8 When the T(W)AIL wags global environmental governance

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Abstract

This chapter highlights how Africa's dissatisfied view of fairness and equity in international environmental processes shapes the continent's contributions and approaches to global environmental governance. It also examines how international environmental regimes may be analysed through insights from Third World Approaches to International Law (TWAIL). Starting from a broad Third World analysis, the chapter discusses some distinctly African critiques of international environmental policies and how this informs African ideas on how to reform the system. After briefly reviewing areas of international law other than the environment, the chapter focuses on the impact of transnational environmental governance policies on the countries of the Third World and how they exacerbate divisions between developed and developing countries. In addition to providing evidence of African ideas influencing the international environmental discourse and policy, the extent to which the international governance processes resonate with long-standing African views of the discriminatory, exclusionary, and inequitable characteristics of contemporary international norms and institutions is considered.

1 Introduction

The overarching goal of critical international law scholars operating under the rubric of Third World Approaches to International Law (TWAIL) is to expose the unequal and discriminatory uses to which international law could be put. One such area is international environmental law. TWAIL scholars, as Okafor affirms, are united by 'a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order'.[1] Among TWAIL

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1 OC Okafor 'Newness, imperialism, and international legal reform in our time: A TWAIL perspective' (2005) 43 *Osgoode Hall Law Journal* 171.

scholars' goals, therefore, is to realise 'the promise of international law to transform itself into a system based, not on power, but justice'.[2]

Africa is very much an integral part of the Third World. The continent could also be the most descriptively prescient of all regions of the world that fall within that 'Third World' constituency. If granted, it means TWAIL whether seen as an approach, a theory, or a methodology of international law[3] (I return to this later) is very much invested in Africa's place in the development, critique, and potential reformation of international law as the rest of the Third World in a broader construction. To be clear, the Third World is also described in other ways, more commonly as including all states within what is known as the 'Global South'.[4]

The main aim of this chapter is to show how Third World concerns shape international environmental and climate governance processes. It charts the path from critique to reform through an imagination of international law in this area welded to specific Third World and African concerns. In the analysis, international climate law specifically, and international environmental law more broadly, are evaluated first from a general Third/developing World perspective and thereafter from an African point of view. However, before focusing on international environmental and climate law, I explore African perspectives and what African/Third World fears and apprehensions (rather than interests and objectives) inform these perspectives. The overall conclusion is that international climate change governance processes, in particular, resonate with long-standing Third World apprehensions regarding the discriminatory, exclusionary, and inequitable characteristics of contemporary global governance procedures, actors, and institutions. The chapter is presented in seven parts of which this introduction is the first. Part two looks at TWAIL generally as framework for critique of international law and institutions as well as how it could be used in the international environmental-law context. The third part uses the Clean Development Mechanism (CDM) of the Kyoto Protocol to illustrate inequalities in global environmental governance frameworks which are detrimental to developing regions such as Africa, while part four highlights trade, investment, and human rights as other areas in which Africa has contributed significantly to norm creation. In part five the chapter zeroes in on historical African ideas relating to

2 S Atapattu & C Gonzalez 'The North-South divide in international environmental law: Framing the issues' in Shawkat Alam and others (eds) *International environmental law and the Global South* (2015) 1-2.

3 OC Okafor 'Critical Third World Approaches to International Law (TWAIL): Theory, methodology, or both?' (2008) 10 *International Community Law Review* 371.

4 B Ugochukwu 'From reaction to agency: A "subaltern" response to William Twining's globalisation and legal scholarship' (2013) 4 *Transnational Legal Theory* 549 at 550.

governance and the environment, while the sixth part contextualises these ideas within contemporary environmental challenges. The final part is the conclusion.

2 TWAIL as theory, methodology, and critique

As its point of departure, the chapter relies, first, on a broad Third World critique of the regime governing international law and its institutions, and second, other international/global governance processes and mechanisms. From the initial expanded examination of the topic, I isolate specific African responses to those international legal and governance processes as informed by TWAIL critique.

The idea is to tease out distinctly pragmatic African policies and contributions to international law and governance from a generic TWAIL critique. My analysis supports the proposition that while Africa recognises the importance of critique, African states and institutions share the belief and practice that it is also beneficial to bring alternative policy ideas to the table, especially where those ideas advance Africa's objectives and address its concerns as to international law and governance. This is in response to those who accuse critics of international legal processes like TWAIL of being 'all sizzle and no steak' when it comes to offering concrete suggestions for improvement,[5] or that TWAIL is under-inclusive in terms of scholars' framing of 'the other'.[6]

There are various ways of understanding and ascribing meaning to the TWAIL framework for evaluating international law. We have already seen that it is a form of *critique*, which means that the framework does not perceive international legal processes as value-free, neutral, or objective.[7] Rather, it sees the reproduction of specific power structures and hegemonies in the mechanisms and institutions of international law. TWAIL could also be a *methodology* for understanding and explaining international law. In this case, the framework does not pretend to offer

5 See, for instance, DP Fidler 'Revolt against or from within the West? TWAIL, the developing world, and the future direction of international law' (2003) 2 *Chinese Journal of International Law* 29 at 30. See also, BR Roth 'Governmental illegitimacy and neocolonialism: Response to review by James Thuo Gathii' (2000) 98 *Michigan Law Review* 2056 at 2057.

6 S Burra 'TWAIL's others: A caste critique of TWAILers and their field of analysis' (2016) 33 *Windsor Yearbook of Access to Justice* 111.

