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Africa: influencing aspects of theory and practice in international law

*Chris Maina Peter**

> 'We have awakened. We will not sleep anymore. Today, from now on, there is a new African in the world! Our country's independence is meaningless unless it is linked up with the total liberation of the African continent.'
>
> Kwame Nkrumah

Introduction

This essay attempts to map the influence of the African continent in the development of international law at both theoretical and practical level. It is noted that in all the achievements made, Africa has not been working as a lone ranger but rather with other people from the developing world. This has mainly been through inter-governmental organisations. These include the Asian-African Legal Consultative Organization (AALCO); the Group of 77; the Non-Aligned Movement; the South Commission as well as working as part of the UN and its various institutions.

As it will be elaborated at length later, it was while working as part of the Asian-African Legal Consultative Organization (AALCO) that Africa was able to develop and come up with the concept of Exclusive Economic Zone (EEZ) in the course of the development of Law of the Sea. Again, it was in the process of fighting for self-determination and independence, the struggle led to the recognition of wars of national liberation as legitimate wars entitling those involved to prisoner of war status. At the same time, mercenaries involved in similar wars were not only denied prisoner of war status, but all their activities were declared illegal in the eyes of international law. The work goes on to examine the contribution of Africa to the appreciation of human rights beyond the individual to the wider community and the input of African culture in the process. Connected to the peoples,' group and solidarity rights is the recognition of gender rights in the continent[1] which surprisingly goes

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1 See Protocol to the African Charter on the Rights of Women in Africa, 2003 (Maputo Protocol).

beyond the celebrated United Nations (UN) Convention on Elimination of all forms of Discrimination Against Women (CEDAW), 1979.[2] Apart from the various theoretical contribution done by Africa to international law, this work also mirrors the influence of the continent in various global initiatives like those led by the Group of 77 and non-aligned movement and had its hand in the formulation of the New International Economic Order and its programme of action. Also, the continent had valuable contribution in the process leading to the adoption of the UN Law of the Sea Convention in 1982.

The work notes that there were conditions leading to these momentous contributions by Africa to international law. The personalities in leadership in the continent played a very pivotal role due to their standing at global, regional and national stages.[3] Africa lacks such visionary people at present. Therefore, it will take a while before the presence of the continent at international stage can be felt again. In the meantime, African academics, both at home and in the diaspora have continued to do marvellous work in terms of providing progressive interpretation of international law as it develops.[4] This is a very encouraging situation.

For me it is a great honour to be invited to contribute to this volume of essays in honour of Professor Christof Hendrik Heyns. I met Christof for the first time in Nairobi, Kenya in the early 1990s. Both of us and others had been invited as External Examiners at the then Faculty of Law of the University of Nairobi by Prof Kivutha Kibwana, then the Dean of the Faculty and now the Governor of Makueni County in Kenya. At that time the world had just opened the doors to South Africa in various areas including academics. Christof was warm, pleasant, friendly and very enthusiastic and with a lot of questions on what was happening in our Universities and the meaning and value of external examination exercise. I explained calmly and it attracted him. We also visited various bookshops in Nairobi which are well-stocked with up-to-date materials and he ended up spending most of his allowances on books.

2 See Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW).

3 This crop to leadership which brought Africans together, inspired them and cultivated the sense of unity and oneness include Haile Selassie of Ethiopia, Jomo Kenyatta of Kenya, Asagyefo Kwame Nkrumah of Ghana, Gamal Abdel Nasser of Egypt; Ahmed Ben Bella of Algeria; Julius Nyerere of Tanzania and others. On these popular first generation leaders in after and their work see eg JM Biswaro *The quest for regional integration in the twenty first century: rhetoric versus reality – a comparative study* (Mkuki na Nyota 2012).

4 The contribution Africans to the development of international law is well captured Professor Tiyanjana Maluwa, the former Legal Counsel of the then Organisation of African Unity (OAU) and now teaching at the School of Law of Pennsylvania State University in the USA. See T Maluwa 'Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties' (2020) 41 *Michigan Journal of International Law* 327.

We later met after he and his colleagues at the University of Pretoria had established the Centre for Human Rights and the popular LLM in Human Rights and Democratisation in Africa programme. He somehow liked Tanzania and always made sure that we had a slot or two in the programme. The students selected did not let him down. They did well and today they are Judges of the High Court and Court of Appeal and some are Ministers in the Cabinet. They fondly speak of him and the Centre whenever we bump into each other.

Later, we were to meet in Geneva, Switzerland almost on annual basis when he served as a Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016) and as a member of the Human Rights Committee (2017-2020). I was then a member of the UN Committee on Elimination of All Forms of Racial Discrimination and later the UN International Law Commission (ILC). Time allowing, he was part of the annual Nelson Mandela World Human Rights Moot Court Competition management team which organised the finals of the competition at the UN in Geneva. I remember us standing at the *Palais des Nations* Tram Station for hours allowing trams to go as we discussed many issues of common interest. There is no doubt that we are already missing him as he has just gone too soon.

Colonial objects

Africa, as a continent, was ignored for a very long period. It was a walking ground for those looking for places to loot and they did actually loot the continent with impunity. Under oppression, it was unthinkable for the continent to contribute anything and that is why legal luminaries coined the terms *subjects* and *objects* of international law. The subjects of international law were those with a say and the objects were those without any say in international law and could do nothing to influence its development. It is only in 1950s and later in 1960 that territories in African began trickling into the community of nations. It must be emphasised that this was not a lone journey. Africa was not the only area of the world which was colonised. This as soon to develop into a global phenomenon on which imperialism was built.[5] It follows logically that the anti-imperialist struggle was equally global in its reach. It touched all the empires of the colonial powers. Therefore, the contribution of the African continent to international law over the years has been influenced and assisted a close collaboration with the

5 On the characteristics of imperialism and its need see VI Lenin *Imperialism, the highest stage of capitalism a popular outline* (1917) (published later in Lenin's *Selected works (volume 1)* (Progress Publishers 1963); DW Nabudere *The political economy of imperialism: its theoretical and polemical treatment from mercantilist to multilateralism* (Zed Press 1977); & JL Kanywanyi 'The struggle against imperialism: a popular outline' (1976) Faculty of Law, University of Dar es Salaam.

others who had suffered the same fate. This will be illustrated clearly as we examine one contribution after the other. It has not been easy, but Africa has struggled had to maintain its place among the nations.

Liberation and struggle against colonialism

The first area where Africa made an important breakthrough in international law was in wars of national liberation and struggle against colonialism and the system of apartheid practised in South Africa. These struggles led to new thinking and appreciation of the laws of war which are technically referred to as 'international humanitarian law'.

Rivalries among colonial powers at times led to serious wars. These large-scale wars were at times given wrong names. For instance, world wars while they were actually not. However, they entailed shifting colonial subjects from occupied territories from one continent to another. During these wars, people met – all of them oppressed and suppressed but fighting for the same master. They exchanged ideas and their experiences. Thus, when they returned home, they were different people. A bug of liberation had entered them, and it was germinating. For most Africans and particularly those from former British colonies, Burma (today's Myanmar) is where the bug was picked. It is the soldiers from the campaigns in Burma who brought new ideas about freedom of their countries.[6] That was the genesis of the wars of liberation in the continent.

