stigmatised as "tribes", such as the Ashanti, the Edo (Benin), Buganda, Toro, Shona, Hausa, Fulani, Yoruba, and Mandingoes had run their own states for centuries. Because of this attitude, the fact that fragmentation will persist within the post-colonial African state because it would be difficult to erase the shared memories of these recently conquered peoples was lost on these leaders and their foreign supporters. See M. wa Mutua, *supra* note 68 at 520-533. That this attitude continues to this day in Africa is aptly illustrated by Namibia's 1989 constitution which stigmatises ethnic diversity as "tribalism" and denounces it as a scourge and a pathology. See D. Welsh, *infra* note 78 at 484.

78. See D. Welsh, "Ethnicity in Sub-Saharan Africa" (1996) 72 *International Affairs* 477.

79. See R. Stavenhagen, *supra* note 5 at 1 and 131-132. The second strategy was often adopted, and was in the case of Nigeria even written into the constitutional process of the country.

80. *Ibid* at 131-132.

unitary command structure of military and civilian dictatorial regimes.

Although the historical background against which these leaders sought to construct united and therefore strong nations out of the fragmented newly decolonised states is understandable, in the end, the specific kind of nation-building project that was embarked upon by most of these leaders was a problematic kind of nation-building. It was a nation-building project that idealised the coercive, even violent, homogenisation of the fragmented populations of African states.

Needless to say, rarely in our time has this sort of nation-building resulted in success. The coercive approach to nation-building has not failed because of the nature of the intent behind it, for there is something to be said for the strength and unity of purpose that can be achieved by forging a number of diverse cohesive groups into a single and stronger one. After all, as Thomas Franck has observed, "what is a nation other than a synthesis of other earlier, vanished or submerged nations?"⁸¹ Rather, for the most part, it failed because in our age of human rights, the idea of often violent, coercive unification, or of repressive homogenisation is in the final analysis morally and socially bankrupt.⁸²

This idea is bankrupt for a number of major reasons. The first is that it has ignored five important truisms: namely, the positive sides of socio-cultural diversity; the inherent tendency for such processes to foster the co-option of the institutional apparatus of the new states by one or more dominant groups to the relative exclusion of the others; the resentment

81. See T.M. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice" (1996) 90 *American Journal of International Law* 359 at 367.

82. See O. Nnoli, *supra* note 22 at 19-21.

that such a process of domination creates amongst the non-dominant groups; the massive human rights abuses that such processes necessarily entail; and the tenacity of the shared memories possessed by target sub-states groups. It is also bankrupt because, rather than leading to long-term peace, such approaches are more often than not unsustainable. In the long-term, they lead inexorably to internecine strife. This is so largely because the repressive practices that necessarily characterise such coercive nation-building, such as the attempts to suppress the voices of a distinct people⁸³, or to suppress sub-state groups economically, politically, culturally, and/or linguistically, often breed intense resentment and resistance within the target groups.⁸⁴ In other instances, repression has taken the form of the state-sanctioned imposition of the cultural or political motifs of one or more groups on the rest of the population in a way that encourages the dominance of some cultures at the expense of others.⁸⁵ This repression-resentment relationship among the state and some of its component groups often develops into low-level internecine strife as witness Ogoni, Zangon-Kataf, Western Kenya, and Uganda; or civil war as witness Biafra, Southern Sudan, Rwanda, Burundi, Katanga, the former Zaire, Congo, Eritrea, Chad, Senegal, Sierra Leone,

83. This is the most pandemic form of repression in Africa as well as in the rest of the world.

84. This has been the case with the Ogoni of Nigeria, the Ewe of Togo, the Bajju of Nigeria, the Tuareg of Mali, the Dinka and other southern peoples of the Sudan, and at various times either the Hutu or the Tutsi of Rwanda and Burundi.

85. This is the case amongst the Baaju, Seyawa, and Atyab minority peoples of Northern Nigeria. See O.C. Okwu-Okafor, "Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems" (1994) 6 ASICL Procs. 88.

and Liberia.⁸⁶

This has also been the effect of the attempts at the construction and sustenance of large centralised states by Africa's post-colonial leaders. From Zaire to Nigeria, from Morocco to the Sudan, from Uganda to Mali, from Chad to Ethiopia, these leaders were quite wary of the negative effects of internal disunity on the body politic. They soon became quite obsessed with the survival *intact* of the large centralised states bequeathed to them by the departing colonialists. Little did it matter that, at least at that time, few of these new states possessed the actual capacity to effectively control the full extent of their territory.⁸⁷

In an international society of states which has been traditionally based on competitive self-help, in which no state trusted another around the corner, in which resort to inter-state violence is an ever-present possibility, it was meet that states be so constituted that they be apt for war. As such this meant that difference and division, which might weaken the state and leave it open to enemy infiltration was intolerable.⁸⁸

Understandably, therefore, the newly de-colonised African states were quite paranoid about secession, and in most cases, in the hope of nipping secessionist agitation in the bud, eschewed the practice of federalism, local autonomy, minority rights, and any other device that might, in their view, de-centralise power and reduce the level of control exercised by

86. See generally, I.W. Zartman, ed., Collapsed States: The Disintegration and Restoration of Legitimate Authority (Boulder: Lynne Rienner, 1995).

87. For example until quite recently, large portions of Zaire were under the effective rule of local chieftains. Yet the central regime in Kinshasa and the international community seemed to maintain the fiction that the central government was the governing authority in the entire territory. On the Zairean question, see The Economist, March 8, 1997.

88. See S. Ryan, supra note 10 at 170.

the central regime over the groups and provinces that composed each of these states. This in turn led to struggles for local power, for local autonomy, for de-centralisation, which in some cases intensified into violent internecine conflict.⁸⁹ This is not to say that some African states did not heed that de-centralisation imperative. For some like Nigeria were *constitutionally mandated* federal states from the very moment of their independence. The point is that rarely was federalism in fact *practised* in these states.

Traditional international law and institutions did not explicitly proscribe this sort of behavior. Nor did the law traditionally mandate either consensual nation-building or the practice of state de-centralisation. Until very recently, very few commentators agreed that the right to self-determination applied in the non-colonial context of the internal politics of established states. Indeed, it may also be said with confidence that, in general, the law did not at this time overtly concern itself with the legitimacy or otherwise of the internal structure or conditions of states.

Thus, if as I have tried to show in chapter three, international law and institutions have exhibited normative and other attitudes which, far from outlawing it, have tended to encourage or facilitate the homogenisation/nation-building project as well as the construction of large centralised states (or empires), then the law has contributed to whatever ill-effects those projects have had on the post-colonial African state. As I have also shown in this chapter, those projects have contributed in various ways to the formation, sustenance and intensity of internecine strife in Africa. Thus, viewed from this optic, the law is seen to have

89. The case of the Bajju, Seyawa, and Atyab minority peoples of Northern Nigeria is again instructive.

provided ready and powerful arguments, justifications and excuses for those states that, for otherwise understandable reasons, were concerned to maintain, at great socio-economic and political cost, the unity of their populations and the integrity of their territories.

In the end, the definitive argument being made here is quite straightforward. It is that by facilitating the coercive kind of nation-building and the construction and survival at all cost of large centralised states in Africa, international law and institutions were also contributing to the incidence of internecine strife that was in part attributable to the implementation of those projects.

D. THE CONTRIBUTION OF THE EFFECTIVENESS PRINCIPLE TO INTERNECINE VIOLENCE IN AFRICA:

As has been discussed in the preceding chapter, at traditional international law the doctrine of actual effectiveness enjoyed relative hegemony over that of normative legitimacy. Succinctly stated, that principle posited that when once an act had been effectively done, it was *ipso facto* lawful and legitimate. In this sense, the law was little more than a tendentious, *ex post facto*, crystallisation of state practice. It largely responded to, and did not seek to alter effective situations or events. Accordingly, the legitimacy or otherwise of a state did not depend on any notion or principle as to its justice, but depended on its capacity to establish itself as such, and survive thereafter.⁹⁰

As might be expected, even the very process of transiting to statehood has for many subaltern or conquered peoples/polities been a militant one. In most cases, not being able to

90. See R.H. Jackson and C. Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis" (1986) 24 The Journal of Modern African Studies 1 at 2.

count on ready international support, sub-state groups have realised that they could achieve local autonomy or independent statehood only if they are able to *forcibly* repel the coercive attempts often made by parent states to keep such groups within the confines of the relevant state. Not unexpectedly, more often than not, such struggles over political autonomy have been laden with violence. Both parent states and rebellious sub-state groups have freely applied militant strategies and tactics in their respective efforts to become effective. For, until recently, it was the effectiveness, not the justice, lawfulness, or legitimacy of such causes that most influenced decision-making as to the legitimacy or otherwise of the established state under international law.

The tendency of these state/sub-state group confrontations to be bitter and intense is also amplified by the law's facilitation of the homogenisation and centralisation of states. Having internalised and matched them in their own practice, African states relied, *inter alia*, on these doctrinal attitudes of the law to justify their propensity to use excessively militaristic methods in their bid to suppress effectively, challenges to their integral existence. Viewed against the background of the not infrequent imagination of the parent state, by members of a rebellious sub-state group, as an occupying army, it is little wonder that the use of force in such situations often assumes excessive proportions; and sometimes turns out to be explosive and cataclysmic.⁹¹

African examples of the excessive militarism of both successful and abortive attempts at separate statehood abound. The transition of Eritrea (formerly a sub-state group that was governed as part of Ethiopia) to both *de facto* and *de jure* statehood was marked by over

91. See V.D. Volkan and M. Harris, *supra* note 32 at 150.

three decades of internecine strife.⁹² The Biafran secession was achieved and later crushed against the background of the loss of millions of lives, and two and a half years of destruction and misery.⁹³ The Southern Sudanese secessionist imbroglio is still with us, over three decades after the first violent incidents were recorded in that bitter internecine strife.⁹⁴ African examples of the violent repression of sub-state groups even when such groups have not explicitly challenged the integral existence of the state also abound. The suppression of its Ogoni, Kataf, and Bajju minorities by the Nigerian state are but a few examples of this rather macabre practice.

Understandably, therefore, the imperative need, expressed by the international normative order in a number of ways, for their states to become unified and integral has been relied upon by African governments as a justification for their excessive use of force in their relations with their sub-state groups. But rarely has the degree of violence that has been deployed by such states in an effort to suppress a rebellious sub-state group been proportional to the actual necessity disclosed by the relevant events.

Another way in which the doctrine of effectiveness contributes to the violence of the process of state formation and survival in Africa is evident from the attitude of international law and institutions to the protection of threatened sub-state groups. In general, when minority or other sub-state groups are threatened with repression or extermination by their

92. See R. Iyob, The Eritrean Struggle for Independence (Cambridge: Cambridge University Press, 1995).

93. See H. Ekwe-Ekwe, The Biafran War: Nigeria and the Aftermath (Lewiston, N.Y.: Mellen Press, 1990).

94. See J.M. Burr and R.O. Collins, Requiem for Sudan: War, Drought, and Disaster Relief on the Nile (Boulder: Westview Press, 1995).

parent states, other states have been said not to possess the legal *right* to extend such military aid to them as would facilitate their secession from their parent state.⁹⁵ Exceptions have, however, been made to this general rule in the case of groups that were able to establish forcibly their factual independence.

Even though the continued general validity of the rule that prohibits the extension of military aid to *every* threatened sub-state group is now far from certain when viewed in the light of the ever-advancing developmental state of the norm in favour of the self-determination of peoples⁹⁶, the rule is even today still representative of the position taken by most international lawyers. And this is so despite some cases that, at first sight, might seem like departures from the rule, such as the international attempts to protect Iraqi Kurds and the Muslim population of Bosnia-Herzegovina. In the first situation, military aid was indirectly extended to an oppressed sub-state group when a "no-fly" zone was established over skies that look down on the Kurdish parts of Iraq. This has effectively shielded them from aerial bombardment, but was not aimed at facilitating their struggle for local autonomy or separate statehood. In the second case, the aid was extended to the established state itself, for despite the palpable weakness of the Bosnian state which was controlled by the Muslims, it was still an established state. In neither case did the international society of states purport

95. See H.J. Richardson III, "'Failed States', Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations" (1996) 10 Temple International and Comparative Law Journal 1 at 10.

96. For instance, the African Charter on Human and Peoples' Rights guarantees the right to self-determination to all colonial or oppressed peoples. Now since "oppressed" is a much wider category than "colonial", it must mean non-colonised peoples who are oppressed such as the socio-cultural fragments of states. See specifically, article 20(2) of the African Charter on Human and Peoples' Rights, reproduced in (1982) 21 I.L.M. 59.

to aid militarily a secessionist or autonomist struggle against an established state.⁹⁷ Thus, to this day, the old rule continues to frame most *overt* political and military action regarding the extension of military aid to separatist sub-state groups.

This has meant that the violence meted out by established states toward their rebellious sub-state groups has, in many cases, been quite terrible, being unhindered by even the weakest balance of military power as between the state and the relevant group.⁹⁸ Again, this has in the past, as well as at present, been the case in a number of African countries such as Nigeria (Ogoni, Bajju, and Kataf), Ethiopia (Oromo, and Eritrea), the Sudan (Dinka etc), Zaire (Shaba, Katanga, etc), Zimbabwe (Ndebele), and Togo (Ewe).

Thus, the doctrine of effectiveness has in more than one way contributed to the internecine strife that is often produced by the process of state-formation, state-survival and re-configuration in the world in general, and in Africa in particular. States have all-too-often found that otherwise important doctrine to be a ready and powerful ally in their attempts to coercively homogenise and centralise their national territories. While, as I have already shown in Chapter Three, the strict doctrine of effectiveness is itself in relative decline, that doctrine is still alive and well in the discourse and practice of international law and international relations.

97. On the Bosnian question, see G. Xhudo, Diplomacy and Crisis Management in the Balkans: A US Foreign Policy Perspective (New York: St. Martin's Press, 1996). On the Kurdish problem, see Human Rights Watch/Middle East, Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds (New Haven: Yale University Press, 1995).

98. This was partly the problem during the heyday of the disintegration of Yugoslavia and Serb-Yugoslavian Military campaigns in Bosnia-Herzegovina.

E. THE CONTRIBUTION OF THE DOMESTICATION PRINCIPLE TO INTERNECINE VIOLENCE IN AFRICA:

In Chapter Three, the point was made at length that in a number of related ways, international law and institutions defer to what Thomas Franck has styled "the single voice organising principle of international relations; what I have referred to as the "domestication" doctrine.⁹⁹ Under this doctrine, a state is generally imagined in both international legal/political theory and practice as a unity, as a monolith, as a single voice.¹⁰⁰ Thus, sub-state groups are denied distinct access to the international sphere. No matter how disillusioned they are with their parent state, no matter how aggrieved they are, and no matter how oppressive their parent state is, they cannot, in general, even voice these grievances or challenge the parent state at any *authoritative* international forum which might be able to offer them even the slightest hope of respite.¹⁰¹

While this formal unity of the state is of course a fictional construct which was developed as a corollary of the homogenisation project, it had in the past seemed logical to the architects of the international system that that fiction be maintained. It was an understandable fiction that developed out of the felt need to ensure a minimum of stability

99. See T.M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995) at 481.

100. See M. Ennals, "Ethnic Conflict Resolution and the Protection of Minorities: The Quest for NGO Competence Building" in K. Rupesinghe, ed., supra note 9 at 13 (arguing that while socio-culturally differentiated minorities have always identified their problems, their voices are often not heard, and obstacles are created by their governments to the voicing of their grievances both within and without the state).

101. While, as I have contended in Chapter Three, it is important to understand that this position is beginning to change, the old principle still dominates even contemporary international legal and political imagination.

and certainty in the conduct of international relations. Yet, the repressive domestication of sub-state groups is itself one of the very causes of injustice and instability in our time.¹⁰²

The complexity of this problem was captured in Gideon Gotlieb's assertion that:

"Making room for nations [that are part of established states] trying to break loose from states that rule over them is a pressing issue for world stability and peace; but so is the avoidance of global fragmentation."¹⁰³

However, the dogmatic application of this doctrine; one that proceeds *as if* every case of fragmentation is alike, and that every case of fragmentation is pernicious, has not conducted to intra-state peace in many of the fragmented states of Africa.

The application of the principle has in practice meant the absence of *peaceable* avenues through which aggrieved groups might express the deep resentment they often feel in relation to their parent states. Consequently, it has also meant that aggrieved sub-state groups have often seemed to have come to the rather unfortunate conclusion that, as a historical fact, a turn to violence is one of the most effective ways of drawing both local and international attention to their plight. The militaristic method is even more tempting for those of them that are themselves militarily suppressed by their parent states. As Professor Henry J. Richardson III has so well put it:

"Sustained national violence remains the predominant route to international recognition of groups opposing a state's government or opposing each other, notwithstanding global policy pronouncements *ad infinitum* that conflict

102. See M.C. Lam, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination" (1992) 25 Cornell International Law Journal 603.

103. See G. Gotlieb, Nation Against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty (New York: Council on Foreign Relations Press, 1993) at 1.

prevention is to be a major goal of international law."¹⁰⁴

In fact as late as 1995, a commentator recommended that the international society of states should sanctify the use of force as the route to the securement of an international voice by sub-state entities. In his view, since not every group can be granted access to the international sphere, those ethno-national groups in states that have experienced *severe and prolonged intercommunal conflict* should be allowed to gain an international voice.¹⁰⁵ Further illustration of this point is provided by the fact that whilst such sub-state groups more often than not have identifiable armies and military machines, few of them have identifiable advocacy infrastructure to carry out their political goals.¹⁰⁶

Examples of the use of such "*communicative violence*" abound both the world over, and on the African continent. On the international front, the Palestine Liberation Organisation (PLO) is a notable sub-state group that has secured limited access to the international sphere after waging a sustained campaign involving the use of force against Israel, their "parent" state.¹⁰⁷ On the African continent, it was only after Biafra had effectively established itself for a while that it began to receive the recognition of even that

104. See H.J. Richardson III, "Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations" (1996) 10 Temple International and Comparative Law Journal 1 at 10.

105. See D. Wippman, "Hearing Voices Within the State: Internal Conflicts and the Claims of Ethno-National Groups" (1995) 27 New York University Journal of International Law and Politics 585 at 588-589.

106. See K. Rupesinghe, *supra* note 9 at 40.

107. For example see F.L. Kirgis, "Admission of 'Palestine' as a Member of a Specialised Agency and the Withholding of Assessments in Response" (1990) 84 American Journal of International Law 218.

handful of states that were sympathetic to its cause. The very decision to declare the state of Biafra and to defend its integrity by the use of force was in part necessitated by a communicative imperative. It was made necessary by the need to communicate the widespread fear of Eastern Nigerians, justified by their survival of two pogroms, for the safety of their lives and property within the larger Nigerian state. Also, it is now trite that the *de facto* and *de jure* recognition that Eritrea has received was won after nearly thirty years of violent struggle against the Ethiopian state.¹⁰⁸ The socio-cultural minority groups of northern Nigeria, especially the Bajju, Kataf and Seyawa have also engaged in this kind of violence but have not achieved the same kind of recognition because of the overwhelming military and political power that the Nigerian state exerts in relation to these groups.¹⁰⁹

In this sense, these sub-state groups often engage in a kind of violence which expresses and communicates their desire for local and international legitimacy, for legitimate autonomy, legitimate statehood, or legitimate existence. But "communicative violence" is not the exclusive preserve of sub-state groups. Because of the absence of authoritative international fora at which state and sub-state groups can negotiate or resolve their grievances, such violence can also be used by established states themselves. Such states use communicative violence to express their desire for continued corporeal existence. In other words, such states use communicative violence to express their desire to further the ends of homogeneity (i.e nation-building), central authority, and continued membership of the international society of states as a unified or unfragmented political container. In this sense,

108. See R. Iyob, *supra* note 92.

109. See O.C. Okwu-Okafor, *supra* note 85.

therefore, established states use coercive methods in order to further a deep desire of international law, in order to fulfil one normative ideal, regarding the character of states.

The use of the local and international media by both established states¹¹⁰ as well as rebellious or aggrieved fragments of such states¹¹¹ in order to gain international attention, and secure world public opinion to their side is evidence that the communicative aspects of intra-state violence cannot be ignored.

Thus, the domestication doctrine has contributed to the violence that is often produced by the process of state formation, survival and re-configuration in the world in general, and in Africa in particular. Frustrated by inadequate or ineffective local attention to their grievances, and unable to secure credible avenues through which such pressing grievances may be related to the international community in the hope of generating some international pressure against their parent states, sub-state groups have often resorted to the use of force simply in order to secure such vital access to the outside world. On the other hand, states have been able to rely on this lack of access to the international sphere by sub-state groups to stave off to some extent the international pressure that might have been generated against them consequent upon international access to knowledge about their ill-treatment of their sub-state groups.

110. For example Israel (during the intifadah), and South Africa (during the era of nationalist resistance by its African population) used the media to put out their versions of events, and lobby for international support.

111. For example, the Palestinians (during the intifadah), the Ogoni of Nigeria (since the very beginnings of their struggle), and the Southern Sudanese (since the 1960s) have acted in this manner.

F. THE CONTRIBUTION OF THE PEER- REVIEW PRINCIPLE TO INTERNECINE VIOLENCE IN AFRICA:

In the preceding chapter, the question of the deference of international law to the peer review principle, despite its persistent oscillation, over time, between *peer-* and *infra-review*, was explored. In this section, the contribution of this attitude of the law to the formation, sustenance and intensity of internecine strife in Africa will be explored. The point that will be made is that the strict version of the peer-review doctrine has operated to create a normative environment that enabled many African states to deal so inadequately with the questions of minority rights and sub-state group autonomy that beset such states almost from the very moment of de-colonisation.

As has already been explained, the peer-review principle takes the *ipse dixit* (say-so) of the pre-existing society of states as the determinant of the legitimacy of the statehood of a target state. The peer-reviewers are not *required* at law to incorporate, in the decision-making process, the reality of fragmentation within the relevant entity. Opposed to this approach is the *infra-review* approach under which it becomes imperative that account is taken of the extent to which the relevant state enjoys the support of its component fragments; the bench mark being the insufficiency of the *ipse dixit* of the pre-existing society of states in the determination of the legitimacy of the statehood of the relevant entity.

Among the major attitudes of the law to the question of fragmentation, this is the most general in nature. Yet, it is also the one that offers the most evidence of the European origins of the core of the particular body of norms that we now style "international law". As has already been shown in Chapter Three, European states traditionally set themselves up as the sole arbiters of legitimate statehood. They determined the criteria for legitimate

statehood and purported to admit or reject claims to membership in this eurocentric society of states on the basis of such criteria. While the criteria varied from time to time, from the 19th century AD, the pre-dominant criterion was that of the effectiveness of the state concerned. In the same era, the pre-dominant policy consideration was to legitimise states on the basis of their resemblance to European states, and thus to create "look-alikes" of the European-style nation-state where they found none.¹¹²

Over time, this reality has had important implications for the development of prevailing ideas about statehood, as well as for peace and development the world over. One of the major background reasons for this is that the states that were produced under the influence of this peer-review approach were produced in almost complete disregard for the input of the cohesive groups that made up the internal space of each of these states. As such, even though these colonial states, as well as the post-colonial states that succeeded them, had a high degree of external legitimacy, they were often found lacking in the area of internal legitimacy.¹¹³

Moreover, having produced states with such low levels of internal legitimacy, and having expanded the society of states that constituted the peer review panel to embrace nearly every state in the world, the contemporary peer-review process remained tied to the umbilical cord of the old peer-review regime. Thus, the emerging regime still emphasises

112. This is part of the explanation for what happened during the partition of Africa and parts of Asia.

113. The post-colonial state, the inheritor of this colonial state, performed so dismally that it was in general unable to secure the legitimacy of its internal population. See R.H. Jackson and C. Rosberg, *supra* note 90; and M. wa Mutua, *supra* note 68.

the old attitudes of international law to the question of fragmentation.¹¹⁴

The historic lack of concern exhibited by the law toward the imperative for the African state to be internally legitimate, and its preoccupation with the external legitimacy of such states, has often translated into the law's neglect of the structural concerns that are central to the question of the internal legitimacy or illegitimacy of a state. These include the question of the protection of minorities, and that of the right of oppressed sub-state groups within African states to either the exercise of internal autonomy, or, in extreme cases, the exercise of the option of secession. Yet, struggles for minority and other group rights, and for internal autonomy are, and have always been, some of the most important causes of internecine strife in Africa.

