

COUNCIL OF MINISTERS
Fifteenth Ordinary Session
Addis Ababa - August 1970

CM/334/Add.1

REPORT ON THE COMMISSION OF MEDIATION, CONCILIATION
AND ARBITRATION



ORGANIZATION OF AFRICAN UNITY

ORGANISATION DE L'UNITE AFRICAINE

B U R E A U

OF THE COMMISSION OF MEDIATION,
CONCILIATION AND ARBITRATION

DE LA COMMISSION DE MEDIATION,
DE CONCILIATION ET D'ARBITRAGE

ADDIS ABABA - ETHIOPIA Cables: MECAR.ADDISABABA P.O. BOX 3536

Telephone 41091-41095

Reference: ADM.1/1/105/70

Date: 15th July, 1970.

Your Excellency,

I refer to Your Excellency's meeting with my two Vice-Presidents and the Registrar of my Commission in June 1970, about the report which the Commission proposed to address to Your Excellency and also to the distinguished members of the Council of Ministers of the O.A.U.

The report has now been concluded and I have the honour to forward five copies thereof in English for translation into French and also the Stencils as have been agreed.

I would like to take this opportunity to thank you very much for your visits to me at the Police Hospital and for the great concern shown about my health. I am happy to inform you that I am convalescing satisfactorily and hope to have the pleasure of seeing you in due course.

I would like to take this opportunity to renew to Your Excellency the assurances of my highest esteem and consideration.

(Sgd) JUSTICE M.A. ODESANYA

H.E. Mr. Diallo Telli,
Administrative Secretary-General,
O.A.U.,
ADDIS ABABA.

REPORT ON THE COMMISSION OF MEDIATION
CONCILIATION AND ARBITRATION

At the Sixth Ordinary Session of the Assembly of Heads of State and Government, the Council of Ministers was directed to make a study of the structure of the Commission of Mediation, Conciliation and Arbitration, and to submit its recommendations if any to the Assembly of Heads of State and Government for amendments where necessary to the Protocol and the Charter of the O.A.U.

The Fourteenth Session of the Council of Ministers postponed the consideration of this matter until a full and comprehensive report on the Commission has been submitted by the Administrative Secretary-General in collaboration with the Bureau of the Commission of Mediation Conciliation and Arbitration. A clear appreciation of the place of the Commission within the machinery set up at Addis Ababa in 1963 for accomplishing the purposes of the O.A.U. is necessary at the very outset of this report.

THE PLACE OF THE COMMISSION WITHIN THE O.A.U.

1. One of the cardinal principles enshrined in the Charter of the O.A.U. is the peaceful settlement of disputes by negotiation, mediation, conciliation and arbitration. Member States in Article 6 pledged to observe scrupulously this principle among others, having already by Article 3 agreed to observe this principle. The founding fathers saw it fit to repeat and reiterate this in Article XIX which provides:-

"Member States pledge to settle all disputes among themselves by peaceful means and to this end decide to establish a Commission of Mediation, Conciliation and Arbitration, the composition of which and conditions of services shall be defined in a separate Protocol to be approved by the Assembly of Heads of State and Government. The said Protocol shall be regarded as forming an integral part of the present Charter."

This makes clear the importance which the Heads of State and Government attach to this cardinal principle.

2. The pronouncements of the Heads of State and Government themselves put this beyond doubt.

His Imperial Majesty Haile Selassie I said to the First Assembly at Cairo, that :-

"The Charter has accurately and adequately defined the principles to which we have pledged our adherence. Africans, however, like all other people possess not only virtues but weaknesses, and it is perhaps inevitable that differences will arise among us from time to time. Just as Africa, as a single entity, and the general African States individually toil for the peaceful settlement of disputes among states, so must we ensure that disputes in Africa are settled peacefully. If our continent is not free of inter-tribe strife, how can we hope to influence others whose disputes endanger the peace of the world."

3. The importance which the Member States attach to the principle of peaceful settlement of disputes is further emphasized by the special place given to the Commission by Article 7 of the Charter, which designates it as one of the four principal institutions of the O.A.U. alongside the Assembly of Heads of State and Government, the Council of Ministers and the General Secretariat. The special character of the Commission is further marked by the fact that Article 19 provides that it shall be set up through a separate constituent instrument. Under Article 20 the Assembly is given a general power to create "Specialized Commissions." But under the Charter the Commission of Mediation, Conciliation and Arbitration is not envisaged as a subordinate "Specialized Commission." It is envisaged as an autonomous body having its own constituent instrument which is, however, to form an integral part of the Charter of the Organization.

4. The importance of the Commission has further been attested to by the Heads of State and Government themselves. His Imperial Majesty Haile Selassie I declared at the opening of the First Session of the Commission in December, 1967 :-

"This Commission occupies a special place in the Charter of the O.A.U. as one of its four principal institutions. There is nothing that is closer to our hearts than the work with which it is entrusted in the peaceful settlement of disputes; it is a task of great significance, for without

conditions of security and peace none of the objectives and aspirations enshrined in the Charter can be realised."

5. Learned writers have also testified to its importance. Dr. T.O. Elias has said:-

"The importance of the Commission of Mediation, Conciliation and Arbitration described in the present Protocol cannot be over-emphasized. Within the framework of the OAU nothing is more central to the problem of unity and solidarity than the maintenance of good relations and neighbourliness among the Member States. Indeed, it can be said that this Commission in large part supplies the *raison d'etre* of the Organization itself. All the Specialized Commission will no doubt play their several significant parts in the promotion of the economic, social and cultural well-being of the communities of the Member States, and it is on the extent to which they fulfil these aspirations of the peoples of Africa that the success of the Organization will be judged. But the peaceful resolution of conflicts, both large and small within the framework of the Organization, provides the necessary condition for orderly progress, not only for the individual Member States, but also for the entire continent of Africa. It is to be hoped that more and more use of the Commission of MCA will be made by Member States as a forum for the amicable settlement of their disputes, thereby reducing the occasions for international conflicts and misunderstandings."

(⁴¹British Year Book of International Law Page 348)

6. It is clear that the structure of an institution of such importance should not be tampered with unless after a most careful consideration and study. It is therefore not surprising that the Assembly of Heads of State and Government did not take any summary decision on the structure at the Sixth Session, but rather directed the Council of Ministers to undertake a study of the structure of the Commission and make recommendations if necessary. The Council of Ministers in turn asked the Administrative Secretary-General in collaboration with the Bureau of the Commission to submit a full report on the Commission. We have therefore tried to make this Report as comprehensive but as short as possible.

We have tried to examine the Commission from its very conception to its activities to date, and have discussed the various proposals that have from time to time been made for its improvement.

ADOPTION OF THE PROTOCOL

7. The historic meeting of the Heads of African State and Government at Addis Ababa in May 1963, which adopted the Charter creating the O.A.U. decided to establish a Commission of Mediation, Conciliation and Arbitration. The Commission was to be one of the principle organs through which the O.A.U. is to accomplish its purposes. The meeting however postponed consideration of its detailed structure till a subsequent date. This decision was inscribed in Article 19 of the Charter which provides:-

"Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration, the composition of which and conditions of service shall be defined by a separate protocol to be approved by the Assembly of Heads of State and Government. The said Protocol shall be regarded as forming an integral part of the present Charter."

8. The Charter itself came into force in August 1963, when the requisite number of Member States deposited their instruments of ratification with the Government of Ethiopia in accordance with the provisions of Article 25 of the Charter. Subsequently the Government of Mali circulated draft proposals for the composition of the Commission of Mediation, Conciliation and Arbitration. These proposals were considered at the First Ordinary Session of the Council of Ministers which met at Dakar, Senegal from the 2nd to the 11th August, 1963. The Council decided that the draft be circulated to the Governments of Member States for further study and comments to be submitted not later than 31st December 1963. It was also decided that the draft Protocol would be examined at the next session of the Council of Ministers, and submitted for the approval to the next session of the Assembly of Heads of State and Government at Cairo in 1964.

9. After this session of the Council of Ministers, the dispute between Morocco and Algiers broke out and the First Extraordinary Session of the Council of Ministers was convened at Addis Ababa on the 15th November 1963. The Chairman of this Extraordinary Session of the Council of Ministers said:-

"What would have been desirable of course is that the Commission provided for by the Charter had been set up. If it had existed there would be no problem since we should have referred the matter to the Commission. It happens unfortunately, that although provision has been made for it, this Commission has not been set up. Its membership is not known. Moreover if it is to be an integral part of the Charter, the text constituting the Commission must be adopted by the various States in accordance with the terms of the Charter."

10. It was the absence of the Commission of Mediation, Conciliation and Arbitration that led the Council of Ministers to establish an ad hoc Commission. This is made quite clear by the terms of the Resolution ECM/Res. 1 adopted at the meeting setting up the ad hoc Commission. It said inter alia:-

"CONSIDERING that all the Member States are bound by Article 6 to respect scrupulously all the principles formulated in Article 3 of the Charter of the Organization of African Unity,

CONSIDERING the imperative need of settling all differences between African States by peaceful means and within a strictly African framework,

REAFFIRMS the unwavering determination of the African States always to seek a peaceful and fraternal solution to all differences that may arise among them by negotiation and within the framework of the principles and the institutions prescribed by the Charter of the Organization of African Unity,

CONSIDERING that the Commission of Mediation, Conciliation and Arbitration provided for in Article 19 of the Charter has not yet been set up,

DECIDES therefore to create the ad hoc Commission provided for in Article 4 or the joint Bamako Communique and designates for this purpose the following countries....."