7 M Sornarajah 'The Asian perspective to international law in the age of globalization' (2001) 5 *Singapore Journal of International & Comparative Law* 284 at 285, arguing: 'international law that was shaped in the colonial era was not a neutral discipline but an instrument of naked power, skilfully dressed up so as to hide its objective of controlling the colonized world for the benefit of the colonial powers'.

policy prescriptions or suggestions for improving the international legal processes one way or another; it merely offers a means of studying and understanding what is happening on the ground. At its core, TWAIL could also be seen as a *theoretical approach* to understanding international law – an approach 'critical' of international law, but only from the perspective of the Third World.

Okafor has some takes on each of these ideas – that is, TWAIL as methodology, theory, or both of methodology and theory with some more thoughtful fragments in between.[8] In fact, he sees TWAIL principally as an approach – the position adopted in the framework for this collection of essays – but one which leans 'more in favor of the methodological than the theoretical'[9] to the extent that the framework can accommodate 'both the theoretical and methodological dimensions and properties of TWAIL scholarship'.[10] Okafor also hints that TWAIL could be described as a 'school of thought' in international law to the extent that it signifies an intellectual community grounded in similar ideas[11] – in this case Third World perspectives on international law. If we take the discussion as encompassing only an 'approach', in what sense is the term 'approach' imagined? Does this approach refer to contributions to norm creation or responses to the ultimately agreed norms?

I would argue for the former especially as the responsorial approach has been discussed earlier as consisting, in the main, of critiques of the existing system and its long-standing biases. As Gathii clarifies, on independence, scholars from newly independent Third World and African countries were faced with two options for confronting the Eurocentric foundations of international law. They could reject international law in its entirety or accept only those areas of international law that were not inimical to the interests of the newly independent states;[12] or they could accept international law 'warts and all'. However, herein lay the challenge of effective action. Gathii argues further:

> 'Rejecting [international law] entirely without an ability to change it even in the United Nations, where the developing countries had majorities, seemed

8 See Okafor (n 3).

9 Okafor (n 3) 377.

10 As above.

11 Okafor (n 3) 378.

12 JT Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 317 at 318-19.

> foolhardy. Yet accepting it without challenging its participation in the colonization of their countries seemed unacceptable.'[13]

However, Gathii imposes a significant caveat on the 'contributionist'[14] mindset of Africa's international law discourse. He reasons that 'Africa's place in the international legal system cannot be reduced to or be seen solely through the lens of contributionism'.[15] The reason why Gathii regards this as important should not be overlooked; in his view, while African contributions to the development of international law at normative and doctrinal levels deserve recognition, these contributions actually demand further action. As he puts it, 'contributing to new norms…does not in and of itself, without more, make much of a difference [and] contributionism is a narrative asking for more'.[16]

Equally deserving of consideration is how the rest of the world responds to international law norms that are first adopted in Africa and other regions in the developing world. As I understand it, developing states wish their issues to be accorded comparable weight in the development of norms and the design of institutions in the international law arena. It is one thing to 'contribute' norms that apply within the African/developing regions' legal spaces, but quite another to have those norms accepted in a more globalised legal space. Unless norms find international resonance and influence how the current international legal structures address concerns specific to African/developing states, they merely confirm Gathii's skepticism and leave African peoples asking for more. For purposes of illustration the next section highlights one international policy measure as an example of how international environmental norms are indifferent to African concerns or reinforce the continent's precarious position.

3 Case Study: The Kyoto Protocol's Clean Development Mechanism (CDM)

The Clean Development Mechanism (CDM) was a flexible, market-based process intended to help reach the carbon emission reduction goals set under the 1997 Kyoto Protocol to the United Nations Framework

13 As above.

14 Gathii describes contributionists as scholars who 'regard international law as the product of a number of civilizations rather than the sole product of European civilization [and] emphasize the importance of participation by diverse constituencies in the creation of global norms'. Gathii (n 12).

15 JT Gathii 'Mapping African international law' (2011) 2 *Transnational Legal Theory* 429 at 431.

16 As above.

Convention on Climate Change (UNFCCC).[17] The original idea was raised by Brazil and was intended to establish a Clean Development Fund (CDF) into which financial penalties from developed states that failed to meet their emission reduction targets could be paid.[18] Money pooled in the CDF would then be used to fund climate change mitigation and adaptation projects in developing countries, including Africa. Developed countries led by the United States, while agreeing with the flexibility of the mechanism, rejected its penal requirements.[19] This led to a revision of the language from a punitive fund to an investment mechanism for states and corporations. Once CDM projects were viewed through the lens of international investment, they had to conform to the rules of the marketplace in addition to the formal eligibility requirements prescribed under the UNFCCC process.

The formal requirements were relatively objective and straightforward. First, that both host and the investor state must have ratified the Kyoto Protocol. Second, participation in the CDM project had to be voluntary for both states. Finally, the host state government had to designate a national authority for the CDM project.[20] The market eligibility or host country attractiveness requirements were more subjective and so also more controversial. With the CDM operating as a market for investors, it meant that developed countries had broad latitude in deciding where to invest. The host states chosen invariably turned out to be countries considered politically safe and that guaranteed the greatest profit at the least cost.[21] The market requirements, therefore, included such elements as the potential of the envisaged project to lead to appropriate mitigation results, the overall investment climate in the host country, and the legal and institutional capacity of the country as an effective project host.[22]

17 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December (1997) 2303 UNTS 162.