Such struggles have led to the fragility of many of the established but newly decolonised states, and have been partly responsible for the formation and sustenance of internecine strife within such states. In Africa, with a few exceptions, post-colonial political leaders inadequately addressed the question of the effective protection of minorities, and the grant of internal autonomy to their sub-state groups.¹¹⁵ Yet, in all but a few cases, the struggles of sub-state groups for minority and other such rights have been central to the politics of state-building within African states. This was possible largely because the question of the legitimacy of the territorial and other arrangements that constituted the new states was, for the most part, regarded and treated as a function of the external acceptability of these

114. These attitudes have been explained at length in Chapter Three.

115. D. Welsh, "Ethnicity in Sub-Saharan Africa" (1996) 72 *International Affairs* 477 at 484.

nascent states. At the time, their internal acceptability mattered far less than did the opinion of their would-be peers, the pre-existing states.

Thus, it is evident that international law's deference to the peer-review approach, and neglect of the infra-review approach has contributed to the violence that is often produced by the process of state formation, survival and re-configuration in the world in general, and in Africa in particular. Even though, as was shown in Chapter Three, the law's attitude in this respect is beginning to shift in the direction of the infra-review principle/approach, that shift is still very much nascent, tentative, and slow. It is neither sure-footed nor irreversible.

In the next section, the relationship between the contribution of international law to internecine strife in Africa, and that continent's problem of underdevelopment will be examined. This examination will, however, be preceded by a brief recap of the arguments that have already been presented in this chapter.

G. INTERNATIONAL LAW, INTERNECINE STRIFE, AND THE PROBLEM OF UNDERDEVELOPMENT IN AFRICA:

In the preceding sections of this chapter, the contributions of certain attitudes of international law and institutions to the problem of internecine strife in Africa were explored. It was suggested that by providing a number of powerful arguments, justifications and excuses to post-colonial African leaders, certain doctrinal attitudes of the law (such as the glorification of the establishment and maintenance of large centralised states as well as deference to the peer-review, effectiveness, domestication and homogenisation doctrines) have contributed to the strife that has been produced by the process of state formation, survival and re-configuration in Africa. The point being that:

"When the dominant nation-state ideology [facilitated by certain international legal attitudes] is incapable of accommodating cultural and ethnic diversity, the likelihood of protracted ethnic conflict increases."¹¹⁶

It was also noted that the evidence, and my own analysis of the evidence, suggests that far from being detached from the fray, far from being an untainted umpire, international law has been present in the arena of conflict¹¹⁷, and has helped structure it. It has thus partly contributed to the generation and sustenance of the ill-effects that such conflicts and violence have produced in Africa, as elsewhere.¹¹⁸

If, as is being suggested, the law urgently needs to undergo a process of self-reflection, toward self-realisation, then it is our duty as international lawyers to facilitate that process. It is to international lawyers, who have been aptly described by Professor Tom Farer as "the accountants of the international legal process"¹¹⁹, that the primary duty to facilitate that process of self-reflection and self-realisation falls. This process is all the more important given the ripple effects that the application of international law could have in all

116. See R. Stavenhagen, "Ethnic Conflicts and their Impact on International Society" (1991) 43 *International Social Science Journal* 117.

117. This is somewhat different from David Kennedy's suggestion that international law seems to recognise its place in our violent world of sovereign states. See D. Kennedy, International Legal Structures (Baden-Baden: Nomos, 1987) at 250.

118. This suggestion is not intended to obscure the fact that international law has also had many positive effects such as de-colonisation. See F.L. Kirgis, "The Degrees of Self-Determination in the United Nations Era" (1994) 88 *American journal of International Law* 304. International law and organisation have also significantly contributed to development. See I.L. Head, "The Contribution of International Law to Development" (1987) 25 *Canadian Yearbook of International law* 29.

119. See T. Farer, "Harnessing Rogue Elephants: A Short Discourse on Intervention in Civil Strife" in R. Falk, ed., The Vietnam War and International Law (Princeton: Princeton University Press, 1968) at 1093.

parts of the world in the present age of global interconnectedness.

In this section, it will be suggested, *inter alia*, that there is an important relationship between the internecine strife that international law and institutions have contributed to, and the problem of underdevelopment in Africa.¹²⁰ All-too-often, the costs of waging a civil conflict have proven exorbitant to the post-colonial African state, and to its peoples, and even the victorious party has often ended up with a net loss.¹²¹

Such violent conflicts have also made a shambles of social peace and development¹²² on all continents, in both developed¹²³ as well as developing countries.¹²⁴ In Guyana for instance, such violent conflicts have led to loss of regime legitimacy, the destruction of legitimate rule, pervasive human rights abuses, persistent

120. There are of course many other factors which have contributed to underdevelopment in the African context but this thesis is largely concerned with this one relationship. See A. Adedeji, "The African Economy: Prospects for Recovery" in O. Obasanjo and H. d'Orville, eds., Challenges of Leadership in African Development (New York: Crane Russak, 1990) at 35; and A. Sawyer, "Marginalisation of Africa and Human Development" (1993) 5 African Journal of International and Comparative Law 176. See also A. Adedeji, "Marginalisation and Marginality: Context, Issues and Viewpoints" in A. Adedeji, ed., Africa Within the World: Beyond Dispossession and Dependence (London: Zed Books, 1993).

121. See K. Rupesinghe, supra note 9 at 37.

122. It must also be realised that development itself is also a necessary condition for intra-state peace. see O. Nnoli, Ethnicity and Democracy in Africa (Lagos: Malthouse Press, 1994) at 3. Development, according to Professor Claude Ake, is not per se economic growth; it is a bottom-up process not a one-time project; and must be largely induced from within a given polity. See C. Ake, infra note 141 at 125.

123. See the Report of the World Summit for Social Development, 6-12 March 1995, U.N. Doc. A/CONF.166/9, of 19 April 1995.

124. See R. Premdas, Ethnic Conflict and Development: The Case of Guyana (Aldershot: Avebury, 1995) at 2 (hereinafter referred to as "Guyana").

instability, physical insecurity, inter-group hatred/paranoia, the emigration of highly skilled labour to other lands (or "brain drain"), the collapse of social services such as health institutions, battered infrastructure, and a battered economy.¹²⁵

The story has not been that different in other countries that have been beset by internecine strife.¹²⁶ For instance, in Sri Lanka, the costs of internecine strife have been equally exorbitant, leading to the diversion of over 20% of the GDP from the provision of basic social services to the financing of the military campaign to stamp out the rebellion of the Tamil peoples.¹²⁷

In Africa, internecine violence has also taken a huge toll on social peace and development via its tendency to cause political, social and economic difficulties.¹²⁸ A recent and quite excellent study by Lila Ammons has shown that wars¹²⁹ in Africa are unlikely to produce positive development because African countries participating in wars have tended to experience less growth in single development indicators between the pre- and

125. Ibid at 147-164.

126. See R. Premdas, "Ethnicity and Development: The Case of Fiji" UNRISD Discussion Paper of October 1993 at 1.

127. See L. Morris and S. Gnanaselvam, "The Economic Effects of the Sri Lankan Civil War" (1993) 41 *Economic Development and Cultural Change* 395 at 404.

128. See J.S. Wunsch and D. Olowu, "The Failure of the Centralised African State" in J.S. Wunsch and D. Olowu, eds., The Failure of the Centralised State (Boulder: Westview Press, 1990).

129. These have been mainly civil in nature as Africa has one of the lowest rates of inter-state war in the world.

post-war periods than similarly situated countries not participating in war.¹³⁰ In Nigeria, the costs imposed by internecine violence on national development have also been extremely high in the sense of great wastage of human resources, destruction of infrastructure, suspension of development projects, and the flight of investment capital that it caused.¹³¹

Such violent internecine conflicts also produce immense numbers of refugees and displaced persons.¹³² In 1988, with only 10% of the world's population, Africa accounted for about 25% of the world's refugee population.¹³³ By 1992, this percentage had grown to 29%, or a total of 5.4 million people.¹³⁴ And by 1995 the number was put at 6 million people.¹³⁵ Its share of displaced persons, which Professor Tiyanjana Maluwa has put at 14

130. See L. Ammons, "Consequences of War on African Countries' Social and Economic Development" (1996) 39 *African Studies Review* 67. Robert Looney has found, however, that it is not merely increased defence spending that fosters the developmental cost, as a number of other factors are at play. See R.E. Looney, "Military Expenditures and Socio-Economic Development in Africa: A Summary of Recent Empirical Research" (1988) 26 *The Journal of Modern African Studies* 319 at 325. In some cases, civil wars had the positive effect of inducing innovation as happened during the Nigerian civil war. See N.R. Ogbudinkpa, The Economics of the Nigerian Civil War and its Prospects for National Development (Enugu: Fourth Dimension, 1985) at 5-69.

131. See O. Nnoli, supra note 22 at 145-146

132. See R.G. Wirsing, "Dimensions of Minority Protection" in R.G. Wirsing, ed., Protection of Ethnic Minorities: Comparative Perspectives (Elmsford, New York: Pergamon Press, 1981) at 3.

133. See D.B. Abernathy, "European Colonialism and Postcolonial Crises in Africa" in H. Glickman, ed., The Crisis and Challenge of African Development (New York: Greenwood Press, 1988) at 4.

134. See The State of the World's Refugees 1993 (New York: Penguin, 1993) at 8-18.

135. See E.O. Awuku, "Refugee Movements in Africa and the OAU Convention on Refugees" (1995) 39 *Journal of African Law* 79.

million (out of 26 million globally)¹³⁶ is also as disproportionate.¹³⁷

It must be kept in mind though, that despite its very harmful effects on development, the differentiation which leads to fragmentation, and which in turn might lead to internecine strife, is not in and of itself, always pernicious, or ineluctably bad for development. Indeed, as Wunsch and Olowu, as well as Okwudiba Nnoli, have found, sustained development in Africa has more often than not been achieved at the local level by "ethnic" based town unions and community associations.¹³⁸ Also, it is being increasingly recognised by scholars that such groups provide certain factors such as a sense of trust, security and continuity which foster development.¹³⁹ As Ralph Premdas has stated:

"The ethnic map can be conducive either to inter-group trust or suspicion, thus positively or negatively affecting efforts aimed at the mobilisation of human and material resources for general welfare and development."¹⁴⁰

All in all, the important point to note about the relationship among the incidence of underdevelopment in Africa, and the factors that affect it, is that as Claude Ake has shown, by all indications, political factors are the greatest impediment to development.¹⁴¹ In Africa, the most important of these political factors has been the *completely absorbing* post-

136. See T. Maluwa, "The Refugee Problem and Quest for Peace and Security in Southern Africa" (1995) 7 International Journal of Refugee Law 653.

137. *Ibid.*

138. See J.S. Wunsch and D. Olowu, *supra* note 128; and O. Nnoli, *supra* note 22 at 6.

139. See D. Ronen, *supra* note 12 at 7.

140. See R. Premdas, "Guyana", *supra* note 124 at 1.

141. See C. Ake, *Democracy and Development in Africa* (Washington, D.C.: The Brookings Institution, 1996) at 1.

independence struggle for power over the control of the totalistic post-colonial African state; a struggle that has been principally waged among members of the sub-state groups present in a given state.¹⁴² Another factor has been the obvious hindrance of development, is the destruction of basic infrastructure during episodes or era of internecine conflict. This issue has already been examined.

Having noted this last point, it becomes easier to appreciate the various ways in which the application of the various doctrines by post-colonial African leaders have indirectly contributed to underdevelopment in Africa. The point that is being made here is that if international law has behaved in a way that has fostered or intensified internecine violence in Africa, it is also indirectly responsible for the contribution of that violence to underdevelopment on that same continent. Put differently, the argument is that certain doctrines of international law have been deployed in a way that contributes to internecine strife within African states; that such strife contributes to underdevelopment; and that therefore, in this way, the character of certain international legal doctrines has contributed to the underdevelopment of the post-colonial African state.¹⁴³

My own interpretation of the evidence is that a good way to ensure accelerated development in contemporary Africa is for the post-colonial African state to realise that it

142. *Ibid* at 7.

143. There is also another way in which the norms of international law and politics, or the norms of international legitimacy, are said by some important scholars to contribute to underdevelopment in Africa. Professors Robert Jackson and Carl Rosberg have, in what is now a well cited paper, suggested that current norms of international legitimacy free African states from competitive international pressures to integrate their political jurisdictions or acknowledge the independence of uncontrollable peripheries, and build up what they can. See R.H. Jackson and C. Rosberg, *supra* note 90 at 14-15.

has to live with what Professor Michael Chege sees as, "its fissiparous subnationalism and ethnic diversity".¹⁴⁴ Africa's problem of intense sub-state fragmentation cannot be ignored or repressed, cannot be reduced to an epiphenomenon that will disappear in short order.¹⁴⁵ Thus, more state violence, more brutal attempts at establishing at all costs the effectiveness of the post-colonial African state, cannot accomplish the important task of ensuring that African states realise the necessity of learning to live with the fact of their deeply ingrained socio-cultural diversity. If it is to stand a chance of becoming successful and leading to lasting peace and development on the continent, this process of realisation must itself be organic, internally motivated, and relatively non-violent.

H. SUMMARY OF THE ARGUMENTS:

In this chapter, it has been suggested that despite their many other positive contributions to international life, international law and institutions have contributed in a number of ways to the pandemic strife that has characterised relations among African states and their sub-state groups. Certain identifiable international legal and institutional doctrines have interacted with the concrete reality of intense fragmentation to produce this effect in Africa. The law has provided powerful normative arguments, justifications and excuses that have been deployed by African states in their relationships with their sub-state groups. This has occurred in ways that have contributed to the incidence of internecine strife, and therefore of underdevelopment within those states.

144. See M. Chege, "Remembering Africa" (1992) 71 Foreign Affairs 146 at 151.

145. See R. Premdas, supra note 124 at 2.

In the following chapter, an attempt will be made to explore the relevant evidence and the literature for indications as to the direction in which both the law and multilateral African institutions are headed as they strive to facilitate the creation of an environment in which the fragmented post-colonial African state can begin to live with its fissiparous socio-cultural groups. In the pursuit of that objective, an attempt will be made to examine the extent to which international law and policy, as well as multilateral African institutions, have contributed to, and taken advantage of, the on-going changes in the normative climate regarding the response of the law to the question of fragmentation within the post-colonial African state. The enquiry will also seek to discover how much progress has been made by law and institutions as they strive to ensure that all states, including those on the African continent, deal with their sub-state groups in ways that do not foster pandemic internecine strife.

The emphasis will be on the utility of multilateral African institutions. All through the chapter, an attempt will be made to interrogate the literature and the data for any indication that there is indeed a *preventive function* in multilateral African institutions, such that they have and are continuing to contribute to the search for ways to prevent and/or reduce the incidence in Africa of the phenomenon that I have referred to as internecine conflict/strife. This examination and analysis will be undertaken under the rubrics of separate enquiries into the possibility of such a preventive function in multilateral institutions in general, in the Organisation of African Unity, in the African Commission on Human and Peoples' Rights, and in the Economic Community of West African States.

CHAPTER FIVE

International Law, Multilateral African Institutions, and the Prevention of Internecine Conflict Within Established African States

A. THE CRUX OF THE ARGUMENTS:

In this chapter, an attempt will be made to understand the ways in which multilateral African institutions have begun to alter historical attitudes of international law and institutions toward the question of "socio-cultural fragmentation within established states".¹ In this chapter, I will map the various ways in which such institutions have actually contributed, and could in future continue to contribute, to the on-going attempts to re-configure the nature of the relationships among post-colonial African states and their restive sub-state groups.

I will also explore the possibility that the efforts being made by such institutions to re-configure the nature of the relationships among African states and sub-state groups will translate into an enhanced capacity within such institutions to *prevent* and/or *reduce* the incidence of internecine conflicts within African states. The point that will be made is that if certain attitudes of the law have in the past been relied upon to create conditions that have led to the incidence or intensification of internecine strife within African states, then the efforts currently being made by multilateral African institutions to eliminate or reduce the extent to which these normative arguments, justifications and excuses are available to the states that have relied upon them may well facilitate efforts to prevent and/or reduce the incidence of such strife on the continent. Indeed, as will be demonstrated, these institutions

1. Hereinafter referred to as "fragmentation".

have already begun to take advantage of the changing normative climate governing the question of fragmentation. They have begun to *actually* work toward the prevention and reduction of internecine strife in a number of specific African states.

In the course of this exercise, the emphasis on certain African institutions will be justified.² But before the exercise in justification of that choice is conducted, an attempt will be made to understand the nature of the function of multilateral institutions in the area of preventing and/or reducing those internecine conflicts that are traceable to the existence of sub-state fragmentation. I will also offer a number of justifications for my turn to some of such bodies to perform the task of ameliorating the unsatisfactory social, economic, and political effects of previous international legal and institutional treatment of the question of fragmentation.

B. A PREVENTIVE FUNCTION IN MULTILATERAL INSTITUTIONS:

Re-Configuring the Post-Colonial African State: Between Violence and Peace?

In the years since the end of the "cold-war", there has been a great deal of debate as to the direction in which policy and practice should head if the crisis of structural legitimacy that has beset many of Africa's established states is to be successfully managed. Despite the on-going paradigm shift within multilateral African institutions in favour of a deeper

2. The institutions upon which this enquiry concentrates are the Organisation of African Unity (OAU), the African Commission on Human and Peoples' Rights (ACHPR), and the Economic Community of West African States (ECOWAS).

involvement in the prevention and management of the continent's internecine conflicts³, there are still many who advocate various kinds of western-led intervention such as "trusteeship" as *the* panacea that is required.⁴

Others such as Professor Makau wa Mutua have eschewed such ideas and expressed a preference for a more fundamental re-configuration of the very character of the post-colonial African state.⁵ Mutua has pinpointed the fundamental problems inherent in the structure of the post-colonial African state, and has urged the development of formulae for a more *peaceable* dis-aggregation of the inherited colonial state-structures that are still operated to this day by most African states, as a way of avoiding an ineluctably *violent* one.⁶ In his view, whether by "sub-state self-determination" or "regional integration", the outlines of most present-day African states will change over the next century.⁷ Mutua is not convinced by arguments that warn against any such re-configuration of the map of Africa either by reference to the possibility of the consequent chaos, or by reference to one possible end-result: the re-balkanisation of Africa into an inordinately large number of separate

3. See Panafrican News Agency Report, 16 October 1997 at 1 (quoting OAU Secretary-General Salim Ahmed Salim).

4. For a comprehensive examination of some of these arguments, see I.W. Zartman, ed., The Disintegration and Restoration of Legitimate Authority (Boulder: Lynne Rienner, 1995).

5. See M. wa Mutua, "Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State" (1995) 21 Brooklyn Journal of International Law 505 at 508 (arguing that as presently constituted, the post-colonial African state does not deserve to be saved at all cost).

6. Ibid at 536.

7. Ibid at 535-536.

polities.⁸ In his own view, a violent and thus very costly process of balkanisation and crisis seems inevitable, unless pre-empted by a more consensual, and thus more peaceable, re-configuration of African geo-political space.⁹

This is an imperative that Gideon Gotlieb has recognised. Although he has warned that past efforts at the re-drawing of borders did not bring immediate peace to Europe, and that fragmentation is a ready recipe for an even more dangerous and anarchic world, he has also viewed this problem from another perspective. In advocating his "state-plus-nations" approach, he has recognised that *making room for nations trying to break loose from states that rule over them is a pressing issue for world stability and peace*.¹⁰

The choice therefore seems to be between two kinds of re-configuration, the one peaceable and the other violent. The peaceful approach is of course preferable. But as Gotlieb has also suggested, the international system needs to re-invent itself if it is to succeed in an attempt at the peaceable achieve the peaceable re-configuration of the relationships among states and sub-state groups.¹¹ More specifically, as Crawford Young suggests, "[n]othing less than a reinvention of the state is the task at hand".¹²

8. See M. wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Enquiry" (1995) 16 Michigan Journal of International Law 1113 at 1119.

9. Ibid.

10. See G. Gotlieb, Nation Against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty (New York: Council on Foreign Relations Press, 1993) at 2.

11. Ibid at 35-36.

12. See C. Young, The African Colonial State in Comparative Perspective (New Haven: Yale University Press, 1994) at 283.

Accordingly, it seems that the fetishisation of the state¹³, especially the post-colonial African state as it is presently constituted, must give way to a pragmatic dis-aggregation of the state in whatever ways that conduce to the peace and development of particular African and other established states. A context-dependent transformation of the fundamental character of each state is therefore imperative. As Thomas Franck has shown:

"We do know that there is no evidence to support the claim of any particular political configuration - the multinational state, the nation-state, the city-state, the multistate organisation, or any other - to be the 'natural' order of things, to reflect some ineluctable human destiny".¹⁴

If this is so, then international law and institutions ought not be obsessed with any particular kind of political configuration. The law ought to roam the vast extent, and probe the deepest recesses, of human imagination in search of the particular configuration(s) that best conduce to peace in any particular epoch and context. If this requires a dis-aggregation of any existing configuration, then so be it, as long as the cause of international peace and development will be thereby served. This is in fact already happening. For, as Professor Ivan L. Head has recently put it, "the very definition of sovereignty has changed considerably in recent years."¹⁵

That is why an attempt will be made in this chapter to sketch the outlines of a newly

13. For a discussion on the relevance of the state even in our post-modern age, see A. Etzioni, "The Evils of Self-Determination" (1992/93) 89 Foreign Policy 21.

14. See T.M. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice" (1996) 90 American Journal of International Law 359 at 365.

15. See I.L. Head, "Address to the World Food Day Ceremony" delivered at the United Nations, New York, U.S.A., 25 October 1996 at 8 (on file with this writer). See also A. Chayes and A.H. Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Cambridge, Mass: Harvard University Press, 1995).

emerging relationship among African states and their sub-state groups. This emerging relationship is being formed as a corollary of the on-going modification of the attitudes that international law and institutions have exhibited toward the question of fragmentation. This emerging configuration will be read as a function of the various ways in which the law and these institutions have begun to modify, and will continue to modify, the normative climate governing the law's attitudes to the related problems of fragmentation and the incidence of internecine strife within African states. This is, in other words, the nature of the "preventive function" that such institutions could perform; a possibility that I explore in much of the rest of this chapter. I will also be interested in understanding the ways in which multilateral institutions, especially the African ones, have begun to take advantage of the changing international normative climate to make concrete efforts to re-configure the relationships among specific African states and their sub-state groups.

Before I engage that subject though, it is important, I think, that an explanation be offered for the "faith" in the capacity of multilateral institutions that seems to be implied by the central role that has been accorded to such institutions in the search for novel ways to peaceably re-configure the *internal structure* of states.

Why the Turn to Multilateral Institutions?

I have retained a cautious faith in, and made the present turn to, multilateral institutions¹⁶, as well as to the law that guides their activities despite my awareness of the

16. For a deeper understanding of the concept of multilateralism, see J. Caporaso, "International Relations Theory and Multilateralism: The Search for Foundations" (1992) 46 *International Organisation* 599 (arguing that multilateralism might be conceived as a deep organising principle of international life; as an ideology designed to promote multilateral

problematic history of earlier moves to international institutions. Moreover, the very question of the utility of a turn to international institutions¹⁷ as a way of solving international or even domestic socio-political problems is a vexed one, one that has divided scholars for a long time. And even though there is hardly any space in this thesis for a comprehensive exploration of this important debate, a brief discussion of its fundamentals is apposite.

John Mearsheimer has framed this debate as one between the so-called "realists" and the so-called "institutionalists".¹⁸ Put simply, realists are those scholars who appear to be wedded to the "power-politics" paradigm for understanding international relations, and who are fundamentally sceptical of the value of international institutions as tools for the achievement of international peace. Institutionalists, on the other hand, reject that paradigm

activity); and R.W. Cox, "An Alternative Approach to Multilateralism for the Twenty-first Century" (1997) 3 *Global Governance: A Review of Multilateralism and International Organisations* 103.