11. After this resolution, the urgency of adopting a Protocol defining the composition of the Commission became apparent. Before the Lagos session, other disputes had arisen between Ethiopia and Somalia, and between Somalia and Kenya. These disputes were considered by the 2nd Extraordinary Session of the Council of Ministers at Dar-es-Salaam from 12th February to 15th 1964. Dr. T.O. Elias had said that these disputes made the adoption of the Protocol a matter of some urgency. (See 40 BYIL Page 339).

".....the establishment of the Commission of Mediation, Conciliation and Arbitration might not have been accorded the high priority which it received but for the border conflicts between Ethiopia and Somalia and between Algeria and Morocco, both of which at one stage seemed to threaten the unity and solidarity of the O.A.U. so recently forged at Addis Ababa in May 1963. As it was, steps were at once taken to draw up the constitution of the Commission."

12. By the time of the 2nd Ordinary Session of the Council of Ministers at Lagos, comments had been received from a number of Member States including Liberia and Somalia. Drafts were submitted jointly by Nigeria, Liberia, Ghana and Tanzania and separately by Somalia and the Malagasy Republic. A committee of seven experts was appointed to examine the various drafts of the Protocol and to evolve an acceptable draft out of them. This Committee consisted of:- Ghana, Liberia, Somalia, Mali, Tanganyika (now Tanzania) United Arab Republic, and Nigeria. The Committee of Seven put forward a tentative draft, and at the same time recommended that it should be allowed to study the matter further with a view to producing a really comprehensive and adequate protocol. Though this request was granted, the Council of Ministers, by resolution CM/Res. 25 (ii) made it clear that they were anxious that the adoption of the protocol should not be delayed. The resolution said inter alia:-

HAVING noted that the Committee has carefully studied the various drafts in the light of the provision of Article 19 of the Charter of the Organization of African Unity and of international law and practice in the fields of mediation and conciliation on the one hand and arbitration on the other,

ANXIOUS that the date of submission of the Protocol to the Assembly of Heads of State and Government for approval should not be later than originally envisaged,

- (1) Decides to circulate the Draft Protocol prepared by the Committee of Seven to all Member States.
- (2) Requests the Member States to forward to the Provisional Secretariat not later than 15th April, 1964 their comments on the Draft Protocol.
- (3) Directs the Provisional Secretariat to convene a meeting of the Committee of Seven in Cairo not later than 15th May, 1964 to finalize a text for consideration of the Council of Ministers prior to the meeting of the Assembly of Heads of State and Government and to circulate the final text prepared by the Committee to all Member States.

13. The Committee of Experts met as directed under the Chairmanship of Dr. T.O. Elias, Attorney-General and Minister of Justice of the Federation of Nigeria, and the Lagos Draft was radically revised in the light of further comments and suggestions received from Somalia, Nigeria, Togo, Ethiopia, Ghana, Senegal, Mali and Malagasy as well as the Committee's Rapporteur, Mr. (now Mr. Justice) E.E. Seaton of Tanzania. A final draft was prepared which was considered fully by the Council of Ministers and recommended for adoption by the Assembly of Heads of State and Government. The Protocol was approved and signed in July 1965 at Cairo.

14. The foregoing shows that the Protocol was adopted:-

(a) in answer to the felt necessities of the time and with full appreciation of the dangers facing African States. The disputes already referred to threatened to disrupt relations between Member States of the Organization and the necessity for establishing the Commission was felt as a real urgent need.

(b) after a most careful consideration by a body of experts who took into account the relevant provisions of the Charter of the Organization of African Unity relating to the peaceful settlement of disputes and the international law and practice in the field of mediation, conciliation and arbitration.

15. Subsequent to the adoption of the Protocol, the disputes which gave it priority in the thoughts of African statesmen seemed to have been suppressed if not entirely settled. Territorial claims and boundary disputes seem to have died down with the general acceptance of the O.A.U. resolution that existing boundaries as at the time of the attainment of independence ought to be respected. However, other disputes of a purely political nature arose such as those between Ghana and Guinea over the detention of Guinean diplomats at Accra, and those between Guinea and the Ivory Coast. This latter dispute was in fact referred to the Commission of Mediation, Conciliation and Arbitration, but little could be done by the Commission as the Bureau had not at that time being set up, and as the Commission itself was experiencing several vicissitudes which are so well-known to Member States, that there is no need to discuss them.

16. The impression rapidly gained ground that the Commission might prove to have been still-born. Pleas were made for the reactivation of the Commission both at the Third Session of the Assembly at Addis Ababa and at the Fourth Session at Kinshasa. For example, according to the Summary Records of the Third Session of the Assembly, the Prime Minister of the Sudan is reported to have said:-

"that the OAU should be most effective in the area of mediation, conciliation and arbitration. It was therefore necessary to strengthen the Commission and not allow tendencies to weaken it. The Commission was not as active as it should be. There were very many disputes, far too many to cope with. The Commission was vital to the OAU and he therefore supported the proposal to take note of the (President's) report. He called upon the Secretariat to activate the Commission and upon Member States to refer to it in time of need. When bilateral negotiations took place the Commission should be informed. The Commission should set up machinery to strengthen its liaison. Whether the continued permanent employment of staff was needed or not, it was necessary to strengthen the Commission."

17. At both the sessions of the Assembly at Kinshasa and Algiers the Commission was discussed and several ideas were put forward concerning the Commission. It is necessary however before dealing with these various suggestions and proposals regarding the functions and structure of the Commission, to have a clear and accurate picture of the structure prescribed by the Protocol and the underlying reasons for that structure.

THE STRUCTURE OF THE COMMISSION

18. The Protocol deals with the structure of the Commission in Article 1-7. These provide:-

ARTICLE 1

The Commission of Mediation, Conciliation and Arbitration established by Article XIX of the Charter of the Organization of African Unity shall be governed by the provisions of the present Protocol.

ARTICLE 2

1. The Commission shall consist of twenty-one members elected by the Assembly of Heads of State and Government.
2. No two Members shall be nationals of the same State.
3. The Members of the Commission shall be persons with recognized professional qualifications.

4. Each Member State of the Organization of African Unity shall be entitled to nominate two candidates.
5. The Administrative Secretary-General shall prepare a list of the candidates nominated by Member States and shall submit to the Assembly of Heads of State and Government.

ARTICLE 3

1. Members of the Commission shall be elected for a term of five years and shall be eligible for re-election.
2. Members of the Commission whose terms of office have expired shall remain in office until the election of a new Commission.
3. Notwithstanding the expiry of their terms of office, Members shall complete any proceedings in which they are already engaged.

ARTICLE 4

Members of the Commission shall not be removed from office except by decision of the Assembly of Heads of State and Government, by a two-thirds majority of the total membership, on the grounds of inability to perform the functions of their office or of proved misconduct.

ARTICLE 5

1. Whenever a vacancy occurs in the Commission, it shall be filled in conformity with the provisions of Article 2.
2. A Member of the Commission elected to fill a vacancy shall hold office for the unexpired term of the Member he has replaced.

ARTICLE 6

1. A President and two Vice-Presidents shall be elected by the Assembly of Heads of State and Government from among the Members of the Commission who shall each hold office for five years. The President and the two Vice-Presidents shall not be eligible for reelection as such officers.
2. The President and the two Vice-Presidents shall be full-time members of the Commission, while the remaining eighteen shall be part-time Members.

ARTICLE 7

The President and the two Vice-Presidents shall constitute the Bureau of the Commission and shall have the responsibility of consulting with the parties as regards the appropriate mode of settling the dispute in accordance with this Protocol.

19.

Dr. T.O. Elias has said:-

"Before deciding to establish a Commission centred upon the Bureau of only three permanent members the Committee of Experts took into consideration the question of expense and the difficulty which many members of the Organization of African Unity would experience if called upon to spare some of their ablest men for permanent service with the Commission at its headquarters. The various

arrangements in international practice for the organization and functioning of arbitral tribunals were examined in some detail, together with the different specific objectives they were designed to achieve. The particular arrangement which is embodied in the present Protocol has, therefore, been dictated by the requirements of economy both in personnel and in the material resources of the member states, as well as by the desire to avoid setting up too complicated a machinery for the settlement of disputes. (emphasis OURS).... It can fairly be said that the three principles underlying the structure and functioning of the Commission are those of economy, simplicity and flexibility."

20. The original draft Protocol discussed at Dakar at the First Session of the Council of Ministers provided in Article 2 that the Commission shall be composed of fifteen members (15) with a President and two Vice-Presidents. It was not specifically stated whether this Commission was to be on a full-time or a part-time basis. Some articles could be interpreted to mean that the Commission was to operate on a part-time basis, other provisions did not give that impression. No special functions were assigned to the President or the Vice-Presidents. As has already been said, several States submitted comments on the draft and others submitted alternate drafts. The Somalia draft for example did not accept the proposed composition and structure of the Commission, and their recommendation on this point eventually materially influenced the contents of the final draft.