18 M Grubb & D Brack *Kyoto Protocol: A guide and assessment* (1999) 101.

19 L Lohmann 'Financialization, commodification and carbon: The contradictions of neoliberal climate policy' (2012) 48 *Socialist Register* 85 at 86.

20 DS Olawuyi 'Achieving sustainable development in Africa through the Clean Development Mechanism: Legal and institutional issues considered' (2009) 17 *African Journal of International & Comparative Law* 270 at 279.

21 F Lecocq & P Ambrosi 'The Clean Development Mechanism: History, status, and prospects' (2007) 1 *Review of Environmental Economic & Policy* 134; TN Maraseni 'Evaluating the Clean Development Mechanism' in T Cadman (ed) *Climate change and global policy regimes: Towards institutional legitimacy* (2013) 96; A Dinar and others *The Clean Development Mechanism (CDM): An early history of unanticipated outcomes* (2013).

22 M Jung 'Host country attractiveness for CDM non-sink projects' (2005) Hamburg Institute of International Economics Discussion Paper No 312 https://www.econstor.eu/bitstream/10419/19284/1/312.pdf (accessed 26 September 2022).

Brazil's original idea was ostensibly to spread sustainable developments projects under this mechanism fairly among the developing states in the world's various geographical regions.[23] However, once market calculations intervened via its American iteration, the hoped-for fairness could no longer be guaranteed. The result was that CDM projects were unevenly distributed with some regions gaining more than what would be their 'fair share' under a less subjective process. Unsurprisingly, a disproportionate share of the registered CDM projects found their way to Asia. Asia was followed by the Americas, including the Caribbean which had a little under 12 per cent of all projects.[24] Africa, which hosted only 3 per cent of the projects, lagged well behind these other regions. What was the reason for the skewed distribution of these projects? There appears to have been an assumption that market conditions would determine when the minimum developmental threshold necessary to attract the CDM was reached. However, the specific parameters were unclear as the rules did not tailor market-based instruments like the CDM to various levels of social development.[25] In the circumstances, the deck was stacked against African states from the outset.

With the earlier scepticism on contributionism and the example of the shortcomings of Kyoto's CDM in mind, I turn now to selected areas in international law where African dissatisfaction with the prevailing international legal system has moved beyond critique for its own sake, to a paradigm of normative policy contributions. As confirmation of Gathii's warning regarding contributionism, it can be seen that on each of the issues considered, more still needs to be done to reap the benefits of the contributions highlighted. On some of those topics, the ideas enshrined in African instruments are already integral to the corpus of normative regulations on the continent while others are in draft form and being debated. In this section, I briefly highlight the draft and adopted instruments and in what ways they depart from mainstream dominant Euro-American ideas of international law to formulate principles tailored to specific African concerns.

23 JC Cole & DM Liverman 'Brazil's Clean Development Mechanism governance in the context of Brazil's historical environment development discourses' (2011) 2(2) *Carbon Management* 145-160.

24 See United Nations Framework Convention on Climate Change 'Distribution of registered projects by UN region and sub-region' https://cdm.unfccc.int/Statistics/Public/files/201706/proj_reg_bySubregion.pdf (accessed 26 September 2022).

25 See J Fay & U Kumar 'Market-based incentives in developing countries: Geographical dispersion, antecedents and implications of the Clean Development Mechanism' (2017) 9 *Climate & Development* 164. See also C Streck & J Lin 'Making markets work: A review of CDM performance and the need for reform' (2008) 19 *European Journal of International Law* 409.

4 Examples from African trade, investment, and human rights norms

The first example is the Draft Pan African Investment Code issued in 2016 by the Economic Affairs Department of the African Union Commission and intended 'to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located.'[26] The Draft Code, which is yet to be adopted, recognises the 'growing importance of trade and investments for the growth and development of Africa',[27] and also serves as a response to 'the need for a comprehensive guiding instrument on investment for all African Union Member States'.[28]

It is important first to note Africa's relationship to the twin issues of international trade and foreign direct investment. As the Draft Code itself states, both trade and investment are essential for Africa's development and prosperity. As I have argued elsewhere, 'if material human conditions in Africa were to improve, the continent would require an expanded share of global trade as well as massive injection of foreign capital through direct investments'.[29] However, trade and investment do not always produce positive outcomes and could in certain contexts impact negatively on human rights.[30]

The Draft Code contains provisions questioning current protocols in contemporary international trade and investment law and how to address observed shortcomings from an African perspective. While current international investment agreements tend to advance only the rights of investors within a domestic legal space, the Draft Code makes copious room for investor obligations as well. Its article 20 on the political obligations of investors, for example, is directed at potential dominant

26 African Union Commission, Economic Affairs Department 'Draft Pan-African Investment Code' December 2016 https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed 26 September 2022) art 1.

27 African Union Commission (n 26) Preamble.

28 As above.

29 B Ugochukwu '"First put out the house fire": The future of the African human rights system' (2018) 35 *Wisconsin International Law Journal* 367 at 394.

30 As above. See also J Goldstein 'Kenyans say Chinese investment brings racism and discrimination' *New York Times* 15 October 2018 https://www.nytimes.com/2018/10/15/world/africa/kenya-china-racism.html (accessed 26 September 2022); SL Blanton & R Blanton 'What attracts foreign investors? An examination of human rights and foreign direct investment' (2007) 69 *Journal of Politics* 143.

international investors who might wish to interfere in domestic political processes.[31] The draft Code is also bold in enshrining such contentious ideas in international law as corporate social responsibility (art 22), liability of investors for human rights violations (art 24), and the relationship between investments and sustainable development (art 17).