17. There is no widely-agreed upon definition of an "international institution", and that term is often used interchangeably with the term "international regime". John Mearsheimer has defined it as a set of rules that stipulate the ways in which states should cooperate and compete with each other and are typically formalised in international agreements, and embodied in organisations with their own personnel and budgets. See J.J. Mearsheimer, "The False Promise of International Institutions" (1994/95) 19 *International Security* 5 at 8-9. Milton Esman and Shibley Telhami define "international regimes as norms, rules, and procedures that regulate an issue area of international relations. They define an "international organisation" as a multilateral organisation composed of states as members and primarily intended to regulate relations amongst member states. See M. Esman and S. Telhami, "Introduction" in M. Esman and S. Telhami, eds., International Organisations and Ethnic Conflict (Ithaca: Cornell University Press, 1995) at 2-4. For other definitions of an "international organisation", see G. Abi-Saab, ed., The Concept of International Organisation (Paris: UNESCO, 1981); C. Archer, International Organisation (London: Routledge, 1992); and W. Dale, "Is the Commonwealth an International Organisation?" (1982) 31 *International and Comparative Law Quarterly* 451. In this thesis, I have adopted Mearsheimer's definition of an "international institution" as an embodiment of a "regime" and an "organisation".

18. *Ibid* at 5.

and share a faith in international institutions as a *key* means of promoting world peace.¹⁹

In Mearsheimer's view:

"Realists and institutionalists particularly disagree about whether institutions *markedly affect* the prospects for international stability. Realists say no; institutionalists say yes...Realists maintain that institutions...have no independent effect on state behaviour. Realists therefore believe that institutions are not an independent cause of peace. They matter only on the margins. Institutionalists directly challenge this view of institutions, arguing instead that institutions can alter state preferences and therefore change state behaviour."²⁰

Secondly, I am also aware that, more particularly, "identity" is not something that is easily susceptible to compromise judgements through negotiation²¹. The fact is that international institutions face a lot of problems in managing internecine conflict either among sub-state groups, or between a state and any of such groups.²² Such problems have included the fierceness of the competition, the sovereignty of the parent state, the internal illegitimacy of central governments, financial limitations, and the difficulty sometimes faced by the leadership of contesting parties in convincing their members to accept centrist solutions.²³

19. Ibid.

20. Ibid at 7. Emphasis supplied. Mearsheimer is himself a key realist scholar. Key internationalist writings include R.O. Keohane, "The Diplomacy of Structural Change: Multilateral Institutions and State Strategies" in H. Hafterdorn and C. Tuschhoff, eds., America and Europe in an Era of Change (Boulder: Westview Press, 1993); R.O. Keohane, International Institutions and State Power (Boulder: Westview Press, 1989); J.G. Ruggie, "Multilateralism: The Anatomy of an Institution" (1992) 46 International Organisation 561; and A-M. Burley, "Toward an Age of Liberal Nations" (1992) 33 Harvard International Law Journal 391.

21. See J. Walker, "International Mediation of Ethnic Conflicts" in M.E. Brown, ed., Ethnic Conflict and International Security (New Jersey: Princeton University Press, 1993) at 176.

22. Ibid at 3-4.

23. Ibid.

Yet, such negotiation and compromise is the very stuff of international institutional practice.²⁴

I am also aware of the nature of the critique of the project of international institutionalisation that has been launched by Harvard Law Professor David Kennedy. His criticisms are many, but four of them will be discussed here. In the first place, he criticises the move to institutions as an embodiment of the "self-promotion" which he sees as common among international lawyers.²⁵ Secondly, Kennedy sees the focus on the *level* of governance that is implied by a move to international (rather than domestic) institutions as, more or less evidence, of a focus on *process* without *substantive commitment*.²⁶ The third criticism levelled by him against the turn to international institutions is that there is nothing new about it. The fourth, and most crucial, is that past waves of enthusiasm for international institutions have all been similarly motivated²⁷, and that each of them has ended in frustration and tiredness at the limitations of the "international" approach.²⁸

It is true that ever since the birth of modern European nationalism, international lawyers on that continent have attempted to create a suitable regime to reconcile that

24. Ibid.

25. See D. Kennedy, "A New World Order: Yesterday, Today and Tomorrow" (1994) 4 Transnational Law and Contemporary Problems 329 at 339.

26. Ibid at 341.

27. Ibid at 356-357.

28. Ibid at 331.

continent's diverse sub-state groups to each other.²⁹ It is also true that the life of the international institution dates back at least to the time of the League of Nations. What is not true, however, is the conclusion that just because the institution has been with us for such a long time, faith in its ability to contribute to world peace is altogether unjustified. Even Professor Kennedy himself seems to have recognised this point when he urged the international community to allow the participation of sub-state groups in debates within intergovernmental institutions.³⁰

Whatever be the limitations of international institutions (and there are many), as Professor Kennedy has himself noted, the promise of international institutions still burns to this day, continually relit by a shared experience of the urgency of international efforts to solve the globe's most pressing problems.³¹ A recognition of the grave difficulties which face international institutions in their efforts to solve the many problems that have been assigned to them, need not in every instance translate to a loss of faith in the ability of such institutions to make a significantly valuable contribution to the amelioration or resolution of those problems.

It may well be that the reason for the frustration that is felt by some scholars at the limitations of international institutions is that in the past their expectations of these

29. See N. Berman, "Nationalism Legal and Linguistic: The Teachings of European Jurisprudence" (1992) 24 New York University Journal of International Law and Politics 1515 at 1516.

30. See D. Kennedy, *supra* note 25 at 345.

31. *Ibid* at 330.

institutions have been overly optimistic.³² Realists are thus right to note that all-too-often, such institutions have been imagined as the *panacea* for the world's problems. Rarely have they been clearly imagined as one of a number of *resources* available to the international policy-maker.

Realists are also quite correct to warn that institutionalism can induce false promises if the possibilities of international institutional action are over-estimated³³. But given the inherent indeterminacy of our social world, a world in which it has been most difficult to neatly isolate the direct causes of pertinent phenomena³⁴, in which the very paradigm of causality is at present said to be in a state of near chaos³⁵, it is unconvincing to entirely dismiss international institutions as a significant factor in the search for world peace, especially when such a dismissal is based on their failure to measure up to a herculean standard of performance. Whether as an actor or as an arena, an international institution cannot but exert some significant influence on its member states³⁶.

It must be re-emphasised though, that "faith" in international institutions does not always entail a rather naive belief in the *sufficiency* of such institutions as problem-solvers. Standing alone, these institutions cannot solve the world's major problems, let alone all of

32. See D. Kennedy, "The Move to Institutions" (1987) 8 Cardozo Law Review 841.

33. See J.G. Ruggie, "Peace in Our Time? Causality, Social Facts and Narrative Knowing" (1995) American Society of International Law Proceedings 93 at 100.

34. Ibid.

35. Ibid.

36. See G. Abi-Saab, "Introduction-The Concept of International Organisation: A Synthesis" in G. Abi-Saab, ed., supra note 17 at 17.

the world's problems. They are not *the* panacea, but one of the many resources available to be pressed into service whenever and wherever the international society thinks fit.

Moreover, an analysis of the history of the League of Nations seems to show that, by and of themselves, norm creation and institutional activity are not enough to deal with the problem of fragmentation and strife within states.³⁷ Neither is the strategy adopted by the League at that time the panacea for our own time.³⁸ Just as institutions in and of themselves are inadequate to handle the task at hand, the law is by itself always insufficient, always inadequate to do the same. And since it takes what Kelsen has referred to as the "dynamic process of concretisation"³⁹ to apply any norm to a particular situation, normative processes are invariably influenced by factors external to themselves, and are thus, to a large extent, indeterminate in application and consequence.⁴⁰

Though these limitations on the capacity of institutions to contribute to world peace must always be kept in mind as a *guide* to policy-makers, and as an influence on the shaping of their expectations of the international institution, these insights ought not paralyse them.

37. Political problems such as the exclusion of the direct voices of protected minorities from the League itself, the absence of an effective sanctioning mechanism, the humiliation of target states by the selective application of the system, and the larger problems of the League itself, are said to contributed to that system's eventual collapse. See B. Driessen, The Concept of Nation in International Law (The Hague: TMC Asser Instituut, 1992) at 130-135.

38. See R.G. Wirsing, "Dimensions of Minority Protection" in R.G. Wirsing, ed., Protection of Ethnic Minorities: Comparative Perspectives (Elmsford, New York: Pergamon, 1981) at 4. See also J-M. Guehenno, The End of the Nation-State, V. Elliot Tr., (Minneapolis: University of Minnesota Press, 1995) at 138-139.

39. See H. Kelsen, General Theory of Norms (Oxford: Clarendon Press, 1991).

40. See I. Bibo, The Paralysis of International Institutions and the Remedies (Sussex: Harvester Press, 1976) at 3.

The limits of the promise of international institutions ought not douse the enthusiasm of such actors for imaginative solution-seeking. When viewed against the background of the extremely high costs that past inaction has exacted on global peace and development, such paralysis would lead to very unsatisfactory results. At the very least, policy-makers ought to continue to imagine ways of preventing the worsening of our problems. The potentially high costs of conflict and the intractability that the outbreak of violence brings to intra-state conflict especially in fragmented states are good reasons for the international community to invest heavily in preventive mechanisms.⁴¹

A question that might be asked by a sceptic is why it is that multilateral (and not domestic) institutions capture our attention whenever we begin a search for a way to prevent this particular type of violence? After all, international institutions have so far been unable to provide a generally effective and organised response to such challenges.⁴² Moreover, international law and institutions have historically acted *reactively*, rather than *preventively*.⁴³ More often than not the expenditure of institutional capital to manage such situations has awaited the expenditure of human lives in the throes of conflict.

In the prevention of this kind of violence through pre-emptive action, the major

41. See J.M. Richardson, Jnr and S.W.R. de A. Samarasinghe, "Measuring the Economic Dimensions of Sri Lanka's Ethnic Conflict" in S.W.R. de A. Samarasinghe and R. Cougham, eds., Economic Dimensions of Ethnic Conflict (New York: Pinter, 1991) at 218.

42. See G. Alfreddson and D. Turk, "International Mechanisms for the Monitoring and Protection of Minority Rights: Their Advantages, Disadvantages and Interrelationships" in A. Bloed, L. Leicht, M. Nowak and A. Rosas. eds., Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms (Dordrecht: Martinus Nijhoff, 1993) at 169.

43. See M. Eisner, "A Procedural Model for the Resolution of Secessionist Disputes" (1992) 33 Harvard International Law Journal 407 at 417.

advantage of multilateral institutions over the option of domestic institutions is that of "relative detachment".⁴⁴ The diversity and size of the membership of the multilateral institution, and the fact that they are, quite unlike the concerned state, not likely to be an interested participant in the conflict, often provides them with the relative detachment from the conflict that is a minimum condition for the appearance and fact of impartiality.⁴⁵ Without an expectation of fair treatment and a chance of success, it is often difficult to persuade the rebellious or aggrieved segment of the established state to refrain from violence. This is so because such groups are usually prone to adopt militaristic approaches in the face of the ill-treatment of their membership by their parent state. In this kind of context, it is obviously counter-productive for the concerned state to act as the umpire in such cases. For, as history has shown, many post-colonial African states have not been tolerant of, or fair to, their fissiparous sub-state groups.

And while another state or third party may mediate or attempt to lessen the tensions, unilateral mediation or action by one state is more likely to be viewed with suspicion than would multilateral mediation or action by an established and credible institution. The increasing *preference* for multilateral over unilateral action by the international society is an

44. It should be noted that this point is still valid despite the fact of the exercise of unequal power by states within multilateral institutions.

45. Professor Ibrahim Gambari has made a similar point. See I.A. Gambari, "The Role of Foreign Intervention in African Reconstruction" in I.W. Zartman, ed., Collapsed States: The Disintegration and Restoration of Legitimate Authority (Boulder: Lynne Rienner, 1995) at 232.

indication of a recognition of the advantages of cooperation and of such concerted effort.⁴⁶

This does not mean that multilateral action is always viewed as impartial. For, as the experience of the UN in Somalia suggests, the performance of multilateral institutions in such situations may actually be hampered by their historical record of rampant selectivity. This will be especially so if that record of rampant selectivity has led to pre-existing perceptions among the local population that the relevant institution is prone to treat others in an unfair manner.⁴⁷ In this sense, the interventionary action or mediation may be doomed from its very commencement for reasons that have less to do with its present merits and more to do with the historical behaviour of the intervenor. This is what Francis Deng and John Steinbruner have at different times referred to as the "immune reaction" of the local population.⁴⁸ Interventionary action or mediation by multilateral institutions are less susceptible to this sort of immune reaction.⁴⁹ This is because they often diffuse the interests of the different powers involved, or at least do so better than unilateral action.⁵⁰ A good illustration of this kind of diffusion is the way in which the other members of the Economic

46. Nearly every interventionary action or mediation in intra-state conflict in this decade has been multilateral. Liberia, Somalia, Bosnia, Cambodia, South Africa, Sierra Leone, Rwanda, Burundi, Slovenia, Croatia, and the recent events in Nigeria come to mind. Also the Academic Council on the United Nations has just begun publishing a new journal which focuses on multilateralism. See for instance (1997) 3 *Global Governance* 103.

47. This point has been made at length in O.C. Okafor, "Is there a Legitimacy Deficit in International Scholarship and Practice?" (1997) 13 (special issue) *International Insights* 91.

48. See F. Deng, "State Collapse: The Humanitarian Challenge to the United Nations" in I.W. Zartman, ed., *supra* note 4 at 211. See also J. Steinbruner, "Civil Violence as an International Security Problem" Unpublished memorandum, cited by F. Deng, *ibid.*

49. See F. Deng, *ibid.*

50. See I.A. Gambari, *supra* note 45 at 232.

Community of West African States (ECOWAS) were, in the early days of the Sierra Leonean Crisis of 1997/98, able to modify Nigeria's interest in a quick military solution. Nigeria's unexpected enthusiasm for a military offensive designed to oust the Sierra Leonian putschists from power was outvoted by the other member states who preferred the imposition of severe sanctions against the military regime in Sierra Leone.⁵¹ While the ECOWAS eventually resorted to a military solution to that problem, the military option was only adopted after it had become clear to most members of that community that the ruling Sierra Leonian military junta was bent on reneging on its solemn promise to hand over the control of the state to the legitimately elected leadership of Sierra Leone.⁵²

Another good reason for the turn to multilateral institutions for the prevention of internecine violence within the post-colonial African state is that few countries can find the huge resources necessary to mount, unilaterally and regularly, such interventionary action or mediation.⁵³ Yet, preventive action requires regular and continual action, not episodic and *ex post facto* reactions to particular situations.

There are other reasons as well for this move to the "international", this preference for the "multilateral", as opposed to the "unilateral" or "domestic".

First of all, such institutions provide a relatively critical adjudicatory arena. They provide a place where both the established state and its aggrieved or rebellious fragments can

51. Nigeria was at this time itself ruled by a military government which had come to power via a coup d'Etat.

52. This promise was solemnised in an international agreement signed with the ECOWAS on 23 October 1997 at Conakry, Guinea. See infra note 229.

53. See I.A. Gambari, supra note 45 at 232.

tell their stories before a relatively critical audience; an audience that is much more impartial than the state would be were it to act as both disputant and judge. These institutions provide a place where the scrutiny of the state's story is not done by its own agents as happened at the 1995 trial of the Ogoni 10 in Nigeria⁵⁴. Such institutions also provide an arena where the power differential between both sides to the dispute is neither as wide nor as paralysing⁵⁵; where an aggrieved sub-state group may make its voice heard without being stifled, and without first resorting to the use of force just in order to focus local and international attention on its plight.

Secondly, because established states often do not possess the institutional means through which they can feel for, and actually detect, the pulses of their sub-state groups, they might become better educated about the real grievances of such fragments if they are required to listen and respond to them at international fora. This re-education will occur as a by-product of an attempt by states to secure as much knowledge of the case for the sub-state group as will enable them to formulate a convincing defence to the claims of that group. This might foster a mutual learning process as between the state and its fragment, leading to a negotiated peace. After all, is that not the very stuff of which functional

54. See O.C. Okafor, "In Spite of the Crucifix?: International Law, Human Rights and the Allegory of the Ogoni Problem" Paper presented at the 1996 Annual Conference of the African Studies Association held at San Francisco, U.S.A. (on file with this writer).

55. This is usual in disputes between states and any of their sub-units. But the intervention of a multilateral institution often reduces this power differential and empowers these groups. The practice of the Human Rights Committee established under the International Covenant on Civil and Political Rights is instructive in this regard. See for instance Bernard Omniyak, Chief of the Lubicon Lake Band v Canada Communication No. 167/1984; Kitok v Sweden Communication No. 197/1985; and Dominique Guesdon v France Communication No. 219/1986.

agreements are made?⁵⁶

Lastly, the strengthening of the multilateral institution is a way of de-centralising the over-centralised African state. In this sense, decentralisation proceeds upwards as some power is shed to the multilateral institution. This might have the effect of reducing the overwhelming lure of the all-powerful central regime, and dousing the flames of the bitter contests for its control that have raged since independence in many states, be they African or non-African. If one of the major reasons for the explosiveness of the struggle for control of the central government in African states is that central governments are often all-powerful, any reduction of their power might translate into a peace dividend.

Despite all these advantages, the international community has not so far set up any *global* machinery with which to harness the benefits of a multilateral institutional approach to the problem of internecine violence among states and their sub-state groups. As Henry Richardson III has noted, we still need international arenas for focused preventive diplomacy.⁵⁷ Indeed, his description of what such arenas might look like is so interesting as to deserve reproduction *in extenso*. According to him:

"Such arenas would comprise structures for mediation/arbitration and other forms of decision-making, based on rights-oriented procedures to address claims of self-determination arising within a troubled state by identifiable groups as against that state government. There are currently no international standing arenas - aside from in theory, the International Court of Justice - where authoritative decisions can be made regarding the relevant parties about

56. See T.M. Franck and M.M. Munansangu, "The New International Economic Order: International Law in the Making?" (New York: UNITAR, 1982) at 12.

57. See H.J. Richardson, III, "Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations" (1996) 10 Temple International and Comparative Law Journal 1 at 9-10.

the balance of self-determination related rights, and pre-existing constitutional arrangements, in a situation of potential conflict, before it deteriorates Such arenas must be established, and the consequence, *inter alia*, of a decreasing state-centric orientation to these problems is a preferable objective compared to current approaches."⁵⁸

Similar machinery already exists at the regional (European and African) levels. But while the existence of the European mechanism is widely acknowledged,⁵⁹ the presence of, and increasing resort to, such machinery in Africa is still not widely recognised. Indeed, international lawyers have almost completely missed the comprehensive picture of the actual and possible contribution of multilateral African institutions to the prevention of the incidence of internecine strife in the relations among states and sub-state groups.⁶⁰

In the following sections of this chapter, an attempt will be made to understand and chart this actual and potential contribution. The section is, however, preceded by another in which I will make an attempt to justify my focus on certain multilateral African institutions.

58. Ibid.

59. The European mechanism is rooted in the OSCE system and will be examined to some extent while discussing the existing and emerging African mechanisms in the following sections of this chapter.

60. A few international lawyers and scholars of other disciplines have identified the existence of relevant multilateral African institutions. But nowhere does a complete study of the contributions of such institutions in this area as yet exist. For examples of the work of the few scholars who have recognised the existence of these African mechanisms, see S.B. Gutto, "The OAU's New Mechanism for Conflict Prevention, Management and Resolution and the Controversial Concept of Humanitarian Intervention in International Law" (1995) 7 ASICL Procs. 348; R. Ranjeva, "Reflections on Proposals for the Establishment of a Pan-African Mechanism for the Prevention and Settlement of Conflicts" in N. Blokker and S. Muller, eds., Towards More Effective Supervision By International Organisations (Dordrecht: Martinus Nijhoff, 1994) at 93; C. Bakwesegha, "The Role of the Organisation of African Unity in Conflict Prevention, Management and Resolution" (1995) special Issue-International Journal of Refugee Law 207; and J. Packer, "Conflict Prevention By the OAU: The Relevance of the OSCE High Commissioner on National Minorities" (1997) African Yearbook of International Law 279.

Why the Emphasis on Multilateral African Institutions?

There are two additional reasons for my emphasis on African institutions. Firstly, it is increasingly being recognised that the difference between an interventionary action, arbitration, or mediation that succeeds, and one that is destroyed by immune reaction, depends on the degree of spontaneous acceptance or rejection by the local population.⁶¹ One of the reasons for the spontaneous or successfully "manufactured" rejection of such action by local populations in Africa is that the net experience of Africans with foreign intervention has been, from their own perspective, quite negative. From the heyday of European colonialism to this day, African peoples have not, on the balance, experienced foreign intervention as neutral, be it surreptitious American intervention in Zaire⁶², or the first phase of Nigerian intervention in Liberia.⁶³ This has been so despite perceptions among many westerners and Africans that some interventions may have been at least partly motivated by humanitarian considerations.⁶⁴ Thus, African populations, not just the leaders, are often quite suspicious of international action even when it involves a multilateral rather

61. See J. Steinbruner, supra note 48.

62. During the "cold-war", the USA surreptitiously intervened in many parts of Africa, sometimes engineering the ouster of unfriendly regimes. See for example, S. Kelly, America's Tyrant (Lanham: American University Press, 1993).

63. This was the phase in which the then Nigerian President, General Ibrahim Babangida, engineered a Nigerian-led West-African endorsed intervention in Liberia which was at first widely perceived as designed to prevent Charles Taylor's rebel forces from completely overwhelming the regime of Samuel Doe. For more on this intervention, see A.C. Offodile, "The Legality of ECOWAS Intervention in Liberia" (1994) 32 Columbia Journal of Transnational Law 381.

64. See I.A. Gambari, supra note 45 at 221-223.

than a unilateral effort.⁶⁵ They seem, however, to be far less suspicious of multilateral African institutions. They perceive such institutions not just as their own creations, but also as less imperialist.⁶⁶ Accordingly, multilateral African institutions, if otherwise well equipped and operated, seem to have the best chance of success in managing the problem of internecine strife in Africa. In a reactive rather than preventive sense, the recent ECOWAS intervention in Sierra Leone, which was by most accounts welcomed, and even aided, by most ordinary Sierra Leonians, as well as by most states, is a good example of this kind of intervention.⁶⁷

The other reason for emphasising multilateral African institutions is simply that, if better equipped and organised, Africans are likely to be the best people, and the most willing, to solve their own problems. While this optic was in the past not justified by the available evidence, since the late 1980s, the facts have begun to bear it out.⁶⁸ Again, African institutions, it seems, are more likely to be familiar with the environment, the culture, and the politics than outsiders. In other words, they are much more likely to know

65. This perception has not been helped by the colonialist nostalgia evident in some of the recent writing on the African crisis. For a detailed discussion of this disturbing trend, see H.J. Richardson III, supra note 57.

66. See J. Packer, supra note 60 for the justifiability of the preference expressed for multilateral African institutions.

67. See the Vancouver Sun, 14 February 1998 at A18 (noting the widespread celebrations that greeted the success of the ECOWAS troops who sacked the then ruling junta from power).

68. For more on the new mood in multilateral African institutions, see S.G. Amoo, "Role of the OAU: Past, Present and Future" in D.R. Smock. ed., Making War and Waging Peace (Washington D.C.: United States Institute of Peace, 1993) at 240-253; and R. May and G. Cleaver, "African Peace-Keeping: Still Dependent?" (1997) *International Peacekeeping* 1.

the history and context of the problem. And it is they who bear most the brunt of those problems.⁶⁹ The bulk of African refugees live in other African countries, and it is these same countries that suffer the most from the spill-over effects of internecine strife.⁷⁰

(This is not to say that I do not have an interest in global or European mechanisms that deal or might deal with similar questions; the need for brevity and focus, however, necessitates a concentration on a particular area, and I have chosen Africa as that target area. I will nevertheless refer to global and European mechanisms either in comparison or as illustrations.)

