

# Africa's contribution to the development of international human rights and humanitarian law

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## 1 Introduction

Africa is associated more with human rights problems and humanitarian crises than with their solutions, more with the need for international human rights law than its applications, and more with the failure of international law than with its success. If Pliny had the opportunity of writing today, he would probably have coined the phrase: 'Out of Africa, always something terrible.'<sup>1</sup>

This contribution sets out to show that this exclusive negativity is misplaced. Africans and African issues have also given rise to solutions, and have played an active role in the development of international human rights and humanitarian law, sometimes even initiating new paradigms. The focus is on a particular part of international law, and an

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<sup>1</sup> In his book *Natural History* Pliny referred to the common Greek saying that Africa always produces some novelty ('semper aliquid novi Africam adferre') (Book VIII, 17). In his *Historia Animalum*, Aristotle referred to the old saying 'Always something fresh in Libya' (Volume IV of JA Smith & WD Ross (eds) *The Works of Aristotle*, Book VIII, 606b, trans DW Thompson (1910)).

assessment of Africa's impact on international law in general is not attempted here.<sup>2</sup>

## 2 Africa and the development of international human rights law

The essential features of international human rights law as we know it were fixed in the period between 1945 and 1966. During this time the United Nations (UN) General Assembly adopted the Universal Declaration of Human Rights, followed by the elaboration and adoption of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The fact that these three instruments, with the Optional Protocol to the ICCPR (OPI), subsequently became known as the 'International Bill of Rights' is indicative of their collective foundational nature.<sup>3</sup> The influential European regional human rights system also came into being during this period.<sup>4</sup> This phase also saw the number of independent African states increase from 4 to 37. After gaining their independence, these states became members of the UN almost immediately. Despite, or maybe owing to, their colonial past, African states gradually extended their initial interest into vigorous participation in the international arena. I argue here that in the process Africa contributed meaningfully to the renewal and redefinition of international human rights law, and I shall now investigate aspects of the 'African contribution' to this development.

### 2.1 The African Charter on Human and Peoples' Rights

The source of 'African enrichment' of international human rights law most frequently cited is the African Charter on Human and Peoples' Rights (African Charter). The OAU Assembly of Heads of State and

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2 On African participation in, for example, the composition of and cases brought before the International Court of Justice, see SRS Bedi 'African participation in the International Court of Justice: A statistical appraisal (1946-1998)' (1998) 6 *African Yearbook of International Law* 181. On the contribution of the Organisation of African Unity (OAU) to the development and expansion of international law, see TO Elias *Africa and the development of international law* (1988); T Maluwa 'International law-making in the Organisation of African Unity: An overview' (2000) 12 *African Journal of International and Comparative Law* 201.

3 See L Henkin 'The International Bill of Rights: The Universal Declaration and the Covenants' in B Bernhardt & JA Jolowicz (eds) *International enforcement of human rights* (1987) 1.

4 The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted under the auspices of the Council of Europe, and entered into force on 3 September 1953.

Government adopted this regional instrument in 1981.<sup>5</sup> It entered into force in 1986. Today all 53 OAU member states are party to the African Charter.

Common wisdom has it that the African Charter is 'autochthonous' in its inclusion of the concept of 'peoples', its enumeration of individual duties, the non-justiciability of the dispute settlement procedure, its anti-colonial stance, its emphasis on morality, and its placing of first generation rights on a par with second and third generation rights.<sup>6</sup> All these aspects represent the introduction of a series of ambiguities into the bipolar structural design of the international human rights discourse. The system, as it had developed by the 1970s, was premised on the dichotomies of 'individual vs community', 'rights vs duties', 'first vs second and third generation rights', 'enforceability vs non-enforceability'.<sup>7</sup> In each instance, one of these polarities was privileged to construct the model or golden thread: what matters are individual rights, of the 'first generation', which are enforceable.

By unmasking the pretence of these strict dichotomies, by showing that the dualities can be bridged, and by alerting us to the reality of the ambiguity inherent in their co-existence, the African Charter makes its greatest contribution.

Western-dominated discourse privileges the individual. Human rights instruments postulate an autonomous, independent individual (complainant), who is prepared, ultimately, to dissociate from others and enter into legal battle with the collectivity (the state). The African Charter treats the human being both as an individual and as a member of the collective (the 'people'). Generally, 'every individual' is a bearer of rights under the African Charter. The communal aspect is emphasised in the rights guaranteed to 'peoples'<sup>8</sup> and in the recognition of the family as the 'natural unit and basis of society'.

One reason why the Universal Declaration was not adopted as a binding document was Western opposition to implementing second generation rights in the same way as first generation rights. The subsequent creation of the two covenants stands as an illustration of this split. The

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5 OAU Doc OAU/CAB/LEG/67/3/Rev 5, C Heyns (ed) *Human rights law in Africa 1996* (1996) 7; <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 1 February 2001).

6 See eg W Benedek 'Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in P Kunig, W Benedek & CR Mahalu (eds) *Regional protection of human rights by international law: The emerging African system* (1985) 59 and UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 87-96.

7 For an analysis of dichotomies from a feminist perspective, see R Murray (2000) *The African Commission on Human and Peoples' Rights and international law*.

8 For example, arts 20-24 African Charter.

same bipolarity was taken up in most international human rights treaties,<sup>9</sup> domestic human rights regimes, and at the regional level.<sup>10</sup>

The African Charter does not offer any basis for a distinction in the implementation of various categories of rights. Civil and political rights are included next to socio-economic rights. The Preamble states that 'civil and political rights cannot be dissociated from economic, social and cultural rights'.<sup>11</sup> No difference in implementation of the two 'categories' of rights is provided for. However, some of the socio-economic rights are internally qualified, such as the right to enjoy the 'best attainable' state of physical and mental health.<sup>12</sup>

The dominant discourse at the end of the 1970s referred to 'rights' only. By implication, duties were underplayed, as they were regarded as a threat to the concept of 'rights'.<sup>13</sup> The African Charter departs from the premise that rights and duties inevitably exist concomitantly. The Preamble draws the inference that 'the enjoyment of rights and freedoms also implies the performance of duties'. A list of duties is provided in article 29 of the African Charter, each implicitly embodying the 'values of African civilization'.<sup>14</sup> The principle that rights and duties are reciprocal forms the basis of article 27(2),<sup>15</sup> which may be described as a general limitation provision.