21. The Somalia draft contained inter alia, the following provisions:-

ARTICLE 2 (1)

The Commission shall consists of a President, two Vice-Presidents and a panel of 20 members, who shall be elected by the Assembly of Heads of State and Government in accordance with the provisions of the following Articles:-

ARTICLE 4 (1)

The President and the Vice Presidents shall devote their full-time to the Commission. The members of the panel may be called upon from time to time to perform the duties of mediators, conciliators or arbitrators under the terms of this Protocol.

ARTICLE 17

Where the President is temporarily unable to perform his duties, the elder Vice-President shall act as President; and where the elder Vice-President is unavailable, the other Vice-President shall act as President.

ARTICLE 20 (1)

Where a controversy or dispute arises between two or more Member States, the President may extend his good offices in the interests of promoting friendly relations between the States concerned, recommend recourse to the machinery of the Commission, and where necessary recommend any suitable provisional measures.

ARTICLE 20(1)

Where the dispute poses an immediate and serious threat to the maintenance of peace and security among Member States the President may also bring the matter to the attention of the Council of Ministers or the Assembly of Heads of State and Government for appropriate action.

22. These provisions show that the Somalia draft envisaged a President and two Vice-Presidents on a full-time basis with specific functions to perform. These articles in the Somalia draft influenced the provisions of articles 5 and 7 of the Protocol. The President and two Vice-Presidents were to hold office for five instead of four years as in the Somalia draft, and were not eligible for re-election and the functions of the President were vested in a Bureau made up of the President and two Vice-Presidents. The number of members was reduced from 20 to 18. The functions of the Bureau was to consult with Member States as to the best mode of settling disputes.

23. The reasoning behind these provisions can best be stated in the words of the Somali Government herself:-

"In the view of the Somali Government, the main shortcomings of the draft Protocol are the following:-

- (a) The Commission would consist of 15 members who, during their term of office, would presumably serve on a full-time basis at the Headquarters of the O.A.U.

This solution would offer certain disadvantages i.e.

- i) a permanent Commission would constitute a heavy financial burden on the budget of the O.A.U.
- ii) it would be difficult to find fifteen persons of sufficiently high calibre to devote their full activity to the Commission without assurance that the machinery of the Commission would be used extensively.
- (b) The submission of disputes to the Commission would depend entirely on the attitude of Member States towards the Commission itself. There is no provision in the draft Protocol to induce Member States to avail themselves of the Commission and to raise its prestige to a level which would encourage States to do so.

After other comments on other articles in the draft Protocol which are not material for our purposes, the comments go on:-

"In the light of the foregoing observations, the Somali Government respectfully proposes for consideration an alternative draft Protocol seeking to reflect the purposes and the language of this Charter of the O.A.U.

The cardinal principle on which the proposed draft is based is to further the maximum recourse by Member States to the machinery provided by the Commission for the settlement of disputes in the spirit of African Unity, respecting at the same time the sovereignty of states, and endeavouring to limit the cost of the Commission within reasonable bounds.

While the draft Protocol discussed at the Dakar meeting of Foreign Ministers would establish a permanent Commission of 15 members, the Somali Government draft provides for a creation of a small permanent body consisting of the President and two Vice-Presidents. In addition there is a panel of 20 members (now 18) who would be called, as necessary, to perform the role of mediators, conciliators or arbitrators."

The comments in speaking of the role of the President state:-

"The President assisted by the Vice-Presidents is the keystone of the proposed Commission. It is essential that he should be a person of the highest moral and intellectual qualities, commanding universal respect for his impartiality, objectivity and devotion to peace and the cause of African Unity. The responsibilities entrusted to the President are extremely delicate and require the utmost tact and resourcefulness. He should keep abreast of developments in the African continent which might lead to friction or disputes between states and be prepared to offer his good offices for the purpose of promoting friendly relations. He would be empowered not only to recommend recourse to the machinery of the Commission, but also to recommend provisional measures outside the Commission for the purpose of removing particularly acute causes of dissension."

24. It seems therefore that the reasons for adopting this structure was to enable initiatives to be taken in African disputes to remove the seeds of dissension before they germinate and grow into an impenetrable jungle of communal and inter state strife.

Moreover, the very membership of the Commission calls for a central directing and coordinating body. The 18 members are not responsible or answerable to their Governments; they live in different states, as no state should have more than one member on the Commission; each is doing his own work and only serves the

Commission on a part-time basis. The drafters thought that a central body like the Bureau would give some cohesion to the Commission which is designated as a principal institution of the O.A.U.

25. The structure adopted in the Protocol has given rise to much discussion within the political organs of the O.A.U. over the years. Adverse criticism has been levelled at the Commission mainly on the ground that enough work is not forthcoming to justify a permanent Bureau of a President and two Vice-Presidents. Suggestions have therefore being made for changing the structure of the Commission by either abolishing the permanent nature of the Bureau or of giving the Commission more competence to justify the existence of a permanent Bureau. Before discussing these proposals, it would be necessary to examine the operations of the Commission to ascertain if it is correct that the present structure is not working satisfactorily and if so why.

THE OPERATIONS OF THE COMMISSION

26. The vicissitudes that beset the Commission from 1964 when the Protocol was adopted in Cairo to the setting up of the Bureau in February 1969 are too well-known to need further elaboration. The death and incarceration of some of the Members of the Commission, and the non-voting of a budget for the Commission until sometime in 1968 however need to be noted. One of the first two Vice-Presidents died and the other was incarcerated and neither ever took office.
27. Since February 1969, the Bureau has been set-up at Addis Ababa, and all members have taken up residence. An office has been established, and the registrar and a basic administrative staff recruited. The Bureau on being set up immediately set to work, and took some initiatives in certain African situations, and would have succeeded in attracting work for the Commission if certain factors had not appeared which militated against it. These factors must be set-out and discussed seriatim.

CONTROVERSY CONCERNING THE BUREAU'S COMPETENCE

As has already been pointed out article 7 of the Protocol provides that:-

"The President and the two Vice-Presidents shall constitute the Bureau of the Commission and shall have the responsibility of consulting with the parties as regards the appropriate mode of settling the dispute in accordance with the Protocol."

and

Rule 2 (4) of the Rules of Procedure of the Commission also provides:-

"The Commission shall take such steps and adopt such measures as are necessary to remind Member States of the OAU that the services of the Commission are open to them at all times."

The Bureau took and still is of the view that these provisions empower the Bureau to take the initiative where disputes arise, and to offer the services of the Commission to and consult with the Member States involved as to the best mode of settling the dispute, without necessarily waiting for the dispute to be referred to the Commission. The purpose of such consultations would be to ascertain if Member States would, and even in certain cases to try to persuade them to, refer their disputes to the Commission for settlement. Some Member States did not accept this construction of article 7 as correct, maintaining that it is only after a dispute has been referred to the Commission that the Bureau can commence consultations with the States involved as to the best way of settling it. The proper meaning of this article can only be settled by the Assembly of Heads of State and Government under article 27 of the Charter.

28. The Council of Ministers in studying the structure of the Commission may consider this problem and make appropriate recommendations to the Assembly of Heads of State and Government. We therefore think that it is necessary for the Bureau to state the grounds on which they rely in support of the view they have taken of the provisions of article 7 of the Protocol.

(a) It is permissible in interpreting a treaty to have recourse to the preparatory material or work used in its drafting. Reference to such material may throw some light on the meaning of article 7 of the Protocol. We have already referred to some of the comments and memorandum submitted to the Committee of Experts which was responsible for drafting the Protocol especially to the comments submitted by the Government of Somalia. From this preparatory material it seems that the intention of the drafters was that the Bureau was to be able to take an initiative before actual reference.

(b) There is nothing in article 7 of the Protocol that provides that the Bureau's functions commence only on reference. Wherever in the Protocol "reference of a dispute" is made a condition precedent to action or forbearance by any organ, officer or even a member state it is explicitly stated. For example:-

Article 13 (2) of the Protocol provides that:-

"Where a dispute has been referred to the Commission as provided in para. 1 and one or more of the parties have refused to submit to the jurisdiction of the Commission, the Bureau shall refer the matter to the Council of Ministers for consideration."

Article 15 of the Protocol provides:-

"Member States shall refrain from any act or omission that is likely to aggravate a situation which has been referred to the Commission."

Article 20 provides that:

"When a dispute between Member States has been referred to the Commission, the President shall, with the consent of the parties, appoint one or more members of the Commission to mediate the dispute."

If the intention was that the Bureau can initiate consultations only where a dispute has been referred to the Commission, it would have stated explicitly in Article 7 that "where a dispute has been referred to the Commission, the Bureau shall have the responsibility of consulting with the parties as regards the appropriate mode of settling it in accordance with this Protocol." Not having been so explicitly stated in article 7, whereas it has been so stated in other articles already referred to, the proper inference, in the absence of anything to the

contrary is that it was not so intended.