It is therefore not surprising that at its inception in May 1963, the Organisation of African Unity (OAU) set as it main priority liberation of the continent from colonialism and the racist system practised in South Africa and the then South West Africa.[7] A liberation committee was set up and based in Dar es Salaam, Tanzania,[8] with the single aim of liberation of the continent and particularly in southern Africa where Mozambique, Angola were still under colonial yoke and without prospects for independence and also Guinea Bissau, Cape Verde, Sao

6 See the narratives of Bildad Kaggia of Kenya and Ally Kleist Sykes of Tanganyika in K Bildad, *Roots of freedom 1921-1963: the autobiography of B Kaggia* (East African Publishing House 1975), and JV Mwapachu *A journey: my life, speeches & writings* (E & D Publishers 2021).

7 On South Africa and control of Namibia see WS Rayner & others *How Botha and Smuts conquered German West Africa* (Simpkin, Marshall, Hamilton, Kent & Co 1916); MH Park 'German South-West African campaign' (1916) 25 *Journal of African Society* 113, and CJ Johnston *The campaign in German South West Africa 1914-1915* (Government Printer 1937).

8 On the wars of national liberation in Africa see H Mbita *Southern African national liberation struggles* (Mkuki na Nyota 2014); H Othman *Sites of memory: Julius Nyerere and the liberation struggle in Southern Africa* (Zanzibar International Film Festival, 2007); and C Chachage & Annar Cassam (eds) *Africa's liberation: The Legacy of Nyerere* (Pambazuka Press & Fountain Publishers 2010).

Tome and Principe, Equatorial Guinea in West Africa[9] and Western Sahara in the North West Africa.[10]

Wars of liberation took guerrilla form due to the inferior capacity of those involved and the mighty fire power of the colonial powers assisted by the metropole. With time and gain in legitimacy, these wars were waged openly. International law could not ignore what was happening in the continent and it is not surprising that as international humanitarian law was being revised in 1977 to improve the four Geneva Conventions of 1949 Africa and what was happening in the continent was on the agenda.

Two issues were discussed, adopted and mainstreamed into international humanitarian law. Firstly, was the question of the status of wars of national liberation.[11] Before 1977 wars of national liberation were not recognised as legitimate wars which would attract protection of those involved under the law of nations. These wars were categorised as terrorism and those involved once arrested were not treated as legitimate fighters and thus never accorded prisoner of war status. This changed completely in 1977 following the adoption of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977:

> Article 1(4) provides that armed conflicts in which peoples are *fighting against colonial domination, alien occupation or racist regimes* are to be considered international conflicts. (emphasis added)

That was a major victory for Africa. Others had fought wars of this nature for years, but it is the continent that brought in sufficient heat that made a difference.

Another area which was addressed in the 1977 Geneva Protocols which is of relevance to Africa is in relation to the use of mercenaries. The colonial powers had left the continent reluctantly. Thus, they could not leave it in peace. They used their national intelligence organisations to destabilise the newly independent African states directly or through use of private mercenaries, popularly known as the 'hired gun', 'soldiers of fortune' or 'dogs of war' in 1960s and 1970s.[12] From the Comoros

9 Against Portugal alone the following guerrilla groups were at its neck: In Angola (People's Movement for the Liberation of Angola (MPLA), National Liberation Front of Angola (FNLA), National Union for the Total Independence of Angola (UNITA)), Mozambique (FRELIMO), Guinea-Bissau (PAIGC, FLING), and Cape Verde (PAIGC).

10 All these liberation struggle groups and their main players are discussed at length H Othman 'Mwalimu Julius Nyerere: an intellectual in power' in Chachage & Annar Cassam (n 8) 28.

11 See HA *Wilson International law and the use of force by national liberation movements* (OUP 1990).

12 On mercenaries and their use in Africa, see *Mercenary: Mike Hoare's personal story of his astonishing and horrifying experiences in the Congo as a mercenary* (Corgi Books 1967); AH Thobhani, 'The mercenary menace' (1976) 23 *Africa Today* 61; PC Maina 'Mercenaries and international humanitarian law' (1984) 24(3) *Indian*

through the Sudan up to Nigeria, mercenaries created havoc on the continent and they cared little save for their ill-gotten pay.[13] Though their status was suspect, they still enjoyed the backing of the former colonial powers and even international law was alleged to be contested in issues relating to them. That came to an end in 1977 through article 47 of the same Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The Protocol in article 47(2) defines a mercenary as a person who

(a) is especially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Meanwhile, article 47(1) is categorical that 'a mercenary shall not have the right to be a combatant or a prisoner of war'. That was the second positive result coming directly from liberation struggles in the African continent, namely, outlawing mercenaries in the laws of war at global level. Of course, the problem of mercenaries in wars across the world is far from over. They are coming back into the war scene in some other forms having been given legitimacy, blessings and full support by their own governments or those governments hiring them to indirectly fight for them in open combat.[14]

Journal of International Law 373; G Arnold *Mercenaries: the scourge of the Third World* (Palgrave Macmillan 1999); and E Lieblich 'The status of mercenaries in international armed conflict as a case of politicisation of international humanitarian law' (2009) 3 *Bucerius Law Journal* 91.

13 On German mercenary Rolf Steiner's campaigns in the Biafra War and with the Anyanya in Southern Sudan and the French mercenary Bob Denhard, who was all over the continent of Africa from Congo to the Comoros see P Baxter *Biafra: the Nigerian Civil War 1967-1970* (Helion & Co 2014); E O'Ballance *Sudan, civil war and terrorism, 1956-99* (Springer, 2003); S Weinberg *Last of the pirates: the search for Bob Denhard* (Pantheon 1995); and D Hebditch & K Connor *How to stage a military coup: from planning to execution* (Skyhorse 2017) at 136.

14 It is worth noting that all these efforts notwithstanding, mercenaries are coming afresh into the war field in another form. They are openly fighting in Iraq, Afghanistan and elsewhere as military contractors hired by private military companies commissioned and paid by foreign states waging wars in these territories. See PW Singer *Corporate warriors: the rise of the privatized military industry*

Africa and the law of the sea

It is in the development and organisation of the Law of the Sea that Africa has made an indelible mark. However, this major contribution to international law is the least known as very few people in Africa and beyond have interest in the sea and particularly its governance, notwithstanding the fact that the continent is surrounded in all parts by the sea.[15] For the majority, having fish on the dinner table is more than enough. However, the sea is more than fish and the blue water which many associate with it.

