This book emerged from the observation that in international law scholarship, few studies have been done on Africa as both object and subject of international law despite the involvement of African states and Africans in the international arena and their active participation in many debates. To fill this gap by examining, sixty years after the independence of African states, the place of Africa in international law and the way international law looks at Africa is the challenge that the contributors to this book, all internationalists of the 1980-1990 generation, have taken up. The book highlights the specificity of a particular African law and examines the African experience in this field from an international law perspective.

Ce livre naît du constat que dans la littérature juridique internationaliste, en dépit de l'implication des Etats africains et des africains sur la scène internationale et leur participation active à de nombreux débats, peu d'études ont été faites sur l'Afrique à la fois comme objet et sujet du droit international. Combler ce vide en se penchant, soixante ans après les indépendances des Etats africains, sur la place de l'Afrique dans le droit international et sur le regard que le droit international porte sur l'Afrique, est le défi que se sont lancés les contributeurs à cet ouvrages, internationalistes de la génération 1980-1990. Le livre met en évidence la spécificité d'un droit africain particulier, et étudie également l'expérience africaine dans ce domaine sous l'angle du droit international.

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L'AFRIQUE & LE DROIT INTERNATIONAL

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ANS APRES LES INDEPENDANCES

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REGARDS D'UNE GENERATION

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Sixty years after independence, Africa and international law: Views from a generation
Soixante ans apres les independances, l'Afrique et le droit international: Regards d'une generation

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Foreword
Avant-propos

Following their independence, African states participated in and became part of the vast movement of new states that challenged their submission to an international law to the elaboration of which they had not contributed and which, in certain cases, had been an instrument of their subjugation by the so-called 'civilised' colonial powers. In many international spheres, these states have thus invoked a right of inventory, allowing them to choose from the existing normative arsenal the rules to which they consider themselves subject and which would therefore be enforceable against them. Like most of the states that gained independence in the first half of the twentieth century, African states considered that the formation of international law in force was done without their participation, without their involvement, and was imposed on them. They, therefore, wished to dissociate themselves from certain principles and rules drawn up by a small number of European powers or powers of European origin, which they criticised for their 'criteriological particularism', the fruit of a dominant but not universal civilisation.[1]

Beyond challenging specific rules, African states did not question the existence of international law that should govern their relations with other states, nor their submission to these rules. What they were challenging was the idea of a 'Euro-centric' international law that did not consider their specific needs and requirements, and did not reflect their particular interests. Behind the discourse of these states was the underlying idea of a Third World, if not specifically African, vision of what the international legal order should be.

In the field of research, despite the involvement of African states in the international arena and their active participation in many debates, few studies have been done on Africa as both object and subject of international law. The question arose mainly among African international lawyers who questioned the existence of an African international law in pre-colonial Africa and/or Africa's contribution to the development of international law. Between 1968 and 1972, some major works on Africa

1 R Yakemtchouk *L'Afrique en droit international* (1972) 11-12.

and international law were published.[2] These works questioned, on the one hand, the impact of the emergence of new states in Africa on the development of international law and, on the other hand, the existence of a specifically African international law. In general, these studies acknowledged that it was somewhat premature to ask these questions only ten years after the formation of the young states; the content of the studies proved to be too thin to draw definitive conclusions.

Some 60 years after the wave of independence, it seems useful to once again look at the place of Africa in international law, and at the way international law looks at Africa. The purpose of the book is to analyse the participation of Africa in the development of international law; the relationship of African states with international law; the use that African states make of international law; the existence of an African regional law; and the discourse of international law on Africa. The aim of the book is not only to highlight the specificity of a particular African law but also to study the African experience in this field from an international law perspective. It is hoped that the contributions gathered in this volume will testify to the liveliness and value of a common reflection by young internationalists on past, present, and future developments of international law in Africa.

Indeed, 60 years after independence, it is questionable whether the trend observed by Yakemchouk has been confirmed. Even if 'neither librarians nor "Google" can find a single entry for a *jus gentium africanum*, it is fair to ask whether there is a specific and recognisable "African public international law'". To what extent have African states succeeded in playing a role in the development of international law since their independence? What is the extent to which African demands and aspirations have been taken into account in international law? Have African states succeeded in consolidating specific principles of international law in such a way as to see the emergence of a genuine African regional law? Is it possible to speak today of an African approach to international law that would be inspired by an African legal philosophy and anthropology that some researchers have already highlighted?[3]

Adopting a holistic approach, the book first asks whether there is an African international law and/or an African approach to international law. Starting from the debate on the necessity of such an approach and

2 See among others Yakemtchouk (n 1); E Taslim Olawale *Africa and the development of international law* (1972); J-M Bipoun Woum *Le droit international africain: problèmes généraux, règlement des conflits* (1970); U Umo Orji 'International law and colonialism in Africa: A critique' (1971) 3-4 *Zambia Law Journal* 95.

3 See, eg, JI Lewitt 'African origins of international law: myth or reality?' (2015) 19 *UCLA Journal of International Law and Foreign Affairs* 113-165.

the tension it may imply on the unity and universality of international law, it questions the African specificities in the elaboration and application of international law, as well as the foreign legal policy of African states. The various contributions thus raise the values and interests defended by African states and organisations, as well as the places and forms of resistance to international law or some of its values. They also shed light on the discourse of international law on Africa, including the place of African practice and expertise in the various spheres of international law making and implementation.

The book is accordingly structured in four parts. The first part addresses the question of the existence of an African international law. In their respective contributions, Apollin Koagne Zouapet, Firmin Ngounmedje and Carole Nouazi Kemkeng discuss the delicate balance to be found between the affirmation of an African specificity and the necessary universality of international law and the values it promotes. Although the authors have in common that they want to inscribe Africa in universality, it is interesting to note the divergence of approaches they advocate. This undoubtedly reflects their perception of international law and what its universality means or should mean. This debate on the ontology of international law runs through almost all the contributions and, despite the diversity of the issues addressed, highlights the tensions that run through international law, which is torn between its past and the imperialist projects it has sometimes served, and the noble ideal of peace and harmony it claims to build.

Despite this heavy history of international law or, more precisely, of a certain discourse on and of international law, of which it has been a victim, Africa embraces the ideal of international law and does not hesitate to work actively to develop the rules serving this objective. This is the thread of the second part devoted to Africa's contribution to the progressive development of international law. Whether it is the protection of humanity through the Responsibility to Protect or the repression of the most serious crimes under international criminal law or the exploitation of the seabed in the interests of the international community as a whole, Africa seems to be gradually moving away from its distrust of international law to embrace it. It is, therefore, an Africa that is particularly active in the development of international law, and no longer merely the object or a simple consumer of the rules of international law that Léandre Mvé Ella, Balingene Kahombo and Talatu Akindolire respectively portray to us. Both within multilateral institutions and in the more restricted regional framework, African states have gradually succeeded in getting their concerns included in the international normative agenda while formulating concrete proposals to make international law evolve in the

desired direction. It is regrettable, as Misha Ariana Plagis forcefully points out, that this role of Africa and Africans is not always recognised. Through a study on the right to development in international law, she demonstrates the pioneering role of Africa, under the leadership of one of its brilliant sons, Keba M'Baye, in the elaboration and consecration of a right that has gradually become universal. However, on this issue, as on others, African legal engineering has not always been given its due value and is not well known, even by Africans themselves. Serge Itourou Songue's chapter is another illustration of this engineering on a complex and controversial issue, the right to sovereignty over natural resources.

The third part, which deals with Africa's contestation of international law, highlights the fact that the above contribution is accompanied by a challenge to rules deemed inadequate or unfair. Indeed, one should not believe that everything is perfect and that the protest movement in the aftermath of independence has totally disappeared in the African perception and discourse of international law. The particularly complex relationship between the continent and the African states with the International Criminal Court illustrates this. However, it is another field of international law that has allowed the authors to highlight the 'battle' between African states and other actors over the meaning and evolution of international law. In their respective contributions, Chidebe Matthew Nwankwo, Olaoye Kehinde Folake and Rimdolmsom Jonathan Kabré analyse the progressive 'dissent' of African states in the field of international investment law. This dissidence is illustrated on two levels: a growing distrust of dispute settlement mechanisms, particularly arbitration, and a desire to define substantive law in order to introduce a better balance between investors' rights and obligations. Tools of this desire for revolution are the sub-regional codes relating to the promotion and protection of investments and the Pan-African Investment Code, which do not hesitate to set aside certain standards of investment protection hitherto considered to be part of customary law while demanding a more important place for national judges in the settlement of disputes and/or arbitration procedures taking place on the continent.

If Africa is a force of proposals for reform or evolution of international law, it also is a place where experiences and initiatives that have succeeded elsewhere are welcomed. The fourth and final part of the book deals with this Africanisation of law by illustrating it in the fields of regional integration and the protection of the human person. The contributions of Serges Sobze on regional integration, Telesphore Tekebeng Lélé on collective security and Rostand Banzeu on the promotion and protection of human rights illustrate this import and adaptation to Africa of UN and European models of legal institutions and mechanisms that have been

successful in ensuring economic development, the preservation of peace and the protection of human dignity in Africa. Each of these authors points out that these imports have rarely resulted in a simple replication of the models and are accompanied by a necessary 'tropicalisation' that has consequences for the effectiveness and efficiency of the institutions thus established. In this context, Francesca Mussi and Giuseppe Pascale question the future of the African Court on Human and Peoples' Rights, the establishment of which seems to have been more a response to institutional mimicry than a desire on the part of African states to open up the courtroom of an international tribunal to their citizens.

Despite all the above, the feeling of being marginalised in international institutions and in the formulation of international law is never totally absent from African considerations. It was, therefore, necessary to compile at the end of the book data allowing the reader to form his or her own religion of the place of Africa and Africans in the 'making' of international law today.

Finally, the major interest and originality of the book are that it combines cross-cutting studies and thematic analyses in many areas of international law. Without claiming to be exhaustive, the book aims to offer the reader a global vision of the place of Africa today in the international legal order. It is a new vision, emanating from young researchers and practitioners, both European and African, who have the necessary hindsight to appreciate the colonial legacy and develop their vision of international law. It is hoped that their reflections in this book will serve both as a starting point and a ferment for a sustained debate on the development of international law in Africa and on the teaching and research of international law in Africa.

I would therefore like to thank the Pretoria University Law Press (PULP) for making this possible and for taking up the challenge with us to support an initiative of young scholars, thus taking the daring step of bringing novelty and diversity to the international legal literature. The democratisation and diversity proclaimed in international law still seem far from having reached the publishing world and it can be particularly difficult, even discouraging, and hopeless for young authors to get published. Thank you to the PULP editorial board for taking up this challenge. Special thanks are due to Ms Lizette Hermann, Ms Liesl Hager, Professor Charles Fombad and Dr Trésor Makunya, who accompanied this project throughout the publishing process, for their support and kindness. This project would also not have been possible without the support and valuable advice of Professors Makane Moïse Mbengue and Alain Kenmogne and Dr Jean-Pelé Fometé.

Professors Dire Tladi and Hajer Gueldich have respectively agreed to sign the preface and postface of this book, despite their numerous occupations and requests. I would like to reiterate my gratitude to each of them.

The authors of the various contributions deserve credit for having succeeded in producing these reflections in a particularly difficult context. The health crisis due to COVID-19 has spared no one and some of them have experienced the pain of the disease and unfortunately the loss of loved ones. Despite these particularly difficult trials, each of them was determined to see this project through to the end, selflessly investing themselves in the writing, proofreading and editing of their articles as well as other colleagues in the process of mutual evaluation of contributions. I would like to dedicate this book to these loved ones who have left us in great sorrow and disarray.

The Hague, April 2022
Apollin Koagne Zouapet

Avant-propos
Foreword

Au lendemain de leur indépendance, les Etats africains ont participé et se sont intégrés au vaste mouvement des nouveaux Etats qui contestaient leur soumission à un droit international à l'élaboration duquel ils n'avaient pas contribué et qui, dans certains cas, avait été un instrument de leur subjugation par les puissances coloniales dites « civilisées ». Dans de nombreuses sphères internationales, ces Etats ont ainsi invoqué un droit d'inventaire, leur permettant de choisir dans l'arsenal normatif existant les règles auxquelles ils s'estiment soumis et qui leur seraient donc opposables. A l'instar de la plupart des Etats ayant accédé à l'indépendance dans la première moitié du 20ème siècle, les Etats africains considéraient que la formation du droit international en vigueur s'est faite sans leur participation, sans leur implication, et leur a été imposée. Ils souhaitèrent se dissocier par conséquent de certains principes et règles, élaborés par un petit nombre de puissances européennes ou d'origine européenne, dont ils fustigent le « particularisme critériologique », fruit d'une civilisation dominante mais non universelle.[1]

Au-delà de la contestation de règles spécifiques, les Etats africains ne remettent pas en cause l'existence d'un droit international qui devrait régir leurs relations avec les autres Etats, ni leur soumission à ces règles. Ce qu'ils contestaient, c'était l'idée d'un droit international 'européo-centré' qui ne prenait pas en compte leurs exigences et besoins spécifiques, et ne reflétait pas leurs intérêts particuliers. Derrière le discours de ces États, il y avait l'idée sous-jacente d'une vision tiers-mondiste, sinon spécifiquement africaine, de ce que devrait être l'ordre juridique international.

Dans le domaine de la recherche, malgré l'implication des Etats africains sur la scène internationale et leur participation active à de nombreux débats, peu d'études ont été faites sur l'Afrique à la fois comme objet et sujet du droit international. La question s'est posée principalement parmi les juristes internationaux africains qui ont mis en doute l'existence d'un droit international africain dans l'Afrique précoloniale et/ou la contribution de l'Afrique au développement du droit international. Entre 1968 et 1972, quelques ouvrages majeurs sur l'Afrique et le droit international ont été

1 R Yakemtchouk *L'Afrique en droit international* (1972) 11-12.

publiés.[2] Ces travaux remettaient en question, d'une part, l'impact de l'émergence de nouveaux Etats en Afrique sur le développement des règles de droit international et, d'autre part, l'existence d'un droit international spécifiquement africain. D'une manière générale, ces études admettaient qu'il était quelque peu prématuré de poser ces questions dix ans seulement après la formation des jeunes Etats ; le contenu des études s'est finalement avéré mince pour pouvoir tirer des conclusions définitives.

Quelque 60 ans après la vague des indépendances, il semble utile de se pencher à nouveau sur la place de l'Afrique dans le droit international, et sur le regard que le droit international porte sur l'Afrique. Il s'agit d'analyser la participation de l'Afrique au développement du droit international, les relations des États africains avec le droit international, l'usage que les États africains font du droit international, l'existence d'un droit régional africain et le discours du droit international sur l'Afrique. L'objectif de l'ouvrage n'est pas seulement de mettre en évidence la spécificité d'un droit africain particulier, mais aussi d'étudier l'expérience africaine dans ce domaine dans son ensemble sous l'angle du droit international. Il est espéré que les contributions réunies dans ce recueil témoignent de la vivacité et la valeur d'une réflexion commune de jeunes internationalistes sur les développements passés, présents et futurs du droit international en Afrique.

En effet, 60 ans après les indépendances, on peut se demander si la tendance observée par Yakemtchouk s'est confirmée. Même si « ni les bibliothécaires ni 'Google' ne peuvent trouver une seule entrée pour un *jus gentium africanum*, il est juste de poser la question de savoir s'il existe un 'droit international public africain' spécifique et reconnaissable ».[3] Dans quelle mesure les États africains ont-ils réussi à jouer un rôle dans le développement du droit international depuis leur indépendance ? Quel est le degré de prise en compte au sein du droit international des demandes et aspirations des africains vis-à-vis de ce droit? Les Etats africains ont-ils réussi à consolider des principes spécifiques du droit international de manière à voir émerger un véritable droit régional africain ? Est-il possible de parler aujourd'hui d'une approche africaine du droit international qui s'inspirerait d'une philosophie et d'une anthropologie juridiques africaines que certains chercheurs avaient déjà mises en évidence ?[4]

2 Voir notamment Yakemtchouk (n 1); E Taslim Olawale *Africa and the development of international law* (1972); J-M Bipoun Woum *Le droit international africain: problèmes généraux, règlement des conflits* (1970); U Umo Orji 'International law and colonialism in Africa: A critique' (1971) 3-4 *Zambia Law Journal* 95.

3 J Zollmann 'African international legal histories – international law in Africa: Perspectives and possibilities' (2018) 31 *Leiden Journal of International Law* 898.

4 Voir par exemple, JI Lewitt 'African origins of international law: Myth or reality?'

Adoptant une approche holistique, l'ouvrage s'interroge d'abord sur l'existence d'un droit international africain et/ou d'une approche africaine du droit international. Partant du débat sur la nécessité d'une telle approche et la tension qu'elle peut impliquer sur l'unité et l'universalité du droit international, il interroge les spécificités africaines dans l'élaboration et l'application du droit international, ainsi que la politique juridique extérieure des États africains. Les différentes contributions soulèvent ainsi les valeurs et les intérêts défendus par les États et les organisations africaines, ainsi que les lieux et les formes de résistance au droit international ou à certaines de ses valeurs. Elles mettent également en lumière le discours du droit international sur l'Afrique, notamment la place de la pratique et de l'expertise africaine dans les différentes sphères de l'élaboration et de la mise en œuvre du droit international.

L'ouvrage est divisé à cet effet en quatre parties. La première partie aborde la question de l'existence d'un droit international africain. Dans leurs contributions respectives, Apollin Koagne Zouapet, Firmin Ngounmedje et Carole Nouazi Kemkeng s'interrogent sur le délicat équilibre à trouver entre l'affirmation d'une spécificité africaine et la nécessaire universalité du droit international et des valeurs qu'il promeut. Bien que les auteurs aient en commun d'inscrire l'Afrique dans l'universalité, il est intéressant de noter la divergence d'approches qu'ils préconisent. Ce qui traduit sans doute la perception qu'ils ont du droit international et de ce que son universalité signifie ou doit signifier. Ce débat sur l'ontologie du droit international traverse la quasi-totalité des contributions et permet en dépit de la diversité des questions traitées de mettre en exergue les tensions qui traversent le droit international tiraillé entre son passé et les projets impérialistes qu'il a quelques fois servi et le noble idéal de paix et d'harmonie qu'il prétend construire.

En dépit de ce lourd passé du droit international, ou plus exactement d'un certain discours sur et du droit international, dont elle a été victime, l'Afrique embrasse l'idéal du droit international et n'hésite pas à œuvrer de façon active au développement des règles servant cet objectif. C'est le fil d'Ariane de la deuxième partie consacrée à la contribution de l'Afrique au développement progressif du droit international. Qu'il s'agisse de la protection de l'humanité à travers la Responsabilité de protéger ou la répression des crimes les plus graves en droit international pénal ou encore l'exploitation des Fonds Marins dans l'intérêt de la communauté internationale dans son ensemble, l'Afrique semble progressivement se départir de sa méfiance envers le droit international pour se l'approprier. C'est donc une Afrique particulièrement active dans le développement du

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droit international, et plus seulement l'objet ou un simple consommateur des règles du droit international que nous dépeignent respectivement Léandre Mve Ella, Balingene Kahombo et Talatu Akindolire. Aussi bien au sein des institutions multilatérales que dans le cadre régional plus restreint, les Etats africains ont réussi progressivement à faire inscrire dans l'agenda normatif international leurs préoccupations, tout en formulant des propositions concrètes pour faire évoluer le droit international dans le sens souhaité. Il est regrettable comme le souligne avec force Misha Ariana Plagis, que ce rôle de l'Afrique et des africains ne soit pas toujours reconnu. A travers une étude sur le droit au développement en droit international, elle montre le rôle pionnier de l'Afrique, sous la férule de l'un de ses brillants fils, Keba M'Baye, dans l'élaboration et la consécration d'un droit qui s'est progressivement universalisé. Pourtant, sur cette question comme sur certains d'autres, l'ingénierie juridique africaine n'a pas toujours été saluée à sa juste valeur et est méconnue, y compris des africains eux-mêmes. L'article de Serge Itourou Songue est une autre illustration de cette ingénierie sur une question à la fois complexe et polémique, le droit à la souveraineté sur les ressources naturelles.

La troisième partie, qui porte sur la contestation du droit international par l'Afrique permet de souligner que la contribution sus-relevée s'accompagne d'une remise en cause des règles jugées inadéquates ou inéquitables. Il ne faut en effet pas croire que tout est parfait et que le mouvement de contestation du lendemain des indépendances a totalement disparu tant dans la perception que le discours africain du/sur le droit international. Les rapports particulièrement complexes du Continent et des Etats africains avec la Cour pénale internationale sont là pour l'illustrer. Mais c'est un autre champ du droit international qui a permis dans cette troisième partie, aux auteurs de mettre en exergue la « bataille » qui oppose les Etats africains et d'autres acteurs sur le sens et l'évolution du droit international. Dans leurs contributions respectives, Chidebe Matthew Nwankwo, Olaoye Kehinde Folake et Rimdolmsom Jonathan Kabré analysent la « dissidence » progressive des Etats africains dans le champ du droit international des investissements. Cette dissidence s'illustre sur deux plans : une méfiance de plus en plus affirmée envers les mécanismes de règlement des différends et notamment l'arbitrage, et une volonté de définir le droit matériel afin d'introduire un meilleur équilibre entre droits et obligations des investisseurs. Outils de cette volonté de révolution, les codes sous-régionaux relatifs à la promotion et la protection des investissements et le Code panafricain des investissements, qui n'hésitent pas à écarter certains standards de protection des investissements jusqu'ici considérés comme faisant partie du droit coutumier, tout en exigeant une place plus importante pour les juges nationaux dans le règlement des différends et/ou des procédures d'arbitrages se déroulant sur le Continent.

Si l'Afrique est une force de propositions pour des réformes ou une évolution du droit international, elle est aussi un lieu d'accueil des expériences et initiatives ayant réussi ailleurs. La quatrième et dernière partie de l'ouvrage traite de cette africanisation du droit en l'illustrant dans les champs de l'intégration régionale, et de la protection de la personne humaine. Les contributions de Serges Sobze sur l'intégration régionale, Telesphore Tekebeng Lélé sur la sécurité collective et Rostand Banzeu sur la promotion et la protection des droits de l'homme illustrent cette importation et une adaptation en Afrique des modèles onusiens et européens d'institutions et de mécanismes juridiques ayant réussi dans le souci d'assurer le développement économique, la préservation de la paix et la protection de la dignité humaine en Afrique. Chacun de ces auteurs souligne que ces imports ont rarement abouti à une simple réplique des modèles et sont accompagnés d'une nécessaire « tropicalisation » qui n'est pas sans conséquence sur l'efficacité et l'efficience des institutions ainsi mises en place. Francesca Mussi et Giuseppe Pascale s'interrogent dans ce contexte sur l'avenir de la Cour africaine des droits de l'homme et des peuples, dont la mise en place semble avoir répondu davantage à un mimétisme institutionnel qu'une volonté des Etats africains d'ouvrir le prétoire d'une juridiction internationale à leurs citoyens.

En dépit de tout ce qui précède, le sentiment d'être marginalisé dans les institutions internationales et dans la formulation du droit international n'est jamais totalement absent des considérations africaines et c'est pourquoi il a été nécessaire de compiler dans un ultime chapitre des données permettant au lecteur de se faire sa propre religion de la place de l'Afrique et des africains dans la 'fabrique' du droit international aujourd'hui.

Au final, l'intérêt majeur et l'originalité de l'ouvrage sont de combiner des études transversales et des analyses thématiques dans de nombreux domaines du droit international. Sans prétendre à l'exhaustivité, l'ouvrage vise à offrir au lecteur une vision globale de la place de l'Afrique aujourd'hui dans l'ordre juridique international. Il s'agit d'une vision nouvelle, émanant de jeunes chercheurs et praticiens, tant européens qu'africains, qui ont le recul nécessaire pour apprécier l'héritage colonial et développer leur propre vision du droit international. Le souhait est que leurs réflexions réunies dans le présent livre servent à la fois de point de départ et de ferment pour un débat nourri tant sur le développement du droit international en Afrique que sur l'enseignement et la recherche du/en droit international en Afrique.

Je voudrais par conséquent remercier l'éditeur, Pretoria University Law Press (PULP) pour avoir rendu possible ceci et accepté de relever ce

défi avec nous en appuyant une initiative de jeunes chercheurs, faisant ainsi le pari osé de la nouveauté et de la diversité dans la littérature juridique internationale. La démocratisation et la diversité proclamés en droit international semblent encore loin d'avoir touché le monde de l'édition et il peut être particulièrement difficile, voire décourageant et désespérant pour des jeunes auteurs d'être publiés. Merci au Comité éditorial de PULP d'avoir osé ce pari. Des remerciements particuliers doivent être adressés à Mesdames Lizette Hermann, Liesl Hager, au Professeur Charles Fombad et au Dr Trésor Makunya qui ont accompagné ce projet tout au long du processus d'édition pour leur soutien et leur bienveillant appui. Ce projet n'aurait également pas été possible sans les soutiens et les précieux conseils des professeurs Makane Moïse Mbengue, Alain Kenmogne et du Dr Jean-Pelé Fometé.

Les professeurs Dire Tladi et Hajer Gueldich, ont accepté de signer respectivement la préface et la postface du présent ouvrage, en dépit de leurs nombreuses occupations et sollicitations. Je tiens à renouveler ici à chacun d'eux toute ma gratitude.

C'est aux auteurs des différentes contributions que revient le mérite d'avoir réussi à produire ces réflexions dans un contexte particulièrement difficile. La crise sanitaire liée au Covid 19 n'a épargné personne et certain(e) s d'entre eux ont connu la douleur de la maladie et malheureusement la perte des êtres chers. En dépit de ces épreuves particulièrement difficiles, ils/elles ont tenu à poursuivre ce projet jusqu'au bout, s'investissant avec abnégation dans la rédaction, la relecture et les corrections de leurs articles ainsi que d'autres collègues dans le cadre du processus d'évaluation mutuelle des contributions. C'est à ces proches partis, en nous laissant démunis et dans une grande douleur, que je veux dédier le présent ouvrage.

La Haye, Avril 2022
Apollin Koagne Zouapet

Preface
Préface

Ce livre, *Soixante ans après Les Indépendances : L'Afrique et le droit international – Regards d'une génération*, préparé sous la direction de Apollin Koagne Zouapet est très opportun. La place du droit international en Afrique, ainsi que le rôle que joue ce droit sur notre continent sont des sujets qui requièrent davantage de réflexions. Quel rôle joue l'Afrique en droit international et comment le droit international peut-il être utilisé pour construire un meilleur continent ? Ce sont des là en effet des questions fondamentales.

Je suis par conséquent très heureux de l'initiative ce livre, et fier que Apollin Koagne Zouapet ait eu la clairvoyance d'initier et de diriger la rédaction de ce livre. Je suis particulièrement heureux parce que Apollin représente la nouvelle génération de juristes en droit international.

The relationship between international law and the continent of Africa is one steeped in complexities. A basic tenet of this relationship, evident from the title 'Sixty years after independence', is that Africa, as a continent, was absent from the making of much of international law. Here, I speak not only (but also) of substantive, primary rules of international law, but of the more foundational and systemic rules of international law, such as the questions of *how* law is made, interpreted, rules of jurisdiction and rules of responsibility. *All* of these foundational principles were established in the absence of Africa and were decreed to it as a take-it-or-leave-it without the option of leaving it.

What is more, even after independence, the role of Africa in international law making, at best, is insignificant – this notwithstanding that it is the second largest and second most populous continent. There are many reasons for the slow rate of contribution of African states to general international law, many of which are linked to resource constraints.[1]

1 These are issues that I have had the occasion to write on, in various platforms. See 'Representation, inequality, marginalisation and international law-making: The case of the International Court of Justice and the International Law Commission' (2022) 7 *UCI Journal of Transnational, International and Comparative Law*; 'Reflections on advising the South African government on international law' in A Zidar & J-P Gauci (eds) *The role of legal advisers in international law*; and 'Aspirations of developing countries in biodiversity

For example, African states do not have the resources to publicise their state practice, such that in the assessment of the rules of customary international law, it is often to European states or the United States that we look for practice. African states generally do not have the resources, both in terms of time, personnel and material, to respond to the request for written observations on efforts towards the progressive development and codification of international law, for example in the processes of the United Nations (UN) International Law Commission. Even in treaty-making processes, where African states are represented, with some well-known exceptions,[2] the role of African states is limited.

There are even more institutional factors that lie behind the lack of influence of international law by African states. The most obvious of these institutional issues is the underrepresentation of African states, as is the case with developing states in general, in important law-creating institutions such as the International Court of Justice. The same applies to the Security Council, the resolutions of which, though not intended to have a law-making effect, certainly contribute to the making of law.

Yet, on another level, Africa has been instrumental in normalising certain concepts in international law. Perhaps the best example of this is article 4(h) of the African Union (AU) Constitutive Act which puts into a legal instrument the notion of the responsibility to protect – a concept that, in general, is a policy concept. Article 4(h), in some ways, reveals how that concept could be moved from the realm of policy to the legal realm. Similarly, in the African Charter on Human and Peoples' Rights, African states took the lead in placing, in internationally-binding legal instruments, the right to the environment, a right now recognised by the international community.

In recent times, Africa has also sought to develop a different relationship with international law, one of uniqueness – the notion that, in addition to general international law, there exists a special species of international law, namely, the African international law. This has seen the establishment of institutions of the AU engaging in the elaboration of model laws and other instruments designed to create greater coherence in African law, including African international law. Key amongst these has been the AU Commission on International Law. Now, whether the AU Commission on International Law is achieving its ends is an open question, but the very establishment of the Commission is an indication of the lengths to develop an African international law.

law-making: Dreams deferred' in J Ebbesson *Stockholm plus 50* (forthcoming).

2 Africa and International Tribunal for the Law of the Sea (ITLOS)

A final relationship between the continent and international law worth mentioning concerns the role that international law has played in the developmental progress or regression of the continent. Africa's approach to areas of international economic law, such as investment law and international trade law, has come into sharp focus.

It is against this background that this book makes such an immense contribution to the relationship between international law and the African continent. What is particularly pleasing is that not only the editor, but all the contributors, represent the future of African international law in the hope that Africa will no longer be fed international law, but will contribute to the making of the international law.

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List of acronyms and abbreviations
Liste des sigles et abréviations

AALC	Asian-African Legal Consultative Committee
ADSR	Africa Deep Sea Resources
AfCFTA	African Continental Free Trade Area
African Children's Committee	African Committee of Experts on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
ALPC	Armes légères et de petit calibre
AMISOM	African Union Mission in Somalia/Mission de l'Union africaine en Somalie)
AQMI	Al Qaeda au Maghreb Islamique
AU	African Union
AUC	African Union Commission
BIT	Bilateral investment treaty
BLEU	Belgo-Luxembourg Economic Union
CADBE	Charte Africaine des droits et du bien-être de l'enfant
CAE	Communauté d'Afrique de l'Est
CCI	Chambre de Commerce Internationale
CCIA	Common Market for Eastern and Southern Africa (COMESA) Common Investment Area
CCJA	Cour Commune de Justice et d'Arbitrage
CDDA	Communauté de Développement d'Afrique Australe
CDI	Commission du Droit International des Nations Unies
CEA	Communauté Économique Africaine
CEDEAO	Communauté Economique des États de l'Afrique de l'Ouest
CEEAC	Communauté Economique des États de l'Afrique Centrale
CEMAC	Communauté Economique et Monétaire de l'Afrique Centrale/ Economic and Monetary Community of Central Africa
CEN-SAD	Communauté des États sahélo-sahariens
CERs	Communautés économiques régionales
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CIISE	Commission internationale de l'intervention et de la souveraineté des États
CIJ	Cour Internationale de Justice
CILSS	Comité inter-États de lutte contre la sécheresse au Sahel

CIMA	Conférence Interafricaine des Marchés d'Assurance
CIPRES	Conférence Interafricaine de la Prévoyance Sociale
CJUE	Cour de justice de l'Union Européenne
CJUEMOA	Cour de justice de l'Union Économique et Monétaire Ouest Africain
CNE	Centre National d'Éducation (Cameroun)
CNUCED	Conférence des Nations Unies sur le Commerce et le Développement
CNUDCI	Commission des Nations Unies pour le droit commercial international
COMESA	Common Market for Eastern and Southern Africa/Marché Commun de l'Afrique Australe et Orientale
COVID-19	Virus SARS-CoV-2 (Coronavirus Disease 2019)
CPA	Cour permanente d'arbitrage
CPI	Cour Pénale Internationale
CPS	Conseil de Paix et de Sécurité de l'Union Africaine
CUADI	Commission de l'Union Africaine pour le Droit international
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EPC	Economic Planning Commission
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
FPS	Full Protection and Security
FtAIL	Feminist Approaches to International Law
GATT	General Agreement on Tariffs and Trade/ Accord général sur les tarifs douaniers et le commerce
HCR	Haut-Commissariat des Nations Unies pour les Réfugiés
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IIA	International investment agreement

IIL	International investment law
ILC	United Nations International Law Commission
ILO	International Labour Organisation
ILR	International Law Reports
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
LCIA	London Court of International Arbitration
LTC	Legal and Technical Commission
MFN	Most-favoured-nation treatment
MIAB	Mission de l'Union africaine au Burundi
MIGA	Multilateral Investment Guarantee Agency
MINRESI	Ministère de la recherche scientifique et de l'innovation (Cameroun)
MINSAHEL	Mission de l'Union Africaine pour le Mali et le Sahel
MINUAD	Mission conjointe des Nations unies et de l'Union africaine au Darfour
NAFTA	North American Free Trade Agreement
NAIL	New Approaches to International Law
NEPAD	New Partnership for Africa's Development/ Nouveau partenariat pour le développement de l'Afrique
NGO	Non-governmental organisation
NIEO	New International Economic Order
NT	National treatment
OAU	Organisation of African Unity
OCAM	Organisation Commune Africaine et Mauricienne
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires/ Organisation for the Harmonization of Business Law in Africa
OIT	Organisation internationale du travail
OMS	Organisation Mondiale de la Santé
ONG	Organisation non gouvernementale
ONU	Organisation des Nations Unies
ONUB	Opération des Nations Unies au Burundi/ United Nations Operation in Burundi
ONUCI	Opération des Nations Unies en Côte d'Ivoire
OPEC	Organisation of Petroleum Exporting Countries
OSIR	Organisations d'intégration sous régionales
OTAN	Organisation du Traité de l'Atlantique Nord
OUA	Organisation de l'Unité Africaine
PAIC	Pan-African Investment Code
PCA	Permanent Court of Arbitration
Prepcom	Preparatory Committee for the Law of the Sea
PSNR	Permanent Sovereignty over Natural Resources
R2P	Responsabilité de protéger
RAIL	Regional Approaches to International Law
RDC	République démocratique du Congo
REC	Regional Economic Community
SADC	Southern African Development Community/ Communauté pour le développement de l'Afrique australe
SADI	Société Africaine pour le Droit International

SFDI	Société Française du Droit International
TIP	Treaties with investment provisions
TNC	Transnational Corporations
TPIY	Tribunal pénal international pour l'Ex Yougoslavie
TPP	Trans-Pacific Partnership
TWAIL	Third World Approach to International Law
UA	Union Africaine
UAM	Union Africaine et Malgache
UDHR	Universal Declaration of Human Rights
UE	Union Européenne
UEAC	Union Économique de l'Afrique Centrale
UEMOA	Union Economique et Monétaire Ouest-Africaine
UMAC	Union Monétaire de l'Afrique Centrale
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Education, Science and Culture Organisation/Organisation des Nations Unies pour l'éducation, la science et la culture
UNIDROIT	Institut international pour l'unification du droit privé
UNTS	United Nations Treaty Series
US	United States
WTO	World Trade Organization
ZEP	Zone d'échanges prioritaire
ZLECA	Zone de Libre-échange Continentale Africaine

Part I: The question of the existence of an African international law

Première partie : La question de l'existence d'un droit international africain

1 Is there an African approach to international law? Is it even needed?

*Apollin Koagne Zouapet**

1 Introduction

In the aftermath of their independence, African states participated in and became part of the vast movement of new states that contested their submission to an international law, to which elaboration they had not contributed, and which in some cases had been an instrument of their domination by the so-called 'civilised' colonial powers.[1] In many international spheres, these states have thus invoked a right of inventory, allowing them to choose from the existing normative arsenal the rules to which they consider themselves subject and which, therefore, would be enforceable against them. Following the example of most states that gained independence in the first half of the twentieth century, African states consider that the formation of the international law in force was done without their participation, without their involvement, and was imposed upon them. Therefore, they dissociate themselves from certain principles and rules, drawn up by a small number of European powers or powers of European origin, whose 'criteriological particularism', the fruit of a dominant but not universal civilisation, they castigate.[2] They emphasise Africa's absence from the major peace conferences held in The Hague in 1899 (26 participating states, none of which were African) and 1907 (44 participating states, five of which were Asian and none African) as well as from the League of Nations, which has only four African states among its members (Egypt, Ethiopia, Liberia and the South African Union). African states also believe that the normative structures devised

* This chapter was prepared as part of a postdoctoral fellowship at the Berlin-Potsdam Research Group 'The International Rule of Law – Rise or Decline'. Some of the ideas in this contribution were further developed by the author in Working Paper 52 of the Berlin-Potsdam Research Group. See A Koagne Zouapet 'Regional approaches to international law (RAIL): Rise or decline of international law?' (2020) 52 KFG Working Paper Series. The views expressed here are those of the author and do not necessarily reflect those of the International Court of Justice or the United Nations.

1 On the *jus publicum europaeum* and the colonisation of Africa, see AA Yusuf *Pan-Africanism and international law* (2014) 57-77.

2 R Yakemtchouk *L'Afrique en droit international* (1972) 11-12.

by the European powers were lagging behind the imperatives of modern international life and called for a 'new international law'.[3]

Beyond the contestation of specific rules, African states did not question the existence of an international law that should govern their relations with other states, nor their submission to these rules. What they were contesting was the idea of a Eurocentric international law that did not take into account their specific requirements and needs, and reflected their specific interests.[4] Behind the discourse of these states, there was the underlying idea of a Third World vision, if not specifically African, of what the international legal order should be. It seemed to them essential, for example, that international law should clearly reject any colonial enterprise and allow them to fight effectively for the liberation of the continent from colonialism and racism. Without claiming an 'African international law' there was, therefore, a vision or a specific African approach to international law that justified the initiatives, positions and votes in the various international bodies, mainly in United Nations (UN) bodies.[5]

In the international law scholarship, the question has also arisen among African international lawyers who have questioned the existence of African international law in pre-colonial Africa and/or Africa's contribution to the development of international law. While the United Nations (UN) provided African governments with a platform to present their political positions, the academic world (universities, academic journals, conferences) offered a much less inviting area for African and, in general, Third World voices to be heard.[6] Nonetheless, a small number of voices did enter the conversation and were able to formulate criticism of European international law on different levels and with different strategies. Gathii divides African scholars' international legal literature on the issue into two streams: on the one hand, what he identifies as a 'contributionist' and 'weak' approach which 'is largely complimentary of the liberatory claims of principles such as self-determination as uncompromising tenets of world peace and indicators of the rejection of the colonial experience', and 'uncritically endorses the United Nations agenda in areas such as human rights and the right to development as

3 Yakemtchouk (n 2) 14-15. See also TO Elias *Africa and the development of international law* (1988) 33; Yusuf (n 1) 101-102.

4 See FC Okoye *International law and the new African states (*1972) 178.

5 For an overview of these different initiatives, see Yusuf (n 1) 103-141.

6 J von Bernstorff & Ph Dann 'The battle for international law. An introduction' in J von Bernstorff & Ph Dann (eds) *The battle for international law. South-North perspectives on the decolonisation era* (2019) 25.

having potential and being of continuing benefit to the formerly colonised countries';[7] on the other hand, the approach described as 'critical' and 'strong' that focuses on 'the claims and role of economic, political, social and cultural superiority/inferiority in the historical relationship of colonized and colonizing countries in the past and present' and expresses its 'desire for self-determination and autonomy from all form of external or neo-colonial controls'.[8] Gathii's classification has been criticised for being 'broad-brush' in its approach, implicating both the history and theory of international law, while ignoring the political and intellectual context in which these different approaches developed.[9] In any case, this African international legal scholarship shared a common desire to see Africa and African states move from the status of objects to that of true subjects and actors of international law.

Here again, as with the reactions of states in international fora, less than the claim of a re-reading of a past that is now over, it is a question for academics from young independent states to demonstrate and ensure that these states are not totally alien to international law and that they can, or more precisely must, contribute actively and effectively to the development and application of international law. Far from being only 'importers' and 'consumers' of norms, Africans and African states have a philosophy, a specific vision of international law that should be taken into account for the emergence of a truly universal international law. Yakemtchouk thus indicated in 1971 that since the African colonial heritage now belongs to the past, African states are faced with the task of building a network of specifically regional norms. By observing the practice of young states, he believes that he can detect a certain specificity peculiar to Africa which, given the constant implementation of these specific elements, will lead to the progressive consolidation of an African law.[10]

Sixty years after independence, it is questionable whether the trend observed by Yakemtchouk has been confirmed. Even though 'neither

7 JT Gathii 'International law and eurocentricity' (1998) 9 *European Journal of International Law* 189. Cf Mutua, speaking of 'minimalist assimilationists' in M Mutua 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 32.

8 Gathii (n 7) 187. For specific studies on the approach of the authors of each stream, see C Landauer 'Taslim Olawale Elias. From British colonial law to modern international law' in von Bernstorff & Dann (n 6) 318-340; JT Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 317-349; U Özsu 'Determining new selves. Mohammed Bedjaoui on Algeria, Western Sahara, and post-classical international law' in von Bernstorff & Dann (n 6) 341-357.

9 C Gevers 'Literal "decolonisation". Re-reading the African legal scholarship through the African novel' in von Bernstorff & Dann (n 6) 389.

10 Yakemtchouk (n 2) 11-12.

librarians nor "Google" can find a single entry for a *jus gentium africanum,* it is fair to pose the question whether there is a specific, recognizable "African international public law"'.[11] How far have the African states been successful in playing their part in the development of international law since their independence and the subsequent demands they have made? Besides this, how far do cultural factors have their influence on the attitudes of African states and scholars towards international law? Have African states succeeded in consolidating specific principles of international law in such a way as to see the emergence of a genuine African regional law? Is it possible to speak today of an African approach to international law that would be inspired by an African legal philosophy and anthropology that some researchers had already highlighted?[12] The simple fact of envisaging a reflection on an African approach/vision of international law, or even for the most daring, an 'African international law', raises fundamental questions that touch on the very ontology of international law: What does it entail? What issues, procedures and process do we have in mind when we suggest that there should be or could be an African approach to international law? In a basic way, what is the purpose of, or a need for, such an idea?

The reflection on an African approach or vision of international law cannot be carried out in abstraction of the current context and the crisis that international law is undergoing. Indeed, in recent years the spectre of fragmentation of international law has been a source of anxiety and concern for the international legal community. The anxiety and fear associated with a possible fragmentation of international law are not new and seem to be consubstantial with the very existence of the discipline.[13] Torn between the imperative of unity of a law intended to govern all the actors of international society and the calls for diversity from these actors, at least some of them, international law seems to be undergoing an existential crisis: 'It wants to be universal (but not totalitarian) and particular (but not anarchist).'[14] The field of international law looks stuck 'between the centripetal search for unity and universality and the

11 J Zollmann 'African international legal histories – international law in Africa: Perspectives and possibilities' (2018) 31 *Leiden Journal of International Law* 898.

12 See, eg, JI Lewitt 'African origins of international law: Myth or reality?' (2015) 19 *UCLA Journal of International Law and Foreign Affairs* 113-165.

13 See on the argumentative structure of the fragmentation debate in a historical perspective, A-C Martineau 'The rhetoric of fragmentation: Fear and faith in international law' (2009) 22 *Leiden Journal of International Law* 1-28.

14 Martineau (n 13) 5. See also R-J Dupuy 'Conclusions of the workshop' in R-J Dupuy (ed) *The future of international law in a multicultural world* (1984) 470; M Jorgensen 'Equilibrium and fragmentation in the international rule of law: The rising Chinese geolegal order' (2018) 20 KFG Working Paper Series 8.

centrifugal pull of national and regional differences'.[15] This existential crisis of international law is all the more incurable since its specialists perceive fragmentation only in terms of their idea of what international law is or should be. Indeed, while some are concerned that the unity of international law is being undermined in the face of divergent and (too) specialised interpretations, others, on the contrary, welcome the sign of greater pluralism which, without necessarily leading to legal relativism, would make it possible to reflect the diversity of international law. As Martineau notes, the debate on the fragmentation of international law first and foremost is a formidable rhetorical tool in the construction of an academic and political vision, the expression of faith and/or fears in and about the evolution of international law.[16]

Seen in this light, the current debate on the fragmentation of international law expresses anxiety about both the discourse on international law of certain political leaders and the centrifugal tendencies of certain special regimes and regional groupings.[17] While the UN International Law Commission (ILC) has addressed the issue, it has seemed to respond reassuringly to the threat of a possible material fragmentation of international law in the face of certain functional regimes, considering that regional approaches can only have an impact if they have a normative scope.[18] For the ILC, on the one hand, the strong presumption of the universality of international law in the legal profession limits such regional approaches and doctrines to mere convergences of interests, values and political objectives. On the other hand, regionalism can arguably be seen as a specific application of special regimes of international law.[19] Presuming and affirming the unity and universality of international law, the Commission examines regionalism solely through the prism of the hierarchy of norms and the rudimentary relationship between domestic or regional legal orders and the international legal order.[20] However, there

15 A Roberts *Is international law international?* (2012) 3.

16 Martineau (n 13) 8-9.

17 See H Kriege & G Nolte 'The international rule of law – rise or decline? Points of departure' (2016) 1 KFG Working Paper Series. See also H Krieger 'Populists governments and international law' (2019) 30 *European Journal of International Law* 971-996; CA McLachlan 'Populism, the pandemic and prospects for international law' (2000) 45 KFG Working Paper Series.

18 See Report of the Study Group of the International Law Commission (ILC), finalised by M Koskenniemi 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' UN Doc A/CN.4/L.682, 13 April 2006.

19 Report of the ILC's Study Group (n 18) paras 103-108, paras 1999-208.

20 See for an analysis of the Report and conclusions of the ILC Study Group, A de Hoogh 'Regionalism and the unity of international law from a positivist

seems to be a need for a more open approach to the issue and not to limit it to an already agreed conception of international law. The debate on regionalism or, in the case of this reflection, on regional approaches to international law (RAIL) such as the African approach, cannot free itself from an ontological reflection on international law: The first question to be posed before asking whether regional approaches are desirable is 'desirable in relation to what'?[21] It is this preliminary question that the first part of this chapter seeks to address.

It is impossible to address in an in-depth way all the issues raised above, the answers to which alone would allow for a comprehensive approach to the question, in a contribution such as this. The present reflection, therefore, will merely raise those issues that are considered essential and that can guide a deeper consideration of the other aspects, which are also addressed in other contributions in this book. Thus, as mentioned, the first part will address the challenge of the existence of an African approach to international law. This part, which is the densest part of the study, will concern both the challenge that the African approach, such as all RAIL, can pose to international law and the challenge that the formulation of such an approach poses for Africans themselves. The second part will look specifically at the criteria for a purely African approach, and the third part will look concretely at Africa's contribution to the development and practice of international law. The analysis will focus on those international law norms arising within Africa that have created new legal concepts or elaborated on existing ones, and which have subsequently exerted influence beyond the continent.

2 The call for an African approach to international law: Contributing to the development of plural and diversified universal international law

The idea of an African approach to international law or even 'African international law' is not something entirely new and international law has other precedents. As early as 1910, Alejandro Alvarez published his book on 'American international law' calling for the recognition of norms specific to the American continent. Some time later, the American Institute of International Law proposed to examine American legal issues either in accordance with generally-accepted principles or by

perspective' in MJ Aznar & ME Footer (eds) *Select proceedings of the European Society of International Law: Regionalism and international law Valencia, 13-15 September 2012* (2015) 51-76.

21 L Fawcett 'Regionalism: From concept to contemporary practice' in Aznar & Footer (n 20) 10.

creating new principles adapted to the special needs of the American continent.[22] While this trend at the time was challenged and rejected as a danger to international law, which necessarily is one and indivisible, this has not prevented more recent claims for regional or even national approaches to international law. At the first World Meeting of Societies for International Law, organised at the initiative of the Société Française de Droit International in 2015, some 40 regional and national societies were present.[23] They will more than double their number at the second meeting in 2019 in The Hague.[24] This multiplication of national and regional learned societies of international law has been accompanied by the production of numerous scientific writings questioning and/or calling for a regional or even national approach or vision to international law.[25]

As with the 'American international law' of the early twentieth century, these claims for national and regional approaches to international law are anxiously observed by some international lawyers, whose views are well summarised by Wood. For Wood, there can be no such thing as

22 See A Alvarez *Le droit international américain. Son fondement, sa nature, d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique* (1910) 392; W Samore 'The new international law of Alejandro Alvarez' (1958) 52 *American Journal of International Law* 41-54; JL Esquirol 'Alejandro Álvarez's Latin American Law: A question of identity' (2006) 19 *Leiden Journal of International Law* 931-956; A Becker Lorca 'International law in Latin America or Latin American international law – Rise, fall and retrieval of a tradition of legal thinking and political imagination' (2006) 47 *Harvard International Law Journal* 283-306; L Obregón 'Regionalism (re-) constructed: A short history of a "Latin American international law"' in Aznar & Footer (n 20) 25-38; JL Esquirol 'Latin America' in B Fassbender & A Peters (eds) *The Oxford handbook of the history of international law* (2012) 553-577.

23 http://www.sfdi.org/wp-content/uploads/2015/06/Liste-des-participants-version-finale.pdf (accessed 12 December 2020).

24 https://rencontremondiale-worldmeeting.org/societies-represented/ (accessed 12 December 2020).

25 See, among others, F Messineo 'Is there an Italian conception of international law' (2013) 2 *Cambridge Journal of International and Comparative Law* 879-905; H Xue 'Chinese contemporary perspectives on international law. History, culture and international law' (2011) 355 *Recueil des Cours* 41-234; H Ruiz Fabri 'Reflections on the necessity of regional approaches to international law through the prism of the European example: Neither yes nor no, neither black nor white' (2011) 1 *Asian Journal of International Law* 83-98; O Corten 'Existe-t-il une approche critique francophone du droit international? Réflexions à partir de l'ouvrage Théories critiques du droit international' (2013) 46 *Revue Belge de Droit International* 257-270. P Palchetti 'International law and national perspective in a time of globalisation: The persistence of a national identity in Italian scholarship of international law' (2018) 20 KFG Working Paper Series; see the different contributions on the French, German, American, Canadian and European approaches/visions/influences in Société Française pour le Droit international *Droit international et diversité des cultures juridiques/International law and diversity of legal cultures* (2008) 473.

a European, or any other regional, approach or vision of international law:[26]

> First, there is, and can only be, one system of international law in today's world. International law is universal – or it is nothing. Secondly, while there may be an infinite variety of approaches to (or visions of) international law, it is not helpful to seek to corral this rich variety into a European approach or vision, an American one (or perhaps an Anglo-American one), and other visions, somehow embracing the rest of the world.

Indeed, the question of regionalism has always been generally perceived and analysed through the prism of the unity or/and universality of international law. The idea of a universal international law governing the relations between the actors of the international society implies the existence of a certain number of rules and principles of which the validity is not suspended to the particular contingencies of this or that region. This idea is further strengthened when universal rules derive their validity from specific values, an embodiment of the 'legal conscience of mankind', the minimum from which the unity of international law develops.[27] This contribution is unlikely to deviate from this. That is why it focuses on 'African approaches to international law' and not on the idea of 'African international law'. Nevertheless, and contrary to the approach often followed, this chapter will question the very notions of unity and universality and the representations that international law scholars make of these. As rightly pointed out, whether we want it or not, in the background of such reflection always lies a play of influence. The answer very much depends on how the question is phrased and the disciplinary bias of the author.[28] An important part of the analysis, therefore, will focus on the discourse of/on international law, that is, 'acts to signify generalised; socially constructed categories of thought to which important social meanings and values are attributed. Discourses promote particular

26 M Wood 'A European vision of international law: for what purpose?' in H Ruiz Fabri, E Jouannet & V Tomkiewicz (eds) *Select proceedings of the European Society of International Law, Volume 1 2006* (2008) 152. In the same sense, for a vehement negation of a European international law, A Orakhelashvili 'The idea of European international law' (2006) 17 *European Journal of International Law* 315-347.

27 J-M Bipoun-Woum *Le droit international africain. Problèmes généraux- règlement des conflits* (1970) 11-12; E McWhinney 'Comparative international law: Regional or sectorial, inter-systemic approaches to contemporary international law' in Dupuy (n 14) 224-225; H Xue 'Meaningful dialogue through a common discourse: Law and values in a multi-polar world' (2011) 1 *Asian Journal of International Law* 13.

28 Ruiz Fabri (n 25) 84.

categories of thought and belief that guide our responses to the prevailing social environment.'[29]

The purpose of this contribution is not to contest the universal vocation of international law, nor its unity. On the contrary, it affirms that universality is consubstantial with international law, but invites further reflection on it. Such a reflection requires consideration of whether the application of international law extends to any subject concerned, whether no object is excluded and whether its objectives are achieved to the benefit of all.[30] This leads to the realisation that the universality and the unity of international law are a project, a process that is built up daily. In the words of Heselhaus, 'the assumption is that contrary to a glance at first sight, universality of international law has not come to an end. On the contrary, universality still is and in the 21st century will be a permanent and prevailing task, not only for the community of states, but for the academic legal community as well.[31]

Therefore, it is essential, in order to build a universal and unified international law, that international lawyers admit that, far from being acquired and immutably inscribed in the genes of international law, universality is a horizon, a roadmap that invites a specific methodological approach. Similarly, the unity of international law must not be dogmatically perceived in a way that is definitively irreconcilable with the pluralism to which the diversity of international society invites. The first paragraph of this part, therefore, will call for a move away from the illusion of pseudo-universality and dogmatic approach to international law towards the elaboration of a genuine universalisation of international law.

For Africans, and because of the particular history of the continent, the elaboration of an African approach is an imperative that responds to the need expressed after independence for an international law that is at the service of their development. The construction of such an African approach must be guided by an inclusive logic, ensuring the participation of Africa and Africans in the elaboration and application of international law, while avoiding the trap of a regionalist approach, which would have

29 T Evans 'International human rights law as power/knowledge' (2005) 27 *Human Rights Quaterly* 1049.

30 M Chemillier-Gendreau 'À quelles conditions l'universalité du droit international est-elle possible?' (2011) 355 *Recueil des Cours* 19; O Yasuaki 'A transcivilisational perspective on international law. Questioning prevalent cognitive frameworks in the emerging multi-polar and multi-civilisational world of the twenty-first century' (2009) 342 *Recueil des Cours* 220-221.

31 S Heselhaus 'Universality in international law in the 20th century' in T Marauhn & H Steiger (eds) *Universality and continuity in international law* (2011) 474.

the ambition to move from a Western-centred international law to an Afro-centred international law. These are the issues addressed respectively in the second and third paragraphs of this part.

2.1 Ending the illusion of a proclaimed unity and universality of international law

Although the terms 'universality' and 'unity' are sometimes used interchangeably, and despite the close interrelationship that exists between them when applied to international law, the two words nevertheless are not synonymous. As Prost explains, 'to say that law is universal is not the same thing as to say that it is one or unitary. Law can be both universal and fragmented. Similarly, a regional or local order can be perfectly unitary. There is no *a priori* or necessary connection between unity and universality.'[32] Unity always necessitates some form of connection or rapport between the constituent parts. There must exist a certain structure in the object, that is, a mutual connection between its different parts that make it possible to perceive it as a unitary whole.[33] To find unity in an immaterial thing such as international law, for example, there must exist between its constituent parts some causal link that justifies the categorical synthesis (substantial, cultural, logical).[34] Universality, on the other hand, can have two main meanings. At the most fundamental or basic level, the universality of law signifies its omnipresence: The law can be encountered everywhere at once.[35] At a second level, universality means generality; to say that international law is universal in this second sense thus is to say something about its reach and scope. 'It signals the all-inclusiveness of the international legal domain but says little about the unity of its forms or substance.'[36]

In the discourse on international law, and despite Prost's reservation on the synonymy that may exist between the unity and universality of international law,[37] the validity of one term is derived from the other. If international law is one, it is because it is elaborated inclusively and

32 M Prost *The concept of unity in public international law* (2012) 34-35.

33 Prost (n 32) 25.

34 After stressing the arbitrary and versatile nature of the establishment of the unity of immaterial things such as law, Prost indicates that unity can derive from several causes or criteria that are often subjective; Prost (n 32) 25-31.

35 Prost (n 32) 35.

36 Prost (n 32). For a broader presentation of different conceptions of universality, see also Heselhaus (n 31) 472-474; B Simma 'Universality of international law from the perspective of a practitioner' (2009) 20 *European Journal of International Law* 267-268.

37 Prost (n 32) 36-38.

universally, taking into account all the variations and contributions of the different actors involved; its universality of elaboration, therefore, gives it its unity. Its universal vocation thus is the glue that holds together the different elements and branches of international law. Here, the unity of international law allows it to define the common interests of the members of the international society despite the extreme diversity of society or issues. In turn, this unity ensures its universal application by all and for all: It is because international law does not admit variations that it must be interpreted and applied in a uniform, or at least consistent, manner. Thus, there is a 'virtuous' circle where each characteristic infinitely reinforces the other. The problem is that this understanding of the unity and universality of international law is based on a myth, a fantasy that does not reveal the reality of international law. It is the recognition and acknowledgment of this reality that justifies and underpins regional approaches such as the African approach to international law.

2.1.1 African approach as a means for the universalisation of international law

For many, if not all, international lawyers, to question the universality of international law is to question the very *raison d'être* of the discipline. Jennings said in this regard that universality is the first and essential general principle of international law that it is vital to safeguard.[38] This universality not only defines the geographical (worldwide) and personal (for all subjects of international law) scope of application of the rules of international law, but also founds the spirit and collegial feeling of the 'invisible college of international lawyers'.[39] Indeed, 'unlike any other body of lawyers, international lawyers speak the common language of a universally accepted discipline, share a common commitment to furthering the universal reign of law and the universal ideal of human dignity and keep functioning constantly across national borders'.[40] It is this commitment, this devotion of international lawyers to their field

38 R Jennings 'Universal international law in a multicultural world' in M Bros & I Brownlie (eds) *Liber amicorum for the Rt Hon Lord Wilberforce* (1987) 41. Many important notions in international law, such as *jus cogens,* obligations *erga omnes* presuppose the idea of international law with universal validity. See A Koagne Zouapet 'To be or not to be imperative: *Jus cogens* between universal vocation and regional claims' (2021) 86 *QIL, Zoom-in* 47-70.

39 O Schachter 'The invisible college of international lawyers' (1977) 72 *Northwestern University Law Review* 217-226.

40 CG Weeramantry *Universalising international law* (2004) 79. On the commitment of international lawyers to their discipline, see M Koskenniemi 'Between commitment and cynicism: Outline or a theory on international law as practice' in United Nations Office of Legal Affairs *Collection of essays by legal advisers of international organizations and practitioners in the field of international law* (1999) 497-501.

that can undoubtedly explain their idealised vision of the universality of international law. Such a dogmatic conception of universality can be problematic and even ultimately lead to the loss of this attribute by international law. As Jennings rightly points out, a universality that would be so rigid that it would not admit the possibility of regional approaches would lead to imperialist law being imposed by certain states or other fundamentalist ideologies on other subjects of international law. The postulate of universality, though logically necessary to any system of law that claims to be a true international law, may fall short of the full realisation of universality in act: It may take the form of an assumption of superior power, or superior culture or civilisation by one group of subjects (states or others) so that international law then takes the form of a legal sanction for the subjection more or less of some people to others.[41]

As Roberts acknowledges from the very first pages of her famous book, even though international law aspires to be the world's Esperanto, the reality is different from this theoretical postulate. International law, in fact, is the product of the domination of certain states and regional groups, very often Western, which, without having the monopoly to define what international law is, succeed in imposing their vision and approaches.[42] Going further, Roberts emphasises the subjectivity that lies at the heart of the 'science' of international law: 'What counts as international law depends in part on how the actors concerned construct their understandings of the field and pass them on go to the next generation.'[43] As shocking as it may seem, this assertion by Roberts nonetheless is difficult to contest. Like all the social sciences and other 'humanities', the study of international law and the formulation of the rules of international law contain a significant degree of subjectivity related to the human nature of those who study it. Unless one challenges the insurmountable subjectivity of the actors of international law (state representatives, judges, international civil servants, academics, counsel and lawyers) or deifies them by depriving them of their human weakness (if one considers that a subjective appreciation of the world is a weakness) one must admit that the alleged universality of international law is only an illusion and that all these actors appreciate norms and rules through the prism of their position, culture and/or interests. Indeed, 'international law aspires to be a universal field, but is also, and inevitably, a deeply human product'.[44] As pointed out by Koskenniemi, a court's decision or

41 Jennings (n 38) 42.

42 Roberts (n 15) 9.

43 Roberts (n 15) 2.

44 Roberts (n 15) 320. See also M al Attar 'Reframing the "universality" of international law in a globalising world' (2013) 59 *McGill Law Journal/Revue de droit de McGill* 138-139.

a lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated by external criteria.[45]

Any answer is necessarily situated, that is, linked to the person giving it, and may therefore vary according to that person's professional situation, origin and training.[46] Concepts and principles now considered universal, such as freedom of the seas or *jus cogens*, were first theorised and proposed to address specific concerns in particular contexts.[47] There is no strictly globalist or cosmopolitical vision of international law, as Jouannet reminds us,[48] but rather an inevitable multiplicity of particular national, regional, individual and institutional visions of international law. This can be explained by the fact that all the players in the international game are conditioned by their own legal culture and not by a cosmopolitical legal culture that does not yet really exist as such. If it can be admitted that international law itself constitutes a kind of common language, an Esperanto as indicated above, this language is expressed through singular voices that continue to emerge from particular and differentiated legal cultures. This is why it is essential that every actor of international law is aware of his or her own biases and has the modesty to recognise his or her consubstantial subjectivity.

The problem then is not subjectivity in the approaches to and development of international law, but its negation. The existence of different legal cultures and perspectives is not an obstacle to the universality of international law, as long as the recognition of these differences enables bridges to be built between them. The main obstacle to the universality of international law, thus, is not the diversity of approaches, but the

45 M Koskenniemi 'What is international law for?' in MD Evans (ed) *International law* (2018) 42. See also Prost (n 32) 129; L Delabie *Approches américaines du droit international. Entre unité et diversité* (2011) 224-341; D Kennedy 'One, two, three, many legal orders: Legal pluralism and the cosmopolitan dream' (2007) 31 *New York University Review of Law and Social Change* 647-649; A Bianchi & A Saab 'Fear and international law-making: An exploratory inquiry' (2019) 32 *Leiden Journal of International Law* 351-365.

46 Ruiz Fabri (n 25) 85. See on the 'imperial ambivalences' of international law and lawyers about the exercise of power, and of the West about the rest of the world, N Berman *Passion and ambivalence: colonialism, nationalism and international law* (2011) 419-424.

47 On the notion of *mare liberum* developed by Grotius in direct response to the needs of colonial empires, see McWhinney (n 27) 223; M Craven 'Colonialism and domination' in Fassbender & Peters (n 22) 862-863. On the genesis of *jus cogens,* as exposing the 'dark sides of international law', see F Lange 'Challenging the Paris Peace Treaties, state sovereignty and Western-dominated international law – The multifaceted genesis of the *jus cogens*' (2018) 19 KFG working paper series.

48 E Jouannet 'Les visions française et américaine du droit international: cultures juridiques et droit international' in Société Française pour le Droit international (n 25) 43-44.

hegemonic will of certain operators of international law to claim that their approach, their vision is universal since it is objective, and/or necessary for the good of humanity. This gives them an excuse to cling to their beliefs and convictions, refusing any debate, confident that they are necessarily right and others are wrong. This actually reveals a kind of contempt and condescension for others: 'Respect for others includes the recognition that they are equally capable of carrying their own burdens of judgment and that in doing so they might well reach conclusions different from our own.'[49] It is necessary, writes Ruiz Fabri, to realise the ambivalence of the reference to the universal as, since the latter has no voice of its own to express itself, it is constantly susceptible to subjective appropriations, possibly suspicious of ulterior motives, and the suspicion of imperialist temptation can never be dismissed. She rightly warns Europe and European academics against this temptation, but this applies to all international lawyers and all regions of the world.[50]

Indeed, the 'European subjectivity has traditionally been presented and has often been received as universal objectivity'.[51] In the field of the history of international law, periodisation is based on a division that corresponds primarily to a Western-centred approach falsely presented as objective. This distortion is reflected in an over-emphasis on European authors and practice, and an under-emphasis on, or even an omission of, non-European experiences.[52] Similarly, in the field of identification

49 E Voyiakis 'International law and the objective of value' (2009) 22 *Leiden Journal of International Law* 57.

50 Ruiz Fabri (n 25) 95. In the same vein, see M Koskenniemi 'International law in Europe: Between tradition and renewal' (2005) 16 *European Journal of International Law* 115. Another author harshly castigates 'ces "juristes impérialistes", si bien intentionnés, "fiers de leur mission et surs de leurs pouvoirs"'. W Capeller 'Droits infligés et "chantiers du survivances": De quel lieu parle-t-on?' in W Capeller & T Kitamura (eds) *Une introduction aux cultures juridiques non occidentales* (1998) 29. On the risk of instrumentalising the universal and the general interest, see also P Wrange 'Is there a general interest *hors la loi*?' in Ruiz Fabri et al (n 26) 279-292.

51 al Attar (n 44) 127. Capeller denounces a 'shamelessly pretentious' European production of legal studies; Capeller (n 50) 13. See also M Chiba 'Droit non-occidental' in Capeller & Kitamura (n 50) 44; M Bennouna 'Droit international et diversité culturelle' in United Nations *International law on the eve of the twenty-first century. Views from the International Law Commission* (1997) 81; PhC Jesup 'Non-universal international law' (1973) 12 *Columbia Journal of Transnational Law* 415-429; M Mutua 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 37; A Bradford & EA Posner 'Universal exceptionalism in international law' (2011) 52 *Harvard International Law Journal* 6; K Gorobets 'The unity of international law: An exercise in metaphorical thinking' 15-16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599840 (accessed 22 December 2020).

52 See O Diggelmann 'The periodisation of the history of international law' in Fassbender & Peters (n 22) 1000-1001; A Becker Lorca 'Eurocentrism in the history of international law' in Fassbender & Peters (n 22) 1034-1057; BS Chimni 'The past,

of customary law, both national and international jurisdictions, learned societies and authors tend to rely almost exclusively on the practice or case law of a handful of mainly Western states and English-language and sometimes French-language sources. As a result, the practice of non-Western states, as well as that of non-Anglophone/Francophone sources, is often omitted, or insufficiently considered in the analysis.[53] The problem, once again, is not the non-exhaustiveness or selectivity of the data collected, but the willingness to present these results as objectives and reflecting universally-accepted or elaborated international law.

By endowing it with a proclaimed rather than a constructed universality, international lawyers have made international law 'a weapon of choice, an instrument of assertion, a strategic stake' in the eyes of states, who think they can use it to defend any position.[54] This irremediably leads to a crisis of universality. Fashionable concepts such as 'international community' help to convey the erroneous idea that such a community, very embryonic and still (very slowly) being built, already exists, and contribute to this 'race for universality'; a tool at the service of the dominant rhetoric to conceal its domination under the guise of pluralism in order to make it better accepted, and above all to make it unquestionable, on pain of the protester passing as anti-humanist.[55] Universality is not and could not mean an unalterable truth, legal principles and rules enacted by a cultural or social group as being imposed on the whole of international society because these principles and rules would carry, in the opinion of those who enact and defend them, unquestionable universal values.

present and future of international law: A critical Third World approach' (2007) 8 *Melbourne Journal of International Law* 499-516; H Steiger 'Universality and continuity in international public law' in Marauhn & Steiger (n 31) 13-43; RP Anand 'Universality of international law: An Asian perspective' in Marauhn & Steiger (n 31) 87-105. A Becker Lorca 'Universal international law: Nineteenth-century histories of imposition and appropriation' (2010) 51 *Harvard International Law Journal* 475-552.

53 Of course, this may be linked to the accessibility and availability of documents from countries, particularly in the south. However, it is important to emphasise that the digital divide, far from being an excuse and/or justification, is part of the problem. See A Roberts & S Sivakumaran 'The theory and reality of the sources of international law' in MD Evans *International law* (2018) 105-16; A Boyle & C Chinkin *The making of international law* (2007) 28-29; K Linos 'Methodological guidance. How to develop comparative international law case studies' in A Roberts et al (eds) *Comparative international law* (2018) 37; Roberts (n 15) 270-278.

54 E Jouannet 'What is the use of international law? International law as a twenty-first century guardian of welfare' in Fabri et al (n 26) 55; CG Weeramantry 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 278-279.

55 R Charvin '"Communauté" internationale ou empires oligarchiques'(2019) 69 *Droits* 15-16.

Rather than maintaining a dogmatic approach to the alleged universality of international law, it probably is appropriate to move away from this illusion and adopt a more fruitful approach to the universalisation of international law. Universality of international law 'does not mean uniformity but rather richness of variety and diversity'.[56] This is probably why Delmas-Marty invites lawyers to write 'universalism' in the plural. Not a plural of majesty, but a plural of modesty, as universalism, as soon as it is invoked in the legal field, seems to fluctuate between reason and faith, demonstration and revelation.[57] As the eminent author points out, it no doubt would be more accurate to speak of a 'process of universalisation'.[58] This universalisation, and thus the progressive construction of the universality of international law, requires 'to adopt an ethos of justice (*meaning*) – parity of participation – and then to establish rules (machinery) that facilitate popular and democratic engagement'.[59] This presupposes upstream the recognition by each of the actors of the inevitable subjectivity of their discourse and vision and, therefore, the need for greater humility in their pretension to enact the universal. Such an approach could shield international lawyers from the dismay they feel at the tension that exists between a fantasised universality and a reality that denies it. Thus, recognising the necessary diversity of cultures and the irreducible subjectivity of one's approach can be positive and serve the cause of the universality of international law as long as it allows one to distance oneself from one's own 'evidences', to be attentive to the different cultural contexts in which international law can be apprehended and, thus, to better understand differences in interpretation and application. Indeed, immanent subjectivity of the actors and operators of international law does not constitute an obstacle to the construction of universal international law, if one accepts the inter-subjective nature of this quest.[60] Recognising such an approach will make it possible to perceive RAIL, such as the African approach, not as a challenge to the universality

56 Jennings (n 38) 42 ; A Yusuf 'Diversity of legal traditions and international law: Keynote address' (2013) 2 *Cambridge Journal of International Law* 683; VS Vereshchetin 'Cultural and ideological pluralism and international law: Revisited 20 years on' in S Yee & J-Y Morin (eds) *Multiculturalism and international law: Essays in honour of Edward McWhinney* (2009) 127; Bennouna (n 51) 80; B Donnelly-Lazarov 'Natural law and the possibility of universal normative foundations' in H Ruiz Fabri, R Wolfrum & J Gogolin (eds) *Select proceedings of the European Society of International Law, volume 2 2008* (2010) 235-266.

57 M Delmas-Marty *Les forces imaginantes du droit. Le relatif et l'universel* (2004) 26.

58 Delmas-Marty (n 57) 54.

59 al Attar (n 44) 99.

60 Voyiakis (n 49) 76. Contrary to what Green has written, who saw regional and political groupings as the end of all hope for universal international law. LC Green 'Is there a universal international law today?' (1985) 23 *Canadian Yearbook of International Law* 32.

of international law from a logic of competitive points of view, but as constructive contributions in a collective approach to the development of consensual and universal international law. The same approach must be followed concerning the unity of international law.

2.1.2 African approach as a building block for a democratised international law: Unitas multiplex

As hinted earlier, many studies have iteratively underlined the danger posed to international law by regional or national approaches. For its proponents, by highlighting the differences between visions of international law, RAIL can weaken and undermine the unity and even the very existence of international law. An excessive focus on regional particularities would lead to obscure the 'general' international law and the values it carries.[61] As with universality, these fears and apprehensions essentially are dictated by international lawyers' representation of the unity of international law. The unity of international law is perceived as meaning uniformity, total homogeneity in the interpretation and application of the rule of international law. As with universality, there sometimes is a dogmatic approach to defining the unity of international law that corresponds to a certain representation of what international law should be, rather than what it is; 'a somewhat compulsive, almost obsessive concern'.[62]

The idea of a united or single international law that would fall prey to centrifugal tendencies resists little examination of reality: There are no periods during which international law was homogeneously conceived either one way or another.[63] International law, as Prost recalls, essentially is a special or regional, even local phenomenon. Conventional norms, which make up a large part of the norms of international law, are proof of this division of law into special regimes, binding several or a few actors, with real risks of confrontation and normative inconsistencies. There are very few universal treaties covering all the subjects (even if limited to states) of international society. Even assuming that such universal treaties are multiplying, they do not signify a unity of international law: There 'is still the possibility of conflict between legal universals, that is, incompatibilities or even antinomies between the rationality, teleology

61 For a presentation of these arguments, see A Roberts et al 'Conceptualising comparative international law' in Roberts et al (n 53) 27-28; PB Stephan 'Comparative international law, foreign relations law, and fragmentation: Can the centre hold?' in Roberts et al (n 53) 62.

62 Prost (n 32) 192.

63 Martineau (n 13) 3.

rights and obligations of universal regimes'.[64] While international law certainly is unique, because it is, it is not in the sense of uniformity, of a whole so homogeneous corpus that any variation or any particular approaches, such as the African approach to international law or any other RAIL, would call it into question. Opposing the unity of international law to pluralism and diversity is more a question of political interpretation than the interpretation of a legal principle, a normative choice based on a political option taken upstream: 'un alibi pseudo-scientifique à une position politique, position qui pourrait servir à des fins avec lesquelles la théorie même ne serait pas d'accord'.[65]

Multiculturalism and pluralism are part of the DNA of international law. The emergence of international law, its very *raison d'*être, is in itself a 'tribute to multiculturalism'.[66] The role of international, among others, is to represent and reconcile heterogeneity where it is legitimate to do so.[67] This corresponds to what one sociologist has called 'pluralism of equality'.[68] It is because sovereign states were aware of their differences and their divergences that they decided to put in place a body of rules to govern their relations and interactions with one another. If these differences of views and approaches were to disappear, international law as it stands today would disappear, because it would have been transformed into the internal (imperial) law of a super-federation of all the world's states. It is difficult to move, in the name of an idealistic vision, so abruptly from diversity to unity which would mean uniformity. Secreted for a pluralist and diverse society, international law must not only respond to this diversity but must also reflect it.

64 Prost thus cites the case of the GATT and certain agreements relating to the environment, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), as an illustration. Prost (n 32) 36-38. See also A Nollkaemper 'Inside or out: Two types of international legal pluralism' in J Klabbers & T Piiparinen (eds) *Normative pluralism and international law, exploring global governance* (2013) 111-115, Gorobets (n 51) 11.

65 P Sack 'Le droit: perspectives occidentales, perspectives non occidentales' in Capeller & Kitamura (n 50) 57. M Koskenniemi 'The fate of public international law: Between technique and politics' (2007) 70 *The Modern Law Review* 24-25. Gorobets evokes the representations of constellations in the sky. The stars are linked together according to an image that corresponds to a familiar image, which is not the same for everyone, but above all masks the fact that in reality the stars are not linked in this way. Gorobets (n 51) 15-17.

66 M Rama-Moutaldo 'Universalism and particularism in the creation process of international law' in Yee & Morin (n 56) 130. See on law as a system of legal relations, P Allott 'The concept of international law' (1999) 10 *European Journal of International Law* 36-37.

67 Donnelly-Lazarov (n 56) 255.

68 See H Sanson 'Le point de vue du sociologue: modèles de coexistence dans la différence de cultures' in Dupuy (n 14) 62-64.

As noticed, most people would probably agree that diversity of culture not only is an inevitable fact but that it also benefits and enriches humankind. Indeed, a uniform world would not only be dull but would also stagnate as history shows us; societies that tried to impose uniformity of thought and behaviour sooner or later collapsed. Pluralism and diversity, therefore, are as important for international law as biodiversity is for humanity.[69] Following the beautiful Bedjaoui formula, 'le vrai esprit international ... voit dans les nations civilisées autant de facettes d'un même cristal, chacune réfléchissant à sa manière la lumière civilisatrice et chacune devenant une part nécessaire et intégrale d'une pierre précieuse'.[70] RAIL, therefore, are the tool to maintain pluralism and diversity by offering the possibility of new ideas and visions that allow international law to constantly renew itself and fulfil its functions in international society. RAIL, as the African approach, allow pluralism to enrich international law by emphasising the second meaning of the word, that of a 'general suspicion of a notion of "the truth"'. Pluralism, of which RAIL are one of the vectors, opposes value monism, hegemonic and suppressive discourses that use and misuse the notion of truth and universality as a pretext to dominate and subjugate alternative world views.[71] This is not necessarily antinomic to unity. Thus, the emergence of an African approach to international law does not appear as a threat to international law, but rather as an instrument for its refinement and enrichment.

2.2 African approach, active participation in the construction of an inclusive and multi-cultural international law

Regional approaches to international law appear to be tools for legitimising international law to make it truly universal, in the face of a legal field that has long been European and Western-centred. Such an approach is necessary for Africa to be able to assert itself as an actor in international relations. The pan-Africanist ideal can only move from a simple project to a concrete reality if it allows the various fields of international life (economy, politics, law) to define their own approaches adapted to the realities and needs of the continent. Specifically, an African approach to international

69 R Müllerson 'From E unum pluribus to E pluribus unum in the journey from an African village to a global village' in Yee & Morin (n 56) 34. See also E McWhinney *The International Court of Justice and the Western tradition of international law* (1987) 20-21. This idea would also correspond to Kant's cosmopolitanism. J Almqvist 'Coping with multilateralism through cosmopolitan law' in Ruiz Fabri et al (n 56) 103.

70 M Bedjaoui *Fonction politique internationale et influences nationales,* quoted by M Forteau 'L'idée d'une culture internationale du droit international et les Nations Unies' in Société Française pour le Droit International (n 25) 367.

71 T Piiparinen 'Exploring the methodology of normative pluralism in global age' in Klabbers & Piiparinen (n 64) 55.

law would enable the African continent, among others, to participate in the definition of universal values that permeate international law; to avoid new imperialism under the guise of new 'missions of civilisation' as in the past; and, finally, to be a driving force for standards with a universal vocation. This paragraph will briefly address each of these elements, which alone can make it possible to overcome the current Eurocentrism of international law and move from the *jus europaeum* to a true *jus universalis*.[72]

2.2.1 African approach, contribution to the definition of universal values

All law, including international law, necessarily reflects the aspirations, representations, and values of a society. The law thus has an inherent political dimension, in that it is a tool at the service of a model that a given community wishes to achieve. It is this model and the values it embodies that allow the law to adapt to new circumstances by indicating the direction in which practices and institutions should evolve.[73] The values defended and promoted must, therefore, be the compass for adapting international law to the changes in international society, and in certain hypotheses to indicate the desired evolutions of this society. Moreover, the values at the heart of international law are also critical in establishing its universality: They must reflect a 'universal culture' or at least be relevant to all cultures, 'because international law is sure to be ignored if it is not culturally relevant'.[74] The difficulty in international law is that the determination of values has almost always been univocal and unilateral, in defiance of the multiculturalism and pluralism that must permeate a truly universal international law. Some cultures or civilisations believe that they have a messianic mission to indicate the direction of history and progress to the whole of humanity. The feeling of cultural superiority and values that dominated the colonial period still seems to persist in the norm-making process of international law, despite the significant changes in international relations over the past 60 years. Within this logic, 'history is a linear, unidirectional progression with the superior and scientific Western civilisation leading and paving the way for others to follow'.[75]

72 These ideas are presented and developed in more detail in A Koagne Zouapet 'Regional approaches to international law (RAIL): Rise or decline of international law?' (2020) 52 KFG Working Paper Series.

73 See in the same vein I Scobbie 'A view of Delft: Some thoughts about thinking about international law' in Evans (n 53) 56.

74 AG Koroma 'International law and multiculturalism' in Yee & Morin (n 56) 81. In the same vein, Jouannet (n 54) 81.

75 D Slater *Contesting occidental vision of the global: The geopolitics of theory and North-South relations,* quoted by M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201 fn 2. See also R Sacco 'Les problèmes d'unification du droit' in L Vogel (ed) *Unifier le droit: le rêve impossible?* (2001)

Müllerson's warning must be borne in mind in any debate on the values that should underpin international law: '[B]oth the desire to lead separate and distinct lives as well as attempts to impose one's own understanding of the true and the good to others are both fraught with existential danger.'[76] Therefore, it is important to avoid 'cultural proselytism' under the guise of international law and values that it is supposed to protect or that should be enshrined in it. It should also always be borne in mind that the 'validity of a cultural norm is a local truth, and judgment or evaluation of that truth by a norm from an external culture is extremely problematic, if not altogether an invalid exercise'.[77] This is all the more necessary since what has been termed 'cultural chauvinism'[78] is not unique to Western culture and is found in all cultures and civilisations. Proof of this can be found in the numerous works and publications on national or regional visions of international law, each of which claims to defend universal values and virtues useful for peace and stability in international relations.[79] Because they all consider themselves superior and are convinced that the values they defend are best able to ensure the well-being of mankind in the representation they make of it, all cultures see themselves as 'civilised' and perceived cultures with contrary or different practices and beliefs as 'barbaric'. Under the prism of 'civilised self and barbaric others', a clash of civilisations seems inevitable, with each culture converting and saving the others, each convinced that its values are the salvation and future of humanity: International law must be universal, but according to 'our universality'. To emerge from this inescapable confrontation and to give international law its role in pacifying international relations, it is important to place pluralism and diversity at the heart of the universality with which this law is endowed; a universality that does not mean similarity, nor unanimity or absence of contradictions and discord.[80]

RAIL as an African approach can facilitate the identification and understanding of the values and perceptions of other groups and break

12. Numerous studies have been devoted to the 'mission of civilisation' and the role of international law in basing colonisation on this idea. See, among others, S Drescher & P Finkelman 'Slavery' in Fassbender & Peters (n 22) 890-916; L Obregón 'The civilised and the uncivilised' in Fassbender & Peters (n 22) 917-939.

76 Müllerson (n 69) 58.

77 Mutua (n 75) 220. See also MCW Pinto 'What's wrong with international law?' in C Ryngaert, EJ Molenaar & S Nouwen (eds) *What's wrong with international law? Liber amicorum AHA Soons* (2015) 381; Capeller (n 50) 17.

78 I Mgbeoji 'The civilised self and the barbaric other: Imperial delusions of order and the challenges of human security' in R Falk, B Rajagopal & J Stevens (eds) *International law and the Third World. Reshaping justice* (2008) 152. See also Sanson (n 68) 64.

79 See references at n 25.

80 R-J Dupuy 'Introduction of the subject' in Dupuy (n 14) 29.

out of the 'in-between' decried by Roberts. Because they are convinced of the universality of the values they promote and defend, international lawyers do not bother to check that these values are shared by other regions of the world, projecting an inaccurate or insufficiently nuanced account of state practice and giving the mistaken impression that the featured approach is universally adopted or relatively uncontroversial.[81] Facilitating a comparative approach from the perspective of identifying universalist intersections, African approaches and other RAIL can be useful in identifying shared values and capturing the slightest variations and nuances that are sources of disagreement and thus help foster dialogue. This implies breaking away from the narrow view of law simply as a means of implementing values. The opposite dynamic is possible, and international law, through RAIL, can contribute to the construction and securing of universal values.[82] The comparison made possible by RAIL can lead not only to the harmonisation of points of view but also to the acceptance of differences, allowing a better understanding of the choices to be made together.

2.2.2 African approach, guard against imperial international law

'Western people have a tendency to think that colonialism is something which occurred in the eighteenth and nineteenth centuries and is now over. The rest of the world doesn't see things quite the same way.'[83] For many populations and human groups in Africa and around the world, the memory of colonisation and the role of international law in legitimising it are too vivid for them to believe without reservation the former colonial powers when they claim that they have changed and proclaim a new, more intrusive conception of law based on values presented as universal. Seen from Africa, the Arab world, Asia or Latin America, explains Vedrine, it looks a lot like Jules Ferry's 'duty to civilise' or Kipling's 'burden of the white man'.[84] This still is a world in which 'one's chance of getting nabbed for committing a "universal crime" varies with the inverse

81 Roberts (n 15) 179.

82 On this specific 'content-related' function of law, see D Burchardt 'The functions of law and their challenges: The differentiated functionality of international law' (2018) 17 KFG Working Paper Series 7-8.

83 HP Glenn *Legal traditions of the world* (2014) 272. See also G Abi-Saab 'The Third World and the future of the international legal order' (1973) 79 *Revue Egyptienne de Droit International* 31-32; B Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Comparative Law Review* 3. Cf Tomuschat stating that 'colonialism is a word of the past. It does not afflict the contemporary world.' C Tomuschat 'Asia and international law: Common ground and regional diversity' (2011) 1 *Asian Journal of International Law* 221.

84 H Vedrine 'A quoi sert le droit international?' in Ruiz Fabri et al (n 26) 102.

square of the distance from London to Brussels'.[85] The former colonised cannot reasonably be blamed for being distrustful and cautious with an international law that sometimes has been the tool of their enslavement and subjugation.[86]

This is the only way in which to understand, for example, the attachment of states in certain regions of the world, precisely those that have experienced colonisation, to a concept that seems obsolete for others, namely, that of sovereignty. Outside of states and the framework of Western academics, sovereignty, and the institutions that are perceived as attached to it, such as immunities, are still seen as necessary to preserve a freshly and hard-won independence.[87] To overcome the trap of strict voluntarism, which confines the development of international law to almost unanimity of states, and above all minimise the risk that 'nations of power and influence use their special position to browbeat, coax or bribe the less influential members of the world community to support their point of view',[88] African approach and others RAIL offer the possibility of opening an inclusive debate in regional blocs so that the visions of all regions of the world can be adequately represented. For these human groups, there is neither 'good' nor 'benign' imperialism.

Indeed, part of the discourse on international law consists in reducing international law to a face-to-face confrontation between great powers, between ideological blocs that all claim to show the rest of the world the way forward. Critical articles on the dangers of the Chinese conception of international law, US instrumentalism, Russian selectivity, or rigid European formalism are published to justify the accuracy of their own

85 D Kennedy 'One, two, three, many legal orders: Legal pluralism and the cosmopolitan dream' (2007) 31 *New York University Review of Law and Social Change* 642.

86 An excellent overview of the use of international law for and against the liberation struggle of these peoples is presented in von Bernstorff & Dann (n 6). See also IJ Gassama 'International law, colonialism, and the African' in M Shanguhyia & T Falola (eds) *The Palgrave handbook of colonial and postcolonial history* (2018) 564-565.

87 See, among others, A Koagne Zouapet 'Too hard-won to be wasted … Sovereignty, immunities and values: A (sub-Saharan) African perspective' in R Bismuth et al (eds) *Sovereign immunity under pressure. Norms, values and interests* (2022) 77-105; A Koagne Zouapet *Les immunités juridiques dans l'ordre juridique international. Le prisme de la constance* (2020) 123-125, 341-347; Bipoun-Woum (n 27) 145-146; Abi-Saab (n 83) 39-45; SP Sinha 'Perspective of the newly independent states on the binding quality of international law' in FE Snyder & S Sathirathai (eds) *Third World attitudes toward international law* (1987) 28; DP Fidler 'Revolt against or from within the West? TWAIL, the developing world, and the future direction of international law' (2003) *Chinese Journal of International Law* 39-40.

88 Weeramantry (n 40) 419.

vision.[89] One reserves the right to make a plea for the weeds in the name of methodological rigour to support the positions of one's bloc[90] while decrying imperialism in the approach of others when they dare to defend a law that is considered vile or 'scandalous'.[91] We are all busy denouncing the biases of others while carefully avoiding indicating from which position we are talking and thus our biases. When one finally concedes that the approach advocated in fact results in imposing its values and conceptions on others, one immediately adds that this imperialism is benign, justified, and differs from what one decries in others, because it is the bearer of universal values necessary for the well-being and happiness of mankind.[92] In these discourses and confrontations of visions all assuming a messianic role, Africa and the rest of the world seem to be limited to the role of docile disciples, at best faithful apostles, having to simply choose between the options presented, between the imperialism best suited to them.

RAIL appear to be a means of freeing oneself from the law of imperialism and imperial law denounced by Laghmani,[93] an opportunity for the 'eternally colonised' to indicate a 'third way', to participate in the elaboration of international law, and the establishment of international institutions more adapted to their interests and political choices. In

89 See Société Française pour le Droit International (n 25), where the diversity of legal cultures in international law is examined in a face-to-face confrontation between Europe and the United States. J Pauwelyn 'Europe, America and the "unity" of international law' (2006) 103 *Duke Law School Legal Studies Paper*, where the author believes that the future of international law depends on a face-to-face meeting between the United States and Europe, ensuring that 'the American and European model is one of the greatest challenges for us international lawyers in the 21st century'. A von Bogdandy & S Dellavalle 'Universalism and particularism as paradigms of international law' (2008) 3 *International Law and Justice Working Papers*, conceive their task as providing a critical standpoint from which to understand and assess the positions held by international lawyers, but also as supporting 'intercultural dialogue on international law'. However, this intercultural dialogue in the article is limited to an analysis of the ideas of European and American international lawyers.

90 A Pellet 'Le "bon" droit et l'ivraie- Plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)' in *Mélanges Charles Chaumont. Le droit des peuples à disposer d'eux-mêmes* (1984) 465-493.

91 A Pellet 'Values and power relations: The "disillusionment" of international law?' (2019) 34 KFG Working Paper Series 6, 8.

92 For an account of this strategy of 'good' imperialism', see B Delcourt 'International law and the European Union. The liberal imperialism doctrine as a normative framework for the Union's foreign policy' in Ruiz Fabri et al (n 26) 190-202; Berman (n 46) 415-418 430; C Ryngaert 'Whither territoriality? The European Union's use of territoriality to set norms with universal effects' in Ryngaert et al (n 77) 442-447. For these defences of national and regional approaches that are considered to carry a universal law, see Coulée (n 25) 13.

93 S Laghmani 'L'ambivalence du renouveau du *jus gentium*' in Ruiz Fabri et al (n 26) 209-218.

short, African approaches offer resistance to imperial international law by substituting 'professed universal objectivity with actual organic subjectivity'.[94]

2.2.3 African approach, tool of democratisation of the centres of impetus and formulation of proposals

The democratisation movement of which RAIL are the bearer also touches on the agenda of international law, that is, the questions to which international law must provide an answer at a given time. It should be stressed that this agenda has so far been driven solely by the interests and concerns of one part of international society. Primarily a few states dictate how the world order should be and what issues need to be placed on the international law agenda. Indeed, 'what becomes a "crisis" in the world and will involve the political energy and resources of the international system is determined in a thoroughly Western-dominated process'.[95] If the rules of international law are mainly drawn up in a context of fear and to reassure people against them,[96] it very often is Western fears. An illustration of this state of affairs is the current 'crisis' in arbitration, which has led to debates on possible reforms. For a long time, the complaints and protests of Africa countries and other from the south, then the main importers of investments and, therefore, defenders in arbitration proceedings, were inaudible drowned out by the litany of lauders of a system represented as necessary to protect investments. It was not until the countries of the north, faced with these procedures and their national public opinions were moved by opaque procedures, with possible conflicts of interest of the actors, and clearly with an asserted pro-investor bias, that the reform process that the Third World states were calling for was initiated. The flaws and errors of the system pointed out for 50 years by Third World countries and considered irrelevant suddenly took on the character of a crisis requiring immediate action.[97]

94 al Attar (n 44) 123.

95 Koskenniemi (n 45) 34. See also I Ziemele 'Legitimacy of the vision: Central and Eastern Europe' in Ruiz Fabri et al (n 26) 145. This does not prevent certain concepts and notions of international law from having their origin in non-Western regional claims. See notably Rama-Moutaldo (n 66) 150; Yusuf (n 1) 136-155).

96 A Bianchi & A Saab 'Fear and international law-making: An exploratory inquiry' (2019) 32 *Leiden Journal of International Law* 353-354.

97 See M Sornarajah 'The battle continues. Rebuilding empire through internationalisation of state contracts' in Von Bernstorff & Dann (n 6) 174-197; AA Shalakany 'Arbitration and the Third World: A plea for reassessing bias under the spectre of neoliberalism' (2000) 41 *Harvard International Law Journal* 427-429; S Chesterman 'Asia's ambivalence about international law and institutions: Past, present and futures' (2016) 27 *European Journal of International Law* 975-976.

Such a confiscation of the international law agenda is partly due to the illusion of the universality and unity of international law, which in fact leads to the concerns of Western countries, the main places where international law has been formulated and discussed so far, being considered as those of the whole planet. RAIL, including the African approach, challenge this illusion by establishing several centres of impetus and proposals for international law. They allow attention to be paid equally to all regions of the world, avoiding the use of unity as a screen to marginalise the crises of others while universalising their own. It is a question, as Chimni wrote, of giving the same interest to the suffering of human beings whoever and wherever they are, a universal empathy that does not distinguish according to place and origin of suffering and can recognise in the face of the suffering Other, his/her own face.[98]

This consideration of extra-Western dynamics and the admission of a non-Western impulse is necessary not to complete the gaps and incompleteness of the Western approach, but as justified by itself. Ideas put forward by Africa and other regions of the world, to be retained, need not be subject to the condition that the *jus europaeum* does not already contain them or could lead to them. The unity of international law cannot mean setting the European approach as a model for assessing the relevance of an idea or proposal. Indeed, the creation of international law no longer is 'the prerogative of countries bearing the cultural heritage of the West but the common task of all members of the international community'.[99] Africa and other regional approaches should thus make it possible to reverse this burden of proof on non-Western proposals, but also to avoid one of the most dangerous aspects of the hegemony which is 'the ideological certainty it conveys, neutralising human imagination and creativity'.[100]

3 The need for a vigorously open African approach, not a regionalist approach

While the development of an African approach to international law is justified and explained by the need to progressively develop a truly universal

98 BS Chimni 'A just world under law: A view from the south' (2007) 22 *American University International Law Review* 216.

99 Anand (n 52) 103. In the same vein, M Baharvand 'Contribution of the Asian-African Legal Consultative Organisation to the codification and progressive development of international law' (2015) 2 *Journal of the African Union Commission on International Law* 291.

100 al Attar (n 44) 119. See also K Fortin 'How to cope with diversity while preserving unity in customary international law? Some insights from international humanitarian law' (2018) 23 *Journal of Conflict and Security* 358.

international law, this purpose also defines the framework and perspective within which this approach should be thought. The African approach must, then, be an approach within the framework of international law that must not give in to the temptation to retreat into a supposed African own identity. It should remain a means to an end, that is, to develop an inclusive language of international law. Second, this approach must be truly regional, that is, it must reflect a regional consensus and not serve as a framework for the expression of local hegemony or nationalism under the pretext of a model that should inspire the region. Finally, an African regional approach cannot be limited to inter-state dialogue but must be inclusive to take into account all the actors of the 'African community', including non-state actors.

African approach and all RAIL should not be used to reinforce diametrically opposed antagonisms and visions of international law or lead to regionalist or nationalist visions of international law. These regionalist and nationalist approaches, inscribed in an imperialist logic, tend to reject the common model, and want to unilaterally impose their model as the only relevant one. Such approaches, far from enriching international law, lead to a profound indeterminacy of the very principles of international law.[101] Having an African approach to international law does not in any way mean engaging in a kind of ideological proselytism, aimed at convincing people of the rightness of this approach, or even imposing it. Rather, 'it means acknowledging in a pluralist – or realist – way that there may not be just one universal way of understanding and applying international law'.[102]

The challenge and relevance of RAIL thus lie in their ability to develop a regional vision without being self-centred, avoiding being locked into an 'international legal ghetto'. An African approach is neither 'particularism' nor a form of 'group unilateralism'. It should not aim at a form of self-exclusion of a group of subjects from international law but aims at defending identity and common interests in a universal environment whose cosmopolitanism reinforces. There is, therefore, no question of creating an 'autarkic parallel order' or an 'international legal ghetto'.[103] African approach requests an ethical research position that highlights the significance of avoiding exaggerations, glossing over or erasure

101 Jouannet (n 48) 44-45.

102 Roberts (n 15) 22.

103 This follows from the definition of regionalism. See A Remiro Brotons 'Commentaire sur Peyro et Pureza' in Aznar & Footer (n 20) 167; M Kamto 'La codification du droit international en Afrique: méthode et défis' (2015) 2 *Journal of the African Union Commission on International Law* 268.

of uncomfortable truths.[104] It is about knowledge, not commitment: 'Knowledge relies on the speaker's ability to support one beliefs with evidence that, when laid out, will convince everyone sharing the speaker's concept of evidence and the rational argument of the truth thus validated. No emotional attachment to such a truth is needed.'[105] In the discourse of all actors, this requires a real effort to convince their interlocutors of the correctness and relevance of the solutions of 'their' system if they are convinced of it, but also the humility and hindsight necessary to listen to what others have to propose without *a priori* or prejudices, admitting that they may be right.

Similarly, any strategy that would lead to an approach being seen as discredited because it served imperialist purposes in the past would weaken international law rather than strengthen it. The logic of any RAIL should not be to replace one centre with another in the development and application of international law. One cannot, therefore, ask for the pre-eminence of one approach simply because 'the centre of gravity is clearly shifting towards Asia' or the 'relative economic decline [of the United States] accompanied by the collapse of its moral authority'.[106] Beyond the fact that RAIL aim to contribute to the construction of a true universality of democratically elaborated and applied international law, the logic of 'each in turn' would lead to a competition for the control of international law, reduced to being a mere instrument in the hands of the powerful of the moment.

In the same way, it is necessary to get out of the extreme susceptibility of certain international lawyers from the south, decried by Yasuaki, that leads them to consider and consequently reject any Western idea or proposal as bearing the seeds of imperialism.[107] The exactions and abuses suffered in the past are not enough to validate any reform proposal, nor do they totally discredit a region of the world in formulating universally valid principles. African approach and other RAIL must neither allow for the giving of undue weight and importance to a region of the world or some countries in the international legal order nor on the contrary push for the disqualification of a region in the proposal of norms or values simply because they originate from a region or a group in international society. The method to be followed in the elaboration and defence of each regional

104 B Fagbayibo 'Some thoughts on centring pan-African epistemic in the teaching of public international law in African universities' (2019) 21 *International Community Law Review* 188.

105 Koskenniemi (n 40) 499.

106 Chesterman (n 97) 966.

107 See Yasuaki (n 30) 111.

approach must be the 'hospitality' that Immanuel Kant recommended in the elaboration of his cosmopolitan law. It is simply a question of not considering foreign and different approaches as hostile and negating his vision, but simply a contribution to the 'growth of culture and men's gradual progress toward greater agreement regarding their principles' which could 'lead to mutual understanding and peace'.[108] Different approaches do not inevitably mean opposition and conflict between them.

In the other direction, an African approach to international law cannot be used as a pretext for extreme cultural relativism that would lead to a denial of the universality of human rights or the existence of *jus cogens* norms in international law such as the prohibition of torture. It certainly is a question of bringing new perspectives and new conceptions to international law where necessary but in accordance with accepted methodological canons. This is only possible if the African operators of international law, without losing sight of the tensions and interests that run through it, bear in mind that it first and foremost is a question of drawing up a single, universal law for an international community under construction. This means in concrete terms, that 'the promotion of a particular political doctrine in this context should not be ignorant of the prospects of some "common ground" across differing international legal communities on the "reasonableness" of the concepts and principles it sets forth'.[109] Pluralism, which is advocated here through the RAIL, of which the African approach is a part, is an approach that aims to consolidate universal values, define a common basis for the protection of men and women in all countries and not lead to the nihilism of any universal value. Donnely-Lazarov's plea for allowing a 'room for error' for each interlocutor in this debate, and above all tolerance for contrary opinions and convictions is to be supported.[110]

RAIL, including African approach, can only serve the pluralism and diversity of international law while preserving its unity if they are developed under the paradigm of their own 'incompleteness' (*incomplétude* in French).[111] This is a recognition by each approach of its own biases, its shortcomings and, above all, its inability to develop universal international law on its own. It is a weakness that is recognised and assumed, which

108 I Kant *To perpetual peace. A philosophy sketch* (1983) para 367. On this 'hospitality' as a tool of multiculturalism in international law, see Almqvist (n 69) 102-105.

109 Almqvist (n 69) 96.

110 This tolerance, she writes, 'ask us to accept that it may be appropriate to respect autonomy even when the opportunity for human fulfilment is not as advanced in one context than in another'. Donnelly-Lazarov (n 56) 263; using the concept of 'charity', see also Voyiakis (n 49) 77-78.

111 The concept is borrowed from Delmas-Marty (n 57) 396.

is salutary and fruitful because it keeps international law free from dogmatism and facilitates the search for solutions. This incompleteness of each regional approach means flexibility, openness and creativity and, therefore, can guide international lawyers in the search for adequate and universal solutions.

Taking into account diversity and plurality is also a requirement in the identification and expression of regional approaches. African approach can only be relevant and useful for the definition of truly universal and universally-accepted international law if it is itself representative of the dynamics and practices of Africa. This, therefore, requires upstream reflection on the real or supposed plurality of national or other groups' approaches and, in one way or another, a comparative approach. It is essential to elucidate who is or would be the author, where, when and how it would manifest itself.[112] It will then become possible for the promoters of the African approach to ask themselves 'why such an approach is or should be necessary, by analysing what its objectives and purposes are or should be. All these questions also require critical assessment of the existing approach in order to determine whether it needs to be modified, replaced, completed, etc.'[113] It is a question for the promoters of the African approach to defining the delicate duality that must distinguish all RAIL: what unites internally to enable a common vision to be defined; and what distinguishes externally to make this approach specific. This means building a regional coherence.[114] This is not an easy exercise that must be carried out with great rigour.[115] It is imperative in all cases to avoid a nationalist approach which, in fact, would result in transforming African approach into a field for the exercise of the imperialism of regional power. This requires modesty and the ability to get out of the trap of generalisation and analytical shortcuts. It also invites one to get out of the trap of a nationalist approach consisting of justifying and praising the decisions of one's state while criticising or ignoring the contrary decisions of other nations.[116] Only a comparative approach in good faith and without *a priori* should make it possible to move from national to the

112 Ruiz Fabri (n 25) 88-89.

113 Ruiz Fabri (n 25) 89.

114 Ruiz Fabri (n 25) 93-94. On, eg, the lack of regional coherence for a truly Asian approach to international law, see Chesterman (n 97) 960-961.