Despite the fact that many quasi-judicial monitoring bodies have been established, the discourse (at least at regional and domestic level) privileges enforceable judicial means. At the time the African Charter was drafted, the two other regional systems each provided for a court as final arbiter for resolving disputes. The African Charter opts for a quasi-judicial institution, the African Commission on Human and Peoples' Rights (African Commission). The African Charter and the African Commission itself have emphasised amicable settlements between parties.<sup>16</sup> The

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9 See art 4 of the 1989 Convention on the Rights of the Child (CRC), which draws a distinction in 'implementation' between 'the rights' generally, and economic, social and cultural rights.

10 The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), dealing almost exclusively with civil and political rights, was later supplemented by the European Social Charter (1961), dealing with socio-economic rights. Implementation of the 2 instruments differs, as complaints may be brought only under the first, while states have to report under the second.

11 Arts 16 and 17 African Charter.

12 Art 16(1) African Charter.

13 In the Cold War context, a political dimension was added, as the West regarded the concept of 'duties' as socialist in nature.

14 Preamble to the African Charter.

15 Art 27(2) states that rights must be 'exercised with due regard to the rights of others, collective security, morality and common interest'.

16 Art 48 African Charter and comments by Commissioners during examination of state reports at various sessions.

argument that the preference for a commission above a court reflects an inherently 'African' conception of dispute resolution may be countered if regard is given to the political context at the time of drafting. Weakening the implementation mechanism was most likely a compromise necessary to ensure the support of rulers not yet completely committed to human rights, democracy and the rule of law.<sup>17</sup>

## 2.2 The African Charter on the Rights and Welfare of the Child

The 1989 Convention on the Rights of the Child (CRC), which entered into force in 1990, has subsequently been ratified by all African member states of the UN except Somalia.

Even before the entry into force of the CRC, the OAU Assembly of Heads of State and Government adopted a regional pendant to the CRC: the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>18</sup> Its entry into force required fifteen ratifications.<sup>19</sup> This number was only reached after almost a decade, at the end of 1999.<sup>20</sup>

In a number of respects, the African Children's Charter sets a higher level of protection for children than its UN equivalent. Some of the most dramatic differences are highlighted below:<sup>21</sup>

- Under the African Children's Charter no person under 18 is allowed to take part in hostilities.<sup>22</sup> The CRC allows children between 15 and 18 to be used in direct hostilities.<sup>23</sup>
- The CRC allows the recruitment of youths between 15 and 18,<sup>24</sup> while the African Children's Charter requires states to refrain from recruiting anyone under 18.<sup>25</sup>

17 See K M'Baye *Les droits de l'homme* (1992) 164–5.

18 OAU Doc CAB/LEG/153/Rev 2; reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38; <<http://www.up.ac.za/chr/ahrd/ahrd.html>> (accessed 1 February 2001).

19 Art 47(2) African Children's Charter.

20 The African Children's Charter entered into force on 29 November 1999.

21 For a more detailed discussion, see F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199.

22 Art 22(2) African Children's Charter.

23 Art 38(2) CRC. The UN General Assembly adopted an Optional Protocol to the CRC on the involvement of children in armed conflict on 25 May 2000 (A/RES/54/263). State parties are required to take 'all feasible measures' to ensure that children under 18 do not take direct part in hostilities (art 1 of the Protocol) and to ensure that children under 18 are not 'compulsorily recruited into their armed forces' (art 2 of the Protocol). The Protocol has not yet entered into force.

24 Art 30(3) CRC.

25 Art 22(2) African Children's Charter.

- Child marriages are not allowed under the African Children's Charter.<sup>26</sup> The same does not apply to the CRC, in terms of which the age of majority may be attained below the age of 18.<sup>27</sup>
- The scope of the protection of child refugees is broader under the African Children's Charter, which allows for 'internally displaced' children to qualify for refugee protection.<sup>28</sup> The causes of internal dislocation are not restricted, but may take any form, including a breakdown of the economic or social order.
- Under the African Children's Charter, the best interest of the child is 'the primary consideration',<sup>29</sup> not merely 'a primary consideration', as provided for in the CRC.<sup>30</sup>

Each of these aspects resonates with the precarious position in which children find themselves in Africa. Although not restricted to Africa, child soldiers, child marriages and child refugees are recurring problems on the African continent.

As in the case of the CRC, the African Children's Charter provides for a supervisory body. The body established under the African Children's Charter, called the Committee of Experts, has a broader mandate than the CRC Committee. The African Committee of Experts is not only tasked to examine state reports, but is also to make recommendations arising from individual or interstate communications.<sup>31</sup> In fact, acceptance of this complaints mechanism is part and parcel of ratifying the African Children's Charter. This contrasts sharply with the mandate of the CRC Committee, which provides only for the examination of state reports.<sup>32</sup>

Apart from setting a higher standard in numerous respects, the African Children's Charter also incorporates some uniquely 'African' features. As in the 'mother' document, the African Charter, duties are placed on individual children.<sup>33</sup> However, it should be noted that collective or 'peoples' rights' are not included in the African Children's Charter.

### 2.3 Africa and the international protection of refugees

The UN Convention relating to the Status of Refugees (UN Refugee Convention) was adopted under the auspices of the UN in 1951, and entered into force in 1954.<sup>34</sup> The socio-political context of its adoption

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26 Art 21(2), read with art 2 African Children's Charter.