The sea covers about two-thirds of the surface of the earth while more than three quarters of the world trade is transported easily through the sea. This part of the globe is important for security, communication, as a source of food, minerals, oil, gas and other resources.[16] The discovery of manganese nodules on the surface of the ocean beyond national jurisdiction particularly on the Pacific Ocean enhanced the importance of the sea to the world community.[17] Notwithstanding its strategic importance, the sea has for many years been chaotically organised. This is mainly due to the existence of different interest groups depending on their affinity to the sea. These interest groups include coastal states, land-locked states, geographically disadvantaged states, island states, archipelagos and others.[18]

Africa has deep interest in the sea. It is actually surrounded by the sea on all sides. In the East it is the Indian Ocean and on the West side is the Atlantic Ocean on the northern side is the Mediterranean Sea which

(Cornell University Press 2004); RY Pelton *Licensed to kill: hired guns in the War on Terror* (Crown, 2006); K Fallah 'Corporate actors: the legal status of mercenaries in armed conflict' (2006) *International Review of the Red Cross*; J Scahill *Blackwater: the rise of the world's most powerful mercenary army* (Serpent's Tail 2007); and M Mancini *Private military and security company employees: are they the mercenaries of the twenty-first century?*, EUI Working Paper AEL 2010/5, European University Institute, San Domenico di Fiesole, 2010.

15 On an early analysis of the third UN on the Law of the Sea see NS Rembe *Africa and the international law of the sea* (Sijthoff & Noordhoff 1980). See also TO Elias *Africa and the development of international Law* (Martinus Nijhoff Publishers 1988), ch 14 on the Law of the Sea.

16 Importance of the sea, see DR Rothwell *The Oxford handbook on the law of the sea* (OUP 2021); and P De Souza & A Pascal *The sea in history* (Baydell & Brewer 2017).

17 Manganese nodules and seabed mining see O Sparenberg 'A historical perspective on deep-sea mining for manganese nodules, 1965-2019' (2019) 6(3) *The Extractive Industries and Society* 842; ME Borgese & PMT White *Seabed mining: scientific, economic and political aspects – an interdisciplinary manual* (International Ocean Institute 1984); and A Jaeckel 'Deep seabed mining and adaptive management: the procedural challenges for the international seabed authority' (2016) 70 *Marine Policy*, August 205.

18 All these different interests in the sea were to a very large extent accommodated in the 3rd UN Law of the Sea Convention, 1982. See United Nations *The Law of the Sea – UN Convention of the Law of the Sea – With Index and Final Act of the Third UN Conference on the Law of the Sea* (United Nations 1983).

drops into the Red Sea on the North-East. In such a strategic geographic place, Africa cannot ignore the sea.

The bone of contention has been access and control of the resources of the sea. Who should have what and how much. Although there had been discussions on how to handle the resources of the sea, the main impetus was brought about by the decision of the USA to extend its control beyond national jurisdiction. This was in two Presidential Proclamations made in 1945 by President Harry Truman.[19]

These two proclamations had far reaching international implications as they were extending the control of the US to areas of the sea and the seabed beyond US national jurisdiction. They provided as follows:

Proclamation 2667 – Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf dated 28 September 1945:

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Proclamation 2668 – Policy of the United States with respect to coastal fisheries in certain areas of the high seas of 28 September 1945:

> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that

19 33rd President of the United States of America: 1945-1953. See H Truman *1945: year of decision* (New Word City Inc 2014) (first published 1955); and H Truman & RH Ferrell *The autobiography of Harry S Truman* (University of Missouri 2002) (first published 1980).

> corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

The decision by the United States to extend its jurisdiction seawards led to both panic and anger. The Latin American states meeting in Santiago, Chile, in 1952, came up with equally unprecedented measures. They proclaimed a 200-mile territorial sea.[20] The aim was to protect their anchovies. Although not recognised by many states, the unilateral decision by Latin America culminated in the calling of the first UN Conference on the Law of the Sea (UNCLOS I) in 1958.[21] Although four different Conventions were concluded during this meeting, this was not sufficient to regulate the seas of the world. Thus, a new conference was convened by the UN in 1960, called UNCLOS II, but it was less successful.[22]

However, African contribution in the area of the Law of the Sea came about during the Third UN Law of the Sea Conference (UNCLOS III) between 1973 and 1982. One of the heatedly contested issues was the control of the resources and the breadth of the area immediately after the territorial sea. On the territorial sea the contest was between the traditional 3-Nautical Mile favoured by developed and industrialised states and the radical proposal of 200-Nautical miles of the Latin American states.

It is Africa, working closely with Asia in the Asian-African Legal Consultative Organisation (AALCO) that came with the answer to this stand-off. In the course of the UNCLOS III, Dr Frank X Njenga from Kenya through AALCO coined the term *Exclusive Economic Zone (EEZ)*.[23] It was accepted and adopted by the Conference. Interestingly, very little is said, written or otherwise documented about this major contribution although it is a fact and it has never been disputed. This is a legal regime established by the UN Convention on the Law of the Sea, 1982, which shall not extend beyond 200 nautical miles from the baselines from

20 KF Brimah 'Latin American States and the Law of the Sea' 1976. Unpublished Master's thesis. 3481. https://thekeep.eiu.edu/theses/3481

21 The 1st UN Conference on the Law of Sea (UNCLOS I) was held in Geneva, Switzerland from 24 February to 27 April 1958. A total of 86 states attended. The main aim of the conference was to examine the technical, biological, economic, and political aspects of the law of the sea and to codify the results into one or more international conventions. The Conference adopted four separate international conventions. These were on The Territorial Sea and the Contiguous Zone; The High Seas; Convention of Fishing and Conservation of the Living Resources of the High Seas; and Convention on the Continental Shelf.

22 The 2nd UN Conference on the Law of the Sea in 1960 (UNCLOS II) did not result in any new agreements. Therefore, states remained guided by the Conventions reached in 1958.

23 Dr Frank X. Njenga was the Secretary General of the Secretary General of the Asian–African Legal Consultative Organization (AALCO) between 1988 and 1994.

which the breadth of the territorial sea is measured.[24] It was accepted and eventually agreed that in this area the coastal state shall have control over the resources of the sea while the other states retained the traditional freedoms such as the right of innocent passage. The African contribution working closely with Asian states salvaged UNCLOS III from collapse before being held ransom by the United States towards the end of the Conference on issues relating to sea-bed mining.[25] This is one of the achievements which Africa and Africans have made to international law which is still enduring and has become an important beacon to the law of the sea and yet it is not mentioned in many public international law textbooks. If others do not say it, it is for Africa and Africans to shout loudly about this major achievement.

Setting standards for gender equality

In comparison with developed parts of the world, in particular, gender equality came rather late to the African continent. This has been attributed to the culture of most of the people in the continent. There are similarities in some of the cultural attributes which have marginalised women in the continent. These include female genital mutilation; demand and payment of bride price for women at marriage; and societal gender based violence. By and large there have been serious attempts to build in a negative cultural context across most societies.

As the African Charter on Human and Peoples' Rights (African Charter) was being drafted in late 1970s, the same negative attitude towards women continued. Therefore, in the whole Charter women were mentioned only once in article 18. Even then, women were mentioned in the context of the family and in name only in a single sub-paragraph. The sole article states:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

24 Art 57 of the UN Convention on the Law of the Sea, 1982. See IM Bendera *Admiralty and maritime law in Tanzania* (Law Africa 2017) at 60.

25 Seabed mining became a thorn in the fresh and it led USA to blocking progress towards the UN Convention on the Law of the Sea, 1982, coming into force for 12 years up to 1994 with the relevant areas of the implementation highly watered down. See R Sharma *Deep-sea mining: resource potential, technical and environmental considerations* (Springer 2017); C Banet (ed) *The law of the seabed: access, uses, and protection of seabed resources* (Leiden: Brill, 2021); and E Egede *Africa and the deep seabed regime: politics and international law of the common heritage of mankind* (Springer 2011).