Equally noteworthy is the fact that developed states of the global North have resisted long-standing efforts to impose international legal accountability on corporations for business practices that impact negatively on human rights.[32] Conversely, developing states (including those in Africa) have been at the forefront of reforming the international legal system by establishing a regime of corporate legal accountability.[33] What the Draft Pan-African Investment Code will accomplish if eventually adopted, is to send a strong, unambiguous signal that African governments, while protecting investor rights, will also impose investor obligations – a clear departure from current trends in this area of international law.

The next document is the African Charter on Human and Peoples' Rights (African Charter) which made some ground-breaking contributions to our understanding of international law. This is clear in two major areas: the recognition of the idea that just as human rights impose obligations, they equally impose duties;[34] and the recognition of peoples' or group rights in a way not previously articulated.[35] At the time of its drafting and adoption, the African Charter was the first international instrument of its kind expressly to include the concept of duties arising from human rights in its text.

31 This is as much a concern in Africa as in other parts of the developing world. See, for instance, Katia Fach Gomez 'Latin America and ICSID: David versus Goliath?' (2011) 17 *Law and Business Review of the Americas* 195.

32 See Human Rights Council 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', GA Res A/HRC/RES/26/9, UNGAOR 26th Session, 14 July 2014 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement (accessed 26 September 2022). See also C Lopez & B Shea 'Negotiating a treaty on business and human rights: A review of the first intergovernmental session' (2015) 1 *Business and Human Rights Journal* 111.

33 As above.

34 K Quashigah 'Scope of individual duties in the African Charter' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 119.

35 RM D'Sa 'The African Charter on Human and Peoples' Rights: Problems and prospects for regional action' (1981) 10 *Australian Yearbook of International Law* 101 at 116.

It can further be argued that this novel approach to human rights has given impetus to the need to reach international consensus that those who claim human rights entitlements from society must also be alive to the human rights responsibilities they may be required to shoulder both individually and as part of a collective.[36] This new thinking on human rights duties/responsibilities resulted in the United Nations appointing a Special Rapporteur on Human Rights and Human Responsibilities in 2003. The Special Rapporteur's report established a firm basis 'to create and develop a new individual and collective awareness of the need to find a solid balance between the rights of the individual and his/her social duties or responsibilities'.[37]

At the time of its adoption, the African Charter was also the first international instrument of its kind to provide that: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'[38] However, the United Nations has 'failed to take decisive steps towards the global recognition of this right, [instead] remaining for now on the side-lines of history on this issue'.[39] It has been argued that '[t]he absence of such a global recognition weakens the entire human rights project by leaving a gaping hole in the protection regime'.[40] And only recently, the UN Special Rapporteur called on the General Assembly

36 See, for instance, B Ugochukwu 'Unpacking the universal: African human rights philosophy in Chinua Achebe's *Things fall apart'* in O Onazi (ed) *African legal theory and contemporary problems: Critical essays* (2014) 206: 'In the African context therefore, it looks more like the community requires protection from the individual. An indication of how this understanding is factored into the African human rights philosophy could be seen in the preambular and some normative portions of the African Charter on Human and Peoples' Rights … In those areas, the Charter broke with the tradition of older international and regional human rights instruments by enshrining not only rights but duties as well, showing that not only does the individual have rights (entitlements); she also is subject to duties (responsibilities). Those duties are owed to others and to the corporate community.'

37 United Nations Economic and Social Council 'Final Report of the Special Rapporteur on Human Rights and Human Responsibilities' 17 March 2003 http://hrlibrary.umn.edu/demo/HumanRightsandResponsibilities_Martinez.pdf (accessed 26 September 2022). See also Draft Universal Declaration on Human Responsibilities https://www.ykliitto.fi/sites/ykliitto.fi/files/universal_declaration_of_human_responsibilities.pdf (accessed 26 September 2022).

38 Art 24. See also M van der Linde 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* Communication' (2003) 3 *African Human Rights Law Journal* 167.

39 S Duyck 'The time is now for the UN to formally recognize the right to a healthy and sustainable environment' CIEL Blogpost 25 October 2018 https://www.ciel.org/un-global-recognition-right-healthy-environment/ (accessed 26 September 2022).

40 As above.

officially to recognise the right to environment as a human right at the global level.[41]

One may well ask what 'specific African concerns' regarding environmental protection warranted the inclusion of this right in the continent's charter of human rights. First, as discussed further below, newly independent African states were concerned about their living environments long before the rest of the world recognised these as a human rights and development issue. The African states immediately saw that human rights and the environment are closely linked and enshrined this connection in the first continent-wide treaty dealing with the environment – the 1968 African Convention on the Conservation of Nature and Natural Resources.

Second, implicit in the recognition of the relationship between the living environment and human rights is the realisation among Africans that many of the environmental challenges confronting the continent were caused by non-African entities. Therefore, in offering protection for the environment, African states saw a problem not limited to Africans as right-holding individuals but as 'peoples' suffering collectively from environmental degradation not of their making. It came as no surprise, therefore, that the African Charter, adopted thirteen years later, protected the environmental rights of African 'peoples' rather than individuals.