27 Art 1 CRC.

28 Art 23(4) African Children's Charter.

29 Art 4(1) African Children's Charter.

30 Art 3(1) CRC.

31 Art 44 African Children's Charter.

32 Art 44 CRC.

33 Art 31 African Children's Charter.

34 For the Convention text, see EM Patel & C Watters *Human rights: fundamental instruments and documents* (1994) 231.

explains many of this Convention's features. The early period of the 1950s was the aftermath of the Second World War, and the beginning of the Cold War. The main contributors to the preceding deliberations were Western European powers. Their main concerns were related to experiences drawn from the world war (such as Jews fleeing Nazi persecution) and from a new problem: ideologically based defections from the East to the West.

Three important limitations of the Convention relate to these factors. Firstly, the basis on which someone qualifies for refugee status is limited to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.<sup>35</sup> This factor relates mainly to a subjective requirement, 'fear', that in each individual case has to be assessed for its 'well-foundedness'. Apart from this individualistic focus, the definition of the listed grounds is very restrictive and does not take into account other factors (such as natural disasters or internal wars) which may be just as instrumental in people becoming refugees. Secondly, a temporal limit was provided for in the Convention. The 'fear' had to be 'as a result of events occurring before 1 January 1951'.<sup>36</sup> This cut-off date underlines the close link to the preceding war and its effects. The third limitation, of a geographical nature, was included as an option which states could adopt at ratification (or accession). By making a declaration, states could specify that the 'events' referred to above shall be understood to mean 'events occurring in Europe'.<sup>37</sup> Few states have made such a declaration.<sup>38</sup>

In the light of the above, there should be little cause for surprise in the assertion that African states saw the Convention as a 'European instrument'.<sup>39</sup> The perception of exclusion was exacerbated in the 1960s when it became clear that refugee problems in Africa continued and, most often, started well after 1951. These problems arose on a massive scale, and were mostly caused by internal conflicts. Early examples were the many refugees fleeing conditions in the Congo (later Zaïre, now the Democratic Republic of the Congo) and Nigeria.

Owing in the main to African criticism and efforts to adopt an African convention separate from the UN Convention, a brief Protocol to the 1951 Convention was adopted by the UN in 1966, and entered into force in 1967.<sup>40</sup> The Protocol dispensed with the temporal and geographic limitations in the 1951 Convention. In the Preamble to the

35 Art 1(A)(2) UN Refugee Convention.

36 Art 1(A)(2) UN Refugee Convention.

37 Art 1(B)(1) UN Refugee Convention.

38 P Weis 'The Convention of the Organisation of African Unity governing the specific aspects of refugee problems in Africa' (1970) 3 *Revue des Droits de l'Homme* 449.

39 Weis (n 38 above) 452.

40 Patel & Watters (n 34 above) 243.

Protocol, 'consideration' is given to the fact that 'refugee situations have arisen since the Convention was adopted'. From 1967, then, the Convention applied equally to all who qualified for refugee status. However, the definition of 'refugee' was left intact. African states actively supported the adoption of the Protocol.

After the adoption of the 1966 Protocol, African efforts to elaborate a separate UN instrument dealing with refugees were channelled into adopting a complementary regional instrument,<sup>41</sup> with the result that the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) was adopted in 1969.<sup>42</sup>

Both the historic framework and the Convention title indicate that this regional instrument should be viewed in conjunction with, and supplementary to, the international Convention that had been in existence since 1951. After 1967, efforts became directed at a regional supplement to the UN Convention. Thus the OAU Convention recognises the 1951 Convention (as modified by the 1967 Protocol) as 'the basis and universal instrument relating to the status of refugees'.<sup>43</sup> The OAU Convention goes further by adapting universal norms and standards to deal with the challenges facing Africa.

By 31 January 2001, 48 states in Africa had ratified or acceded to the UN Refugee Convention. Of all international human rights instruments, only the Convention on the Rights of the Child enjoys broader African ratification. Three of the five states that have not yet ratified the UN Refugee Convention are island states. They are Cape Verde, the Comoros and Mauritius.<sup>44</sup> The other two non-ratifying states in Africa are Eritrea and Libya.

The OAU Convention entered into force on 20 June 1974.<sup>45</sup> By 31 January 2001 it had been ratified by 44 OAU member states. Of the ten non-ratifying states, all but three (Comoros, Eritrea and Mauritius) have at least ratified the UN instruments. This means that the more universal instrument has been accepted by more states in Africa than the regional

41 Weis (n 38 above) 453.

42 UN Treaty Series vol 1001 45, adopted on 10 September 1969 and entered into force on 20 June 1974. The text of the OAU Refugee Convention is reprinted in C Heyns (ed) (n 18 above) 34; <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 1 February 2001).

43 Preamble of OAU Convention para 9. See also art 8(2): 'The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention.'

44 The fact that they are island states is probably significant in that their geographic location has in the past caused these states to be left largely unaffected by flows of refugees. It may further reflect an 'island' mentality in terms of which these states are reluctant to open up their borders (and legal systems) for the potential impact of 'continentals'.

45 Patel & Watters (n 34 above) 245. For the most recent status of ratifications, see OAU Doc CAB/LEG/24.3 (19 February 2001).

supplement. Four states (Botswana, Côte d'Ivoire, Kenya and South Africa) ratified the OAU Convention after 1990, indicating that the instrument retains its relevance in Africa today.

In an attempt to understand why an 'African supplement'<sup>46</sup> to existing international refugee law was added, one should draw a distinction between the two systems. In this way one may ascertain how the African contribution differs from its global equivalent.