3. *The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.* (emphasis added).
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

It is understandable that the new African Union came out with a solution by adopting the Protocol to the African Charter on the Rights of Women in Africa of 2003 in Maputo, Mozambique (hence the name Maputo Protocol) to address the glaring deficiencies.[26] The Protocol is revolutionary in its own right and goes beyond what could have been imagined in the content. This is because it has gone beyond the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW), which for years has been regarded as the yardstick when it came to the rights of women across the world.

The rights guaranteed in the Maputo Protocol include elimination of discrimination against women and promotion of equality between women and men in all spheres of life;[27] the right to dignity inherent in all human beings;[28] right to life, integrity and security of her person;[29] elimination of harmful practices such as genital female mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other related practices;[30] freedom of and in marriage including retaining the maiden name and nationality and the right to retain personal property in marriage;[31] the right to retain the same rights as men in case of divorce, separation or annulment of a marriage;[32] and right of access to justice and equal protection before the law including access to legal aid in case of need.[33]

At a political level, women have the right to participate in political and decision-making processes including existence of affirmative action and equal representation at all levels of development and implementation of state policies;[34] the right to peace and peaceful existence and equal participation in promotion and maintenance of peace;[35] the right to protection during armed conflicts and particularly

26 On the background and history of this Protocol see F Banda *Women, law and human rights: an African perspective* (Hart 2005) at 66; and R Murray *Human rights in Africa: from the OAU to the African Union* (CUP 2004) at 134.
27 Art 2.
28 Art 3.
29 Art 4.
30 Art 5.
31 Art 6.
32 Art 7.
33 Art 8.
34 Art 9.
35 Art 10.

in relation to displacement, sexual exploitation and recruitment;[36] the right to education which goes hand in hand with elimination of stereotyping in textbooks and syllabuses and the media;[37] and right to economic and social welfare guarantees which will open equal opportunities in work and career advancement and other economic opportunities.[38]

At a personal level, the Protocol underlines the importance of health and reproductive rights including the rights of women to control their fertility and choice whether to have children or not and the number and spacing of children;[39] the right to food and food security and guarantee of access to clean drinking water and domestic fuel and land;[40] the right to adequate housing and acceptable living conditions in a healthy environment[41]; the right to a positive cultural context in the society they live in and participation of women in formulation of cultural policies at all levels;[42] the right to a healthy and sustainable environment; and the right to sustainable development.[43]

As to vulnerable women, the Protocol provides for the rights of widows to enjoy all human rights including retaining custody of their children and family property after the passing on of the husband;[44] the right to inheritance of the property of her husband and equitable share of the properties of their parents;[45] and protection of the elderly against attacks and discrimination due to age[46] with special care and respect being directed at women with disabilities;[47] and rights of women in distress particularly poor women and women heads of families including women from marginalized population or pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.[48]

This is an admirable catalogue not seen before at the global or regional level. Africa is therefore setting the pace in international law – something which cannot be denied.[49]

36 Art 11.
37 Art 12.
38 Art 13.
39 Art 14.
40 Art 15.
41 Art 16.
42 Art 17.
43 Art 18.
44 Art 20.
45 Art 21.
46 Art 22.
47 Art 23.
48 Art 24.
49 On these various rights see VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (PULP 2016); L Chenwi 'Protocol to the African Charter on Human and Peoples' *Rights on the Rights of Women in Africa* (Maputo Protocol)' in C Binder et al (eds) *Elgar Encyclopedia of Human Rights*

The child … the future

Africa has always been keen not to copy and paste when it comes to the adoption of the good practices developed and adopted by the international community. For a long period there was no instrument solely aimed at protecting the children of the world. However, everyday new and devious methods and means were being hatched to hurt our children. Quarrels within families leading to separation left the children highly vulnerable. Some children are pushed into destitution on our streets and we calmly call them street children without much thought while we know they all had mothers and fathers.

Warlords, who are not few in the continent, have also been very active abducting children of all ages and recruiting them into their armies. These innocent human beings are quickly introduced to drugs of all kinds and turned into very sharp killing machines for their masters.[50] Luckily, the international community has not left them to do as they like. They are being charged and convicted.[51] Again, the fertile minds and eyes of film makers have found an easy prey in our unsuspecting children and particularly those out of direct care of their parents. Thus, child pornography has developed into a multi-billion dollar illegal industry across the world.[52] In poor communities, the girl-child has not been allowed to develop her potentials through school and career. They are married early as an 'honour' to their parents who in return collect a bride price. This is a serious injustice which has been facilitated by the inability to define who is a child and who is an adult.

Therefore, the global community welcomed the timely move by the UN to come up with the UN Convention on the Rights of the Child (CRC) in 1989.[53] It is such a popular legal instrument that it came into

(Ghent, Belgium: Faculty of Law and Criminology, University of Ghent 2021); and K Kounte *Protocol to the African Charter on Human and Peoples' Rights 2003 – Simplified* (Aldus Press 2005).

50 See RA Dallaire *They fight like soldiers, they die like children: the global quest to eradicate the use of child soldiers* (Walker 2010); C Jesseman 'The protection and participation rights of child soldier: an African and global perspective' (2001) 1 *African Human Rights Law Journal* 140.

51 See the judgements of the International Criminal Court (ICC) in the cases of *The Prosecutor v Thomas Lubanga Dyilo (*ICC-01/04-01/06), 2006; *The Prosecutor v Dominic Ongwen (*ICC-02/04-01/15), 2015; and *The Prosecutor v Bosco Ntaganda,* ICC-01/04-02/06-2359, 2019.

52 The CRC has a Protocol covering pornography. This is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002. Though optional in nature, the Protocol is popular with 177 parties currently.

53 See CRC (adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990). On this Convention and its application see, S Detrick

force in less than a year. At present it is ratified by all countries of the world except the United States of America. A number of people attribute this feat to the fact that all of us were once children and remember how vulnerable we were. However, it is rather sad that the CRC made a minor but important compromise on the definition of the child. In article 1 the Convention states:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier* (emphasis added).

The problem with this definition is the proviso at the end … unless under the law applicable to the child, majority is attained earlier. This proviso allows children to be declared adults before they are eighteen years of age by the domestic law. The consequences of this possibility are alarming. It is now easy to marry a girl of 12 or below without violating the Convention.[54] And some will justify it through religion or culture and get away with it notwithstanding the existence of the CRC.

It is in relation to this provision that Africa came and made a timely intervention. In the African Charter on the Rights and Welfare of the Child, 1990, the definition of the child was very definitive. Article 2 of the Charter says: 'For the purposes of this Charter, *a child means every human being below the age of 18 years*.' (emphasis added)

That is a very comforting provision which does not allow children to get into danger *under the law*.[55] With that the Continent had done its duty to humankind and very timely. It was not done by sheer opportunism. It came out of experience on the way Africans themselves deal with children across the continent.[56] In many societies in Africa the child in highly valued. This is because the child is the future of a

A commentary on the UN Convention on the Rights of the Child (Martinus Nijhoff 1999); N Van Oudenhoven & W Rekha *Newly emerging needs of children: an exploration* (Garant Publishers, 2006); and RV Makaramba *We owe the child the best: children rights in Tanzania* (Friedrich Ebert Stiftung, 1997) at 6.

