Chapter 2 THE CONTRIBUTION OF THE UNITED NATIONS TOWARDS THE REALISATION OF HUMAN RIGHTS IN AFRICA

When dealing with the application of international standards in a regional setting, one may be tempted to re-open the debate between the universality and culturally-determined specificity of human rights.[1] This is not the aim here. Instead, the assumption is made that human rights are inalienable to humankind. The 1993 World Conference on Human Rights adopts a similar reaffirmation in the Vienna Declaration and Programme of Action, in which all states declare their commitment "to fulfil their obligations to promote universal respect for" internationally-accepted human rights. It continues as follows: "The universal nature of these rights and freedoms is beyond question".[2] It also states unequivocally that all human rights are "universal, indivisible and interdependent and interrelated".[3] Simultaneously, though, "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind".[4] The existence of such regional and local particularities does not detract from efforts to seek consensus about standards globally, and from attempts at ensuring their realisation. It seems to be axiomatic that the closest conformity with specific concerns can be reached at the local or domestic level. But this does not exclude consensus-seeking at regional and universal levels. However, it follows that the consensus will become narrower as the extent of participation and globalisation increases. For this reason, the international human rights regime allows for reservations and for implementation predominantly through non-judicial means. The role of the international human rights regime in Africa will now be investigated.

2.1 Africa in international law: an introduction

2.1.1 Before the UN (- 1945)

International human rights law is of relatively recent origin. Its evolution and functioning forms part of the development of international law in general. Africa's role in international law is

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1 See, on this debate generally, An-Na'im(ed) (1991), Pannikar (1982) 120 *Diogenes* 75, and Pollis and Schwab (eds) (1980). For arguments on contemporary Africa, see Howard (1986) ch 2.

2 Art 1 of the Vienna Declaration.

3 Art 5 of the Vienna Declaration.

4 Art 5 of the Vienna Declaration.

therefore placed under a brief spotlight, before the focus turns to international human rights instruments more specifically.[5]

The first contact of Africans with Europeans resulted from curiosity fuelled by the scientific advances of the Enlightenment and civilizing mission of Christianity. This represented a movement of explorers and missionaries **into Africa** from especially the sixteenth century. When industrialisation began taking off in Europe during the eighteenth century, the movement turned in the other direction, with the capture and **export of Africans from Africa** as slaves to the "new world". At this stage little interest was paid to the African interior. Foreign powers established a more or less informal presence, directed at the export of slaves. Only with the British occupation of Egypt and the expansionist stance of Leopold II of Belgium in relation to the Congo did the need arise to effectively partition the African continent into colonies under the sphere of European influence. A conference was organised in Berlin, lasting from late 1884 to 1885. At this conference the borders of the African continent were to a large extent demarcated. This introduced the phase of colonialism, which mainly represented a movement of **natural resources from Africa** to the newly industrialised Europe. To some extent the movement also went the other way, with African markets serving as a dumping ground of surplus products.[6]

From the outset, traditional African states were disregarded as equal subjects in the ensuing law relating to international law.[7] Africa developed mistrust of international law, as it supported first slavery, and then colonialism. The predecessor to the UN, the **League of Nations**, in 1936 created a perception of contempt for black race in the Italo-Abyssinian War.[8] The military invasion and colonisation of Ethiopia, a sovereign member state of the League, by Italy, another member of the League, epitomises Western misuse of international law in relation to Africa. In Umozurike's view, certain states failed to regard Ethiopia as a sovereign state "because it was African".[9] He regards the failure of the League members to prevent Italy's aggression by sanctions as "reminders

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5 There is no need to traverse this topic, as it has been dealt with comprehensively by competent writers such as Umozurike (1979) and Elias (1988).

6 On the economics of colonialism, see Rodney (1989).

7 For a comprehensive overview of this development, see Umozurike (1979).

8 Eso (1996) 6 *African Human Rights Newsletter* 9.

9 Umozurike (1979) at 66.

of the bad faith and double standards that existed and still persist in the international community when vital African interests are concerned".[10]

In the period after the First World War **resistance against colonialism** gained momentum. It took the form of African-nationalism within numerous African states and the pan-Africanist movement outside Africa. The insistence on self-determination and decolonisation became stronger and stronger, culminating in the independence of Ghana in 1957, followed by a series of former French colonies in 1960. Today the process of decolonisation is complete.[11] But in some instances the shadow of colonialism has been cast over the present.[12]

2.1.2 Under the UN (1945 -)

When the UN was founded after the Second World War in 1945, only four independent African states became members: Egypt, the Union of South Africa, Liberia and Ethiopia.[13] Three of these states voted in favour of the UN General Assembly resolution containing the Universal Declaration

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10 Umozurike (1979) at 78.

11 With the possible exception of the Western Sahara, see par 2.2.5 (c) below.

12 For example, the explanation for the human suffering caused by the killing of Hutus and Tutsis in 1994 may, to a large extent, be traced back to colonialism. The original inhabitants of Rwanda were the Twa. They were hunters and gatherers. The Hutus, who were peasants, became the first group of "settlers". Around 1400 pastoralist Tutsi immigrated from the north to settle there. Political functions became divided between the Hutu and Tutsi, and was greatly localised. Reyntjens explains how this precarious balance was unsettled by the Belgian policy of "indirect rule" ((1987) 25/26 *Jnl of Legal Pluralism and Unofficial Law* 70). Because the Tutsi tribe was considered to be of "Hamite" origin, and was "more intelligent, more active, more capable of understanding progress" the Belgians started reserving political office for the Tutsi (Reyntjens (1987) 25/26 *Jnl of Legal Pluralism and Unofficial Law* 70 at 80, quoting bishop Classe). Disallowing the Hutus access to political power exacerbated ethnic opposition and division. Through central Tutsi control, the traditional institutions were also transformed, disturbing "the equilibria of protection and allegiance that had made this supremacy bearable" (Reyntjens (1987) 25/26 *Jnl of Legal Pluralism and Unofficial Law* 70 at 80).

13 On 24 October, 7, 12 and 13 November 1945 respectively.

of Human Rights in 1948. The Union of South Africa was one of eight states abstaining.[14] In retrospect, the claim to universality inherent in the "Universal Declaration" is undermined by the **absence of** any significant **African participation** in the initial process of deliberation.[15] Non-Western views were largely unrepresented, because the "third world" countries represented were mainly Latin American states "whose dominant worldview was European".[16] The Universal Declaration has been described as an attempt "to universalize civil and political rights accepted or aspired to in Western liberal democracies".[17]

One of the first steps undertaken by most of the newly independent African states was to become members of the UN.[18] Today all the states enjoy membership of the UN. In the period leading up

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14 GA Resolution 217 (III), adopted on 10 December 1948 by a vote of 48 to 0, with Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukraine and Yugoslavia abstaining. See also Farer (1987) 9 *HRQ* 550 at 557.

15 See Eide *et al* (1992) at 11. From Africa, only Egypt participated in its drafting. See also Legesse in Thompson (ed) (1980): "If Africans were the sole authors of the Universal Declaration of Human Rights, they might have ranked the rights of communities above those of individuals, and they might have used a cultural idiom fundamentally different from the language in which the ideas are now formulated" (at 129). This claim is partly confirmed by the subsequent inclusion of both "rights" and "duties", as well as the concept of "peoples' rights" in the African Charter. But in an important respect the African Charter refutes the claim made by Legesse, as it keeps to the notion that individuals are entitled to certain rights against their governments, rather than ranking the rights of communities above those of individuals.

16 Mutua (1996) 36 *Virginia Jnl of Intl Law* 589 at 605.

17 Mutua (1996) 36 *Virginia Jnl of Intl Law* 589 at 606.

18 The sequence was as follows (date of UN membership, date of independence in brackets):

Libyan Arab Jamahiriya	14 December 1955 (24 December 1951)
Morocco	12 November 1956 (2 March 1956)
Tunisia	12 November 1956 (20 March 1956)
Sudan	4 December 1956 (1 January 1956)
Ghana	8 March 1957 (6 March 1957)
Guinea	12 December 1958 (2 November 1958)
Benin	20 September 1960 (1 August 1960)
Burkina Faso	20 September 1960 (5 August 1960)
Cameroon	20 September 1960 (1 January 1960)
CAR	20 September 1960 (13 August 1960)
Chad	20 September 1960 (11 August 1960)

Footnotes continued on next page.

Congo	20 September 1960 (15 August 1960)
Côte d'Ivoire	20 September 1960 (11 August 1960)
Gabon	20 September 1960 (17 August 1960)
Madagascar	20 September 1960 (26 June 1960)
Niger	20 September 1960 (3 August 1960)
Somalia	20 September 1960 (1 July 1960)
Togo	20 September 1960 (27 April 1960)
Zaïre	20 September 1960 (30 June 1960)
Mali	28 September 1960 (20 June 1960)
Senegal	28 September 1960 (20 June 1960)
Nigeria	7 October 1960 (1 October 1960)
Sierra Leone	27 September 1961 (27 April 1961)
Mauritania	27 October 1961 (28 November 1960)
Tanzania	14 December 1961 (9 December 1961)
Burundi	18 September 1962 (1 July 1962)
Rwanda	18 September 1962 (1 July 1962)
Algeria	8 October 1962 (1 July 1962)
Uganda	25 October 1962 (9 October 1962)
Kenya	16 December 1963 (12 December 1963)
Malawi	1 December 1964 (6 July 1964)
Zambia	1 December 1964 (24 October 1964)
Gambia	21 September 1965 (18 February 1965)
Botswana	17 October 1966 (30 September 1966)
Lesotho	17 October 1966 (4 October 1966)
Mauritius	24 April 1968 (12 March 1968)
Swaziland	24 September 1968 (6 September 1968)
Equatorial Guinea	12 November 1968 (12 October 1968)
Guinea-Bissau	17 September 1974 (10 September 1974)
Cape Verde	16 September 1975 (5 July 1975)
Mozambique	16 September 1975 (25 June 1975)
São Tomé e Príncipe	16 September 1975 (12 July 1975)
Comoros	12 November 1975 (6 July 1975)
Seychelles	21 September 1976 (29 June 1976)
Angola	1 December 1976 (11 November 1975)
Djibouti	20 September 1977 (27 June 1977)
Zimbabwe	25 August 1980 (18 April 1980)
Namibia	23 April 1990 (21 March 1990)

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to independence, international law became an instrument through which ideals of decolonisation and independence were fulfilled. This continued even after the majority of states became independent in the 1960s, in order to rid Africa of all remaining remnants of colonialism. The legitimacy of the UN was enhanced further by its assistance in the anti-apartheid and decolonisation campaigns in Africa. The three clearest instances are Rhodesia/Zimbabwe, South West Africa/Namibia and South Africa. Ian Smith's Unilateral Declaration of Independence in Rhodesia on 11 November 1965 was considered to be a threat to peace, and mandatory economic sanctions were imposed.[19] A mandatory ban on arms traffic to South Africa was followed by more comprehensive sanctions.[20] Although the effect of these measures became visible only on the longer term, the eventual independence of Zimbabwe and Namibia and the dismantling of apartheid in South Africa stand as evidence of the UN's constructive involvement in anti-colonialist efforts in Africa.

One of the beacons of Africa's participatory role in international affairs, is the adoption of the International Convention on the Elimination of Racial Discrimination ("CERD"). Africans celebrated its adoption in 1965 as the General Assembly's "finest hour".[21] Issues of relevance and concern for African states started to appear increasingly in discussions and resolutions of the General Assembly from the early 1960s.

Selection processes for the various UN bodies nowadays have to comply strictly with the principle of regional representation. A recent example is provided by the selection of members to the Commission on the Limits of the Continental Shelf, established under the UN Convention on the Law of the Sea. For such purposes, UN members are divided into five groups, the African, Asian,

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Eritrea 28 May 1993 (23 May 1993)

Africa Institute (1992) *Africa at a Glance.* This is a total of 53 states. The total excludes the Saharawi Arab Democratic Republic ("SADR"), declared independent unilaterally on 27 February 1976, but not admitted as a UN member (See ch 2.4 below).

19 See Forsythe (1991) at 70, 76.

20 *Ibid.*

21 Schwelb (1966) 15 *ICLQ* 996.

Eastern European, Latin American and Caribbean and "Western and Other" state groups.[22] State parties to UNCLOS decided on an *ad hoc* allocation, in terms of which each state group would be entitled to at least three Committee members. In the election five members each were elected from Asian, African and the "Western and Other" state groups.

2.2 UN Charter bodies and human rights

The UN Charter includes the achievement of international co-operation in "promoting and encouraging respect for human rights and for fundamental freedoms" among its purposes.[23] One of the architects of the human rights provisions in the UN Charter, especially in the Preamble thereto, was the South African Jan Smuts.[24] It is remarkably ironic that South Africa became the first state to be condemmned for human rights violations. Ironically, South African attempts to hide behind the shield of the "domestic jurisdiction" clause necessitated stronger action. The atrocities of apartheid had the positive effect of shattering the shield of the "domestic affairs" clause, setting a precedent for stronger UN action in this field. It also spurred into motion, after inactivity in the first years, the 1503 procedure.

Some institutions, which have been established in terms of the UN Charter, commonly referred to as UN Charter bodies, involve themselves to varying degrees with human rights issues:

- The **General Assembly** may discuss any matter within the ambit of UN Charter and may adopt recommendations to member states pertaining to such matters.[25] Over the years, these discussions and recommendations have also covered human rights matters. The Charter and treaty bodies also report back to the General Assembly.

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22 See ch 2.4 below.

23 Art 1(3) of the UN Charter. See also arts 55 and 56 of the Charter.

24 See Heyns (1995) 7 *RADIC* 329.

25 Art 10 of the UN Charter.

- Although the **Security Council** does not have an explicit mandate to involve itself in human rights matters, its mandate of maintaining "international peace and security"[26] has been extended to include human rights related issues.

- Likewise, the UN's principal judicial organ, the **International Court of Justice** ("ICJ") involved itself to a limited extent in human rights matters.

- One of the central institutions created by the Charter is the **Economic and Social Council** ("ECOSOC").[27] It consists of representatives from 54 UN member states[28] and may make recommendations to the UN General Assembly on a wide range of topics, including human rights matters.[29] ECOSOC was instructed to set up commissions to further the promotion of human rights.[30] These commissions include the **UN Human Rights Commission**, the **Sub-Commission on Prevention of Discrimination and Protection of Minorities**, the Commission on the Status of Women and the recently instituted High Commissioner of Human Rights.

These bodies are now discussed with reference to their particular relevance for Africa.

2.2.1 The General Assembly

The main contribution of the General Assembly to human rights lies in the field of standard setting.[31] General Assembly debates and discussions have over the years resulted in numerous resolutions, declarations and binding treaties (or "conventions").[32] The first of these was the

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26 Art 24(1) of the UN Charter.

27 See ch X of the UN Charter.

28 Art 61(1) of the UN Charter.

29 In terms of art 62(2) of the Charter.

30 Art 68 of the Charter.

31 On the involvement of the General Assembly in the field of human rights, see in general Cassese in Alston (ed) (1992) and Quinn in Alston (ed) (1992).

32 General Assembly resolutions are generally only recommendatory, but may become binding if they are proof of pertinent contemporary international community standards (see *South West Africa Cases (Second Phase)* 1966 ICJ Reports 6 at 50 – 51).

adoption of the landmark Universal Declaration in 1948. The following resolutions adopted by the General Assembly over the last decade serve as examples of the sustained significance of the Assembly's role:

- In 1990, the Assembly adopted the resolution deciding to convene a World Conference on Human Rights.
- In 1993, it established the post of UN High Commissioner for Human Rights.
- In 1994, it resolved to proclaim the UN Decade of Human Rights Education.[33]

But the role of the General Assembly extends much further. It not only plays a legislative role, but also serves as a forum for various other human rights activities. For example, it receives annual reports from the numerous human rights treaty bodies, from thematic and country rapporteurs and from the High Commissioner for Human Rights.[34]

African scepticism towards the UN changed in the 1960s, due mainly to the role the newly independent African states started playing in the UN General Assembly, where the Afro-Asian block forms a majority. African states used the Assembly as a forum to address the issues of self-determination, decolonisation and anti-racism. The adoption by the General Assembly, in 1960, of the Declaration on the Granting of Independence to Colonial Countries accentuated the right to self-determination of peoples in the colonial sphere.[35] Although the African states had not been involved significantly in the initial proposals for the incorporation of this right in the two Covenants of 1966, their support ensured its eventual inclusion in these treaties.[36] To some extent, African states have been instrumental in the adoption of the first binding treaty adopted by the UN in 1965, the Convention on the Elimination of All Forms of Racial Discrimination. African

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33 For a full list of resolutions dealing with human rights matters, see United Nations (1995).

34 See Quinn in Alston (ed) (1992).

35 See Cassese in Cassese (ed) (1979) at 141.

36 See art 1 of the CESCR and CCPR; Cassese in Cassese (ed) (1979) at 140 - 143, and Nowak (1993) at 9 - 11.

opposition against South Africa's racial policies largely motivated the adoption of the Convention on the Suppression and Punishment of the Crime of Apartheid.[37]

Especially the South African minority government became a frequent target, leading to the first significant encroachment on state sovereignty by the UN.[38] The reliance of the South African government on the principle of non-interference in domestic affairs was rejected by the Assembly. In this way, ironically, the South Africa precedent has paved the way for more effective human rights scrutiny by the Assembly in later years.[39]

However, the majority of African states have not been equally prepared for inspection and criticism of African internal affairs. One recent example is given: After the execution by Nigeria of Ken Saro-Wiwa and eight other Ogoni activists in 1995, the matter was raised in the General Assembly.[40] The Assembly adopted a resolution on the general situation of human rights in Nigeria, in which the arbitrary executions were condemned and concern was expressed about the human rights situation in Nigeria.[41] But the Assembly stopped short of recommending economic measures against that state. Especially African states were responsible for toning down the operative sections of this resolution in order to counter a perceived trend of resolutions critical of African states.[42]

2.2.2 The Security Council and peacekeeping in Africa

The Security Council functions as the only body in the UN that can take executive decisions. It can, in addition, "call on" member states to carry out the decisions. At present, the Security

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37 See Cassese in Alston (ed) (1992) at 39 – 40.

38 See Stultz (1991) 13 *HRQ* 1.

39 The new doctrine was consolidated in 1974, when the Assembly "intervened" in the case of Chile (see Cassese in Alston (ed) (1992) at 43).

40 The Security Council would not consider the matter (see Marks in Tessitore and Woolfson (eds) (1996) at 203).

41 Resolution A/Res/50/199.

42 See Marks in Tessitore and Woolfson (eds) (1996) at 203.

Council consists of fifteen members.[43] Of these, five are permanent members. They are the USA, Britain, France, the USSR and China (all victors of the Second World War). The ten non-permanent members are elected by the General Assembly for two-year terms. Three African states were represented in 1996: Botswana, Egypt and Guinea-Bissau. Kenya replaced Botswana in February 1997. The Security Council meets on a continuous basis, usually in New York. A peculiar feature of their operations is the veto power of the permanent five members. If one of these states opposes a course of action, the Council remains powerless to act.

The Security Council is empowered to take "measures not involving the use of force" when a "threat to the peace" exists.[44] This power was used for the first time in 1968 when mandatory sanctions were imposed on the then Southern Rhodesia.[45] South Africa became the next target, when the Security Council imposed a mandatory arms embargo against that country in 1977.[46] These two instances were ground-breaking in that they were "self-evidently based upon *internal situations*" and served as precedents for sanctions increasingly imposed by the Security Council in the post-Cold War era.[47]

In the build-up towards the fiftieth of the UN in 1995, its institutions and functioning was scrutinised. A number of voices called for an end to the way in which the five permanent members dominated the Security Council and, in effect, the United Nations as a whole. Questions that arose were:[48]

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43 On its composition see web page http://www.un.org/Overview/Organs/sc.html.

44 See arts 39 and 41 of the UN Charter.

45 Resolution 232 (1966), SCOR *Resolutions and Decisions* at 7, adopted by 11 votes to 0, with 4 members abstaining.

46 Resolution 418 (1977), SCOR *Resolutions and Decisions* at 5, adopted unanimously. See Benneh (1993) 5 *ASICL Proc* 241 at 243. In 1985 the Security Council adopted a further resolution, calling for the following comprehensive measures against South Africa: (a) suspension of investments; (b) prohibition of the sale of Krugerrands; (c) restrictions of sport and cultural relations; (d) suspension of guaranteed export loans; (e) prohibition of new nuclear contracts; and (f) prohibition of the sale of computers that may be used by the army or police.

47 See Benneh (1993) 5 *ASICL Proc* 241 at 243, emphasis in original.

48 See eg Koechler in Barnaby (ed) (1991) at 238, Caron (1993) at 87 *AJIL* 552 and Hüfnerk (ed) (1995).

- Why should the victors of the Second World War still be in a dominant position in international affairs?
- Do the mechanisms in the Security Council reflect the democratic ideals of the organisation?
- Is the collective authority as exercised by the Security Council legitimate?

Possible ways of addressing the problem were identified: the veto system must be reformed, either through its abolition[49] or extension; the membership of the Council may be increased; and the influence of the General Assembly in the work of the Security Council can be enhanced. Whatever form the eventual reform will take, it has been accepted for some time that at least two African regional powers (Egypt and Nigeria)[50] should be allowed a more significant say if the Security Council is made more representative. Since its return as an esteemed member of the international community, South Africa has positioned itself as a third major African regional power.

The tension between African interests and the veto came to a head when Boutros-Ghali (an Egyptian) came up for election to a second term as Secretary-General in 1996.[51] All the permanent members of the Security Council, except the USA, supported him in the initial round. The three African countries that served as temporary members expressed their support for Boutros-Ghali. Despite this unanimity, the USA persisted in vetoing the candidature. In terms of UN practice, it has become accepted that the Secretary-General serves for two consecutive terms. It was generally agreed, also by the USA, that another candidate from Africa should be elected in Boutros-Ghali's place. With the election of Kofi Annan, a career diplomat of Ghanaian origin and previously under-Secretary-General for peacekeeping, the first sub-Saharan African was elevated to the highest position in the UN.[52]

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49 South African President Mandela has expressed his preference for its abolition: see "Scrap UN Veto - Mandela" (29 March 1997) *Pretoria News* at 4.

50 See Whittaker (1995) at 18.

51 Goshko "Boutros-Ghali won't go quietly" (22 - 28 November 1996) *Mail and Guardian*.

52 See Goshko "Soft-spoken man who gets things done" (20 - 23 December 1996) *Mail and Guardian* 18.

The UN Charter does not specifically provide for peacekeeping. Such operations are justified under the general rubric of its stated purpose to "maintain peace and security".[53] The UN's involvement in this regard may take different forms. On the one end of the scale lies monitoring, with minimal UN involvement. On the other end lies peace-enforcement, with the UN becoming actively involved in the conflict.[54] The middle ground is made up of numerous forms of peace-keeping, ranging from technical and humanitarian assistance, to overseeing cease-fires.

The UN's peace-keeping operations started off as "simply observation and interposition missions".[55] The peace-keeping mission to Congo ("ONUC") in 1960 was the first UN operation of its kind. Initially welcomed by most African States, ONUC came to be regarded as "an imperialistic instrument to subvert African independence".[56] This mission was a precursor to the UN's increasing involvement in internal conflicts, as opposed to inter-state wars. UNTAG, the UN mission to Namibia, marked the advent of more active UN participation in multi-disciplinary peace building, rather than attaining military objectives as part of peace-keeping. The UN missions became involved in the protection of human rights, humanitarian relief and election supervision. More importantly, also for the purpose of this study, this marks a shift away from the conference room to the reality of the situation itself.[57] This approach was also used to good effect in Mozambique, and with limited success in Angola and Rwanda.

After the end of the Cold War the link between peace-keeping and human rights was increasingly highlighted. In 1995, the then UN Secretary-General wrote that "any process whose goal is one of peace-keeping must take into account the human rights situation and aim to ensure the promotion and protection of those rights".[58] By that time, at least seven UN operations worldwide included an

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53 UN Charter art 1(1).

54 This is justified in terms of Chapter VI of the UN Charter.

55 Boutros Boutros-Ghali "Introduction" in *The UN and Human Rights 1945-1995* (1995) at 112.

56 Jonah in El-Ayouty (ed) (1994) 1 at 4.

57 See Brody (1994) 53 *ICJ Review* 1 at 1-2. In his view, the appointment of the UNHCHR as the first human rights "executive" is another signal of this shift in emphasis.

58 Boutros Boutros-Ghali (1995) at 113.

essential human rights component.[59] Some of the recent instances of UN peace-keeping in Africa will now be discussed in roughly chronological order of their establishment. The relevance to the realisation of human rights will also be considered.[60]

2.2.2.1 Namibia

The UN Security Council approved the establishment of the United Nations Transitional Assistance Group ("UNTAG") in 1978.[61] Its main function was to implement the provisions of Security Council Resolution 435, calling for free elections as the only way of resolving the dispute in Namibia. Martti Athisaari was appointed as the Secretary-General's special representative. More than 8 000 UN personnel were deployed. UNTAG oversaw the transition and elections, which culminated in Namibia becoming an independent state on 21 March 1990. The Namibian experience, in which the UN successfully acted as "midwife" in the birth process of a new state, indicated a new direction of involvement for the UN. In essence, it was a decolonisation operation, but it extended to a wide range of aspects to become "a highly successful process of peace-keeping, constitution making, and election (management)".[62]

2.2.2.2 Angola

When the warring parties drew up a peace accord in 1988, the UN became involved to oversee the withdrawal of Cuban troops.[63] The Security Council decided to send a mission, called the United Nations Angola Verification Mission ("UNAVEM") to perform this function. The UN remained involved thereafter. UNAVEM II, which followed the first mission, was involved in the subsequent election process, securing its fairness. Under the UN's monitoring eye the election took place in

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59 Boutros-Ghali (1995) at 113 cites UNTAG (Namibia), ONUSAL (El Salvador), UNTAC (Cambodia), ONUMOZ (Mozambique), UNPROFOR and UNCRO (former Yugoslavia) and MINUGUA (Guatemala).