115 On an illustration of those difficulties, see Messineo (n 25) 903-904.

116 See on what is considered to be a weakness of international lawyers, L Oppenheim 'The science of international law: Its task and method' (1908) 2 *American Journal of International Law* 340-341. On the danger of such practice breaking down the international law system, see WW Burke-White 'Power shifts in international law: Structural realignment and substantive pluralism' (2015) 56 *Harvard International Law Journal* 78.

regional level, without prejudice of comparisons between the later and the universal level.[117]

Finally, for such an approach to be truly African and inclusive, it undoubtedly is necessary for it to recognise that the 'African community' is not limited to states and, therefore, the definition of an African vision cannot be limited to inter-state dialogue. It therefore is imperative in the process of defining this regional approach to examine 'the structures, the components of the region' and to ask 'who are, in Africa, the international actors qualified to produce rules of international law and take charge of its implementation. One important aspect to study should be to ask who are the actors who might be in a position to influence decisions: whether the peoples, the NGOs, or the transnational firms.'[118] An African approach to international law has to have a high degree of legitimacy both among all African states as well as non-sates actors.

4 The challenge of identifying an African approach to international law

The essential question that lies at the forefront of all attempts to identify a national or regional approach to international law can be summarised in one sentence: Do there exist at all something such as an 'African legal tradition' which could form the basis and inspiration for an African approach to international law? While this question should probably be answered in the affirmative by virtue of the aphorism *ubi societas ibi jus*, which assumes that every society necessarily has a particular law, there remains the challenge of identifying the particularities and characteristics of an African legal tradition that is both common to the African space and specific in order to enable it to form the basis of a distinctively African vision. Embedded in this question is a series of other questions that need to be answered by going back, to a certain extent, to the starting point. Thus, one preliminary step for the definition of an African approach to international law would be to specify who is or could be its author, as well as where, when and how this approach would appear.[119] These questions reveal a particular complexity for a continent with a particular history such as Africa, several times colonised, torn between various legal cultures and whose very reality as a single Africa may be questioned. The definition of

117 PF Gonidec 'Towards a treatise of African international law' (1997) 9 *African Journal of International and Comparative Law* 820; Ruiz Fabri (n 25) 88.

118 Gonidec (n 117) 809. See also AO Adede 'Africa in international law: Key issues of the second millennium and likely trends in the third millennium' (2000) 10 *Transnational Law and Contemporary Problems* 368.

119 See Ruiz Fabri (n 25) 89; S Oeter (n 25) 29.

an African approach will therefore have to resolve upstream the question of 'Africanness' itself. Having set out the terms of this question in the first paragraph, this part will examine in the second paragraph the specific issue of African international lawyers whose training and research are still far from meeting the requirements and necessities of an African approach to international law.

4.1 Which Africa? Which Africanness?

To define what an African approach is, one must first determine what Africa is, and this is not as easy a task as it may seem. Geographically, despite relative geographical continuity (leaving aside Madagascar and other islands attached to countries on the continent) the existence of internal and parallel subdivisions can raise doubts about apparent unity. Thus, for example, the category 'Middle East and Maghreb' in certain political divisions can legitimately raise questions about the connection between the positions of a Maghreb state and an undeniably African vision. In the same way, it is difficult to state with certainty that an African, Francophone, Muslim and Shari'a-applying state, when expressing a vision of international law, bases it on its African identity as defined within the framework of the African Union, Francophone as discussed within the Organisation Internationale de la Francophonie, or inspired by a common position defined at the Organisation for Islamic Cooperation, limiting the assessment criterion to the international organisations of which it is a member. The solution proposed by Bipoun-Woum in 1970 solves this problem only imperfectly. He suggests perceiving the region not under the institutional prism, but from the angle of a contract of which the *raison d'être* is the safeguarding of a peaceful order between peoples, and the existence between the contracting states of a particular reason (political, economic, or historical interest in coming together).[120] By placing the will of states at the centre of the definition of African regionalism, Bipoun-Woum thus succeeds in affirming the existence of an African approach to international law common to the states of the African continent based on the affirmation by them of 'a single Africa composed of a mosaic of races, religions, languages and civilisations forming an African personality of its own'.[121] Africanness thus appears as an identity that is not given but constructed.

120 Bipoun-Woum (n 27) 17-18. See also PF Gonidec 'Towards a "treatise of African international law"' (1997) 9 *African Journal of International and Comparative Law* 807-808. Cf Wolfgang Graf Vitzthum 'Quelle est l'identité de l'Europe?' in I Buffard et al (eds) *International law between universalism and fragmentation. Fetschrift in honour of Gerhard Hafner* (2008) 1069-1070.

121 Statement by the Libyan delegate to the Sixth Committee of the United Nations General Assembly on Africa's representation in the ILC (author translation) quoted by Bipoun-Woum (n 27) 38.

The definition of a regional approach or vision presupposes upstream a set of shared values or at least a common legal tradition which the proponents of this approach would seek to promote in international society. However, the question of the existence of an African legal tradition is itself very complex due to the colonial history of the continent and its extreme diversity. A tradition in fact is closely linked to that of identity and the relations between different peoples. It involves a certain extension from the past to the present and the transmission of information deemed essential from generation to generation.[122] The challenge is to find this common information base that is shared by all African socio-cultural groups, even with some variations. Huntington, for example, who considers religion to be a central element in the definition of a civilisation, is not totally convinced of the existence of a religion, or a common African spiritual substratum founding an 'African civilisation', which he says is only 'possible' near other clearly-identified civilisations (Sinic/Chinese, Japanese, Hindu, Islamic, Orthodox, Western and Latin American).[123]

Speaking of an African legal tradition, therefore, is particularly complicated, first because it is necessary to identify the different 'chthonic' traditions,[124] pre-existing before colonisation, which continue to govern the life of certain communities; and, second, to see the interactions that they may have had with the law inherited from colonisation, very often adopted by the state, before embarking on the perilous task of comparing some 50 countries, all distinct from the others. As a result of the many colonial enterprises of which they were victims, African countries belong to many legal traditions, sometimes several within the same state, which makes it particularly difficult for any comparative enterprise to define an African approach. Moreover, in some countries, the process of harmonising the so-called modern law inherited from colonisation and the local rights to which communities are attached is far from complete. In some countries there indeed are, what Glenn calls *pays légal*, that is, the legal tradition of the state inherited from colonisation (common law, civil law) which is distinct and distant 'from the mass of people, who look,

122 See Glenn (n 83) 12-14.

123 SP Huntington *The clash of civilisation and the remaking of world order* (1998) 44-47. Huntington's doubt is all the more open to critique because he is talking about civilisation and not culture. If 'culture' can be applied to the narrowest human groupings to which 'civilisation' would not be appropriate, the latter is much broader and represents the broadest moral or spiritual unity to which a society and, more generally, a group of societies, can be attached. If culture can refer to a segment of civilisation, civilisations are, according to Huntington's own formula, the largest 'we'. See Y Ben Achour *Le rôle des civilisations dans le système international (droit et relations internationales)* (2003) 1-2.

124 On the chthonic legal traditions, see Glenn (n 83) 62-86.

absent a viable alternative, to old ways of sustenance'.[125] This makes the task particularly arduous for any comparatist who would prefer to deal with laws in 'terms of a limited member of families, defined by reference to the different vocabularies, hierarchies of sources and methods built on different philosophical, political or economic principles so as to achieve different models of society'.[126] This has led some to conclude that it is impossible to identify a specifically African legal culture.[127] However, this position is not unanimous and other authors, while acknowledging the extreme diversity of cultures in a continent divided into a multitude of communities, have identified a common background to these laws either in opposition to Western legal cultures[128] or by trying to identify common features of the different cultures by finding a 'meaning in itself' and not in a Western-centric approach.[129]

The easier and simplest approach seems to be the one proposed by Jouannet for a European vision. While stressing that neither the Europe under construction, nor the European Union (EU), nor shared currents of thought and values can prevent the persistence of different cultural, linguistic and national contexts in which particular visions are rooted, she points out that there is a possibility of harmonising, without unification, the different traditions around a partly common legal culture.[130] For a geographical area that is still weakly integrated at the continental level, such as Africa, it is a matter of working towards a political rapprochement of visions within or under the auspices of pan-African organisations such as the AU. As has been written on the question of the existence of an African health law, the existence of regional international organisations with legal competences as well as the legally-affirmed desire for a convergence of national legal systems does indeed justify the existence of a common vision, a shared approach to international law, at least on certain issues.[131]

125 Glenn (n 83) 86. In the same vein, see R David *Les grands systèmes de droit contemporains* (2002) 23; Chiba (n 51) 39-41.

126 Bing Bing Jia 'Multiculturalism and the development of the system of international criminal law' in Yee & Morin (n 56) 683.

127 S Roberts 'Culture juridique africaine. Nature de l'ordre juridique en Afrique' in Capeller & Kitamura (n 50) 179.

128 David (n 125) 441-454. See also the stimulating critical analysis of the use of this approach by K M'Baye in P Sack 'Le droit: perspectives occidentales, perspectives non occidentales' in Capeller & Kitamura (n 50) 45-57.

129 Chiba (n 51) 248-249.

130 Jouannet (n 48) 46-47.

131 M Bélanger 'Existe-t-il un droit africain de la santé?' in D Darbon & J du Bois de Gaudusson (eds) *La création du droit en Afrique* (1997) 361-362.

As with the development of universal law, the existence of this diversity of legal cultures and different perspectives does not prevent from thinking about the bridges that can exist between them and the points of convergence that make it possible to define a specific African vision and approach to international law. Seen from this perspective, the increasing participation of the AU in conferences for the negotiation of international agreements, or even in judicial proceedings, may be a sign of the development of this, even minimal, African approach to international law which therefore confuses itself with 'African public law'. To this, of course, must be added the agreements, treaties, resolutions, and other normative texts adopted within the AU which may be indicative of a certain pan-African vision of international law (see below 5).[132] As for the EU, the reality and the degree of an African approach or vision to international law are tightly linked to the desired degree of integration of the continent.[133]

The progressive jurisdictionalisation of intra-African relations with existing and future courts at both regional and sub-regional levels should gradually enable this African approach to be strengthened, as is the case with the Court of Justice of the EU, not because these judges will develop a separate vision of international law, but because they will strengthen this 'integrated approach' which is intimately linked to the structure of the specific legal order in question.[134] This 'institutional' African approach to international law, therefore, is not the result of a 'social determinism', but of a 'collective free will', crystallised by common political and judicial institutions set up in a consensual manner by states.[135] This institutional approach makes it possible to understand the 'complex essence' of the African approach to international law: According to the Bipoun-Woum formula, it draws elements of 'feeling' a little from culture, a little from history (solidarity and memory of common domination) and elements of 'reason' from economic necessity. It thus is at the 'crossroads of past, present and future' of modern Africa as imagined by the common African institutions.[136] In this sense, 'Africanness' as the basis of the African approach to international law can be identified with a 'militant will' of which the theoretical foundation has not yet been fully developed but

132 On the choice of a pan-African rather than an African vision, see Yusuf (n 1) 13.

133 See Ruiz Fabri (n 25) 92.

134 L Burgorgue-Larsen 'Existe-t-il une "approche européenne" du droit international? Eléments de réponse à partir de la jurisprudence de la Cour de justice des communautés européennes' in Société Française pour le Droit International (n 25) 276.

135 See Ph Weckel & A Rainaud 'Union européenne et développement d'une culture européenne de droit international' in Société Française pour le Droit International (n 25) 298.

136 Bipoun-Woum (n 27) 31.

which is expressed in terms of awareness, particularly of the needs of its integral development which conditions its social future.[137]

The debate on Africanness is particularly complex for international lawyers. At what point can a publicist, within the meaning of article 38 of the Statute of the International Court of Justice (ICJ), be considered 'African' and considered in an African approach to international law? Is it because of the topics covered? Or is it in consideration of the passport? This second option should be ruled out immediately. Indeed, there is no reason, unless an unacceptable atavism or heredity is claimed, why the promotion and development of an African approach to international law should be the exclusive prerogative of the natives of Africa.[138] Why and how would a Sierra Leonean who has done all his or her studies in Great Britain be better at conveying an African vision of international law than an Australian who has devoted most of his or her research to the application of the African Charter on Human and Peoples' Rights (African Charter)? As with all other regional approaches, it is not enough to have a passport to have the correlative regional approach; it is not even necessary to have one from the region concerned to espouse and promote a RAIL. In fact, it is not impossible that, as in other parts of the world and even in some countries, there are as many approaches to international law as there are international lawyers with African passports, whether they are based in Africa or outside the continent. However, this diversity has not prevented the identification elsewhere of a certain school that dominates the training of international lawyers and the discourse of academics.[139] The question therefore is whether there is an African school of international law that can provide the basis and then popularise an African approach to international law.

4.2 An 'extroverted' international law of 'globalised' international lawyers

In the aftermath of independence, many African international lawyers, like many others from the Third World, took part in the 'battle for international law' by insisting that the African vision and interests be taken into account in a very Eurocentric international law. Taslim Olawale Elias, Mohamed Bedjaoui, UO Umozurike, Georges Abi-Saab and Francis Dieng, to name but a few of the best known, have each in their own way and despite their different approaches, advocated a profound change in the international

137 Bipoun-Woum (n 27) 46. This idea is inspired by Nkrumah's 'consciencism'. K Nkrumah *Consciencism: Philosophy and ideology for decolonisation* (1964) 122.

138 Ruiz Fabri (n 25) 90.

139 See Messineo (n 25) 904-905.

legal order and how international law is developed or applied.[140] While there is no doubt that these precursors played a fundamental role in the diversification of international law and sowed the seeds for the conceptual and methodological development of an African approach to international law, one can legitimately question the preservation of their theoretical and ideological heritage. It undoubtedly is difficult to make an assessment here of the evolution of African international legal thinking over the last 60 years. However, a quick overview reveals that one of the main challenges for the development of a true African approach to international law remains the outward orientation, or even a Westernisation of the study, practice and research of international law in Africa and by Africans.

As far as the study and teaching of international law are concerned, these are still dominated in Africa by a massive importation of concepts and knowledge. This is due, first, as Roberts has well demonstrated, to the strong emigration of African students to 'Western knowledge centres'. While a significant proportion of African international law students are trained in their home countries, a considerable and very important fringe, especially those who have the ambition to write doctoral theses, precious sesame to become teachers in their own countries, choose to continue their studies in the West. Except for South Africa, which attracts students mainly from Southern Africa, the future African doctors mainly favour Great Britain and the United States for the English-speaking population, and France for the French-speaking population.[141] However, as Roberts wrote, in these universities, studies and research are exclusively Western-centric or even a resolutely national-centric approach in the case of the United States, with practically little space given to African practice and discourse in international law.[142] If asked the question that Roberts proposes to any international lawyer, 'whose international law is it',[143] a straightforward answer would be that they study and teach 'Western international law'.

In the second place, the situation is no different for those who are trained and study on the continent. The research and teaching of international law are conducted in a totally outward-looking manner, also focusing on Western practice and visions conveyed by the textbooks of Western

140 See notably Bernstoff & Dann (n 6) 25-28; Gevers (n 9) 383-403; A Brunner 'Acquired rights and state succession. The rise and fall of the Third World in the International Law Commission' in Bernstoff & Dann (n 6) 124-140; Landauer (n 8) 318-340; Özsu (n 8) 341-357.

141 Roberts (n 15) 53-58.

142 Roberts (n 15) 62-68.

143 Roberts (n 15) xiv.

authors that are mainly used there. The result is that, despite the difference in location or passports, the international lawyers who are trained or teach in Africa have a predominantly Western-centric approach to international law. Thus, the maintenance of a Western-centric discourse of international law is not always unilaterally imposed but is co-authored.[144] The curriculum in many African universities remains 'steeped in Eurocentric canons and does little to disrupt the hegemonic assumptions that place European thinkers at the heart of the development of international law', neither does it attempt to provide a critical discussion around 'important epistemologies that emerged from diplomatic interactions between and among pre-colonial African empires'.[145] In addition, the consideration of works such as Third World Approach to International Law (TWAIL), New Approaches to International Law (NAIL) or Feminist Approaches to International Law (FtAIL) 'which have exposed the non-neutral underpinnings of international law, remain marginal or non-existent'.[146] This lack of educational diversity affects the sources and approaches that African scholars use when identifying and analysing international law, both in regional and international jurisdictions. As written, teaching international law without including the national and regional perspective, at the end of the day, is problematic from a practical point of view and contributes to students' lack of realistic sense of the impact or relevance of international law.[147]

This 'denationalised' and 'deregionalised' approach to international law is justified by the appropriation by African international lawyers of the myth of the universality and unity of international law mentioned above. It is this belief in a falsely universal law, in addition to the Western-centric training mentioned above, that generally explains the rarity of an African approach in international jurisdictions,[148] and the normative borrowings,

144 See Fagbayibo (n 104) 171-172, 182-183; K-G Lee 'The "reception" of European international law in China, Japan and Korea: A comparative and critical perspective' in Marauhn & Krieger (n 31) 437-438; Yasuaki (n 30) 219; Capeller (n 50) 18.

145 Fagbayibo (n 104) 172.

146 As above.

147 Roberts (n 15) 155; Fagbayibo (n 104) 182.

148 A study of the legal concepts used in ICJ decisions tends to reveal that judges use references to them that systematically refer to principles originating in Western legal spaces despite the progressive enlargement of the Court to include judges from the Third World. S Ouechtati 'L'hétérogénéité dans la justice internationale. Le cas de la Cour internationale de justice' in Ruiz Fabri et al (n 56) 426-427. In the same vein, KT Gaubatz & M MacArthur 'How international is "international" law?' (2001) 22 *Michigan Journal of International Law* 261. For an interesting study on legal culture as a problem at the International Criminal Court, see also C Reveillere 'Quelle place pour la critique à la Cour pénale internationale? Analyse grammaticale de ce qui fait la force d'une institution faible' (2020) 105 *Droit et Société* 293-297. On the Western hegemony

or even abusive mimicry within African regional jurisdictions. The strong presence of the jurisprudence of other human rights protection bodies, in particular the European Court of Human Rights (ECtHR), which is so redundant in the jurisprudence of the African human rights judge that one can legitimately be concerned about the loss of the African system's specificities, has been criticised. While one can understand the refusal to lock oneself into a register of cultural particularism which explains the use of exogenous sources, one can be more dubious in the face of this unbridled quest by African judges for the legitimisation of their decisions in the jurisprudence of other institutions.[149] In research, this tendency is accentuated by the 'discursive policies' of international law, which are defined by a region of the world on its own values and visions.

Indeed, each discipline is governed by rules of formation that control the production of discourse and define its order of truth, its domain of validity, normativity and actuality.[150] It is these rules and policies that constitute 'the syntax and the grammar of the discipline, the rules of language that every proposition or statement must reactivate to be accepted as valid, comprehensible or respectable (that is, to be "within the true")'.[151] International law is no exception to the rule, and any international lawyer, to be recognised as a member of the community, must necessarily refer to concepts, objects and ideas recognised by the community, use the concepts in a manner deemed appropriate, reflect on themes perceived as falling within the field of international law, and adhere to a certain aesthetic of argument as well as the formal requirements of their presentation. It is only by submitting to this rigorous protocol that one's subject matter will be able to access the 'scientificity' that allows his or her peers to assess the 'truthfulness' or 'falsity' of his or her positions. No one can claim access to or claim to be part of the 'invisible college' unless he or she submits to these rules, which set the parameters for the production, dissemination

of training of judges, see A Marissal 'Cultures juridiques et internationalisation des élites du droit. Le cas de la Cour internationale de Justice' (2020) 105 *Droit et Société* 355.

149 A Koagne Zouapet 'L'activisme judiciaire supranational en Afrique. Une tentative de systématisation' (2020) 28 *African Journal of International and Comparative Law* 38-42. See also AD Olinga 'Les emprunts normatifs de la Commission africaine des droits de l'homme et des peuples aux systèmes européen et interaméricain de garantie des droits de l'homme' (2005) 62 *Revue Trimestrielle des Droits de l'Homme* 499-537; AD Olinga *'L'influence de la jurisprudence de Strasbourg sur l'interprétation de la Charte africaine par la Cour africaine des droits de l'homme et des peuples' in Mélanges en l'honneur de Frédéric Sudre, Les droits de l'homme à la croisée des droits* (2018) 525-536.

150 Prost (n 32) 151.

151 As above.

and validation of juridical discourse in international law.[152] This is the case in practically all scientific fields. The problem in international law is that these protocols and standards have been defined unilaterally by one part of the world, for a 'science' that is international in scope and is applied and controlled for the most part by the members of the dominant legal cultures that have defined these discursive policies.

This control is carried out through the places where knowledge is produced and validated, which are overwhelmingly dominated by Westerners. Norms and standards are defined on the basis of a duopoly of the civil law and common law legal cultures. The most reputable publishing houses, which consequently give a halo of scientific credibility to publications, are practically all based in European countries with mainly Western collection directors and editorial board members, or academics based in Western universities. The same is true of academics' journals, which are dominated by Western academics and practitioners. Roberts points out that the Western dominance on these editorial boards will in all likelihood result in the normalisation of certain Western perspectives. Comparable Western dominance does not characterise the editorial boards of international law journals in other parts of the world, such as African international law journals, which for the most part feature a high proportion of Western-based academics in their editorial boards.[153] Moreover, most of these African journals are published by European publishers. Thus, African scholars that are compelled by institutional requirements (for any promotion, academic responsibility, funding of research projects) to publish in 'leading international journals' have 'to conform to Eurocentric canons if they want their articles published'.[154]

To convince editorial boards of the 'scientificity' of their position and to be in line with 'the truth' of international law, African scholars, especially those who do not have enough notoriety to allow themselves a certain amount of recklessness, must take care to present their arguments 'through the works and ideas of the "great" English and German scholars'. Short quotations of those masters are then 'embellished' with more precise contents of a "second echelon" of scholarship, usually occupied by Spanish authors'.[155] Peer review, even anonymous, obliges every writer of

152 Prost (n 32) 153.

153 Roberts (n 15) 109-110. See the criticisms and confusion of a librarian, LL Jacques 'What's wrong with international law scholarship: Gaps in international legal literature' (2008) 35 *Syracuse Journal of International Law and Commerce* 172-173.

154 B Fagbayibo 'A critical approach to international legal education in Africa: Some pivotal considerations' (2019) 12 *Third World Approaches of International Law Review Reflections* 4.

155 Becker Lorca (n 22) 289.

an article to find a balance between the original ideas they may have and the obligation to express themselves in the forms and vocabulary accepted by the 'orthodoxy' of the discipline. Therefore, it is necessary, to ensure a true universality of international law, on the one hand for these journals to diversify their editorial and scientific committees in order to enable the dissemination of 'alternative truths' to the dominant ones; on the other hand for Africans and all those interested in an African approach,[156] both to develop an African vision and to equip themselves with the tools (journal, publishing house, collection from established publishers) to disseminate it.

One essential factor to keep in mind in the teaching of international law is that 'what counts as international law depends in part on how the actors concerned construct their understandings of the field and pass them on to the next generation'.[157] It is the great responsibility of African international lawyers to contribute to the enrichment of international law by using traditions, learning and wisdom from Africa. A truly African approach requires a process through which teachers and researchers provide students with the opportunity to study the world and its people, concepts and history from an African world view. This, as Fagbayibo underlines, does not imply that the contribution of other civilisations should be expunged from the syllabus or encouragement of positioning African civilisation as superior to others, but rather an exercise that aims to widen the knowledge base of students by dispelling the 'myth of universalism'.[158] The need and modalities for developing an African approach to the teaching, practice and research of international law are the same as those already outlined some 40 years ago:[159]

> We must give attention to the teaching of international law in Africa. In so doing we must direct our focus on new perspectives and conceptions and examine in detail African aspirations and practice and their relationship to the totality of international law and relations remembering always that the target is a system not only for Africa but for the whole world.

156 African international lawyers and academics can undoubtedly draw inspiration in this respect from the strategy of their Latin American colleagues during the 19th century to develop and popularise an American approach to international law. See Becker Lorca (n 52) 482-483.

157 Roberts (n 15) 2.

158 Fagbayibo (n 104) 185.

159 TA Aguda 'The dynamics of international law and the need for an African approach' in K Ginther & W Benedek (eds) *New perspectives and conceptions of international law. An Afro-European dialogue* (1983) 8-11. See also K Ginther 'New perspectives and conceptions of international law: Introductory remarks' in Ginther & Benedek (above) 1-7; K Ginther 'The teaching of international law under a developmental aspect: The relevance of African cases and materials' 216-224; 'Concluding and press statement' 241-243.

5 The progressive emergence of an African vision of international law

When examining the vision of international law developed so far by African states, it is clear that, from the moment they accede to international sovereignty, it is tainted by political elements that are manifest both in its elaboration process and in its modes of expression. This has been explained by the youth of these states: Any birth of a state, any territorial mutation, is a matter of history and remains indissolubly linked to political factors; the more recent it is, the more politics conditions and taints the legal and the process of law making bears the mark of it.[160] The progressive formulation of the African approach to international law thus bears the imprint of the major problems that agitate the political life of the Continent and that preoccupy its leaders: yesterday apartheid, decolonisation or state contracts; today unconstitutional changes of government, the repression of international crimes or economic development. On each of these points, the African approach is marked by the adoption of two categories of norms highlighted by Yusuf: first, a category of truly innovative and original norms that are specific to Africa; and, second, a category of norms adopted as a complement to the universal framework, whose gaps they aim to fill, broaden the scope of application or take account of regional specificities in their implementation in Africa.[161]

Beyond the complexity and intertwining of the situations, another categorisation is possible, not exclusively that of Yusuf, which underlines the two complementary dynamics that may be identified, one intra-regional and the other, which can be described as 'external', concerning relations with other countries in the world. One of the characteristic features that can be identified in each of these dynamics is an affirmed desire for protection enshrined in the African vision. At the intra-regional level, this involves the progressive development of a framework for the protection of populations and communities, including against the state. The protection of the human person and the establishment/preservation of a framework that can facilitate this protection sum up the spirit of this African regional law, despite the fluctuations that can be observed. In relations with the outside world, protection becomes self-protection. Sixty years after independence, the trend highlighted by Bipoun-Woum is confirmed: Africa, freshly emancipated from the colonial yoke, is reluctant

160 Yakemtchouk (n 2) 12.

161 Yusuf (n 1) 185. See also PF Gonidec 'Existe-t-il un droit international africain ?' (1993) 5 *African Journal of International and Comparative Law* 249.

to provide itself with a new protector, whatever the motives.[162] This ambivalent protection does not go without a certain tension sometimes between the desire for self-protection against the outside world and the desire to protect the populations within it, when, for example, it is the state apparatus that is responsible for serious human rights violations. This part will try to brush very succinctly these two movements.

5.1 An intra-African law of solidarity and protection

This African intra-regional law corresponds to what has been referred to as 'public law of Africa'. It is not a law distinct from international law, from which it has no claim to be distinct, but a regional legal system which 'is designed to cater to the specific needs and aspirations of the peoples of Africa and to regulate relations among Africa states in such a manner as to contribute to their unity and solidarity in conformity with the ideals of pan-Africanism'.[163] This definition is similar to that proposed for 'American international law'.[164] Despite its primary function, which is to regulate relations between African states or to govern other intra-regional relations, this regional international law or public law of Africa nevertheless remains international law and has a vocation for universality. Indeed, 'in view of the rules and principles of this regional public law, it cannot be denied that they may give rise to international legal norms of much wider application, thus enriching universal international law'.[165] By crystallising the practice and *opinio juris* of the 50 or so African states brought together within the AU, these AU instruments are therefore an important element to be taken into account not only in the identification of customary law, but also in any reflection on the development of international law in that they necessarily convey the vision of these states of international law in a specific field.

The logic of promoting African solidarity and protecting this regional law was instilled from the very beginning of its elaboration. Indeed, grouped within the Organisation of African Unity (OAU), the young African states have placed at the heart of the action of this international organisation and their mobilisation, the promotion of African unity, the decolonisation of African territories still under foreign domination, and the improvement of the living conditions of African populations.[166] Article 3 of the OAU Charter, for example, required of African states 'absolute

162 Bipoun-Woum (n 27) 6.

163 Yusuf (n 1) 18.

164 See Green (n 60) 10.

165 Yusuf (n 1) 19.

166 See Preamble, OAU Charter, 25 May 1963.

dedication to the total emancipation of the African territories which are still dependent' and 'affirmation of a policy of non-alignment with regard to all blocs'. The same logic of solidarity, independence and protection of the rights of the populations can be found in articles 3 and 4 of the Constitutive Act of the AU, which set out respectively the objectives of the Organisation and the principles that should guide its action.

Going beyond the inter-state and sovereignist approach of the OAU Charter, the Constitutive Act of the AU reflects an evolution towards a more anthropocentric approach to international law, at least in the intra-regional framework with a stronger affirmation of the protection of the dignity of the human person living in Africa and of African peoples. Thus, as the African Commission on Human and Peoples' Rights (African Commission) has affirmed, the rights of peoples in Africa are not only protected against external aggression, oppression or colonisation, but also against internal abuses that may be committed by the state.[167] As a sign of this new impetus for a more protective law for people, including against their government, article 4 of the AU Constitutive Act sets out new principles that constitute a rejection of the OAU's sacrosanct principle of non-interference in internal affairs. These include the prohibition of unconstitutional changes of government; participation by African peoples in the activities of the organisation; condemnation and rejection of impunity and political assassination; respect for democratic principles and good governance; the right of the Union to intervene in a member state in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity; the right of member states to request intervention from the Union in order to restore peace and security; the promotion of social justice to ensure balanced economic development; and the promotion of self-reliance within the framework of the Union.

To these important innovations set out in the AU Constitutive Act and reinforced by numerous specific texts, one must add the strengthening of the penal framework against crimes considered the most serious, again with new proposals. Thus, Africa has not only established the first regional court with jurisdiction in criminal matters but has also expanded the list of international crimes. The future African Court of Justice, Human and Peoples' Rights will have jurisdiction not only for the four 'classic' international crimes of genocide, crimes against humanity, war crimes and crimes of aggression, but also for ten other crimes: the crimes of unconstitutional change of government, piracy, terrorism, mercenaryism, corruption, money laundering, trafficking in persons, trafficking in drugs,

167 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 222.

trafficking in hazardous wastes and illicit exploitation of natural resources (article 38A of the Statute of the African Court of Justice and Human and Peoples' Rights).

The strong symbol of this new African approach to international law at the regional level undoubtedly remains the AU's right of intervention enshrined in article 4 (h) of the Constitutive Act, which makes it the only international organisation with the statutory right to intervene in a member state in grave circumstances arising from war crimes, genocide and crimes against humanity. Beyond the affirmation of the overcoming of the rigid intergovernmentalism of the OAU symbolised by non-interference in the internal affairs of states, the consecration of this right of intervention marks a real paradigm shift in the African vision of the international legal order, or at least in Africa, the importance of which is not only symbolic. Yusuf thus highlights four important legal consequences that are significant for the identification of an African approach to international law and which it seems useful to reiterate here. First, by conferring such a right on the pan-African organisation in the event of serious crimes, African states appear to have resolved the tension that may have existed between sovereignty values-based and the human rights values-based in favour of the latter. Sovereignty can no longer be used as a cloak in Africa to commit such crimes with impunity. Second, the right conferred on the AU is not subject in the Constitutive Act to prior authorisation by the UN Council. The AU has the necessary powers to assess the grounds for possible intervention. 'As the AU continues to develop African public law rules on intervention, it will become more difficult, both legally and politically, for outside powers to block an African solution to African problems in the Security Council.'[168] Third, this principle has an impact on the relationship between the AU and the Security Council and establishes a new relationship in the maintenance of peace and security as well as in the field of humanitarian intervention. Fourth, and finally, with this explicit recognition of the right to intervene on humanitarian grounds, African states are enshrining in positive law a norm that has hitherto been proposed and debated only on moral and ethical grounds.[169]

The other principle, symbolic of this African vision of international law, undoubtedly is the prohibition of unconstitutional changes of government, which is the manifestation of taking into consideration the social and political context to develop regional law. Indeed, one of the

168 Yusuf (n 1) 191.

169 Yusuf (n 1)191-192. See also R Cole 'Africa's approach to international law: Aspects of the political and economic denominators' (2010) 18 *African Yearbook of International Law* 292-298.

most significant developments in constitutional and international law in Africa since independence has been the occurrence of a series of *coups d'état* and other forms of unconstitutional changes of government. Given the negative impact of internal crises linked to political competition on human rights, development efforts and the facilitation of the most serious crimes, African regional law has gradually given a central place to issues of governance, democracy and good public administration and has given impetus to governance reform processes within African states. Thus, for example, the African Charter on Democracy, Elections and Governance adopted in 2007 establishes that accession to power through non-democratic means no longer is a matter of domestic jurisdiction but a situation that triggers the adoption of certain measures or sanctions by the AU. These provisions have not gone unheeded, and the AU has already imposed sanctions upon some states due to changes in their leadership following *coups d'état*.[170] Gradually, therefore, the AU succeeded in overcoming the criticism levelled at the OAU for making conventions that were nothing more than projective constructions based on an ideal law that was essentially forward-looking, a law that gave an imaginary representation of reality and was intended to mask concrete situations.[171]

This desire for better protection of the human person in Africa and, therefore, the adoption of a more anthropocentric approach to international law at the regional level, does not prevent African states from being wary of and reserved for similar initiatives coming from organisations they consider foreign.

5.2 An 'external' international law of resistance and liberation

A certain resistance to existing international law is part of the DNA of the African vision of international law. As noted above, Africans did not hesitate, as soon as they gained independence and had the opportunity to make their voice heard on the international scene, to decry international law made without their knowledge and which very often served to subjugate and dominate them (see 2.2 above). This informed participation in the non-aligned movement, or the positions adopted at the first conference of independent African states in Accra in April 1958. These actions were all guided by a logic of emancipation and the will to be heard and respected as

170 See, among others, Communiqué of the African Union Peace and Security Council (AUPSC), 9 December 2010, AU Doc.PSC/PR/COMM.1(CCLII); Communiqué AUPSC, 17 March 2010, AU Doc.PSC/PR/COMM.(CCXXI); Communiqué of the AUPSC, 19 February 2010, AU Doc.PSC/PR/COMM.2(CCXVI).

171 Gonidec (n 161) 255-256.

fully-fledged actors in international society.[172] The rejection and resistance approaches were applied to those norms of international law supporting and legitimising colonial enterprise and imperialism in Africa. This legacy of the past strongly permeates the African approach to international law, which gives a very special place to sovereignty, established as a categorical and quasi-absolute imperative. The principles that African states attach to it, such as the equality of states, territorial integrity, self-determination of peoples and non-intervention, thus occupy a central place in their vision of what the international legal order should be. With the emphasis on sovereignty and institutions as immunities, African states, like many other developing countries, aim to use the existing international law to craft a more pluralistic, tolerant international system where new 'missions of civilisation' in the name of certain values will not lead to unilateral military or judicial actions against them. They thus emphasise the exclusivity of territorial jurisdiction and consider that a state is only bound by rules to which it has expressly consented, either through the conclusion of a treaty or by formally recognising the international validity of a customary rule.[173]

According to Yakemtchouk, this restrictive attitude can be explained by psychological factors. Independence and sovereignty, considered the supreme objective during the hard years of liberation and conquered sometimes at a heavy cost of blood and human life, are precious goods that must be kept intact and whole, and which cannot be renounced without betraying the memory of the martyrs sacrificed.[174] To this must be added the aforementioned past instrumentalisation of international law and the fear of alienation of decision-making power. Africans are aware of the vulnerability of their young states, and of the fact that their political independence is not sufficient to ensure their real independence from former colonial and other hegemonic powers of international society.[175] International law indeed is not just an instrument of social regulation. It is used by states, according to their interests and as the case may be, as an object for promoting and transforming the world politically, economically, socially or to fight against what they consider to be inequalities. In this perspective, it has become a new mode for the exercise of power since it requires putting in place specific regulatory techniques and practices.[176]

172 See Yusuf (n 1) 95-97. See also Bipoun-Woum (n 27) 66-71.

173 Yakemtchouk (n 2) 18-19. For an account of the strategy and means of this resistance within the United Nations, see Yusuf (n 1)102-141.

174 Yakemtchouk (n 2) 19. In the same vein, see Cole (n 169) 292.

175 Yakemtchouk (n 2) 19.

176 Jouannet (n 54) 57. See also Burchardt (n 82) 11-13; Jorgensen (n 7) 19-24.

If this reality is admitted, it is possible to understand, without necessarily justifying it, some (not all) of the attitudes and positions of African countries as 'an effort to have their normative experiences better reflected in international law destined to regulate [them]. To use a Hegelian expression, [they are] carrying out [their] own "struggle for recognition".'[177] This willingness to oppose in order to be recognised is clearly expressed in the oppositions of the OAU/AU to the Security Council both during the sanctions against Libya at the beginning of the 1990s, and the referral of situations concerning serving heads of state to the International Criminal Court (ICC). Beyond the divergence of approach, the pan-African organisation criticised the Security Council for ignoring its proposals in favour of the interests of Council members.[178] This is what has been called 'regionalism with a universalist character' constituted as an attempt by its members to free themselves from imperialism. It does not aim at distancing itself from international society but, on the contrary, at claiming the equal sovereignty of its different members to be able to participate fully in it.[179] The same logic can be found in the regional initiative for the codification of international law.[180]

This 'international law of resistance' manifests itself in particular through the elaboration within the African regional framework of legal instruments which, although limited *ratione loci* to Africa, clearly have foreign partners as their addressees and therefore affect relations with them. These instruments thus enable African states either to insist on and enshrine positions defended during the negotiation of universal instruments and which would have been discarded, or to initiate the reform of a universal legal framework that they contest. Thus, the conventions and legal instruments adopted in Africa very often constitute an expression of the position of African states towards a corresponding norm of international law. This is the case when the African rule lays

177 Lee (n 144) 442. See also Burke-White (n 116) 3; Ben Achour (n 123) 157-158.

178 See Tshibangu Kalala 'La décision de l'OUA de ne plus respecter les sanctions décrétées par l'ONU contre la Libye: désobéissance civile des États africains à l'égard de l'ONU' (1999) 2 *Revue Belge de Droit international* 545-576; M Kamto 'L'"affaire Al Bashir" et les relations de l'Afrique avec la Cour pénale internationale', in *Liber Amicorum Raymond Ranjeva. L'Afrique et le droit international: variations sur l'organisation internationale* (2013) 147-170; O Corten 'L'Union Africaine, une organisation régionale susceptible de s'émanciper de l'autorité du Conseil de sécurité? *Opinio juris* et pratique récente des Etats' in Aznar & Footer (n 20) 203-218. See more generally on opposition in international law, I Ley 'Opposition in international law – Alternatively and revisibility as elements of a legitimacy concept for public international law' (2015) 28 *Leiden Journal of International Law* 717-742.

179 M Forteau 'Commentaire sur de Hoogh et Pullkowski' in Aznar & Footer (n 20) 89.

180 M Kamto 'La codification du droit international en Afrique: méthode et défis' (2015) 2 *Journal of the African Union Commission on International Law* 256.

down a general principle or when, having a special purpose, it results from the modification of an old rule, very often laid down by European powers, and hitherto considered 'customary'.[181]

One example is the broad definition of the term 'refugees' in the OAU Refugee Convention compared to that of the 1951 UN Convention. According to Yusuf, this broad definition is a direct response to the specific problems faced by African states at that time. During that period, some African countries were occasionally subjected to aggression due to their support for liberation movements. Thus, the reference to 'external aggression, occupation and foreign domination' was designed to both freedom fighters and their supporters. In short, the deliberate decision on the part of the drafters of the African Convention to omit several elements of the refugee in the 1951 Convention effectively broadens the class of persons who could qualify for refugee status under the African Refugee Convention.[182]

The most symbolic example of this African approach undoubtedly is the Bamako Convention on the ban of the import into Africa and the control of transboundary movement and management of hazardous wastes within Africa. The Bamako Convention was elaborated as a direct response to gaps in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal that were considered prejudicial to the interests of African states concerning the definition, import and dumping of hazardous waste, the liability regime applicable to violators of rules prohibiting the former, and the scientific standard used to determine a breach of such rules.[183] Taking into account the situation of African states and in particular the danger of importing these hazardous wastes, the Bamako Convention enshrines the positions defended by African states and not included in the Basel Convention, in particular a longer list of hazardous wastes, the inclusion of radioactive waste in the scope of the Convention, broader rules for unlimited liability, and the enshrinement of a strict precautionary principle to be applied by states. Significantly, the Bamako Convention establishes an absolute ban on the importation of all hazardous waste into Africa from states that are not parties to the Convention. Thus, only intra-African trade in hazardous waste is permitted under the Convention, while the Basel Convention

181 Bipoun-Woum (n 27) 131.

182 Yusuf (n 1) 222-224; 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* 341-345.

183 Yusuf (n 1) 245.

only prohibits the import of hazardous waste to the state parties that have prohibited the import of such wastes.[184]

The Pan-African Investment Code (PAIC) is another illustration of this African approach to international law of resistance against an international investment law that so far seems to protect foreign multinationals to the detriment of national interests. Reflecting this rejection of an unbalanced legal framework in favour of foreign investors, the PAIC requires that investments are now only protected if they truly contribute to the sustainable development of host African countries instrument. PAIC thus is an African tuning and recalibrating of international investment law with innovations as direct obligations on investors, for example, or the specific exceptions to the Most Favourable Nation and National Treatment standards, or the complete omission of a Fair and Equitable Treatment standard.[185]

As indicated at the beginning of this part, these African regional approaches, at the same time as constituting a challenge to the existing legal order, are also an invitation, proposals for the evolution of international law in a direction that seems, at least to its initiators, the way forward. Indeed, at the very least, these contributions signify the emergence of a regional approach of international law. However, although these rules and principles often are only applicable among the African state parties to the particular treaties, they have the capacity to make an impact on future developments in international law outside the African regional context. That is why these are only proposals, the future if which will depend on both the counter-narratives and norm contestations opposing these emerging norms, and to the non-implementation of some of the norms by the norms creators themselves, as this might signify a certain ambivalence or caution.[186] Whether, therefore, it is a question of developing a purely inter-regional law or, on the contrary, a regional law aiming to have an impact beyond the strictly African framework, it is always a contribution to the development of international law, of which the African approach undeniably is a part.

6 Conclusion

For Africans, the development of a regional approach represents much more than an instrument of resistance and a contribution to the enrichment of the universal legal heritage. It is also a framework for the expression of

184 Yusuf (n 1) 246-248.

185 See the analysis of Mbengue & Schacherer (n 53) 549-569.

186 Maluwa (n 181) 411.

the 'African personality' once denied, today if not contested, at least still ignored by some. In this context the definition of a regional approach appears, as the means to continue the struggle engaged in the aftermath of independence, that of ensuring that Africa is no stranger to international law, of which it remains convinced in spite of everything that it is the only guarantee of peaceful cooperation between peoples and civilisations.[187]

This African vision of international law is still essentially formulated by states, mainly within the framework of regional organisations, and is still struggling to materialise in the teaching, research and practice of international lawyers. Therefore, it is necessary for the latter and, in particular, academics, to carry out an in-depth reflection on the requirements of an approach to international law, considering both the necessary unity of the continent and its diversity, in order to advance both the development of international law in Africa by including social needs and the development of a truly universal law bearing African values and interests. The first step would already be the elaboration of a genuine treatise on international law in Africa, which would explore in particular the African philosophy of international law, the practice of African states and organisations, the modes of production of international law in Africa, the places, and fields of public law in Africa.[188]

It is true that research on these issues in Africa remains handicapped by the difficult access to jurisprudence, the practice of African states and even the preparatory work for conventions adopted on the continent. Regrettably, the establishment of the International Law Commission of the AU has not resulted in greater popularisation of African practice in international law. Africa's absence in international law textbooks and international judicial decisions is also the result of this lack of a compendium providing access to the practice of both African states and international organisations. Beyond this essential work of collecting and popularising African practice, the International Law Commission of the AU should work more actively on teaching and researching in international law in Africa. This means working closely with the continent's academic institutions in defining training curricula adapted to the African vision, identifying priority research areas, and supporting research. It is only by developing a clear African approach to international law that African international lawyers, African states and organisations will be able to fully participate in the development of truly universal international law, applicable to the international community of which they are full members.

187 Bipoun-Woum (n 27) 25-26.

188 For proposals on the content of such a treatise, see Gonidec (n 117) 807-821.

2 La construction du droit international africain à l'aune de la prégnance du droit international universel

Firmin Ngounmedje et Carole Valérie Nouazi Kemkeng

1 Introduction

Avant 1960, la plupart des États africains avaient le statut de 'territoire sous tutelle' en raison de leur absence de souveraineté. En effet, pour les colonisateurs, les Etats africains étaient incapables de prendre en main leur devenir politique, économique et juridique, c'est cette incapacité qui justifia leur dépendance. Cet état de chose justifie par ailleurs la pénétration du droit international sur le continent africain. Toutefois, ce droit sera remis en question par les africains à la suite de leur accession à l'indépendance pour plusieurs raisons : d'abord parce que c'est un droit qui a été formulé en leur absence et imposé sans leur consentement préalable. Ensuite, il a eu pour unique finalité la résolution des préoccupations étrangères au détriment de celles propres aux Etats africains. Enfin, il a été perçu comme un droit de domination, taillé à la mesure des grandes puissances. D'où la nécessaire formulation d'un ordre juridique adapté à l'environnement africain.[1] En 1968, le Professeur Pierre François Gonidec posait déjà la question de savoir s'il existe un droit international africain.[2] Le problème posé était celui de savoir si à l'échelle du continent africain, considéré dans son ensemble, il existe un corps de règles de droit international propres à cette région.[3] En vue de l'identification de ce corpus de règles, il exigeait la réunion de deux conditions : d'une part, une exigence de spécificité, nécessaire pour différencier le droit international africain du droit international universel ou des autres droits internationaux régionaux et d'autre part, une exigence d'effectivité, c'est-à-dire que les

1 Il convient de relever que le 'droit international est devenu universel mais en même temps, il s'est décentralisé. Des ordres juridiques internationaux particuliers se sont élaborés. Le phénomène n'excluait pas une certaine interpénétration des différents groupes et des systèmes de droit, donnant ainsi un essor nouveau à ce qu'on a appelé le droit commun international. Il se superposait aux systèmes de droits particuliers continentaux ou régionaux', voir G Scelle *Manuel élémentaire de droit international public* (1943) 43, cité par J-C Gautron 'Le fait régional dans la société international', *in* Société Française du Droit International Régionalisme et universalisme dans le droit international contemporain (1977) 5.

2 PF Gonidec *Les droits africains : évolutions et sources* (1968) 2.

3 Gonidec (n 2) 2-11.

règles qu'énonce ce droit international africain régissent effectivement les relations de ceux qui en sont destinataires.[4]

De manière progressive, le droit international africain s'est construit dès la base sous un autre angle, à l'échelle sous régionale, par le droit communautaire africain, avec l'émergence à partir de la décennie 1990, de certaines communautés économiques régionales ou sous régionales africaines s'inspirant du modèle européen d'intégration.[5]

Eu égard à cette présentation, l'on conviendrait avec le Professeur Blaise Tchikaya que « l'inégalité de puissance des États dans les relations internationales serait, en grande partie, liée au contenu du droit qu'ils appliquent dans leurs échanges, à son élaboration et à son écriture ».[6] C'est ainsi que se résume en quelque sorte la pensée qui a fait émerger dès les années 2000, l'idée de mettre en place au sein de l'Union Africaine (UA) une Commission de l'Union Africaine pour le Droit International (CUADI). Il s'agit d'« une institution de réflexion et de codification du droit international composée d'Africains et acquise à la pensée et aux causes africaines »,[7] qui permit à l'Afrique de faire irruption dans la codification du droit international.[8] Ainsi, par l'entrée en jeu de l'Afrique dans la diversification des relations, et par le biais d'une volonté d'harmoniser des efforts entre les différentes nations pour maintenir la paix, la sécurité internationale et la coopération internationale et de développer les relations amicales entre les nations, on est passé d'un droit de coexistence à un droit de coopération.

Le droit international universel peut être défini comme un ensemble de règles juridiques socialement édictées et sanctionnées qui régissent

4 Gonidec (n 2) 11.

5 Il s'agit de l'Union Economique et Monétaire Ouest-Africaine (UEMOA), de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), de la Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC), du Marché Commun de l'Afrique Australe et Orientale (COMESA), de la Communauté pour le développement de l'Afrique australe (SADC), de la Communauté d'Afrique de l'Est (CAE). Les transformations normatives et institutionnelles de l'Union africaine et de la Communauté économique des Etats de l'Afrique de l'Ouest les rapprochent, à certains égards, de caractéristiques des organisations internationales africaines sus-évoquées. J Mpiana Kazadi 'La problématique de l'existence du droit communautaire africain. L'option entre mimétisme et spécificité' (2014) *Revue libre de Droit* 39.

6 B Tchikaya 'Les orientations doctrinales de la commission de l'union africaine sur le droit international' (2017) 30 (1) *Revue québécoise de droit international* 115.

7 La CUADI a été fondée le 30 janvier 2009 et a débuté ses activités en mai 2010. Elle est mise en place comme un organe de l'UA sur la base l'art 5 de l'Acte constitutif de l'organisation continentale africaine.

8 Tchikaya (n 6) 115.

les relations internationales. Ces règles sont, autrement dit, destinées à résoudre les problèmes globaux et non spécifiques. Cette définition nous renseigne de manière générale sur l'orientation du droit international universel avant les indépendances. Il s'agit pour lui de résoudre l'épineux problème de la guerre afin de promouvoir la stabilité, la paix universelle, qui cependant s'avère utopique pour le continent qui est en proie aux questions à la fois économique, politique et démocratique ignorées par la Charte pendant cette période. Le droit international africain quant à lui, est un droit qui vise à identifier les problèmes africains et à y proposer des solutions africaines, de même qu'il vise à apporter l'originalité africaine à la résolution des grands problèmes qui affectent la planète dans sa globalité. Dans un contexte fortement marqué par la prégnance du droit international universel, parler de la construction d'un droit international africain serait tout simplement présenter les éléments et les matériaux qui ont contribué à l'édification de ce droit.

Entreprendre donc une étude sur la construction du droit international africain par l'étude des outils de fabrication et de consolidation de ce droit, vaut tout son pesant d'or, dans la mesure où la doctrine y a porté une attention particulière bien que minimaliste. Le Professeur Joseph Marie Bipoun-Woum, s'est fixé la tâche difficile de donner une présentation du droit international africain.[9] L'intitulé de son ouvrage pose évidemment le problème essentiel de savoir s'il existe un droit international africain ; et, dans l'affirmative, ce droit international africain diffère sensiblement du droit international général et des autres droits internationaux particuliers fondés sur un régionalisme. Pour leur part, Moise Cifende Kaciko, Stefaan Smis précisent que les États africains, fort d'un projet commun de société et d'une coopération accrue, ont développé un droit international spécifiquement africain assurant ainsi l'inculturation du droit international général et opérant subtilement, par moment et par endroit, une dissidence normative par rapport au droit international général encore dominé par les grandes puissances[10]. Le Code de droit international africain rend compte de cette tension, mieux, de cette symbiose entre le général et le particulier. Cet ensemble de règles juridiques propres aux africains reflète les efforts d'inculturation et d'appropriation des règles générales ainsi que du souci constant de répondre aux besoins spécifiques de l'Afrique. À cet égard, porter un regard négatif sur une possible existence du droit international africain, serait de la mauvaise foi, puisque Alvarez qui, développant ses conceptions historico-sociologiques du droit international, a affirmé, le

9 JM Bipoun-Woum *Le droit international africain : problèmes généraux, règlement des conflits* (1970) 327 p. Disponible sur https://www.persee.fr/doc/ridc_0035-3337_1971_num_23_2_16001

10 M Cifende Kaciko & S Smis *Code de droit international africain* (2013) 714 p.

premier, qu'« il y a aussi… un droit international africain », à côté d'un droit international européen, d'un droit international américain,[11] d'un droit international soviétique, etc.[12] Cependant, le Professeur François Borella n'étant pas tout à fait d'accord avec le terme, l'a amenuisé, en parlant de « la conception africaine du droit international ».[13] À ce titre, les africains révèlent leur capacité à trouver des solutions juridiques inhérentes à leurs propres préoccupations[14]. Il s'est agi par ce fait, de mettre en place un corpus de règles, de principes juridiques cohérents qui correspondent à la réalité de l'Afrique et non pas à l'illusion que présentait le droit universel aux territoires colonisés. En fait, le droit international universel pendant la période coloniale ne prenait pas en compte les problèmes spécifiques aux africains.

Cette capacité dont il est question signifierait-elle que le corps de règles mis en place par les États africains était-il spécifique ? C'est une question que se poseront certains, parmi lesquels M. Gautron.[15] À cette interrogation s'ajoutait une autre, celle M. Gonidec relative à l'« existence du droit international africain'.[16] Ces deux auteurs à travers ces questions expriment non seulement leur scepticisme quant à l'existence d'un droit particulier aux africains mais aussi sur son efficacité et sa capacité à satisfaire les problèmes en Afrique. C'est sans doute cette crainte qu'exprimait le Professeur Joseph Marie Bipoun-Woum, lorsqu'il soulève la question d'un système africain de règlement pacifique des conflits.[17] Selon lui, le droit international africain comme le droit international universel devraient contribuer à promouvoir la paix et la stabilité sociale[18]. En revanche, la résurgence des conflits se présenterait comme 'une menace grave' posant le problème de la survie de l'Organisation de l'Unité Africaine (OUA) devenue Union africaine (UA). Ce qui implique de manière claire la capacité des États africains de rendre effectif leur propre droit.

11 Le droit international américain s'appréhende comme étant des règles de droit international propres aux Etats du continent américain ou de certains d'entre eux. Voir J Salmon (dir) *Dictionnaire de Droit International Public* (2001) 382.

12 A Alvarez *Le Droit international nouveau dans ses rapports avec la vie actuelle des peuples* (1959) 447, cité par Bipoun-Woum (n 9) 3.

13 F Borella 'Le Régionalisme africain et l'Organisation de l'Unité africaine' (1963) *Annuaire Français de Droit international* 853.

14 Borella (n 13) 853.

15 J-C Gautron *Régionalisme africain et le modèle interaméricain* (1966) 49.

16 Gonidec (n 2).

17 Bipoun-Woum (n 9) 4.

18 Bipoun-Woum (n 9) 4

En effet, le droit international africain pose de nos jours un véritable problème lié à son respect et son application. Car, en Afrique, les instruments juridiques n'« ont pas toujours été respectés et restaient trop souvent inappliqués ».[19] Il suffit pour s'en convaincre d'observer les conséquences pratiques sur le plan politique et juridique. Sur le plan politique, de nos jours, en Afrique, les conflits politiques sont extrêmement violents et donnent l'impression d'un retour de l'État de nature. Le Professeur Célestin Keutcha Tchapnga constate une sorte de « dégénérescence des antagonismes politiques à des antagonismes armés ».[20] Ce fut les cas du Niger et du Burundi en 1996, du Congo-Brazzaville en 1997, et de la Côte d'Ivoire en 1999 et 2002.[21] Pour le Professeur Maurice Kamto, la difficulté d'appliquer le droit international africain dans son volet démocratie est le produit de la transcendance du pouvoir et du blocage culturel et politique des populations non éduquées à l'usage du droit.[22] Cette situation est sans doute due au fait qu'après les indépendances, les instruments juridiques qui organisent la vie politique en Afrique sont considérés comme des chiffons de papier[23] ce qui peut justifier les difficultés liées à leur application. Plus encore, des actes antidémocratiques perpétrés sur le sol africain au mépris des droits africains, semblent expliquer la recrudescence des coups d'État perpétrés en Afrique[24] et considérés comme justification subjective induisant l'idée du procès fait au régime en place et aux leaders souvent fondée sur la refondation de l'État[25] au mépris du droit.

Il en ressort que, certes, la substance des droits africains peut être assortie d'une absence de clarté et d'intelligibilité, mais la difficulté fondamentale en termes de violation des normes juridiques est une émanation du politique et particulièrement des Chefs d'États. Car, « depuis l'indépendance, la plupart des Présidents ont considéré qu'une fois en fonction, ils avaient vocation à la conserver indéfiniment. Sous le régime des partis uniques ou largement dominants, il leur était facile de se faire

19 M Kamto *Pouvoir et droit en Afrique noire francophone. Essai sur les fondements du constitutionnalisme dans les États d'Afrique noire francophone* (1987) 439.

20 C Keutcha Tchapnga 'Droit constitutionnel et conflit politique dans les États francophone d'Afrique noire' (2005) 63 (3) *Revue Française de Droit Constitutionnel* 451.

21 Keutcha Tchapnga (n 20) 451.

22 M Kamto (n 19) 440.

23 A Bourgi 'L'évolution du constitutionnalisme africain : du formalisme à l'effectivité' (2002) 52 *Revue Française de Droit Constitutionnel* 725.

24 J-C Gautron 'L'exercice du pouvoir par l'armée. Analyse des régimes juridiques militaires africains actuels' (1989) *Revue juridique africaine* 61.

25 Gautron (n 24) 62.

réélire indéfiniment, le plus souvent d'ailleurs comme candidat unique ».[26] Ce qui est la marque d'une résurgence des pratiques non démocratiques : c'est « la restauration autoritaire d'une éligibilité indéfinie ».[27] Sur le plan juridique, se pose le problème de l'inapplication du droit et surtout des décisions de justice comme un facteur de remise en cause de l'efficacité de l'ordre juridique africain et de son originalité.[28] En effet, si le droit international africain est spécifique dans sa forme, tel devrait être le cas dans le fond. Pour ce faire, les juridictions africaines doivent être exemptes de l'emprise politique[29] qui les « l'asservit »[30] et les décisions issues d'une autonomie particulière, mieux, vêtues d'une véritable *auctoritas* qui « augmente la valeur d'un acte en lui conférant la plénitude de ses effets juridiques »[31] définitives, contribuant ainsi à l'épanouissement du droit international africain comme la marque d'un continent enraciné dans la culture juridique et partant, devenant à l'occasion le berceau de promotion de l'État de droit et de la démocratie.

Il sied avant tout autre considération de donner le sens des concepts qui jalonnent l'intitulé. Ainsi qu'il a été indiqué ci-dessus, il faut entendre par droit international africain un corps de normes juridiques chargé d'apporter une satisfaction aux besoins, préoccupations et intérêts africains afin de promouvoir une stabilité tant politique que sociale dans le système de rapports entre Etats africains ou non. *A contrario*, le droit international universel quant à lui, est un ensemble de règles juridiques qui garantissent les intérêts et résolvent les problèmes purement européens en cherchant à pacifier autant que faire se peut le système de relations mondiales. S'agissant du vocable « prégnance », littéralement, l'expression renvoie au verbe « imposer, dominer, prédominer ». Selon le Larousse français, c'est la qualité de ce qui s'impose de façon plus ou moins grande aux sujets.[32]

Au regard de ces définitions, il en ressort qu'en Afrique, dominait avant les indépendances, un corps de règles étrangères, qui ne tenait pas

26 G Conac 'Quelques réflexions sur le nouveau constitutionnalisme africain' in *Actes du symposium international de Bamako* (2000*)* 31, disponible sur http://démocratie.francophone.org./IMG/pdf/bamako.297.pdf.

27 A Loada 'La limitation du nombre de mandats présidentielles en Afrique francophone' (2003) 3 *Revue électronique Afrilex* 163.

28 D-E Adouki 'Contribution à l'étude de l'autorité des décisions du juge constitutionnel en Afrique' (2003) 95 (3) *RFDC* 627.

29 M Ondoa *Le droit de la responsabilité publique dans les États en développements. Contribution à l'étude de l'originalité des droits africains postcoloniaux* (2010) 310.

30 K Kessougbo 'La Cour constitutionnelle et la régulation de la démocratie au Togo' (2005) 3 *RJPEF* 391.

31 S Keineis 'Autorité' in S Rials & D Alland*, Dictionnaire de la culture juridique* (2003)112.

32 *Dictionnaire français Larousse*, consulté sur www.larousse.fr, le 5 octobre 2020, à 13h30.

compte des spécificités propres au continent. C'est à ce titre que la présente étude soulève le problème de construction et d'instauration d'un ordre juridique nouveau et consubstantiel aux problèmes africains à l'aune de la prévalence du droit international universel.[33] Autrement dit, comment le droit international africain s'est-il construit dans un contexte de prégnance du droit international universel ?

Cette question trouve toute son importance, dans la mesure où elle présente un double intérêt : pratique et théorique. Du point de vue théorique, la thématique de la construction d'un droit africain permet d'entrevoir la nécessité d'apporter des solutions particulières aux problèmes qui concernent les rapports des États africains et contribuer ainsi à son épanouissement interne et à son rayonnement au niveau universel. Du point de vue pratique, la question de la construction du droit international africain nécessitait une institutionnalisation. En d'autres termes, il s'agit de la mise en place d'un organe chargé de codifier et d'implémenter les problèmes identifiés sur l'ensemble du continent africain. C'est pourquoi, en appliquant, la méthode juridique appropriée à cet effet, et en se référant à la doctrine juridique, l'on constate que le régionalisme africain a certainement connu des périodes difficiles, mais a évolué sous la double impulsion du panafricanisme et de l'intégration régionale.[34] Ainsi, il apparait que la construction du droit international africain s'est faite dans une logique binaire. Il s'agit de l'internalisation et de l'internationalisation des préoccupations du continent africain qui constituent les principaux leviers de construction du droit international africain.

2 L'internalisation des préoccupations du continent africain comme facteur de construction du droit international africain

Les États africains ayant constaté que la finalité du droit international universel était aux antipodes des exigences africaines pendant la période postcoloniale, vont revendiquer un ensemble de normes juridiques qui correspondraient aux « acclimatations tropicales ».[35] C'est une revendication qui s'est traduite par la dénonciation des omissions du droit international universel et la naissance d'un ordre juridique régional et institutionnalisé africain.

33 Bipoun-Woum (n 9) 28.

34 I Semuhire *Les organisations internationales, le régionalisme international, le régionalisme international africain* (1996) 237 et ss.

35 M Kamto 'La fonction administrative contentieuse de la cour suprême du Cameroun' in G. Conac & J De Gaudusson du Bois *Les cours suprêmes en Afrique* (1988) 31-67.

2.1 La dénonciation de l'exclusion des préoccupations et intérêts africains par le droit international universel

Il s'agit pour l'Afrique indépendante de contester l'ignorance des besoins africains et les débordements du droit international universel.

2.1.1 La contestation des manquements du droit international universel comme prémisse de l'émergence du droit international africain

Il est courant d'affirmer que les droits africains ne présentent aucune originalité car ils ont reçu l'empreinte très monotone des systèmes européens.[36] Si au lendemain des indépendances, certains auteurs estimaient que le droit international africain était un droit encore en formation, 60 ans après les indépendances en Afrique, il serait vain de contester sa réalité. La véritable question à se poser est de savoir si le droit international africain n'est pas identique au droit international universel. Autrement dit, le droit international africain ne serait-il que la pâle copie du droit universel? Sur ce point, deux thèses ont été avancées : celle de l'assimilation et celle de l'assujettissement. Pour les tenants de la thèse assimilationniste, les droits africains sont le prolongement des droits européens. Cette thèse pose le principe de l'équilibre et de l'égalité suivant lequel, les règles applicables tant en Afrique qu'en Europe sont identiques, puisque « soumis au même régime constitutionnel, législatif, administratif et économique ».[37] Cette formulation indique qu'il y a égalité entre les colonies et les métropoles en termes de traitement et donc égalité de droit. Dans notre contexte, on pourrait y percevoir la prise en compte de préoccupations africaines par le droit international universel, toute chose qui battrait en brèche la contestation au regard de l'unité de droit et d'intérêts.

A contrario, les tenants de la thèse de l'assujettissement postulent pour la domination du droit universel. Cette thèse subordonne totalement les intérêts de la colonie à ceux des métropoles, la domination étant économique, culturelle, politique et juridique.[38] En clair, cette thèse fondée sur la domination laisse apparaitre un phénomène de discrimination et d'inégalité. Concernant la discrimination, selon le *Petit Robert* 2007, « c'est l'action d'isoler et de traiter différemment certains individus ou un groupe entier par rapport aux autres ».[39] Il s'agit « d'une différenciation

36 G Conac *Les cours suprêmes en Afrique* (1988) 62.

37 P-F Gonidec 'Note sur le droit des conventions internationales en Afrique' (1965) 11 *AFDI* 867.

38 Gonidec (n 2) 7.

39 Gonidec (n 2) 7.

contraire au principe d'égalité civile consistant à rompre celle-ci au détriment de certaines personnes en raison de leur appartenance raciale ou confessionnelle ».[40] Il ressort de ces formulations que la suprématie du droit international universel emporte suprématie des intérêts et préoccupations de la métropole dans le continent africain. La contrariété d'objet semble alors être à l'origine des contestations et revendications.

Dès lors, les africains ont revendiqué un nouvel ordre juridique international dans lequel ils ont pris conscience des problèmes liés à l'implantation de la démocratie sur le Continent, et ont décidé d'adopter un ensemble de textes de portée contraignante protecteurs des intérêts du Continent. La spécificité du fait international africain s'affirmerait davantage, selon Romain Yakemtchouk, dans le refus des nouveaux États de se considérer comme étant liés par le droit international général ; droit élaboré, il est vrai, sans la participation des peuples africains, mais qui revendique, néanmoins, l'universalité la plus entière.[41]

Le droit international universel émerge dans un contexte marqué par la violence, qui ne pouvait être combattue que par la paix et la sécurité. Son pendant moderne résulte du traité de Westphalie de 1648 qui met fin à la guerre des trente ans et à la suprématie religieuse pour conférer une véritable souveraineté aux États.[42] Il convient de souligner qu'entre 1919 et 1945, les pays africains avaient selon le cas, le statut de colonie ou d'État sous tutelle et non le statut d'État indépendant,[43] c'est-à-dire la capacité de jouir de la plénitude de compétences à l'exclusion d'un tout autre État étranger.[44] Si la colonie signifie soumettre un territoire à la dépendance[45] d'un autre territoire, l'on comprend que le continent africain dont la majorité des territoires était occupée, était juridiquement dépendant des puissances coloniales.

De ce point de vue, le droit international africain était inexistant, n'avait pas voix au chapitre. Dans cette perspective, le droit international était donc un droit essentiellement, sinon exclusivement, européen, mais,

40 *Petit Larousse illustré* Paris (2007) 370.

41 R Yakemtchouk 'L'Afrique en droit international' (1971) 23 (4) *RIDC* 980 ; R Yakemtchouk *L'Afrique en droit international* (1971) 319 p.

42 Article 24 de la Charte des Nations Unies du 26 juin 1946.

43 P-M Gaudemet 'L'autonomie camerounaise' (1958 (8) *RFSP* 46.

44 L Djiogue Tiomela *La formation du droit de la fonction publique de l'État du Cameroun : de 1960 à nos jours, contribution à l'autonomie des droits africains*, Thèse de Doctorat Ph/D en Droit Public, Université de Yaoundé II-Soa (2017-2018) 87, inédit.

45 Cour permanente d'arbitrage, 4 avril 1928, *affaire de l'Ile de Palmas, États-Unis c. Pays-Bas*.

selon les convenances de l'époque, il n'en demeurait pas moins du droit international. En effet, avant les indépendances, l'Afrique n'a connu le droit international traditionnel que dans une projection coloniale (capitulation, protectorat, concession, *etc.*) que les Africains considéraient dans la suite, comme un droit conçu en particulier pour légitimer les acquisitions et les appétits européens.[46] C'est la raison pour laquelle dès leur accession à l'indépendance, les États africains vont initier un double mouvement : il s'agit d'abord de contester un ordre juridique international façonné en leur absence (et donc, bien évidemment, ignorant de leurs intérêts et préoccupations) et, ensuite, de revendiquer un nouvel ordre juridique international. Et ce mouvement de revendication ne s'est pas limité à des incantations.

En outre, certains débordements découlant des pratiques du droit international universel ont tout aussi été dénoncés et contestés par le continent africain. En effet, le 31 mars 2005, la résolution 1593 est adoptée par le Conseil de Sécurité des Nations Unies exigeant que soit « déféré devant le procureur de la Cour pénale internationale la situation du Darfour depuis le 1er juillet 2002 ». Mais avant cette date, la Cour Pénale Internationale (CPI) avait émis un mandat d'arrêt contre le Président de la République soudanaise, Omar El Béchir pour crime contre l'humanité et crime de guerre. La demande est formulée en 2009 par le procureur de la CPI, Luis Moreno-Ocampo.[47] Les Etats africains vont contester la décision pour usage abusif du principe de la compétence universelle.[48]

C'est une dénonciation qui s'est matérialisée par le refus de l'UA de coopérer avec la CPI repris avec force par leur absence au 15e Sommet des chefs d'État et de gouvernement qui s'est tenu à Kampala du 15 au 27 juillet 2010. La conséquence logique fut la revendication qui allait aboutir à la création de la CUADI chargée de réfléchir sur les thématiques africaines urgentes, de conceptualiser et de codifier au niveau régional sur droit international.[49] Le but est de promouvoir le progrès du droit international africain et de marquer la présence du continent au niveau universel. Plus encore, la dénonciation s'est poursuivie par des retraits des

46 Lire P-F Gonidec 'De la dépendance à l'autonomie : l'État sous tutelle du Cameroun' (1957) 3 *Annuaire Français de Droit International* 597-626.

47 G Boutros Boutros 'Le système régional africain' in SFDI, Régionalisme et universalisme dans le droit international contemporain (1977) 61.

48 En 2008 par exemple, ces Etats ont considéré à Syrte que ce mandat constituait 'une application abusive du principe de la compétence universelle par les pays non africains'. *Voir* S Lyal *The emerging system of international law: development in codification and implementation* (1997).

49 *Décision relative à l'utilisation abusive du principe de compétence universelle*, Doc off, UA, EX.CL/Dec, 496 (XV), Rev.2 (2008).

institutions internationales en l'occurrence la CPI. C'est le cas du Burundi en 2015 qui accuse cet organe de mener une chasse aux sorcières contre les dirigeants africains. La Gambie quant à elle ayant repris les mêmes arguments parle « de persécution envers les africains et en particulier les dirigeants africains ». Seulement, ce dernier pays à la suite des réformes opérées au sein de l'institution à l'instar de l'élection du nouveau président de ladite Cour, a changé ses priorités et intentions de sortie.[50]

Il convient de retenir que la prégnance du droit international universel a emporté la domination du droit universel en Afrique au point d'ignorer dans la pratique les limites fixées par ledit droit, et partant, fait de la cause africaine une cause secondaire. Dès lors, l'on peut comprendre la réaction contestataire des africains. Ce mouvement de contestation s'est également accompagné par la nécessité de pallier les questions économiques et démocratiques.

2.1.2 La nécessité de pallier les questions économiques et démocratiques comme objet de l'émergence du droit international africain

Dès leur accession aux indépendances, les États africains sont confrontés aux problèmes d'ordre économique et d'ordre démocratique. L'accession à l'indépendance supposait alors que les Africains devaient prendre en main leur devenir économique et démocratique pour remédier à leurs effets néfastes. Ces questions nécessitaient une attention toute particulière du fait de leur aspect déterminant pour le développement. Or, tout développement est un processus qui s'imprègne des réalités, des spécificités propres à un continent. C'est dans ce sens que les Nations Unies vont adopter une déclaration faisant de la décennie 1970 la décennie du développement, reconnaissant l'importance que cette question devait occuper sur la scène internationale et précisément en droit international. C'est la raison pour laquelle un grand nombre de textes à vocation économique seront adoptés dans la mouvance de cette déclaration. Il s'agit par exemple de la Déclaration sur la souveraineté permanente des États sur leurs ressources naturelles du 14 décembre 1962, la Déclaration relative à un nouvel ordre économique international du 1er mai 1974, la Charte des droits et devoirs économiques des États du 12 décembre 1974 ou encore la Déclaration sur le droit au développement du 4 décembre 1986.

Du point de vue du développement économique et de la coopération entre les États, les États africains ont aussi adopté la Constitution de l'Association des Organisations africaines de Promotion du Commerce.[51]

50 Tchikaya (n 6) 6.

51 Adoptée à Addis-Abeba le 18 janvier 1974.

Elle était considérée comme étant provisoirement en vigueur bien qu'elle n'avait pas encore réuni la ratification requise de douze États signataires (article XV (3) de la même convention). Quant à la Convention interafricaine portant établissement d'un programme de coopération, elle n'est pas encore entrée en vigueur, et pourtant comme le rappelait déjà Victor Umbricht, « la plupart des marchés des africains sont de petites dimensions, (…) Souvent ils n'assurent pas une viabilité économique et ne soutiennent pas une production sur une échelle économique ».[52] L'auteur renchérit en précisant que, les pays africains gagneraient à « coopérer dans la production à plus grande échelle intéressant des besoins spécifiques ou une action de coopération permet de mieux répondre aux besoins des populations ».[53] Cependant, cette coopération doit s'accentuer sur le développement inclusif, et interne du continent. Pour que l'Afrique se développe économiquement, il faudrait qu'il s'engage plus dans la transformation pour pouvoir être compétitif à l'exportation, afin que les termes d'échange lui soit au même titre que les autres continents, favorables, car « tout développement est d'abord endogène ».[54] La Convention de l'OUA pour l'élimination du mercenariat en Afrique est entrée en vigueur le 22 avril 1985 alors qu›elle avait été adoptée et signée le 3 juillet 1977 à Libreville (Gabon), même si la pratique est toujours d'actualité au sein du continent.

Sur un plan politique, Michel Rocard parlant du développement en Afrique, faisait déjà observer que c'est une affaire de volonté politique[55]. Il est remarquable de relever que les États africains, ayant pleinement pris conscience des problèmes liés à l'implantation de la démocratie sur le continent, ont décidé d'adopter un ensemble de textes destinés à faciliter son implantation sur le continent parmi lesquels l'Acte constitutif de l'UA.[56] Il précise dans son préambule que les Chefs d'États et de gouvernement se déclarent 'résolus à promouvoir et à protéger les droits de l'homme et des peuples, à consolider les institutions et la culture démocratiques, à promouvoir la bonne gouvernance et l'État de droit' et dans son article 4 (p), l'Acte constitutif de l'UA consacre un principe de la « condamnation et du rejet des changements anticonstitutionnels de gouvernement ». On peut citer également la Charte africaine de la démocratie, des élections et de la gouvernance qui, entre autres objectifs, vise à « promouvoir

52 V Umbricht 'La coopération entre les Etats africains' in (1987) 33 *Annuaire Français de Droit International* 824.

53 Umbricht (n 52) 824.

54 M Rocard 'Le développement de l'Afrique, affaire de volonté politique' (2003) 398 (1) Études 28.

55 Rocard (n 54) 21-31.

56 Adoptée à Lomé au Togo le 11 juillet 2000.

l'adhésion de chaque État partie aux valeurs et principes universels de la démocratie et le respect des droits de l'homme ».[57] Seulement, faut faire le constat selon lequel, sur le plan démocratique, l'Afrique peine encore à imprégner ses marques surtout en ce qui concerne les partis politiques au sein desquels l'on note deux usages à savoir, « la structuration forte de la clientèle de chaque chef, ou le support d'expression de signes d'identité ethnique, religieuse ou linguistique, le contraire de ce dont l'Afrique a besoin »[58] pour son développement.

On peut également faire référence à l'Union Africaine qui dans son budget 2018, fait une analyse des progrès tout en martelant ses aspirations, qui sont entre autres, un ensemble d'objectif à atteindre pour le continent.[59] La Charte africaine de la jeunesse, qui reconnait dans son préambule que « la jeunesse représente un partenaire et un atout incontournable pour le développement durable, la paix et la prospérité de l'Afrique avec une contribution unique à faire au développement présent et futur », est le premier texte international de portée juridique consacré exclusivement à cette catégorie sociale. Par l'adoption de ce texte, les Etats africains s'engagent à mettre un accent particulier sur les besoins de la jeunesse.

2.2 La traduction conventionnelle et institutionnelle des préoccupations africaines

Le mouvement de revendication et de problématisation du droit international a été fait suivant deux approches : une approche conventionnelle et une approche institutionnelle**.**

2.2.1 La codification des préoccupations africaines comme facteur de matérialisation du droit international africain

Le continent africain, dans sa perspective de vulgarisation du droit international africain, tend à contribuer au développement du droit international, tout en l'orientant vers la codification et la promotion du droit international de l'Afrique. Dans une première acception, *lato sensu*, l'on peut définir la codification, selon le Professeur Gérard Cornu, comme une opération « consistant à réunir en un seul acte, sans en changer la substance, un acte de base et les actes modificateurs qui l'affectent, moyennant la publication du nouvel acte et l'abrogation de tous les

57 Article 2 de la Charte africaine de la démocratie, des élections et de la gouvernance du 30 janvier 2007.

58 Rocard (n 54*)* 24.

59 Voir Union Africaine, *Le document cadre budgétaire 2020 de l'Union Africaine*, projet de septembre (2018) 9-13.

autres ».[60] Dans une seconde acception, celle qui parait appropriée, la codification renvoie selon le Professeur Jean Salmon, a « une entreprise consistant à rédiger le contenu de la coutume internationale ».[61] C'est plus précisément la formulation *ordonnée* dans *un corps de règles écrites* du droit international public coutumier.[62] Le Professeur Maurice Kamto précise à ce sujet que la codification universelle entend dégager les règles de droit universellement applicables à un sujet donné alors que la codification régionale vise avant tout à répondre à des besoins juridiques spécifiques. Il met en exergue les principales méthodes de codification à savoir la méthode de transposition ajustée, la méthode de constatation et la méthode constructive.[63]

Codifier le droit international régionalement est une épreuve non négligeable pour la CUADI, étant donné qu'il faudrait voir si ce droit devrait exister.[64] Si un tel droit existe, c'est au sens de l'arrêt *Haya de la Torre,*[65] dans lequel la Cour Internationale de Justice a validé l'existence d'un droit régional latino-américain, dont l'existence est une sorte de *lex specialis* qui légitime le droit international. Cette validation semble révélatrice, comme le souligne fort bien le Professeur Blaise Tchikaya, d'une sorte d'exaltation des doctrines protectrices des intérêts de l'Afrique dans le développement progressif du droit international. En ce sens, la CUADI marque déjà son empreinte par ses avis consultatifs.[66]

Pour la doctrine, le fait pour une organisation intergouvernementale de codifier son propre droit, permet non seulement de résoudre ses problèmes mais aussi de promouvoir la coopération interétatique. C'est dans ce sens que Fleishhauer affirme que le fait pour l'UA de prendre « en charge la codification du droit international pourrait se défendre par le fait qu'elle accomplit simplement l'un de ses mandats : la coopération des États membres et la résolution des problèmes de plus en plus croissants

60 G Cornu *Vocabulaire juridique* (2000) 153.

61 Salmon (n 11) 190.

62 A Oraison 'Justification et enjeux de la codification du droit international public' (2003-2004) 4 *RJOI* 25.

63 M Kamto 'La codification et le développement progressif du droit international en Afrique : contexte, méthodes et défis' (2015) *Journal de la Commission de l'Union africaine sur le droit international* 261.

64 B Tchikaya 'La codification régionale du droit international à l'Union africaine : Nouvelle fragmentation ou continuité ?' (2015) *Journal de la Commission de l'Union africaine sur le droit international* 269.

65 CIJ, *Haya de la Torre (Colombie c. Pérou),* arrêts du 27 novembre 1950 et 13 mai, 1951, CIJ *Rec*. (1950) 266.

66 Tchikaya (n 64) 269.

de ces États ».[67] En confiant ainsi ce mandat à la CUADI, l'UA n'a fait qu'orienter sa fonction de codification aux préoccupations des problèmes africains. À cet égard, il apparait une diversification de codification dont la conséquence est le changement de nature.[68]

La codification au sein de l'UA doit s'inscrire dans le cadre du droit international général en conciliant la spécificité africaine qui doit guider la codification au niveau régional. Conformément aux principes de base du droit international, des principes universellement connus et à respecter, comme le principe de réciprocité, le principe de bonne foi, au niveau universel, il y a des garde-fous pour tous les pays du monde, une sorte de standards internationaux. C'est ainsi que la question des droits de l'Homme sera évoquée, mais avec des spécificités (par exemple la Charte africaine des droits de l'Homme et des peuples, avec des réalités à respecter et des situations à gérer telles que la question de la polygamie et autres spécificités africaines).[69]

Si la codification traduit « l'esprit de synthèse et de totalité, une intention de renouveau politique, en tant qu'un espoir d'arrêter le cours de l'histoire »,[70] cette rupture envisagée a conduit les Etats africains à définir eux-mêmes un régime juridique nouveau lorsque les problèmes sont purement africains.[71] Pour ce faire, la CUADI a la charge de préparer des avant-projets de textes et identifier les secteurs qui n'ont pas encore été règlementés par le droit international sur le continent africain ou suffisamment développés dans la pratique des États africains.[72] Le but est d'adapter et de formuler le droit international aux réalités locales et/ou régionales, étant donné que « certaines conventions régionales africaines se sont inspirées des traditions juridiques africaines, (…) tout particulièrement la [Charte africaine des droits de l'homme et des peuples (CADHP)] ».[73] Les Etats Africains ont élaboré et adopté la CADHP,[74] afin de répondre aux besoins spécifiques qui leur sont propres. Sur le

67 Tchikaya (n 6) 119.

68 C-A Fleishhauer 'Les organisations internationales face à la codification du droit international' in *SFDI*, *La codification du droit international* (1999) 293.

69 M Kamto (n 63) 256.

70 C Kessedjan 'La codification en droit international privé' in SFDI *La codification en droit international*, (1999) 101.

71 J Carbonnier *Droit civil* (1955) 201.

72 Gonidec 'Note sur le droit des conventions internationales en Afrique' (n 37) 882.

73 Statut de la Commission de l'Union africaine sur le droit international, Doc off UA EX.CL478(XIV) a (2009) art 51 [Statut CUADI].

74 M Mubiala 'Charte africaine des droits de l'homme et des peuples et cultures africaines' (1999) 12 (2) *RQDI* 198.

plan doctrinal, la Charte africaine a suscité un réel intérêt en raison de l'originalité qui la caractérise.[75] Elle constitue aujourd'hui le pilier d'un véritable système régional de protection des droits de l'homme.[76] Comme le souligne le Professeur Maurice Kamto, elle apparait comme une expression de la dialectique entre l'universalisme des droits fondamentaux de la personne humaine et une volonté d'enracinement dans la culture africaine.[77] Il convient de préciser que cet enracinement culturel consistait en la promotion et la protection d'une part, des valeurs traditionnelles fondées sur la famille, la communauté, la solidarité et d'autre part, d'une valeur idéologique fondée sur la notion de peuple qui constitue un vecteur du combat de la décolonisation et du développement.[78]

À titre d'illustration, le préambule de ladite Charte accorde une place de choix aux droits de la 3e génération, notamment le droit au développement lié au contexte africain.[79] Selon les dispositions de l'article 2 : « (1) tous les peuples ont droit à leur développement économique, social et culturel dans le respect strict de leur liberté et de leur identité, et à la jouissance du patrimoine commun de l'humanité. (2) Les États ont le devoir, séparément ou en coopération, d'assurer l'exercice du droit au développement ».

Dans la mouvance de la prise en compte des particularités du continent africain, le cadre conventionnel s'est densifié au fil des années.[80] Comme l'a relevé le Professeur Jean de Noël Atemengue, l'enrichissement de la Charte africaine par conventionnalisme est fondé sur l'article 66 de la Charte. C'est une tentative d'africanisation de certains champs importants.[81] De nombreux textes à caractère conventionnel répondant

75 La Charte africaine des droits de l'homme et des peuples a été adoptée par la 18ème Conférence des Chefs d'Etat et de gouvernement de juin 1981 à Nairobi (Kenya) Cette Convention a été ratifiée par tous les Etats membres et est entrée en vigueur le 21 octobre 1986.

76 Sur l'originalité de la Charte africaine, lire F Ouguergouz *La Charte africaine des droits de l'homme et des peuples, une approche juridique des droits de l'homme entre tradition et modernité* (1993) ; K Mbaye *Les droits de l'homme en Afrique* (2000).

77 M Kamto 'Introduction générale' in M Kamto (dir) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme : commentaire article par article* (2011) 2.

78 Kamto 'Introduction générale' (n 77) 3.

79 A-B Fall 'La Charte africaine des droits de l'homme et des peuples : entre universalisme et régionalisme' (2009) 129 *Pouvoirs* 77-100.

80 Le préambule de la charte énonce que les Etats africains sont « *convaincus qu'il est essentiel d'accorder une attention particulière au droit au développement* ».

81 J de Noël Atemengue 'La Charte africaine des droits de l'homme et des peuples et ses enrichissements ultérieures' in AD OLINGA (dir), *La protection internationale des droits de l'homme en Afrique. Dynamiques, enjeux et perspectives trente ans après l'adoption de la Charte africaine des droits de l'homme et des peuples* (2012) 39-61.

spécifiquement aux attentes du continent ont également vu le jour.[82] Concernant les préoccupations humanitaires, on peut citer la Convention de l'OUA régissant les aspects propres aux problèmes des réfugiés en Afrique adoptée à dAddis-Abeba (Éthiopie) le 10 septembre 1969. Sur le plan culturel, on peut noter la Charte culturelle de l'Afrique adoptée à l'Ile Maurice le 5 juillet 1976 entrée en vigueur le 19 septembre 1990.

En ce qui concerne le raffermissement du système africain de protection des droits de l'homme, l'on note une floraison normative.[83] On peut citer entre autres, le Protocole à la Charte africaine des droits de l'homme et des peuples relatif à la création d'une Cour africaine des Droits de l'homme et des peuples. Ce Protocole a pour objectif de renforcer le régime des droits de l'homme en Afrique notamment sur le plan de la protection juridictionnelle.[84] L'on peut citer également à titre illustratif la Charte africaine des droits et du bien-être de l'enfant, adoptée par la 26ème session de la Conférence des Chefs d'État et de gouvernement d'Addis-Abeba (Éthiopie) en juillet 1990 entrée en vigueur le 29 novembre 1999; le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes, adopté par la 2ème session ordinaire de la Conférence de l'Union africaine à Maputo, le 11 juillet 2003 qui est un

82 En 2001, le Secrétariat général de l'OUA était dépositaire de plusieurs traités et conventions à l'instar de la Convention générale sur les privilèges et immunités de l'OUA ; du Protocole additionnel à la Convention sur les privilèges et immunités ; de la Convention phytosanitaire pour l'Afrique adoptée le 13 septembre 1967 à Kinshasa (République Démocratique du Congo). On peut également citer la Convention africaine sur la conservation de la nature et des ressources naturelles adoptée et signée par les Chefs d'État et de gouvernement à Alger le 15 septembre 1968 entrée en vigueur le 16 juin 1969 ; la Constitution de la Commission africaine de l'aviation civile, signée à Addis-Abeba le 17 janvier 1969 entrée en vigueur le 15 mars 1972 ; la Convention régissant les aspects propres aux problèmes des réfugiés en Afrique adoptée et signée par la Conférence des Chefs d'État et de gouvernement à Addis-Abeba (Éthiopie) le 10 septembre 1969 entrée en vigueur en 1975. Sur le plan sécuritaire, on peut citer le Traité faisant de l'Afrique une zone exempte d'armes nucléaires adopté le 11 avril 1996 au Caire en Égypte et non encore entré en vigueur ; la Convention de Bamako sur l'interdiction d'importer en Afrique des déchets dangereux et sur le contrôle des mouvements transfrontières en Africaines adoptée lors d'une conférence du Conseil des ministres de l'environnement à Bamako (Mali) en janvier 1991 et entrée en vigueur le 22 avril 1998. La Charte africaine des transports maritimes non encore entrée en vigueur ; la Convention sur la prévention et la lutte contre le terrorisme adoptée à Alger lors de la 35ème session de la Conférence des Chefs d'État et de gouvernement.

83 Le rapport du Secrétaire général sur l'état des signatures et ratifications/adhésion des traités de l'OUA, adopté par le Conseil des ministres de l'OUA en sa 73ème session ordinaire du 22 au 26 février 2001 à Tripoli (Libye), Document OUA, CM/ 2196, (LXXIII) 2.

84 Voir AD Olinga 'Introduction générale. L'émergence progressive d'un système africain de garantie des droits de l'homme et des peuples' in Olinga (n 81) 13-35.

instrument essentiel pour renforcer la protection et la promotion des droits des femmes en Afrique.

Comme le souligne le Professeur Pierre François Gonidec, la pratique du droit conventionnel en Afrique révèle l'existence d'un droit international spécifiquement africain[85]. Quid de la dynamique institutionnelle ?

2.2.2 La création des institutions spécifiques à l'Afrique comme garante du rayonnement du droit international africain

Pour une action concertée dans le processus de revendication, les Africains ont uni leur volonté et ont trouvé un cadre institutionnel nécessaire et favorable pour leur campagne. Il s'agissait des institutions d'union dont le but était de défendre, de consolider et de promouvoir les intérêts africains. Principalement, toutes les conventions adoptées dans le cadre de ces mouvements ont été faites sous l'égide de l'OUA et de l'UA avec la participation de la CUADI. L'apport considérable de l'OUA dans l'édification d'un droit international qui répond aux préoccupations africaines est multiple. À titre d'illustration, pour compléter les traités, les différents organes de l'OUA ont pris des décisions et résolutions importantes en vue de résoudre les problèmes propres aux peuples africains.

François Borella affirme que « l'influence des États africains sur le droit international est indéniable. Cette influence est d'autant plus considérable dans la mesure où elle aboutit à de nouvelles orientations dans l'interprétation des principes et des objectifs de l'ONU ».[86] Il souligne également l'inquiétude exprimée par les autres sujets de droit sur les divergences dans la façon d'appréhender certaines questions de droit international. En effet, dans le domaine de la décolonisation, les Etats membres de l'OUA interprètent d'une façon particulière le principe des compétences nationales réservées, argüant que le problème colonial constitue une ingérence dans les affaires intérieures de l'Afrique, ce qui leur permet de déduire la nécessité de soutenir les mouvements anticolonialistes. Cette nécessité est érigée au rang de devoir qui s'impose

85 Il a été adopté par la 34ème session de la Conférence des Chefs d'État et de gouvernement de l'OUA à Ouagadougou (Burkina Faso), le 10 juin 1998.

86 Gonidec 'Note sur le droit des conventions internationales en Afrique' (n 37) 867.

à tout État membre de l'OUA, ainsi que le droit de résistance à l'agression[87] tel que reconnu par le droit international.[88]

Signalons également, l'avènement de nombreuses autres résolutions de l'OUA destinées à édicter des règles générales dont l'importance et le contenu ont varié selon les axes prioritaires tracés par l'organisation au cours de son évolution. Sans être exhaustif nous citerons, les résolutions sur la lutte contre la sècheresse et les calamités naturelles (CM/Rés.924 (XXXVIII)); sur l'intangibilité des frontières (AGH/Rés.16 (I)); sur les problèmes des pays africains les moins avancés (ECM/ECD9(XIV) Rev.2); sur le développement industriel en Afrique (CM/Rés.886 (XXXVII)); sur les personnes handicapées en Afrique (CM/Rés.920 (XXXVII)); sur la promotion de la culture africaine (CM/Rés.757 (XXXIII)); sur le droit de la mer (CM/Rés.745 (XXIII)).[89]

En sus, l'inégalité de puissances des États dans les relations internationales, serait en grande partie, liée au contenu du droit qu'ils appliquent dans leurs échanges, à son élaboration et à son écriture. Cette pensée émerge et s'impose à l'Union africaine dès le début des années 2000, d'où l'idée de mettre en place une institution de réflexion et de codification du droit international composée d'Africains et acquise à la pensée et aux causes africaines. D'où également la mise en place d'un organe de conceptualisation et de codification du droit international nommé la Commission de l'Union africaine pour le droit international. Les raisons qui ont justifié la naissance de cet organe partent des revendications juridiques de l'adoption de la résolution 1593 (2005) du 31 mars 2005 du Conseil de sécurité de l'ONU, demandant que soit « déféré au procureur de la Cour pénale internationale la situation au Darfour depuis le 1er juillet 2002 ». À la lecture des dispositions de son statut, notamment l'article 4, il s'agit pour cette dernière « d'entreprendre des activités relatives à la codification et au développement progressif du droit international sur le continent africain ».

87 À partir de ce principe, l'OUA est parvenue à obtenir l'adoption, par l'ONU, de la résolution 2131(XX) du 21 décembre 1965 qui appelait tous les Etats à contribuer à l'élimination totale de la discrimination raciale et du colonialisme sous toutes ses formes. Notons également que des résolutions ont été adoptées par les organes de l'OUA, notamment le Conseil des ministres sur la question de discrimination raciale. Il s'agit entre autres de *la résolution sur l'apartheid et la discrimination raciale ; la résolution sur l'interdiction de relations aériennes entre Etats indépendants de l'Afrique et l'Afrique du* Sud. *Cf* : CM/Rés. 102 (IX) septembre 1967 à Kinshasa. Nous pouvons également évoquer *La résolution sur l'application des régimes minoritaires de l'Afrique Australe*. *Cf* :CM/Rés. 473 (XXVII) juillet 1976 à Port-Louis.

88 F Borella 'Le régionalisme africain en 1964' (1965) *AFDI* 621.

89 CM/Rés.734(XXXIII) Rev.2 juillet1979 à Moronvia.

Cela étant, bien que sous l'égide de l'OUA il y ait eu confection d'un nombre important d'instruments et/ou textes visant la recherche de solutions propres aux Africains, toujours est-il qu'il demeurait beaucoup à faire dans la ratification et leur mise en œuvre. Cependant, à travers toutes ces mesures édictées spécialement dans un intérêt commun de l'Afrique, l'OUA a contribué au développement du droit international africain.

Au regard des considérations précédentes, il ressort clairement que l'internalisation des préoccupations du continent africain constitue une modalité indéniable de construction du droit international africain. Auquel cas, il faudrait ajouter un autre relatif à sa formation à savoir l'internalisation.

3 L'internationalisation des préoccupations africaines comme facteur d'émancipation du droit international africain

Sous une approche économique, l'internationalisation est une stratégie qui conduit les entreprises à se développer à l'échelle internationale, par le biais de filiales, par exemple, afin de tirer parti des avantages offerts par les différents pays.[90] Sous l'angle juridique elle suppose un processus dynamique caractérisé par l'interaction et l'interdépendance entre les systèmes de droit.[91] L'internationalisation des préoccupations africaines suppose donc une exportation, une revendication à l'échelle internationale pour une prise en compte des particularités africaines. Une analyse sera faite sur les procédés d'internationalisation et sur la contribution du droit international africain à la reconfiguration du droit international universel.

3.1 Les procédés d'internationalisation comme solutions aux problèmes du continent

Démontrer les manifestations de l'internationalisation comme étant une issue aux problèmes du continent africain revient à présenter cette opération d'internationalisation qui s'est faite de deux manières : d'une part par la ratification et d'autre part par la conciliation des buts.

90 UA, *Décision relative à l'utilisation abusive du principe de la compétence universelle,* Doc off UA EX.CL/ Dec. 496(XV) Rev.2 (2008).

91 Dictionnaire Larousse, consulté sur le site https://www.larousse.fr/dictionnaires/francais/internationalisation/43767.

3.1.1 La ratification par les africains des conventions orientées vers la prise en compte des problématiques africaines au niveau universel

Le droit international régional est un ensemble composé de règles de droit conventionnel et de droit coutumier.[92] Comme le souligne Michel Belanger, les études de droit international régional sont difficiles à mener, car elles empruntent aussi bien au droit international proprement dit, qu'au droit comparé ou encore au droit national.[93] Du latin *ratus* qui signifie définitif, fixé, valable et *facere* qui veut dire faire : rendre valable, la ratification est l'acte qui, par une déclaration authentique et solennelle prenant la forme requise, permet de confirmer ce qui a préalablement été accepté ou promis. En d'autres termes, il s'agit pour l'État qui ratifie d'accepter d'être lié juridiquement par les dispositions de la convention.[94] Pour Gérard Cornu, il s'agit d'un acte par lequel l'organe compétent d'un État, généralement le chef de l'État ou un organe collégial, confirme la signature apposée sur un traité par un plénipotentiaire et marque ainsi le consentement définitif de l'État à être lié par ce traité.[95] Ce faisant, ce dernier crée envers lui-même un ensemble d'obligations impératives dont la violation mettra en jeu sa responsabilité internationale.[96] Par définition, ratifier un traité international signifie l'adhésion à une règle de conduite obligatoire pour les États signataires.[97] Ratifier un traiter ou une convention avec d'autres États suppose l'existence d'une préoccupation commune et la protection d'un intérêt commun.

Les États africains se sont engagés dans plusieurs conventions internationales. C'est le cas de l'accord de Paris sur le climat. En décembre 2015, la communauté internationale est parvenue, après plusieurs négociations, à un accord historique pour lutter contre les changements climatiques et atténuer leurs conséquences dans le monde. Cette situation justifie l'universalisme des problèmes du continent.

S'il est vrai qu'à nos jours cette convention n'a été ratifiée que par peu d'États africains néanmoins elle a reçu la signature d'un bon nombre

92 M Belanger 'Existe-t-il un droit africain de la santé ?'in D Darbon & J du Bois De Gaudusson *La création du droit en Afrique* (1997) 361.

93 Belanger (n 92) 361.

94 http://www.unicef.org/signature-ratification-et-adhésion, consulté le 30/07/2020. Voir aussi J Salmon (n 11) 929.

95 Cornu (n 60) 842.

96 G Abi-Saab 'Cours général de droit international public' in *Recueil des Cours de l'Académie de droit international de La Haye,* disponible sur http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041103178_01, consulté en novembre 2021.

97 C Rousseau *Droit international public, introduction et sources* (1970) 134.

d'entre eux. Cette participation massive des États africains témoigne de l'importance des préoccupations climatiques aussi bien à l'échelle africaine et qu'internationale, et encore plus pour l'Afrique en proie aux changements climatiques.

3.1.2 La conciliation des buts comme preuve de l'unité des objectifs juridiques

Il est important que les « accords ou les organismes et leurs activités soient compatibles avec les buts et les principes des Nations Unies ».[98] C'est ainsi que l'article 14 du Pacte de non-agression et de défense commune de l'Union africaine dispose que c'est la « Commission du droit international de l'Union africaine qui aura, entre autres, pour objectifs d'étudier toutes les questions juridiques liées à la promotion de la paix et de la sécurité en Afrique, y compris la démarcation et la délimitation des frontières africaines ».[99] Ce texte se rapporte au règlement pacifique des différends qui marque la volonté des africains et de leurs institutions à ne pas se départir des buts et objectifs du droit international universel. Le professeur Alvarez[100] soutient le relativisme du droit international et voyait dans le droit international une valeur universelle. Semblent coexister deux idées : les dispositions locales peuvent d'une part, exister comme droit entre États et, d'autre part ne pas remettre en cause le droit international universel. C'est du reste ce que souligne la décision de la CIJ rendue en 1951 dans l'affaire *Haya de la Torre*.[101] En effet, dans cette affaire les parties demandaient à la Cour de clarifier les circonstances d'octroi de l'immunité diplomatique dans un cadre latino-américain et indiquer si dans ce contexte régional il y avait un droit de qualification unilatérale et définitif. Y faisant suite, la Cour déclare que le droit d'asile octroyé n'est pas en conformité avec les conventions signées entre les deux parties ; ce qui constitue une validation du droit régional.

Le droit international vise à assurer aux États la paix et le bien-être. En l'absence de droit international, un désordre total pourrait régner entre les nations. Le droit international établit ainsi un cadre reposant sur un système juridique international dont les États sont les principaux acteurs ;

98 Pacte de non-agression et de défense commune de l'Union africaine, 31 janvier 2005, 2656 RTNU 285. La crise Libyenne a fait l'objet d'un avis juridique de la part de la CUADI. Voir Avis Juridique de la Commission de l'Union africaine sur le droit international sur certains aspects de la situation en Lybie : portée et implications juridiques et obligations des Etats membres des Nations-Unies, y compris celles des Etats membres de l'Union africaine, résultant des résolution 1970 et 1973 du Conseil de sécurité des Nation Unies du 19 mai 2011.

99 Article 52 de la Charte des Nations Unies de 1945.

100 A Alvarez *Le droit international nouveau : son acception, son étude* (1960) 100-102.

101 Affaire *Haya de la Torre* (n 65).

il définit leurs responsabilités juridiques mutuelles et, à l'intérieur des États, la façon dont les personnes sont traitées.[102] Le droit international africain poursuit également les mêmes objectifs. Ce qui lui permet à travers certaines originalités de contribuer à la reconfiguration du droit international universel.

3.2 La contribution du droit international africain à la reconfiguration du droit international universel

Le droit international régional est avant tout du droit international. Il peut innover sans conséquence sur la forme. En revanche, il ne peut évoluer en ignorant le corpus des normes universelles, même si parfois il peut s'en démarquer.[103] La contribution du droit international africain à la reconfiguration du droit international universel est notable à plusieurs niveaux : la consécration de l'universalisme des préoccupations africaines et l'apport substantiel et coutumier comme objet du progrès du droit international universel.

3.2.1 La consécration des préoccupations africaines par l'universel comme preuve de reconfiguration du droit international universel

Les préoccupations africaines ayant fait l'objet des revendications après l'accession aux indépendances ont irradié la scène internationale. C'est ainsi que les problèmes tels que la démocratie, le développement, les ressources naturelles etc. ont été universalisés. Afin d'y apporter des solutions appropriées, les Africains ont adopté une Charte africaine de la démocratie des élections et de la gouvernance du 30 janvier 2007 qui entre autres encourage en son (article 2), l'adhésion de chaque État partie aux valeurs et principes universels de la démocratie et le respect des droits de l'homme. C'est à la suite de ce texte que les débats sur la démocratie ont jalonné la scène internationale se traduisant par des conventions y relatives au niveau universel. Or, avec la fin de la domination coloniale, l'accession à l'indépendance aidant, les Etats africains vont initier un double mouvement qui vise à reconfigurer le droit international : il s'agit d'abord de contester un ordre juridique international façonné en leur absence (et donc bien évidemment ignorant de leurs intérêts et préoccupations) et ensuite, de revendiquer un nouvel ordre juridique international. Et ce mouvement de revendication ne s'est pas limité à des incantations

102 Il englobe des domaines tels que les droits de l'homme, le désarmement, la criminalité transnationale organisée, les réfugiés, les migrations, l'apatridie, le traitement des détenus, le recours à la force, la conduite de la guerre, l'environnement, le développement durable, les océans, l'espace extra-atmosphérique, les communications mondiales et le commerce international.