54 In the countries where age of marriage has been lowered child marriage and prevalent and with it comes widows. See M Watson *Child marriage and child widows in the Women, Peace and Security Agenda and Humanitarian Response* (Geneva: Action on Child Early and Forced Marriage 2021); and Magoke-Mhoja, Monica Elias, *Child widows silenced and unheard* (Author House 2008).

55 See CM Peter & AM Ummy *African Charter on the Rights and Welfare of the Child* in AA Yusuf & Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organisation* (Leiden and Boston: Martinus Nijhoff Publishers, 2012) p. 477; M Gose *The African Charter on the Rights and Welfare of the Child: an assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (Bellville, South Africa: Community Law Centre, 2002); and D Olowu 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of the Children's Rights* 127.

56 See J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (Ashgate Publishing 2008); and J Sloth-Nielsen and BD Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7(2) *African Human Rights Law Journal* 330-353.

family and the group and thus guarantees continuity. That is why in many African communities, children are deemed to belong to the whole community and can be disciplined by any member of the community for misbehaviour. Not having children in a family is taken as a calamity or disaster and the couple, apart from seeking medical advice will go into adoption or where the situation allows, adding a wife into the family.[57]

Therefore, with the adoption of the African Charter on the Rights and Welfare of the Child, 1990 the continent was hitting two birds with a single stone.[58] That is correcting the shortcomings of the 1981 African Charter, which had largely ignored the African child, and correcting the 'slip of the pen' so to say in the CRC, which exposed the child to danger. This was a well-aimed single shot which is highly appreciated. There is no doubt that it is a major contribution to the development of international law from the continent.

The people and their rights

The most significant contribution of Africa in international law is in the area of human rights. This may be said to arise out of violation of these rights in the continent for a very long time. It should be remembered that during the long period of colonisation the only aspect of 'development' which was left back in the metropole was human rights and freedoms. These two items were never exported to the underdeveloped world.

Torture and mistreatment of the 'Natives' was an everyday affair in order to ensure that the main needs of the colonial project, that is, labour, raw materials and markets were ensured without fail. Therefore, stories of harsh conditions of the local people are rampant in all phases of colonialism across the continent. Discussions about human rights came about in late 1950s when it became clear that colonialism was no longer viable as a vehicle for controlling Africa and other territories under the colonial yoke. The turning point was the speech made by

57 Even to the extent of the culture allowing women to marry other women for purposes of procuring children for them. This has led to women to women marriages which have been recorded in a number of African countries as part of customary law. These include Botswana, Kenya and Tanzania. In the Mara Region in Tanzania for instance, the Kuria people practice same-sex marriage among the women. It is called *Nyumba ntobhu* or house without a man. In this arrangement an older woman 'marries' a younger women who is supposed to bear children for her (through a man of her choice) in order to maintain her lineage. The older woman pays bride price for the young bride. This form of relationship is becoming popular among the Kuria people. See AN Sikira 'Women to women marriages (*Nyumba Nthobhu*): violence among infertile women in Mara Region, Tanzania' Volume 12 *Tanzania Journal of Development Studies*, 2012. All these are efforts to have children and underlines their importance.

58 On the evaluation of the effectiveness of the African Charter on the Rights and Welfare of the Child, 1990 see DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

the then British Prime Minister Harold Macmillan to the South African Parliament in Cape Town on 3 February 1960. In this historical speech, Macmillan underlined that a wind of change was blowing through this continent and change was inevitable due to the growth of national consciousness that was growing.[59] What followed was emphasis on the incorporation of Bills of Right in the constitutions of the colonies moving into independence.[60] Not so much out of newly found love for the 'Natives' but to protect what had been accumulated during the colonial period and the subjects of the Empire who would be remaining at the end of colonialism. However, the Bills of Rights also provided breathing space to the citizens in the newly independent states. At the same time, it has effects on how international law generally was being viewed due to these new developments.[61]

Having lived under colonial rule and some having been prison 'graduates' the majority of the first phase African leaders were extremely careful, nationalistic and focused to change the continent. However, they were wary of their existence in power. This explains the enactment of laws providing the leadership with extensive powers to detain individuals without good cause or the need to give reasons.[62] The climax of this new tendency was the rise of dictators in the continent violating fundamental rights and freedoms of their citizens at will and

59 See D Horowitz 'Attitudes of British conservatives towards decolonization in Africa' (1970) 69 *African Affairs* 15; C Young *The African colonial state in comparative perspective* (Yale University Press 1994) at 182; E Lawrence-Floyd *Losing an empire, losing a role?: the Commonwealth vision, British identity, and African decolonization, 1959–1963*, unpublished PhD Thesis University of Kansas, 2013; and H Nissimi 'Mau Mau and the decolonisation of Kenya' (2006) 8(3) *Journal of Military and Strategic Studies* 25.

60 In the negotiations for independence, mostly held at the Lancaster House, London, most of former British colonies accepted the incorporation of the Bill of Rights in their independence constitutions. A rare exception was Tanganyika which refused outright to incorporate a Bill of Rights in its Independence Constitution of 1961. See SJ Read 'Bills of Rights in the Third World – some Commonwealth experiences' (1973) 6 *Verfassung und Recht in Übersee* 21.

61 See K Ginther 'Re-defining international law from the point of view of decolonisation and development and african regionalism' (1982) 26 *Journal of African Law* 49; and TO Elias *New horizons in international law* (Sijthoff & Noordhoff 1979).

62 Over time these laws went by different names including Preservation of Public Security Act (Kenya); State Security (Detention of Persons) Decree, 1984 (Nigeria); Internal Security Act, 1982 and Public Safety Act, 1953 (South Africa); Preventive Detention Act, 1962 and Deportation Ordinance, 1921 and Expulsion of Undesirable Persons Ordinance, 1930 (Tanzania); Preservation of Public Security Act, 1960 (Zambia); Detention Order, 1978 (Swaziland) etc. But the overall aim was to deny rights and freedoms without being questioned. See CM Peter 'Tanzania' in A Harding & J Hatchard (eds) *Preventive detention and security law: a comparative survey*, (Martinus Nijhoff 1993) 247. Also relevant and informative is J Hatchard *Individual freedoms and state security in the African context: the case of Zimbabwe* (Baobab Books, Ohio University Press & James Currey 1993); R Martin *Personal freedom and the law in Tanzania: a study of socialist state administration* (OUP 1974); and T Lissu *Remaining in the shadows: Parliament and accountability in East Africa* (Konrad Adenauer Stiftung 2020) 210.

without cause.[63] It is the rise of dictators that gave the continent the opportunity to come up with its own brand in human rights. Over and above individual rights associated with the western countries, Africa in formulation of its human rights charter brought up a more communal based rights. These were characterised as peoples', group, solidarity etc. rights.[64] Although there is a tendency of underplaying this new development in international law, there is no doubt that this was a serious intervention by the continent spearheading a new approach to human rights.[65]

The African Charter was a major break-through in human rights circles.[66] It completely changed the focus and shone the light beyond civil and political rights; and economic, social and cultural rights. Rights which could be enjoyed by individuals as part of the community became the new focus. These included the rights and freedoms of the people as a collective which were guaranteed freedom from domination by another people;[67] right to existence and the inalienable right to self-determination;[68] freedom from bonds of domination;[69] right to freely

63 The list of dictators is endless. The most notorious include Jean-Bédel Bokassa, of Central Africa; Idi Amin Dada Oumee of Uganda; Francisco Macías Nguema of Equatorial Guinea; and Yahya Abdul-Aziz Jemus Junkung Jammeh of the Gambia.