Aspects of the normative orientation of the African Charter illustrate the limitations of contributionism highlighted by Gathii, alongside the doctrinal possibilities of enshrining the right to environment in the Charter. A good example of this is the 1996 complaint filed against Nigeria by the Nigerian non-governmental group, Social and Economic Rights Action Centre (SERAC), before the African Commission on Human and Peoples' Rights (African Commission).[42] In this light the African human rights systems was not only the first to recognise the right to a satisfactory environment, but also the first to pronounce on the meaning and content of the right in the decision by the Commission in the *SERAC* complaint.[43]

41 D Damplo 'Special Rapporteur calls on the UN to recognize the universal right to a healthy environment' Universal Rights Group 27 October 2018 https://www.universal-rights.org/nyc/blog-nyc-2/special-rapporteur-calls-on-the-un-to-recognize-the-universal-right-to-a-healthy-environment/ (accessed 26 September 2022).

42 *Social and Economic Rights Action Centre (SERAC) & Centre for Economic and Social Rights v Nigeria* 155/96 of 27 October 2001 http://www.achpr.org/communications/decision/155.96/ (*SERAC* complaint) (accessed 26 September 2022).

43 See Van der Linde (n 38).

However, the Charter's revolutionary and innovative environmental provisions are negated by the obvious failure to address challenges that may arise from including environmental rights in the text of the Charter. As Linde argues, merely adopting a right to environment without thoroughly considering the possible impact of a complaint based on the text, was a failure on the part of those who negotiated the human rights instrument.[44] Consequently, the Charter's 'right to a satisfactory environment' raises a number of questions, not least what constitutes a violation of this right and whether it is a stand-alone right which exists independently of other rights such as the rights to life and health.[45]

This notwithstanding, in deciding the *SERAC* complaint, the African Commission made perhaps the first doctrinal articulation of the right to environment in a breakthrough moment for the African human rights system. The Commission's decision affirmed that to assure a satisfactory environment, states party to the Charter undertook obligations on a range of substantive and procedural rights, including the prevention of pollution and environmental degradation, conservation, sustainable development, the use of natural resources, independent scientific monitoring of threatened environments, environmental impact assessment procedures prior to major industrial developments, access to information for communities who may be affected by development projects, and the rights of those communities to be heard and to participate in developmental decision making.[46]

5 The environment: Africa leading the world

The African Convention on the Conservation of Nature and Natural Resources was adopted in 1968 and revised in 2003. The Convention falls within the category of instruments through which the continent responds to international legal rules. In both orientation and textually, the Convention approaches its subject with Africa's disadvantaged position in international law in mind. First, in the Preamble the Convention refers to the 1974 United Nations Charter on Economic Rights and Duties of States adopted by the UN General Assembly along the strictly binary lines of developed and developing countries. Developing countries saw this Charter as a 'legally binding commitment that the developed countries will make a good faith effort, measured by the standards of the Charter, to assure a more equalized distribution of the profits and rewards from

44 As above.

45 As above.

46 As above.

global trade and resource utilization'.[47] The developed countries – with the United States leading the way – were less enthusiastic as to the Charter's potential to address global economic inequality.[48]

In the context of African approaches to international law several characteristics of this Convention and its revision deserve closer attention. It is the first – though not the only – continent-wide convention on the environment designed by independent African states. There had previously been the Convention for the Preservation of Wild Animals, Birds and Fish in Africa of 1900[49] as well as the Convention Relative to the Preservation of Fauna and Flora in their Natural State of 1933.[50] These two instruments were negotiated and adopted by colonial governments in Africa and therefore did not have goals suited to Africa's place in the world as imagined by Africans themselves. For example, the main objective of the 1900 Convention was 'to ensure a fair supply of game for trophy hunters, ivory and skin traders'[51] while the 1933 Convention placed greater emphasis on the 'creation of protected areas.'[52]

The 1968 Convention was adopted well before the first global conference on the environment in 1972.[53] Its 2003 revision is based on a variety of normative foundations that are yet to be adopted on the global level. These include a recognition of the right to a satisfactory environment,[54] a duty on states to ensure protection of the right to development,[55] and the prioritisation of access to and transfer of, environmentally sound

47 JC Vanzant 'Charter on Economic Rights and Duties of States: A solution to the development aid problem?' (1974) 4 *Georgia Journal of International and Comparative Law* 441.

48 As above.

49 Convention for the Preservation of Wild Animals, Birds and Fish in Africa, signed at London 19 May 1900; Presented to Both Houses of Parliament by Command of Her Majesty, May 1900 British Parliamentary Papers 1900 Cd 101 vol 56 at 825-837 https://iea.uoregon.edu/treaty-text/1900-preservationwildanimalsbirdsfishafricaentxt (accessed 26 September 2022). The Convention never entered into force.

50 Convention Relative to the Preservation of Fauna and Flora in their Natural State, *Register of international treaties and other agreements in the field of the environment* UNEP/Env.Law/2005/3 at 5. The Convention entered into force on 14 January 1936.

51 M van der Linde 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 33 at 35.

52 As above.

53 EP Amechi 'Linking environmental protection and poverty reduction in Africa: An analysis of the regional legal responses to environmental protection' (2010) 6 *Law, Environmental and Development Journal* 114 at 119.