103 Kamto (n 63) 268.

En effet, en remettant sur la table la raison d'être du droit international, les États africains ont contribué à imposer de nouvelles thématiques dans l'agenda international et qui ont été prises en compte par la communauté internationale. Ainsi, si le droit international vise à conduire les États à la paix et du bien-être, pouvait-on conclure, au moment de l'accession des États africains à l'indépendance, que tel était effectivement le cas ? L'une des plus grandes contributions des États africains aura donc été de remettre au goût du jour les préoccupations économiques et de bien être partagé au centre du débat international.

3.2.2 La réception des pratiques africaines par le droit international universel comme preuve du progrès du droit international universel

Le continent africain a contribué à donner une nouvelle perspective à la coutume internationale dans les relations internationales, faisant émerger ce que René-Jean Dupuy a appelé « coutume sauvage », par opposition à la « coutume sage ».[104] Ainsi, par leur attitude, les Etats africains nous enseignent qu'à défaut de faire bouger les lignes rigides du droit conventionnel, il est possible de faire évoluer le droit international plus rapidement par le biais de la coutume internationale, une coutume internationale où l'élément psychologique, l' *opinio juris,* précède l'élément matériel, la *consuetudo* ; autrement dit, la conviction que l'on agit conformément au droit précède la consolidation de la pratique dans le temps et dans l'espace. Ainsi, la coutume internationale peut émerger dans un laps de temps réduit, dès lors que la pratique convergente des États, quand bien même elle n'est pas encore consolidée dans le temps et dans l'espace, a pour soubassement la conviction que l'on agit conformément au droit, comme la jurisprudence internationale l'a légitimé dans l'affaire du plateau continental, Tunisie-Libye'.[105]

D'un autre côté, on souligne que l'Afrique a également apporté sa contribution à l'évolution du droit international mondial. Quelques exemples suffiront pour s'en convaincre. Alors que le concept de ressources naturelles est omniprésent dans le débat international, notamment dans le contexte actuel où la planète milite en faveur de leur conservation, aucune source de droit à vocation universelle n'en propose une définition. Il faut se référer à la convention africaine sur la protection de la nature et des ressources naturelles du 11 juillet 2003 pour en avoir une définition précise.

104 R-J Dupuy 'Coutume sage et coutume sauvage' in *La communauté internationale, Mélanges offerts à Charles Rousseau* (1974) 75-77.

105 Voir CIJ *Demande en révision et en interprétation de l'arrêt du 24 février 1982, en l'affaire du Plateau continental (Tunisie/ Jamahiriya arabe Libyenne)*, arrêt du 10 décembre 1985.

De plus, c'est dans le droit africain que l'on retrouve la définition la plus commode du réfugié dans le contexte international actuel. Celui-ci n'est plus seulement l'individu qui quitte son territoire national pour fuir des persécutions dont il fait l'objet en raison de ses convictions politiques, philosophiques ou religieuses,[106] mais également

> « toute personne qui, du fait d'une agression, d'une occupation extérieure, d'une domination étrangère ou d'évènements troublant gravement l'ordre public dans une partie ou dans la totalité de son pays d'origine ou du pays dont elle a la nationalité, est obligée de quitter sa résidence habituelle pour chercher refuge dans un autre endroit à l'extérieur de son pays d'origine ou du pays dont elle a la nationalité ».[107]

Ainsi peut-on constater que les pays comme les États-Unis, la France, la Grande Bretagne ont accordé et continuent d'accorder refuge à des étrangers tout simplement en raison d'un conflit qui se déroule dans leur pays d'origine (Afghanistan, Irak) alors qu'ils ne sont pas liés par les dispositions de la Convention OUA. N'est-ce tout simplement pas là l'aveu d'un anachronisme de la Convention des Nations Unies de 1951 et le triomphe de la vision africaine sur la question des réfugiés à l'échelle mondiale ? Enfin l'exemple de la Convention de l'Union africaine sur la protection et l'assistance aux personnes déplacées en Afrique du 22 octobre 2009 (Convention de Kampala) qui est le seul instrument de valeur contraignante consacrée à cette catégorie de personnes vulnérables à l'échelle internationale. A son article 2, elle se donne pour objectif de « promouvoir et renforcer les mesures régionales et nationales destinées à prévenir ou atténuer, interdire et éliminer les causes premières du déplacement interne, et prévoir des solutions durables ». En ce sens, elle pourrait constituer une base de discussion en vue de l'adoption d'une convention similaire à l'échelle mondiale, tant il est vrai que le problème des déplacés ne se pose pas seulement en Afrique.

En somme, face à la prégnance du droit international universel, le droit international africain s'est construit d'une façon duale, d'abord par une internalisation des préoccupations du continent africain et ensuite par le processus d'internationalisation des spécificités du même continent africain. Il apparait que l'Afrique a son mot à dire dans l'évolution du droit international. De ce point de vue, à la question que se pose Maurice Flory à savoir « le droit international est-il européen ? », la réponse devient évidente. En raison de cette émergence, les Etats africains ne seraient pas

106 Convention des Nations Unies sur le statut des réfugiés et apatrides du 28 juillet 1951.

107 Article 1 alinéa 2 de la Convention de l'OUA régissant les aspects propres aux problèmes des réfugiés en Afrique.

loin de partager l'opinion des auteurs soviétiques,[108] qui considéraient avec une certaine méfiance les règles à la formation desquelles ils n'ont pas contribué et ne les acceptent pas sans bénéfice d'inventaire. Cette remise en question du droit international classique s'est accompagnée de réticences à saisir les instances internationales lorsque des différends ou des conflits surgissent entre les Etats africains. Ces instances n'étaient saisies que lorsque des puissances extérieures à l'Afrique étaient impliquées dans des conflits ou des différends concernant l'Afrique. Ainsi, le Cameroun a saisi la Cour internationale de justice du litige qui l'opposait au Royaume-Uni à propos du rattachement de la partie septentrionale du Cameroun (administrée par cet État dans le cadre du régime international de tutelle) au Nigeria.[109] De même l'Organisation des Nations Unies (ONU) a beaucoup servi de cadre aux pays africains pour critiquer l'action des grandes puissances et pour accélérer le mouvement de décolonisation.[110] Il n'est donc pas étonnant qu'une des résolutions votées à Addis-Abeba en mai 1963 affirme le désir des États africains de renforcer l'ONU et de lui apporter leur appui en même temps que leur regret d'être sous-représentés dans les organes de l'ONU, ainsi que leur décision de constituer un groupe africain plus efficace en dehors du groupe afro-asiatique. En revanche, une tendance à régler les problèmes purement africains entre Africains et à écarter l'intervention de puissances ou d'organisations extérieures à l'Afrique s'est affirmée, surtout avec la création de l'OUA. Les problèmes frontaliers qui ont surgi au cours de ces années sont assez caractéristiques à cet égard. Ces problèmes ont été réglés par accord entre les Etats intéressés (Mauritanie-Mali par exemple) ou grâce à l'intervention d'organisations africaines telles que le Conseil de l'Entente (différend entre le Niger et le Dahomey), ou bien l'ont été dans le cadre de 1'OUA.

4 Conclusion

En somme, les États africains, en général, ont toujours adopté à l'égard du droit international classique, une attitude extrêmement critique, voire réservée. Leur position à cet égard se fonde principalement sur le fait que les africains n'entendent pas être liés par un droit à l'élaboration duquel ils n'ont pas participé. L'africanité, comme affirmation de l'Afrique dans le système international est une problématique ancienne qui interroge comment le droit international africain s'est construit dans un contexte

108 I Lapenna *Conceptions soviétiques de droit international public* (1954) 160.

109 P Vergnaud 'La levée de la tutelle et la réunification du Cameroun' (1964) 18 (4) *Revue juridique et politique : indépendance et coopération* 556-573.

110 T Hovet *The role of Africa in the United Nations, et Africa in the United Nations*, (1963); C Hoskyns 'The African states and the United Nations (1958-1964)' (1964) 40 (3) *International affairs* (466).

de prégnance du droit international universel. L'objet étant d'examiner les aspects normatifs et institutionnels du régionalisme en droit international, cette étude passe en revue l'examen des sources et le contenu du droit international africain. De l'examen de ces sources, il ressort que celle-ci incluent des sources traditionnelles du droit international (conventions internationales et coutumes) et des sources nouvelles que sont les traditions juridiques et judiciaires africaines. De même, plusieurs innovations contenues dans les conventions régionales, dont certaines ont eu un écho normatif au plan universel trouvent leur origine dans ces traditions. Il s'agit d'une contribution méconnue des traditions africaines au droit international. Le Professeur Maurice Kamto souligne que « l'Afrique doit poursuivre son entreprise de codification régionale afin de répondre à ses besoins spécifiques du droit entre les États du continent. Mais en même temps, elle doit s'appuyer sur le droit international existant pour le faire évoluer dans le sens de ses intérêts propres, ou à tout le moins d'une manière qui prend en compte ceux-ci ».[111] En effet, il ne s'agit pas d'une question de stratification communautaire du droit international, mais d'approfondissement de ce droit. En d'autres termes, il s'agit de rechercher comment exprimer l'universalité du droit international en intégrant suffisamment de valeurs propres et estimés communes à ce continent. C'est ce qui ressort des dispositions de l'article 6 du Statut de la CUADI, qui prescrit à cette dernière de procéder : « à la codification du droit international par une formulation systématique et précise des règles dans les secteurs où il y a déjà eu une longue pratique étatique, une jurisprudence et une doctrine sur le continent africain pour en faire des règles en droit international ». L'on peut constater l'apport coutumier et substantiel du droit international africain dans la reconstruction du droit international.

111 Kamto (n 63) 268.

Part II: Africa and the progressive development of international law

Deuxième partie : L'Afrique et le développement progressif du droit international

3 L'Afrique et la responsabilité de protéger : Vingt ans après, *quo vadis* ?

Léandre Mvé Ella

1 Introduction

Il ne pouvait en être autrement, lorsque, sollicité pour fournir notre vision sur une question de droit international d'un point de vue africain, nous avons décidé d'entreprendre une – énième – réflexion sur la responsabilité de protéger (R2P). Sans doute, convaincu que ce thème présentait pour nous, quelque chose de rassurant, de familier, nous décidions de faire le lien entre cette responsabilité de protéger et l'Afrique. Après tout, il y a quelque chose de passionnant[1] dans la responsabilité de protéger car elle touche à la fois aux deux pôles de la société internationale : l'indépendance des États et la solidarité internationale.[2]

C'est justement sur la question de l'indépendance que porte l'ouvrage, quand l'idée de solidarité est au centre de la responsabilité de protéger.[3] Le terme « indépendance » est décisif ici car il fixe à la fois l'horizon, la perspective dans laquelle s'inscrit cette réflexion – et, en réalité, celle de tout l'ouvrage – en même temps qu'il est central dans le développement de la responsabilité de protéger qui prétend faire de la souveraineté ou de l'indépendance,[4] une responsabilité. Les soixante ans des indépendances africaines correspondent donc aussi aux vingt ans de la responsabilité de protéger depuis les premiers développements initiés par la Commission internationale de l'intervention et de la souveraineté des États (CIISE). Le moment est donc particulièrement opportun pour faire le bilan d'une relation conflictuelle.

1 À la fois du point de vue de ses contempteurs que de ses partisans qui défendent, chaque camp, avec le même entrain, soit la souveraineté des États, soit la dimension humaine comme finalité même du droit et des États.

2 G Rolin-Jaequemyns 'Note sur la théorie du droit d'intervention' (1876) *RDILC* 676-677.

3 L Boisson De Chazournes '*Responsibility to Protect: reflecting solidarity?'* in R Wolfrum & C Kojima (eds) *Solidarity: A structural principle of international law* (2010) 93-109, 95.

4 C Rousseau 'L'indépendance de l'État dans l'ordre international' (1948-II) 73 *RCADI* 167-253.

Établie en septembre 2000 à la demande du gouvernement canadien, la CIISE avait pour but de répondre à la question suivante : « des États ont-ils jamais le droit de prendre des mesures coercitives – et particulièrement militaires – contre un autre État pour protéger des populations menacées dans ce dernier, et si oui, dans quelles circonstances ? ».[5] Cette question se pose et continue de se poser avec une acuité toujours plus forte depuis les crises humanitaires au Rwanda (dès 1994), au Kosovo (dès 1998), au Darfour (dès 2003) ou dans des cas plus actuels comme la Syrie (depuis 2011),[6] la République démocratique du Congo (RDC) depuis 2008[7] ou au Myanmar au sujet des Rohingyas (depuis 2017).[8]

Dans la version de la CIISE, la responsabilité de protéger entend protéger les populations des États de la commission des crimes les plus graves : le génocide, le crime de guerre, le crime contre l'humanité et le nettoyage ethnique. Cette protection se fait de manière graduée, en trois piliers : la prévention, la réaction et la reconstruction de l'État. L'utilisation de la force ne constitue de ce point de vue, qu'un ultime recours. C'est ce que confirme également la version onusienne de la responsabilité de protéger consacrée en 2005 dans le Document final du Sommet mondial de 2005.[9] Il ressort de ce texte que si la responsabilité de protéger sa

5 CIISE *Rapport sur la responsabilité de protéger* 18 décembre 2001 VII.

6 Y Nahlawi 'The Responsibility to protect and Obama's red line on Syria' (2016) 8 No 1 *GR2P* 76-101.

7 D Schrank 'Democratic Republic of Congo' in J Genser & I Cotler (eds) *The Responsibility to protect: the promise of stopping mass atrocities in our time* (2012) 320-323.

8 S Adams 'The Responsibility to protect and the fate of the Rohingya' (2019) 11 (1) *GR2P* 435-450.

9 A/RES/60/1, 24 octobre 2005 : '138. C'est à chaque État qu'il incombe de protéger ses populations du génocide, des crimes de guerre, du nettoyage ethnique et des crimes contre l'humanité. Cette responsabilité consiste notamment dans la prévention de ces crimes, y compris l'incitation à les commettre, par les moyens nécessaires et appropriés. Nous l'acceptons et agirons de manière à nous y conformer. La communauté internationale devrait, si nécessaire, encourager et aider les États à s'acquitter de cette responsabilité et aider l'Organisation des Nations Unies à mettre en place un dispositif d'alerte rapide. 139. Il incombe également à la communauté internationale, dans le cadre de l'Organisation des Nations Unies, de mettre en œuvre les moyens diplomatiques, humanitaires et autres moyens pacifiques appropriés, conformément aux Chapitres VI et VIII de la Charte, afin d'aider à protéger les populations du génocide, des crimes de guerre, du nettoyage ethnique et des crimes contre l'humanité. Dans ce contexte, nous sommes prêts à mener en temps voulu une action collective résolue, par l'entremise du Conseil de sécurité, conformément à la Charte, notamment son Chapitre VII, au cas par cas et en coopération, le cas échéant, avec les organisations régionales compétentes, lorsque ces moyens pacifiques se révèlent inadéquats et que les autorités nationales n'assurent manifestement pas la protection de leurs populations contre le génocide, les crimes de guerre, le nettoyage ethnique et les crimes contre l'humanité. Nous soulignons que l'Assemblée générale doit poursuivre l'examen de la responsabilité de protéger les populations du génocide,

population appartient principalement, et en premier lieu à chaque État, elle incombe, en cas de manquement à cette responsabilité initiale, à la société internationale.

Loin de se contredire sur le fond, ces deux versions de la responsabilité de protéger se complètent en dépit du fait que la version de 2005 – fruit d'un consensus étatique – soit davantage axée sur la protection de la souveraineté des États que celle de la CIISE de 2001 qui ne cherche qu'à la concilier avec l'intervention.

Si les États ont une responsabilité permanente de protéger leur population, il n'est point douteux que celle de la société internationale, demeure essentiellement ponctuelle. À ce titre, c'est seulement en cas de crise grave, de défaillance de l'État – qui ne peut plus ou ne veut plus protéger sa population – que cette société internationale entend mener en faveur des populations menacées, une intervention à des fins de protection humaine.

De ce point de vue, si la responsabilité de protéger est avant tout un principe de gestion des crises, son application dans le contexte africain revêt une signification particulière au regard de l'expérience de gestion de crises de ce continent depuis les années quatre-vingt-dix notamment. Le passage de l'Organisation de l'Unité africaine (OUA) à l'Union Africaine (UA) à la fin des années quatre-vingt-dix, est plus que révélateur de la nouvelle dimension prise par l'Organisation régionale, moins soucieuse de la défense de la souveraineté des États vis-à-vis des États occidentaux (anciennement colonisateurs), mais plus soucieuse du bien-être des populations. Ce changement d'approche a connu son expression la plus aboutie dans l'Acte constitutif de l'Union africaine de 2000 qui a mis en place un mécanisme de gestion des crises humanitaires. En ce sens, l'idée de responsabilité de protéger n'est pas étrangère à l'Afrique.

Notre démarche entend par conséquent montrer que si l'on ne peut pas dire qu'il existe une approche africaine de la responsabilité de protéger qui se démarquerait de l'approche onusienne ou du système de sécurité collective de la Charte des Nations unies, il y a lieu d'admettre cependant que l'Afrique a participé au processus de consécration (2) et

> des crimes de guerre, du nettoyage ethnique et des crimes contre l'humanité et des conséquences qu'elle emporte, en ayant à l'esprit les principes de la Charte et du droit international. Nous entendons aussi nous engager, selon qu'il conviendra, à aider les États à se doter des moyens de protéger leurs populations du génocide, des crimes de guerre, du nettoyage ethnique et des crimes contre l'humanité et à apporter une assistance aux pays dans lesquels existent des tensions avant qu'une crise ou qu'un conflit n'éclate'.

de concrétisation (3) du principe au niveau mondial en étant à la fois le terrain privilégié de son application et même de ses échecs.

2 L'apport de l'Afrique à la consécration de la R2P

L'idée que chaque État a l'obligation de protéger sa population dans son territoire n'est pas, en soi, nouvelle. Elle était déjà au centre de la vieille théorie de l'intervention d'humanité.[10] Ce qui est nouveau, c'est la détermination du seuil à partir duquel l'État peut être considéré comme ayant failli à cette obligation initiale. Sur ce point, c'est à l'article 4 (h) de l'Acte constitutif de l'UA que l'on doit d'avoir, avant tout autre texte,[11] précisé les crimes qui conditionnent la mise en œuvre de cette responsabilité de protéger (2.1). C'est cette disposition qui a influencé les positions des acteurs africains dans le débat sur le contenu de la responsabilité de protéger au niveau universel (2.2).

2.1 Les origines africaines de la R2P : l'article 4 (h) de l'Acte constitutif de l'UA

Au terme de l'article 4 (h) de l'Acte constitutif de l'Union africaine, il est affirmé que,

> Le droit de l'Union d'intervenir dans un État membre sur décision de la Conférence, dans certaines circonstances graves, à savoir : les crimes de guerre, le génocide et les crimes contre l'humanité.[12]

Certes, l'expression responsabilité de protéger n'apparait pas dans cet article, mais il n'est point douteux que la parenté qui unit cette disposition avec les paragraphes 138 et 139 du document final de 2005[13] qui consacrent le principe par l'Organisation des Nations unies (ONU) est évidente. Cette « institutionnalisation du principe »[14] trouve, en réalité, son origine dans les défaillances des organisations régionales africaines – d'abord l'OUA, puis l'UA – lors des nombreuses crises humanitaires et sécuritaires des années 1990. Que l'on se rappelle l'incapacité d'agir de l'OUA, lors du génocide

10 A Rougier 'La théorie de l'intervention d'humanité' (1990) *RGDIP* 495-496 ; Rolin-Jaequemyns (n 2) 293-385 ; B Weil-Sierpinski *L'intervention d'humanité : un concept en mutation*, thèse de doctorat, Université de Montpellier 1995.

11 M Mwanasali 'The African Union, the United Nations, and the responsibility to protect: towards an African intervention doctrine' (2010) 2 (4) *GR2P* 388-413.

12 Acte constitutif de l'Union africaine (11 juillet 2000), art 4 (h).

13 A/RES/60/1 (24 octobre 2005).

14 P D Williams 'From non-intervention to non-indifference: the origins and development of the African Union's security culture' (2007) *African Affairs* 278.

au Rwanda ou des crises en Sierra-Leone, au Liberia ou en Somalie pour mieux mesurer l'intérêt et la portée de cet article. Construite comme un contre-feu au colonialisme[15] autour du principe de non-intervention, l'OUA était, de toute évidence, inadaptée pour répondre aux situations de crises régionales et pour protéger les civils.[16] C'est avec la création de l'UA qu'un changement de doctrine a été opéré en faveur de la non-indifférence,[17] ôtant ainsi l'ultime verrou contre l'intervention à des fins de protection des populations. Le point d'orgue de cette approche nouvelle se trouve dans l'article 4(h), qualifié de « révolutionnaire »[18] car incarnant la doctrine de l'intervention humanitaire.[19]

Avant 2000, encore plus en Afrique qu'ailleurs, la controverse sur la légalité de l'intervention humanitaire était largement restée un débat d'Écoles. Il faut dire qu'à ce moment, aucune organisation internationale n'avait prévu dans son traité constitutif, une intervention de ce type. Ni la Charte des Nations unies ni celle instituant l'Organisation des États américains (OEA) – ou le Traité révisé de la Communauté économique des États de l'Afrique de l'Ouest (CÉDÉAO) – autre acteur majeur du système la sécurité collective en Afrique – ne contient expressément des dispositions fondant la légalité de l'intervention à des fins humanitaires. Il est d'ailleurs révélateur de constater que les questions humanitaires sont souvent l'occasion pour le Conseil de sécurité des Nations Unies d'étaler un peu plus ses dissensions comme le montrent les crises au Kosovo, au Darfour ou plus récemment en Syrie.[20]

L'intégration de la responsabilité de protéger à la nouvelle architecture de paix et de sécurité de l'UA ne fait guère l'objet d'objections si bien que l'on a pu soutenir que, c'est en agissant en vertu de ce principe que les États africains sont intervenus lors des crises au Burundi et au

15 T Murith 'The responsibility to protect, as enshrined in art 4 of the Constitutive Act of the African Union' (2007) 16 No 3 *African Security Review* 16.

16 Charte de l'Organisation de l'Unité africaine, 25 mai 1963, art II(1) et (2).

17 Williams (n 14) 256; voir également R Thakur *The Responsibility to protect. Norms, laws and the use of force in international politics* (2011) 148-149; A Abass 'Africa' in J Genser, I Cotler (n 7) 110 ; C Welch JR. 'The African Commission on human and peoples' rights : A five-year report and assessment' (1992) 14 *Hum. Rts. Q.* 43.

18 A Abass (n 17) 43.

19 NJ Udombana 'When neutrality is a sin: The Darfur crisis and the crisis of humanitarian intervention in Sudan' (2004) 27 (4) *Hum. Rts. Q.*1167-1169.

20 R Songolé 'L'intervention armée consécutive aux allégations d'usage d'armes chimiques en Syrie : brèves remarques sur une opération controversée' (2018) 31 (2) *RQDI* 1-21.

Darfour en 2003.[21] Bien avant la reconnaissance officielle du principe au sein de l'ONU, les États africains avaient donc déjà recouru à l'idée d'une intervention à des fins de protection des populations dans un État défaillant. Cette « congruence »[22] entre la responsabilité de protéger et l'article 4 (h) de l'Acte constitutif de l'Union africaine est soutenue de manière quasi unanime par les États qui ont participé aux discussions sur la responsabilité de protéger lors de la 63ème session de l'Assemblée générale des Nations unies de 2009. Ainsi, le représentant de l'Égypte a considéré que « l'Union africaine a été la première à mettre en œuvre la responsabilité de protéger en raison de son histoire particulière. Les conditions de mise en œuvre sont clairement énoncées aux alinéas (h) et (j) de l'article 4 de l'Acte constitutif de l'Union africaine ».[23] C'est le même hommage qui est rendu par le Swaziland « à l'Acte constitutif de l'Union africaine, en particulier à son article 4 (h) qui fait clairement mention de la responsabilité de protéger, d'autant plus qu'il met l'accent sur la valeur de la politique de la non-indifférence »,[24] par le Kenya,[25] l'Afrique du Sud,[26] ou encore le Ghana.[27] Mieux encore, même les États non-africains procèdent à la même reconnaissance. Le représentant du Costa-Rica a, suivant cette logique, qualifié l'Organisation africaine de « pionnière »,[28] quand les États-Unis ont parlé de « voie tracée par l'Acte constitutif de l'Union africaine »[29] et la France a admis que « l'Acte constitutif de l'Union africaine a, dès l'an 2000 et dans son article 4), posé le principe du droit de l'Union à intervenir dans un État membre sur décision de la Conférence, dans certaines circonstances graves, à savoir les crimes de guerre, le génocide et les crimes contre l'humanité ».[30]

S'il est établi que la responsabilité de protéger dans sa version onusienne s'est construite sous l'inspiration de la disposition africaine, cette proximité

21 D Kuwali 'The African Union and the Challenges of Implementing the "Responsibility to Protect" ' (2009) 4 *Policy Notes* 1.

22 Kuwali (n 21) 1. Voir sur l'idée de responsabilité de protéger en tant que norme de congruence : L Mvé Ella *La responsabilité de protéger et l'internationalisation des systèmes politiques* (2020).

23 A/63/PV.97 (21 juillet 2009) 7.

24 A/63/PV.100 (28 juillet 2009) 22.

25 A/63/PV.101 (28 juillet 2009) 3 ('Ce même principe [la responsabilité de protéger] est également enraciné dans la culture africaine et a été inscrit dans l'art 4(h) de l'Acte constitutif de l'Union africaine').

26 A/63/PV.98 (24 juillet 2009) 17 et suiv.

27 A/63/PV.98 (n 26) 20 et suiv.

28 A/63/PV.97 (21 juillet 2009) 25.

29 A/63/PV.97 (n 28) 19.

30 A/63/PV.97 (n 28) 19.

conceptuelle[31] ne doit pas pour autant pousser à la confusion tant les points de rupture demeurent persistants. Notons d'emblée que la résolution finale du Sommet mondiale de 2005 pose un principe d'attribution de compétences : aux États, la responsabilité première de protéger leur population contre les crimes les plus graves et à la société internationale, celle subsidiaire de pallier cette défaillance. À l'inverse, le texte de l'UA met l'accent sur la sanction ou la conséquence de la défaillance de l'État : l'intervention. De ce point de vue, le texte offre à l'Union africaine un cadre juridique pour intervenir dans l'un de ses États membres[32] tandis que les paragraphes 138 et 139 ne font pas de la responsabilité de protéger un motif d'intervention au même titre que la légitime défense et la qualification par le Conseil de sécurité d'une situation de menace à la paix et à la sécurité internationales. Autrement dit, le texte africain contient une plus-value évidente en offrant un cadre juridique autonome – et suffisant – d'intervention tandis que les paragraphes 138 et 139 ne constituent pas à eux seuls, un fondement juridique à l'intervention. Le constat est d'autant plus vrai qu'aucune organisation régionale ne peut recourir à la force sous le seul fondement du Chapitre VIII de la Charte des Nations Unies alors même que ses propres statuts ne l'y permettent pas. En ce sens, l'article 4 (h) confère donc à l'UA « une compétence statutaire juridiquement nécessaire au sens du droit des organisations internationales ».[33]

De même, on a pu trouver à l'article 4 (h) plus de vertu que son pendant onusien dès lors que celui-ci aurait été rédigé avec davantage de rigueur juridique.[34] En effet, la version onusienne de la responsabilité de protéger fait du crime de nettoyage ethnique, une infraction autonome pouvant conditionner l'intervention. Paradoxalement, cette incrimination est absente du texte de l'UA qui se contente des trois autres crimes graves (crime de guerre, crime contre l'humanité et génocide). À l'évidence, cette exclusion ne surprend guère, tant le droit international positif ne consacre pas le nettoyage ethnique comme infraction autonome.[35]

31 C Stahn 'Responsibility to protect: political rhetoric or emerging legal norm?' (2007) 101 (1) *AJIL* 114.

32 O Corten *Le droit contre la guerre. L'interdiction du recours à la force en droit international contemporain* (2014) 525-526.

33 Corten (n 32) 525-526.

34 N Hajjami *La responsabilité de protéger* (2013) 399.

35 Remarquons par exemple que les Statuts de Rome portant création de la CPI ne font du nettoyage ethnique qu'un élément constitutif du crime plus général de génocide. Dans le même sens, la résolution de l'Assemblée générale des Nations unies A/RES/47/121 (7 avril 1993) considère le 'nettoyage ethnique' comme 'une sorte de génocide'. Dans TPIY, *Le Procureur c. Radislav Krstic*, Affaire No : IT-98-33-T, 2 août 2011, para 562, les juges ont soutenu qu''il y a d'évidentes similitudes entre une politique génocidaire et ce qui est communément appelé une politique de 'nettoyage ethnique''.

C'est toutefois sur un autre point que les oppositions entre les deux textes sont plus criantes. À la question de savoir « qui intervient ? », l'article 4 (h) répond que ce pouvoir appartient à l'Union et qu'il s'agit d'un droit. Le Document final de 2005 quant à lui répond que ce pouvoir appartient à la « communauté internationale, dans le cadre de l'Organisation des Nations unies » et qu'il s'agit d'une responsabilité. Deux remarques s'imposent sur ce point. Premièrement, le texte africain parle de « droit » d'intervenir, ce qui sous-entend la possibilité ou non pour les États membres de recourir à la force. Cette vision est beaucoup plus réaliste, l'intervention des tiers n'étant, dans le cadre de la responsabilité de protéger qu'une obligation de moyen[36] au risque de systématiser le recours à la force. À l'inverse, le texte onusien parle de « responsabilité » de la société internationale. Le terme est manifestement inapproprié si on le prend dans sa pleine rigueur juridique car sous-entend le manquement par les tiers d'une obligation première. Or, il n'en est rien. Il s'agit en réalité d'une obligation essentiellement morale, c'est-à-dire, une faculté par elle d'intervenir sans y être contrainte. Deuxièmement, les deux textes confèrent à des entités différentes, le pouvoir d'intervenir dans le but de protéger les populations. Sur cette question il faut lire l'article 4 (h) comme ne conférant aux États membres un droit d'intervention que dans le cas où ceux-ci auront reçu l'onction du Conseil de sécurité des Nations unies ; la Charte étant « peu compatible avec la reconnaissance d'un droit d'intervention en dehors de l'hypothèse d'une autorisation du Conseil de sécurité ».[37]

2.2 La participation de l'Afrique au développement de la notion de souveraineté responsable

Trois personnalités politiques africaines ont joué un rôle particulièrement décisif dans le développement conceptuel de la responsabilité de protéger : F. Deng, B. Boutros-Ghali et K. Annan. Le premier, diplomate soudanais

36 L Mvé Ella *La responsabilité de protéger et l'internationalisation des systèmes politiques* (2020) para 948.

37 Corten (n 32) 528 ; I Belahouene, H Gueldich 'La violation des droits de l'homme justifie-t-elle le recours à la force ?', in R Ben Achour & S Laghmani (dir) *Les Droits de l'Homme, une nouvelle cohérence pour le droit international ?* (2008) 325 ; B Kioko 'The right of intervention under the African Union's Constitutive Act : From non-interference to non-intervention' (2003) 85 *RICR* 807-825 ; Union Africaine, *Protocole relatif à la création du Conseil de paix et de sécurité de l'Union africaine* (9 juillet 2002) art 17. Voir pour une thèse contraire soutenant un droit d'intervention autonome tiré de l'art 4(h) : M Kunschak 'The African Union and the right to intervention : Is there a need for UN Security Council authorization ?' (2006) 31 *South Africa Yearbook of International Law* 206 ; G Amvane 'Intervention pursuant to art 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorization' (2015) 15 (2) *African Human Rights Law Journal* 296-298; D Kuwali 'Protect Responsibly : The African Union's Implementation of Article 4(h) Intervention' (2008) *Yearbook of international Humanitarian Law* 58-65; A Abass, 'Africa' (n 17) 122-129.

et Représentant spécial du Secrétaire général des Nations unies sur les personnes déplacées en 1993 a servi de catalyseur pour le concept de souveraineté en tant que responsabilité.[38]

La souveraineté responsable a été d'abord appliquée à la question des déplacés, la souveraineté traditionnelle, telle qu'interprétée, étant devenue un obstacle à la protection des déplacés lors des conflits.[39] La réalité était que les victimes qui franchissaient la frontière de leur État pouvaient bénéficier du statut de réfugié (beaucoup plus protecteur car soumis aux règles internationales) tandis qu'à l'inverse, celles qui se déplaçaient à l'intérieur du territoire national demeuraient sous la juridiction de leur État, pourtant défaillant et à l'origine de leur exode. Le concept de souveraineté comme responsabilité chez F. Deng était donc un moyen de contourner l'obstacle de la souveraineté, utilisée par les États pour justifier un refus d'assistance internationale aux personnes déplacées.[40] Loin donc d'avoir été préalablement conçue pour servir la cause de la responsabilité de protéger, la souveraineté-responsabilité chez F. Deng visait avant tout à protéger les déplacés, en rappelant d'abord que, si la souveraineté comporte des responsabilités pour l'État vis-à-vis de sa population,[41] c'est à cet État qu'il incombe en premier lieu, d'assurer à sa population, un niveau de protection de leurs droits et une garantie de leurs besoins fondamentaux.[42] Le manquement de l'État à cette obligation est de nature à remettre en cause sa souveraineté interne.[43] C'est en second

38 AJ Bellamy *Responsibility to protect. The global effort to end mass atrocities* (2009) 21 ; CG Badescu *Humanitarian intervention and the responsibility to protect : security and human rights* (2011) 4-104

39 Comme un auteur a pu le remarquer, 'aucune convention internationale ne mentionne la catégorie de personnes déplacées'. Voir S Aggar 'La responsabilité de protéger : un nouveau concept ?' Thèse de droit, Université de Bordeaux, 2016 at 215 ; F Deng 'The Impact of State Failure on Migration' (2004) 15 (4) *Mediterranean Quarterly* 20.

40 AJ Belllamy *Responsibility to protect* (n 38) 22.

41 F Deng et al *Sovereignty as responsibility: conflict management in Africa* (1996) 32. À l'origine, le principe visait à assurer une protection équivalente à celle des réfugiés aux déplacés qui tombaient sous l'empire de la souveraineté interne. Lors de la guerre du Biafra les déplacés internes n'ont pas pu bénéficier d'une protection efficace car ne tombaient pas sous le coup de la Convention sur les réfugiés mettant ainsi le Haut-commissariat dans une impasse. Voir R Cohen 'From sovereign responsibility to R2P' in W A Knight & F Egerton (eds) *The Routledge handbook of the responsibility to protect*, (2012) 12).

42 F Deng et al (n 41) 27: '*to be legitimate, sovereignty must demonstrate responsibility, which means at the very least ensuring a certain level of protection for and providing the basic needs of the people'.*

43 F Deng et al (n 41) 33. Il considère qu' 'Aucun gouvernement qui laisse des centaines de milliers, et peut être des millions de citoyens mourir de faim quand la nourriture pourrait leur être fournie, qui les expose aux éléments quand il pourrait leur être fournir un abri, ou qui permet qu'ils soient torturés, brutalisés et assassinés de façon aveugle

lieu à la société internationale qu'appartient la responsabilité d'aider ces populations et de faire en sorte que ces États puissent rendre compte de leur défaillance.[44] La réponse apportée à propos des déplacés internes par F. Deng a fourni les bases conceptuelles de la responsabilité de protéger à travers l'idée d'une souveraineté-responsabilité.[45] Il entend montrer que l'autorité souveraine de l'État dure aussi longtemps que celui-ci pourra assumer les exigences de protection de sa population.[46]

La deuxième personnalité, B. Boutros-Ghali, quant à elle n'a pas soutenu expressément l'idée d'une souveraineté responsable. Toutefois, en tant que Secrétaire général de l'ONU, elle a rejeté la thèse d'une souveraineté absolue[47] et a reconnu que la souveraineté ne saurait être invoquée comme un paravent contre le peuple.

C'est K. Annan, son successeur au Secrétariat général de l'ONU qui a le mieux formalisé les enjeux, au point que l'on a admis qu'il avait dégagé les prémisses de la souveraineté responsable.[48] Il a posé le problème de la manière suivante :

par des forces armées, ne peut prétendre à la souveraineté. Un gouvernement qui laisse ses citoyens souffrir sans aucun sens de la responsabilité et de conduite morale ne peut invoquer la souveraineté pour empêcher le reste du monde d'offrir protection et assistance'.

44 F Deng 'From "Sovereignty as Responsibility" to the "Responsibility to Protect"' (2010) 2 (4) *GR2P* 354; F Deng et *al.* (n 41) VII: *'Sovereignty should no longer be seen as protection against external interference in a state's internal affairs. Rather the state must be held accountable to domestic and external constituencies'*); CIISE *La responsabilité de protéger,* (2001) para 2.14.

45 R Cohen 'From Sovereign Responsibility to R2P' (n 41) 15 ; E Lebrun-Damiens 'Responsabilité de protéger et souveraineté' (2010) (10) *Mondes. Les Cahiers du Quai d'Orsay* 12. Le raisonnement qui est utilisé ici pour consacrer la souveraineté responsable dans le cadre de la responsabilité de protéger est un sophisme, connu sous le nom de l'argument de la pente glissante. L'idée est que : 'l'adoption d'une décision politique ou juridique (décision A) […] rendrait plus aisée le passage à une autre décision ou situation présentée comme manifestement peu souhaitable (décision B). Autrement dit, l'argument consiste à dire que la décision A n'est pas nécessairement mauvaise en soi, mais qu'elle rendra plus probable l'une des conséquences supposées (décision B) – toute la force de l'argument reposant sur le caractère probable de ce passage –». Voir S Goltzberg *L'argumentation juridique* (2017) 56-60, 120). Dans le cas de la responsabilité de protéger, l'idée serait que : puisque la souveraineté responsable s'applique aux États en temps de crise pour protéger les déplacés, pourquoi ne s'appliquerait-elle pas également à ces mêmes États de manière permanente pour protéger leurs populations ?

46 A Orford *International authority and the responsibility to protect* (2011) 36-37.

47 Il considère que 'la souveraineté absolue et exclusive n'est […] plus de mise, si la pratique a jamais égalé la théorie' (A/47/277 - S/24111 (2012) para 17).

48 N. Hajjami *op. cit.* 150.

> […] si l'intervention humanitaire constitue effectivement une atteinte inadmissible à la souveraineté, comment devons-nous réagir face à des situations comme celles dont nous avons été témoins au Rwanda ou à Srebrenica, devant des violations flagrantes, massives et systématiques des droits de l'homme, qui vont à l'encontre de tous les principes sur lesquels est fondée notre condition d'êtres humains ? ».[49]

Autrement dit, il cherche un moyen juridique pour concilier la nécessité de respecter les droits de l'homme avec l'impératif de souveraineté des États ; principes qui, jusqu'alors, avaient été jugés inconciliables.[50] La souveraineté responsable était donc à la fois le moyen de ne pas porter atteinte à la souveraineté, tout en assurant la protection des droits de l'homme dans les États en crise ; le moyen de protéger l'intégrité territoriale des États sans renoncer à défendre le principe de l'humanité.[51] L'approche de K. Annan visait à trouver un moyen de surmonter l'opposition souveraineté/intervention à des fins de protection des individus[52] en essayant de concilier les deux principes.

Ce dilemme s'était déjà présenté lors des discussions qui ont précédé le Sommet mondial de 2005. En effet, les 'petites et moyennes puissances',[53] essentiellement africaines, ont principalement soutenu une conception de la responsabilité de protéger limitant le recours à la force afin de se prémunir des situations d'ingérence extérieure. L'inquiétude a été clairement résumée par l'Algérie lorsqu'elle affirmait que :

> Nous ne remettons pas en question le fait que les Nations unies ont le droit et le devoir d'aider l'humanité en souffrance, mais nous demeurons extrêmement sensibles face à tout affaiblissement de nos souverainetés, non seulement parce que la souveraineté est notre dernière défense contre les règles d'un monde inéquitable, mais aussi car nous n'intervenons pas dans le processus décisionnel du Conseil de sécurité.[54]

49 A/54/2000 para 217.

50 C'est cette difficulté qui est soulevée par O Corten lorsqu'il constate que 'la souveraineté s'avère incompatible avec l'existence d'une sorte de "police internationale" à l'échelle mondiale' ('Les ambiguïtés du droit d'ingérence humanitaire' (1999) *Le Courrier de l'UNESCO* http://www.operationspaix.net/DATA/DOCUMENT/6103~v~Les_ambiguites_du_droit_d_ingerence_humanitaire.pdf , consulté le 15 août 2020.

51 A/54/2000, para 218-219 ; K Annan 'Two concept of sovereignty' (18 September 1999) *The Economist*.

52 K Annan *Rapport du millénaire, Nous les peuples, le rôle des Nations Unies au XXIème siècle* (Mars 2000) para 218.

53 N Hajjami *op. cit.*, para 165.

54 A Bouteflika, cité par T G Weiss *What's wrong with the United Nations and how to fix it* (2012) 23.

La méfiance vis-à-vis de l'intervention devint si grande que les discussions ne portèrent plus vraiment sur l'adhésion ou non à la responsabilité de protéger mais sur la question des atteintes à la souveraineté des États portées par ce principe.[55] De là naquit l'opposition prétendue des États africains[56] vis-à-vis de la responsabilité de protéger. Opposition en apparence car, si les États africains, ont accepté bon an mal an l'idée que chaque État doit protéger sa population prioritairement à quiconque,[57] c'est la mesure et la portée de la réponse donnée par la société internationale à la défaillance de cet État qui demeurent toujours problématiques. Le reproche sous-jacent est que l'approche onusienne ne met pas suffisamment l'accent sur la dimension préventive et laisse accroire que seule l'intervention constitue la réponse à la commission des crimes graves, comme si la responsabilité de protéger donnait systématiquement lieu à un recours à la force[58] comme le « prétendu »[59] droit d'ingérence. C'est en l'occurrence la position des États africains à l'ONU, relayée par le Malawi lorsqu'il déclarait que « la protection des citoyens ne devrait pas être utilisée comme un prétexte pour mettre en péril la souveraineté, l'indépendance et l'intégrité territoriale des États ».[60] D'autres États comme l'Algérie ont également succombé à cette opposition en affirmant que la responsabilité de protéger est « très difficile [à] distinguer de la notion d'ingérence humanitaire, que les pays du Sud, avaient formellement rejetée en 1999 ».[61] Plus nettement encore, l'Égypte craint que cette doctrine conduise « à une nouvelle ère d'ingérence dans les affaires intérieures des pays, en particulier compte tenu du fait que les bases juridiques d'une telle théorie demeurent floues'.[62] Pire encore, la responsabilité de protéger a été vouée aux gémonies par la plupart des États africains qui soutenaient qu'elle renforçait, davantage, *in fine*, la

55 (Lesotho) A/63/PV.101 (28 juillet 2009) 5 ; (Guinee Bissau) A/63/PV.98 (24 juillet 2009) 32 ; (Gabon) S/PV.6354 (7 juillet 2010) 22 ; (Benin) A/63/PV.100 (28 juillet 2009) 31.

56 C Focarelli 'The Responsibility to protect doctrine and humanitarian intervention : too many ambiguities for a working doctrine' (2008) 13(2) *J. Conflict & Sec. L.* 202.

57 (Lesotho) A/63/PV.101 (28 juillet 2009) 5 ; (Gabon) CS/10442, le Conseil de sécurité réfléchit aux moyens de faire de la protection des civils dans les conflits armés une réalité sur le terrain, 9 novembre 2011.

58 Voir. par exemple l'application de la responsabilité de protéger au Kenya (2007-2008).

59 CIJ, *Affaire du Détroit de Corfou*, fond, arrêt du 9 avril 1949, *Rec*. 1949, 39.

60 A/59/PV. 85 (5 avril 2005) 25. Voir dans le même sens, l'Égypte : 'la notion de 'responsabilité de protéger' […] pourrait s'avérer une menace au principe de la souveraineté nationale des États et pourrait conduire à une nouvelle ère d'ingérence dans les affaires intérieures des pays'.

61 A/59/PV.86 (5 avril 2005) 9.

62 A/59/PV.86 (n 61)14.

souveraineté des grandes puissances au détriment de celle des petits États défaillants.[63]

Si la responsabilité de protéger est loin d'être une innovation conceptuelle onusienne, comme nous venons de l'exposer au regard des positions des États africains, reste que celle-ci n'a fini par faire consensus entre eux que depuis l'adoption par l'Assemblée générale des Nations Unies de la résolution 60/1 en 2005. Dès lors, sa mise en œuvre en Afrique a donné lieu à un double sentiment contradictoire : la déception lorsqu'elle est appliquée et des attentes justifiées dans les cas où le principe a pu ou dû s'appliquer (sans l'être) donnant ainsi le sentiment partagé que l'on est face à une véritable norme.

3 L'apport de l'afrique à la concrétisation de la R2P

C'est devenu un lieu commun d'invoquer la responsabilité de protéger de la société internationale chaque fois qu'un désastre humanitaire a lieu dans un État de son fait[64] ou même du fait de la nature[65] comme si le principe avait désormais la vertu de stopper les catastrophes quelles qu'elles soient. Il y a pourtant lieu de rappeler quelques principes de bon sens qui conditionnent l'application de la responsabilité de protéger au risque de généraliser les atteintes à la souveraineté des États. Parmi ces principes ou conditions, il y a la commission d'un au moins des quatre crimes considérés comme les plus graves (le génocide, le crime de guerre, le crime contre l'humanité ou le nettoyage ethnique). Il faut encore que ces faits émanent de l'État ou qu'il soit incapable de les endiguer : c'est la condition de défaillance (sécuritaire). Cela n'est guère encore suffisant puisque l'usage de la force dans le cadre de la responsabilité de protéger implique l'examen des critères d'opérationnalité ou principes de précaution : la bonne intention, le dernier recours, la proportionnalité des moyens et les perspectives raisonnables de succès.[66] C'est au regard de toutes ces conditions qu'il faut

63 Focarelli (n 56) 202 et suiv.

64 Voir par exemple pour les massacres contre la minorité Rohingya, 'Rakhine : le gouvernement du Myanmar a la responsabilité de protéger les populations dans le besoin (Guterres)' (2017) *ONU Info*, https:// news.un.org/fr/story/2017/08/363122-rakhine-le-gouvernement-du-myanmar-laresponsabilite-de-proteger-les, consulté le 27 févr. 2018.

65 C'est le cas de la Birmanie, après le passage du cyclone Nargis. Voir 'Birmanie : vif débat sur la 'Responsabilité de protéger'' (2008) *Le Monde*, http://www.lemonde.fr/asie-pacifique/article/2008/05/14/birmanie-vif-debat-sur-la-responsabilite-de proteger_1044751_3216.html, consulté le 27 févr. 2018.

66 CIISE para 4.32.

évaluer l'apport de l'Afrique à la responsabilité de protéger lors des crises où le principe a été appliqué (3.2) ou ignoré (3.1).

3.1 Un apport limité : l'inapplication de la R2P au Darfour et au Nigéria

Depuis 2001, l'*International Coalition for the Responsibility to Protect*[67] a recensé une vingtaine de crises dans le monde – plus de la moitié ont lieu ou se déroulent en Afrique[68] – lors desquelles la responsabilité de protéger a été invoquée. Afin de ne pas alourdir les analyses, la réflexion sera limitée aux cas du Darfour et du Nigeria, symptomatiques de l'inapplication de la responsabilité de protéger dans une crise où elle aurait dû l'être. Ce choix paraît d'autant plus indiqué qu'il est révélateur des atermoiements de la société internationale face à la commission des crimes graves en même temps qu'il montre que la coopération africaine est la réponse à une application effective et efficace de la responsabilité de protéger en Afrique.

Au Darfour,[69] alors que le gouvernement islamiste soudanais, soupçonné d'avoir recruté des milices des tribus arabes (Janjawids), massacrait les populations noires et commettait contre elles, les atrocités les plus graves,[70] le débat au sein de la société internationale se cristallisait autour de la qualification desdits faits, de crime de génocide.[71] Si ce crime est une des conditions de mise en œuvre de la responsabilité de protéger, cela ne veut pas pour autant dire que chaque fois qu'une telle qualification est retenue, il existe une obligation juridique pour le Conseil de sécurité de recourir à la force, au titre de ses missions de maintien de la paix et en se fondant (idéologiquement) sur la responsabilité de protéger. Le cas du Darfour démontre que la responsabilité subsidiaire de la société

67 L'*ICRtoP* rassemble des ONG de toutes les régions du monde pour renforcer le consensus normatif pour la RtoP, approfondir la compréhension de la norme, faire pression pour renforcer les capacités pour prévenir et arrêter les génocides, les crimes de guerre, le nettoyage ethnique et crimes contre l'humanité et mobiliser les ONG pour pousser à l'action pour sauver des vies dans des 'situations RtoP' spécifiques aux pays.

68 Burundi, République centrafricaine, Côte d'Ivoire, Darfour, République démocratique du Congo, Guinée Conakry, Kenya, Libye, Mali, Nigéria, Soudan, Sud-Soudan, Zimbabwe. Le cas somalien quant à lui fait l'objet d'une surveillance accrue.

69 Sur l'historique de cette crise : A S Natsios, Z Scott 'Darfur, Sudan' in Genser & Cotler (n 7) 235-259.

70 Le conflit aurait fait plus de 350000 morts, plus de 2000000 déplacés et 200000 réfugiés entassés dans divers camps dans le Tchad voisin : J Coebergh 'Sudan : Genocide Has Killed More than the Tsunami' (2005) 9(7) *Parliamentary Brief* 5-6 ; E Reeve 'Darfur Mortality Update: From Violence, Malnutrition, and Disease' (31 août 2005) *Political Affairs Magazine* http://www.politicalaffairs.net/ article/articleview/1771/1/32/.

71 J-B Jeangène Vilmer 'La responsabilité de protéger et le débat sur la qualification de génocide au Darfour' in SFDI *La responsabilité de protéger* (2008) 233-241.

internationale de protéger est avant tout, une responsabilité politique collective, au demeurant imparfaite, et n'est guère un droit pour les victimes d'être secourues.[72]

C'est dans cette logique que doit se comprendre le rôle joué par la Chine dans le processus décisionnel au sein du Conseil de sécurité dans l'échec de l'adoption par celui-ci d'une résolution autorisant le recours à la force. Il est paradoxal de constater qu'au sein du Conseil de sécurité, aucune référence explicite à la responsabilité de protéger n'eût été faite dans sa résolution 1769 (2007). Ce silence est d'autant plus coupable que le conflit était pourtant déjà connu. Ainsi, en 2004, K. Annan déclarait à ce propos lors d'une journée internationale sur le Rwanda que « la volonté politique d'agir fait défaut, alors même que les signes alarmants abondent ».[73] Le mois suivant, le Haut-commissaire des Nations unies aux Droits de l'homme décrivait le régime soudanais de « régime de terreur ».[74]

Certains ont pu expliquer cette réticence par le fait que le recours à la force apparût pour beaucoup, comme un « durcissement »[75] du ton de la diplomatie alors même que la responsabilité de protéger ne renvoie pas systématiquement à une intervention militaire. La confusion entre le recours à la force et la responsabilité de protéger était, hélas, déjà opérée, à tel point que certains États comme la Chine ont encouragé les autres délégations onusiennes à ne pas recourir au concept de responsabilité de protéger[76] de peur de saper l'action « constructive »[77] qu'ils ont entamée. Jugeant la responsabilité de protéger trop subversive et inappropriée, car « inutilement antagoniste »,[78] le Conseil de sécurité a, tout simplement, décidé de ne pas recourir au principe dans le cas du Darfour et de se contenter de la non ambitieuse, mais, au demeurant plus consensuelle,

72 J-F Thibault 'De la responsabilité de protéger : le test échoué du Darfour' (2005) 18 *Sécurité mondiale* : en ligne http://www.cms.fss.ulaval.ca/recherche/upload/hei/fichiers/securitemondiale18.pdf.

73 'Déclaration du Secrétaire général des Nations Unies à l'occasion de la journée de réflexion sur le génocide au Rwanda', (2004) SG/SM/9245/AFR/893/HR/CN/1077.

74 'Situation des droits de l'homme dans la région du Darfour au Soudan', 7 mai 2004, E/CN.4/2005/3.

75 Hajjami (n 34) 356.

76 S/PV.5703, (22 juin 2007) 19.

77 A Kajee 'The Darfur conflict and the responsibility to protect : toward a sustainable peace'' in H Besada (ed) *Crafting an African security architecture addressing regional peace and conflict in the 21st Century* (2010) 166.

78 Hajjami (n 7) 357. Voir pour les mêmes raisons, à la demande de la Chine, la suppression dans la résolution 1769 (2007) du rappel aux paragraphes 138 et 139 de la résolution finale du Sommet mondial de 2005 (S/PV.5703 (22 juin 2007) 19).

référence à la « protection des civils en période de conflits armés » de la résolution 1674.

Finalement, l'inapplication de la responsabilité de protéger au Darfour est due à la fois à l'important débat qui a (trop) retenu la société internationale sur la qualification des crimes, de génocide et au blocage systématique opéré par la Chine au sein du Conseil de sécurité qui considérait le principe (du fait de sa mauvaise réputation) comme incompatible avec l'action de la Mission conjointe des Nations unies et de l'Union africaine au Darfour (MINUAD).

D'un point de vue contextuel, l'inapplication de la responsabilité de protéger dans cette crise peut aussi trouver une explication dans le fait que, au moment où les actes susceptibles de déclencher une action internationale ont eu lieu, la norme « responsabilité de protéger » n'avait pas encore été consacrée au niveau universel[79] et bien que l'idée eût déjà une base juridique dans l'Acte constitutif de l'Union africaine (comme nous l'avons montré plus haut). Le consensus naissant, dégagé par la CIISE en 2001, était encore trop fragile pour que le principe eût été repris en appui d'une intervention internationale avant même sa ratification par l'Assemblé générale des Nations unies en 2005.

Sans être totalement considérée comme un échec de la responsabilité de protéger[80] qui n'a jamais pu s'y appliquer, la situation au Darfour, constitue à notre sens, une expérience formatrice pour les interventions ultérieures et une étape vers l'évolution du principe. Il s'agirait davantage d'un facteur de promotion d'un interventionnisme sécuritaire en Afrique en vue de stabiliser les États, que de l'avortement prématurée d'une « norme naissante ».[81] C'est tout le sens du constat fait par l'ancien président sud-africain lorsqu'il considère que « Nous [les États africains] n'avons demandé à personne en dehors du continent africain de déployer des troupes au Darfour. C'est une responsabilité africaine, et nous pouvons le faire ».[82]

79 Dans le même sens, A J Bellamy 'The Responsibility to Protect – Five Years On' (2010) 24(2) *Ethics & Int'l Aff.* 153.

80 A de Waal 'Darfur and the failure of the responsibility to protect' (2007) 83(6) *Int'l Aff.* 1039-1054; D Kingsbury *Sri Lanka and the responsibility to protect* (2011); C G Badescu & L Bergholm 'Responsibility to protect and the conflict in Darfur: the big let-down' (2009) 40 (3) *Security Dialogue* 287-309.

81 H Verhoeven, R Soares De Oliveira & M Mohan Jaganathan 'To Intervene in Darfur, or not: re-examining the R2P debate and its impact' (2016) 30 No 1 *Global Society* 21-37.

82 SE Rice 'Why Darfur Can't be Left to Africa' (August 7 2005) *Brookings*, sur: https://www.brookings.edu/articles/why-darfur-cant-be-left-to-africa/, consulté le 18 août 2020.

Au Nigeria, le contexte est assez différent. Depuis les événements de 2014 (enlèvements de lycéennes), le pays a été le théâtre de la commission par le groupe terroriste islamiste Boko Haram et les forces de sécurité de l'État nigérian de nombreuses violations du droit international humanitaire. L'escalade des tensions sectaires et l'incapacité de l'État à protéger sa population ont fait dire au procureur de la Cour pénale internationale, F. Bensouda, que les crimes commis relevaient de la compétence de la Cour qui a autorité sur les affaires de crimes de guerre, crimes contre l'humanité et génocide.[83]

Contrairement au cas du Darfour, la question de la légalité de la mise en œuvre de la responsabilité de protéger semble se poser ici : la responsabilité de protéger est-elle de nature à s'appliquer dans des situations de lutte contre le terrorisme ? En ne s'en tenant qu'au bon sens, l'on peut admettre aisément que la lutte contre le terrorisme ne peut et ne doit exonérer un État de sa responsabilité de protéger sa population contre les crimes les plus graves.[84] D'ailleurs, le *Document final du Sommet de 2005* dans son paragraphe 85 abonde dans le même sens en affirmant que :

> les États doivent veiller à ce que les mesures qu'ils prennent pour combattre le terrorisme soient conformes à leurs obligations au regard du droit international, en particulier le droit international des droits de l'homme, le droit international des réfugiés et le droit international humanitaire.[85]

Une simple lecture croisée des paragraphes 138, 139 et 85 permettrait de dire que la responsabilité de protéger ne saurait être utilisée pour affaiblir la lutte contre le terrorisme et *vice versa*. En y regardant de plus près, la tentation d'appliquer la responsabilité de protéger aux actes de terrorisme, vient de ce que le terrorisme entraine souvent – comme dans le cas nigérian – la commission des crimes graves face auxquels la responsabilité de protéger n'est pas indifférente. Dès lors, ce n'est pas tant le terrorisme en soi qui serait sanctionné par la responsabilité de protéger – celui-ci n'étant ni une condition de sa mise en œuvre ni une incrimination claire en droit international –, mais sa conséquence.

83 Bureau du Procureur de la CPI, *Rapport sur les activités menées en 2015 en matière d'examen préliminaire*, para 195 à 216.

84 Hajjami (n 34) 330 et 335. Pour certains, les situations de terrorisme pourraient même être considérées comme le nouveau pilier de la responsabilité de protéger. Voir V Popovski & B Maiangwa 'Boko Haram's attacks and the people's response : A "Fourth pillar" of the responsibilility to protect ?' (2016) 25(2) *African Security Review* 159-175 ; K Senaratne 'R2P or R2PT ? – The "Responsibility to protect from terrorism"' (17 juin 2008) *Permanent Mission of Sri Lanka to the UN Office of Geneva*, texte disponible à l'adresse suivante : http://www.lankamission.org/content/view/403/

85 A/RES/60/1 (2005) para 85.

Dans le cas du Nigéria, aucune résolution onusienne ne mentionne le recours à la responsabilité de protéger du gouvernement face aux actes terroristes perpétrés ; signe que le Conseil de sécurité n'a pas voulu saper le consensus autour de la responsabilité de protéger en l'appliquant aux situations de terrorisme qui ont été clairement exclues de l'article 4(h) et des paragraphes 138 et 139 de 2005. La crise a davantage été appréhendée sous l'angle du terrorisme que sous celui de la responsabilité de protéger ; sans doute parce que la lutte contre le terrorisme est moins contestée que le principe de la responsabilité de protéger.

3.2 Un apport discuté : des applications variées de la R2P

La mise en œuvre de la responsabilité de protéger de la société internationale, parce qu'elle constitue par sa nature une intervention dans les affaires d'un État est toujours un sujet controversé. Il faut distinguer sur ce point deux types d'application du principe sur le territoire d'un État : celles qui n'impliquent pas le recours à la force (3.2.1) – elles sont souhaitables, mais fort rares – et celles qui conduisent à l'utilisation de la force (3.2.2).

3.2.1 La mise en œuvre de la R2P sans utilisation de la force : l'exemple kenyan

Bien que peu connue, la crise post-électorale kenyane constitue sans doute, l'un des premiers cadres de mise en œuvre de la responsabilité de protéger.[86] Ce cas méconnu et, au demeurant, singulier est l'une des rares applications – pourtant réussies[87] – du principe sans recours à la force[88] ce qui le rend moins spectaculaire que les cas libyen ou ivoirien. Une telle application de la responsabilité de protéger a d'intéressant qu'elle met en lumière la différence fondamentale qui existe entre le principe et le droit ou devoir d'ingérence.[89]

La crise au Kenya est née d'un changement anticonstitutionnel de gouvernement. Au mépris de la transparence et des règles de dévolution du pouvoir, le président sortant M Kibaki a été déclaré vainqueur par la Commission nationale électorale au détriment de son adversaire R.

86 J Langer 'The Responsibility to protect: Kenya's post-electoral crisis' (2011) *Journal of International Service* 2 ; M Kamto, *Droit international de la gouvernance* (2013) 163-164.

87 A Branch 'The Responsibility to Protect and Africa's International Relation' in T Murithi (ed) *Handbook of Africa's International Relations* (2014) 191.

88 J Junk 'Bringing the non-coercive dimensions of R2P to the fore : the case of Kenya' (2016) 30(1) *Global Society* 54-66.

89 J-B Jeangène Vilmer *La responsabilité de protéger* (2015) 27; G Evans 'From Humanitarian Intervention to Responsibility to protect' (2006-2007) 24(3) *Wis. Int'l L. J.* 703-722.

Odinga, à la suite de l'élection présidentiel de 2007. Les contestations post-électorales ont fini par entrainer un soulèvement du peuple et une mutation de la crise vers un conflit ethnique sous fond de guerre civile. La violence des affrontements était telle qu'on a parlé de crimes contre l'humanité,[90] de nettoyage ethnique, de génocide.[91] L'Union africaine et son médiateur K. Annan quant à eux sont restés mesurés en considérant que « le Kenya fait face à des violations massives et systématiques des droits de l'Homme »[92] quand F. Deng, Conseiller spécial pour la prévention du génocide, a considéré qu'il s'agissait d'un « cycle destructeur d'attaques et de représailles ».[93] Au total, près de 1500 personnes ont été tuées et 300000, déplacées.

Les faits commis, peu importe la qualification exacte retenue, étaient de toute évidence au titre de ceux qui conditionnent la mise en œuvre de la responsabilité de protéger. K. Annan, a ainsi vu la crise

> sous le prisme de la responsabilité de protéger avec un gouvernement kényan incapable de contenir la situation ou de protéger son peuple' avant de poursuivre en affirmant que '[…] si la communauté internationale n'était pas intervenue, les choses se seraient désespérément aggravées. Le problème, est que, quand on dit 'intervention', les gens pensent militaire, alors qu'en fait c'est un dernier recours. Le Kenya est un exemple réussi de mise en œuvre de la R2P.[94]

Cette position n'est pas isolée puisque la responsabilité de protéger a été systématiquement associée à la crise au Kenya[95] aussi bien par le Secrétaire général des Nations Unies que par son Conseiller spécial pour

90 Commission of Inquiry on Post-Election Violence/Waki Commission, *Report*, 2008, p. 303, sur https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D5492576070001F459D-Full_Report.pdf, consulté le 23/08/2020.

91 Position de la Conférence internationale pour la région des grands lacs africains (réunissant les onze États de la région), citée par l'AFP (7 janvier 2008).

92 Les décisions et déclarations de la 9ème Conférence, http://www.africaunion.org/root/ ua/index/index.htm.

93 UN Center News Press Release, 28 January 2008: UN genocide adviser urges end to violence in Kenya, http://www.un.org/apps/news/story.asp?NewsID=25425&Cr=kenya&Cr1=.

94 Cité par R Cohen 'How Kofi Annan Rescued Kenya' (2008) 55(13-14) *New York Review of Books* (nous traduisons).

95 Certains commentateurs ont cependant fait remarquer que c'est seulement rétrospectivement que cette association a été faite : M Schneider 'Implementing the responsibility to protect in Kenya and beyond' (5 March 2010) *International Crisis Group*, http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2730-international-crisis-group-implementing-the-responsibility-to-protect-in-kenya-and-beyond

la prévention du génocide qui rappelaient aux dirigeants kényans d'exercer leur responsabilité de protéger au risque d'être tenus responsables devant la société internationale.[96]

L'un des principaux apports du cas kényan est qu'il fournit une illustration parfaite de ce que la responsabilité de protéger peut offrir en termes d'action préventive si bien que sa seule menace a suffi pour convaincre les dirigeants kenyans à assumer leurs obligations de protection. Pour d'autres encore, c'est le leadership de l'Union africaine qui a été décisif dans la résolution de la crise à la seule étape de la prévention.[97] Selon cette position, la responsabilité de protéger n'aura joué qu'un rôle marginal dans la résolution de la crise[98] puisque son action n'était fondée que sur l'architecture de paix et de sécurité de l'UA qui date d'avant la consécration onusienne de 2005. Cette position que nous avons rejetée plus haut, n'est tenable que si l'on admet que l'architecture africaine de paix et de sécurité ne fait pas mention de l'idée de responsabilité de protéger. Or, une telle approche est erronée.

Tout compte fait, l'application de la responsabilité de protéger nous enseigne que le principe peut être mis en œuvre avec succès sans recourir à la force – qui n'est jamais que l'ultime recours – et que l'action des acteurs africains, soutenue par celle du Conseil de sécurité constitue le moyen le plus efficace d'application de la responsabilité de protéger.

3.2.2 La mise en œuvre de la R2P avec utilisation de la force : les exemples libyen et ivoirien

À l'évidence, les cas les plus marquants d'application de la responsabilité de protéger sont ceux qui donnent lieu à l'utilisation de la force. Les exemples les plus connus sont ceux de la Libye, de la Côte d'Ivoire, du Mali et de la Centrafrique. Nous nous limiterons aux deux premiers car la responsabilité de protéger y a franchi un « nouveau palier »[99] en étant pour les premières fois mentionnées dans une résolution autorisant le recours à la force. Depuis, on compte un peu moins d'une centaine de références plus ou moins explicites à la responsabilité de protéger dans les résolutions du Conseil de sécurité.

96 B Ki-Moon *Address to the summit of the African Union* (January 31, 2008).

97 Bellamy 'The Responsibility to protect – five years on' (n 79) 155.

98 S Harder 'How They Stopped the Killing' (June 2009) *Stanley Foundation*, www.stanleyfoundation.org/articles.cfm?id=596, consulté le 20 août 2020.

99 Jeangène Vilmer (n 89) 69.

En Libye, la mauvaise répartition des richesses exacerbée par la vague de démocratisation[100] des États maghrébins dans le cadre du Printemps arabes a assené en 2001, au régime de Kadhafi – en place depuis 1969 –, son dernier coup de boutoir. La vague de protestation commencée avec l'arrestation par le régime d'un militant des droits de l'homme a eu pour réponse l'utilisation par le régime en place de la force contre la population désormais constituée en rébellion. Le désastre humanitaire est dû en partie à l'attitude du colonel Kadhafi qui a affirmé en des termes non équivoques son intention d'ordonner l'exécution de toute personne prenant les armes contre la Libye et demandé publiquement à ses forces de « purifier » la région de ces « cafards ».[101] Il est vrai que si de tels faits sont susceptibles de constituer des crimes contre l'humanité, de nettoyage ethnique et même de génocide, ils ont surtout le malheur d'être associés au génocide rwandais de 1994 qui constitue pour la société internationale, un monumental échec moral.[102]

C'est donc tout logiquement que le Conseil de sécurité a rappelé au pouvoir en place sa responsabilité de protéger sa population[103] avant d'autoriser l'intervention de l'OTAN[104] en vue de mener cette mission ; constatant du même fait la défaillance du régime en place. Si ces deux résolutions font de la responsabilité de protéger, l'« outil intellectuel et normatif nécessaire pour agir »[105] – sans faire du principe un fondement autonome du Chapitre VII de la Charte des Nations unies – cela est sans doute dû au rôle décisif joué par les acteurs africains aussi bien dans l'acte décisionnel que dans l'acte opérationnel. A. J. Bellamy a pu ainsi opiner que sans les soutiens de la Ligue des États arabes, du Conseil de coopération du Golfe et de l'Organisation de la Conférence islamique, il était presque assuré que les Russes et les Chinois auraient mis leur veto à la résolution 1973.[106]

100 O O Varol 'The Democratic Coup d'État' (2012) *Harv. Int'l L.J.* 292-356.

101 N Dupont, P Bas-Rabérin 'Mouammar Kadhafi promet de "nettoyer la Libye maison par maison"', 22 février 2011, Paris, *L'Express*.

102 AJ Bellamy 'Libya and the responsibility to protect: the exception and the norm' (2011) 25(3) *Ethics and International Affairs* 265.

103 S/RES/1970 (2011) et S/RES/1973 (2011).

104 S/RES/1973 (2011).

105 R Thakur 'UN breathes life into "Responsibility to protect"' 21 March 2011, Toronto, *The Toronto Star*.

106 EA Heinze 'Norms of intervention, R2P and Libya' (2014) 6(1) *GR2P* 108-109. Dans le même sens: M Haddar & J-Y Moisseron (dir) 'Le monde arabe dans la crise' (2010) 206 *Maghreb-Machrek*, pour qui, le soutien de la Ligue des États arabes 'était nécessaire pour obtenir l'absence de veto de la Chine et de la Russie'.

Pour ce qui est de la Ligue des États arabes, sa Charte des droits de l'homme de 1994 est un instrument assez modeste voire, « primitif »[107] de protection des droits de l'homme car se limite aux seules activités de la Commission permanente arabe des droits de l'homme. Cette lacune fut évidente en Libye au regard des difficultés rencontrées par la Ligue pour trouver un fondement juridique dans ses textes en vue de prévenir les crises et de protéger les populations. La principale réaction de l'Organisation fut la suspension de la Libye – le 22 février 2011 – ; comme si une telle sanction avait pour effet ricochet de protéger la population.

C'est au regard de cette faiblesse structurelle que l'Union africaine, plus expérimentée dans la gestion des crises, a envoyé des émissaires[108] afin de trouver une solution diplomatique. L'action politique de la Ligue arabe est donc assez symbolique et cantonnée à un rôle de relais et de promoteur. Elle a ainsi participé à l'obtention d'un consensus régional incluant la mise en place par le Conseil de sécurité d'une zone d'exclusion aérienne et l'autorisation par ce dernier d'une intervention militaire pour des raisons humanitaires sans le consentement d'un État fonctionnel.[109] Rôle des acteurs africains certes insuffisant, mais décisif car, là où il a fallu des années pour intervenir militairement au Kosovo, il ne fallut que vingt-huit jours à la société internationale pour le faire en Libye.[110]

En Côte d'Ivoire, les faits à l'origine de la crise humanitaire sont sensiblement les mêmes qu'au Kenya : alors que les résultats des élections présidentielles sont proclamés, le président sortant est déclaré vainqueur par le Conseil constitutionnel tandis que la Commission électorale indépendante faisait de son adversaire, le président élu. La crise ivoirienne intéresse les organisations régionales africaines en ce que celles-ci prohibent les changements anticonstitutionnels de gouvernements[111] mais également parce que les conséquences de cette crise sont essentiellement

107 M Amin Al-Midani 'La Ligue des États arabes et les droits de l'homme' (2002) 26 *Scienza & Politica* 114.

108 'Kadhafi accepte la feuille de route de l'UA', 10 avril 2011, Paris, *Le Figaro*, http://archive.wikiwix.com/cache/index2.php?url=http%3A%2F%2Fwww.lefigaro.fr%2Fflash-actu%2F2011%2F04%2F10%2F97001-20110410FILWWW00224-kadhafi-accepte-la-feuille-de-route-de-l-ua.php

109 PD Williams 'The road to humanitarian war in Libya' (2011) 3(2) *GR2P* 249.

110 Jeangène Vilmer (n 89) 72, justifie la célérité de cette action du Conseil de sécurité à la fois par le consensus régional et par la grande clarté de la menace.

111 Article 30 de l'Acte constitutif de l'Union africaine du 11 juillet 2000 ; *Déclaration sur le cadre pour une réaction de l'OUA face aux changements anticonstitutionnels de gouvernement*, AHG/Decl. 5 (XXXVI) (2000) [*Déclaration de Lomé de 2000*] ; art 23 de la Charte africaine de la démocratie, des élections et de la gouvernance du 30 janvier 2007 ; art 45 du Protocole A/SP1/12/01 sur la démocratie et la bonne gouvernance de la CÉDÉAO du 21 décembre 2001.

humanitaires.[112] Les crimes commis lors de cette crise étaient tels que l'on a parlé de possibilité de génocide, de crimes de guerre et de nettoyage ethnique susceptibles de justifier des mesures d'urgence au titre de la responsabilité de protéger.[113] C'est cependant la charge de crimes contre l'humanité – charge désormais abandonnée – qui a été retenue à l'encontre de L. Gbagbo et de C. Blé Goudé.[114]

Dans sa résolution 1975, autorisant l'intervention des forces françaises Licorne et l'appui de l'opération des Nations unies en Côte d'Ivoire (ONUCI) déjà en place, le Conseil de sécurité a reconnu la commission des crimes graves et rappelé la responsabilité des parties de protéger les civils. Pour ce qui est de la CÉDÉAO (organisation sous régionale), en privilégiant des solutions diplomatiques ou politiques, son rôle a été déterminant dans la prévention de la crise. Elle a ainsi été la première organisation internationale à intervenir dans le conflit postélectoral. Lors de sa réunion extraordinaire à Abuja (Nigéria) du 7 décembre 2010, elle a pris acte de la situation politique et exprimé « sa vive préoccupation face aux menaces qu'elle fait peser sur le processus de paix et de sortie de crise en Côte d'Ivoire ».[115] En outre, elle a reconnu M. Alassane Ouattara comme président élu de la Côte d'Ivoire et demandé à M. Gbagbo de tirer toutes les conséquences de cette reconnaissance. La mesure la plus retentissante restait cependant la suspension du pays des activités de l'Organisation. La dimension préventive d'une telle décision est très douteuse. Passons ce fait sous silence et remarquons la célérité de la CÉDÉAO ; la prise en charge de la crise n'ayant eu lieu que dix jours après le début de la crise.

Pour ce qui est de l'Union africaine, son rôle basé sur la « prévention réactive » du conflit reste, somme toute, assez classique. En effet, afin d'éviter que la crise ne s'aggravât en conflit ouvert, le Conseil de paix et de sécurité (CPS), organe exécutif de l'Union, a créé lors de sa 259ème réunion tenue à Addis-Abeba le 28 janvier 2011, un Groupe de haut niveau pour le règlement de la crise en Côte d'Ivoire. Concrètement, il avait pour

112 B Tchikaya, a ainsi établi un lien entre les fraudes électorales et les crises humanitaires en qualifiant de telles actes de crimes : 'Le crime international de changement anticonstitutionnel de gouvernement' in R. Ben Achour (dir) *Les changements anticonstitutionnels de gouvernement – Approches de droit constitutionnel et de droit international* (2014*)* 141-147.

113 F Deng & E Luck *Déclaration sur la situation en Côte d'Ivoire* (19 janvier 2011).

114 Chambre préliminaire III, Mandat d'arrêt à l'encontre de Laurent Koudou Gbagbo ICC-02/11-01/11-1-tFRA. *Affaire : Le Procureur c. Laurent Gbagbo* 23 novembre 2011 Chambre préliminaire III, Mandat d'arrêt à l'encontre de Charles Blé Goudé ICC-02/1102/11-1-tFRA. *Affaire : Le Procureur c. Charles Blé Goudé*, 21 décembre 2011.

115 Communiqué final de la Session extraordinaire de la Conférence des chefs d'État et de gouvernement sur la Côte d'Ivoire du 7 décembre 2010, Abuja.

mission de proposer une évaluation approfondie de la situation à la suite des interactions entre les différents protagonistes. Cette phase politique de la résolution de la crise sur le plan régional a abouti à l'adoption par le CPS d'une décision au cours de sa 265ème réunion tenue le 10 mars 2011.[116] Cette dynamique affirmée du CPS de l'UA nécessite des précisions. Le protocole de Durban dans son article 7 lui a confié, en consultation avec le Président de la Commission, le pouvoir de prendre les mesures nécessaires visant à anticiper et prévenir 'les différends et les conflits, ainsi que les politiques susceptibles de conduire à un génocide et à des crimes contre l'humanité'.[117] C'est une mission d'alerte rapide et d'analyse de la crise au niveau de ses causes directes, c'est-à-dire celles qui sont à l'origine du conflit.

4 Conclusion

Comme nous venons de le montrer, les organisations régionales ont joué un rôle relais dans la prévention des crises qui est induite du chapitre VII de la Charte des Nations unies, un rôle de médiation en proposant par différents moyens susmentionnés, des sorties de crise. En revanche, l'efficacité de cette action préventive reste incertaine du fait non seulement, de la singularité de la crise en Libye (révolution arabe) dont la survenance a été imprévisible, mais surtout en raison de l'absence de volonté politique dans l'application des mesures de prévention. Le rôle des organisations régionales dans la prévention des crises libyenne et ivoirienne (promotion, relais, médiation), est resté inefficace car l'absence de volonté politique des acteurs dans l'application des mesures décidées a été un frein important. Cependant, cette opinion doit être tempérée pour ce qui est de l'UA et la CÉDÉAO dans la mesure où les deux organisations régionales ont œuvré de concert et bénéficiaient d'une plus grande expérience en matière de prévention de crise. Après l'analyse de ces actions préventives, nous pouvons constater que la subsidiarité apparaît à la fois sur le plan institutionnel (il y a un échelonnement au niveau des organisations régionales : la CÉDÉAO, puis l'UA et enfin l'ONU) et sur le plan actionnel (il y a également une gradation des moyens de prévention : médiation, reconnaissance de l'autorité « légitime ou légale », suspension de l'État, l'organisme régional, intervention armée).

116 L'action de L'Union africaine s'inscrit dans la même logique que celle de la CÉDÉAO : d'abord une suspension du pays de ses activités, puis une reconnaissance d'Alassane Ouattara et enfin le constat d'une crise sécuritaire et réaffirmation de la responsabilité de protéger des parties.

117 Article 7 du Protocole.

Pour ce qui est de la mise en œuvre des résolutions du Conseil de sécurité autorisant une action en vue de protéger les populations, l'apport des acteurs africains dans la phase de réaction reste relativement faible, ceux-ci étant peu outillés sur le plan militaire. Ainsi, ni la résolution 1973, ni la résolution 1975 n'associe les organisations africaines au processus de protection des populations, confortant ainsi le sentiment d'un interventionnisme occidental chaque fois que la responsabilité de protéger donne lieu à l'utilisation de la force. C'est la même timidité des acteurs africains qu'on observe dans la phase de reconstruction de l'État en crise, troisième pilier de la responsabilité de protéger.

4 The African contribution to the development of international criminal law

Balingene Kahombo

1 Introduction

Fighting impunity is one of the principles of the African Union (AU)[1] and a major impetus for the African contribution to the development of international criminal law. This contribution normally has two different dimensions. The first is universalism or globalism that dictates the life of global or universal international criminal law. The latter contains rules and institutions that govern the fight against impunity from international crimes worldwide. The second dimension pertains to regionalism and African regional international criminal law that specifically governs the struggle against impunity from international and regional crimes on the African continent. African international criminal law has to be considered as a branch of African international law. It comprises universal rules incorporated into African legal instruments that apply to or within African states and other rules and institutions designed to enforce them.

The African contribution to the development of global international criminal law is not examined in this chapter since its content is more or less well known. The existing literature has identified three types of contribution. Foremost, there is a negative contribution whereby Africa has been a consumer of institutions of international criminal law, thereby supporting the utility and the functioning of the global system of international criminal justice.[2] This has been the case with the deployment of the United Nations (UN) courts and tribunals in Africa, such as the International Criminal Tribunal for Rwanda (ICTR). Another type of contribution relates to African inputs during the negotiation processes of major global penal treaties, notably the Rome Statute of the International Criminal Court (ICC).[3] African states and the AU have also contributed to enriching alternative narratives on the fate of international criminal law. There have been heated debates on the interaction between protected

1 African Union Constitutive Act 11 July 2000, art 4(o).

2 P Manirakiza 'L'Afrique et le système de justice pénale internationale' (2009) 3 *African Journal of Legal Studies* 27.

3 Manirakiza (n 2) 28.

values, such as peace and reconciliation in the course of a process of justice based on a prosecution-sentencing approach of offenders, immunities before international criminal jurisdictions, the scope and application of the principle of universal jurisdiction, judicial neocolonialism and the need to reform the ICC justice system.[4]

However, the contribution of Africa to the development of international criminal law through the lenses of African international criminal law is often overlooked. This chapter endeavours to identify this contribution in the form of progressive development and/or codification of international law. Efforts made by Africa with a view to regionalising international criminal law must be saluted and result in a third layer of international criminal justice, beside the universal and domestic ones, in a manner that can improve the world struggle against impunity. Regionalisation here refers to the process by which African states, acting particularly within the AU, transform rules and principles of international criminal law into a sort of law made in Africa; develop its substantive rules and/or procedural as well as enforcement mechanisms; and also regulate, within the regional framework, those penal problems of specific concern to the continent. It therefore is a process of 'Africanisation of international criminal law'[5] based on regionalism which represents, for the International Law Commission (ILC), another privileged forum for international law making 'because of the relative homogeneity of the interests and actors concerned'.[6] Regionalisation likely is the most important contribution of African states and the AU to the development of international criminal law. It is expected that regional rules developed on this basis will influence, even in the long term, the development of this body of law at the global level. As the ILC has underscored, 'much of international law has developed in this way, as the gradual extension of originally regional rules to areas outside the region'.[7]

This chapter focuses only on some substantive and jurisdictional developments that the author subjectively considers to be of major

4 See B Kahombo 'Africa within the justice system of the International Criminal Court: The need for a reform' (2016) 2 KFG Working Paper Series Berlin Potsdam Research Group 'The international law: Rise or decline?'; R Schuerch *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders* (2017).

5 A Soma 'L'africanisation du droit international pénal' in Société africaine pour le Droit international *L'Afrique et le droit international pénal* (2015) 7-36.

6 International Law Commission (ILC) 'Report of the International Law Commission on the Work of its 57th Session' 2 May-3 June and 11 July-5 August 2005 UN Doc A/60/10 207 209.

7 As above.

importance for the development of international criminal law. It is an analytical, constructivist and critical study based on various African legal instruments and judicial practices. In this regard, the substantive contribution refers to the codification of crimes against peace and security in Africa whilst the jurisdictional aspects concern the promotion of the system of African regional criminal justice.

2 The codification of crimes against peace and security in Africa

This is an innovative concept in African international law. The specificity of the notion must be highlighted (2.1) before analysing, notably, the extent to which by regionalising ICC crimes, the concept contributes to the development of international criminal law (2.2).

2.1 The specificities of the notion

The concept of crimes against peace and security in Africa has two major points of specifity. These relate to the list of codified crimes and its rationale as well as their legal nature.

2.1.1 The list of codified crimes and its rationale

There are at least 14 categories of crimes against peace and security in Africa: four ICC crimes (aggression, genocide, crimes against humanity and war crimes); two crimes against the security of states (mercenarism and unconstitutional change of government); and eight more crimes against human security (piracy, terrorism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources). This classification may be challenged but it enables to shed light on the justification for the list and its bases in African international criminal law. Some crimes are based on the regionalisation of the rules contained in universal legal instruments, others on treaties that are very specific to Africa, adopted within the AU, others still on treaties concluded within the regional economic communities (RECs). In the first case, let us mention the ICC Statute; in the second case, the African Charter on Democracy, Elections and Governance (2007) and the AU Convention on the Prevention and Fight against Corruption (2003); and in the third, the Multilateral Agreement on Regional Cooperation to Combat Trafficking in Persons, in particular Women and Children in West and Central Africa (2006). The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) establishing an International Criminal Law Section (AU Criminal Court) within the African Court of Justice and Human and

Peoples' Rights (AfCJHPR) defines each of these 14 crimes and lays down the foundations for their repression. In this respect, it appears as a unifying instrument of Africa.

The question, however, arises as to the rationale of the codification of these crimes on the continent. The first reason derives from their collective classification: crimes against peace and security in Africa. This concept is enshrined as such in the Organisation of African Unity (OAU) Convention of 1977 for the Elimination of Mercenarism, which provides that 'any person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this Article commits *an offence considered as a crime against peace and security in Africa* and shall be punished as such'. [8] It is reminiscent of the ILC's list of 'crimes against the peace and the security of mankind'[9] at the universal level, which can also be found in some domestic legislation.[10] However, the two concepts are not identical. Crimes against the peace and security of humanity, namely, aggression, genocide, crimes against humanity, war crimes and crimes against UN personnel and associated personnel, are less numerous than crimes against the peace and security of Africa. The ICC Statute also refers to 'the most serious crimes of concern to the international community as a whole'[11] and that 'threaten the peace, security and well-being of the world'.[12] Another important distinction is the definitions contained in the Malabo Protocol (annex), which are sometimes extended and adapted to the African context, even if their territorial scope remains confined to the continent.

Second, it can be assumed, and rightly so, that no African state alone has the capacity or ambition to end these crimes. The latter should be seen as behaviours that undermine African regional public order, so the cooperation of the entire African community of states and peoples appears to be a necessity to eradicate them. The two primary interests affected

8 OAU Convention for the Elimination of Mercenarism in Africa 3 July 1977 art 1(3) (my emphasis).

9 ILC Draft Code of Offences Against the Peace and Security of the Mankind (1954); ILC Draft Code of Crimes Against the Peace and Security of Mankind (1996).

10 See DRC's Acts implementing the Rome Statute: Law 15/022 of 31 December 2015 modifying and complementing the Decree of 30 January 1940 relating to the Penal Code; Law 15/023 of 31 December 2015 modifying Law 024-2002 of 18 November 2002 laying down the Military Penal Code; Law 15/024 of 31 December 2015 modifying and complementing the Decree of 6 August 1959 laying down the Code of Criminal Procedure.

11 Rome Statute of the International Criminal Court (ICC Statute) (17 July 1998) Preamble, para 4.

12 ICC Statute, Preamble, para 3.

by this criminality, that is to say, peace and security, are common to this community and not specific to a single country. It is not just about peace and national security, which is state-centred, or regional security based on peaceful coexistence between African states. It also and above all concerns human security which revolves around the satisfaction of the socio-economic needs of peoples and individuals. All this implies a strategic change in the conception of Africa's pacification policy. Hence, the use of armed force and political-economic sanctions or the establishment of a common development strategy is particularly limited in order to put an end to the aforementioned criminality, without a real criminal deterrence policy.

This is all the more true since crimes against peace and security in Africa are emerging today from the ordinary, if not daily, problems of the continent.[13] This is largely attested by the number and frequency of armed conflicts and the commission of worse international crimes (war crimes, crimes against humanity and genocide) in African states.[14] In this regard, the Kenyan non-governmental organisation (NGO), Kenyans for Peace with Truth and Justice, has posited in respect of crimes other than ICC crimes or core international crimes as follows:[15]

> An important rationale for placing these crimes on the same level as the so-called 'core' international crimes is that many of them are capable of destabilising a state, which in turn leads to the proliferation of core international crimes. For example, several of the civil wars in Africa were preceded by an unconstitutional change of government that threw the state into chaos in which core crimes were committed. Thus, it is arguably more sensible and forward-looking to address the crimes that may *lead* to serious conflict or civil war, rather than waiting for violence to happen. In addition, there is often a mutually causative and reinforcing relationship between these crimes and core international crimes.

Third, criminal judicial cooperation is self-evident because such instability makes national borders porous, resulting in the mobility of criminals across several countries and the development of cross-border crimes. This risk would be compounded by the opening of state borders in favour of the

13 M Sirleaf 'The African justice cascade and the Malabo Protocol' (2017) *International Journal of Transitional Justice* 5-6.

14 See J Cilliers 'Future (im)perfect? Mapping conflict, violence and extremism in Africa' (2015) 287 Institute of Security Studies Paper.

15 Kenyans for Peace with Truth and Justice 'Seeking justice or shielding suspects? An analysis of the Malabo Protocol on the African Court' November 2016 13, http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed 18 March 2018).

free movement of persons, in line with the continent's integration process. In this context, it is easy to understand why the Niamey Convention seeks to engage state parties to promote cross-border cooperation in the field of 'security, especially combating cross-border crime, terrorism, piracy and other forms of crime'.[16] Justice will intervene to help curb these phenomena as 'an aspect of efforts to promote the objectives of the political and socio-economic integration and development of the continent with a view to realising the ultimate objective of a United States of Africa'.[17]

Finally, the concept intends to fill the gap of the global system of international criminal justice which focuses on core crimes only. It must be reminded that it was because of this gap that the UN Secretary-General in 2012 proposed to the Security Council the establishment of specialised mixed courts in Somalia in order to prosecute acts of piracy committed in the Horn of Africa.[18] In taking into account socio-economic crimes, such as illicit exploitation of natural resources, corruption and money laundering, the concept provides a positive evolution in international criminal law that has the potential to strengthen the fight against impunity of businessmen and enterprises, including transnational corporations, of which the criminal activities impair development in Africa.

2.1.2 The legal nature of codified crimes

Crimes against peace and security in Africa are both of international and transnational character, but the difference between transnational and international crimes is not a truism. It is the subject of a long debate.[19] Authors do not perceive the notion of international crimes in the same way. The distinction is important due to its legal implications. In principle, international crimes are not subject to statutes of limitation, blanket amnesty or pardon. They may attract states to exercise universal jurisdiction, justify the launch of prosecutions before an international court or the rejection of state officials' immunities.

In the ILC's Draft Articles on State Responsibility of 1996 the notion of international crimes was linked to that of the crimes of

16 African Union Convention on Cross-Border Cooperation (Niamey Convention) 27 June 2014 art 3(4).

17 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (ACtJHR Amendments Protocol) 27 June 2014 (Annex) art 46H(1).

18 UN Security Council 'Report of the Secretary-General on specialised anti-piracy courts in Somalia and other States in the region' 20 January 2012 S/2012/50 para 126.

19 CC Jalloh 'The nature of the crimes in the African Criminal Court' (2017) 15 *Journal of International Criminal Justice* 799-826.

states.[20] The commission of such crimes in principle is a manifestation of political violence to maintain power and may entail individual criminal responsibility of officials who act on behalf of the state under international law.[21] Even individuals who may have acted outside the state umbrella can also be held criminally responsible. This is the case of members of armed groups. In this regard, some commentators define the notion of international crimes as 'those offences over which international courts and tribunals have been given jurisdiction under *general international law*'.[22] However, this definition seems to conceive the notion of international crimes only in relation to global international criminal law. This was also the position of the American Tribunal at Nuremberg in 1948 which held that an international crime was 'such act *universally* recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances'.[23] This universal recognition to qualify a behaviour as an international crime seems to be justified by the fact that such a crime amounts to a gross or serious violation of universal values protected by international law. This is the case of the prohibition to use armed force between states, the violation of which can constitute an act of aggression. Accordingly, international crimes have been identified in respect of gross violations of (universal) international law which entail international criminal responsibility[24] and constitute a matter of concern to the entire world community.[25] It arguably is this universal concern that justifies the intervention of international courts, expressing the will of the whole international community.[26]

However, the above definitions do not provide any indication as to why jurisdiction may not be conferred over international crimes on regional criminal courts. Likewise, these definitions do not tell anything about the possible existence of regional crimes, that is to say international crimes under regional international criminal law. Furthermore, it is known that even mixed criminal courts and tribunals, that is, those jurisdictions combining both domestic and international characters, have been given

20 ILC Draft Articles on State Responsibility (1996) arts 19(2) & (3). See also A Cassese 'Remarks on the present legal regulation of crimes of states' in P Gaeta & S Zappala (eds) *The Human Dimension of International Law: Selected Papers* (2008) 403-404.

21 A Smeulers & F Grünfeld *International crimes and other gross human rights violations: A multi- and interdisciplinary textbook* (2011) 20-21.

22 R Cryer et al *An introduction to international criminal law* (2007) 2.

23 K Kittichaisaree *International criminal law* (2001) 3.

24 A Cassese *International criminal law* (2003) 23.

25 A Cassese 'Rationale for international criminal justice' in A Cassese (ed) *The Oxford companion to international criminal justice* (2009) 127.

26 Cassese (n 25) 127 130.

jurisdiction not only over international crimes but also over ordinary offences, without the latter being transformed into international crimes. Additionally, the ICC Statute implies a gradation between international crimes. It applies to the most serious crimes of concern to the international community as a whole. This may suggest that there are other crimes that do not constitute the most serious international crimes and a matter of concern to the international community as a whole. Therefore, outside ICC crimes, other crimes against peace and security in Africa may be considered international crimes constituting a matter of concern to the entire community of African states and peoples.

This suggestion is without prejudice to the notion of transnational crimes. The AU Non-Aggression and Common Defence Pact refers to transnational crimes in the definition of 'trans-national organised criminal group' in the following terms:[27]

> Trans-national organised criminal group means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more *serious crimes* which are transnational in scope, or offences established in accordance with international law, including the United Nations Convention Against Transnational Organised Crime and its Protocols thereto, the purpose being which to obtain, directly or indirectly financial and other material benefits.

Beside the UN Convention against Transnational Organised Crime (Palermo Convention) of 15 November 2000, two other treaties may be referred to, namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (November 2000); and the Protocol against the Smuggling of Migrants by Land, Sea and Air (November 2000). The Palermo Convention clearly defines the notion of transnational organised crimes.[28]

First of all, there must be a group of three or more persons who act in concert with the aim of committing a crime.[29] This group shall be structured, meaning that 'it is not randomly formed for the immediate commission of an offence',[30] regardless of whether there are 'formally defined roles for its members, continuity of its membership or a developed

27 AU Non-Aggression and Common Defence Pact art 1(x) (my emphasis).

28 See also N Boister *An introduction to transnational criminal law* (2012) 3-4.

29 United Nations Convention against Transnational Organised Crime 15 November 2000 art 2(a).

30 UN Convention (n 29) art 2(c).

structure'.[31] Second, the Palermo Convention requires an international dimension to qualify a crime as transnational by nature in four different situations, namely, if (a) it is committed in more than one state; (b) it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) it is committed in one state but has substantial effects in another state.[32] Third, a transnational organised crime must fulfil the condition of gravity and be among those offences that are referred to by the Palermo Convention or its additional protocols. A serious crime means 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.[33] This is the case of participation in an organised criminal group;[34] corruption;[35] trafficking in persons, especially women and children;[36] the laundering of proceeds of crime,[37] including money laundering;[38] and related obstructions to justice.[39]

Unlike international crimes, transnational crimes are not in principle state crimes in the sense of political violence to maintain power or mass atrocities. Rather, they are mostly criminal conducts of individuals (private or official) and constitute offences against a certain decency or morality that should reign within a community.[40] Some of these offences are on the list of crimes against peace and security in Africa, such as corruption, money laundering and trafficking in persons. These must be distinguished from 'trans-border crimes' of which they may form a category. The definition of trans-border crimes can be borrowed from the Economic Community of West African States (ECOWAS) Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security:[41]

31 As above.

32 UN Convention (n 29) art 3(2).

33 UN Convention (n 29) art 2(b).

34 UN Convention (n 29) art 5.

35 UN Convention (n 29) art 8.

36 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime 15 November 2000) arts 3 & 5.

37 UN Convention (n 29) art 6.

38 UN Convention (n 29) art 7.

39 UN Convention (b 29) art 23.

40 S Szurek 'La formation du droit international pénal' in H Ascensio et al (eds) *Droit international pénal* (2000) 19.

41 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, 'Definitions'.

> 'Trans-border crime' refers to all crimes organised or perpetrated by individuals, organisations or networks of local and/or foreign criminals operating beyond the national boundaries of a member state, or acting in complicity with associates based on one or several states adjoining the country where the crimes are actually committed or having any connection with any member state.

These crimes in principle are subject to prosecutions in domestic legal orders. However, if some crimes against peace and security in Africa are transnational by nature, it is submitted that they have been *conventionally* raised by the Malabo Protocol to an independent status of regional crimes, entailing individual and corporate criminal responsibility. Their commission, therefore, does not necessarily any longer require the 'structured group' element or the condition of perpetration in more than one state as provided for by the UN Convention against Transnational Organised Crime. To establish these regional crimes, it would be sufficient to prove the only constituent elements that are contained in their independent definitions enshrined in the Malabo Protocol (Annex) instituting the AU Criminal Court. This obviously is the case of corruption committed within one state by public agents. This change of nature from transnational to regional international crimes reflects the necessity for solidarity with which the impunity from these crimes, which are particularly dangerous for the states or the entire African community, should be combated. The need for solidarity in the prosecution of these crimes justifies the whole process of their regional codification.

2.2 The regionalisation of ICC crimes

The regionalisation of ICC crimes means their incorporation into African regional legal instruments. This can happen in two ways. First, it can simply be referred to the crimes in question in terms of prohibition, obligation for states to prevent or to punish their perpetrators, or in relation to the expression of a need for a regional action to protect human and peoples' rights. The second way relates to the definition of these crimes in the context of the region. While a mere reference to these crimes does not raise any particular problem as far as regional codification is concerned, their different definitions in an African regional instrument may have a drawback and an advantage. As drawback, regionalisation may lead to contradictions with universal legal standards or bring ambiguities in law. As advantage, it can result in the expansion of the scope of the definitions of ICC crimes in Africa, thereby contributing to the development of international criminal law. If some states not parties to universal treaties ratify the regional instrument, the range of addressees of the definitions in question would be widened. Two cases can illustrate this state of affairs

on the basis of the Malabo Protocol (Annex): the expansion of the scope of the definition of war crimes and the case of aggression.

2.2.1 The case of war crimes

War crimes are defined by the Malabo Protocol (Annex) in article 28D. It is the most expansive article among all the definitions of ICC crimes incorporated into the Malabo Protocol (Annex). It restates article 11 of the AU model national law on universal jurisdiction over international crimes. This article largely differs from the provision of the International Conference on Great lakes Region (CGLR) Protocol on the prevention and suppression of sexual violence against women and children, which wrongly restricts the definition of war crimes to graves breaches of the Geneva Conventions of 1949.[42] Compared to the ICC Statute, the Malabo Protocol (Annex) is a progressive development of international law even though it is not perfect due to many other omissions of universal standards.

The starting point is the improvement of the age of children victims of conscription or enlistment into armed forces or groups or their use to participate actively in hostilities. The ICC Statute, which relies on both Additional Protocols of 1977 to the Geneva Conventions (1949),[43] takes into account the yardstick of 15 years old.[44] Instead, the Malabo Protocol (Annex) incriminates such acts for children under the age of 18 years.[45] This age limit emanates from the African Charter on the Rights and Welfare of the Child (African Children's Charter), which defines such person as 'every human being below the age of 18 years'.[46] The Children's Charter does not permit any derogation from this definition.[47] All children

42 Protocol on the Prevention and Suppression of Sexual Violence against Women and Children art 1(7).

43 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session) adopted at Geneva on 8 June 1977(GP I) art 77(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (with Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session adopted at Geneva on 8 June 1977 (GPII) art 4(3)(c).

44 ICC Statute arts 8(2)(b)(xxvi) and (e)(vii).

45 ACtJHR Amendments Protocol (Annex) arts 28D(b)(xxvii) and (e)(vii).

46 African Charter on the Rights and Welfare of the Child 1 July 1990 art 2.

47 See *Institute for Human Rights and Development in Africa v The Government of Malawi* ACERWC Comm 004/Com/001/2014, Report on consideration of an amicable

within this age limit and not only a category of them must be protected. The ICC Statute contradicts itself on this issue. It does not prohibit the practice of child soldiers over the age of 15 years, while excluding them from the Court's jurisdiction if they commit crimes when they are younger than 18 years old.[48]

The Malabo Protocol (Annex) also incorporates a total number of 15 new crimes, such as the criminalisation of the use of nuclear weapons or other weapons of mass destruction. Yet, in its Advisory Opinion of 8 July 1996, the ICJ stated that it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake'.[49] International efforts rather focused on nuclear weapons disarmament. For example, the UN General Assembly has considered Africa as a denuclearised zone since 1961.[50] This policy was endorsed by the OAU Assembly in July 1964.[51] It resulted in the adoption of the African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty) in 1996. State parties are forbidden to possess, to develop, to manufacture, to test, to allow transit or stationing of any nuclear weapons or explosive devises within this zone. Only peaceful nuclear activities for non-military purposes are permitted.

However, the Pelindaba Treaty does not as such prohibit the use of nuclear weapons in African conflicts. It is the Malabo Protocol (Annex) that takes a step in this direction,[52] regardless of the type of armed conflict. The African continent is taking the lead on a controversial issue on which states have not yet found a compromise at the global level. The

settlement under the auspices of the Committee 27 October 2016 paras 6-7. In this case, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) decided to adopt the Amicable Settlement on Communication 004/Com/001/2014 opposing the Institute for Human Rights and Development in Africa (IHRDA) to the Republic of Malawi, in which the latter state committed itself to conform its Constitution (as amended in 2010) art 23(5) which defines children as persons under the age of 16 years, to the African Charter on the Rights and Welfare of the Child by December 2018.

48 Art 26 of the ICC Statute provides: 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.'

49 *Legality of the threat or use of nuclear weapons,* Advisory Opinion of 8 July 1996, ICJ Reports 1996 para 105.

50 UNGA Res.1652 (XVI) 24 November 1961 para 6.

51 AHG/Res.11(I), Denuclearisation of Africa, 1st ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity, Cairo, Egypt 17-21 July 1964 paras 1-4.

52 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex) art 28D(g).

use of nuclear weapons is not criminalised under the ICC Statute despite the will of several states from the Global South, including India.[53] In this regard, a proposal to amend the ICC Statute was introduced by Mexico,[54] even though it seems to have little chance of being accepted by military nuclear powers. The fact that these powers rejected the UN Treaty on the prohibition of nuclear weapons, adopted on 7 July 2017, is a clear indication that they will not *a fortiori* adhere to the criminalisation of their use in the context of armed conflict.

Other innovations relate to seven new war crimes in the context of international armed conflicts as stipulated in articles 28D(b)(v), (xxviii), (xxix), (xxx), (xxxi), (xxxii) and (xxxiii) of the Malabo Protocol (Annex): intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects that will be excessive in relation to the concrete and direct overall military advantage anticipated; unjustifiably delaying the repatriation of prisoners of war or civilians; wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; making non-defended localities and demilitarised zones the object of attack; slavery and deportation to slave labour; collective punishments; and despoliation of the wounded, sick, shipwrecked or dead. Article 28D of the Malabo Protocol (Annex) incorporates other seven war crimes in the context of armed conflicts of non-international character under paragraphs (e)(xvi), (xvii), (xviii), (xix), (xx), (xxi) and (xxii): intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies; utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage; making non-defended localities and demilitarised zones the object of attack; slavery; collective punishments; and despoliation of the wounded, sick, shipwrecked or dead. All these new crimes find their original source in international humanitarian law in terms of prohibitions.[55]

53 G Tiwari 'Why India continues to stay out of ICC?' (2013) *A Contrario International Criminal Law*, http://acontrarioicl.com/2013/04/27/why-india-continues-to-stay-out-of-icc/ (accessed 18 March 2021).

54 Secretariat of the Assembly of the States Parties 'Informal Compilation of Proposals to Amend the Rome Statute' 23 January 2015 4, http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf (accessed 19 March 2021).