64 See T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183.

65 On peoples' rights see R Gittleman 'Peoples' rights: a legal analysis' (1982) 22 *Virginia Journal of International Law* 667; P Kunig et al, *Regional protection of human rights by international law: the emerging African system* (Baden-Baden: Nomos Verlagsgesellschaft, 1985); RN Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80; J Crawford (ed) *The rights of peoples* (Oxford: Oxford University Press 1988); and F Reyntjens 'Peoples' rights' in the Banjul Charter: a short note on an elusive concept' in African Law Association (ed) *The African Charter on Human and Peoples' Rights, context, significance* (Marburg: ALA 1991) 225; and CM Peter *Human rights in Africa: a comparative study of the African Human and Peoples' Rights Charter and the new Tanzanian Bill of Rights* (New York/Westport, Connecticut and London: Greenwood Press Inc. 1990) 53.

66 See UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 911; K Mbaye 'Human Rights in Africa' in K Vasak & P Alston (eds) *The international dimension of human rights* (Paris: UNESCO 1982) 583; E Kannyo 'The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (Albany: State University of New York Press 1984) 128; and KJ Partsch 'Recent developments in the field of peoples' rights' (1986) 7 *Human Rights Law Journal* 2. See also JB Marie 'Relations between peoples' rights and human rights: semantic and methodological distinctions' (1986) 7 *Human Rights Law Journal* 195; and P Kunig 'The role of 'Peoples' Rights' in the African Charter of Human and Peoples' Rights' in K Ginther & B Wolfgang (eds) *New perspectives and conceptions of international law: an afro-European Dialogue* (Wien and New York: Springer-Verlag 1983) 162.

67 Art 19.

68 Art 20(1). On this right see A Kiss 'The peoples' right to self-determination' (1986) 7 *Human Rights Law Journal* 165; and BSK Nyameke 'Changing perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *Journal of African Law* 147. Also interesting is A Cassese 'The self-determination of peoples' in L Henkin (ed) *The International Bill of Rights*, (New York: Columbia University Press, 1981) 96.

69 Art 20(2).

dispose of their wealth and natural resources;[70] right to economic, social and cultural development;[71] right to national and international peace and security;[72] right to generally satisfactory environment favourable to their development.[73] This was a powerful statement of solidarity among Africans as a people.[74]

These rights have not been left idle. The decision to establish the Centre for Human Rights at the University of Pretoria in 1986, just five years after the adoption of the African Charter, in 1981, and while South Africa was still under the apartheid system was a strong statement and a timely one too. This Centre has become the rallying point for promotion of human rights in the continent. Students from across Africa are admitted into the human rights programmes of the Centre on a very competitive basis. The majority of them have become human rights ambassadors not only in the continent but elsewhere too. Some are working for the international institutions like the World Bank; some are Ministers in their countries; and some are top notch academics in their own right across the world. What is important is that they are spreading the human rights gospel. When the history of this Centre is eventually written, there is no doubt that the name of Christof Heyns will not only form a chapter but will be a cross-cutting theme in the whole book.

The Nelson Mandela World Human Rights Moot Court Competition, which was established by the Centre for Human Rights in 2009, in its own right is a major contribution to international law. Students and their professors from around 50 Universities in the world take part in this premiere competition which is multi-lingua and thus allowing as many Universities as possible to participate. Apart from introducing and cementing the interests of the youth in human rights and international law, the Moot Court has caught the attention of all major players in the field and particularly the UN, which hosts the finals in Geneva, Switzerland. It is gratifying to note that the Nelson Mandela World Human Rights Moot Court Competition has not allowed even the mighty COVID-19 pandemic to stand on its way. In the last two years (2020 and 2021) it has been held virtually and very successfully too. The future of public international law belongs to the youth of this world

70 Art 21(1).

71 Art 22(1). On this important right see M Bedjaoui 'The right to development and *jus cogens*' (1986) 2 *Lesotho Law Journal* 93; De V Mestdagh 'The right to development' (1981) 38 *Netherlands International Law Review* 30; and RY Rich 'The right to development as an emerging human right' (1983) 23 *Virginia Journal of International Law* 287.

72 Art 23(1).

73 Art 24.

74 See OC Eze *Human rights in Africa: some selected problems* (Macmillan 1984); and M Nowak 'The African Charter on Human and Peoples' Rights: introduction and selected bibliography' (1986) 7 *Human Rights Law Journal* 2.

and the Centre has managed to work with the youth globally and thus contributing to the promotion of the law of nations.

Contribution of Africa to international law in context

The contribution of Africa to international law can only be understood if examined in context. That is in terms of the period which these contributions were made and the types of political alliances that were taking place. It is obvious from the examination of the situation in 1950s onwards there were very close relationships among developing countries due to common experience of oppression and exploitation. These countries therefore organised themselves in groups with common interests and in so doing they were able to make an impact at the international level.

A good example is the Group of 77 (G-77) which was established by 77 developing countries in 1964 to enable them to collectively articulate issues affecting them as a group in various international forums and particularly at the UN and to promote co-operation among them. Among their success was the ability to sponsor a Special Session of the UN(S-VI) in May 1974 to discuss the New International Economic Order (NIEO).[75] This meeting managed to come out with a Declaration and a Programme of Action for the New International Economic Order.[76]

The co-operation among these developing countries was not a theoretical matter. It was a commitment which had to be justified among their people so that they could voluntarily make a sacrifice in order to free others and for the common good. For instance, in order to successfully prepare a good UN Special Session, President Houari Boumediene of Algeria hosted a Non-Aligned meeting in Algiers in 1974.[77] Also, when Tanzania was requested to host a major G-77 in

75 See B Gosovic & JG Ruggie 'The new international economic order: origin and evolution of the concept' (1976) 28(4) *International Social Science Journal* 639; W Gillian 'A new international economic order?' (1976) 16(2) *Virginia Journal of International Law: Symposium on the New International Economic Order* 323; JK Nyerere *Freedom and a new world economic order: a selection from speeches 1974-1999* (OUP 2011).

76 On the New International Economic Order and its Programme of Action of 1974 see M Bedjaoui *Towards a new international economic order* (Paris/New York and London: UNESCO and HM Holmes & Meier Publishers 1979) K Ginther 'The new international economic order, african regionalism and sub-regional attempts at economic liberation' in K Ginther & W Benedek (eds) *New perspectives and conceptions of international law: an Afro-European dialogue* (Springer-Verlag 1983) 59; and JF Rweyemamu *Third World options: power, security and the hope for another development* (Tanzania Publishing House 1992).