The OAU Refugee Convention largely restates the exact wording of the UN Convention, but the term 'refugee' is broadened. The global instrument allows for a 'well-founded fear of being persecuted' as the only basic requirement for refugee status. The OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality'.<sup>47</sup> This extension was necessitated by the restrictive nature of the initial approach to refugees. 'Fear of persecution' concentrated on the ideas a person holds, and not on the socio-political context itself. This has led Oloka-Onyango to conclude that 'the overall ideology of those grounds . . . are rooted in the philosophy that accords primacy of place to political and civil rights over economic, social, and cultural rights.'<sup>48</sup> This broadened definition allows for many more factors to be invoked in seeking refugee status. These factors include serious natural disasters (such as famine, which has become prevalent in Africa) and need not affect the country as a whole.

The UN Convention's definition assumes individual screening of persons in order to establish whether they have a 'well-founded fear of persecution'. Such a system is obviously only manageable when persons flee as individuals or in small groups. When questions about refugee status arise, not in isolated cases, but from mass migrations, the application of such a test becomes impossible. Exactly the latter type of situation prevailed and still prevails in Africa. This necessitated an approach in which cumulative and objective factors could be determinative of refugee status. Such factors are events 'seriously disrupting' public order and 'foreign domination'.<sup>49</sup>

The grounds in the OAU Convention on which refugees lose their status as refugees ('cessation of status'), or persons who are disqualified from qualifying as refugees at all ('exclusion from status'), are again derived from the UN document. But also in this regard the OAU Refugee

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46 The OAU Refugee Convention recognises the UN Convention and Protocol as 'the basic and universal instrument' on the topic (Preamble).

47 Art 1(2) OAU Refugee Convention.

48 'The plight of the larger half: Human rights, gender violence and the legal status of refugee and internally displaced women in Africa' (1996) 24 *Denver Journal of International Law and Policy* 349 364.

49 Art 1(2) OAU Convention.

Convention adds to the list. The widened scope created by the broader definition of 'refugee status' is narrowed down by virtue of these additional grounds for exclusion and cessation of refugee status. Three additional categories are included in the OAU document: anyone guilty of acts contrary to the purpose and principles of the OAU; anyone who has seriously infringed the purposes and objectives of the OAU Refugee Convention; anyone who has committed a serious non-political crime outside his country of refuge after his admission to that country of refuge.<sup>50</sup>

The OAU Refugee Convention is explicit about the obligation of states to grant asylum to refugees,<sup>51</sup> in contrast to the UN Convention, which is silent on this issue. The duty on states under the OAU Refugee Convention is 'to use their best endeavours . . . to receive all refugees'.<sup>52</sup> The way in which this duty was phrased led Weis to conclude that the requirement is recommendatory, rather than binding.<sup>53</sup> Also, because these endeavours must be 'consistent with their respective legislation',<sup>54</sup> states need merely comply with internal laws, whatever their content. This provision may be viewed as a precursor to the inclusion of 'claw-back' clauses in the African Charter.<sup>55</sup>

The OAU Refugee Convention determines that a refugee has to conform with the law in the state of refuge. He or she must also 'abstain from any subversive activities against any Member State of the OAU'.<sup>56</sup> In this regard, states have the obligation to prohibit refugees from attacking other OAU member states through acts of armed aggression or the use of mass media.<sup>57</sup> Although the basis of the prohibition of the use of force and of disseminating propaganda for war has its roots in international law, the OAU Refugee Convention is unique in placing a duty on the host state to ensure compliance.

An interesting innovation in the OAU Refugee Convention is the duty placed on the country of origin in relation to returning refugees. States must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them.<sup>58</sup>

The OAU Convention has rightly been declared a progressive contribution to international refugee law. It presents a clear example of how

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50 Art 1 OAU Refugee Convention.

51 Art 2(2) OAU Refugee Convention.

52 Art 2(1) OAU Refugee Convention.

53 Weis (n 38 above) 457. However, see art 12(3) African Charter, which provides for the right 'when persecuted, to seek and obtain asylum'.

54 Art 2 OAU Refugee Convention.

55 An example of such a clause is the phrase 'provided he abides by the law' in art 10 African Charter.

56 Art 3(1) OAU Refugee Convention.

57 Art 3(2) OAU Refugee Convention.

58 Weis (n 38 above) 463.

a regional instrument can supplement an international regime by addressing problems specific to that region. The restrictive definition of 'refugee' under the UN Refugee Convention has made the application of the Convention difficult in regions other than Africa. For example, mass migrations owing to political violence and instability highlighted the inadequacy of the UN Convention definition in Latin America. Protection was granted by the Inter-American Commission to 'persons who have fled their country because their lives, safety, or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disrupted public order'.<sup>59</sup> This broadened definition incorporates much of the African instrument, but does not grant refugee status merely because persons had to leave their country due to disturbed public order.

#### **2.4 Africa and the protection of the environment**

In recent times, the influence of the environment on the well-being of individuals has been highlighted. Although the protection of the environment is primarily dependent on non-legal factors (such as government policy, local and international economic forces, demographics and natural elements), international treaties may also play a part by creating or stimulating an appropriate (legal) framework to improve environmental protection. The African Charter devotes one article to the right to a generally satisfactory environment 'favourable to the development of all peoples'.<sup>60</sup> The adoption of this provision should be seen in the context of the two treaties (one earlier and one later than the African Charter) that deal more specifically with the environment. These treaties are discussed briefly. Moreover, in the more recent Treaty Establishing the African Economic Community (AEC), specific provision is also made for the environment and the ban on import of hazardous waste into Africa and across African borders.<sup>61</sup>

##### **a *The African Convention on the Conservation of Nature and Natural Resources***

In 1968 the OAU Heads of State and Government adopted an African instrument on the environment, the African Convention on the Conservation of Nature and Natural Resources in Algiers.<sup>62</sup> It entered into force

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59 Annual report of Inter-American Commission 1984–1985. This definition was subsequently affirmed by the General Assembly of the Organisation of American States. See E Arboleda 'Refugee definition in Africa and Latin America: The lessons of pragmatism' (1991) 3 *International Journal of Refugee Law* 185.