Those who take a view contrary to that taken by the Bureau maintain that the use of the words "the dispute" in article 7 of the Protocol must mean a particular dispute. The simple answer is that if even it meant a particular dispute it does not necessarily mean a dispute that has been referred to the Commission; it can also mean a particular dispute that has arisen between Member States. The Bureau is of the view that where a provision in an instrument is susceptible to two or more interpretations, that interpretation ought to be chosen which would advance the broad and outstanding purposes of the whole instrument, in this case the Charter and its integral part, the Protocol.

There are several other arguments in support of the view taken by the Bureau; it is however not necessary to set all out here. As has been said any question as to the interpretation is within the exclusive competence of the Assembly of Heads of State and we have only stated our view in order to show how the question has arisen in the course of the work of the Bureau and in the hope that Member States would accept the view of the Bureau as substantially correct and thereby remove one of the factors that have militated against the smooth running of the work of the Commission.

29. The second factor which has militated against the working of the Commission has been the uncertainty concerning its future structure. It is unlikely that Member States involved in disputes would be willing to submit them to a Commission in respect of whose future structure there is a doubt. The opportunity has now presented itself for a close and careful study and review of the Protocol to enable the structure of the Commission to be settled once and for all.

30. The third factor has been the tendency of African disputes being settled by prominent African statesmen or even by Heads of State of friendly Governments. African States have so far been fortunate in having a Head of State always ready and willing to offer his good offices in the settlement of some disputes;

and African States are further fortunate that all these attempts at settlement have so far proved successful. How long are they prepared to rely on good fortune in the fulfilment of one of the cardinal principles enshrined in the Charter.

31. It will be seen therefore that the present factors militating against the smooth running of the Commission are of a temporary nature. Given an agreed understanding of the functions and areas of competence of the Commission and its Bureau there is every likelihood that some work will be done to justify the high hopes placed in the Commission by the founding fathers of the O.A.U.

A study of the future structure of the Commission ought properly to consider the various proposals which have from time to time been made during the interventions in the debates of the Assembly and the Council of Ministers, and also to other suggestions which are being put forward here for the first time.

PROPOSALS FOR MAKING THE COMMISSION MORE EFFECTIVE

32. We have already stated the factors militating against the effective operations of the Commission are of a temporary nature. Some of the proposals for making the Commission more effective were made before the adoption of the Protocol. For example His Excellency Mr. Phillippe Yace, Chairman of the National Assembly of the Republic of Ivory Coast said in his address to the first session of the Assembly in Cairo before the Protocol was adopted.

"On the other hand if we are satisfied with the conditions in which the Commission of Mediation, Conciliation and Arbitration operate, we believe the role of this Organization could be enlarged and that its action would be more effective if it were also exercised as a deterrent. This Commission should have power to intervene not only when the disputes become extremely serious, but also whenever tension between two states threaten to lead to later developments liable to compromise peace or even to seriously affect the normal relations between two brother States." (AHSG/PV 4 (1) App.2 pp. 7)

This was said before the Protocol was adopted, and as we have said the Bureau is of the opinion that it has power under Article 7 of the Protocol to take initiative in disputes. We have already stated our view of the construction to be placed on the relevant Article 7. If on the other hand, the contention is upheld that the Bureau has no such duty then we would suggest that the view expressed by H.E. Mr. Phillippe Yace of the Ivory Coast deserve close study and consideration.

33. (a) That the jurisdiction of the Commission should be enlarged to include any matter referred to it by a Member State the Assembly of Heads of State and Government, the Council of Ministers, the Secretariat or any other organ of the O.A.U. Article 12 of the Protocol provides:-

"The Commission shall have jurisdiction over disputes between States only."

This may seem unusually restrictive in view of the experience of several international organizations and also of the problems confronting African States.

- (b) The Article dealing with the jurisdiction of the Commission might read:-

"The Commission shall subject to the provisions of the Charter, have jurisdiction over any question, matter or dispute referred to it by any Member State, the Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat or any other organ of the O.A.U."

- (c) Such a provision still leaves with Member States the discretion of choosing what matters they can ask the Commission to deal with. It however empowers the Commission to deal with a broader range of problems which any Member State, or organ of the O.A.U. may deem fit to refer to it. It also makes sure that the Commission shall abide by the principles contained in the Charter. It would also enable any Head of State who has offered his good offices in the settlement of a dispute or has been chosen to settle a dispute by the parties or by the Assembly of Heads of State and Government to use the services of the Commission instead of his own Foreign Ministry, thus ensuring that all settlements are effected strictly within the machinery provided for in the Charter of the O.A.U.

(d) This will prevent such remarks as contained in a recent book on the O.A.U. where the author states:-

"The history of the O.A.U. since its founding has shown quite clearly that the machinery evolved at Addis Ababa in 1963 was not strong enough in itself to act as an immediate extinguisher of hostilities in Africa. Past and even present disputes have clearly revealed the weaknesses of the system devised by the Charter of the O.A.U. for the settlement of disputes. Considering the high hopes which were placed in the OAU, it will be a blow to the prestige of the Charter if the impression conveyed to the world is one of self-interest, where the private initiative of individual African Statesmen continues to be given preference over the organized authority of the O.A.U."

(Page 99 Cevenka; The O.A.U. and its Charter)

(e) However such a proposal however attractive on its face ought to be examined very carefully indeed before adopted. It may call for additional provisions either to the Protocol or to the rules of procedure of the Commission.

PROPOSALS TO MAKE THE COMMISSION MORE USEFUL

34. These proposals are usually rooted in the recognition of the fact that there are several areas of work which have to be performed in the interests of the O.A.U. and African Unity, and which at present are not being performed because there is no machinery for their performance. It is suggested therefore that consideration might be given to the idea of imposing these duties on the Commission of Mediation, Conciliation and Arbitration.

35. The Secretary-General put some such proposals to the Fifth Assembly at Algiers. He said:-

"Bearing in mind the fact that there is a Bureau of the Commission, composed of a President, two Vice-Presidents, Registrar and subordinate administrative staff, who will be called upon to operate only if the parties to a dispute decide to submit to the jurisdiction of the Commission, perhaps the time has come to think of amending the Charter and the Protocol with the view to enlarging the Commission's competence. Like the International Court of Justice, the Commission could act as an advisory body on legal questions which might arise as a result of the implementation of the Charter. The Commission might also assume what was originally to have been the role of the former Commission of Jurists; the promotion of African Law and the aligning of the various customary laws existing in Africa."

After adverting to the attitude of some member states on the same question, the Secretary-General went on to say:-

"This is an important and complex problem which the Assembly will have to study with diligence and care. (emphasis is OURS). CM/212

36. A look at these proposals against the background of the experience of the O.A.U. establishes quite clearly that they merit a closer examination.

THE PROPOSAL THAT THE COMMISSION'S BUREAU BE GIVEN ADVISORY JURISDICTION:

The mechanism for the interpretation of the Charter is provided in Article 27 which states:-

"Any question which may arise concerning the interpretation of this Charter shall be decided by a vote of two-thirds of the Assembly of Heads of State and Government of the Organization."

A question may arise during the deliberations of the Council of Ministers, it may arise in the course of the work of the General Secretariat, or any of the Specialized Commissions, or between the General Secretariat and a Member State or between Member States of the Organization, bearing in mind that the Assembly meets only once a year in Ordinary Session, the work of these organs of the O.A.U. would be greatly impeded if they had to submit every question of doubt or disagreement as to the meaning of any clause in the Charter to the Heads of State and Government. Yet this is the procedure laid down in the Charter in clear and unambiguous terms.

This procedure followed that laid down for the interpretation of the Statutes of the International Monetary Fund and the I.B.R.D.

The Governing Board of the IMF which is charged with the interpretation of the relevant statute is a relatively small body which meets frequently and the questions arising for determination fall within a specialist field. Even then the IMF has entered into an agreement with the UN pursuant to article 63 of the Charter of the U.N., and article 10 of the Funds Articles with respect to interpretation. Article 8 of that agreement, which came into force on 15th November 1947 provides:-

"The General Assembly of the U.N. Hereby authorizes the Fund to request advisory opinions of the International Court of Justice on any legal questions arising within the scope of the Funds Activities other than questions relating to the relationship between the Fund and the United Nations or any Specialized Agency. Whenever the Fund shall request the Court for an advisory opinion, the Fund will inform the Economic and Social Council of the request."

The provision in the O.A.U. Charter was adopted because, as Dr. T.O. Elias said:-

"In the early stages of the drafting of this article, provision was made for a reference to the International Court of Justice at the Hague as the sole arbiter in every dispute as to the interpretation or application of the Charter. But after considerable discussion and thought it was considered that disputes as to the interpretation of any of the provisions of the Charter would be best disposed of within the framework of the Organization itself, rather than by an authority external to it. It was accordingly decided that questions of interpretation should be decided by a two-thirds majority of the Assembly of Heads of State and Government of the Organization. What in the view of the founding fathers, made the International Court of Justice inappropriate in this context was the fact that the majority of Member States of the O.A.U., as of U.N.O., had yet to accept the compulsory jurisdiction of the World Court."

It is quite clear therefore that even the drafters of the Charter chose this procedure only as second best. Their first preference was for judicial interpretation, and at the time the Charter was adopted, the Protocol had not been adopted, and the structure and jurisdiction of the Mediation Commission was not known, and the only judicial body available, i.e. the International Court of Justice proved unsuitable.