60 On the Security Council's general involvement in human rights, see Bailey (1994).

61 Whittaker (1995) at 204 - 213.

62 Andemichael in El-Ayouty (ed) (1994) 119 at 123.

63 For a discussion of UNAVEM I and II see Sinjela *et al* (1994) 2 *AYBIL* 181 at 195.

September 1992, and was certified as free and fair by the Secretary-General's special representative. The incumbent (Eduardo Dos Santos) secured almost 50% of the vote in the presidential elections, followed by 40% by Jonas Savimbi (the leader of National Union for the Total Independence of Angola ("UNITA")).[64] In the election for seats in the legislature, the MPLA obtained 129, followed by the 70 of UNITA. UNITA made allegations of fraud, contesting the finding that the elections were free and fair, and returned to hostilities.

After a protracted process to restore peace, the parties agreed on the Lusaka Protocol, which they signed on 20 November 1994. Pursuant hereto, the UN Security Council decided to set up a peace-keeping force to oversee the process of restoring peace and national reconciliation in Angola. In terms of its resolution, UNAVEM III was set up. About 7200 military and 500 civilian personnel were deployed. One of the main functions of UNAVEM III, and the Secretary-General's special representative, was the implementation of the principles of national reconciliation. The "special status" accorded to UNITA leader Jonas Savimbi took a long time to be resolved. A Summit of the SADC Organ on Politics, Defence and Security called on Savimbi to fulfil his commitments under the Lusaka Protocol.[65]

The main aim of the Lusaka Protocol is to bring about a government of national unity. But concern for human rights is stipulated in the Protocol as being integral to the process of national reconciliation. In terms of Annex 6, I. 4 (b) "national reconciliation" implies "respect for the rules of the constitutional state, the basic human rights and civil liberties, as defined by the prevailing national legislation and by the various international legal instruments to which Angola adheres ...". This emphasis was incorporated into UNAVEM III's mandate. According to the empowering resolution, the Security Council "expresses satisfaction that the Secretary-General intends to include human rights experts in the political component of UNAVEM III, to observe the implementation of the provisions in the Protocol relating to national reconciliation".[66]

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64 The acronym "UNITA" refers to the Portuguese version of the organisation's name, "União Nacional para a Independência Total de Angola".

65 See Communiqué of Summit, issued on 2 October 1996.

66 SC Resolution 976 (1995).

A Human Rights Unit was established soon after the adoption of the resolution. The Unit consists of a chief and deputy, as well as ten experts deployed in different provinces. The European Union supports six of these experts. The main functions[67] of the Unit are sensitisation,[68] education,[69] assistance,[70] protection[71] and co-operation towards legal reform.[72]

Other UN agencies also contributed to the UN's efforts in Angola. The effects of the prolonged civil war left many Angolans in need of humanitarian assistance. The UN Humanitarian Assistance Co-ordination Unit was established in 1993 to co-ordinate these efforts. This involved providing in the socio-economic needs of people. In this regard, the UN's World Food Programme ("WFP") distributed relief assistance to about 3.5 million war-affected people in 1993-94.

The UN contributed significantly to the creation of a Government of Unity and National Reconciliation ("GUNR"). Despite the fact that its members were sworn in on 11 April 1997, the situation in Angola has not stabilised completely.[73]

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67 The discussion that follows is based on information contained in (1996) UNAVEM Report on the Human Rights Situation, (1996) UNAVEM III General Overview of the Activities of UNAVEM III in Human Rights, and interviews with members of the UN Human Rights Unit, December 1996, Luanda.

68 To change the national ethos on human rights a National Seminar on Human Rights was held in the National Assembly. Representatives of the state and of UNITA were present. The proceedings were televised live on television. The national seminar was followed by three regional seminars. At the end of each of these seminars pamphlets on human rights were distributed during a cultural event, incorporating traditional "African" practices of song and dance. The ten officers are responsible for creating an awareness of rights among the people in the various areas.

69 More formal human rights education is undertaken by presenting lectures to school children, and members of the police and prison services.

70 This function developed pragmatically. A major problem identified is the disintegration of the judicial system. Without a functioning legal system, violations of human rights cannot be redressed. The court system has to be rehabilitated. Without courts able to redress wrongs, knowledge and consciousness of rights will be to little avail. Assistance to reunify dispersed families was also rendered.

71 Individuals can complain to the Human Rights Unit. On 31 October 1995 54 complaints had been received. Most of these complaints related to the right to life and to liberty.

72 Apart from its principally political mission, UNAVEM also assists in the improvement of the judicial system. This entails, amongst others, legislative reform of the penal system.

73 (1997) *Africa Research Bulletin* at 12639.

2.2.2.3 *Mozambique*

Independence in Mozambique was followed by a protracted civil war involving government forces ("FRELIMO"), and rebels ("RENAMO").

After the parties had signed a peace agreement in Rome on 4 October 1992, the UN became involved in securing implementation.[74] A UN force, the United Nations Operation in Mozambique ("ONUMOZ") was established on 16 December 1992. By early 1995 its mandate expired. The intervening period saw ONUMOZ contributing in various respects:

- Forces were demobilised.
- Multi-party elections were held.[75] The dates of the voting were extended to allow RENAMO members to vote, following RENAMO's last minute decision to participate in the elections. The Secretary-General and President of the Security Council used their good offices to attain this positive result.
- Vast areas were de-mined.

The contribution of the UN in Mozambique is reminiscent of its success in Namibia. In both cases, its participation ended a cycle of violence, spared loss of human life, and helped to establish viable state institutions. If human rights realisation starts with hope, a first step towards this goal was taken under UNUMOZ.

2.2.2.4 *Somalia*

After Said Barré was ousted in 1991, a severe civil war erupted in Somalia. The UN sent an observer mission, the United Nations Observer Mission in Somalia ("UNOSOM"). After

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74 See, on the process of UN involvement, Sinjela (1996) 4 *AYBIL* 285 at 310 - 317.

75 The Secretary-General appointed judges to the international Mozambique Electoral Tribunal in 1994 (see Sinjela (1995) 3 *AYBIL* 285 at 310).

conditions necessitated becoming actively involved to provide a secure environment for humanitarian relief, the mission was strengthened and converted into the United Nations Task Force ("UNITAF"). This clearly changed the role into peace-enforcement. UNOSOM II was later established to assist in the process of reconciliation.[76] Inter-clan fighting persisted. UN peace-keepers had been threatened and even attacked. This force was a failure, and withdrew in 1995. The Somali experience shows that the UN is powerless in situations where infrastructures have broken down, and where parties actively oppose its actions.

2.2.2.5 Liberia

In Liberia, for the first time, the UN co-ordinated its efforts with that of a regional force already involved in a conflict.[77] A number of West African states, under the auspices of ECOWAS, established the West Africa Military Observer Group ("ECOMOG"). In 1993 the UN established the UN Observer Mission in Liberia ("UNOMIL") to work with ECOMOG towards the implementation of the Cotonou Peace Agreement signed between the Liberian parties in July 1993.[78] Initially, the parties failed to abide by the agreement between them. The mandate of UNOMIL was extended time and again. By 1995 the parties had installed the Council of State and had re-established a cease-fire which appeared to be holding. After a bloody relapse into violence in April 1996, a democratic election was eventually held in July 1997. One of the ex-war lords, Charles Taylor, won the Presidential election when he secured more than 75 per cent of the vote.[79]

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76 See Sinjela (1995) 3 *AYBIL* 363 - 368

77 See also ch 4.3.1 below.

78 For background information see Ouguergouz (1994) 2 *AYBIL* 210 and Sinjela (1995) 3 *AYBIL* 285 at 299 - 300. See, for more detail, ch 4.3.1 below.

79 See Ankomah "At Last, Liberia has a President" (1997) Sept *New African* at 14 - 15.

2.2.2.6 *Rwanda*

Even prior to the violence erupting in April 1994, the UN was involved in Rwanda. Its involvement took the form of the UN Assistance Mission for Rwanda ("UNAMIR").[80] Its function was to oversee a cease-fire agreement between the interim government of Rwanda and the Rwanda Patriotic Front. UNAMIR was woefully inadequate to prevent ethnic violence, or to intervene. In fact, its size was reduced.

The UN's main contribution was made after the event, with the establishment of the International Tribunal for Rwanda. This followed the request by the Security Council in 1994 that the Secretary-General should establish an impartial Commission of Experts to investigate violations of human rights committed after 6 April 1994.[81]

Independent from UNAMIR, the UN also launched a human rights operation. A few human rights observers were deployed in August 1994, and grew to some 90 observers by January 1996.[82]

Their mandate included the following:[83]

- **Investigation** into the human rights violations that occurred between April and July 1994. In this respect, it assisted the work of the International Tribunal for Rwanda. It also provided assistance to the Commission of Experts. In addition, the data gathered by the human rights mission serve as a source of information to the Special Rapporteur on Rwanda, Réné Degni-Sègui, and thematic rapporteurs concerned with the situation in Rwanda.

- The human rights mission also aims to establish and develop a **human rights culture** in Rwanda.

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80 See Sinjela (1995) 3 *AYBIL* 285 at 318 - 362, and Mubiala (1995) 3 *AYBIL* 277.

81 Resolution 935 (1994).

82 See Mubiala (1995) 3 *AYBIL* 277 at 281.

83 *Ibid.*

- To attain these objectives, observers give "**technical assistance**", which consists of educational programmes and improvement of infrastructure. By rebuilding faith in the rule of law and human rights, a recurrence of the tragic events may be prevented.

UN involvement in Rwanda has undergone a shift in approach. Initially, military objectives such as peace-keeping and cease-fires were aimed at. This was replaced by longer-lasting, prospective objectives, such as peace-building and promotion of human rights. This illustrates a general shift in the UN away form "peace-keeping" to a "field approach", which entails continuous involvement at grassroots-level.

2.2.2.7 Western Sahara

A broader context to the United Nations Mission for the Referendum in Western Sahara ("MINURSO") will be given below.[84] The aim of MINURSO is to assist in holding a referendum in which the inhabitants of the Western Sahara can choose between independence and Moroccan rule. Its main activity has been to identify and register potential voters. Various factors of a technical and political nature have caused delay. The mandate of MINURSO has been extended time and again. The referendum, initially planned for 1992, has not taken place yet.[85]

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84 See par (c)(ii) below, and Sinjela (1995) 3 *AYBIL* 285 at 369 - 375.

85 In April 1997, James Baker, newly appointed head of the UN mission, undertook an evaluation mission to the area. He cautioned that a final decision about the fate of the former Spanish colony is still far off ((1997) 34 *Africa Research Bulletin* at 12635.

2.2.3 Africa and the ICJ

2.2.3.1 General

The International Court of Justice ("ICJ") is established in the UN Charter as one of the UN's principal organs.[86] It was established in 1946 to replace the Permanent Court of International Justice ("PCIJ"). Potentially, human rights may be realised in the exercise of the Court's competence to resolve inter-state disputes (its contentious jurisdiction) and to render advisory opinions (its advisory jurisdiction).

Initially African states viewed the ICJ with suspicion. After independence, a conciliatory mechanism for the resolution of inter-African disputes was put in place. Diplomatic means were preferred to judicial means of resolving disputes. This preference was explained with reference to a historically founded claim that the traditional way of settling differences was characterised by conciliation and consultation. While such claims may be made for a variety of reasons, they frequently conceal a jealous protection of state sovereignty.[87] The general sentiment that the ICJ was conservative and espoused a Eurocentric philosophy was exacerbated by the Court's 1966 judgment in the South West Africa case.[88] The effect of the 1971 judgment on South West Africa did much to turn the tide.

Africa's enhanced role in the mainstream of international affairs, its increased self-confidence and faith in and contribution to international law, is reflected in the acceptance of the ICJ's jurisdiction by African states.[89] In the period 1947 to 1979 a total of 46 cases were dealt with by the ICJ. African states were involved in only four of these, or 9% of the total number of cases. In the term 1980 to 1993 20 cases were placed on the ICJ's roll. The percentage of cases in which African

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86 Art 92 of the Charter.

87 Mubiala (1995) 3 *AYBIL* 173 at 175.

88 *South West Africa Case, Second Phase* 1966 ICJ Reports 6.

89 Data extracted from ICJ Yearbooks.

states were involved, rose to 40% (8 out of 20). Since 1993, at least two more cases were placed on the Court's roll.[90]

This trend towards greater participation is also evident from the profile of judges appointed to the ICJ. Fifteen judges serve on the Court. On 31 July 1993 three judges were from African states. They were M Bedjaoui (Algeria, whose term expired on 5 February 1997), R Ranjeva (Madagascar, whose term expires on 5 February 2000) and B A Ajibola (Nigeria; his term has expired on 5 February 1994). Judge Koroka from Sierra Leone was subsequently elected in the place of judge Ajibola and judge Bedjaoui was re-elected. In recent times, African judges therefore consistently make up 20% of the Court's membership. In the preceding years (1946 to 1993), a total of seven African judges had been chosen. Expressed as a percentage, that represented 12% (7 of 59) of all the judges selected in that period. Although this percentage has increased in recent times, there still is a discrepancy between African membership of the UN (which stands at 28,8%, or 53 out of 185) and African representation on the ICJ.

In 1979, an African jurist, TO Elias (from Nigeria), was the first African to be elected as Vice-President of the ICJ.[91] He served as the first African President thereafter, from 1982 to 1985. Judge Kéba M'Baye (from Senegal) was the next African Vice-President, serving in that capacity between 1988 and 1991. The term of the next African to hold the position of President, judge Bedjaoui, expired early in 1997.

The role of the ICJ in the realisation of human rights in Africa will now be investigated in respect of its contentious and advisory jurisdiction.

2.2.3.2 Contentious jurisdiction

The ICJ has not been created as a human rights court. The absence of the possibility of recourse to the Court by individuals and NGOs underlines the emphasis on inter-state relations, rather than on

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90 See cases xiii and xiv discussed in par (b) below.

91 *ICJ Yearbook 1992-1993* 9 - 13, where a list of current and previous members of the ICJ appears.

individual redress. However, many of the judgments handed down in the exercise of its contentious jurisdiction had and still have human rights implications. Writing about human rights in the international Court in 1991, Schwebel[92] highlighted eight cases decided by the Permanent Court of International Justice, and thirteen judgments by the ICJ. Schwebel concluded that the ICJ has been an instrumental force in the **progressive development of international human rights law**. As for cases involving African states, he referred to **advisory opinions** in only two instances, the South West African/Namibia cases and the Western Sahara case. To investigate the validity for Africa specifically of Schwebel's general statement, the role of the ICJ in the development of African human rights law is now investigated with reference to **each of its fourteen judgments in contentious cases** involving African states:

i *Protection of French Nationals and Protected Persons in Egypt (France v Egypt)*[93]

France approached the Court to protect some of its nationals in Egypt who had been affected by measures adopted by the Egyptian government in relation to their property and persons. After these proceedings had been instituted, Egypt desisted from effecting the measures. The case was withdrawn from the Court's list, illustrating the deterrent effect of a potential judicial resolution of a dispute.

ii *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*[94]

As Dugard pointed out, Ethiopia and Liberia brought proceedings before the ICJ primarily to have the world Court declare that the policy of apartheid applied in Namibia had violated the mandate in terms of which South Africa administered that country since 1920.[95] It is not coincidental that these two states approached the Court. They were the two African states that had never been colonised, giving them the "moral standing" to institute these proceedings. In its first judgment on the issue, the Court narrowly rejected South Africa's preliminary objection about the jurisdiction of

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92 Schwebel (1991) 24 *Vanderbilt Jnl of Transnational Law* 945.

93 1950 ICJ Reports 59.

94 *South West Africa Case, Preliminary Objections* 1962 ICJ Reports 319; *South West Africa Case*, Second Phase 1966 ICJ Reports 6.

95 (1996) 8 *RADIC* 549 at 549-550.

the Court.[96] Four years later, in 1966, the Court held that the applicants had not established any legal right or interest in the resolution of the dispute.[97] The Court's judgment, finding that they lacked "judicial" standing to bring the case, meant that the Court did not have to address the merits of the claim.[98] Especially the ICJ's reluctance to condemn apartheid as a violation of the mandate and "thereby to advance the liberation of South West Africa/Namibia", was criticised.[99] The other ground for criticism was the implication that a narrow concept of state sovereignty prevailed above broader considerations of the advancement of human rights. The effect of this judgment was ameliorated by an advisory opinion given by the Court five years later.[100]

iii *Northern Cameroons (Cameroons v United Kingdom)*[101]

On popular demand a plebiscite was held to determine whether part of Cameroon should be incorporated into Nigeria. The result was that the Northern Cameroons were attached to Nigeria. The UN General Assembly adopted a resolution accepting the outcome of the popular vote. Cameroon approached the Court, arguing that Nigeria had violated its trustee agreement. The ICJ decided that it could not adjudicate on the merits of the claim, as it could not overturn the de facto position, recognised by the General Assembly.

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96 *South West Africa* 1962 ICJ Reports 319, with a margin of eight votes to seven.

97 *South West Africa, Second Phase* 1966 ICJ Reports 6 at 51. The Court regarded their claim as an *actio popularis*. The applicants lacked standing because this action was "not known to international law as it" then stood and was not imported into the body of international law by "general principles of law" (at 47).

98 *South West Africa, Second Phase* 1966 ICJ Reports 6.

99 See Dugard (1996) 8 *RADIC* at 549 at 551.

100 See the excerpt from the judgment revealing a very legal positivistic approach: 1966 Reports 6 at 34 (at par 49): "Throughout this case it has been suggested, directly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered."

101 1963 ICJ Reports 15.

iv *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*[102]

A dispute arose concerning what part of the continental shelf appertained to which state. The Court decided the issue with reference to principles of equity and proportionality. Malta's attempt to intervene was rejected.

v *Continental Shelf (Libyan Arab Jamahiriya v Malta)*[103]

Subsequently, a case was submitted to the ICJ related to the delimitation of areas of the continental shelf appertaining to Libya and Malta. Adopting a number of equitable principles, the Court delimited the areas in the light of the relevant circumstances.[104]

vi *Frontier Dispute (Burkina Faso v Mali)*[105]

This case concerned the disputed ownership of the "Agacher Strip", situated on the border between Burkina Faso and Mali.[106] The area was disputed ever since the countries attained independence in 1960. The conflict intensified when armed conflict broke out in 1974. Mediation under OAU auspices did not succeed, and the two parties consented to the Court's jurisdiction. Before the Court could decide on the merits of the case, renewed hostilities broke out. Both parties applied to the Court to give a ruling on provisional measures. The Court ordered that the parties must observe the cease-fire, and that they must agree on the terms of withdrawal within twenty days.[107] In the case of failure by the parties to reach an agreement, the Court would make its own order determining the terms of withdrawal. The parties complied with the order and devised their own terms. According to Akande this case illustrates "the positive and influential role the International Court can play in the settlement of disputes directly threatening the peace".[108] As for the

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102 1979 ICJ Reports 3, 1980 ICJ Reports 70, 1981 ICJ Reports 3, 1982 ICJ Reports 18.

103 1982 ICJ Reports 554, 1983 ICJ Reports 3, 1985 ICJ Reports 13.

104 See, generally, Singh (1989) at 418.

105 *Frontier Dispute Case (Burkina Faso/Mali)* 1986 ICJ Reports 554.

106 For some background, see Akanda (1996) 8 *RADIC* 592 at 607-608.

107 *Frontier Dispute Case (Burkina Faso/Mali) Provisional Measures*, Order dated 10 January 1986, 1986 ICJ Reports 3.

108 Akande (1996) 8 *RADIC* 592 at 608.

provisional matters, the Court's order facilitated an almost immediate and stable resolution of the conflict. As for the decision on the merits, the Court "settled decisively a dispute that had twice resulted in armed conflict between the parties".[109] As far as the merits of the case are concerned, the principle of *uti possidetis* (respect for and upholding of colonial borders) was affirmed.[110]

vii *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiryia)*[111]

Tunisia approached the Court in connection with the judgment given in the case concerning the continental shelf. It contended that the Court had to determine more precisely the most westerly point of the Gulf of Gabes. The Court found that such a need had not been shown to exist.

viii *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*[112]

Judgment in this matter was given on 12 November 1991. In terms of an agreement between France and Portugal, the maritime border between Senegal and Guinea-Bissau was established in 1960. A dispute arose about delimitation. At first the parties negotiated. An Arbitration Agreement was then entered into, in terms of which an Arbitration Tribunal was established. The

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109 *Ibid.*

110 Both parties complied with the judgment. The implication of the ICJ judgment was to strengthen the sovereignty of the independent African states by judicially fixing the colonial frontiers. The Court observed that the "maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice"(1986 ICJ Reports 554 at 564). State sovereignty was further enhanced by the court's restrictive interpretation of the principle of "self-determination of peoples". The concept "peoples" was linked to those inhabiting the territory of a legitimately recognised state: "The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African states judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples" (1986 ICJ Reports 554 at 567).

111 1985 ICJ Reports 192. See also "UN: Secretary-General's Report concerning the Agreement on the Implementation of the ICJ Judgment concerning the Territorial Dispute between Chad and Libya" (1994) 6 *RADIC* 521 at 522.

112 See (1992) 31 *ILM* 32.

tribunal made an arbitral award in 1989. For reasons not discussed here, Guinea-Bissau argued that the award should be declared inexistant, or null and void. The ICJ, with a 12 to 3 vote, found that the award was valid and binding.

ix *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*[113]

Judgment in this matter was given on 3 February 1994. The Court effectively found that the disputed "Aouzou Strip" was part of Chad. The aftermath of the ICJ's decision show the extent to which the states accepted the Court's settlement of the dispute.[114] Both governments pledged to abide by the judgment in letters addressed to the Secretary-General of the UN.[115] It is encouraging to note that the **humanity of the ordinary persons** affected by the Court's resolution of the dispute is not negated. The UN reconnaissance team expressed its concern about the welfare of about 4 000 inhabitants of the Strip, who were dependent on Libyan support to make a living. The Secretary-General sketched the following solution: "In consultation with the Department of Humanitarian Affairs, it is envisaged that a representative of the UN Development Programme could assist the team in the potential humanitarian dimension of the situation".[116]

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113 See (1995) 100 *ILR* 1.

114 Akande regards this case as a demonstration that the ICJ "does have a role to play in the maintenance of peace" ((1996) 8 *RADIC* 592 at 609). Remarkable in this instance, in my view, are two facts: the disputed area was very substantial, and Libya had been occupying the area for more than twenty years. Despite these factors, Libya complied with the judgment.

115 "UN: Secretary-General's Report concerning the Agreement on the Implementation of the ICJ Judgment concerning the Territorial Dispute between Chad and Libya"(1994) *RADIC* 521. The Secretary-General's report details that "an agreement was signed on 4 April 1994 at Surt, Libyan Arab Jamahiriya, establishing the practical modalities for the implementation of the ICJ Judgment". Article 1 provides for the withdrawal of the Libyan administration. Other aspects dealt with are removal of mines, crossing points for persons and property, and demarcation of the boundary. A UN Reconnaissance Team was sent to ascertain whether it would be possible to deploy UN observers to oversee an orderly withdrawal. Following their positive finding, the UN Aouzou Strip Observer Group ("UNASOG") was established and deployed.

116 "UN: Secretary-General's Report concerning the Agreement on the Implementation of the ICJ Judgment concerning the Territorial Dispute between Chad and Libya" 6 *RADIC* (1994) 521 524.

x *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)*

The case was instituted by Guinea-Bissau in respect of the Court's previous judgment on the issue. When the parties reached agreement, Guinea-Bissau withdrew the case.[117]

xi *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Dispute at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*

The case is still pending.

xii *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Dispute at Lockerbie (Libyan Arab Jamahiriya v United States of America)*

The case is still pending.

xiii *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)*[118]

In 1994 Cameroon instituted proceedings against Nigeria in respect of the Bakassi peninsula, an area presumed to contain rich oil reserves. Aggression which led to the killing of people on the peninsula has prompted a request for provisional measures. In terms thereof the parties should ensure "that no action of any kind, and particularly no action by their armed forces, is taken"[119] which may prejudice vested rights or aggravate the dispute. The case on the merits is still pending.

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117 See web page http://www.law.cornell.edu/icj/reports/report96.htm.

118 See "African Legal Materials" (1996) 8 *RADIC* 671 for the order on provisional measures, dated 15 March 1966.

119 At 681 (par 1 of the court's judgment).

xiv *Botswana/Namibia* [120]

On 29 May 1996 the governments of Botswana and Namibia notified the registrar of the ICJ that they are submitting a dispute for the Court's determination.[121] The Court is requested to determine the boundary between Botswana and Namibia around the Kasikili (or Sedudu) island and the legal status of that island. In terms of the special agreement between the parties, the Court's finding will be final and binding, and the parties undertake to carry out the Court's judgment.[122] The case on the merits is still pending. This dispute is ostensibly concerned with a worthless island in the Chobe river, but its resolution may have a profound influence on access to water resources.[123]

2.2.3.3 Advisory jurisdiction

As far as advisory opinions are concerned, it is important to note that only public international organisations may approach the Court for advisory opinions. Many of these opinions have had a direct or more indirect impact on Africa. As far as human rights are concerned, three issues stand out, and are now discusssed.

i *Peacekeeping in Congo*

In the advisory opinion on Certain Expenses of the UN[124] the Court decided that expenses incurred as a result of operations in Congo (and the Middle East) were "expenses of the organisation". In effect, this decision gave retrospective validity to the operations in the Congo, the first time the UN endeavoured to undertake such operations. This established the legal basis of the operation, and enabled similar steps in the future.

ii *Western Sahara*

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120 For a discussion, see Maluwa (1993) 5 *RADIC* 113.