54 African Convention on the Conservation of Nature and Natural Resources 2003, art III (1).

55 As above art III (2).

technologies which, it has been argued, place 'sound environmental management policies, techniques and processes within the reach of less developed countries'.[56]

I now turn to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) which criminalises trafficking in hazardous waste on the African continent and so 'presents an opportunity for African states to alter the status quo in environmental protection'.[57] The Protocol (which is yet to enter into force) is also seen as a response to very obvious 'limitations of the international legal framework for regulating hazardous waste'.[58] What is the problem here? Annually, millions of tonnes of hazardous waste materials make their way from the developed world to Africa and other parts of the developing world, often illegally, in what has been described as 'toxic colonialism'.[59]

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal remains the primary global instrument regulating hazardous waste. However, the agreement operates more like a regime for legitimate trade in (and export/import of) hazardous waste.[60] While the Convention bans illegal trafficking in hazardous waste, the consequences of doing so apparently amount to no more than a slap on the wrist for perpetrators – the exporter or generating state has merely to take back the waste (if practicable) or otherwise dispose of it.[61] The Convention in effect left it up to state parties to use national or domestic legal processes of their choice to punish and prevent illegal trafficking in waste. Parties could elect 'to use tort law, criminal law, administrative law or other relevant areas of law to remedy this illegality.'[62]

In adopting this standpoint, the framers of the Convention neglected a crucial fact in the relationship of international and domestic law; states party to international agreements often respond to weaknesses in domestic legal systems to fashion more global regulatory solutions. It was therefore unhelpful in the context of this Convention for the state parties to send the problem they should be solving back to domestic legal regimes. If the

56 See Van der Linde (n 38).

57 M Sirleaf 'Not your dumping ground: Criminalization of trafficking in hazardous waste in Africa' (2018) 35 *Wisconsin International Law Journal* 326 at 328.

58 As above.

59 As above.

60 Sirleaf (n 57) at 340.

61 Art 9(2).

62 See Sirleaf (n 57) 342.

problem of international trafficking in toxic materials could have been solved at the domestic level, the international efforts culminating in the Convention would not have been necessary.

African scepticism as to the effectiveness of the Basel Convention would sooner give way to action and a full-on criminalisation of the importation of hazardous wastes into the continent. African states were unimpressed by the Basel Convention's approach which was to regulate 'controlled' trade[63] in hazardous waste, rather than prohibiting its international movement. In fact, earlier in 1988 the Organisation of African Unity (OAU) Council of Ministers had adopted a resolution declaring the dumping of nuclear and industrial waste in Africa a crime against Africa and the African people.[64] The resolution also condemned 'all transnational corporations and enterprises involved in the introduction, in any form, of nuclear and industrial wastes in Africa' and demanded that they clean up the areas already been contaminated.[65]

Because of its obvious shortcomings – particularly from an African point of view given 1988 resolution – African states demurred *en masse* to sign into the Basel Convention when it opened for signature in 1989. Instead, in 1991 a meeting of OAU Ministers of Environment adopted the Bamako Convention on the Ban of Importation into Africa and the Control of Transboundary Movement and Management of Hazardous Waste within Africa.[66] The major objective of the Convention was to outlaw and criminalise the importation of hazardous waste to the continent from non-African countries.[67] To achieve this goal, it introduced African waste management schemes in form of clean production methods, waste avoidance and elimination, use of non-polluting technology, and trafficking in hazardous waste among African countries.[68] The Convention entered into force on 22 April 1998.

63 MG Amlak 'African countries and the conventions on the control of transboundary movements of hazardous wastes' A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the Degree of Master of Laws University of McGill, Montreal, Quebec, Canada (1992) https://escholarship.mcgill.ca/concern/theses/1g05fc48c?locale=en (accessed 26 September 2022) 58.

64 OAU Council of Ministers 'Resolution on dumping of nuclear and industrial wastes in Africa' CM/Res 1153(XLVIII) https://www.iaea.org/sites/default/files/infcirc352.pdf (accessed 26 September 2022). See also B Chaytor & M Manek 'An African response to Basel: The Bamako Convention' in B Chaytor & KR Gray (eds) *International environmental law and policy in Africa* (2003) 38.

65 OAU Resolution CM/Res 1153(XLVIII) as above.

66 30 *ILM* 775 (1991).

67 Amlak (n 63) 102.

68 As above.

The Bamako Convention contains norms for controlling the illegal movement of hazardous waste in Africa. On the other hand, the Malabo Protocol – which also acknowledged both Africa's precarious fate as the main dumping ground for illicit transboundary waste and the shortcomings of the Basel Convention in addressing the problem – is geared towards establishing a regional judicial enforcement regime. In the circumstances, one of the major innovations of the Protocol, in addition to the criminalisation of trafficking in hazardous waste, is the granting of jurisdiction to the international criminal law section of the African Court of Justice and Human and Peoples' Rights to try perpetrators of the crime.[69] In addition, the Protocol departed from all similar instruments before it by imposing not only individual criminal liability for the offenses it created, but also corporate criminal responsibility.[70] The main problem to be confronted is that the Court is yet to take off.

6 African approaches to other contemporary environmental challenges

Kéba Mbaye, whose contributions to the development of Africa's vision of a global rule of law this conference is celebrating, once warned of a civilisation characterised solely by increasing 'production and consumption',[71] that inevitably leads to 'a civilisation condemned to contradictions and chaos'.[72] Mbaye saw this as a global problem and so urged for an understanding of economic development that also accounted for its environmental effects.[73] This latter point, in addition to the developing country demand that environmental challenges not be used as pretext to delay or thwart their economic development, has tended to shape the contributions and approach of those states to global environmental actions.