However, the experience of the Organization itself shows how difficult it is to leave the interpretation of an intricate treaty like the Charter to a body, however eminent of 41 Heads of State and Government who meet only once a year. What is in fact happening therefore is that the other organs of the O.A.U. are each performing this function of the Charter interpretation, without subsuming it under the relevant provision of the Charter. The Council of Ministers may consider whether or not the time has not come when the O.A.U. needs a body which can be called upon at short notice to

give advisory opinions as to the interpretation of the Charter. These opinions may be made to take effect pending their ratification by the Assembly of Heads of State and Government.

PROPOSAL THAT THE COMMISSION SHOULD PERFORM THE FUNCTIONS OF THE COMMISSION OF JURISTS

37. The Secretary-General's second suggestion is that the Mediation Commission should be invested with the work which should have been done by the Commission of Jurists. Members will recall that the Council of Ministers at their meeting in Lagos, Nigeria in 1964 (Second Ordinary Session) decided to recommend to the Assembly of Heads of State and Government to consider making the Commission of African Jurists a Specialized Commission within the O.A.U. In Cairo, the Commission of Jurists was set-up as a Specialized Commission. The Assembly at Accra decided to set up an Institutional Committee to examine inter alia the institutional development of the O.A.U. The view was that the Institutional Development of the O.A.U. has been too rapid in relation to the resources available to the Organization. In December 1965 this Institutional Committee started to work. The Summary Records of this Committee show how the Committee approached the question of the Commission of Jurists and the Commission of Mediation, Conciliation and Arbitration. On Page 4 Inst./SR 2 the Ghana delegate said:-

"The Commission of Jurists might be organized outside the O.A.U. or possibly eliminated altogether."

The Chairman Page 4 Inst./SR 1 said:-

"As for the Commission of Jurists, it could be eliminated as there was a Mediation, Conciliation and Arbitration Commission."

PP.5 Inst/SR 2 the Secretary-General said:-

"As for the Commission of Jurists, it should either be dropped as a permanent body of the O.A.U. or else transferred into a sub-committee of the Mediation, Conciliation and Arbitration Commission."

PP.7 Secretary-General stated:-

"that the Secretariat had not neglected the importance of the Commission of Jurists and proposed that it should be made a private Commission, as was the case in the OAS and in the Arab League. If it were decided to maintain the Commission of Jurists, he would suggest that it should be attached to the Commission of Mediation, Conciliation and Arbitration."

The Chairman recommended that the Commission of Jurists be given advisory status.

Guinea - proposed that this Commission should be eliminated and its tasks conferred upon the Commission of Mediation, Conciliation and Arbitration.

Ghana - Felt that jurists should be assured of complete independence in the accomplishment of their task. As the activities of the Commission of Conciliation and those of the Commission of Jurists were different in nature, he proposed that the latter be maintained.

Ethiopia - shared this view.

Sudan - was in favour of a commission of jurists that would be a non permanent body to assist the O.A.U. in case of need.

The Chairman underlined the advantage of a commission of jurists having special status - i.e. advisory status.

The Committee recommended that the Commission of Jurists should not be one of the Specialized Commission of the O.A.U. but should revert to its previous form and structure as a Commission of African Jurists prior to the creation of the O.A.U. "The Institutional Committee therefore recommends that an advisory status should be granted to this new organ."

This recommendation was accepted by the Assembly of Heads of State and Government.

38.

These proceedings of the Committee have been reproduced at length to show that the possibility of the Mediation Commission doing the work of the Commission of Jurists was not seriously studied or debated probably because:-

(a) The structure of the Mediation Commission was not within the Committee's terms of reference and was not mentioned in the Committee's report and moreover.

(b) at that time the Mediation Commission existed only on paper.

It is humbly suggested that the proposal if the Secretary-General that the Commission's competence should be enlarged to take charge of the work which would have been done by the Commission of Jurists deserves careful and close examination.

39. PROPOSAL THAT THE COMMISSION SHOULD PERFORM THE FUNCTIONS OF A HUMAN RIGHTS COMMISSION.

Member States, will recall that in September 1969 the U.N. organized a Seminar at Cairo at the invitation of the Government of the U.A.R. under the programme of advisory services in the field of Human Rights established by resolution 926 (x) of the General Assembly. All independent African States were invited to this Seminar and many sent representatives.

Member States which sent representatives included Chad, Congo (Dem. Rep. of), Dahomey, Ghana, Guinea, Kenya, Liberia, Libya, Mali, Mauritania, Mauritius, Morocco, Nigeria, Senegal, Sierra Leone, Somalia, Tunisia, UAR, Tanzania, and Zambia.

At this Seminar certain conclusions were arrived at including the following:-

The participants agreed unanimously to:-

(a) Request the Secretary-General of the U.N. to communicate the report of the seminar to the Secretary-General of the O.A.U. and the Governments of Member States of O.A.U. so that O.A.U. might consider appropriate steps, including the convening of a preparatory committee representative of O.A.U. membership, with a view to establishing a regional commission on Human Rights for Africa, taking into account the deliberations of the Seminar.

40. (b) Appeal to all Governments of Member States of O.A.U. to give their support and co-operation in establishing a regional commission on Human Rights for Africa.

Instead of the OAU convening yet another preparatory committee, to consider setting-up yet another Commission; the Council of Ministers may consider the possibility of endowing the Commission of Mediation, Conciliation and Arbitration with the proposed functions of a Human Rights Commission. The arguments in favour of such an approach are many:-

- (i) The Charter of the O.A.U. itself emphasises the importance which Member States attach to the Universal Declaration of Human Rights.

The preamble declared that the Heads of African State and Government are:-

"Persuaded that the Charter of the U.N. and the Universal Declaration of Human Rights, to the principles of which we reaffirm our adherence provide a solid foundation for peaceful and positive co-operation among States...."

And Article 2 (a) dealing with the purposes of the O.A.U. provides that one of these shall be

"to promote international co-operation, having due regard to the Charter of the U.N. and the Universal Declaration of Human Rights."

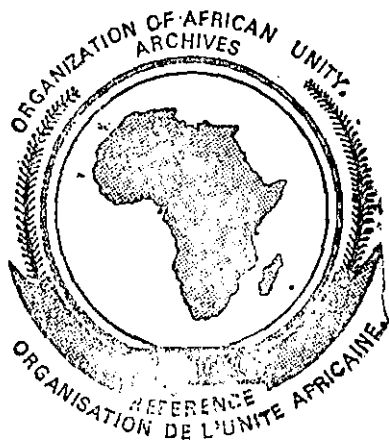
And as has already being said, the Commission of Mediation, Conciliation and Arbitration has been designated in the Charter as one of the principal institutions through which the O.A.U. shall accomplish its purposes. Many Regional Organizations have some machinery for the implementation of the obligation of Member States to promote the respect for Human Rights: It would not be out of place if the O.A.U. Council of Ministers gave serious consideration to the Provision of such a machinery, taking into account the economic, financial and social circumstances of Member States.

(ii) The element of independence and impartiality of Members of a Human Rights Commission is already present in the constitution of the Commission of Mediation, Conciliation and Arbitration where members do not represent Governments and are not removable except with 2/3 majority of Assembly and only on grounds of proved misbehaviour or inability to perform their functions. The element of professional competence is also already provided for in the Protocol. The requirement of a full time controlling body to under-

take the promotional functions of such a human rights commission is also satisfied to a large extent by the existence of the Bureau of the Commission at Addis Ababa.

(iii) Prudence would dictate that African States at least examine the possibility of building on what they already have. To dismantle the Commission of Mediation while at the same time considering the possibility however remote, of setting-up another Commission to deal with a matter that could have been handled by the Mediation Commission is an approach which cannot readily be recommended.

That the Bureau of the Mediation Commission should be the Administrative Tribunal of the O.A.U. General Secretariat. Member States will recall the protracted discussions that have taken place in the O.A.U. on the question of an Administrative Tribunal for the officers and staff of the General Secretariat. They will also recall the several complaints made by the Administrative Secretary-General about the difficulties in recruiting staff of the right calibre for service in the O.A.U. The provision of an Administrative Tribunal would give added protection to the staff. The Council of Ministers may consider the idea of conferring on the Bureau of the Commission the duties of an Administrative Tribunal. The details of such a proposal would however have to be worked out carefully in order not to place the General Secretariat under the supervision of the Mediation Commission. The Mediation Commission may be empowered to examine the case presented by an aggrieved officer, and give a written opinion to the Council of Ministers or the Advisory Committee of Financial and Budgetary Matters for action.



PROPOSALS FOR MAKING THE COMMISSION LESS EXPENSIVE

42.