77 The Special Session of the UN General Assembly managed to adopt two Resolutions, Resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974 containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order. See R Kesseiri 'Algeria's self-determination and third worldlist policy under President Houari Boumediene' a review of A Getachew *World making*

1979 the government had to put up a brand new pre-fabricated hotel called Hotel Seventy Seven to host the delegates.[78]

Also, at times, there have been harder sacrifices to make. For instance, when the UN declared apartheid a crime against humanity, countries in southern Africa voluntarily put their countries and their resources at the disposal of freedom fighters. Botswana, Zambia and Tanzania were at the forefront of this undertaking.[79] They provided land, travel documents and other facilities such as Radio Programmes to groups such as the African National Congress and Pan Africanist Congress of South Africa or South West African People's Organisation (SWAPO) of Namibia before independence.[80] In the same vein falls huge projects such as Tanzania-Zambia Railway Authority (TAZARA) built to divert cargo to and from Zambia and other southern African states from apartheid South African ports.[81]

All these examples indicate that the contribution of Africa to international law has not been only theoretical but practical with both political and economic sacrifices fuelled by belief of doing what is good and right.

Co-operation among developing countries continued in many global initiatives and always ensured a common position and success. For instance, they worked closely during all the nine years of the 3rd UN Conference on the Law of the Sea (UNCLOS III) between 1973 and 1982 when eventually the UN Convention on the Law of the Sea was adopted. Therefore, all the various contributions made by the Continent

after empire: the rise and fall of self-determination (Princeton University Press 2019) in *British International Studies Association* 30 September 2021. See also B Gosovic & JG Ruggie 'On the creation of a new international economic order: issue linkage and the Seventh Special Session of the UN General Assembly' (1976) 30(2) *International Organization* 309.

78 See JK Nyerere 'Unity for a new economic order' in JK Nyerere *Freedom and a new World Economic Order: a selection from speeches 1974-1999*, 55.

79 There was actually a loose coalition of countries in southern Africa established in 1960s to fight colonialism and apartheid in the region. They focused on South Africa, Rhodesia, Mozambique, Angola and Namibia. In 1970s it was recognised as a Committee of the Heads of State of the Organisation of African Unity (OAU). In later years it included Angola, Botswana, Lesotho, Mozambique, Tanzania, Zambia and Zimbabwe. It was wound up in 1994 following the election of Nelson Mandela as the President of South Africa. For many years the group was chaired by President Julius K Nyerere of Tanzania. See D Martin 'New role for frontline states' in *Southern Africa News Features* 30 June 1994; and S Chan *Robert Mugabe: a life of power and violence* (IB Tauris & Co 2003).

80 See C Horace 'The decolonisation process in Namibia' in ISR Msabaha & MS Timothy (eds) *Confrontation and liberation in Southern Africa: regional directions after the Nkomati Accord* (Westview Press and Gower 1987) at 33.

81 On the mammoth construction of the Tanzania Zambia Railway Authority see JK Nyerere 'TAZARA: From a caricature of a "Chinese" railway to "our" railway' in JK Nyerere *Freedom and liberation: a selection from Speeches 1974-1999* (Oxford University Press 2011) at 95; and Department of Policy Planning, Ministry of Foreign Affairs of the People's Republic of China *A monument to China-Africa friendship: first hand account of the building of the TAZARA* (World Affairs Press 2014).

are somehow associated with co-operation with other developing countries. This was at the global, regional and sub-regional levels.

Therefore, the contribution by Africa to international law should not be seen only in theory only but also in practical politics and joint position taken on various important issues of common interest not only to the continent but the developing world as a whole. All these initiatives were successful because there was a common problem namely, history of being ruled, oppressed and exploited by a global system. Also, those at the helm of these countries had practical experience and this cemented their commitment.

However, at the moment it is almost impossible to record anything positive coming from Africa and developing countries in general. Not that the old leadership did not pass the baton to the younger generation. Time has taken away the memory and the unity of purpose and thus Africa and developing world is no longer speaking as one. While developed countries of the West are no longer fighting 'World Wars' but rather strategically organising to continue controlling and dominating the world, we are drifting away from each other.

At international level, developing countries no longer work together. They are easily divided and some feel proud when praised by their counterparts from the developed world and thus failing to concentrate on their interests and priorities. In the UN, for instance, when it comes to occupation of positions in different commissions and committees, instead of organising themselves tactfully, they fight over the available slots.[82]

Lack of leadership, politicising issues and bad faith

As it can be noted, much of the contribution by Africa to the international system was made in the early years of independence of most African countries. The leadership in Africa were inspired by what they had achieved and wanted to consolidate their independence and thus worked closely with other people from across the world with the same experience.[83]

Things have changed now. Africa is getting rulers without history and by persons with suspect legitimacy. It is not easy to link their agenda

82 A good example is in the UN International Law Commission (ILC). In 2016 there were 8 slots allocated to Africa out of the 38 members forming the Commission. Notwithstanding the fact that the African Union at its Summit in February 2016 had met and endorsed the 8 candidates it would support, during the elections in November of the same year there were 16 candidates. That is not only chaos but lack of strategic planning as a continent and it will not get anyone anywhere. See https://legal.un.org/ilc/ (accessed 31 December 2021).

83 The Charter of the Organisation of African Unity (OAU) is a good reflection of this world outlook. See JM Biswaro *Perspectives on Africa's integration and cooperation from OAU to AU: old wine in new bottle?* (Tanzania Publishing House 2006).

and the people from whom they are highly alienated. It is therefore not surprising to realise that other than worrying about the problems and plight of their people they are busy looting their countries and hiding the loot in banks in Western countries and buying villas in France; Switzerland; Dubai; Singapore and elsewhere.

Therefore, when a regime falls in Africa, two things happen. One, those in power unanimously rally behind their fallen colleague. Two, what comes to light is embarrassing. Rulers who have been busy preaching to their people about the need to love their country, the need to tighten their belts etc. are found in weird situations. Walls of their bedrooms are found to be lined up with secret shelves holding hoard of banknotes. Not of their currency but Dollars, Euros, Pounds and many others. Pictures of the bedrooms of President Zine El Abidine Ben Ali of Tunisia,[84] Omar El-Bashir[85] where the Central Bank had to install a Dollar counting machine are still haunting us. As for Yahya Jammeh of the Gambia[86] money was not enough. As a compromise to force him to leave the Gambia, his colleagues in Economic Community of West African States (ECOWAS) had to allow him to leave with government limousines, bought with public funds. That is how low Africa has sunk and that is the typical picture of an African 'leader' who cares little for the welfare of his people and least of all, of their educational system. With this type of thuggery going on left, right and centre across the continent and with directionless rulers, how is Africa expected to produce Nobel level type of theories? Can Africa be expected to contribute to the development of international law?