60 Art 24 African Charter.

61 Arts 58 and 59 Abuja Treaty.

62 OAU Doc CAB/LEG/24.1, adopted on 15 September 1968.

on 16 June 1969. This Convention concerns itself primarily with wildlife, but also extends to many other aspects, such as the use of resources like soil and water. It has been described (in 1985) as the 'most comprehensive multilateral treaty for the conservation of nature yet negotiated',<sup>63</sup> in which environmental concerns and development are linked.<sup>64</sup> As is the case with other treaties on the environment, no administrative structure is created to ensure implementation. As a result, the Convention's provisions have largely remained neglected. Still, the Convention 'has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of national legislation is based'.<sup>65</sup> By 1985, 28 states had become party to the Convention. A further fourteen had at that stage signed the treaty, without ratifying it.<sup>66</sup> Between 1985 and 1997 the number of ratifications had risen by only one.<sup>67</sup> This indicates that this Convention has lost some of its initial appeal.

#### **b      *The Bamako Convention***

The Bamako Convention on the ban of the import into Africa and the control of transboundary movement and management of hazardous wastes within Africa was adopted on 30 January 1991 by a conference of ministers of the environment from 51 African states who were all members of the OAU.<sup>68</sup> This followed on the heels of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, adopted under UN supervision on 22 March 1989.<sup>69</sup> Given the high degree of specialisation and uniformity due to standardised technical terminology, it should hardly be surprising that the regional treaty borrows extensively from its international predecessor. Not only the sequence of issues dealt with, but also the wording of articles correspond very closely in the two instruments.<sup>70</sup> The Bamako Convention has only one article more, dealing with its registration with the UN, once it becomes operational. The other 29 articles of the

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63 S Lyster (1985) *International wildlife law* 115.

64 See eg art 7 of the Convention.

65 Lyster (n 63 above) 115.

66 For a list of these states, see Lyster (n 63 above) 115.

67 Only Gabon has become a party since 1985, in 1988.

68 See text in (1993) 1 *African Yearbook of International Law* 269–93.

69 See text in (1989) 28 *International Legal Materials* 657.

70 Both envisage implementation primarily through national institutions, with transnational institutions in the form of a secretariat and conference (see arts 5, 15 and 16 of the Bamako Convention).

respective documents deal with the same subject matter, mostly using the same formulations, although there are a few significant differences.<sup>71</sup>

- As its title suggests, the Bamako document deals specifically with the importing of hazardous waste **into Africa** and its movement across African borders. It places a total ban on the import of waste into the continent, and regulates waste movement within Africa itself. The Basel Convention, in contrast, contains no ban. It is regulatory in that it permits and regulates all transboundary movement of hazardous waste.<sup>72</sup>
- The scope of the Bamako document is more extensive as it broadens the definition of 'hazardous waste'.<sup>73</sup> The inclusion of artificially created radio-active waste in the list of controlled waste streams is of particular relevance.<sup>74</sup>

Other minor changes may be observed. For instance, the Basel Convention requires twenty ratifications before its entry into force, while the Bamako Convention requires ten ratifications.<sup>75</sup> The former entered into force on 5 May 1992.<sup>76</sup> By 31 December 1992 only three African states had ratified the Basel Convention: Mauritius, Nigeria and Senegal.<sup>77</sup> On the same date, of the three only Mauritius had also ratified the Bamako Convention. Except Mauritius, another two African countries (Tunisia and Zimbabwe) had by then ratified the regional instrument. The Bamako Convention entered into force on 22 April 1998.<sup>78</sup>

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71 See in general F Ouguerouz 'The Bamako Convention on Hazardous Waste: A new step in the development of the African international environmental law' (1993) 1 *African Yearbook of International Law* 195 and D Tladi 'The quest to ban hazardous waste import into Africa: First Bamako and now Basel' (2000) 33 *Comparative and International Law Journal of Southern Africa* 210.

72 See I Cheyne 'Africa and the international trade in hazardous wastes' (1994) 6 *African Journal of International and Comparative Law* 493 499.

73 See Ouguerouz (n 71 above) 201.

74 This aspect has probably inhibited ratification by a country like South Africa.

75 Art 25 of both conventions.

76 See Ouguerouz (n 71 above) 196.

77 As above.

78 Based on information provided by Tiyanjana Maluwa, in his capacity as legal counsel of the OAU. The Bamako Convention envisaged its entry into force on the ninetieth day after the deposit of the tenth instrument of ratification by the signatory states. This was interpreted to mean that it was only the ratification of the original signatories to the treaty which would count in computing the ten ratifications and not those ratifications by states which acceded to the treaty only after its adoption. This happened on 21 January 1998, when the tenth original signatory state (Benin) deposited its instrument of ratification. No secretariat has as yet been established, mainly because of a lack of funds (according to officials of the South African Department of Foreign Affairs).

## 2.5 Africa and the UN human rights treaties and treaty bodies

Six major human rights treaties, each providing for a treaty monitoring body, have been adopted under the auspices of the UN. They are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), ICCPR, ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the CRC.

African states were in particular instrumental in the adoption of the first of the six treaties, CERD, in 1965.<sup>79</sup> Formal acceptance of the treaty norms by African states is impressive. By 1 January 2001, 44 of the 53 African UN member states had accepted CERD, 45 the ICCPR, 43 the ICESCR, 48 CEDAW, 32 CAT and 52 CRC.<sup>80</sup> The optional individual complaints mechanisms of the First Optional Protocol to the ICCPR (OPI), article 14 of CERD, article 22 of CAT and the Optional Protocol to CEDAW enjoy lesser but still significant African acceptance.<sup>81</sup> Africans have also served on all the six treaty monitoring bodies.<sup>82</sup>

Despite the reluctance to comply with their obligations to submit periodic state reports, African participation has enriched the reporting process.<sup>83</sup> Numerous individual communications have been brought against African states, especially under OPI. Africans in European states have brought a number of communications against these states, especially under article 22 of CAT.