Given this background, I now turn to more general environmental and climate change-related issues where African voices and ideas have influenced mainstream international norms and processes. The first international conference dedicated to global environmental conditions was held in Stockholm in 1972 following a 1968 UN General Assembly

69 Arts 28(a) & 28(l).

70 Art 46(c).

71 K Mbaye 'Le droit au développement comme un droit de l'homme' (1972) 5 *Revue des droits de l'homme* 505 at 511 cited in Karin Mickelson 'Rhetoric and rage: Third World voices in international legal discourse' (1998) 16 *Wisconsin International Law Journal* 353 at 355.

72 As above.

73 Mbaye (n 71) 514.

resolution calling for such a conference to be held.[74] Developing countries were not supportive of the conference. In fact, in the words of the UN official tasked with supervising it, 'the biggest single threat to the conference was the ambivalence, even antipathy, that developing countries felt toward the whole issue of the environment.'[75]

The position of the developing countries emerges from the powerful statement by the respected Pakistani economist, Mahbub ul Haq, who participated in preparatory meetings for the conference.

> Industrialization had given developed countries disproportionate benefits and huge reservoirs of wealth and at the same time had caused the very environmental problems we were now asking developing countries to join in resolving. The cost of cleaning up the mess, therefore, should be borne by the countries that had caused it in the first place. If they wanted developing countries to go along, they'd have to provide the financial resources to enable them to do so.[76]

This viewpoint has been adopted by developing countries, including African states, in their approach to international environmental challenges and global efforts to address them. These states argue that any effort to address these challenges should not stifle their own development (just as developed states' development had not been stifled) and should also not place unnecessary financial burdens on them for environmental remediation. Developing states assert further that the developed world which caused the challenges through developmental transformation to a level that is detrimental to the sustainability of the human environment, should be responsible for addressing them. This long-held view exemplifies my earlier assertion that it is African/Third World fears and apprehensions (rather than interests and objectives) that inform their perspectives. This position aligns with Atapattu and Gonzalez's view that while international cooperation is needed to overcome global environmental challenges, including climate change, multilateral discussion is generally strained because the 'global environmental agenda has often been dominated by the priorities and concerns of affluent countries'[77] while 'the concerns of developing countries are frequently marginalized'.[78]

74 T Weiss & R Thakur *Global governance and the UN: An unfinished journey* (2010) 204.

75 M Strong *Where on Earth are we going?* (2000). See also Mickelson (n 71) 353 at 389.

76 Strong (n 75) at 123.

77 See Atapattu & Gonzalez (n 2) 1.

78 As above. See also L Polgreen & M Simons 'Global sludge ends in tragedy for Ivory Coast' *New York Times*, 2 October 2006 https://www.nytimes.com/2006/10/02/world/africa/02ivory.html (accessed 26 September 2022); L Pratt 'Decreasing dirty

Though the developing countries eventually participated in the Stockholm conference, they did so on their own terms and stood by their stated position – an approach they and have since maintained at subsequent similar global meetings. A significant example is the 2009 'Common Position of the Committee of the African Heads of State on Climate Change'.[79] The Common Position articulates a set of demands by African states that forms the basis for their engagement with the global climate change negotiation process. Two of these demands underscore the concern of African states with the fairness of the negotiations in responding to historical environmental injustices, and even more importantly, how to distribute the burdens of environmental redress equitably.

The first African demand calls for 'financial compensation for natural, economic and social resources that have been lost and the historical responsibility of developed countries on climate change in that respect'.[80] The group also demands that the UNFCCC principle of common but differentiated responsibilities (CBDR) be respected.[81] The CBDR principle 'recognises the historical differences in contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems'.[82] These two demands could therefore be considered shorthand for Africa's entire strategy for assuring the inclusion of issues that address her peculiar position in climate negotiation processes. They recognise what African states regard as unjust moves to impose obligations for climate remediation on Africans who not only did not contribute as

dumping? A re-evaluation of toxic waste colonialism and the global management of transboundary hazardous waste' (2011) 35 *William & Mary Environmental Law & Policy Review* 581; L Ognibene 'Dumping of toxic waste in Côte d'Ivoire: The international framework' (2007) 37 *Environmental Policy & Law* 31; CU Gwam 'Human rights implications of illicit toxic waste dumping from developed countries including the USA, especially Texas to Africa, in particular, Nigeria' (2012) 38 *Thurgood Marshall Law Review* 241.

79 JC Hoste 'Where was United Africa in the climate change negotiations?' (2010) *Africa Policy Brief* https://www.open.ac.uk/socialsciences/bisa-africa/files/africanagency-seminar1-hoste.pdf (accessed 26 September 2022).

80 As above.

81 'Africa has had a singular voice in global environmental negations, advocating greater respect for the principle of common but differentiated responsibilities'. See EL Fotabong and others 'Climate diplomacy in Africa' November 2016 *Climate Diplomacy Policy Brief* https://www.nepad.org/climate/publication/climate-diplomacy-africa (accessed 26 September 2022).