121 See "Botswana and Namibia Bring a Case before the Court" (1996) 8 *RADIC* 749.

122 *Ibid.*

123 Rake "Water Wars" (April 1997) *New African* 15.

124 1962 ICJ Reports 151.

The UN General Assembly referred the following two questions to the Court for its determination:

- When the Spanish colonised the Western Sahara (Rio de Oro and Sakiet el Hamra), was the territory *terra nullius*?
- If not, what are the respective legal claims of Mauritania and Morocco to the territory?

Finding that the territory was not *terra nullius* at the time of initial occupation, the Court proceeded to the second question. The historical claims of Moroccan and Mauritanian sultans and emirs as a basis on which the Saharan tribes owe them sovereign allegiance, were rejected by the ICJ.[125] In its judgment, the Court referred to the right of the population of the territory to "determine their future political status by their own freely expressed will".[126] The right to self-determination was given strong impetus by the finding of the Court. The ICJ expressed its approval of the application of the "principle of self-determination through the free and genuine expression of the will of the peoples of the Territory".[127] Immediately after the ICJ decision, the Moroccan king, Hassan II, raised a civil army and undertook the "Green March". The ensuing events resulted in Spain's capitulation, and led to a division of the Western Sahara between Morocco and Mauritania,[128] and is causally linked to Morocco's withdrawal from the OAU in 1984.[129]

Its 1975 advisory opinion, which affirmed the right of the Saharawi people to decide on their own future through a referendum, forms the basis of the present position in the Western Sahara. In 1994, the UN deployed the MINURSO (the UN Mission for the Referendum in Western Sahara).

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125 *Advisory Opinion on Western Sahara* 1975 ICJ Reports: Although the Court found that the "Western Sahara" was not *terra nullius* at the time of colonisation, and that both Morocco and Mauritania had shown "legal ties of allegiance", neither of the two proved a tie to "territorial sovereignty". See Amankwah (1981) 14 *CILSA* 34.

126 1975 ICJ Reports 12 at 36.

127 1975 ICJ Reports 12 at 68.

128 See Naldi (1989) at 47.

129 Abedajo "Referendum dilemma for the Children of the Clouds" *Africa Today* (1996) 32 at 33.

iii South West Africa/Namibia

Advisory opinions on the international status of South West Africa[130] and related issues[131] were issued by the Court. Following the 1966 ICJ judgment, the UN General Assembly decided that South Africa's mandate over South West Africa had been terminated. In terms of a resultant Security Council resolution South Africa's continued presence in the territory was declared illegal.[132] States were obliged to refrain from recognising the illegal presence of South Africa. Despite these resolutions, South Africa continued its mandate. The Security Council requested an advisory opinion from the ICJ on South Africa's continued presence. The Court, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[133] confirmed the stance of the General Assembly and the Security Council.

The thrust of South Africa's objection against the General Assembly resolution was that a detailed factual investigation should have preceded any finding that South Africa was not fulfilling its obligations. The Court observed that it was common cause that the policy of South Africa in the territory was to "achieve the complete separation of races and ethnic groups in separate areas within the Territory".[134] No factual investigation was required. The Court then found: "To establish..., and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental rights is a flagrant violation of the purposes and principles of the Charter".[135]

Schwelb elaborated on the significance of this decision for international human rights law.[136] It marks the clearest indication to that date that the UN Charter as such imposes legal obligations in the field of human rights on its members. In the absence of the numerous human rights treaties to which many states are parties today, seeking the basis for such an obligation in the UN Charter

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130 1950 ICJ Reports 128.

131 See 1955 ICJ Reports 67 and 1956 ICJ Reports 23.

132 Resolution 276 (1970).

133 1971 ICJ Reports 16.

134 1971 ICJ Reports 16 at 58.

135 1971 ICJ Reports 16 at 56-57.

was significant. Extrapolating the judgment, it means that policies entailing apartheid, discrimination or segregation as such are violating the UN Charter, wherever they are implemented. This laid the foundation for stronger steps against South Africa itself, even if it had not ratified any other international human rights treaty.[137] On a more universal scope, it edged away at the sacrosanct principle that internal or domestic affairs are beyond the scope of international concern.

2.2.3.4 Conclusion

Through its interpretation (and acceptance) of these claims the Court gained legitimacy in Africa. Again, ironically, as the Court clearly recognised the sovereignty of the African states, they became more prepared to submit to the jurisdiction of the Court to resolve disputes affecting their sovereignty. Numerous other decisions indicate what the importance to human rights realisation in Africa of an international tribunal had been and can be.

But the role of the ICJ in relation to human rights realisation will remain limited. The ICJ provides a forum to states for the resolution of dispute between them. Although its jurisdiction may potentially be extended to the violation of human rights by another state, experience has learnt that states are reluctant to initiate such action. States are more likely to approach the Court in matters of political prestige and in cases involving territorial disputes. Only by allowing for individual complaints to the ICJ, will this trend be changed. As this possibility seems improbable, the ICJ is likely to remain a static and state-centred institution. The human rights impact of ICJ decisions is incidental or coincidental. Its limited impact accentuates the need for the existence of other international bodies to further the global human rights project.

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136 Schwelb (1972) 66 *AJIL* 337 at 348-349.

137 As the case was, South Africa abstained in the 1948 vote on the Universal Declaration.

2.2.4 The UN Human Rights Commission

One of the first actions undertaken by ECOSOC was to set up the Human Rights Commission, as mandated by article 68 of the UN Charter.[138] The main accomplishment of the UN Human Rights Commission ("UNHRC") is the elaboration and near-universal acceptance of the three major international human rights instruments: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights ("CCPR") (1966) and the International Covenant on Economic, Social and Cultural Rights ("CESCR") (1966).[139] The Commission was also instrumental in the process of drafting other human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").

The UNHRC does not consist of independent experts, but is made up of 54 "instructed governmental representatives".[140] The political bias of representatives is more likely to arise in such circumstances.

While the UNHRC initially worked primarily towards human rights promotion, it is now involved in efforts to deal with human rights violations. Its approach started off as **country-oriented**, with the appointment of *ad hoc* rapporteurs, called "Special Rapporteurs". In the 1980s it broadened its approach to make provision for **thematic rapporteurs**, such as the Special Rapporteurs on religious intolerance and mercenarism. An ever-expanding network of working groups and rapporteurs serves as the vehicle in the process of human rights realisation.[141] Many of these are involved with Africa. At the UNHRC's 1996 session, for example, Special Rapporteurs on Equatorial-Guinea,[142] Burundi,[143] Rwanda[144] and Zaïre[145] reported; an independent expert on

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138 In terms of this article, ECOSOC "shall set up commissions in economic and social fields and for the promotion of human rights...". This was done in respect of the UNHRC in 1946.

139 Sometimes referred to as the international Bill of Rights.

140 Boekle (1995) 13 *NQHR* 367 at 368.

141 See Buergenthal (1995) at 81.

142 See report of Special Rapporteur in E/CN.4/1996/67/Add 1.

143 See UN document E/CN.4/1996/15, and web site http://www. law.uc.edu:81/dynaweb/ecn.4_96/0007n.

144 See UN document E/CN.4/1996/7.

145 See UN document E/CN.4/1996/66, and web site http://www.law.uc.edu:81/dynaweb/ecn4_96/0006r.

Somalia gave feed-back,[146] and the work of the Special Rapporteurs on Extra-Judicial, Summary and Arbitrary Executions, as well as the Special rapporteur on Torture, touched on numerous African cases.[147] In the 1990s, the Commission started to emphasise a field approach, in trying to help restore faith in and rebuilt state institutions.[148]

At the Commission's 1997 session, the mandate of the Special Rapporteur for Rwanda, René Degni-Ségui, was discontinued. This resulted from concerted efforts by the Rwandan government to have his mandate terminated.[149]

As far as human rights violations are concerned, two different routes may be used to approach the UNHRC:

2.2.4.1 "1235 Procedure"

Despite the fact that large numbers of communications requesting UN intervention in human rights matters have been received annually, the UNHRC decided in 1947 that it had no power to act on the basis of such complaints.[150] This position was changed in 1967, when ECOSOC decided on resolution 1235, which permits the Commission to examine gross human rights violations.[151] The role which the situation in South Africa played in the adoption of this resolution is immediately apparent from its wording, in terms of which the Commission and its sub-commission is empowered to "examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of *apartheid* as practised in the Republic of South Africa".[152]

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146 See the report E/CN.4/1996/14.

147 See the report on Togo, E/CN.4/1996/89, on web site http://www.law.uc.edu:81/dynaweb/ecn.4_96/0007n.

148 See Mubiala (1995) 3 *AYBIL* 277.

149 See "A Confrontational UN Commission on Human Rights" (1997) 7 *Libertas* (newsletter of the International Centre for Human Rights and Democratic Development) at 8.

150 See Buergenthal (1995) at 87.

151 Adopted on 6 June 1967.

152 Quoted in Buergenthal (1995) at 89, emphasis in original.

The 1235 procedure does not require the initiative of an individual complainant. The procedure is **public and non-confidential**. In terms of the 1235 procedure, the Commission has been conducting country-based investigations of gross human rights violations. Boekle tabulates 37 instances in which the UNHRC adopted 1235 procedure measures between 1967 and 1995.[153] Of the total, 14 involve African countries. The first three, predating 1980, relate to situations of racial discrimination, colonial oppression and denial of self-determination. South Africa is not only the first African country to be investigated, but triggered the whole procedure into motion. South Africa remained on the agenda from 1967 to 1995. An *ad hoc* Working Group on Southern Africa was also established by the UNHRC. The other two pre-1980 investigations also targeted countries in Southern Africa that still suffered under colonialism or its aftermath - Rhodesia and the Portuguese colonies Angola and Mozambique. The mandate of the *ad hoc* Working Group on Southern Africa included the monitoring of the situation in Rhodesia and the Portuguese colonies.

The next African situation to be investigated was that in the Western Sahara, in 1980. This issue remains on the UNHRC's agenda. Equatorial Guinea has been a focus of attention since 1980, as well. An expert-investigation was conducted in both 1980 and 1984, followed by a report from the UN Secretary-General (1983 - 1984). A Special Rapporteur for that country was appointed in 1993. Severe atrocities and human rights violations in the Central African Republic and Uganda during the early 1980s caused the UNHRC to place these two countries on its agenda. No measures were however taken in any of these instances.

The situations in seven African states have been investigated since then. These countries are Sudan, Togo, Zaïre (all three for the first time on the agenda in 1993), Burundi, Angola (both since 1994), Rwanda (since 1995) and Nigeria (since the Commission's 53rd session, held in April 1997).[154] Two different types of measures have been employed in these cases. On the one hand, a

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153 (1995) 13 *NQHR* 367 at 378. The analysis that follows is based on Table 2, "Country-specific CHR resolutions and monitoring measures under the 1235 Procedure, 1967 - 1995".

154 See (June-July 1997) 18 *African Topics* 32. In the vote on the appointment of a Special Rapporteur on Nigeria, only two African states were amongst the 28 members in favour of the appointment. These states were South Africa and Uganda. Ten African states abstained, while three more or less neighbouring states (Benin, Gabon and Zaïre) joined China, Cuba and Indonesia in voting against it.

report by the UN Secretary-General was compiled and presented. On the other hand, Special Rapporteurs were appointed.[155]

2.2.4.2 "1503 Procedure"

The other possibility is the 1503 procedure, established through ECOSOC Resolution 1503.[156] An **individual complaining of the violation of his or her rights** sets this process in motion. The Commission may act by conducting a thorough study or by appointing an *ad hoc* committee to investigate.

Two factors minimise the role of the UNHRC in this regard. Firstly, the procedure is couched in **secrecy**. Only the names of the relevant countries are announced after deliberations, without any details. Secondly, the procedure comes into play only after **domestic remedies** had been exhausted and procedures prescribed in international or regional instruments available to the individual, had been followed. However, the major strength of the procedure is that all member states of the UN are subject to scrutiny by the Commission, notwithstanding the fact that they may not have ratified any international human rights instruments.[157]

This procedure found application in a number of dictatorships in Africa, such as CAR, Equatorial Guinea and Uganda.[158] In 1996 the African "situations" on the "black list" were Chad, Mali and Sierra Leone.[159] General criticism about the lack of publicity also applied in these instances. The Commission went the furthest in a case concerning Malawi.

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155 In three of the cases.

156 Adopted on 27 May 1970.

157 See eg Kokott (1996) 8 *RADIC* 347 at 375.

158 (1980) 24 *ICJ Review* 34.

159 See Marks in Tessitore and Woolfson (eds) (1996) at 208.

2.2.5 The Sub-Commission on Prevention of Discrimination and Protection of Minorities

The Sub-Commission is a subordinate body of the Human Rights Commission and ECOSOC.[160] It consists of 26 experts elected by the Human Rights Commission. It provides analysis and advice to the Human Rights Commission. Initially, it was involved primarily in standard setting in the fields of discrimination and minority protection. After the adoption of the Universal Declaration, its mandate was extended to provide for undertaking of studies and making of recommendations to the UNHRC. A number of working groups have been established. Except for the working groups discussed below, the one on Communications and the other on the Rights of Indigenous Populations, should also be mentioned.

In the field of prevention of discrimination, numerous studies concerning South Africa were prepared. Recommendations which were implemented include the listing of organisations who dealt with the "colonial and racist regime" in South Africa.[161]

2.2.6 Working Groups of the Commission and Sub-Commission

2.2.6.1 The Working Group on Contemporary Forms of Slavery

In 1975 the UN Sub-Commission established a semi-permanent working group, called the Working Group on Slavery. Its function was to monitor "developments in the field of slavery and the slave trade in all their practices and manifestations".[162] From 1988, it has been known as the Working Group on Contemporary Forms of Slavery, conveying that the traditional understanding of slavery has been broadened. The working group consists of five experts chosen from the membership of

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160 See, in general, Eide in Alston (ed) (1992) 211.

161 Eide in Alston (ed) (1992) 211 at 218 - 219.

162 Eide in Alston (ed) (1992) 211 at 232.

the Sub-Commission. These experts meet annually for one week in Geneva to consider contemporary forms of slavery.

One African country that has featured consistently on the agenda of the working group is Mauritania.[163] Under pressure from the NGO Anti-Slavery International a UN delegation was sent to Mauritania. It subsequently made recommendations on the eradication of slavery, but they have not been implemented.

2.2.6.2 The Working Group on Arbitrary Detention

Two communications considered against African governments during 1994 illustrate the functioning and potential effect of this working group. Two citizens of Zaïre addressed a communication to the Working Group, concerning their detention without trial due to opposition against the Mobutu regime.[164] The communication was forwarded to the government. After 90 days had expired, no response was received. The Working group was left with no option but to proceed on the available information. After investigating the facts, the Working Group found that the detention was arbitrary, in contravention of articles 19 and 20 of the Universal Declaration and of articles 19 and 22 of the CCPR. It then requested the government of Zaïre to "take the necessary steps to remedy the situation in order to bring it into conformity with" the principles and provisions of the Universal Declaration and the CCPR.[165]

In a decision taken in September 1994, the Working Group found that two senior members of the South African National Congress ("ANC") had been arbitrarily detained prior to the formation of the "popular Government".[166] This constitutes a violation of the Universal Declaration and the CCPR. The Working Group requested the new government to "take note of this decision" and to

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163 See "Slavery in Mauritania" (1997) 7 *African HR Newsletter* at 7.

164 See Decision 4/1994 (Zaïre), UN document E/CN.4/1995/31/Add.1 at 59 - 60.

165 Par 9 of Decision 4/1994 (Zaïre), adopted on 18 May 1994.

166 Decision no 15/1994 (South Africa), UN document E/CN.4/1995/31/Add. 2 at 14 - 15.

"take such appropriate steps as it considers necessary to remedy the situation in order to bring it into conformity" with the provisions of the above-mentioned human rights instruments.[167]

2.3 *UN human rights treaty bodies*

In the near half-century since the adoption of the Universal Declaration **six major human rights treaties** have been adopted under the auspices of the UN. The first, adopted in 1965, was the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[168] Soon thereafter, in 1966, it was followed by the International Covenant on Civil and Political Rights ("CCPR")[169] and the International Covenant on Economic, Social and Cultural Rights ("CESCR").[170] The international human rights regime was further supplemented by the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (adopted in 1979),[171] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") (of 1984),[172] and, most recently, in 1989, by the Convention on the Rights of the Child ("CRC").[173] Each of these treaties, with the exception of the CESCR,[174] has established a treaty monitoring body in the form of a supervisory quasi-judicial institution, called a "committee".

These six treaties are by no means the only human rights instruments adopted under UN auspices. **Other human rights treaties** include the following: The Convention on the Suppression and Punishment of the Crime of Apartheid,[175] the Convention on the Prevention and Punishment of the

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167 Par 8 of Decision 15/1994, adopted on 28 September 1994.

168 UN Treaty Series vol 660 at 195, adopted on 21 December 1965, entered into force on 4 January 1969.

169 UN Treaty Series vol 999 at 171, adopted on 16 December 1966, entered into force on 23 March 1976.

170 UN Treaty Series vol 993 at 3, adopted on 16 December 1966, entered into force on 3 January 1976.

171 UN GA Res 34/180, UN doc A/34/46, adopted on 18 December 1979, entered into force on 3 September 1981.

172 UN GA Res 39/46, UN doc A/39/51, adopted on 10 December 1984, entered into force on 26 June 1987.

173 UN GA Res 44/25, adopted on 20 November 1989, entered into force on 2 September 1990.

174 See par 2.4.3 below.

175 UN Treaty Series vol 1015 at 243, adopted on 30 November 1973, entered into force on 18 July 1976.

Crime of Genocide,[176] the Convention on the Political Rights of Women,[177] the Convention on the Nationality of Married Women,[178] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[179] the Convention relating to the Status of Refugees[180] and the Protocol relating to the Status of Refugees.[181]

The **adherence of African states** to the six major and the other mentioned human rights instruments is set out in Table B below. To form a better impression of Africa's formal adherence to these instruments, in comparison with that of other continents or regions of the world, one must keep in mind that African states constitute nearly a quarter of the total number of states in the world. A total of 191 states in the world have ratified one or more of the international human rights instruments in Table B below.[182] The 54 African states represent 23% of that total number of states parties.[183] When ratifications by region is considered, the division of UN members into five regional units, as grouped together mainly for lobbying and electoral purposes, is adopted in this study. The five regions are the African, Asian, Eastern European, Latin American and Caribbean,

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176 UN Treaty Series vol 78 at 277, adopted on 9 December 1948, entered into force on 12 January 1951.

177 UN Treaty Series vol 193 at 135, adopted 20 December 1952, entered into force on 7 July 1954.

178 UN Treaty Series vol 309 at 65, adopted on 20 February 1957, entered into force on 11 August 1958.

179 UN Treaty Series vol 521 at 231, adopted on 10 December 1962, entered into force on 9 December 1964.

180 UN Treaty Series vol 189 at 137, adopted on 28 July 1951, entered into force on 22 April 1954.

181 UN Treaty Series vol 606 at 267, adopted on 31 January 1967, entered into force on 4 October 1967.

182 This is based on data collected by Marie (1996) 17 *HRLJ* 61. The total number includes both Morocco and the Saharawi Democratic Republic, bringing the possible number of African ratifications to 54.

183 The total number of African "states", 54, includes both Morocco and the Saharawi Arab Democratic Republic ("SADR").The OAU membership currently numbers 53. This excludes Morocco, who withdrew from the OAU when the SADR was admitted and took its seat at the OAU Assembly of Heads of State and Government in 1984. After the OAU had recognised the Saharawi Democratic Republic, Morocco withdrew as a member of the OAU. Morocco remains a member of the UN, though, while the Saharawi Democratic Republic has not been recognised as a UN member state. See Naldi (1989) at 49, also on the UN General Assembly's "low key" approach to this issue. The question of the statehood of the SADR is not canvassed here. Naldi argues that the four requirements of a permanent population, a defined territory, a stable and effective government and capacity to enter into international relations, are met (see Naldi (1989) at 62). The SADR was established by a unilateral declaration of independence by the Polisario Front on 27 February 1976.

and the "Western and Other" ("WEO") units. While the first four geographical groupings are more or less self-explanatory, the last is quite a diverse conglomerate of nations.[184]

Before the African role and contribution under each of the monitoring bodies is considered, some observations are made about the **treaty system in general**. Examination of state reports by treaty bodies is the main supervisory mechanism provided for under these treaties. In the light of the experience provided by almost thirty years of state reporting, one is forced to conclude that the system has not been very successful. Bayefsky listed the number of state reports due under the five major treaties at the end of 1992.[185] The total number of reports due in terms of CERD, stood at 336 (or 88% of the states parties). In the case of CEDAW, the number of reports due (112) exceeded the number already considered (92). More than 50% of the states parties to CESCR also had overdue reports under that treaty. The global trend to neglect reporting obligations is accentuated in respect of Africa. Of the "top ten" countries in Bayefsky's analysis (with the highest number of overdue reports) eight, Guinea, Uganda, Gabon, Liberia, Togo, Zaïre, Gambia and Cape Verde, were from Africa.[186]

2.3.1 The Committee on the Elimination of Racial Discrimination

2.3.1.1 Background

The first comprehensive and binding multilateral treaty concluded under UN auspices was the CERD. It was adopted on 21 December 1965.[187] Its adoption was preceded by a declaration on the

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184 The full list of WEO states is provided by Bayefsky in Henkin and Hargrove (eds) (1994) at 269 (n 43): They are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Turkey and the United Kingdom. The USA is considered to be a member of this group only for electoral purposes. Israel not a member of any regional group of the UN.

185 See data in Tables A, D E, gathered by Bayefsky in Henkin and Hargrove (eds) (1994) at 286 - 289.

186 Guyana and El Salvador were the non-African states on the list.

187 See general discussion by Partsch in Alston (ed) (1992) at 339.

same subject in 1963.[188] African states took the initiative on both occasions.[189] CERD was ratified by a sufficient number of states in just over three years. Of the 27 states that had ratified the instrument when it entered into force in January 1969, a majority (19) were from the "third world".[190]

A CERD Committee is instituted in terms of the treaty.[191] This Committee consists of eighteen independent experts, nominated and elected by member states.[192] The main functions of the Committee are four-fold:[193]

- It considers and evaluate "progress **reports**" presented to it by states parties within a year of ratification, and thereafter, every two years.[194]
- It considers **inter-state complaints**.[195] However, no formal inter-state complaint have as yet been submitted to the Committee.
- In the case of states that have accepted the Committee's jurisdiction to do so, it examines **communications submitted to it by individuals** or groups.[196]
- From 1993 the Committee has adopted an *ad hoc* procedure in which it takes the initiative to **investigate** the situation in states on the basis of actual or potential circumstances.[197]

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188 The Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly by resolution 1904 (IVIII) on 20 November 1963.

189 (1966) 15 *ICLQ* 996 at 998.

190 Partsch in Alston (ed) (1992) 339 at 339.

191 Art 8 of CERD.

192 Art 8 of CERD.

193 The CERD Committee also adopts resolutions: See eg UN doc CERD/C/49/MISC.2/ Rev 3/1996 on Burundi.

194 Art 9 of CERD.

195 Arts 11 - 13 of CERD.

196 Art 14 of CERD.

197 See O'Flaherty (1996) at 103. By the end of 1995, this procedure has been invoked in respect of eleven countries. Three of these eleven are African states: Algeria, Burundi and Rwanda.

2.3.1.2 Composition

Committee members are elected by states parties for terms of four years.[198] In the establishment of the Committee, three factors should be given consideration: "equitable geographical distribution", representation of "different forms of civilization" and representation of "the principal legal systems".[199] After the election in 1990, the 18-member Committee consisted of the following three members from African states: Mahmoud Aboul-Nasr (Egypt); Hamzat Ahmadu (Nigeria); Lamptey (Ghana). West Europe had five members on the Committee, Eastern Europe had three, Latin America four and the Asian region three. In 1996, Abdoul-Nasr and Ahmadu still served on the Committee, but Lamptey was replaced by Andrew Chigovera (Zimbabwe).[200]

2.3.1.3 Ratifications and reservations

At the time the Convention started operating, a substantial percentage of ratifying states was from Africa. After an initial rush to ratify, only one African state has been added to the list since 1990, when Malawi acceded to CERD on 11 June 1996. It should be added, though, that South Africa signed it on 30 October 1994. By 31 March 1997, 43 African states had acceded to or ratified the Convention, while two states have only signed it.[201] This means that 81% of all OAU member states have ratified CERD, a percentage surpassed by this group of states only in relation to the conventions on women, children and refugees. The total number of ratifications at that stage was 148, or 77% of all potential ratifying states. The likelihood of an African state having ratified CERD is thus greater than the chance of states around the globe to have done so.

Some fifty countries wold-wide have entered **reservations or made declarations** on accession or ratification, including six African states (Egypt, Libya, Madagascar, Morocco, Mozambique and

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198 Art 8(2) and 8(5) of CERD.