## 3 Africa and the development of international humanitarian law

International humanitarian law deals mainly with the protection of individuals (or groups) in times of war. International humanitarian law aims to ensure less inhumane warfare, whether of an international or non-international character. International humanitarian law is distinct

79 See E Schwelb 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 996-998.

80 See <<http://www.un.org/ENGLISH/bible/englishinternetbible/part1/chapter1V>> (accessed 1 February 2001).

81 By 31 January 2001, three African states had made declarations in terms of art 14 of CERD, 31 had accepted OPI, 6 had made a declaration in terms of art 22 of CAT and 3 African states had accepted the Optional Protocol to CEDAW.

82 For a detailed overview of this and other aspects of African involvement in the UN system, see F Viljoen 'The six major United Nations human rights treaties and monitoring mechanisms: Their relevance for Africa' (1999) 11 *African Society of International and Comparative Law Proceedings* 109.

83 C Heyns & F Viljoen *The UN human rights treaties at the national level* (2001) (forthcoming), eg ch 6, 17-19.

from international human rights law as it allows for deprivation and extensive diminution of rights (for example, allowing lawful killing). But, ultimately, they serve the same goal: the protection of the dignity and humanity of everyone.<sup>84</sup>

### 3.1 The International Criminal Tribunal for Rwanda (ICTR)

On 8 November 1994, the UN Security Council adopted Resolution 955, establishing an international tribunal to prosecute and punish individuals responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between 1 January and 31 December 1994.<sup>85</sup> This followed in the footsteps of, and was institutionally linked to, the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993.<sup>86</sup>

Although the ICTY was the first truly international tribunal to prosecute serious violations of international humanitarian law, the ICTR extends the ambit of the ICTY's protection. While the ICTY covers violations arising from an international armed conflict, the ICTR was created to deal with violations arising from internal (non-international) conflict.<sup>87</sup>

Not only the creation of the ICTR, but also its functioning, has contributed to enrich international humanitarian law. The ICTR became, in *The Prosecutor v Jean Kambanda*,<sup>88</sup> the first court to find an individual guilty of the crime of genocide. This decision brought to life the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>89</sup> which had largely remained a dead letter since 1948. It should be recalled that it was proposed during the deliberation of this Convention that a court be created to implement its provisions. As a result of compromise, no implementing mechanism was brought into existence. This judgment could serve as an important precedent for the to-be-established International Criminal Court (ICC).

84 See T Meron 'Convergence of international humanitarian law and human rights law' in D Warner (ed) *Human rights and humanitarian law: The quest for universality* (1997) 97-106.

85 UN Doc S/RES/955 (1994), adopted by 13 votes to 1 (Rwanda), with 1 abstention. The Statute of the ICTR is annexed to the Resolution. The Statute provides that Rwandan citizens responsible for violations 'committed in the territory of neighbouring states' may also be subjected to the jurisdiction of the ICTR (art 1 of the ICTR Statute).

86 UN Doc S/RES/827 (1993).

87 Art 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II is included in the jurisdiction of the ICTR (art 4 of the Statute of the ICTR) and not in that of the ICTY. See also Leers 'The Rwanda Tribunal' (1996) 9 *Leiden Journal of International Law* 37-38.

88 Case ICTR-97-23-5, judgment of 4 September 1998; (1998) 37 *International Legal Materials* 1411; <<http://www.ictor.org>> (accessed 1 February 2001).

89 Adopted on 9 December 1948 and entered into force on 12 January 1951.

Kambanda pleaded guilty to charges of genocide, conspiracy to commit genocide, incitement to commit genocide, complicity in genocide and crimes against humanity. In setting out the basis for his guilty plea, Kambanda admitted, amongst other things, the following:<sup>90</sup>

- There was, in 1994, a widespread and systematic attack against the civilian Tutsi population.
- The purpose of the attack was to exterminate the Tutsi.
- As Prime Minister, he headed the Council of Ministers. At these cabinet meetings and meetings of *préfets* the course of the massacres was actively followed, but no action was taken to intervene.
- He issued the Directive on Civil Defence, which encouraged and reinforced the Interahamwe who were committing mass killing of the Tutsi civilian population.

For the first time since the Nuremberg trials, a high-ranking government official was held accountable for grave violations of humanitarian law. Jean Kambanda was the Prime Minister of the Interim Government of Rwanda from 8 April to 17 July 1994. The Interim Government was established after the air crash on 6 April 1994, in which President Habyarimana was killed. Kambanda's convictions resulted from acts committed in a position of power, as he exercised *de jure* authority over the members of his government, as well as *de jure* and *de facto* authority over senior civil servants and senior officers in the military.

He was sentenced to life imprisonment. The fact that he held such a high government position was taken into account as an aggravating factor.<sup>91</sup> The ICTR observed as follows:<sup>92</sup>

The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population.

The ICTR found the presence of mitigating factors in the fact that Kambanda's example of pleading guilty was likely to encourage others to recognise their individual responsibility.<sup>93</sup> Despite the presence of mitigation, the court concluded that the aggravating factors 'negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post, at the time he committed the said crimes'.<sup>94</sup>

By 30 January 2001, a further ten members of the former cabinet were awaiting trial (including the Ministers of Foreign Affairs, Information, Education and Family and Women Affairs).