The Commission of Mediation, Conciliation and Arbitration is the least expensive of the principal institutions of the OAU. The current budgets of the Assembly and the Council of Ministers are US\$99,638 and US\$83,665 respectively; but these do not take into account the considerable expenditure incurred by each Member States in having her Head of State or Foreign Minister at the Sessions; nor does it take into account the cost to the host country in providing the necessary facilities for these conferences. Compared with the General Secretariat, the expenditure on the Commission is peanuts. The 1969/70 approved budget for the whole Commission was US\$122,730 and the actual expenditure was US\$102,869.68. Both the approved budget and the actual expenditure were considerably less than the salaries and rent paid to and on behalf of the Administrative-Secretary General and his four Assistant Secretaries General alone which is US\$124,000 per annum made up of

Salaries - Administrative-Secretary-General	28,000.-
4 Assistants	72,000.-
Rent - Administrative-Secretary-General	9,600.-
4 Assistants	14,400.-
Total	<u>124,000.-</u>
	=====

This sum does not include the expenditure on cars, petrol, free drivers, medical care, dependency allowances etc.

The 1969/70 budget for the travel on official business by the President and the two Vice-Presidents was US\$1,000 compared with that for the chief of Cabinet in the Secretary-General's office alone which was US\$1,100.-.

The current approved budget for the whole Commission, is US\$134,188.50 which again is about the same expended on the personal emoluments of the Administrative-Secretary-General and his four Assistants when we add the costs of cars and their maintenance, the Provision of free drivers, medical care and other fringe benefits.

The facts are clear that the President has tried to run the Commission on as economical a basis as possible. There can therefore be no accusation that the Commission is being run extravagantly or expensively.

In fact, according to the Summary Reports of the Third Ordinary Session of the Assembly, H.E. President Adhijo of the Cameroons is reported to have said that the President of the Commission seems

"to be inspired by a great concern for economy."

(AHG/SR 6 (iii) pp. 7)

43. The charge is however sometimes made that the whole idea of a Bureau within the Commission is an expensive luxury, and that the Commission can do without a Bureau of permanent members. So far no country has advocated the total abolition of the whole Commission. In the Summary Reports of the Proceeding of Committee B of the 4th Session of Council of Ministers dealing with the Report of the Institutional Committee, the Tunisian delegate is reported to have said inter alia

"It was essential therefore, to be realistic, and to keep only Commissions specifically related to the OAU. In addition, it would have been interesting to assemble the African Members of the specialized agencies of the UN, before the meetings of the statutory meetings of these agencies, in order to decide upon a common policy. Henceforth, their activities could be brought before the Council of Ministers. For the time being, it was quite evident that there was constant need to call upon outside experts in order to implement, and even to initiate projects on a continental or national scale. With this state of affairs in mind, the representative of Tunisia formally proposed that all the specialized commissions of the OAU be dissolved, except the Defence Commission and the Commission of Mediation, Conciliation and Arbitration."

44. And His Imperial Majesty Haile Selassie the first, in His opening address to the 6th Session of the Assembly of Heads of State and Government said

"The OAU has also grown in terms of the structure required to advance its aims and purposes. Among the important decisions of the first Session of the Assembly held in Cairo, Member States signed the Protocol of the Commission pledging themselves to solve inter-African problems through our African Institution. Although so far not much use has been made of the Commission we must not minimize the importance of having an institution ready to render its services when the occasion arises. Furthermore, it is by the establishment of such institutions that we can develop the habit of resorting to them as the need arises."

(emphasis ours)

45. However proposals are usually made advocating the abolition of the full-time basis of the Bureau of the Commission; they come in several forms.

(a) That the whole Commission should be on an ad hoc basis. Article 7 of the Charter as has been said, designates the Commission of Mediation, Conciliation and Arbitration as one of the principal institutions of the OAU. An ad hoc institution is a structural and constitutional abortion. An ad hoc body means a body that has been set-up because of a particular issue, and its terms of reference are limited to that issue. It is never a permanent body whereas an institution implies some permanence. To convert the Commission into an ad hoc body is in effect to abolish the Commission as a principle institution of the OAU.

46. (a) Permanent Commission will only part-time members

That the Commission, though permanent, should have no full-time members. This can be considered in its several variations.

(b) That all members, including the President and the two Vice-Presidents of the Commission should be on a part-time basis but with a Registrar and a small staff at Headquarters. This suggestion seems to follow the structure and the practice of the Permanent Court of Arbitration at the Hague. We do not think that it should be suggested that the OAU should adopt a structure and follow an example which has demonstrably failed to achieve its purposes. We are . . . further fortified in our thoughts when it is remembered that the Permanent Court of Arbitration has no mediation or conciliation functions to perform. Arbitration proceedings are more leisurely, but mediation and conciliation proceedings being largely preventive, and designed to prevent situations getting out of hand, must be quick and immediate.

The proposed amendments by Dahomey seem to envisage some such structure for the Commission. We shall therefore leave further consideration of this proposal until we deal with the proposed amendments under a separate heading.

(c) That the Administrative-Secretary-General should perform the work of the Bureau and the Registrar should be an officer in the Secretariat. The Secretary-General in his report to the 14th Ordinary Session of the Council of Ministers held in Addis Ababa in February 1970 said inter alia

".... on the basis of observations and discussions during the Sixth Assembly of Heads of State and Government meeting in Addis Ababa in September 1969 it is more than likely that the Commission of Mediation, Conciliation and Arbitration will become an ad hoc Commission from September 1970, thus losing its permanent status. In view of this, the General Secretariat wishes to suggest that the posts of Registrar and Accounts Clerk of the Commission remain permanent, but attached to the General Secretariat of the OAU.

(IB) The former could be transferred to the Legal Section of the General Secretariat and would continue in his duties being responsible for convening meetings of the Commission, should the need arise."

47.

The only argument that can be advanced in favour of such an arrangement is one based on economy; and even this may prove illusory. It was the only argument that the Administrative-Secretary General put forward in his report. It contemplates that the President and the two Vice-Presidents will have no other functions to perform except possibly presiding over meetings of the whole Commission. They would not constitute a Bureau. Probably it is envisaged that the Administrative-Secretary-General would be responsible for consulting with Member States as to the best method of settling a dispute. The obvious result of this would be to enlarge very considerably the sphere of competence of the Administrative-Secretary-General. He would be obliged to formulate proposals to Member States involved in disputes. The combination of these duties with those of the Administrative-Secretary-General will transform the nature of the General Secretariat into something never contemplated by the founding fathers of the OAU. Rule 7 of the Rules and Regulations of the General Secretariat provides that

"The Administrative-Secretary-General is directly responsible to the Council of Ministers for the adequate discharge of all duties assigned to him."

The Charter and Protocol contemplate that the Commission of Mediation, Conciliation and Arbitration is accorded some degree of independence and made answerable to the Assembly of Heads of State and Government. Care must be taken not to invest the Administrative Secretary-General with delicate duties for which he is answerable only to the Heads of State and Government and not to the Council of Ministers. Arguments in favour of economies should not be pressed to the detriment of the proper functioning of the OAU, especially when these economies may prove illusory.

48. (d) The Dahomean Amendments: Two proposals for the amendment of the Charter and the Protocol have been circulated by the Government of Dahomey. H.E. The President of Dahomey made it clear, in his intervention during the Sixth Ordinary Session of the Assembly of Heads of State and Government that the proposed amendments have not been circulated with a view of prejudging proposals and recommendations which might be proposed by the Council of Ministers to the Seventh Ordinary Session of the Assembly of Heads of State and Government, but that the purpose of the immediate deposit of the amendments is to avoid, in case of a modification of the Charter and Protocol, any postponement to 1971 of its validity.

49. The proposed amendments are contained in two documents, one dated 8th September 1969, and the other undated. The first part of the proposal contained in the document dated 8th September seeks to amend Article 19 of the Charter to read :-

"Member States pledge to settle all disputes among themselves by peaceful means and to this end provide for ad hoc Commissions of Mediation, Conciliation and Arbitration'..... etc...."

Of course, if the proposed amendment had stood like this without more, it would have made consummate nonsense of the Protocol. Dahomey herself was quick to notice this. She therefore x cabled a further proposed amendment to the Protocol which seeks to amend Article 6 (2) of the Protocol to read:-

"The President and the two Vice-Presidents and the remaining eighteen members of the Commission shall carry out their duties occasionally."

50. We shall attempt a juridical analysis of these proposals against the background of other provisions in the Charter and the Protocol.

The first point to be taken is the patent conflict that would arise between Article 19 and Article 7 of the Charter, and almost every Article in the Protocol.

The Dahomean amendment would provide for a plurality of ad hoc Commissions in Article 19 of the Charter, while Article 7 of the Charter would still consider as a principal institution of the OAU one single Commission of Mediation, Conciliation and Arbitration. Moreover Article 1 of the Protocol provides

" The Commission of Mediation, Conciliation and Arbitration established by Article 19 of the Charter of OAU shall be governed by the provisions of the present Protocol."

How can the Protocol be said to govern several ad hoc Commissions established by Article 19 where Article 1 of the Protocol contemplates only one Commission ? And as we have already said an ad hoc body can never be a principal institution in any organization.

The next point is that the Dahomean amendments cannot succeed, even if adopted in turning the Commission into a series of ad hoc Commissions. Each ad hoc Commission must have its own President or Chairman etc. What they seem to contemplate is one permanent Commission, with all the members working on a part-time basis. If that is the case then the first portion of the amendment i.e. the proposed amendment to Article 19 is not necessary.