55 K Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes

These innovations have faced several criticisms. The main criticism suggests that the passage from prohibition to criminalisation is not automatic.[56] It must be based on a special justification, that is, the wrongfulness and the gravity of the prohibition.[57] However, it is curious to observe that this argument does not specify to which extent the aforementioned war crimes do not fulfil this requirement. In any case, there is no legal obstacle to a group of states expanding the protection of humanitarian standards through international criminal law. States are sovereign and free to adopt the laws that fit better with the preservation of their collective interests or those of their peoples. The only difference is that the new war crimes will not be universal because of their treaty-based character between state parties to the Malabo Protocol. A similar expansion can even be made by one state within its domestic legal order as in the case of extensive definitions of genocide.[58] However, the principle of legality would be breached in respect of the exercise of adjudicative powers if the war crime to be prosecuted against aliens (in case of universal jurisdiction, passive personality and protective principle) were not committed on the territory of a state party to the Malabo Protocol or another state which has adopted the same definition under its domestic legislation. The Malabo Protocol (Annex) should be applied in light of the same requirement.

2.2.2 The case of the crime of aggression

The crime of aggression is defined by the Malabo Protocol (Annex) in article 28M. Previously, various initiatives were undertaken to codify rules on aggression in Africa. The most important treaties were concluded in Western and Central Africa.[59] The reason why aggression captured the attention of African states so early, contrary to the other ICC crimes, apparently is the discourse on decolonisation and the consolidation of state sovereignty after accessing independence, notably against former

(article 28D) and the crime of aggression (article 28M)' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 43 46-47.

56 Ambos (n 55) 43 47.

57 Ambos (n 55) 48.

58 J Quigley *The Genocide Convention: An international law analysis* (2006) 16-17.

59 Agreement on Non-Aggression and Defence Assistance (ANAD) between Member States of the Western African Economic Community (CEAO) and Togo (9 June 1977); Amended Protocol on Non-Aggression between Member States of the Economic Community of West African States (22 April 1978); Non-Aggression Pact between Member States of the United Nations Standing Advisory Committee on Security Questions in Central Africa (8 July 1996); Mutual Assistance Pact between Member States of the Economic Community of Central African States (2000). See M Mubiala *Coopérer pour la paix en Afrique centrale* (2003) 35-37 65-69.

colonial powers. Human rights protection was not yet a priority. The AU adopted its own Non-Aggression and Common Defence Pact in 2005 and inspired other initiatives at the sub-regional level, such as the *International Conference on the Great Lakes Region* (ICGLR) in 2006.[60] The AU Non-Aggression and Common Defence Pact also inspired the Malabo Protocol (Annex) regarding at least the list of constitutive acts of aggression. The UN General Assembly resolution 3314 of 14 December 1974 on aggression, which has influenced the definition of this crime under the ICC Statute, was not referred to. This is because the said resolution limits the crime of aggression to state acts, while the AU Non-Aggression and Common Defence Pact extends its definition to acts of 'a state, a group of states, an organisation of states or non-state actor(s) or … any foreign or external entity'.[61] This is a substantial departure from global international law which may have implications with respect to the exercise of the right of a state to self-defence (against non-state actors). As a consequence, the definition of aggression in the Malabo Protocol (Annex) differs from the one that is provided for in the ICC Statute, with the exception of the nature of acts of individuals who may be held criminally responsible. Both treaties criminalise 'the planning, preparation, initiation or execution' of acts of aggression. What has to be noted is the criminalisation of preparatory acts that should in principle fall outside the ambit of criminal law. Such criminalisation of preparatory acts seems to be the acknowledgment of the gravity of aggression as the 'supreme international crime'[62] from which other crimes can be committed.

Furthermore, the Malabo Protocol (Annex) criminalises acts of aggression that constitute violations of the UN Charter or the AU Constitutive Act 'and with regard to the territorial integrity and human security of the population of a state party'.[63] The phrase 'with regard to the territorial integrity and human security of the population of a state party' at first sight appears ambiguous. The *travaux préparatoires* of the Malabo Protocol (Annex) provide no indication in order to clarify its meaning. However, given that the UN Charter prohibits the use of armed force between states, one may suggest that the phrase is connected to acts of aggression by non-state actors, the prosecution of which might be relevant if only they have infringed the territorial integrity of the state party or

60 Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region 30 November 2006 arts 1(2) & (3). It copies the definition of aggression provided for by the African Union Non-Aggression and Common Defence Pact under arts 1(c)(i) to (xi).

61 AU Non-Aggression and Common Defence Pact art 1(c).

62 C Kress 'The crime of aggression before the first review of the ICC Statute' (2007) 20 *Leiden Journal of International Law* 852.

63 ACtJHR Amendments Protocol (Annex) art 28M(A).

human security of its population. As a consequence, simple threats of aggressive acts against a state would not be sufficient for the commission of this crime. Likewise, fears of a state to be a victim of such acts could not justify the use of armed force against a non-state actor on the territory of another state without the latter's consent. Such use of armed force without the consent of the territorial state would be constitutive of the crime of aggression.

However, the deficiency of the Malabo Protocol (Annex) is the inclusion of the general definition of aggression under article 28M(B)(a), that is, 'the use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations', in the list of constitutive acts of this crime. It is a non-sense insofar as every act of aggression proceeds from the use of armed force, meaning that such use cannot *per se* constitute a crime. The general definition also extends to violations of the AU Constitutive Act *and* the UN Charter, whereas article 28M(A) already defines redundantly aggression with respect to 'a manifest violation of the Charter of the United Nations *or* the Constitutive Act of the African Union'.

Finally, the nature of some perpetrators of aggression can be misunderstood. For the state or non-state actors, everything is clear. It does not seem to be the case for 'an organisation of states or any foreign entity'. Maybe, such an organisation of states could include not only interstate organisations having legal personality and *de facto* military alliances. However, the hypothesis may turn out to be an aggression by a state because such organisations are constituted by individual countries. Concerning 'any foreign entity', the AU Non-Aggression and Common Defence Pact refers to 'any external entity'. The adjective 'external' apparently alludes to 'out of the African continent', but the term 'entity' remains very ambiguous. Even the *travaux préparatoires* are silent on the issue. Arguably, 'given the criminal responsibility of corporations, the phrase may refer to legal entities in the sense of legal persons, but such "entities" would certainly need military assistance to perform acts of aggression'.[64] It will belong to the AU Criminal Court to clarify the text in its case law.

64 Ambos (n 55) 50.

3 The promotion of the system of African regional criminal justice

The system of African regional criminal justice comprises African criminal courts and tribunals, as well as alternative mechanisms to justice, designed to fight against impunity or to address the adverse effects of crimes on peace and reconciliation within states at the regional level. It complements the two traditional levels of international criminal justice, that is, universal and municipal administration of justice. It implies the existence of regional legal power to prescribe penal rules, to investigate, to prosecute and eventually to try crimes against peace and security in Africa.[65] Ensuring international criminal justice, therefore, is part of what Adjovi calls 'African international criminal policy',[66] the objective of which is to place Africa in the centre of the fight against impunity. In this system, the AU plays a central role, solely and/or in cooperation with RECs or its member states. Various questions arise regarding the legal bases for the emerging system of regional criminal justice and the judicial options that are available as may be attested by African justice practices.

3.1 The legal bases

There are two main bases for the promotion of the system of African regional criminal justice, namely, the Common African Defence and Security Policy and the AU's right to intervene in a member state.

3.1.1 The Common African Defence and Security Policy

The Common African Defence and Security Policy (CADSP) is the main AU instrument that describes threats to regional peace and security and collective institutions that are competent to take action in defence of the interests of the African community of states and peoples. The AU Constitutive Act provides that the Union shall establish 'a common defence policy for the African continent'.[67] This policy has been adopted by the AU Assembly which is the competent organ to 'determine the common policies of the Union'.[68] The expression 'Common African Defence and Security Policy' was explicitly used in other important decisions of the

65 M Mubiala 'Chronique de droit pénal de l'Union africaine: vers une justice pénale régionale en Afrique' (2012) 83 *Revue internationale de droit pénal* 548.

66 R Adjovi 'Introduction: l'Afrique dans le développement de la justice pénale internationale' (2006) 14 *African Yearbook of International Law* 28.

67 AU Constitutive Act art 4(d).

68 AU Constitutive Act art 9(a).

AU Assembly in 2002 and 2003. The Durban Decision was a call on the AU Chairperson and South African President, Thabo Mbeki, to establish a group of experts to examine all aspects related to the establishment of such policy and to submit recommendations to the AU Assembly.[69] The Maputo Decision commended the efforts of the AU Chairperson for the implementation of his mission after presenting the Draft Framework for a Common African Defence and Security Policy.[70] This document constitutes the basis on which the Solemn Declaration on a Common African Defence and Security Policy was adopted in February 2004.

The CADSP pursues three objectives, which are interconnected and mutually dependent. First, the CADSP aims to preserve national security, that is, the security of the state. Second, it aims to protect human security, which turns around the individual. According the AU Non-Aggression and Common Defence Pact, human security must be understood in terms of satisfaction of the basic needs of the individual.[71] However, human security also includes 'the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development'.[72] As far as African regional criminal law is concerned, this is an important distinctive feature from the global system of international criminal justice that pays little attention to economic crimes as threats to human security. Third, the CADSP aims to establish peace and security on the African continent. In this regard, the AU Constitutive Act provides that the scourge of conflicts in Africa constitutes 'a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of [the] development and integration agenda'.[73] Likewise, the AU Non-Aggression and Common Defence Pact aims 'to deal with threats to peace, security and stability in the continent and to ensure the well-being of the African peoples'.[74] This third goal is transversal as it can be attained only if human security and state security

69 ASS/AU/Dec. 8 (I), Decision on a Common African Defence and Security, 1st ordinary session of the Assembly of the African Union, Durban, South Africa 9-10 July 2002 para 2.

70 Assembly/AU/Dec.13 (II), Decision on the African Defence and Security Policy (Doc. Assembly/AU/6 (II)), 2nd ordinary session of the Assembly of the African Union, Maputo, Mozambique 10-12 July 2003 paras 1 & 4.

71 AU Non-Aggression and Common Defence Pact art 1(k).

72 AU Non-Aggression and Common Defence Pact art 1(k).

73 AU Constitutive Act, Preamble para 9.

74 AU Non-Aggression and Common Defence Pact, Preamble para 9.

are guaranteed. Put differently, there will not be peace, security and stability in Africa if individuals, peoples and states are not secured or protected.

Against this backdrop the CADSP covers any threat to peace and security occurring in Africa: aggression; genocide; war crimes; crimes against humanity; subversion; political assassinations; unconstitutional changes of government; corruption; trafficking in human beings; and so forth. Situations or cases of crimes that occur outside the continent are not within its ambit.

This limitation applies to all collective institutions that are competent to deal with these threats: first, the AU Peace and Security Council (PSC), which is competent to 'develop a common defence policy for the Union, in accordance with article 4(d) of the Constitutive Act'[75] on behalf of the AU Assembly, and to 'implement the common defence policy of the Union'.[76] According to the AU Non-Aggression and Common Defence Pact, the PSC shall be assisted in the implementation of its mandate by 'any organ of the Union, pending the setting up of mechanisms and institutions for *common defence and security*'.[77] These institutions constitute an integral part of the African Peace and Security Architecture (APSA). Their list extends to criminal courts and tribunals established at the regional level. In other words, the system of African regional criminal justice is one of the available means of the APSA to react against crimes committed in Africa. It can be superseded by the action of other institutions of common defence and security, such as the PSC or other alternative mechanisms to justice, depending on each specific circumstance, when prosecutions and fighting impunity are not the primary goal to be first achieved.

3.1.2 The right of the African Union to intervene in a member state

The will to curb the OAU inertia when faced with crises and criminality within its member states is the reason for the broad ambitions of the AU. However, the modification of the law is not of itself sufficient for the effective realisation of these ambitions if no action is undertaken on the ground to ensure order, peace and security;[78] hence, the AU's right to intervene in a member state pursuant to a decision of the AU Assembly.[79]

75 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AUPSC Protocol) 9 July 2002 art 3(e).

76 AUPSC Protocol (n 75) art 7(h).

77 AU Non-Aggression and Common Defence Pact art 9 (my emphasis).

78 NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1256-1257.

79 AU Constitutive Act art 4(h).

The mechanism contains two different coexisting conceptions in the AU Constitutive Act. The first is an intervention 'in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'.[80] This is the first time that such a right is provided for in a treaty in favour of an intergovernmental organisation in international law. The UN Charter prohibits interferences with the domestic affairs of member states, except for measures adopted under Chapter VII in order to maintain international peace and security.[81] Instead, the right to intervene in a member state is one of the principles governing AU functioning. The mechanism aims to protect human security. It is also provided for in other AU legal instruments, such as the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[82]

The second conception is brought in by the Protocol on Amendments on the AU Constitutive Act of 2003. This Protocol adds to the list of grave circumstances a new situation as follows: 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council*'.[83] If the amendment comes into force, it will put on a balance the protection of human security with the right to intervene for the protection of the legitimate order established and contested in a member state.[84] The AU's choice might be difficult between these two conflicting conceptions: protecting human and peoples' rights or saving a bloody or a dictatorial government. The ambiguity is such that there is not even a definition of what could be 'a serious threat to legitimate order', contrary to serious crimes that have established definitions under international law. The risk of misusing one conception against another cannot be excluded.

In addition, there is no definition of the forms in which the AU could exercise its right to intervene in a member state. In practice, the AU may decide a military intervention to stop gross violations of human

80 As above.

81 UN Charter art 2(7).

82 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 22 October 2009 art 8(1).

83 Protocol on Amendments on the AU Constitutive Act 11 July 2003 art 4(d) (my emphasis).

84 E Baimu & K Sturman 'Amendments to the African Union's right to intervene: A shift from human security to regime security' (2003) 12 *African Security Review* 37-45.

rights or humanitarian international law. The possibility was invoked as such by the PSC as a measure of last resort in Burundi, following the constitutional crisis due to a contested third presidential term for Pierre Nkurunziza in 2015, should this country not accept the deployment of a peace support operation, called the African Prevention and Protection Mission in Burundi (MAPROBU).[85] The AU's right to intervene also implies a criminal dimension. On this basis, the AU took the decision to try the former Chadian President,[86] Hissène Habré, for acts of torture, war crimes and crimes against humanity. This practice illustrates that the AU can establish even a special regional criminal tribunal with the mandate to prosecute crimes that would normally fall within the primary jurisdiction of one or more member state(s).

The AU's right to intervene in a member state must be distinguished from 'the right of member states to request intervention from the Union in order to restore peace and security',[87] for example, in the event of aggression or non-international armed conflict. This request would imply that the intervention is accepted by the territorial state. However, it is not clear whether any other country may demand the AU's intervention in the territory of a non-requesting state. There is not yet a sufficient practice to support a trend in this direction.

On the other hand, the AU has just a right to be exercised. This does imply that there is a political will to intervene, if the necessary resources (financial, military or others) are made available to carry out an intervention.[88] Nothing indicates that the AU has a duty to intervene. However, the Kampala Convention seems to give rise to a duty insofar as it reaffirms the Union's right to intervene in a member state as part of its obligations to protect and assist internally-displaced persons (IDPs). Given the fact that the AU cannot access this treaty, the enforcement of its obligation becomes problematic. In the *Femi Falana* case the African Court on Human and Peoples' Rights (African Court) declined its jurisdiction to examine a judicial claim against the AU concerning violations of a treaty to which it was not a party.[89]

85 PSC/PR/COMM (DLXV) 17 December 2015 para 13(c)(iv).

86 Assembly/AU/Dec.127 (VII), Decision on the Hissène Habré case and the African Union (Doc.Assembly/AU/3 (VII)), 7th ordinary session of the Assembly of the African Union, Banjul, The Gambia 1-2 July 2006 para 3.

87 AU Constitutive Act art 4(j).

88 N Dyani-Mhango 'Reflections on the African Union's right to intervene' (2012) 38 *Brooklyn Journal of International Law* 13.

89 *Femi Falana v The African Union* Judgment of 26 June 2012, African Court, Application 001/2011 paras 71-72. See A Kilangi 'Legal personality, responsibility and immunity of the African Union: Reflections on the decision of the African Court on Human and

Another problem with the AU's right to intervene in a member state is the lack of an anticipatory or preventive authority.[90] The intervention can be decided on only if one of the grave circumstances has occurred or is ongoing. The mechanism is also very difficult to activate. As a matter of procedure, the AU Constitutive Act is 'incomplete on how to decide when to intervene'.[91] In fact, 'it is unclear whether the AU Assembly may first conduct an investigation before determining if an intervention is necessary, or whether it needs to first decide to intervene before finding out if indeed international crimes were committed in a member state'.[92] However, looking at the MAPROBU case, it is clear that the PSC invoked the AU's right to intervene after taking note of the preliminary findings of the fact-finding mission dispatched in Burundi by the African Commission on Human and Peoples' Rights (African Commission) pursuant to the Communiqué of 13 November 2015.[93]

Finally, the decision to intervene in a member state is a regional enforcement action in the meaning of Chapter VIII of the UN Charter on regional arrangements of collective security. The authorisation of the Security Council therefore is necessary pursuant to article 53(1) of the UN Charter.[94] However, the AU Constitutive Act makes no express reference to this procedure. In practice, the Security Council's authorisation can be given *a priori* or after adopting the decision to intervene, or even after its implementation, in terms of an approval resolution. This is a requirement for practical flexibility because of the urgent character of the right to intervene. It must be kept in mind that the authorisation or approval in question guarantees that the AU's right to intervene is not

Peoples' Rights in the *Femi Falana* case' (2013) 1 *AUCIL Journal of International Law* 95-139.

90 S Dujardin 'L'Union africaine: objectifs et moyens de gestion des crises politiques et des conflits armés' in D Bangoura & EFA Bidias (eds) *L'Union africaine et les acteurs sociaux dans la gestion des crises et des conflits armés* (2006) 61.

91 D Kuwali 'The conundrum of conditions for intervention under article 4(h) of the African Union Act' (2008) 17 *African Security Review* 93.

92 Dyani-Mhango (n 88)4-15.

93 PSC/PR/COMM.(DLVII) 13 November 2015 paras 9(iii) and 10; PSC/PR/COMM (DLXV) para 5.

94 Art 53(1) of the UN Charter provides: 'The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.'

perceived, contrary to what some commentators have argued,[95] as a challenge to the authority of the UN Security Council. Rather, the AU's right to intervene is a prerogative aiming to ensure that Africa takes its political responsibility in dealing with African situations and problems, even when there is not any timely action decided at the global level. This understanding is consistent with the view of the AU itself, as expressed in the Common African Position on the Proposed Reform of the United Nations, famously known as 'The Ezulwini Consensus'. This Position was adopted by the AU Executive Council in March 2005 in reaction to the report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, issued in the context of the emerging doctrine of the responsibility to protect in 2004.[96] The Ezulwini Consensus indicates:[97]

> Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action.

On this basis it is now important to look at African judicial practices and see the kind of jurisdictions have been created or deployed to tackle impunity at the regional level.

3.2 The African regional judicial practices

Like the UN, the AU is not an institution of criminal nature. However, it has three judicial options at its disposal. In practice, the AU has preferred to resort to the technique of delegating jurisdiction to a member state or attempting to ensure justice through hybrid criminal tribunals. These two approaches to the exercise of regional criminal jurisdiction have

95 YG Muhire 'The African Union's right of intervention and the UN system of collective security' PhD thesis, Utrecht University, 2013 231-236 (on file with the author); A Abass & MA Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 23.

96 United Nations 'A more secure world: Our shared responsibility – Report of the Secretary General's High-Level Panel on threats, challenges and changes' (2004) paras 185 & 203, <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf> (accessed 19 March 2021).

97 Ext/EX.CL/2 (VII) The common African position on the proposed reform of the United Nations: 'The Ezulwini Consensus' 7th extraordinary session of the Executive Council of the African Union, Addis Ababa, Ethiopia, 7-8 March 2005 6.

contributed to the process towards the establishment of the AU Criminal Court.

3.2.1 The delegation of jurisdiction to a member state

A delegation of jurisdiction is a conferral of judicial power by a competent entity on another entity that becomes entitled to exercise the delegated power in the interests of both parties. In international law, such a delegation of jurisdiction is possible between states or in their relationship with intergovernmental organisations.[98] The delegation of jurisdiction is a legal operation that is realised through the conclusion of an international treaty or in application of it. The operation aims to vest the delegated entity with the power of the delegating authority without which it would have been incompetent to act or to proceed. Practices of delegation of jurisdiction are particularly widespread in international law as far as powers conferred on international tribunals are concerned.[99] The striking example is the ICC jurisdiction over nationals of a state that is not a party to the Rome Statute.[100] This power derives from the jurisdiction that could be exercised over such nationals by a state party in the territory of which the crime has been committed. In other words, the ICC will be just doing the job in the place of the state concerned. Despite criticisms,[101] consent of the state not party is not required.[102]

The AU has delegated jurisdiction to one of its member states (Senegal) in order to try the former Chadian head of state, Hissène Habré. It is a distinct practice from the conferral of jurisdiction on a court by treaty as in the case of the ICC or the creation of an *ad hoc* international criminal tribunal by the UN Security Council. The delegation of jurisdiction was decided upon the referral of the matter to the AU by Senegal. Support was given to the collective commitment to fight impunity 'in line with the

98 D Sarooshi 'Some preliminary remarks on the conferral by states of powers on international organisations' (2003) 4 Jean Monnet Working Paper 2.

99 See K J Alter 'Delegating to international courts: Self-binding vs other-binding delegation' (2007) 7 Working Paper Buffett Center for International and Comparative Studies, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1452&context=lcp1(accessed 8 March 2021).

100 D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (2003) 1 *Journal of International Criminal Justice* 634-636.

101 See M Morris 'High crimes and misconceptions: The ICC and non-party states' (2001) 64 *Law and Contemporary Problems* 15 21; R Wedgwood 'The irresolution of Rome' (2001) 64 *Law and Contemporary Problems* 199.

102 F Mégret 'Epilogue to an endless debate: The International Criminal Court's third party jurisdiction and the looming revolution of international law' (2001) 12 *European Journal of International Law* 251-254.

relevant provisions of the Constitutive Act'.[103] After deliberations, the AU Assembly decided to establish a Committee of Eminent African Jurists with the following mandate:[104]

> to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial, taking into account the following benchmarks: (a) adherence to the principles of total rejection of impunity; (b) adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings; (c) jurisdiction over the alleged crimes for which Mr Habré should be tried; (d) efficiency in terms of cost and time of trial; (e) accessibility to the trial by alleged victims as well as witnesses; (f) priority for an African mechanism.

In its reports of July 2006, the Committee recommended three options for the trial of Hissène Habré.[105] The first option was national jurisdiction in Senegal or Chad. Senegal was chosen as the country of residence of the suspect, while Chad was the state where the alleged crimes were committed against Chadian victims. The Committee argued that Senegal was the country best suited to conduct the trial as it was bound by international law to perform its obligations under the UN Convention against Torture.[106]

The second option was the creation of an *ad hoc* regional criminal tribunal, composed of five judges.[107] In the Committee's view, 'the power of the Assembly to set up such an *ad hoc* regional criminal tribunal is based upon article 3(h), 4(h) and (o), 9(1)(d) and article 5(2) of the Constitutive Act of the African Union'.[108] While these articles do not explicitly give the

103 Assembly/AU/Dec.103 (VI) Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/8 (VI)) Add.9, 6th ordinary session of the Assembly of the African Union, Khartoum, Sudan, 23-24 January 2006 para 1.

104 Decision (n 103) para 3.

105 African Union 'Report of the Committee of Eminent African Jurists on the Case of Hissène Habré' (2006) paras 27-33, http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf (accessed 18 March 2021).

106 African Union (n 105) paras 17 & 29.

107 African Union (n 105) paras 24 & 31.

108 African Union (n 105) para 23. Art 3(h) provides that the AU aims to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. Art 4(h) confers on the AU the right to intervene in a member state in the event of genocide, war crimes and crimes against humanity. Art 4(o) provides for the principle of respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities. Art 5(2) states that the AU shall have organs that the Assembly may decide to establish in addition to those which are expressly determined by the Constitutive Act. Art 9(1)(d) reiterates such power of the AU Assembly to establish any other organ of the Union.

power to the AU Assembly to create an *ad hoc* regional criminal tribunal, one may agree that objectives to protect human rights and principles to fight impunity which they provide for play a functional role, from which complementary rules can be adopted or implied.[109] In this regard, creating an *ad hoc* regional criminal tribunal as a subsidiary organ of the AU Assembly was not problematic. However, the Committee warned that 'an ad hoc tribunal, in whatever form, would cost a lot of money and create further delay in the trial of Habré',[110] even though 'where there is a will, there is a way and the process could be expedited'.[111]

The third option took into account the possibility for any African state to prosecute and exercise jurisdiction.[112] The criterion of availability of any African state to do so was simply the ratification by it of the UN Convention against Torture. However, this option was more problematic than the previous ones for two main reasons. First, there was no evidence as to the existence of domestic legislation implementing the UN Convention against Torture in any other African state. Second, the preparedness of the judiciary of any African third state to begin with the trial could be undertaken by zero, including the transfer of the existing judicial file from Senegal and the study of its various documents.

Consequently, the AU Assembly rightly decided to confer jurisdiction on Senegal.[113] The motivation of this decision contains three considerations. First of all, the AU Assembly observed that 'according to the terms of articles 3(h), 4(h) and 4(o) of the Constitutive Act of the African Union, the crimes of which Hissène Habré is accused fall within the competence of the African Union'.[114] Second, the AU Assembly acknowledged that 'in its present state, the African Union has no legal organ competent to try Hissène Habré'.[115] Third, given that the *Hissène Habré* case was within the competence of the Union, the AU Assembly decided to mandate Senegal to prosecute and ensure that the suspect was tried, 'on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.[116] All AU

109 JF Wandji 'L'Afrique dans la lutte contre l'impunité des crimes internationaux' (2013) 11 *Cahiers de la recherche sur les droits fondamentaux* 97.

110 African Union (n 105) para 25.

111 As above.

112 African Union (n 105) paras 21 & 33.

113 Assembly/AU/ Dec.127 (VII), Decision on the Hissène Habré Case and the African Union (DOC. ASSEMBLY/AU/3 (VII)), 7th ordinary session of the Assembly of the African Union, Banjul, The Gambia, 1-2 July 2006.

114 Assembly/AU/ Dec.127 (VII) (n 113) para 3.

115 Assembly/AU/ Dec.127 (VII) (n 113) para 4.

116 Assembly/AU/ Dec.127 (VII) (n 113) para 5(ii).

member states were requested to cooperate with Senegal on this matter,[117] while the Chairperson of the Union, in consultation with the Chairperson of the AU Commission, was mandated 'to provide Senegal with the necessary assistance for the effective conduct of the trial'.[118]

The benefits of this model of jurisdiction are not negligible. It appears that it fits better for trying a small number of specific individuals, such as high-ranking state officials, in a particular situation and outside the territory of the state of commission of the crime or the state of nationality. The collective delegation of jurisdiction increases the legitimacy of proceedings on the part of the designated/delegated third state. The latter acts as a true agent of the international community, exercising its power. This is a significant departure from the exercise of universal jurisdiction by a state. Compared with prosecutions before *ad hoc* international criminal tribunals, state procedures are likely to take not too much time. These procedures may also cost less money due to a reduced internationalisation as regards staff composition and institutional building. However, there are also drawbacks. One of these could be the perception of an imperial jurisdiction when the state of nationality of the presumed offenders has not consented to such a delegation of power or when jurisdiction is not conferred on the country of its wish. Difficulties in the process of implementation can also arise if the content of the legal mandate is not clearly specified for the delegated state in advance. Interpretations on how this mandate has to be executed can create a number of complex legal problems to solve, thereby undermining the start of the trial in a reasonable time or even thwarting the effectiveness of prosecutions. An alternative could be to create a mixed or hybrid court.

3.2.2 The creation of mixed or hybrid courts

A mixed, hybrid or internationalised criminal tribunal is a jurisdiction that combines national and international staff, and often involves both domestic and internationally-recognised criminal justice rules and procedures.[119] There are, however, different variants: either a national jurisdiction that is internationalised or an international court that is nationalised.[120] Such a criminal tribunal may take the form of a mixed

117 Assembly/AU/ Dec.127 (VII) (n 113) para 5(iv).

118 Assembly/AU/ Dec.127 (VII) (n 113) para 5(iii).

119 T Mbeki et al 'Darfur: The quest for peace and reconciliation. Report of the African Union High-Level Panel on Darfur (AUPD)' October 2009 PSC/AHG/2(CCVII) Peace and Security Council, Abuja, Nigeria 29 October 2009 para 247.

120 P Pazartzis 'Tribunaux pénaux internationaux internationalisés: une nouvelle approche de la justice pénale internationale ?' (2003) XLIX *Annuaire français de droit international* 644 646.

court that is autonomous from the domestic legal system or of special mixed chambers that are integrated into the judicial system of the state concerned. A hybrid tribunal is designed to deliver justice in a particular context or special circumstances. Its jurisdiction, therefore, is limited in time, whereas its exercise is often expected to contribute to the promotion of stability or reconciliation in a post-conflict state.

In practice, the AU in cooperation with Senegal resorted to a hybrid jurisdiction with the creation of the Extraordinary African Chambers (EACs) in the Senegalese Courts in 2012. Other relevant experiences must be noted with recommendations made to create hybrid courts in relation to Sudan in 2009 and South Sudan in 2014.[121]

If we focus only on the example of the EACs, one has to observe that the Chambers were created after the failure to implement the delegation of criminal jurisdiction to Senegal for the purpose of the trial of Hissène Habré. Contestations of this delegated jurisdiction were brought before several African courts,[122] including the ECOWAS Court of Justice. In its judgment of 18 November 2010 the ECOWAS Court of Justice concluded that by amending its domestic legislation for the purpose of trying Hissène Habré, Senegal violated the principle non-retroactivity of penal laws.[123] Furthermore, the Court held that the AU's delegation of jurisdiction conferred on Senegal the mandate to conceive and to suggest specific modalities for trying the accused person in the framework of an *ad hoc* special procedure of an international character as is practised in international law by all civilised nations.[124] For the Court, this was the only procedure that would not breach the principle of non-retroactivity of criminal laws as it was consistent with article 15(2) of the International Covenant on Civil and Political Rights (ICCPR),[125] which permits 'the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general

121 Mbeki et al (n 119) para 246; African Union 'Final Report of the African Union Commission of Inquiry on South Soudan' 15 October 2014 paras 1125-1129 & 1133, http://www.peaceau.org/uploads/auciss.final.report.pdf (accessed 19 March 2021).

122 *Michelot Yogogombaye v Republic of Senegal*, Judgment of 15 December 2009 African Commission, Application 001/2008 paras 20-21. Art 7(2) of the African Charter provides: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

123 *Hissène Habré v Republic of Senegal* Judgment ECW/CCJ/JUD/06/10 of 18 November 2010, ECOWAS Court of Justice paras 54 & 61.

124 *Hissène Habré v Republic of Senegal* (n 123) paras 58 & 61.

125 *Hissène Habré v Republic of Senegal* (n 123) para 58.

principles of law recognised by the community of nations'. The Court decided that Senegal should respect decisions delivered by its own courts declining their jurisdiction over this case.[126]

This judgment may raise much criticism. However, the AU Assembly took note of it in spite of various legal flaws. In January 2011 it requested the AU Commission 'to undertake consultations with the government of Senegal in order to finalise the modalities for the expeditious trial of Hissene Habre through a special tribunal with an international character consistent with the Economic Community of West African States (ECOWAS) Court of Justice Decision'.[127] With the advent of the new Senegalese government of President Macky Sall in April 2012, negotiations with the AU were resumed. These resulted in the conclusion of the Agreement on the Establishment of the Extraordinary African Chambers on 22 August 2012. This Agreement was ratified by Senegal after parliamentary authorisation by virtue of the Law 2012/25 of 28 December 2012.

The EACs qualified as a mixed or hybrid tribunal,[128] as they fulfilled the six criteria of this type of jurisdiction.[129] First, the EACs performed criminal functions. Second, concerning the duration of their existence, they were temporary institutions. Third, there was a minimum international participation in the functioning of the Chambers: The president of the Trial Chamber and the president of the Appeals Chamber were non-Senegalese judges, selected from another AU member state. Nevertheless, all other Senegalese judges were nominated by the Senegalese Minister of Justice but appointed by the Chairperson of the AU. Fourth, international assistance in the financing of the EACs was provided. Fifth, the applicable law combined both international law and Senegalese domestic legislation. Sixth, a party other than Chad was involved in the EACs, that is, the AU. According to Williams, the EACs constituted a new type of mixed tribunal

126 *Souleymane Guengueng & Others v Hissène Habré* Judgment 14 of 20 March 2001, Court of Cassation (Première chambre statuant en matière pénale) http://www.asser.nl/upload/documents/20121105T123352-Habre,%20Cassation%20Court,%20Senegal,%2020%20March%202001.pdf (accessed 18 March 2021); *Public Prosecutor's Office and Francois Diouf v Hissène Habré* Judgment 135 of 4 July 2000, Dakar Court of Appeal (Chambre d'accusation) https://www.hrw.org/legacy/french/themes/habre-decision.html (accessed 18 March 2021).

127 Assembly/AU/ Dec.340(XVI), Decision on the Hissene Habre Case (Doc Assembly/AU/9(XVI)), 16th ordinary session of the Assembly of the African Union, Addis Ababa, Ethiopia, 30-31 January 2011 para 9.

128 S Williams 'The extraordinary African chambers in the Senegalese courts: An African solution to an African problem?' (2013) 11 *Journal of International Criminal Justice* 1140, 1147 & 159.

129 Williams (n 128) 1145-1146.

as it was the first jurisdiction of the kind to apply universal jurisdiction (with the consent of Chad), so operating outside the state of commission and having a minimalist approach to judicial internationalisation, in order to address a particular situation of impunity in Africa.[130]

Thus, the involvement of the international community in the functioning of a hybrid tribunal may not come only from the UN.[131] It could also come from a regional organisation or even other states.[132] The restriction of such an involvement to the UN had no justification. In fact, international law not only exists but may also be enforced at the regional level.

3.2.3 The establishment of the Criminal Court of the African Union

The project for the creation of an African criminal court dates back to the time of the OAU.[133] It was materialised with the AU following criticisms against the global system of international criminal justice, notably those related to the abusive application of the principle of universal jurisdiction by some European states and the ICC's intervention in Africa perceived as being neocolonial and applying double standards.[134] The AU Criminal Court contains some good innovations, such as the inclusion of corporate criminal responsibility and a Defence Office, led by the Principal Defender, who is vested with equal status to that of the Prosecutor.[135] It is a permanent jurisdiction. This raises two important issues concerning the Court's legal status that must be carefully considered. First, what informed the decision to establish a permanent rather than a non-permanent jurisdiction? Second, did the AU follow a maximalist approach in establishing a single court or a minimalist approach, implying that this jurisdiction would coexist with several other courts or tribunals established by the RECs? These two questions were not scrutinised during the drafting process of the Malabo Protocol. The creation of the International Criminal Law Section within the AfCJHPR has given birth to a giant and complex court's system because of the failure to opt for a single court for the African continent, and to establish a non-permanent criminal jurisdiction.

130 Williams (n 128) 1160.

131 Williams (n 128) 1145.

132 As above.

133 M du Plessis et al 'Africa and the International Criminal Court' (2013) 1 International Law Programme Paper 'Africa programme, Africa and the changing balance of international power' 9.

134 Kahombo (n 4) 20-25.

135 ACtJHR Amendments Protocol (Annex) arts 22C & 46C.

A single regional criminal jurisdiction for Africa

The starting point of the debate is the AU decision of July 2009 which indicated that the proposed AU Criminal Court 'would be complementary to national jurisdiction and processes for fighting impunity'.[136] No reference was made to tribunals other than domestic courts. Surprisingly, the Malabo Protocol (Annex) provides: 'The jurisdiction of the Court shall be complementary to that of the National Courts and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'.[137] The reasons why the drafters have departed from the original will of the AU Assembly to include jurisdictions of RECs in the system of the AU Criminal Court are not specified in the *travaux préparatoires*. However, one may suppose that the Malabo Protocol (Annex) espouses the minimalist approach to pan-Africanism and African regionalism.

The meaning of the minimalist approach is closely related to controversies over the way in which African unity and, thus, pan-Africanism should be achieved. The Conference of African Independent States, held in Accra, Ghana, on 15 April 1958 had particularly insisted on uniting all African states in one continental organisation. In this organisation, African unity could have been based on three objectives according to President Kwame N'krumah: economic integration; common foreign policy; common defence and a united government of Africa.[138] This maximalist approach to pan-Africanism suggested that multiplication of regional groupings was a factor of division of African states depending on geography, colonial history and so linguistic and economic ties. Instead, the Conference of African peoples, which took place in Accra from 5 to 13 December 1959, was reluctant to a policy of continentalisation. While agreeing with the necessity for African unity, the Conference concluded that states should first and foremost create specific groupings on the bases of their location, economic, linguistic and cultural connections as initial steps towards the realisation of continental unity, the ultimate objective.[139] In other words, and for the first time, it was agreed that continentalisation should be progressively realised, step by step, through the division of

136 Assembly/AU/Dec.245 (XIII) Rev.1, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (Doc. Assembly/AU/13(XIII)), 13th ordinary session of the Assembly of the African Union, Sirte, Libya, 1-3 July 2009 para 5.

137 ACtJHR Amendments Protocol (Annex) art 46H.

138 R Ndeshyo et al *L'antidérive de l'Afrique en désarroi: le Plan d'action de Lagos* (1985) 148.

139 Ndeshyo et al (n 138) 149.

Africa into different regions and state groupings.[140] These two visions were confronted during the Conference of Addis Ababa for the creation of the OAU in 1963. The proponents of immediate continentalisation constituted the so-called progressist group, led by Presidents Kwame N'krumah (Ghana) and Sekou Touré (Guinea/Conakry). The other group consisted of the so-called realist states, led by Presidents Félix Houphouët Boigny and Léopold Sédar Senghor (Senegal). At the end of negotiations, a compromise was found. The OAU Charter provided for a minimum cooperation between states at the continental level. States would have to consolidate their independence before embarking progressively on the path of Africa's integration. They were also free to create their specific regional groupings in conformity with relevant criteria defined by the OAU Council of Ministers in August 1963.[141] This minimalist approach, therefore, leaves minor powers to the continental level but tends to include regions as primary spaces from which African unity has to be built and realised. The coexistence between continental and regional institutions is its main characteristic. This logic persists with the advent of the AU. President Kwame N'krumah's maximalist approach was revived by Muhammar Kadhafi, who was defending the establishment of the United States of Africa.[142] However, views from the majority of states such as Nigeria and South Africa were in favour of the minimalist position.[143] In any case, if the continental level is vested with more power in the framework of the AU than it was under the OAU, it is still a fact that RECs remain the pillars of Africa's integration.

The drafters of the Malabo Protocol seem to have followed the minimalist approach: The AU Criminal Court should coexist with courts of justice of RECs, the latter having even jurisdictional primacy over it. This position can be politically justified. However, the implication of such courts in criminal matters is likely to render justice difficult to administrate. First of all, the financial burden to operationalise the AU Criminal Court become aggravated owing to the costs that states must pay to make other potential eight criminal jurisdictions attached to those recognised RECs effective. Second, states normally belong to more than a REC. For example, the Democratic Republic of the Congo (DRC) is a member of four RECs: SADC, COMESA, EAC and ECCAS. It is not

140 Organisation Internationale de la Francophonie (OIF) *Le mouvement panafricain au vingtième siècle: recueil des textes* (2004) 283-284.

141 CM/Res. 5 (I), Regional Groupings, 1st ordinary session of the Council of Ministers of the Organisation of the African Unity, Dakar, Senegal, 2-11 August 1963 para 2.

142 GN Tshibambe 'Etats-Unis d'Afrique: analyse généalogique d'une vision' (June-July-August 2008) 426 *Congo-Afrique* 510-516.

143 As above.

excluded that it consents to their respective criminal jurisdictions. In such a situation, the multiple membership to RECs reduces the state capacity to contribute substantially to the funding of common and duplicated criminal institutions. Third, and more important, there are technical drawbacks. On the one hand, the AU Criminal Court may prove to in fact be useless due to the lack of cases to handle. This is because of the double complementarity principle established by the Malabo Protocol (Annex), requiring that the Court intervenes only when states fail to carry out investigations and prosecutions against the alleged perpetrators, and when the case is not or has not been prosecuted or tried before a regional court of justice. On the other hand, the Malabo Protocol (Annex) creates unnecessary competing criminal jurisdictions. In this regard, 'the question is which of the RECs' courts should be considered for the purposes of the complementarity principle where the national state of an accused person holds multiple memberships'.[144] The Malabo Protocol (Annex) is dramatically silent on the coordination of these courts. There is only one reference to agreements which the AU Criminal Court may conclude with any other jurisdictions.

There are two additional reasons why the Malabo Protocol (Annex) should have opted for the maximalist approach. First, the proper dynamic of African regionalism towards continental unification shows that RECs themselves are in a process of rationalisation. They were grouped into two main regional blocs of integration in order to avoid duplication of objectives, programmes and institutions in view of reaching in time 'the final stage of the political and economic integration of the continent'.[145] One of these blocs is constituted by SADC-COMESA-EAC-IGAD and the other by ECOWAS-ECCAS-AMU-CEN-SADC.[146] Therefore, whereas there is a will to speed up the process of integration towards continental unification, the trend that consists of creating and increasing the number of regional institutions runs against this backdrop. Second, in 2012 it was envisaged to create an arbitral section within the African Court of Justice

144 A Abass 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 945.

145 AU Non-Aggression and Common Defence Pact art 4(d).

146 Assembly/AU/Dec.392(XVIII), Decision on African Integration (Doc: EX.CL/693(XX)), 18th ordinary session of the Assembly of the African Union, Malabo, Equatorial Guinea, 29-30 January 2012 para 7; Assembly/AU/Dec.394(XVIII), Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area (Doc. EX.CL/700(XX)), 18th ordinary session of the Assembly of the African Union, Malabo, Equatorial Guinea, 29-30 January 2012 paras 4(i) & (ii); Assembly/AU/Decl.1(XVIII), Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA), 18th ordinary session of the Assembly of the African Union, Malabo, Equatorial Guinea, 29-30 January 2012 para 6.

and Human Rights (AfCJHR) as part of the institutional mechanism of the proposed African Continental Free Trade Area.[147] For the first time, one jurisdiction was foreseen to be relevant for the settlement of disputes on the continent without any role being left to courts of justice of RECs.[148] Due to all the drawbacks mentioned above, the Malabo Protocol (Annex) could have followed the same dynamic of unification. The AU had the power to make such an institutional rationalisation and harmonisation pursuant to article 4(l) of the Constitutive Act.

A permanent or non-permanent court

As a reminder, the AU Assembly chose to confer criminal jurisdiction on the AfCJHPR rather than creating a separate criminal tribunal comparable to an ICC made in Africa. This choice was quite logical because it was already decided in 2004 to merge the AU's existing courts as a matter of institutional rationalisation and for reducing financial costs.[149] Creating a separate criminal jurisdiction could have been in contradiction with this policy.[150] Nevertheless, the form of the criminal jurisdiction to create was not thoroughly considered during the drafting process of the Malabo Protocol.

Like the Court itself, its International Criminal Law Section shall be permanent. This means that the criminal jurisdiction will be also exercised permanently. In other words, the Court is not designed to deal with particular situations with a limited mandate in time. However, its permanence to some extent is mitigated by the fact that the Court shall sit in ordinary or extraordinary sessions,[151] and so judges will perform their functions on a part-time basis.[152] Only 'the President and Vice President reside at the seat of the Court'.[153] However, for a permanent criminal

147 B Kahombo 'L'intensification du commerce intra-africain et l'accélération de la création de la Zone continentale de libre-échange: aperçu global sur le nouveau Plan d'action de l'Union africaine' in O Ndeshyo (ed) *Le nouvel élan du panafricanisme, l'émergence de l'Afrique et la nécessité de l'intégration continentale –Les actes des journées scientifiques consacrées à la commémoration de la journée de l'Afrique: 2011-2012-2013-2014* (2015) 142.

148 As above.

149 K Kindiki 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal difficulties and merits' (2007) 15 *African Journal of International and Comparative Law* 138.

150 Manirakiza (n 2) 49.

151 Protocol to the Statute of the African Court of Justice and Human Rights (ACtJHR Statute) (Annex) art 20.

152 ACtJHR Amendments Protocol (Annex) art 5(4).

153 ACtJHR Amendments Protocol (Annex) art 22(5).

jurisdiction, it is difficult to imagine that sessions would permit criminal judges to be out of the seat of the Court during a large period of the year as in the case of their counterparts sitting in the General Affairs and Human Rights Sections. The reason is that criminal justice is a matter of daily administration, particularly if the accused persons are in detention. The procedure is characterised by a high degree of oral submission and publicity before the Court. Hence, procedural motions to be dealt with and the length of hearings must make these judges almost permanent at the seat of the Court like the president and vice-president. The Office of the Prosecutor (OTP), which shall not only support the accusation before the Court but also monitor situations occurring on the continent, will also necessarily be permanent. The same observation applies to the Registry which shall be responsible for the administration of the Court,[154] in addition to its traditional judicial mission to record the Court's hearings. This permanent character of the Court will imply enormous financial costs for African states. Yet, the AU has wished to avoid these costs through the rationalisation of its institutions.

Another judicial option was possible: the creation of a non-permanent criminal jurisdiction. The Malabo Protocol (Annex) could have included article 19(2) of the Protocol of the Court of Justice of the AU of July 2003, which was deleted without justification in the Protocol on the Statute of the AfCJHR of July 2008. This article provided that the AU Assembly could confer on the Court jurisdiction over *any dispute* other than those referred to in its first paragraph.[155] The term 'any dispute' could be given a broad meaning in order to cover criminal matters. For example, such conferral of jurisdiction could be decided on matters in which competent states remain inactive or that engender an international dispute as it has been observed in the *Hissène Habré* case. In this scenario, the AU Criminal Court could have received the function analogues to that of an *ad hoc* international criminal tribunal, intervening only in exceptional circumstances when a particular situation was referred to it. In this context, it was not necessary to institutionalise a permanent

154 ACtJHR Amendments Protocol (Annex) art 22B(5).

155 Art 19(2) of this Protocol reads as follows: '1. The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to: (a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (g) the nature or extent of the reparation to be made for the breach of an obligation.'

criminal jurisdiction; rather, the AU needed to appoint a special prosecutor attached to the Court, vested with the mandate to monitor and investigate permanently situations all over Africa. It could have been up to this special prosecutor to identify situations or cases which could deserve regional judicial action and to recommend to the AU Assembly or the PSC either to refer the matter to the Court or to choose any other option of regional criminal justice mentioned above, that is, to delegate jurisdiction to a third member state or to create a hybrid criminal tribunal. The involvement of the AU Assembly or the PSC as political bodies in this system of justice could not have hampered the course of justice. First, their involvement could be a test of good faith on the part of the AU to fight impunity. Second, at least for crimes falling under its competence, the ICC's eyes would be permanent in a manner that when a situation or a case is not dealt with by the competent state or the AU, there would be no reason to complain about its intervention to deliver justice. In this regard, the AU special prosecutor could work hand-in-hand with the ICC Prosecutor and exchange judicial information, documents and evidence. Likewise, if the AU decided to resort to any of the three models of regional criminal jurisdiction, the ICC could support the proceedings in the same manner or even more and up to providing financial assistance.

This kind of non-permanent criminal jurisdiction had several advantages as a matter of judicial policy. First, it gives a margin of appreciation to the AU Assembly to decide, on a case-by-case basis, whether or not to trigger the regional criminal jurisdiction. In this process of decision making, various factors could be put into consideration, including the political sensibility of a situation or a case to be taken out of Africa and the availability of financial means. Second, it would avoid unnecessary conflicts with the ICC. This is important because there has been a perception that calls for the establishment of the AU Criminal Court 'are manifestly meant to detract from the progressive development of international criminal justice'.[156] Third, the exercise of regional criminal jurisdiction would remain very exceptional. Positive cooperation would be strengthened between the ICC and the AU through its special prosecutor. The operations of this kind of regional criminal jurisdiction would be less heavy to sustain than the institution established by the Malabo Protocol which poses questions about its viability.

156 CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1086.

4 Conclusion

Africa not only is a consumer but also an enforcer of international criminal justice. In addition, African states, acting mainly through the AU, have adopted several treaties, decisions and declarations on international criminal law in order to improve the fight against impunity from crimes of collective concern to the continent. It is a process of regionalisation of international criminal law that entails substantive, procedural and institutional African contributions to the development of international criminal law.

This chapter has focused on two important contributions: first, the codification of crimes against peace and security in Africa. These crimes constitute serious violations of rules of fundamental importance for the protection of peace, stability and human rights in Africa or any other essential interests of the African community of states and peoples as a whole, and imply criminal responsibility. They represent a tangible threat to the African regional public order. Three main categories have been identified, namely, crimes against human security; crimes against the states and Africa; and ICC crimes incorporated into African legal instruments with a relative expansion of their definitions. In this regard, suffice it to recall some innovations in respect of ICC crimes under the Malabo Protocol (Annex). For example, the crime of aggression can be committed on behalf of a state or a non-state actor. War crimes include 15 new offences as compared to the definition provided for by the ICC Statute. This notably is the case of the criminalisation of the use of nuclear weapons or other weapons of mass destruction in the context of any armed conflict. The other crimes of specific concern to Africa over which the ICC does not have jurisdiction are unconstitutional changes of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources.

Second, the fight against impunity from all these crimes by Africa itself is the *raison d'être* of the promotion of the system of African regional criminal justice. The chapter has demonstrated that this system is based on three optional models of justice, namely, the delegation of jurisdiction to a member state; the creation of hybrid courts with the participation of regional judges; and the establishment of a regional criminal court. Together with crimes against peace and security in Africa, these models of justice form the core of the content of African international criminal law. Delegation of jurisdiction to a member state was experienced in the case of the trial of the former Chadian President, Hissène Habré, in

Senegal. Hybrid courts were suggested in Senegal, Darfur (Sudan) and South Sudan. The first experience succeeded with the establishment of the EACs, the second failed due to insufficient international support and the lack of political will on the part of Sudan, while the third is still in its prime infancy of conception. The regional criminal court was created by the Malabo Protocol in June 2014, which has not yet entered into force. In fact, the Malabo Protocol rather creates an International Criminal Law Section within the AfCJHPR which this chapter has referred to as the AU Criminal Court. For any initiation of regional prosecutions or trials of crimes committed in Africa, the AU may attempt to rely on any of these three models of justice, depending on the specificity of every situation or case and of course the availability of financial resources. The AU Criminal Court is the main judicial institution in the emerging system of African regional criminal justice, although its intervention will remain exceptional because prosecutions and trials could be conducted by states themselves, in collaboration with the AU, or by courts of justice of RECs.

Overall, regional criminal justice is an additional level to the fight against impunity at the universal and national levels. Jurisdictional conflicts of course are possible. Thus, the efficiency of the fight against impunity will depend on the better coordination of regional judicial institutions with global mechanisms of international criminal justice, notably the ICC and the principle of universal jurisdiction.

5 Africa's engagement with part XI of the United Nations Convention on the Law of the Sea: A policy perspective

*Talatu Akindolire**

1 Introduction

The United Nations Convention on the Law of the Sea of 1982 (Convention'or UNCLOS) is an international treaty that addresses all the various aspects of the maritime areas as well as their activities and consequences; it advanced on the four Geneva Conventions of 1958.[1] The Convention has become the legal framework for marine and maritime activities internationally. UNCLOS comprises 320 articles, arranged into 17 parts and supplemented by 9 annexes. Part XI together with annexes III and IV sets out the regime for the Area in UNCLOS. The Area is defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.[2] Other aspects of the Convention that fall within the purview of the Authority's scope of work are Parts XII and XIII. Part XII sets out the broad principles for the protection and preservation of the marine environment and the prevention of marine pollution from land and sea sources. Part XIII focuses on marine scientific research, the manner in which it should be carried out and the dissemination of the results.[3]

This chapter focuses on the international law regime governing the Area. The legal and regulatory regime within which the chapter is discussed are the aforementioned parts of the Convention, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994 Agreement) and the mining code, which comprise the comprehensive set of rules, regulations and procedures issued by the

* The views of this author in this article are not intended to represent any official position or express any opinion whatsoever on the part of the Secretariat of the International Seabed Authority.

1 These conventions of 1958 were the Convention on the Territorial Sea and Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; the Convention on Fishing and Conservation of the Resources of the High Seas. There was also an optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

2 See art 1(1) of UNCLOS.

3 See RR Churchill 'The 1982 United Nations Convention on the Law of the Sea' in DR Rothwell et al *The Oxford handbook of the law of the sea* (2015) 28-29.

Authority to regulate prospecting, exploration and exploitation of marine minerals in the Area.[4] To date, the Authority has issued three Regulations, namely, (i) Regulations on Prospecting and Exploration for Polymetallic Nodules (adopted on 13 July 2000 and amended 25 July 2013); (ii) Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted on 7 May 2010); and (iii) Regulations on Prospecting and Exploration for Cobalt-Rich Crusts (adopted on 27 July 2012). There is a draft exploitation regulation (ISBA/ 25/C/WP.1) currently being negotiated in the Council of the Authority. The initial projection for its adoption was July 2020. However, this was not actualised owing to the COVID-19 global pandemic.

The focus of this chapter is on how countries on the continent have engaged with the regime established for the Authority specifically. It does not address the entire law of the sea regime, as this is too broad a scope that may not be exhaustively discussed within the context of this chapter. The chapter is divided into three main parts. Part 2 adopts a historic approach by examining the role and participation of the African group before the establishment of UNCLOS, with a particular focus on the role played in the enactment of Part XI of the Convention. Part 3 focuses on events after the entry into force of UNCLOS, and the current composition and extent of engagement, while part 4 serves as a conclusion to address possible future prospects for further engagement by African states in the work of the Authority.

2 African states' participation pre-UNCLOS: Historical perspectives

The United Nations (UN) initiative to establish Part XI of the Convention commenced with the General Assembly adopting Resolution 2172(XXI) in 1966. The Resolution requested that the UN, in cooperation with its agencies and interested member states, undertake a comprehensive survey of activities in marine science and technology, including mineral resources to formulate proposals with regard to the exploitation and development of marine resources.[5] Paragraph 1 endorsed the Economic and Social Council Resolution 1112(XL) of 7 March 1966. The Resolution requested the Secretary-General to make a survey of the state of knowledge of the resources of the sea beyond the continental shelf, excluding fish, and the

4 See arts 133(a) and (b) of the Convention that defines the 'resources' of the Area to mean all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed including polymetallic nodules. Resources when recovered from the Area are thereafter referred to as mineral.

5 NS Rembe *Africa and the international law of the sea* (1980) 38-40.

techniques for exploiting those resources. While these interests grew at the international level, countries, particularly developed countries capable of carrying out exploitation, had commenced measures to undertake further studies of the deep seabed and the possibility of exploiting the mineral resources therein. President Johnson of the United States, at the time, made the following remark at the commissioning of the ocean research ship, *Oceanographer*, in 1966:[6]

> Under no circumstances, we believe, must we ever allow the prospects of rich harvests and mineral wealth [of the oceans] to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are the legacy of all human beings.

In 1967 there was another clarion call in a meeting of approximately 2 000 lawyers and judges from over 100 countries under the auspices of the World Peace Through Law. The meeting adopted a resolution recommending that the General Assembly issue a proclamation declaring that the non-fishery resources of the high seas, outside the territorial waters of any state, and the bed of the sea beyond the continental shelf, appertain to the jurisdiction and control of the UN.[7]

On the international scene in the UN, it was the remarkable speech delivered by the ambassador of Malta, Arvid Pardo, in November 1967 that further roused the consideration of the resources of the seabed. Pardo at the time was the permanent pepresentative of Malta to the UN. He inscribed on the agenda of the twenty-second session of the UN General Assembly the item: 'Examination of the question of the reservation exclusively for peaceful purposes, of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and the use of their resources in the interest of mankind'.[8]

The speech, among other things, highlighted the broad prospect of untold wealth in the deep seabed, 'vast untapped wealth' with a focus mainly on manganese nodules at the time. His speech in some ways epitomised the common heritage of mankind principle, which became

6 HB Robertson 'The 1982 United Nations Convention on the Law of the Sea: An historical perspective on prospects for US accession' (2008) 84 *International Law Studies* 112.

7 Rembe (n 5) paraphrased citing A/C. 1/PV. 1515, 67.

8 See the speech of Ambassador Pardo in UN Doc A/C1/PV.1515 and 1516 of 1 November 1967.

enshrined in UNCLOS and the 1994 Agreement. African states played a significant role in the development of the legal regime for the Area, rallying behind Arvid Pardo's call to recognise the seabed beyond the limits of national jurisdiction and its resources as the common heritage of mankind.[9]

The four Geneva Conventions on the law of the sea that preceded UNCLOS did not tackle issues relating to the seabed beyond national jurisdiction. Therefore, it was necessary to establish a convention that would, among others, create a regime for the regulation of the resources on the seabed in the areas beyond the national jurisdiction of all states. In 1969, by Resolution 2749(XXV), the General Assembly adopted a moratorium against any individual state's claim or activity in the seabed Area.[10] This was shortly followed by the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the limits of national jurisdiction in 1970. UNCLOS declared the deep seabed and its resources 'the common heritage of mankind' and this eventually became embodied in article 136 of the Convention. Article 140 was also the outcome of one of the compromises reached during the negotiations, especially for African states.

The first meetings towards the development of UNCLOS did not enjoy much participation from African states. This may have been owing largely to the fact that a number of the states were colonised at the time or were just emerging from colonialisation/self-determination. With respect to African states' participation, at the first UN Conference in 1960 (UNCLOS I) only six out of 86 states participated.[11] At the Second United Nations Conference on the Law of the Sea (UNCLOS II) 10 out of

9 Africans supported the common heritage of humankind because its wider application meant justice, equality, development and an equitable distribution of resources, fitting with the major development of the new international order which was prevalent in the 1970s. This view was expressed by the chairperson of the Group of 77 when he stated that 'Resolution 2749(XXV) remained valid … and in the absence of an international treaty … all states and all natural or juridical persons were required to refrain from exploiting the area', with the result that 'all activities undertaken outside the international regime to be established unlawful (UNCLOS III '19th first committee meeting' 21 (UN Doc. A/CONF.62/C.1/SR.19 (1975) Official Records II 53).

10 Resolution 2749 (XXV) had 108 votes in favour, none against and 14 abstentions. The General Assembly passed the resolution 'that, pending the establishment of the aforementioned international regime: (a) states and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction; (b) no claim to any part of that area or its resources shall be recognised'.

11 United Nations Conference on the Law of the Sea 1958 (UN Doc. A/CONF.13/38) xiii-xxiv (namely, Ghana, Liberia, Libya, Morocco, South Africa and Tunisia).

88 states participated.[12] However, during UNCLOS III (1973-1982) several African nations had attained independence and more African states actively participated in negotiations. Notably, Bamela Engo (Cameroon), acted as Chairperson of the First Committee, tasked with issues related to the deep seabed beyond national jurisdiction. He also acted as Chairperson of Negotiating Group 3 on the organs and decision-making powers of the International Seabed Authority. Francis Njenga (Kenya) acted as Chairperson of Negotiating Group 1, which dealt with the system of exploration and exploitation and resource policy.

The General Assembly (through Resolution 2340 (XXII) of 18 December1967) established the seabed *ad hoc* committee to study the peaceful uses of the seabed and the ocean floor. Ten African states sponsored the draft resolution, namely, Ghana, Kenya, Libya, Madagascar, Nigeria, Senegal, Somalia, Sudan, Tunisia and Egypt. Moreover, seven African states were members of the committee, all of which were coastal states, namely, Kenya, Liberia, Libya, Senegal, Somalia, Egypt and Tanzania. At the following session, the General Assembly reconstituted the *ad hoc* Committee into a standing seabed committee under the title the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond Limits of National Jurisdiction (Seabed Committee).

The Seabed Committee was enlarged from the original 35 members of the *ad hoc* committee to 42 members. Africa was represented by the addition of Cameroon, Madagascar, Mauritania, Nigeria, Sierra Leone and Sudan to the original seven members of the *ad hoc* committee. The Seabed Committee was further enlarged to 91 members,[13] including 26 African states. This metamorphosed into the preparatory Committee for the Law of the Sea, established by Resolution I of UNCLOS III[14] (Prepcom). The Prepcom met twice a year between 1983 and 1994. Its most prominent work at the time was implementing and amending the provision of Resolution II of the UNCLOS III concerning pioneer investors, all of which changed substantively with the entry into force

12 Second United Nations Conference on the Law of the Sea 1960 Summary Records of Plenary Meetings and of the Committee of the Whole, UN DOC. A/CONG.19/8, xiii-xxiv. (Countries that participated were Cameroon, Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, South Africa and Sudan).

13 See Resolutions 2750(XXV), 17 December 1970, para 5; and 2881 (XXVI), 21 December 1971, para 3.

14 Resolution I on the Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law for the Sea, adopted by UNCLOS III on 30 April 1982, in *Law of the Sea* (United Nations, 1983, Sales E. 83.V.5), at p. 175; reproduced in vol 3 as Doc 14.1.

of the 1994 Agreement.[15] At the first session of the Prepcom,[16] Joseph Sinde Warioba of Tanzania was elected as Chairperson. Another African, (Judge) Jose Lui Jesus of Cabo Verde, was elected to preside over the Prepcom[17] from 1987 to 1994. Its principal task was to prepare the draft rules, regulations and procedures necessary to enable the Authority to commence its functions and deal with other preliminary matters of an institutional nature. At its first meeting, 162 members participated, 32 out of which were African states.[18]

The Organisation for African Unity (OAU) also participated in the conference and subsequently in the Prepcom. The OAU put forward a rather united front for the advancement of the interests of African states, especially taking into consideration the peculiarity of African countries in that many of these countries lacked the requisite technology to mine the resources in the Area. It was imperative to ensure that the system established would be both favourable to them in the long run, hence they advocated the internationalisation and equitable distribution of the benefits derived from the exploitation of the resources of the seabed.[19] Unfortunately, despite its active engagement in the early days of the establishment of the Authority and the regime for the Area, the OAU's participation in the work of the Authority faded in the years following. This may have been attributable to the internal change over from OAU to the African Union (AU) in 2002.

15 M Lodge 'International seabed authority' in W Rüdiger (ed) *Max Planck encyclopaedia of public international law* B.5.

16 The first session of the Prepcom held in Jamaica from 15 March to 8 April 1983, and 15 August to 9 September 1983.

17 Jose Lui Jesus of Cabo Verde currently is a judge at the International Tribunal on the Law of the Sea (ITLOS) and has been a member of the tribunal since 1 October 1999; re-elected as from 1 October 2008 and 1 October 2017; president of the tribunal 2008-2011; president of the Seabed Disputes Chamber 2014-2017; member of the Special Chamber formed to deal with the dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives).

18 A full list of the Countries in attendance may be found at https://www.un.org/depts/los/convention_agreements/texts/final_act_eng.pdf (accessed 14 August 2020). See the OAU declaration on the issues of the Law of the Sea doc A/AC.138/89 and A/CONF. 62/33.

19 The OAU Council of Ministers Declaration of the 37th ordinary session on the UN Conference on the Law of the Sea (OAU Doc. CM/ST.20 (XXXVII) of 15 June 1981) para 6 – noting the 'concern of the African producers of minerals whose economies are likely to be adversely affected by uncontrolled exploitation of such minerals from the sea-bed [that the matter] be thoroughly examined and satisfactorily resolved'. See also E Luard *The control of the sea-bed: A new international issue* (1974) 294, where this approach, it was suggested, would create international socialism.

For African countries participating in the discussions at the time, there was the concern that seabed mining would adversely affect the mainstay of their economies that was based on raw materials equally derivable from the seabed, particularly cobalt and manganese. Therefore, it became paramount and imperative to them that the developing countries were willing to negotiate a system whereby the resources from the seabed would be accessible to all. Whenever these minerals were to be extracted, the proceeds thereof would be shared equitably among all nations, including developing states whose economies were likely to suffer serious adverse effects on their export earnings or economies. The projection was that seabed mining would result in a fall in the price of a mineral or metal or a reduction in the volume of exports of that mineral or metal.[20]

3 African engagement with Part XI of UNCLOS through the International Seabed Authority

The lengthy negotiations leading up to the adoption of the Convention in 1982 were complex, with some developing and developed states only agreeing to be signatories to the Convention after the implementation agreements had been adopted. Overall, the Convention managed to bridge some of the gaps between developing and developed countries through compromises.[21] Part XI established the International Seabed Authority as the organisation embodied with the responsibility to regulate activities in the Area and, in some ways, safeguard the common heritage of mankind. Therefore, no state may carry out activities in the Area without being issued a contract to do so by the Authority.

In the last 26 years of its existence, the work of the Authority has been centred around three main mineral resources, namely, polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. These mineral resources contain, in varying quantities, a wide range of precious metals such as cobalt, copper, zinc, manganese and nickel. Over the last years, the activities in the Area have mostly centred around prospecting

20 This is now covered in art 151(10) of the Convention and Annex sec 6 para 7 of the 1994 Agreement. Sec 7 para 1(a) establishes an economic assistance fund by the Authority from payments received from contractors, the Enterprise and voluntary contributions. Based on the portion of funds of the Authority, excluding administrative expenditure. The size of the fund will be determined by the Council from the time to time acting upon the recommendations of the Finance Committee.

21 TTB Koh & S Jayakumar 'The negotiating process of the third United Nations conference on the law of the sea' in MH Nordquist (ed) *United Nations Convention on the Law of the Sea 1982: A commentary* (1985) 54.

and exploration in the Area, butexploitation is yet to commence.[22] As of 2022, the Authority has issued 31 contracts for exploration.[23] In line with the regulations, these contracts are granted for 15-year periods following approval by the council of the Authority upon recommendation by the Legal and Technical Commission.

At the time of writing this chapter, no contractor has been sponsored by an African country. This is possibly attributable to several factors including the fact that deep seabed mining is a very expensive venture and some African countries fear that they are unable to competitively gain traction or compete fairly. However, this situation is envisaged and well anticipated by the Convention and the 1994 Agreement. It recognises that member states from developing countries that are unable to financially engage but are willing to do so can exploit through 'the Enterprise'.[24] In the Convention, the Enterprise is established as an independent organ of the Authority, although it is yet to be fully operationalised in line with the requirements and the terms stipulated for its operationalisation in the Convention and the 1994 Agreement.[25]

Hypothetically, the Enterprise is the pathway through which developing states may benefit from seabed mining through joint ventures in the reserved areas.[26]

To sponsor a contract, a member state would have to show effective control over the contractor and, among others, issue a certificate of

22 The Convention recognises in art 1 that the activities in the Area means all activities of exploration for and exploitation of the resources of the Area. Prospecting is discussed under Annex III art 2.

23 These contracts are sponsored by 21 different countries, to see the breakdown of the mineral resources and contracts issued by the Authority. Information is available at https://www.isa.org.jm/exploration-contracts (accessed 14 August 2020).

24 See art 8 of Annex III of UNCLOS 82 and sec 1 para 10 of the Annex to 1994 Agreement.

25 Under the 1994 Agreement, the secretariat is to perform the functions of the Enterprise listed in in Annex secs 2(1)(a)-(h) until it begins to operate independently of the Secretariat. The 1994 Agreement further provides that the Enterprise shall conduct its initial deep seabed mining operations through joint ventures, and that upon certain eventualities, 'the Council shall take up the issue of the functioning of the Enterprise independently of the Secretariat of the Authority see (functioning' (Annex sec 2(2) 1994 Agreement).

26 For more information on the Enterprise, see a recently-concluded study by the Authority 'A study related to issues on the operationalisation of the Enterprise. Legal, technical and financial implication for the International Seabed Authority and for states parties to the United Nations Convention on the Law of the Sea' ISA Technical Report 1/2019 prepared by Edwin Egede, Mati Pal and Eden Charles, https://isa.org.jm/files/files/documents/enterprise_study.pdf (accessed 14 August 2020).

sponsorship evidencing same which is presented to the Authority.[27] Developing countries face challenges in deep sea exploitation due to the capital-intensive nature of this venture. Bearing in mind also that the technology and equipment needed to engage in this process is still evolving, government entities, state enterprises and private companies that are contractors in the Area would need to have robust engineering and mining industries and budgets to undertake capital-intensive research expeditions and cruises. This is key to having a competitive advantage, which may at this time be lacking for several African countries. Nevertheless, it is worth noting that there are a few developing states that currently are sponsoring states, the majority of which are in the Asia-Pacific region.[28] Interestingly, in 2020 Blue Minerals Jamaica Ltd, a company sponsored by the government of Jamaica (and host country of the Authority) applied for a contract for polymetallic nodules which was approved by the Council, making Jamaica the first Caribbean sponsoring state.

3.1 Participation in the organs of the International Seabed Authority

This part will examine African membership in the various organs and sub-organs of the Authority. The organs of the Authority are the Assembly, the Council, the Legal and Technical Commission, the Finance Committee, the Secretariat and the Enterprise.[29] The Assembly comprises all member states of the Convention. At the time of writing this chapter, there are 168 members of the Authority, 27 of which are member states of the European Union (EU). Out of this number, 47 are from Africa.[30] Though

27 For more information on effective control, see Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case 17, 1 February 2011, 50 ILM 458.

28 These are China, Singapore, Tonga, Nauru, Cook Islands, Kiribati, India and Brazil. For a full list of contractors for the Authority, see https://isa.org.jm/exploration-contracts (accessed 14 August 2020).

29 The organs of the Authority are spelt out in the Convention; see art 58. There are hereby established, as the principal organs of the Authority, an Assembly, a Council and a Secretariat. There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in art 170 para 1. Such subsidiary organs as may be found necessary may be established in accordance with this part. 4. Each principal organ of the Authority and the Enterprise shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.

30 A full list of the members of the Authority is available at https://www.isa.org.jm/member-states; regional groupings can also be found at https://www.isa.org.jm/regional-groups (accessed 14 August 2020).

several African member states have ratified the Convention, the majority have never attended the meetings of the Authority since its establishment and others participate infrequently.

3.1.1 Council membership

The Council is the executive organ of the Authority and is established under article 162 of the Convention. It has powers to establish specific policies on any matters within its competence under the Convention as well as the general policies of the Authority. The Council also proposes to the Assembly a list of candidates for the election of the Secretary-General and the Director-General/governing board of the Enterprise. In accordance with paragraph 15, section 3 of the Annex to the 1994 Agreement, the Council is to be comprised of 36 members. In the current composition of the Council for 2022, 10 slots have been allocated to the African group, which currently is comprised of South Africa, Uganda, Lesotho, Algeria, Cameroon, Mauritius, Ghana, Nigeria, Sierra Leone and Morocco. The election of the members is done through a complex formula of groupings into groups A-E which is based on rules of eligibility. The criteria of eligibility for each group is different and based on a range of factors. Group A comprises member states that make up the total world consumption or imports of the commodities produced from the categories of minerals derivable from the Area. Group B comprise the largest investments in preparation for and in conduct of activities in the Area. Group C is for states that are major net exporters of the categories of minerals to be derived from the Area. Group D reflects potential producers that represent special interests for landlocked or geographically disadvantaged states, and Group E is reserved for states that qualify based on the principle of equitable geographical distribution of the seats.[31]

African presidents in the Council have come from Senegal (2004), Egypt (2009), Cameroon (2014) and South Africa (2019). In terms of membership, every election year an eligibility list is prepared by the secretariat pursuant to paragraph 9 section 3 of the Annex to the 1994 Agreement, to indicate which countries meet the criteria for the year. In 2020 Zambia has shown promise within the group of major consumers and importers of more than 2 per cent in value terms of total world consumption of the commodities from cobalt and copper, and South Africa for manganese and nickel. The Democratic Republic of the Congo (DRC) has featured in the list of major producers and net exporter for cobalt and copper. Gabon and Ghana have also been identified as major

31 For full details on the groupings, see paras 15(a)-(d), sec 3 of the Annex to the 1994 Agreement.

producers and net exporters for manganese. Morocco has been identified as one of the developing states that are major importers of cobalt. A number of African states have been identified as potential producers of the categories of mineral derivable from the Area.[32]

3.1.2 Legal and Technical Commission

The Legal and Technical Commission (LTC) is a subsidiary organ of the Council comprising independent experts, nominated by member states with appropriate qualifications relevant to the exploration, exploitation and processing of mineral resources, oceanography, protection of marine environment, or economic or legal matters relating to ocean mining and related fields of expertise. Article 163 of the Convention also establishes the Economic Planning Commission (EPC). The EPC is to review the trends of and factors affecting the supply, demand and prices of minerals that may be derived from the Area, bearing in mind the interests of both importing and exporting countries, and in particular of the developing states. Members of the EPC shall have appropriate qualifications in mining, management of mineral resource activities, international trade or international economies.[33] However, the EPC is yet to be in operation, so its activities are currently undertaken by the LTC, until such a time as is deemed fit by the Council to operationalise the EPC. This currently is on the agenda of the Council for discussion at its meetings in 2022.[34]

The first five-year term of the LTC was elected in 1997. Although the stipulated number in the Convention for both Commissions is 15, the Convention gives the discretion to increase the size of either Commission having en due regard to economy and efficiency.[35] Membership of the LTC started at 22 and has gradually increased over the years. The current composition of the LTC is 30 members, though at the Part II meeting of the Council, it decided to further enlarge the size of the Commission for the 2023-2027 membership.[36] The Chairperson and a Vice-Chairperson are elected from among members. Five of the 30 current members of the Legal and Technical Commission (2017-2021) are from Africa, namely,

32 See ISBA/26/A/CRP.2 for the indicative list of states for 2020, https://www.isa.org.jm/files/documents/isba_26_a_crp.2.pdf (accessed 14 August 2020)..

33 See art 164 of UNCLOS.

34 See document ISBA/27/C/25, Operationalisation of the Economic Planning Commission, 6 May 2022.

35 See art 163(3) of UNCLOS.

36 See ISA document ISBA/27/C/41, Decision of the Council of the International Seabed Authority relating to the election of members of the Legal and Technical Commission, 28 July 2022.

Theophile Mbarga (Cameroon); Michael Gikuhi (Kenya); Thembile Joyini (South Africa); Ahmed Farouk (Egypt); and Joshua Tuhumwire (Uganda). In 2000 and 2001 Namibia chaired the LTC session, in 2005 Senegal chaired, South Africa in 2003 and 2004, Egypt in 2007 and Mozambique in 2010. The graph below shows the overall membership for African states in the Commission from 1997 to 2020.

3.1.3 Finance Committee

The Finance Committee was created under the 1994 Agreement to oversee the financing and financial management of ISA. The Committee consists of 15 members elected by the Assembly for a period of five years, taking into account equitable geographical distribution among regional groups and representation of special interests. As of 2022, two of the 15 members of the current composition of the Committee are from Africa, namely, Medard Ainomuhisha (Uganda) and Abderahmane Zino Izourar (Algeria). The Committee plays a central role in the administration of the Authority's financial and budgetary arrangements. Members are expected to have qualifications relevant to financial matters as they are involved in making recommendations on financial rules, regulations, and procedures of the organs of the Authority, its programme of work as well as the assessed contributions of its member states. In 2017-2020 Algeria served as Vice-Chair of the Committee. Below is a graph indicating participation from Africa since its creation.

3.1.4 Secretariat

The Secretariat is located in Kingston, Jamaica at the seat of the Authority and is headed by a Secretary-General.[37] It currently has a staff strength of approximately 47 which reflects nationalities with an equitable geographical spread among the member states of the Authority. As at the time of writing this chapter, there are two staff members from Africa (Nigeria and the Republic of Sudan). Interestingly, the second Secretary-General of the Authority was from Ghana, Mr Nii Allotey Odunton.[38] A significant number of achievements and milestones were reached in the Authority during his tenure. He served two tenures, from 2009 to 2016. In 2020 the Authority's museum was named in his honour.[39] The Secretariat provides support to the Secretary-General and other principal organs and

37 Art 156(4) of UNCLOS, which establishes the seat of the Authority as Jamaica.

38 Nii Oduton passed away 13 February 2022.

39 Press release of 27 November 2020 of the Authority, https://www.isa.org.jm/news/isa-deep-sea-exploration-museum-named-honour-mr-nii-allotey-odunton (accessed 16 December 2020).

their subsidiary organs in undertaking the functions under the Convention and the 1994 Agreement and the mining code. It accomplishes this through its four organisational units.[40]

4 Projection for the coming years, challenges and prospects for Africa

The current priority for the Authority is the development of the regulations for exploitation of mineral resources in the Area. Since its inception, no contractor has engaged in exploitation. Contractors have only carried out prospecting and exploration, that is, the stage where the mineral resources are assessed for availability, quantity, size, coverage, and s forth. Exploitation, which is the next and most lucrative phase, involves the harvesting and production of the minerals from the deep seabed into precious metals. The benefits of these minerals to mankind are inexhaustible and have the potential to boost international trade in metals. Discussions on the development of the draft exploitation regulations commenced in 2014. Since then there have been several rounds of consultations and negotiations.

During these negotiations, the African group and individual African states have made submissions to the draft text and adopted a rather coordinated approach. Key issues of particular interest to the African group have been (i) the operationalisation of the Enterprise; (ii) the financial model for the payment mechanism for deep sea mining; (iii) the potential impact of mineral production from the Area on the economies of developing land-based producers; and (iv) the protection and preservation of the marine environment.[41]

At the first part of the twenty-sixth session meetings of the Council in February 2020, three informal working groups were established to advance discussions on specific parts of the draft regulations for exploitation. Janet Olisa (Nigeria) was appointed facilitator of the informal working group that deals with inspection, compliance and enforcement.

In recent times,the African group has adopted an active and rather coordinated approach in its engagement in the Authority. However, the

40 The organisational units of the Authority are the office of legal affairs; the executive office of the Secretary-General; the office for administrative services; and the office of environmental management and mineral resources.

41 See the Authority's stakeholder consultation process on the draft Exploitation Regulations from 2015 for comments from the African group and from other individual African Countries, https://www.isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area (accessed 18 December 2020).

region still witnesses very low participation from member states, and in many cases non-payment of annual assessed contributions for long periods. This has led to the suspension of voting rights of many African member states, several of which still fail to attend meetings of the Authority at all, despite having ratified the Convention.

The author shares the view that some of the perceived reasons for this lack of engagement can be attributed to, among others, the following issues:

(a) the remoteness of the secretariat in Jamaica, as well as the high cost of travel from Africa to the Caribbean to attend meetings, which would require transiting through one or more countries. Currently there are no direct flights to Jamaica from any African country. Therefore, any person travelling to Jamaica would be mandated to transit through Europe or the Americas. In some cases, participants are unable to obtain or denied transit visas.
(b) a lack of understanding and/or appreciation of the regime of the Area, its importance, and potential benefits. The concept of mining in the Area remains rather aspirational and somewhat far-fetched to several African states, which has led to high levels of apathy.

Irrespective of these challenges, the Authority is working assiduously to ensure that all developing states, with a particular attention to small island developing states and African states, engage in deep seabed exploration and exploitation. The latter can be seen in the launching of the Africa Deep Seabed Resources (ADSR) project carried out in partnership with the AU, with support from the Norwegian Agency for Development Cooperation.

Furthermore, in February 2020 the Authority convened an international workshop dedicated to needs and resource assessment. This was specifically focused on undertaking an assessment of capacity-building needs of developing states to improve effectiveness and impact of the Authority's capacity-building programmes, namely, the contractor training programmes, the Endowment Fund for Marine Scientific Research and internships.[42] Through the ADSR project, the Authority has managed to undertake workshops and trainings in Africa (South Africa,

42 This is in line with Strategic Direction 5 of the Authority's Strategic plan for 2019-2023. See the ISBA/25/A/15 for the Authority's strategic plans 2019-2023; further information on the need assessment workshop can also be found at https://www.isa.org.jm/event/international-workshop-capacity-development-resources-needs-assessment (accessed 14 December 2020).

Uganda, Nigeria, Morocco, Senegal and Côte d'Ivoire) as well as sponsor secondment opportunities within the Secretariat for experts from Africa.[43]

Over the years, several nationals from African states have benefitted from the capacity-building programmes of the Authority. As of 2022, 91 out of 253 placements for contractor training programmes have been granted to Africans, while 55 out of 158 have benefited from the Endowment Fund on Marine Scientific Research.[44]

Another step that the Authority has taken, especially in view of the COVID-19 pandemic, is to move its workshops and programmes to a remote format, in which case the issues relating to budgetary limitations on travelling can no longer be the reason for non-participation in the Authority's work. Prior to the COVID-19 pandemic, the meetings of the Council and Assembly within the last two years have been streamed live on the website of the Authority to garner a wider range of participation.

4.1 Future prospects

One may rightfully argue that the regime of the Area is one of the most balanced international regimes established. It provides ample opportunities for developing states to benefit by creating a level playing field. This part highlights specific provisions in UNCLOS that ensure that developing states benefit from special incentives and initiatives. Bearing in mind that a large percentage of African states fall into the categorisation of developing states, the following opportunities would readily be available and accessible to nearly all African member states and their nationals:

4.1.1 Training programmes

Article 144(2) of the Convention, section 5 paragraph 1(c) of the Annex to the 1994 Agreement and the current version of the draft exploitation regulations state that a contractor shall draw up practical programmes for the training of personnel of the Authority and developing states, including in all activities in the Area that are covered by the contract.

43 For more information on the ADSR project, see https://www.isa.org.jm/training/adsr-experts accessed 20 August 2020 (accessed 14 December 2020).

44 Full details on the training programmes and the beneficiaries can be found at https://isa.org.jm/training accessed 20 August 2020 (accessed 14 December 2020).

4.1.2 Reserved areas

The reservation of sites is provided for in Annex III, articles 8, 9 and 11[45] of the Convention and in Annex Section 1(10) of the 1994 Agreement. It was first introduced in the Revised Single Negotiating Text in 1967.[46] In summary, the system requires that an applicant for a contract with the Authority reserves an equal half of its proposed contract Area for the Authority, for exploitation through the Enterprise or in association with developing states. The system is also called site-banking and has been elaborated in the Regulations on Prospecting and Exploration for all three minerals.[47]

4.1.3 Joint arrangements and incentives with the Enterprise

Under article 11 of Annex III article 5, contractors entering joint arrangements (including joint ventures or production sharing) with the Enterprise and with developing states or their nationals may receive financial incentives. The purpose and aim of this is the encouragement of transfer of technology through training personnel of the Authority and of developing states.

4.1.4 The promotion of marine science and technology

This is enshrined in Part XII (Marine Scientific Research) and Part XIV (development and transfer of Marine Science and Technology) of the

45 Art 8 of UNCLOS states: 'Each application, other than those submitted by the Enterprise or by any other entities for reserved areas, shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The applicant shall indicate the coordinates dividing the area into two parts of equal estimated commercial value to allow two mining operations. The applicant shall indicate the coordinates dividing the area into two parts of equal estimated commercial value and submit all the data obtained by him with respect to both parts [to the Authority] without prejudice to the powers of the Authority pursuant to Article 17 of this annex [powers to make rules and regulations], the data to be submitted concerning polymetallic nodules shall relate to mapping, sampling, the abundance of nodules and their metal content. Within 45 days of receiving such data, the Authority shall designate which part is to be reserved solely for the conduct of activities by the Authority through the Enterprise or in association with developing states. This designation may be deferred for a further period of 45 days if the Authority requests an independent expert to assess whether the data required by this article has been submitted. The area designated shall become a reserved area as soon as the plan of work for the non-reserved is approved and the contract is signed.'

46 ED Brown *Sea-bed energy and mineral resources and the law of the sea: The area beyond the limits of national jurisdiction (*1986).

47 See Regulations 15, 16, 17 & 18 of the three regulations on prospecting and exploration in the Area.

Convention. These provisions aim to enhance the capacity of member states by training scientists from developing countries and assisting developing states in the evaluation of research results.[48]This is an area where the African continent possesses the lowest share of capability and where there is much growth potential. There are a wide range of collaborations at the international and regional levels equally involving the Authority within and outside the UN system. One such collaborative initiative can be seen in the recent adoption of an Action Plan for Marine Scientific Research in support of the UN Decade of Ocean Science for Sustainable Development.[49] Furthermore, in 2019 the Authority launched a deep data website pursuant to its mandate under article 143(3)(b),[50] to promote marine scientific research by making publicly available all deep seabed activities related data and, in particular, data collected by the contractors on their exploration activities and other relevant environmental and resource-related data for the Area.[51]

4.1.5 Land-based producer developing countries

Section 7 of the Annex to the 1994 Agreement and article 152(10) of the Convention ensure that when commercial mining cmmences, land-based producer developing states are not disadvantaged by seabed mining. To this end, an economic assistance fund is to be established by the Authority based on a portion of the funds received from contractors,

48 For more on this topic, see AHA Soons *Marine scientific research and the law of the sea* (1998); UNAOLOS *The law of the sea: Marine scientific research: A guide to the implementation of the relevant provisions of the UN Convention on the Law of the Sea* (1991); see also the Authority's work in the development of the Marine scientific research through its Action Plan in support of the United Nations Decade of Ocean Science for Sustainable Development.

49 The MSR Action Plan identifies six strategic research priorities: advancing scientific knowledge and understanding of deep-sea ecosystems, including biodiversity and ecosystems functions in the Area; standardising and innovating methodologies for deep-sea biodiversity assessment, including taxonomic identification and description in the Area; facilitating technology development for activities in the Area, including ocean observation and monitoring; enhancing scientific knowledge and understanding of potential impacts of activities in the Area; promoting dissemination, exchange and sharing of scientific data and deep-sea research outputs and increasing deep-sea literacy; strengthening deep-sea scientific capacity of ISA members, in particular developing states.

50 Art 143(3)(b) of UNCLOS states that the ISA is to ensure that programmes are developed through the Authority or other international organisations as appropriate for the benefit of developing states and technologically less developed states with a view to (i) strengthening their research capabilities; (ii) training their personnel and the personnel of the Authority in the techniques and applications of research; (iii) fostering the employment of their qualified personnel in research in the Area.

51 ISA Deep Data, https://data.isa.org.jm/isa/map/accessed 15 December 2020 (accessed 14 December 2020).

but taking into account administrative fees. The policy of the Authority on economic assistance is to be based on the four principles identified in the 1994 Agreement.[52] A determination on the size and the time for the establishment of the fund is currently being addressed by the Legal and Technical Commission, with a view to identifying potential impacts of exploitation on land-based mining producers of developing states. The current focus of the Commission is on the impact for polymetallic nodules.[53]

4.1.6 Equitable distribution under article 82 of the Convention

Although a rather complex and somewhat aspirational formulation, article 82 of the Convention mandates that where a coastal state undertakes exploitation of non-living resources of the continental shelf beyond 200 nautical miles, it shall make payments at a specified percentage to the Authority. The Authority, in turn, shall distribute the proceeds equitably to state parties to the Convention, taking into account the interests and needs of developing states, particularly the least developed and land-locked states. Several African states fall within this categorisation and, as such, could potentially benefit from the actualisation of this mandate.[54]

52 See Annex, sec 7 para 1 of the 1994 Agreement, which states as follows '1. The policy of the Authority of assisting developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area, shall be based on the following principles: (a) The Authority shall establish an economic assistance fund from a portion of the funds of the Authority which exceeds those necessary to cover the administrative expenses of the Authority. The amount set aside for this purpose shall be determined by the Council from time to time, upon the recommendation of the Finance Committee. Only funds from payments received from contractors, including the Enterprise, and voluntary contributions shall be used for the establishment of the economic assistance fund; (b) Developing land-based producer States whose economies have been determined to be seriously affected by the production of minerals from the deep seabed shall be assisted from the economic assistance fund of the Authority; (c) The Authority shall provide assistance from the fund to affected developing land-based producer states, where appropriate, in cooperation with existing global or regional development institutions which have the infrastructure and expertise to carry out such assistance programs; (d) The extent and period of such assistance shall be determined on a case-by-case basis. In doing so, due consideration shall be given to the nature and magnitude of the problems encountered by affected developing land-based producer states.'

53 ED Brown *Sea-bed energy and minerals: The international legal regime* (200) 90.

54 Art 82 of the Convention states that payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles '1. The coastal state shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall

5 Conclusion

In this chapter we looked at Africa's engagement over the years, as well as identified key challenges of African states. Areas of prospects and future opportunities were also discussed. The author is of the view that the continent stands to gain enormous benefits from intensifying its engagement with the International Seabed Authority and the Convention in general. It would also be a promising step if at least one African state becomes a sponsoring state for a contract in the Area. This would have the effect of signalling to the others the actualisation of this possibility.

The need for increased interest, engagement and knowledge intensification in the work of the Authority has to be systemic and ingrown, emanating from political will at the governmental level of respective states. This should be evidenced by the domestication of the provisions of the Convention in national law, as well as enacting national legislation on deep seabed mining. Other steps could include assigning permanent or semi-permanent desk officers and focal point offices that could engage on a regular and frequent basis. Doing so would build capacity of the team and ensure that capacity-building opportunities from the Authority are targeted to the right persons and departments. Furthermore, the attendance and participation at workshops are encouraged, especially now with the development and proliferation of remote trainings and workshops, which would bridge the challenge of budgetary implications on travel. Furthermore, initiatives such as the ADSR project are specifically targeted to Africa; hence, there is no excuse for a lack of engagement. African member states are also requested to actively engage by paying up their assessed contributions to the Authority. Several states have had their voting rights suspended due to outstanding balances spanning over years. To get the best benefit from the privileges and advantages envisaged by UNCLOS, this would need to change.

The prospect of commercial mining is becoming a reality each day, bringing us closer to the vision the founding fathers of the Convention had

be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at7 per cent thereafter. Production does not include resources used in connection with exploitation. 3. A developing state which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource. 4. The payments or contributions shall be made through the Authority, which shall distribute them to states parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing states, particularly the least developed and the land-locked among them.'

during negotiations. This is the best time for African states to completely engage in the work and vision of the Authority and harness the potentials and benefits that rests within part XI of the Convention and the 1994 Agreement.

6 A longer African history: Re-politicising the right to development

*Misha Ariana Plagis**

1 Introduction

> The concept of the right to development is of African origin.[1]

'The "right to development" is considered a specifically African contribution to the international human rights discourse.'[2] Kéba M'Baye, one of the early giants of African international law during the independence struggles, is considered the father of the right to development,[3] as well as the father of the African Charter on Human and Peoples' Rights (African Charter).[4] Yet, in today's discussions at the United Nations (UN) on the right to development, this intellectual history is often glazed over with little to no recognition of the contribution of African thinkers, such as M'Baye and others.[5] The purpose of this contribution is to bring to the fore the history of the right to development, drawing the politics of its origins further back, in order to re-politicise the right today.

* An early draft of this chapter was presented at the workshop 'Law, Rights, and Governance in Africa. A look to the Future' at Leiden University in January 2020. I also received helpful comments and feedback from various colleagues, with special thanks to the anonymous peer reviewer, the editor of this book, Apollin Koagne Zouapet, Nathaniel Rubner, Jolein Holtz, and Magdalena Pacholska. All errors remain my own.

1 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 298.

2 IG Shivji *The concept of human rights in Africa* (1989) 29.

3 RL Barsh 'The right to development as a human right: Results of the global consultation' (1991) 13 *Human Rights Quaterly* 322.

4 1981, OAU CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982). For a contribution of M'Baye, see MA Plagis & L Riemer 'From context to content of human rights: The drafting history of the ACHPR and the enigma of article 7' (2020) 23 *Journal of the History of International Law/Revue d'histoire du droit international*.

5 M'Baye was one of a number of key actors working on the right to development; see, eg, N Rubner 'An historical investigation of the origins of the African Charter on Human and Peoples' Rights' PhD thesis, Cambridge University, 2008 699-714 (on file with author).

'Development' can mean different things to different people(s), in different times and places.[6] Between 1979 and 1981 the meaning of the right to development in the context of the Organisation of African Unity (OAU) was codified in article 22 of the African Charter. The article, as it stands today, is divided into two sections; the first paragraph protects the rights of individuals and peoples, providing that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.' The second paragraph places an obligation on states and the wider international community, stating that '[s]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development', thus giving article 22 an inbuilt duality. The article was drafted at a time when many sub-Saharan African states found themselves in economic decline,[7] and ideological tensions were running high between the classic distinction of civil and political rights, on the one hand, and economic, social and cultural rights, on the other.[8] What emerged from this context was a right that focussed on *both* economic equity at the inter-state level, as well as individual and community rights that transversed the ideological divide between the 'generations'[9] of human rights. As a result, the right to development has a distinct character that is unique to the African human rights system.

The mark of M'Baye on the right to development is unmistakable. Nonetheless, the aim of this chapter is to also highlight the embeddedness of the right to development in a longer history of Africa's (and Africans') involvement in the creation of international law at multiple levels.[10] The aim is to demonstrate the influence of African legal and political thought in shaping international human rights law, then and now. In doing so, the chapter makes three assertions. First, it is suggested that while the roots of the link between development and human rights as a legal concept are clearly African, their point of origin is perhaps older than some initially anticipated. Second, the chapter cautions against the potential erasure of

6 Eg, Treblicock and Prado provided an extensive overview of the literature on development and particular goals: development as economic growth, as lack of poverty, as freedom, as sustainability, or as quality of life. MJ Treblicock & MM Prado *Advanced introduction to law and development* (2014) 3-16.

7 PM Lewis 'Economic reform and political transition in Africa: The quest for a politics of development' (1996) 49 *World Politics* at 92.

8 F Viljoen *International human rights law in Africa* (2013) 214; HB Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights (1988-2006)* (2007) 27-35.

9 Donnelly identifies the right to development as a 'third generation' right. J Donnelly 'The "right to development": How not to link human rights and development' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 263.

10 For a more extensive history of the right to development, see Rubner (n 5) 699-714.

the 'Africanness' of the right to development in its universalisation. As the right to development has re-emerged at the UN level, its socio-political underpinnings that challenged conventional power in international law, which often excluded Africans and peoples of African descent, are in danger of being erased. Third, I argue, therefore, that by going back to the origin story of the right to development in the struggles against colonialism and apartheid, and calls for a new international economic order (NIEO), the new cadre of African international law jurists can challenge their own preconceptions of the boundaries of international law by reflecting on the creativity and ingenuity in the process of resistance of previous generations of African international lawyers.

The chapter maps out the course of 'the right to development' from the first Pan-African Conference in 1900 to the latest iteration of the aspirations of the UN to adopt a right to development. While this might appear to imply a teleological approach,[11] the narrative here is not to claim a linear progression of a new human right from 1900 onwards. Thus, although Orford's approach to anachronism[12] is used to a certain extent, the chapter asserts that the story of the right to development is complex. As has been explained elsewhere, the right to development was at times contested and there were multiple motives for its adoption in the African Charter.[13] There are also potential disjunctures between what was codified, and the breadth of what has since been interpreted. In addition, the UN proposal for a right to development in certain respects is a step back to a more limited vision of what should be included in such a right, and lacks the more radical underpinnings of its origins. Hence, an approach to history that focusses on a 'narrative of progress'[14] would be misleading in this case.

This contribution also deviates from other narratives that distinguish between nation building and the human rights project.[15] The dismissal of the connections between self-determination, nation building, and

11 On how to disrupt such an approach in histories of international law, see M Arvidsson & M Bak McKenna 'The turn to history in international law and the sources doctrine: Critical approaches and methodological imaginaries' (2020) 33 *Leiden Journal of International Law* 1.

12 See A Orford 'On international legal method' (2013) 1 *London Review of International Law* 166.

13 Plagis & Riemer (n 4); Rubner (n 5).

14 Critiqued in Arvidsson & Bak McKenna (n 11) 41.

15 Unlike Moyn who asserts that the right to self-determination is merely an expression of nationalism, Anghie has argued that states consented to their sovereignty being impinged. A Anghie 'Whose utopia? Human rights, development, and the Third World' (2013) 22 *Qui Parle* 63.

individual rights misses two important points in relation to the right to development: First, the duality of the right to development, which is both an individual right and a right among states, was part of a nationalist agenda.[16] Therefore, it is an expression of nationalism, but its recognition of individual rights is also part of the 'ongoing revolution' of the human rights project.[17] Second, the centrality of sovereignty was explicit during the drafting process of the African Charter.[18] To a large extent, the experiences of Africans with the international slave trade, colonisation, and post-colonial economic subjugation[19] meant that self-determination and, by extension, sovereignty were core features of the concept of the right to development.[20] This is also evident when engaging the longer history of the pan-African movement. Therefore, the distinction between decolonisation, sovereignty, and self-determination as part of a nation-building project, on the one hand, and the inclusion of the right to development as part of the human rights project, on the other, misses the 'complex interconnections and continuities'[21] between the concepts and their histories. 'The idea of pan-Africanism signalled that it was time to claim the [right to development] in Africa',[22] and the inclusion of this right was also integral to the push for African states' independence. Thus, instead of tracing the imperialist ideology and Eurocentric universalism of international law in today's world,[23] this chapter traces how past struggles against those systems are now being erased in the process of universalisation.

The chapter is divided into four parts. Part 2 starts by providing a longer view of history and delves into the early history of the pan-Africanist movement. It highlights the calls for a combination of rights that helped

16 See, eg, Rubner's explanation of the use of human rights discourse by African leaders in relation to (former) colonial powers. Rubner (n 5) 711-713.

17 Anghie (n 15) 70.

18 The centrality of sovereignty was one of the four major factors to have influenced the drafting of the African Charter; see Plagis & Riemer (n 4). The centrality of sovereignty has also been discussed by others, although asserting that sovereignty took precedence over human rights in the negotiations on the African Charter; see S Moyn *The last utopia: Human rights in history* (2012) 84-119; Jallow (n 9) 22. This distinction has been disputed elsewhere; see B Ibhawoh 'Testing the Atlantic Charter: Linking anticolonialism, self-determination and universal human rights' (2014) 18 *The International Journal of Human Rights* 3-6.

19 For an overview, see ch 1.2 of SD Kamga *The right to development in the African human rights system* (2018).

20 Kamga (n 19) ch 1.2.

21 Anghie (n 15) 71.

22 Kamga (n 21) ch 1.2.2.

23 Arvidsson & Bak McKenna (n 11) 52.

form the underlying notions of the right to development in article 22. The analysis demonstrates the connections between the rights invoked by the pan-Africanist movement, and those included in the African Charter almost 70 years later. Part 3 then turns to a brief overview of how the right to development has been interpreted in the African human rights system. It delves into the drafting of the African Charter, what makes the right to development 'uniquely' African, and how the right has been interpreted to date. Part 4 connects the stories of the creation of the right to development at the UN with African scholars and the work that was taking place on the continent. It explores the usefulness of re-engaging with the political underpinnings of the right to development. The fourth part emphasises the importance of this long durée perspective of the pan-Africanist movements in the beginning of the twentieth century, to the African Charter, and current developments, to better situate the contribution of African voices to international law. The purpose of this mapping and re-politicising exercise is to highlight the moments in history when the concept was introduced, the actors and politics that supported the emergence of the right to development, and how these histories can be useful to the new cadre of African international lawyers today in terms of challenging the boundaries of international (human rights) law.

2 A longer (pan-)Africanist perspective

Some authors place the origin of the right to development in the 1967 Algiers Economic Conference of the Group of 77.[24] Others place its origins in 1972 with the publication of *Le Droit du Development comme un Droit de l'Homme* authored by M'Baye.[25] For example, Ouguergouz and Murray both place the origins of the right to development in the late 1970s,[26] and firmly within the narratives of post-colonial struggles, control over natural resources, and agitation for a NIEO.[27] Rubner discusses the political history of the right to development and places emphasis on inter-state claims, and the calls for a NIEO,[28] among other things. Senghor and M'Baye, both influential voices during the drafting of the African Charter, exemplified this in their speeches at the time of its drafting. For example,

24 Ouguergouz (n 1) 298.

25 K M'Baye 'Le droit au développement comme un droit de l'homme' (1972) 5 *Revue des Droits de l'Homme*.

26 Ouguergouz (n 1); R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019).

27 Murray (n 26) 521.

28 Rubner explains the processes between M'Baye and others at the UN, which demonstrates how circular some of the process were, and how many of the figures, including M'Baye, were integral at different points and kept re-emerging. Rubner (n 5) 701-703.

Senghor explained the right to development as follows in his speech in Dakar in 1979:[29]

> We wanted to lay emphasis on the right to development and other rights which need the solidarity of our states to be fully met: the right to peace and security, the right to a healthy environment, the right to participate in the equitable share of the common heritage of mankind, the right to enjoy a fair international economic order and, finally, the right to natural wealth and resources.

Umozurike summarises the position of M'Baye at another meeting in 1972 as follows: 'All rights are intertwined with the right of existence, with a progressively higher standard of living, and therefore with development.'[30] M'Baye has also been credited with the inclusion of the right to development in the 1977 UN Commission on Human Rights Resolution 4(XXXIII), when he presided over the thirty-third session of the UN Commission on Human Rights.[31] The UN subsequently adopted the Declaration on the Right to Development (UNDRTD) in 1986.[32]

Pointing to the first mentions of the right to development helps to identify the moment such a right was perceived as necessary, and formulated as such. Yet, a broader and longer history is required to understand the political and ideological struggles that lay at the centre of why and from where this necessity arose. By addressing the right to development through its political origins, this chapter draws the line of influence further back to the first Pan-African Congresses (PACs), with their origins as early as 1900.[33] More specifically, I argue that the right to development is intimately connected to the calls by lawyers, scholars, political activists, and others from Africa and those of African origin centred on human dignity, self-determination, and authority over natural

29 Address delivered by Léopold Sédar Senghor, President of the Republic of Senegal, address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal, 28 November to 8 December 1979. Reprinted in IG Shivji *The concept of human rights in Africa* (1989) 121, reproduced in CH Heyns (ed) *Human rights law in Africa* (1999) 79.

30 UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 906. The address was given at the Institute of International Law of Human Rights in Strasbourg.

31 Shivji (n 2) 29.

32 UN Doc. A/RES/41/128, adopted on 4 December 1986.

33 This is not to claim a starting point for pan-Africanism, nor to suggest that it is limited to these congresses. However, for the purposes of this chapter, the focus will be on the formal processes that took place between 1900 and 1945. For a fuller history of some of the earlier thinkers, such as James Horton, see H Adi & M Sherwood *Pan-African history: Political figures from Africa and the diaspora since 1787* (2003).

resources in the early twentieth century as a counter to colonialism. This conceptualisation of the political ideas underlying the right to development not only endured the test of time, as reflected in the drafting process of the African Charter, but it also became the mainstay of how the right to development has been codified in the African Charter. In other words, the chapter extends the line of history further back. That is not to say that pan-Africanism necessarily was the 'origin' of the right to development. In that sense the scholars above rightly point to the term being coined in the 1970s.[34] Instead, this look further towards the past is used to highlight the struggles engrained in the conceptualisations of the right to development, of which pan-Africanism is one expression. In doing so, the political struggle for a variety of rights, and their protagonists, are brought to the fore. This, in turn, helps to demonstrate how those struggles are connected to the OAU and, by extension, the African Charter.