90 Para 39 of the judgment.

91 Art 6(2) ICTR Statute.

92 Para 44 of the judgment.

93 Para 61 of the judgment.

94 Para 62 of the judgment.

In *The Prosecutor v Jean-Paul Akayesu*,<sup>95</sup> for the first time, an international court applied rape in an international context. It declared that rape amounts to genocide if committed with the intention to destroy a particular group. Initially, the indictment against Jean-Paul Akayesu did not contain specific charges of sexual crimes. An amendment to the indictment, in 1997, added a count of crime against humanity (rape).<sup>96</sup> Accompanying this amendment, paragraphs 10A, 12A and 12B were inserted into the indictment. These paragraphs set out allegations that displaced Tutsi women, who had sought refuge at the bureau communal, were subjected repeatedly to sexual violence. Jean-Paul Akayesu, it was further alleged, knew of and encouraged the commission of these crimes.

On this basis, the ICTR Chamber found Akayesu guilty of crimes against humanity. However, the Court went further. It found, of its own accord, that the same acts also constituted genocide.<sup>97</sup> Article 2(2) of the ICTR Statute does not refer explicitly to sexual crimes, but makes reference to acts 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.<sup>98</sup>

The tribunal concluded that the rapes met this requirement, remarking as follows:<sup>99</sup>

Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

This case has been singled out for its 'immense factual and jurisprudential importance'.<sup>100</sup> It stands as the first instance of rape being included as part of the definition of genocide. Stated differently, it has now been established that rape may be committed with genocidal intent.

The tribunal has also explored and elevated into the international discourse an important aspect of traditional African society, that of restorative justice. The Tribunal Registrar has established a programme for victims, especially victims of rape and other sexual crimes. This emphasis on restorative justice rather than on (only) retribution has influenced the provision for a Trust Fund under the ICC Statute.<sup>101</sup>

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95 ICTR 96-4-T, judgment of 2 September 1998, <<http://www.ictor.org>> (accessed 1 February 2001). Summary of case (1998) 37 *International Legal Materials* 1399; (1999) 11 *African Journal of International and Comparative Law* 336.

96 See PJ Magnarella 'Some milestones and achievements at the International Criminal Tribunal for Rwanda: The 1998 *Kambanda, Akayesu* cases' (1998) 11 *Florida Journal of International Law* 517 532.

97 Paras 731, 734 of the judgment.

98 Art 26(2) ICTR Statute.

99 Paras 731, 734 of the judgment.

100 Magnarella (n 96 above) 537.

101 Art 79 ICC Statute.

### 3.2 The establishment of the International Criminal Court

The process of establishing the ICTR has contributed to international law by creating the much-needed spark for the establishment of an International Criminal Court. It is correct that the Yugoslav crisis (re)opened the debate about the need for a supra-national jurisdiction to secure accountability after cases of violations of human rights. After the ICTY was in fact created, the Rwandan genocide ensued. There were persuasive arguments for the creation of another court, or the extension of the ICTY mandate. As in the Yugoslav case, the main motivation was to ensure accountability. Not creating a court to deal with the Rwandese genocide would amount to a very legitimate objection that double standards are being applied in that the Rwandese conflict is being taken less seriously than the European.<sup>102</sup>

But the very creation of the court for Rwanda brought to the fore the problem of proliferation. Maybe there is scope for one more court to be established, but how many after that? Problems related to the establishment of multiple tribunals include limited resources, personnel duplication and time delays in establishing a tribunal infrastructure to deal with ad hoc conflicts. Against this background parties elaborated and eventually agreed on the ICC Statute.<sup>103</sup> As a result, something that seemed unthinkable not long before was realised.

### 3.3 Africa and mercenaries

Although mercenarism has existed from time immemorial, it only became an issue in international humanitarian law in this century. During the 16th century, for example, the use of mercenaries was the unquestioned norm.<sup>104</sup> In the first comprehensive codification of humanitarian law, the 1907 Hague Convention, the recruitment of mercenaries was prohibited. When the UN was formed in 1945, the single provision in the Hague Convention was still the only reference to mercenarism in international law. The UN Charter went no further than stating the general principle that states should refrain from the use of force against 'the territorial integrity or political independence'<sup>105</sup> of another state. Viewed against the background of the realities of the Second World War and the ideological conflicts flaring up immediately thereafter, mercenaries hardly merited any attention.<sup>106</sup>

102 See P Akhavan 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 *American Journal of International Law* 501.

103 Adopted by a UN conference of plenipotentiaries on 17 July 1998: (1998) 37 *International Legal Materials* 999.

104 C Botha 'Soldiers of fortune or whores of war: The legal position of mercenaries with specific reference to South Africa' (1993) 15 *Strategic Review of Southern Africa* 75-78.

105 Art 2(4) UN Charter.

106 JL Taulbee 'Myths, mercenaries and contemporary international law' (1985) 15 *California Western International Law Journal* 339-345.

The independence of states previously under colonial rule coincided with an increase in and a changing attitude towards the use of mercenaries. It became a focus of concern especially in Africa. Concern was first raised about the situation in the Congo in the early 1960s. During the civil war, the Katangese secessionist forces of Moïse Tshombé were assisted by mercenaries from Europe and South Africa.<sup>107</sup> Subsequently, the government of Mobutu Sese Seko also employed foreign soldiers. Other African examples over the last few decades are Nigeria, Angola, the *coup d'Etat* by the French national Bob Denard in the Comoros, and the attempted *coup d'Etat* in the Seychelles by mercenaries under the leadership of Mike Hoare.<sup>108</sup>

Gradually, mercenarism became an issue raised in international political fora. At the regional level, first the OAU Council of Ministers and later the Assembly of Heads of State and Government denounced these activities. At the global level, the UN General Assembly followed in 1968 with Resolution 2465, termed 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples', which declared the use of mercenaries against national liberation movements in colonial territories to be a criminal act. This is evidence of how an African concern has been given global recognition.