199 Art 8(1) of CERD.

200 See O'Flaherty (1996) at 88 (n 11).

201 See list of ratifying states at website www.un.org/Depts/Treaty/final/ts2/newfiles/.

Rwanda).[202] Where some of the other states raised concerns about **substantive** provisions of the Convention, the six African states raised a **procedural** objection. They all declared themselves not to be bound by article 22 of the Convention, in terms of which disputes between parties not settled by negotiation, shall be referred to the ICJ "at the request of any of the parties to the dispute". This represents a departure of the normal procedure in relation to the ICJ, which as a rule requires consent by both parties. The six states mentioned above (as well as others, such as the USA) declared that the consent of all the parties in each individual case will still be required before it submits to the jurisdiction of the ICJ.

Individual complaints may be entertained by the Committee in respect of those states that had made a **declaration in terms of article 14** of the Convention. As at 31 March 1997, 24 such declarations had been made.[203] Two of these declarations came from African states: Algeria and Senegal. Expressed as a percentage, it represents 5% of the total number of African ratifying states. Of the other global regions, only Asia has a lower rate (4%). In contrast, ten out of the 19 states (or 53%) that had ratified CEDR in Western Europe also allow for individual petition. As

2.3.1.4 *State reporting*

As of January 1994, 33 African states had two or more reports due.[204] At that stage, one state (Sierra Leone), had ten reports outstanding. Two other states, Liberia and Swaziland, had nine reports due. A combined total of not less than 238 reminders have been sent to these three states, without eliciting any response.

2.3.1.5 *Individual communications*

The CERD Committee examines communications in respect of those states that have made a declaration in terms of article 14. As yet, the Committee has only heard a "handful of individual petitions".[205] No complaints have apparently emanated from the two African states referred to above.

2.3.1.6 *Realisation*

Discrimination based on ethnic difference is not unknown in Africa. Despite the initial enthusiasm on the part of African countries about CERD and ratification by most, it has not become a vehicle for the elimination of racial discrimination in Africa. As far as "racial discrimination" could be equated with "apartheid", all African states unified in condemnation. The unequivocal African support in the drafting and adoption phases may be ascribed to the common ideal to eradicate systematic racial discrimination from the continent. This also explains the inclusion of the "duty" on states to "condemn racial segregation and *apartheid*",[206] a duty most OAU member states fulfilled with vigour. But African states, perhaps blinded by the scale and extent of racial discrimination in South Africa, did not take CERD seriously as far as their domestic systems were concerned. Few states complied with their primary "visible" duty under the Convention, to submit

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204 See table in Hatchard (1994) 38 *JAL* 61 at 62 - 63.

205 Buergenthal (1995) at 66. This followed after the Committee gave its first opinion on 10 August 1988 in the case *Yilmaz-Dogan v The Netherlands* ((1991) 12 *HRLJ* 302).

206 Art 3 of CERD.

state reports. In the light of the non-compliance with this obligation, it remains an open question to what extent states comply with other, "unsupervised"[207] duties, such as the duty to encourage "integrationalist multiracial organizations".[208] Because so few African states have allowed individuals to lodge complaints with the Committee, this avenue never became a viable route of redressing racial discrimination.[209]

2.3.2 The Human Rights Committee

2.3.2.1 Background

The International Covenant on Civil and Political Rights ("CCPR") was adopted by the UN General Assembly in 1966, and entered into force on 23 March 1976. The enforcement body established under this treaty is the Human Rights Committee ("HRC").[210] The Committee has three main functions:

- In the case of all states parties, it **considers periodic reports** submitted by them.[211]
- In respect of those states that have made declarations under article 41 of the Covenant, the Committee **considers inter-state communications**.
- Thirdly, it **considers communications submitted by individuals** from states that have accepted the first Optional Protocol to the Covenant.[212]

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207 That is, not dependent on state reports.

208 Art 2(1)(e) of CERD.

209 For an example of a South African court finding interpretative guidance in CERD, see *Ex parte Gauteng Legislature* 1996 3 SA 163 (CC), par 71 (n 53) and par 82.

210 Not to be confused with the Human Rights Commission (for which the acronym "UNHRC" is used in this study), see par 2.3.1 above.

211 In terms of art 40 of CCPR.

212 This Protocol ("OPI") entered into force on 23 March 1976, simultaneously with the CCPR. The Preamble of the Optional Protocol states that it is aimed at further achieving the purpose of the CCPR and at improving implementation thereof. Art 1 provides that states parties to the Protocol recognise the

Footnotes continued on next page.

The HRC has an extended mandate in respect of states that have ratified the Second Optional Protocol to the CCPR. This Protocol ("OPII") aims at the abolition of the death penalty in ratifying states.[213] All states parties to the second Optional Protocol must report to the HRC on measures which they have adopted to give effect to the provisions of this Protocol.[214] In respect of states parties that have accepted the HRC's competence to consider inter-state and individual communications, other states and individuals may base communications against ratifying states on the provisions of OPII.[215]

2.3.2.2 Composition

The HRC is composed of eighteen members who are elected by the states parties to the CCPR for renewable terms of four years.[216] They serve in their personal capacity. Since its inception, African states have been underrepresented.[217]

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competence of the HRC "to receive and consider communications from individuals subject to its jurisdiction".

213 Art 1 of OPII provides that no person "shall be executed" in a ratifying state, and that states parties "shall take all necessary measures to abolish the death penalty within its jurisdiction".

214 Art 4 of OPII.

215 See arts 4 and 5 of OPII. However, a state may make a statement to the contrary at the moment of ratification or accession.

216 Arts 28(1) and 32(1) of the CCPR.

217 Of the eighteen members elected in 1993-1994, three of the members were African, one each from Egypt, Mauritius and Senegal (UN docs A/48/40, A/49/40). Of the three women members of the HRC, none was from an African state. From 1977 to 1993, eight Africans were part of the group of 48 people who had served on the HRC (See Nowak (1993) at 914 - 915. The states represented were Egypt, Kenya, Mauritius, Rwanda, Senegal and Tunisia. The last two countries had members serving on the Committee twice. From 1 January 1995 to 31 December 1996 only two Africans served on the Committee. They are El Shafei (Egypt) and Lallah (Mauritius). (The member from Senegal (Ndiaye) retired, and was not replaced by an African: see Nowak (1995) 377 at 378.) Africa's clear underrepresentation is to an extent palliated by the fact that El Shafei served as the body's Vice-Chairperson for two successive terms.

2.3.2.3 *Ratification, reservations and derogations*

On 31 March 1997 41 African states (including Morocco) had ratified the **CCPR**.[218] Of the 41, 24 had accepted individual petition under the Optional Protocol to that Covenant. They are: Algeria, Angola, Benin, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gambia, Guinea, Libyan Arab Jamahiriya, Madagascar, Malawi, Mauritius, Namibia, Niger, Senegal, Seychelles, Sierra Leone, Somalia, Togo, Uganda, Zaïre and Zambia. The global number of ratifications of the CCPR on the same date was 136, or 71% of the total number of potential ratifying states.[219] For the African states, the average was 76% (41 out of a possible 54).[220]

Of the 25 states worldwide that ratified the **Second Optional Protocol** to the Covenant, only three were African.[221] Of the three, two states (Namibia and Mozambique) are from Southern Africa.[222] The third is Mauritius.[223]

Six African countries entered **reservations** when they ratified or acceded to the CCPR. This is a small proportion of the total number of 52 states that entered reservations, undertakings and declarations. The reservations of African states are also not very detailed or comprehensive, when compared to, for example, the five reservations, five undertakings and three declarations made by the USA on accession.[224] The ratifications by African states may be grouped as follows:

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218 See Table B below.

219 That is, 136 of the total of 191.

220 Or 77%, calculating 41 as a percentage of the 53 UN African members.

221 See Table B below.

222 See ch 3.2.2(c) below. Botswana has not ratified OP II. But see *S v Ntesang* 1995 4 BCLR 426 (Botswana), in which the death penalty was found not to violate the Botswana Constitution, where the Court of Appeal observed as follows (*per* Aguda JA, at 435G – H: "I … express the hope that before long the matter will engage the attention of that arm of the Government which has responsibility of effecting changes to the statutes for its consideration and changes which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world".

223 Mauritius is also a member of SADC.

224 See information contained at web site http://www.un.org/Depts /Treaty/funal/newfiles /frontboo/ tocgen.html

- Guinea and Libya raised concerns of an excessively political nature in their reservations. Guinea objected that article 48(1) is contrary to the democratisation of international relations. Libya clarified that acceptance of the treaty obligations did not imply acceptance of the Israeli state. Congo and the Gambia raised substantive conflicts between domestic law and provisions of CCPR. Article 11 of the CCPR stipulates that no one "shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". Congo's reservation left its private law intact in so far as it allows for civil imprisonment.[225] The Gambia reserved the right of its nationals to invoke the right to free legal assistance "where the interests of justice so require"[226] only when charged with a capital offence. Egypt made a declaration intent on infusing the interpretation of the CCPR with the spirit of Shari'ah: It accepted the CCPR, but "taking into consideration the provisions of the Islamic Shari'ah and the fact that it does not conflict with the text ...".

- Algeria made a number of, what it termed "interpretative declarations". The reference in article 1 to "Non-Self-Governing and Trust Territories" prompted Algeria to state that article 1 cannot in any way imply the impairment of the right to self-determination. Article 22, dealing with freedom of association, does not impair the right to organise, but makes "law the framework for action by the State". The last reference is to the position of women. Article 23(4) requires states parties to ensure equality of spouses in marriage. The declaration that this provision shall in no way impair on the "essential foundations of the Algerian legal system" in relation to entering into marriage, the situation during marriage and the dissolution of the marriage, is very drastic.

Mainly West European states raised **objections** against certain reservations. A number of objections were also directed against the reservations entered by the USA. No African state raised any objection against any of the reservations or declarations.

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225 Belgium entered an objection to this reservation. On the basis of an analysis of the Congolese law, Belgium observed that the reservation was unnecessary and should not be regarded as setting a precedent. In terms of the Congolese law imprisonment will only follow if a creditor is due more than 20 000 CFA, and in bad faith became insolvent. Imprisonment can only be imposed for those between 18 and 60 years old. See SA case *Coetzee v Government of RSA* 1995 6 SACLR (CC).

226 Art 14(3)(d) of the ICCPR.

As was stated, the CCPR also provides for the **optional acceptance of inter-state complaints**.[227] By the end of 1996, a total of 45 states globally had accepted the competence of the Human Rights Committee to consider communications of this nature. Six African states (Algeria, Congo, Gambia, Senegal, Tunisia and Zimbabwe) have accepted this optional provision.

Article 4(3) allows states parties to notify other parties of **temporary derogations** from the Convention. Only two states parties from the African continent have as yet provided such information.[228] They are Algeria and Sudan. In the case of Sudan, the continuous conflict between the north and south provide the explanation for the state of emergency.

2.3.2.4 Reporting obligations

The primary overseeable duty of ratifying states is to present an initial report (within two years of ratification) and periodic reports (every five years thereafter). Initial reporting is required by article 40 of CCRP; periodic reporting was introduced by the Committee.[229] The non-compliance of states has become a major obstacle to the effective functioning of the system. On 4 November 1994 23 African states had one or more reports outstanding. Of these, the following eleven have not submitted their initial or any subsequent reports:[230]

Angola	(report due 9 April 1993)
Benin	(report due 11 June 1993)
Ethiopia	(report due 10 September 1994)
Equatorial Guinea	(report due 24 December 1988)
Gabon	(report due 20 April 1984)
Côte d'Ivoire	(report due 25 June 1993)

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227 In terms of art 41 of the CCPR.

228 Information contained in web site http:/www.un.org/Depts/Treaty/final/ts2/newfiles/frontboo /tocgen.html.

229 See Nowak (1993) 14 *HRLJ* 9.

230 At the end of the Committee's 52nd session, see UN document CCPR/C/104 at 5 - 8.

Mozambique	(report due 20 October 1994)
Nigeria	(report due 28 October 1994)
Seychelles	(report due 4 August 1993)
Somalia	(report due 23 April 1991)
Zimbabwe	(report due 12 August 1992)

The initial reports of 22 of the ratifying states worldwide were outstanding at that stage. In other words, Africa made up 50% of those not complying with the initial obligation to report. This compares very unfavourably with the percentage of African states parties. The five reports longest overdue were from Gabon, Equatorial Guinea, Somalia, Haiti and Zimbabwe.

An analysis of some of reports examined by the HRC since 1992 reveals that timely submission of reports is not a goal in itself, and guarantees very little. One state, **Burundi**, had submitted its periodic report on time.[231] The report was considered in 1992. The delegation at that stage supplemented the report with more updated information. The HRC expressed its concern about the lack of protection of minorities, ethnic dominance of one ethnic group of the armed forces, the declaration of and power to declare states of emergency, detentions, and the lack of investigation of past atrocities. Not long after the report was considered, renewed ethnic violence broke out in Burundi. In 1994, the HRC requested the Burundi government to submit a report about the local human rights conditions. This request was made in terms of the obligation of states to submit reports "whenever the Committee so requests".[232] Although the report lacked information on the situation in Burundi, the Committee used all information at its disposal to examine the situation. By that time, the violence had abated. The HRC repeated, mostly in more detail, the observations and recommendations contained in its previous comments.[233] The Committee emphasised that these human rights violations must be addressed within the greater framework of working towards national reconciliation.

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231 See UN document CCPR/C/79/Add 9 (1992).

232 Art 40(1) of CCPR.

233 See HRC report CCPR/C/79/Add 41 (1994).

Not only were reports submitted late, but they mostly suffered from a lack of detail as well.[234] Where detail of legislative provisions and administrative regulations were provided, there was a lack of information on the "implementation of the Convention in practice"[235] and on the difficulties experienced in securing enjoyment of the rights in the Convention.[236] Also disappointing is the fact that many of the reports were not the first to be presented by the state and to be considered by the Committee. Despite previous advice, states have still not followed the guidelines for reporting and have not complied with the spirit required for meaningful reporting. However, in the case of Morocco, the problematic aspects of the report were corrected by frank answers, admitting to some difficulties in implementing the Covenant.[237]

As some states have submitted previous reports, the extent of progress between the two reports could be gauged.[238] Two states in particular have been praised for progress in a number of respects. After the consideration of its last report, the HRC observed with approval that **Senegal** has taken the following steps:[239]

- The State Security Court was abolished.
- The position of Mediator was created.
- A new, improved Electoral Code was adopted.
- Certain provisions of the CCPR were applied by domestic courts for the first time.

Although Tunisia had generally seen a deterioration of human rights, certain reforms had also been implemented. This included new provisions in the Penal Code, which provide for heavy sanctions in respect of violence against women, and changes to the Personal Status Code liberalising women's access to child custody and divorce.[240]

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234 The report of Niger was desribed as "extremely succinct" (CCPR/C/79/Add 17 (1993)) and that of Cameroon as "summary and rather theoretical" (CCPR/C/79/Add 33 (1994)).

235 See eg the Moroccan report (CCPR/C/79/Add 44 (1994)) and the report submitted by Senegal, described by the HRC as lacking in attention to actual implementation (CCPR/C/79/Add 10 (1992).

236 See eg HRC report on Egypt's report (CCPR/C/79/Add 23 (1993)).

237 See CCPR/C/79/Add 44 (1994) at par A.

238 This is indeed regarded as the method by which follow-up would be effected.

239 See CCPR/C/79/ Add 10 (1992) at par 3.

240 See CCPR/C/97/Add 43 (1994).

After analysing most of the reports submitted by African states, the following recurring aspects which impede the realisation of the CCPR in the continent may be identified:

- the imposition and application of the death penalty;
- extra-judicial executions by security forces;
- discrimination against women;
- provision for states of emergency, and derogation of rights during emergencies;[241]
- non-notification of the Secretary-General of declaration of state of emergency;
- provision for preventative detention, and the conditions of detention;
- violations of freedom of expression and association; and
- persistent problems related to ethnicity.[242]

But there is also a ray of hope. Most of these reports were submitted by states which have recently held multi-party elections and are progressing on the road to democracy.[243] It is significant that these states have submitted themselves to international scrutiny. Viewed in the context of democratisation, the reporting obligation takes on new meaning, and becomes a vehicle for establishing and guarding over democratic institutions.

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241 See, in particular, the concerns raised by the HRC on the extension of the state of emergency in Egypt since 1981: CCPR/C/97/Add 23 (1993) at par 12.

242 This was clearly the root cause of the upheaval in Burundi. In other states, too, this is often the "Achilles heel" in human rights realisation. See the problems related to the Casamance region in Senegal (HRC report CCPR/C/97/Add 10 (1992)), the Tuareg in northern Niger (HRC report CCPR/C/97/Add 7 (1993)), the position of the Berbers in Algeria (CCPR/C/97/Add 1 (1992) and the English-speaking north-west of Cameroon (CCPR/C/97/Add 33(1994)).

243 This is of particular relevance in the case of Algeria (see CCPR/C/97/Add 1 (1992)), Niger (see CCPR/C/97/Add 17 (1993)), Tanzania (see CCPR/C/97/Add 12 (1992)) and Togo (see CCPR/C/97/Add 36 (1994)).

2.3.2.5 *Individual complaints under the first Optional Protocol*

As at 31 March 1997, 24 African states have become party to the first Optional Protocol.[244] Malawi and Sierra Leone, who acceded to the Protocol in 1996, have most recently become parties. At the same time, the African states parties to the CCPR numbered 41. This means that almost half (45%) of African states are party to both the Covenant and its optional complaints procedure. The percentage globally is 47%. While the African percentage for **ratification of the CCPR** exceeds the global percentage (77% in Africa, as against 71% globally), the **order is reversed** when it comes to **accepting individual complaints** (45% in Africa, as against 47% globally). One explanation could be that the commitment in Africa is easily secured at the more rhetorical level. Mechanisms that could publicly embarrass states are less easily accepted. Peter[245] expressed the opinion that "most states, and in particular those from the developing world, have constantly avoided signing or ratifying the Optional Protocol" because it is an "enforcement mechanism".

At the end of each session the HRC publishes views and decisions. Views are "contestations", while decisions are irrevocable. An analysis will now be made of the views and decisions issued from the 4th session, held in 1979, to the end of 1994, to establish to what extent individuals in African states have utilised the Optional Protocol procedure. The 4th session is the starting point, as the Committee issued views for the first time at the end of this session, when it began "consideration of communications in accordance with the Protocol".[246] The Committee's first view was issued on 15 August 1979, in response to a communication registered on 15 February 1977. **From 1976 to 1 June 1993** the HRC issued a total of 291 final views and findings on admissibility.[247] At that stage, **less than 5% (16)** of these were issued in respect of African states.[248]

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244 See Table B below.

245 Peter in Peter and Juma (1996) 52 at 54.

246 See par 147, UN document A/32/40, 37/40.

247 Nowak (1993) gives a list of these views and findings in an addendum. Although the last case mentioned was registered as 491, the smaller total (291) represents the number of cases in which views were expressed or findings were made.

248 Communications 16/1977 (against Zaïre), 35/1978 (against Mauritius), 49/1979 (against Madagascar), 90/1981 (against Zaïre), 115/1982 (against Madagascar), 124/1982 (against Zaïre), 132/1982 (against

Footnotes continued on next page.

The first view adopted in relation to an African state was in a case from Mauritius.[249] **By the end of 1994**, the HRC had found a total of **21 violations** against African states. Zaïre accounted for almost half of these communications, nine cases from that state having served before the HRC. The other states complained against were Madagascar (four cases), Equatorial Guinea (two cases), Zambia (two cases), Cameroon, CAR, Libya, Mauritius and Senegal (on one occasion each).

The views expressed on the merits of communications from Africans against African governments[250] are as follows:[251]

1979 : 0 (total 1)[252]

1980 : 0 (total 5)[253]

1981 : 1 (total 12) Mauritius[254]

1982 : 0 (total 14)[255]

1983 : 3 (total 17) Madagascar;[256] Zaïre (2)[257]

1984 : 1 (total 7) Zaïre[258]

Madagascar), 138/1983 (Zaïre), 155/1983 (Madagascar), 157/1983 (Zaïre), 194/1985 (Zaïre), 241/1987 (Zaïre), 242/1987 (Zaïre), 354/1989 (Mauritius), 457/1991 (Libya) and 463/1991 (Zaïre).

249 Communication 35/78 (*Aumeerudy-Cziffra and 19 Others v Mauritius*). Mauritius became the second African state to accede to or ratify the Optional Protocol by acceding in 1973 (after Madagascar ratified it in 1971).

250 Since states undertake to "respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights set out in the CCPR (art 2(1) of the CCPR), citizens of African countries are sometimes complainants in cases against non-African governments, especially in Europe (see ch 5.1 above).

251 In each year, the number of complaints against African governments is provided, followed by the total number of complaints in that year against all ratifying states. The name(s) of the African state(s) against which complaints have been directed is (are) furnished as well.

252 See UN doc A/34/40

253 See UN doc A/35/40.

254 See UN doc A/36/40 Communication 35/1978 (*Aumeeruddy-Cziffra and others v Mauritius)*, (1981) 2 *HRLJ* 139.

255 UN doc A/37/40.

256 UN doc A/38/40. Communication 49/1079 (*Marais v Madagascar*), (1983) 4 *HRLJ* 204.

257 UN doc A/38/40. Communication 16/1997 (*Mbenge v Zaïre*), (1983) 4 *HRLJ* 185 and Communication 901/1981 (*Mabanga ex - Philibert v Zaïre*), (1983) 4 *HRLJ* 195.

258 UN doc A/39/40. Communication 124/1982 (*Muteba v Zaïre*), (1984) 5 *HRLJ* 215.

1985 : 2 (total 12) Madagascar (2)[259]

1986 : 2 (total 4) Zaïre (2)[260]

1987 : 1 (total 5) Madagascar[261]

1988 : 1 (total 8) Zaïre[262]

1989 : 0 (total 10)[263]

1990 : 2 (total 13) Zaïre (2)[264]

1991 : 0 (total 6)[265]

1992 : 0 (total 18)[266]

1993 : 2 (total 23) Zambia (2)[267]

1994 : 7 (total 32)[268] Cameroon;[269] Central African Republic;[270] Equatorial Guinea (two);[271] Libya;[272] Senegal;[273] Zaïre.[274]

The following four cases illustrate the potential role of the HRC in an African context:

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259 UN doc A/40/40. Communication 115/1982 (*Wight v Madagascar*), (1986) 7 *HRLJ* 294, and Communication 132/1982 (*Jaona v Madagascar),* (1985) 6 *HRLJ* 233.

260 UN doc A/41/40. Communication 138/1983 (*Mpandanjipa et al v Zaïre*), (1986) 7 *HRLJ* 277, and Communication 157/1983 (*Mpaka-Nsusu v Zaïre*), (1986) 7 *HRLJ* 280.

261 UN doc A/42/40. Communication 155/1983 (*Hammel v Madagascar*), (1988) 9 *HRLJ* 249.

262 UN doc A/43/40. Communication 194/1985 (*Muiyo v Zaïre*), (1990) 11 *HRLJ* 146.

263 UN doc A/44/40.

264 UN doc A/45/40. Communication 241/1987 (*Birindiwa v Zaïre*), (1993) 15 *HRLJ* 15; Communication 242/1987 (*Tshisekedi v Zaïre*), (1993) 15 *HRLJ* 15.

265 UN doc A/46/40.

266 UN doc A/47/40.

267 UN doc A/48/40. Communications 314/1988, 326/1988 *(Bwalaya v Zambia; Kalenga v Zambia*), (1995) 16 *HRLJ* 389.

268 Un doc A/49/40.

269 Communication 458/1991 (*Mukong v Cameroon*), (1995) 16 *HRLJ* 391.

270 Communication 428/1990 (*M'Boissona on behalf of Bozize v CAR*), (1995) 16 *HRLJ* 391.

271 Communication 468/1991 *(Bahamonde v Equatorial Guinea*), views of 20 October 1993, (1995) 15 *HRLJ* 26; Communication 414/1990 (*Miha v Equatorial Guinea*), (1995) 16 *HRLJ* 388.

272 Communication 440/1990 (*Youssef on behalf of Bashir El-Megreisi v Libya*), (1995) 16 *HRLJ* 392.

273 Communication 386/1989 (*Koné v Senegal*), (1995) 16 *HRLJ* 394.

274 Communication 366/1989 (*Tshiongo a Minanga v Zaïre*), (1995) 16 *HRLJ* 396.

- The first case was decided by the HRC in 1993, following a complaint by Angel Bahamonde against **Equatorial Guinea**.[275] Bahamonde was and still is an outspoken opponent of the Equatorial regime. His allegations are as follows: Before he fled the country in 1991, he was the victim of numerous human rights violations. His passport was confiscated, he was arbitrarily detained, and his lands were expropriated. The government argued that local remedies had not been exhausted, as Bahamonde had not filed any action before local courts. The complainant gave detailed information of numerous attempts to obtain judicial redress, which have failed. His attempts were systematically blocked by the authorities and by the President himself. He added that the judiciary in the country cannot act independently as all judges and magistrates are nominated directly by the President.

  The HRC declared the communication admissible. Under the circumstances, the applicant could not be expected to exhaust local remedies. The government had asserted, but only in very general terms, that the complainant could have involved at least four laws or regulations before local tribunals. The failure of the state "to link its observations to the specific circumstances of the author's case"[276] prompted the Committee to find that the applicant had met all admissibility requirements. As to the merits, the HRC found that the complainant had been arbitrarily arrested, that his right to security of the person had been violated, that he was denied the right to leave his country, and that he was discriminated against. As an appropriate remedy the government was urged to "guarantee the security of his person, to return confiscated property to him or to grant him appropriate compensation, and that the discrimination to which he has been subjected be remedied without delay".[277] The Committee requested to receive, within 90 days, information on steps subsequently adopted by the government.