82 As above.

much in creating the problem ('Africa's contribution to climate change is negligible'),[83] but would bear the weight of its deleterious impacts.[84]

There is, however, an important caveat to be made. That Africans came up with these common demands does not mean that all African states see these concerns from a common perspective. On occasion, individual states may gamble on pursuing narrow state interests that tend to conflict with their commitment to an Africa-wide strategy. For example, during a 2009 UNFCCC session on financing in Bonn, South Africa insisted that there be no differentiation in access to climate-change-related development funds among developing countries, a statement that took other African states and observers by surprise.[85] The move was interpreted as an attempt by South Africa to secure its own economic development.[86]

Significantly, African strategies for contributions to global environmental discourse face, in addition to 'conflicting needs and interests',[87] a range of other limitations. These include 'poverty, low institutional capacity, scepticism among some heads of state about the reality of climate change, and lack of progress among member states to implement national climate change policies'.[88] These limitations are exacerbated in the climate change negotiation processes where considerable expertise and knowledge of the often-complex technical materials being negotiated is essential for informed contributions and to protect identified interests.

83 W Scholtz 'The promotion of regional environmental security in Africa's Common Position on Climate Change' (2010) 10 *African Human Rights Law Journal* 1 at 2. See also United Nations Framework Convention on Climate Change 'United Nations fact sheet on climate change: Africa is particularly vulnerable to the expected impacts of global warming' http://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf (accessed 26 September 2022) stating: 'Africa accounts for only 2-3 per cent of the world's carbon dioxide emissions from energy and industrial sources.'

84 The feeling of 'shared vulnerability' is one that Africa shares with the rest of the developing world 'both in terms of the potential impacts of climate change, and the ability to counter these adverse effects'. See M Williams 'The Third World and global environmental negotiations: Interests, institutions and ideas' (2005) 5 *Global Environmental Politics* 48 at 61.

85 J Drexhage 'Sobering days in Bonn: An IISD commentary' 21 August 2009 https://www.iisd.org/pdf/2009/com_sobering_days_bonn.pdf (accessed 26 September 2022).

86 See Hoste (n 79).

87 See Fotabong and others (n 81) 2.

88 As above.

On a different level, and under the auspices of the African Union, African states have since 2014 been discussing a Draft African Strategy on Climate Change.[89] The need for such a strategy is underpinned by the long-held assertion by African states 'that the climate change agenda is generally framed by powerful international players who, incidentally, have been responsible for the onset of the ongoing climate crisis …'[90] The Draft Strategy is clear in stressing that 'African countries have been the aggrieved party [in the climate change debacle] considering that they virtually played no part in precipitating the menacing global threat'.[91] It goes a step further to stress that Africa's situation is 'all the more excruciating because the historic emitters have shown no factual interest in assisting Africa evolve resilient economics (*sic*).'[92] The Draft Strategy further underscores the African experience in 'slave trade, imperialism, colonialism, the Cold War, and neo-colonial vicissitudes'.[93] It would appear that these factors form the basis for Africa's engagement in climate change negotiations as well as informing the contributions of the continent's negotiators in the process.

As regards actual strategy, it is divided into two parts: processes that promote adaptation to climate change; and those that address mitigation of the challenge.[94] As regards adaptation, the Draft Strategy pays specific attention to the funding required to implement adaptation projects on the continent which, it provides should come from the historic emitters, in other words, the developed world. As such the Draft Strategy stipulates that: 'Funding by developed countries for adaptation must reflect responsibility for economic and social damages resulting from climate change in the context of their historical contributions to greenhouse gases and current climate change.'[95]

As regards mitigation, the draft strategy underscores the major challenges developing regions such as Africa would face and must overcome in order to make any meaningful contribution to mitigating climate change. As a first step, the Draft Strategy proposes that developed countries commit to the measurable mitigation outcomes, while developing countries be permitted to take mitigating action without being bound to

89 Africa Union 'African strategy on climate change' http://www.un.org/en/africa/osaa/pdf/au/cap_draft _auclimatestrategy_2015.pdf (accessed 26 September 2022).

90 African Union (n 89) 7.

91 African Union (n 89) 4.

92 As above.

93 African Union (n 89) 5.

94 African Union (n 89) 21.

95 As above.

any measurable outcomes. In addition, the draft strategy emphasises that mitigation action by African states must be conditional on measurable, reportable, and verifiable technology, financing, and capacity-building measures from more affluent countries.[96]

7 Conclusion

While developing countries, including those in Africa, bear a disproportionate burden in the global environmental crisis, the inequalities are perpetuated in the efforts to combat the phenomenon. In this chapter, it has been shown that African scholars applying the TWAIL framework have been at the vanguard of critiquing international legal norms and institutions that perpetuate these inequalities. Their goal is to ensure a fair and non-discriminatory global order by removing features of the international legal system that exacerbate exclusion. By paying attention to the scholarly discourse in the field, African states have in various thematic areas including trade, investment, human rights, and environmental governance developed ideas and norms that speak to the specific concerns of Africans in international legal governance.

These ideas respond to critics' claims that TWAIL scholars criticise the international legal system without offering alternative norms or modes of regulation that address their concerns. Granted, while some of the ideas – such as those relating to human rights duties, the rights of peoples, and environmental rights – have been adopted and implemented on the continent, others are in draft or awaiting ratification. What is clear, however, is that African states are rising to the occasion and advancing regional solutions to international legal challenges of concern to the continent.

A lot remains to be done. African states must show greater commitment by signing and ratifying the instruments that have yet to enter into force. Only by so doing will they be taken seriously by the international legal system and their own people. Leaving those ideas half-way done would be a travesty far too serious to contemplate. Reluctance, indecision, and lack of action will play into the hands of those who accuse Africans of being all criticism and little meaningful action.

96 As above.