2.1 Why a longer history?

The move to look to the PACs might appear rather anachronistic: that calls related to sovereignty, human dignity, equality and intra-African relations are plucked from their historical context, and that present-day questions are used to distort the interpretation of these 'past events, texts or concepts'.[35] However, as Orford has argued, why should concepts from the past not 'be recovered to do new work in the present',[36] especially in the context of international law, where the 'transmission of concepts, languages and norms across time and space' is an integral part of understanding present obligations.[37] In addition, as Moyn advocates, human rights can be viewed 'as a powerful transnational idea and movement'.[38] Taken at face value, the PACs, the OAU and, subsequently, the AU and its institutions, are transnational initiatives that have promoted certain norms across time as part of a larger movement for decolonisation, among other aims.

It would, therefore, also be somewhat misleading to see the developments at the PACs as completely separate from the developments surrounding the OAU and the creation of the African Charter. For example, although the early PACs were dominated by those of African

34 It is also not a historical accounting of the political processes, as has been done elsewhere for the African Charter. For the right to development, see in particular Rubner (n 5) 699-707.

35 Orford summarising Skinner's perspective. See Orford (n 12) 171.

36 Orford (n 12) 174.

37 Orford (n 12) 175.

38 Moyn (n 18) 7.

origin in the diaspora,[39] there are overlaps with those who attended the later meetings and the founding of the OAU. This was coupled with a shift in focus between the earlier pan-Africanist movements pre-1945 and those that came after, namely, the switch between a focus on relations with colonialism, to a focus on continental unity necessary for liberation.[40] It was this vision of unity – promoted by Francis Nwia Kofi Kwame Nkrumah, a vision shared by Sékou Touré, Ahmed Ben Bella, and Julius Nyerere, among others[41] – that was seen as contributing to the founding of the OAU.[42] Figures such as Nkrumah were both some of the most prominent pan-Africanists in promoting the OAU, and organisers of the 1945 Manchester PAC.[43] During the post-World War II era many parallel initiatives were also taking place among key players such as M'Baye, Karel Vasak, Senghor and others, at both the African and UN levels to promote the right to development.[44] Therefore, the contexts are connected. That is not to say that there is a direct line of progress from the first PAC to the African Charter to the UN. However, the thinking and concerns underlying what were seen as priorities in different times and different places are connected through the actors and communities of pan-Africanist thinkers that transverse those times and places.

More generally, the contested relationship between African states – or other post-colonial states for that matter – and international law has been explored by numerous authors.[45] Although the PACs preceded the independence of many African states from colonial rule, the struggles that informed the types of calls for rights during the later PACs were related to the need for independence and self-determination. In addition, once independence was gained by most African states, the struggles against neo-colonialism and apartheid were still very much on the agenda. It was also this focus on self-determination and sovereignty, and the push for an

39 Adi & Sherwood (n 33) ix.

40 As above.

41 This list exclusively contains the names of men who later became the leaders of their respective states. However, women were also active in the pan-Africanist movement and the PACs, whose history often is less visible. See, eg, ZM Roy-Campbell 'Pan-African women organising for the future: The formation of the Pan African Women's Liberation Organisation and beyond' (1996) 1 *African Journal of Political Science / Revue Africaine de Science Politique* 45.

42 Adi & Sherwood (n 33) ix.

43 Adi and Sherwood (n 33) 143.

44 For more details on parallel initiatives, see Plagis & Riemer (n 4).

45 Often categorised as TWAIL, see, eg, M Mutua 'What Is TWAIL?' (2000) *ASIL Proceedings*; JT Gathii 'The promise of international law: A Third World view' (2020) Grotius Lecture presented at the 2020 Virtual Annual Meeting of the American Society of International Law, 25 June 2020.

African human rights instrument, that helped shape the content of the African Charter,[46] and the inclusion of the right to development.

2.2 Pan-Africanism and (human) rights[47]

There were six PACs throughout the first half of the twentieth century that discussed colonialism and the need for the political liberation of Africa.[48] Yusuf traces the start of the human rights and self-governance narratives in the pan-Africanist movement to the second PAC[49] held in Paris in 1919.[50] This notwithstanding, the product of the first PAC held in London in 1900 – the Address to the Nations of the World (Address)[51] – also mentions the needs for certain 'rights'. For example, the Address spoke of the need for opportunities for 'education and self-development' of Africans and those of African descent, and how this would contribute to the hastening of human progress at large.[52] The Address placed strong emphasis on the consequences of the exploitation of African peoples and their resources by colonial powers, and argued for the need for self-governance.[53] These calls for individual rights and the need for independence reflect the duality of the right to development as codified in the African Charter.

The focus of the second PAC held in Paris was slightly different from the first conference.[54] In the context of colonisation and the end of World War I, the focus of the second PAC was on 'the rights of peoples living

46 Plagis & Riemer (n 4).

47 The title of this part is a play on Yusuf's book based on a series of lectures he gave at The Hague Academy of International Law; AA Yusuf *Pan-Africanism and international law* (2015).

48 For an overview, see S Adejumobi 'The Pan-African Congresses, 1900-1945' 30 July 2008, https://www.blackpast.org/global-african-history/perspectives-global-african-history/pan-african-congresses-1900-1945/ (accessed 25 February 2021).

49 Some claim that the 1919 conference was at the first Pan-African Congress. See, eg, the BBC, http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/13chapter5.shtml (accessed 17 January 2020). However, others agree with Yusuf's classification of it being the second. See, eg, CG Contee 'Du Bois, the NAACP, and the Pan-African African Congress of 1919' (1972) 57 *The Journal of Negro History*; JR Hooker 'The Pan-African Conference 1900' (1974) 46 *Transition*.

50 Yusuf (n 47) 21.

51 1900 Pan-African Conference Resolution, Address to the Nations of the World by the Pan African Conference in London, 1900, http://www.houseofknowledge.org.uk/site/documents/neoGarveyismCorner/1900%20Conference%20resolution.pdf (accessed 17 January 2020), reprinted from A Langley *Ideologies of liberation in black Africa* (1979) 738-739.

52 Pan-African Conference Resolution (n 51).

53 As above.

54 Yusuf (n 47) 21.

on the continent' and their 'international protection'.[55] Central to this call for rights for Africans were the concepts of human dignity and self-determination.[56] Furthermore, the 1919 Resolution adopted at the second PAC called for an overseeing body that would ensure the application of laws relating to political, social, and economic welfare.[57] The 1919 Resolution also contained a duality of rights. Part of the Resolution focused on land and natural resources, and the need to invest the capital generated from natural wealth of the state.[58] The other part highlighted the importance of the social needs of the people, with a focus on issues such as labour rights, education, and public health, as well as the political rights of Africans.[59] Lastly, the 1919 Resolution also called for the League of Nations, the predecessor of the UN, to help facilitate and safeguard the mission of 'the development of these peoples'.[60]

2.3 Pan-Africanism, the OAU and the African Charter

Although most of the PACs took place long before the OAU was established[61] – let alone the drafting of the African Charter took place – the underlying sentiments and the struggles for which they were employed are closely connected. This is not to claim some kind of genealogy of 'the right to development' from 1900 to the start of its codification in 1979. Among other reasons, the PACs, and the documents produced during them, pre-date the first mention of the right to development in the literature by a couple of decades, rendering such an exercise unfeasible. Instead, the aim here is to demonstrate how political struggles for the recognition of certain rights that were ignored or withheld from certain peoples and places in international law produced concepts that formed the foundations of what the right to development aims to encapsulate.

55 Yusuf (n 47) 22. Resolutions passed at the 1919 Pan-African Congress, 19-21 February 1919, full resolution available at https://www.international.ucla.edu/asc/mgpp/sample09 (accessed 17 January 2020).

56 Yusuf (n 47) 22.

57 Resolutions passed at the 1919 Pan-African Congress, 19-21 February 1919; full resolution available at https://www.international.ucla.edu/asc/mgpp/sample09 (accessed 17 January 2020). It is also interesting to note that this is perhaps the earliest call for an African Commission on Human and Peoples' Rights. One of the earliest calls is often viewed as emerging from the Seminar on the Establishment of Regional Commission on Human Rights with Special Reference to Africa (UN Proposal) in September 1969.

58 Resolutions passed at the 1919 Pan-African Congress (n 57).

59 As above.

60 As above.

61 Depending on how they are counted, there were between five and six PACs between 1900/1919 and 1945. Latter PACs were organised in Dar es Salam (1974), Kampala (1994) and Johannesburg (2014).

Therefore, while neither the first nor the second PACs explicitly mention 'the right to development', it is clear that many of the ideas that underpin the conception of the right to development in the African Charter had already emerged in these fora, especially with regard to what later became the structure of article 22.

For example, the OAU was established in May 1963 with numerous aims connected to promoting independence, sovereignty, development, and the 'advancement of our peoples'.[62] Specifically, the Preamble to the OAU Charter emphasises that member states:

> Conscious of [their] responsibility to harness the natural and human resources of our continent for the total advancement of our peoples in all spheres of human endeavour … dedicated to the general progress of Africa … [and] desirous that all African states should henceforth unite so that the welfare and wellbeing of their peoples can be assured.

The articulation of these aims echo some of calls made by the PACs, including human dignity, self-determination, equality, and a focus on intra-African relations,[63] all of which have found themselves repeated over time in various contexts.

In his background paper during the Dakar Seminar organised by the International Commission of Jurists and the *Association Sénégalaise d'Études et de Recherches Juridiques* in 1978, M'Baye acknowledged that Africans were working not only towards the right to development in the African context, but also at the international level.[64] It has been argued that the OAU was not particularly concerned with the idea of human rights as such in the 1960s,[65] instead focusing on dismantling colonialism and apartheid,[66] and promoting their economic development.[67] It was only when the OAU became the AU in 2002 that an explicit shift in the narrative took place that put 'peace and security as well as rule of law, good governance, human rights and democracy' on the political agenda at the

62 Preamble, Organisation of African Unity Charter, Addis Ababa, 25 May 1963.

63 For a brief overview, see Yusuf (n 47) 15-19.

64 K M'Baye 'United Nations seminar on the establishment of regional commissions on human rights with special reference to Africa' (1979) Background paper, ST/HR/Liberia/1979/BP.2.

65 Rubner (n 5) 4.

66 AA Yusuf & F Ouguergouz 'Introduction' in AA Yusuf & F Ouguergouz (eds) *The African Union: Legal and institutional framework. A manual on the Pan-African Organisation* (2012) 1.

67 M'Baye (n 64); see also Rubner (n 11) on the emphasis on the NIEO.

continental level.[68] However, to claim that a focus on self-determination and advancement of African peoples in light of the struggles against colonialism and apartheid completely excluded ideas of (human) rights would be too cynical. Instead, as argued here, a distinction between outward facing rights and inward facing rights would be more apt: The pan-Africanist thinkers of the PACs and those that established the OAU were more concerned with enforcing the rights of newly-founded states (and their citizens) against outside powers, rather than concerned with the internal relationship between people(s) and their states. Yet, elements of inward facing rights of individuals and communities emerged both with the PACs and in the articulation of article 22 in the African Charter. The latter is a unique example of a right in which an external and internal articulation of rights – referred to here as its duality – was consolidated into a single article in contemporary human rights law.

3 The right to development and African specificities

The African approach to the right to development was codified in the African Charter in 1981. The inclusion of the right to development was one of the reasons why the Charter was considered unique,[69] in comparison to existing human rights instruments. M'Baye did not define development in any particular way.[70] He argued generally 'that development is a metamorphosis of structures involving "a range of changes in mental and intellectual patterns that favour the rise of growth"'.[71] Essentially, as Shivji summarises, M'Baye viewed 'development as a comprehensive integrated process including, but not confined to, economic development.'[72] It is important to note in this regard that M'Baye was natural law inclined, and rather modestly never claimed originality when it came to the right to development,[73] rather indicating that the right to development 'descended from the "sphere of morals to the that of law"'.[74]

3.1 Drafting of the African Charter

A close reading of the documents produced at the various meetings that led up to the adoption of the African Charter reveals two important

68 Yusuf & Ouguergouz (n 66) 1.

69 Umozurike (n 30) 910.

70 Shivji (n 2) 29. M'Baye himself has published widely on the topic; see, eg, one of his most famous works on the matter: M'Baye (n 25).

71 Shivji (n 2) 29.

72 Shivji (n 2).

73 Rubner (n 5) 700-701.

74 Shivji (n 2) 31.

factors regarding the right to development: first, the synthesis of the desire for the inclusion of economic, social, and cultural rights, the need for equitable sharing in natural resources, and the necessity of independence and self-determination;[75] second, an entanglement of the efforts made by the UN, OAU, and other organisations to have an African human rights instrument, exemplified by the mix of meetings that took place around the same time.[76]

In the run-up to the adoption of the African Charter, several OAU and UN meetings – and the resulting resolutions – were held in quick succession. There were many overlaps in terms of the participants at the meetings, including M'Baye himself. For example, the African Charter was not the only document to include a right to development. The UNDRTD was adopted in 1986, the result of a 14-year 'struggle', which included various meetings organised – among others – by the International Commission of Jurists, of which M'Baye was the president at the time.[77] Nonetheless, there is a distinction between when the African Charter was actually drafted, and the longer process of discussing human rights in Africa.[78] For a hard law rule on the right to development, the African Charter is the most relevant document. The commitment to draft an African Charter was made in Decision 115 (XVI) by the OAU Heads of State and Government in 1979,[79] with the African Charter adopted in 1981. Even though the right to development was discussed and mentioned in meetings and resolutions held before 1979, these discussions did not directly lead to any legally-binding documents.[80]

The first draft of the African Charter,[81] commonly referred to as the M'Baye Draft, ironically did not include an explicit right to development,[82] perhaps because it drew heavily on other international instruments[83] – which do not provide an equivalent right. The right to development only emerged after the second draft, the Dakar Draft,[84] which was adopted after

75 See, eg, Umozurike (n 30) 907.

76 Plagis & Riemer (n 4).

77 International Commission of Jurists 'The Review, special edition No 57' (1996) 32.

78 See Plagis & Riemer (n 4).

79 OAU AHG/Dec 115 (XVI) Rev 1 1979.

80 For a longer discussion, see Plagis & Riemer (n 4).

81 OAU CAB/LEG/67/1.

82 The word 'development' is mentioned in, eg, art 2, which is the same as Common Art 1 of ICCPR and ICESCR. However, this does not necessarily reflect the same breadth of meaning of the right to development in the final draft of the African Charter.

83 Plagis & Riemer (n 4) 22.

84 OAU CAB/LEG/67/3/Rev. 1.

the Dakar Meeting of Experts in late 1979. It is unclear why M'Baye did not include the right to development in his initial draft of the Charter, although it should be noted that M'Baye was also one of the experts at the Dakar Meeting. The discussions during the Dakar Meeting emphasised the need not to adopt a carbon copy of other international human rights instruments, as these 'did not focus on African concerns or traditional values'.[85] Unfortunately, there are few to no records available on what happened during the Dakar Meeting itself to indicate who initiated the right to development being included in article 22.[86] Therefore, while some argue that '[w]ith hindsight, it is apparent that the African Charter clearly distanced itself from the approach enshrined at the universal level',[87] this is only part of the story when it comes to the right to development.

The fact that M'Baye was often an influential author in both the OAU and UN fora further indicates that, in the case of the right to development, rather than African approaches diverging from universalist approaches, African approaches were setting the course at both the OAU and the UN level. Thus, the African approaches that emerged during this era were simultaneously particular and universalist. The outcome, however, was that while the right to development was enshrined in article 22 of the African Charter in 1981,[88] four decades later a legally-binding right to development at the UN level is yet to be adopted.

3.2 African specificities

M'Baye cautioned against promoting social and economic development without due regard for human rights. For him, 'development includes human rights; in other words, there can be no development without respect for human rights',[89] drawing on the 1961 Law of Lagos on 'the full development of the human person in all countries'.[90] Generally, M'Baye argued that the *status quo* of promoting 'development' as economic growth that did not respect the rights of the people was unacceptable and against his more comprehensive notion of development, which was

85 Jallow (n 8) 31.

86 Information on the *travaux préparatoires* is limited when it comes to the African Charter; see F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313, 315, 325.

87 Ouguergouz (n 1) 304.

88 Also see arts 20, 21 and 24 African Charter.

89 M'Baye (n 64) 6.

90 M'Baye (n 64) 7.

centred in human rights.[91] However, he also pointed out that the notion of development relates to the collective, while human rights operate in the realm of the individual,[92] acknowledging the duality in the protections of what was to be included in the African Charter. His views were summed up as follows during his interventions at the Dakar Seminar:[93]

> They no longer considered it acceptable to justify systematic violations of human rights by the need for economic and social development but expressed the view that the road to economic growth and progress should not bypass human rights. On the contrary, at the beginning and at the end of all development, as [President Léopold Sédar Senghor] said, 'there is man'. There is man, with his needs, his fundamental rights and his freedoms, whether it is a question of civil and political or social, economic and cultural rights.

M'Baye's emphasis on the balancing of human rights and economic and social development is reflected in the drafting of the African Charter. Both M'Baye's statement and the African Charter focus on the need for an African instrument and an African conception of human rights that addressed the needs of the time. These needs were defined as 'development, decolonisation, the elimination of racial discrimination and the duties of the individual *vis-à-vis* the community'.[94] Taking cognisance of these African priorities at the time, the Charter recognises that the aim is to work towards 'continually improving the conditions of life. That, ultimately, is what the various civil and political, economic, social and cultural rights amount to; the final aim is development.'[95]

3.3 Subsequent interpretations

Within the African human rights system, the right to development has been interpreted broadly[96] by both the African Court on Human and Peoples' Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission). This part highlights key elements of decisions of the African Commission and Court.[97] That is not

91 M'Baye (n 64) 5-7.

92 M'Baye (n 25) 505. Original: 'Il l'est aussi, parce que «développement» se réfère au groupe, à une société donnée: région, Etat, ensemble d'Etats; il concerne donc la collectivité, alors que les droits de l'homme s'analysent généralement comme les droits ou le droit d'un homme isolé ; ils concernent donc au premier chef l'individu.'

93 M'Baye (n 64) 7.

94 M'Baye (n 64)14.

95 M'Baye (n 64) 15.

96 Murray (n 26) 528.

97 For a comprehensive overview of all the case law, see Murray (n 26) 497-557;

to say that this forms part of a teleology of the progressive broadening of the right over the decades. Rather, it demonstrates the extent to which the right to development has been interpreted, without implying intent on the part of the original drafters.[98]

Before engaging specific decisions, three broad points should be made about the interpretation of the right to development. First, the African Commission has stated that the right to development has 'two prongs' with both a constitutive and instrumental element.[99] In other words, it is 'useful as both a means and an end', with an obligation on states to comply with both elements, as a 'violation of either will violate article 22'.[100] This interpretation to embody broad aims[101] is different from the duality of the right to development discussed above. These broad aims relate to the inward facing rights between the individual/community and the state, and even among African states, but not outward facing inter-state solidarity rights.

Second, while the cases discussed in this part focus mainly on article 22 of the African Charter, it is important to note that articles 20, 21 and 24 also relate to the right to development, and should be read together with article 22. These include the right to self-determination[102] that encompasses a NIEO,[103] the right of peoples to 'pursue their social and economic development', and the governance of natural resources.[104] Article 24 covers protection of the environment, which includes climate change and indigenous peoples' rights.[105] The interconnected nature of articles 20, 21, 22, and 24 is further reinforced by the decisions of the African Commission and case law of the African Court. As Umozurike put it: 'The Charter recognises the right to development as belonging to

SAD Kamga & CM Fombad 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) 57 *Journal of African Law* 196.

98 The drafting of the African Charter included a more complex series of political processes and agendas; see, eg, Rubner (n 5).

99 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 277.

100 Murray (n 26) 529.

101 OC Okafor '"Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in SP Marks (ed) *Implementing the right to development: the role of international law* (2008) 54.

102 In arts 20 & 21, Murray (n 26) 497 508.

103 Murray (n 26) 497.

104 Murray n 26) 498. Also see Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR/Res.224, 2 May 2012.

105 Murray (n 26) 528-534.

all peoples and encompassing economic, social, and cultural aspects.'[106] Therefore, while article 22 is often used as a shorthand for the right to development, in part because of its title, the right to development in the African Charter is best understood as a package of mutually-reinforcing rights.

Third, the fact that the right to development has been the subject of decisions by both the African Commission and African Court should not be underestimated. In 1983 Umozurike and others were less than optimistic about the justiciability of the right to development. In particular, the distinction was made between the negative duties of states 'not to impede' development, and 'the positive duty to aid such development'.[107] According to Umozurike, the 'higher level of commitment' required for positive duties to aid development rested 'on nonlegal considerations'.[108] Umozurike rightly alluded to the political nature of the NIEO element of the right to development, making it ostensibly inadequate for implementation at the international level. Although the full extent of the inter-state obligations has not been realised, one of the few examples of a break with the general practice of African states not bringing inter-state claims is exemplified by the communication of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (*DRC* decision).[109] In that decision, the right to development was interpreted along the individual and community rights axis, and the inter-state solidarity axis in a more limited way. In other words, the clear codification of the right to development in the African Charter as a justiciable right for individuals, communities, and states has allowed for the anticipated political limitations to be overcome in the African context. The result has been a small but rich body of work from the African Commission, and emerging jurisprudence from the younger African Court.

At the inter-state level, in the *DRC* decision of 2003 the African Commission found that the 'indiscriminate dumping of and[/]or mass burial of victims' was a violation of their right to cultural development protected under article 22.[110] In addition, the 'deprivation of the right of the peoples of the [DRC…] to freely dispose of their wealth and natural resources' violated 'their right to their economic, social and cultural development and of the general duty of states to individually or

106 Umozurike (n 30) 906.

107 Umozurike (n 30) 907.

108 As above.

109 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004).

110 *Democratic Republic of Congo v Burundi* (n 109) para 87.

collectively ensure the exercise of the right to development'.[111] In another case, Tanzania argued in favour of an embargo against Burundi, stating that it was 'difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others'.[112] The *DRC* decision is unique for multiple reasons, but primarily for placing emphasis on the collective duty of states and highlighting the false dichotomy between individual rights, on the one hand, and the rights of states, on the other, when it comes to the right to development. In addition, these decisions were an early indication of the broadness of the African Commission's approach to article 22, as well as the somewhat surprising turn of African states towards emphasising the civil and political rights required for development.

At the individual and non-governmental organisation (NGO) communication level, the general theme of discrimination of communities or peoples by the state has dominated much of the work of the African Commission with regard to article 22. For example, in 2009 in *Sudan Human Rights Organisation & Another v Sudan* the Commission considered the meaning of peoples in the context of the right to development.[113] In the end, the Commission held that Sudan should 'rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the [internally-displaced persons] and refugees'.[114] In the same year, in *Centre for Minority Rights Development & Others v Kenya*, the communication concerned the consequences of the displacement of the indigenous Endorois community from their ancestral lands.[115] In terms of the right to development, the central plea was that the creation of a game reserve on the lands of the Endorois without their involvement in the development process violated article 22.[116] The African Commission summarised its position in *Endorois* in another decision, stating that '[t]he failure of the respondent state to involve the Endorois populations … in the design of reserve settlement projects as well as in the enjoyment of income

111 *Democratic Republic of Congo v Burundi* (n 109) para 95.

112 *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 25. Unlike the *DRC* case, this was not an inter-state case.

113 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) paras 217-223.

114 *COHRE v Sudan* (n 113) para 229.

115 *Centre for Minority Rights Development* (n 99) para 1. For an analysis of the case, see SAD Kamga 'The right to development in the African human rights system: The *Endorois* case' (2011) 2 *De Jure* 381.

116 *Centre for Minority Rights Development* (n 99) para 269.

accruing to their exploitation is a violation of article 22 of the Charter'.[117] The African Commission also drew upon the UNDRTD and the use of 'active, free and meaningful participation in development'.[118] In so doing, the African Commission reaffirmed that the right to development is 'closely allied' with the issue of participation,[119] the importance of benefit sharing,[120] and free, prior, and informed consent, especially of indigenous communities.[121]

In more recent communications, the African Commission has also looked to the past for inspiration and made reference to M'Baye's work as part of the 'doctrine on the right to development'.[122] For example, in 2016 the *Open Society Justice Initiative v Côte d'Ivoire* decision concerned the emergence of discriminatory laws in Côte d'Ivoire. The African Commission found that the right to development was 'an inalienable, individual or collective right, to participate in all forms of development, through the full realisation of all fundamental rights, and to enjoy them without unjustifiable restrictions'.[123] The African Commission also linked article 22 with article 24 through the addition of the 'obligation to at least create the opportunities and environment conductive to the enjoyment of the [right to development]'.[124] Ultimately, the denial of a number of rights, including the denial of nationality to the Dioulas, was considered a violation of article 22.[125]

In 2012, in another case involving Kenya the African Court also engaged on the issue of indigenous peoples' rights in relation to article 22 of the Charter. In *African Commission on Human and Peoples' Rights v Kenya* the Court found that Kenya had violated the Ogieks' right to development as they were 'continuously evicted … without being effectively consulted', and that these evictions had adverse impacts on the Ogieks' economic,

117 Citing *Centre for Minority Rights Development* (n 99) paras 269-298 in *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06, African Commission on Human and Peoples' Rights, 27 May 2016, para 182.

118 *Centre for Minority Rights Development* (n 99) para 283.

119 *Centre for Minority Rights Development* (n 99) para 289.

120 *Centre for Minority Rights Development* (n 99) para 294.

121 *Centre for Minority Rights Development* (n 99) paras 289-297.

122 *Open Society Justice Initiative* (n 117) para 183.

123 As above.

124 As above.

125 *Open Society Justice Initiative* (n 117) paras 185-186.

social, and cultural development.[126] In addition, the Ogieks had 'not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.'[127] In general, the African Commission has recognised the impediments member states faced in achieving the right to development due to the scarcity of resources.[128] However, it has also developed a clear line that discriminatory practices, or those that do not take due regard of free, prior and informed consent, will not pass the test of the right to development.[129]

While the pan-Africanism of the PACs initially was more outward facing towards the West, the decisions of the African Commission and Court highlight internal issues within and among African states. This is a logical move in terms of the jurisdiction of these institutions and the African Charter, the success of the decolonisation movement in Africa[130] and the question of gaining rights no longer being centred in the fight against colonialism and against outside powers. Nonetheless, the linkages should also not be dismissed in relation to the effects of colonialism on territorial boundaries and community formation.[131]

4 Re-politicising the right to development?

Almost 50 years since pan-Africanists pushed for the 'right to development' on the world stage, and more than a century since early pan-Africanism called for the ideas and norms that underly it, the only international law that codifies the right to development is the African Charter. As new efforts to replace soft law mechanisms with a hard law right to development at the UN level gain momentum,[132] it becomes ever more important to revisit the origins of the right to development. It is imperative to draw

126 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012, African Court on Human and Peoples' Rights, 26 May 2017 para 210.

127 As above.

128 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 206. See the criticism of this progressive realisation approach in Kamga & Fombad (n 99) 212.

129 See *Centre for Minority Rights Development* (n 115); *African Commission on Human and Peoples' Rights v Kenya* (n 126).

130 Remaining colonies notwithstanding, such as the Chagos Islands.

131 For an overview of some of these intricacies, see EN Amadife & JW Warhola 'Africa's political boundaries: Colonial cartography, the OAU, and the advisability of ethno-national adjustment' (1993) 6 *International Journal of Politics, Culture and Society* 533.

132 For an overview, see K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 221. More recently, eg, the UN Expert Mechanism on the right to development adopted its first report (A/HRC/45/29) on 21 July 2020. See the priorities of the Working Group in para 19.

on the longer history from which it originated, and to keep emphasising the underlying political agendas that made the right necessary in the first place. This is especially important as, despite this 'new momentum … [d]eep substantive and political divisions about the exact content and implications of the [right to development] prevail between – and within – the North and the South'.[133]

The meaning of the right to development in the African context, and its meaning in the African Charter, were elaborated on by M'Baye, and subsequently by the African Commission and African Court. However, the notion of 'development' at the international level more generally has not always reflected the same ideas.[134] Much has been said on the different methods of measuring development, and the various aims that development projects and theories may have.[135] The origins, however, of these discussions lie in different fields, and for the most part in development economics. Within the sphere of African international law, the focus on the duality of the economic development of states and individual and community rights was already prevalent in the 1970s and during the drafting of the African Charter.

With new developments at the UN aiming to adopt a right to development, the potential erasure of the voices of the (pan-)Africans who helped shape it has arisen. This part provides a brief overview of the efforts at the UN to adopt such a right at the international level. In doing so it highlights the danger of the loss of the political and ideological struggles that helped shape the right to development.

4.1 The United Nations and the right to development

Those less familiar with the African Charter, or other documents emanating from the OAU or the AU, would be forgiven to think that the current push for the right to development at the UN is novel.[136] For example, in a summary report by the UN Secretary-General on the origins of the right to development, Africa and the African Charter are

133 Arts & Tamo (n 132) 221.

134 For a brief overview of how development has been defined in different eras by different disciplines, see Treblicock & Prado (n 6) 3-16. For discussions on the developmental state in Africa, see T Mkandawire 'Thinking about developmental states in Africa' (2001) 25 *Cambridge Journal of Economics* 289-313; V Gumede 'Rethinking and reclaiming development in Africa' in B Mpofu & SJ Ndlovu-Gatsheni (eds) *Rethinking and unthinking development: Perspectives on inequality and poverty in South Africa and Zimbabwe* (2019) 51.

135 Treblicock & Prado (n 6).

136 If one were to dismiss the 1986 UNDRTD as it is not legally binding.

not mentioned once, and the contribution of M'Baye is relegated to two footnotes.[137] As a result, the African origins, and the political struggles that underly the *raison d'être* of the right to development in the African human rights system, appear to be somewhat blurred, if not lost, in more recent discussions at the UN level.[138]

Before the current push, the right to development was acknowledged by the UN in the UNDRTD,[139] adopted in 1986, which clearly links the concept of development to the concept of human rights.[140] It was also M'Baye who was credited with its introduction.[141] However, the legal status of the right to development remains precarious in the UN system.[142] It also misses an essential component in that it does not include burden sharing, or solidarity, among states. The adoption of the UNDRTD was considered another expression of the ideological battles between the Global South and Global North, which were also embodied in other international struggles, such as that over the NIEO.[143]

Although the idea of human rights and development has been further mainstreamed at the international level since the 1980s,[144] the focus has remained on the classic human rights paradigm between the individual and the state. Examples include the adoption of the UN Global Consultation on the Right to Development as a Human Right in 1989,[145] UN Millennium Development Goals (MDGs) in 2000, and the Sustainable Development

137 Office of the High Commissioner for Human Rights (OHCHR) 'Chapter 1: The emergence of the right to development' in *Realising the right to development*: eBook (2013), https://www.ohchr.org/EN/Issues/Development/Pages/RTDBook.aspx (accessed 27 February 2021).

138 As above. One exception is the publication of the condensed version of the report commissioned by Van Boven in 1977. See address by T van Boven, Director of the Division of Human Rights and Representative of the Secretary-General, Monrovia Proposal for Setting-up an African Commission on Human Rights, UNGA A/34/359/Add. 1 (5 November 1979). It should be noted that M'Baye was instrumental in the early UN and UNESCO efforts on recognising the right to development; see Rubner (n 5) 701-703.

139 For more details on its adoption, see fn 1024 in Ouguergouz (n 1) 301.

140 Preamble, Declaration on the Right to Development 'Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations'.

141 Rubner (n 5) 702-705.

142 Barsh (n 3) 322.

143 As above.

144 Eg, the adoption of the UN Millennium Development Goals (MDGs) in 2000, and the Sustainable Development Goals (SDGs) in 2015.

145 For more details on the meeting, see Barsh (n 3). Also see United Nations Economic and Social Council, UN Doc. E/CN.4/1990/9/Rev.1 (1990).

Goals (SDGs) in 2015. In addition, while the political will to establish a hard law right to development remains in some corners, the legal status of this right outside the African human rights system remains soft law in nature at best. Therefore, although the MDGs and SDGs re-emphasise the importance of the right to development and make clear connections between the need for development and the human rights regime, such as AU Agenda 2063,[146] they lack the political commitment of a binding legal treaty.

The global discussion on what constitutes the right to development, however, goes further back to the 1970s when the UN Commission on Human Rights was drafting the UNDRTD. The draft working papers reveal that there was much discussion on what the final document should state, as Shivji summarises:[147]

> While the Cuban Draft retained some of the political foundations of the M'Baye proposal and defined the right to development as 'an inalienable collective right belonging to all people', the draft of the government experts from the 'Group of 77' defined the 'right to development' as a human right which applies to 'individuals, groups, peoples and states' and 'applicable at the local, national, regional and global level' with even greater emphasis on states.

The UN Division for Human Rights (the office now known as the UN High Commissioner for Human Rights) also prepared a study on the connections between the right to development and the broader claim making in relation to the international community, which was tied into the calls for a NIEO.[148] The International Commission of Jurists, which helped facilitate a number of meetings on the issue, went on to summarise the findings in three draft articles. Articles 1 and 2 emphasised the rights of individuals and communities, while article 3 was concerned with the applicability of the right at all levels, from the community, local and national, to the regional and global levels.[149]

Although the two constituted separate processes, there was a significant overlap between the language at UN and OAU meetings. For example, in

146 African Union Commission, Agenda 2063: The Africa We Want, September 2015.

147 Shivji (n 2) 31-32.

148 Address by T van Boven (n 138). With a subsequent report entitled 'The international dimensions of the right to development as a human right in relation with other human rights based on international co-operation, including the right to peace, taking into account the requirements of the new international economic order, and the fundamental human needs'.

149 Shivji (n 2) 32.

1979 two parallel meetings were organised less than three months apart: the Monrovia Seminar by the UN, and the Dakar Meeting by the OAU. At the Monrovia Seminar, Theo Van Boven addressed the connections made between development and 'the [NIEO] for the realisation of human rights'.[150] At the OAU Dakar Meeting of Experts, Senghor, then President of the Republic of Senegal, championed the right to development in his address to the experts embarking on the project of drafting the African Charter. He emphasised the integrated nature of the right, and how it went beyond mere economic growth 'at all costs'.[151] He proposed Michael Adiseshish's definition highlighting human rights: '"a form of humanism; a moral and spiritual fact, both material and practical; an expression of man as a whole meeting his material needs (food, clothes, shelter) as well as his moral requirements (peace, compassion, freedom, charity)…". In this conception, development, the right of peoples, respects man and his freedoms'.[152]

The fact that the addresses by Van Boven and Senghor both included the right to development is no accident. It was M'Baye who prepared draft papers that formed the foundation of the work at both the Monrovia Seminar and the Dakar Meeting of Experts, and also further demonstrates the influence of Africans in UN processes.

The linkages between the African protagonists of the right to development and the international sphere are clear. Without M'Baye, the right to development would look very different, not just within the African human rights system, but also at the UN level. Without political leaders such as Senghor championing the African Charter and the framing of rights in it, it might not have been adopted. The right to development, as M'Baye envisioned it, was not just a stance on human rights, it was intimately connected with histories of colonialism and oppression. M'Baye connected the right to development to the individual and the collective, to the state and the international community, to the political and the economic, and not just the legal. For him, the right to development was not only about individual rights, it was also about rebalancing distortions

150 Van Boven (n 138).

151 LS Senghor address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal, 28 November to 8 December 1979. Reprinted in IG Shivji *The concept of human rights in Africa* (1989) 121, as cited in Murray (n 26) 529. Also available in Heyns (n 29) 78-80.

152 Murray (n 26) 529.

in north-south relations.[153] At its very core, the right to development was about solidarity among peoples and states.[154]

Although not always explicitly recognised at the UN level, these ideas are still very much alive in the AU context. The need for an inclusive and holistic right to development was reiterated in the AU Agenda 2063. The first goal of the Agenda is 'a prosperous Africa based on inclusive growth and sustainable development',[155] the opening paragraphs pay homage to the origins of Pan-Africanism, and the closing paragraphs of the Agenda speak to 'the right to development and equity'.[156]

4.2 Re-centring the African legacy

The contributions of African voices to the development of international law, especially human rights law, have not always gained the prominent position they should be afforded.[157] The right to development demonstrates an important part of why this might have happened, and still happens: When the African Charter was originally adopted, it was met with much scepticism.[158] The critiques of the time have subsequently proven to be somewhat overblown, especially regarding the unjusticiable nature of certain rights. The right to development has left its mark on the human rights jurisprudence of the African human rights system, proving that the vision of African jurists, such as M'Baye, was not international law pipe dreams at the regional level. The right to development, therefore, is one of the areas of international law in which Africa and Africans have clearly led the way and laid a strong ideological foundation of solidarity at the 'global, regional and national levels' on which to build.[159]

However, while a number of the newer documents at the UN level acknowledge the importance of recognising 'colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war' as

153 Shivji (n 2) 29-31.

154 Shivji (n 2) 31.

155 African Union Commission (n 146) para 8.

156 Africa Union Commission (n 146) paras 1, 2, 4 & 76.

157 Gathii laments the exclusion, even today, of the work produced by Africa's international courts. See Gathii (n 45).

158 See, eg, the issue of clawback clauses; L Mapuva 'Negating the promotion of human rights through "claw-back" clauses in the African Charter on Human and Peoples' Rights' (2016) 51 *International Affairs and Global Strategy* 1.

159 A/HRC/45/29 (n 132) para 25.

impediments to development,[160] the origins of these discussions are often lost.[161] It is not just that these form impediments, it is that the struggles against them in Africa and beyond helped the emergence and necessity of a right to development in the first place. In the (further) universalisation of the right to development, these political origins of the right to development are at risk of being lost.

The re-politicisation of the right to development serves an important function, as it is by exploring and re-centring these underpinnings that its origins become clear, and the contribution of Africans to international law are highlighted. Tracing the history of the right to development further back is not merely an exercise in what can be imagined,[162] but also concerns what was actually achieved by previous generations. In that sense, the re-politisation also serves another function. It helps to highlight the work that still needs to be done when making the translation from the African back to the international context in terms of the right to development. Like previous generations, African jurists and scholars today face many challenges. With neo-colonialism, the lack of solidarity, and persistent inequity at the international level still present, the full extent of the right to development has yet to be realised. Although it is unlikely to be the 'answer' to the world's lack of equity, the right to development does serve as a frame of reference for thinking about the world and rights differently. How can political struggles inform the types of rights perceive as necessary to achieve human dignity? What might have been radical at the time is now mainstreamed within the African human rights system, and the UN seeks to do the same in a more limited way. For newer generations of African jurists, activists, and politicians, the challenge lies in the fact that the problems faced within and across states have not remained static, but have shifted and morphed. Thus, these issues require continued ingenuity and thinking about how to connect current struggles in the pursuit of human dignity to the rights regime so that it serves the needs of the moment.

This accounting might appear pessimistic. Yet it is intended as being hopeful: The right to development overcame narrower ideas of what can constitute human rights, and was a tool of previous generations of African international law jurists, activists, and politicians of the twentieth century to fight back against an exclusionary international legal order.

160 A/HRC/45/29 (n 132) para 24.

161 As with a number of other UN documents, the eBook's first chapter on the emergence of the right to development (n 137) does not mention 'Africa', 'M'Baye', or the 'African Charter'.

162 Arvidsson & Bak McKenna (n 11) 54.

Focusing on their contributions to international law, and the need for a more inclusive regime, is a call that still rings true today.[163] It is also a call to the current generation of African jurists to seek out these histories, and to draw inspiration from a wider range of sources, even if it challenges the *status quo*.[164]

5 Conclusion

The African conception of the right to development is entwined in ideals of human dignity, sovereignty, self-determination, and human rights, especially economic, social, and cultural rights. While its modern history can be traced to the late 1970s and early 1980s, this chapter demonstrated how earlier struggles place its origins at the start of the twentieth century when there was a push, internationally, for the dignity and political emancipation of African peoples and people of African descent. This legacy helps us understand the complex nature of the right to development in the African Charter and how it goes beyond other international legal documents. This history is important for current discussions around development where the rights of individuals are often pitted against the right of the state to develop as a whole. This dichotomy between individual rights and state-based rights, especially in the context of large-scale development projects, is evident in the case law of the African Commission and African Court. The tensions felt today are a reflection of a longer history in which people struggled for control over their civil and political as well as their economic, social, and cultural rights. The right to development in the African Charter is an individual right, a group right, *and* a right among states. It is part of solidarity among people(s) and among states. Despite this broad scope of protection, it has served a useful function in the African human rights system by providing relief to those who would have been left behind by a narrower concept of economic development.

By mapping the right to right to development in the African and pan-Africanist contexts, this chapter has illustrated the interconnectedness between processes at the international and the regional levels, and the underlying political aspirations of African jurists and politicians. This was done on two levels. First, by going back to declarations of the early PACs, the chapter has demonstrated the origins of the ideas that potentially influenced the conceptualisation of development as a human right that emerged within the OAU. Tracing the right to development to some of the earlier struggles against colonialism, as well as the post-colonial

163 Gathii (n 45).

164 Arvidsson & Bak McKenna (n 11).

experiences of African states, helps shed light on the shared politics of the need for a collective right and the duality in which that should and could be conceived. Second, this contribution illustrated that the people leading these initiatives carried out overlapping functions in different fora. M'Baye was the father of the right to development in both the UN and the African Charter, although the latter remains the only hard law document protecting the right to development. Members of the earlier PACs were also influential actors in later OAU processes as political leaders. In this way, the stories of the international and the regional are not disjointed; to the contrary, they are intimately connected. Therefore, mapping the emergence of the right to development is also important for highlighting the protagonists of the story: the African scholars, leaders and institutions that pushed for a right as a response to a history of exclusion.

Finally, the use of international law as a tool to correct past injustices in the context of the right to development serves another purpose. While the international community is still contemplating how to formulate a hard law commitment, the African human rights system has included the right for 40 years and has an expanding body of case law relating to it. Therefore, the history of the emergence of the right to development is not only significant for its distinctly African origin, but also an important reminder of how international law was and is used by Africans to achieve their political ends, even when 'international law' was not yet ready for such an evolution, and, in some ways, international law still is not ready. By revisiting how African jurists mobilised international law as a tool for their struggles for dignity, sovereignty, independence, and autonomy over natural resources in the twentieth century, it demonstrates how international law can be a powerful (ideological) tool, depending on who defines and wields it.

7 Le droit à la souveraineté sur les ressources naturelles: Droit des peuples ou droit des Etats?

Serge Itourou Songue

1 Introduction

La question de la souveraineté sur les ressources naturelles est étroitement liée à celle du développement, elle-même fille des inégalités structurelles entre d'une part la société occidentale dite développée et d'autre part le tiers-monde, ou tout au moins ce qui est considéré comme tel. En effet, le droit au développement considéré aujourd'hui comme un droit de l'homme et des peuples[1] « est une notion récente née de la réflexion suscitée par les échecs de l'aide au développement et la nécessité de repenser la coopération internationale dans un cadre moins mercantiliste ».[2] L'objectif manifestement recherché par ce droit est de rattraper l'écart de développement entre le nord et le sud, en permettant aux pays du sud d'être les véritables acteurs d'une politique de développement jusqu'alors extravertie et inefficace.[3]

La réappropriation par le sud des outils et des moyens de son développement devait se faire sur un double plan civil et politique d'une part, économique, social et culturel d'autre part. Ainsi on a assisté à la consécration d'un droit des peuples à disposer d'eux-mêmes, droit en vertu duquel il leur est reconnu la faculté de choisir leur statut politique et d'assurer leur développement économique et social. L'article 1er (1) commun aux deux pactes de 1966[4] résume clairement cette orientation

1 Lire dans ce sens K Mbaye 'Le droit au développement comme un droit de l'homme' (1972) 2-3 *Revue des droits de l'homme*. Lire également le paragraphe 8 du préambule et l'art 22 de la Charte africaine des droits de l'homme et des peuples.

2 K Mbaye *Les droits de l'homme en Afrique* (2002) 210.

3 C'est l'idée générale qui se dégage de la lecture de l'ouvrage dirigé par J-E Pondi *Repenser le développement à partir de l'Afrique* (2011).

4 Il s'agit du Pacte international relatif aux droits civils et politiques adopté le 16 décembre 1966 et du Pacte international relatif aux droits économiques, sociaux et culturels adopté le 19 décembre 1966.

en ces termes : « Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel ». Mais c'est au deuxième alinéa de cet article que les rédacteurs des deux pactes ont indiqué les moyens qui permettent à ces peuples d'arriver à leurs fins. « Pour atteindre leurs fins, tous les peuples peuvent disposer librement de leurs richesses et leurs ressources naturelles, sans préjudice des obligations qui découlent de la coopération économique internationale […] ».

A ce stade, deux remarques liminaires doivent être faites. La première est que le droit des peuples sur leurs richesses et ressources naturelles obtient une reconnaissance internationale. Cette consécration qui a certainement été inspirée par la Résolution 1803 (XVII) de l'Assemblée Générale des Nations Unies du 14 décembre 1962 sur la « souveraineté permanente sur les ressources naturelles », est confirmée par la Charte africaine des droits de l'homme et des peuples en son article 21 aux termes duquel « les peuples ont la libre disposition de leurs richesses et de leurs ressources naturelles ». Une partie de la doctrine lui reconnait d'ailleurs le statut de norme impérative de droit international,[5] composante du droit à l'autodétermination et corollaire de la souveraineté.[6]

La seconde remarque que nous pouvons faire est que, tel que consacré, le droit à la souveraineté sur les ressources naturelles semble être un droit destiné au peuple et exercé pleinement et exclusivement par ce dernier.[7] Les personnes ou entités autres que le peuple ne seraient donc pas juridiquement fondées à exiger le respect de ce droit, car elles manqueraient de qualité et d'intérêt pour le faire. Mais cette évidence apparente ne doit pas occulter la réalité car la mise en œuvre du droit à la souveraineté sur les ressources naturelles révèle une réelle difficulté quant

5 D Rosenberg 'Le principe de souveraineté permanente sur les ressources naturelles : un droit à l'émancipation et une arme de libération pour les peuples du Tiers Monde' (1976) 2 *Annuaire du Tiers Monde* 96 : 'l'application du principe de souveraineté permanente sur les ressources naturelles, norme de droit impératif général (…) doit contribuer à rendre plus justes les relations économiques entre pays industrialisés et pays en voie de développement'.

6 M Sinkondo 'Principe de souveraineté, droit des peuples et sécurité en droit international contemporain' (1991) 66 *Revue de droit international et de droit comparé* 323.

7 Cet énoncé n'est pas sans rappeler la définition de la souveraineté donnée par Max Huber dans sa sentence arbitrale sur l'île de Palmas. Pour lui en effet, la souveraineté se résume en la plénitude et en l'exclusivité des compétences. *Ile de Palmas* (Etats-Unis c. Pays Bas), Sentence arbitrale, Max Huber, Cour Permanente d'Arbitrage (CPA) 4 avril 1928 Recueil des Sentences Arbitrale (RSA) (1935) II *Revue Générale de Droit International Public* 156.

à la détermination du véritable titulaire de ce droit. Pour s'en convaincre, trois éléments au moins peuvent nous édifier.[8]

D'abord, dans l'*affaire Saramaka*[9] devant la Cour interaméricaine des droits de l'homme, l'Etat du Surinam et le peuple Saramaka ont prétendu tous les deux à un droit sur les ressources naturelles. Les Saramaka estimaient que leur droit d'user et de jouir de toutes les ressources naturelles est une condition nécessaire pour l'exercice de leur droit à la propriété en vertu de l'article 21 de la Convention. L'Etat quant à lui arguait que tous les droits à la terre, plus précisément aux ressources naturelles du sous-sol, relèvent du domaine de l'Etat, qui peut jouir librement de ces ressources en octroyant des concessions à des tiers.

Ensuite, dans le *Dictionnaire de droit international public*, Jean Salmon fait savoir que le mot peuple est un « terme employé parfois à la place du mot Etat ». Il en est ainsi du Préambule de la Charte des Nations Unies qui est formulé ainsi qu'il suit : 'Nous, peuples des Nations Unies (…) Avons décidé d'associer nos efforts (…) En conséquence nos gouvernements respectifs (…) Ont adopté la présente Charte'.[10] Il en est de même de l'article 1er de la même Charte qui énonce les buts des Nations Unies, notamment 'développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité de droit des peuples et de leur droit de disposer d'eux-mêmes'.[11] Pour l'auteur, le droit des peuples à disposer d'eux-mêmes tel que formulé à l'article 1er de la Charte serait en réalité un droit reconnu à l'Etat, car le terme peuple est employé ici 'à la place du mot Etat'. De plus comme le fait remarquer Dominique Rosenberg, la doctrine utilise indifféremment les expressions 'droit à la souveraineté permanente des Etats sur leurs richesses naturelles' d'une part et 'droit des peuples à disposer de leurs ressources naturelles' d'autre part.[12] Doit-on en conclure que le droit des peuples à disposer d'eux-mêmes, et son corollaire le droit à la souveraineté sur les ressources naturelles ne sont en définitive que des droits réservés aux seuls Etats souverains ?[13]

8 On pourrait ajouter à ces trois éléments un quatrième qui oppose le peuple et la nation comme titulaires du droit à la souveraineté sur les ressources naturelles. Il s'agit là d'un pan de voile que nous ne lèverons pas ici, pour des raisons d'espace.

9 Case of the *Saramaka People c. Suriname* (Jugement) Inter-American Court of Human Rights (28 novembre 2007) paras 80-84.

10 J Salmon (dir) *Dictionnaire de droit international public* (2001) 827.

11 Salmon (n 10). A cela l'auteur ajoute le droit des peuples à la non intervention dans les affaires intérieures.

12 Rosenberg (n 5) 80.

13 Il faut relever que la confusion terminologique n'est pas l'apanage de la seule doctrine. Certains textes utilisent ces expressions dans un sens qui laisse comprendre sans aucune équivoque que le droit à la souveraineté sur les ressources naturelles est un droit réservé

A propos de la souveraineté justement, et c'est enfin le troisième élément d'illustration, il peut paraître insolite que l'on parle de souveraineté du peuple en droit international des droits de l'homme[14] (branche rattachée à l'arbre qu'est le droit international général),[15] tant il est vrai que seuls les Etats sont titulaires de la souveraineté internationale tant dans son sens formel (liberté reconnue à l'Etat de limiter son autonomie internationale à sa guise en souscrivant des engagements internationaux) que matériel (existence d'un nombre déterminé de compétences intransférables pour l'Etat au risque de perdre son statut).[16] Reconnaître la souveraineté du peuple sur les ressources naturelles ne revient – il pas à « prophétiser » la mort ou l'érosion de la souveraineté ?[17] Du peuple ou de l'Etat, qui est le destinataire final du droit à la souveraineté sur les ressources naturelles ? Au-delà de la simple rhétorique marquée par l'utilisation du mot peuple, peut-on penser qu'en souscrivant des engagements internationaux les Etats aient cédé un pan de leur souveraineté au peuple, ou alors qu'il s'agit d'un simple habillage qui n'occulte en rien le fait que l'Etat reste en réalité le seul vrai souverain sur ces ressources naturelles ?

La réalité est quelque peu nuancée, et il est nécessaire de faire preuve de circonspection pour mieux saisir les subtilités de ce droit. Pour mieux comprendre la place de chacun (Etat et peuple) dans la mobilisation de ce droit, il convient de faire appel à des notions propres au droit des personnes telles que la jouissance et l'exercice d'un droit, ou encore au droit des obligations, notamment le créancier et le débiteur d'une obligation. La souveraineté sur les ressources naturelles est un droit reconnu et protégé en droit international. Il s'agit cependant d'un droit protégé en définitive pour et entre les peuples (I), bien qu'il soit exercé et garanti par et contre l'Etat (II).

aux Etats. C'est le cas notamment de la Charte des droits et devoirs économiques des Etats, Résolution 3281 (XXIX du 12 décembre 1974) qui dispose en son art 2(1) que *'*chaque Etat détient et exerce librement une souveraineté entière et permanente sur toutes ses richesses, ressources naturelles et activités économiques, y compris la possession et le droit de les utiliser et d'en disposer*'*.

14 L'expression conviendrait davantage au droit interne car ici, la souveraineté du peuple en matière de choix de ses dirigeants ne fait l'objet d'aucun doute.

15 A Pellet 'Droit-de-l'hommisme' et droit international » (2001) 1 *Droits fondamentaux* 178 (www.droits-fondamentaux.org): 'Je ne crois nullement que le droit international des droits de l'homme constitue une branche autonome, moins encore une discipline distincte du droit international général (…) si évidemment, rien n'empêche les juristes de se spécialiser dans l'étude de tel ou tel chapitre du droit des gens, ils devraient sans doute prendre garde de ne pas couper la branche de l'arbre : elle dépérirait …'.

16 Lire dans ce sens J Combacau & S Sur *Droit international public* (2010) 257.

17 Cette expression est de Pellet (n 15). L'auteur pense que prophétiser la mort de la souveraineté de l'Etat serait aller vite en besogne, et il est encore prématuré d'envoyer les faire-part.

2 Le droit à la souveraineté sur les ressources naturelles : un droit reconnu et protégé pour et entre les peuples

Bien qu'il soit possible d'utiliser le terme peuple à la place du terme Etat, il reste et demeure que le droit à la souveraineté sur les ressources naturelles est un droit exclusivement réservé au peuple (A). L'utilisation du concept de souveraineté ne remet pas en cause cette réalité, car comme le fait remarquer Edmond Jouve, le premier droit d'un peuple est d'être souverain.[18] Cependant, l'exclusivité de la souveraineté d'un peuple sur une ressource naturelle peut se voir imposer des aménagements lorsque cette ressource est partagée par plus d'un peuple, ou encore lorsque ce peuple bien que souverain sur ses ressources cohabite avec d'autres peuples au sein d'un même Etat (B).

2.1 Le peuple comme destinataire exclusif du droit à la souveraineté sur les ressources naturelles

« Tout peuple a un droit exclusif sur ses ressources et richesses naturelles. Il a le droit de les récupérer s'il en a été spolié ».[19] Cette exclusivité ainsi soulignée par l'article 8 de la Déclaration universelle des droits des peuples est confirmée par l'article 21 de la Charte africaine des droits de l'homme et des peuples en ces termes : « Les peuples ont la libre disposition de leurs ressources naturelles. Ce droit s'exerce dans l'intérêt exclusif des populations (…) ». Mais dire que le peuple est le destinataire exclusif du droit à la souveraineté sur les ressources naturelles ne renseigne pas suffisamment sur la véritable identité du peuple. Il convient donc de bien définir le peuple bénéficiaire de ce droit (1), et ce n'est qu'après avoir été renseigné sur son identité que nous nous intéresserons au caractère exclusif pour le peuple du droit à la souveraineté sur ses ressources naturelles (2).

2.1.1 Identification du peuple titulaire du droit à la souveraineté sur les ressources naturelles

On pourrait *a priori* renoncer à identifier le peuple bénéficiaire du droit des peuples sur les ressources naturelles, si l'on se limite à l'affirmation de Karel Vasak pour qui « personne ne sait ce qu'est le peuple ».[20] On

18 E Jouve 'Où en est le droit des peuples à l'aube du IIIème millénaire' *Symposium international de Bamako* 507. www.democratie.francophonie.org/IMG/pdf/424-2.pdf (Consulté le 30 août 2012).

19 Article 8 de la Déclaration universelle des droits des peuples, Alger, 4 juillet 1976.

20 Cité par Jouve (n 18) 503. Lire également dans ce sens E Jouve, *Le droit des peuples* (1986) 109, lorsqu'il parle de 'l'introuvable définition juridique du peuple'.

ne peut cependant pas dire comme Edmond Jouve que le peuple est une entité encore non définie,[21] mais plutôt reconnaître qu'il « est un terme polysémique (qui) peut être compris dans des sens très divers ».[22] Au sens du dictionnaire Larousse, le peuple est l'ensemble d'hommes habitant ou non sur un même territoire et constituant une communauté sociale et culturelle.[23] Il découle de cette définition que deux éléments peuvent être pris en compte pour servir de clé de décryptage du terme peuple : le territoire d'une part et la communauté sociale et culturelle d'autre part. Loin de s'opposer, ces deux éléments sont conjointement pris en compte pour définir un peuple, et leur combinaison aboutit à quatre (4) variantes différentes de la notion en fonction de la nature du territoire en question.

Ainsi, si on considère un territoire étatique, on peut définir le peuple comme une communauté sociale et culturelle ressortissant d'un même territoire. Il s'agit d'« une collectivité d'êtres humains unis par un lien de solidarité (…), le fait d'être ressortissant d'un même Etat ».[24] Dans ce cas de figure, le terme peuple est parfois employé à la place du terme Etat, donnant lieu à des déclarations telles que : « nous, peuples des Nations unies (…) avons décidé d'associer nos efforts (…) en conséquence nos gouvernements respectifs (…) ont adopté la présente charte ».[25] Dans son deuxième sens, le peuple peut être constitué en l'absence d'un Etat, ce qui amène à le redéfinir. Dans cette hypothèse donc, le peuple est « une communauté établie sur un territoire qui ne constitue pas un Etat ».[26] On pourrait prendre pour exemple le peuple palestinien. Pour l'un et l'autre des deux sens du terme examinés jusqu'ici, que le territoire soit étatique ou non, le peuple présente une certaine homogénéité (communauté sociale et culturelle), mais aussi un encrage géographique certain et bien déterminé (le territoire en question).

Cependant, on peut envisager un peuple dont le point d'encrage géographique est une ou certaines parties du territoire ou encore qui va au-delà du territoire considéré. Ainsi, et il s'agit là du troisième sens du terme, on peut considérer comme peuples distincts des « communautés réparties sur le territoire d'un seul Etat mais qui aspirent à devenir des

21 *Ibid.*

22 Salmon (n 10) 827.

23 Le Petit Larousse Illustré (2007) 811. C'est dans ce sens que s'exprime M Kamto lorsqu'il parle de 'la difficulté de s'accorder sur ce qu'est un peuple'. Voir M Kamto, 'Le droit des peuples à disposer d'eux-mêmes entre fétichisme idéologique et glissements juridiques' (2010) 1 *Vers un monde nouveau* 1426.

24 Salmon (n 10).

25 Salmon (n 10).

26 Salmon (n 10).

Etats séparés ».[27] Cette définition peut s'appliquer à des peuples vivant sur un même territoire non étatique, même si ce cas de figure est rare.[28] C'est la dimension *infra* territoriale du peuple qui est prise en compte ici. A l'inverse, le peuple peut être pris dans sa dimension extraterritoriale pour représenter « une communauté répartie sur plusieurs territoires ».[29] Ce dernier cas de figure est largement observé sur le plan international, avec des exemples tels que le peuple kurde ou le peuple juif.

De toutes ces hypothèses, seule la quatrième ne peut être prise en compte dans la mesure où la souveraineté d'un peuple sur les ressources naturelles implique que ce peuple se trouve sur un territoire, étatique ou non. On peut donc trouver une définition appropriée du peuple bénéficiaire en reformulant la définition du dictionnaire Larousse ainsi qu'il suit : le peuple est l'ensemble d'hommes habitant sur un même territoire étatique ou non et constituant une communauté sociale et culturelle. On peut conclure sur ce premier point en faisant remarquer que le peuple n'est ni indéfini, ni indéfinissable, mais recouvre plusieurs sens, et c'est en fonction du sens choisit que l'on détermine le contenu et la valeur de son droit à la souveraineté sur les ressources naturelles.

2.1.2 Exclusivité du droit des peuples à la souveraineté sur leurs ressources naturelles

Partant de la définition retenue pour le peuple et des différentes variantes de la notion, il faut relever que l'Etat et le peuple ne renvoient pas strictement à la même réalité. En effet, le peuple peut avoir une assise géographique trans-étatique, étatique ou infra étatique. L'identité ethnoculturelle étant l'élément central dans la définition du peuple, on se rend à l'évidence que les peuples ne se conçoivent pas nécessairement par rapport à la structure étatique.

Le peuple n'étant pas l'Etat et inversement, le droit des peuples n'est pas le droit des Etats. S'agissant plus particulièrement du droit à la souveraineté sur les ressources naturelles, il faut dire avec Marcel Sinkondo que « le titulaire originaire et permanent de ce droit, c'est le peuple. L'Etat n'en a que l'usufruit ».[30] De plus, l'usufruit reconnu à l'Etat n'est valable que lorsqu'il va dans l'intérêt du peuple. C'est dire que lorsque les intérêts

27 Salmon (n 10).

28 Il faut dire à propos qu'à l'observation, nous n'avons pas trouvé un cas de figure qui confirme cette hypothèse, ce qui, sauf évolution ultérieure, en fait une simple hypothèse d'école.

29 Salmon (n 10).

30 Sinkondo (n 6) 312.

de l'Etat usufruitier se révèlent différents de ceux du peuple nu propriétaire, ce dernier peut remettre en cause l'exercice de ce droit.[31]

Dans sa jurisprudence *Saramaka People c. Suriname*, la Cour interaméricaine reconnaît aux peuples autochtones et tribaux en général et au peuple Samaraka[32] en particulier *«* le droit de posséder les ressources naturelles qu'ils utilisent traditionnellement sur leur territoire pour les mêmes raisons pour lesquelles ils ont le droit de jouir de la terre qu'ils utilisent et occupent traditionnellement depuis des siècles *»*.[33] Le droit à la souveraineté sur les ressources naturelles ainsi reconnu à un peuple infra étatique démontre à suffire le caractère exclusif pour les peuples de ce droit. En effet, « que les peuples non encore organisés en Etats soient titulaires de droits garantissant leur libre disposition et leur sécurité, au même titre que ceux dotés de la structure étatique montre que ces droits sont bien ceux des peuples, et que les Etats ne peuvent s'en prévaloir que dans la mesure où la fin poursuivie n'est pas contraire à cet intangible droit des peuples à la souveraineté et à la sécurité ».[34]

Cependant, la question du contenu du droit à la souveraineté sur les ressources naturelles demeure entière, notamment pour ce qui est de la nature des ressources en question. En effet, le droit à la souveraineté du peuple s'exerce –t– il sur toutes les ressources du sol et du sous-sol présentes sur leurs terres, ou seulement sur certaines d'entre elles jugées importantes ? S'inspirant de la jurisprudence de la Cour interaméricaine des droits de l'homme conformément à l'article 61 de la Charte africaine des droits de l'homme et des peuples, la Commission africaine des droits de l'homme et des peuples est arrivée à la conclusion que les ressources naturelles disponibles sur les territoires des peuples autochtones et tribaux et dans leur sous-sol sont les ressources naturelles utilisées et nécessaires pour la survie même, le développement et la perpétuation du mode de vie de ces peuples,[35] des ressources qu'ils utilisent traditionnellement pour leur subsistance et leurs activités culturelles et religieuses.[36] Ce qui signifie *a contrario* que les ressources ne répondant pas à cette exigence peuvent

31 L'article 21(2) de la Charte africaine dispose qu'*'*en cas de spoliation, le peuple spolié a droit à la légitime récupération de ses biens ainsi qu'à une indemnisation adéquate*'*.

32 L'un des six groupes Marron du Suriname.

33 Cour interaméricaine des droits de l'homme (IACtHR), *Case of the Saramaka People c. Suriname* Jugement du 28 novembre 2007 para. 260.

34 Sinkondo (n 6) 320.

35 *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHLRLR 75 (ACHPR 2009) para 261.

36 *Endorois* (n 35) para 263.

être librement exploitées par l'Etat, même si pareille exploitation ne doit pas influer sur l'usage et la jouissance par le peuple d'autres ressources naturelles nécessaires pour sa survie.

Pour ce qui est de la valeur normative de ce droit, on pourrait se demander si la souveraineté permanente sur les ressources naturelles constitue une règle de droit international ou simplement une doctrine comme le pense Georges Fischer.[37] Sur ce point, il faut dire simplement que cette souveraineté a progressivement évolué, allant du statut de doctrine à celui de règle de droit international, consacrée par les textes juridiques sus-évoqués. Pour Keba Mbaye, « le droit de libre disposition des peuples vis-à-vis de leurs richesses et de leurs ressources naturelles est déjà reconnu par le droit international ».[38] L'affirmation de Georges Fischer était certainement vraie en son temps (1962), mais est aujourd'hui largement révolue. On peut dire avec Cristescu que ce droit « doit être considéré comme un principe établi, un droit universellement reconnu relevant du droit international contemporain, un principe juridiquement obligatoire qui jouit de l'universalité et qui constitue une règle générale de droit international ».[39] Cependant, aussi universel que soit ce droit, il n'est pas absolu en toutes circonstances. Il connait certains aménagements, notamment lorsque les ressources en question sont partagées par plusieurs peuples ou lorsque le peuple souverain sur ses ressources doit faire preuve de solidarité nationale envers les autres peuples.

2.2 La protection entre les peuples du droit à la souveraineté sur les ressources naturelles partagées

La libre disposition des richesses et ressources naturelles doit se faire sans préjudice de l'obligation de promouvoir une coopération économique internationale fondée sur le respect mutuel, l'échange équitable, et les principes du droit international. Cette exigence formellement prévue à l'article 21 (3) de la Charte africaine s'illustre davantage lorsque les ressources sur lesquelles le peuple exerce sa souveraineté sont partagées avec un autre peuple d'un Etat voisin, ou encore lorsqu'elles se situent sur une partie d'un territoire étatique contrôlée par un seul peuple. Dans le premier cas, les peuples concernés ont l'obligation de gérer les ressources partagées de façon rationnelle, équitable et non dommageable (1). Dans le second, le peuple qui contrôle doit pouvoir faire preuve de solidarité nationale (2).

37 Sinkondo (n 6) 518.

38 Mbaye (n 2) 209.

39 Cité par Jouve (n 20) 508-509.

2.2.1 La gestion rationnelle, équitable et non dommageable des ressources naturelles partagées

La souveraineté permanente du peuple sur ses ressources naturelles ne signifie nullement que ce dernier a le droit de faire tout ce qu'il veut des ressources qu'il partage avec d'autres peuples, car l'exercice par d'aucuns de leurs droits ne doit compromettre l'exercice du même droit par un autre peuple. C'est notamment le cas pour ce qui est de l'utilisation des ressources en eau partagées. En effet, les cours d'eau internationaux qui sont en eux-mêmes des ressources et en contiennent, traversent généralement plusieurs territoires, de sorte que l'utilisation qu'on en fait en amont n'est pas sans conséquence en aval du cours d'eau. Le principe est donc celui de l'utilisation équitable des cours d'eau internationaux. L'article 8 de la Convention du 21 mai 1997 relative à l'utilisation des cours d'eau à des fins autres que la navigation prévoit une obligation de coopération à la charge de tous les Etats riverains. Cette coopération implique l'utilisation conjointe des ressources en eau partagées. La Cour internationale de justice (CIJ) a eu l'occasion de réitérer cette obligation dans son arrêt du 25 septembre 1987 en l'affaire du *projet Gabcikovo-Nagymaros.*[40] Dans son arrêt, la Cour reconnait *«* le rôle vital du Danube dans le développement commercial et économique des Etats riverains, car il a mis en évidence et accru l'interdépendance, rendant indispensable la coopération internationale *»*.[41] L'utilisation conjointe des cours d'eau internationaux est donc indispensable et peut consister en *«* une obligation de consultation et d'harmonisation des actions respectives des deux Etats, lorsque les intérêts généraux sont engagés en matière d'eau *»*.[42]

En plus d'être équitable et concertée, l'exercice par un peuple de la souveraineté sur ses ressources naturelles partagées ne doit pas avoir des conséquences dommageables pour les autres peuples. C'est ici que trouve tout son sens le principe de l'interdiction d'utiliser son territoire à des fins contraires aux droits des autres Etats. La Déclaration de la conférence de Stockholm des Nations Unies sur l'environnement humain a reconnu et renforcé ce principe en énonçant que « … les Etats (…) ont le devoir de faire en sorte que les activités exercées dans les limites de leur juridiction ou sous leur contrôle ne causent pas des dommages à l'environnement dans d'autres Etats … *»*. [43]

40 *Projet Gabcikovo-Nagymaros (Slovaquie c. Hongrie)* Cour internationale de Justice (arrêt) 25 septembre 1997 *Annuaire Français du Droit International* (1997) 333.

41 *Projet Gabcikovo-Nagymaros* (n 40) para 17 (1).

42 *Affaire du Lac Lanoux* (sentence arbitrale) 16 novembre 1957.

43 Article 21 de la déclaration.

On peut aisément déduire de tous ces développements que la souveraineté du peuple sur les ressources qu'il partage avec d'autres peuples ne peut s'exercer dans l'absolu. Elle doit tenir compte de certains principes du droit international au rang desquels l'utilisation équitable et concertée des ressources et l'interdiction d'utiliser son territoire à des fins contraires aux droits des autres Etats.[44] Loin d'être une limite à la souveraineté des peuples, cette exigence tend simplement à assurer une meilleure protection du droit à la souveraineté sur les ressources naturelles entre les peuples. Seulement, si au niveau interétatique la coopération internationale est nécessaire, on peut aussi concevoir au plan interne une exigence de solidarité nationale entre les peuples d'un même Etat inégalement dotés en ressources naturelles.

2.2.2 La protection du droit à la souveraineté des peuples sur leurs ressources naturelles : de la coopération internationale à la solidarité nationale

Parler d'un droit à la souveraineté sur les ressources naturelles pour l'un des peuples d'un même Etat pourrait *a priori* surprendre, dans la mesure où le droit des peuples revêt généralement une dimension interétatique. On a rarement émis l'hypothèse d'un droit à la souveraineté d'un peuple faisant partie d'une communauté nationale, c'est-à-dire vivant sur le même territoire étatique qu'un autre peuple. Mais rappelons ici que l'on peut considérer comme peuples distincts des « communautés réparties sur le territoire d'un seul Etat mais qui aspirent à devenir des Etats séparés ».[45] S'il est admis que sur le plan international les peuples doivent coopérer entre eux dans la gestion de leurs ressources naturelles, comment peut-il en aller autrement pour des peuples qui occupent le même territoire étatique ? Doit-on penser que lorsque nous restons dans les limites du territoire national, la coopération entre les peuples n'est pas nécessaire, faute de consécration législative ou réglementaire ?

Nous avons dans le monde un grand nombre d'Etats dans lesquels certains peuples occupent une partie du territoire abondamment dotée en ressources naturelles, alors que d'autres peuples n'en disposent pas ou presque. C'est le cas par exemple du Nigéria avec le peuple Ogoni qui se trouve sur la zone pétrolifère du Delta du Niger.[46] On peut aussi évoquer le cas de la République Démocratique du Congo avec la région autonome du Katanga. Si l'on applique dans l'absolu le droit à la souveraineté sur les ressources naturelles, on pourrait conclure que chaque peuple a un droit

44 Sur ces principes, lire J Sohnle 'Irruption du droit de l'environnement dans la jurisprudence de la CIJ' (1998) 1 *Revue Générale de Droit International Public* 85-119.

45 Salmon (n 10) 827.

46 L'Etat du Biafra produisait en 1970, 67% du pétrole nigérian. Voir Rosenberg (n 12) 78.

exclusif sur ses ressources naturelles et peut les utiliser librement sans qu'il ne soit tenu d'en faire profiter les autres peuples du même Etat. Même si elle paraît défendable dans un contexte de fédéralisme ou d'autonomie régionale, cette conclusion n'est ni économiquement rentable, ni socialement opportune. En effet, il est impossible pour un peuple, quel que soit son niveau de dotation en ressources naturelles, de vivre en autarcie. Les ressources dont il dispose ne sont jamais suffisantes pour assurer son bien-être, et l'application stricte du droit à la souveraineté sur les ressources naturelles l'empêcherait de bénéficier des avantages comparatifs que peuvent offrir les autres peuples, ou du moins leurs ressources naturelles. Cet élément économique se double d'une exigence sociale qui est la vie en communauté et la solidarité nationale. Il n'est pas socialement opportun de créer au sein d'un même Etat des écarts de développement ou de bien être qui ont pour conséquences la fragilisation du sentiment national et le développement d'un narcissisme autodestructeur.

Le devoir de solidarité qui doit s'imposer à ces peuples découle de l'interprétation que l'on peut faire de l'article 21 (4) de la Charte africaine. D'après ce texte, « les Etats parties à la présente Charte s'engagent tant individuellement que collectivement, à exercer le droit de libre disposition de leurs richesses et de leurs ressources naturelles, en vue de renforcer l'unité et la solidarité africaine ». La solidarité nationale faisant partie de cette solidarité africaine, l'Etat doit pouvoir assurer une redistribution équitable des ressources naturelles, afin que la souveraineté sur les ressources naturelles soit protégée non seulement pour les peuples mais aussi entre ces derniers, de manière à ce qu'un peuple ne pâtisse pas de l'usage excessif de son droit par un autre. C'est également à ce stade que l'Etat doit jouer un grand rôle, celui de régulateur, celui d'« administrateur légal »[47] des ressources naturelles qui appartiennent en définitive aux peuples. C'est lui qui exerce le droit à la souveraineté sur les ressources naturelles pour le compte du peuple qu'il représente, et doit s'assurer que ce droit n'est menacé ni par lui-même, ni par un autre Etat quelconque.

3 Le droit à la souveraineté sur les ressources naturelles : un droit exercé et garanti par et contre l'Etat

« Si la persécution est infligée à un degré intolérable, toutes les nations peuvent secourir le peuple infortuné ».[48] Cette réflexion faite par Vattel trouve tout son sens en matière de protection du droit à la souveraineté des peuples sur leurs ressources naturelles. En effet, les « nations » semblent avoir

47 Mbaye (n 2) 39.

48 Vattel cité par Mbaye (n 2) 38.

pris conscience des injustices dont ont longtemps été victimes les peuples, singulièrement en ce qui concerne le pillage de leurs ressources naturelles. Ainsi par exemple, elles se sont rendues compte de ce que « les ressources matérielles et humaines de l'Afrique ont été largement exploitées au profit de puissances étrangères, créant ainsi une tragédie pour les africains eux-mêmes (…) ».[49] Ces « nations » ont donc décidé de « secourir » les peuples infortunés en assurant une réelle protection de leur droit à la souveraineté sur leurs ressources naturelles. Elles se sont engagées à exercer le droit des peuples à la libre disposition de leurs ressources naturelles (3.1.), et à éliminer toutes les formes d'exploitation économique qu'elle soit le fait d'un Etat étranger ou celui de l'Etat exerçant ce droit (3.2.). Ce dernier aspect reflète les deux versants interne et externe du droit des peuples.[50]

3.1 L'exercice par l'Etat du droit des peuples à la souveraineté sur leurs ressources naturelles

Le fait que la souveraineté sur les ressources naturelles soit un droit des peuples ne fait l'objet d'aucun doute. Cependant, bien qu'étant bénéficiaire de ce droit, ce n'est pas le peuple qui l'exerce effectivement. Généralement, comme le souligne Keba Mbaye, « ce sont les Etats, représentants de ces entités souvent difficiles à déterminer, qui exercent les droits qui leurs sont reconnus. Mais cela n'enlève rien à la réalité juridique fondamentale. C'est bien aux peuples (…) que sont reconnus lesdits droits (…) ».[51] C'est dans ce sens que l'article 21 (4) de la Charte africaine énonce clairement l'engagement des Etats partis à exercer le droit de libre disposition de leurs richesses et de leurs ressources. L'exercice de ce droit passe par l'adoption et la vulgarisation des instruments de protection d'une part (1) et la poursuite et la répression des atteintes au droit à la souveraineté sur les ressources naturelles d'autre part (2).

3.1.1 L'adoption et la vulgarisation par l'Etat d'instruments juridiques de protection

La protection du droit des peuples en général et du droit à la souveraineté sur les ressources naturelles en particulier ne serait qu'un vœu pieux sans l'élaboration et l'adoption par les Etats d'instruments juridiques de protection. De plus, il ne suffit pas que ces textes existent, il faut aussi et surtout qu'ils soient aptes à remplir efficacement leur rôle, car comme le

49 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) 1-9.

50 Sur cette notion, lire Kamto (n 23) 1435.

51 Mbaye (n 2) 39.

dit Prosper Weil, « sans normes de bonne qualité, le droit international ne serait qu'un outil défectueux, mal approprié à ses fonctions ».[52]

C'est aux Etats qu'il revient d'adopter, pour le compte des peuples, les instruments juridiques qui protègent leurs droits. Trois éléments au moins nous permettent de tirer cette conclusion. D'abord, c'est la structure de la société internationale, essentiellement interétatique, qui donne un rôle primordial à l'Etat dans l'élaboration des normes juridiques. Bien que les individus et les peuples aient acquis une reconnaissance internationale, la souveraineté des Etats reste encore prégnante. Pour illustrer cette réalité, Alain Pellet s'exprime en ces termes : « Je ne crois nullement que la percée des droits de l'homme dans le droit international remette en cause le principe de souveraineté, qui semble demeurer (…) un puissant facteur organisateur de la société internationale et une explication, toujours éclairante, des phénomènes juridiques internationaux ».[53] Ainsi pour l'auteur, l'Etat a la compétence du dernier mot, car il est le bras séculier seul capable de donner vie à la norme internationale.[54] Ensuite, le peuple est une entité souvent difficile à déterminer et pas toujours organisée, ce qui rend impossible l'exercice par lui-même de son droit. Il a besoin de se faire représenter par l'Etat qui est une entité mieux structurée. Enfin, c'est dans la jurisprudence de la Commission africaine qu'il faut rechercher le fondement de l'adoption par l'Etat des normes régissant le droit à la souveraineté sur les ressources naturelles. Pour la Commission en effet, les gouvernements ont le devoir de protéger leurs citoyens, en adoptant des législations appropriées et en les appliquant effectivement.[55]

Par ailleurs, les Etats ont le devoir de vulgariser les droits des peuples, de les faire connaître par tous les citoyens. La Charte africaine met à la charge des Etats partis le devoir de promouvoir et d'assurer, par l'enseignement, l'éducation et la diffusion, le respect des droits qui y sont contenus,[56] notamment le droit à la libre disposition des richesses naturelles. Cette vulgarisation du droit peut être l'œuvre des Etats pris individuellement[57]ou collectivement,[58] l'essentiel étant de faire comprendre aux individus et aux peuples le contenu de leurs droits et celui des obligations qui pèsent sur

52 P Weil 'Vers une normativité relative en droit international' (1982) 1 *Revue Générale de Droit International Public* 7.

53 Pellet (n 15) 178.

54 Pellet (n 15) 178.

55 *SERAC* (n 49) para 57.

56 Article 25.

57 C'est souvent le rôle des Commissions nationales des droits de l'homme.

58 C'est la Commission africaine en tant qu'organe interétatique qui a cette mission au plan régional.

eux. Mais à ce stade, l'essentiel n'est pas sauf, car c'est la certitude de la sanction qui est la garantie de l'effectivité de la règle de protection.

3.1.2 La poursuite et la répression des atteintes à la souveraineté des peuples sur leurs ressources naturelles

Les atteintes qui peuvent être portées à un droit quelconque sont souvent limitées non par la sévérité de la sanction en cas de manquement, mais par la certitude de cette sanction. S'il est certain que personne ne peut échapper à la sanction pour violation des droits de l'homme, les règles de droit seraient beaucoup moins violées.

C'est à l'Etat qu'il revient de mettre en place des organes et institutions, judiciaires notamment, qui sont chargées de veiller à ce que les violations des droits des peuples ne restent pas impunies. De façon pratique, deux obligations peuvent être imposées aux Etats. La première qui est tirée de la jurisprudence de la Commission africaine, est l'obligation d'enquêter sur les violations des droits de l'homme et des peuples, et de poursuivre en justice toutes les personnes impliquées dans ces violations.[59] La seconde découle de la Charte africaine qui, en son article 26, met à la charge des Etats le devoir de garantir l'indépendance des tribunaux et le perfectionnement d'institutions nationales appropriées chargées de la protection des droits et des libertés. Il ne suffit donc pas de créer ces institutions, encore faut-il assurer leur bon fonctionnement. Il s'agit pour l'Etat, comme le dit Keba Mbaye, d'« entreprendre ou d'encourager les organisations gouvernementales ou publiques qui contribuent par leur action au respect des droits de l'homme, mais surtout de créer des institutions judiciaires nationales exerçant leurs fonctions en toute liberté et en toute indépendance ».[60] Dans le même sens, Alain Pellet rappelle que « la responsabilité fondamentale de mise en œuvre des droits de l'homme (…) repose avant tout sur l'action de l'Etat, dont les organes sont chargés de l'application quotidienne des normes de droits de l'homme, même lorsque celles-ci sont définies internationalement ».[61]

Cependant, il ne faut pas perdre de vue le fait que les droits des peuples en général sont certes protégés par l'Etat, mais très souvent à l'encontre de ce dernier. En effet, les Etats partis à la Charte africaine se sont engagés à éliminer toutes les formes d'exploitation économique étrangère, c'est-à-

59 *SERAC* (n 55). La Commission exhorte le gouvernement de la République fédérale du Nigéria à mener des enquêtes sur les violations des droits du peuple *Ogoni* et à poursuivre toutes les agences impliquées dans la violation de ces droits.

60 Mbaye (n 2) 237.

61 Pellet (n 15) 176.

dire pratiquées par les Etats étrangers, leurs agents ou leurs ressortissants. On entend ici par Etats étrangers les Etats signataires ou non de la Charte africaine qui sont en violation du droit à la souveraineté des peuples sur leurs ressources naturelles. De plus, il peut arriver qu'au plan interne, l'Etat viole lui-même les droits qu'il est sensé protéger. Dans un cas comme dans l'autre, il s'agit de protéger le droit à la souveraineté sur les ressources naturelles contre les actions des Etats.

3.2 La protection contre l'Etat du droit des peuples à la souveraineté sur leurs ressources naturelles

On peut dire avec Valère Eteka Yemet que certains droits des peuples peuvent s'opposer à un Etat déterminé et d'autres à un groupe d'Etats ou à l'ensemble des Etats, à la communauté internationale.[62] Pour l'auteur, les droits des peuples à disposer librement de leurs ressources naturelles rentrent dans cette seconde catégorie et interpellent de ce fait la solidarité internationale pour leur réalisation.[63] C'est au nom de cette solidarité internationale que les Etats étrangers doivent se garder d'exploiter les ressources naturelles des peuples (1). Cependant, les atteintes aux droits des peuples ne proviennent pas systématiquement de l'extérieur. L'Etat qui est censé représenter le peuple peut lui-même violer ses droits, ce qui justifie la protection du droit des peuples contre l'Etat qui exerce ce droit dans son propre intérêt ou celui des entités autres que le peuple souverain (2).

3.2.1 L'élimination de toutes les formes d'exploitation économique étrangère

Tel qu'il est formulé par les deux pactes de 1966 et la Charte africaine, le droit des peuples à la libre disposition de leurs richesses naturelles semble être garanti contre les seuls Etats étrangers qui ont pendant longtemps exploité les ressources en question. Pour la Commission africaine, l'origine de cette disposition peut remonter au colonialisme, période durant laquelle les ressources matérielles et humaines de l'Afrique ont été largement exploitées au profit de puissances étrangères, créant ainsi une tragédie pour les africains eux-mêmes, les privant de leurs droits inaliénables et de leurs terres.[64] Proclamer solennellement qu'aucun peuple ne peut plus être privé de son droit à la libre disposition de ses ressources naturelles, revient à sonner le glas de l'exploitation des ressources naturelles des Etats du Tiers-monde par les Etats étrangers économiquement puissants. C'est la raison pour laquelle les Etats parties à la Charte africaine ont

62 V Eteka Yemet *La Charte africaine des droits de l'homme et des peuples* (1996) 184.

63 Eteka Yemet (n 62) 184.

64 *SERAC* (n 59) para 57.

pris l'engagement d'éliminer toutes les formes d'exploitation économique étrangère en Afrique, notamment celle qui est pratiquée par des monopoles internationaux.

La protection du droit à la souveraineté sur les ressources naturelles contre les Etats étrangers implique des obligations positives et négatives tant pour l'Etat qui exerce ce droit que pour les Etats étrangers. L'Etat qui exerce le droit à la souveraineté sur les ressources naturelles doit prendre toutes les mesures nécessaires pour non seulement récupérer les ressources qui ont été pillées sur son territoire ou exiger une indemnisation adéquate, mais aussi contenir toutes les velléités de recolonisation économique, « en ramenant le développement économique coopératif à sa place traditionnelle, c'est-à-dire au cœur des sociétés africaines ».[65] Pour les Etats étrangers, il s'agit de respecter ce droit en s'abstenant de mener directement ou indirectement toute activité dont le but est le pillage des ressources naturelles des peuples.

Par solidarité internationale, les Etats étrangers doivent aussi faciliter la réalisation du droit des peuples à disposer d'eux-mêmes. Cette solidarité est importante notamment pour les pays en développement qui n'ont pas toujours les moyens d'exercer pleinement leurs droits. C'est la raison pour laquelle Valère Eteka Yemet dit que « les droits des peuples ne peuvent faire appel qu'à la solidarité internationale. Il a fallu la solidarité internationale pour que les peuples colonisés accèdent à 'l'indépendance politique, il faudra cette même solidarité pour réaliser les droits des peuples à disposer librement de leurs ressources naturelles ».[66] Il est cependant difficile pour ces Etats étrangers contre qui un droit est protégé de concilier à la fois obligation d'abstention et devoir de solidarité, tant il est vrai que les rapports internationaux sont essentiellement basés sur l'intérêt. La difficulté est encore plus grande lorsque l'Etat qui exerce le droit à la souveraineté sur les ressources naturelles ne le fait pas dans l'intérêt du peuple.

3.2.2 La protection du droit à la souveraineté sur les ressources naturelles contre l'Etat exerçant ce droit

Le droit à la souveraineté sur les ressources naturelles est exercé par l'Etat, mais dans l'intérêt exclusif du peuple. Aucun conflit d'intérêts ne doit exister entre l'Etat et le peuple car dans ce cas, le peuple peut remettre en cause l'exercice de ses droits par cet Etat. En effet, le droit à la souveraineté étant reconnu à l'Etat sur présomption de représentativité, ce dernier en

65 *SERAC* (n 59) para 57.

66 Eteka Yemet (n 62) 184.

perd l'exercice dès que le divorce avec le peuple est consommé.[67] C'est dans ce sens que la Commission a reconnu aux peuples autochtones le droit de porter leurs réclamations devant elle en cas de violation du droit sur leurs ressources naturelles.

La Commission souligne dans l'affaire Ogoni, que le droit aux ressources naturelles contenues sur leurs terres traditionnelles est également reconnu aux peuples autochtones, établissant clairement le fait qu'un peuple habitant une région donnée dans un Etat peut également exprimer une réclamation en vertu de l'article 21 de la Charte africaine.[68]

On constate de plus en plus que l'Etat devient un acteur économique très important, dont les activités nécessitent l'exploitation des ressources naturelles du peuple qu'il représente. Certes l'exploitation par l'Etat des ressources naturelles qu'il administre vise *a priori* à satisfaire les besoins de sa population, l'Etat étant par excellence le garant de l'intérêt général. Mais pour que cette exploitation se fasse dans l'intérêt exclusif du peuple, certaines conditions doivent être remplies.

D'abord, le peuple doit être consulté avant la mise en œuvre de tout projet portant sur l'exploitation de ses ressources naturelles, de façon à pouvoir donner son point de vue. En effet la « Commission africaine note que selon ses propres normes, un gouvernement doit consulter les populations autochtones, particulièrement lorsque des questions aussi sensibles que la terre sont traitées ».[69] C'est pour remplir cette obligation que les audiences publiques doivent être organisées dans les localités concernées par l'exploitation.

Ensuite, le peuple doit être informé des avantages du projet et des dangers qu'il coure si l'exploitation envisagée est effectivement mise en œuvre. Cette obligation d'information qui s'impose à l'Etat ne peut être valablement satisfaite que si ce dernier a mené une étude d'impact social et environnemental du projet envisagé. Par l'étude d'impact social et environnemental d'un projet, l'Etat permet de concilier le développement

67 Sinkondo (n 37) 312.

68 *Endorois* (n 35) Para 255.

69 *Endorois* Para 281. Voir également dans ce sens la Convention relative aux populations autochtones et tribales dans les pays indépendants (OIT No 169), Bulletin officiel de l'OIT 72 59, entrée en vigueur le 5 septembre 1991, qui stipule que 'les consultations en application de cette Convention doivent être menées en toute bonne foi et dans une forme appropriée aux circonstances, avec comme objectif la réalisation de l'accord ou du consentement aux mesures proposées'.

économique et la protection de l'environnement, traduisant ainsi dans les faits le principe du développement durable.[70]

Enfin, le peuple doit bénéficier des retombées de l'exploitation de ses ressources, et l'Etat doit pour se faire assurer une meilleure redistribution des richesses créées. Tout Etat qui ne remplit pas ces obligations exerce mal le droit des peuples à la souveraineté sur ses ressources naturelles et peut se rendre coupable de violation de ces droits, qu'il agisse directement ou permette à des personnes ou groupes privés d'agir librement et impunément.[71] L'intérêt du peuple doit donc être garanti à toutes les étapes et tout conflit d'intérêt entre l'administrateur (l'Etat) et le titulaire du droit (le peuple) doit se solder par la destitution de l'administrateur, ou tout au moins son rappel à l'ordre. C'est dans ce sens que la Commission africaine, après avoir estimé que la République fédérale du Nigéria était en violation de l'article 21 de la Charte entre autres, a exhorté le gouvernement à assurer une meilleure protection des moyens d'existence du peuple Ogoni.[72]

4 Conclusion

Eu égard aux développements qui précèdent, nous ne pouvons pas arriver à la même conclusion que Sandrine Davanture, lorsqu'elle affirme que « l'emploi concomitant par les Nations Unies des termes 'peuples' et 'Etats' démontre que l'organisation internationale ne veut laisser personne. Le droit à la souveraineté sur les ressources naturelles s'adresse d'une part aux Etats souverains et d'autre part aux peuples des territoires soumis à la domination coloniale et raciale et à l'occupation étrangère ».[73] Si les textes onusiens font référence aux Etats souverains, c'est bien parce qu'ils sont en charge de l'exercice d'un droit qui appartient en définitive au peuple.

La souveraineté sur les ressources naturelles n'appartient pas à la fois au peuple et à l'Etat, chacune de ces deux entités ayant son rôle à jouer.

70 Sur la définition de ce principe, lire le rapport du Ministre norvégien de l'environnement, Gro Harlem Brundtland, président la Commission mondiale sur l'environnement et le développement en 1987, intitulé : Notre avenir à tous est soumis à l'Assemblée Générale des Nations Unies. Lire également le principe 17 de la déclaration de Rio sur l'environnement et le développement : 'une étude d'impact sur l'environnement, en tant qu'instrument national, doit être entreprise dans le cas des activités envisagées qui risquent d'avoir des effets nocifs importants sur l'environnement et dépendent de la décision d'une autorité nationale compétente'.

71 *Velasquez Rodriguez* (Judgment) Inter-American Court of Human Rights series C 4 (29 July 1988).

72 Lire le dispositif de la décision de la Commission africaine dans l'affaire *SERAC*.

73 S Daventure, *Les limites à l'application du droit sur les ressources naturelles : le cas des territoires palestiniens et du Sahara occidental* (2006).

Il convient donc de se référer aux propos de Keba Mbaye qui s'exprime en ces termes : « Certes, généralement ce sont les Etats, représentants de ces entités souvent difficiles à déterminer, qui exercent les droits qui leurs sont reconnus. Mais cela n'enlève rien à la réalité juridique fondamentale. C'est bien aux peuples et aux nations que sont reconnus lesdits droits, souvent même à l'encontre de l'Etat ».[74] Ce postulat vient confirmer l'idée émise au départ, selon laquelle on a d'une part une entité (le peuple) qui a la jouissance d'un droit (la souveraineté sur les ressources naturelles), et d'autre part une autre entité (l'Etat) qui en a l'exercice. C'est de la combinaison de la capacité de jouissance du peuple et de la capacité d'exercice de l'Etat que la souveraineté sur les ressources naturelles devient effectivement un droit réel et mobilisable. Cette idée est parfaitement résumée par Marcel Sinkondo lorsqu'il affirme qu'« avec les Etats, sans les Etats et souvent contre eux – mais non sans l'inévitable recours à leur compétence exclusive de codification du droit, les peuples (…) font valoir avec plus ou moins de succès ou d'infortune, leur droit à la souveraineté (…) aux plans international et interne ».[75]

Cependant, il ne faut pas perdre de vue le fait que l'on est réellement titulaire d'un droit que si l'on a les moyens de veiller à sa mise en œuvre. Si le peuple n'a pas lui-même les moyens d'exercer directement le droit à la souveraineté sur les ressources naturelles, son exercice par l'Etat pourrait produire les effets pervers de la protection diplomatique lorsque les intérêts du peuple et ceux de l'Etat divergent. Tout en reconnaissant la place de ce mécanisme de protection des droits de l'homme, il faut relever que ce domaine du droit a la particularité de consacrer un *locus standi* à l'individu. Il faudrait donc que le peuple garde les moyens légaux lui permettant de veiller au bon exercice par l'Etat de la souveraineté sur les ressources naturelles, notamment en lui reconnaissant un *locus standi* devant les mécanismes de protection. Si la représentation du peuple ne pose aucune difficulté devant la Commission africaine, la défense de ses intérêts devant la Cour africaine va se confronter à la même difficulté que pour les individus, du fait de la condition d'acceptation préalable par les Etats de la compétence de la Cour en la matière.

74 Mbaye (n 2) 39.

75 Sinkondo (n 67) 311.

Part III: Africa and the challenge to international investment law

Troisième partie : L'Afrique et la remise en cause du droit international des investissements

8 The past, present and future of international investment law in Africa

Kehinde Folake Olaoye

> African history, the destiny of our peoples is being played out day by day. The life of a man is counted in decades, the life of Africa is endless. The path that Africa must take no limit; each generation receives from the past a heritage that it is duty bound to hand on enriched its turn. There is no doubt that our generation will count …
>
> Ahmed Sékou Touré (1963)[1]

1 Introduction: Wind of change and economic independence

After the end of World War II, a strong 'wind of change' spread through Asia and Africa.[2] Between 1951 and 1965, 38 African territories attained independence from European powers[3] with 17 African states gaining independence in 1960 alone.[4] Colonial powers realised that their imperial hold on the continent had to give way to gradual self-governance and recognition of self-determination.[5] However, self-governance in Africa was also to come at an expense for the 'coloniser'.[6] One of the immediate concerns for colonial powers was the demise of colonial economies that had functioned on the basis of international law 'geared towards maximum

1 African Union *Celebrating success: Africa's voice over 50 years 1963-2013* (2013) 48.

2 A Aguda 'The dynamics of international law and the need for an African approach' in K Ginther & W Benedek (eds) *New perspectives and conceptions of international law: An Afro-European dialogue* (1983) 8.

3 IL Head 'The alien's access to local remedies: The African commonwealth countries experience' (1967) 21 *Vanderbilt Law Review* 701.

4 FE Snyder & S Sathirathai 'Preface' in FE Snyder & S Sathirathai (eds) *Third World attitudes toward international law: An introduction* (1987) xi.

5 N Chukwuemeka 'International co-operation in Africa' (1951) 18 *Social Research* 55; JN Hyde 'Permanent sovereignty over natural wealth and resources' (1956) 50 *American Journal of International Law* 855; G Devernois 'The evolution of the Franco-African community' (1960) 10 *Civilisations* 89; B Marshall 'International law and politics in French Africa' (1960) 54 *Proceedings of the American Society of International Law at its Annual Meeting* 91.

6 MD McWilliam 'Economic problems during the transfer of power in Kenya' (1952) 18 *The World Today* 164.

economic benefit for the European state'.[7] Reflecting this change in political economy, international law scholars began to write on the influence newly-developed African states would have on established international law.[8] As territories in Africa gained partial or full independence, there were fears that the appearance of newly-independent nations 'would destroy the universality of international law'.[9] Some authors viewed the place of Africa with scepticism, while others expressed optimism that an African international law was emerging.[10]

One of the central issues that emerged after decolonisation was the legal problems of foreign investment and international law.[11] The nationalisation of foreign-owned companies became the nemesis of the 'coloniser'.[12] A burgeoning Cold War was the atmosphere in which African attitudes to foreign investment and international law began to emerge.[13] Unlike other questions of international law, such as the law of

7 OU Umozurike 'International law and colonialism in Africa: A critique' (1971) 3 *Zambia Law Journal* 98.

8 PC Jessup *The use of international law* (1959) 133; GM Abi-Saab 'The newly independent states and the scope of domestic jurisdiction' (1960) 54 *Proceedings of the American Society of International Law at its Annual Meeting* 87; LC Green 'The impact of the new states on international law' (1969) 4 *Israel Law Review* 27; OJ Lissitzyn 'International law in a divided world' (1963) 34 *International Conciliation* 37; M Sahovic 'Influence des États nouveaux sur la conception du Droit international : inventaire des positions et des problèmes' (1966) 12 *Annuaire Français de Droit International*; O Udokang 'The role of the new states in international law' (1971) 15 *Archiv des Völkerrechts* 145; M Sornarajah *The pursuit of nationalized property* (1986) 24.

9 Lissitzyn (n 8) 4.

10 AA Fatouros 'International law and the Third World' (1964) 50 *Virginia Law Review* 783 820; K Miles *The origins of international investment law: Empire, environment and the safeguarding of capital* (2013) 78.

11 FJ Pedler 'Foreign investment in West Africa' (1955) 31 *International Affairs* 459; EI Nwogugu *The legal problems of foreign investment in developing countries* (1965) 4; E Austin 'Protection of private property and investments of foreigners abroad: foreign investment laws of newly emerging nations' (1966) 12 *Howard Law Journal* 270; G Schwarzenberger 'Decolonisation and the protection of foreign investments' (1967) 20 *Current Legal Problems* 213; H Fox 'The settlement of disputes by peaceful means and the observance of international law: African attitudes' (1969) 3 *International Relations* 389; A Rafat 'Compensation for expropriated property in recent international law' (1969) 14 *Villanova Law Review* 200; TO Elias 'Foreign investments and international law' (1970) 4 *Nigerian Law Journal* 160.

12 AW Bradley 'Legal aspects of the nationalisations in Tanzania' (1967) 3 *East African Law Journal* 149 151; C Dias 'Tanzanian nationalisations: 1967-1970' (1970) 4 *Cornell International Law Journal* 59.

13 B Sen *A diplomat's handbook of international law and practice* (1965) 396; SKB Asante 'International law and investments' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 667 671; M Sornarajah *Resistance and change in the international law on foreign investment* (2015) 35.

succession,[14] boundary issues,[15] international law on the sea[16] and human rights, the economic dimensions of foreign investment raised difficult questions of international law on 'acquired interests'.[17] In 1956, Egyptian President Gamal Abdel Nasser announced the nationalisation of the Suez Canal company that had been operated as a joint British-French enterprise since 1869 through a decree.[18] Guinea's 1958 independence under Ahmed Sékou Touré ushered in radical discouragement of foreign investment and economic difficulties.[19] The United Nations (UN) became a battlefield for international law where the world was split along ideology and hemisphere.[20] During this decolonisation period, international law underwent significant changes and an international investment law began to emerge.[21]

Most of Africa has become fully independent, but many of the international economic law issues that emerged for the first time six decades ago remain highly relevant today.[22] These issues are not merely theoretical, but they are practical issues that remain embedded in the everyday lives of Africa's 1 216 billion inhabitants.[23] As many African states celebrated 60 years of self-governance in 2020, the international law of foreign investment provides an important context for examining the contributions of Africa to international law, and the place of Africa in a fast-evolving regime where politics and economics continue to shape the dynamics and functioning of law.

14 K Zemanek *State succession after decolonisation* (1965).

15 OA Cukwurah *The settlement of boundary disputes in international law* (1967).

16 N Rembe *Africa and the international law of the sea: A study of the contribution of the African states to the third United Nations conference on the law of the sea* (1980).

17 M Domke 'Foreign nationalisations: Some aspects of contemporary international law' (1961) 55 *American Journal of International Law* 585; Schwarzenberger (n 11) 215; P Lalive 'The doctrine of acquired rights' in M Bender (ed) *Rights and duties of private investors abroad* (1965) 145.

18 R Delson 'Nationalisation of the Suez Canal company: Issues of public and private international law' (1957) 57 *Columbia Law Review* 755; Abi-Saab (n 8) 89.

19 E Schmidt *Cold War and decolonisation in Guinea, 1946–1958* (2007) 172.

20 O Schachter 'Private foreign investment and international organisations' (1960) 45 *Cornell Law Quarterly* 415.

21 JH Jackson 'International economic problems and their management in the 21st century' (1979) 9 *Georgia Journal of International and Comparative Law* 497.

22 M Sornarajah 'The battle continues: Rebuilding empire through internationalization of contracts' in J von Bernstorff & P Dann (eds) *The battle for international law: South-north perspectives on the decolonisation era* (2019) 175 197.

23 African Union 'State of Africa's population' (2017), https://au.int/sites/default/files/newsevents/workingdocuments/32187-wd-state_of_africas_population_-_sa19093_-e.pdf (accessed 7 December 2020).

This chapter examines how African approaches to international investment law have evolved over the last six decades in tandem to 'world' political and economic events. These include decolonisation and the quest for self-determination after World War II; UN-based resolutions for permanent sovereignty over natural resources and a new international economic order in the 1960s and 1970s; the 1973 world oil crisis; the end of the Cold War in the 1990s; the 2008 global financial crisis and a multi-polar post-9/11 world. This chapter argues that these events have led to an accidental trajectory that has contributed to deeply-fragmented ideas on the form, structure, purpose and use of international law in Africa. Although African contributions to international investment law have been largely overlooked, this chapter repositions the importance of the continent.

The chapter is divided into three main parts: the past, the present and the future. These parts chronologically examine key developments in a historical, economic and political context.[24] This analysis reveals that even though it is difficult to identify a uniform intellectual movement on an African international investment law, the central concern for all scholars remains economic growth and development of the continent. Using a law and sociology approach, the chapter identifies the main strands of scholarship that have emerged over the last six decades. The chapter also examines the challenges of international investment law in Africa by amplifying the perspectives of a younger generation of international law scholars. Overall, the chapter argues that the future of international investment law in Africa rests on collaboration, dialogue, capacity, realism and impact-driven research. The chapter illustrates that the main hindrances to the future of international investment law are good governance and an overhaul of the current political class.

2 Ideological warfare and the sociology of international investment law

International investment law (IIL) has been described as one of the most controversial areas of international law.[25] This may partly be because it is a field of international law that remains central to post-colonial engagements

24 Udokang (n 8)147; K Yelpaala 'In search of a model investment law for Africa' (2006) 1 *African Development Bank Law for Development Review* 71.