My focus is restricted to a few, not all, multilateral African institutions. I am interested in the OAU, the ACHPR and the ECOWAS. I have selected these on the basis of their historical involvement with, and potential for, arbitrating tensions amongst states and their sub-state groups that compose them well before such tensions degenerate into violence.

I will not deal with the Southern African Development Community (SADC) for a number of reasons. The first is the limitations imposed by limited space. The second is the fact that SADC is far too young and inexperienced to be studied with profit in respect of the subject-matter of this thesis. The third is that its institutions are not as established as those of the three organisations that I have chosen.⁷¹ In any case, the member states of SADC

69. See C. Bakwesegha, *supra* note 60 at 217.

70. For example, the former Zaire has been recently inundated by Rwandese Hutus fleeing the civil war in Rwanda. See *Toronto Star*, 8 May 1997. Also, Rwandese refugees have inundated many of the countries in the great lakes region of East and Central Africa. See *Calgary Herald*, 23 May 1997.

71. See Treaty of the Southern African Development Community, August 1992, *reprinted* in (1993) 5 *African Journal of International and Comparative Law* 419. This organisation was presaged by the Southern African Development Coordination Conference (SADCC)

are also participants in the OAU and ACHPR, two of the institutions on which I focus.

In the following three sections of this chapter, I will explore the actual and potential contributions of the OAU, the ACHPR, and the ECOWAS, in that order, to the prevention and/or reduction of the incidence of internecine strife among African states and their sub-state groups. These contributions will, for the most part, be gleaned from an analysis of the various ways in which these institutions have helped create a new normative climate that provides an alternative to the familiar arguments, excuses and justifications that many African states have relied on for a long time in order to rationalise their ill-treatment of their sub-state groups, arguments that have often resulted in the production of internecine strife within those states. It appears that these institutions have begun to create an emerging normative climate largely by attempting to re-orient inter-African politics toward infra-review (as opposed to peer-review), de-centralising the state (as opposed to over-centralising it), de-homogenising the state (as opposed to homogenising it), and affording cohesive sub-state groups access to the international sphere (as opposed to domesticating them). In these ways these institutions have begun to create, as well as take advantage of, a legal and political climate that is more conducive to the prevention and/or reduction of the incidence of internecine strife within African states.

C. A PREVENTIVE FUNCTION WITHIN THE ORGANISATION OF AFRICAN UNITY:

In this section, I will explore the actual and potential contributions of the Organisation

which was formed in 1979 with its Headquarters in Gaborone. See R. Friedland, A Guide to African International Organisations (London: Hans Zell, 1990) at 41.

of African Unity (OAU)⁷² to the search for ways of preventing and/or reducing the incidence of internecine strife among African states and their sub-state groups. This will be done under two rubrics: the political organs of the OAU (i.e., the Assembly of Heads of States and Governments, the Council of Ministers, and the Secretariat⁷³), and the emerging African Economic Community. While the contribution of the political organs of the OAU is at this time partly actual and partly potential, that of the AEC is, at this time, almost entirely potential.

The Political Organs of the Organisation of African Unity

More often than not in the history of the OAU, its political organs have not found the political will to deal adequately with the conflicts that have occurred in Africa.⁷⁴ This record has contributed to the OAU being summarily dismissed in some quarters as irrelevant to the resolution of Africa's political problems.⁷⁵

The record of the organisation has been even poorer with regard to internal, mostly

72. The OAU was founded by thirty states on 25 May 1963. In terms of membership, it is the largest regional organisation in the world. See P. Kunig, "The OAU and the Nation-Building Process: The International Legal Context" (1984) 29 *Law and State* 23.

73. For the organisational structure of the OAU, see J.S. Bowen, "Power and Authority in the African Context: Why Somalia Did not Have to Starve - The Organisation of African Unity (OAU) as an Example of the Constitutive Process" (1995) 14 *National Black Law Journal* 92 at 101-108.

74. See F. Deng, *supra* note 48 at 210. This may in part be attributed to the fact that as Sesay, Ojo and Fasehun have shown, the OAU is a low resource organisation. In 1980, its budget was a mere \$17.6 million. See A. Sesay, O. Ojo and O. Fasehun, *The OAU After Twenty Years* (Boulder: Westview, 1984) at 39.

75. See S.G. Amoo, *supra* note 68 at 240.

inter-group related, violence.⁷⁶ This has been so despite the increasing prominence on the continent of internecine strife as opposed to inter-state wars. Indeed, there have been very few inter-state wars on the African continent.⁷⁷ Right from the Katanga and Biafran secession attempts in the former Zaire and in Nigeria, African leaders and the institutions they built, such as the OAU, have been captivated by the twin ideas of *uti possidetis* and the fetishisation of the territorial integrity of states.⁷⁸

These status-quo, regime-maintaining, "stabilising", doctrines have been janus-faced. On the one hand, they gave vent to a felt need among the recently decolonised African states to consolidate the independence of the new states and avoid what was seen as the potential catastrophe of a continuing process of boundary re-adjustment and state formation on the continent.⁷⁹ On the other hand, the otherwise reasonable idea of preserving, at all cost, the colonially imposed borders of the new states became a license that many of these new states frequently used to justify the violent oppression of their minority and other populations.⁸⁰ Central regimes were in almost every case afforded the support of the OAU, no matter how oppressive they were of their sub-state groups. A good example is the overwhelming support

76. See P. Kunig, supra note 72 at 31.

77. Of the 22 or so current violent and semi-violent conflicts on the African continent, only 3 (Ghana-Togo, Western Sahara-Morocco, and Nigeria-Cameroun) were inter-state. One of the very few wars that have been inter-state is the momentous unilateral Tanzanian intervention in Uganda to oust the Idi Amin from power.

78. See B. Driessen, supra note 37 at 71-72.

79. See C.O.C. Amate, Inside the OAU: Pan-Africanism in Practice (London: Macmillan, 1986) at 32.

80. See I.A. Gambari, supra note 45 at 222.

afforded the Nigerian state during the two and a half year Nigerian civil war. At the time, it did not seem to matter to the OAU that powerful elements amongst the leadership of that state had tolerated acts of mass murder against the section of the population that had rebelled against the state.⁸¹

In this sense, the politics and legal regime fostered by the OAU has historically been *homogenising* as well as *centralising*. The primary value that guided its action has always been the protection of the integral existence of the established state, no matter what the relevant state's record was as regards the treatment of its sub-state groups, and no matter the moral and even legal legitimacy of the demands of any of such groups for independence from the established state.

The politics and legal regime constructed by the OAU has also been *domesticating*, as well as characterised by a *deference to peer-review*. It has been domesticating in the sense that the sub-state groups have not been afforded a voice in the decision-making processes of the OAU. Neither Biafra, Eritrea, nor Katanga were afforded such a voice. An exception was of course made for the African populations of Namibia, Zimbabwe, and South Africa, but that exception was made under the *jus cogens* norms prohibiting colonial and apartheid rule. Those states were in effect regarded as still being under colonial rule. The OAU has traditionally deferred to the strict application of the peer-review approach in the sense that decisions about the legitimacy of states have been left entirely to the *ipse dixit* of other African states; states which were at the time bound by very few, if any, normative

81. See H. Ekwe-Ekwe, The Biafra War: Nigeria and the Aftermath (Lewiston, N.Y.: Mellon Press, 1990); and J.N. Saxeena, Self-Determination: From Biafra to Bangladesh (Delhi: University of Delhi Press, 1978).

requirements that are truly independent of their own say so. Biafra was for instance almost entirely de-legitimated by its non-recognition by most African states despite the imperative of its *raison d'être* as a shield against a rapacious and oppressive Nigerian state.⁸² So was Katanga and, until most recently, Eritrea.⁸³ Put simply, the OAU has for the most part, not concerned itself with the question of the legitimacy of the *internal structure* of African states.⁸⁴ In the past, distinct groups used to be coerced and/or crushed, almost without any normative inhibitions, in order to make them part of, or retain them within, the domain of larger or more powerful groups.⁸⁵ For pragmatic reasons, the OAU decided not to occupy itself with the intra-state problems that occurred as a direct result of, and in the aftermath of, such violent state-building.

This is not, however, the same as saying that the African leadership and the OAU have not at all concerned themselves with matters internal to African states. This has sometimes happened in the past. For instance, Togo was excluded from the 1963 Addis Ababa conference at which the OAU was inaugurated because the ruling regime at the time had just overthrown the elected regime of Sylvanus Olympio.⁸⁶ The apartheid regimes in South Africa and Namibia, and the illegitimate regime of Ian Smith in Rhodesia (now

82. On the de-legitimation of the rebel Biafran state, S.G. Amoo, *supra* note 68 at 245.

83. On the Katanga problem, see R. Young, Tr., *Katanga Secession* (Madison: University of Madison Press, 1966). On the Eritrean question, see R. Iyob, *The Eritrean Struggle for Independence* (Cambridge: Cambridge University Press, 1995).

84. See P. Kunig, *supra* note 72 at 25-35.

85. See C. Bakwesegha, *supra* note 79 at 208.

86. See C.O.C. Amate, *Inside the OAU: Pan-Africanism in Practice* (Basingstoke: MacMillan, 1986) at 51.

Zimbabwe) were also excluded from the OAU.⁸⁷ OAU peacekeeping efforts in intra-state conflicts dates back to the Chadian civil war of the late 1980's.⁸⁸ The point is that historically the OAU has, in general, acted as a *pro-status quo* agent. It has hesitated to intervene in intra-state tensions and violence, but even when it did intervene, *it has almost always been on the side of the established order*.⁸⁹ Exceptions were of course made in cases involving colonial or apartheid rule, but the general rule has traditionally been applied with some consistency.

This was the state of affairs until recently, when the OAU began to make a marked turn away from these old positions. While the OAU, like other international organisations, has not turned away from the strict peer-review process as a way of assessing the legitimacy of a claim to statehood or continued aggregate statehood, it has begun what promises to be a slow and tortuous journey toward that turn. The nature of the treatment of any sub-state group (such as a minority) by any state is increasingly gaining salience as a criterion for assessing the legitimacy of established states. At the normative level, the 1982 African Charter on Human and Peoples' Rights clearly provides for the right of oppressed minorities and other peoples to various kinds of self-determination, up to and including secession from an established state.⁹⁰ At the level of state and institutional practice, the very fact that an Extraordinary Session of the African Commission on Human and Peoples' Rights (ACHPR),

87. Ibid.

88. Ibid at 180-189.

89. Ibid at 431.

90. See articles 19-23, African Charter on Human and Peoples' Rights, reprinted in (1982) 21 I.L.M. 59.

an affiliate of the OAU, was convened with the support of a number of African states, in order to consider the treatment of the Ogoni people and their leaders by the Nigerian state, is clear evidence of the beginnings of a turn toward *infra-review*, a turn toward the guidance of the peer-review process by normative requirements regarding the internal conduct of a state toward its sub-state groups.⁹¹ The evidence produced in the ACHPR will be examined in greater depth in the next section, but suffice it to say that increasingly, as in Nigeria, Liberia, Ethiopia, Zaire, Rwanda, and Burundi, the OAU is indicating its willingness to guide its peer-review process by a concern for the internal structure and conditions of African states.

Again, the willingness of the OAU, and of Ethiopia (the parent state) to accept, in diplomatic negotiations, the independence of Eritrea, the first secessionist state to survive and gain legitimacy in post-colonial Africa, is indication of yet another emerging move. It indicates a move within that body toward the abandonment of the strict application of the doctrines of *uti possidetis* and the territorial integrity of established states. Alongside the normative and factual evidence of an increasing concern within the OAU for the welfare of sub-state groups, this indicates a move away from the facilitation of the over-centralisation and coercive homogenisation of states that has hitherto characterised the legal and political regime of the OAU.

Another indication of the waning of the era of the all-powerful and over-centralised African state is the formal reduction of its power that has been initiated through efforts to

91. See Final Communique of the 2nd Extraordinary Session of the African Commission on Human and Peoples' Rights (on file with this writer).

integrate the African continent politically and economically.⁹² Embedded in this regime of integration is a normative promise to provide access to the international sphere, and to provide voices within regional institutions, for sub-state groups and entities other than states. This promises to be an important method of strengthening the hands of the sub-state groups, of affording them voices in the decision-making processes of the OAU, in almost the same way as in the ACHPR.⁹³ Again, the point is that the OAU is becoming increasingly concerned with the internal structure of states, with the legitimacy or otherwise of the nature of the relationships among states and sub-state groups.⁹⁴ Put differently, it is thought that if certain doctrines of the law have created an environment that is favourable for the occurrence of internecine strife within African states, then the efforts being made by the OAU toward the creation of a climate that is less favourable to the application of those doctrines and the occurrence of internecine strife in Africa are most important for the search for ways to prevent and or reduce the incidence of such conflicts in Africa.

The most salient evidence of this concern is the creation of the OAU Mechanism for

92. See W. Hummer and R. Hinterleitner, "Supra-Regional. Regional and Sub-Regional Cooperation and Integration in Africa" (1980) 21 Law and State 74. There is of course another kind of de-centralisation, i.e the grant of local self-government to sub-state units. The turn to minority rights in Africa would certainly entail the discussion of this option as well as its implementation in certain contexts. On the emerging European standards that guarantee local self-government to national minorities, see J. Packer, "The OSCE and International Guarantees of Local Self-Government" in Proceedings of the UniDem Seminar, 25-27 April 1996 (Strasbourg: council of Europe, 1996) at 250.

93. These points will be examined further in the sub-section on the African Economic Community and in the section on the ACHPR.

94. See C. Bakwesegha, *supra* note 60 at 216.

Conflict Prevention, Management and Resolution.⁹⁵ This innovative mechanism⁹⁶ was created in June 1993 by the OAU Assembly of Heads of States and Governments pursuant to a June 1992 Proposal for its creation by the OAU Secretary-General Salim Ahmed Salim.⁹⁷ The mechanism is built around a Central Organ⁹⁸ with the Secretary-General and Secretariat of the OAU as its operational arm.⁹⁹ The Central Organ is constituted by the Bureau of the Assembly of Heads of States and Governments, or the Council of Ministers of the member states of the Bureau, or their Ambassadors to the OAU.¹⁰⁰ The Secretary-General of the OAU is empowered to run the mechanism under the direction of the Central Organ, in consultation with *all* the parties to the conflict¹⁰¹, and to take all measures to

95. See Declaration of the Assembly of Heads of State and Governments on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 28-30 June 1993, reprinted in (1994) 6 African Journal of International and Comparative Law 158. See also A.S. Osman, "The Organisation of African Unity, the United Nations and Resolution of conflicts: Need for Strengthening Cooperation and Partnership" (1995) 7 ASICL Procs. 171.

96. See R.A. Ranjeva, supra note 60 at 94.

97. See Proposals for an OAU Mechanism for Conflict Prevention and Resolution, CM/1710 (LVI), 22-27 June 1992, reprinted in (1993) 5 African Journal of International and Comparative Law 1072 (hereinafter referred to as the "Proposals").

98. This organ was preferred to the establishment of a new African Security Council or the resuscitation of the moribund OAU Commission of Mediation, Conciliation and Arbitration. The former was not considered feasible at the time, while the latter was limited by the mandate conferred upon it by its constitutive document; it was designed to handle only inter-state disputes. See "Proposals", Ibid at 1076-1079. For a discussion on the problems of the Commission of Mediation, Conciliation and Arbitration, see C.O.C. Amate, supra note 79 at 31 and 154-169.

99. See paragraph 17-22 thereof.

100. Ibid.

101. Notice that this category is not limited to established states.

prevent, manage, and resolve conflicts, including the appointment of Special Envoys/Representatives. S/he may also despatch fact-finding missions to conflict areas.¹⁰² A special fund has also been established and funded in order to finance this mechanism.¹⁰³

Inherent in the constitution of this mechanism is a speedy preventive function, a function that the declaration emphasises as its primary objective.¹⁰⁴ Thus, the design and operation of this mechanism is such that the speedy prevention of internecine conflicts and violence can be accomplished.¹⁰⁵ Accordingly, despite the continued and understandable insistence in the Declaration on respect for the territorial integrity of states and for the inviolability of inherited colonial borders,¹⁰⁶ the mechanism is a sure first step toward the amelioration of the negative effects of the doctrinal responses of international law and institutions to fragmentation within African states.¹⁰⁷

This is because the mechanism has been vested with substantial power to *prevent*,

102. See Paragraph 22.

103. See M. Hefny, "Enhancing the Capabilities of the OAU Mechanism for Conflict Prevention, Management and Resolution: An Immediate Agenda for Action" (1995) ASCIL Procs. 176 at 179.

104. See paragraph 15 thereof.

105. That the prevention of internecine conflicts and violence among sub-state groups is the raison d'être of this mechanism is denoted by ICJ Judge Raymond Ranjeva's call for a definition of the content of the "rights of Peoples" that constitute established states as a prelude to the successful operation of the mechanism. See R. Ranjeva, supra note 60 at 95.

106. Note that this Declaration was adopted before Eritrean independence in 1993. For a chronology of the events that led up to that moment, see <http://www2.uwindsor.ca/pag1.htm>.

107. This mechanism was designed to be gradually improved over the years. As such it is not sacrosanct; nor is it without flaws. See C. Bakwesegha, supra note 60 at 215; and M. Hefny, supra note 103 at 177. For an analysis of the flaws inherent in the mechanism, see J. Packer, supra note 60 at 282-290.

manage, and *resolve* internecine conflicts in Africa in a way that helps dilute the often awesome internal power exercised by a state *vis-a-vis* a rebellious or aggrieved sub-state group. Unlike in the past, the OAU Secretary-General is now obliged to consult both states and sub-state groups alike before acting. Again, in acknowledgement of their fundamental distinctiveness from the established state, sub-state groups are afforded voices in the decision-making processes of this mechanism. Even states themselves are beginning to adopt this attitude toward their rebellious sub-state groups.¹⁰⁸ This is a move away from a strict reliance upon the doctrines of homogenisation and domestication. Lastly, the voices that have been afforded to sub-state groups in the decision-making process of this mechanism will ensure that the concerns of such groups, as well as the normative requirements that have been laid down regarding the treatment of sub-state groups by parent states are built into the peer-review process. This is in itself an advance on the strict approach to peer-review.

As a whole, the mechanism is also a kind of *fact-finding* and *early warning* system,¹⁰⁹ in which capacity it is also important for the effective discharge of a preventive function in the area of internecine conflicts within African states. The value of such fact-

108. See for example the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 20th November 1996, reprinted in (1997) 9 *African Journal of International and Comparative Law* 414.

109. Note, however, that at the time of writing the early-warning capacity of the OAU was still in its infancy. See M. Hefny, *supra* note 103 at 179-180. For book-length explanations of the concepts of fact-finding and early-warning, see B.G. Ramcharan, International Law and Fact-Finding in the Field of Human Rights (The Hague: Martinus Nijhoff, 1982); and B.G. Ramcharan, The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch (Dordrecht: Martinus Nijhoff, 1991).

finding and early warning systems has been well stated by Paul Brietzke.¹¹⁰ According to him:

"The aim is to put a grievance mechanism in place before rival positions grow rigid and violent, and before foreign patrons choose sides. Like the international early warning networks proposed for famines or environmental disasters, such a mechanism would substitute prevention for costlier and potentially more violent cures."¹¹¹

Other quasi or full-blown fact-finding and early-warning systems in place around the world include the UN High Commissioner for Human Rights,¹¹² the UN Commission on Human Rights,¹¹³ the UN Secretary-General,¹¹⁴ Human Rights Non-Governmental

110. See P. Brietzke, "Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict" (1995) 14 Wisconsin International Law Journal 69 at 118.

111. *Ibid.* See also M. Ennals, "Ethnic Conflict Resolution and the Protection of Minorities: The Quest for NGO Competence Building" in K. Rupesinghe, ed., Ethnic Conflict and Human Rights (Oslo and Tokyo: Norwegian University Press and United Nations University, 1988) at 13.

112. This position was created by a resolution of the UN General Assembly. See U.N. Doc. A/Res/48/632/Add.4 of 20 December 1993, reprinted in (1994) 1 International Human Rights Reports 335. On the history and role of the High Commissioner, see R.S. Clark, A United Nations High Commissioner for Human Rights (The Hague: Martinus Nijhoff, 1972); V. Wiebe, "The Prevention of Civil War through the Use of the Human Rights System" (1995) 27 New York University Journal of International Law and Politics 409 at 427; H. Cook, "The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?" (1995) American Society of International Law Proceedings 235; J. Lord, "The United Nations High Commissioner for Human Rights: Challenges and Opportunities" (1995) 17 Loyola of Los Angeles International and Comparative Law Quarterly 329; H. Hannum, "Setting a New Agenda for United Nations Human Rights Activities" (1994) 15 Michigan Journal of International Law 823; and C. Cerna, "A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner for Human Rights" (1995) 10 American University Journal of International Law and Policy 1265.

113. See V. Wiebe, *Ibid* at 430-432. This commission utilises a variety of procedures including the appointment of country and thematic rapporteurs and the 1503 procedure (in which communications are addressed to the UN Secretary-General for consideration by the working group of the Sub-Commission on the Prevention of Discrimination etc).

Organisations,¹¹⁵ and the Organisation for Security and Cooperation in Europe (OSCE) High Commissioner on National Minorities.¹¹⁶ Of all of these, the one that is most directly involved in the attempt to prevent internecine violence amongst states and their sub-state groups, or among these groups *inter se*, is the OSCE HCNM. Established at the 1992 Helsinki conference of the organisation, this mechanism was conceived by Europeans as a tool with which to address potentially destabilising tensions involving national minorities as early as possible.¹¹⁷

So far, the OAU mechanism has been deployed with varying degrees of success in a number of African countries such as Nigeria, the former Zaire, Congo, Burundi, Rwanda, Liberia, Central Africa, Somalia, Gabon, Cameroun, Lesotho, Sierra Leone, and the Sudan, either to prevent conflict, or to prevent its intensification.¹¹⁸ In most of these cases, the organisation has recognised the need to alter the fundamental relationships among the state and sub-state groups. While it has not always succeeded in its ambitions, it has begun to make what scholars who are familiar with its history would characterise as fundamental

114. *Ibid* at 427. See also M.-C. Bourloyannis, "Fact-Finding by the Secretary-General of the United Nations" (1990) 22 *International Law and Politics* 641 (tracing the Secretary-General's fact-finding powers to article 99 of the UN Charter).

115. See M. Ennals, *supra* note 111 at 13-14.

116. Hereinafter referred to as the OSCE HCNM. See D. McGoldrick, "The Development of the Conference on Security and Cooperation in Europe (CSCE) After the Helsinki 1992 Conference" (1993) 42 *International and Comparative Law Quarterly* 411 at 424-425; and A. Bloed, ed., The Challenges of Change: The Helsinki Summit of the CSCE and its Aftermath (Dordrecht: Martinus Nijhoff, 1994).

117. See R. Zaagman and H. Zaal, "The CSCE High Commissioner on National Minorities: Prehistory and Negotiations" in A. Bloed, ed., *ibid* at 97.

118. See Decisions of the OAU Council of Ministers, *infra* note 198.

advances in this department of its mandate. A few examples will suffice to illustrate this point. For instance, in the case of Rwanda, the OAU mechanism played a central role in the negotiation of the ill-fated *Arusha Peace Agreement of 4th August 1993* and that same year sent a Neutral Military Observer Group to monitor the implementation of that agreement.¹¹⁹ That agreement was designed to end the intense civil war that had been raging between the Tutsi-dominated Rwandan Patriotic Front and the now defunct Hutu-dominated government of Rwanda.¹²⁰ In the case of Liberia, the OAU appointed Zimbabwean President Canaan Banana as the OAU Eminent Person for Liberia; an appointment that facilitated the signing, among the warring parties, of the *Abuja Peace Agreement of August 1995* (as subsequently modified). This agreement has brought peace to Liberia.¹²¹ Again, in the case of the Republic of Congo (not the former Zaire), the OAU has played an effective role in preventing, for some years, the outbreak of civil war between the then government of Pascal Lisouba and the then Opposition led by General Sassou Nguesso.¹²² The methodology employed by the organisation in this situation was the appointment of a Mediator in the person of Ambassador Mohammed Sahnoun.¹²³ A similar function is also being discharged by the OAU in Somalia, where, in an effort to prevent the

119. See C. Bakwesegha, *supra* note 60 at 213.

120. *Ibid.*

121. *Ibid.* at 214. See also C.E. Adibe, "The Liberian Conflict and the ECOWAS-UN Partnership" in T.G. Weiss, ed., *Beyond UN Subcontracting* (New York: St. Martin's Press, 1998) at 78-80.