51. The second proposal by Dahomey if taken alone would amend Article 7 of the Protocol and provide that the President and the two Vice-Presidents and all other members of the Commission work on a part-time basis.

There would therefore be one permanent institution, the Commission of Mediation, Conciliation and Arbitration although all members work on a part-time basis. The Registrar and other administrative staff will continue on a full-time basis, and form a seat at Addis Ababa.

52. This proposal deserves careful and serious examination, and in so doing account should be taken of (a) the other provisions of the Charter, (b) the effect such an amendment will have on the purposes of organization as a whole and (c) the effect of the amendment on the conditions of service of the present incumbents in the posts of the President and the two Vice-Presidents.

53. (a) Other Provisions of the Charter and Protocol

Article 7 of the Protocol provides that

"The President and the two Vice-Presidents shall constitute the Bureau of the Commission and shall have the responsibility of consulting with the parties as regards the appropriate mode of settling the dispute in accordance with this Protocol."

The Dahomean amendment does not contemplate the abolition of the Bureau. It seems the President and the two Vice-Presidents shall continue to constitute the Bureau, and have these functions to perform albeit on an occasional basis. They shall each presumably be in his own country, and meet from time to time to perform these functions.

Article 13 (2) of the Protocol further provides that

"Where a dispute has been referred to the Commission as provided for in paragraph 1, and one or more of the parties have refused to submit to the jurisdiction of the Commission, the Bureau shall refer the matter to the Council of Ministers for consideration."

This collegiate duty is on the face of it a simple one, but a careful consideration of the Article reveals that it is a very delicate duty. A duty to report on ^{the} conduct of a sovereign state to a diplomatic conference like the Council of Ministers is not to be undertaken lightly or hurriedly. To determine whether a sovereign state has refused to do something rather than merely failed to do so must be taken after a most careful consideration of the facts. Members of the Bureau must have careful and detailed discussion of the matter before deciding to refer the matter to the Council of Ministers. This will be difficult where they are to meet for only a few days; and it must be further remembered that members of the Commission do not represent their States, and would therefore have little or no protection in the event of a premature or ill-considered reference. The Dahomean amendments do not envisage that this duty be abolished: it is difficult to contemplate how this duty is to be properly performed where the President and his Vice-Presidents are not in constant touch with each other, and capable therefore of keeping the situation under constant and careful review.

(b) Article 8 of the Protocol provides that

"The salaries and allowances of the Members of the Bureau and the remuneration of the other Members of the Commission shall be determined in accordance with the provisions of the Charter of OAU."

The Dahomean proposal does not seek to amend this provision in the Charter. These terms have been settled to the knowledge of Member States of the OAU. It may mean that Dahomey intends that the members of the Bureau shall continue to receive their salaries and allowances whether they perform their duties on a full time basis or not and that Members of the Commission shall receive remuneration for work done. The Commission can be expensive either in money or in men. It may be that Dahomey is concerned with the waste of manpower and not necessarily that of money. It may be that the suggestion is that three judges should not be tied up in Addis Ababa and that they can combine the work they are supposed to perform in Addis Ababa with service to their own States. In such a case they will be paid for the work they do for the OAU, and also work in their own States. This is the only inference that can be drawn in view of the fact that no proposal has been put forward for the amendment of Article 8. It may however be that Dahomey intends to propose at a later date that the members of the Bureau be not paid any salaries or allowances, or that they should be paid at a reduced rate, of course, these are more conjectures at this stage, but it is essential that all possible consequences of the proposed amendments be examined in this document. If we at this stage assume the more likely basis for the proposed amendments, that is, the members of the Bureau should not be paid any salaries or allowances, or be paid on a reduced rate, than other considerations arise. The Dahomean amendments do not affect the scope of the functions of the President and the two Vice-Presidents; they still constitute the Bureau, they are still responsible to the Heads for the proper functioning of the Commission. There is in fact nothing that reduces the degree of their responsibility or the scope of their duties. The only contention implied in the proposed amendments is that these duties can conveniently be performed on a part-time basis. We shall show that these duties are less conveniently performed when done on the proposed part-time basis.

EFFECT ON THE OPERATIONS OF THE OAU

54. It has already been said that one of the cardinal principles of the OAU is the pacific settlement of disputes by mediation, conciliation and arbitration. Negotiation is a direct method between the foreign ministries of the two states concerned. Sometimes a third party offers her good services to promote this negotiation. Mediation, conciliation and arbitration always contemplate the presence of a third person, be he a head of state, some other important personage, or an institution. The founding fathers thought that it would be in the interest of Africa to have a permanent institution to carry out these functions. We have already adverted to the difficulties that beset the Commission at its inception. These difficulties have resulted in Member States relying on negotiations, and the use of the good offices of Heads of African States in the settlement of their disputes. They have also resulted in a reluctance of Member States to use the Commission. It will take sometime for this reluctance to be broken down, and for Member States to realise and appreciate the advantages of having an institutionalized form of settling disputes between them.

As has been said the Commission started work in February 1969. In September 1969, the question of changing the structure of the Commission had already been raised. This has not helped to instill any confidence in the Commission among Member States. The effect on the General Secretariat has been even more shattering. The Bureau of Mediation Commission is considered as a body which is on its way out. The Secretary-General could write in his annual report (which has already been quoted), that

"It is more than likely that the Commission of Mediation, Conciliation and Arbitration will become an ad hoc Commission from September 1970 thus losing its permanent status."

The weaknesses created in the Commission as a result are clear. To turn it into an ad hoc body is not likely to improve the position. The Dahomean amendment seems to copy the example of the Permanent Court of Arbitration at the Hague, with slight amendments. It should be recalled that the Permanent Court of Arbitration was established when there was no world body. Even the League of Nations had not been established. When the League was established a Permanent Court of International Court of Justice

was also established as an adjunct. The UN has its International Court of Justice. It would be strange if the OAU decides that the attainment of one of its cardinal principles should be on a part-time basis. As has been said, those who drafted the Protocol took into account the economic position of Member States of the OAU, and came to the conclusion that they could not have a wholly full-time body. At least a body which is partly full-time and partly part-time should satisfy the conditions of African which seeks to have a regional organization for the settlement of disputes on a minimum budget.

Other arguments can be advanced against this arrangement proposed by Dahomey. It is clumsy and would undoubtedly prove ineffective. It overlooks the fact that members of the Commission are appointed in their individual capacities. The structure which provides for a full-time President and two Vice-Presidents makes it possible for an organization to exist where they can be in touch with their members on an independent basis without recourse to their Governments. The Bureau provides a central directing and co-ordinating body giving cohesion to the whole Commission. Where the President and the two Vice-Presidents are working for their own Governments and are responsible to their own Governments, it would at best be difficult for them to organize and run a Commission on an independent basis. A President who is a judge in his own country, and supposed to do the same amount of work as the other judges is also supposed to find time to run "a principle institution of OAU!" It should be remembered that between 1965 and 1968 the President was a judge in Nigeria. It was the political organs of the OAU which asked him to take up full time employment at Addis Ababa in order to organize the Bureau and activate the Commission. It was clear at that time that the Commission would never become active until the Bureau was set up. The President had barely been here, and the Bureau had barely been organized, when proposals were put forward seeking to send him packing back to Nigeria.

EFFECT ON THE TERMS OF THE PRESENT COMMISSION

55. An amendment of the Protocol affecting the structure of the Commission may also affect the terms of office and the conditions of service of the present members of the Commission. A clear understanding and appreciation of these is therefore necessary. The relevant provisions are contained in Articles 2-7 of the Protocol which provide :-

ARTICLE 2

1. The Commission shall consist of twenty-one members elected by the Assembly of Heads of State and Government.
2. No two Members shall be nationals of the same State.
3. The Members of the Commission shall be persons with recognized professional qualifications.
4. Each Member State of the Organization of African Unity shall be entitled to nominate two candidates.
5. The Administrative Secretary-General shall prepare a list of the candidates nominated by Member States and shall submit it to the Assembly of Heads of State and Government.

ARTICLE 3

1. Members of the Commission shall be elected for a term of five years and shall be eligible for re-election.
2. Members of the Commission whose terms of office have expired shall remain in office until the election of a new Commission.
3. Notwithstanding the expiry of their terms of office, Members shall complete any proceedings in which they are already engaged.

ARTICLE 4

Members of the Commission shall not be removed from office except by decision of the Assembly of Heads of State and Government, by a two-thirds majority of the total membership, on the grounds of inability to perform the functions of their office or of proved misconduct.

ARTICLE 5

1. Whenever a vacancy occurs in the Commission, it shall be filled in conformity with the provisions of Article 2.
2. A Member of the Commission elected to fill a vacancy shall hold office for the unexpired term of the Member he has replaced.

ARTICLE 6

1. A President and two Vice-Presidents shall be elected by the Assembly of Heads of State and Government from among the Members of the Commission, who shall each hold office for five years. The President and the two Vice-Presidents shall not be eligible for reelection as such officers.
2. The President and the two Vice-Presidents shall be full-time members of the Commission, while the remaining eighteen shall be part-time Members.

