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)

---

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.

---

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]

---

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.

---

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]

---

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:

---

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

---

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.

---

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

---

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

---

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.

---

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

---

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

---

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]

---

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]

---

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.

---

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]

---

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

---

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

---

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.

---

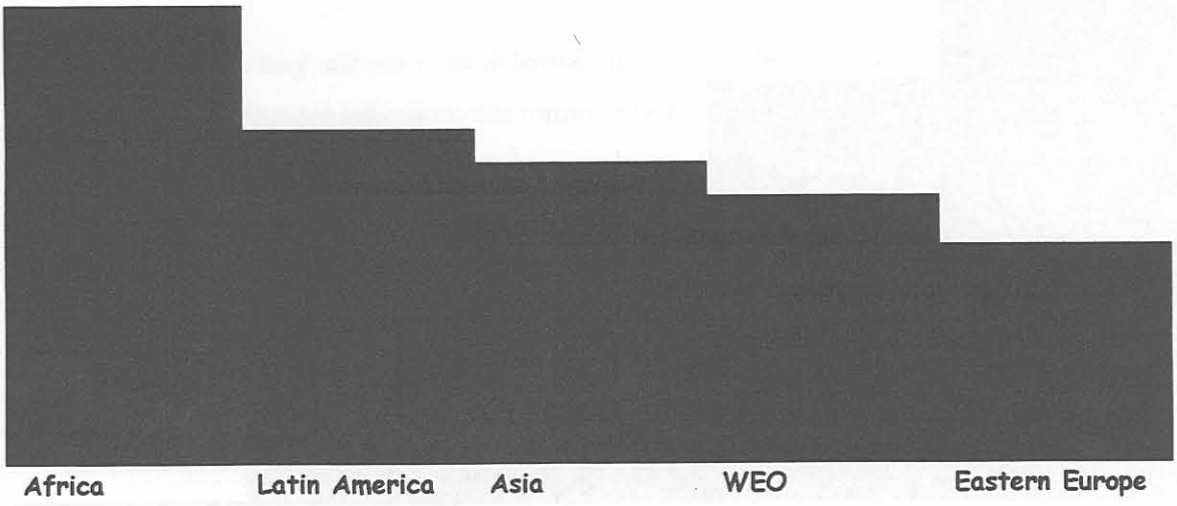
340 See Preamble and art 2 of CEDAW.

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

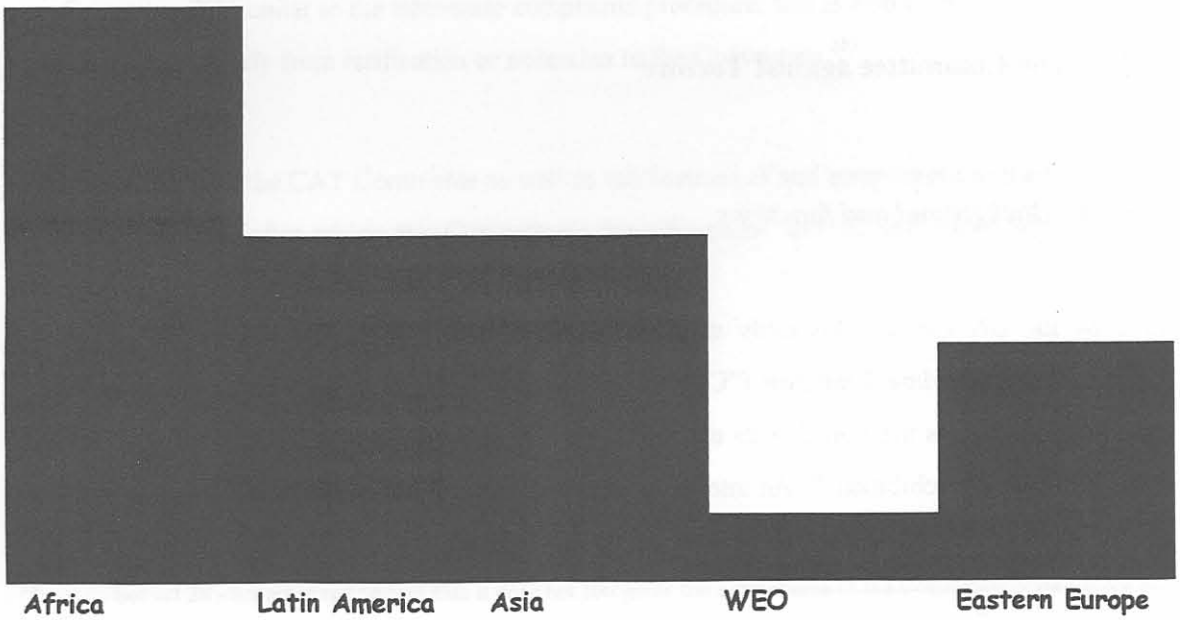
342 Below.