- In the second case, *Lubuto v Zambia*,[278] the HRC dealt with article 6(2) of the CCPR, which allows for the imposition of the death penalty "only for the most serious crimes". In terms of **Zambian** legislation, the imposition of the death sentence was mandatory where a firearm had

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275 Communicatin 468/1991 *(Bahamonde v Equatorial Guinea)*. See HRC's views at (1994) 15 *HRLJ* 26.

276 At par 6.1 of the HRC's views.

277 At par 11 of HRC's views.

278 Communication 390/1990, 31 October 1995, see (1996) 10 *Interights Bulletin* 28 - 29.

been used in the course of a robbery. Capital punishment had to follow, irrespective of whether the firearm was used to injure or kill anyone. The HRC held this position to be in violation of article 6(2), as the courts could not take into account whether the use of the firearm had ensued in death or injury, or not. In Lubuto's case, gunshots were fired during the course of the robbery, but no-one was injured. The Committee regarded the commutation of Lubuto's sentence as an appropriate and effective remedy in the circumstances. The HRC also found that Lubuto was not tried without undue delay.[279] The period that had expired between his arrest and the final decision dismissing the appeal was excessive. Although the Committee took into account the difficult economic conditions faced by the Zambian government, it had to implement the minimum standards contained in the CCPR.

- In another case involving **Zambia**, the HRC in 1994 found violations of the CCPR which had been committed under the Kaunda government.[280] The case originated when Bwalya ran for a parliamentary seat in 1983, and was arrested and detained for 31 months on charges that he belonged to an organisation considered to be illegal under Zambia's (then) one-party Constitution. The HRC found a violation of article 25, which allows for free participation in the conduct of public affairs, and to "be elected at genuine periodic elections".[281] The Committee observed that "restrictions on political activity amounts to an unreasonable restriction on the right to participate in the conduct of public affairs".[282] Other rights of the author of the communication had also been violated, the Committee concluded. In a brief note, the state informed the HRC that the complainant had been released. As if to suggest that the matter should be laid to rest, the state failed to co-operate any further. However, the HRC found that the release of the complainant is not the only "remedy" appropriate in the circumstances, as it urged the state to grant compensation to Bwalya, and to ensure that similar violations do not occur in the future.[283] It also requested the state to provide it, within 90 days, with information about measures taken to address the situation.

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279 See art 14(3) (c) of CCPR.

280 Communication 314/1988 (*Bwalaya v Zambia*), views of HRC, 14 July 1993. Quoted in Steiner and Alston (1996) at 541 - 543.

281 Art 25(b) of the CCPR.

282 At par 6.6 of the Committee's views.

283 At par 8 of the HRC's views.

2.3.2.6 *Realisation*

Against the above background the question may be asked how effective the implementation of the CCPR had been in the African context.

State reporting suffers from numerous draw-backs. As was pointed out above, in the case of Burundi, subsequent events have revealed the ineffectiveness of the reporting procedure in the reality of a state caught up in cycles of ethnically-based violence. It also shows the limitations of the inherent effectiveness of the reporting system in the face of massive violations during large-scale civil disturbance. However, other cases emanating from Africa show the potential of the mechanism to strengthen democratic governance. State reporting cannot uproot repressive regimes and cannot redress massive violations. But it can bolster fledgling democracies, which already are in place, and it can improve the protection of human rights, if states are in principle committed to the advancement of human rights.

The question arises to what extent individuals have in fact benefited from the procedure provided for especially in the **first Optional Protocol**. McGoldrick, in analysing the effectiveness of the Optional Protocol for individuals, compiled two lists of states: one of those that usually co-operate and comply and one of those who do not. This list of states identified as willing to co-operate with the Committee and abide by its final views includes Canada, a number of West European states and Jamaica. Only one African state, Mauritius, is included. The *Mauritian Women Case* in fact provides, in his view, "the clearest example of a State party taking measures in consequence of the HRC's final views".[284] The Mauritius legislature amended two pieces of legislation found by the HRC to be discriminatory against women. The HRC decision was also cited with approval by the Zimbabwean Supreme Court when it considered a similar issue.[285]

However, without doubt, most African states do not comply with the views issued by the HRC. In the case of *Marais v Madagascar*, for example, the state did not adhere to the Committee's statement that it would "welcome a decision by the State party to release Mr Marais, prior to

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284 McGoldrick (1991) at 203 par 4.132.

285 See *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 2 SA 182 (ZSC) at 189-190.

completion of his sentence, in response to his petition for clemency". Marais was only released after he had completed his sentence.[286] The decision in *Mpandanjila et al v Zaïre* was not only rejected by the Zairian government, but also resulted in retaliatory measures by the government. In response to the HRC's views, the authors of the communication were arbitrarily detained and subjected to internal banishment and inhuman treatment. In a subsequent communication, two of them complained to the HRC. In that decision, *Birindiwa and Tshisekedi v Zaïre,*[287] the government was again found to be in violation of the CCPR.

Inevitable **time delays** cause the Committee's views to have little impact. For example, views were adopted in two cases against Zambia in July 1993.[288] Both communications related to restraint of free political activity and delay in giving reasons for arrest. The circumstances in both had a close link to the one-party system prevailing at the time. Although numerous violations were found and compensation was ordered, some five years have already lapsed by then. The intervening years saw the one-party system dismantled. It fell to the new, democratically-elected government to redress the wrongs of the past.

Even in respect of the African states that have ratified the Optional Protocol to the CCPR, **few communications** have been brought against African states. By the end of 1992, when 17 African states have accepted the Committee's competence to receive individual communications, eight of these states had not been the subject of any such complaints. These states were Algeria, Angola, Benin, Congo, Gambia, Niger, Seychelles and Somalia.[289] It appears from the data above that the next two years did not see a change in the situation. A small number of complaints originated in most of the other state. Despite its meagre contribution of cases, Odinkalu *et al* concluded that the views adopted on African communications significantly enriched the jurisprudence of the Committee.[290] The likelihood of a communication emanating from Africa being declared

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286 See McGoldric (1991) at 223 (n325).

287 Communication 241/1987 and 242/1987, views of 2 November 1989 (See Nowak (1993) 14 *HRLJ* 9 at 15).

288 Communication 314/88 (*Bwalaya v Zambia*) and Communication 326/88 (*Kalenga v Zambia*).

289 See Bayefsky in Henkin and Hargrove (eds) (1994) at 292: Table J.

290 Odinkalu, Tadessey and Lumumba (1994) 8 *Interights Bulletin* 67.

admissible, is greater than those emanating from any other region.[291] When communications were in fact considered on the merits, the HRC found violations in all the cases.[292]

It is clear from the above that **arbitrary detention** is an endemic problem in Africa. In each of the seven 1994 cases cited above, the Committee found a violation of article 9 of the CCPR. The wording of article 9(1) embodies the crucial concerns of many Africans: "Everyone has the rights to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". In all seven cases a violation of article 9 was found, exposing the government as repressive and intolerant of any form of dissent. These specific violations were embedded in the denial of democratic rights to the population generally.

The cases brought and findings reached by the HRC reinforce the **interdependence of the rights** in the CCPR and those in the CESCR. The socio-economic implications of detention have been raised on numerous occasions. In *Mukongo v Cameroon*,[293] for example, the Cameroon government argued that harsh prison conditions were a result of the persistent underdevelopment of that country. The HRC referred to the UN Standard Minimum Rules for the Treatment of Prisoners and held that those minimum requirements had to met by all states, regardless of possible "economic justifications".[294] Two other cases, *M'Boissona v CAR*[295] and *Koné v Senegal*[296] are examples of the Committee's approach to delay awaiting trial. Securing expeditious trials, as required by the HRC, will only be attained through resource allocation.

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291 Based on figures as from February 1993, see Bayefsky in Henkin and Hargrove (eds) (1994) at 294, Table M. Of the African communications, 82% were declared admissible, as against 50% from Eastern Europe, 71% from Latin America and 32% from the WEO states.

292 See Bayefsky in Henkin and Hargrove (eds) (1994) at 294, Table M. The African percentage (100%) should be contrasted with the 30% violations found in respect of communications from WEO states.

293 Communication 458/1991.

294 See par 9.3 of the HRC's views.

295 Communication 428/1990. The Committee also noted the extremely poor prison conditions in this case, and found a violation of art 7. Redress of such conditions will clearly have "economic" implications.

296 Communication 386/1989.

The more **indirect influence** of the CCPR is more difficult to gauge. It has come to be accepted as one of the primary international human rights instruments, and has served as role model for human rights standard setting in the domestic sphere. Another indirect form of influence is judicial reliance on CCPR provisions as interpretative guides.[297]

2.3.3 The Committee on Economic, Social and Cultural Rights

2.3.3.1 Background to and functions of the Committee

The International Covenant on Economic, Social and Cultural Rights ("CESCR") is one of the two human rights treaties that converted the lofty declarations of the Universal Declaration into binding state obligations. In its attempt to realise social justice, the document covers a wide range of rights - from education, employment and the family, to minority languages and cultures. It was adopted in 1966, but entered into force only in 1976. Supervision of the treaty is exclusively by means of state reporting. A supervisory body, the Committee on Economic, Social and Cultural Rights (the "CESCR Committee"), is responsible for the examination of state reports. This Committee, created by ECOSOC in 1986, replaced the previous "moribund working group of government representatives".[298]

2.3.3.2 Composition

The eighteen members of the CESCR Committee are elected by all members of ECOSOC.[299] In the process of electing members, "due consideration" is to be given to "equitable geographical

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297 See eg *Nyambirai v National Social Security Authority* 1996 1 SA 636 (ZS) at 647I, *Ex parte Gauteng Legislature* 1995 3 SA 165 (CC) at par 71, *S v Makwanyane* 1995 3 SA 391 (CC) at paras 63 – 67 and *S v Williams* 1995 3 SA 632 (CC) at paras 21 (n 24) and 26.

298 Forsythe (1992) at 68.

299 See Alston in Alston (ed) (1992) 473 at 488.

distribution and to the representation of different forms of social and legal systems".[300] This was interpreted as allowing each of the five regional grouping three members to the Committee, with the additional three being divided between Latin America, Africa and the WEO states.[301]

2.3.3.3 Ratification, reservation and derogation

Oloka-Onyango analysed the state of African ratification of the CESCR.[302] As of 15 July 1995, over 30% of African states had not ratified the instrument. Using the analogy of the Convention on the Rights of the Child, he argued that universal African ratification of the CESCR is the "necessary first step for all African states which claim to uphold the ideals contained in the instrument".[303] Serious observance will only follow once a "bench-mark from which standards in the area can be critically and universally assessed", is in place.[304] Oloka-Onyango singled out Ghana as a state that purports to be a proponent of the need to address socio-economic inequalities at the international level and domestically. Notwithstanding, Ghana has not ratified the CESCR, revealing an unwillingness to hold steps taken in this regard up to international scrutiny.

By 31 March 1997, the same number of African UN member states (41) has ratified the CCPR and the CESCR.[305] Forty of these states ratified both the covenants. Only one state, Guinea-Bissau, has ratified the CCPR, but not the CESCR. Conversely, Mozambique has ratified the CESCR, but not the CCPR. This corresponds with a global trend, as 135 states globally have ratified the CESCR, and 136 the CCPR.[306]

Nine African states made **reservations** when accepting their obligations in terms of the treaty. The Covenant obliges states parties to respect the liberty of parents to choose schools, other than public

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300 ESC Res 1985/17, par b, quoted by Alston in Alston (ed) (1992) 473 at 487.

301 See Alston in Alston (ed) (1992) 473 at 488.

302 (1995) 26 *California West Intl Law Jnl* 1.

303 (1995) 26 *California West Intl Law Jnl* 1 at 16.

304 (1995) 26 *California West Intl Law Jnl* 1 at 15.

305 See Table B below.

306 See Table B below.

schools, for the education of their children "in conformity with their own convictions".[307] In this respect, Algeria, Congo and Rwanda raised objections. Congo, for example, declared that the article does not give parents the right to establish private schools contrary to the monopoly of the State in the nationalisation of education. Algeria, Guinea and Libya made reservations of a political nature similar to those entered in relation to the CCPR.[308] Egypt made a declaration of a religious nature, similar to the one entered in relation to the CCPR. Reservations made by Kenya, Madagascar and Zambia are indicative of an honest appraisal of the implications of the obligations under the Covenant. The duty on states to ensure paid leave or adequate social security to women before and after childbirth is guaranteed.[309] Kenya reserved its adherence to this obligation, observing that it cannot be realised at present. Both Madagascar and Zambia declared that the right to free primary education for all cannot be realised at present.[310]

2.3.3.4 Reporting obligations

As is the case under other treaties, African states have been reluctant to meet their obligation to report.[311] One factor of particular importance in Africa is that governments "do not have appropriate data of good quality for this type of analysis".[312] An optional Protocol to CESCR that will allow for individual complaints is now being considered. This will convert the approach from monitoring of "progressive realisation" to a "violations"-based approach. As far as Africa is concerned, this approach is preferable in the light of the fact that "a violations approach does not necessarily require access to extensive statistical data.[313]

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307 Art 13(3) of the Covenant.

308 See par 2.4.2 (c) above.

309 Art 10(2) of the Covenant.

310 Art 13(2)(a) of the Covenant.

311 See in general on reporting Craven (1995).

312 Chapman (1995) 55 *ICJ Review* 23 at 28.

313 Chapman (1995) 55 *ICJ Review* 23 at 31.

2.3.3.5 Realisation

Continent-wide conditions of poverty, illiteracy and general underdevelopment testify to the failure of African states to secure viable socio-economic environments to their nationals. Ratifying the CESCR might have a gravitational pull-power, but as yet its promise lies unfulfilled. Reporting obligations were insufficient in securing improved realisation of these rights. On the short term and in isolated cases, at least, the gravest breaches of socio-economic rights may be redressed by adopting a violations-based approach.

2.3.4 The Committee on the Elimination of Discrimination against Women

2.3.4.1 Background

Numerous human rights instruments have been adopted to deal with aspects of the precarious position of women around the globe. The most comprehensive of these is the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). Others include the Convention on the Political Rights of Women,[314] the ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value and the Convention on Consent to Marriage[315], Minimum Age for Marriage and Registration of Marriages and the Convention on the Nationality of Married Women.[316]

A number of African states have become party to some of these instruments. On 31 March 1997, the number of states that have ratified each of these was as follows:[317]

- CEDAW: 45 states
- Convention on the Political Rights of Women: 29 states:[318]

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314 UN Treaty Series vol 193 at 135, adopted on 20 December 1952, entered into force on 7 July 1954.

315 ILO Convention no 100, UN Treaty Series vol 165 at 303, adopted on 29 June 1951, entered into force on 23 May 1953. Also see par 2.5.1 below.

316 UN Treaty Series vol 309 at 65, adopted on 20 February 1957, entered into force on 11 August 1958.

317 See Table B below.

- Consent, Minimum Marriage Age Convention: 9 states
- Nationality of Married Women Convention: 12 states

The African Charter incorporates these rights by reference: African states shall ensure the "elimination of every discrimination against women and so ensure the protection of the woman and child as stipulated in international declarations and conventions".[319] This means that, notwithstanding the fact that a state might not have ratified a specific convention, those provisions become binding on that state by virtue of the state's ratification of the African Charter. As far as international commitment is concerned, one should distinguish between African states that have a primary commitment to women's rights, and those who have a derivative obligation. In relation to CEDAW the difference would be that realisation is the responsibility of different institutions. For states incurring their commitments via the African Charter, the African Commission is the enforcement mechanism; for the states that have ratified the conventions themselves, realisation is the responsibility of the Committee.

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318 Even some of those states that have ratified entered restricting reservations. See web site http://www.un.org/Depts/Treaty/bible/Part_1_E/XVI_/XVI_1.html: Lesotho: "Article III is accepted subject to reservation, pending notification of withdrawal in any case, sofar as it relates to: Matters regulated by Basotho Law and Custom". Swaziland: "(a) Article III of the Convention shall have no application as regards remuneration for women in certain posts in the Civil Service of the Kingdom of Swaziland. (b) The Convention shall have no application to matters which are regulated by Swaziland Law and Custom in accordance with Section 62 (2) of the Constitution of the Kingdom of Swaziland. [(a) The office of Nggwenyama; (b) the office of Ndlovukazi (the Queen Mother); (c) the authorization of a person to perform the functions of Regent for the purposes of section 30 of this Constitution; (d) the appointment, revocation of appointment and suspension of Chiefs; (e) the composition of the Swazi National Council, the appointment and revocation of appointment of members of the Council, and the procedure of the Council, (f) the Ncwala; (g) the Libutfo (regimental) system.]" Sierra Leone and Mauritius do not consider themselves bound by article III in so far as that article applies to recruitment to and conditions of service in the Armed Forces or to jury service.

319 Art 18(3) of the Charter.

2.3.4.2 *Composition and functions*

The Committee on the Elimination of Discrimination against Women ("the CEDAW Committee") is made up of 23 independent experts, elected by the states parties to CEDAW.[320] They meet yearly to consider state reports submitted in terms of CEDAW.[321] The CEDAW Committee may "make suggestions and general recommendations based on the examination of reports and information received from the States Parties".[322] These suggestions and recommendations are contained in the Committee's annual report to the General Assembly.[323]

At present, six of the 23 Committee members are from African states.[324] They are all female and are more or less representative of the African continent, although Southern and Central Africa are underrepresented. The African members are: Abaka (Ghana), Aouij (Tunisia), Bare (Zimbabwe), Ouedraogo (Burkina Faso), Sinegiorgis (Ethiopia) and Tallawy (Egypt). The terms of four members expire in 1998, and that of the other two (the members from Burkina Faso and Ethiopia) expire in the year 2000.

Byrnes has described the performance of African experts as "varied": "some have been among the most active members of the Committee, while others have been relatively passive".[325] He also noted that "rigorous scrutiny of developing countries appears to have been tempered by the perception of the difficulties they face in the promotion of the equality for women".[326]

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320 Art 17 of CEDAW.

321 Art 20 of CEDAW.

322 Art 21(1) of CEDAW.

323 This report is submitted through ECOSOC: see art 21(1) of CEDAW.

324 See Web site gopher://gopher.un.org: 70/00/ga/CEDAW/REP.

325 Byrnes (1989) 14 *Yale Jnl of Intl Law* 1 at 11.

326 *Ibid.*

2.3.4.3 *Ratifications and reservations*

As at **31 December 1995**, CEDAW had been **ratified** by 43 African states.[327] Half of the ten non-ratifying states were Arabic countries.[328] Apart from these five states, another two of the non-ratifies were states within the Islamic sphere of influence.[329] Botswana, Sao Tome e Principe and Swaziland accounted for the other three. By **31 March 1997**, two of these states, Algeria and Botswana, have joined the 43, pushing the number of African ratifying states to 45. This represents 85% of all OAU member states. The global ratification percentage then stood at 83%.

States may enter **reservations** when ratifying or acceding to CEDAW. The general rule that reservations may not be incompatible with the object and purpose of a treaty,[330] is spelt out in the Convention.[331] Eight African states ratified CEDAW with reservations.

- **Algeria and Ethiopia** both declared themselves not bound by article 29(1). That provision creates the possibility of doing away with the requirement of mutual consent of states parties in order to seize the ICJ.

- Two African states, **Libya and Malawi**, made general reservations.[332] Libya made it clear that the principle of equality may not be invoked in contradiction of Shari'ah. Malawi entered a reservation to the effect that traditional customary practice rather than CEDAW is to be upheld in cases of conflict.

- Article 11 of CEDAW deals with equality in the field of employment. A number of states parties made reservations about the full realisation of the rights contained in this article. The

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327 See Table B below.

328 They are Algeria, Djibouti, Mauritania, Somalia and Sudan (see Table B). They are all members of the Arab League (see ch 5.4 below).

329 They are Niger and Mozambique, both members of the Organisation of Islamic Conference (see ch 5.4 below).

330 Art 19 of the 1969 Vienna Convention on the Law of Treaties.

331 Art 28(2) of CEDAW.

332 See web site http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_8.html.

"most blunt" of these reservations came from **Mauritius**,[333] who declared itself not bound by articles 11(1)(b)[334] and 11(1)(d), which guarantees equal remuneration for work of equal value. Lijnzaad has described the terms of these reservations as "highly questionable".[335]

- Further reservations were entered by **Algeria, Egypt and Lesotho**. These are of a more limited nature and refer to particular aspects. The Algerian reservation requires that the Convention may not contradict provisions of the Algerian Family Code in respect of rights in marriage. The Egyptian reservation also invokes the Shari'ah and may be subjected to criticisms similar to those raised in respect of Libya.[336] Lesotho made a reservation which probably best illustrates the possibility of a tolerable reservation.[337] Its reservation excludes a particular aspect of Lesotho society from the reach of the general principle of gender equality. This aspect is succession to the throne and to traditional chieftainships, which is regarded as the prerogative of men. Without agreeing to the principle,[338] it seems to be very different from being wholesale negating of treaty obligations.

Seven states **objected** formally to reservations entered by states parties. All of them objected to Libya's reservation. In my view the reservations entered by both Libya and Malawi are too vague and general. If a state wants to make a reservation, it must at least be precise about what aspect it reserves.[339] All-inclusive reservations, like those of Libya and Malawi, dilute all the rights in CEDAW. They reduce the state's obligation to existing local law, either in the form of Shari'ah or traditional law. This is clearly incompatible with the principal objective of the Convention, which

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333 As Lijnzaad (1995) observed (at 314).

334 This sub-article grants women equality in employment opportunity.

335 Lijnzaad (1995) at 314.

336 On the question of Shari'ah and CEDAW reservations, see also Byrnes (1989) *Yale Jnl of Intl* Law 1 at 52 - 55. On conflicts between the Islamic religion and the implications of ratifying CEDAW, see Sullivan (1988) 82 *AJIL* 487 at 514 - 517.

337 For a more general discussion of the significance of CEDAW for women in Lesotho, see Mamashela (1993) 5 *ASICL Proc* 153.

338 The importance of female inclusion in African public spheres is discussed in ch 3 below.

339 See Lijnzaad (1995) at 305, pointing out that the Malawian reservation encompasses all spheres of society.

is to eliminate all forms of discrimination against women.[340] These reservations subject international human rights law to internal law. This conflicts with the Vienna Convention on the Law of Treaties, which provides that local legislation may not be invoked as a ground to dilute treaty obligations.[341]

2.3.4.4 Reporting

State compliance with reporting obligations is analysed and presented schematically in Table B.[342] Viewed within a global perspective, African states have been quicker to ratify, but slower to report than states in the other regions.

2.3.4.5 Realisation

The limitations of the human rights institutions and instruments have been highlighted. Sexual inequality is reinforced by custom and culture in most of Africa.

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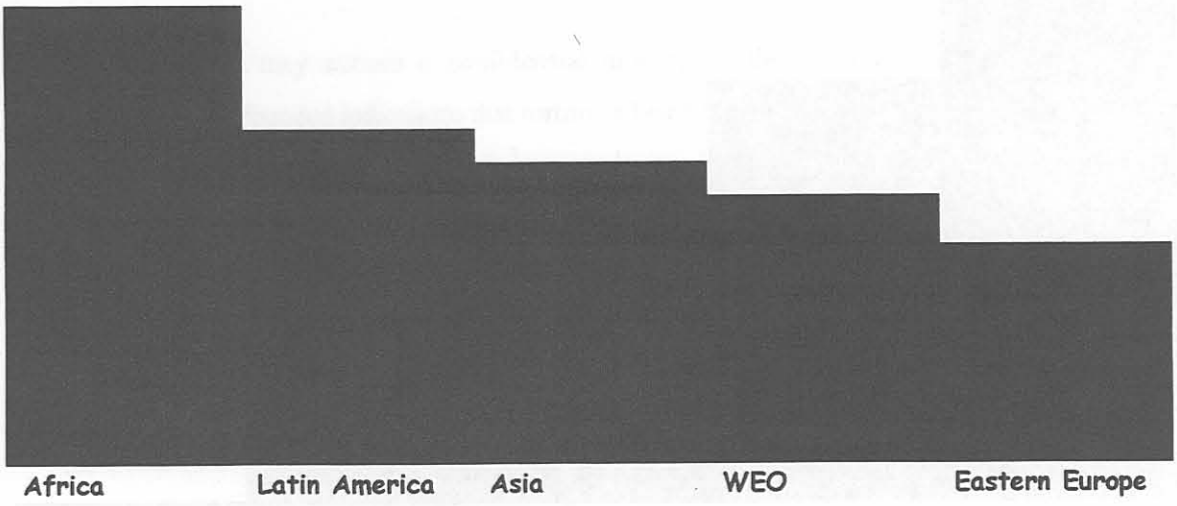
340 See Preamble and art 2 of CEDAW.