122. See C. Bakwesegha, *supra* note 60 at 214.

123. *Ibid.*

outbreak of further violence and de-escalate the existing conflict, the OAU has played an eminent role in facilitating consultations among the various disputants.¹²⁴ And finally, the OAU has worked closely with the ECOWAS in order to prevent or reduce the incidence of internecine strife in the region, not just in Liberia¹²⁵, but also recently in Sierra Leone.¹²⁶ Both exercises have met with relative success.

The Special Fund of the OAU which finances the mechanism has also received much African and international support.¹²⁷ It is made up of 5% of the regular OAU budget (and at any rate not less than \$1 million), as well as of voluntary contributions from both African and non-African sources.¹²⁸

All in all, it is important to reiterate at this point that, based on the evidence, it is safe to say that the OAU has begun to contribute to, and take advantage of, the changing normative climate respecting the responses of the law to fragmentation and strife within states. It has begun to actually make efforts to alter the internal situation of specific African states by reviewing, and then going on to attempt to influence, the manner in which they deal

124. *Ibid* at 214-215.

125. Indeed, in this instance, the ECOWAS was actually nudged into action by the OAU leadership. See C.E. Adibe, *supra* note 121 at 69.

126. In this case, the closeness of the OAU involvement can be deciphered from the fact that even as Nigerian led troops fought to take control of Sierra Leone from the ruling military junta, the Central Organ of the OAU Mechanism was in session (at the Ambassadorial level) monitoring the operation and taking important decisions. See Panafican News Report, 15 February 1998. Moreover, a representative of the OAU had been a principal witness of the PPeace agreement signed among the parties and ECOWAS in October 1997. See ECOWAS Peace Plan for Sierra Leone, *infra* note 229 at 1001.

127. See <http://www.dfat.gov.....leases/fa/fa53.html>.

128. See M. Hefny, *supra* note 103.

with their sub-state groups.

The Emerging African Economic Community

The AEC, it seems, is also capable of making a *future* contribution to the prevention of internecine strife in Africa. Like the political organs of the OAU, the AEC may be able to contribute to the modification of the doctrinal attitudes of the law that have functioned in an aberrant fashion when applied to the internal conditions of African states. If this is so, then the AEC is also likely to help create, as well as take advantage of, a more conducive normative climate for the prevention and/or reduction of the incidence of internecine conflict within African states.

Under the auspices of the OAU,¹²⁹ African states are currently attempting a phased political and economic integration of the continent, a transition that is also set to alter the normative climate regarding international law's response to fragmentation.¹³⁰ While this effort is, as yet, at its very earliest stages, certain elements of the emerging arrangement may be significant as evidence of a certain mind set, of *a new way of thinking*, of a fast approaching re-arrangement and re-conditioning of the internal constitution of many African

129. See article 98 of the Treaty, infra note 130.

130. See Treaty Establishing the African Economic Community, 3 June 1991, reprinted in (1991) 3 African Journal of International and Comparative Law 792 (hereinafter referred to as the "treaty"). Article 7 of the treaty establishes six major institutions of the community including the Assembly of Heads of States and Governments (hereinafter referred to as the "Assembly"); the Council of Ministers (hereinafter referred to as the "Council"); the Pan-African Parliament (hereinafter referred to as the "Parliament"); the Court of Justice (hereinafter referred to as the "Court"); the General Secretariat; and the Economic and Social Commission.

states. There are a number of ways in which this emerging phenomenon may be observed, but it must be kept in mind that so far these arrangements are still very much emergent, even tentative.¹³¹

First of all, the very presence of a pan-continental supra-state centre of power, in the African Economic Community (AEC), is likely to reduce the extent of the awesome power exercised by many over-centralised African states toward their sub-state groups. In this way, the cession of some social, political and economic power by African states to the AEC itself is likely to affect their ability to deal as they please with their sub-state groups.¹³² At the same time, the AEC will itself not really be strong enough to become an empire unto itself.¹³³

Secondly, the *Parliament* and the *Court* of the AEC are avenues through which the sub-state groups might be able to make their voices heard. If the history of political contests

131. The AEC is expected to be progressively established in six stages. The appropriateness of progress from one stage to the other is to be determined by the Assembly, but the cumulative transitional period is not to exceed 40 years from the date of the treaty. See articles 6(4) and (5) of the Treaty.

132. Decisions of AEC organs are binding. For instance, see article 3 of the Treaty which provides that:

"Regulations shall be enforceable automatically thirty (30) days after the date of their signature by the Chairman of the Council and shall be published in the official journal of the Community."

133. Most of the organs of the AEC are dominated by states themselves. Article 8 makes the Assembly of Heads of States and Governments "the supreme organ of the Community". The Council is composed of Ministers of member states. And under article 18, the court may be approached only by member states or the Assembly, which is itself entirely composed of Heads of States and Governments. The only exception is the Parliament which, according to article 14, is to be designed in a future Protocol, to ensure that "the peoples of Africa are fully involved in the economic development and integration of the Continent". Future Protocols on the Parliament and the Court may, however, alter the state-centric nature of these AEC institutions.

in Africa and other parts of the world are anything to go by, then it is fair to expect that voters will at least try to use the medium of electing the members of this continental Parliament to send representatives who will be expected to champion the causes of their various constituencies.¹³⁴ Accordingly, it is not unreasonable to expect that the Parliament will provide an opportunity for a limited but formal role for sub-state groups within the AEC.

Unless the situation is altered in the Protocol, anticipated by article 20 of the Treaty (i.e the treaty that will, in future, provide detailed specifications of the Court's powers, procedures etc), the Court will be less able to provide to sub-state groups an avenue for participation in the politics of the AEC. This is because of the highly restrictive mandate conferred on it by article 18 of the Treaty. That provision limits the competence of the Court either to the consideration of actions brought to it by a member state or the Assembly, and to the rendering of advisory opinions at the request of either the Assembly or the Council.¹³⁵ The Assembly may, however, confer on the Court power to assume jurisdiction over any dispute other than those already referred to.¹³⁶ It does not seem likely, though, that African states will be in a hurry to extend such a privilege to their usually restive sub-state groups. This having been said, it is not altogether impossible that that might occur in the long term. Again, since it is well known that African states are often very keen defenders of the rights of those of their kin who reside in neighbouring states, it is not unreasonable

134. See D. Horowitz, Ethnic Groups in Conflict (Berkeley: University of California Press, 1985).

135. See article 18(3)(a) and (b) of the Treaty.

136. See article 18(4) of the Treaty.

to expect that any such state might be willing to bring a dispute before the court alleging a violation of the Treaty. For instance, Ghana is home to a substantial number of Ewes, including its President, Jerry Rawlings. Given this fact, it is conceivable that Ghana could bring a matter before the court on the basis that the repression of Togolese Ewes is a contravention of the fundamental principles of the Treaty. This is a plausible argument because the internecine strife that has characterised much of the relationship of Togolese Ewes to their state may be viewed by the court as having given rise to a situation that is inimical to the promotion of a peaceful environment in Africa. Under article 3(f) of the Treaty the existence of such a peaceful environment is regarded as a pre-requisite for the economic development of the continent. The ill-treatment of Togolese Ewe may also constitute a violation of several of the minority rights guaranteed under the African Charter on Human and Peoples' Rights, the recognition, promotion, and protection of which every member of the AEC is bound by article 3(g) of the Treaty to ensure.

Thirdly, the "voice" that might directly or indirectly be afforded sub-state groups as a consequence of the operations of the Parliament and the Court might also have the consequence of making the heterogeneity of the post-colonial African state even more visible (in the formal sense) within the processes that create international norms and practices in Africa. The entry of the elected representatives of African peoples onto the international stage might help ensure that the heterogeneity of the post-colonial African state is forced on to the political agenda of the AEC. The salience of such possible minority protection claims as the hypothetical "Ghana-Togo" matter already mentioned might also help to achieve the same objective. In this way, the homogenising tendency of international law and institutions

to facilitate coercive nation-building within states may, at the very least, be kept in check.

Fourthly, the presence of independently elected or appointed parliamentarians and Judges in the Parliament and Court of the AEC might modify the deference of the African Community to the exclusive peer-review approach of assessing the legitimacy of both established and would-be states. The individuals who will sit on these organs of the AEC might, as I have already explained, be concerned with issues relating to the treatment of minorities and other socio-cultural groups by established African states, including the violation of their international legal rights. Such issues are critical for the achievement of the peaceful environment that is required to achieve the aims of the AEC. This concern will be necessarily reflected in the decisions of these organs regarding the legitimacy of states, and in that event, may amount to a modification of the peer-review approach in favour of a norm-based infra-review approach that would still incorporate aspects of the old peer-review process.¹³⁷

Lastly, the introduction of a regime of free movement, residence and establishment of persons envisaged by the treaty will greatly reduce the now near-total power exercised by particular states over the behaviour of their sub-state groups.¹³⁸ No longer will members of such groups feel trapped by any one particular state. No longer will such persons be forced to live in any one particular state, no matter how oppressive or repressive it is to

137. Notice that a decision as to the treatment of a minority socio-cultural group within a state entails in effect a decision as to the international legal rights of the group. Consequently, such a decision also entails a review of the legitimacy of that state's internal structure, organisation, and behaviour.

138. See articles 6(2)(e)(iii) and 43 of the Treaty.

them. This may also provide members of such groups with the added choice of emigration rather than taking up arms against their parent state. While it is true that most such groups feel bound to particular territories as their homeland, and will almost always not flee the homeland for ever,¹³⁹ this is at least an option that is feasible in the case of groups partitioned between two or more countries such as the Masai of Kenya and Tanzania, the Somali of Somalia, Ethiopia, Djibouti, and Kenya, the Yoruba of Nigeria and Benin, and the Ewe of Togo and Ghana.¹⁴⁰

Again, it must be emphasised that these are as yet only factually and normatively informed projections that have not as yet been empirically demonstrated. It must also be emphasised that the road to the establishment of the AEC will be fraught with problems. For instance, six years after the Treaty was signed at Abuja in Nigeria, not as much has been achieved as was anticipated. None of the Protocols outlining the powers and procedures of the Court and the Parliament has been signed. The very design of some AEC institutions is questionable. For instance, the Court does not yet have formal authority to hear disputes between an established state and any of its sub-state groups, or between individuals and their home states.¹⁴¹ And even though article 90 of the Treaty envisages cooperation between the AEC and African NGOs, the latter have not as yet been afforded a formal role in the

139. Note, for example, the Rwandese Tutsi who recently returned from their long sojourn in exile in Uganda to take over violently the control of the Rwandan state. See G. Prunier, The Rwanda Crisis: History of a Genocide (New York: Columbia University Press, 1995); and A. Destexhe, Rwanda and Genocide in the Twentieth Century (New York: New York University Press, 1995).

140. See A.I. Ashiwaju, Partitioned Africans (London: C. Hurst and Co., 1985).

141. See M. Ndulo, "Harmonisation of Trade Laws in the African Economic Community" (1993) 42 International and Comparative Law Quarterly 101.

deliberations either of the Court or of the Parliament. This situation has obtained despite the fact that, aside from a number of failings attributable to them,¹⁴² NGOs have been widely recognised as important resources in the search for human rights, peoples' rights, and lasting peace and social development the world over.¹⁴³ They have also been recognised as valuable fact-finders.¹⁴⁴ Fact-finding is important for the early-warning system that the AEC and other institutions must incorporate if they are to achieve any success in their efforts to prevent the kind of internecine violence that we are concerned with here.

An Assessment of the Total Contribution of the OAU System

All in all, the important point that has been made is that the OAU is now contributing to the prevention of internecine violence within the post-colonial African state by having created a different normative climate from that which had governed the question of fragmentation in the past. It has done so through its political organs, and might continue to do so under the auspices of the still emerging, but clearly anticipated, AEC. The political will necessary for continued progress in this direction is not as bountiful as it might have been, but is most certainly evident. No longer is the OAU paralysed by absolutist conceptions of the doctrines of *uti possidetis*, territorial integrity, and non-interference. No

142. See M. wa Mutua, "The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa" (1996) 17 Michigan Journal of International Law 591.

143. See C.E. Welch, Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organisations (Philadelphia: University of Pennsylvania Press, 1995). See also P. Willets, ed., 'The Conscience of the World': the Influence of Non-Governmental Organisations in the UN System (London: Hurst, 1996).

144. See H. Thoolen and B. Verstappen, Human Rights Missions: Fact-Finding Practice of Non-Governmental Organisations (Dordrecht: Martinus Nijhoff, 1986).

longer is that continental body handicapped by its consistent recusal from what ought to be one of its primary conflict prevention roles.

The OAU's recent concern for the internal situations in a number of African countries aptly illustrates this point. It has, *inter alia*, recently dealt with the questions of the legitimacy of the system of governance in the Democratic Republic of Congo (formerly Zaire), the necessity for minority protection and peaceful inter-group relations in the fragmented states of Burundi, Liberia, Sierra Leone, Somalia, and Angola.¹⁴⁵ While this has not "solved" Africa's problems with internecine strife, it must be kept in mind that such is not the role that might be fairly expected of such an organisation. Such bodies as the OAU are merely one of a number of resources that may be deployed to the service of the conflict prevention and management process.

D. A PREVENTIVE FUNCTION IN THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS:

Even though the African *Commission* on Human and Peoples' Rights (ACHPR)¹⁴⁶ is part and parcel of the OAU system, it has been extremely independent of the OAU secretariat.¹⁴⁷ It has thus acquired such a life of its own as to deserve separate examination

145. See Decisions Adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers, CM/Dec.330-363 (LXIV), 28-31 May 1997, reprinted in (1997) 9 *African Journal of International and Comparative Law* 457 at 467-471.

146. This Commission was established under article 30 of the African Charter on Human and Peoples' Right, reprinted in (1982) 21 *I.L.M.* 59 (hereinafter referred to as the "Banjul Charter"). It started its work in 1987. On the nature of this institution, see I.B. El-Sheikh, "The African Commission on Human and Peoples' Rights: Prospects and Problems" (1989) 3 *Netherlands Quarterly on Human Rights* 272.

147. See E.A. Ankumah, *infra* note 152.

in a thesis such as this.

In this section, the actual and potential contributions of the ACHPR to the prevention of internecine strife among African states and their sub-state groups will be explored. Again, this contribution will be assessed as a function of the contribution of the ACHPR to the creation of a normative environment that is more conducive to the management of fragmentation and the prevention of internecine strife within states. Firstly, I will examine the question of the actual, on-going contributions of the ACHPR in this regard. Following that, I will turn to the question of the potential contributions of the body, especially in relation to its work in concert with the proposed African Court on Human and Peoples' Rights.¹⁴⁸ The reader is urged to keep in mind that the principal argument that is being made here is that the ACHPR has both helped to create, as well as take advantage of, this new normative order, in an effort to make a contribution to the prevention of internecine strife in Africa.

The entry into force of the Banjul Charter and the establishment of the ACHPR has been part of the marked turn toward greater concern for the internal structure and situation of the post-colonial African state that has already been explored at length in the previous

148. See the Report of the First Government Legal Experts Meeting on the Question of the Establishment of an African Court on Human and Peoples' Rights, 6-12 September 1995, reprinted in (1996) 8 *African Journal of International and Comparative Law* 493 (hereinafter referred to as the "First Experts Meeting"). For a detailed analysis of the first draft Protocol to the Banjul Charter produced at this meeting, see G. Naldi and K. Magliveras, "The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison" (1996) 8 *African Journal of International and Comparative Law* 944. See also Report of the Second Government Legal Experts Meeting on the Question of the Establishment of an African Court on Human and Peoples' Rights, 11-14 April 1997, reprinted in (1997) 9 *African Journal of International and Comparative Law* 423 (hereinafter referred to as the "Second Experts Meeting").

section of this chapter. Described by Professor B. Obinna Okere as "modest in its objectives and flexible in its means",¹⁴⁹ the Banjul Charter and the ACHPR (which was established under the charter) were the products of a continent-wide ferment, a growing recognition of the importance of an inter-African concern for the internal structure and conditions of African states.¹⁵⁰ This felt need was captured by Ugandan President Yoweri Museveni in his first address to the Assembly of Heads of States and Government of the OAU in 1986, the year the Banjul charter came into force, and one year before the ACHPR was functional. According to him:

"Over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives I must state that Ugandans ... felt a deep sense of betrayal that most of Africa kept silent the reason for not condemning such massive crimes has supposedly been a desire not to interfere in the internal affairs of a member state, in accordance with the Charters of the OAU and the United Nations. We do not accept this reasoning because in the same organs there are explicit laws that enunciate the sanctity and inviolability of human life."¹⁵¹

The establishment of the ACHPR has thus created an opportunity to ensure inter-African involvement in such internal problems and situations, as well as in many other kinds of cases.

149. See B.O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis With the European and American Systems" (1984) 6 Human Rights Quarterly 141 at 158.

150. For a history of the drafting and adoption process, see U.O. Umozurike, "The African Charter on Human and Peoples' Rights" (1983) 77 American Journal of International Law 902; B.G. Ramcharan, "The Travaux Preparatoires of the African Commission on Human and Peoples' Rights" (1992) 13 Human Rights Law Journal 307; S.B. Gutto, Human and Peoples' Rights for the Oppressed (Lund: Lund University Press, 1993); and E. Bello, "The Mandate of the African Commission on Human and Peoples' Rights" (1988) 1 African Journal of International and Comparative Law 31.

151. See Amnesty International Doc. IOR/63/02/91.

The ACHPR is itself a body of independent experts appointed by the Assembly of Heads of States of the OAU and who serve in their personal capacity.¹⁵² It formulates its own rules of procedure,¹⁵³ and appears to have both quasi-judicial and quasi-legislative functions.¹⁵⁴ Pursuant to its quasi-legislative functions, it has passed several resolutions. For instance, it has passed a resolution enlarging the fair trial provisions of the Banjul Charter.¹⁵⁵ It has also passed other types of resolutions such as calling on "states to relegate the era of military interventions in government to the past and urging African military regimes to respect fundamental human rights",¹⁵⁶ condemning the gross violation of human and peoples' rights in Nigeria and deciding to send a delegation to the Nigerian

152. See articles 30-44 of the Banjul Charter. In practice the composition of the ACHPR has been criticised for a lack of gender and geographic balance. For instance, as at 1997, only 2 of the 11 members were women, and about half were West African. It has also been criticised on the grounds that a few of its members have held seats in the cabinets of their countries while serving on the ACHPR. For instance Molekiki Mokama (Botswana) who served between 1987 and 1993, and Alexis Gabou (Congo) who served during this same period were at the same time ministers in the governments of their respective countries. For a discussion of these criticisms, see E.A. Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures (The Hague: Martinus Nijhoff, 1996) at 13-20.

153. See the Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, 6 October 1995, reprinted in (1996) 8 African Journal of International and Comparative Law 978. All references in this chapter to "rules" shall be to this document. For a critique of the old rules, see A.C. Odinkalu, "Proposals for Review of the Rules of Procedure of the African Commission on Human and Peoples' Rights" (1993) 15 Human Rights Quarterly 533.

154. Ibid at 20-21.

155. See Resolution on the Right to Recourse Procedure and a Fair Trial, 11th Ordinary Session, Tunis, 2-9 March 1992, cited in I.A.B. El-Sheikh, "Preliminary Remarks on the Right to Fair Trial Under the African Charter on Human and Peoples' Rights" Paper Presented at the 1996 Heidelberg Seminar on the Right to a Fair Trial.

156. See Resolution on the Military, 3 November 1994, reprinted in (1996) 3 International Human Rights Reports 242.

Government on the issue;¹⁵⁷ condemning the genocide in Rwanda;¹⁵⁸ condemning the military takeover in the Gambia;¹⁵⁹ commenting on the internecine strife between the Sudanese state and a number of its "cohesive" sub-state groups, who support the Southern Sudanese Liberation Movement and Army;¹⁶⁰ and acknowledging the fact that the human rights situation in many African countries is characterised by violations of economic, social, cultural, civil and political rights.¹⁶¹

Pursuant to its quasi-judicial function, the ACHPR has considered communications from individuals, NGOs and groups.¹⁶² It is also empowered to consider the two-yearly periodic reports of states,¹⁶³ as well as communications brought by a state party to the

157. See Resolutions on Nigeria of 3 November 1994 and 22 March 1995, reprinted ibid at 242 and 247.

158. Reprinted ibid at 243.

159. Reprinted ibid at 244.

160. Reprinted ibid at 246.

161. Reprinted ibid at 245.

162. See articles 55-57. See also rules 102-104. See for example, Civil Liberties Organisation V Nigeria Comm. No. 129/94 (1995) 2 International Human Rights Reports 616 (Where it held, inter alia, that Nigeria could not oust the operation of the Charter within its jurisdiction by the enactment of any type of domestic legislation. The only way Nigeria could withdraw from its obligations under the Charter was to undertake an international process involving notice); and Civil Liberties Organisation V Nigeria Comm. No. 101/93 (1995) 2 International Human Rights Reports 619 (Where it held that a decree of the Nigerian Federal Military Government making it an offence to litigate on any aspect of the legislation transferring control of the Nigerian Bar Association to the Body of Benchers violated the Charter's guarantee of a right to a fair hearing).

163. See article 62. See also rules 81 to 86.

Banjul Charter alleging the violation of the charter by another state party.¹⁶⁴ While no state party has as yet utilised this last procedure, it is not unreasonable to project that given the increasing involvement of African states in the domestic situation in other African states *via* the instrumentality of international mechanisms and procedures, and given the presence of internecine strife in many parts of the continent, it is not altogether unlikely that African states may begin to utilise this procedure in the near future. For instance, Rwandese Tutsis were recently openly involved in the protection of their ethnic kin in the Kivu area of the former Zaire;¹⁶⁵ Ugandan Tutsis were responsible for the most recent insurgency in Rwanda which occurred in the wake of massacres of Rwandese Tutsis;¹⁶⁶ Somalia was prepared to go to war with Ethiopia over the treatment of "ethnic" Somalis in the Ogaden province of Ethiopia;¹⁶⁷ and Togo and Ghana regularly clash over the treatment of "ethnic" Ewes in Togo.¹⁶⁸

Every indication is that the influence of the ACHPR in Africa has been on a steady rise. Apart from its influence on the domestic politics of African states through a medium that Thomas Franck and Gregory Fox have in another context described as "inter-

164. See articles 47-54.

165. See Toronto Star, 9 July 1997.

166. See G. Prunier, *supra* note 139.

167. See Vancouver Sun, August 10, 1996; and Globe and Mail Metro Edition, August 10, 1996.

168. See Toronto Star, 7 January 1994.

jurisdictional discourse",¹⁶⁹ it has also influenced domestic legislation and policy-making, and has been creatively deployed by African NGOs, individuals and groups to further the cause of human and peoples' rights in Africa.¹⁷⁰ Again, the ACHPR has observed elections in Mali,¹⁷¹ and to some extent affected the course of action of the Nigerian government with respect to the Ogoni question.¹⁷² The trouble taken by countries such as Algeria to object to even formally non-binding ACHPR resolutions is also indicative of the growing influence exerted by it on the post-colonial African state.¹⁷³ This growing influence of the ACHPR is thus contributing to the effort to prevent internecine strife among African states and their sub-state groups. The ACHPR has begun to make a modest contribution to this effort in much the same ways as the OAU: by helping to foster, and in specific cases taking actual advantage of, an emerging change in the relevant normative climate.

The ACHPR has in general helped to contribute to the process of state re-configuration that is gaining currency in Africa. It has done so by garnering the power to make some decisions that more or less affect the extent and the nature of the power exercised

169. See T.M. Franck and G.H. Fox, International Law Decisions in National Courts (New York: Transnational, 1996) at 5.

170. See E.A. Ankumah, supra note 152 at 64-73.

171. Ibid at 23. By August 1995, its parent body, the OAU had observed 39 elections in 25 African states. See M. Hefny, supra note 103 at 177.