Yet, in Germany, we witness the out-going Chancellor Angela Merkel having lived in the same apartment she used to live before being elected 16 years ago. She has been doing her own shopping and doing all her household work with her husband and without any house servants. She does not own a villa, a swimming pool or a garden.[87] Yet she was at the forefront giving aid and assistance to developing countries – aid which at times never reached the common person on the streets or villages. That comparison speaks volumes. It is therefore

84 See J Elvers-Guyot, N Naumann 'Zine El Abidine Ben Ali: The Robber Baron of Tunisia' Bonn: DW 19 September 2019.

85 The Sudanese strongman Field Marshal Omar Hassan Ahmad al-Bashir who ruled Sudan between 1989 and 2019 when he was overthrown due to public protests in the whole country is still under custody and there are requests to surrender him to the International Criminal Court (ICC) in the Hague. His fate is still being considered by the current rulers. See T Achraf 'Sudan: why the ICC is at a crossroads with *Omar al-Bashir*' case' *The Africa Report*, 2 July 2021.

86 M Soumaré 'Gambia: will former President Yahya Jammeh (ever) go on trial?' *The Africa Report*, 9 June 2021.

87 On Chancellor Angela Merkel see A Crawford & T Czuczka *Angela Merkel: a Chancellorship forged in crisis* (John Wiley & Sons & Bloomberg Press 2013); and M Qvortrup *Angela Merkel: Europe's most influential leader* (Duckworth Overlook 2017).

not surprising that on 1 February 2021, the 80 million Germans she led with competence, skill, dedication and sincerity for years stood outside their balconies and gave her a six-minute long national applause. Very close to that would be President Julius Kambarage Nyerere of Tanzania, who at his voluntary retirement in 1985 did not have a single vehicle registered in his name and did not even have a pension. The newly enacted Parliament of the United Republic of Tanzania had to meet urgently to enact a new law to provide him with a pension.[88]

Now, Africa has a new type of ruler who will grab anything on sight while their people have no running water or medical care and children are dying of malnutrition. The above picture of the African ruler does not promise much to the international community. It will take time until the glory of 1960s and 1970s can revisit the continent again and in the process contribute to the development of international law.

The image of the African rulers has not been helped by their attempt to leave the International Criminal Court (ICC) in favour of their own international criminal system through the Malabo Protocol of 2014.[89] It has just reinforced their alienation from their people and fear of transparency and accountability. Therefore, the future is not bright at all.

Futility of using the international legal system

If Africans have to make a difference at the international level, they have to do it in conjunction with people from the developing world. Cooperation or collaboration with developed world using the existing institutions is proving elusive and without genuine desire to move forward. Experience indicate clearly that the rules of the game are not fair and do not provide equal and level playing ground. This is discernible in all institutions and organs of most global institutions. For instance, at the International Law Commission (ILC) where the rules of international law are crafted by 34 of the best legal minds in the world, it is very difficult for any member from an African country to make it as a Rapporteur whatever the subject he or she wants to take up.[90] Also, any topic addressing Africa or the developing world is shot even

88 See the Specific State Leaders Retirement Benefits Act, 1986 (Act 2 of 1986). This Act covers former President; former Vice President; and former Prime Minister.

89 African states through the African Union declared their desire to establish their own mechanism to address serious crimes through the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, adopted at Malabo, Equatorial Guinea. This mechanism would have assisted to depart from the Rome Statute, 1998 establishing the International Criminal Court (ICC). Surprisingly, to date this Protocol has 15 signatures and no ratification. That is not a sign of seriousness.

90 You are brought down through legal technicalities. It is veiled and an undeclared ideological war.

before landing on the plenary meetings of the Commission for debate.[91] Sophisticated objections will be raised and supported just to allow an adjournment and discourage those involved.

African members of the Commission, who come up with viable topics and are appointed Rapporteurs are constantly confronted by discouraging comments from the members from the Western countries. The same trend is discernible in the United Nations' Sixth Committee to which the ILC reports go. To date, very few Africans have managed to be appointed Rapporteurs.[92] The same could be said for topics which are viewed as sympathetic with the interests of the developing countries. They are discouraged right from the beginning. Salvation lies in joining hands with some of the members from the developed world which does not advance the agenda of African or developing countries. Though one cannot say with certainty, but one cannot avoid reading some form of discrimination in what is happening.[93] But more importantly, this is one avenue closed for Africa and Africans to contribute to the development of international law.

Therefore, Africa and Africans are strongly advised to work closely and with determination with the rest of the developing countries to come up with rules of international law which affect a larger section of the globe and not the few powerful states. In academic circles, training institutions and particularly high education ones should popularise the teaching of the different branches of international law. It is in these institutions that we expect experts in the Ministries of Foreign Affairs to go and speak for the continent at global level.[94] In order to be effective, the people in government should work closely with the academia in order to be able to mix theory and practice. If this is done, we might be able to relive the 1960 and 1970s again.

91 See for instance the topic of Universal Criminal Jurisdiction being proposed by Professor Charles Chernor Jalloh of Sierra Leone is finding it hard to be adopted properly in the work of the International Law Commission.

92 Between 1949 and 2016 only 7 out of 61 rapporteurs have been from Africa. These are: Mohammed Bedjaoui (Algeria); Mohammed Bennouna (Morocco); Christopher John Robert Dugard (South Africa); Abdullah El-Erian (Egypt); Maurice Kamto (Cameroon); Doudou Thiam (Senegal); and Dire D Tladi (South Africa).

93 Racism was more openly exhibited at the World Economic Forum in Davos where five young women went there to canvas for climate change. To their surprise, a photo taken for promotion taken by *Associated Press*, without good cause cropped her out Ms Vanessa Nakate from Uganda who describes herself as 'a fighter for the people and the planet.' It is only after her protest that the original picture in which she is in was restored. See Kenya Evelyn, 'Outrage at whites-only image as Ugandan climate activist cropped from photo,' *The Guardian* (UK), 25 January 2020; and Dahir, A Latif, 'Erased from a Davos photo, a Ugandan climate activist is back in the picture,' *The New York Times*, 7 May 2021.

94 As it has been correctly noted, you cannot survive alone in the world today. See AK Nyuon, JM Biswaro & SS Wassara (eds) *Revamping African foreign policies in the 21st century: ingredients, tools and dynamics* (Africa World Books 2006).

Conclusion

Africa has enormous potential to contribute to the development of international law. Over the years, the continent has managed to turn its disadvantages to opportunities to create change. This work attempts to show the various initiatives taken by Africa which have had positive impact on the development of international law. This has been at theoretical as well as in practice and particularly in international dialogue between states. It has been indicated that in all these initiatives Africa has not acted alone. It has closely collaborated with other developing parts of the world and it has not been in vain.

It is noted that there have been conditions which have encouraged this positive development. However, these conditions are no longer in place in the continent. Particularly missing is serious leadership that can lead the continent to the lost past glory. To achieve this, establishment of democratic institution which can empower the people to be able to take their fate in their own hands is necessary. Unfortunately, autocratic tendencies are on the rise as more and more rulers, some of whom came to power through the ballot are changing their minds. The illegal change of Constitutions to allow incumbents to extend their stay in power has become almost a routine. Though ruling with an iron fist, in some of these countries people are slowly becoming impatient and strangely indicating preference for military rule to the so-called autocratic civilian rule. With this confusion going on, it is difficult to think of the possibility of the continent and its allies in the developing countries influencing change at international law at the moment. However, the people are not giving up. Not yet.