25 SKB Asante 'International law and foreign investment: A reappraisal' (1988) 37 *International and Comparative Law Quarterly* 588 588; M Sornarajah *The international law on foreign investment* (2017) 14.

and struggles for economic determination.[26] Even though there are no agreed definitions, IIL may be defined as 'domestic and international principles and rules which govern the legal regime of investments carried out by nationals of a state in the territory of another state'.[27] It is a field of international law that can be defined on the basis of 'myriad sources and actors – treaties, custom, domestic laws and contracts; states, investors, arbitrators, international institutions, NGOs, and academics'.[28] IIL is the sum of rules and procedures that regulate relationships between host states and foreign investors. At the centre of these multiple norms is the right of non-state subjects (including state-owned enterprises) to institute claims against sovereign states before *ad hoc* arbitral tribunals.

Even though IIL may be described as a successful field of international law, it remains steeped in controversy, mystery, complexity and mythical illusions surrounding its theoretical foundations and practical implications.[29] Several legal theories can be applied to IIL, but one way to address the theoretical difficulties of IIL in the post-colonial state is to examine IIL as a sociological enterprise. This is because IIL is a perfect site for examining the dynamics of the sociology of legal knowledge[30] and the role of international lawyers.[31] Academic scholarship has shown that IIL is developed and interpreted by an investment arbitration community that influences the content of the law.[32] The earliest and most prominent of these studies was published by Garth and Dezalay in 1996.[33] Other studies

26 GM Abi-Saab 'The newly independent states and the rules of international law: An outline' (1962) 8 *Howard Law Journal* 95 113; S Pahuja *Decolonising international law: Development, economic growth and the politics of universality* (2011) 119; Sornarajah (n 23) 196.

27 P Juillard *L'évolution des sources du droit des investissements* (1994) 21.

28 J Pauwelyn 'Rational design or accidental evolution? The emergence of international investment law' in Z Douglas et al (eds) *The foundations of international investment law: Bringing theory into practice* (2014) 12 13.

29 JE Alvarez *The public international law regime governing international investment* (2011) 351.

30 M Reisman 'Forward' to G Wang *International investment law: A Chinese perspective* (2015) ix.

31 S Dezalay 'Professionals of international justice: From the shadow of state diplomacy to the pull of the market for commercial arbitration' in J d'Aspremont et al (eds) *International law as a profession* (2017) 311 328; CN Brower & D Litwin 'Navigating the judicialisation of international law in troubled waters: Some reflections on a generation of international lawyers' (2019) 37 *Berkley Journal of International Law* 171.

32 M Hirsch *Invitation to the sociology of international law* (2015) 142.

33 Y Dezalay & BG Garth *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order* (1996).

have argued that IIL is an epistemic community.[34] For example, using network analytics, a recent study maps the appointment of individuals to investment arbitration tribunals.[35] Methodologically, examining IIL as a sociological enterprise requires a full review of existing literature.[36] This is because IIL literature reminds us that

> [w]e must also acknowledge that IIL literature reflects both an evolution in the law itself and changes in the professional, political, and institutional practices and communities involved. The literature on international investment law thus is a reflection of the sociological dimension of a discipline that until recently was the province of a small group of specialists and now is rapidly moving mainstream.[37]

The IIL community is an 'invisible' community of smaller communities of arbitrators, lawyers, scholars, states and organisations who identify with different ideologies and take different stances.[38] The spheres of interaction include arbitral proceedings, conferences, protests, international law commission sessions, public consultations, blog posts, universities and treaty negotiations. As a member of the IIL community, an African scholar fulfils several functions and roles. These roles are performed in separate but overlapping functions. Dynamic relationships exist between these overlaps and because individuals are not immune, they are often guided by personal values and beliefs that function as social parameters.[39] An African international law intellectual may act as an arbitrator, as an adjudicator, as a teacher of law, as a 'highly-qualified' jurist, as a counsel, as a government official,[40] as a negotiator and as a legal consultant. For six generations of international law scholars, borrowing from Abi Saab, these roles may be described as choices between confrontation, participation, or operation behind enemy lines. Interestingly, Abi Saab has described

34 Miles (n 10) 291; A Kulick 'Narrating narratives of international investment law: History and epistemic forces' in SW Schill et al (eds) *International investment law and history* (2018) 41 48 .

35 S Puig 'Social capital in the arbitration market' (2014) 25 *European Journal of International Law* 387.

36 W Kidane 'Africa's international investment law regimes' (2020) *Oxford Bibliographies*.

37 SW Schill 'W(h)ither fragmentation? On the literature and sociology of international investment law' (2011) 22 *European Journal of International Law* 875.

38 A Roberts *Is international law international* (2017) 230.

39 E Gaillard 'Sociology of international arbitration' (2015) 31 *Arbitration International* 1 14.

40 G Abi-Saab 'The Third World intellectual in praxis: Confrontation, participation, or operation behind enemy lines?' (2016) 37 *Third World Quarterly* 1957 1967.

his personal encounters with international investment arbitration as 'operating behind the enemy lines'.[41]

A socio-legal analysis of IIL is important because, unlike other fields of international law, IIL has not developed solely through treaties and conventions. As a result of its highly-decentralised structure, and the social conditions in which it operates,[42] IIL has developed through arbitral decisions and the writings of highly-qualified publicists.[43] Even though article 38 of the Statute of the International Court of Justice (ICJ) recognises the writings of highly-qualified publicists as a source of international law, it has been argued that this is a weak source of international law developed in the interests of capital-importing states.[44]

In addition to several other reasons, one of the main criticisms of IIL is that 'from a sociological standpoint … [IIL] reflects a growing global class divide and the converging interests of an ascendant transnational capitalist class of the developed and third world nations in the era of neoliberal globalisation'.[45] This criticism of IIL can only be fully understood in the historical context of decolonisation. It thus is trite to describe IIL as follows:[46]

> An important part of the history of IIL is the technical and sociological process of its establishment as its own distinct professional specialization, a new 'field' of study and work. It has emerged in recent years as not merely a particular application of general rules of public international law or procedures for commercial dispute settlement, but as a new discipline requiring specialist (and expensive) knowledge and expertise, provided and supported by an 'epistemic community' with its own networks, conferences, and journals.

As the next part will illustrate, decolonisation in Africa was followed by fierce ideological battles between 'Western' publicists and 'non-Western'

41 Abi-Saab (n 40) 1969.

42 Abi-Saab (n 26) 95.

43 Abi-Saab (n 40) 1963; M Sornarajah 'The case against a regime on international investment' in L Trakman & N Ranieri (eds) *Regionalism in international investment law* (2013) 475 487; Y Radi *Rules and practices of international investment law and arbitration* (2020) 36.

44 M Sornarajah *The international law on foreign investment* (2004) 404.

45 BS Chimni 'Customary international law: A Third World perspective' (2018) 112 *American Journal of International Law* 1 33.

46 A Mills 'The balancing (and unbalancing?) of interests in international investment law and arbitration' in Z Douglas et al (eds) *The foundations of international investment law: Bringing theory into practice* (2014) 437 454.

publicists. Although some of these writings may have failed to crystallise immediately into international law, they form an important backdrop and have indeed formed the basis for formation of law and exchange of ideas in later years. It thus is important to examine if today's IIL has been influenced by African experiences.

Until a few years ago, it would have been difficult to identify an African international investment law community. Even though African states and scholars have played active and pivotal roles in the development of IIL, until recently these roles have not been fully acknowledged.[47] This may be because until decolonisation, Africans were not encouraged to study law.[48] However, as a need for 'capital economic growth for certainty and predictability (and the protection of foreign investments), the consolidation of land titles, and the structuring of new economic institutions increased',[49] there was an increasing need for African trained lawyers. The following parts identify main strands of African scholarship in the field of international investment law over the last six decades as a sociological enterprise.

3 The past

This subsection examines the first decades of international investment law in a decolonised Africa. It shows that this period was one of trial and error, characterised by acceptance, rejection and pragmatism.

3.1 Decolonisation and the emergence of international investment law (1960-1970)

Until the 1960s modern IIL was non-existent.[50] Rather, customary rules on international law protected the interests of alien property.[51] Foreign capital and property was promoted and protected by a patchwork of friendship and commerce agreements,[52] state contracts[53] and enforced primarily

47 *MM Mbengue 'Something ELSE: African discourses on ICSID and on ISDS: An introduction' (2019) 34 ICSID Review-Foreign Investment Law Journal 259* 263.

48 Y Ghai 'Law, development and African scholarship' (1987) 50 *Modern Law* 763.

49 As above.

50 J Baumgartner *Treaty shopping in international investment law* (2016) 44.

51 PC Jessup 'Responsibility of states for injuries to individuals' (1946) 46 *Columbia Law Review* 903.

52 KJ Vandevelde 'A brief history of international investment agreements' (2005) 12 *UC Davis Journal of International Law and Policy* 157.

53 C Veeser 'A forgotten instrument of global capitalism? International concessions, 1870-1930' (2013) 35 *International History Review* 1136.

through state-state dispute settlement.[54] Principles on state responsibility, which recognised the duty of states to protect the property of foreigners, had developed primarily in eighteenth and nineteenth century Europe and America.[55] Although these rules have evolved over two centuries of international law, the emergence of new states in the 1950s created great anxiety among international lawyers and colonial powers.[56]

In the immediate decolonisation era, the declaration of economic self-determination by newly-independent states emphasised the inadequacies of pre-existing rules on the protection of alien property.[57] There were also concerns about the distinct legal succession problems that would arise from concession agreements granted by the colonial powers.[58] These issues were critical to economic and political integration. African states declared their intention to encourage the investment of foreign capital provided that this did not compromise their independence, sovereignty and territorial integrity.[59] Notably, during the colonial period concessions had been granted to nationals of colonising powers. Upon decolonisation, African states sought to determine their economic affairs afresh. For example, during his speech at the inauguration of the Organisation for African Unity (OAU) in 1962, Gamal Abdel Nasser, the second President of Egypt (1954-1970) stated:

> We were surprised only months after its withdrawal from our land the first time in June 1956, to see it return to us once again in the form of total invasion on October 29th concentrating the forces of three countries alleging that our restoration of the Suez Canal and our removal of that monopoly remaining from the piracy of the nineteenth century, was a violation of international law and the sanctity of treaties. We had to carry arms once again reluctantly we carried arms in a battle imposed on us. Then came the Suez victory, victory

54 A Kaushal 'Revisiting history: How the past matters for the present backlash against the foreign investment regime' (2009) 50 *Harvard International Law Journal* 491 498.

55 C Lipson *Standing guard: Protecting foreign capital in the nineteenth and twentieth centuries* (1985) 12.

56 Lissitzyn (n 8) 41.

57 Hyde (n 5) 855; AA Fatouros 'An international code to protect private investment: Proposals and perspectives' (1961) 14 *University of Toronto Law Journal* 77 82.

58 TM Franck 'Some legal problems of becoming a new nation' (1965) 4 *Columbia Journal of Transnational Law* 13 21.

59 CA Johnson 'Conferences of independent African states international organisation' (1962) 16 *Africa and International Organization* 426; T Allen 'The law relating to private foreign investment in manufacturing in Botswana, Zambia and Zimbabwe' (1992) 4 *African Journal of International and Comparative Law* 44 45.

> for freedom in Africa and everywhere and a symbol of emancipation which heralded hope for numerous peoples in the struggling continent.

The Suez Canal crisis of 1956 was a turning point in international economic law history as it represented a bold attempt by a post-colonial government to revoke a colonial concession.[60] Upon decolonisation of African and Asian states in the 1950s and 1960s, the international law on foreign investment began to emerge. The main catalysts for this change were the desire by European states to build war-torn economies, quests for overseas capital by American corporations and an urgency for foreign capital in newly-independent African states.[61] There were also fears that an 'African socialism' would result in expropriation of foreign-owned property.[62] To facilitate overseas foreign investment flows, international lawyers and decision makers emphasised the need for more clearly-defined international law rules through bilateral and multilateral treaty commitments.[63] Even though post-independence constitutions and domestic investment codes recognised expropriation without compensation as unlawful, Western scholars considered these instruments insufficient.[64] Proposals for a multilateral foreign investment charter were revigorated through the ABs-Shawcross Draft Convention on Investments Abroad.[65] Although proposals for a multilateral investment code did not materialise, European states began to sign bilateral investment treaties (BITs) which were an important departure in international economic law relations of the previous decades.[66] Between 1959 and 1970, 54 BITs were signed between European states and African states on the basis of European treaty models.

60 W Friedmann 'Half a century of international law' (1964) 50 *Virginia Law Review* 1333 1345.

61 Abi-Saab (n 26) 100; AA Yusuf *Pan-Africanism and international law* (2014) 121.

62 Bradley (n 12) 149; W Friedman 'Legal problems in foreign investments' (1959) 14 *Business Law* 746.

63 Domke (n 17) 615; Fatouros (n 58) 77.

64 Domke (n 17) 592; K Ahooja 'Investment laws and regulations in Africa' (1964) 2 *Journal of Modern African Studies* 300.

65 AS Miller 'Protection of private foreign investment by multilateral convention' (1959) 53 *American Journal of International Law* 371.

66 AA Fatouros 'The quest for legal security of foreign investments: Latest developments' (1962) 17 *Rutgers Law Review* 257 262; R Preiswerk *La protection des investissements privés dans les traités bilatéraux* (1963).

The immediate decolonisation era was marked by other important international law events. Following a very successful Bandung Conference (1955),[67] the Asian-African Legal Consultative Committee (AALC) was established in 1958 as an advisory body of legal experts. In its early yearly sessions, the AALC took a stand that the relationship between foreign investors and states was subject to domestic law.[68] These sessions challenged Western notions on foreign investment protection and played a key role in projecting alternative views to international law.[69] One of the most significant international economic events of the 1960s was the 1962 United Nations (UN) General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (PSNR).[70] Newly-independent African states that now had equal voting power at the UN supported this Resolution.[71] This Resolution emerged in response to concerns over protection of foreign direct investment and economic development in developing countries.[72] For African countries, support for Resolution 1803 was aimed at ensuring that 'independence was not just an empty shell but a concrete attribute which would pave the way to economic development'.[73] Resolution 1803, which only very recently has been recognised as a principle of customary international law, enshrines adequate compensation for expropriation and exhaustion of local remedies/consent-based arbitration in disputes relating to compensation for expropriation.

The third key event of the 1960s was the establishment of the World Bank's International Centre for Settlement of Investment Disputes

67 A Chen 'A reflection on the south-south coalition in the last half century from the perspective of international economic law-making: From Bandung, Doha and Cancun to Hong Kong' (2006) 7 *Journal of World Investment and Trade* 201 203; D Lustig *Corporate regulation in international law: A history of failure?* (2020) 184. Egypt, Ethiopia, Gold Coast (Ghana), Liberia, Libya and Sudan participated in this landmark conference.

68 LC Green 'Asian African Legal Consultative Committee: Third session, Colombo, 1960' (1962) 25 *Modern Law Review*122 123; RJ Cummins 'Legal protection for foreign investment: Developing a flexible framework' (1968) 9 *Arizona Law Review* 404 409.

69 Asian-African Legal Consultative Committee 'Foreign investment laws and regulations of member countries' (1965).

70 SM Schwebel 'The story of the UN's declaration on permanent sovereignty over natural resources' (1963) 49 *American Bar Association Law Journa*l 463.

71 Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo, Dahomey (Benin), Ethiopia, Gabon, Guinea, Côte d'Ivoire, Liberia, Madagascar, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Upper Volta (Burkina Faso) and Togo.

72 N Schrijver *Sovereignty over natural resources: Balancing rights and duties* (1997) 1.

73 V Barral 'National sovereignty over natural resources, environmental challenges and sustainable development' in E Morgera & K Kulovesi (eds) *Research handbook on international law and natural resources* (2016) 1.

(ICSID). This was an important watershed moment in the modern development of international investment law.[74] Upon independence, many African states joined the International Bank for Reconstruction and Development (IBRD). These states provided the numbers required for ratification of the ICSID Convention.[75] During the regional meeting organised to promote the ICSID Convention in Addis Ababa, Ethiopia, Taslim Olawale Elias, who was Nigeria's Minister of Justice and Attorney-General (later president of the International Court of Justice) was one of the African legal experts who welcomed this new international law institution.[76] By the end of 1965, there were only 49 signatories to the ICSID Convention which included 23 African states.[77] The first 15 of the first 20 parties to the Convention were African states.

Other important events in the 1960s were the establishment of the United Nations Economic Commission for Africa and the OAU.[78] During this period IIL jurisprudence was at an embryonic stage and there were very few international investment arbitration disputes between foreign investors and African states.

74 G Delaume 'ICSID arbitration and the courts' (1983) 77 *American Journal of International Law* 784.

75 AR Parra 'The participation of African states in the making of the ICSID Convention' (2019) 34 *ICSID Review – Foreign Investment Law Journal* 271.

76 Parra (n 75) 271. Other experts who participated in the Addis Abba Meeting were Said Mohamed Ali (Somalia); Raymond Awoonor-Renner Expert (Sierra Leone); A Benani (Morocco); Estrada Bernard (Liberia); Jacques Bigay (Central African Republic); B B Bouiti (Congo-Brazzaville); R Brown(Tangayika); MT Diawara (Côte d'Ivoire); NM C Dodoo (Ghana); Osman El Tayeb (Sudan); A Foalem (Niger); Hedi Ghachem (Tunisia); Badr El Din Abo Ghazi (United Arab Republic); Abdul Rahaman Gulaid(Somalia); G Harelimana (Rwanda); L Hassouni (Morocco); C Johnson (Dahomey); S Kpognon (Dahomey); Ahmed Ben Lamin (Libya); S Laurent(Congo-Leopoldville); M Lemma (Ethiopia); E Lobel (Mali); B Macaulay (Sierra Leone); J Mallamud (Uganda); B Mankoubi (Togo); E Mayinguidi (Congo-Brazzaville); M Moalla (Tunisia); D Moignard (Senegal); Ahmed Mokadmy (Libya); Ali Mohsen Moustafa (United Arab Republic); PT Mpanjo (Cameroon); Sangare Nfaly (Guinea); NZ Nicayenzi (Burundi); P Nikiema (Upper Volta); A Ogbagzy (Ethiopia); PR Okpu (Nigeria); CCY Onny (Ghana); GU Osakwe (Nigeria); AO Ouma(Uganda); L Quashie (Togo); Mohamed Abdul Rahman (Ethiopia); N Ratsirahonana(Malagasy Republic); M Robinson (Malagasy Republic); D Sow (Senegal); S Traore (Mali); Soter Tsanga (Cameroon); and E Yossanengar (Chad).

77 Parra (n 75) 277.

78 B Boutros-Ghali 'The Addis Ababa charter: A commentary' (1964) 35 *International Conciliation* 5 18 (quoting Nkrumah: 'In dealing with a united Africa investors will no longer have to weigh with concern the risks of negotiating [at one period with governments which may not exist] in the very next period.'

3.1.1 The first generation of African international investment law scholarship

The political and economic climate examined in the previous subsection was the background against which the first generation of African international law scholarship began to emerge.[79] Until the 1960s, international law scholarship on foreign investment had been dominated by the writings of European and American publicists.[80] During the decolonisation era, non-African publicists declared that the recognition of acquired rights was a basic principle of international economic law recognised by the law of civilised nations.[81] They also argued that the concept of sanctity of contracts was universally acceptable under domestic and international legal order.[82] In the wake of expropriations and nationalisations, European scholars and lawyers declared that under international law, the legality of a nationalisation was subject to prompt, adequate and effective compensation defined as payment of the full value (market price) of the property.[83] These arguments were based on the doctrine of the minimum standard required under international law for the protection of foreigners and international standards governing state responsibility for the treatment of aliens. [84]

The first generation of IIL scholarship in Africa struggled to find a place in a field that was predominantly practised by selected European diplomats and government-appointed lawyers. Even though scholarship was dominated by European and American writers, young African

79 R Yakemtchouk 'L'Afrique en droit international' (1969) 7 *Cahiers économiques et sociaux* 383; D Thiam 'L'Afrique demande un droit international nouveau' (1968) 1 *Law and Politics in Africa, Asia and Latin America* 52; PF Gonidec 'Note sur le droit des conventions internationales en Afrique' (1964) 11 *Annuaire français de droit international* 866; Green (n 64)123; YZ Blum 'New nations and the law of nations international law: Indian courts and legislature' (1969) *17 American Journal of Comparative Law* 485 486; JHW Verzijl 'The present stagnation of interstate adjudication causes and possible remedies' (1963) 2 *International Relations* 479 490.

80 JF Williams 'International law and the property of aliens' (1928) 9 *British Yearbook of International Law* 1; EM Borchard 'Enemy private property' (1924) 18 *American Journal of International Law* 523; H Lauterpacht 'The Grotian tradition in international law' (1946) 23 *British Yearbook of International Law* 1.

81 Domke (n 17) 585.

82 RY Jennings 'State contracts in international law' (1961) 37 *British Yearbook of International Law* 56.

83 FG Dawson & BH Weston 'Prompt, adequate and effective: A universal standard of compensation' (1961) 30 *Fordham Law Review* 727.

84 F García-Amador 'State responsibility in the light of the new trends of international law' (1955) 49 *American Journal of International Law* 339.

scholars made very important contributions.[85] The most notable of these contributions was by a 29 year-old Egyptian Harvard student, Georges M Abi-Saab, in a '1962' essay on newly-independent states. In this essay he argued for the liquification of traditional rules of state responsibility, stating that it was necessary for 'newly-independent states to find ways and means to hold these rules in check'.[86] He rejected arguments that favoured direct access for individuals to international tribunals, arguing that economic disputes between states and foreigners were subject to local law and local dispute resolution mechanisms.[87] However, he recognised the importance of honouring investment agreements that had been negotiated between newly-developed states and European states on the basis of equality and mutual interest.[88] Abi-Saab argued that bilateral economic treaties were more favourable to the interests of newly-independent states than a multilateral convention.[89] He also favoured mediation and conciliation of disputes rather than institutionalised adjudication or compulsory arbitration.[90]

Legal scholarship that emerged during the first years of African independence was carried out by young African scholars who received education abroad and who were confronted by principles of international law.[91] In 1965 Nwogugu, a young Nigerian scholar, published a book based on a doctoral thesis on *The legal problems of foreign investment in developing countries* which he completed in 1963 at the University of Manchester, aged 30.[92] This was one of the earliest comprehensive books on the international law of foreign investment written by an African scholar. In this book Nwogugu adopted a pragmatic stance to established principles of international law, arguing that there was 'no valid legal justification for a state which enters into an investment agreement from which it obtains benefits, to repudiate its obligation by a claim of sovereign immunity'.[93]

In the first decade of African independence, one of the most crucial debates revolved around investment contracts. In 1967 a 27 year-old

85 Before this legal scholarship had focused on independence. See L Solanke *United West Africa at the bar of the family of nations* (1927).

86 Abi-Saab (n 26) 114.

87 Abi-Saab (n 26) 115.

88 Abi-Saab (n 26) 116.

89 As above.

90 Abi-Saab (n 26) 117.

91 Abi-Saab (n 26) 100.

92 EI Nwogugu 'Legal problems of foreign investments' (1976) 153 *Recueil des Cours* 174.

93 Nwogugu (n 11) 208.

Columbia University LLM graduate,[94] Frank Njenga, published one of the very few essays written by an African on the question of state contracts under international law. In this essay he stated that a 'so-called "community interest" in safeguarding the absolute security of investment, is like a partnership of the horse and the rider – the developing countries being in the former role'.[95] In another essay, Harvard-trained 30 year-old Ibrahim FI Shihata, who at the time was an international law lecturer in Cairo, argued that because international law principles of sovereignty and non-intervention were beneficial to interests of new African states, arguments that 'traditional international law was made for the European powers and the foreign traders and investors' were no longer relevant.[96]

Abi-Saab, Nwogugu, Shihata and Njenga represented a new generation of post-colonial African legal scholars. With the exception of Shihata, who is recognised as an important pillar of modern IIL, these young African men eventually had distinguished legal careers in other fields of international law. Abi-Saab would build a very illustrious career in human rights, sit as a judge *ad hoc* on the ICJ, as Chairperson of the Appellate Body, World Trade Organisation (WTO) and judge on the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[97] Much later, between 2005 and 2010, Abi-Saab was appointed as an arbitrator in key international investment law arbitrations instituted against Latin American states.[98] Nwogugu became a professor in Nigeria specialising in Nigerian family law[99] and the international law of nuclear energy.[100] Njenga, who is known as the father of the maritime concept

94 International Law Commission 'Forty-sixth session Geneva, 2 May-22 July 1994 Filling of Casual Vacancies, Note by the Secretariat Addendum' UN Doc A/CN.4/456/Add.2 (19 April 1994), https://legal.un.org/ilc/documentation/english/a_cn4_456_add2.pdf accessed (4 August 2020).

95 FX Njenga 'The legal regime of concession agreements' (1967) 3 *East African Law Journal* 105.

96 IF Shihata 'The attitude of new states toward the International Court of Justice' (1965) 19 *International Organisation* 217.

97 He has also served as a member of the administrative tribunal of the International Monetary Fund, as an arbitrator in various international arbitral tribunals, and as member and Chairperson of the Appellate Body of the World Trade Organisation.

98 *Abaclat & Others v Argentine Republic* ICSID Case ARB/07/5 (formerly *Giovanna a Beccara & Others v The Argentine Republic*) Dissenting Opinion to Decision on Jurisdiction and Admissibility (4 August 2011).

99 EI Nwogugu *Family law in Nigeria* (1990).

100 EI Nwogugu et al 'International law and nuclear energy: Overview of the legal framework' (1995) 37 *IAEA Bulletin* 16.

of the Exclusive Economic Zone (EEZ),[101] became secretary of the Asian-African Legal Consultative Committee and was Chairperson of negotiating group 77, group 2 during the Third United Nations Conference on the Law of the Sea. [102]

In addition to the scholarship of the young Africans examined above, the second group of international investment law scholars, which was older, had closer ties with the political class of the 1960s. The two most prominent of these scholars were Kéba M'Baye and Taslim Olawale Elias. Like most scholars of their generation, M'Baye and Elias originally were African law scholars.[103] However, in the next decades they would make important contributions to African international investment law. Elias was 49 years old when he led the Nigerian delegation to the 1963 ICSID Regional Meeting held in Addis Ababa. In the same year, M'Baye was appointed under Léopold Sédar Senghor as president of the Supreme Court of Senegal in 1963 at the age of 39 years. One of M'Baye's earliest articles examined foreign capital, law and development in French West Africa.[104]

Another author, Salah-Eldin Abdel-Wahab, who was a district attorney and judge of the United Arab Republic (Egypt) argued that a state did not violate its contractual obligations when it nationalised a foreign investor's property for national interests.[105] He also argued that partial compensation covering a major part of the investor's losses was reasonable compensation.[106] Overall, the first generation of African international investment law scholarship was contributory in nature. With the exception of a few scholars, most writers focused only on describing the law as it was.

By the end of the 1960s, African legal scholarship began to take a shape of its own and could be distinguished from scholarship by Asian authors and authors from other developing countries. Reflecting this new scholarly movement, in 1967 a conference on International Law and

101 TO Akintoba *African states and contemporary international law: A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (1996) 72.

102 United States Congress House 'The Status of the Third United Nations Conference on the Law of the Sea: Hearing before the Committee on Foreign Affairs, House of Representatives, Ninety-sixth Congress, First Session, 16 May 1979' (1979) 53.

103 See TO Elias *The nature of African customary law* (1956); Elias (n 11) 160.

104 K M'Baye 'Droit et développement en Afrique francophone de l'ouest' (1967) 1 *Revue sénégalaise de droit* at 23.

105 S Abdel-Wahab 'Economic development agreements and nationalisation' (1961) 30 *University of Cincinnati Law Review* 436.

106 Abdel-Wahab (n 105) 444.

African Problems was held in Lagos, Nigeria supported by the Carnegie Endowment for International Peace.[107] One of the key issues examined during this conference was the treatment of aliens in Africa. A shift from Afro-Asian attitudes to African international law was aslo exemplified in seminal generalist works by Taslim Olawale Elias and Joseph-Marie Bipoun-Woum.[108] Even though the OAU had placed an emphasis on economic integration, more emphasis was placed on political integration of the continent. Kidane rightly notes that in the immediate post-colonial decades, Africans were preoccupied with the serious task of nation building as a matter of priority, and while scholars focused on questions such as human rights and international criminal law, less emphasis was placed on the study of international economic law.[109] This may be one reason why the first generation failed in its modest attempts to change traditional rules of international investment law.

3.1.2 A new 'African' international economic order (1970-1989)

The 1960s era of decolonisation and urgency for foreign capital took a new turn in the 1970s.[110] Disillusionment after independence, military *coups*, conflicts and economic problems were rife in most African states. Several governments introduced restrictive investment laws and indigenisation policies that aimed at promoting local ownership of economic activities.[111] This was followed by major expropriations in Algeria, Libya, Nigeria, Somalia, Sudan, Tanzania, Uganda and the United Arab Republic.[112] At the UN, developing countries sought a new international economic order (NIEO) based on principles of self-determination and economic development.[113] The NIEO was moved by Algeria when it hosted the fourth

107 J Spencer 'International law and African problems: African conference, Lagos, 14-18 March 1967 under joint auspices of the Nigerian Institute of International Affairs and the Carnegie Endowment for International Peace' (1962) 63 *American Journal of International Law* 373.

108 J Bipoun-Woum *Le Droit international Africain : problèmes généraux règlement des conflits* (1970).

109 W Kidane 'The culture of investment arbitration: An African perspective' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 413.

110 J Duru 'Proceedings: Expropriation regional conference American Society of International Law' (1972) 2 *Denver Journal International Law and Policy* 125.

111 Yelpaala (n 25) 29.

112 FJ Truitt 'Expropriation of foreign investment: Summary of the post-World War II experience of American and British investors in the less developed countries' (1970) 1 *Journal of International Business Studies* 21 27; WG Haight 'Libyan nationalisation of British Petroleum Company assets' (1972) 6 *International Lawyer* 54.1

113 Umozurike (n 7) 79.

non-aligned conference in 1973.[114] The group of Third World states at the UN, led by the Organisation of Petroleum Exporting Countries (OPEC), also caused a system-wide international economic and political crisis,[115] which is generally known as the beginning of the NIEO.[116] The 1974 UN Charter of Economic Rights and Duties of States was an integral part of the resolutions entitled the New International Economic Order and the Programme of Action.[117] Even though the Charter of Economic Rights and Duties of States was first proposed by President Luis Echeverría of Mexico, the draft resolution for adoption of the Charter was introduced by Ethiopia on behalf of the Group of 77.[118]

Many African states incorporated provisions of the NIEO on economic and political independence of states, permanent sovereignty over natural resources, and nationalisation subject to national laws, regulation of foreign investments and the activities of multinationals in domestic legislation.[119] The NIEO also gave birth to a law and development movement and declaration of development as a human right. The Declaration on the Establishment of a New International Economic Order recognised nationalisation as a sovereign right and provided that disputes over compensation had to be solved in accordance with the domestic laws of every country.[120] However, it recognised the right of states to conclude agreements in free exercise of their sovereign will.[121] The Economic Charter also recognised the right of states to expropriate foreign-owned property, and a duty to provide compensation taking into account relevant laws and regulations. Notably, the Charter provides that disputes over compensation shall be settled under the domestic law of the

114 NS Rembe 'Prospects for the realisation of the new international economic order: An African perspective' (1984) 17 *Comparative and International Law Journal of Southern Africa* 322 326.

115 VN Fru *The international law on foreign investments and host economies in sub-Saharan Africa: Cameroon, Nigeria, and Kenya* (2011) 37.

116 B Rajagopal *International law from below: Development, social movements and Third World resistance* (2003) 77.

117 SK Chatterjee 'The Charter of Economic Rights and Duties of States: An evaluation after 15 years' (1991) 40 *International and Comparative Law Quarterly* 669 672.

118 United Nations Audiovisual Library of International Law 'General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States' https://legal.un.org/avl/pdf/ha/cerds/cerds_ph_e.pdf (accessed 15 December 2020).

119 Rembe (n 114) 332.

120 *Texaco Overseas Petroleum Co and California Asiatic Oil Company v Libya* Award (19 January 1977) para 90; EJ de Arechega 'Application of the rules of state responsibility for the nationalisation of foreign-owned property' in K Hossain (ed) *Legal aspects of the new international economic order* (1980) 220.

121 UN General Assembly, 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, 1 May 1994, A/RES/3201(S-VI) art 4(e)(iii).

nationalising state and by its tribunals except where states agreed to settle the dispute by any other peaceful means.[122] The NIEO UN resolutions were strongly criticised by scholars from developed countries.[123] As nationalisation became common place, issues concerning the exhaustion of local remedies, breaches of concession agreements and stabilisation clauses were at the centre of academic legal debates.[124] During this period 91 bilateral investment agreements were signed by African states. Unlike the treaties signed between 1959 and 1969, a number of these treaties were signed with states from other developing countries. Reflecting a position that favoured regulation of foreign investment by domestic law, changes were made to domestic law, and regional economic communities (RECs) were established. A few very important investment arbitration disputes occurred during this period.

3.2 A 'newer' generation of African international investment law scholarship

The New International Economic Order movement heralded a newer generation of African international investment law scholarship. Some of these scholars were actively engaged in this movement and they expressed optimism that traditional rules of international law on trade and investment would change. For some of these scholars, these rules had to be rejected because they had been developed for the subjugation of African states for European interests.[125] They believed in a new order in which 'international trade, investment and foreign aid must be made to resonate with the objectives of self-sufficiency and economic self-determination'.[126] For example, Elias argued that customary international law on the treatment of alien property was bound to transform in a manner 'calculated to serve the evolving international community in the foreseeable future'.[127] Asante argued for the formulation of a new set of norms with respect to foreign companies that would give developing countries equal participation.[128] Dr Andronico Adede, who was a founding member of the African Society

122 UN General Assembly, Charter of Economic Rights and Duties of States: Resolution adopted by the General Assembly, 17 December 1984, A/RES/39/163 art 2(c).

123 Haight (n 112) 591.

124 HJ Richardson II 'Reflections on education in international law in Africa' (1974) 4 *Denver Journal of International Law and Policy* 199 211.

125 A Mahiou 'Les implications du nouvel ordre économique et le droit international' (1976) 12 *Belgian Review of International Law* 445.

126 RN Kiwanuka 'The thirteenth UN General Assembly special session: Lessons for Africa' (1987) 21 *Journal of World Trade Law* 78.

127 TO Elias 'New perspectives and conceptions in contemporary public international law' (1981) 10 *Denver Journal of International Law and Policy* 409 423.

128 Asante (n 26) 627.

of International Law, argued that the old order was changing and that change would be coherent and deliberate.[129] He argued that

> [d]eveloping countries' attack upon the traditional law of diplomatic protection in cases of expropriation may not be seen as a position which is inconsistent with the legitimate desire of encouraging foreign private investments. A new atmosphere is being established redefining the relationship between the owners of the natural resources and the Transnational Corporations (TNC) which exploit such resources.[130]

During this period, African scholars wrote important dissertations and gave courses at the Hague Academy of International law.[131] Notably, in 1979 Mohammed Bedjaoui published a seminal text titled *Towards a new international economic order* under the direction of the *United Nations Educational, Scientific and Cultural Organisation* (UNESCO). Bedjaoui had been the first Secretary-General of the newly-independent Algerian government, and Minister of Justice. Kéba M'Baye also played a pivotal role in articulating the right to economic development which he argued was the corollary of the right of peoples to self-determination.[132] M'Baye also argued that the harmonisation of investment laws in Africa was a major priority that would lead to legal certainty.[133] Another African, Samuel SKB Asante, was one of the prominent African scholars of this era. In 1977, at the age of 44,[134] he was appointed by Klaus Sahlgren as Chief Legal Adviser of the United Nations Centre on Transnational Corporations (UNCTC).[135] Asante, who had completed a JSD in law at

129 AO Adede 'International law and property of aliens: The old order changeth' (1977) 19 *Malaya Law Review*175 191.

130 Adede (n 129) 192.

131 OC Eze 'The legal status of foreign investments in the East African common market' unpublished PhD thesis, The Graduate Institute Geneva, 1975; Nwogugu (n 87) 174; DA Ijalaye 'Indigenisation measures and multinational corporations in Africa' (1981) 171 *Recueil des Cours, de l'Académie de Droit International* 9; AO Adede *Legal trends in international lending and investment in the developing countries* (1984).

132 K M'Baye 'Voie africaine du socialisme et propriété' (1975) *Éthiopiques : revue socialiste de culture négro-africaine* 1 39; K M'baye 'Développement et sociétés le droit au développement' (1980) 21 *Éthiopiques : revue socialiste de culture négro-africaine* 1.

133 K M'Baye 'L'harmonisation du droit privé et du droit international privé en matière commerciale dans les États de l'Afrique occidentale, équatoriale et orientale' (1971) 26 *Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente* 139 149.

134 'Profile of Samuel KB Asante' https://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/asante-samuelkb.pdf (accessed 4 August 2020).

135 T Sagafi-nejad & JH Dunning *UN and transnational corporations: From code of conduct to global compact* (2008) 93 (noting that Asante's appointment was one of the two most influential appointments).

Yale in 1968 at the age of 35, called for a reappraisal of foreign investment international law. He argued that developing states had the sovereign inherent right to nationalise foreign property and that this right was only subject to payment of 'appropriate compensation'. He also argued that state contracts could be unilaterally modified by states in the public interest. Asante also argued that a host state had no obligation to give special treatment to foreign investors.[136] Samuel Kofi Date-Bah, a 28-year-old African scholar, who later became a Supreme Court judge in Ghana, argued that public international law should play a subsidiary role and that municipal law of host states should be developed to achieve fairness to foreign investors.[137] Adopting similar arguments, Adede argued that a modern rule of exhaustion of local remedies could play an important role in redressing the unbalanced relationship between developed and developing states.[138]

Some scholars who emerged during the second decade of Africa's independence were more accepting of established international law on foreign investment, recognising that some rules of international law were beneficial to the interests of African states. As Abi-Saab has stated more recently, even though newly-independent states contested the universality of international law, they 'claimed the right to pick and choose the rules that apply to them, in a voluntarist attitude'.[139] For example, David Ijalaye, who completed a JSD at Columbia under the supervision of Friedmann, aligned with a position that development agreements were subject to international law as these agreements involved state parties.[140] Umozurike, who is known for his research on self-determination and human rights, represented a middle ground arguing that while there was an inherent danger in a state's economy being dominated by aliens, respect for *pacta sunt servanda* was imperative.[141] He argued that it was wrong to imply that principles of nationalisation were created by imperialist states, favouring a principle of reasonable compensation that would depend on the circumstances of each case.[142]

136 Asante (n 25) 595.

137 SK Date-Bah 'The legal regime of transnational investment agreements that is most compatible with both the encouragement of foreign investors and the achievement of the legitimate national goals of host states' (1971) 15 *Journal of African Law* 241 248.

138 AO Adede 'A survey of treaty provisions on the rule of exhaustion of local remedies' (1977) 18 *Harvard International Law Journal* 117.

139 Abi-Saab (n 41) 1959.

140 DA Ijalaye *The extension of corporate personality in international law* (1978) 242.

141 Umozurike (n 7) 97.

142 Umozurike (n 7) 96.

Some other African scholars, mostly international relations experts, were very sceptical of the NIEO. They were convinced that the attitude of the newly-developing states to international law was primarily driven by 'narrow political ideologies and economic sympathies to assert equality as a fact rather than a relative concept, and justice as an attainable value'.[143] Reflecting similar fears, Adeoye Adesanya, a political scientist who frequently wrote on foreign investment in Africa in legal periodicals,[144] described the NIEO as a 'bad omen for foreign investment in the Third World'.[145] Elias, who had been elevated to the International Court of Justice, argued that the most important guarantees African states could give to foreign investors was not liberal investment laws but political stability and abundant natural resources.[146] Elias also argued that the incessant nationalisation of foreign enterprises would still scare off investors even where there were guarantees of adequate compensation.[147]

One of the central issues that emerged in legal scholarship between 1970 and 1989 was the involvement of African states in international arbitration.[148] Even though the ICSID Convention had been in force for years, ICSID became more active in the 1980s under the direction of Ibrahim Shihata (Egypt).[149] The first disputes instituted at ICSID were instituted mostly against African states and this resulted in negative perceptions towards international arbitration.[150] Even though the NIEO embodied settlement of disputes in national courts, African states signed investment contracts that recognised the jurisdiction of international tribunals. Some scholars embraced ICSID while others viewed the ICSID Convention as detrimental to the interests of developing states.

143 Udokang (n 8) 174.

144 A Akinsanya 'International protection of direct foreign investments in the Third World' (1987) 36 *International and Comparative Law Quarterly* 58; A Akinsanya & A Davies 'Third World quest for a new international economic order: An overview' (1984) 33 *International and Comparative Law Quarterly* 208; A Akinsanya 'Host governments' responses to foreign economic control: The experiences of selected African countries' (1981) 30 *International and Comparative Law Quarterly* 769.

145 A Akinsanya 'Permanent sovereignty over natural resources and the future of foreign investment' (1980) 22 *Journal of the Indian Law Institute* 466 475.

146 TO Elias *Africa and the development of international law* (1988) 241.

147 As above.

148 K M'baye 'Commentary' in ICC *ICC Court of Arbitration 60th anniversary: A look at the future* (1984) 293 296; J Paulsson 'Third World participation in international investment arbitration' (1987) 2 *ICSID Review* 19.

149 AR Parra *The history of ICSID* (2012) 42.

150 *Holiday Inns SA & Others v Morocco* ICSID Case ARB/72/1; *Adriano Gardella SpA v Côte d'Ivoire* ICSID Case ARB/74/1; *AGIP SpA v People's Republic of the Congo* ICSID Case ARB/77/1; *SARL Benvenuti & Bonfant People's Republic of the Congo* ICSID Case ARB/77/2; *Guadalupe Gas Products Corporation v Nigeria* ICSID Case ARB/78/1.

For example, Elias argued that even though the ICSID Convention was far from perfect, it would go a long way towards improving the climate of foreign private investment in Africa.[151] Some scholars believed that ICSID was an institution that 'African states ought to call their own and have confidence in to settle their investment disputes'.[152] Peter Mutharika (Malawi), who had just completed a JSD at Yale aged 32, argued that parties to the ICSID Convention were better positioned to attract foreign investment at the expense of a state that is not party to the Convention.[153] Other scholars argued that African courts were unsuitable for settling investment disputes because they could be influenced by pressure from African governments.[154] African perspectives on international investment law began to emerge in the decisions of arbitral tribunals, notably in dissenting opinions made by some prominent first generation African scholars.[155]

By the end of the 1980s, African scholars were faced with the reality that changing old rules of international law would not be very easy especially as there were frictions within their political and economic classes. Yelpaala has rightly stated that investment legislation of the NIEO era failed to achieve desired economic independence and equity.[156] Even though the NIEO began to disappear from international and academic discourse,[157] scholars such as Abdulqawi A Yusuf argued that UN resolutions on permanent sovereignty over natural resources and the NIEO were not merely political resolutions, but resolutions that would over time have legal significance.[158] Some scholars continued to argue that international law principles were not acceptable as they had been

151 Elias (n 135) 246.

152 AA Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177 183.

153 P Mutharika 'Treaty acceptance in the African states' (1973) 3 *Denver Journal of International Law and Policy* 185 195.

154 AA Agyemang 'African courts, the settlement of investment disputes and the enforcement of awards' (1989) 33 *Journal of African Law* 31 43.

155 *Société Ouest Africaine des Bétons Industriels v Senegal* ICSID Case ARB/82/1 Dissenting Opinion of Kéba M'baye (25 February 1988); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case ARB/84/3 (20 May 1990) Dissenting Opinion of Mohamed El Mahdi; *Asian Agricultural Products Ltd v Republic of Sri Lanka* ICSID Case ARB/87/3 Dissenting Opinion of Samuel K B Asante (15 June 1990).

156 Yelpaala (n 25) 16.

157 Yelpaala (n 25) 16.

158 AA Yusuf *Legal aspects of trade preferences for developing states: A study in the influence of development needs on the evolution of international law* (1982) 78; MB Kumuwanga 'The teaching of international trade and investment law in a law and development context: A view from Zambia the application of law and development theories: Some case studies' (1987) 1 *Third World Legal Studies* 131 142.

developed without the consent and participation of African states.[159] Other scholars embraced the idea of liberal systems to foreign investors.[160] In 1986 the African Association of International Law was established to 'foster the development and dissemination of African perspectives and practices of international law'.[161]

3.3 Neo-liberalism and the emergence of a global investment law regime (1990-2010)

In the 1980s sub-Saharan Africa faced a serious economic crisis[162] described by some scholars as the 'decade of greed'.[163] The dawn of hope and independence of the 1960s, which had been followed by the commodity price boom of the 1970s,[164] was soon replaced by the debt crisis and the pro-market ideological shift of the 1980s.[165] This resulted in a major shift towards policy-based lending-structural and sector adjustment lending measures introduced by the World Bank group.[166] The Multilateral Investment Guarantee Agency (MIGA) was established in 1988 under the leadership of Ibrahim Shihata to provide guarantees against various types of non-commercial risks faced by foreign private investors in developing countries. By the 1990s, with the impending decline of Soviet power, many African states turned to the World Bank for development assistance, which had changed from project-specific financing to assistance dependent on policy and legal reform.[167] With the end of the Cold War, economic

159 Abi-Saab (n 41) 1959.

160 CN Ngwasiri 'The effect of legislation on foreign investment: The case of Cameroon' (1989) 33 *Journal of African Law* 192 204.

161 'African Association of International Law/*Association Africaine De Droit International*' (1987) 20 *Law and Politics in Africa, Asia and Latin America* 301-302.

162 OO Akinla 'Economic reform in sub-Saharan Africa: The changing business and legal environment' (1987) 7 *Boston College Third World Law Journal* 19 20; M Ndulo 'Harmonisation of trade laws in the African economic community (1993) 42 *International and Comparative Law Quarterly* 101.

163 TWälde 'A requiem for the "new international economic order": The rise and fall of paradigms in international economic law' in NM Al-Nauimi & R Meese (eds) *International legal issues arising under the United Nations decade of international law* (1995) 1301 1333.

164 IFI Shihata 'Destination embargo of Arab oil: Its legality under international law' (1974) 68 *American Journal of International Law* 591.

165 MG Desta 'Competition for natural resources and international investment law: Analysis from the perspective of Africa' (2016) *Ethiopian Yearbook of International Law* 117 148.

166 PW Ofosu-Amaah *Reforming business-related laws to promote private sector development: The World Bank experience in Africa* (2000) 23.

167 DP Fidler 'A kinder, gentler system of capitulations: International law, structural adjustment policies, and the standard of liberal, globalised civilisation' (2000) 35 *Texas*

nationalism was replaced by a new regime based on adoption of a free market philosophy in which the private sector played an active role both in investment and development.[168]

The liberalisation of foreign direct investment also led African states to negotiate an increasing number of bilateral investment and avoidance of double taxation treaties.[169] In 1992 the Guidelines on Foreign Investment were formulated by the World Bank.[170] Ibrahim Shihata, who was the founder of the OPEC Fund and Senior Vice-President and General Counsel at the World Bank from 1983 to 1998, played an important role in the 'depoliticisation' of international investment law and in the formulation of these guidelines.[171] Mohamed Ibrahim Khalil, who was the first dean of law at the University of Khartoum and former speaker of the Sudan Parliament, was one of the individuals who was carefully selected by Shihata to conduct a survey with Rudolf Dolzer which formed the background to the 1992 World Bank Guidelines of Foreign Investment.[172] During his tenure, Shihata appointed distinguished Africans such as Kéba M'Baye to ICSID *ad hoc* committees, which was a deliberate decision to promote consistency in the jurisprudence and create more geographically-balanced panels.[173] While to some Shihata must have represented American hegemony and 'neo-colonisation' of the Third World,[174] he pursued his activities with great passion. Reflecting on his time at the World Bank, he would later state that he had acted as the spokesman for the law as he understood it, and that this was not based on personal preferences but on research. He was fully aware that this was a choice between being popular and being credible.[175]

After the 1990s there was a proliferation of international investment agreements. Between 1990 and 2010 almost 700 bilateral investment

International Law Journal 387 404.

168 F El Rahman & A El Sheikh *The legal regime of foreign private investment in Sudan and Saudi Arabia* (2003) 5; Sornarajah (n 13) 10.

169 El Rahman & El Sheikh (n 168) 6; A de Nanteuil *International investment law* (2020) 33.

170 IFI Shihata *Legal treatment of foreign investment: The World Bank guidelines* (1993).

171 World Bank Legal Vice Presidency 'Ibrahim I Shihata: Senior Vice President and General Counsel of the World Bank 1983-1998 '(2019) http://documents1.worldbank.org/curated/en/266821572449833340/pdf/Ibrahim-F-I-Shihata-Senior-Vice-President-and-General-Counsel-of-the-World-Bank-1983-1998.pdf (accessed 4 August 2020).

172 Shihata (n 171) 47.

173 Parra (n 150) 172.

174 Rajagopal (n 117) 121.

175 World Bank Archives 'Transcript of oral history interview with Ibrahim F I Shihata' (23-24 May 2000).

treaties were signed by African states. Many of these agreements took a path that was different from the principles embodied in the NIEO principles and were based on European or American treaty models. These treaties provided for international arbitration without the requirement to exhaust local remedies; they attached treatment of foreigners to a minimum standard of treatment under customary international law and provided that parties could not derogate from their obligations. Even though the African Union (AU) was established to replace the OAU in 2000, full integration of investment rules remained minimal. In 2003 a model law on investment law in Africa was drafted but this faced difficulties. Several disputes were instituted at ICSID by foreign investors from developed countries against African states. At the global level, the economic crisis of 2008 contributed to a 'backlash' in the international investment law regime.[176]

3.4 New African approaches to international law

African scholarship that emerged in the 1990s and 2000s was very different from the scholarship that had emerged in the preceding decades. It was diverse, rich and more specialised. More African scholars studied IIL as an advanced subject and there were more doctoral dissertations on the subject. Some of the scholars who had written in previous years began to reflect on the paucity of African solutions to African problems. There were renewed calls for African solutions to international trade and investment problems.[177] Notably, in 1997 a group of scholars declared a treatise of African international law, which identified international economic law (investments, international contracts, nationalisations and privatisations) as one of the most important fields of African international law.[178] However, as in preceding decades, there still was no deliberate or uniform African international law position on international investment law.[179]

Scholarship became more critical and reflexive. Some scholars began to address the expropriation of alien property without prompt, adequate and effective compensation by dictatorial regimes, arguing that this was

176 Abi-Saab (n 41) 1961.

177 AO Adede 'Africa in international law: Key issues of the second millennium and likely trends in the third millennium' (2000) 10 *Transnational Law and Cotemporary Problems* 351 357.

178 P Gonidec 'Existe-il un droit international Africain' (1993) 5 *African Journal of International and Comparative Law* 243; P Gonidec 'Towards a treatise of African international law' (1997) 9 *African Journal of International and Comparative Law* 807 814.

179 Yelpaala (n 25) 59.

inimical to a minimum world order.[180] It was argued that the 'approach-and-avoidance' attitude toward foreign direct investment (FDI) was a mishmash of incentives and disincentives, which often was internally inconsistent.[181] As a new millennium beckoned, African scholars recognised that there was an irreconcilable conflict between economic nationalism and the need for foreign investment.[182] Scholarship showed that political and economic instability had weakened Africa's negotiating power with foreign investors and that, unless this was addressed, Africa would remain underdeveloped.[183] Other scholars began to focus on the need for regional integration noting that to promote foreign capital, African states must create large internal markets.[184]

The late 1990s gave birth to alternative African approaches to international law, and the Third World Approaches to International Law (TWAIL) movement was created among young African scholars studying in the United States of America. These scholars expressed dissatisfaction with what they considered to be 'contributionist, non-confrontational and non-critical' legal scholarship of 'elite' law scholars of previous generations.[185] For example, in a review of the scholarship of TO Elias, James Thuo Gathii, who is a founder of the TWAIL movement, has argued that Elias underemphasised the role of international law in the colonial encounter and that his contributions failed to examine the role of international law in the economic and political subjugation of Africa.[186] Even though TWAIL scholarship is full of 'blind spots', it has sought to uncover the role of international law in what is considered to be deeply-ingrained biases and injustices in the rules and institutions of

180 E Kwakwa 'Emerging international development law and traditional international law – Congruence or cleavage' (1987) 7 *Georgia Journal of International and Comparative Law* 431 454.

181 K Ndiva 'The political economy of foreign direct investment: A framework for analysing investment laws and regulations in developing countries' (1992) 23 *Law and Policy in International Business* 619 625.

182 T Allen 'The law relating to private foreign investment in manufacturing in Botswana, Zambia and Zimbabwe' (1992) 4 *African Journal of International and Comparative Law* 44 81.

183 AA Agyemang 'Protecting natural resource contracts from national measures in Africa: Some comparisons with the Australian experience' (1992) 25 *Comparative and International Law Journal of Southern Africa* 273 292.

184 PA Mutharika 'The role of international law in the twenty-first century: An African perspective' (1994) 18 *Fordham International Law Journal* 1706 1716.

185 JT Gathii 'TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3 *Trade Law and Development* 26 39.

186 JT Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International* 317 323.

the international legal system.[187] These scholars argue that BITs facilitated foreign investment to increase productivity in developing countries without simultaneously addressing whether such investment indeed works to increase productivity or even to promote equitable distribution of wealth.[188] They also argue that transnational corporations and multilateral institutions exploit Third World states to escape accountability through investment agreements that disregard the environment and erode the rights of workers.[189] Although these claims underemphasise the role of Africa's political class in 'under-developing Africa', TWAIL has successfully provided alternative approaches to tradition Eurocentric international investment law.

As in the preceding decades, African involvement in international investment arbitration disputes was a major concern for scholars. Increasing international arbitration cases led scholars to focus attention on African states and investment arbitration.[190] Even though these studies focused on 'commercial arbitration', they examined the involvement of African states in investment arbitration. After the 1990 decision in *AAIL v Sri Lanka*, investment treaty arbitration became more common.[191] Some scholars argued for the primacy of domestic law over international law in oil investment disputes.[192] Other authors argued that investment arbitration was tilted in favour of foreign investors [193] and criticised

187 Abi-Saab (n 41) 1958.

188 JT Gathii 'Foreword: Alternative and critical: The contribution of research and scholarship on developing countries to international legal theory' (2000) 41 *Harvard International Law Journal* 263 267.

189 M Mutua 'Critical race theory and international law: The view of an insider-outsider' (2000) 45 *Villanova Law Review* 841 851.

190 S Sempasa 'Obstacles to international commercial arbitration in African countries' (1992) 41 *International and Comparative Law Quarterly* 387 402; L Atsegbu 'International arbitration of oil investment disputes: The severability doctrine and applicable law issues revisited' (1993) 5 *African Journal of International and Comparative Law* 634 634; SKB Asante 'The perspectives of African countries on international commercial arbitration' (1993) 6 *Leiden Journal of International Law* 331; VC Igbokwe 'Developing countries and the law applicable to international arbitration of oil investment disputes: Has the last word been said' (1997) 14 *Journal of International Arbitration* 99; KK Mwenda & NG Goblr 'International commercial arbitration and the international centre for settlement of investment disputes' (1998) 30 *Zambia Law Journal* 91; AA Shalakany 'Arbitration and the Third World: A plea for reassessing bias under the specter of neoliberalism' (2000) 41 *Harvard Journal of International Law* 419; AA Asouzu *International commercial arbitration and African states: Practice, participation and institutional development* (2001).

191 AS El-Kosheri 'ICSID arbitration and developing countries' (1993) 8 *ICSID Review* 104.

192 Atsegbua (n 176) 660.

193 Abi-Saab (n 41) 1969.

African scholarship that exposed the inadequacy of African courts for settling investment disputes.[194]

By the end of the 2000s, African scholars were faced with the harsh reality that even though the legal regime for foreign investment had become more liberal, FDI levels remained very low.[195] Also, many countries continued to face economic problems. During the 2000s there were reviews of investment agreements and innovative regional rules on investment such as the Economic Community of West African States (ECOWAS) Supplementary Act on Investment and the Southern African Development Community (SADC) Investment Protocol. However, there was a renewed realisation that continental regulation of foreign investment was important. In 2008 the African Ministers responsible for continental integration decided to initiate work on a comprehensive investment code for Africa.[196]

4 New nationalism and new regionalism: The present (2010-2020)

This subsection examines the growth and development of international investment law in Africa since 2010. It illustrates how the last decade has led to new approaches at national, regional and continental levels that are relics of the decolonisation era.

4.1 The decade of African international investment law

In the last decade, international investment law in Africa has expanded and flourished. There has been a marked increase in distinct African approaches and sub-regional investment norms. To a large extent, these norms are taking a departure from the copy-and-paste approach of investment treaties signed in previous decades. South Africa, Tanzania and Côte d'Ivoire have introduced foreign investment policies that are reminiscent of the NIEO.[197] Other states, such as Ethiopia, have introduced national

194 Sempasa (n 191) 402.

195 Yelpaala (n 24) 34.

196 Mbengue (n 48) 260.

197 South Africa, Protection of Investment Act 22 of 2015 (art 12(5) provides: 'The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor.' Art 11 of the Tanzanian Permanent Sovereignty Act 2017, provides only for settlement of disputes in local courts. Art 50 of the 2018 Côte d'Ivoire Investment Code provides only for resolution of disputes in the Arbitration Centre of the Common Court of Justice and Arbitration (CCJA) of the Organisation for the Harmonisation of Corporate Law

investment laws that are more liberal to promote foreign investment. Even in the midst of these different African approaches to international foreign investment law, it has been said that we have entered an era of 'African investment law'.[198] However, it is clear that the present state of international investment law in Africa is deeply fragmented, incoherent, conflicting and quite variegated.[199] This is because even though in recent years African states have adopted regional investment treaties, because of the historical events of the last two centuries, the African continent reflects diverse post-colonial interests that are relics of its colonised past. To a large extent, African states remain capital-importing states that compete for rent-seeking foreign investment. At the global level, the last decade has been marked by new nationalism, termination and renegotiation of investment treaties, the rejection of arbitration by some European states and an explosion in investment arbitration awards.[200] We have also witnessed the rise of new international economic powers.

African scholarship on foreign investment post-2010 has remained very critical and divided, but a key distinction may be drawn in the literature. Unlike scholarship that emerged in the decolonisation era, instead of focusing solely on rejecting rules of international law, scholars now understand that the future of Africa no longer lies in empty promises and rhetoric.[201] Some argue that the IIL regime undermines 'African countries' governance and national development priorities'.[202] Other scholars, who appear to be in the minority, are more pragmatic, showing more convincedly that, for instance, actions of public officials are the major causes of investment arbitration claims and that a wider regulatory space for host states in BITs will make little difference to the incidence of ISDS claims against African states.[203]

in Africa.

198 Mbengue (n 48).

199 FN Botchway '*Consent to arbitration: African states' practice' (2019) 34 ICSID Review-Foreign Investment Law Journal* 278 294.

200 M Sornarajah 'Disintegration and change in the international law on foreign investment' (2020) 23 *Journal of International Economic Law* 413.

201 MF Massoud 'International arbitration and judicial politics in authoritarian states' (2014) 39 *Law and Social Inquiry* 1.

202 D Dagbanja 'The limitation on sovereign regulatory autonomy and internationalisation of investment protection by treaty: An African perspective' (2016) 60 *Journal of African Law* 56 82.

203 E Laryea & O Fabusuyi 'African countries and international investment law: Right to regulate or appropriate regulation or both?' (2019) 40 *Australasian Review of African Studies* 40 27.

In the past few years there has been a significant increase in African scholarship in international investment law[204] even though this has not been matched by an increase in appointment of African arbitrators. Notably, female scholars have emerged as important contributors.[205] Unlike previous decades when scholarship remained limited, studies now focus on broad-ranging subjects including treaty practice of states such as South Africa[206] and Nigeria[207] and treaties with China.[208] Studies have also focused on the practice of RECs such as the Organisation for the Harmonisation of Business Law in Africa (OHADA)[209] and the Common Market for Eastern and Southern Africa (COMESA).[210] Scholars have focused on topical issues such as agricultural and land contracts,[211] human rights[212] and the relationship between BITs and FDI inflows.[213] Scholarship has highlighted the role that African states have played in the development

204 African-centred research networks such as the African International Economic Law Network (AfIELN), the African Society of International Law, and the African Journal of International Economic law are promoting 'African International Investment Law'.

205 R Radilofe 'Phénomène de Droit transnational dans les pays en développement/legal enclosure and international investment: essay on a phenomenon of transnational law in developing countries' PhD thesis, University of Nice Sophia Antipolis, 2019 (on file with the author).

206 Z Motala 'Free trade, the Washington consensus, and bilateral investment treaties: The South African journey: A rethink on the rules on foreign investment by developing countries' (2016) 16 *American University Business Law Review* 31; T Chidede *Legal protection of foreign direct investment: A critical assessment with focus on South Africa and Zimbabwe* (2016).

207 Nde Fru (n 106).

208 UE Ofodile 'Emerging market economies and international investment law: Turkey-Africa bilateral investment treaties' (2019) 52 *Vanderbilt Journal of Transnational Law* 949; W Kidane 'China's bilateral investment treaties with African states in comparative context' (2016) 49 *Cornell Journal of International Law* 141.

209 WB Hamida 'L'intégration imparfaite de l'arbitrage d'investissement dans le droit de l'OHADA' (2019) 4 *Revue de l'arbitrage : Bulletin du Comité français de l'arbitrage* 1109; GL Sita 'Le défi de l'Organisation pour l'harmonisation en Afrique du droit des affaires face au développement des marchés financiers africains : quid de la protection des investisseurs' (2019) 22 *Droit en Afrique* 157.

210 R Baruti 'Investment facilitation in regional economic integration in Africa: The cases of COMESA, EAC and SADC' (2017) 18 *Journal of World Investment and Trade* 493.

211 UE Ofodile 'Managing foreign investment in agricultural land in Africa: The role of bilateral investment treaties and international investment contracts (2017) 7 *Law and Development Review* 329.

212 F Adeleke *International investment law and policy in Africa: Exploring a human rights-based approach to investment regulation and dispute settlement* (2017); A Hankings-Evans 'Africa's human rights and development-based approaches to international investment law' in R Hofmann et al (eds) *Investment protection, human rights, and international arbitration in extraordinary times* (2022) 291.

213 DN Dagbanja 'Can African countries attract investments without bilateral investment treaties? The Ghanaian case' (2019) 40 *Australasian Review of African Studies* 71.

of the ICSID dispute settlement system.[214] Most scholars who belonged to the first generation have left us or are no longer actively writing. However, ideological divides across generations remain and scholars of the first generation, such as Abi-Saab, continue to place much hope on the crystallisation of decolonisation era principles such as permanent sovereignty over natural resources.[215]

The most distinct characteristic of African scholarship in the last decade is what may be described as the 'Africanisation' of international investment law.[216] 'Africanisation' was first used in the decolonisation era to signify changes in political power and replacement of colonial officers with an African civil service and judicial officers.[217] It was used by 'African law scholars', such as William Twinning, Antony Nicholas Allott and Olawale Elias, to signify a new political class of African leaders.[218] It was also used to describe African nationalisation of foreign property.[219] More recently, Africanisation of international investment law, as coined by Makane Moïse Mbengue, is used to describe Africa as a 'catalyser', 'crystalliser' and 'customiser' of IIL.[220] Professor Mbengue, who has played a key role in the drafting of the Pan-African Investment Code, defines the Africanisation of IIL as 'the regulation of international investment according to African policy and development priorities'.[221] For this reason, decades after seminal texts on Africa and the development of international law were published, international investment law may be a field where the place of Africa appears to be very active.

The Pan-African Investment Code (PAIC) may be described as the beginning of a new era of international investment law in Africa. In 2016 the ministers of the AU adopted the PAIC as a model for future investment treaty negotiations in Africa. The PAIC is distinct because it is the first continent-wide African model investment treaty and because it introduces distinct treaty provisions that are meant to reflect the needs

214 Parra (n 75) 277.

215 Abi-Saab (n 41) 1966.

216 MM Mbengue and S Schacherer 'The Africanisation of international investment law: The pan-African investment code and the reform of the international investment regime' (2018) 18 *Journal of World Investment and Trade* 414.

217 TO Elias 'The commonwealth in Africa' (1968) 31 *Modern Law Review* 284 296.

218 AS Touré *Toward full re-Africanisation: Policy and principles of the Guinea Democratic Party* (1959); AN Allott 'The codification of the law of civil wrongs in common law African countries' (1966) 16 *Sociologus* 101 103; W Twining 'Legal education within East Africa' (1966) 12 *International and Comparative Law Quarterly* 115 141.

219 Bradley (n 12) 171.

220 Mbengue (n 48) 263.

221 Mbengue & Schacherer (n 217) 199.

of African states.[222] However, in practice the PAIC has failed to have real impact on the treaty practice of African states.[223] A desktop review of treaties signed after the PAIC came into force reveals that treaties still follow the template of the non-African treaty partner. Also, African states are still developing model treaties that are inconsistent with a 'pan-African' model.[224] Thus, even though the PAIC represents the promise of a truly African international investment law, in reality African treaty practice is still shaped by deeply-entrenched economic and political interests that are legacies of the colonial era. Therefore, even though increasing focus is placed on the novelty of African investment norms, it is glaring that Africa's contributions to the development of IIL are still through mere participation, rather than deliberate decision making.[225]

4.2 Contributions

Africa has played an important role in the evolution of IIL over the last six decades. This may be examined from a positive and a negative perspective. Even though for many years African countries were perceived to be at the margins of the field,[226] as the preceding parts have illustrated, African intellectuals and institutions have been behind some of IILs greatest achievements.[227] African individuals have played very important roles in the construction of legal rules and norms. As the previous parts have also shown, the independence of African states was a watershed for the development of modern IIL. This slowed down the multi-lateralisation of IIL and contributed to the non-universality of international investment law.[228]

At the national level, African states have actively signed investment agreements and contracts that invariably are part of international law. The involvement of African states in investment arbitration disputes has helped to develop the jurisprudence that forms the backbone of one of the most vibrant fields of international law.[229] Even though very few Africans

222 Mbengue (n 48) 261.

223 As above.

224 Morocco- Model BIT 2019.

225 Kidane (n 110) 420.

226 MM Mbengue 'Africa's voice in the formation, shaping and redesign of international investment law' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 455.

227 SW Schill 'Editorial: The new (African) regionalism in international investment law' (2017) 18 *Journal of World Investment and Trade* 367.

228 PC Jessup 'Non-universal international law' (1978) 12 *Columbia Journal of Transnational Law* 415 419.

229 OD Akinkugbe 'Reverse contributors? African state parties, ICSID and the development

have been appointed as arbitrators, Africa has been pivotal to this.[230] In recent years African experts have also been at the forefront of legitimising the international investment law regime. For example, Judge Abdulqawi Ahmed Yusuf has introduced reforms that prevent sitting judges of the ICJ from accepting appointments as investment arbitrators.[231]

4.3 Challenges and opportunities

Six decades of international investment law have provided an adequate timeframe to reflect on the challenges that African states continue to face. These challenges have been examined by scholars. First and foremost, even though rules of foreign investment have been fully developed, Africa still faces serious economic and political challenges.[232] Thus, many of the international economic law problems that emerged six decades ago remain present.[233] In post-independence Africa, 'the asymmetrical vulnerability dependence has continued and so have the minimalist investment policies. Countries with abundant natural resources have continued to attract "scoop and ship" investment operations.'[234] Intra-African investment remains low and most economies are capital-importing, debt-ridden and dominated by foreign investors. In addition to this, international investment agreements have failed to live up to the grand bargains of promoting foreign investment.

Second, even though Africa has very competent IIL scholars, a 'brain drain' persists. For this reason, inadequate legal capacity to negotiate investment agreements and contracts is not because of the absence of competence hands but a function of economic and power dynamics. Many African governments continue to view investment treaties and contracts as photo-taking opportunities, failing to realise that agreements have deep consequences. This has been described as a suicidal attitude under which African lawyers only turn pages for signatures.[235] Over the last 60 years of international investment law practice, African countries

of international investment law' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 434.

230 Kidane (n 110) 413.

231 F Baetens & P Bodeau-Livinec 'Face-à-face interview with President Yusuf: president of the international court of justice' (2020) 18 *Law and Practice of International Courts and Tribunals* 267 276.

232 D Ailola 'Using law to protect foreign investors in Southern Africa: An appraisal' (1996) 29 *Comparative and International Law Journal of Southern Africa* 295 308.

233 Umozurike (n 7) 123.

234 Yelpaala (n 25) 70.

235 Kumuwanga (n 159)145.

have been perceived as investment rule 'consumers'. The main reason for this perception is that a larger majority of international investment agreements (IIAs) concluded by African states reflect the models of their respective contracting partners.[236] This is also evident in recently-drafted 'new generation' African regional treaties that adopt 'foreign models' and give less favourable treatment to African investors by excluding access to arbitration and omitting standards of protection.

The number of African scholars who specialise in international economic law remains rather low.[237] In investment disputes, African states usually appoint foreign counsel and arbitrators,[238] thereby enabling a diversity deficit.[239] Related to this is the low visibility of female African intellectuals in the formation of the African intellectual project. Even though this is changing, more female scholars should be given adequate space to address some of Africa's foreign investment challenges. Until recently, a third challenge was the dearth of African scholarly works.[240] Even though this has improved significantly, leading IIL texts are still written by European and American authors[241] and quoted as authority by investment arbitration tribunals. This sociological dimension on the formation of law must not be overlooked.

A fourth major challenge of IIL in Africa is the dearth of specialised international economic law programmes.[242] At the 1968 Conference on African Legal Education, participants agreed that it was important to train lawyers who would be able to address 'growing problems of foreign investment and contractual negotiations'.[243] Even though several African universities have integrated IIL into their curricula, many lawyers are not

236 MM Mbengue & S Schacherer 'Evolution of international investment agreements in Africa: Features and challenges of investment law Africanisation' in J Chaisse, L Choukroune & Sufian Jusoh (eds) *Handbook of international investment law and policy* (2020) 19.

237 Kidane (n 110) 413.

238 Kumuwanga (n159) 145.

239 Kidane (n 110) 421.

240 YN Hodu & MM Mbengue (eds) *African perspectives in international investment law* (2020); D Dagbanja *The investment treaty regime and public interest regulation in Africa* (2022).

241 Abi-Saab (n 27) 101.

242 The University of Pretoria offers the LLM in International Trade and Investment Law in Africa while the University of Western Cape offers the LLM in International Trade, Business and Investment Law.

243 Richardson (n 125) 210.

trained to deal with international investment law and other transnational problems.[244]

A fifth and major challenge of IIL in Africa is the absence of clear continental coordination and policy making.[245] Even though this is a reflection of the non-universality of international law, it has created a fragmented system with multiple and overlapping norms.[246] Furthermore, many of the investment agreements between African states have never been ratified.[247] Finally, another major challenge of IIL is the divisions that continue to exist between different schools and legal systems.[248] For example, even though several important doctoral dissertations have been written in French, IIL is largely dominated by Anglophone publishers, creating a divide between Francophone and Anglophone Africa, and distancing Lusophone states. Related to this is the disconnect between the legal academy and political decision makers at all levels of governance. While one must acknowledge that none of the challenges identified above are purely legal questions, by reflecting on the past one can understand the limited but important function law plays in the realisation of economic goals.

5 The future (beyond 2020)

Making predictions about the future of international law is not always straightforward. This is because even though international law is a dynamic process which evolves with changes in society, norm making can be very slow. Decades ago, some African scholars made predictions about the future of international investment law in Africa. Most of these predictions emerged during the NIEO. For example, in 1977 Adede argued that states would continue to protect legitimate interests of foreign investors and that this would lead to increases in intra-African capital investment flows.[249] For Mutharika, Africa would remain marginalised and irrelevant until reforms were made to encourage investment and until regional free trade

244 Richardson (n 125) 205.

245 Allen (n 183) 83; Mbengue (n 48) 260.

246 Mbengue & Schacherer (n 217) 12.

247 Mbengue & Schacherer (n 217) 20.

248 WEB du Bois 'The realities in Africa - European profit or negro development' (1943) 21 *Foreign Affairs* 721 724. 'For convenience we refer to "Africa" in a word. But we should remember that there is no one "Africa". There is in the continent of Africa no unity of physical characteristics, of cultural development, of historical experience, or of racial identity. We may distinguish today at least eleven Africas.'

249 Adede (n 118) 192-193.

arrangements were signed.[250] For him, African countries that faced political and economic stability will continue to play a limited role in shaping international law.[251] Mutharika also argued that the principal foreign investors in Africa will remain multinational companies.[252] Eze argued that because international law would remain for another 40 years (1979 to 2019), states would resort to national regulation of foreign investment.[253] As the previous parts have illustrated, Professor Eze's predictions have not come true. In the last three decades, IIL has undergone radical transformation and IIL i no longer is embryonic.[254] However, he may have been partly right, as we are witnessing a shift from internationalisation to nationalism and protectionism in some states. Also, domestic investment laws continue to play important roles in African states.

Fully aware of the limitations of making predictions, it remains worthwhile to think of what IIL will look like beyond 2020. In the next few decades, African states will continue to sign international investment treaties. Competition between regional, sub-regional and continental norms will continue to exist and some states will continue to use national law to regulate the activities of foreign investors. More African arbitration centres will be established, but these institutions will continue to compete with more established arbitral institutions based outside the continent. There will be a marginal increase in the number of arbitration claims filed against African states, and some new claims will be instituted on the basis of intra-African treaties and investment contracts. However, this will not necessarily lead to an increase in the appointment of African arbitrators. Even with an increase in the number of African arbitrators, it is highly unlikely that these arbitrators will radically transform existing international investment rules. However, the appointment of African arbitrators will give some sociological legitimacy to the regime and provide some more context for developing African solutions to Africa's international economic law problems. It suffices to say that while we may indeed see the emergence of an African foreign investment law, full control over economic activities will depend on good governance, good policy making and economic development.

250 Mutharika (n 185) 1711.

251 Mutharika (n 185) 1719.

252 Mutharika (n 185) 1716.

253 OC Eze 'Legal structures for the resolution of international problems in the domain of private foreign investments: A Third World perspective now and in the future' (1979) 9 *Georgia Journal of International and Comparative Law* 535 547.

254 C Leben *The advancement of international law* (2010) 5.

In March 2018 member states of the AU established the African Continental Free Trade Area which creates a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent. This treaty is born from a reinvigorated Pan-African Vision for an integrated, prosperous and peaceful Africa. Phase II negotiations, which will include an Investment Protocol, will be completed soon. The major objectives of this Protocol are the Africanisation of international law on foreign investment law and the facilitation of intra-African investment. This Protocol is expected to replace 178 bilateral investment treaties and several overlapping sub-regional investment treaties. The texts of the Agreement establishing the African Continental Free Trade Area (AfCFTA) will be spearheaded by an older generation of African international scholars, but the task of moving this project ahead will fall on an even younger generation. Even though the AfCFTA is meant to signify a new dawn of international economic law in Africa, there are clear indications that the future of international investment law in Africa will be fraught with challenges and opportunities.

6 Conclusion

The present chapter has examined the evolution of international investment law scholarship over the last six decades, using a sociological approach, from the perspective of a young scholar who studied international law long after a requiem mass was declared for the NIEO.[255] It has identified defining moments in 60 years of African independence and highlighted the contributions of Africa to the development of international investment law.

This edited book is about Africa's international law's decades. It is also about the quest for self-discovery and economic freedom in post-colonial Africa. This chapter has examined the ideas held by previous generations and shown how rejection of international law was replaced by new pragmatism and new radicalism. As the opening quote to this chapter stated, Africa's international law history remains cyclical and it has been inherited by younger generations who are shaped by different sociological agents. Unlike preceding generations, we have had ample time to learn from Africa's international jurists and no longer live on borrowed knowledge.[256] We understand that it no longer is sufficient to keep harping on the harm

255 H Koh 'The new new international economic order: Private international law' (1993) 87 *Proceedings of the ASIL Annual Meeting* 449; Wälde (n 151).

256 Abi-Saab (n 27) 101.

that colonialism has done to the Third World.[257] The newer generation of Africans do not want to see an Africa that depends mostly on commodity prices and foreign aid for economic stability.[258] Younger investment lawyers and arbitrators have been accused of being non-vocal and unwilling to challenge the basic premises of the investment law regime by inference being alibis to investment law's coloniality.[259] Our generation has been accused by older international investment lawyers of being thirsty 'to join the institutions set up by the First World, and become betrayers of [our] own people'.[260] In our defence, we agree that we must pursue 'statesmanship, vision, a commitment to the social good and … selflessness'.[261] Yet, our generation understands that the greatest stakes are not developing a perfect international law or being cynical. Rather, learning from previous generations, we know that the greatest political stakes are our abilities as social agents and intellectuals to 'combine legal professionalism with a new strategic awareness of the limits and possibilities offered by international law for political engagement'.[262] We also know that the future of international investment law in Africa rests on collaboration, dialogue, capacity, realism, impact-driven research, good governance and an overhaul of the 'lost generation' of Africa's political leaders.

The young African international lawyer is fully aware of the ideological choices that must be made. She understands that Africa is still divided along linguistic lines, along legal traditions and divided by invisible but powerful lines drawn between the north and the south of the Sahara. However, there is a pan-African international law collective for addressing problems of conflict, strife, poverty, economic development, poor governance and unequal wealth distribution. The first generation of African international law scholars has virtually been replaced by newer generations that remain divided along lines of political ideology and legal tradition. Six decades of post-colonial experiences have produced radical, pragmatist and cynical clusters of international economic law

257 M Sornarajah 'On fighting for global justice: The role of a Third World international lawyer' (2016) 37 *Third World Quarterly* 1972 1984.

258 CN Brower & Michael P Daly 'A study of foreign investment law in Africa: Opportunity awaits' Paper delivered at ICCA Congress Mauritius (2016) 30.

259 D Schneiderman *Investment law's alibis: Colonialism, imperialism, debt and development* (2022) 36.

260 Sornarajah (n 257) 1985.

261 M Sornarajah 'A law for need or a law for greed? Restoring the lost law in the international law of foreign investment' (2006) 6 *International Environmental Agreements: Politics, Law and Economics* 329 329.

262 M Koskenniemi 'The politics of international law: 20 years later' (2009) 20 *European Journal of International Law* 7 9.

scholarship. It has led to disillusionment and distrust in the promise of international law. Yet, the African continent is on the cusp of its largest and most ambitious international economic law integration project: the AfCFTA. As 90 year-old Samuel Asante has written more recently, we must understand that '[t]he grand battles have been fought and won. Colonialism is no more; nationalism has prevailed. After fits and starts … beyond the epoch-making milestones achieved in the broad political arena …We now have the solemn duty of carrying on the legacy of our forebears.'[263]

263 SKB Asante 'The role of the early generation of lawyers in establishing good governance' (2014) 27 *Ghana University Law Journal* 1 5.

9 An African perspective on the balancing of investor-host state dynamic in international investment law

Chidebe Matthew Nwankwo

1 Introduction

International investment agreements are facing a protracted legitimacy crisis. The current praxis of Investor-state dispute settlement (ISDS) mechanisms is widely perceived as generating an asymmetrical system, which protects 'the interest of investors, and intruding into the space of human and environmental rights'.[1] These asymmetries have become the rallying point for social movements, scholars and policy makers who are reacting to the vagaries of international investment agreements (IIAs) by urging disadvantaged states to resist the signing of new IIAs, support the inclusion of human and environmental rights safeguards, and stricter regulation of extractive projects that are likely to produce severe environmental liabilities.[2]

Several disputes between host states and corporations from capital exporting states riddle national courts and the ISDS mechanisms with matters seeking redress. One such prominent dispute is the *Texaco/Chevron* law suit,[3] which commenced in November 1993 and is still being litigated. The Ecuadorian plaintiffs claim that Texaco's extractive operations between 1964 and 1992 have had a devastating effect on the environment and on the development prospects and health of the Amazonian people of Ecuador and nearby communities. A tortuous and lengthy judicial

1 L Pellegrini et al 'International investment agreement, human rights and environmental justice: The *Texaco/Chevron* case from the Ecuadorian Amazon' (2020) *Journal of International Economic Law* 1.

2 As above.

3 United States Court of Appeals, Second Circuit, *Aguinda 'B' 'C' 'D' v Texaco Inc* 16 August 2002. The plaintiffs argued that due to its operations during this period, Texaco had cause massive environmental impacts ultimately leading to several adverse effects on the Amazonian region in Ecuador, including higher than normal morbidity and mortality rates. The Southern District of New York Court refused to admit the case and it was eventually instituted in a provincial court in Ecuador resulting in a decision in 2013 that awarded a payment of US $9 500 million against Chevron (which had succeeded Texaco in an acquisition),

process was followed by an arbitral proceeding[4] in 2018 deriving from the Ecuador-United States Bilateral Investment Treaty.[5] An arbitral tribunal constituted under the Permanent Court of Arbitration (PCA) in The Hague decided that Ecuador had to render the 2013 judgment of the Ecuadorian court that condemned Chevron unenforceable as it found that the company had not been given a fair trial. As the time of writing the case has been litigated for 27 years in various fora, including the USA, Ecuador, Argentina, Canada and international courts, and demonstrates how protracted law fare makes it difficult for states to hold multinational companies accountable for their often environmentally and economically devastating actions.[6]

Despite these disputes and the perceived power asymmetries between host states and investor, the number of IIAs continue to rise. As at August 2022 there are 2 872 bilateral investment treaties (BITs) negotiated by states, with 2 231 in force. Furthermore, of the 430 treaties with investment provisions (TIPs) 336 are in force.[7] This underscores the continued relevance of IIAs as a major means of trade and economic development particularly for developing countries. Foreign direct investment (FDI) continues to play an important role in the process of capital importation by providing the financing that, for many developing countries, is otherwise unavailable.[8] This chapter examines the ongoing crisis in international investment law from an African perspective. It undertakes an analysis of the pattern of IIAs entered into by African states and weighs its potential in attaining key national and continental agenda for sustainable development. The first part takes a brief look at the value which IIAs hold for developing countries. The second part examines the importance of IIAs and the quest for sustainable development in Africa. The current *zeitgeist* of regional integration in Africa – sustainable development its relationship with IIAs. The third part undertakes textual analysis of intra-African and extra-African investment agreements. The fourth part explores the pathways available to resolving the challenges plaguing IIAs in Africa. The fifth part is the conclusion.

4 *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* UNCITRAL, PCA Case 2009–23 (2019), https://www.italaw.com/cases/257 (accessed 26 July 2020).

5 Pellegrini et al (n1) 2.

6 S Joseph 'Protracted lawfare: The tale of Chevron Texaco in the Amazon' (2012) 3 *Journal of Human Rights and the Environment* 70.

7 UNCTAD International investment agreements database, https://investmentpolicy.unctad.org/international-investment-agreements (accessed 26 July 2020).

8 AH de Wet & R van Eyden 'Capital mobility in sub-Saharan Africa: A panel data approach' (2005) 73 *South African Journal of Economics* 22.

2 International investment for host states: To what benefit?

The question remains whether international treaty law holds any advantages for host states. Therefore, it is therefore important to briefly highlight the historical context under which these agreements have been negotiated and implemented. It has been argued that contemporary international investment law is historically rooted in a system designed to protect the interests of foreigners abroad. This was to ensure that foreign citizens or corporations from capital exporting countries benefited from governance as good as they got at home in their host states.[9] Root's seminal speech articulates the ideology behind modern international investment law thus:[10]

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.

This statement reflected the core minimum standard that was advocated by capital-exporting states as a fundamental tenet of international investment law. It referred to a set of norms encapsulating foreign subjects' entitlement to be treated according to good governance precepts obtainable in 'civilised nations'.[11] The primary function of the customary minimum standard was primarily to protect aliens from the failures of governance in host states, such as a denial of justice and uncompensated takings of property.[12]

It has been stated that despite the portrayal of the international minimum standard as an embodiment of the good governance benchmarks

9 M Sattorova *The impact of investment treaty law on host states: Enabling good governance*? (2018) 1.

10 E Root 'The basis of protection to citizens residing abroad' (1910) 4 *American Journal of International Law* 517 521.

11 See AH Roth *The minimum standard of international law applied to aliens* (1949) cited in Sattorova (n 9) 2.

12 Roth (n 11) 2.

endorsed by civilised nations supposed to be advantageous to a wider world community, it was designed to protect foreigners at the exclusion of nationals in reality.[13] For this reason, it was strongly opposed by developing countries. A remarkable example of the refusal of developing countries to endorse the international minimum standard was the national standard advocated by Latin American states. The national standard required that foreigners and their property be accorded treatment no more favourable than that accorded to the nationals of the host state. This standard is most prominently embodied in the Calvo doctrine or 'national standard', a principal tenet of which is the notion that when entering the territory of a host state a foreigner 'submits to local conditions with benefits and burdens' and that to grant a foreigner special treatment 'would be contrary to the principles of territorial jurisdiction and equality'.[14]

The idea of the core minimum standard and the requirement for compensation for expropriation projected by capital importing states also faced opposition from a coalition of newly-independent developing countries that questioned the fairness of these rules, and re-asserted the primacy of national treatment with regard to foreigners' entitlement for expropriated property. This position of the newly-independent countries found expression in the 1974 UN Charter of Economic Rights and Duties of States,[15] which provided that each state had the right to nationalise, expropriate or transfer ownership of foreign property, and that it was for the state to determine appropriate compensation, taking into account relevant national laws and regulations and all circumstances that it considered pertinent.[16]

Notwithstanding the resistance the international minimum standard had faced in the past, the ideas of special treatment or 'better governance' for foreign investors eventually found its way into the corpus of international investment law through treaties. The resolve of capital importing states, particularly the independent states in Africa, to jealously protect the sovereignty of their nascent states waned at the realisation that 'foreign investment is critical for the purposes of injecting finances into faltering economies, expanding trade opportunities and strengthening infrastructure, which result in growth and development'.[17] Thus, the

13 I Brownlie *Principles of public international law* (2003) 501-502.

14 Brownlie (n 13) 502.

15 A/RES/39/163.

16 See BH Weston 'The charter of economic rights and duties of states and the deprivation of foreign-owned wealth' (1981) 75 *American Journal of International Law* 437.

17 W Nabalende 'Protecting foreign investment using Calvo Doctrine' (2020) 1 *Finance Development* 167.

international minimum standard became incorporated into bilateral and multilateral agreements on the promotion and protection of investment following the wave of economic liberalisation that swept across the globe in the 1980s and 1990s. Capital-exporting states often negotiated BITs with developing countries by designing treaties not just to protect investments into developing countries but also, importantly, to 'treatify' the Hull rule of compensation for expropriation of property by host states.[18]

This codification process resulted in a hitherto unprecedented number of BITs whereby each contracting state committed to implement a range of standards of treatment, including notably the guarantee against uncompensated expropriation, fair and equitable treatment, and non-discrimination.[19]

With this regime of international investment agreements, foreign investors were granted access to arbitration and the right to bring action directly against the host government. By participating in bilateral arrangements on investment protection, developing countries were hailed as 'sending a strong signal of their commitment to provide a predictable, stable and reliable legal environment for foreign direct investors, to stimulate investors' confidence and boost FDI flows'.[20] Advocates of the investment treaty regime advanced the view that one of the principal functions of investment treaty law was to ensure that foreign investors are treated in accordance with stronger, internationally-recognised, good governance standards.[21]

Subsequently, the international investment landscape became marked by investors actively using the investor-state dispute settlement (ISDS) system to challenge various host state actions. This led to a shift in the perception of international investment treaty regime from an attempt to ensure the application of good governance to foreign investment to a system that conferred undue privileges to foreign investors to the detriment of host states. First, investment treaties grant investors direct standing and a right of action for damages against host states, and also allow investors in doing so to avoid national remedies and to enforce awards against state assets located in foreign jurisdictions.[22] This is evident in the weight of financial penalties of investment arbitration for respondent states.

18 KJ Vandevelde *U.S international investment agreements* (2009) 25-26.

19 Sattorova (n 9) 3.

20 As above.

21 Sattorova (n 9) 3.

22 G van Harten and M Loughlin ' Investment treaty arbitration as a species of global administrative law ' (2006) 17 *European Journal of International Law* 332.

Developing countries in particular have found themselves vulnerable due to the detrimental financial impact of the awards on their budget.[23]

Second, the power asymmetry in the investor-state relations is most present in the fact that investors are granted extensive substantive and procedural rights but not obligations. States, on the other hand, are subjected to an array of obligations unaccompanied by rights. These rights enjoyed by foreign investors, being products of treaty law, remain operational in spite of activities of corporations that grossly impede sustainable development in the host state. Consequently, these obligations imposed on states, some argue, 'unduly limit the regulatory powers of host states to implement environmental, labour and social policies by obliging host states to compensate foreign investors for damages caused by such measures'.[24]

As host state measures to implement sustainability policies have frequently been the target of investment arbitration, critics argue that IIAs impede rather than encourage sustainable foreign investment.[25] The critique of IIAs led to the conclusion that there is an IIA crisis. In recent time, discussions have commenced to strengthen the regulatory sovereignty of host states to ensure that foreign direct investment do not impede the sustainable development plans of host states.[26] In addition, ISDS reform debates in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III aim at the reform of the ISDS standards to address the legitimacy concerns over the system and

23 In most cases, to 'expedite payment of the awards, funds may be diverted from important development objectives, such as investment in infrastructure, education, health or other public goods'. See UNCTAD *Best practices in investment for development. How to prevent and manage investor-state disputes: Lessons from Peru* (2011) 7.

24 GM Zagel 'International investment agreements (IIAs) and sustainable development: Are African reform approaches a possible way out of the global IIA crisis' (2020) 17 *Manchester Journal of International Economic Law* 27. See also H Mann 'Reconceptualising international investment law: Its role in sustainable development' (2013) 17 *Lewis and Clark Law Review* 532.

25 Zagel (n 24) 27. See also T Fritz *International investment agreements under scrutiny: Bilateral investment treaties, EU investment policy and international development* (2015); 'Rights for people, rules for corporations – Stop ISDS', https://stopisds.org/ (accessed 10 March 2022).

26 UNCTAD has played a leading role in these reforms by which pursuing a wide-ranging concept of investment policy reform to facilitate sustainable foreign investment. Through its 'Roadmap for IIA Reform' presented in 2015, the organisation supports and systematically surveys national IIA reform processes. See UNCTAD report 'UNCTAD's reform package for the international investment regime', (2018) (UNCTAD 2018), https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_ Reform_Package_2018.pdf (accessed 28 August 2022); UNCTAD, *World Investment Report* (Geneva: UNTAD, 2015).

prevent adverse effects on sustainable development.[27] However, despite attempts by states to reform their respective IIA regimes accordingly, worldwide scepticism remains, as the controversies on the Trans-Pacific Partnership (TPP), North American Free Trade Agreement (NAFTA) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) recently demonstrate.[28] For this reason, African states have moved to introduce reforms at national, sub-regional and regional levels to ensure that IIAs do not impede on efforts to address climate change and the environment.[29]

3 IIAs and sustainable development in Africa

The case of African states is not any different from other developing countries that view foreign investments as the motor for economic development. Thus, African states have concluded numerous IIAs and continue to explore these as a pathway to economic development. Of the few thousand IIAs in operation around the world, around 900 involve African countries.[30] Originally, African states entered into IIAs as a north-south strategy to promote and protect investments from capital-exporting Western countries into the newly-decolonised countries. From the 1990s onwards African IIAs moved increasingly towards south-south treaties with states within and outside Africa.[31]

27 UNCTAD 2018 (n 26). 8.

28 Among the most obvious challenges facing these trade agreements are President's Trump decision to pull out from the TPP on his first day in office in 2015; the stalemate between the US and her North American counterparts Mexico and Canada over renegotiation of the NAFTA. Regarding the TPP, another 11 member states have proceeded without the US. See O Hoskin & LLP Harcourt 'NAFTA, CETA and the TPP – Significant challenges and opportunities' https://www.lexology.com/library/detail.aspx?g=d2cc84f5-b00a-4aef-8c7a-4efe96fc3bb9 (accessed 15 January 2021); J McBride, A Chatzky & A Siripurapu 'What is the Trans-Pacific Partnership?' Council on Foreign Relations, 1 December 2020, https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp (accessed 15 January 2021).

29 See generally CM Nwankwo 'Balancing international investment law and climate change in africa: Assessing vertical and horizontal norms' (2020) 17 *MJIEL* 48-63.

30 For an overview, see UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements (accessed 29 August 2020).

31 Zagel (n 24) 27-28. For a systemic overview of the pattern of IIAs in Africa, see MM Mbengue & S Schacherer 'Evolution of international investment law agreements in africa: Features and challenges of investment law "Africanisation"' in J Chaisse, L Choukroune & S Jusoh *Handbook of international investment law and policy* (2021).

The benefit of these IIAs and the ISDS to African states has been mixed. African states, termed 'reverse contributors',[32] have contributed considerably to the development of ICSID arbitration from post-independence.[33] However, the percentage of disputes involving African states at ICSID sharply contrast with the share of foreign direct investment coming into Africa.[34] Zagel aptly articulates the cost-benefit dynamic of IIAs and the ISDS in Africa over the years thus:[35]

> Up to the mid-nineties, the majority of the ICSID disputes involved African states. While initially most cases were decided in favour of the investor, the outcome of investment awards has been more balanced in recent years. In case of a loss, the damages awarded frequently pose an enormous challenge to the tight budgets of African states. But even if a host state wins the case, the costs for the proceedings and legal services may be huge. Moreover, a publicly known investment dispute always affects the investment climate and reputation of a host state, irrespective of the outcome of the case.

African states are aware that rapid and extensive industrialisation is imperative to compete in the global market. However, industrialisation ought to be pursued in a manner that balances economic development derivable from international investments with its social and environmental impact. In recognition of this need for sustainable development, the continental blueprint under the auspices of the African Union (AU) for the socio-economic advancement of the African continent in the coming years, the Agenda 2063[36] aspires to, by 2063, achieve 'a prosperous Africa based on inclusive growth and sustainable development'.[37] The Agenda 2063 alludes to the fact that 'while Africa at present contributes less than

32 See OD Akinkugbe 'Reverse contributors? African states parties, ICSID and the development of international investment law' (2019) 34 *ICSID Review – Foreign Investment Law Journal* 434.

33 AA Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177.

34 As at the time of writing over 25% of all investment disputes brought before ICSID involve African states while a meagre 2,9% of global FDI make it to the region. See UNCTAD World Investment Report 2020, https://unctad.org/system/files/official-document/wir2020_overview_en.pdf (accessed 30 January 2021); ICSID Caseload Statistics, January 2021, https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf (accessed 30 January 2021).

35 Zagel (n 24) 30.

36 African Union 'Agenda 2063: The Africa we want' https://au.int/en/agenda2063/overview (accessed 30 August 2020).

37 As above.

5% of global carbon emissions, it bears the brunt of the impact of climate change'.[38]

While the Agenda 2063 anticipates that foreign investment can play a fundamental role in implementing the region's sustainable development targets,[39] corporations continue to impede the sustainability measures of their host states either through their operations or by manipulating the ISDS mechanisms. One case that demonstrates the challenge that traditional IIAs pose to the regulatory sovereignty of African states, particularly as it affects sustainable development, is *Biwater Gauff v Tanzania*.[40] In this case Tanzania commissioned its water and sewerage infrastructure and services to Biwater Gauff, a company under the control of British and German investors. The company's mandate was to restore and operate the water and sewerage system of Dar-es-Salaam, a major commercial port and largest city in the country. The company failed to provide satisfactory services, as their cost calculation to acquire the bid could not generate the income required to fund the investment and maintenance costs.[41] Biwater requested a renegotiation of the contract only 18 months after it was awarded. Determined to ensure functioning water supply and sewage services for residents of the city, Tanzania terminated the contract after several unsuccessful negotiation rounds. Biwater instituted a case before an ICSID tribunal claiming that Tanzania's conduct constituted an expropriation and violated the fair and equitable treatment (FET) standard guaranteed in the Tanzania-United Kingdom BIT (1994).[42]

The Tribunal established an expropriation[43] and rejected Tanzania's argument that the conduct was necessary to grant freshwater supply to the population of Dar-es-Salaam[44] which itself was a breach of the FET standard.[45] The tribunal, however, did not award any damages, as Biwater could not prove any losses and had violated its contractual obligations.[46] In spite of this, Tanzania had to bear the costs of the arbitration and its

38 As above.

39 See AU Agenda 2063 (n 36) AU 2063, aspirations 1 & 2 and para 72.

40 *Biwater Gauff v Tanzania* ICSID Case ARB/05/22, award of 24 July 2008.

41 *Biwater Gauff* (n 40) paras 486 and 789.

42 *Biwater Gauff* (n 40) para 354; see also Tanzania-United Kingdom BIT (1994) arts 2(2) & 5.

43 *Biwater Gauff* (n 40) paras 451-519.

44 *Biwater Gauff* (n 40) paras 514-515.

45 *Biwater Gauff* (n 40) paras 622-628.

46 *Biwater Gauff* (n 40) paras 788-808.

legal fees[47] which could have been made available for water and sewerage systems in Dar-es-Salaam.

The sustainable development policy of the Tanzanian government was adversely affected even if the Tribunal did not award any damages in favour of the company. The reason behind Tanzania's decision to terminate the contract was to secure the services of a more competent company to provide a safe and affordable water and sewerage system for Dar-es-Salaam,[48] which is an essential infrastructure to improving the health and nutrition of the Dar-es-Salaam population. However, between Biwater's failure to provide the services and the institution of the arbitral proceeding, Tanzania's water policy not was only at a standstill but stood the risk of being totally reversed. Yet, Tanzania had to bear costs for the ISDS proceedings initiated by Biwater, although it won the case.[49] Furthermore, the case itself affects Tanzania's reputation as a reliable host state, which may ward off investment flows to the country in future. In addition, the effect of the dispute may cause the Tanzanian government to become reluctant to implement sustainable development policies of this magnitude, an effect called the 'regulatory chill effect' of IIAs.[50]

The *Biwater* case further underscores the general weaknesses of traditional IIAs regarding implementation of the sustainable development policies of host states. First, the weak rules on expropriation and FET hands arbitral tribunals extreme flexibility to apply and interpret these provisions, which blindsides states' ability to predict the obligations resulting from these standards and thus the outcome of investment disputes. For instance, in the case of Biwater, the tribunal considered the termination of the contract by Tanzania an expropriation despite the investor's breach of its contractual obligations. Second, while traditional IIAs grant the protection of foreign investors, they do not require arbitral tribunals to take into account the need of host states to pursue measures in the public interest – such as the implementation of sustainable development policies or the conduct of foreign investors.[51] Third, IIAs typically do not provide for procedural guidance concerning the admissibility of frivolous claims, counterclaims, or the calculation of damages, elements that save resources through limiting the duration and costs of investment disputes.[52]

47 *Biwater Gauff* (n 40) paras 812-813.

48 *Biwater Gauff* (n 40) paras 428-436.

49 *Biwater Gauff* (n 40) para 813.

50 See *Clayton and Bilcon of Delaware Inc v Government of Canada* PCA Case 2009-04, Dissenting Opinion of Donald McRae, para 48.

51 Zagel (n 24) 32.

52 As above.

4 African states attempt to address the IIA crisis

International investment law in Africa is best characterised as a cross-cutting or fragmented regime operating at various levels. There are at least three levels of regulation, namely, national investment legislation, BITs and regional investment agreements. This proves that Africa currently is one of the most active regions in the world when it comes to finding new approaches in shaping IIAs. Over the past 10 years African states, at all levels, have adopted highly-innovative investment instruments in their quest to reshape international investment law. This process of renegotiating the norms guiding IIAs has been described as 'Africanisation' of international investment law.[53] The Africanisation of international investment law by African states through the regulation of international investment according to their policy and development priorities has been described as an 'evident contemporary phenomenon'.

In furtherance of the sustainable development goals agenda of the AU, African states appear to mostly design IIAs to ensure the prioritisation of sustainable development with varying degrees of success. Most of the clauses requiring investors to ensure sustainable development are mostly found in intra-African IIAs (agreements between African states) while extra-African IIAs (between states outside the region) have seen little development in terms of reforming the overly advantageous nature of IIAs for foreign investors and their home economies.[54]

4.1 The Pan-African Investment Code as the regional guide for international investment agreements

In 2008 African ministers responsible for continental integration decided to initiate the work on a comprehensive investment code for Africa. Thus, the elaboration of the Pan-African Investment Code (PAIC)[55] started. From the beginning, the AU and its member states intended to create a text that would address Africa-specific needs. After several years of drafting the text the PAIC was approved in March 2016 and subsequently adopted as non-binding model investment guideline. Notwithstanding its status as

53 MM Mbengue 'The "Africanisation" of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 414-48.

54 Mbengue (n 31) 2.

55 Draft Pan-African Investment Code, December 2016, https://au.int/sites/default/files/documents/32844-doc-draft_pan (accessed 24 April 2020).

a normative guideline, the PAIC introduces very important model clauses that will guide IIAs in the region in the coming years.

In terms of the content, the PAIC introduces several innovative clauses. Article 1 provides that the objective of the PAIC is 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. It also includes provisions on due diligence and obligations for investors in relation to human rights, corporate social responsibility, use of natural resources and land grabbing.[56] The PAIC also omits certain investment standards that have been disadvantageous to African states. For instance, the instrument completely leaves out the controversial FET standard.

The PAIC precisely places strong emphasis on safeguarding the right of host states to regulate admitted investments and to adopt measures concerning preserving the environment,[57] international peace and security, and national security interests and promoting national development. In addition, the instrument limits the application of most-favoured-nation treatment (MFN) and national treatment (NT) obligations to investments 'in like circumstances'[58] and grant host states the right to derogate from these obligations to preserve public interests (that is, environment, security).[59] Article 22(3) obliges the investor to contribute to the economic, social and environmental progress to achieve sustainable development of host states.

The PAIC has been hailed as one of the 'boldest investment instruments adopted so far'[60] for imposing of certain obligations on investors. These obligations range from compliance with host states' corporate governance standards, adherence to socio-political obligations, to adherence to corporate social responsibility standards, responsible use of natural resources, and compliance with business ethics and human rights.[61] In addition, the PAIC attempts to create symmetry in the relationship between investors and host governments by introducing horizontal obligations that

56 Draft PAIC (n 55) 18.

57 Art 37(1) provides that the member states shall not encourage investment by relaxing or waiving compliance with domestic environmental legislation.