172. The suspension of the trial and probable execution of more than 19 other Ogonis that are currently being held in custody in Nigeria over the same matter as the executed Ogoni activists seems to have been partly achieved by the pressure mounted on the Nigerian Military Regime by the ACHPR during and after its 2nd Extraordinary Session, as well as during its special mission to Nigeria. This was certainly one of the factors that weighed on the minds of the Nigerian Government as it considered what course of action to take.

173. See E.A. Ankumah, supra note 152 at 23-24.

by states over their sub-state groups. When this emerging trend eventually ripens, it will tend to reduce the proclivity among African states to act like highly centralised empires toward their sub-state groups. In addition, the ACHPR has striven to provide to sub-state groups a supra-state forum to which such groups may go in order to seek a measure of control over their treatment at the hands of their parent states. This is not to say that this will be possible in every case, but to note that the emerging situation signals a substantial shift from the adherence of multilateral African institutions to the strict requirements of the old normative order in their review of the behaviour of states toward sub-state groups. For instance, in *Constitutional Rights Project (on behalf of Zamani Lekwot) and Others v Nigeria*,¹⁷⁴ the court acted to stop the execution of leaders of the Kataf group by the Nigerian state by issuing an interim order of protection in the matter. However, in *Katangese Peoples' Congress v Zaire*,¹⁷⁵ the ACHPR refused the request of the alleged victim to declare that the people of Katanga had a right to secede from Zaire. Nevertheless, even though the alleged victims in the Katanga case did not succeed entirely, the reasoning of the ACHPR in finding a violation of the Banjul Charter and dismissing the communication on its merits, is a clear indication of the emergent centrality of the right to self-determination and other rights claimed by sub-state groups within the discourse and practice of African institutions.¹⁷⁶

174. Comm. No. 87/93 (1996) 3 International Human Rights Reports 137.

175. Comm. No. 75/92 (1996) 3 International Human Rights Reports 136.

176. This move towards a greater recognition of the rights of sub-state groups in Africa was begun with the entrenchment of minority and other peoples' rights in articles 19-24 of the Banjul Charter, especially article 20(2) which provides that colonised or oppressed peoples shall have a right to free themselves from the bonds of domination.

According to the decision of the ACHPR, the reason for dismissing this claim was not that under the Banjul Charter sub-state groups can never be entitled to form their own independent state. The reason was that:

*"In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of [the former] Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire."*¹⁷⁷

Thus, in the opinion of the ACHPR itself, there appears to be a point at which the behaviour of an African state towards its constituent groups will enable the ACHPR to call that state's territorial integrity in question! This procedural process of litigating secessionist or self-determination claims is, from the perspective of securing African peace, clearly a preferable cause of action than the forcible attempt at secession made by the same sub-state group in the 1960s.¹⁷⁸

This new approach is also contrary to the old unilinear kind of approach to "nation-building" which in general sought to repress or eliminate socio-cultural differences and homogenise in a coercive manner, the populations of states. Now, difference is openly and fundamentally acknowledged in the guarantee of minority rights in the charter,¹⁷⁹ and in

177. Emphasis supplied. See paragraph 6 of the decision.

178. This is not to say, however, that violent self-defence is necessarily illegitimate in international law.

179. See especially, articles 19-23 of the Charter.

the adjudication of minority rights-based communications by the ACHPR.¹⁸⁰ In this way also, the ACHPR has offered a strong voice to sub-state groups in Africa. The processes of the ACHPR afford individuals, and more importantly for this thesis, groups and their NGO representatives, an opportunity to ventilate their grievances before it.¹⁸¹

Quite apart from the access granted to groups and NGOs under article 55 of the Charter under which they may bring communications to the ACHPR, an access that has been widened in practice by the non-rigidity of the ACHPR with respect to the application of the "exhaustion of domestic remedies" rule,¹⁸² rule 72 empowers the ACHPR to invite any organisation or persons to participate in its deliberations without a vote. This rule is obviously wide enough to include any organisation representing the interests of a minority or other sub-state group that forms a part of any African state. Rule 6(f) mandates the ACHPR to, *inter alia*, include on its agenda any item proposed by an NGO, while rule 76

180. See the communications related to the Katangese, Ogoni, and Atyab (Kataf) problems already discussed.

181. A Memorandum written by an operative of one of the most established Human Rights NGOs in Africa, the Civil Liberties Organisation (CLO), based in Nigeria, shows that it is frequently and willingly consulted by sub-state groups and entities who have grievances against the Nigerian state. CLO has also attended all the sessions of the ACHPR since 1989, and has always brought up matters related to the treatment of sub-state groups in Nigeria. However, only about 10% of their efforts are devoted to the handling of such matters. The CLO has also found international institutions more helpful than domestic institutions in prosecuting such matters. Constraints faced by the CLO and similar organisations in Nigeria include lack of finances, harassment by security agents, and inability to enforce court decisions. Problems with using international institutions include the long delays and expense involved. See Memorandum of 26 May 1997, by Olawale Fapohunda, Project Head in the CLO (on file with the present writer).

182. This rule mandates the ACHPR to declare a communication inadequate if it has been lodged without the alleged victim first exhausting all available domestic remedies. See articles 50 and 56 of the Charter. In practice the ACHPR has taken a liberal view of this rule. See E.A. Ankumah, *supra* note 152 at 67-70.

specifically empowers the ACHPR to consult NGOs either *proprio motu* or at the request of such organisations. Since sub-state groups often work in concert with or through NGOs, these provisions have the capacity to afford access to the international arena represented by the ACHPR to such groups.

Furthermore, the ACHPR has also begun to modify the classic peer-review approach in favour of a greater use of the infra-review approach. By this is meant that the ACHPR relies on the normative standards laid down, *inter alia*, by the Banjul Charter in its evaluation of the legitimacy or illegitimacy of the behaviour of African states toward their sub-state groups. Thus, Nigeria's treatment of its Ogoni and Atyab (or Kataf) minority groups, as well as Zaire's treatment of its Katangese people, have all been the subject of norm-based review by the members of the ACHPR. This infra-review is not conducted by states as such or the representatives of states, but by relatively independent experts. Even though these experts are appointed to the ACHPR by African states acting in the OAU Assembly of Heads of States and Governments, they have still acted in a significantly independent manner in a great number of cases.

Another way in which the ACHPR contributes to the prevention of the kind of internecine violence within states that interests us in this thesis is through the exercise of its power under rule 111 to order provisional measures. This is a power that the ACHPR could and has used in order to avoid the occurrence of irreparable damage *pendente lite*.¹⁸³ The use of such measures in cases involving a dispute between a state and any of its sub-state groups might have the effect of de-escalating tensions and pre-empting violence. The

183. For instance, see the Lekwot case, *supra* note 174.

ACHPR has recently ordered such measures with regard to the remainder of the Ogoni prisoners being held by the Nigerian state.¹⁸⁴

Again, the ACHPR is empowered under article 46 of the Charter to conduct fact-finding missions which might lead to that institution assuming the functions of an early warning mechanism. Under this procedure, it has sent a mission to Nigeria to investigate the situation in that country with respect to the protection of human and peoples' rights. The ACHPR also possesses a number of in-built fact-finding and early-warning capacities. First of all, both individual, NGO and group communications to it are reservoirs of data which are available to the ACHPR. Secondly, it can gather facts by exercising its powers to consult any organisation or persons, or to invite them to its meetings. Thirdly, the comments of observers on the periodic reports submitted by states to the ACHPR, as well as the reports themselves, are invaluable reservoirs of information from which the likelihood of a situation exploding into violent conflict might be gleaned. This process of investigation and early-warning is yet another valuable way in which the ACHPR can contribute to the effort to prevent internecine strife in Africa. Consequently, the fact that states are beginning to be more disposed to permit such investigative activity within their territories is much welcome.¹⁸⁵

As has already been pointed out, the OAU has recently produced a Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court

184. It did this during the 2nd Extraordinary Session of the ACHPR.

185. Before 1994, no state had permitted the ACHPR to undertake such investigations in its territory. By 1995, Togo and Senegal had permitted such visits. See E.A. Ankumah, *supra* note 152 at 41-42. Nigeria also permitted such a visit in 1996.

on Human and Peoples' Rights.¹⁸⁶ The call by the OAU Assembly for the convening of the first and second experts' meetings,¹⁸⁷ and the production of this draft, were influenced by criticisms of the African Human Rights System for not incorporating a Court of Human Rights.¹⁸⁸

The draft Protocol was produced at the Second Experts Meeting convened for that purpose in Nouakchott, Mauritania between 11-14th April 1997. This Protocol provides for the establishment of an African Court on Human and Peoples' Rights¹⁸⁹ which shall "complement the protective mandate of the African Commission on Human and Peoples' Rights".¹⁹⁰ The proposed jurisdiction of the Court is wide, and shall extend to all cases and disputes concerning the interpretation and application of the Banjul Charter, the Protocol, and other applicable African Human Rights instruments.¹⁹¹ The only persons entitled to submit cases before the court are states and the ACHPR, but the Court may entitle individuals and those NGOs with observer status before the ACHPR to submit cases to it. Individuals and NGOs may also do so indirectly since they are entitled to approach the

186. Hereinafter referred to as "the Protocol".

187. See OAU Doc. AHG/Res. 230 (XXX) of June 1994. But see also the Final (Addis Ababa Draft Protocol, *infra* note 200.

188. For instance, C. Welch, *supra* note 143 at 47; and U.O. Umozurike, "The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights" (1988) 1 African Journal of International Law 65 at 82-83.

189. Hereinafter referred to as "the Court". See article 1 of the Protocol.

190. Article 2 of the Protocol.

191. Article 3 of the Protocol.

ACHPR.¹⁹² The Court shall be composed of eleven independent Judges elected by a secret ballot in the OAU Assembly of Heads of States and Governments.¹⁹³ Proceedings shall be held in public,¹⁹⁴ and its judgements are required to be reasoned.¹⁹⁵ The Court has power to order provisional measures,¹⁹⁶ and its decisions are binding and final.¹⁹⁷ This document is scheduled to be considered at a third meeting of government legal experts and diplomats, and the OAU Council of Ministers to be held at Addis Ababa, Ethiopia, at the end of 1998.¹⁹⁸

One important question that arises from the moves to establish the Court is the extent to which it can make a difference, i.e the extent to which the establishment of the Court is likely to improve the protection of human rights in Africa. In the specific case of the present thesis, it is important to ask whether the Court is likely to improve the capacity of the ACHPR to contribute to the prevention of the kind of internecine strife that concerns us in the present enquiry. The simple answer that is suggested by the evidence is an affirmative

192. See articles 5 and 6 of the Protocol. But note that under article 6(5) the Court cannot hear any case brought to it by an NGO or individual except if the relevant state party has made a declaration accepting the jurisdiction of the court.

193. Articles 11-14 of the Protocol.

194. Article (10)(1) of the Protocol.

195. Article 27(4) of the Protocol.

196. Article 26(2) of the Protocol.

197. Article 27(2) of the Protocol.

198. See Decisions Adopted by the Sixty-Sixth Ordinary Session of the OAU Council of Ministers, OAU Doc. CM/Dec.330-363 (LVIV), 28-31 May 1997, reprinted in (1997) 9 *African Journal of International and Comparative Law* 457 at 466.

one. Like the ACHPR, the Court will be an important addition to the repertoire of resources available to be pressed into the service of the protection of human rights in Africa. Like the ACHPR, the Court will help to chip away at the awesome power that is often exercised by the post-colonial African state *vis-a-vis* the diverse peoples that compose it. Like the ACHPR, the Court will provide a forum for the adjudication of minority and other peoples' rights. This will help to alter the coercive nation-building previously facilitated by the law. And just like the ACHPR, the Court of Human Rights will help to provide sub-state groups with the privilege of gaining vital access to the international arena, and become a forum for the infra-review of the conduct of states toward their sub-state groups.

But the role of international justice, especially of the formally binding kind, in our world ought not to be exaggerated, for the problem of peaceable co-existence within states cannot be reduced to the settlement of disputes.¹⁹⁹ Far from being a panacea, an international court, such as the proposed African Court of Human and Peoples' Rights,²⁰⁰ is but an additional resource available to be deployed in the search for international peace and development. It would therefore be quite unhelpful to criticise the African Human Rights System solely for its lack of a Court of Human Rights. The pitfall of this sort of criticism

199. See G. Guillaume, "The Future of International Judicial Institutions" (1995) 44 *International and Comparative Law Quarterly* 848 at 860.

200. For the final draft of the Protocol establishing this court which was approved by an OAU Council of Ministers Meeting held at Addis Ababa, Ethiopia between the 12-13 of December 1997, see OAU/LEG/EXP/AFCHPR/PROT(III), reprinted in (1997) 9 *African Journal of International and Comparative Law* 953-961. For a commentary on this final draft, see I.A.B. El-Sheikh, "Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: An Introductory Note" (1997) 9 *African Journal of International and Comparative Law* 943.

would be that it assumes what is not demonstrable: namely that an international human rights court is necessarily more functionally effective or influential on states than an international human rights commission. This is not necessarily so. Indeed scholars are increasingly recognising that the success of any international institution, be it a court or a commission, in actually contributing to the achievement of peace, or actually securing influence within states has less to do with its formal status as a court that issues formally binding decisions, and much more to do with its ability to mobilise relevant public opinion on its side.²⁰¹ The trend towards the holding of more public sessions of the work of the ACHPR is evidence of the growing recognition of this fact even in the ACHPR itself. The difference between an African Court of Human Rights and the African Commission on Human and Peoples' Rights is merely that the one is declared to be capable of issuing formally binding decisions and the other is not. This is no more than a difference of textual acclaim; one that has to be translated by something other than the *ipse dixit* of the text into the "compliance" of states. Thus, it is wrong, for instance, to view the inability of the African community to adequately restrain the relative impunity of the Nigerian Military Government as a function of the absence of a Human Rights Court on the continent. That kind of argument would amount to one that holds that had there, all along, been an African Court of Human and Peoples' Rights, the human rights situation in Nigeria would necessarily have been better. This

201. See D. Weissbrodt and J. McCarthy, "Fact-Finding by International Non-Governmental Human Rights Organisations" (1981) 22 Virginia Journal of International Law 1; N.L. Wallace-Bruce, "Two Hundred Years On: A Reexamination of the Acquisition of Australia" (1987) 19 Georgia Journal of International and Comparative Law 87 at 113; and D.E. Spencer and H. Yang, "Lessons from the Field of Intra-National Conflict Resolution" (1992) 67 Notre Dame Law Review 1495 at 1505.

argument is unconvincing.

Now, just as it has had many successes, the ACHPR has had many problems. Some of these are the lack of adequate funds, the lack of adequate resources at its disposal, self-censorship, some control of the publication of its findings by the OAU Assembly of Heads of States and Governments, and the lack of seriousness displayed by many states toward the fulfilment of their obligations under the Banjul Charter.²⁰² The lack of a court is, however, the least serious of its problems, and ought not be imagined either as the primary source of its failures or the major obstacle to its progress.

Therefore, with or without the court, the ACHPR will continue to contribute to the search for ways to prevent internecine strife in Africa and, as I have shown, has already begun to make significant contributions by helping to give fillip to, and take advantage of, the changing normative climate regarding the international response to the questions of fragmentation and internecine strife within states.

E. A PREVENTIVE FUNCTION IN THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES:

In this section, an attempt will be made to understand the actual and potential contributions of the Economic Community of West African States (ECOWAS)²⁰³ to the

202. See E.A. Ankumah, supra note 152 at 38-39.

203. See the Revised Treaty of the Economic Community of West African States, 24th July 1993, reprinted in (1996) 8 *African Journal of International and Comparative Law* 189 (hereinafter referred to as "the Treaty"). The ECOWAS is said to have the largest membership (15) of all sub-regional organisations in the world. See R. Friedland, A Guide to African International Organisations (London: Hans Zell, 1990) at 37.

prevention of internecine strife among African states and their sub-state groups. It must be kept in mind that this contribution will be *largely* assessed as a function of the contribution of this organisation to the change that has been experienced by the normative order governing the international community's response to the question of fragmentation within states. The ECOWAS has both contributed to, and taken advantage of, this change in the doctrinal attitude of the law to advance the project of finding effective ways of preventing or reducing the incidence of internecine strife in Africa. While the ECOWAS has made many actual contributions in this regard, it has also been recently endowed with a lot of potential to make an even greater contribution in the future. Consequently, the section will be an enquiry into its actual and potential contributions.

The establishment of the ECOWAS is the realisation of the idea of West African integration first mooted by ex-Liberian President William Tubman in January 1964.²⁰⁴ The first ECOWAS Treaty was adopted at Lagos, Nigeria, in May 1975, and came into effect on 23 June 1975.²⁰⁵ Its most influential members are Nigeria, Ghana and Cote d'Ivoire, which contribute about 32.8%, 12.9% and 13% of its budget, respectively.²⁰⁶ Nigeria's leadership has been crucial to the establishment and progress of the ECOWAS.²⁰⁷

204. See J.E. Okolo, "ECOWAS Regional Cooperation Regime" (1989) 32 German Yearbook of International Law 111.

205. *Ibid* at 113.

206. *Ibid* at 117.

207. See S.B. Ajulo, "The Economic Community of West African States and International Law" (1989) 27 The Journal of Modern African Studies 233. at 249; O.J.B. Ojo, "Nigeria and the Formation of ECOWAS" (1980) International Organisation 573; and M. Lean Brown, "Nigeria and the ECOWAS Protocol on the Free Movement and Residence" (1989) 27 The Journal of Modern African Studies 258.

The citizens of member states of the ECOWAS have "community citizenship". Thus far, this status allows them the right to a form of free movement within the sub-region that is defined in the relevant Protocol,²⁰⁸ as well as the right to a limited term of residence that is defined in the same protocol. It is anticipated that in the near future community citizens shall have the right to establishment (i.e., permanent abode) anywhere within the community.²⁰⁹ The principal institutions of the ECOWAS are the Authority of Heads of States and Governments, the Council of Ministers, the proposed ECOWAS Parliament, the proposed ECOWAS Court of Justice, the Arbitration Tribunal, and the Secretariat.²¹⁰ Full economic union is expected to be achieved by the year 2005.²¹¹

While much of this effort at the political and economic integration of West Africa is as yet in its very earliest stages, much has already been done toward the achievement of this objective. Certain elements of the emerging arrangement may be significant as evidence of an ongoing re-configuration of the internal arrangement of the post-colonial African state. There are a number of ways in which this can be observed, but it must be kept in mind that so far these arrangements are still very tentative.

In the two decades since the establishment of the ECOWAS, the West African sub-region has slowly begun the march toward union. Community citizens now have the right

208. See the ECOWAS Protocol on the Free Movement of Persons, Right of Residence, and the Right of Establishment, ECOWAS Doc. ECW/HSG/1/21, Rev.1.

209. See article 59(1) of the Treaty. See also J.E. Okolo, *supra* note 204 at 126-128.

210. These are all mentioned in article 6, and established by articles 7, 10, 13, 16 and 17 of the Treaty, respectively.

211. See article 54 of the Treaty.

to move freely within the area, and to take up residence in any member state for a period of time. Again, the very presence of a pan-West African supra-national centre of power chips away at the excessive power exercised by the over-centralised African state in relation to sub-state groups. The sharing of economic, and even some political, power between the post-colonial African states and the ECOWAS will reduce the power of the over-centralised West African states in relation to their sub-state groups, while allowing such groups access to credible international political arena. At the same time, the continued exercise of power by member states within the institutions of this organisation will ensure that the ECOWAS does not itself become strong enough to become an empire in itself.

More specifically, the ECOWAS has, both textually and in practice, begun to shed its previous posture of absolute non-interference in the internal affairs of member states,²¹² and begun to concern itself with the internal situation in, and structure of, member states. Article 4(g) of the Treaty makes the protection of human and peoples' rights, such as those in favour of the protection of the rights of minorities and sub-state groups, a fundamental principle to be adhered to by the ECOWAS in the pursuit of its aims and objectives. Article 56(2) of the Treaty commits it to the protection of the rights of minorities and other peoples guaranteed in the African Charter on Human and Peoples' Rights.²¹³ Articles 9 and 12 of the Treaty make the decisions of the Authority and the regulations of the Council binding

212. While this principle is, under article 4, still an important norm that is expected to guide relations amongst West African States, it is no longer applied absolutely. Indeed, its re-formulation as the "principle of good neighbourliness" is an indication of the extent to which the norm has been modified in West Africa. Recent events in Liberia and Sierra Leone illustrate this point. See Panafican News Report, 18 February 1998 at 1.

213. *Supra* note 146.

on member states. Similarly, article 19 of the Protocol on the ECOWAS Court²¹⁴ makes the decisions of the court binding on member states. Again, article 58(2) of the Treaty, as well as the ECOWAS Declaration of Political Principles²¹⁵ binds member states to cooperate with the community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-state and inter-state conflicts. Details regarding the nature of these mechanisms are to be spelt out in a Protocol.²¹⁶ On 17 December 1997, the leaders of ECOWAS states agreed to set up an autonomous and transparent mechanism for conflict prevention and resolution which will be free from the dominance of a single state such as Nigeria.²¹⁷

In practice, the ECOWAS has been involved in peace-keeping, peace-enforcement, and peace-building efforts in Liberia. In that country, a Nigerian-led ECOWAS military force which undertook peace-keeping and peace-enforcement efforts there for many years was, during the latter part of its stay there, involved in a peace-building effort that has partly focused on the facilitation of reconciliation among the state and sub-state groups.²¹⁸ The same ECOWAS military force, styled "the ECOWAS Monitoring Group (ECOMOG)", as well as the political organs of the ECOWAS, has also been involved in the ouster from power of the ruling Sierra Leonian military junta. as well as the restoration to power of the

214. See the Protocol on the Community Court of Justice, Protocol A/P.1/7/91.

215. On file with this writer.

216. See article 58(2) of the Treaty.

217. See Unixg.ubc.ca-clariworld. Africa. Western:101073.

218. See A.C. Offodile, *supra* note 63; and United Nations and the Situation in Liberia (New York: United Nations Secretariat, 1995).

legitimately elected President of that country.²¹⁹ In the process of ousting the junta from power, the ECOWAS imposed a variety of economic and socio-political sanctions on Sierra Leone, sanctions that have been backed by the OAU and the United Nations Security Council.²²⁰ More important than the specific actions that the organisation has taken in Liberia and Sierra Leone is the re-orientation of both intra-state and inter-state politics in West Africa that was signified by this course of events. The Liberian and Sierra Leonian interventions would have been unthinkable in the first two decades of West-Africa's post-colonial era. Today, it is no longer political heresy to suggest that West African states should concern themselves with the internal situation in, and structure of, neighbouring states. Indeed, the efforts to restore peace to these two states have been most cognisant of the need for the state to deal with their sub-state groups in much less coercive ways, in ways that foster national reconciliation and inter-group harmony.²²¹ This is a general trend that seems to herald the onset of a new era in which the rights of minorities and other sub-state groups would also be an important concern of the institutions of the ECOWAS.

But while this trend seems commendable from the point of view of the protection of sub-state groups, it has so far been largely reactive rather than preventive. It is hoped that the ECOWAS will continue to make efforts to enhance its capacity to act more preventively than reactively in situations that require its attention. This is imperative if it is to avoid the complications that the outbreak of violence brings to intra-state disputes. Some of the

219. See *Toronto Star*, 5 September 1997.

220. See *Panafrican News Report*, 18 February 1998.

221. See for instance the peace agreement between the ECOWAS and the then ruling Sierra Leonian junta led by Major Johnny Koroma, *infra* note 229.

proposed, but as yet non-functional, institutions of the ECOWAS might hold the key to the realisation of this preventive function especially through the modification of the four violence producing attitudes of international law and institutions already discussed in Chapters Three and Four.

Potentially, the ECOWAS Parliament²²² is an avenue through which sub-state groups might be able to make their voices heard. It is not unreasonable to expect that the ECOWAS Parliament will provide one more opportunity to sub-state groups to achieve access to the international arenas, arenas that are comparatively much more unbiased than those of the very state with which they are locked in dispute. It is not unreasonable to expect that when it eventually ripens, the existence of such access may contribute to the amelioration of the tendency of aggrieved groups to take up arms just in order to secure an international voice.