341 Art 27 of the Vienna Convention on the Law of Treaties.

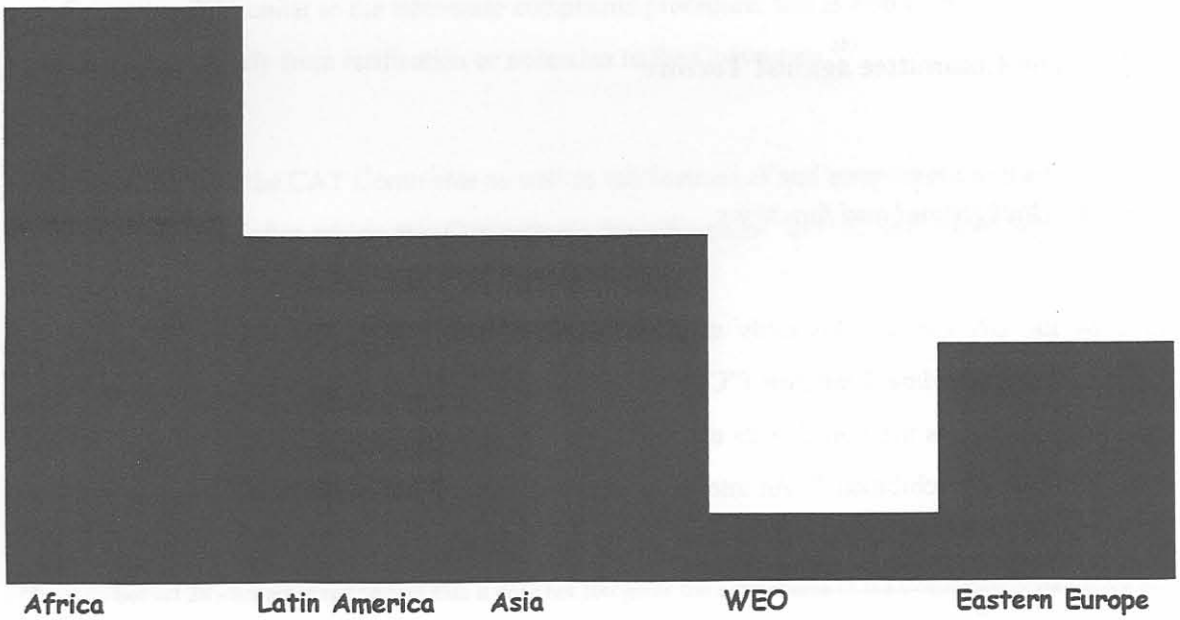
342 Below.

TABLE A: CEDAW: RATIFICATIONS AND STATE REPORTING BY REGION[343]

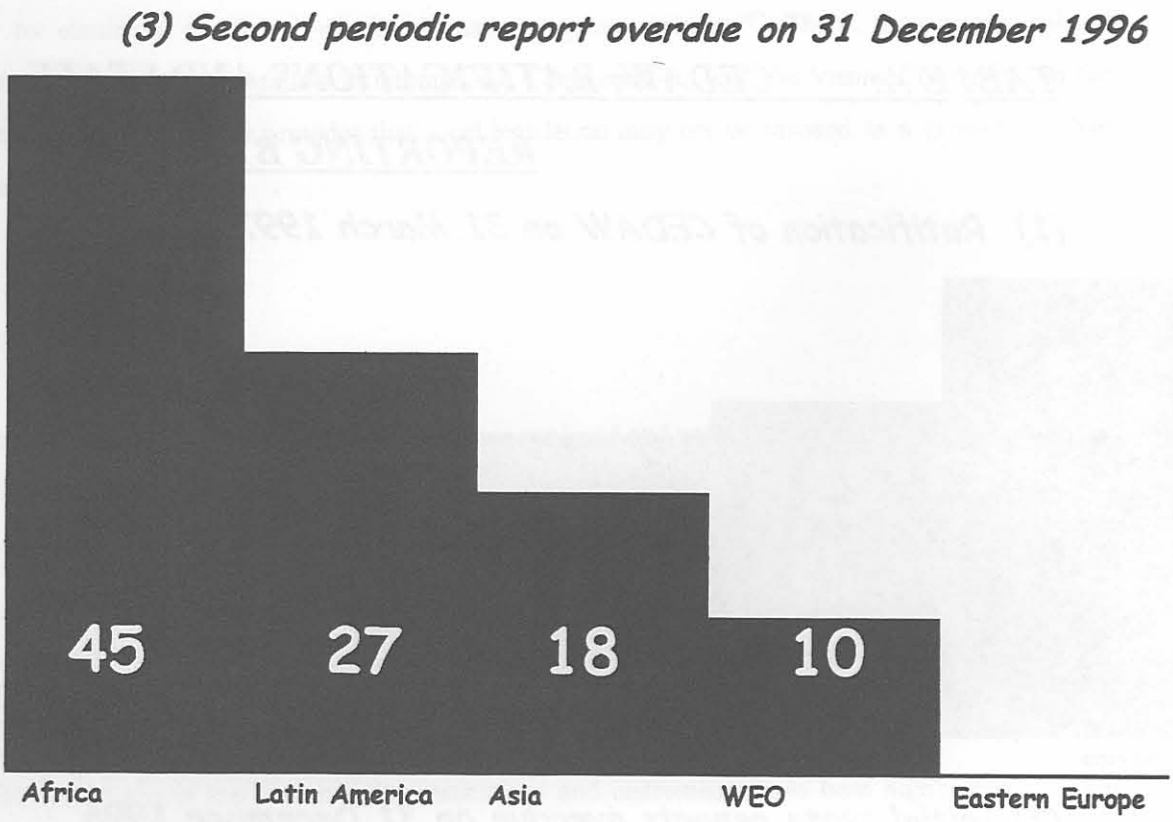
(1) Ratification of CEDAW on 31 March 1997



(2) Initial state reports overdue on 31 December 1996



343 Graphs show percentages of total of cases for all regions together. Source: CEDAW/C/1997/2; data at gopher://gopher.un.org:70/00/ga/cedaw/1997/C-1997-2).



2.3.5 The Committee against Torture

2.3.5.1 Background and functions

In 1984 the UN General Assembly adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment ("CAT").[344] Taking as its starting point that international law outlaws the practices mentioned in its title, the main aim of the Convention is to provide measures to strengthen this prohibition.[345] An international supervising body, the Committee against Torture ("CAT Committee"), is established to implement the provisions of CAT.[346]

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344 Adopted on 10 December 1984, GA Res 39/46, entered into force on 26 June 1987, after ratification by twenty states (art 27).

345 Burger and Danelius (1988) at 1.

346 Arts 17 and 18 of the Convention.

Four functions are accorded to this Committee:

- It considers **state reports**, which states parties have to submit within one year of ratification or accession, and again every four years thereafter.[347] After considering these reports, the Committee may issue comments on a particular report, and may include general comments about the reports in its annual report to the states parties and the UN General Assembly.[348]

- The Committee may initiate a **confidential inquiry** on the basis of reliable information revealing "well-founded indications that torture is being systematically practised in the territory of a State party".[349] Once a finding has been made, it is kept confidential and transmitted to the state party. The finding may later be included in the Committee's annual report. Unless a state party makes a specific declaration to exclude this competence,[350] it follows automatically from accession or ratification.

- **Complaints by one state party against another** may be directed to and may be considered by the Committee. This procedure is optional.[351]

- **Complaints by or on behalf of individuals** may be directed to and may be considered by the Committee.[352] Similar to the inter-state complaints procedure, this is also a procedure that does not follow directly from ratification or accession to the Convention.[353]

The composition of the CAT Committee as well as ratifications of and reservations to the CAT will now be discussed, after which the Committee's four functions will be elaborated upon in the African context.

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347 Art 19.

348 Art 19(5), read with art 24 of CAT.

349 Art 20(1).

350 See art 28 - a state may "declare that it does not recognize the competence of the Committee provided for in Article 20".

351 Art 21 of CAT.

352 Art 22 of CAT.

353 An art 22 *declaration* is therefore similar in effect to Optional Protocol I to the CCPR.

2.3.5.2 *Composition*

The states parties to CAT elect ten experts as Committee members for renewable terms of four years.[354] Those elected perform their functions in their personal capacities.[355]

The first CAT Committee was elected in 1987. Of the ten members, one (or 10% of the membership) was from an African state. This was Alexis Mouelle, from Cameroon.[356] At that stage, 27 states had ratified CAT. Of these, 4 (or 7 % of the ratifying states) were African.[357] Before the meeting an informal agreement had been worked out by the states parties. In terms thereof, two members would be from Africa, one from Asia, two from Eastern Europe, two from Latin America and three from the WEO states. The end-result did not reflect this informal agreement, as the WEO states were "overrepresented" in relation to the agreement, with four representatives and Africa "underrepresented", with only one. The African states, and the Philippines, expressed their concern about this departure from the informal agreement.[358] However, at 7% of the ratifying states, and 10% of the Committee membership, Africa had in fact been overrepresented on the Committee.[359]

2.3.5.3 *Ratification, reservations and derogations*

Nineteen African states have **by 1 January 1996** ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[360] By **31 March 1997**, four more African states (Côte d'Ivoire, Malawi and Zaïre in 1996, and Kenya on 21 February 1997) have ratified

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354 Art 17(1) and 17(5) of CAT.

355 Art 17(1) of CAT.

356 See Burgers and Danelius (1988) at 111.

357 These four states were Egypt, Senegal, Cameroon and Togo (see Burgers and Danelius (1988) at 109).

358 See Burgers and Danelius (1988) at 111.

359 In 1992 - 1993 two Africans served on the Committee: Moulle and El Ibrashi from Egypt, whose term expired at the end of 1995 (Annex II to UN doc A/48/44, Supplement no 44).

360 See Table in Heyns (1996) at 3 - 4.

CAT, bringing the African total to **23**. This is proportionately less than the global average: 53% of states worldwide have ratified,[361] and only 43 % of African states have done the same.[362]

A similar tendency as in the case on the CCPR and its Optional Covenant is noted. The African percentage drops strikingly when the percentage of states that have made **declarations in terms of articles 21 and 22 of CAT**, is compared with the number of states that have ratified the Convention. A declaration in terms of article 21 allows the CAT Committee to consider inter-state complaints, and one made in terms of article 22 allows individuals to complain to the Committee. By 31 March 1997, four African states have made declarations, all four of them in terms of both articles. The four states are Algeria, Senegal, Togo and Tunisia. This means that 13% of the African states parties to CAT have accepted the Committee's broader competence, as opposed to 36% of all the states parties to CAT taken together.[363] It also means that only 8% of all African members of the UN can be investigated effectively for compliance with obligations undertaken under the CAT.

Only one African state entered a **reservation** when it ratified CAT. Morocco excluded the competence of the CAT Committee in terms of article 20(1) of CAT.[364] This is disappointing, as article 20(1) provides one of the most significant mechanisms for preventative and proactive implementation of CAT. It provides the Committee with the power to "invite" a state party to "co-operate in the examination" of reliable information about systematic practices of torture received by the CAT Committee in respect of that state. The "invitation" need not entail a visit to the state party, as visits are dependent on state consent.[365] By excluding the competence of the Committee *ab initio*, Morocco has given a very clear indication of its reluctance to subject its penitentiary system to international scrutiny. This conclusion is consistent with Morocco's non-acceptance of the CAT Committee's optional competencies.

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361 102 of the total of 191 states.

362 23 of the 53 African UN member states.

363 The total number of states parties to CAT that have made declarations is 37 (see web site referred to in Table II). Expressed as a percentage, this is 36 %.

364 See web site http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

365 See art 20(3) of CAT.

2.3.5.4 *Reporting obligations*

States have a regular reporting duty. They must report on measures taken to give effect to the treaty within one year of ratifying it. Thereafter, states must report every four years.[366] As is the case with reporting to other treaty bodies, many states lag behind in their duty.[367] The general problem of duplication of information contained in different reports is accentuated by the high degree of overlap between CAT and CCPR. This factor may impact significantly in states that already find it difficult to comply with reporting obligations. Institutional and financial constraints accentuate these difficulties in most African countries.

The Committee considered the state report of Libya in November 1991.[368] It referred the report back for supplementary information on the way in which the CAT was implemented in Libya. In November 1992, the Committee examined the additional report. Although the report, and the answers of the Libyan representative, gave details about the Libyan legal system and its formal conformity with the Convention, the report still lacked information about the practical application of the instrument.[369]

2.3.5.5 *Confidential inquiry*

Article 20 of CAT provides for a procedural innovation as far as treaty bodies are concerned.[370] When the CAT Committee receives "reliable information which appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party",[371] the Committee may investigate and report on the matter. If the information meets the threshold-test

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366 As required by art 19(1) of CAT.

367 See Bayefsky in Henkin and Hargrove (eds) (1994) 229 at 287 (Table C).

368 See paras 181 - 207 of Report of the Committee against Torture, UN doc A/48/44.

369 The Committee concluded as follows: "The Committee also stated that it was awaiting with impatience the second periodic report ... due in June 1994, and that it would be grateful if that report would describe the application of the Convention article by article" (par 205 of UN doc A/48/44).

370 See Burger and Danelius (1988) at 160.

371 Art 20(1) of CAT.

contained in the wording of article 20(1), it must refer the matter to the state to seek its input and co-operation. It may obtain information from other sources (including NGOs) in its inquiry. A visit to the state concerned may only take place with the state's consent.[372] Once the inquiry is completed, its results are communicated to the state party. The state may then comment. Thereafter, the CAT Committee may publish the summarised report in its annual report. The Committee embarked on its first investigation of this kind at its fourth session.[373] Not much data is available yet on how this procedure functions in practice. The procedure in terms of article 20 is binding on all ratifying states, unless they opt out explicitly, as Morocco has done. By the end of March 1997, seven other ratifying states have also denied the CAT Committee its powers under article 20.[374]

2.3.5.6 Individual complaints

By the end of its seventh session, the CAT Committee had adopted decisions on only seven cases. In each instance, the communication was rejected on admissibility grounds.[375] Two cases involving African citizens, one against an African and one against a non-African state, are now discussed:

In the first instance a complaint against Tunisia was submitted to the Committee against Torture in 1994[376] in respect of the arrest and death in detention of a Tunisian student, Faïsal Barakat. On the facts presented to the Committee, including medical reports, a case of torture seemed to have been established. The application was, however, declared inadmissible. The Committee had to interpret article 22(1) of the Convention, stipulating that states parties may recognise the Committee's competence to receive communications "from or on behalf of individuals". This article should be read with rule 107(1)(b) of the Committee's Rules of procedure. This rule provides that the communication must be submitted by:

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372 See art 20(3) of CAT.

373 See Byrnes in Alston (ed) (1992) at 532.

374 See web page http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

375 Byrnes in Alston (ed) (1992) at 539.

376 *Faïsal Bakarat and family v Tunisia*, Communication 14/ 1994, UN Doc. A/ 50/ 44 at 70 (1995).

- "the individual himself"; or
- "by his relatives or designated representative"; or
- "by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf".

The third category was at issue in this communication. The victim was dead and therefore obviously unable to complain personally. Provided that he "justifies" his acting on the deceased's behalf, the author would be allowed to bring the communication. The author in this case is a political refugee, residing in France, but he did not establish that he was duly authorised by the deceased's family to submit the communication. The Committee arguably accepted the allegations that the victim's and author's family are threatened by the Tunisian government, as it requested the government to ensure that no harm is done to them. Given this context, it seems overly restrictive and technical for the Committee to have accepted the government's contention that the author had not been "duly authorised by the family". Having declared the communication inadmissible, the Committee left the door open for a subsequent communication properly establishing standing on behalf of the victim.

The subject matter of *Mutombo v Switzerland*[377] was torture and consistent mass violations of human rights in Zaïre. Mutombo, a Zairian citizen, was involved in activities opposed to the Mobutu regime in Zaïre. He was subsequently detained and allegedly exposed to torture. When he was released, he fled the country, and eventually ended up in Switzerland. His entry into Switzerland was illegal. Consequently, he applied for refugee status. His application was rejected, and appeal to the Commission of Appeal in Refugee Matters was unsuccessful and he faced expulsion. The CAT Committee concluded that his expulsion would constitute a violation of article 3[378] of CAT.[379] As Zaïre is not a party to CAT, Mutombo would no longer be under CAT's legal protection from expulsion. The Committee concluded that Switzerland was under an

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377 Communication 13/1993 (*Mutombo v Switzerland*), views adopted on 27 April 1994.

378 Article 3(1) reads: "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to tortune".

379 At par 9.7 of its views.

obligation not to expel him to Zaïre, or to a country where he would face a real risk of being expelled to Zaïre.[380]

2.3.5.7 Realisation

The most promising aspect of implementation under CAT, the article 20 investigation, has not taken off yet. It is encouraging, though, that only one of the African states has declared its unwillingness to recognise this competence of the CAT Committee. Of the total number of parties (102), eight (or7 %) have made declarations excluding the Committee's competence under article 20,[381] compared with a single African state (or 4% of African states). In the absence of an effectively functional judicial system, CAT provides important redress possibilities in individual cases. Few cases have been filed with the Committee, though. In time, this avenue may become better known and may be more effectively utilised. At the moment a very limited number of complaints have been brought under CAT.

2.3.6 The Committee on the Rights of the Child

2.3.6.1 Background and functions

One of the most recent conventions adopted under the auspices of the UN is the Convention on the Rights of the Child ("CRC").[382] This followed the submission by the Polish government of a draft on the rights of the child in 1979, the International Year of the Child. A decision was taken by the General Assembly to set up a working group. The final version of the Convention was adopted in November 1989. In record time the required twenty states ratified, causing the Convention to enter into force in September 1990, less than a year after its adoption.

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380 At par 10 of its views.

381 See art 28 of the CAT, which earmarks such a declaration as a reservation.

382 For a background, see Leblanc (1995).

African involvement in the drafting process was limited. Only three African states participated for at least five of the nine years that the working group took to draft a final proposal.[383] This is the lowest percentage of all the continents, contrasting sharply with West European (61%) and even Latin American (29%) participation over a similar period.[384] However, by 1989 nine African states have been participating in the activities of the working group.[385]

The Committee on the Rights of the Child is the enforcement mechanism under this Convention. Individual communications are not provided for. Self-Reporting by states parties is the main method of ensuring compliance with the provisions of the Convention.

2.3.6.2 Composition

The Committee consists of ten members with recognised competence in the field of children's rights. They are elected by states parties, and serve in their personal capacity.[386] Members are elected for a term of four years, but they may be re-elected.[387] The Committee met for the first time in 1991, after its ten members had been elected.

In electing members to the Committee, states parties' consideration should be given to "equitable geographical distribution, as well as to the principal legal systems".[388] After the first election in January 1997, three of the ten members of the Committee were from African states: Burkina Faso (Akila Belembaogo), Egypt (Hoda Badran) and Zimbabwe (Swithun Mombeshora).[389] The terms of two of these members (from Egypt and Zimbabwe) expired on 28 February 1997. Mrs Belembaogo's term expires on 28 February 1998.[390]

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383 See Table in LeBlanc (1995) at 30.

384 *Ibid.*

385 See Table in LeBlanc (1995) at 48.

386 See art 43(2) of the Convention.

387 Art 43(b).

388 Art 43(2).

389 The first two are women.

390 UN document CRC/C/50 at Annex II.

This means that 30% of the membership of the Committee was African, a figure that deviates slightly from the African percentage of the total number of states parties (which stood at 37%). The West European region was "overrepresented". LeBlanc justifies this overriding of strict geographical considerations with reference to the fact that "states in that region were the most active and constructive"[391] in drafting the Convention. They also carry "the heaviest financial burdens" in supporting the UN.[392]

2.3.6.3 Ratifications and reservations

Despite the insignificant part played by African personalities in the ten years of debate and discussion preceding the Convention's adoption, it has been ratified by a significant number of states on the continent. After about two years, on 31 December 1992, 39 out of a possible 52 states in Africa (75%) had already ratified the Convention.[393] Of all the regions in the world,[394] only Latin America and Western Europe had higher ratification rates.[395] The African ratification percentage was also higher than the global average of 70%.[396]

Of the 39 African states parties to the Convention at the end of 1992, six states have entered **reservations**.[397] With the exception of Latin America, this is the lowest regional reservation percentage globally. Even so, of the ten states whose reservations were objected to, two were African.[398] Only European countries had at that stage raised objections against reservations to the Convention by other states parties.[399]

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391 (1995) at 210.

392 *Ibid.*

393 See Table in LeBlanc (1995) at 48.

394 LeBlanc uses eight regions: Africa, Asia and Pacific, East Europe, West Europe, Latin America, Middle East, North America and Carribean and others (1995) at 48.

395 At 90 and 80% respectively, see LeBlanc (1995) at 48.

396 LeBlanc (1995) at 48.

397 See Table in LeBlanc (1995) at 53.

398 See Table in LeBlanc (1995) at 56.

As at 31 January 1997, 189 states were **party to the Convention**, including 52 African states.[400] Only one state on the continent, Somalia, has neither signed nor ratified the Convention. The CRC became the first human rights instrument that Djibouti ratified. This trend has manifested itself globally, culminating in near-universal ratification of the CRC. Simultaneously, however, the number of states entering reservations and making declarations has increased to 58. Ten African states entered reservations or declarations. These relate to the Islamic religion,[401] the age of majority,[402] religion and traditional values,[403] the provisions of national legislation,[404] the state's inability to ensure free primary education,[405] and to children seeking refugee status.[406]

Objections to reservations or declarations were raised by eleven states. At the end of 1992 only European states parties had raised objections. Objections were made against the reservations and declarations entered by Botswana, Djibouti and Tunisia.[407]

2.3.6.4 Reporting obligation

On 30 June 1995 a total of 86 reports under the Convention were overdue.[408] It should be noted that of the three African states parties represented on the Committee on the Rights of the Child, two (Burkina Faso and Egypt) complied with their obligations to report.

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399 *Ibid.*

400 See website http://www.un.org/Depts/Treaty/final/t52/newfiles/part-600/iv-600/iv-11.html.

401 Reservation by Algeria, Egypt, Mauritania and Morocco.

402 Reservation by Botswana (Denmark objected against it).

403 Reservation by Djibouti.

404 Reservations by Mali and Tunisia.

405 Declaration by Swaziland.

406 Reservation by Mauritius.

407 See web site http://www.un.org/Depts/Treaty/final/t52/newfiles/part-600/iv-600/iv-11.html.

408 See UN document HRI/MC/1995/3 at 3-9. The following African states parties had one report overdue: Algeria, Angola, Benin, Burundi, Cameroon, Cape Verde, CAR, Chad, Côte d'Ivoire, Djibouti, Equatorial Guinea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Niger, Nigeria, São Tome and Principe, Seychelles, Sierra Leone, Togo, Uganda, Tanzania, Zaïre, Zambia, Zimbabwe.

At the Committee's 16th session (January 1997) the number of initial reports overdue by African states was 18 (from a total of 52). Forty-two states had their second periodic report overdue, of which 18 were African. Of the 51 states that owed their third periodic reports, 19 were African. Fourth periodic reports were outstanding in respect of 43 states, including 8 from Africa. Although African states have a high rate of overdue reports, non-reporting or late submission of reports is by no means exclusive to one continent.[409]

From its first to its 12th session, the Committee examined nine reports from African states.[410] They were from Egypt,[411] Sudan (both at the 3rd session),[412] Rwanda (at the 4th),[413] Namibia (at the 5th),[414] Burkina Faso (at the 6th),[415] Madagascar (at the 7th),[416] Tunisia (at the 9th session),[417] Senegal (at the 10th session)[418] and Zimbabwe (at the 12th session).[419] It is interesting to note that, in contrast to most other treaty bodies, the Committee on the Rights of the Child has expressed appreciation for various aspects of the reports submitted to it by African countries. Almost all these reports culminated in a frank and constructive dialogue, according to the Committee. A self-

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409 Analysis of UN document (EDAW/C/1997/2 at web site gopher: // gopher.un.org: 70/oo/gu/cedaw/1997/C-1997-2.

410 From a total of 56 reports: See web site www.umn.edu/human/crc/CRC-MORE/. At the 13th session another seven reports were examined. Of these, four were from African states. Country reports of Nigeria (CRC/C/8/Add 26), Mauritania (CRC/C/3/Add 36), Morocco (CRC/C/28/Add 1), and Ethiopia (CRC/C/8/Add 27) were considered.

411 See UN documant CRC/C/15/Add 5 (1993), also at web site www.umn.edu/humanrts /crc /EGYPT.htm.

412 For Sudan's report, see also the 4th session, where the examination was finalised in the light of further information provided by the state (see CRC/C/15/Add .6 (1993) and CRC/C/15/Add 10 (1993)).

413 See CRC/C/15/Add 12 (1993). The Committee adopted only "preliminary observations", as it suggested that a new report should be submitted. This was not forthcoming.

414 See CRC/C/15/Add 14 (1994). The Committee expressed its appreciation for a detailed and comprehensive report, for its self-critical approach and for frank and constructive dialogue with the state party.

415 See CRC/C/15/Add 19 (1994). The Committee's report is reprinted in (1994) 38 *JAL* 197, where the Burkinabe report is described as "one of the few African reports" to have been submitted to the Committee.

416 See CRC/C/15/Add 26 (1994).

417 See CRC/C/15/Add 11 Annex 2 (1995) and CRC/C/15/Add 39 (1995).

418 See CRC/C/15/Add 44 (1995).

419 See CRC/C/15/Add 55 (1995).

critical and open attitude was also identified in the reports of and interactions with the delegates from Burkina Faso, Madagascar, Namibia and Zimbabwe.

In general, governments co-operated with the Committee by drafting adequate reports, by sending high profile delegations, and by answering queries. Madagascar presents an example. It ratified the Convention on 19 December 1990, and submitted its first periodic report on 20 July 1993.[420] The 65-page report is an excellent example of serious compliance with reporting obligations. Richness of detail and the inclusion of statistical data (on the percentage of children attending school, and on technical education) make examination of the report meaningful. State compliance is not taken as a *fait accompli*, but is sometimes criticised in the country report.[421] One problematic aspect in terms of preparation of reports, is the provision of statistics on the realisation of especially socio-economic rights of children. The Committee requested that such information be included in subsequent reports.[422]

This does not mean that the Committee did not identify areas in which the protection granted by states fell short of the guarantees in the CRC. Some of these areas are:

- Discrimination against girls is rife in most states. This is especially the case when cultural practices indigenous to parts of Africa, such as female genital mutilation, conflict with the provisions of the CRC. Other forms of discrimination and violation of the dignity of the girl-child is the practice of forced marriage, the incidence of domestic violence[423] and sexual exploitation.[424] In some states, patterns of disparity in access to education have been criticised.[425]

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420 See UN document CRC/C/8/Add.5, dated 13 September 1993.