58 PAIC arts 7(3) & 9(3).

59 PAIC arts 8 & 10.

60 Mbengue (n 53).

61 See, eg, art 24 of the PAIC. See also E de Brabandere 'Human rights and international investment law' in M Krajewski & RT Hoddmann (eds) *Research handbook on foreign direct investment* (2019) 619–645; Nwankwo (n 29) 53-57.

are addressed to both the host states and the investors. These provisions refer to basic principles as to how state contracts as well as public-private partnerships should be designed; how African states should adapt their labour policies and resource development; and how investors can help to promote technology transfer, clean technologies, and environmental protection.[62]

4.2 Sub-regional model treaties

Most of the regional economic communities (RECs)[63] in Africa have in the past adopted legal instruments that regulate foreign investment. Various treaties were concluded from the 1970s to the 1990s, to enhance cooperation and harmonisation in the area of investment, such as the 1965 Economic and Monetary Community of Central Africa (CEMAC) Investment Agreement; the 1984 ECOWAS Protocol on Community Enterprises; and the 1979 ECOWAS Protocol on Movement of Persons and Establishment. In 2007 the Common Market for Eastern and Southern Africa (COMESA) developed a modern investment agreement, which was to establish a COMESA Common Investment Area. However, negotiations are still ongoing regarding its content. The 2006 SADC Protocol on Finance and Investment is another important instrument adopted by an REC. For its part, the EAC adopted a model investment agreement in 2006 (which was revised in 2015).[64] The provisions of these sub-regional intra-African investment treaties and model instruments reflect the innovative wording of the PAIC. The following parts briefly highlight key provisions of selected instruments at the sub-regional level.

62 Mbengue (n 53).

63 There currently are eight recognised RECs that form the building block for the African Economic Community under the 1991 Abuja Treaty. These include the Economic and Monetary Community of Central Africa (CEMAC); the Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Economic Community of East African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority for Development (IGAD); and the Southern African Development Community (SADC).

64 M Mbengue 'The quest for a pan-African investment code to promote sustainable development' (2016) *Bridges Africa*, www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable (accessed 22 March 2020).

4.2.1 The SADC Model Bilateral Investment Template

In 2012 the SADC adopted its Model Bilateral Investment Template[65] as a non-binding guideline under its 2006 Protocol on Finance and Investment. The main objective of the agreement 'is to encourage and increase investments … that support the sustainable development of each party and in particular the host state where an investment is to be located'.[66] This orientation is maintained throughout the text and was used as a benchmark when examining other draft provisions for the text. It is worth noting that the SADC Model BIT is merely a draft guideline for SADC member states as the required number of ratification is yet to be achieved. However, its provisions are of value as it shapes the content of individual BITs entered into by member states. The instrument places an obligation on investors to comply with environmental and social impact assessment according to the laws of the host state or the International Finance Corporation (IFC) performance standards.[67] In similar manner as the PAIC, the SADC Model BIT prohibits investors from managing or operating investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are higher.[68]

4.2.2 The investment agreement for the COMESA Common Investment Area

The COMESA Common Investment Area (CCIA)[69] was adopted by the heads of state of COMESA member states in May 2007. The CCIA agreement is considered 'a precious investment tool established to create a stable region and good investment environment, promote cross border investments, and thus enhance COMESA's attractiveness and competitiveness … as a destination for Foreign Direct Investment (FDI), and in which domestic investments are encouraged.'[70] Article 5(e) of the CCIA obliges member states not to 'waive or otherwise derogate from or

65 See 'SADC Model Bilateral Investment Treaty Template with Commentary' July 2012, www.iisd.org/itn/wp-content/uploads/2012/10/SADC-ModelBIT-Template-Final.pdf (accessed 22 March 2020).

66 Art 1 SADC Model Bilateral Investment Treaty Template.

67 Art 13(1) SADC Model Bilateral Investment Treaty Template.

68 Art 15 SADC Model Bilateral Investment Treaty Template.

69 Investment Agreement for the COMESA Common Investment Area adopted 23 May 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download (accessed 22 March 2022).

70 P Muchlinski 'The COMESA Common Investment Area: Substantive standards and procedural problems in dispute settlement' in C Lim (ed) *Alternative visions of international law on foreign investment* (2016) 156.

offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments'.

The new CCIA is remarkable for further narrowing down the wide scope of investment protection standards. For instance, the FET standard has been reduced to fair judicial and administrative treatment. Lastly, in terms of dispute settlement between host state and investor, the CCIA foresees the exhaustion of local remedies. In addition to this requirement, the instrument also encourages the referral of disputes to the COMESA Court of Justice or to an arbitral tribunal constituted under the COMESA Court of Justice.[71]

4.3 The Morocco-Nigeria BIT as a potential model

In December 2016 Morocco and Nigeria signed a BIT[72] that attempts to address the unbalanced content of IIAs, restrictions on regulatory powers and the inadequacies of investment arbitration.[73] The Morocco-Nigeria BIT centres the agreement on sustainable development by making it the overarching objective of the treaty. In the Preamble to the treaty, up to four references are made to the sustainable development. With regard to the substantive provisions of the BIT, the treaty establishes a balance between the investors' rights and obligations. The investors' rights mimic those that are traditionally contained in IIAs. However, the scope of protection is limited to investments that fulfil the criteria of the treaty's investment definition. This definition requires that an investment has to contribute to the sustainable development of host states.[74]

71 Arts 26 & 27 CCIA.

72 Reciprocal investment promotion and protection agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016, not yet in force) https://investmentpolicyhubold.unctad.org/Download/TreatyFile/5409 (accessed 20 June 2019).

73 Dissatisfaction with traditional BITs has generated four main types of reaction: (a) reluctance to ratify BITs; (b) conclusion of facilitation agreements, which radically downgrade the substantive protection of foreign investment and do not provide for arbitration; (c) termination of BITs and adoption of investment legislation; and (d) upgrading of BITs with a view to striking a better balance between the private and public interests at stake which the Morocco-Nigeria BITrepresents. See T Gazzini 'Nigeria and Morocco move towards a "new generation" of bilateral investment treaties' *EJIL Blog* 8 May 2017, www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/ (accessed 12 February 2020).

74 Art 1(3) Morocco-Nigeria BIT. Under art 24(1), investors 'should strive to make the maximum feasible contributions to the sustainable development of the host state and the local community'.

The treaty also requires investors to comply with environmental assessment screening and assessment processes in accordance with the most rigorous between the laws of the home states, as well as social impact assessment based on standards agreed with its Joint Committee.[75]

The Morroco-Nigeria BIT also obliges investors to apply the precautionary principle;[76] maintain an environmental management system and uphold human rights in accordance with core labour and environmental standards as well as labour and human rights obligations of the host state;[77] operate through high levels of socially-responsible practices and apply the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[78] The treaty also addresses the perceived restrictions imposed by some investment treaties upon the regulatory power of host states by recognising the parties' right to exercise discretion 'with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities'.[79]

Lastly, the BIT introduces a novel provision that subjects investors 'to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state'.[80]

75 Art 18 Morocco-Nigeria BIT.The treaty establishes a Joint Committee composed of representatives of both contracting states. Its responsibilities include to monitor the implementation and execution of the treaty; to debate and share opportunities for the expansion of mutual investment; to promote the participation of the private sector and civil society; and to resolve any issues or dispute concerning parties' investment amicably.

76 Art 14(3) Morocco-Nigeria BIT.

77 Art 18 Morocco-Nigeria BIT.

78 Art 24 Morocco-Nigeria BIT.

79 Art 13(2) Morocco-Nigeria BIT. Art 13(4) provides that nothing in the treaty prevents state parties from adopting, maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with the treaty that they consider appropriate to ensure that investment activity in their territory is undertaken in a manner sensitive to environmental and social concerns.

80 Art 20 Morocco-Nigeria BIT: 'Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.'

4.4 Extra-African international investment agreements

The majority of the agreements concluded with non-African countries was concluded with European countries.[81] Switzerland and Germany have signed most of the agreements with African countries.[82] European countries were also the first to commence bilateral relations with African countries in order to establish international rules on investment protection. Egypt is the country that has concluded the highest number of BITs with European countries, followed by Morocco, Tunisia, Algeria and Mauritius.[83]

Mbengue states that the early initiative of the conclusions of BITs between African and European countries was driven mainly by colonial links and heritage.[84] As such, they were primarily intended to protect the vested interests of European countries already present in Africa, particularly in the extractive industry.[85] The content of the majority of these agreements follows the traditional approaches of treaties elaborated by capital-exporting countries.[86] The main provisions found in these BITs impose traditional obligations on host states.[87]

At the moment, China appears to be making the most inroads into African states on the back of its Belt and Road Initiative. Currently, there are 33 BITs between China and African countries, all of which are into force. However, despite the possibility for south-south cooperation between China and Africa, most of the BITs follow the traditional pattern, as regards their content, of capital-exporting countries. In sum, the BIT network between China and Africa does not reflect much of the current Africanisation of international investment law. It has even been referred

81 L Cotula et al 'China-Africa investment treaties: Do they work?'26, https://pubs.iied.org/pdfs/17588IIED.pdf (accessed 14 March 2022).

82 Germany (52) and Switzerland (46). They are followed by China (33); Belgium-Luxemburg Economic Union (32); Italy (32); The Netherlands (30); Turkey (30); France (25); United Kingdom (24); Portugal (21); and Spain (19).

83 United Nations Economic Commission for Africa (UNECA) (ed) *Investment policies and bilateral investment treaties in Africa: Implications for regional integration* (2016) 4.

84 Mbengue (n 53) 4.

85 Cotula et al (n 81) 7.

86 OECD (1967) Draft Convention on the Protection of Foreign Property.

87 These include, as highlighted above, National treatment; Most-Favoured Nation (MFN) treatment; Fair and Equitable treatment (FET); Full Protection and Security (FPS); the prohibition of 'arbitrary', 'unreasonable' or 'discriminatory' impairment of the foreign investment; and the duty to pay compensation in case the foreign investment is, directly or indirectly, expropriated.

to as 'sporadic, outdated, uninformed by recent developments, incoherent, and even purposeless'.[88]

5 The way forward

African states have contributed substantially to the development of international investment law. This has earned them the title of 'reverse contributors',[89] particularly through their role in the generation of the jurisprudence of ICSID case law.[90] While this may be perceived as confidence in the 'transformative potential of the ICSID system for the economic development of their economies', it perhaps is more attributable to the power asymmetries of IIAs as well as the ISDS system. The perception of African countries as investment rule consumers is mainly attributable to the heavy reliance of African countries on private capital commitment which drives the acceptance of pre-drafted BIT models of capital-exporting countries.

Therefore, it is not surprising that African states constantly explore ways of reforming the system although they have only been able to relatively achieve this on the continent. However, by at least producing model investment instruments at continental, sub-regional and national levels as exemplified by the PAIC, the SADC model BIT and the Morocco-Nigeria BIT respectively, African states are becoming producers.

However, African states are still a long way from attaining the required balance in the system. First, while it may not be easy to overcome the power asymmetries that underlie IIAs with third states, African countries must be brave enough to incorporate the highly-innovative regional approaches into agreements negotiated with extra-African countries. Direct transfixing of content of the PAIC, the SADC Model and the Morocco-Nigeria BIT may not be achievable in the immediate future, but negotiations can be based on the terms of these agreements.

88 W Kidane 'China's bilateral investment treaties with African states in a comparative context' (2016) 49 *Cornell International Law Journa*l 175-176.

89 Some scholars have also argued that African states have not only contributed to the ISDS system but may even have developed a regional *lex mercatoria*. See C Onyejekwe & E Ekhator 'AfCFTA and *lex mercatoria*: Reconceptualising international trade law in Africa' (2020) 47 *Commonwealth Law Bulletin* (2021) 93.

90 Between 1972 and 2017, African states have been a party to at least 144 investor-state ICSID cases. Furthermore, 19% of the disputes registered in 2018 under the ICSID Convention and additional facility rules by region involved sub-Saharan African states. See Akinkugbe (n 32) 435.

Second, African states must seek to establish consistent policy approaches for intra-African investment negotiations. The essence of this is to ensure uniformity and predictability in intra-African BITs so that the region can benefit collectively from the normative transformation of IIAs within, before it can possibly be exported to other regions.[91]

Lastly, African states must do well to avoid overlap in the 'spaghetti bowl'[92] dynamic of instruments regulating foreign investment in the region. The international investment law landscape in an Africa country in most cases comprises national investment law, regional investment instruments, as well as a BIT. These different levels of legal commitments raise many issues, particularly the fragmentation of legal norms. This unpredictability of prevailing rules could potentially deter investment in Africa. To solve these issues African states should work toward harmonising the inconsistencies between their national, regional, and international commitments.

6 Conclusion

As debates over the need to reform and rebalance international investment law continue, African states must be commended for attempting to achieve the much-needed change from within the continent. The move to align IIAs within the continent with the sustainable development agenda is an indication of the awareness that foreign investment must be aligned with critical values.

The dichotomy of approaches between north and south remain over the benefit of international investment law to host states, while some scholars argue that, in spite of the perceived power asymmetries hampering economic development as envisaged under international investment law, IIAs may serve as vessels for good governance in the host state.[93] A counter argument that has been made is that the cost of

91 Eg, the Morocco and Congo (Brazzaville) BIT which was signed in 2018 varies markedly from the Morocco-Nigeria BIT. The former reflects the features of traditional BITs. Investor obligations, which are central aspect of the PAIC, are not included; not least does the treaty contain references to voluntary corporate social responsibility standards. In addition, the Congo-Morocco BIT does not contain appreciable safeguards for the host state's right to regulate for sustainable development purposes as provided for under the Morocco-Nigeria BIT.

92 The term was coined by Jagdish Bhagwati to describe the proliferation of US free trade agreements. See 'US trade policy: The infatuation with free trade agreements' in J Bhagwati & A Krueger *The dangerous drift to preferential trade agreements* (1995).

93 See, eg, Vandeverde who states that that investment treaties 'embody norms that all countries committed to the rule of law should follow' and can therefore 'contribute greatly to institutional quality in host countries'. KJ Vandevelde 'Model bilateral

the disputes arising from these traditional IIAs, obscures the benefits of the IIA system as originally conceived.[94] While African states must take action to balance IIAs IIL with a view to remedying the often devastating consequences of the activities of investors, they must also match norm-generation with adroit implementation.

investment treaties: The way forward' (2012)18 *Southwestern Journal International Law* 313.

94 See, eg, Tienhaara arguing that '[m]any African countries that have ratified numerous BITs have remained marginalised in terms of global investment flows'. K Tienhaara *The expropriation of environmental governance: Protecting foreign investors at the expense of public policy* (2009) 59.

10 African states and the settlement of investment disputes: *Quo vadis*?

Rimdolmsom Jonathan Kabré

1 Introduction

Investor-state dispute settlement (ISDS)[1] is undergoing a process of reform taking place at national, bilateral, regional, continental and multilateral levels.[2] The need for these reforms has been iterated by United Nations Conference on Trade and Development (UNCTAD) according to which '[t]he question is not about *whether* to reform or not, but about the *what*, *how* and *extent* of such reform'.[3] These reforms are meant to deal with the dissatisfaction about and the criticisms levelled against the current ISDS system, which is the most used mechanism for the settlement of investment disputes,[4] and to suggest some features that might help ISDS to adapt to the ever-evolving environment.

Against this backdrop, this contribution discusses the participation of African countries in this reshaping process. More specifically, it looks at the question of what the lessons are that can be learned from decades of African involvement in ISDS, and how this African experience can contribute to ongoing debates about the future of ISDS. It should be recalled that ISDS and the appropriateness of its alternatives continue to be controversial among African countries: If some aspects of international investment law to some extent have been 'Africanised',[5] this is not the case with the settlement of investment disputes. This is evidenced by the fact that the Pan-African Investment Code (PAIC), which was supposed to present 'the African consensus on the shaping of international investment

1 Investment arbitration is the most used mechanism for the settlement of investment disputes between investors and states.

2 UNCTAD World investment report 2015, reforming international investment governance (2015) 164-170.

3 UNCTAD (n 2) 120 (my emphasis).

4 According to the Investor Dispute Settlement Navigator, there are almost 1 200 known treaty-based ISDS cases; see https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 22 August 2022).

5 MM Mbengue 'Africa's voice in the formation, shaping and redesign of international investment law' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 455-481.

law',[6] did not solve the issue but rather left this important matter up to the discretion of national governments.[7]

Hence, this chapter reflects on the possible future of ISDS in Africa. It begins with an historical account of the origin of ISDS in Africa through the discussion of African participation on the setting up of ISDS system. The chapter proceeds to assess the almost 60 years of African actors' involvement in the ISDS regime and by examining some aspects of ISDS that have crystallised the dissatisfaction some African countries have had *vis-à-vis* the international investment regime. Finally, the chapter reflects on the future of the settlement of investment disputes in Africa through a critical examination of current trends regarding the ISDS system (both inside and outside Africa) and a discussion of proposals that African countries may consider in their forthcoming negotiations.

2 African countries and the settlement of investment disputes: Chronicles of the original sin

The independence of many African states, in 1960, coincided with the setting up of the dispute settlement mechanism under the Convention on the settlement of investment disputes between states and nationals of other states (International Centre for Settlement of Investment Disputes (ICSID) Convention), in which they played an important role.[8] One author claimed that Africa can even be considered as the 'birthplace of investment arbitration' given the fact that the first of four regional conferences, organised by the World Bank, took place in Africa, and gathered 29 out of the 32 African countries, independent at that time.[9] Without the participation of African states, it is doubtful whether the ICSID Convention would have come into existence: They provided three-

6 MM Mbengue & S Schacherer 'Africa and the rethinking of international investment law: About the elaboration of the Pan-African Investment Code' in A Roberts et al (eds) *Comparative international law* (2018) 547.

7 According to PAIC art 42 (1), '[m]ember states may, in line with their domestic policies, agree to utilise the investor-state dispute settlement mechanism'.

8 P-J le Cannu 'Foundation and innovation: The participation of African states in the ICSID dispute resolution system' (2018) 33 *ICSID Review - Foreign Investment Law Journal* 456-500; AR Parra 'The participation of African states in the making of the ICSID Convention' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 270-277; Mbengue (n 5) 455-481.

9 T Naud, B Sanderson & AL Veronelli 'Recent trends in investment arbitration in Africa' *GAR, The Middle Eastern and African Arbitration Review 2019* 11 April 2019, https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2019/1190119/recent-trends-in-investment-arbitration-in-africa (accessed 26 August 2022).

quarters of the 20 ratifications needed for the ICSID Convention to come into existence[10] and, in many respects, had contributed to the development of the then new system.[11] Although the ICSID Convention has become 'the main piece of ISDS infrastructure',[12] the settlement of investment disputes did not start with the ICSID system but earlier.

This part puts this African participation into the broad context of the evolution of the international investment law regime and discusses some of the lessons that can be learned. It is important to correctly recount the historical engagement of African states with the current international investment law regime as it may provide guidance on what the future should be. This historical account will be made through a discussion of the origins of ISDS, as well as a discussion of the reasons behind the massive adherence of African states to the ICSID Convention.

2.1 Establishing an international investment dispute settlement system: A revolution or evolution?

Discussing the contribution of African states to the establishment of the ISDS system may recall the debate and discussions around African participation in the evolution of international law. There are two major schools of which the thoughts are opposed on this issue: The contributionists emphasise Africa's contributions to international law while the critical theorists examine Africa's subordination in its international relations as a legacy that is traceable to international law.[13]

In the specific context of international investment regime, it is commonly acknowledged that this regime was the result of an evolution and not a revolution. While some authors, such as Pauwelyn, describe the evolution as an organic process,[14] others, such as Kidane, contest

10 See the list of contracting states and other signatories of the ICSID Convention, https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf (accessed 26 August 2022).

11 See part 2.2 below.

12 UNCTAD (n 2) 121.

13 JT Gathii 'Africa and the history of international law' in B Fassbender & A Peters (eds) *The Oxford handbook of the history of international law* (2012) 407. One of the proponents of the contributionists' school of thought, Elias Tobias, participated in the Addis Ababa meeting where the ICSID Draft Convention was discussed. He described this meeting as an opportunity to 'engage in the progressive development of international law', ICSID *History of ICSID Convention* (1968) 244.

14 According to him, this regime has emerged through an 'an organic process of small increments and accidents: centuries old rules on diplomatic protection and treatment of aliens, treaties on friendship, commerce and navigation (FCN treaties) and evolving generations of BITs and FTAs, UN resolutions, ILC reports and draft articles, World

the organic growth approach and claim that 'it is organic only to North-South and perhaps in the distant past, North-North relations, but never to South-South relations'.[15] Be that as it may, the establishment of the ICSID system was part of this evolution and can be viewed as a 'landmark development' of the investment regime, preceded by some other important developments such as the conclusion of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (New York Convention) and the conclusion of the first bilateral investment treaty (BIT) in 1959 (between Germany and Pakistan).[16]

During the colonial era (between the eighteenth and nineteenth centuries) investment was primarily made in the context of the colonial expansion and did not need specific protection since 'the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments which went into the colonies'.[17] It was only after independence that the 'need for a system of protection of foreign investment came to be felt by the erstwhile imperial powers which now became the exporter of capital to the former colonies and elsewhere'.[18]

At the same time, and between Western powers and countries, which were not concerned by the colonial system (notably from central and

Bank, Organisation for Economic Co-operation and Development (OECD) and International Bar Association (IBA) guidelines and codes of practice, rulings and awards by the Permanent Court of International Justice (PCIJ), International Court of Justice (ICJ), Iran-US, mixed claims, ICSID and UNCITRAL tribunals, studies and critiques by academics, NGOs and influential organisations'; J Pauwelyn 'At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed' (2014) 29 *ICSID Review* 379.

15 W Kidane 'The China-Africa factor in the contemporary ICSID legitimacy debate' (2014) 35 *University of Pennsylvania Journal of International Law* 537.

16 The drafting of these agreements' provisions was influenced by the treaties on friendship, commerce, and navigation. That is why some authors consider these BITs as 'less a push forward than an attempt … to prevent backsliding of customary international law'; Pauwelyn (n 14) 34-35. The current investment regime is composed of three mains elements which are the ICSID Convention, the investment agreements (notably BITs) and the New York Convention; see UNCTAD (n 2) 122.

17 M Sornarajah *The international law on foreign investment* (2004) 19; D Collins *An introduction to international investment law* (2017) 7-10.

18 Sornarajah (n 17) 22. In the same vein, it should be recalled the EU statement according to which international investment rules were invented 'in Europe' (and maybe, for Europe); see European Union 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' concept paper, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed 26 August 2022). For one author, 'international investment law is not made *by Africa*, it was made *for Africa* as a replacement for colonial rules for the protection of capital'; Kidane (n 15) 526.

Latin America), the protection and regulation of aliens' properties, rights and interests were organised around the principle of diplomatic protection with sometimes the threat or the use of force to protect overseas nationals and their investments: the gunboat diplomacy.[19] This period was also characterised by the frequent recourse to arbitration administrated by mixed claims tribunals to resolve claims 'espoused by the home state of an injured foreign national'.[20] The mixed claims tribunals were mostly used by the United States and Great Britain, either against each other (for example, in the context of the Alabama arbitration)[21] or against Latin American states.[22] These arbitrations contributed to the development of international law[23] and to the establishment of international arbitration as a means for the resolution of international disputes.[24] This is evidenced by the fact that many international agreements concluded between the end of the nineteenth century and the first quarter of the twentieth century included the recourse to arbitration for the settlement of investment disputes.[25] This is the case of the Treaty of Versailles of 1919, which contains some articles related to the settlement of disputes (including investment disputes) such as articles 297 and 304, as well as some agreements adopted by the League of Nations.[26]

19 OT Johnson & J Gimblett 'From gunboats to BITs: The evolution of modern international investment law' in KP Sauvant (ed) *Yearbook on international investment law and policy 2010-2011* (2012) 652-657.

20 Johnson & Gimblett (n 19) 653.

21 T Bingham 'Alabama arbitration' *Max Planck Encyclopedia of Public International Law* (2006) https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e89 (accessed 26 August 2022).

22 Johnson & Gimblett (n 19) 653-654.

23 Bingham (n 21) paras 10-12.

24 The Alabama arbitration helped to 'fuel the subsequent movement to place international arbitration on a more permanent footing'. Johnson & Gimblett (n 19) 654.

25 Eg, arbitration was recognised as 'the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle'; see art 16 of 1899 Convention for the Pacific Settlement of International Disputes, https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf (accessed 26 August 2022). The same idea is to be found in art 38 of 1907 Convention for the pacific settlement of international disputes, https://docs.pca-cpa.org/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf (accessed 26 August 2022). The two treaties are also the founding treaties of the Permanent Court of Arbitration (PCA).

26 See notably the Geneva Protocol on arbitration clauses, adopted on 24 October 1923, entered into force on 28 July 1924, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf (accessed 26 August 2022); see also the Geneva Convention on the execution of foreign arbitral awards, signed on 26 September 1927, http://www.arbitrations.ru/userfiles/file/Law/Treaty/Geneva%20convention%20on%20execution%20of%20foreign%20awards.pdf (accessed 26 August 2022).

Arbitration clauses were also included in concession contracts between foreign companies and countries in which they operate so that, in an event of a dispute, the case was brought before an arbitral tribunal.[27] This was the case, for example, in the Lena Goldfields arbitration where the concession was granted for the exploitation of gold-fields business.[28] Some other cases were related to oil and gas concessions.[29] These arbitration cases played an important role in the theory of internationalisation of foreign investment contracts[30] and in the creation of the ICSID, which was originally designed to deal with cases arising from concession agreements and other investment contracts.[31] Although there has been a shift toward treaty-based arbitration, notably after the *AAPL v Sri Lanka* case,[32] contract-based arbitration continues to have a certain relevance nowadays.[33]

This historical background reveals that ISDS was nothing new or revolutionary and could be seen as a 'logical progression'.[34] Despite its

27 Eg, such arbitration clauses were included in certain public service concession contracts in Greece in 1925; see *Syndicat d'études et d'entreprises v Gouvernement grec*, explained by JG Wetter & SM Schwebel 'Some little- known cases on concessions' (1964) *British Yearbook of International Law* 94, cited by C Leben 'La théorie du contrat d'Etat et l'évolution du droit international des investissements' (2003) 302 *Collected Courses of the Hague Academy of International Law* 215-228. An arbitration of this kind can even be traced back to the *Compagnie universelle du Canal de Suez v Vice-Roi d'Égypte,* sentence of 21 April 1864, cited by C Leben 'L'évolution du droit international des investissements: un rapide survol' in C Leben (ed) *Le contentieux arbitral transnational relatif à l'investissement, nouveaux développements (*2006) 9-21.

28 A Ernst 'Lena Goldfields arbitration' (2014) *Max Planck Encyclopedia of Public International Law*, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e158 (accessed 31 January 2021); see also VV Veeder 'The Lena Goldfields arbitration: The historical roots of three ideas' (1998) 47 *International and Comparative Law Quarterly* 747-792.

29 See *Cheikh of Abu Dhabi v Petroleum Development Ltd* Award, 28 August 1951 (1953) *AJIL* 156; see also *Saudi Arabia v Arabian American Oil Company (Aramco*) Award, 23 August 1958. For a discussion of the last case, see B Suzanne 'Le droit international public dans la sentence de l'Aramco' (1961) 7 *Annuaire français de droit international* 300-311.

30 M Sornarajah *The international law on foreign investment* (2010) 289-299; see also M Sornarajah *Resistance and change in the international law on foreign investment* (2015) 99-130; Leben 'La théorie du contrat d'Etat' (n 27) 215-228; Leben 'L'évolution du droit international des investissements' (n 27) 9-21.

31 'Though much of the jurisprudence generated by ICSID is based on jurisdiction obtained on the basis of investment treaties, it is important to remember that ICSID was originally fashioned to deal with cases arising from investment contracts'; Sornarajah (n 30) 300.

32 *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* ICSID Case ARB/87/3, Final Award, 27 June 1990; see Pauwelyn (n 14) 42-44.

33 Sornarajah (n 30) 300-302.

34 Investment arbitration should be viewed as 'a logical progression of the PCA's founding purpose … [A] majority of the PCA's early inter-state arbitrations precisely involved

many innovative features, the ICSID Convention 'formalised' some practices and forms of dispute settlement already in use, before the independence of many African countries.[35] This is also confirmed by some statements such as that of Gardiner, the then Executive Secretary of the Economic Commission for Africa, who claimed that the ICSD system was designed to fill a gap in international law through the universal recognition and the international binding character of direct conciliation or arbitration for the settlement of investment disputes between the host state and the foreign corporations, which were already in use at that time.[36] This prompts a certain prudence when talking about the 'decisive' participation of countries in the setting up of a system that in part, if not its very core, existed before their independence. As Leben has declared, 'the novelty of a notion is rarely absolute and historical research often reveals the ancient existence of certain ideas that were believed to be quite recent' (author's translation).[37]

private interests (of the type that would typically now be dealt with through investor-state arbitration), espoused by the state in question through diplomatic protection. The *Norwegian Shipowners* and the *Lighthouses* cases, eg, primarily involved the interests of private parties'. J Paulsson 'Confronting global challenges: From gunboat diplomacy to investor-state arbitration' in PCA Peace Palace Centenary Seminar, 11 October 2013 3, https://docs.pca-cpa.org/2016/01/Confronting-Global-Challenges_-From-Gunboat-Diplomacy-to-Investor-State-Arbitration-by-Jan-Paulsson.pdf (accessed 31 January 2021).

35 'ICSID confirmed the model of commercial-style arbitration for the settlement of investor-state disputes (party-appointed arbitrators, confidential proceedings, quick and final decisions without appeal, focus on money damages rather than compliance), thereby embedding the system with the competing analogies of private commercial arbitration and public international law'; Pauwelyn (n 14) 36.

36 'In traditional international law a wrong done to a national of one state for which another state was internationally responsible was actionable not by the injured national, but by his state. *In practice that principle had been superseded in a number of cases in which provision had been made for the settlement of investment disputes by direct conciliation or arbitration between the host state and the foreign investor*. The internationally binding character of such arrangements had not, however, been universally recognised hitherto, and the Convention was designed to fill that gap' (my emphasis); ICSID *History of ICSID Convention* (1968) 241. In the same vein, Taslim Olawale Elias, the then Attorney General and Minister of Justice of Nigeria, described the draft project as 'an attempt … to *codify certain principles of customary law* and to engage in the progressive development of international law, and he warmly recommended it' (my emphasis); ICSID, *History of ICSID Convention* (1968) 244.

37 Original French reads as follows: 'La nouveauté d'une notion est rarement absolue et des recherches historiques révèlent souvent l'existence ancienne de certaines idées que l'on croyait toutes récentes'. Leben (n 27) 212.

Additionally, the discussion of the reasons for which African countries have adhered to this Convention gives a fuller picture of African countries' participation in the establishment of the ISDS system.

2.2 The ICSID Convention, foreign investments, and the development of African countries: An uneasy equation

The question of why African countries had massively adhered to the ICSID Convention needs to be addressed, namely, why these countries, asserting their newly-gained economic and territorial sovereignty,[38] accepted to delegate a part of the much venerated sovereignty through their accession to the ICSID Convention.[39] Surprisingly, African countries did not emphasise the impact that the ICSID Convention and other related agreements would have on their sovereignty.[40] They rather focused on the claimed positive consequence of accessing to the ICSID Convention, that is the attraction of foreign investments Africa needed for its development.[41]

38 African states are often seen as being rather 'jealous' of their own sovereignty. See HB Jallow *The law of the African (Banjul) Charter on Human Rights and Peoples' Rights (1988-2006)* (2007) 58. These countries had massively adhered to the Declaration on Permanent Sovereignty over Natural Resources, United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962.

39 'The proposed Convention was intended to give *internationally binding effect to the limitation of sovereignty* inherent in an agreement by a state pursuant to the Convention to submit a dispute with a foreign investor to arbitration' (my emphasis); ICSID *History of ICSID Convention* 241-242. This question was addressed from the general perspective of developing countries by, among others, A Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1997-1998) 38 *Virginia Journal of International Law* 639-688. See also Pauwelyn (n 14) 372-418.

40 Exceptionally, the representative of Cameroon underlined the tension that may exist between the limitation on the exercise of state's sovereign rights and the need to reassure investors so that they can invest without fear. He described this as an 'attempt to conciliate the unconciliable'; ICSID, *History of ICSID Convention* (1968) 245. According to Aaron Broches, the then General Counsel of the International Bank for the Reconstruction and the Development (IBRD) and Chairperson of the meeting, 'African experts had shown less interest in conceptual problems of sovereignty and had taken a pragmatic approach being concerned, however, to establish a balance between an admitted need for and desire to encourage private foreign investment, and the degree in which adherence to the Convention might limit a State's freedom of action'; ICSID *History of ICSID Convention* (1968) 311. On the contrary, many Latin American countries (such as Jamaica, Argentina, Bolivia, Ecuador) expressed fear and were reluctant given the potential limitation on their sovereignty; see ICSID *History of ICSID Convention* (1968) 306, 308, 310.

41 Many African countries, such as Ethiopia, Guinea, Central African Republic, Tunisia and Tanganyika, made statements in that regard. For one author, they 'had to do so in order to attract private foreign investment to develop their ailing post-colonial economies'. See Kidane (n 15) 585-586 while others assert that 'in addition to recognising their need to attract investment, African officials acknowledged that offering a neutral and international dispute resolution mechanism was a key factor for the deal'. CN Brower & MP Daly 'A study of foreign investment law in Africa:

However, a question arises as to whether there is a genuine link between the accession to the Convention and the attraction of the investment, which also recalls the economic theories of foreign investment.[42] There thus are two conflicting theories: On the one hand, the classical theory on foreign investment is focused on the positive effects of investments and claims that they are 'fully' beneficial to the host state. On the other hand, the dependency theory asserts that foreign investments cannot bring any meaningful economic development.[43]

The first theory (the classical view on foreign investment) predominated at the Addis-Ababa meeting:[44]

> International investment was universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world and had become one of the major features of the partnership between the richer and poorer nations; its promotion was a matter of urgent concern to capital-importing and capital-exporting countries alike. That was particularly true of private foreign investment which, if wisely conducted, could make great contributions to the development of the economies of the recipient countries.

Surprisingly, hoewever, the ICSID Convention did not mention the link between the ICSID Convention and the development; it put it as a goal to be achieved in its corpus.[45]

Opportunity awaits' in A Menaker (ed) *International arbitration and the rule of law: Contribution and conformity* (2017) 510.

42 It should be recalled that, to some extent, these theories shape or influence the shaping of legal attitudes to foreign investment.

43 There are some nuances and variations in the formulation of these theories as well as a middle path theory, which is an intermediary between these two extreme theories. For an in-depth discussion of these theories, see Sornarajah (n 30) 47-60.

44 ICSID *History of ICSID Convention* (1968) 240.

45 It seems that the Convention has been 'carefully drafted to avoid exactly that implication'; see Kidane (n 15) 562. Later on, an investment tribunal, in a case involving an African country, stated that the contribution to economic development of the host state can be added as an additional condition when defining investment; *Salini & Others v Morocco* ICSID Case ARB/00/4, decision on Jurisdiction, 23 July 2001, 152 para 52. However, such reasoning has been rejected by some other tribunals arguing that economic development is a goal of investment, not an inherent characteristic of it. For an analysis of those cases, see A Grabowski 'The definition of investment under the ICSID Convention: A defence of Salini' (2014) 15 *Chicago Journal of International Law* 298-299.

Were African countries aware of the effects of signing investment agreements?[46] In some respects there are grounds for doubt. Even if some countries on the continent had domestic legislation for foreign investments, they did not have prior experience in all the issues regarding the regulation of foreign investments. Therefore, '[w]hen the World Bank asked the newly-independent African states to join ICSID in 1964, they were rather unsure of what it meant for them beyond the promise of increased foreign investment'.[47] Almost half a century later, some countries and institutions have underscored the absence of a connection between the signing of investment agreements and the attraction of foreign investments.[48] According to the United Nations (UN) Economic Commission for Africa's Committee on Regional Cooperation and Integration, '[t]he impact of bilateral investment treaties on economic and social development in Africa remains debatable. There is no conclusive evidence regarding the effect of these treaties on foreign investment.'[49] This absence was also highlighted by the South African government as a reason to terminate some of its bilateral investment treaties (BITs).[50]

46 The example of Latin American countries.

47 W Kidane 'Contemporary international investment law trends and Africa's dilemmas in the Draft Pan-African Investment Code' (2018) 50 *George Washington International Law Review* 533. He further adds that 'most joined the ICSID system with enthusiasm when their Latin American counterparts refused. Then, predictably, many African states appeared before ICSID tribunals over the years, accused of unlawful expropriation and denial of justice (violations of the fair and equitable principle), to mention just a few. With almost no participation in the decision-making process … the African states continued to accept the "creditors' interpretation" of the investment treaties with their wealthier and more powerful partners.' This echoed to the argument made by Poulsen, according to which it was due to ignorance and that these countries did not realise what they were committing themselves to. LNS Poulsen *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries* (2017).

48 A recent analysis by Dominic Npoanlari Dagbanja shows that, in the specific context of Ghana, most foreign direct investments in Ghana come from countries with which it does not have BITs and that these BITs do not play any statistically significant role in attracting FDI from Ghana's contracting parties to BITs when compared to FDI inflows to Ghana from other countries; DN Dagbanja 'Can African countries attract investments without bilateral investment treaties? The Ghanaian case' (2019) 40 *Australasian Review of African Studies* 71-89.

49 UN Economic Commission for Africa, Committee on Regional Cooperation and Integration, Investment Agreements Landscape in Africa, 7-9 December 2015, E/ECA/CRCI/9/5, http://www.uneca.org/sites/default/files/uploaded-documents/RITD/2015/CRCI-Oct2015/report-on-investment-agreements.pdf1. By contrast, Latin American countries, with prior experience, raised many concerns related to the impact of this new convention, and rejected the proposed draft.

50 The three-year review of its BITs, conducted by the South African government, revealed that, although foreign direct investment has been central to the economic development, the system opens the door for 'narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making'. X Carim

Based on the foregoing, can the assumption that signing the ICSID Convention helps to attract foreign investment be seen as a 'plausible folk theory'?[51] This last expression refers to the fact that many of the rules and regulations, passed at the global level, are based on assumptions that have not been empirically verified.[52] Assumptions made, far from being necessarily wrong, are simply not verified. Some authors argue that the investment treaty system is based on many plausible folk theories that include the increase of foreign investment because of concluding investment agreements:[53]

> If asked why states sign investment treaties, most people in the field historically would have answered 'because it depoliticises investment disputes' or 'because it increases foreign investment' or 'because it contributes to the rule of law'. These arguments sound right. They are plausible. They have the sound of truth to them. Yet, as the field has evolved, these claims have come under scrutiny in the academic literature, and some have not stood up well. But is this evidence used in global governance debates? If not, why?

Finally, all the above developments questioned the 'capacity' of the newly-independent countries to significantly contribute to the establishment of the ISDS system. How can they be at the forefront of the adoption of the ICSID Convention while having a rather passive role in the drafting of investment rules and substantive standards of protection (BITs) that are

'Lessons from South Africa's BITs review' (2013) 109 *Columbia FDI Perspectives*. According to the President of Commission for a Comprehensive Citizens' Audit of Investment Protection Treaties and of the International Investment Arbitration System (CAITISA), set up by the government of Ecuador '[i]t is absolutely logical for Ecuador to move forward with the denunciation of its investment protection treaties, because, as our report will reveal, they have been very onerous for the country. *BITs do not contribute to attract foreign investment and have deviated millions of dollars of the public treasury to fight against million-dollar claims*. In turn, they have systematically undermined social and environmental regulation' (my emphasis); C Olivet '*Auditing Commission to release report as Ecuador moves to terminate investment agreements'* 4 May 2017, https://www.tni.org/en/node/23493?content_language=en (accessed 26 August 2022).

51 TC Halliday 'Plausible folk theories: Throwing veils of plausibility over zones of ignorance in global governance' (2018) 69 *British Journal of Sociology* 936-961.

52 A Roberts & TS John *UNCITRAL and ISDS reforms: Plausible folk theories*, *Ejiltalk* 13 February 2020, https://www.ejiltalk.org/uncitral-and-isds-reform-plausible-folk-theories/#_ftn1 (accessed 26 August 2022).

53 Roberts & John (n 52).

applicable before ICSID tribunals?[54] This is one of the 'dilemmas' these countries faced in the post-colonial period.[55]

However, this ambiguous and overemphasised role in the establishment of the ISDS system should not foreclose the possibility of accounting for subsequent contributions of African states in the settlement of investment disputes. The next part will discuss these contributions.

3 African actors in ISDS: What lessons after almost 60 years of African participation?

The participation of African states in the settlement of investment disputes has been extensively investigated.[56] In 2019, for example, the ICSID Review launched a special issue on Africa and the ICSID dispute resolution system to offer a 'comprehensive and complete overview of Africa's contribution to ISDS and, in particular, to the ICSID system'.[57] So far, 49 African countries have either signed or ratified the ICSID Convention.[58] From a statistical point of view, the continent has been

54 It should be recalled that until 2000, very few African states had an 'investment treaty model of their own, let alone an investment policy strategy or a negotiating framework'. H El-Kady & M De Gama 'The reform of the international investment regime: An African perspective' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 486.

55 Kidane (n 47) 523-579.

56 For an overview of these studies, see WB Hamida, JB Harelimana & A Ngwanza *Un demi-siècle africain au CIRDI, Regards rétrospectifs et prospectifs* (2019); MM Mbengue & S Schill (eds) 'Africa and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 367-584; MF Qumba 'South Africa's move away from international investor-state dispute: A breakthrough or bad omen for investment in the developing world?' (2019) 52 *De Jure* 358-379; AA Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177-189; PMDS Rosário & O Ajayi 'Investments in sub-Saharan Africa: The role of international arbitration in dispute settlement' (2009), https://ssrn.com/abstract=1426823; AA Asouzu *International commercial arbitration and African states practice, participation and institutional development* (2001); K Daele 'Investment arbitration involving African states' in L Bosman (ed) *Arbitration in Africa: A practitioner's guide* (2013) 403-467; UE Ofodile 'Africa and international arbitration: From accommodation and acceptance to active engagement' (2015) 4 *Transnational Dispute Management*; AA Yusuf 'From reluctance to acquiescence: The evolving attitude of African states towards judicial and arbitral settlement of disputes (2015) 28 *Leiden Journal of International Law* 605-621; A Telesetsky 'A new investment deal in Asia and Africa: Land leases to foreign investors' in C Brown & K Miles (eds) *Evolution in investment treaty law and arbitration* (2011) 539-569.

57 https://academic.oup.com/icsidreview (accessed 26 August 2022). See special focus section: 'Africa and the ICSID dispute resolution system' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 259-551.

58 https://icsid.worldbank.org/about/member-states/database-of-member-states (accessed 26 August 2022).

involved in between 15 and 26 per cent of the whole ICSID cases (15 per cent for sub-Saharan Africa and 11 per cent for Middle East and North Africa).[59] A closer look reveals that the continent has played a pioneering role in many respects:[60] It was involved, among others, in the first ICSID case registered,[61] the first ICSID award rendered,[62] the first ICSID case in which a counterclaim was successful,[63] and the first ICSID case in which a host state lodged a claim against a foreign investor.[64]

Despite this important contribution, much dissatisfaction has been voiced by African countries against the current system established for the settlement of investment disputes. The ongoing discussions at the UN Commission on International Trade Law (UNCITRAL) Working Group III offer an excellent platform for the analysis of these dissatisfactions, as many participants have pointed to some of the flaws that are affecting the current system. As a reminder, the UNCITRAL entrusted its Working Group III with a broad mandate to work on the possible reform of investor-state dispute settlement (ISDS).[65] The dissatisfactions or concerns on African countries can be grouped into four categories: concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; concerns pertaining to arbitrators and decision makers; concerns pertaining to cost and duration of ISDS cases; and concerns pertaining to third-party funding.[66] They can be also viewed as concerns related to the arbitral process, concerns related to the arbitral outcomes and concerns related to arbitrators and decision makers.[67]

59 ICSID *The ICSID caseload-statistics* 12.

60 Le Cannu (n 8) 463-467.

61 *Holiday Inns SA & Others v Morocco* ICSID Case ARB/72/1.

62 *Adriano Gardella SpA v Côte d'Ivoire* ICSID Case ARB/74/1 Award, 29 August 1977.

63 *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case ARB/84/4, Award, 6 January 1988.

64 *Gabon v Société Serete SA* ICSID Case ARB/76/1, order taking note of the discontinuance issued by the Tribunal (27 February 1978).

65 For the sake of precision, the mandate given to the Working Group contained three stages: '(i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission' United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27November–1December 2017), A/CN.9/WG.III/WP.142, 5.

66 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 36th Session (Vienna, 29 October-2 November 2018), A/CN.9/964, 6-19.

67 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 34th session (Vienna, 27 November - 1 December 2017), A/CN.9/WG.III/WP.142, 5-9.

An analysis of submissions by African states puts the spotlight on a common concern that is related to the issue of legal expertise in the context of ISDS. In this regard, Morocco noticed that

> [o]wing to their limited financial resources and *lack of legal professionals with significant experience in ISDS*, developing countries need assistance in that area. It would therefore be highly desirable to establish a mechanism for supporting and assisting those countries in dealing with ISDS cases so as to enable them to better prepare for, handle and manage disputes relating to international investment.[68]

Additionally, the submission of Mali points out the lack of expertise and preparation of African countries in ISDS, saying that 'African states find themselves involved in arbitral proceedings, often without being sufficiently prepared, given the lack of a strategy document for negotiations, *with only limited expertise in complex legal issues*'.[69] Furthermore, the intersessional regional meeting, held in Conakry and attended by almost 30 African countries, underlined the need to develop '"ISDS awareness" guided by an approach of demystification, democratisation and "domestication" and by appropriate actions, including capacity-building'.[70] Although African countries were not unfamiliar with the European legal cultures that 'underpinned' the creation of the ICSID system, they had to 'acquire working knowledge of the rules, and acclimate better to the Eurocentric cultures of the institutions'.[71] The question, therefore, arises as to whether they have been able to do so. Also, was the participation of African actors limited only to providing support and cases or were they able to contribute to the decision making? If yes, how? If no, why not?

Analysing the issue of African legal expertise is of particular importance since it helps also in addressing some of the most important criticisms voiced against the current ISDS. For example, it is acknowledged

68 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th session (New York, 1–5 April 2019), Submission from the Government of Morocco, A/CN.9/WG.III/WP.161, 4, para 18 (my emphasis).

69 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th session (New York, 1–5 April 2019), Submission from the Government of Mali, (Vienna, 14–18 October 2019), A/CN.9/WG.III/WP.181, 2 (my emphasis).

70 UNCITRAL, Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Guinea, (Vienna, 14–18 October 2019), A/CN.9/WG.III/WP.183, 7 para 25.

71 W Kidane 'The culture of investment arbitration: An African perspective' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 413.

that investment arbitration incurs important costs.[72] However, a large proportion of these costs is comprised of the costs for parties' legal representation (fees and expenses for counsel, experts and witnesses).[73] Under these circumstances, can the use of more African legal expertise help in reducing the costs of ISDS? Additionally, the issue of legal expertise in ISDS is related to concerns pertaining to arbitrators and decision makers. As a reminder, and according to ICSID Convention article 14(1), '[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators'. Against this backdrop, one might wonder whether the lack of diversity in arbitrators can be due, among others, to a lack of expertise in the field of law of some countries, such as African countries.

This part will look at all the issues related to African legal expertise in ISDS with a particular focus on the case of African arbitrators and African agents, counsel and advocates.

3.1 African arbitrators in ISDS

Statistically, 59 sub-Saharan African arbitrators, conciliators and *ad hoc* committee members (hereinafter designed as arbitrators) have been appointed, so far, either by ICSID or the litigant parties.[74] In addition, 107 other arbitrators appointed are from 'Middle East and North Africa'.[75] This amounts to 166 out of a total population of 2 731 arbitrators in ICSID cases. A detailed analysis reveals that African arbitrators come from countries such as Egypt (39); Morocco (13); Nigeria (10); Somalia (8); Senegal (7); Algeria (4); South Africa (3); Togo (3); Benin (2); Cameroon (2); Gabon (2); Ghana (2); Madagascar (2); Malawi (2); Burundi (1); Cabo Verde (1); Central African Republic (1); Sudan (1); and Zambia (1).[76] Of these arbitrators, a number hold dual nationalities from Mauritius and France (2); Malta and South Africa (2); Algeria and France (1); United Kingdom and Uganda (1); and United Kingdom and Ghana (1). Based on this information, it is safe to say that African arbitrators are

72 G Bottini et al 'Excessive costs and recoverability of costs awards in investment arbitration' (2020) 21 *Journal of World Investment and Trade* 251-299; SD Franck *Arbitration costs, myths and realities in international treaty arbitration* (2019).

73 UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 34th session (Vienna, 27 November–1 December 2017), https://undocs.org/en/A/CN.9/930/Rev.1, 7 para 36.

74 ICSID Statistics 17.

75 As above.

76 ICSID Statistics 18-19.

underrepresented in ISDS.[77] The reasons of such underrepresentation are to be found at many levels.

First, at the level of African countries themselves which, as litigant parties and contracting states, are playing an important role in this regard. According to article 37 of ICSID Convention, litigant parties determine the number and the method of arbitrators' appointment. When the ICSID default mechanism applies, because of a lack of agreement, litigant parties are also appointing two out of the three arbitrators.[78] In addition, each contracting state, according to article 13 of the ICSID Convention, has the right to appoint up to four persons each to ICSID's official Panel of Conciliators and its Panel of Arbitrators. However, some countries do not fully take advantage of this opportunity. In fact, the list of persons provided by many African countries is either not up to date[79] or includes political figureheads who, according to some authors, 'are guaranteed never to be accepted as neutral arbitrators'.[80]

Second, the ICSID Centre also bears a portion of responsibility since article 13(2) of the ICSID Convention empowers the Chairperson of the ICSID Administrative Council to appoint 10 persons of different

77 This underrepresentation was also discussed at the intersessional regional meeting, held in Conakry; UNCITRAL, Summary of the intersessional regional meeting on investor-state dispute settlement (ISDS) reform submitted by the government of the Republic of Guinea, (Vienna, 14–18 October 2019), A/CN.9/WG.III/WP.183, 8, para 31; UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th session (New York, 30 March-3 April 2020); submission from the government of Morocco, A/CN.9/WG.III/WP.195, 3; L Young & A Ross 'Africa must have more representation on tribunals, says somali judge' *Global Arbitration Review* 15 October 2015, https://globalarbitrationreview.com/article/1034844/africa-must-have-more-representation-on-tribunals-says-somali-judge (accessed 26 August 2022).

78 This provision is completed by Rules 2 and 3 of The Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to art 6(1)(c) of the ICSID Convention.

79 The list of arbitrators provided by the following countries is not updated: Burundi (expired in 2016); Burkina Faso (expired in 2010); Central African Republic (expired in 1986); Comoros (expired in 1987); Democratic Republic of the Congo(expired in 2019); Gabon (expired on 4 September 2020); Guinea (expired in 1987); Kenya (expired in 2018); Lesotho (expired in 1989); Liberia (expired in 1991); Malawi (expired in 2012); Niger (expired in 1997); Senegal (expired in 2004); Tanzania (expired in 2005); Uganda (expired in 2016); Zimbabwe (expired in 2019). The list of some other African countries contains two categories of people: some whose term has ended while the term of other arbitrators is still valid. This is the case of countries such as Sierra Leone and Seychelles.

80 Brower & Daly (n 41) 23.

nationalities.[81] In this regard, the ICSID Administrative Council has appointed three sub-Sahara African arbitrators in 2020.[82] Some authors believe that the Centre should not be held responsible for such underrepresentation. Rather, it is helping to fulfil the demands of these countries that want arbitrators with a high level of expertise.[83] However, the ICSID Centre (its Administrative Council and the Secretary General) can play a role in promoting diversity among arbitrators and have started to do so.[84]

Third, the lack of African arbitrators seems to be associated with the low representation of African counsel and advocates in ISDS (which is discussed under part 3.2.). It appears that litigant parties tend to appoint arbitrators based on the recommendation of their counsel. One author even claims that 'there appears to be a connection between the counsel representing the parties and the nationality of arbitrators appointed by the parties'.[85] For example, in *AngloGold Ashanti (Ghana) Limited v Republic of Ghana*, where both parties appointed Ghanaian law firms as counsel, one of the arbitrators was African.[86] On the contrary, in *Gustav FW Hamester GmbH & Co KG v Republic of Ghana* none of the parties retained a local law firm and none of the arbitrators was African.[87]

What can be the impact of lacking African arbitrators and African arbitral institutions involved in the settlement of investment disputes? In *SOABI v Senegal* Kéba M'Baye described the mission of the adjudicator as being one of finding legal solutions for the settlement of disputes and doing justice. In his dissenting opinion, he wondered whether it was not time for international tribunals to no longer merely coldly apply ready-made formulas but to use the discretionary power they have in certain areas to

81 Among these 10 persons, three are from Africa; see https://icsid.worldbank.org/about/arbitrators-conciliators/database-of-icsid-panels (accessed 26 August 2022).

82 ICSID *The ICSID Caseload -Statistics* 2 (2020) 28.

83 Brower & Daly (n 41) 24.

84 It seems like 'the increase in the appointment of African arbitrators and conciliators on ICSID panels is driven primarily by the ICSID Secretariat itself and not by the African states or investors appearing before ICSID panels as parties'. E Onyema 'African participation in the ICSID system: Appointment and disqualification of arbitrators' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 374.

85 Onyema (n 84) 375.

86 The arbitrator concerned is Muna B Ndulo, from Zambia. *AngloGold Ashanti (Ghana) Limited v Republic of Ghana* ICSID Case ARB/16/15, Order of the Tribunal taking note of the discontinuance of the proceedings, 7 August 2018.

87 *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case ARB/07/24, Award, 18 June 2010.

say what the law is and to achieve justice.[88] While calling on arbitrators to discourage the legal artifices that can be used to promote injustice, M'Baye encouraged them to contribute to the north-south dialogue and to the recognition of the legitimate right to development of the people of countries with social and economic difficulties.[89] The absence of African arbitrators can be detrimental to this dialogue and the quest for justice and development.

Such an absence also impacts the legitimacy of the investment regime: The lack of adjudicator diversity has been considered as an area of concern for the legitimacy of the ISDS system, but also for international adjudication in general.[90] It is not surprising that the representation of principal legal systems (in the world) as well as the equitable geographical distribution are of particular importance in the composition of many international adjudicative bodies.[91] Even though international arbitration does not have a single cultural root,[92] it can easily be noticed that African cultural practice and legal traditions are not well represented. This can be seen through the absence of African expert in the working committee of the International Bar Association (IBA) Rules on the Taking of Evidence, which is supposed to be representative of 'over 2 300 members from over 90 countries'.[93] This absence of African arbitrators can also lead to cultural

88 It reads in French as follows: 'Cette remarque conduit à se demander s'il n'est pas temps pour les tribunaux internationaux, siégeant dans des affaires d'un type particulier, de ne plus se contenter d'appliquer froidement des formules toutes faites mais de saisir l'occasion que leur offre leur pouvoir d'appréciation dans certains domaines pour non pas seulement dire le droit mais rendre la justice? La Convention de Washington protège fort opportunément les entrepreneurs qui apportent leur capitaux et leur industrie pour contribuer (tout en faisant des profits, puisque c'est leur vocation) à une entreprise de développement dans un pays du tiers-monde. Quand, profitant de relations personnelles locales, des hommes d'affaires *(sans* risque financier) réussissent à faire signer un contrat, ce qui souvent est l'essentiel, et en cas de différend arrivent par des artifices juridiques à mettre les torts du côté de leurs partenaires, n'est-il pas normal que les tribunaux s'emploient à décourager de tels agissements et usent à cette fin (dans le cadre de la loi) de leurs pouvoirs d'appréciation s'ils existent?'. *Société Ouest Africaine des Bétons Industriels v Republic of Senegal* (ICSID Case ARB/82/1), Dissenting Opinion of Kéba M'Baye, 25 February 1988, 240 para 20.

89 M'Baye (n 88) 241 para 21.

90 AK Bjorklund et al 'The diversity deficit in international investment arbitration' (2020) 21 *Journal of World Investment and Trade* 410-440; F Baetens (ed) *Identity and diversity on the international bench, who is the judge?* (2020).

91 See, eg, art 2(2) of the Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea).

92 For an author, it is an 'imperfect amalgamation of cultures that compete for dominance'. Kidane (n 71) 414.

93 IBA 1.

misunderstanding, as evidenced in the *Duty Free v Kenya*.[94] In another case, the arbitral tribunal composed of three British lawyers interpreted the respect and deference shown by an African witness to an elder as a tacit agreement with the elder while the witness was politely expressing his disagreement, as his culture requires, but the tribunal just did not get it.[95]

Moreover, the lack of African arbitrators might influence the perception other regions have on the ability of African lawyers and institutions to effectively settle disputes. Recently, in the context of the China-Africa Joint Arbitration Centre, China refused that the third arbitrator (the one appointed arbitrator by the two arbitrators appointed by the parties to the dispute) be an African[96] as if an arbitral tribunal (exclusively or in majority) composed of African arbitrators cannot be sufficiently neutral or experienced to adjudicate a case that took place in Africa while arbitrators from other continents can. If it is for the sake of neutrality, why are African arbitrators not appointed in cases involving actors from other continents?

Admittedly, some cases that have involved African regional institutions and arbitration centres were not well handled. The case between Mr Josias van Zyl (South Africa), the Josias van Zyl Family Trust (South Africa), the Burmilla Trust (South Africa) and the Kingdom of Lesotho was first brought before the Tribunal of the Southern African Development Community (SADC) on 12 June 2009. Following the suspension of the SADC tribunal's operations indefinitely and, ultimately, the restriction of its jurisdiction to state-state disputes,[97] the claimants instituted, under the SADC Protocol on Finance and Investment, arbitration proceedings against Lesotho. This arbitration was seated in Singapore, governed by the UNCITRAL Rules, and administered by the Permanent Court of

94 Kidane (n 71) 426-432.

95 According to an anecdote told by a counsel who did not want to disclose the nationality nor the case, because of confidentiality requirements. O Holmey 'Droit des affaires: L'arbitrage international dans le box des accusés' *Jeune Afrique* 28 January 2020, https://www.jeuneafrique.com/mag/885737/economie/droit-des-affaires-larbitrage-international-dans-le-box-des-accuses/ (accessed 26 August 2021).

96 O Holmey 'Chine-Afrique: une nouvelle alliance en droit des affaires face à l'Occident' 28 janvier 2020, https://www.jeuneafrique.com/mag/885723/economie/chine-afrique-une-nouvelle-alliance-en-droit-des-affaires-face-a-loccident/ (accessed 26 August 2022).

97 https://www.sadc.int/about-sadc/sadc-institutions/tribun (accessed 26 August 2022).

Arbitration.[98] In *Getma v Republic of Guinea*[99] the arbitration was governed by the provisions of the Title IV of the Organisation for the Harmonisation of Business Law in Africa (OHADA) Treaty, the Rules of Arbitration of the Common Court of Justice and Arbitration of the OHADA of 11 March 1999, the Rules of Procedure of the Court, and their annexes. However, a controversy arose regarding arbitrators' fees, between the arbitrators and the CCJA.[100] This is why some authors consider that many African countries unfortunately have 'a reputation as an arbitration-unfriendly venue'.[101] Fortunately, this is not a generalised tendency, and some African arbitral institutions are building a strong reputation, such as the Kigali International Arbitration Centre,[102] the Cairo Regional Centre for International Commercial Arbitration[103] and the Arbitration Foundation of South Africa.[104]

3.2 African agents, counsel, and advocates in ISDS

According to Rule 18(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) '[e]ach party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party'. The issue of legal representation is closely linked to states' capacity which, according to Sharpe, is 'an integral part of the legitimacy and viability of international investment arbitration'.[105] Given the public interests involved in ISDS, states are

98 See *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust & Others v The Kingdom of Lesotho* PCA Case 2013-29 (First Case); *Josias Van Zyl, The Josias Van Zyl Family Trust & The Burmilla Trust v The Kingdom of Lesotho* PCA Case 2016-21 (Second Case); the Singapore Court of Appeal decision in *Swissbourgh Diamond Mines Pty Limited & Others v Kingdom of Lesotho* 2018 SGCA 81 Decision CA-CA 149-2017, 27 November 2018.

99 *Getma International v Republic of Guinea* (I) CCJA Case 001/2011/ARB.

100 See the judgment of CCJA, 19 November 2015, annulling the arbitral award of 29 April 2014, https://jusmundi.com/en/document/decision/en-getma-international-v-republic-of-guinea-i-award-tuesday-29th-april-2014#decision_4081 (accessed 26 August 2022) and the response of the arbitrators in *Jeune Afrique*, https://www.jeuneafrique.com/285543/societe/affaire-getma-guinee-les-arbitres-repondent/ (accessed 26 August 2022). An ICSID arbitration took place and involved the same litigants but based on other grounds; see *Getma International & Others v Republic of Guinea [II]* ICSID Case ARB/11/29.

101 Brower & Daly (n 41) 18.

102 https://kiac.org.rw/new/ (accessed 26 August 2022).

103 https://crcica.org (accessed 26 August 2022).

104 https://arbitration.co.za (accessed 26 August 2022).

105 JK Sharpe 'Control, capacity, and legitimacy in investment treaty arbitration' (2018) 112 *AJIL Unbound* 265. He further adds that '[t]he legitimacy (and utility) of the

encouraged to appoint an agent whose role is 'indispensable' in investment arbitration.[106] However, many African countries tend not to appoint agents nor include officials in their legal teams but, rather, to outsource their legal representation. In fact, few states have a specific department dedicated to the representation of their interests in international disputes, in general, and in investment arbitration, more specifically. Egypt has, within its Egyptian State Lawsuits Authority (ESLA),[107] a department called the Foreign Disputes Department (FDD), exclusively dedicated to the representation of Egypt in international disputes, including investment arbitration.[108] This can be explained by the fact that this country is the most active African country, in ISDS with, so far, 38 ICSID cases.[109] A country such as Senegal also has such a specific department, Agence Judiciaire de l'État, of which the mission is to represent the Senegalese government in the settlement of all contentious cases in which this state is a party, be it before national and international judicial or arbitration bodies.[110] Given the financial implications of having such a specific department, and due to the small numbers of cases in which they are involved, some

system rests in part upon states' ability to understand and comply with their legal obligations, effectively defend against investor claims, and keep the law on a sensible track. Capacity thus is an integral part of the legitimacy and viability of international investment arbitration. We should welcome, and encourage, reform efforts that help states build the capacity required to achieve these goals.'

106 JK Sharpe 'The agent's indispensable role in international investment arbitration' (2018) 33 *ICSID Review - Foreign Investment Law Journal* 675-701.

107 https://www.sis.gov.eg/Story/83642/State-Lawsuits-Authority?lang=en-us (accessed 31 January 2021).

108 This department was involved in cases such as *CTIP Oil & Gas International Limited v Arab Republic of Egypt* ICSID Case ARB/19/27); *Petroceltic Holdings Limited and Petroceltic Resources Limited v Arab Republic of Egypt* ICSID Case ARB/19/7); *International Holding Project Group & Others v Arab Republic of Egypt* ICSID Case ARB/18/31); *Future Pipe International BV v Arab Republic of Egypt* ICSID Case ARB/17/31); *LP Egypt Holdings I, LLC, Fund III Egypt, LLC and OMLP Egypt Holdings I, LLC v Arab Republic of Egypt* ICSID Case ARB/16/37).

109 https://icsid.worldbank.org/cases/case-database (accessed 31 January 2021).

110 http://www.finances.gouv.sn/aje/ (accessed 31 January 2021). This department was involved in cases such as *Société Ouest Africaine des Bétons Industriels v Republic of Senegal* ICSID Case ARB/82/1); *VICAT v Republic of Senegal* ICSID Case ARB/14/19); *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal* ICSID Case ARB/15/21); *African Petroleum Senegal Limited v Republic of Senegal* ICSID Case ARB/18/24). So did the Republic of Côte d'Ivoire, which was represented by its 'agent judiciaire du Trésor' in ICSID cases such as *Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot v Republic of Côte d'Ivoire* ICSID Case ARB/16/11); *Wise Solutions CDI, SA v Republic of Côte d'Ivoire* ICSID Case . ARB/17/48). Currently, Burkina Faso, according to the Law 008-2019/AN portant statut de l'Agent judiciaire de l'Etat (AJE) of 23 April 2019, is recruiting its Agent Judiciaire de l'Etat; see https://lefaso.net/spip.php?article98529 (accessed 31 January 2021).

other countries prefer to outsource this task to outside counsel on the grounds that 'it is not viable to set up a dedicated defence team when states are dealing with only one or two ongoing cases'.[111] However, the absence of state employees in the legal team can lead to counterproductive results as evidenced in *Oded Besserglik v Republic of Mozambique*,[112] where this government wasted US $2 million in a case that should have never 'been brought before a tribunal … approved and registered … heard … and untimely defended'.[113]

In general, there are three models of legal representation that are used by litigant states: They can hire in-house counsel, outside counsel or a combination of the two.[114] Like arbitrators, the participation of African counsel and law firms in ISDS in not significant.[115] Very few African law firms and counsel have participated in ISDS. In general, they appear in cases involving their home states or some other African states[116] but, to the best of the author's knowledge, not in cases involving non-African countries.[117]

The reasons for the above situation are to be found at many levels. First, this has to do with what Gathii calls the 'insularity of international law', which is characterised by a 'limited set of locales and ideas'.[118] Gathii has found that 'practitioners in OECD states do not practice before

111 Anna Joubin-Bret 'Establishing an International Advisory Centre on Investment Disputes?' (2015) *E15Initiative* 2, https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Joubin-Bret-Final.pdf (accessed 26 August 2022).

112 *Oded Besserglik v Republic of Mozambique* ICSID Case ARB(AF)/14/2, Award, 28 October 2019.

113 JC Herrera *'Oded Besserglik v Mozambique:* The BIT was not in force, who's to blame?*' Kluwer Arbitration Blog* 6 January 2020*,* http://arbitrationblog.kluwerarbitration.com/2020/01/06/oded-besserglik-v-mozambique-the-bit-was-not-in-force-whos-to-blame (accessed 26 August 2022). See also https://www.afronomicslaw.org/2020/06/01/oded-besserglik-v-republic-of-mozambique-or-when-a-victory-is-pyrrhic/ (accessed 26 August 2022).

114 ICSID Practices Notes for Respondent in ICSID Arbitration, 2015, https://icsid.worldbank.org/sites/default/files/Practice%20Notes%20for%20Respondents%20-%20Final.pdf (accessed 26 August 2022).

115 According to one study, African countries were represented exclusively by African counsel only in 16%; Kidane (n 15) 594.

116 Eg, in *Getma International & Others v Republic of Guinea*, the respondent state retained, in addition to a French law firm, another firm from Burkina Faso; see *Getma International & Others v Republic of Guinea* ICSID Case ARB/11/29) Award, 16 August 2016.

117 The opposite is true since, in most of the cases involving African states, they have appointed outside counsel.

118 JT Gathii 'The promise of international law: A Third World view (including a TWAIL bibliography 1996-2019 as an appendix)' (2020) 114 *Proceedings of the ASIL Annual Meeting* 168.

international courts in places like Arusha and neither do those who practice in places like Arusha practice in the courts based in the global capitals of international law'.[119] In the context of investment arbitration and given the fact that arbitration tribunals very often sit in non-African places,[120] most counsel and advocates involved in investment proceedings also come from Western countries. For some scholars, the field of investment arbitration operates as a close community with many unwritten rules without which lawyers from outside may feel disoriented. As stated by one author, what international arbitration lawyer knows is not written down.[121] However, such views are contested by those who consider it to be a 'mythology of specialised knowledge in international arbitration'.[122]

The marginal role played by African counsel in ISDS, also, has to do with the poor case management of some African lawyers. In *CDC Group PLC v Seychelles,*[123] for example, the counter-memorial, produced by the prosecutor of Seychelles, was 'sloppily drafted and had to be redrafted and refiled, it made strange jurisdictional arguments that were later withdrawn, and it called witnesses at the oral hearing who gave testimony adverse to its own case'.[124] In *Piero Foresti, Laura de Carli & Others v South Africa* one of the South African counsel was involved in corruption.[125] However,

119 Gathii (n 118) 168. He further argues saying the fact that 'the practising bars in places like The Hague, rather than in places like Arusha, are the places we look up to understand international law, has an uncanny continuation of the dominance of former colonial metropolitan centers over sub- regional and regional courts in Africa, and the non-West in general, in the production of international legal knowledge that our discipline celebrates as the benchmark'. In the same vein, the former president of the ICJ, judge Abdulqawi Yusuf, stated that '[t]here is no longer justification to continue delocalizing arbitration involving an African party be it a corporation or a state. By delocalizing the process, the ability of arbitration to contribute to the rule of law is greatly diminished.' AA Yusuf 'The contribution of arbitration to the rule of law – The experience of African countries' in A Menaker (ed) *International arbitration and the rule of law: Contribution and conformity* (2017) 34.

120 Very few investment arbitrations have taken place in an African capital or have involved African regional arbitration centres: See, eg, *Mr Josias van Zyl (South Africa), (2) The Josias van Zyl Family Trust (South Africa), (3) The Burmilla Trust (South Africa) v The Kingdom of Lesotho;* see also *Getma International v Guinea* ICSID Case ARB/11/29 & CCJA Case 001/2011/ARB; *Benin Control v Benin*.

121 *Global Arbitration Review* (2012) Global Arbitration Review 100. The guide to specialist arbitration firms 2012, 3.

122 Kidane (n 71) 239-262.

123 *CDC Group PLC v Seychelles* ICSID Case ARB/02/14, Award, 17 December 2003.

124 A Sarvarian *Professional ethics at the International Bar* (2013) 168.

125 *Piero Foresti, Laura de Carli & Others v The Republic of South Africa* ICSID Case ARB(AF)/07/01, Award, 4 August 2010 8-11, paras 30-45.

unethical attitudes are not to be found among African lawyers alone given the ubiquitousness of conflicts of interest in investment arbitration.[126]

This brief assessment of the 60 years reveals that African legal expertise in ISDS remains problematic. It is not surprising that UNCITRAL has included among its five first reforms the establishment of an advisory centre on investment law to help in the building of this expertise. Equally, African countries should put this issue at the centre of their discussions regarding the reforms of ISDS in Africa.

4 Future of ISDS in Africa

The settlement of investment disputes is at a crossroads, both outside and inside Africa. Outside Africa, the European Union (EU) is pushing for the establishment of an international court of investment.[127] At the same time, and following the *Achmea* decision which recalled that an investment arbitration clause contained in intra-EU BITs is incompatible with EU law,[128] and the signing by 23 European countries of an agreement for the termination of intra-EU BITs,[129] cases between European investors and European countries will be reported to the Court of Justice of the EU.

Inside Africa, there is not a clear position as to whether to reject or accept ISDS. At the domestic level, most countries have included a provision related to ISDS in their legislation. The only African country that has abandoned ISDS is South Africa.[130] The case of Tanzania is also worth mentioning, which prohibits ISDS for the settlement of disputes

126 A Reinisch & C Knahr 'Conflict of interest in international investment arbitration' in A Peters & L Handschin (eds) *Conflict of interest in global, public and corporate governance* (2012) 103-124; KF Gómez *Key duties of international investment arbitrators: A transnational study of legal and ethical dilemmas* (2019) 79-121.

127 This option, for example, is included in the CETA Agreement between the EU and Canada and in the BIT between EU and Vietnam. This option was also discussed in the negotiations of the (abandoned) Transatlantic Trade and Investment Partnership (TTIP) between EU and USA.

128 Case C-284/16 *Achmea*, ECLI:EU:C:2018:158, 6 March 2018. For a discussion of the impact of this decision on ISDS, see HP Hestermeyer 'The autonomy of EU law meets investment arbitration: Case C-284/16 Achmea' in D Sarmiento, H Ruiz-Fabri & B Hess (eds) *Yearbook on procedural law of the Court of Justice of the European Union – 2019* (2020) 77-94.

129 Agreement for the termination of bilateral investment treaties between the member states of the European Union, 29 May 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) (accessed 26 August 2022).

130 Protection of Investment Act 22 of 2015, https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf (accessed 26 August 2022).

arising from the exploitation of natural resources.[131] At regional level, there are different approaches. The majority of the eight regional economic communities (RECs)[132] have adopted legal instruments regarding the regulation of foreign investment. On the one hand, rules regulating investment within the Economic Community of Western African States (ECOWAS) are to be found in texts such as the ECOWAS Treaty (revised in 1993);[133] the ECOWAS Protocol on Movement of Persons and Establishment;[134] the ECOWAS Energy Protocol;[135] and the ECOWAS Supplementary Act on Investments.[136] Article 33 of the Supplementary Act allows the Court of Justice of the Economic Community of West African States (ECCJ) to function as a 'default mechanism' for the settlement of investor- state disputes under the ECOWAS Supplementary Act.[137] Also, the recent ECOWAS Common Investment Code (ECOWIC) contains a provision related to ISDS.[138] On the other hand, it is safe to say that there

131 In July 2017 the Tanzanian National Assembly adopted many laws such as Written laws (Miscellaneous Amendment Act) of 2017; The Natural Wealth and Resources (Permanent Sovereignty) Act 2017; the Tanzania's Wealth and Resources Act (Review and Re-negotiations of unconscionable terms) of 2017.

132 https://au.int/en/organs/recs (accessed 31 January 2021).

133 Adopted on 28 May 1975 and revised 24 July 1993, https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf (accessed 31 January 2021).

134 Protocol A/P1/5/79 on free movement of persons, right of residence and establishment, signed on 25 May 1979, entered into force on 8 April 1980, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3269/download (accessed 31 January 2021).

135 Ecowas Energy Protocol, A/P4/1/03, signed 31 January 2003 (not yet into force), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5477/download (accessed 31 January 2021).

136 Supplementary Act A/SA.3/12/08 Adopting Community Rules on investment and the modalities for their implementation with ECOWAS, signed on 19 December 2008, entered into force 19 January 2009, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download (accessed 31 January 2021).

137 Supplementary Act A/SA.3/12/08 Adopting Community Rules on investment and the modalities for their implementation with ECOWAS, into force 19 January 2009, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments (accessed 31 January 2021); see also M Happold & R Radovic 'The ECOWAS Court of Justice as an investment tribunal' (2017) 19 *Journal of World Investment and Trade* 95-117; M Happold 'Investor-state dispute settlement using the ECOWAS Court of Justice: An analysis and some proposals' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 496-518.

138 According to art 54: '(1) Any dispute between a Member State and an investor or between investors may be resolved through the use of consultations, good offices, mediation, conciliation, arbitration or any other agreed dispute resolution mechanism. (2) Where recourse is made to arbitration, the arbitration may be conducted at any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Court of Justice. Member States and investors are encouraged to utilise regional and national alternatives dispute settlement institutions.

is an opposition to ISDS in the Southern Africa Development Community (SADC). Initially, article 28 of Annex 1 of the 2006 SADC Protocol on Finance and Investment expressly included a provision on ISDS. However, and following several investment claims filed against some SADC members (such as Lesotho[139] and Zimbabwe),[140] this Annex 1 was amended to remove the ISDS mechanism.[141] In addition, this Community released a Model BIT of which the goal was to 'develop a comprehensive approach from which member states can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation'.[142] Although the 2012 Model contained a provision on ISDS (article 29), '[t]he Drafting Committee was of the view that the preferred option is not to include investor-state dispute settlement'.[143] This Model was updated and, among other changes, has removed the ISDS provision.[144] In the same vein, the East African Community Model Investment Treaty 2016 expressly mentioned its preference for the exclusion of ISDS.[145] At the continental level, the formulation of article 42 of PAIC reveals the lack

(3) Where recourse is made to arbitration, the rules of procedure of the relevant forum shall be applicable, including rules for the submission of claims, selection of arbitrators and conduct of the arbitration. (4) Except where the investment contract between a Member State and an Investor provides for the use of international mechanisms such as ICSID or UNCITRAL, parties to the investment contract shall exhaust all local remedies including the ECOWAS Court of Justice or national dispute settlement systems, before resorting to the international mechanisms.' Adopted in July 2018 but not yet entered into force, https://nipc.gov.ng/wp-content/uploads/2019/12/ecowiccode.pdf? (accessed 26 August 2022).

139 *Swissbourgh Diamond Mines (Pty) Limited, Josias van Zyl, The Josias van Zyl Family Trust & Others v The Kingdom of Lesotho* PCA Case 2013-29 (First Case); see also *Josias van Zyl, The Josias van Zyl Family Trust & The Burmilla Trust v The Kingdom of Lesotho* PCA Case 2016-21 (Second Case).

140 *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

141 See arts 25 & 26 of the Agreement Amending Annex 1 (Cooperation on Investment) of the SADC Protocol on finance and investment, 2016, https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf (accessed 26 August 2022).

142 SADC Model Bilateral Investment Treaty Template with Commentary, 3 July 2012, https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf accessed 26 August 2022.

143 SADC Model Bilateral Investment Treaty Template with Commentary, July 2012 55.

144 It seems that some SADC members have requested and obtained the inclusion of an ISDS provision to the updated Model. See Mbengue (n 5) 470.

145 See East African Community, East African Community Model Investment Treaty 2016 (EAC Model Investment Treaty), February 2016 23, https://www.eac.int/documents/category/key-documents (accessed 26 August 2022).

of agreement among African countries *vis-à-vis* ISDS, that are either pro-ISDS or anti-ISDS.[146]

Generally, there are three main trends in current discussions about the future of ISDS. The first is to keep the current system and improve it through some adjustments; the second is a profound redesigning of the ISDS system with some innovative features; and the third trend is focused on the alternatives to investment arbitration.[147]The focus of this part is threefold: First, it is focused on ISDS and the reforms aiming at improving the current ISDS; second, it examines the reforms of which the goal is to redesign ISDS, notably through the creation of a regional investment court for Africa; third, the alternatives to ISDS will be analysed.

4.1 Improving the current ISDS

Many African countries are involved in the multilateral processes of reforming ISDS, be it at the level of ICSID or UNCITRAL. In this regard, eight African countries, and the African Union (AU), have submitted comments on the proposed amendments to the ICSID rules.[148]

146 MM Mbengue & S Schacherer 'The Africanisation of international investment law: The Pan-African Investment Code and reform of the international investment regime' (2017) 18 *Journal of the World Investment and Trade* 442.

147 In the ISDS reforms' discussions, there are incrementalists, systemic reformers and paradigm shifters: *'1. Incrementalists* view the criticisms of the current system as overblown and argue that investor-state arbitration remains the best option available. Hence, they favor retaining the existing dispute resolution system but instituting modest reforms that would redress specific concerns. *2. Systemic reformers* see merit in retaining investors' ability to file claims directly on the international level, but view investor-state arbitration as a seriously flawed system for dealing with such claims. They champion more significant, systemic reforms, such as replacing investor-state arbitration with a multilateral investment court and appellate body. *3. Paradigm shifters* dismiss the existing system as irrevocably flawed and in need of wholesale replacement. They reject the utility of investors' making international claims against states, whether before arbitral tribunals or international courts. They embrace a variety of alternatives, such as domestic courts, ombudsmen, and state-to-state arbitration'. A Roberts 'Incremental, systemic, and paradigmatic reform of investor-state arbitration' (2018) 112 *American Journal of International Law* 410. See also A Roberts 'The shifting landscape of investor-state arbitration: Loyalists, reformists, revolutionaries and undecideds' *Ejiltalk* 15 June 2017, https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/ (accessed 26 August 2022); S Puig & GC Shaffer 'Imperfect alternatives: Institutional choice and the reform of investment law' (2018) 112 *American Journal of International Law* 361-409; AJIL Symposium on Sergio Puig and Gregory Shaffer, 'Imperfect alternatives: Institutional choice and the reform of investment law' and Anthea Roberts 'Incremental, systemic, and paradigmatic reform of investor-state arbitration' (2018) 112 *AJIL Unbound* 228-265.

148 https://icsid.worldbank.org/amendments/state-input (accessed 26 August 2022).

Several others have also submitted proposals to UNCITRAL WG III.[149] Additionally, a meeting was held in Conakry and attended by government officials from 29 African states as well as a few intergovernmental organisations that are active on the continent.[150] These processes are taking an incremental approach and aim at dealing with some of the flaws of the current ISDS system.[151]

In this way, the two institutions have recently released a draft code of conduct for adjudicators that provides guidance and principles addressing matters related to arbitrators' independence and integrity or their duty to conduct proceedings with integrity, fairness, and efficiency.[152] It should be recalled that the arbitrators' conduct has been widely criticised.[153] This code might lead to an increased diversity among arbitrators though the prohibition of multiple roles and, maybe, lead also to the appointment of more African arbitrators, even if this aspect is still disputed.[154]

149 These are Morocco, Mali, Guinea and South Africa; see https://uncitral.un.org/en/working_groups/3/investor-state (accessed 26 August 2022).

150 https://undocs.org/en/A/CN.9/WG.III/WP.183 (accessed 26 August 2022).

151 This approach was criticised by South Africa, according to which '[w]e cannot divorce the procedural from substantive concerns as they are intricately related … Only systemic reform will allow addressing concerns with ISDS in a comprehensive fashion. Piecemeal approaches will only have limited effects as "old" IIAs continue to exist and investors are able to structure their investments to benefit from those treaties.' UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 38th session(Vienna, 14-18October 2019), Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 5 paras 20-21.

152 https://icsid.worldbank.org/news-and-events/news-releases/icsid-and-uncitral-release-draft-code-conduct-adjudicators (accessed 26 August 2022).

153 UNCITRAL 'Possible reform of investor-state dispute settlement (ISDS), Note by the Secretariat' A/CN.9/WG.III/WP.142, 9.

154 Eg, Vanina Sucharitkul thinks that this code could negatively impact gender and regional diversity; 'ICSID and UNCITRAL Draft Code of Conduct: potential ban on multiple roles could negatively impact gender and regional diversity, as well as generational renewal', 20 June 2020 *Kluwer Arbitration Blog* http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal (accessed 26 August 2022).

Another important innovation is the establishment of an advisory centre on investment law, which may help in building African states' legal capacity and allow them to fully participate in ISDS.[155] This is in line with the proposal made by the government of Mali, regarding the 'establishment of a pool of arbitrators and counsel for Africa, consisting of each country's leading experts, available to assist countries and investors at any time'.[156]

A further reform is the exhaustion of local remedies, which already exists under certain BITs[157] and regional agreements.[158] According to UNCTAD,

> [t]his reform option aims to promote recourse by foreign investors to domestic courts while retaining the option for investor-state arbitration, as a remedy of last resort. In so doing, it would respond to some of the concerns arising from the steep rise in ISDS cases over the last decade. Domestic resolution of investment disputes is available in virtually every jurisdiction.[159]

This option, which is also included in the PAIC,[160] offers benefits such as 'preventing frivolous claims, protecting host nations against high international arbitration costs, and fostering sound and properly functioning domestic judiciaries'.[161] This option is of particular importance for host states and can provide them with the opportunity to correct some

155 UNCITRAL *Possible reform of investor-state dispute settlement (ISDS)* Advisory Centre, Note by the Secretariat, A/CN.9/WG.III/WP.168. See also the scoping study on securing adequate legal defence in proceedings under international investment agreements, prepared by the Columbia Centre on Sustainable Investment for the Ministry of foreign affairs of The Netherlands, http://ccsi.columbia.edu/files/2020/04/Securing-Adequate-Legal-Defense-in-Proceedings-Under-International-Investment-Agreements.pdf (accessed 26 August 2022).

156 A/CN.9/WG.III/WP.181, 3.

157 See, eg, art 9(3), 2002 China-Côte d'Ivoire BIT, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/885/china---c-te-d-ivoire-bit-2002 (accessed 26 August 2022).

158 Draft of the Revised Investment Agreement for the COMESA Common Investment Area (n 131) art 36(3): 'COMESA investor or its investment may submit a claim to arbitration pursuant to this Agreement, provided that the COMESA investor or investment, as appropriate.' See also art 29 of the Southern African Development Community (SADC) Model Bilateral Investment Treaty Template (adopted 2012); art 26 al 5 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Federal Government of Nigeria (Morocco-Nigeria BIT) (Adopted on 3 December 2016).

159 UNCTAD *World Investment Report, 2015, Reforming international investment governance* (2015) 149.

160 Art 42(1)(c).

161 UNCTAD *World Investment Report 2015* (n 161) 149.

misconducts at the domestic level and avoid the costs associated with the use of ISDS. According to ICSID Caseload-Statistics 2020-1, 35 per cent of ISDS cases were resolved 'during' the arbitral process.[162] This suggests that some of these cases could have been settled at domestic level if the exhaustion of local remedies was mandatory.

However, these reforms sound like treating the symptom rather than the problems. That is why the (revolutionary) idea of creating a regional court of investment has been put forward.

4.2 Creating a regional investment court for Africa?

The idea of such a standing court for the resolution of investment disputes has been advanced by the EU and has been included in some of its recent agreements.[163] Even if this proposal has, mainly, sought to solve a 'European' problem,[164] it is possible to adapt it to the African context and tailor it so that it can meet African needs, by creating a regional investment court.[165] A regional court could help in addressing the problem of African arbitrators' lack in the field of investment law: The election (or the appointment) of arbitrators, especially on a permanent or full-time basis, could lead to the establishment of 'a pool of arbitrators and counsel for Africa … available to assist countries and investors at any time' as wished by the government of Mali.[166] It could also address the issue of conflicts of interests through, notably, the 'exclusivity' of the function: 'In fact, judges would not be permitted to wear multiples hats or to play multiple roles (as arbitrators and counsel, or arbitrators and experts, etc) as it is currently the case with arbitrators'.[167]

162 https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf (accessed 26 August 2022).

163 See, eg, the CETA agreement between EU and Canada or the EU-Vietnam. It was also included in the (abandoned project of) TTIP. In its submission to UNCITRAL WGIII, the EU is also advocating this option; see UNCITRAL Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its member states, A/CN.9/WG.III/WP.159/Add.1.

164 W Kidane 'Alternatives to investor-state dispute settlement: An African perspective' (2018) *GEG Africa*, discussion paper 15-18, http://www.gegafrica.org/item/644-alternatives-to-investor-state-dispute-settlement-an-african-perspective (accessed 26 August 2022).

165 This idea has been analysed by C Nyombi 'A case for a regional investment court for Africa' (2018) 43 *North Carolina Journal of International Law* 66-109.

166 A/CN.9/WG.III/WP.181, 3.

167 UNCTAD *World Investment Report 2015* (n 161) 149. According to Chrispas Nyombi, 'The proposal, if implemented at a regional level, is likely to sit well with African states for a number of reasons. First, it rests on the principle that private arbitration is not appropriate for handling matters involving national public policy. This calls for

The African Court of Justice (ACJ), referred to by the PAIC, can play a role in this regard.[168] It is true that the ACJ is expected to intervene in state-to-state disputes (article 41(2) of PAIC) but it is possible to extend its competence to include ISDS as well. However, as appealing as this idea might be, it is not without challenges, including at institutional and practical levels.

At the institutional level, the multiplicity of courts on the continent (or the multiplicity of levels of jurisdiction within the same court) can undermine the efficiency of such regional court on investment. Currently, the main continental court is the African Court on Human and Peoples' Rights (African Court).[169] It is true that the Protocol of the Court of Justice of the African Union entered into force,[170] but this Court of Justice of the African Union (CJAU) still is not yet operational. This did not prevent the AU from merging the two courts into a single court: the African Court of Justice and Human Rights (ACJHR) which is not effective.[171] Furthermore, at its twenty-third ordinary session, held in Malabo, Equatorial Guinea, on 27 June 2014, the AU Assembly decided to amend the Protocol on the Statute of the ACJHR and to convert it into the African Court of Justice and Human and Peoples' Rights (ACJHPR).[172] It is against this background that the PAIC extends the jurisdiction of the continental court to investment disputes. What can be the efficiency of such an African Court of Justice, acting as a regional court of investment, or a new African court of investment within this inextricable tangle of courts (African Court, CJAU, ACJHR, ACJHPR) which can be seen also as the

a mechanism that supports the independence and impartiality of judges which can be achieved through tenured appointments to insulate judges from outside interests.' Nyombi (n 165) 100.

168 Art 41 PAIC.

169 Established by virtue of art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in June 1998, entered into force 25 January 2004.

170 Protocol of the Court of Justice of the African Union, adopted 1 July 2003, entered into force 11 February 2009.

171 The Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008. It shall enter into force after ratifications by, at least, 15 countries. So far, only, eight states have ratified it; see https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf (accessed 26 August 2022).

172 So far, 15 countries have signed the Protocol and none of these have ratified it; see https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf (accessed 26 August 2022).

same court but with different levels of jurisdiction and different names? The tensions exist not only at the continental level but also between the regional and the continental layers.[173]

Scepticism grows more when considering some recent experiences of certain African countries with regional courts. It should be recalled that the SADC tribunal was dismantled after *Mike Campbell v Republic of Zimbabwe*, in which the tribunal found that the Zimbabwean government unlawfully expropriated some owners from their property without compensation. This has led to the suspension of the tribunal and its redesigning to exclude individual access to the tribunal. As mentioned above, the *Lesotho* case was brought before the SADC tribunal and later was submitted to investment arbitration. Could it be different with a continental court on investment? Additionally, the recent leave of some countries from the AfCHPR, as a response to its decisions, does not inspire optimism.[174] This option now seems unsatisfactory as it might lead to replacing an unfair system by another unfair system.[175]

In response, many are pushing for an exit of ISDS and promoting its alternatives.

4.3 Exiting ISDS in Africa?

Some authors are of the view that the only way out for African countries is to 'exit' the current system of ISDS as none of proposed solutions can lead to a significant change. In this regard, an author claimed that reforms and proposals, discussed above, are merely 'palliative (symptoms oriented) and not curative (root cause/problem oriented) (that) do not deal with deep rooted historical, sociological, and normative causes

173 See, eg, the ECOWAS system and the AU system.

174 SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1-40. Even if these are examples from one sub-region that cannot be generalised given that some other REC courts have been significantly more active (and sometimes even rather successful), they are illustrative of some hurdles that need to be overcome for such investment court to be efficient.

175 As suggested by one scholar, the 'core pillar of such a reform effort must aim at creating a fair and just system, rather than replacing one unjust system with another'; Kidane (n 164) 19.

of the rot in ISDS'.[176] However, exiting ISDS might be easier said than done. As recalled by the AU, African countries 'are signatories to over 900 Bilateral Investment Treaties, which prescribe Investor-State Dispute Settlement (ISDS) as a means of resolving disputes between investors of the home state and the host state'.[177] For these countries to effectively disengage from ISDS, these countries would have to withdraw from or terminate all their investment treaties in order 'to prevent foreign investors from structuring or restructuring their investments so as to come under the scope of protection of any remaining investment treaty'.[178] This was done by the EU, for intra-European disputes, with the adoption of the agreement for the termination of BITs between the member states of the EU,[179] which entered into force on 29 August 2020.[180] This requires a valid alternative which, as discussed above, currently is not yet available on the continent.

Another alternative is the Brazilian Model of Dispute Settlement for Investment which is contained in its recent Cooperation and Facilitation Investment Agreements (CFIAs) signed with countries such as Angola,[181]

176 HO Mbori 'Exit is the only way out: A polemic response to John Nyanje's "Hegemony in investor state dispute settlement: How african states need to approach reforms"' *Afronomics blogpost* 10 September 2020, https://www.afronomicslaw.org/2020/09/10/exit-is-the-only-way-out-a-polemic-response-to-john-nyanjes-hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms (accessed 26 August 2022).

177 African Union 'Training on the settlement of disputes: The African Continental Free Trade Area', https://au.int/sw/node/36360 (accessed 26 August 2022).

178 Mbengue (n 5) 473.

179 This was signed on 5 May 2020 by the 23 EU member states, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) (accessed 26 August 2022).

180 For a discussion of this agreement, see HSF '23 EU member states sign an agreement for the termination of Intra-EU BITs; European Commission initiates infringement action against non-signatories UKand Finland' 21 May 2020, https://hsfnotes.com/publicinternationallaw/2020/05/21/23-eu-member-states-sign-an-agreement-for-the-termination-of-intra-eu-bits-european-commission-initiates-infringement-action-against-non-signatories-uk-and-finland (accessed 26 August 2022); N Lavranos 'The EU Plurilateral draft termination agreement for all intra-EU BITs: An end of the post-Achmea saga and the beginning of a new one' *Kluwer Arbitration Blog* 12 December 2019, http://arbitrationblog.kluwerarbitration.com/2019/12/01/the-eu-plurilateral-draft-termination-agreement-for-all-intra-eu-bits-an-end-of-the-post-achmea-saga-and-the-beginning-of-a-new-one/?doing_wp_cron=1598260187.5631339550018310546875 (accessed 26 August 2022).

181 Acordo de Cooperação e Facilitação de Investimentos entre O Governo da República Federativa do Brasil e o Governo da República de Angola, signed on 1 April 2015.

Mozambique,[182] Morocco,[183] Ethiopia[184] and Malawi.[185] This model was initiated in 2015 and aims at establishing 'a mechanism for technical dialogue and government initiatives that may contribute to a significant increase of mutual investment'. Also, it emphasises the amicable settlement of disputes notably with the creation of the Joint Committee and the Focal Point (or Ombudsman),[186] which are intended to 'address any issues or differences concerning investments in order to avoid litigation'.[187] The dispute resolution mechanism, under CFIA, has two steps: In case of an alleged breach of CFIA, there is an initial dispute prevention phase, handled by the Joint Committee and, if the dispute has not been resolved, arbitration can be initiated but only state-to-state arbitration.[188] This latter option, an alternative to ISDS, could help in reaching balance between' investor and host state: 'The aggrieved investor shall persuade its home state that a damage was caused to the investment, so it may initiate an arbitration against the host state. It would be expected that only robust claims would proceed under this situation, avoiding adventurous litigators.[189]

182 Acordo de Cooperação e Facilitação de Investimentos entre O Governo da República Federativa do Brasil e o Governo da República de Moçambique, signed on 30 March 2015.

183 Accord de coopération et de facilitation en matière d'investissements entre le royaume du Maroc et la république fédérative du Brésil, signed on 13 June 2019.

184 Agreement between the Federativo Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, signed on 11 April 2018.

185 Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi, signed on 25 June 2015.

186 Arts 14 & 15 Morocco CFIA; arts 17 & 18 of the Ethiopian CFIA; arts 3 7 & 4 Malawi CFIA; arts 4 & 5 Angola CFIA; arts 4 & 5 Mozambique CFIA).

187 Articles 14 & 15 Morocco CFIA; arts 17 & 18 of the Ethiopian CFIA; arts 3 & 4 Malawi CFIA; arts 4 & 5 Angola CFIA; arts 4 & 5 Mozambique CFIA. See F Hees, PM Cavalcante & P Paranhos 'The Cooperation and Facilitation Investment Agreement (CFIA) in the context of the discussions on the reform of the ISDS system' (2018) 11 *South Centre Investment Policy Brief*.

188 'The settlement approach, followed by this type of arbitration, may be seen as favourable to host state protection. No litigation is initiated unless several steps are taken in order to avoid the dispute itself. Both parties are invited to discuss their arguments and reach a settlement, while a preliminary report on the case, with the conclusions of the Joint Committee on their claims, is issued and made available. The fact both parties may discuss their arguments and even be provided with a first analysis of the case may avoid a lengthy and costly litigation, leading to an amicable settlement. NC Moreira 'Cooperation and Facilitation Investment Agreements in Brazil: The path for host state development' *Kluwer Arbitration Blog* 1 September 2018, http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitatio n-investment-agreements-in-brazil-the-path-for-host-state-development/ (accessed 26 August 2022).

189 Moreira (n 188).

Last, but not least, the recourse to mediation for the settlement of investment has recently gained in importance as evidenced by, among others, the signature of the 2019 Singapore Mediation Convention of the United Nations Commission on International Trade Law (UNCITRAL) which aims at ensuring enforcement of international commercial settlement agreements resulting from mediation.[190] At the UNCITRAL Working Group III, some states are pushing for alternatives to investment treaty arbitration and national courts. In this regard, South Africa claimed that mechanisms such as conciliation or mediation can 'narrow down' the actual extent of the dispute by concentrating on a fact-finding exercise: 'The advantage of these alternative approaches is to provide for a faster and less costly settlement, the more so when the problem is tackled at an early stage and with the specific goal of avoiding escalation.'[191] The same idea is put forward by some scholars who think that mediation could become the mode of dispute resolution *par excellence* with regard to disputes involving an African party, in view of its speed and low cost per report to arbitration.[192] The example of countries such as Burkina Faso is a cause for optimism.[193] However, it may be too early to draw firm conclusions.

5 Conclusion

This chapter discussed the participation of African countries in the reforms of ISDS. It started by an historical account of the of African participation in the setting up of the system for the settlement of investment disputes.

190 United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (Singapore Convention on Mediation) adopted 20 December 2018, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf (accessed 31 January 2021). The ICSID recently established Mediation rules for investment disputes; see https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf (accessed 26 August 2022). For an analysis of the recourse to mediation for the settlement of investment disputes, see C Titi & KF Gomez (eds) *Mediation in international commercial and investment disputes* (2019).

191 UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 38th session (Vienna, 14-18October 2019), Submission from the government of South Africa, A/CN.9/WG.III/WP.176, 8.

192 W Pydiamah & A Fouchard *Médiation des litiges en Afrique : quels défis à l'ère du Covid-19?* https://www.eversheds-sutherland.com/documents/global/france/Mediation_des_litiges_en_Afrique_et_defis_a_l_ere_du_covid.pdf (accessed 26 August 2022).

193 So far, the Centre d'arbitrage, de médiation et de conciliation de Ouagadougou (Ouagadougou Arbitration, Mediation and Conciliation Centre) has managed 446 cases, including 265 mediations (and an amount of 2 024 billion FCFA in mediation cases); see https://camco.bf (accessed 31 January 2021). This centre is described as a 'success story'; see Pydiamah & Fouchard (n 192). It is worth mentioning also the Acte Uniforme relatif à la médiation (Uniform Act relating to Mediation) which is applicable in the OHADA area, http://www.ohada.com/actes-uniformes.html (accessed 31 January 2021).

This marginal role played by these countries was further confirmed by a critical assessment of the, almost 60 years of Africa's involvement in ISDS where their contribution was mainly limited to providing support and cases without a significant contribution in the decision-making process. This is why these countries should use the current discussions to advance proposals or reforms that can help them to significantly contribute in the decision-making process, notably through the building of African legal expertise in ISDS: strengthening state agencies' capacity in dealing with ISDS; use (or implication) of African venues for the settlement of these disputes and a more frequent recourse to African experts (arbitrators, counsel, and so forth). This can be done by some adjustments to the current system (establishing an advisory centre on investment law, adopting a code of conduct for arbitrators, exhausting local remedies) or through a profound redesigning of the ISDS, notably with the establishment of a regional investment court. For this last option to be successful, these countries need to overcome a number of inconsistencies and hurdles and avoid the replacement of an unfair system they have criticised, by another unfair system.[194] A combination of many features may be a good compromise for them.

194 As suggested by a scholar, the 'core pillar of such a reform effort must aim at creating a fair and just system, rather than replacing one unjust system with another'. Kidane (n 164) 19.

Part IV: The Africanisation of specific fields of international law

Quatrième partie : L'Africanisation de champs spécifiques du droit international

11 L'harmonisation des processus d'intégration en Afrique subsaharienne francophone

Serge François Sobze

1 Introduction

La problématique de l'intégration en Afrique rend compte de l'histoire générale de l'Afrique[1] d'une part, et de celle du droit de l'intégration[2] d'autre part. En effet bien que déjà employé dans l'entre-deux-guerres, notamment pour qualifier l'économie mondiale, le concept d'intégration n'a véritablement commencé à être utilisé dans le domaine des affaires internationales qu'après la seconde guerre mondiale lorsque plusieurs projets de regroupement économique et politique ont vu le jour, en Europe et en Amérique latine.

Cependant, l'intégration par l'harmonisation des schémas aurait longtemps servi les entreprises d'intégration post-coloniales,[3] elle n'est plus *terra incognita* en raison des facteurs historiques qui l'entourent. Elle est la somme de plusieurs expériences.[4] On peut citer à titre illustratif les expériences du Mali[5] et du Sénégal. En effet, l'histoire de la diplomatie sénégalaise a longtemps été illustrée par les tentatives avortées de regroupements supranationaux.[6] Il est donc question de revitaliser cette

1 J Ki Zerbo *Histoire générale de l'Afrique noire* (1978) ; E Mbockolo *L'Afrique du XXe siècle. Le continent convoité,* (1985) 131 ; EK Kouassi *Organisations internationales africaine,* (1987) 68 ; J Igue *Le territoire et l'Etat en Afrique* (1995), cités par A Sall *Les mutations de l'intégration des Etats en Afrique de l'Ouest, Une approche institutionnelle* (2006) 187p.

2 S Adotevi 'Les facteurs culturels de l'intégration économique et politique en Afrique' in R Lavergne (dir) *Intégration et coopération régionales en Afrique de l'Ouest* (1996) 81 et s.

3 Sall (n 1) 5.

4 M Delmas-Marty 'Le phénomène de l'harmonisation : l'expérience contemporaine' in Ch. Jamin, D. Mazeaud (dir) *L'harmonisation du droit des contrats en Europe*, (2001) 7 ; F Onana Etoudi 'Les expériences d'harmonisation des lois en Afrique' (2012) *Revue semestrielle d'Études, de Législation, de Jurisprudence et de Pratique Professionnelle en Droit des affaires & en Droit Communautaire* 29.

5 Le Mali a réalisé un modèle d'intégration politique où des peuples aussi variés que les Touaregs, les Wolofs, les Malinkés et Bambara, les Peuls et autres populations reconnaissaient un seul souverain. Sall (n 1) 6.

6 Il s'agit de la Fédération du Mali et la Confédération de la Sénégambie et un exemple concerté d'une zone maritime litigieuse. L'échec de ces deux initiatives témoigne des difficultés notables dans les processus de regroupement en Afrique. Sur ces efforts

harmonisation si l'on envisage une intégration complète,[7] celle qui prend en compte les nouveaux défis qui interpellent le continent africain en perpétuelle insécurité. On se réfère à la crise sanitaire mondiale liée à la Covid-19 qui a démontré les insuffisances aux plans normatif et institutionnel de la politique sanitaire en Afrique et dans d'autres continents et les décisions de restriction de la libre circulation des personnes, légitimées par le droit de préservation des citoyens des contaminations. La crise sanitaire actuelle invite les acteurs à adopter une approche prudente dans l'ébauche des politiques communes d'intégration.

L'étude trouve sa matière sur un terrain mouvant et en constante évolution.