Unless the situation is altered in an amendment to the relevant Protocol, however, the ECOWAS Court²²³ will not be able to serve as an avenue for sub-state groups to secure international attention to their grievances. This is because of the highly restrictive mandate conferred on it by article 9 of the Protocol on the ECOWAS Court and article 76 of the Treaty. These provisions limit the competence of the Court to consideration of actions brought to it by a member state or the Authority, and the rendering of advisory opinions at the request of the Assembly, the Council, the Executive Secretary, a member state, or an

222. Hereinafter referred to as "the Parliament". The composition, powers and function of this institution are to be specified in detail in a future Protocol. See article 13 of the Treaty.

223. Hereinafter referred to as "the Court". See article 15 of the Treaty.

institution of the ECOWAS.

Again, the "voice" that might directly or indirectly be afforded sub-state groups by the entry of the elected representatives of West African peoples²²⁴ onto the international stage will ensure that the fact of the heterogeneity of the African state is formally forced on to the political agenda of the ECOWAS. In this way, the tendency of international law and institutions to facilitate the homogenisation of the state will at the very least be kept in check.

Also, the presence of independently elected or appointed parliamentarians and Judges in the Parliament and Court²²⁵ of the ECOWAS might modify the deference shown by the West African Community to the strict peer-review approach for assessing the legitimacy of states. This is so because a decision as to the violation or non-violation of international legal rights of a sub-state group entails, invariably, some judgement as to the legitimacy of the internal conditions or structural arrangement of the parent state.

It is noteworthy that the ECOWAS has itself realised the imperative need to develop a specialised mechanism to deal with the question of conflict prevention in West Africa. The establishment of this mechanism will afford the ECOWAS conflict management system all the obvious advantages of having a specialised agency that is devoted to the enterprise. All in all, the important point is that the ECOWAS has contributed in a small way, and has the potential to contribute much more, to the prevention of internecine violence within the West African state. It has done so largely, but not exclusively, by contributing to, and taking

224. See article 13(2) of the Treaty.

225. Article 3 of the Protocol on the Court requires that the seven Judges of the Court be independent persons of high moral character.

advantage of, the change that has come upon the normative order that guides international responses to the problems of fragmentation and internecine strife within established states.

F. THE PREVENTIVE ROLE OF MULTILATERAL AFRICAN INSTITUTIONS:

At this juncture, it is important to highlight and emphasise the nature of their preventive roles that are beginning to be played by multilateral African institutions in the concerted effort to prevent and reduce the incidence of internecine strife within African states. I have already mapped the extent of the transformative activities and potential recently exhibited by the OAU, the ACHPR, and the ECOWAS. I have done so by demonstrating the fundamentally innovative ways in which these institutions have begun to contribute to the prevention and reduction of internecine strife in Africa. The major argument that has been made here may be summarised in the following ways:

(a) Certain doctrines of the law have been all-too-often relied upon by many African governments as powerful arguments, justifications and excuses for their often violent ill-treatment of their sub-state groups. Such doctrines have for far too long facilitated the enterprise of coercive "nation-building" in Africa.

(b) The consequent (legally facilitated) ill-treatment of sub-state groups by their parent states, and the resistance mounted by such groups against such behaviour have both contributed to the formation and sustenance of internecine strife within post-colonial African states.

(c) The reversals that are being suffered by the relevant doctrines of the law, and the decline in the sway of these doctrines, are helping to create a legal and political climate

within which the pursuit of the objectives of preventing and/or reducing the incidence of internecine violence in Africa is much more feasible and realistic. Put differently, it had been hitherto nearly impossible for multilateral African institutions to pursue that objective given the powerful international legal and political justifications and excuses that were available to, and relied on by, many African states. In the present legal and political milieu, such arguments, justifications and excuses are increasingly becoming either weakened or unavailable.

While this is in itself a very valuable and welcome normative development, it is also noteworthy that African states and multilateral institutions have begun to taken advantage of the changing normative climate in order to deal more effectively with the much unwelcome incidence of internecine strife in Africa. They are beginning to feel normatively enabled as they strive to contribute to efforts to prevent and reduce the occurrence of such phenomena *within* established states. This is in itself a novel and fundamental departure from the positions previously occupied both by traditional international law and the multilateral African institutions.

More specifically, the reversals suffered by the strict peer-review doctrine has meant that a new focus has been placed on the internal situation of African states. No longer is the mere *ipse dixit* of the concerned state enough to trump enquiry by multilateral African institutions as to the welfare of sub-state groups within that state. For instance, for the first time in recorded history, a multilateral African institution, the ACHPR, has in a reasoned opinion held that, in certain exceptional circumstances,²²⁶ sub-state groups in Africa may

226. Such as when their parent state commits egregious and massive violations against them.

have a right to secede. Such a right is derived from the rights guaranteed to such groups under articles 19-24 of the Banjul Charter.²²⁷ Furthermore, the treatment of the Ogoni and the Atyab minority groups by the Nigerian state has recently been questioned by the ACHPR. In the process, it has laid down the minimum normative conditions for the continued membership of sub-state groups in their parent states. The OAU has also questioned the conduct of African states, such as Rwanda, Zaire, Burundi, Mauritania, and the Sudan, toward their sub-state groups. In each of these cases the ACHPR and the OAU have discharged both preventive and reductive roles. The ACHPR has acted early to prevent the outbreak of sustained, widespread, or intense violence between the Nigerian state and either the Atyab or the Ogoni. It has helped to force the Nigerian state to adopt more peaceable ways of dealing with each of these groups. The OAU has acted reactively in the Sudan and elsewhere, not so much as to prevent the incidence of violence, but to de-escalate tensions and prevent the outbreak of a more massive internecine strife. None of this would have been likely at the time that the strict peer-review doctrine still held sway, for that doctrine foreclosed the possibility of such institutions inquiring into the internal structure and conditions of states.

Again, the new posture of multilateral African institutions has been much facilitated and given fillip by the dilution, if not reversal, of the sway of the effectiveness, domestication, homogenisation, and centralisation doctrines of international law. For instance, had the rule remained that effectiveness automatically confers legitimacy, the treatment of the Ogoni, Kataf and some other sub-state groups would likely not have been

227. See Section D of this Chapter.

questioned, stigmatised, condemned, and de-legitimated by the ACHPR. Being effective, the actions of the Nigerian state would have been automatically viewed as legitimate. Had the doctrine of domestication been strictly applied, the Ogoni and Kataf (or their agents) not even have been able to approach the ACHPR in the first place. Had the doctrine of homogenisation been adhered to strictly, the ACHPR would not, in the first place, have recognised the distinctiveness of the Ogoni and Kataf. Also, the very existence and increasing stature of both the OAU and the ACHPR is evidence of the continuing transformation of the stricter versions of the doctrine of centralisation.

For its own part, the ECOWAS has also been enabled by the emerging normative climate to do some concrete things, to take some actual steps toward the prevention and reduction of the incidence of internecine conflicts. The evidence of such work is as yet not as ample as one might wish, but is nevertheless significant and valuable. It has so far centered on efforts to de-militarise governance in West Africa and enthrone systems of governance that are more legitimate. But this effort cannot be neatly separated from its other efforts to prevent internecine strife in that sub-region, for the phenomenon of fragmentation that often leads to such strife is intimately linked with the functionality of systems of legitimate governance. It is well known that one of the more important root causes of internecine conflict in West Africa is the perceived absence, or inadequacy, of substantive political participation by certain sub-state groups in the governance of matters that affect their lives. This is a question of the denial of access to real social, economic and political

power to such groups.²²⁸ If this conclusion is correct, then the efforts made by the ECOWAS to restore legitimate governance to Sierra Leone (including the re-convening of parliament and the other institutions of civil governance) is in a sense also an effort at prevention. It is an effort to prevent the intensification of internecine strife in the country. Indeed, the ECOWAS Six-Month Peace Plan for Sierra Leone recognises this imperative. In an effort to prevent the outbreak of civil strife in the years following the restoration of legitimate governance in Sierra Leone, article 5 of the agreement recognised that:

"... for an *enduring peace* to be restored which will enjoy the support of the majority of Sierra Leonians and the confidence of the sub-region, efforts should be made to ensure that an *all-inclusive government* is evolved ... Furthermore, in order to accommodate the aspirations of their supporters, Board and Senior Civil Service appointments are to reflect *broad national character* [i.e the socio-cultural diversity of the country].²²⁹

By encouraging fuller access to power by *all* segments of this fragmented West African state, the ECOWAS is clearly working toward the elimination of one of the major root causes of internecine strife within that and other states. In this way, the ECOWAS seems to have taken advantage of the changing international normative environment to make some actual contributions to efforts to prevent and/or reduce the incidence of internecine strife in West Africa. This is why those normative changes are themselves so significant.

228. See Panafrican News Report, 16 October 1997 (quoting South African Defence Minister, Joe Modise).

229. See the ECOWAS Six-Month Peace Plan for Sierra Leone 23, October-22 April 1998, reprinted in (1997) 9 African Journal of International and Comparative Law 998 at 999. Emphasis supplied.

G. SUMMARY OF THE ARGUMENTS:

In this chapter, the on-going transformation of international law and institutions with regard to its attitudes toward the phenomenon of fragmentation has been examined. It was noted that much of this transformation has come about in the context of the practice of multilateral African institutions and, indeed, of African states. Institutions such as the OAU, the ACHPR, and the ECOWAS have all begun to alter the prevailing normative climate in ways that countervail the homogenisation, centralisation, peer-review, effectiveness, and domestication doctrines. All in all, this normative transformation has in fact helped create a normative climate that is much more favourable to the efforts to prevent and/or reduce the incidence of internecine strife within African states. Multilateral African institutions have also begun to take advantage of this changing normative climate to advance their contributions to the prevention and/or reduction of violence in specific situations.

In the next and final chapter, I will offer a general overview of the arguments presented in the thesis, as well as the details of recommendations that I have made in view of the need to encourage and consolidate the on-going transformation in the attitudes of the law and of multilateral African institutions to the problem of fragmentation within states. These recommendations are informed by the conclusions reached in the main body of the thesis, and are followed by my presentation of what I see as one of the major challenges facing multilateral African institutions at the end of the present millenium: the challenge of inventing methods for peaceful state-building in Africa.

CHAPTER SIX

The Conclusions and Recommendations of the Thesis

A. CONCLUSIONS:

This thesis has been pre-occupied with four major projects. The first of these was a search for an understanding of the nature of the crisis of structural legitimacy (or legitimate statehood) that currently afflicts the post-colonial African state. The second was to understand the nature, and social effects, of the various doctrinal attitudes historically exhibited by international law and institutions toward the phenomenon of "socio-cultural fragmentation within established states".¹ In this respect, I have sought to understand the ways in which certain doctrines of international law and institutions have provided powerful arguments, justifications or excuses for those states that have deemed it necessary to attempt to forge, coercively, a sense of common citizenship among their various component sub-state groups. The third was to chart the ongoing normative and factual transformation of the traditional approaches that international law and institutions have adopted toward that problem, and thereby map the extent to which these institutions have taken advantage of such innovations and have begun to actually contribute to the effort to prevent and/or reduce the incidence of internecine strife in specific African contexts. And the last was to recommend a way forward that is guided by the conclusions of the thesis: a way in which these institution-driven transformations can be encouraged and consolidated in the specific context of African states.

For purposes of space, brevity and interest, these enquiries have been conducted in

¹ Referred to throughout this Chapter as "fragmentation".

the specific, but somewhat allegorical, context of Africa. It is hoped, however, that even this largely Africa-specific analysis has produced knowledge of such a valuable nature as to have aided the advancement of general research in this area. But before the contribution of this thesis to knowledge can be fruitfully assessed, it is imperative that the specific conclusions of the thesis be summarised and reiterated.

In Chapter Two, it was suggested that the remarkable continuity over time of the structural crisis of legitimacy (i.e of legitimate statehood) that currently afflicts African states, has been under-appreciated. This incomplete reading of the crisis, it was suggested, has been fostered by the "crisis of reading" that currently afflicts the study of the African state. This crisis of reading has itself been generated by the less than adequate attention that has so far been paid to the imperative need for holism, historicity, and contextual-knowing. It was further suggested that the harnessing of methodological and substantive holism, a keen sense of history, and an emphasis on contextual-knowing ought to be the points of departure for any enquiry that aims at the production of credible knowledge about the rich and heterogeneous history of the diverse and vast continent of Africa. It was then argued that if this approach is applied to the search for an understanding of the character of the crisis of legitimate statehood (not governance) in Africa, it becomes clear that not only is that crisis eminently structural in nature, it has also been remarkably continuous. Far from being a sudden, volcanic eruption, this structural crisis of legitimacy is the manifestation of a process of often violent domination and resistance among states and sub-state groups. From the late 19th century AD and even before, this process has been manifest on the African political landscape, leading up to the intense structural deficiencies that have been experienced from

the 1960s by the post-colonial African state. While the details of the specific character of the pre-colonial, colonial, and post-colonial epochs of this process may have been different, each process of domination and resistance, of violent state formation and dis-aggregation, has been presaged by an earlier one. And it has been such earlier ones that have set the parameters for the ones that followed. This is the nature of the striking continuity of the current crisis from the late pre-colonial era to the present. And it is this structural problem that forms the background against which the doctrinal attitudes exhibited by international law and institutions toward the persistent problem of fragmentation is explored.

In Chapter Three, the thesis launched into an examination of these international legal and institutional attitudes. It was suggested that the doctrinal attitudes that international law and institutions have exhibited toward the persistent problem of fragmentation together tell us a reasonably definitive story about the nature of the law's concept of legitimate statehood. Together, these doctrinal attitudes suggest some of the more important of the collective criteria for the legitimacy of states. It was suggested that the combined effect of the relevant international legal norms, rules and state practice, as well as a reading of the international legal and political studies literature, suggests that international law's attitude to the problem of fragmentation within established states (and, therefore, to the question of legitimate statehood) has for the most part been characterised by several distinct but related attitudes. These attitudes may be styled as follows: "persistent oscillation and deference to peer review", "deference to the effectiveness doctrine", "the glorification of empire-like or centralised statehood", "the homogenisation of sub-state groups", and "the domestication of sub-state groups". In general, the argument put forward in this chapter is that these were the

dominant attitudes exhibited by traditional international law and institutions toward the problem of fragmentation. It was also suggested that ample evidence now exists to support the claim that contemporary international law is gradually and steadily shedding the traditional dominance, and/or strict interpretations, of each one of these doctrinal attitudes. Yet, it was also recognised that this emerging situation, this ongoing transformation, is neither guaranteed to endure nor as yet completely accepted by the international society of states. It may well be an extremely delicate question whether or not the observed phenomena point to an on-going progressive transformation of international legal imagination in this area, or is merely evidence of a temporary oscillation of the pendulum of international law in that direction.

In Chapter Four, the major question that was addressed was the extent to which the international legal and institutional attitudes have contributed to the problems of internecine strife and underdevelopment that currently afflict the post-colonial African state. The chapter was especially concerned with the outcomes that have been produced by the interaction among the problematic fact of fragmentation within African states, and these attitudes. Put differently, the chapter was concerned with the ways in which doctrinal attitudes of the law and institutions have in some way influenced the behaviour of states toward their sub-state groups, and the negative socio-economic and political effects of such normative influences. It was argued that governments have all-too-often been able to rely on international law to provide powerful rationalisations, justifications and excuses for their attempts at coercive nation-building. It was also suggested that these attempts at the coercive homogenisation and centralisation of states have in far too many cases had a negative effect on the peace and

development of the post-colonial African state. Such behaviour has often fostered internecine strife within states, severely hindering the efforts that were made to achieve the accelerated development of the post-colonial African state. But this conclusion was not reached before an attempt had been made to understand the very character and properties of the phenomenon of fragmentation as it has been experienced in many African states; especially its *context-dependent* nature.

In Chapter Five, the on-going transformation of the character of the doctrinal attitudes exhibited by the law with regard to the problem of fragmentation was explored. This transformation was also read as an attempt by international law and institutions to re-configure the relationship among post-colonial African states and their sub-state groups. It was suggested that it is now evident that contemporary international law and institutions are departing from their past approaches to that problem. They are thereby altering their historic approach in ways that are no longer as likely to lead to internecine conflict. It was also suggested that it is now also evident that multilateral African institutions have invented, are inventing, and in many cases have already begun to operate, mechanisms that are designed to consolidate this emerging transformation. Institutions such as the Organisation of African Unity (OAU), the African Commission on Human and Peoples' Rights (ACHPR), and the Economic Community of West African States (ECOWAS) have begun to behave quite differently when faced with the related problems of the presence of fragmentation and the incidence of internecine strife within African states. They have begun to act in ways that belie, and often directly oppose, the "homogenising", "over-centralising", and "domestication" doctrines previously posited by international law and institutions with respect

to that problem. They have also begun to move away from their strict deference to the "peer-review" and "effectiveness" doctrines.

This innovative normative transformation has also had concrete and positive consequences for the ability of these institutions to aid the effort to prevent and/or reduce the incidence of internecine strife in Africa. If, as I have argued in Chapter Four, certain doctrines of international law and institutions have been relied on by many an African government to justify and rationalise their efforts at coercive nation-building, then any limitations that are placed on the capacity of these doctrines to provide ready arguments, justifications and excuses for coercive nation-building projects should likely aid the effort to prevent and reduce the occurrence of such strife. And this has indeed begun to happen in practice. Many African states and multilateral African institutions have begun to take practical steps in a number of situations to prevent or reduce internecine strife, steps that would have been nearly impossible in the legal and political climate of yesteryears. As the legal climate has improved, so has the ability and readiness of such states and institutions to grapple with the delicate questions of fragmentation and internecine strife within established states.

All in all, it is thought that the knowledge produced by this enquiry, and systematically recorded in this thesis, may have a valuable impact on the discipline of international law as well as the province of African studies. It is thought that the on-going transformation of the doctrinal attitudes toward the problem of fragmentation that is occurring in both norm and practice, in both law and institutions, in Africa as in the rest of the world, might offer valuable insights. It is also thought that the capacity of multilateral

African institutions to continue to contribute to the actual prevention and reduction of the incidence of internecine strife in specific African situations, as well as to the transformation of the relevant international legal doctrines, might be enhanced if these transformations are systematically investigated and thereafter exposed to both academics and policy-makers the world over.

In order to further this anticipated consolidation, a few policy-oriented recommendations will be made in the next section of this chapter.

B. RECOMMENDATIONS FOR FUTURE ACTION:

"Perhaps more scholars will devote time to developing formulae for a more *peaceful* process of disaggregating the [structures of the inherited] colonial state."

-Makau wa Mutua²

"One has to assume that governments do not welcome and would rather avoid institutional criticism and the consequent pressure, and this embarrassment factor has been successfully employed on many occasions. *Allowing groups increased access to both policy-making and implementation bodies* would ensure that these debates revolve around the real issues. Such access would also serve to let off steam in tense situations, especially as national fora are often lacking, in all parts of the world, for the airing of minority grievances."

-Gudmundur Alfredsson and Danilo Turk³

² See M. wa Mutua, "Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State" (1995) 21 Brooklyn Journal of International Law 505 at 536. Emphasis supplied.

³ See G. Alfredsson and Danilo Turk, "International Mechanisms for the Monitoring and Protection of Minority Rights: Their Advantages, Disadvantages and Interrelationships" in A. Bloed, L. Leicht, M. Nowak and A. Rosas, eds., Minority Human Rights in Europe:

An imperative that is clear from an understanding of the nature of the traditional, but currently changing, attitudes of international law and institutions to the problem of fragmentation is the need to continue and consolidate the transformation of such attitudes, and the creation of a whole new normative and institutional order for the treatment of this and related questions. This transformation, it is thought, must proceed in ways which do not foster, facilitate, or sustain internecine strife within established states in general, and the post-colonial African state in particular. Thus, it is important that the emerging tendencies of international law and institutions toward the encouragement of de-centralisation (as opposed to the over-centralisation of the state), diversity and multicultural nationhood (as opposed to homogenisation and coercive nation-building), access to the international sphere (as opposed to the strict domestication of sub-state groups), deference to norm-based legitimacy (as opposed to the strict application of the doctrine of effectiveness), and infra-review (as opposed to the strict application of the doctrine of peer-review), ought to be encouraged and consolidated.⁴

But how can this transformation be consolidated? How can this be achieved in the specific context of Africa, the continent on which this enquiry has focused? In other words, what is to be done, within or without the multilateral African institutions that have been the focus of this enquiry⁵ for them to achieve this objective of encouraging and consolidating

Comparing International Procedures and Mechanisms (Dordrecht: Martinus Nijhoff, 1993) at 181. Emphasis supplied.

⁴ For a detailed explanation of the meaning and nature of these doctrinal attitudes, see Chapter Three of this thesis.

⁵ These are the Organisation of African Unity, the African Commission on Human and Peoples' Rights, and the Economic Community of West African States.

the on-going transformation? A number of possibilities immediately come to mind.

One alternative is to do nothing at all, save to encourage the efficient operation of the existing institutional mechanisms via which this process of transformation is being-driven. This approach would simply entail the strengthening of the institutional arrangements that have been established, or are in the process of being established, within the framework of the OAU, the ACHPR, and the ECOWAS. This process is already underway.

Another alternative is to improve the conceptualisation and operation of just one of the existing mechanisms, and to devote that mechanism (to the exclusion of all the others) to the cause of the prevention or reduction of internecine strife within fragmented African states.

A third alternative is to continue the joint and several application of each one of these mechanisms to the problem at hand in view of the fact that each has a different process of becoming seized with a potential or actual conflict situation. The OAU and the ECOWAS are political bodies and so, in general, become seized of such situations when they are placed on their agendas by member states. As a quasi-judicial body, the African Commission on Human and Peoples' Rights⁶, is usually seized of such matters on the receipt of a communication from an individual, state, NGO, or other group.⁷

Lastly, a fourth alternative involves a suggestion for the establishment of a new high-level three-person semi-autonomous institution that might be styled the "*OAU Special*

⁶ Hereinafter referred to as the "ACHPR".

⁷ See article 55 of the African Charter on Human and Peoples' Rights, reprinted in (1982) 21 I.L.M. 59 (authorising the ACHPR to consider "communications other than those of states parties").

Commission on National Minorities". The suggested commission shall report directly to the highest organ of the OAU, i.e the Assembly of Heads of States and Governments.⁸ Viewed as an additional resource, as a complement to the work of existing mechanisms, this alternative appears to be the most attractive, and potentially the most effective, of all the stated options.

While the first alternative may at first sight seem like an attractive option, upon closer examination, it turns out less so. It has, of course, the obvious advantage that in this age of immense scepticism as to the value of international institutions and bureaucracies, and of the scarcity of financial resources on the African continent, its implementation would not entail the establishment of an additional bureaucracy, the expenditure of huge amounts of capital, and the conduct of often expensive and tedious preparatory international negotiations. Additionally, it would afford the existing mechanisms an opportunity to "age in the wood". However, the facility of its implementation would only mask its eventual operational inadequacy. This ultimate inadequacy is not surprising given Magdy Hefny's and Chris Bakwesegha's apt descriptions of the most relevant of the existing mechanisms⁹ as a mere

⁸ The name I have given to this body is a variant of the name "UN Special Commissioner on Inter-Ethnic Affairs". In 1994, I had suggested that the United Nations establish that position to deal with similar problems. See O.C. Okwu-Okafor, "Self-Determination and the Struggle for Ethno-National Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems" (1994) 6 ASICL Procs. 88.

⁹ This is the OAU Mechanism for Conflict Prevention, Management and Resolution established under the Declaration of the Assembly of Heads of States and Governments on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 28-30 June 1993, reprinted in (1994) 6 African Journal of International and Comparative Law 158. This mechanism is hereinafter referred to as the "OAU Mechanism".