421 Eg par 79: "The provisions are not always observed by those required to apply them" (on problems with the implementation of civil registration of births) and par 309: "provisions on sexual abuse and exploitation are not always effectively applied".

422 See eg the Egyptian report, and the Committee's comments.

423 See the Committee's evaluation of the report by Burkina Faso (at paras 8 and 14) and that of Sudan (at par 13 of the Committee's concluding observations).

424 See eg the Committee's views in respect of the Malagassy report (at par 15).

425 See the Committee's comments on the Egyptian report (at par 6).

- Education has been targeted as a cause for concern. The absence of compulsory and free education at the primary level,[426] the quality of education,[427] and the high drop out rate before pupils finish primary school,[428] have been brought to the attention of states.

- Socio-economic issues, such as birth rates, heath and welfare have been raised consistently.

- A recurring concern has also been the position of working children. In many instances this amounts to child labour.[429] The Committee drew the attention of states to the ILO convention on minimum age requirements for employment.[430]

- The position of the juvenile offender has also illicited comments from the Committee.[431]

2.3.6.5 Realisation

The report of Sudan illustrates the limitations of the reporting procedure. The Committee could express an opinion on the extent to which legislative provisions conflict with the CRC. But a treaty body is powerless to address more comprehensive considerations at the socio-political and economic terrain. Sudan's children suffer due to the protracted civil war between the south and the north. They suffer from the effects of desertification, drought and famine. They suffer as an indirect consequence of structural adjustment measures and because the state cannot provide adequate infrastructural support. It matters little, viewed against this background, whether the Committee has identified punishment by way of flogging or forced labour as violations of the CRC.

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426 See the Committee's views on the report of Senegal (at par 14).

427 See the Committee's concluding observations in respect of Egypt's report (at par 10).

428 See eg the Madagascar report, and the Committee's concluding observations (at par 13).

429 See the refererence to "forced labour and slavery" in the Committee's concluding observations on the Sudanese report (at par 12).

430 See eg comments on the report of Zimbabwe, par 32.

431 See eg paras 11 and 20 of the Committee's observations on the otherwise almost uncritisised Namibian report.

The system of state reporting is based on a continuation of dialogue between the ratifying state and the treaty monitoring body. Issues that are raised are to be addressed again in subsequent reports.[432] As the African reports thus far examined have been first reports, observations on follow-up are still impossible.

2.4 Africa, the International Labour Organisation and other UN specialised agencies, funds and programmes

2.4.1 International Labour Organisation

The International Labour Organisation ("ILO") is a tripartite organisation which brings together representatives of governments, employers and workers.[433] It was established in 1919,[434] in the aftermath of the First World War, and became a UN specialised agency many years later,[435] in the aftermath of the Second World War. The organisation concerns itself with the world of work, but it has introduced human rights into labour practices and social policy. Standard setting through the adoption of conventions and resolutions in these areas has been one of the ILO's major functions. But, more significantly, it has developed the "most comprehensive international system for examining the implementation of international human rights standards".[436] Implemenation takes various forms:[437]

- States must submit an **annual report** on the fulfilment of its obligations under all the conventions it has ratified. This report is examined by a Committee of Experts.

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432 See the Committee's view on web site www.umn.edu/human/crc/CRC-PROC.htm.

433 On the ILO generally, see eg Valticos in Vasak (ed) (1982).

434 Through the Treaty of Versailles.

435 In 1945, when the UN was founded.

436 Swepston in Hannum (1992) at 115.

437 For a discussion, see Leary in Alston (ed) (1992) at 580 - 618 and Swepston in Hannum (ed) (1992) at 99.

- A special procedure is provided for **complaints concerning freedom of association** in the context of trade union activities. These complaints are examined by the Freedom of Association Committee of the Governing Body.
- A state party may also complain that **another state** is not complying with its obligations. The ILO Governing Body may appoint a Commission of Inquiry to investigate the complaint.
- Personal **visits** (or "direct contacts") by ILO officials may be undertaken to ILO member states to assist them in meeting their obligations under the different conventions.

The administrative and secretarial support and activist role of the ILO Secretariat (the International Labour Office) have been important factors in realising ILO standards. In Africa, the ILO programme consists of a field structure comprising a network of twelve area offices, five multi-disciplinary advisory teams ("MDTs") and a regional office in Abidjan.[438] This network aims at implementing a policy of active partnership by focusing on African priorities such as poverty reduction and its interrelationship with employment, protection of workers' health and safety at work, and promotion of social dialogue.[439]

All 53 OAU independent states in Africa are today members of the ILO. Two states, Liberia and South Africa, joined from the outset in 1919. South Africa's membership was discontinued in 1966, but it resumed its place again in 1994. Most of these states joined the ILO soon after independence, mostly in the 1960s.[440] However, a few states, in particular Botswana[441] and the Gambia,[442] only joined the organisation many years after obtaining independence.

Many of the African states have ratified a great number of the ILO Conventions. States that exceeded fifty ratifications on 31 March 1997 are Algeria (with 53), Djibouti (with 62), Egypt

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438 See eg *ILO Africa* (1996), a newsletter of the Africa Regional Office of the ILO.

439 *Ibid.*

440 See Schedule in ILO (1997).

441 Joined in 1978. By the end of 1996 Botswana had only ratified two conventions. In the course of 1997 (up to the end of July), this number grew to nine.

442 Joined in 1995, and has by 31 March 1997 not ratified any conventions.

(60), Guinea (56), and Tunisia (56).[443] States that have, by 31 March 1997, ratified a small number of conventions include Botswana (two), Eritrea (none), the Gambia (none) and Zimbabwe (nine). While the length of the period of membership influenced the rate of ratification, the type of economic system (socialist, as in Guinea, or capitalist, as in Botswana) also played a role.

Five of the major ILO conventions are now discussed in more detail:

- The **Convention concerning Forced Labour**[444] was adopted to "suppress the use of forced labour in all its forms".[445] Among all the ILO instruments dealing with human rights, this Convention is still most widely accepted, particularly by African member states.[446] By 31 March 1997, 41 African countries had ratified this Convention.[447] The application of this Convention has been commented on extensively by the Committee of Experts. Implementation problems involve mainly two aspects: compulsory labour for the purpose of production, and as a means of political coercion or as punishment.[448]

- The **Convention concerning Freedom of Association and Protection of the Right to Organise**[449] provides that workers and employers may join organisations of their own choosing without prior authorisation.[450] By 31 March 1997, 35 of the 118 ratifications worldwide had been made by African states. The African rate of ratification is comparable to the average for the membership as a whole. Recent ratifications (in 1995 and 1996) came from Mozambique, Namibia and South Africa.

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443 This is out of a potential total of 180 (see Convention no 180, adopted at the ILO 85th session in 1996). Of all the member states globally, Spain had ratified the most conventions (125).

444 No 29, *ILO Conventions and Recommendations vol 1* (1997) at 143, entered into force on 1 May 1932.

445 Art 1(1) of the Convention.

446 ILO (1983) at par 55.

447 ILO *List of Ratifications by Convention and by Country* (1997). They are: Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, CAR, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaïre and Zambia.

448 ILO (1983) at par 57.

449 No 87, *ILO Conventions and Recommendations vol 1* (1997) at 527, entered into force on 4 June 1950.

450 See art 2 of the Convention.

- The **Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value** [451] obliges states to adopt measures to ensure that women are paid equally to men for work of equal value. African states account for a high percentage of the global ratification of this convention.[452]

- States that ratify the **Convention concerning the Minimum Age for Admission to Employment**[453] undertake to raise the minimum age of admission into employment progressively. However, states are also required to fix a minimum age "for the time being".[454] By 31 March 1997, only ten African states had ratified this Convention.[455] This is in keeping with global trends, as the total number of ratifications of this instrument is also much lower than for the three previous instruments, and stood at fifty.

- The **Convention concerning Minimum Standards of Social Security**[456] has been ratified by a relatively small number of African states: only five out of a total of 39 ratifying states are African. These countries are Libya, Mauritius, Niger, Senegal and Zaïre.[457]

Through standard setting and examination of country reports the ILO has charted the development of labour law and labour relations in Africa. But as far as human rights are concerned, its main contribution lies in the technical assistance by undertaking activities such as capacity-building, training and education on the promotion of equality in the workplace, enterprise creation, entrepreneurship development and strengthening of workers' organisations.[458]

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451 No 100, *ILO Conventions and Recommendations* (1997) at 649, entered into force on 23 May 1953.

452 By 31 March 1997, 36 of the 126 ratifying states were African.

453 No 138, *ILO Conventions and Resolutions vol 2* (1997) at 525, entered into force on 19 June 1976.

454 See art 2(1) of the Convention.

455 These states are, with the minimum age set by each state in brackets: Algeria (16), Equatorial Guinea (14), Kenya (16), Libya (15), Mauritius (15), Niger (14), Rwanda (14), Togo (14), Tunisia (16) and Zambia (15).

456 No 102, *ILO Conventions and Resolutions vol 2* (1997) at 9, entered into force on 27 April 1955.

457 See ILO *List of Ratifications by Convention and Country* (1997). It is interesting to note that the Convention was not ratified by countries while under socialist or Marxist rule.

458 See eg ILO (1996).

2.4.2 Other UN specialised agencies, funds and programmes

Other UN specialised agencies, funds and programmes play an important role in Africa. Apart from those referred to briefly below, the contribution in the field of socio-economic rights of the UN Food and Agricultural Organisation ("FAO") and the World Health Organisation ("WHO") should also be mentioned.[459]

2.4.2.1 Economic Commission for Africa

The UN Economic Commission for Africa ("ECA") was founded in 1958 by a resolution of ECOSOC. Its purpose is to initiate and take measures to facilitate economic development in Africa.[460] Most African states are ECA members. Its mandate extended to political issues. ECA was instrumental in efforts to establish the African Economic Community ("AEC").

2.4.2.2 UN Development Programme

The aim of the UN Development Programme ("UNDP") is to foster growth and improve living standards of people around the globe. "Technical assistance" is the main means of support. The UNDP has been very active in numerous African states. In 1994/1995 emergency relief operations were conducted in Angola, Liberia, Mozambique, Rwanda and Zaïre.[461] Since 1996, there has been a tendency to work more towards the enhancement of good governance.

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459 For a general overview see United Nations (1995).

460 For a history of the involvement of the ECA in Africa, see D'Sa (1983) 27 *JAL* 4.

461 *Africa South of the Sahara: 1997* at 78

2.4.2.3 *UN Centre for Human Rights*

The UN Centre for Human Rights provides an advisory service about human rights matters. Technical assistance may be requested on issues such as the support of democratic governance, strengthening of local institutions, and domestic legal reform. The full potential of this resource has not been tapped by African governments. A problematic aspect that arises in this context is the manipulation of state resources by corrupt officials or by an authoritarian government. It is unlikely that assistance will be requested by such a government. Especially in Africa, such assistance should be channelled through organs of civil society, rather than governments.

2.4.2.4 *UN Educational, Scientific and Cultural Organisation*

The UN Educational, Scientific and Cultural Organisation ("UNESCO") was established "to contribute to peace and security ... in order to further universal respect for justice, the rule of law and for human rights and fundamental freedoms".[462] It has taken a leading role in creating a global human rights culture through the dissemination of information of human rights.[463] UNESCO has also undertaken research and education in the field of human rights. However, UNESCO's role should be enhanced in Africa and its activities and the promotional mandate of the African Commission should be co-ordinated.

Conventions have also been adopted under UNESCO auspices. An important example is the UNESCO Convention against Discrimination in Education.[464] By 31 March 1997, this Convention had been ratified by 18 African states. The total number of ratifications stood at 84.

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462 Art 1 of the UNESCO Constitution.

463 A complaints procedure may also be used by individuals and NGOs: see Marks in Hannum (ed) (1992) at 86.

464 UN Treaty Series vol 429 at 93, entered into force on 22 May 1962.

2.4.2.5 World Bank

The World Bank's role in human rights issues is not always acknowledged. The World Bank is independent, but part of the United Nations. It is bound by the UN Charter and should promote human rights as one of the main purposes of international co-operation.[465] Though it is a bank, it is also a development agency.[466] So far, human rights issues have been insufficiently linked to the World Bank policies.[467]

2.5 Africa and the international protection of refugees

By 31 March 1997, 47 states in Africa have ratified or acceded to the UN Convention relating to the Status of Refugees.[468] The most recent entries on the list are Namibia and South Africa.[469] Of all international human rights instruments, only the Convention on the Rights of the Child enjoys broader African ratification. Three of the six states that have not yet ratified the refugee convention are island states. They are Cape Verde, the Comoros and Mauritius.[470] The other three non-ratifying states in the region are Eritrea, Libya and Swaziland.

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465 As required by art 56 of the UN Charter, see also Tomasevski in Nowak and Swinehart (eds) (1989) at 75 - 102.

466 Tomasevski in Nowak and Swinehart (eds) (1989) at 100.

467 See Moller (1997) 25 *NQHR* 21, who suggests the following (at 35) test: "Is there an efficient bureaucracy capable of making national decisions on the uses of Bank funds, acting through clearly formulated and transparent processes, which is supported by a government established through a well-defined open process of public choice ?"

468 See Table B below.

469 They ratified the Convention on 17 February 1995 and 12 January 1996 respectively.

470 The fact that they are island-states are probably significant in that their geographic location have in the past caused these states to be left largely unaffected by flows of refugees. It further reflects 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".

This Convention was adopted under the auspices of the UN in 1951, and turned into force in 1954.[471] The socio-political context of its adoption explains many of this Convention's features. The early 1950s were the aftermath of the Second World War, and the beginning of the "Cold War". The main contributors to the preceding deliberations were West 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 could qualify for refugee status was limited to a "**well-founded fear of being persecuted** for reasons of race, religion, nationality, membership of a particular social group or political opinion".[472] This factor relates mainly to a subjective requirement, "fear", that has to be assessed for its "well-foundedness" in each individual case. Apart from the individualistic focus, the listed grounds are also very restrictive and do not take into account other factors (such as natural disasters or internal wars) which may be just as instrumental in persons becoming refugees. Secondly, a **temporal limit** was also provided for in the Convention. The "fear" had to be "as a result of events occurring before 1 January 1951".[473] 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".[474] Few states have made such a declaration.[475]

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".[476] The perception of exclusion was exacerbated in the 1960s, when it became clear that refugee problems in Africa continued and, most often, started

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471 For the Convention text, see eg Patel and Watters (1994) at 231.

472 Art 1(A)(2) of the Convention.

473 Art 1(A)(2) of the Convention.

474 Art 1 (B)(1) of the Convention.

475 Weis (1970) 3 *Revue des Droits de l'Homme* 449.

476 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 452.

well after 1951. These problems arose on a massive scale, and were caused by internal conflicts. Early examples were the many refugees fleeing conditions in the Congo (Zaïre)[477] and Nigeria.

Due in 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 in 1966, and entered into force in 1967.[478] The Protocol dispensed with the temporal and geographic limitations in the 1951 Convention. In the Preamble, "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 its adoption, African efforts to elaborate a separate UN instrument dealing with refugees were channelled into adopting a complementary regional instrument,[479] with the result that the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted in 1969.[480]

2.6 Africa and aspects of humanitarian law

2.6.1 Africa and international humanitarian instruments

As of 1 January 1996, the Geneva Convention relative to the protection of civilian persons in time of war enjoyed almost universal ratification globally and in Africa. Fifty-two African states have ratified, leaving only Eritrea still to become a party.[481] In line with global trends, fewer African states ratified the two protocols to the Convention. Protocol I, relating to the protection of victims of international armed conflicts, was at that stage ratified by 45 states in Africa; Protocol II, relating to the protection of victims of non-international armed conflicts, by 41. Again, the only

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477 Now, the Democratic Republic of the Congo.

478 See Patel and Watters (1994) at 243.

479 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 453. See ch 3 below.

480 See ch 3.5 below.

481 See Marie (1996) 17 *HRLJ* 61 for data about ratification of this instrument and others discussed in this paragraph.

procedure allowing for concrete implementation received proportionally less support in Africa: only eight African states made declarations in terms of article 90 of Protocol I, recognising the competence of the international fact-finding Commission. Seventeen % (or 8 out of 47)[482] of the declarations made in terms of article 90 was made by African states, while 31% of the total ratification of Protocol I was by states in the same continent.

The establishment of the international penal tribunal in Rwanda (and in the former Yugoslavia) mark important extensions of international humanitarian law into the domestic sphere, by applying international norms to internal conflicts.[483] Of relevance, particularly in this context, is the Convention on the Prevention and Punishment of the Crime of Genocide. By 31 March 1997, it has been ratified by 25 African states, including Burundi, Rwanda and Zaïre.[484]

The total ban of anti-personnel mines has been placed on the international agenda of concern only relatively recently, although mines have killed and devestated the lives of many Africans in countries across the continent.[485] Canada hosted a conference on this issue in October 1996.[486] A general commitment was expressed to draft a legally binding international agreement to ban anti-perrsonnel mines. A follow-up meeting is planned for December 1997, again in Ottawa, Canada. On 10 December 1996 the UN General Assembly adopted a resolution on the banning of landmines.[487] Twenty-five African states were co-sponsors of the resolution, and 45 voted for its adoption.[488] This was followed in February 1997 by the meeting of more than 450 participants at the fourth NGO Conference on Landmines, held in Maputo.[489] Surprisingly few African states

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482 The eight African states that have made declarations are Algeria, Cape Verde, Guinea, Madagascar, Namibia, Rwanda, Seychelles and Togo.

483 See the thoughtful discussion by Merton (1995) 89 *AJIL* 554.

484 See Table B below.

485 See, on the impact of mines in Africa, (April - May 1997) *African Topics*. Countries affected most severely include Angola, Egypt, Eritrea, Ethiopia, Libya, Mozambique, Sudan, Somalia and Zimbabwe.

486 See Carstairs "The Ottawa Process - A Challenge to the Status Quo" (April - May 1997) *African Topics* at 20.

487 Resolution A 51/45 S.

488 See table in (1997) (April - May) *African Topics* at 17.

489 See "The World Demands a Ban on Landmines" (1997) (April - May) *African Topics* at 3.

(only 8)[490] have become party to the most relevant instrument in this regard adopted under UN auspices, the Convention on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[491]

2.6.2 Africa and merceneries

Although mercenarism has existed from time immemorial, it only became an issue in humanitarian and international law in this century. During the 16th century, for example, the use of mercenaries was the unquestioned norm.[492] In the comprehensive codification of humanitarian law of the 1907 Hague Convention the recruitment of mercenaries was prohibited. Recruitment was regarded as active support for a belligerent, and therefore contravened the principle of neutrality. That the prohibition gave expression to the principle of neutrality, and did not condemn the practice of using mercenaries itself, is reflected in the fact that no other provisions on this topic were included.

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"[493] 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.[494]

The independence of states previously under colonial rule coincided with an increase in and a different attitude towards the use of mercenaries. It became a locus of concern especially in Africa. Concern was first raised about the situation in Congo in the early 1960s. During the civil war, the Katangese secessionist forces of Moise Tshombe were assisted by mercenaries from

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490 These states are Benin, Djibouti, Mauritius, Niger, South Africa, Togo, Tunisia and Uganda: see (April - May 1997) *African Topics* at 17.

491 Entered into force 2 December 1983 (see Kalshoven (1987) at 23).

492 Botha (1993) 15 *Strategic Review of Southern Africa* 75 at 78.

493 Art 2(4) of the UN Charter.

494 Taulbee (1985) 15 *California Western Intl Law Jnl* 339 at 345.

Europe and South Africa.[495] 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'état* by the Frenchman Bob Denard in the Comoros, and the attempted *coup* in the Seychelles by mercenaries under the leadership of Mike Hoare.[496]

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 was 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[497]- was adopted under the auspices of the OAU in 1977. After the required number of states ratified the Convention in 1985, it turned into force.[498] It defines a mercenary as a non-national of the state against whom 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.

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

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495 Mourning (1981/2) 22 *Virginia Jnl of Intl Law* 589 at 599, and sources quoted in n 56 and 57.

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

497 Text of substantive provisions reproduced in (1981/2) 22 *Virginia Jnl of Intl Law* 613 - 618, and the International Convention Against the Activities of Mercenaries at 619 - 625.

498 Naldi (1989) gives a list of states parties in 1989 (at 40 (n 20)).

the right to be a combatant or a prisoner of war".[499] The article is a product of compromise, not going as far as the OAU Convention had already gone or 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",[500] because the recurring scenario was one of "white soldiers of fortune fighting black natives".[501] Given the repeated involvement of South African mercenaries in African conflicts,[502] 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. In this

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499 Art 47(1) of Geneva Protocol I.

500 Taulbee (1985) 15 *California West Intl Law Jnl* 339 at 342.

501 *Ibid.*

502 In the 1990s the private South African firm Executive Outcomes played a prominent role in eg 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* 43-44.)

respect, then, the outlawing of mercenaries had little to do with the protection of human rights, but was intertwined with a movement to consolidate power in the hands of African rulers.

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 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".[503] 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 created the room for the involvement of Executive Outcomes in internal African conflicts.

2.6.3 The international criminal tribunal for Rwanda

2.6.3.1 International efforts at preventing impunity

One of the unfortunate, yet inevitable, consequences of large-scale internal and international conflict is gross human rights violations. Such violations may be redressed either at the domestic or the international level. In both cases certain problems arise. A quick and effective domestic response is often difficult due to the collapse of the state apparatus, including the prosecutorial services and the courts. More often, such a response is out of the question because the new ruler, who commands the organs of state, came to power through the very process of human rights violations that has to be redressed. An international response is hampered by the lack of any permanent supra-national tribunal with appropriate jurisdiction. A further impairment is the lack of consensus on the content of crimes regarded as "gross violations of human rights" and which

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503 Pech and Beresford "Africa's new-look dogs of war" (24-30 January 1997) *Mail and Guardian* 24.

should be punishable internationally. The leading international conventions on humanitarian law also do not provide for any form of international enforcement or implementation.[504]

A distinction has to be drawn between the enforcement of international human rights law and international humanitarian law. International human rights law has emphasised state responsibility. Investigations are directed at answering the question whether states have been in breach of their treaty obligations or of customary international law. Breaches of international humanitarian law entail individual criminal liability. These norms are contravened by individuals and not in the first place by governments. When steps are not taken to redress the violation of any of these norms, it results in impunity of those responsible for the violations. As Bassiouni indicates,[505] international human rights standards evolve through phases. Standards are enunciated first, before they could become prescriptive norms. This may be followed by provision for enforcement by means of administrative and civil modalities. The most advanced, the most controversial and least realised, is the application of penal modalities.

The international community has as yet not accepted the jurisdiction of a permanent penal tribunal. After the First World War steps were taken in this direction. The Treaty of Versailles[506] provided for the establishment of an *ad hoc* tribunal to prosecute Kaiser Wilhelm II. However, he was granted refuge in the Netherlands and was never prosecuted.[507] The German Supreme Court prosecuted a limited number of war criminals. The vulgar and crude forms of human rights abuses perpetrated by Nazi Germany spurred the international community into action. The London Agreement[508] provided for an international tribunal in which the victors would sit in judgment of the defeated. The International Military Tribunals at Nuremberg and Tokyo were established. The

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504 See eg the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (of 12 August 1949), art 146: The responsibility is placed on each state party to "undertake to enact any legislation necessary to provide effective penal sanctions" of grave breaches of the Convention. These persons should be brought to trial within that state regardless of their nationality.

505 Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 348.

506 Art 227 of the Treaty.

507 See Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 357.

508 Of 8 August 1945.

Allies also enacted a law, making it possible to set up the International Military Tribunal for the Far East.

After Nuremberg, the UN's International Law Commission ("ILC") has been involved in drafting a codification of international crimes and a statute for an international penal tribunal.[509] Universal political commitment was always unlikely in the era of the Cold War, especially after the Korean conflict of the 1950s. The late 1980s saw some resurgence of interest in an international court, particularly in relation to drug offences. The end of the Cold War towards the end of the 1980s, followed by the violence in the former Yugoslavia, assured its place on the international agenda once again. In 1989 Trinidad and Tobago reintroduced the idea in the UN General Assembly.[510] The ILC adopted a Draft Statute for an International Criminal Court. In 1994 the General Assembly established an *ad hoc* committee to work on the issue,[511] and in 1995 it established a preparatory committee to study the ILC draft.[512] The USA, UK, India and China have insisted on further discussions before calling for a conference of plenipotentiaries. The basis for discussion is the Draft Statute for an International Criminal Court, adopted by the ILC in 1994.[513]

One of the main reasons why states object to such a tribunal is that they fear their sovereignty will be infringed.[514] At least two responses are possible to answer such a contention: Acceptance of the Court's jurisdiction may be made optional. A second, more principled response is that "human rights law should supersede the notion of state sovereignty".[515]

In 1992 the UN established a commission of experts to investigate and report on violations of international humanitarian law in the former Yugoslavia.[516] Following a finding of numerous gross violations, the Security Council adopted Resolution 808 (1993). It called for the establishment of

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509 See Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 359-363.