ARTICLE 7

The President and the two Vice-Presidents shall constitute the Bureau of the Commission and shall have the responsibility of consulting with the parties as regards the appropriate mode of settling the dispute in accordance with this Protocol.

56. 56 It is clear then the Protocol distinguishes between the terms of office of the members of the Commission and those of the President and the two Vice-Presidents. It also makes provisions in Article 9 for the post of the Registrar. Articles 1-5 clearly do not apply to the posts of the President and the two Vice-Presidents which are created by Article 6; and the election of officers to those posts are conducted in accordance with Article 6 and not Article 2. Therefore the position of the President and the two Vice-Presidents cannot be affected or governed by the provisions of Article 5. It is only vacancies in Commission and not in the Bureau that can be filled in accordance with Article 2 of the Protocol.

THE PRESIDENT'S TERM

57. The first twenty-one members of the Commission were elected at the Second S^ession of the Assembly of Heads of State and Government at Accra in 1965. At that Session, Mr. Justice M.A. Odesanya of Nigeria was elected as the President, and Dr. W.C. Ekow Daniels of Ghana and Dr. Ngandadgi of Congo Brazzaville were elected as the two Vice-Presidents. The two Vice-Presidents were never able to take office: however the President was able to proceed to Addis Ababa to assume office in April 1968. The question therefore arises whether the President's term of office began in 1965 or in 1968.

The Protocol is quite explicit in Article 6 which provides that the President and the two Vice-Presidents shall each hold office for five years, and shall not be eligible for re-election to those offices. To hold office has a definite meaning, and the drafters of the Protocol were clear in their intention when they used the term "elected for a term of five years" when speaking of the Members of the Commission, and "hold office" in the provisions dealing with the President and the two Vice-Presidents. A person can be elected to office and yet never hold that office. Presidents of several States are elected during the tenure of office of the previous incumbents. It is at their inauguration that they start holding office. If a President dies before the inauguration he has never held office even though duly elected.

The first Vice-President elected at Accra Dr. Ngandadzi, the Attorney-General of Congo Brazzaville died without even assuming office. However moribund certain persons may think the Commission

is, it would be a strange proposition to hold that a dead man was holding office in the Bureau.

Dr. W.C. Daniels, was the Deputy Attorney-General of Ghana, and a member of the Ghana cabinet until 23rd February, 1966. He has always been a senior lecturer in law on the staff of the University of Ghana. The Protocol states that as Vice-President he is a full-time member of the Commission. He was never on the staff of the OAU either as a political appointee or as an administrative appointee. He was never paid by the OAU, he always derived his income either from the Ghana Government, or the University of Ghana or from private practice. How could it be said that he was a full-time member of the Commission. It is our view that it cannot seriously be contended that Dr. Daniels held office as Vice-President of the Commission. It would be manifestly absurd to maintain that he is barred for life from ever seeking election as Vice-President because he had once been elected even though he never held office.

The position of the President is similar. Up till April 1968, he was a full time High Court Judge in Nigeria, being paid by the Nigerian Government and responsible to the Nigerian Government. It cannot be said that during that period he was holding a full-time appointment with the OAU as President of the Commission. He was a President-elect alright, but he was not holding the office of President of the Commission. He assumed office only in April 1968. It is humbly submitted for the consideration of the Council of Ministers and the Assembly of Heads of State that his term of office ought to be reckoned from the date he assumed office, i.e. April 1968. It is interesting to note that the Administrative Secretary-General in his current note to Member States concerns himself only with the election of members of the Commission, and does not mention the election of a new President.

58.

The position of the current Vice-Presidents is only slightly different. They were elected at the Fifth Session of the Assembly of Heads of State and Government held at Algiers in October 1968. As we have pointed out the provisions of Article 5 of the Protocol dealing with the filling of vacancies cannot apply to the members of the Bureau. Where any person is elected President or Vice-President, the Protocol is clear that that person hold office for five years. The present

Vice-Presidents assumed office in February and January 1968 respectively, and their term ought properly to be calculated from those dates.

59. THE MEMBERS OF THE COMMISSION

Their position is clear as they are elected for a term of five years, and any member who was elected to fill a vacancy left by another member does so for the unexpired term of that member. Their term therefore ends in October 1970. However other practical considerations ought to be taken into account in deciding to hold fresh elections. Article 2 (2) provides that :-

"Members of the Commission whose terms of office have expired shall remain in office until the election of a new Commission:"

The Council of Ministers may consider, in view of the study which the Council is charged to conduct into the structure of the Commission, whether a recommendation should not be made to the Assembly of Heads of State and Government to postpone the election of a new Commission, pending the completion of the study, and the adoption of all necessary amendments to the Protocol if any.

There is nothing in the Charter or the Protocol which provides that there must be an election of members of the Commission every five years. The Assembly of Heads of State and Government have a discretion in the matter.

60. THE REGISTRAR AND OTHER ADMINISTRATIVE STAFF

Article 9 of the Protocol provides that:

The Commission shall appoint a Registrar and may provide for such other officers as may be deemed necessary.

The terms and conditions of services of the Registrar and other administrative officers of the Commission shall be governed by the Commission's Staff Regulations."

The Commission, at their first Session held at Addis Ababa in December 1967, adopted the Staff Rules and Regulations of the General Secretariat, and made them applicable to the Commission. The Registrar is therefore on a permanent appointment with the Commission, and other staff are either on a permanent or contract basis, and responsible to the Commission and not to the General Secretariat. There are no provisions in the Protocol or the Rules and Regulations for the transfer of one officer from the Commission to the General Secretariat or for that matter from one institution of the OAU to another.

THE SUGGESTIONS OF THE BUREAU

We have now examined in some details the various proposals made on the structure and functions of the Commission of Mediation, Conciliation and Arbitration. It is not for us to tell the Council of Ministers what recommendations to make to the Assembly of Heads of State and Government; that is within the exclusive competence of the Council of Ministers itself. We hope however that it would not be thought impudent on our part if we suggested that because of the complexity of the Articles of the Charter and its integral part, the Protocol, and the various rules and regulations of the Commission, the General Secretariat, the Council of Ministers itself, and the Assembly, and other organs of the OAU, and their interrelation one with the other, that the Council of Ministers may consider entrusting the study to a small body of experts, who shall report to the Council of Ministers with the formulation of all necessary and consequential amendments for each recommendations made.

We suggest this for the following reasons :-

(a) The Council of Ministers has always had a crowded agenda, and it is not easy for them at one session to subject both the Charter and its Protocol to the detailed analysis necessary for any meaningful amendments. The present provisional agenda as circulated by the Administrative Secretary-General contains twenty items excluding "any other business." We do not for one moment suggest that there are not enough competent delegates to undertake the work; we are only concerned that enough time might not be available for them to do so.

(b) The Council of Ministers itself appointed at its 2nd Ordinary Session at Lagos, a committee of Seven Experts under the distinguished chairmanship of Dr. T. O. Elias, Attorney-General and Minister of

Justice of the Federation of Nigeria to prepare the draft of the Protocol. It would not seem out of place that the proposed study should be entrusted to the same or similar body of experts.

(c) As we have shown in our analysis, the proposed amendments by Dahomey, which alone can take effect in September 1970 if adopted are not enough to carry out what seem to be the probable intention of their sponsors. Other amendments to other Articles have to be circulated for a year. The Council of Ministers therefore has time to commission a detailed and proper study by a Committee of Experts into the whole structure and functioning of the Commission.

(d) As we have pointed out, the terms of the present incumbents in the Bureau are not due to end this year. The Council of Ministers will therefore have to consider whether to abrogate their contracts and if so under what conditions. A study of this aspect of the problem would require that the case of each member should be heard; it would be inconvenient and even embarrassing to do this before a diplomatic conference like Council of Ministers. We therefore suggest that pending the study and the report by any special body that the Council of Minister may decide to set-up, the Council of Ministers may consider recommending to the Assembly of Heads of State and Government a postponement of the election of new members of the Commission.

These proposals, as has been said already, are put forward for the consideration of the Council of Ministers. Other proposals no doubt would be placed before the Council in the interventions by distinguished delegates during the debates. The Bureau, however, has no doubt that in finally deciding on what recommendations to make to the Assembly of Heads of State and Government, the Council of Ministers will be guided by the same convictions and lofty considerations that led the Heads of African States and Government to adopt on that historic 25th day of May 1963, the Charter of the OAU, and which said considerations are admirably enshrined in the preamble to the said Charter, which says *inter alia*.

We, the Heads of African States and Government Inspired by a common determination to promote understanding among our peoples and co-operation among our States in response to the aspirations of our peoples for brotherhood and solidarity, in a larger unity transcending ethnic and national differences:

Convinced that, in order to translate this determination into a dynamic force in the cause of human progress, conditions for peace and security must be established and maintained:

Resolved to reinforce the links between our states by establishing and strengthening common institutions :-
HAVE agreed to the present Charter.

AFRICAN UNION UNION AFRICAINE

African Union Common Repository

<http://archives.au.int>

Organs

Council of Ministers & Executive Council Collection

1970-08

Report on the Commission of Mediation, Conciliation and Arbitration

Organization of African Unity

Organization of African Unity

<https://archives.au.int/handle/123456789/7692>

Downloaded from African Union Common Repository