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

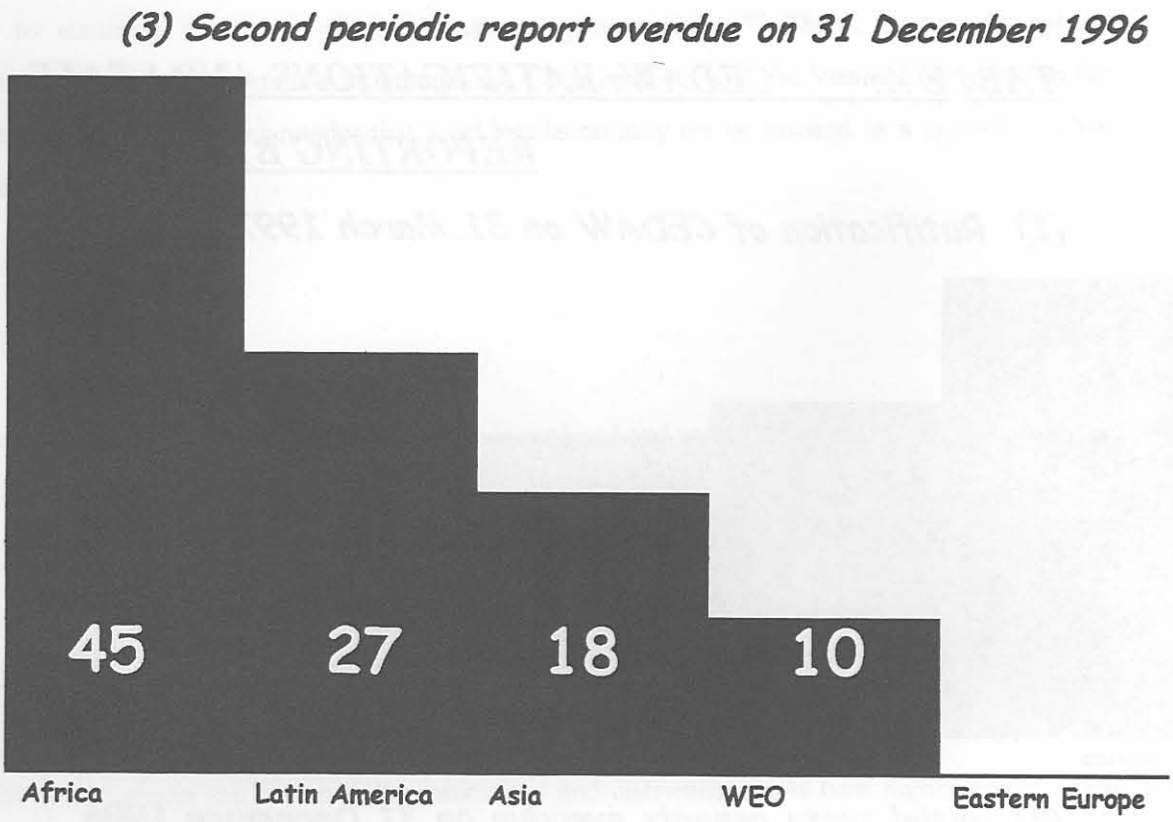
(1) Ratification of CEDAW on 31 March 1997



(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]

---

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.

---

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

---

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.

---

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

---

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:

---

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

---

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.

---

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]

---

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]

---

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.

---

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-

---

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]

---

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.

---

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.

---

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

---

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.

---

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]

---

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.

---

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.

---

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.

---

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

---

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

---

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

---

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

---

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

---

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

---

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

---

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

---

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

---

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).