510 See ICC Fact Sheet at web site http: // www.igc.apc.org/icc/factsheet.html.

511 GA Res 53, UN GAOR, 49th Sess, UN Doc A/RES/49153 (1994).

512 GA Res 46, UN GAOR, 50th Sess, UN Doc A/RES/50146 (1995).

513 See Crawford (1995) 89 *AJIL* 404.

514 See eg Dumas (1990) 13 *Hastings Intl and Comp L Rev* 585 at 593.

515 *Ibid.*

516 SC Resolution 780 (1992).

an *ad hoc* war crimes tribunal for the former Yugoslavia and requested the Secretary-General to submit a comprehensive report within sixty days. A statute for the international tribunal was attached to his report. In 1993 the Security Council established the *ad hoc* International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia.[517]

This tribunal was established as a subsidiary organ of the Security Council. As such, the Yugoslav Tribunal has a much broader international character than the Nuremburg Tribunal. The basis for its establishment is not clear, as such a competence is not specifically mentioned in the UN Charter. It could probably be justified in terms of article 41 of the Charter. Other options were to establish a treaty or to base it on a General Assembly resolution. The former would have been time-consuming and would have left the possibility open that one of the major state players would not become party to such a treaty. The latter was also not feasible, as General Assembly recommendations are only of a recommendatory nature.

The first accused to be brought to trial before this tribunal was Dusko Tadíc. The tribunal was soon faced with a challenge to the lawfulness of the establishment of the tribunal by the Security Council. The Appeals Chamber upheld the tribunal's jurisdiction in a judgment of October 1995.[518]

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517 A detailed analysis of the tribunal for the former Yugoslavia is not provided here. For a historical background and overview of the relevant Statute consult O'Brien (1993) 87 *AJIL* 639.

518 See Aldrich (1996) 90 *AJIL* 64. The judgment is reprinted in (1996) 36 *ILM* 32.

2.6.3.2 *Efforts to prevent impunity after the massacres in Rwanda*

i *International Criminal Tribunal for Rwanda*

Africa has not been spared gross human rights violations. Impunity of violations on a grand scale by Bokassa in the CAR and Amin in Uganda have been identified as causally related to the adoption of the African Charter in 1981.[519] But these violations did not spurn the UN or individual international powers into action.

The end of the Cold War, intensified media coverage, and the link to the conflict in Europe brought Rwanda into the international spotlight. The proximity of the conflict in the former Yugoslavia caused Europe, and later the international community, to take measures to end the violence. Once the conflict had abated, an international tribunal was established to ensure that the worst perpetrators were brought to justice. As these events were followed by what happened in Rwanda, the international community followed the precedent of establishing a tribunal. It remains an open question whether the response to Rwanda would have been different if the recent precedent had not existed. Akhavan worded African scepticism in this regard: " ... had the sequence of events between the Yugoslav and the Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established".[520] Another explanation for the establishment of the Tribunal is Western feelings of guilt. After the death of 36 American soldiers in Somalia, the US was reluctant to become involved. France also chose not to engage militarily even in the face of mass killing. Giving support to the Tribunal was one way to "assuage guilt feelings".[521]

It was also a matter of some debate whether to establish a separate tribunal for Rwanda, or to extend the jurisdiction of the *ad hoc* tribunal already created. The prosecutor of the tribunal for the former Yugoslavia, for one, held the firm view that the latter course should be followed.[522]

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519 See ch 6.1 above.

520 (1996) 90 *AJIL* 501.

521 Forsythe (1997) 15 *NQHR* 5 at 13.

522 See the interview with judge Goldstone in (1996) 2 *Human Rights Brief* (web site http: // www.sray.wcl.american.edu/pub/journals/hrb/pronk.htm).

Judge Goldstone feared a difference in procedures and standards if two tribunals were created. He further argued that setting up another tribunal would lead to expensive duplication and delays.

However, on 8 November 1994 the UN Security Council decided to establish an *ad hoc* international tribunal for Rwanda, "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law".[523] The decision to establish the tribunal followed the appointment of[524] and report by the Commission of Experts on Rwanda. It found violations of international humanitarian law. The special Rapporteur for Rwanda of the UN Commission on Human Rights also reported to the Security Council about violations.[525] The Security Council decision pertinently refers to the "request of the Government of Rwanda",[526] making it clear that the co-operation and consent of Rwanda had been obtained.[527] The preamble to the resolution mentions the need for "international co-operation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects".[528] This emphasises the supplementary role of the UN tribunal. In some sense, the establishment of the Security Council Tribunal weakened the authority of the Rwandese courts. The situation in Rwanda is different from that in the ex-Yugoslavia. In Rwanda a new government has taken over power. This government is intent on prosecuting perpetrators and on preventing impunity.

The personal jurisdiction of the tribunal covers everyone responsible for the relevant crimes committed in Rwanda, and Rwandan citizens responsible for relevant crimes in neighbouring

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523 Resolution 955 (1994) (Adopted by 13 in favour, 1 against (Rwanda), 1 abstention (China), reprinted in (1994) 33 *ILM* 1600. See Akhavan (1996) 90 *AJIL* 501. Rwanda voted against, due to the fact that the Tribunal was not given the power to impose the death penalty. The Statute of the Tribunal was attached to the resolution.

524 In terms of Security Council Resolution 935 (1994).

525 See S/1994/1157, annex I and annex II.

526 Resolution 955 (1994) at 2.

527 The Rwandese Government did not agree with the lack of capital punishment and the temporal cut-off limits, prompting it to vote against the Security Council resolution.

528 *Ibid.*

states.[529] A temporal limitation was fixed - only actions committed between 1 January and 31 December 1994 are covered.[530] Substantially, the tribunal is allowed to hear crimes of genocide[531] (including attempts at "direct and public incitement" to and complicity in genocide), crimes against humanity[532] (including torture, rape and "other inhumane acts") and violations of article 3 common to the Geneva Conventions of 1949, and of Additional Protocol II of 1977, thereto.[533] The penal jurisdiction is limited to the imposition of imprisonment.[534]

The tribunal was established in Arusha, Tanzania.[535] It consists of eleven judges, presided over by judge Laity Kama from Senegal.[536] Two trial chambers of three judges are composed, after election by the General Assembly. These judges are the President, Vice-President Ostrovsky (Russia), and judges Aspegren (Sweden), Khan (Bangladesh), Pillay (South Africa) and Sekule (Tanzania). Five judges serve in the Appeal Chamber.[537] From the Court's inception to 30 September 1996, judge Goldstone served as prosecutor.[538] He was replaced by justice Arbour (Canada). The languages used are French and English.[539] The UN General Assembly appropriated $32.6 million for the 1996-97 fiscal year to enable the tribunal to be set up and function.[540]

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529 Arts 1 and 7 of the Statute of the International Tribunal for Rwanda (hereafter "the Statute").

530 *Ibid.*

531 Art 2 of the Statute.

532 Art 3 of the Statute.

533 Art 4 of the Statute.

534 Art 23 of the Statute. Punishment must be served in Rwanda or any other state that declared itself willing (Act 26 of the Statute).

535 In terms of Security Council Resolution 977 (1995).

536 "Rwanda Genocide Accused Pleads not Guilty" (30 May 1996) *The Star* at 4.

537 Art 11 of the Statute. The Rwanda Tribunal shares these five judges with the International Criminal Tribunal for the Former Yugoslavia. They are judges Cassese (Italy, who serves as President), Karibi-Whyte (Nigeria), Li (China), Vohrah (Malaysia) and Stephan (Australia).

538 See United Nations (1997) *International Criminal Tribunal for Rwanda* (Fact Sheet).

539 Art 31 of the Statute.

540 See Tittemore (1996) 4 *Human Rights Brief* 4 at 5.

The rights of accused persons,[541] as accepted in international law, are guaranteed by the Statute. This includes equality before the law[542] and the presumption of innocence.[543] Further, an accused is to be tried "without due delay",[544] and shall have adequate time and facilities to prepare a defence.[545] The free assistance of an interpreter is guaranteed.[546] If the accused does not have sufficient means to pay for legal assistance, it will be provided free of charge.[547]

The international tribunal does not have exclusive jurisdiction over offences committed in relation to the genocide in Rwanda. Its jurisdiction is concurrent with "national courts" (not only in Rwanda).[548] However, it has primacy over the "national tribunals of all states".[549] The rule of *non bis in idem*[550] applies strictly when a person has already been tried by the international tribunal. Under exceptional circumstances someone tried by a national court may be tried again by the international tribunal.[551]

As of November 1996, 21 suspects have been indicted by the tribunal. Fourteen of them were in custody.[552] From the outset, the tribunal suffered from a lack of human and material resources and a lack of co-operation by states harbouring suspects.[553] The progress of trials was also hampered

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541 It extends to the pre-trial phase: Once taken into custody, the arrested person must be informed immediately of the charge against him (Art 19(2) of the Statute).

542 Art 20(1) of the Statute.

543 Art 20(3) of the Statute.

544 Art 20(4)(c) of the Statute.

545 Art 20(4)(b) of the Statute.

546 Art 20(4)(f) of the Statute.

547 Art 20(4)(d) of the Statute.

548 Art 8(1) of the Statute.

549 Art 8(2) of the Statute.

550 One may not be tried twice for the same offence.

551 If an act of genocide, etcetera, had been characterised as an ordinary crime, or if national court proceedings were not impartial or independent, or the accused was not prosecuted diligently (Art 9(2) of the Statute).

552 Tittemore (1996) 4 *Human Rights Brief* at 5. McGreal (14 - 30 February 1997) *Mail and Guardian* 15 refers to thirteen indicted accused in custody.

553 *Ibid*. See also Sapru 91997) 32 *Texas Intl Law Jnl*, who contends that the defiance of Kenya and Burundi was in part due to the arguable illegality of the process in which the Tribunal was established.

by chaotic management, unqualified staff and indifference at UN headquarters.[554] A further factor contributing to delays and inefficiency is the division of functions between the prosecutor (in The Hague), the investigators (in Rwanda), the tribunal itself (in Tanzania), and the UN headquarters (in New York).[555] Future inhibiting factors were non-extradition of suspects from other states and the killing of witnesses by returning Hutus in Rwanda. This identified another target for criticism, the inefficiency of the tribunal's witness protection scheme, being located in Arusha, rather than in Rwanda itself.[556]

On 30 May 1996 the first accused, Akayesu, appeared in the Arusha tribunal and pleaded not guilty to charges of genocide and crimes against humanity.[557] The second accused Rutaganda, an agricultural engineer, pleaded not guilty on eight counts. An adjournment until 3 October 1996 was ordered, as the defence requested time to gather evidence in Rwanda. Rutaganda's indictment refers to his shareholding in Rwanda's *Radio Television Libre des Milles Collines*, which broadcast propaganda inciting racial hatred.[558]

ii *The role of domestic courts*

The Rwandan courts took action as well. Trials of some 70,000 to 90,000 suspects detained in Rwandese prisons started only in late 1996.[559] The first two accused were convicted of genocide and rape, and were sentenced to death in January 1997 by a court sitting in Kibungu.[560] These two sentenced persons were described as "an erstwhile hospital worker" and "an ex local administrator", suggesting that they were not cardinal role players in the genocide. One of the discrepancies resulting from the dual system of imposing penal sanctions is that the international

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554 McGreal (14 - 30 February 1997) *Mail and Guardian* 15.

555 *Ibid.*

556 (March/ April 1997) *Africa Today* 21 at 22.

557 "Rwanda genocide accused pleads not guilty" (31 May 1996) *The Star* at 4.

558 *Ibid.*

559 The number of suspects who are reportedly detained awaiting trial differs. Morris, justice advisor to Rwandan President Bizimunga, set the number at 90,000 (Goodman, "Justice Drowns In Political Quagmire" (31 January - 6 February 1997) *Mail and Guardian* at 24).

560 "Twee Hutu's Kry Doodstraf" (5 January 1997) *Rapport* at 4.

tribunal hears the most serious cases, but the national courts impose more severe forms of punishment.[561] Taken together, the jurisprudence of these two tribunals belie the principle that all similarly situated accused or convicted persons should be treated alike.

Specialised chambers with exclusive jurisdiction over four categories of offences committed between 1 October 1990 and 31 December 1994, were created.[562] These tribunals consist of career or auxiliary magistrates. A special tribunal for juveniles is also instituted. The four categories of offences are as follows:[563]

- The planners, organisers and leaders of the genocide or of the commission of crimes against humanity fall into category 1. These accused are liable to the death penalty.
- Those not in leadership positions, but who caused, or contributed to, or conspired in the death of victims, fall into category 2. For persons in this category the maximum sentence is life imprisonment.
- Those who committed or participated in serious assaults comprise category 3. The normal parameters of domestic sentencing apply.
- Category 4 provides for offences against property. After conviction for a category 4 offence the convicted person and the victims must, through amicable settlement, agree on an amount of "civil damages". Failing such an agreement, the rules pertaining to criminal and civil actions will be applied.

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561 In terms of a Rwandan "genocide law", perpetrators are divided into four categories. The most culpable perpetrators (eg political and military leaders) fall into the first. Conviction of those in this category may be followed by a death sentence (by firing squad). The second category is for other offences leading to death. Imprisonment of more than seven years may be imposed. Due to overcrowding of prisons, it is unlikely that those convicted for categories three and four offences (lesser offences, eg assault and looting) will serve prison sentences (see Goodman (31 January - 6 February 1997) *Mail and Guardian* at 24).

562 See Organic Law 08/96 of 30 August 1996, on the organisation of prosecutions offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990. (An English version is reprinted in *Rwanda Reconciliation* (1996) 6 at 15 - 22.)

563 Arts 2 and 14 of Organic Law 8/96.

Any person accused before the Rwandan courts may admit and confess to the alleged offences.[564] A confession may be accepted or rejected by the Public Prosecution department. To be accepted, a confession has to comply with the following requirements:[565]

- A detailed description of the offences committed, must be given. The date, time, scene of the act and names of victims and witnesses (if known), must be included.
- Information about accomplices, conspirators and all other information useful to the prosecution must be provided.
- The person must apologise for the offences that he or she had committed.
- The person must also offer to plead guilty at subsequent court proceedings.

From the last requirement, it follows that a confession does not exempt anyone from prosecution, conviction and punishment under the criminal justice system. A confession allows an accused person to go through a different procedure, the "Confession and Guilty Plea Procedure". The court will ensure that the guilty plea had been done voluntarily, and with full appreciation of all the relevant circumstances.[566] If this is established, the person is found guilty and is sentenced. The confession is a mitigating factor and leads to an automatic reduction of sentence in two categories, category 2 and 3. A distinction is further drawn between confession and guilty plea prior to prosecution, and confession and guilty plea after prosecution has commenced. Category 2 offenders who confess before prosecution have their sentences reduced to between 7 and 11 years; those confessing after prosecution started, qualify for a reduction of sentence to between 12 and 15 years.[567]

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564 See Chapter III of Organic Law 8/96.

565 Art 6 of Organic Law 8/96.

566 Art 10 of Organic Law 8/96.

567 See art 15 of Organic Law 8/96. Sentence for category 3 offences are reduced to a third and half of the ordinary sentences respectively.

The process is not only directed at sentencing accused persons to death and to imprisonment, but also provides for payment of damages. Not only those in category 4, but all other convicted persons are jointly and severally liable for damages caused in the perpetration of their crimes.[568] The procedural rights of accused persons are not as comprehensively protected as those of persons accused before the international tribunal at Arusha. The right to counsel is not guaranteed, for example. Provision is made for the right to appeal.[569] An appeal has to be filed within fifteen days. The state may also appeal against acquittals. If an appeal court overturns an initial acquittal, the decision may be reviewed by the Court of Cessation.

Questions may be raised about the suitability of any criminal justice system to redress problems related to conflicts that still lie latent in the society in which they had been committed. National reconciliation must be one of the priorities of any post-traumatised society. In South Africa, for example, a different route has been followed with the creation of the Truth and Reconciliation Commission. In this model, full disclosure of specific offences (of a "political nature") may result in amnesty. Such a person is never prosecuted for that offence. The question arises whether judicial means are best suited to end a cycle of ethnic violence.

Criticism followed the sentence of the first two accused found guilty: They appeared without legal representation.[570] Following this criticism, the Rwandese government made an international appeal for finances to secure legal aid to the reported 90,000 genocide suspects.[571] One of those convicted, Bizimana, criticised the brevity of his trial and the open partisanship of spectators.[572] The process also focuses on "justice" at the expense of longer term considerations of "reconciliation". Another problem that hampered the prosecution of major offenders has been the unwillingness of other states to extradite suspects to Rwanda.[573]

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568 Art 30 of Organic Law 8/96. See also this article on the position of other category offences.

569 On appeals, see arts 24 - 26 of Organic Law 8/96.

570 "Legal Aid Sought for Genocide Suspects" (12 January 1997) *The Sunday Independent* at 2.

571 *Ibid*.

572 McGreal, "Inside Rwanda's Death Row " (31 January - 6 February 1997) *Mail and Guardian* at 15.

573 See eg "Grand Jury Refuses Extradition of Presumed Criminal" (1996) 4 *Messenger IUHR* at 1.

2.6.3.3 Possibility of a permanent international court with penal jurisdiction

The *ad hoc* character of the tribunals established for the former Yugoslavia and Rwanda caused concern to commentators and governments.[574] A permanent court would alleviate the problem of delay and cost in establishing numerous *ad hoc* tribunals. The establishment of a tribunal in response to a particular conflict creates the impression that it is "in a sense part of the conflict".[575] It may also divert attention away from resolving the conflict to punishing wrongdoers. Furthermore, the principle of legality will be served if a permanent court with a legal basis with an international penal jurisdiction is created.[576] However, a permanent court may make it more difficult to negotiate peace at a political level.[577]

This criticism notwithstanding, it is quite possible that the two initiatives could lead to the establishment of a permanent international criminal Court. The fact that two separate institutions were created reflect opposition against a subtle process of establishing a single criminal tribunal of extended jurisdiction. The ILC remains seized with the matter, and much will depend on the outcome of the two *ad hoc* tribunals functioning at the moment. In particular, the role of the tribunals to halt and effectively redress systematic, widespread and flagrant violations of international humanitarian law, will be assessed before a permanent criminal tribunal will be established.

The establishment of a permanent Criminal Court will, at the very least, be a significant symbolic gesture against impunity for gross violations of human rights by individuals. However, from an African perspective, a number of concerns may be raised. Such a court may be geographically and psychologically far removed from the continent. The Rwandan precedent has already shown that an international Court inevitably faces certain technical and pragmatic difficulties. It also remains uncertain whether African conflicts will receive priority if weighed against conflicts and violations in other regions of the world.

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574 See Crawford (1995) 89 *AJIL* 404 at 415.

575 *Ibid*.

576 Crawford (1995) 89 *AJIL* 404 at 416.

577 See, on this cautionary line, Forsythe (1997) 15 *NQHR* 5.

Another possibility is to extend the jurisdiction of the *African Court on Human Peoples' Rights*, hopefully soon to be established under the auspices of the OAU. In terms of the Protocol which forms the basis of current discussions,[578] the Court's jurisdiction will only cover the African Charter on Human and Peoples' Rights and other African human rights instruments. Serious consideration should be given to extend this jurisdiction to include penal jurisdiction for specified crimes, such as genocide and crimes against humanity.[579] This will mean that the Protocol will have to provide for a prosecutor, a factor that will lead to re-negotiation and cost implications. The advantages are that this process may be quicker, that the alienating effect of an international tribunal will be reduced, and that the status of the African Court on Human and Peoples' Rights will be enhanced. Other possibilities include the creation of a separate, but permanent African penal Court, or the inclusion of penal matters under the jurisdiction of the African Court of Justice, to be established as an organ of the African Economic Community.

Notwithstanding any future actions undertaken by the international community, the killing of almost a million Rwandese between April and June 1994 will stand as testimony to the UN's failure to play a meaningful preventative role. This has been ascribed to the marginal political and economic concern of Rwanda to the major powers.[580] Even an international court will punish *ex post facto*. Only an extremely effective court will serve as a deterrent to future perpetrators. Its establishment will stand as testimony not only to the fact that humanity has a conscience, but also a memory.

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578 See ch 7 below.

579 See ch 6.1.1 below, about an attempt to have such a provision included in the African Charter initially, in 1980. At the NGO meeting before the 21st sitting of the Commission, a resolution was adopted which called on African governments to give jurisdiction to the proposed Court "in all matters including genocide, crimes against humanity and war crimes" ((1997) 7 *African HR Newsletter* at 7).

580 See "The International Community Failed to Stop or Stem the Genocide" (1996) May/June *Africa Today* 30.

TABLE B: SELECTED UNITED NATIONS HUMAN RIGHTS TREATIES IN AFRICA AS AT 31 MARCH 1997

Compiled from the United Nations Treaty Database: Web Page

http://www.un.org/Depts/Treaty/final/ts2/newfiles/frontboo/tocgen.html

	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
Algeria	X	a X	X		b X	X	X	X	X				c X	X	X
Angola	X	X	X					X	X	X				X	X
Benin	X	X	X		s	X		X	X			X	X	X	X
Botswana					X			X	X					X	X
Burkina Faso					X	X	X	X	X			X		X	X
Burundi	X	X			X	X	X	X	X	X			X	X	X
Cameroon	X	X	X		X	X		X	X				X	X	X
Cape Verde	X	X			X	X		X	X				X		X
Central African Republic	X	X	X		X	X		X	X	X				X	X
Chad	X	X	X		X	X		X	X				X	X	X
Comoros								X	X						X
Congo	X	a X	X		X	X		X	X	X				X	X
Côte d'Ivoire	X	X			X		X	X	X	X		X	X	X	X
Djibouti								X						X	X
Egypt	X	X			X	X	X	X	X	X			X	X	X
Equatorial Guinea	X	X	X					X	X					X	X
Eritrea								X	X						
Ethiopia	X	X			X	X	X	X	X	X			X	X	X
Gabon	X	X			X	X	X	X	X	X			s	X	X
Gambia	X	a X	X		X	X	X	X	X				s	X	X
Ghana					X	X	X	X	X	X	X			X	X
Guinea	X	X	X		X	X		X	X	X	s	X	X	X	X
Guinea-Bissau	X							X	X					X	X
Kenya	X	X				s		X	X				X	X	X
Lesotho	X	X			X	X	X	X	X	X	X			X	X
Liberia	s	s			X	X	X	X	X	s				X	X

	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
Libyan Arab Jamahiriya	X	X	X		X	X	X	X	X	X	X		X		
Madagascar	X	X	X		X	X		X	X	X				X	
Malawi	X	X	X		X			X	X	X	X		X	X	X
Mali	X	X			X	X	X	X	X	X	X	X		X	X
Mauritania					X	X		X		X				X	X
Mauritius	X	X	X		X			X	X	X	X		X		
Morocco	X	X			X		X	X	X	X			X	X	X
Mozambique		X		X	X	X	X	X						X	X
Namibia	X	X	X	X	X	X	X	X	X				X	X	
Niger	X	X	X		X	X		X		X		X		X	X
Nigeria	X	X			X	X		X	X	X			s	X	X
Rwanda	X	X			X	X	X	X	X					X	X
São Tomé e Príncipe	s	s				X		X	s					X	X
Senegal	X	a X	X		b X	X	X	X	X	X			c X	X	X
Seychelles	X	X	X	X	X	X	X	X	X				X	X	X
Sierra Leone	X	X	X		X			X	X	X	X		s	X	X
Somalia	X	X	X		X	X							X	X	X
South Africa	s	s			s			X	X	s	s	X	s	X	X
Sudan	X	X			X	X		X					s	X	X
Swaziland					X			X		X	X				X
Togo	X	X	X		X	X	X	X	X				c X	X	X
Tunisia	X	a X			X	X	X	X	X	X	X	X	c X	X	X
Uganda	X	X	X		X	X	X	X	X	X	X		X	X	X
United Republic of Tanzania	X	X			X	X	X	X	X	X	X			X	X
Zaïre	X	X	X		X	X	X	X	X	X			X	X	X
Zambia	X	X	X		X	X		X	X	X	X			X	X
Zimbabwe	X	a X			X	X	X	X	X	X		X		X	X
TOTAL NUMBER OF AFRICAN STATES PARTIES	**41**	**41**	**24**	**3**	**43**	**38**	**25**	**52**	**45**	**29**	**12**	**9**	**23**	**47**	**47**
PERCENTAGE OF AFRICAN STATES (53)	***77%***	***77%***	***42%***	***6%***	***81%***	***72%***	***47%***	***98%***	***85%***	***55%***	***23%***	***17%***	***43%***	***87%***	***87%***

	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
SIGNATURES NOT FOLLOWED BY RATIFICATION	*3*	*3*	*0*	*0*	*2*	*1*	*0*	*0*	*1*	*2*	*2*	*0*	*6*	*0*	*0*
TOTAL STATES PARTIES GLOBALLY	**135**	**136**	**90**	**29**	**148**	**100**	**123**	**190**	**157**	**109**	**66**	**47**	**102**	**128**	**128**
AFRICAN PERCENTAGE OF GLOBAL RATIFICATION	*30%*	*30%*	*27%*	*10%*	*29%*	*38%*	*20%*	*27%*	*29%*	*27%*	*18%*	*19%*	*23%*	*37%*	*37%*

X Ratification, accession, approval, notification or succession, acceptance or definitive signature.

s Signature not yet followed by ratification.

[a] Declaration recognizing the competence of the Human Rights Committee under article 41 of the International Covenant on Civil and Political Rights.

[b] Declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[c] Declarations recognizing the competence of the Committee against Torture under articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.