"launching pad" that is to be gradually improved over time.¹⁰ Further, requisite improvements are not likely to occur without a revision and strengthening of the structures and concepts that animate these institutions. Moreover, these Mechanisms have historically faced a number of operational difficulties ranging from inadequate funding to a lack of the imperative political will among member states.¹¹ These problems have persisted despite the many improvements made by such institutions in their approaches to the management of the problem of internecine strife. A closer look at the problems that have been faced by the OAU Mechanism for Conflict Prevention, Management and Resolution will suffice to illustrate this point.

According to OAU Ambassador Magdy Hefny, the OAU Mechanism faces conceptual, political, and institutional/resource-related constraints.¹² In his view, the major conceptual constraint facing the OAU Mechanism is the absence of a politically acceptable "peace operations doctrine" to guide both the choice and character of its interventionist

¹⁰ Ambassador Hefny and Dr. Chris Bakwesegha have been closely associated with the operation of this mechanism. Indeed, Bakwesegha is the founding head of the division of the OAU Secretariat charged with the operation of this mechanism. See M. Hefny, "Enhancing the Capabilities of the OAU Mechanism for Conflict Prevention, Management and Resolution: An Immediate Agenda for Action" (1995) ASICL Procs. 176 at 176-177; and C. Bakwesegha, "The Role of the Organisation of African Unity in Conflict Prevention, Management and Resolution" (1995) special issue-International Journal of Refugee Law 207 at 215.

¹¹ On the OAU, see M. Hefny, *ibid* at 184. On the ACHPR, see E.A. Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures (The Hague: Martinus Nijhoff, 1996). On the problems with the ECOWAS, see M.L. Brown, "Nigeria and the ECOWAS Protocol on the Free Movement and Residence" (1989) 27 The Journal of Modern African Studies 258.

¹² See M. Hefny, *ibid* at 179.

operations in specific cases.¹³ The OAU Mechanism lacks, at present, a detailed and comprehensive enunciation of the conceptual framework that will guide its decisions to intervene or not to intervene in particular situations and not others. The political constraints that confront the OAU Mechanism include the fact that it has so far been rather biased in favour of conflict resolution instead of conflict prevention¹⁴, a bias that the OAU has now taken steps to correct.¹⁵ Among other constraints are: the as yet inadequate level of commitment of some member states to concede a high degree of involvement to the OAU in internal conflicts;¹⁶ the requirement that the consent of the parties to a conflict be first obtained before the OAU Mechanism can intervene in any situation;¹⁷ the politicisation of the Central Organ of the OAU Mechanism by the fact that this organ is composed of states, some of which might be interested in the particular conflict at hand and would not as such be impartial arbiters;¹⁸ and the fact that the ultimate "action" that the Central Organ of the OAU Mechanism might take in relation to a conflict of which it is seized is merely to

¹³ Ibid at 180.

¹⁴ Ibid at 181. See also S.B.O. Gutto, "The OAU's New Mechanism for Conflict Prevention, Management and Resolution and the Controversial Concept of Humanitarian Intervention in International Law" (1995) 7 ASICL Procs. 348 at 349; and J. Packer, "Conflict Prevention By the OAU: The Relevance of the O.S.C.E. High Commissioner on National Minorities" (1997) African Yearbook of International Law 279 at 282.

¹⁵ See M. Hefny, ibid at 182.

¹⁶ Ibid at 181. See also J. Packer, supra note 14.

¹⁷ See J. Packer, ibid.

¹⁸ Ibid at 283.

"report" to the OAU Assembly of Heads of States and Governments.¹⁹

Yet another politically-related criticism has been levelled at the OAU Mechanism by John Packer. Packer has argued that the requirement that decisions in the organs of the OAU Mechanism be made by consensus ineluctably reduces the nature of possible action to the least common denominator, and that this would invariably entail frequent inaction on the part of the Mechanism.²⁰ In fact, however, recent evidence of vigorous action taken by the Mechanism in virtually every conflict-prone or conflict-ridden African state seems to contradict this view.²¹

The institutional/resource-related constraints that face the OAU Mechanism include the paucity of funds in relation to the intensity and number of internecine tensions and conflicts that exist in contemporary Africa.²² Another constraint in this category is the fact that the preparation of the agenda of the Central Organ of the OAU Mechanism is politicised by the involvement of the Chairman of the OAU Assembly of Heads of States and Governments.²³ A third such constraint is the excessively bureaucratic nature of the Mechanism which has made the OAU Secretary-General (who is in charge of the day-to-day functioning of the Mechanism) subject to the close control of the Central Organ and the

¹⁹ See J. Packer, supra note 14 at 283.

²⁰ Ibid.

²¹ The OAU has been vigorously involved in over eleven such conflicts since the creation of the OAU mechanism in 1993. See M. Hefny, supra note 10; and C. Bakwesegha, supra note 10.

²² See J. Packer, supra note 14 at 283.

²³ Ibid.

Assembly of Heads of States and Governments.²⁴ The last such constraint relates to the need for the recruitment and training of better qualified staff to run the operational arm²⁵, and the installation of better communication systems at the headquarters located at Addis Ababa, the Ethiopian capital.²⁶

The second option, i.e the exclusive use of an improved variant of one of the existing Mechanisms is also, at first sight, a reasonably attractive idea²⁷. The exclusive mandate conferred on such a body would ensure that Africa's policies and practices relating to the prevention of internecine strife are coherent and easily identifiable. It would also prevent problems associated with inadequate coordination that might arise from the pursuit of similar objectives by several different bodies. Moreover, the specialisation and focus that would be achieved in that body would enhance the efficiency and performance of those charged with finding solutions to the problem of preventing and reducing the incidence of internecine conflict in the continent. Again, the salience that the visibility of a single institution would give to the urgency of finding peaceable and imaginative solutions to the problem of fragmentation would greatly benefit the search for peace in Africa. The advantages inherent

²⁴ Ibid.

²⁵ See M. Hefny, supra note 10 at 182.

²⁶ Ibid.

²⁷ The launching pad for these improvements ought to include the implementation of the agreements establishing the respective African and West African Courts and Parliaments. On the African Court and Parliament, see Treaty Establishing the African Economic Community, 3 June 1991, reprinted in (1991) 3 *African Journal of International and Comparative Law* 792. On the West African Court and Parliament, see Revised Treaty of the Economic Community of West African States, 24 July 1993, reprinted in (1996) 8 *African Journal of International and Comparative Law* 189.

in the utilisation of one specialised agency need not entail, however, the abandonment of existing regional and sub-regional Mechanisms deemed beneficial to the cause of intra-state peace and development. It is perfectly possible, even desirable, for a number of mechanisms with similar but qualitatively and quantitatively different mandates to co-exist. This is so especially when such mechanisms are in fact somewhat different in nature (as in the case of the distinction between the ACHPR on the one hand, and the OAU and the ECOWAS on the other hand).²⁸ This is also the case when they operate at different geo-political levels (as in the case of the distinction between the ECOWAS on one hand, and the OAU and the ACHPR on the other).²⁹ Indeed, cooperation between such bodies has been usual in the recent history of international relations.³⁰

It is these institutional distinctions that suggest a third option. The joint and several application of every relevant institution to the prevention and reduction of the incidence of internecine strife in Africa to the problem would seem to be promising. The added energy and resources that would be brought to the search for peaceful solutions by pooling the separate contributions of each of these institutions would be welcome given the number and

²⁸ The OAU and the ECOWAS are political bodies while the ACHPR is a quasi-judicial human rights institution. Moreover, the ACHPR is a semi-autonomous arm of the OAU.

²⁹ The OAU is a pan-regional body, while the ECOWAS is a sub-regional West African body.

³⁰ See for instance the cooperation between the UN, OAU and the ECOWAS in Liberia of the 1990s. See C. Bakwesegha, "The Role of the Organisation of African Unity in Conflict Prevention, Management and Resolution" (1995) *Special Issue-International Journal of Refugee Law* 207. Such cooperation was recently manifested in the unity of purpose and single-minded determination displayed by both the OAU and the ECOWAS regarding the restoration of the legitimately elected President of Sierra Leone, Ahmed Tejan Kabbah, to power. See *Panafrican News Report*, 15 February 1998 at 1.

intensity of situations requiring such attention in Africa. This would require, however, careful thought in order to ensure a coordinated approach to tackling the problem. Additionally, it would be preferable were a "flagship" institution identified or established to act as the primary source of policy and practice. Such a flagship institution would also act as the coordinating agency for the "fleet" of institutions engaged with this problem.

Unfortunately, however, for the reasons already advanced, none of the existing multilateral African institutions seems adequately conceived and equipped to act as this proposed flagship, to lead the charge for peaceful solutions to the problem. Each institution is beset with a number of problems, and none is exclusively devoted to the management of the problems of fragmentation and internecine strife. Thus, ideally and in the long-run, it would seem imperative that a fourth alternative, the establishment of a new specialised mechanism, one exclusively devoted to the prevention of the problems of fragmentation and strife within established states, be considered. Such a course of action would not preclude the option of enhancing the effectiveness of the existing mechanisms.

One shorter term variant of this fourth alternative might entail the designation of a number of the more eminent Commissioners serving on the ACHPR as the "*ACHPR Special Commission on the Protection of National Minorities*". This should be easy enough to achieve as all that it requires is a decision of the ACHPR itself to that effect.³¹ The

³¹ Article 45 of the African Charter on Human and Peoples' Rights (the Banjul Charter), (1982) 21 I.L.M. 59 gives the ACHPR power to promote and protect human and peoples' rights, collect documents, and undertake studies and research on African human and peoples' rights problems. Article 46 of the same document empowers the ACHPR to resort to any appropriate method of investigation. The designation by the ACHPR of some of its commissioners to act in this way is thus justifiable either as a method of investigation, or as a way of promoting peoples' rights.

incumbents of that position would make use of the same secretariat as the rest of the members of the ACHPR. While this is not the most satisfactory of arrangements given the need for such persons to act with speed and dynamism if they are to be effective, it has the advantage of being both cost-effective and feasible in the short term. Additionally (or for reasons of resource scarcity, *alternatively*), the OAU Secretary-General might see fit to act under the powers conferred on him by the OAU Mechanism and designate a sufficiently eminent African such as a retired President Nelson Mandela, or Julius Nyerere, as "*The OAU Secretary-General's Special Representative on National Minorities*" with an independent staff within the OAU Secretariat.

It is prudent to note, however, that while the appointment of a Special Representative of the OAU Secretary-General to take charge of this important basket of tasks might appear easy to implement, it is less likely in the end to attract sufficient appeal among those who are interested in the establishment of more effective multilateral African institutions. This is because the Mechanism proposed would be responsible to an OAU Secretary-General who is himself circumscribed by the supervision of the Central Organ of the OAU Mechanism. One clear advantage, however, lies in the fact that the establishment of any such continent-wide specialised mechanism would exempt the various sub-regional organisations in Africa from the need of establishing similar mechanisms because they could use their existing generalist mechanisms to complement the work of the Pan-African one.

A longer-term variant of the fourth alternative, i.e the establishment of an "*OAU*

Special Commission on National Minorities"³², is still another valuable strategy that the OAU might wish to pursue over time. The advantage of this proposed semi-autonomous institutional mechanism lies in its anticipated specialisation, autonomy, non-politicisation, eminence, and internal checks and balances. As has already been argued, specialisation and exclusive focus on a single "basket of issues" would enhance the efficiency and performance of such an institution. The "flagship" or "command-centre" role that this Mechanism could play would also help to facilitate proper coordination amongst the different Africa-wide and sub-regional mechanisms that partly pursue similar objectives. The autonomy of this Mechanism would also enhance its speed, efficiency, and dynamism, since it would report directly to the OAU Assembly of Heads of States and Governments. Again, autonomy might save it from entanglement with some of the many problems associated with established and entrenched bureaucracies. Its non-politicisation and the eminence of its membership would invest it with the capacity to engage in quiet but speedy action which might have a better chance of success in the context of changing the established behaviour of many African states toward their sub-state groups. Lastly, the appointment of a three-person *commission* instead of a one-person *commissioner* might have the advantage of creating more institutionalised checks and balances in the operation of the Mechanism, and less reliance on the discretion and whims of just one person. It could also serve to ensure the inclusiveness of the commission since there will be room for representation on the commission from the different geo-political sections of Africa, a matter which cannot be ignored in a continent that is most

³² This commission would be partially modelled on the OSCE (European) mechanism, but fundamentally restructured in order to adapt it to the special and peculiar needs and conditions of Africa.

sensitive to dominance of one group or race or people over another. This characteristic distinguishes the proposed Mechanism from the similar OSCE Mechanism.³³ The latter is built around the personality of one High Commissioner who has an exceedingly high level of discretion, and picks and chooses the situations to get involved in. Such selectivity would likely be problematic in the African context given the extreme sensitivity of African states to being subjected to intrusive international mechanisms. In that case, it seems more reasonable to employ an international mechanism that is less open to accusations of selectivity than would a one-person body.

The difficulties associated with conflict prevention in Africa might be better addressed if the preferred mechanism conforms to certain additional requirements. In all cases, for example, the appointees should possess enough eminence and moral authority to give them an unusual level of influence on African governments. In all cases, the appointees should work primarily through quiet, confidential diplomacy, adopt a human rights approach to the problems of socio-cultural fragmentation, and have a long-term perspective. They should act with discretion and initiative, recommend solutions to the relevant disputants, be seen to be impartial, and have the leverage and moral authority to persuade disputants to reach an

³³ The office of the OSCE High Commissioner on National Minorities was established in 1992 with Max van der Stoep as its first incumbent. He is supported by a staff of nine, including six advisers. His mandate expires on 31 December 1998 after which another person may be appointed to the position. See Fact Sheet on the High Commissioner on National Minorities, Ref. HCNM/FS-ENG/001-February 1997. For an "external" assessment of the work of the High Commissioner between 1993-1996, see Annual Report of the Foundation on Inter-Ethnic Relations, 1996 (on file with this writer).

accommodation with each other and to come to an agreement.³⁴

Like the OSCE Mechanism, the appointees' primary mandate should also be preventive; they should attempt to identify and de-escalate tensions, and, if this not possible, provide to the political organs of the OAU early-warning of impending strife.³⁵ Confidentiality could be utilised as a "carrot" in order to foster confidence in the early and delicate stages of negotiation, but publication ought to be retained as a "stick" to be applied in the case of a recalcitrant state. A "human rights approach" should help identify and locate the *root causes* of inter-group violence in the social conditions of the relevant state, including the status of minorities in that state. Because human rights standards are for the most part already existing, and perhaps just a little less indeterminate than general moral principles, it should be possible in many such cases to find and apply sustainable solutions.³⁶ Again, the recommendation of solutions to the disputants would encourage them to narrow their differences and to reach early settlement. Impartiality would ensure that the appointees retain credibility, an essential condition for generating an effective solution. And the moral authority and leverage enjoyed by appointees would ensure that they enjoy consistent access to each and every one of the relevant disputants, especially the government side. Such will

³⁴ These have been identified by an informed commentator as the strengths that have made the OSCE High Commissioner on National Minorities effective. See J. Packer, supra note 14 at 289-290. Since these attributes make sense in the context of the need to ensure that potentially cooperative states and disputants are not scared by the publicity generated by the operation of such an intrusive mechanism, and by perceptions as to the partiality of the mediator, there is no reason why these attributes should be a drawback in the African context. Indeed, African states are even much more jealous of their sovereignty than their European counterparts. See M. Hefny, supra note 10 at 180.

³⁵ See OSCE Fact Sheet, supra note 33 at 2.

³⁶ Ibid.

also ensure that their recommendations are taken seriously.³⁷

In all cases, such appointees should also be able to stimulate the formulation, negotiation, entry into force, and domestic incorporation or application of a *detailed* treaty relating to the protection of national minorities in Africa. The existing minority rights charter, contained in articles 19-23 of the African Charter on Human and Peoples' Rights is too general in formulation, and therefore, somewhat inadequate as a comprehensive set of minimum standards that ought to guide African states in their relations with their sub-state groups.³⁸

Under the regime established by the OSCE Mechanism, a regime that has been greatly enhanced in its effectiveness by the good fortune of being created in a particular historical moment, target states, enthusiastic as they are about joining the European Union, might be denied admission if they are not first certified by the OSCE High Commissioner. Unlike that created by the OSCE, the African Mechanism would not enjoy nearly as much extraneous political leverage, and must depend, for most of its effectiveness, on the moral authority.³⁹

³⁷ *Ibid.* Needless to say, an emphasis on conflict prevention rather than resolution will ensure that the huge costs imposed on states by the vicissitudes of internecine strife, and by consequent underdevelopment should, to some extent, be nipped in the bud. For these reasons, it is highly commendable that African states recently resolved (at a meeting of the OAU Assembly of Heads of States and Governments) to concentrate the bulk of OAU conflict management activities on preventive activities. These leaders have come to realise that it is much cheaper to prevent, than put out the flames of, internecine violence

³⁸ For authoritative evidence that these provisions constitute a minority rights charter, see the decision of the ACHPR in Katangese Peoples' Congress v Zaire Communication No. 75/92 (1996) 3 International Human Rights Reports 136.

³⁹ Note however that there are other processes of integration going on in Africa.

Other areas in which the new mechanism (whichever variant is preferred) should differ from the OSCE model include policies regarding terrorism and the territorial integrity of every state. The OSCE Mechanism is required not to become involved in any situation in which acts of "organised terrorism" occur. This body is also required to endorse the maintenance of the territorial integrity of each and every target state, no matter how badly it treats its sub-state groups. While the new African Mechanism ought to concentrate on the prevention of the use of excessive force on both sides of an intra-state dispute, it is also possible for it to play a role in the de-escalation of some already violent conflicts. In any case, since there is no universally accepted general definition of "terrorism"⁴⁰ and some definitions may even label the most genuine of defensive struggles as "terrorist", it may be counter-productive, especially in a continent such as Africa, for the Mechanism to *a priori* bar itself from involvement in every such situation.

Again, it appears that the automatic endorsement of the territorial integrity of each and every African state, no matter how repressively organised, and no matter how badly it treats its sub-state groups, and no matter the surrounding circumstances of a particular situation, may not, in every case, conduce to the achievement of a *sustainable* peace. When utilised as a last resort, the threat of legitimate secession (i.e secession that is legitimated by the OAU itself) could constitute a very powerful leverage in the hands of the commission. Such a policy would not necessarily contravene international law; no authoritative tribunal has explicitly rejected secession as a possible means of achieving the protection of the rights

⁴⁰ See for example T.E. Arnold and M. Kennedy, Think About Terrorism: The New Warfare (New York: Walker, 1988).

of an oppressed people.⁴¹ Indeed, the policy will be in keeping with the "soft law" of the international society which is articulated in paragraph 7 of the relevant section of the Declaration on Friendly Relations⁴². That paragraph provides that secession is illegitimate *unless in the case of the secession of a sub-unit from a state that does not behave in accordance with the tenets of "democratic" governance*. This is a position that has already been impliedly endorsed by the African Commission on Human and Peoples' Rights.⁴³

The proposed commission (or an alternative mechanism) must, however, realise that it is basically a "security" mechanism: a mechanism designed to help carry out the search for arrangements which ensure the internal structural legitimacy of established or would-be states in an atmosphere of continental security; a mechanism designed to further the peaceful and measured re-configuration of the post-colonial African state in order to prevent a violent and therefore very costly balkanisation of the continent.

Finally, it is suggested that the commission or any of the other proposed alternatives would do well to keep in mind that one major way in which to actualise its "preventive function" would be to work toward the consolidation of the emerging transition of international law and institutions away from their historical attitudes to the problem of sub-state fragmentation. Thus, it would be important for the Mechanism to prefer policies that

⁴¹ See T.M. Franck, "Clan and SuperClan: Loyalty, Identity and Community in Law and Practice" (1996) 90 American Journal of International Law 359.

⁴² See the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations, reprinted in (1970) 9 I.L.M. 1292.

⁴³ See the *Katanga Case*, supra note 40.

encourage infra-review instead of peer-review; de-centralisation instead of over-centralisation⁴⁴; norm-based legitimacy instead of the automatic legitimization of effective situations; access to the international arena instead of domestication; and diverse multicultural nationhood instead of coercive nation-building. Put differently, it would be important for the Mechanism to help consolidate the emerging normative climate.

By preferring these new doctrinal attitudes over the previous unsatisfactory responses of the law to the problem of fragmentation, the adopted Mechanism will help ensure that a more satisfactory, but still emergent, international legal and political climate becomes established, even entrenched. It is this emergent climate that has made it possible in the first place for multilateral African institutions to begin to enquire into the legitimacy or otherwise of the internal structure and conditions of African states. Without the ability to conduct that sort of internal enquiry, it would be nearly impossible for such institutions to make future contributions to that worthy enterprise in specific situations. Moreover, as has already been argued, a more conducive atmosphere is created by the reversal of the dominance hitherto enjoyed by the traditional doctrines of international law that have functioned in an aberrant fashion in relation to African states. In the new normative environment, it will be much more difficult for states to find international legal arguments, justifications, or excuses for the ill-treatment of their sub-state groups. In this new climate, it is also likely to be much harder for states that repress their own sub-state groups to escape the scrutiny of other African states and multilateral institutions. Therefore, it will not be unreasonable to expect that, in this new order, the more these justifications are eliminated, the less African states

⁴⁴ The OSCE mechanism actively pursues this objective. See J. Packer, "The OSCE and International Guarantees of Local Self-Government" in *Proceedings of the UniDem Seminar, 25-27 April 1996* (Strasbourg: Council of Europe, 1996) at 250.

will be able to deal ruthlessly or militaristically with their sub-state groups. However authoritarian a regime is, it cannot be completely impervious to the pressure exerted by its peers (such as fellow African states and multilateral African institutions).

A call for the consolidation of these attempts to re-configure the nature of the post-colonial African state is obviously not the same as a call for a *general* disaggregation of each and every African state. Such a general approach would not be context-dependent and thus, would not, in my view be advisable. In this new era of increasing respect for the moral and legal rights of sub-state groups, state-building must be a function of relatively peaceful socio-political and legal struggle, within a specific context, and over a relatively long period of time. There are thus no immediate nor simple answers. There is no ready-made panacea that will be effective in all situations and at all times. A great deal more work remains to be done in order to find credible, peaceful and context-specific ways of re-structuring post-colonial African states. In this connection, much more will be needed in order to achieve lasting peace in many of Africa's fragmented states than a simple re-affirmation of already tried arrangements such as constitutional guarantees of federalism or confederalism. Such textual arrangements have in the past been shown to be insufficient to prevent the outbreak of internecine strife within a number of states. Such arrangements need to be supplemented by inter-African mechanisms that aim at the creation of a culture of constraint in the discourses and practices of state-building across the African continent.

Africa, the birthplace of our species, and of the very idea of the state as a collection of at least two large towns or cities, will do well to recognise the opportunity inherent in the grave adversities that the post-colonial African state currently experiences. This era of

immense grief is also a "Grotian moment",⁴⁵ an age in which, *inter alia*, the very meaning of sovereignty is undergoing a fundamental transformation.⁴⁶ It is an age that has provided humanity with an opportunity to fundamentally re-conceive the very nature of statehood in novel and much more humanist ways, in ways that are more likely to reconcile African states to their often restive sub-state groups; in ways that are not likely to entail massive violations of human and peoples' rights. In this sense, the challenge is one that is unmatched in nature, urgency, scale and intensity by any other in the recorded history of state-building. However, given the historic attitudes exhibited by many African states toward their sub-state groups, this task cannot be left entirely to the states themselves to handle. Inter-African institutions and techniques that can give fillip to this enterprise, and assure the participation in the process of sub-state groups, must be developed. While not a panacea, the establishment of a new "*OAU Special Commission on National Minorities*" may go a long way toward facilitating that inexorably tasking and lengthy process of finding effective, context-dependent responses to the related problems of fragmentation and internecine strife within African states. In this way would the normative promise of international law and institutions become manifest for the benefit, not just of nation-states and dominant groups as in the past, but for the well-being of all of their inhabitants, those persons to whom all laws should be answerable.

⁴⁵ For a recent volume which explores this theme, see J. Ellis and O.C. Okafor, eds., The International System in a Grotian Moment (1997) 13 (special issue) *International Insights* 1-188.

⁴⁶ See I.L. Head, "Address to the World Food Day Ceremony at the United Nations", 25 October 1996 (on file with this writer).

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