On the legal plane Africa also played a leading role. The first treaty dealing specifically with mercenaries — the OAU Convention on the Elimination of Mercenarism in Africa — was adopted under the auspices of the OAU in 1977.<sup>109</sup> After the required number of states ratified the Convention in 1985, it entered into force.<sup>110</sup> It defines a mercenary as a non-national of the state against which he is employed. This includes a person who 'links himself willingly' to groups or organisations aiming to overthrow or undermine another state, or aiming to obstruct the activities of any liberation movement recognised by the OAU.<sup>111</sup>

The African initiative impacted in two major ways on international law:

- The first is the inclusion of an article dealing with mercenaries in the 1977 Geneva Protocol I Additional to the Geneva Convention of 1949. In terms thereof, a mercenary 'shall not have the right to be a combatant or a prisoner of war'.<sup>112</sup> The article is a product of

107 PW Mourning 'Leashing the dogs of war: Outlawing the recruitment and use of mercenaries' (1981/2) 22 *Virginia Journal of International Law* 589–599.

108 On their prosecution in South Africa for contraventions of the Civil Aviation Offences Act 10 of 1972, see *S v Hoare* 1982 4 SA 865 (N).

109 OAU Doc CM/433/Rev L Annex 1 (1972). Text of substantive provisions reproduced in (1981/2) 22 *Virginia Journal of International Law* 613–18, and the International Convention Against the Activities of Mercenaries 619–25.

110 GJ Naldi *The Organisation of African Unity: An analysis of its role* (1999) gives a list of states parties in 1999 (102 (n 25)).

111 Art 1 OAU Convention on the Elimination of Mercenarism in Africa.

112 Art 47(1) Geneva Protocol I.

compromise, not going as far as the OAU Convention had already gone or as the insistence of African states required.

- Secondly, a movement for an international convention on the recruitment, use, financing and training of mercenaries was launched at the UN. In 1979, the UN General Assembly adopted a resolution dealing with the 'use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination'. An ad hoc committee for the drafting of an international convention was established. After years of debate, the General Assembly adopted the Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

The highlighting of mercenarism internationally is an African achievement. It shows the increasing prominence of Africa in the UN. But, with Taulbee, one has to question the substantive impact of these provisions. Viewed globally, mercenaries have played a very limited role in modern warfare and conflict. The African response can be explained primarily with reference to the fact that the mercenary has become 'the symbol of racism and neo-colonialism within the Afro-Asian bloc',<sup>113</sup> because the recurring scenario was one of 'white soldiers of fortune fighting black natives'.<sup>114</sup> Given the repeated involvement of South African mercenaries in African conflicts,<sup>115</sup> the cohesiveness in Africa's approach becomes all the more understandable. One must also not lose sight of the context — the sovereignty of the newly independent Africa states was easily threatened, especially in the absence of a loyal citizenry and a loyal and well-trained armed force. Seen from this perspective, the outlawing of mercenaries had little to do with the protection of human rights, but

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113 Taulbee (n 106 above) 342.

114 As above.

115 In the 1990s the private South African firm Executive Outcomes played a prominent role in, for example, Angola and Sierra Leone. In both these instances they were on the payroll of the government in the countries concerned. Newly elected president of Sierra Leone, Ahmed Tejan Kabbah, relied on the presence of Executive Outcomes to keep rebel forces at bay and ensure stability. In 1996 Executive Outcomes was paid \$1,2 million per month, making up a considerable percentage of state expenditure ('Kabbah strikes back' (1996) *Nov/Dec Africa Today* 43–4).

was intertwined with a movement to consolidate power in the hands of African rulers.<sup>116</sup>

#### 4 Conclusion

Regional human rights treaties adopted under the auspices of the OAU have enriched international human rights law significantly over the latter half of the previous century. The African Charter represents a clear break with numerous dichotomies that prevailed in international law. As far as refugees, the environment and children are concerned, African states responded to defects or omissions in UN treaties. The UN Refugee Convention of 1951 (and the 1967 Protocol thereto) was supplemented by the OAU Refugee Convention of 1969, providing, amongst other things, for an extended definition of 'refugee'. In respect of the environment, the Basel Convention (1989) was taken a step further with the adoption of the Bamako Convention (1991). As far as children's rights are concerned, the African Children's Charter (1990) followed on the heels of the CRC (1989), elevating the protection of children in important respects of particular relevance to Africa.

As UN members, African states and their nationals also participated in the UN human rights treaty system.

Africa has further played an important role in the development of international humanitarian law. The ICTR, established to provide international justice after the genocide in Rwanda, became the first international tribunal to address the effects of a situation of internal armed conflict. The ICTR also became the first tribunal to find that rape may constitute genocide. By convicting a high government official the ICTR demonstrated unequivocally that the international trend favouring impunity may be reversed. The ICTR served as an important precedent for the establishment of the ICC. The adoption by the OAU of a treaty dealing with mercenaries served as an example for a later treaty under UN auspices.

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116 The 1990s saw the emergence of a corporate army, Executive Outcomes. It played an active role in numerous African conflicts, especially in Angola and Sierra Leone. Obvious concerns have been raised: leaders with little popular support may remain in power despite national disintegration (also of the military forces), only because they control state finances. In the process, democracy may be thwarted, and national resources may become directed at the survival of a leader rather than the improvement of citizens' quality of life. On the other hand, Executive Outcomes has served as a 'private Pan-African peace-keeping force of a kind which the international community has long promised, but failed to deliver' (Pech & Beresford 'Africa's new-look dogs of war' (24-30 January 1997) *Mail and Guardian* 24). In both Angola and Sierra Leone its intervention has contributed to an eventual peace process. The absence of any meaningful role played by the OAU or the UN has created the room for the involvement of Executive Outcomes in internal African conflicts.

This contribution has not given a comprehensive overview of African involvement in and contributions towards international human rights and humanitarian law. Treaties dealing with other aspects, such as landmines and women's rights, have not been canvassed here. Recent progress towards a Protocol to the African Charter on the Rights of Women underscores the fact that the African contribution to the development of international law will continue into the next century.<sup>117</sup>

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117 The Draft Protocol is reprinted on 53–63 of this journal.