Par ailleurs, l'idée d'harmonisation des politiques et des législations en Afrique est aussi vieille que l'Organisation de l'Unité Africaine (OUA). A la suite de multiples Résolutions,[8] le Conseil des Ministres de l'OUA posait déjà la question de l'harmonisation des activités et programmes des groupements d'intégration économique. Elle est reprise ici à l'aune de la mondialisation des économies et de la convergence des droits pour marquer l'interpénétration des schémas dans la formation de l'intégration africaine. L'éclosion des champs d'activités des organisations d'intégration réconforte cette idée.

Cependant, il importe de mettre l'accent sur l'harmonisation[9] des processus, d'étendre les champs de compétence des institutions juridictionnelles et non juridictionnelles comme les commissions et les parlements communautaires[10] sur toutes les problématiques liées à l'intégration. Car si la convergence économique peut contribuer à

d'intégration africaine, lire O Demba Ba 'Les grands axes de la politique étrangère du Sénégal' in A Sall & IM Fall (dir) *Actualités du droit public et de la science politique en Afrique Mélanges en l'honneur de Babacar Kante*, (2017) 697-709.

7 J Issa Sayegh 'L'intégration juridique des États africains à la zone Franc' (1997) 823 *Revue Penant* 5 ; A Mouloul *Comprendre l'Organisation pour l'Harmonisation en Afrique du droit des Affaires (O.H.A.D.A.)* (2008).

8 Résolution CM/ Rés. 464 (XXXVI) de 1976 limitant à cinq les régions d'Afrique devant constituer chacune une institution régionale d'intégration (Nord, Ouest, Est, Sud et Centre). Seule la CEDEAO sera instituée.

9 Sayegh (n 7) 5 ; IF Kamdem 'Harmonisation, unification et uniformisation. Plaidoyer pour un discours affiné sur les moyens d'intégration juridique' (2008) *Revue de droit uniforme 709.*

10 Institué par le Traité Fondateur de la Communauté. Article 35 du Traité révisé de l'UEMOA, arts 10 et 47 du Traité révisé de la CEMAC en 2008. A ce titre, le Parlement Communautaire joue un rôle très important dans le processus d'intégration sous-régionale en ce qu'il est un contrepouvoir nécessaire en face de la puissance législative et exécutive que détiennent les organes de décision et d'exécution de la Communauté.

revitaliser l'intégration politique, l'intégration normative ne peut se faire qu'avec des institutions fortes.[11] Autrement dit, les processus d'intégration sont mus par l'idée de *servitude* et de *liberté* qui caractérisent leur effectivité et il est établi que : « si l'on admet que le pouvoir économique confère le pouvoir politique, alors, on doit admettre que le pouvoir monétaire confère le pouvoir politique ».[12]

Il est question de mettre ensemble les processus politiques et économiques d'intégration de telle sorte qu'ils puissent *« collaborer plus efficacement pour stimuler la reprise et bâtir une économie plus forte, plus propre et plus juste ».*[13]

Dans le même sens, la voie qu'a choisie l'Union africaine pour relancer l'intégration du continent reste marquée par l'esprit communautaire, plus exactement par l'idée de combiner étroitement la mécanique économique et la mécanique institutionnelle. L'intégration régionale africaine ne peut véritablement s'achever que si elle se conforme à tous ces « *indices d'intégration ».*[14]

On peut citer aussi l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA)[15] en tant que modèle d'intégration réussie,[16] l'harmonisation du droit de la sécurité sociale à travers les deux principales structures que sont l'Organisation commune africaine et mauricienne (OCAM) et la Conférence interafricaine de la prévoyance sociale (CIPRES) et l'harmonisation des législations économiques à

11 J Sayegh (n 7) 5. J Rideau *Droit institutionnel de l'Union européenne*, (2010) 970.

12 J Tchundjang Pouemi *Monnaie, servitude et liberté. La répression monétaire de l'Afrique* (1980).

13 G Minet 'Concurrence et cohérence dans l'organisation internationale : une problématique pertinente pour l'intégration ?' in M Fau-Nougaret, *La concurrence des organisations régionales en Afrique* (2012) 270.

14 C Deblock ' L'indice d'intégration régionale en Afrique' in *L'Afrique est –elle partie ? Bilan et perspective de l'intégration africaine, Transformation* (2017) 11.

15 Créée par le Traité signé le 17 oct. 1993 à Port Louis en Ile Maurice par les pays de la zone franc que sont : Benin, Burkina Faso, Cameroun, Gabon, République Démocratique du Congo, Côte d'Ivoire, République de Guinée, République Guinée Bissau, Iles Maurice, Mali, Niger, République Centrafricaine, Sénégal, Tchad, Togo.

16 J Paillusseau 'Le droit de l'OHADA. Un droit très important et original' (2004) 44 (5) *La semaine juridique* 1-5 ; A Cisse 'L'harmonisation du droit des affaires en Afrique : l'expérience de l'OHADA à l'épreuve de sa première décennie' (2004) XVIII(2) *Revue internationale de droit économique* 197-225. L'OHADA est appréhendée dans la présente étude comme un droit de l'intégration juridique et judiciaire visant la sécurité juridique du monde des affaires et non nécessairement comme le voudrait une frange de la doctrine, un droit communautaire. Pour la controverse, lire JM Kobila 'La concurrence des droits communautaires dans l'espace C.E.M.A.C./C.E.E.A.C.' in *Actes du Colloque sur le droit communautaire en Afrique* (2011) 42-58.

travers l'Union Economique et Monétaire Ouest Africain (UEMOA) et la Communauté Économique et Monétaire de l'Afrique Centrale (CEMAC)[17] pour ne citer que des initiatives francophones.

Pour mieux comprendre le bien-fondé de cette dynamique d'intégration sur le Continent, il convient au préalable de procéder à quelques précisions terminologiques.

Venant du latin « *harmonia* »,[18] la notion d'harmonisation est rarement définie par les textes juridiques.[19] La première utilisation de cette notion a été attestée en 1842 dans les domaines variés tels la musique (accord de sons), la maçonnerie ; c'est dire que ce mot « chante » dès l'origine[20] et qu'il paraît plus une image qu'un concept.[21]

L'harmonisation relève aussi bien du droit privé[22]que du droit public,[23] en raison de sa « nature d'hermaphrodisme juridique ».[24] En effet, elle est au cœur du droit communautaire en général dans la mesure où elle facilite la mise en œuvre des directives, et du droit fiscal communautaire en particulier en s'articulant autour des règles fiscales harmonisées en vue de favoriser la construction et l'émergence du marché commun.[25] Dès lors, une harmonisation des lois de finances et des comptabilités publiques qui se dégage des Traités CEMAC et UEMOA[26] conduirait une plume prétentieuse à s'interroger sur l'existence d'un droit public financier

17 Voir art 67 du Traité de l'UEMOA et le préambule du traité de la CEMAC.

18 G Cornu *Vocabulaire juridique* (1987) 433.

19 Les textes communautaires européens assimilent *harmonisation* et *rapprochement* sans donner un contenu à chacune des deux notions. Le préambule du Traité révisé CEMAC parle de l'harmonisation des politiques et des législations sans donner une définition au concept. La pratique OHADA l'assimile parfois à l'unification.

20 M Delmas-Marty *Un pluralisme ordonné, les forces imaginantes du droit* (2006) 6.

21 L Vapaille 'Harmonisation fiscale et rapprochement des législations ou de l'inadéquation des moyens aux objectifs' in M Leroy (dir) *Mondialisation et fiscalité, la globalisation fiscale* (2006) 124.

22 A Rieg '*L'harmonisation du droit de la famille*' in *Conflit et harmonisation, Mélanges en l'honneur d'Alfred E. Von Overbeck* (1990) 474.

23 J Boulouis *Droit institutionnel des Communautés Européennes* (1990) 45.

24 A Kpodar 'Quand les colloques nous font nous rencontrer !!! Certaines idées fortuites sur le juge constitutionnel et le pouvoir politique en Afrique' in Sall & Fall (n 6) 294.

25 RA Meyong Abath *L'harmonisation fiscale et douanière en zone CEMAC, fiscalité communautaire en Afrique centrale (Cameroun, Centrafrique, Congo, Guinée Equatoriale, Tchad)*, (2001) 13 ; B. Bagagna *L'harmonisation des politiques fiscales en zone CEMAC : Esquisse de théorie du droit fiscal communautaire,* Thèse de Doctorat en droit public, Université de Douala, 2013 (fichier de l'auteur).

26 Article 67 du Traité de l'UEMOA et Préambule de la CEMAC.

ouest africain.[27] La problématique est abordée ici au confluent du droit international public et du droit communautaire pour marquer l'importance de l'harmonisation des processus dans la réussite de l'intégration régionale en Afrique.

L'intégration quant à elle, est à la fois un processus[28] et une situation qui, à partir d'une société internationale morcelée en unités indépendantes les unes des autres, tendent à leur substituer de nouvelles unités plus ou moins vastes, dotées au minimum d'un pouvoir de décision.[29] C'est fort de cette conjugaison d'approche que l'étude suggère une lecture croisée des différents processus d'intégration à savoir les processus économique,[30] politique,[31] juridique,[32] institutionnel et pourrait-on ajouter socioculturel[33] comme solution pour une intégration achevée.

D'après le *Vocabulaire juridique* de Gérard Cornu, l'intégration vient du latin *integratio*, de *integrare* qui veut dire réparer. Elle s'appréhende comme un transfert de compétences d'un État à une organisation internationale dotée de pouvoirs de décision et de compétences supranationales.[34]

En général, l'intégration renvoie à l'idée de fusion, de deux ou de plusieurs unités distinctes en vue de former une nouvelle entité. La présente étude mettra l'accent sur « [ces] nouvelles dynamiques »,[35] celles qui consistent en l'adoption d'institutions et de mécanismes visant d'une part la réduction des obstacles aux échanges ou les disparités entre les

27 E Toni 'Existe-t-il un droit public financier ouest-africain ?' (2020) 7 *RAFIP* 81-114.

28 Il s'agit d'un enchaînement de phénomènes aboutissant à un résultat déterminé. Voir *Le petit Larousse illustré (2014)* 928. On parlera d'un processus de fabrication pour marquer la production normative et institutionnelle du droit de l'intégration et surtout d'une consolidation de ce droit par les juridictions des Communautés.

29 P-F Gonidec *Les organisations internationales africaines* (1987) 54.

30 L'accélération du processus d'intégration économique du continent africain est liée au lancement officiel de la Zone de Libre-échange Continentale Africaine (ZLECA).

31 Le processus politique peut être tiré l'Agenda 2063 de l'Union Africaine (UA) et identifié par les '*valeurs partagées*' dont les plus saillantes sont la démocratie, la bonne gouvernance et les Droits de l'homme.

32 S Belaid 'Le rôle du droit dans l'intégration régionale' (1989) *Revue tunisienne de droit* 21.

33 Adotevi (n 2) 85 ; CA Diop *Fondements économiques et culturels d'un État fédéral d'Afrique noire* (1974) 17.

34 G Cornu *Vocabulaire juridique* (2014) 558.

35 J Mouangue Kobila 'Les nouvelles dynamiques de l'intégration en Afrique' Communication au colloque organisé sur L'Afrique indépendante dans le système international à l'institut de France à Paris les 15 et 16 octobre 2010 par l'Association des internationalistes et le secrétariat général (français) à la commémoration du cinquantenaire des indépendances africaines (fichier de l'auteur).

économies[36] et, d'autre part, la réalisation d'un ensemble juridique unique et cohérent.[37]

La question cruciale que suscite la présente étude est la suivante : En quoi l'harmonisation des processus d'intégration constitue-t-elle un moyen efficient pour l'achèvement de l'intégration en Afrique noire francophone ?

Relativement à la question posée, l'on peut postuler que la conception marginale[38]est un frein à l'aboutissement du processus d'intégration tandis que la fédération favorise l'intensification des échanges intra-régionaux et permet une réduction des écarts de niveaux de développement et de la polarisation de l'activité économique. Cette lecture croisée des processus d'intégration donne à la réflexion un intérêt tout singulier et nécessite d'être faite sous le prisme de la théorie et de la pratique.

Du point de vue théorique, le présent chapitre met en exergue une analyse juridique des différents processus d'intégration permettant à l'Afrique d'apporter sa contribution à la régionalisation/mondialisation.[39] Il s'agit des linéaments pour la construction d'un droit africain de l'intégration[40] dont le caractère pluriel ou groupal réconforte la thèse du pluralisme juridique[41]qui est une caractéristique principale de l'ordre juridique africain.[42]

Du point de vue pratique, il est question de proposer un aperçu, sur la base de quelques indices, d'une tension qui semble travailler en

36 RA Tsafack & I Tamba 'Enjeux et problématique de l'intégration en Afrique centrale' in H Ben Hammoudou, B Bekolo-Ebe et Touma Mama (dir) *L'intégration régionale en Afrique centrale, bilan et perspectives*, (2003) 43-58.

37 Onana Etoudi (n 4) 15.

38 P Hugon 'Marginalisation et intégration ou auto-exclusion' (1992) *forum de DELPHES* 331.

39 F Ost 'Mondialisation, globalisation, universalisation : s'arracher, encore et toujours, à l'état de nature' in C-A Morand (dir) *Le droit saisi par la mondialisation* (2001) 6.

40 Sur l'émergence de ce concept, voir P Pescatore *Le droit de l'intégration : émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des communautés européennes* (2005) 447.

41 Sur le pluralisme juridique, voir A Sow Sidibe *Le pluralisme juridique en Afrique (l'exemple du droit successoral sénégalais)* (1991) 660 p ; PE Kenfack 'La gestion de la pluralité des systèmes juridiques par les Etats d'Afrique noire : Les enseignements de l'expérience camerounaise' (2009) 153-160.

42 Dans le contexte africain, le pluralisme est un instrument de consolidation de l'unité et de cohésion sociale. Voir par exemple le préambule de la loi n°2016-886 du 8 novembre 2016 portant Constitution de la République de Côte d'Ivoire.

permanence la structure de cette intégration, entre unité et pluralité[43] des processus. Il s'agit d'une sorte de « chassée croisée »[44] des processus d'intégration sans hiérarchie ni subordination véritable dont l'objectif est d'éviter l'enracinement de la crise des institutions africaines[45]en charge des politiques d'intégration. En effet, l'intégration régionale africaine s'enlise de plus en plus, elle procède plus d'une volonté d'hégémonie que de développement, de participation locale.[46]

L'harmonisation des processus apporterait une solution à la problématique actuelle de restriction du principe de libre circulation des personnes et des biens puisqu'elle trouve son fondement dans la limitation des souverainetés des États pour une gouvernance mondiale.[47]

L'harmonisation des processus d'intégration constitue enfin un facteur de stabilité et de sécurité juridique et judiciaire de l'investissement en Afrique.[48] A ce sujet, la doctrine africaine se posait bien la question de savoir quel pays trouverait intérêt à déclarer la guerre à son meilleur client ou fournisseur ?[49] C'est dire que l'intégration économique débouche toujours sur une certaine forme d'intégration politique et elle apparaît comme le meilleur garant des relations pacifiques.[50]

Le choix porté sur l'Afrique francophone subsaharienne permet de mesurer son apport à la *mondialisation* des économies[51] et d'évaluer les principales caractéristiques des processus d'intégration dans les espaces très explorés comme : (CEMAC, Communauté Économique des États de l'Afrique de l'Ouest (CEDEAO) et UEMOA).

43 J Matringe *Le droit international des échanges entre unité et pluralité,* (2009) 116 p.

44 L'expression est de L Burgogue Larsen 'L'internationalisation du dialogue des juges' in *Le dialogue des juges-Mélanges en hommage à Bruno Genevois* (2008) 99.

45 D Bach 'Crise des institutions et recherche de nouveaux modèles' in R Lavergne (dir) *Intégration et coopération régionales en Afrique de l'Ouest* (1996) 96.

46 Sall (n 1) 10.

47 K Ahadzi-Nonou *La citoyenneté régionale face aux enjeux de la libre circulation des personnes et le droit d'établissement dans l'espace CEDEAO*, (2013) 2.

48 J Senghor Étude sur la rationalisation des organisations internationales en Afrique de l'Ouest (2011) 16 ; J. Issa-Sayegh 'L'ordre juridique de l'UEMOA et l'intégration juridique africaine' in *Etudes en l'honneur de J-C Gautron, Les dynamiques du droit européen en début du siècle* (2004) 63.

49 J Mouangue Kobila *Droit institutionnel de la CEMAC*, polycopié de cours de licence en droit public, Université de Douala, 2019-2020 (fichier de l'auteur).

50 D Carreau et P Juillard *Droit international économique* (1978) 228.

51 Cette expression est empruntée à A Wade, 'Préface' in A Yaya Sarr *L'intégration juridique dans l'Union économique et monétaire ouest africaine (UEMOA) et dans l'organisation pour l'harmonisation du droit des affaires en Afriques (OHADA)* (2008) 13.

La démarche méthodologique dans la présente étude allie la description normative[52] et institutionnelle,[53] la critique sous l'angle du droit comparé et de la jurisprudence[54] des organisations dans le processus d'intégration en Afrique subsaharienne francophone.

Dès lors, l'étude suggère une mise en œuvre de l'intégration politique à travers les mesures économiques d'une part (2), et une revitalisation de l'intégration normative par des mécanismes institutionnels d'autre part (3).

2 L'intégration politique par les mesures économiques

L'Afrique indépendante doit cesser de reculer devant ses responsabilités monétaires qui ont tendance à être desservies au profit des velléités politiques.[55] Au plan économique, les nombreuses crises ont poussé les États et les institutions à prendre des mesures d'urgences, notamment en procédant à l'assouplissement ou à l'approfondissement de l'union monétaire d'une part **(2.1.)** et à l'atténuation des souverainismes d'autre part **(2.2.)**.

2.1 L'harmonisation par l'approfondissement de l'Union monétaire

La monnaie joue un rôle important dans le processus d'intégration; elle est au cœur des économies modernes dont elle commande les mouvements. Ce chapitre suggère une révision des politiques monétaires (1) et une harmonie entre la politique sécuritaire[56] et le développement économique comme gage d'une intégration économique réussie (2).

52 H Kelsen *Théorie générale des normes* (1996).

53 M Hauriou 'L'institution et le droit statutaire' (1906) 2(2) *Recueil de législation de Toulouse* 134-182 ; S Romano *L'ordre juridique* (1975) 21-25.

54 P Delnoy *Elément de méthodologie juridique 1. Méthodologie de l'interprétation juridique. 2. Méthodologie de l'application du droit* (2008) 435.

55 Pouemi (n 12) 284.

56 L'idée d'une 'intégration sécuritaire' est empruntée à Sall (n 1) 133.

2.1.1 La révision de la politique monétaire

Dans les grands ensembles régionaux, l'intégration économique est réputée être la principale clé du succès économique comme le souligne le préambule du Traité de la Communauté Économique Africaine (CEA) de 1991 : 'stipulant que l'intégration économique du Continent est une condition essentielle pour la réalisation des objectifs de l'OUA'.[57] Par cette formule, les États parties au Traité d'Abuja instituant la CEA accordent une importance capitale au processus économique d'intégration et mettent ainsi en relief l'hybridité qui caractérise le pouvoir économique.[58]

Dès lors, la politique africaine d'intégration ne peut s'ériger en un modèle de référence pour les autres continents que si elle s'arrime aux exigences de la mondialisation. Il est donc nécessaire de coordonner les législations et de doter les institutions comme l'OHADA et l'UEMOA des compétences suffisantes pour garantir à l'Afrique une intégration économique complète. Le Traité révisé de la CEMAC s'inscrit dans cette perspective lorsqu'il affirme que la promotion de la paix et le développement harmonieux au sein de la Communauté passent par le rapprochement de deux unions : une Union Économique et une Union Monétaire.[59]

Par ailleurs, la révision de la politique monétaire permet d'éviter les 'horreurs économiques'[60] qui sont des véritables freins au processus d'intégration et qui peuvent être évitées si on a la parfaite maîtrise de sa politique monétaire. En effet, il se pose en Afrique subsaharienne en général, un réel problème d'autonomie monétaire car la majorité des États n'ont pas le contrôle de leur monnaie. A ce titre, la crise sanitaire actuelle et son impact sur les économies obligent les États à développer une politique de souveraineté monétaire pour éviter les conséquences économiques et financières désastreuses.

La politique d'harmonisation des domaines techniques paraît à juste titre comme une forme d'intégration plus prudente parce que respectueuse de la souveraineté économique et monétaire des États membres. A ce sujet, le droit dérivé de l'UEMOA connaît aujourd'hui une harmonisation très avancée, à travers l'instauration d'un régime douanier commun à tous les États membres, la dotation d'une législation bancaire commune,

57 Traité instituant la Communauté Economique Africaine adopté à Abuja le 3juin 1991.

58 En s'inscrivant contre le projet de fragmentation de l'Afrique sub-saharienne, le Traité d'Abuja est au cœur du projet de fusion des communautés économiques régionales (CERs) en une seule Communauté Economique Africaine (CEA).

59 Voir art 2 du Traité révisé de la CEMAC.

60 P Sagos 'L'horreur économique dans la relation de droit' (2005) 2 *Droit social* 124.

reprenant et complétant l'ancienne réglementation bancaire, et l'adoption d'une nouvelle législation harmonisée en droit de la concurrence. Il en est de même du code des investissements communautaires des États de l'UEMOA qui est un projet d'harmonisation très ambitieux et qui fait de l'Afrique de l'Ouest un espace de référence en matière d'intégration.

La CEMAC quant à elle, réalise ses objectifs d'harmonisation des législations définis dans son traité institutif à travers deux structures : l'UEAC (Union Économique de l'Afrique Centrale) et l'UMAC (Union Monétaire de l'Afrique Centrale). Il faut dire que dans cet espace économique, les querelles de leadership sont des véritables entraves aux multiples projets d'intégration. En revanche, au-delà des initiatives nationales, les pays de la CEMAC se sont mobilisés pour juguler la crise sanitaire occasionnée par la Covid-19 en mettant en place des stratégies communes notamment l'adoption par les institutions financières sous régionales des mesures pour prévenir les conséquences qui s'annoncent sévères sur les économies locales.

Par ailleurs, l'exemple de l'Union Africaine et Malgache (UAM) dissoute en 1964 et remplacée deux ans plus tard par l'Organisation Commune Africaine et Mauricienne (OCAM) montre que l'Afrique est un vaste chantier d'intégration au plan politique et même économique comme l'atteste la controverse autour du maintien ou de la sortie du FCFA.

En effet, l'actualité économique africaine permet de se demander si l'intégration économique en Afrique passe nécessairement par l'adoption d'une monnaie unique ? La solution réside t- elle forcément dans la rupture avec la monnaie initiale qu'est le franc CFA en Afrique subsaharienne francophone ?[61] Le moins qu'on puisse dire est que la souveraineté monétaire n'a pas de prix. Elle est la voie idéale pour toute politique d'intégration qui se veut autonome. L'Afrique tout entière a besoin d'une politique monétaire qui lui soit propre. A ce titre, avec le débat autour du maintien ou du rejet du franc CFA,[62] et celui de la mise en place de l'ECO (monnaie commune des espaces UEMOA et CEDEAO), la problématique d'une intégration globale avec en relief la dimension économique prend des proportions considérables. L'intégration économique devenant de ce fait un instrument plus poussé de décolonisation, car à l'analyse,

61 Le FCFA est utilisé par 14 pays africains : UEMOA (8 pays) et la CEMAC (6 pays). Pourtant le FCA n'a pas la même signification dans les deux zones : Communauté financière africaine (Zone UEMOA) et Coopération financière en Afrique centrale (Zone CEMAC). Par ailleurs, ces monnaies ne sont pas interchangeables.

62 Voir notamment les critiques de Pouemi (n 12) 30.

les États africains sont plus favorables à la reformation de la monnaie commune existante, à la révision de la coopération financière qu'ils jugent désavantageuse.

Pour réagir à ces interrogations, la France va adopter en mai 2020 lors d'un Conseil des ministres, un projet de loi qui entérine la fin du FCFA et qui a pour points majeurs sa transformation en ECO en maintenant la parité fixe avec l'EURO ainsi que la fin de la centralisation des réserves de change des États d'Afrique de l'Ouest auprès du Trésor français[63] conformément à l'accord conclu entre elle et les États membres de l'UEMOA.[64]

Cependant, si l'Afrique de l'Ouest connaît ces réformes financières, l'Afrique centrale et le Niger en Afrique de l'Ouest sont réfractaires à ce mouvement et appellent le Continent à affirmer sa souveraineté monétaire, et à se débarrasser de cette servitude monétaire qui le maintiendrait dans « le cercle vicieux du sous-développement ».[65] Il serait en effet temps pour les pays africains de « redresser la barre et d'adopter, dans le domaine des conceptions et des monétaires, des comportements plus mûrs, accordés avec les virtualités dynamisantes du phénomène monétaire ».[66] Il est question de rendre à la monnaie tout son rôle, toute sa force d'entraînement et de multiplication sur les autres réalités économiques et sociales. Comme on le voit, on peut passer par les mesures économiques pour garantir à l'Afrique une politique d'intégration autonome et prospère. C'est par cette voie que l'Afrique pourra contribuer en tant qu'acteur et non simplement spectateur à la réforme du système monétaire international et partant, garantir sa propre sécurité économique.

2.1.2 La politique sécuritaire et le développement économique

Le souci de sécurité a hanté les pays africains dès leur accès à l'indépendance.[67] Cette sécurité est non seulement comprise comme un préalable au développement économique, mais elle est aussi ancrée dans la volonté politique des États. Il est dès lors compréhensible que les

63 Deux changements majeurs seront annoncés : le placement libre de ses réserves accordé à la BCEAO et le retrait de la France des instances de gouvernance dans lesquelles elle était présente et en particulier de la présence du ministre français des finances dans les instances de gouvernance.

64 Il s'agit d'un accord de partenariat signé le 21 décembre 2019 entre le président français et les gouvernements des Etats membres de l'UEMOA.

65 Pouemi (n 12) 26 et s.

66 MT Diawara 'Préface' in Pouemi (n 12) 8.

67 Sall (n 1) 133.

organisations communautaires d'intégration mises en place se préoccupent de la sécurité de leurs membres. En effet, parmi les nombreux défis qui interpellent l'intégration régionale africaine, figure en bonne place celui de la sécurité sous tous ses aspects.[68]

Le présent chapitre n'abordera pas les questions de paix et de sécurités qui exigent la mise en place d'une politique de défense collective,[69] mais uniquement la sécurité économique, gage de l'épanouissement économique des États membres des organisations visées. A ce titre, les organisations d'intégration à vocation essentiellement économique étendent souvent leurs compétences dans le domaine politique (promotion de la démocratie et des droits de l'homme) et en matière d'environnement, de lutte contre les pandémies (Sida, choléra et Covid-19). Les deux derniers domaines d'extension doivent être privilégiés par les CER d'Afrique noire, dans la mesure où la paix et la santé constituent une condition préalable au développement et à l'intégration de cette partie du continent qui continue d'être dévastée par les conflits internes. À ce titre, l'implication de la Zone de Libre-échange Continentale Africaine (ZLECA) dans les questions relatives aux droits de droits de l'homme et à la lutte contre la pauvreté est édifiante.[70]

En outre, les concepts d'ordre public et de sécurité publique très souvent invoqués pour protéger les intérêts fondamentaux des États,[71] sont perçus au sein de la CEMAC comme des exceptions incontournables au principe communautaire de libre circulation des objets marchands. Cette position assez radicale s'explique tant par la fragilité des politiques sécuritaires étatiques des pays membres que par la porosité des frontières entre les pays membres, lesquelles peuvent être sources de désordre et d'insécurité, surtout à un moment où la crise sanitaire occasionnée par la Covid-19 oblige les Etats à emprunter la voie du multilatéralisme pour une solidarité agissante.

Il est dès lors urgent de revêtir l'intégration régionale africaine des habits neufs capables de doter les États africains des mécanismes sécuritaires

68 WT Ahouansou *La coopération internationale contre le terrorisme*, Mémoire de Master recherche, Université d'Abomey-Calavi, 2013,136 p (fichier de l'auteur).

69 Voir dans le cadre de la CEDEAO, Sall (n 1) 137. Voir de façon générale dans cet ouvrage l'étude de Telesphore Tekebeng Lele.

70 Lire utilement les implications de la ZLECA sur les droits de l'homme dans Commission Économique des Nations Unies pour l'Afrique et Fondation Friedrich Ebert *Rapport sur la Zone de libre-échange continentale (ZLEC) en Afrique, vue sous l'angle des droits de l'homme (*2017) 180 p.

71 Voir P Le Mire 'La police administrative*'* (1989) 2(7) *Documents d'étude de droit administratif* 4.

communs leur permettant de propulser leur développement. On peut, pour ce qui est de la politique sanitaire commune, à défaut d'élaborer un plan de santé intégré, envisager par exemple une harmonisation des directives communautaires pour les conformer aux directives de l'Organisation mondiale de la santé (OMS) à l'exemple de celles du 23 mars 2020 qui renvoient à l'humanisation des inhumations des personnes décédées de la Covid-19.[72] À ce titre, l'édition 2009 du rapport de la Conférence des Nations Unies sur le Commerce et le Développement (CNUCED) indique que *«* l'intégration régionale est […] un élément capital à prendre en considération lorsqu'il s'agit d'élaborer de nouvelles lignes d'action pour développer les services *»*.[73]

Il est question d'élaborer les politiques sécuritaires contraignantes au triple plan régional, communautaire et international afin d'assurer aux investissements économiques une sécurité certaine. En effet, la pandémie à Corona virus a mis en lumière les angles morts de la politique sanitaire à l'échelle internationale et les limites, notamment en matière d'édiction des règles, de l'Organisation Mondiale de la Santé (OMS).

L'Afrique reste un continent dans lequel la conception d'un modèle de reconstruction constitue une urgence et où la convergence entre la politique et l'économie est une voie idéale pour une intégration réussie.[74] Encore faudrait-il compter sur la restriction des souverainetés étatiques et non exclusivement sur le droit *stricto sensu* en ce qu'il demeure 'secondaire par rapport à la volonté des États*'*.[75]

2.2 L'harmonisation par l'atténuation des souverainismes

La formation du droit international en général et du droit de l'intégration en particulier a été profondément marquée par la problématique de restriction de la souveraineté de l'État. La limitation des souverainetés conduit alors à aborder l'intégration régionale africaine sous une double approche : une approche « *soft* » de la souveraineté des États d'une part (1)

72 Voir OMS *Directives et Procédures Opérationnelles Standard pour la préparation et la réponse au Covid-19 au Cameroun* (2020) ; OMS *conduite à tenir en matière de lutte anti-infectieuse pour la prise en charge sécurisée du corps d'une personne décédée dans le contexte de la Covid-19* (2020).

73 CNUCED, 'Le développement économique en Afrique : Renforcer l'intégration économique régionale pour le développement de l'Afrique', (2009) *Rapport de la CNUCED* 88.

74 S Diouf *L'intégration juridique en Afrique : L'exemple de l'UEMOA et de l'OHADA,* Mémoire de DEA, Université Cheikh Anta Diop de Dakar, 2005 at 12.

75 Sall (n 1) 10.

et, d'autre part, une approche « *hard* »[76] de développement de l'intégration intra-africaine (2).

2.2.1 Une approche « soft » de la souveraineté des États

La souveraineté est selon la doctrine internationaliste, le 'fondement à la fois de l'ordre intra-étatique et inter-étatique'.[77] En ce sens, elle est la caractéristique exclusive de l'État, en tant que seul mode d'organisation sociopolitique issu des traités de Westphalie de 1648. Il s'agit là d'une « puissance absolue et perpétuelle d'une République »[78] qui reste cependant, sans cesse l'objet de nombreuses interrogations. En d'autres termes, sous le prisme de l'intégration, la « souveraineté se retrouve à la fois empiriquement et épistémologiquement questionnée ».[79]

La problématique de limitation des souverainetés dans le cadre des processus d'intégration est formulée par la doctrine française en ces termes : le concept de souveraineté 'doit-il être considéré comme absolu ou faut-il désormais le relativiser ?'[80] Il faut dire que dans son étymologie, le terme intégration met déjà en exergue l'idée de 'transferts substantiels de souveraineté'[81] au profit d'une nouvelle entité souveraine commune.[82]

Au-delà de la proximité géographique, des liens historiques et des affinités culturelles et sociologiques, la constitution d'un ensemble supranational reste fortement tributaire de considérations institutionnelles et de leadership. Cette dépendance est plus sensible dans les domaines de souveraineté tels que la justice, la défense, la sécurité, la politique extérieure, l'économie et les finances.[83] En effet, la réalisation de

76 Sur ces expressions, voir R-J Dupuy 'Droit déclaratoire et programmatoire : de la coutume sauvage à la soft law' in *L'élaboration du droit international public* (1975) 132.

77 R Aron *Paix et guerres entre les nations* (2004) 724.

78 J Bodin *Les six livres de la République (*1977) *122.* Le schéma est presque identique au sein des organisations internationales qui en général, réaffirment dans leurs principes constitutifs le respect de la souveraineté de leurs membres. Voir Gonidec (n 30) 45.

79 X Mathieu 'Souveraineté. Évolution conceptuelle d'une notion-clé' in D Battistella *Relations internationales, Bilan et perspectives* (2013) 195-215 ; B Badie et M-C Smouts *Le retournement du monde* (1992).

80 F Hervouet 'Préface' in A Ondoua Étude des rapports entre le droit communautaire et la Constitution en France. L'ordre juridique constitutionnel comme guide au renforcement de l'intégration européenne, Thèse de Doctorat en Droit public, Université de Poitiers, 1999 at 11 (fichier de l'auteur).

81 Sall (n 1) 63.

82 M Grawitz *Lexique des sciences sociales* (1988) 215.

83 Demba Ba (n 6) 699.

l'intégration africaine a toujours créé des divisions[84] et nécessite encore aujourd'hui des concessions de la part des États souverains.

Par ailleurs, entre l'intégration régionale ou sous-régionale et la souveraineté internationale de l'État, la problématique se pose en termes de compatibilité et une interprétation souple de la souveraineté permet de rapprocher les différentes notions.[85] Ainsi, à l'argument de « l'irréductible souveraineté étatique »[86] développé par la doctrine pour justifier le comportement réfractaire du juge national face au droit international et communautaire, s'est progressivement substituée une désacralisation de la souveraineté consécutive à l'entrée du monde dans une zone de « turbulence » dont la meilleure des certitudes est désormais l'incertitude.[87] Le droit de l'intégration tout comme le droit humanitaire[88] ont progressivement contraint les États africains à se désenchanter, volontairement ou non, pour finalement admettre que la prise en charge de leur population en danger puisse se faire avec une forte collaboration de la société internationale[89] notamment sous le drapeau de la « responsabilité de protéger ».[90] Les résultats sont perceptibles au double plan national et régional.

Au plan national, l'effort en faveur de la coopération et de l'intégration à l'échelle régionale[91] est une constance de la politique étrangère de nombreux États africains. Cette tradition trouve sa source juridique dans

84 Dans la marche vers l'Union pour la reconstruction de l'Afrique, deux groupes se créaient : celui de Monrovia et celui de Casablanca. Pour le premier groupe, il n'était pas question de réaliser l'unité politique, mais une intégration par cercles concentriques à l'échelle des régions, chaque Etat devant conserver sa propre identité, sa propre culture constitutionnelle. Pour le second en l'occurrence les panafricanistes radicaux, il fallait instituer une intégration réelle à l'échelle du continent. Leur vision profonde était d'arriver à l'Unité globale de tout le continent. Leur souhait devait être facilité par tous les facteurs fédérateurs révélés par le milieu physique, l'histoire et la culture. Voir Diouf (n 86) 6.

85 Voir Décision de la Cour constitutionnelle du Bénin*, DCC19-94 du 30 juin 1994, Président de la République*.

86 C Colliard 'L'irréductible diplomatique' *in Études de droit des communautés européennes. Mélanges offerts à Pierre-Henri Teitgen* (1984) 109- 126.

87 J Rosenau *Turbulence in world politics: A theory of change and continuity* (1990) 63. Lire également M Merle 'Le dernier message de Raymond Aron : système interétatique ou société internationale' (1986) 34(6) *Revue Française de Science Politique* 1181-1197.

88 Voir B Kouchner et M Betati *Le droit d'ingérence : peut-on laisser mourir ?* (1987).

89 B Kouchner *Le malheur des autres* (1991) 23.

90 B Cerquiglini 'Mot d'ouverture' in J-M Crouzatier et al (dir) *La responsabilité de protéger, Aspects, Revue d'Etudes francophones sur l'Etat de droit et la démocratie,* (2008) 3. Voir à ce sujet dans cet ouvrage le chapitre de Léandre Mve Ela qui y est consacré.

91 Ahouansou (n 68).

les dispositions constitutionnelles des États qui proclament l'attachement du pays à l'idéal de l'unité africaine.[92] Cette légitimation constitutionnelle participe à la consolidation de la 'dimension étatique' de l'intégration[93] qui est une faculté de l'État souverain et une expression de son engagement[94]. Ces « clauses constitutionnelles d'intégration »[95]conduisent à « renforce[r] à la fois l'ancrage juridique et la légitimité politique de [la participation des États africains] à l'intégration [régionale/ ».[96] Le juge constitutionnel béninois rappellera que la réalisation de l'unité africaine implique « nécessairement un abandon et à tout le moins une limitation de souveraineté ; qu'une telle limitation ou un tel abandon partiel de souveraineté a un fondement constitutionnel ».[97]

On peut en déduire que les constitutions africaines sont désormais un terrain propice à l'enracinement de l'intégration régionale africaine.[98] Le relâchement de la souveraineté comme on le voit peut-être explicite ou implicite[99] et atteste de ce qu'il existe un lien entre la justice constitutionnelle et la justice de l'intégration en Afrique.[100] En d'autres termes, l'architecture africaine d'intégration permet d'affirmer que les constitutions ne sont plus des obstacles à l'intégration régionale africaine; elles en sont des instruments de « guide et d'encadrement ».[101]

92 Voir art 96(3) de la Constitution du Sénégal du 22 Janvier 2001 ; art 172 de la Constitution de la VIIème République du Niger du 25 novembre 2010 ; art 149 de la Constitution du Benin du 11 décembre1990 ; art 115 de la Constitution gabonaise de 1991.

93 J Rideau *Droit constitutionnel de l'Union européenne* (2010) 970.

94 M Kamto 'La volonté de l'Etat en droit international' (2004) 310 *RCADI* 97-101. Voir également *Affaire du vapeur Wimbledon,* 17 août 1923, (1923) *Recueil des arrêts de la CPJI,* série A, 25.

95 A Ondoua 'Existe-t-il un droit national de l'intégration communautaire en Afrique francophone ?' (2013) 6 *Palabres Actuelles* 24 ; J Rideau 'Le rôle des Etats membres dans l'application du droit communautaire' (1972) *AFDI* 885.

96 Ondoua 'Existe-t-il un droit national de l'intégration communautaire …' (n 95) 30.

97 Voir Ondoua 'Existe-t-il un droit national de l'intégration communautaire …' (n 95) 32.

98 A Sall 'Le droit international dans les nouvelles Constitutions africaines' (1997) 1 *RJPIC* 344 ; L Sindjoun 'Les nouvelles constitutions africaines et la politique internationale : contribution à une économie internationale des biens politico-institutionnels' (1995) 26(2) *Etudes internationales* 337.

99 Voir Préambule de la Constitution togolaise de 1992 révisée proclame l'engagement du peuple togolais *à défendre la cause de l'unité nationale, de l'unité africaine et à œuvrer à la réalisation de l'intégration sous-régionale et régionale*. Voir également le Préambule de la Constitution camerounaise du 18 Janvier 1996 révisée.

100 EH Omar Diop « Justice constitutionnelle et justice de l'intégration en Afrique', in *Mélanges en l'honneur de Babacar Kante* (n 6) 381- 423.

101 Pour une étude comparée, lire Ondoua Étude des rapports entre le droit communautaire et la Constitution en France (n 81) 12.

Au plan régional africain, la restriction du principe de souveraineté a reçu un écho inédit lors de la transition entre l'Organisation de l'Unité africaine (OUA) et l'Union Africaine (UA) intervenue au début des années 2000. L'Acte constitutif de l'UA consacre ainsi « le droit de l'union d'intervenir dans un État membre sur décision de la Conférence, dans certaines circonstance graves, à savoir : les crimes de guerre, le génocide et les crimes contre l'humanité ».[102] L'organisation régionale africaine a entendu donner un sens nouveau au multilatéralisme politique africain, historiquement incarcéré dans l'absolue inviolabilité de la souveraineté issue de la colonisation. Elle a de ce fait posé les jalons de développement d'une intégration intra-africaine.

2.2.2 Un développement « hard » de l'intégration intra-africaine

Le développement de l'intégration intra-africaine remet sous le feu des projecteurs l'idée de fragmentation des espaces régionaux et par conséquent celle de restriction des souverainetés étatiques. Il faut donc, pour protéger cette intégration entre États membres d'une communauté[103], compter sur une forte dose de volonté politique invitant chacun à jouer sa partition pour une véritable convergence des processus d'intégration en Afrique[104].

En fait, la politique d'intégration intra-africaine peut être classée dans la catégorie « des situations purement internes »[105] consacrant une compétence communautaire exclusive[106] devant certaines situations sensibles. C'est le cas par exemple des politiques adoptées par le législateur communautaire CEMAC et relatives à la libre circulation des biens, à la préservation de la sécurité publique et à l'ordre public sanitaire qui affectent

102 Art 4(h) de l'Acte Constitutif de l'Union Africaine.

103 J Coussy 'Protection et intégration interafricains : échecs inéluctables ou occasions manquées ?' in J-M Fontaine (dir) *Réformes du commerce extérieur et politiques du développement* (1992).

104 D Gbentnkom *Réformes économiques, échanges intra-régionaux et convergence en Afrique subsaharienne,* Thèse de Doctorat ès Sciences Economiques, Université de Yaoundé-II, 2004 at 80, (fichier de l'auteur).

105 Voir R-E Papadopoulou 'Situations purement internes et droit communautaire : un instrument jurisprudentiel à double fonction ou une arme à double tranchant ?' (2002) 12 *RDE* 95-129.

106 Il faut nuancer en disant que cette notion de 'situations purement internes', a connu une interprétation restrictive de la part du juge communautaire européen qui rappelle qu'elle n'est compatible que dans l'hypothèse où les mesures frappant les marchandises en provenance des autres pays membres touchent aussi strictement les produits nationaux. Voir les *Affaires jointes* C-321/94 et C-324/94 du 15 février 1997, Rec., p. I-2443, Point 44.

directement les ordres publics internes des Etats membres.[107] En effet, les Etats membres disposent encore d'un pouvoir quasi discrétionnaire pour légiférer sur leurs politiques sécuritaires, même s'ils sont obligés d'en avertir le législateur communautaire, lequel sera tenu de conformer ces politiques à la réglementation commune comme l'a fait le juge communautaire européen pour ce qui est de la protection de la santé publique.[108]

En effet, la politique globale d'intégration n'exclue pas celles élaborées à l'initiative des micro-organisations à l'exemple, du développement du commerce entre les États membres d'une même région. Cependant, c'est la portion négligeable de ce commerce intra-africain qui fait douter de son influence réelle sur la politique générale.

Ce type de commerce est présenté par la CNUCED dans son rapport de 2009 sur le développement économique en Afrique et relatif à l'intégration régionale en Afrique et aux possibilités qu'elle offre de remédier aux faiblesses structurelles séculaires des économies africaines et d'améliorer les résultats économiques nationaux et régionaux.[109]

Selon ce rapport, le commerce inter-africain reste très faible par rapport au volume du commerce intra-régional partout ailleurs. Il ne représente, que « 8,7 % des exportations totales et 9,6 % des importations totales de la région ». Ceci se justifie selon la doctrine africaine par la présence dans une sous-région ou régions des « économies clones »,[110] c'est-à-dire des économies dont la production est identique. L'Afrique centrale en général et les pays membres de la CEMAC en particulier exportent ainsi les mêmes produits : les hydrocarbures, les produits miniers, le bois et quelques produits tropicaux comme le café et le Cacao. Le même constat peut être fait pour les pays membres de la CEDEAO.

La mise en place et l'opérationnalisation de la ZLECA peut cependant être une solution en ce qu'elle a pour but « d'augmenter considérablement

107 I Halilou, *L'ordre public de la Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC),* (2020) Thèse de Doctorat en droit public, Université de N'Gaoundéré, 424 p.

108 *Commission c. Royaume Uni* CJCE (15 juillet 1982), Rec. 2739 ; *Sandoz*, CJCE (14 juillet 1983), Rec. 2445.

109 CNUCED 'Développement Economique en Afrique : renforcer l'intégration économique régionale pour le développement économique' (2009) *CNUCED-UNCTAD, UNTD/B/56/4*, 9 p.

110 E Folefack 'Traité d'Abuja et foisonnement des institutions d'intégration régionales en Afrique : problèmes de coordination, de compatibilité des projets et de la gestion des appartenances multiples. Les cas de l'Afrique centrale, de l'Afrique orientale et australe' in *la concurrence des organisations régionales africaines* (n 13) 189.

le commerce intra-africain, de stimuler l'investissement et l'innovation, d'encourager la transformation structurelle des économies africaines, d'améliorer la sécurité alimentaire, de stimuler la croissance économique et la diversification des exportations, de rationaliser les régimes commerciaux des communautés économiques régionales, qui parfois se recoupent »[111].

La Communauté des États sahélo-sahariens (CEN-SAD) illustre une autre difficulté que devra surmonter la ZLECA. Dans cet espace régional, les coûts de transports peuvent atteindre 77% de la valeur des exportations contre 40% pour les pays asiatiques et 33% pour les pays d'Amérique latine et les Caraïbes.[112] Seule une approche sectorielle de la politique économique d'intégration ou l'adoption des politiques macroéconomiques sous-régionales peut être gage de la réussite de l'économique générale. A ce titre, l'intégration régionale reste un processus graduel[113] qui passe par la zone de libre-échange,[114] l'union douanière, le marché commun, l'union économique et enfin l'intégration économique complète. Par exemple, l'intégration régionale dans le domaine des assurances incarnée par la Conférence interafricaine des marchés d'assurance (CIMA)[115] a permis de migrer de la coassurance communautaire au marché commun[116].

Il en découle que la réalisation de l'intégration africaine emprunte deux voies : celle de l'unité africaine axée sur la relativisation des constitutions et celle axée sur l'établissement des « cercles concentriques »[117] qui conditionne la réussite de l'intégration à l'échelle continentale par le succès de regroupements plus restreint au plan régional. La seconde voie a pour avantage d'exiger aux États regroupés, l'élaboration des normes et des institutions communes capables de fédérer leurs unions. Les acteurs communautaires se doivent de développer en leurs pratiques *l'affectio*

111 Commission Économique des Nations Unies pour l'Afrique, 'Avant-propos' in *État de l'Intégration en Afrique VIII : Vers la création de la Zone de libre-échange continentale* (2017).

112 Données recueillies sur le site officiel du CEN-SAD, www.cen-sad.org (consulté le 23 décembre 2020).

113 N Mouelle Kombi 'L'intégration régionale en Afrique centrale. Entre interétatisme et supranationalisme' in *L'intégration régionale en Afrique centrale, bilan et perspectives* (n 36) 207.

114 Sur la notion d'échange, lire J Matringe *Le droit international des échanges entre unité et pluralité,* (2009) 116 p.

115 Instituée le 10 juillet 1992 à Yaoundé, la Conférence interafricaine des marchés d'assurance (CIMA) regroupe 14 pays de l'Afrique de l'Ouest et du Centre (Bénin, Burkina Faso, Cameroun, Centrafrique, Comores, Congo, Côte d'ivoire, Gabon, Guinée Equatorial, Mali, Niger, Sénégal, Tchad, et Togo).

116 Amar Kebe 'Atouts et limites de l'intégration dans le secteur des assurances dans la zone CIMA : De la coassurance communautaire au marché unique' in *Mélanges Babacar Kante* (n 6) 726-737.

117 Cette démarche senghorienne est reprise par Demba Ba (n 6) 701.

integrationis, ce lien sacré existant entre les acteurs formels et informels, qui les oblige à accorder une certaine primauté à l'esprit communautaire[118]. C'est dire que les regroupements macro au sein de l'Afrique ne doivent pas perdre de vue l'objectif principal qui est le développement global du continent. Une telle dynamique est une œuvre collective qui nécessite à la fois des mesures politiques et économiques fortes mais aussi des mécanismes normatifs et institutionnels contraignants.

3 L'intégration normative par les mécanismes institutionnels

L'intégration régionale africaine comme toute entreprise a besoin d'un dispositif normatif et institutionnel pour asseoir son autorité. L'étude suggère d'une part, de mettre l'accent sur le renforcement des outils institutionnels d'harmonisation (3.1.) et, d'autre part, de privilégier le modèle polyphonique d'intégration, ce chœur à plusieurs voix qui rend compte des particularités des processus d'intégration en Afrique noire (3.2.).

3.1 L'harmonisation par le renforcement des outils normatifs et institutionnels

Si l'économie est le moteur de l'intégration, le droit est son moyen. Il est donc judicieux de recourir à la formule dite de l'*«* intégration par le droit *»,*[119] ce processus qui consiste à mettre le droit au centre de toute idée d'intégration. Cette vision pragmatique et « managériale »[120]conduit à un renforcement de l'autorité des normes (1) et à une densification des compétences des institutions juridictionnelles d'intégration (2). [121]

118 P-G Pougoue, « OHADA et intégration économique », in *Dynamiques de développement, débats théoriques et enjeux politiques à l'aube du 21e siècle, Mélanges en l'honneur de Georges Walter NGANGO,* (2005) 575-587.

119 J Issa-Sayegh 'L'intégration juridique des États africains de la Zone Franc*',* (1997) 823 *Penant* 12 ; G Burdeau 'Aspects juridiques de la mise en œuvre des Accords de Marrakech', in SFDI *La réorganisation mondiale des échanges*' (1996) 207 ; E Gnimpieba Tonnang *L'intégration juridique des pays africains de la Zone Franc : Esquisse de bilan et perspectives,* Mémoire de DEA, Université de Nice-Sophia Antipolis, 2000 at 164 (fichier de l'auteur).

120 Sall (n 1) 61.

121 Pour une étude comparée, lire M Lelart 'Un exemple d'Intégration institutionnel : l'évolution de la Zone Franc, du Traité de Maastricht au Traité de l'UEMOA' (1997) 136 *Revue Tiers Monde* 897-918.

3.1.1 Les normes contraignantes

L'harmonisation des politiques et des législations des États est une préoccupation sans cesse renouvelée dans les ordres juridiques communautaires africains. En effet, de nombreux défis interpellent les législateurs régionaux ou communautaires africains qui sont tenus de mettre sur pied un dispositif normatif contraignant capable de réguler les situations litigieuses telles que le flux migratoire, la pollution et le réchauffement climatique, le terrorisme international, la cybercriminalité, l'insécurité sanitaire, la libre circulation[122] et la problématique de la bonne gouvernance communautaire.[123] La fabrique des normes devient une nécessité impérieuse car pour achever une intégration, il faut nécessairement que 'la volonté politique [soit] prolongée par une discipline législative rigoureuse, sinon c'est toute l'entreprise d'intégration qui serait menacée'.[124] Dès lors, l'articulation des systèmes normatifs et institutionnels amorcée en Afrique centrale et en Afrique de l'Ouest entre l'UEAC, l'UEMOA et l'OHADA[125] permet d'attester l'existence d'un 'capital législatif important' en Afrique qu'il convient d'harmoniser pour une intégration régionale complète. Elle ne signifie pas la suppression complète de toutes les divergences des droits nationaux. Car si l'essence même de l'harmonisation est la préservation de la souveraineté nationale, chaque État, participant au processus reste libre de maintenir une certaine spécificité de son droit.[126]

L'intégration régionale africaine pour ce qui est de l'espace CEMAC en particulier, présente des politiques législatives peu contraignantes. Par exemple, malgré l'introduction dans la communauté CEMAC, des politiques relatives à la bonne gouvernance, aux droits de l'homme, au dialogue social et au genre, il est regrettable de constater qu'aucun texte communautaire n'a encore défini leur cadre réglementaire. Il urge donc d'élaborer les normes contraignantes et de doter les juridictions

122 EG Tonnang 'La libre circulation des personnes et des services en Afrique centrale : entre consécrations textuelles, vides jurisprudentiels et hésitations politiques' (2006) 3 *Perspectives internationales et européennes* 241-257.

123 Directive N° 06/11- UEAC- 190- CM- 22 du 19 décembre 2011, relative au Code de transparence et de bonne gouvernance dans la gestion des finances publiques en zone CEMAC.

124 G Taty 'Le recours en manquement d'Etat de l'article 4 du Traité révisé de la CEMAC : analyse critique' (2010) 1 *Revue de droit uniforme africain : actualité trimestrielle de droit et de jurisprudence* 27.

125 J Mestre 'Avant-propos' in Yaya Sarr (n 52) 12.

126 M Delmas-Marty, M-L Izorche 'Marge nationale d'appréciation et internationalisation du droit. Réflexion sur la validité formelle d'un droit commun pluraliste' (2000) 4 *Revue internationale de droit comparé* 753.

communautaires des compétences nécessaires pour sanctionner la violation de ces politiques qui empêchent la Communauté d'atteindre les résultats recherchés.

Par ailleurs, un accent particulier doit être mis sur les normes relatives à la libre circulation des biens, des personnes et des marchandises en raison de son application mitigée en Afrique. Si cette politique connaît une certaine avancée en Afrique de l'Ouest dans le cadre de la CEDEAO, il faut dire qu'elle est encore très incertaine en Afrique centrale. La politique de libre circulation demeure controversée en zone CEMAC du fait de la mise en circulation tardive du passeport communautaire biométrique tandis que la CEEAC n'envisage que la mise en circulation d'un « carnet » susceptible de faciliter les déplacements intracommunautaires dans son espace géographique.

En effet, dans son évolution normale, l'union douanière de l'Afrique Centrale était appelée à se transformer en un marché commun dans lequel on allait retrouver, en plus des traités de la zone de libre échange et de l'union douanière, des dispositifs tendant à supprimer toutes les restrictions à la libre circulation des autres facteurs économiques et à créer ainsi une unité économique plus ou moins homogène entre ses membres. Cette exigence d'intégration s'est manifestée à travers la mise en place progressive d'une politique de promotion de la libre circulation des marchandises et des facteurs de production.[127] Cette politique de libre circulation des personnes est aujourd'hui mise à mal par les politiques de gestion de la pandémie Covid-19 notamment les fermetures des frontières. Il est nécéssaire de procéder à une harmonisation des politiques et des législations relatives à la libre circulation des personnes, considérées comme le ventre mou de la politique d'intégration en Afrique en général et en Afrique centrale en particulier.

Il faut par ailleurs, renforcer la législation sur la concurrence avec les mesures de contrainte forte. Les règles nationales[128] existantes, jugées « lacunaires et imparfaites »,[129] n'ont pas réussi à créer, au niveau interne, les conditions garantissant le libre jeu de la concurrence entre acteurs

127 Voir art 77 du Traité UEMOA ; art 27 du Traité UDEAC ; art 2(c) de la Convention instituant l'Union Economique de l'Afrique Centrale (UEAC).

128 Voir notamment ordonnance camerounaise n°72-18 du 17 octobre 1972 portant régime général des prix, telle que modifiée par les lois n°79/11 du 30 juin 1979 et n°89/11 du 21 juillet 1981, loi centrafricaine du n°60/193 du 23 janvier 1961.

129 H Modikoko Bebey *Le régime des investissements privés au Cameroun*, Thèse de doctorat en Droit, Université de Paris I, 1989 at 42 (fichier de l'auteur). JM Myama 'La liberté du commerce dans le cadre de la loi camerounaise du 10 août 1990' (1991) 2 *Revue Juridique Africaine* 51.

économiques. Une harmonisation rigoureuse des législations fera sortir la concurrence de l'utopie à la réalité.

Il faut relever enfin l'harmonisation des mesures antiterroristes par le Conseil de Paix et de Sécurité (CPS) de l'Union africaine.[130] En effet, conscient du fait que la sécurité est la base de toute coopération durable en Afrique,[131] les enjeux sécuritaires sont orientés depuis lors vers la construction d'une ligne de conduite continentale devant coordonner les politiques antiterroristes.[132] Ce rôle dévolu au CPS en tant que système de sécurité collective et d'alerte rapide exige de l'organe une réaction rapide et efficace aux situations de conflit et de crise en Afrique. Aussi le CPS entend « coordonner et harmoniser les efforts du continent dans la prévention et la lutte contre le terrorisme international sous tous ses aspects ».[133]

Dans cette mission d'harmonisation des efforts régionaux et continentaux de lutte antiterroriste, le CPS applique les prescriptions de la Convention de 1999 et des autres instruments internationaux de lutte contre le terrorisme et travaille de concert avec le conseil de paix et de sécurité des Nations Unies. On en veut pour preuve sa forte implication dans le développement d'une stratégie efficace de relèvement sécuritaire dans la région sahélienne et notamment au Mali (MINSAHEL).[134] Cette coordination des politiques ou mieux des législations contribue à une harmonisation des mécanismes de développement en Afrique.

Au sein de la SADC par exemple, l'harmonisation des législations permettra d'accompagner l'économie des petits pays de niveaux de développement hétérogènes par l'association au plus riche et plus avancé sur le plan économique qu'est l'Afrique du Sud[135]. Il est de ce fait, important

130 F Frasson-Quenoz *La construction de la communauté de sécurité africaine : une perspective africaine*, Thèse de Doctorat en droit public, Université de Lyon III, 2011 at 165-277 (fichier de l'auteur).

131 Y Chouala 'Puissance, résolutions des conflits et sécurité collective à l'ère de l'Union africaine : théorie et pratique' (2006) 6 *AFRI* 291.

132 Voir la proposition d'élaboration d'un code de conduite sur le terrorisme étudiée par la Conférence des Chefs d'Etat et de Gouvernement, *Décision* Assembly/AU/Dec. 9, Seconde session ordinaire de la Conférence, Maputo 10-12 juillet 2003.

133 Article 2(1) du Protocole de 2002 relatif à la création du CPS de l'UA.

134 Conférence de presse à Bamako du Chef de la Mission de l'UA pour le Mali et le Sahel (MINSAHEL), 23 janvier 2014, disponible sur http//www. Peaceau.Org/fr/article/conférence-de-presse-à-Bamako (consulté le 20 juillet à 2020)

135 O Cureau *Intégration régionale, croissance et dynamique de spécialisation : une application à l'Afrique australe,* thèse de doctorat en sciences économiques, Université de Paris II, 2000 at 14 (fichier de l'auteur).

de joindre à cette normativité ambivalente les institutions juridictionnelles capables d'impulser la dynamique au besoin par la contrainte.

3.1.2 Le dialogue entre les institutions juridictionnelles compétentes

Le recours aux institutions juridictionnelles pour accompagner la politique d'intégration passe par le dialogue entre les différentes juridictions ce que la doctrine communautariste a qualifié de « concertation permanente entre les organisations »[136] d'une part, et par l'habilitation de ces juridictions à soumettre les États au respect des dispositions normatives et directives d'autre part. Il s'agit d'un dialogue vertical et horizontal. Le dialogue horizontal, auquel ce chapitre s'intéresse, met en exergue les objectifs du Traité d'Abuja et ceux des communautés économiques régionales (CERs). Une telle logique est partagée par les organisations Ouest africaines d'intégration au regard du Mémorandum sur les axes de coopération entre l'UEMOA, le Comité inter-États de lutte contre la sécheresse au Sahel (CILSS) et la CEDEAO du 3 septembre 1998.[137]

Il en est de même du rapport de juridiction à juridiction prévu dans le cadre du mécanisme de la question préjudicielle par l'article 12 du protocole additionnel n°1 de l'UEMOA relatif aux organes de contrôle de l'UEMOA. A ce titre, c'est pour parer au risque de décisions inconciliables et dépourvues de cohérence et d'harmonie que l'avis n° 001/2000 du 2 février verra le jour. Cet avis met en exergue la « nécessité d'une concertation entre les deux organisations en vue de la coordination de leur politique normative et de leur juridiction respective qui exercent leur contrôle juridictionnel sur les mêmes juridictions des États membres et dans des domaines qui ne sont pas nettement délimités ».[138]

Par ailleurs, l'intégration régionale est aujourd'hui au centre des préoccupations majeures de développement du continent africain. L'harmonisation des techniques d'intégration constitue ainsi l'une des stratégies les plus crédibles pour accompagner les pays africains aux niveaux de développements variés. Il faut donc des institutions solides capables de suivre les sentiers bâtis par le Nouveau partenariat pour le développement de l'Afrique (NEPAD), notamment sur la relance de la croissance et le développement de l'Afrique.

136 Issa-Sayegh 'L'ordre juridique de l'UEMOA et l'intégration juridique africaine' (n 48) 678.

137 Une dynamique initiée par la Commission européenne aux termes du Programme d'Appui Régional l'intégration (PARI) au profit de l'UEMOA.

138 D Kokoroko 'La coexistence entre organisations sous-régionales : limites et perspectives' in *La concurrence des organisations régionales en Afrique* (n 13) 201.

Cependant, les faiblesses institutionnelles sont aussi à l'origine du retard dans le processus d'intégration en Afrique. En effet, les Cours de justices ne s'arment pas suffisamment d'audace pour contraindre les États à s'exécuter et les CER n'ont pas toujours reçu de pouvoirs supranationaux requis pour assurer l'exécution des décisions collectives et la convergence des politiques communes.

Il y a cependant quelques exemples qui pourraient inspirer l'ensemble des juges en Afrique. On peut citer la décision de la Cour de justice de l'UEMOA (CJUEMOA) interdisant le cumul des fonctions d'enseignant-chercheur permanent et celles d'avocat[139] en Afrique de l'Ouest ou hors d'Afrique, les décisions de la Cour de justice de l'Union européenne (CJUE) du 24 octobre 2019[140] et du Conseil d'État français du 10 juillet 2020[141] condamnant la France pour ses failles à réduire la pollution de l'air d'autre part. Ces décisions viennent réaffirmer le principe de la responsabilité des États membres pour violation du droit communautaire issu des jurisprudences *Francovich*[142] *et Factortame*[143] et rapprocher la problématique de l'intégration des politiques sociales telles l'éducation et la pollution. En effet, il se pose dans les ordres juridiques européens et africains un réel problème d'harmonisation des politiques d'intégration sur les axes sensibles de développement comme la santé, le climat, la pollution et le terrorisme.

Dès lors, la mise en place d'une communauté d'intégration régionale ou sous-régionale, nécessite le concours de plusieurs acteurs parmi lesquels des acteurs « formels », ensemble composé d'institutions dont la principale finalité est d'accompagner le processus d'intégration.[144] A ce titre, constatant plusieurs obstacles au processus d'intégration de la CEMAC (absence d'autonomie institutionnelle, absence de cohérence et de sécurité juridique dans le dispositif normatif communautaire) la Conférence des Chefs d'État a initié un vaste programme de réformes institutionnelles.[145]

139 CJUEMOA, arrêt n° 005/2020 du 08 juillet 2020, *Commission de l'UEMOA c. la décision n° 19-287 du 22 août 2019 de la Cour constitutionnelle du Benin*.

140 *Commission c. France* CJUE (2019) ECLI:EU:C:2019:900

141 *CE. Ass, 10 juillet 2020, Association les Amis de la terre France et autres, n° 4284O9*.

142 *Francovich* CJCE (1991) C-6/90 et C-9/90

143 *Francovich et autres c. Italie* CJCE (1996) C- 46/93 et C- 48/9. Voir également OL De Juvigny 'Responsabilité (des États membres)' (2003) 3 *Répertoire de Droit Communautaire* 2.

144 Z Zankia *Contrôle institutionnel et intégration sous régionale en Afrique : Le cas de la Communauté Economique et Monétaire de l'Afrique Centrale et de l'Union Economique et Monétaire Ouest Africaine*, (2014) Thèse de Doctorat en droit public, Université de Dschang, 2014 (fichier de l'auteur).

145 PL Badjan *Réformes institutionnelles et consolidation du processus d'intégration en zone*

En revanche la problématique d'intégration institutionnelle dans les ordres juridiques CEMAC et UEMOA est sous-tendue par le caractère ambigu du contrôle juridictionnel qui y a cours. Cette ambiguïté se traduit par le caractère timoré du contrôle technico-politique et du caractère retenu du contrôle juridictionnel. Ce dernier se traduit d'une part, par le contrôle progressif de l'intégration par les juridictions nationales, à travers l'exécution de leurs compétences communautaires et la mise en œuvre du mécanisme de renvoi préjudiciel ; et d'autre part, par un contrôle diversifié de l'intégration par les cours de justice communautaires et les cours de comptes communautaires, de la CEMAC et de l'UEMOA[146]. Le cas le plus surprenant reste celui de la Cour de justice de la CEEAC qui attend toujours d'être mis en place plus d'un quart de siècle après la création de l'organisation[147].

Il faudrait élaborer une politique allant dans le sens du renforcement des institutions[148] juridictionnelles et non juridictionnelles pour une intégration achevée. Il faut des Commissions et des parlements communautaires aux compétences élargies et capables d'émettre des normes ayant une certaine hégémonie fonctionnelle. La rencontre entre normes et institutions telle que prévues par les textes communautaires, notamment l'article 14 du Traité UEMOA et l'article 5(1) 1 du Traité CEDEAO doit être encadrées.

Comme on le voit, l'intégration normative et institutionnelle dépend de la volonté des acteurs à faire avancer le processus : le changement institutionnel est le fruit d'un acte volontaire de la part des acteurs, lorsque ceux-ci jugent que les institutions ne génèrent pas ou plus les résultats prévus lors de leur création, ils les dénoncent ou les modifient. Cette volonté politique devient déterminante lorsqu'il faut opérer entre un choix entre l'uniformisation, l'unification et l'harmonisation.

3.2 L'harmonisation contrastée des techniques juridiques d'intégration

L'intégration par le droit prend chaque jour dans les sociétés une importance grandissante. Une approche de l'intégration par le droit, notamment par l'harmonisation et l'unification vient confirmer la place

CEMAC : 2006-2010. Contribution à une sociologie compréhensive du changement politique et social en Afrique centrale, Mémoire de Master II, IRIC, 2012 , 26 (fichier de l'auteur).

146 Voir Zankia (n 145).

147 Le Traité instituant la CEEAC a été signé à Libreville le 20 octobre 1983. Il est entré en vigueur le 18 décembre 1984.

148 M Lelart, 'Un exemple d'Intégration institutionnel : l'évolution de la Zone Franc, du Traité de Maastricht au Traité de l'UEMOA' (1997) 136 *Revue Tiers Monde* 897-918.

grandissante du droit dans le processus d'intégration. Cependant, si les deux techniques se recoupent,[149] il faut dire qu'elles ne se confondent pas. Si les objectifs poursuivis par ces notions sont communs à savoir la recherche d'homogénéité et de cohérence des systèmes juridiques nationaux, l'une apparaît cependant discutée (1) tandis que l'autre reste souhaitée (2).

3.2.1 Une uniformisation discutée

Le droit africain de l'intégration est-il « uniformisable » ? Autrement dit quel est le degré de faisabilité de cette uniformisation et son apport au développement de l'Afrique ? Cette question rappelle la difficulté que l'on éprouve à vouloir uniformiser les politiques et les législations dans un ordre juridique plural comme l'Afrique.[150] L'expérience manquée de la Ligue arabe est assez illustrative à cet égard.[151]

Composée des mots latins *unus* qui signifie 'un' et *forma* qui veut dire « forme », l'uniformisation consiste à donner la même forme à un ensemble d'éléments « dont toutes les parties se ressemblent entre elles ».[152] Elle postule que, pour une matière précise, soit minutieusement élaboré un cadre normatif contenu dans un instrument unique auquel les parties prenantes adhèrent sans pouvoir y déroger ni sur le fond, ni sur la forme. C'est ce support commun à tous les intervenants à une intégration juridique qui fait la particularité de l'uniformisation et la distingue de l'unification.

L'unification est une forme radicale d'intégration juridique. Elle consiste à « instaurer, dans une matière juridique donnée, une réglementation unique, identique en tous points pour tous les Etats membres, dans laquelle il n'y a pas de place, en principe, pour les différences ».[153] Elle consiste en effet, à supprimer les décalages entre les lois nationales pour leur substituer une législation unique, rédigée en des termes identiques pour tous les Etats concernés. En d'autres termes, l'unification impose des règles précises auxquelles les États sont tenus de se conformer à l'identique, alors que l'harmonisation se contente d'un rapprochement autour de principes

149 A Mouloul *Comprendre l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA), (2008) disponible sur http://biblio.ohada.org/pmb/opac_css/doc_num.php?explnum_id=911 (accessed 18 August 2022) 24 ; HD Modi Koko Bebey 'L'harmonisation du droit des affaires en Afrique, Regards sous l'angle de la théorie du droit' (2001) *Juriscope* 13.

150 Kenfack (n 41) 153-160.

151 La Ligue des États arabes avait proposé le projet d'un code unifié du statut personnel, mais cette unification ne put jamais aboutir à cause de contraintes à la fois politiques et juridiques.

152 E Littré *Dictionnaire de la langue française* (1971) 1450.

153 Issa-Sayegh, *L'intégration juridique des pays africains de la Zone Franc* (n 130) 25.

communs. Contrairement à la traditionnelle œuvre d'unification du droit des organisations internationales,[154] l'unification des systèmes juridiques au plan interne reste discutée. Elle aboutit à une limitation des libertés des Etats notamment dans la législation de certains secteurs d'activités qui désormais sont régis par la Communauté.

L'uniformisation est bien présente dans le modèle africain d'intégration et l'OHADA en est la référence en ce qu'elle se présente comme *janus*, cette figure de la mythologie romaine dont la face visible est l'harmonisation et l'unification, la partie immergée de *l'iceberg*.[155]

En effet, l'OHADA est un processus d'intégration juridique et dans une certaine mesure juridictionnelle en matière de droit des affaires. Du point de vue de la technique d'intégration, elle recourt nonobstant l'utilisation de la terminologie d'harmonisation dans sa dénomination et dans le traité à deux mécanismes : une unification de principe à travers l'utilisation des actes uniformes comme supports juridiques de l'intégration et une harmonisation exceptionnelle à travers les actes élaborés par le législateur. La réussite du processus d'intégration OHADA est alors assuré par le recours à l'uniformisation et l'institution d'une juridiction supranationale (Cour Commune de Justice et d'Arbitrage (CCJA)) chargée de veiller à l'intégrité de son ordre juridique. Les actes uniformes se caractérisent par leur rigidité puisqu'ils ne laissent pas la possibilité aux États-membres de l'OHADA de les modifier ou d'y apporter des réserves. Une fois, qu'ils ont été adoptés, ils entrent en vigueur dans tous les États de l'OHADA et s'imposent à ceux-ci sans dérogation possible sauf celles qu'ils prévoient eux-mêmes.[156]

Cette technique d'intégration est la manifestation même de la *hard law*. Pourtant, la question de sa capacité à pouvoir assurer seule la réussite du processus OHADA se pose avec acuité. Eu égard, d'une part, aux difficultés actuelles que rencontre l'OHADA dans le cadre de la réglementation de certaines matières (droit du travail, des contrats) et de la réglementation insatisfaisante d'autres domaines (notamment le secteur informel) et, d'autre part, de la volonté d'ouvrir l'OHADA à des États de culture juridique différente de celle de la famille juridique romano-germanique, on peut utilement se demander si elle ne devrait pas revoir

154 Sur la notion, voir Ch Zorgbibe *Les organisations internationales* (1997) 3.

155 Le même raisonnement peut être tiré des Principes relatifs aux contrats du commerce international (Principes d'UNIDROIT). Voir E Charpentier 'Les *Principes* d'Unidroit : une codification de la *lex mercatoria* ?' (2005) 46 *Les Cahiers de Droit* 204.

156 Pour garantir, leur efficacité, l'art 10 du Traité indique qu'ils abrogent toute disposition antérieure ou postérieure de droit interne qui leur est contraire.

ses instruments juridiques dans le double sens de leur accroissement et de leur assouplissement. Dans cette perspective, une observation attentive d'autres expériences en matière d'intégration juridique dans le domaine commercial serait fort utile. Il s'agit notamment des expériences menées dans le cadre de la Commission des Nations Unies pour le droit commercial international (CNUDCI), de l'Institut international pour l'unification du droit privé (UNIDROIT) et de la Chambre de Commerce Internationale (CCI) qui invitent à un recours au *soft law*.

Au plan économique *stricto sensu*, l'union économique aboutit à l'intégration économique complète lorsqu'elle s'accompagne de l'unification des politiques économiques, sectorielles, conjoncturelles et structurelles sous l'égide d'une autorité supranationale[157]. A ce titre la Communauté économique des États de l'Afrique Centrale (CEEAC) et la CEMAC sont des modèles d'uniformisation assez illustratifs. Dès lors, l'uniformisation des programmes sous-régionaux de sécurité alimentaire des deux organisations et l'uniformisation des normes régissant les tarifs préférentiels des deux zones de libre-échange illustrent la volonté politique des deux organisations à harmoniser leurs politiques dans ces différents secteurs.

Pour forcer le trait, la recherche de l'unité continentale qui se concrétise aujourd'hui à travers la prolifération des institutions d'intégration régionale rend compte de l'idée de fusion des institutions régionales et sous régionales en une seule pour parachever le processus d'intégration. C'est ce qui se dégage de nombreux traités adoptés en Afrique et notamment du Traité d'Abuja instituant la Communauté Économique Africaine (CEA).

En revanche, l'unification reste une entreprise très délicate en matière d'intégration. C'est pour cette raison que les traités instituant la multitude d'institutions régionales et sous régionales rendent peu compte du processus d'absorption.[158] En effet, chaque institution est mue par l'idée de promouvoir un objet bien précis de l'intégration. Certaines institutions sont à forte connotation politique tant dis que d'autres prônent plutôt une vision économique ou sociale, c'est le cas de la CEDEAO, de la CEEAC, de la Zone d'Échanges Prioritaire (ZEP) en Afrique de l'Est, et de la *Southern Africa Development Coordination Conference* (SADCC).

157 E Bamou *Intégration régionale et performances économiques des pays de la CEMAC : une analyse basée sur un modèle d'équilibre général calculable multipay*s, Thèse de Doctorat d'Etat ès sciences économique, Université de Yaoundé II-Soa, 2005 (fichier de l'auteur).

158 Folefack (n 111) 176.

La problématique d'unification vient s'ajouter enfin à l'idée de rationalisation des techniques d'intégration qui est une vieille préoccupation de l'Union africaine.[159] Si l'unification peut prospérer dans les ordres juridiques comme l'Europe où *l'affectio integrationis* est très avancée, il faut dire qu'elle a encore de la peine à être érigée en une règle en Afrique où l'esprit communautaire est encore en maturation. De même, la politique de développement à plusieurs vitesses qui a cours en Afrique est un frein à l'unification du droit dans les espaces d'intégration en Afrique. Le cas de la SADC est assez symptomatique avec le décalage en termes de développement entre l'Afrique du Sud, l'Angola et les autres pays tels les Seychelles ou le Swaziland. Par contre, une harmonisation progressive des politiques et des législations permettrait de rechercher un équilibre entre les niveaux de développement en tenant compte des particularités.

3.2.2 Une harmonisation souhaitée

Le droit africain de l'intégration est un droit 'harmonisable', une harmonisation normative qui pourrait contribuer à la réalisation d'une harmonisation judiciaire. Il s'agit d'une technique en pleine expansion entendue comme la recherche d'un droit commun, ou plutôt d'un droit en commun, qui permettrait d'atténuer certaines divergences juridiques, lesquelles ne facilitent pas ou même empêchent l'achèvement de l'intégration[160] en Afrique. À ce titre, la construction communautaire dans les organisations d'intégration économique reste en principe fondée sur le rapprochement, sur l'harmonisation des législations nationales considérée comme un moyen de construction des organisations économiques de caractère unitaire.[161]

Forme la plus douce et la plus prudente d'intégration juridique, l'harmonisation contrairement à l'uniformisation, laisse encore une marge de liberté aux Etats qui sont libre de légiférer dans les domaines communautaires à condition de ne pas enfreindre à son esprit. Sa mise

159 L'UA en 2005 et à la suite d'une réunion d'experts d'Accra et de Lusaka, envisageait une 'rationalisation des Communautés Economiques Régionales (CER). A l'issu de la rencontre, sont nées les CER suivantes : CEN-SAD (Communauté Economique des Etats Sahélo-Sahariens), CEEAC, COMESA (Common Market for Eastern and Southern Africa, CAE (Communauté de l'Afrique de l'Est), IGAD (Intergovernmental Authority for Development), SADC (Southern Africa Development Community) et Union du Maghreb Arabe (UMA).

160 Th Graziano 'Droit comparé et harmonisation du droit privé européen' (2004) *Revue suisse de droit international et européen* 15.

161 P Leuleux 'Le rapprochement des législations dans la Communauté Economique Européenne' (1962) 2 *Cahiers de Droit Européen* 129-161.

en œuvre diffère d'un espace juridique à un autre, qu'il soit régional ou sous-régional.[162]

En effet, dans l'œuvre d'harmonisation législative, plusieurs possibilités existent dont la principale réside dans le transfert de compétences aux institutions communautaires, lesquelles ont désormais le pouvoir d'imposer aux Etats membres des modifications de leurs législations internes, et ceci à des degrés différents - notamment à travers des règlements[163] et des directives[164]- et dont l'une d'elles, le conseil des ministres, constitue par son droit d'initiative l'élément moteur.

Comme on le voit, le droit est devenu à travers la technique dite de rapprochement des législations nationales des Etats, l'instrument essentiel de revitalisation de l'intégration. En effet, l'harmonisation des législations économiques, sociales et commerciales, la redynamisation de la politique monétaire et financière commune, apparaissent comme la voie idoine pour une intégration sécurisée en Afrique. L'expérience de l'OHADA a permis selon ses praticiens, de mettre un terme à l'insécurité juridique et judiciaire en Afrique. En empruntant aux fonctionnalistes,[165] l'intégration par harmonisation des processus doit être progressive. Ce raisonnement qui est perceptible en Afrique de l'Ouest dans les rapports entre la CEDEAO et l'UEMOA s'enracine en Afrique centrale sous le prisme de la concurrence entre les organisations d'intégration sous régionales (OSIR).

En revanche, une harmonisation des législations entre les Communautés CEMAC et UEMOA dans les secteurs névralgiques est bénéfique pour l'intégration régionale en Afrique. Il s'agit de la revitalisation des politiques telle la libre circulation des personnes, des biens et des services, de la nécessité de garantir le maintien de la concurrence et de la protection des consommateurs dans un environnement libéral favorable aux groupes d'entreprises ; d'encourager la compétitivité économique et d'introduire les États membres sur le marché commun recherché par les

162 Voir Tsafack & Tamba (n 36) 44.

163 Article 21(b) de l'Additif au Traité CEMAC relatif au système institutionnel et juridique de la Communauté. Voir également l'art 60 du Traité constitutif et l'Avis n°001/97 du 20 mai 1997.

164 Article 21(c) de l'Additif au Traité CEMAC relatif au système institutionnel et juridique de la Communauté.
Voir arts 63 et suivants de la Convention régissant l'Union Economique de l'Afrique Centrale (UEAC) et arts 10 et suivants de la Convention régissant l'Union Monétaire de l'Afrique Centrale (UMAC).

165 EB Haas & PC Schmitter 'Economic and differential patterns of political integration: projections about unity in Latin America' (1964) XVIII(4) *International Organisation* 710.

Communautés.[166] La compétence revient aux organes de décisions que sont les commissions de la CEMAC[167] et de l'UEMOA,[168] qui auront charge d'une part, de déterminer le caractère compatible ou non compatible des pratiques ou comportements des entreprises, des États avec le droit communautaire de la concurrence et d'autre part d'interdire, d'autoriser ou d'exempter certains comportements des acteurs économiques et des États membres. En revanche, il faut doter les organes nationaux de ces espaces d'un véritable pouvoir de contrôle et de sanction des pratiques anticoncurrentielles comme dans le système européen de contrôle de la concurrence.[169]

4 Conclusion

L'objectif majeur de cette réflexion était de proposer les modalités de coexistence des processus d'intégration dans un même ordre juridique, de passer en revue les points de convergence et même d'achoppement qui peuvent découler de cette harmonisation et de proposer les solutions pour une meilleure articulation des normes et des mécanismes qui les régissent. En effet, la technique d'intégration par fédération est progressivement considérée comme un catalyseur indispensable du développement économique, social et politique des États. La recette n'est pas une spécificité africaine et le modèle européen a lui aussi commencé par un processus d'intégration économique avant la dynamique politique. A l'analyse, ces processus sont complémentaires et non « rivaux ».[170] Il faudrait par conséquent envisager leur rationalisation afin de réaliser les desseins de l'intégration régionale en Afrique.

L'harmonisation des processus d'intégration participe à l'enracinement de la mondialisation des économies et à la réalisation de ce qui a été qualifié de temps du 'monde un'.[171] Elle permet à l'Afrique de devenir

166 Dans le même sens, voir J-R Nze Ndong 'Le droit matériel communautaire de la zone CEMAC' (2001) Communication au Séminaire Sous-régional sur La sensibilisation au droit communautaire *CEMAC* at 7 (fichier de l'auteur).

167 Voir YR Kalieu Elongo & RS Watcho Keugong 'La réforme de la procédure communautaire de concurrence CEMAC' (2009) 80 *Juridis périodique* 110.

168 Voir AS Coulibaly ' Le droit de la concurrence de l'Union Economique et Monétaire Ouest Africaine' *(2003) 43 Revue Burkinabé de Droit* 14.

169 Zankia (n 145) 83.

170 M Bakhoum *L'articulation du droit communautaire et des droits nationaux de la concurrence dans l'UEMOA*, (2007) 425 p ; L-M Ibriga 'UEMOA : une nouvelle approche de l'intégration économique en Afrique de l'Ouest' (1998) *African Yearbook of International Law* 23-64.

171 K M'Baye 'L'harmonisation du droit des affaires dans la zone franc- Une expérience d'intégration juridique en Afrique' in Schaffer (dir) *Relation entre économies industrialisées*

partie intégrante de l'économie mondiale et de participer au processus de régionalisation/mondialisation[172]. Bref, empruntant les trajectoires tracées par l'UE et l'OHADA et axées sur la cohérence juridique, l'intégration politique ne peut se faire qu'après la convergence économique. Il en est de même de l'intégration normative qui n'est possible que s'il existe une juridiction qui impose cette harmonisation. Il faudrait donc sortir de la dimension pyramidale de l'harmonisation des processus imposé par l'école classique de l'intégration pour envisager une harmonisation horizontale ou en forme de réseau.[173]

et économies en transition ou en développent, Institut International de droit d'expression et d'inspiration française (1995) 264.

172 Ost (n 39) 6.

173 Pour mieux comprendre cette transformation du droit, lire F Ost et M Van De Kerchove *De la pyramide au réseau ? Pour une théorie dialectique du droit* (2002) 506 p.

12 La sécurité collective dans l'ordre juridique africain : Le difficile progrès de la paix par le droit

Telesphore Tekebeng Lele

1 Introduction

Le maintien de la paix et de la sécurité internationales demeure l'une des préoccupations permanentes du droit international ; que l'on le perçoive sous le prisme de l'universalisme ou du régionalisme.[1] Au rang des institutions dont a recours le droit international pour remplir cette fonction, se trouve la sécurité collective ; celle-ci pouvant à son tour être appréhendée également au niveau universel comme au niveau régional.[2]

La sécurité collective naît de la volonté des États de se mettre ensemble pour se défendre contre un ennemi commun. Cette sécurité collective est successivement encadrée par le Pacte de la Société des nations et la Charte des Nations Unies. Son évolution est marquée par la mutation des conflits qui sont désormais plus infra étatiques que interétatiques,[3] et par l'avènement de nouvelles atteintes à la paix dont les crises climatiques et les crises sanitaires.

Plus encore, cette évolution intègre des États nouveaux qui ne faisaient pas partie de cette construction sécuritaire originaire. Tel est notamment le cas des États africains qui deviennent indépendants pour la plupart dans les années soixante, soit postérieurement à l'avènement de la

1 SFDI *Régionalisme et universalisme dans le droit international contemporain* (1976); S Doumbe-Bille, 'Régionalisme et universalisme dans la production du droit de l'environnement', in SFDI *Le droit international face aux enjeux environnementaux* (2010); A Badara Fall La Charte africaine des Droits de l'homme et des peuples : entre universalisme et régionalisme', *Revue Pouvoirs*, (2009) 77-100.

2 Au plan universel, c'est bien entendu la sécurité collective telle que régie par la Charte des Nations unies. Au niveau régional, on fait référence à la diversité des mécanismes de sécurité collective fonctionnant au sein des organisations régionales sous le contrôle du Chapitre 7 de la Charte des Nations unies faisant référence aux accords régionaux. Voir dans ce sens L Boisson De Chazournes, *Les relations entre organisations régionales et organisations universelles* (2010) 327.

3 Voir J-Cl Tcheuwa ' Communauté internationale, guerre et responsabilité : réflexion autour de la responsabilité internationale des États' (2007) 1 *RCEI* 135 ; K Boustany 'La qualification des conflits en droit international public et le maintien de la paix' (1989) 90(1) *RQDI*.38-58.

sécurité collective telle qu'organisée au sein et par la Charte des Nations unies[4]. A quelques rares exceptions, ces États africains sont davantage demandeurs en matière d'opérations de paix et de sécurité internationales que contributeurs à cet effort.

Le rapport des États africains à l'égard des opérations de maintien de la paix tout comme le droit international est empreint de crainte et de méfiance. Ils se considèrent comme étrangers à cet ordre international dont ils n'ont pas participé à la construction.[5] Cette position des États africains à l'égard du droit international va persister jusqu'au début des années 1990 lorsque l'on voit naître une certaine confiance à l'égard du droit international par le recours au mécanisme judiciaire onusien de règlement des différends.[6]

En ce qui concerne le maintien de la paix, il se développe une réflexion sur la capacité des États africains à prendre part activement aux opérations de maintien de la paix sur le continent. Le contexte juridique international est également favorable à la construction d'une sécurité collective régionale. Cela découle de la Charte des Nations Unies qui indique que « [l]e Conseil de sécurité encourage le développement du règlement pacifique des différends d'ordre local par le moyen de ces accords ou de

4 Avant 1945, il existait des embryons de sécurité collective, particulièrement au plan régional. Tel est le cas de l'Organisation des Etats américains dont la résolution XV de La Havane en 1940 prévoyait une solidarité des Etats américains face à l'agression : 'Tout attentat *d'un Etat américain* contre l'intégrité ou l'inviolabilité du territoire, la souveraineté ou l'indépendance politique d'un Etat américain, sera considéré comme une agression contre les Etats signataires de cette déclaration'.

5 Le maintien de la paix et de la sécurité internationales n'est pas l'unique domaine du droit international qui emporte la méfiance des Etats africains. Le règlement judiciaire des différends internationaux est sinon l'un des domaines à l'origine de cette méfiance, mais celui où cette crainte est plus poussée. Quelques affaires d'abord devant la Cour permanente de justice internationale, puis devant la Cour internationale de justice (CIJ) constituent la raison de la méfiance de ces derniers envers l'ordre international. La méfiance récente tient au développement de la justice pénale internationale avec la création par le Traité de Rome de Cour pénale internationale où les Etats africains se considèrent comme les principaux, voire les seuls justiciables. Sur le regard des Etats africains envers le droit pénal international, voir Société africaine pour le droit international (SADI) *L'Afrique et le droit pénal international* (2015).

6 Tout comme la méfiance des Etats africains envers le droit international trouve son origine dans le règlement judiciaire des différends (mécontentement suite à l'arrêt rendu dans les affaires du Sud-ouest africain), leur confiance progressive envers cet ordre se traduit par le recours au règlement judiciaire des différends de la CIJ. Voir notamment G Fischer 'Les réactions devant l'arrêt de la Cour internationale de Justice concernant le Sud-ouest africain' (1996) 12 *AFDI* 144-154, D Perrin, *La Cour internationale de justice et l'Afrique* (2005). J Thuo Gathii, 'Africa and the history of international law' in (2012) 48 *Albany Law School Research Paper* disponible sur https://ssrn.com/abstract=2029019.

ces organismes régionaux ».[7] Cette réflexion conduit à l'émergence du concept d'« africanisation » [8] des opérations de paix et de sécurité sur le continent[9]. Il s'agit à la fois d'une revendication par les États africains de la possibilité d'assurer par eux-mêmes les opérations de paix et de sécurité sur le continent, et d'une invitation aux États africains à prendre part activement aux dites opérations. Les institutions internationales africaines entendent ainsi mettre en place un cadre normatif devant permettre de réaliser cet objectif sur le continent. Elles s'inscrivent ce faisant dans l'appréhension de la sécurité collective comme système, en l'espèce un système juridique ; c'est à dire un ensemble de normes, d'institutions, et un mécanisme concourant à sa mise en œuvre.

Ainsi, le propre de tout système de sécurité, quelle que soit sa taille[10] étant de concourir au maintien de la paix, tout questionnement sur le système africain de sécurité ne peut que s'inscrire dans une réflexion sur la contribution dudit système au maintien de la paix et de la sécurité au niveau régional africain et partant international. En effet, le mécanisme africain de sécurité collective a connu une évolution au niveau régional. Il est d'abord organisé au sein de l'Organisation de l'unité africaine (OUA) née au lendemain des indépendances.[11] Cette dernière avait tout d'abord adopté le Protocole de médiation, de conciliation et d'arbitrage signé le 21 juillet 1964, puis le Mécanisme de l'OUA pour la prévention, la gestion et le règlement des conflits, adopté au Caire par les Chefs d'État et de Gouvernement d'Afrique, le 30 juin 1993.[12] Le succès du maintien de la paix sous l'OUA demeure cependant mitigé.[13] Les Chefs d'État africains tirèrent des leçons de cette faiblesse de l'OUA et entreprirent des réflexions pour une réforme institutionnelle qui conduisirent à l'avènement de

7 Article 52(3) de la Charte de l'ONU. Dans le même sens, U Villani 'Les rapports entre l'ONU et les organisations régionales dans le maintien de la paix' (2001) 290 *RCADI* 423.

8 Voir M Mubiala, *Coopérer pour le maintien de la paix en Afrique Centrale* (2003) 35 *UNIDIR* 3-4.

9 J-P Lacroix 'La réforme de l'ONU, orientations et place de l'Afrique dans cette réflexion' in P De Jong(dir) *Vers une africanisation des opérations de maintien de la paix* (2019) 61 ; S Le Gouriellec ' La participation aux opérations de maintien de la paix, un enjeu de politique publique pour les Etats africains', in De Jong (n 9) 95.

10 On fait référence au système universel incarnée par la Charte des Nations unies, les divers systèmes régionaux, voire les systèmes sous-régionaux.

11 Charte de l'Organisation de l'unité africaine, signée à Addis-Abeba le 25 mai 1963.

12 MC Djiena Wembon 'Le mécanisme de l'OUA pour la prévention, la gestion et le règlement des conflits' (1995) *African Yearbook of International Law* 71-91.

13 H Balde 'Le bilan de l'OUA dans le maintien de la paix et de la sécurité en Afrique' (2003) *GEPSI* 11.

l'Union africaine (UA)[14] au sein de laquelle est créé un Conseil de paix et de sécurité. L'UA intègre les communautés économiques régionales qui se positionnent comme ses devancières en matière de paix et de sécurité. C'est d'ailleurs sur ces dernières que s'appuie le système communautaire africain de sécurité en ce que la Communauté économique africaine est constituée desdites communautés régionales. Cet ensemble forme l'architecture africaine de paix et de sécurité.

Plus qu'une innovation institutionnelle,[15] la création du Conseil de paix et de sécurité est la matérialisation au plan normatif de la volonté des chefs d'État et de gouvernement africains de promouvoir la paix, la sécurité et la stabilité sur le continent, ainsi que dans le champ de la prévention, de gestion et de règlement des conflits, de consolidation du processus de paix, de reconstruction post-conflits, d'action humanitaire et de gestion des catastrophes.[16] La mission ainsi assignée à cet organe par les États africains est la concrétisation de leur « responsabilité collective » de réduire le nombre des conflits sur le continent. Tout en faisant de cette institution un organe de décision permanent pour la prévention, la gestion et le règlement des conflits, les chefs d'État et de gouvernement en font également un système de sécurité collective et d'alerte rapide visant à permettre une réaction rapide et efficace aux situations de conflits et de crises en Afrique'. Le mécanisme de sécurité collective africain est par conséquent pensé et organisé autour de cet organe.

On s'interroge dès lors sur le point de savoir si le cadre normatif mis en place permet de réaliser cet objectif de paix et de sécurité. Ce questionnement permet d'appréhender le cadre normatif africain en matière de maintien de la paix et de sécurité sur le continent afin de mieux saisir la contribution de cet ordre juridique régional au développement de la sécurité collective, et partant le maintien de la paix et de la sécurité internationales en particulier et du droit international en général.

Les réflexions sur l'existence d'un droit international d'inspiration africaine naissent avec l'avènement de l'OUA.[17] Il y a en la matière une doctrine favorable à un droit propre au régionalisme africain. Tel est par

14 Voir Acte Constitutif de l'Union africaine signé à Lomé (Togo) le 11 juillet 2000.

15 J Kenfack ' Le conseil de paix et de sécurité de l'Union africaine' in J D Boukongou et J-Cl Tcheuwa (dir) *De la paix en Afrique au 21ème siècle* (2006).

16 Telles sont les fonctions que les chefs d'Etat et de gouvernement assignent au Conseil de paix et de sécurité. Voir Protocole créant le Conseil de paix et de sécurité de l'Union africaine, art 3.

17 D'autres études remontent l'origine de dans l'Egypte antique. Voir J I. Levitt, 'The African Origine of International Law : Myth or Reality'(2015), 19. n°113, *UCLA J. Int'l L. Foreign Affairs* 118.

exemple le cas des travaux du Professeur Joseph-Marie Bipoun-Woum qui soulignent l'existence d'un droit international africain notamment dans le domaine du règlement des différends.[18] À sa suite, le Juge Mohammed Bedjaoui mettra en exergue ce qui est convenu d'appeler le « système africain » de règlement pacifique des différends qui d'après lui a son origine non seulement dans la Charte de l'OUA, mais aussi dans ce qu'il considère comme « l'esprit africain ». Il indique ainsi que ce système est appelé à forger ses mécanismes et ses procédures, ses traditions et son droit applicable[19]. Ces débuts de réflexion vont servir de levier à d'autres analyses, axées notamment sur la mise en œuvre du droit international en Afrique,[20] l'apport de l'Afrique au développement du droit international,[21] le regard africain sur le droit international.[22] On s'interroge aussi sur l'existence de ce droit, de ces pratiques en lien avec le maintien de la paix.

Le système africain de sécurité ne doit cependant pas être perçu sous le seul prisme de l'organisation continentale. Il intègre l'ensemble des communautés économiques régionales qui constituent la Communauté économique africaine. Il y a ainsi un rapport qui se noue entre l'échelle continentale et les mécanismes sous-régionaux. C'est ce qu'il est convenu de nommer « architecture africaine de paix et de sécurité ». Il existe ainsi, des interactions entre les divers éléments du système, à savoir les mécanismes sous-régionaux, et les relations qu'entretient ce système avec les entités qui lui sont extérieures dont le système onusien et les autres mécanismes sous-régionaux.

Ainsi, la contribution du système africain de sécurité collective en matière de maintien de la paix et de la sécurité sur le continent ne peut être mesurée qu'à travers les instruments juridiques qu'il s'est forgé à cet effet, et le cadre structurel de leur mise en œuvre tant au niveau continental, qu'au niveau sous-régional. Cela suppose la prise en compte des conditions d'adoption desdits instruments juridiques, et les diverses interprétations qui conditionnent leur application par les institutions internationales africaines. Il convient également de confronter la pratique africaine aux autres modèles de sécurité. Il faut sans doute également préciser qu'on

18 *Le droit international africain - Problèmes généraux, règlement des conflits,* (1970).

19 M Bedjaoui, 'Le règlement pacifique des différends africains' (1972), vol.18, *AFDI* 86.

20 *L'Afrique et le droit international de la mer*, 7e Conférence annuelle de la SADI (2018).

21 A Onayemi, E Olufemi, 'Aspects of Africa's Contribution to the Development of International Law' (2015) *koninklijke brill NV*, 591; J Zollmann, 'African International Legal Histories – International Law in Africa: Perspectives and Possibilities' (2018), vol. 31, n° 4, *Leiden Journal of International Law* 897-914.

22 J-E Pondi (dir), *L'ONU vue d'Afrique* (2005); Liber Amicorum Raymond Ranjeva, *L'Afrique et le droit international : Variations sur l'organisation internationale. Africa and international law: Reflections on the international organization* (2013).

ne saurait explorer dans les limites et contraintes d'un chapitre comme celui-ci tout le système normatif africain de maintien de la paix, tant il s'agit d'un droit à la fois transversal et diffus. Dès lors, le présent chapitre s'attardera surtout sur les principes à partir desquels il est possible de saisir le système africain de sécurité à la fois dans sa nomenclature normative et dans sa mise en œuvre opérationnelle.

À l'analyse, le chapitre dresse le constat d'un cadre normatif difficilement apte à réaliser la paix et la sécurité sur le continent. On assiste en effet à une production normative qui ne prend pas suffisamment en compte l'ensemble des atteintes à la paix. Cela a pour conséquence une mise en œuvre difficile des normes tant en raison des incertitudes inhérentes à la norme élaborée que de l'insuffisance des moyens mobilisés à cet effet. Ainsi, si l'on peut déceler au fil des années une volonté des États africains de réaliser juridiquement la paix sur le continent (2), la pratique dénote d'importantes difficultés à parvenir à cet objectif (3).

2 La consécration normative de la volonté de réalisation de la paix par le droit

Le droit produit au sein du système africain de sécurité emprunte aux sources traditionnelles du droit international. Parmi les sources conventionnelles, on retrouve notamment les actes originaires des organisations régionales africaines dont les traités qui créent ces dernières[23] et/ou en organisent le fonctionnement[24]. Quant aux sources non conventionnelles, de nombreux principes actuels du droit international coutumier trouvent leur ancrage dans la pratique africaine.

2.1 La consécration d'un droit d'intervention dans le cadre du système africain de sécurité

En créant un cadre propre au maintien de la paix sur le continent africain, les institutions africaines n'ont pas entendu se défaire des principes structurants de ce domaine du droit international. Tout en prenant en compte les principes élaborés dans l'ordre juridique international, ils entendent apporter une particularité eu égard au contexte africain où les

23 Tel est le cas hier de la Charte de l'OUA, aujourd'hui de l'Acte constitutif de l'UA, des traités créant les organisations régionales africaines, les diverses conventions entre Etats africains, Acte additionnel à l'Acte constitutif de l'Union africaine, Protocole créant le Conseil de paix et de sécurité de l'UA, les traités créant les organisations sous régionales africaines,

24 Ils sont ainsi considérés comme la 'constitution' de ces organisations en ce qu'ils mettent en place un ensemble de normes et d'organes relatifs à la vie de l'institution ainsi créée.

actions sont marquées par la recherche d'un équilibre entre la préservation de la souveraineté des États et les préoccupations humanitaires ; l'objectif étant de mieux répondre aux attentes des peuples africains de vivre dans un continent de paix et exempt de divers conflits. Ainsi, le droit d'intervention de l'Union africaine qui s'analyse en une innovation opérationnelle (2.1.1) semble toutefois être émaillé par la politisation du processus décisionnel (2.1.2).

2.1.1 Le droit d'intervention de l'UA : une innovation opérationnelle

L'action du système africain de sécurité collective tire les enseignements du mécanisme qui avait cours au sein de l'OUA qui avait mis un accent sur l'émancipation politique de ses membres[25]. Il ne saurait en aller autrement au regard de l'objectif de la jeune organisation qui était de consolider les indépendances nouvellement acquises. Celle-ci doit faire face à de nombreuses situations conflictogènes laissées derrière elles par les anciennes puissances coloniales. Ces situations vont rapidement donner lieu à des conflits relatifs notamment aux crises frontalières et des soulèvements au sein des jeunes États. Les difficultés vont surgir lorsqu'il va s'imposer la nécessité de régler les différends qui étaient loin d'être anticipés par la Charte de l'OUA. Pour y faire face, l'organisation fera surtout recours aux comités *ad hoc*, à la Conférence des chefs d'Etats et de gouvernements et au Conseil des Ministres pour tenter de trouver des solutions aux crises africaines. C'est le choix des modes politiques qui est ainsi privilégié avec une efficacité relative[26]. Même la création du mécanisme du Caire,[27] qui est la matérialisation de l'engagement des chefs d'État et de gouvernement de l'OUA à œuvrer ensemble pour le règlement pacifique et rapide de tous les conflits sur le continent - engagement pris lors du sommet de juillet 1990 à Addis Addis-Abeba[28] - n'atteindra pas les résultats escomptés.[29] Il y avait dès lors urgence de créer un organisme

25 Voir en ce sens la Charte de l'OUA du 25 mai 1963, art II 1 (a).

26 Il est à mettre notamment au crédit de ce mode politique, la résolution de la crise sociopolitique au Tchad.

27 Mécanisme de l'OUA pour la prévention, la gestion et le règlement des conflits, adopté au Caire par les Chefs d'État et de Gouvernement d'Afrique, le 30 juin 1993.

28 Voir OUA*, Déclaration de la Conférences des Chefs d'Etat et de Gouvernement de l'organisation de l'unité africaine sur la situation politique et socio-économique en Afrique et les changements fondamentaux qui surviennent dans le monde,* Addis-Abeba, juillet 1990.

29 Voir M-C Djiena Wembou *L'OUA à l'aube du XXI*è *siècle: bilan et perspectives* (1995) 244; M Kamto, J-E Pondi & L Zang, *L'OUA rétrospective et perspectives africaines* (1990); D Lecoutre ' Le Conseil de paix et de sécurité de l'Union africaine, clef d'une nouvelle architecture de stabilité en Afrique?'(2004) 4(212) *Afrique contemporaine* 134; 'Les enjeux du Conseil de paix et de sécurité' *Le Monde Diplomatique, supplément Afrique,* septembre 2009, 2 et 3 disponible dur https://www.diploweb.com/Conseil-de-securite-l-Afrique.html consulté le 10 février 2022.

doté de capacités nécessaires pour répondre aux questions de paix et de sécurité sur le continent. La création du Conseil de paix et de sécurité au sein de l'UA s'inscrit dans ce cadre.[30]

Aux termes de l'article 7 du Protocole créant le Conseil de paix et de sécurité (CPS), cet organe dispose de pouvoirs considérables : anticipation des conflits ; règlement des conflits ; intervention dans le cadre d'une opération de maintien de la paix ; sanctions contre toute menace ou atteinte à la paix ; mise en œuvre de la politique de défense commune ; lutte contre le terrorisme ; coopération avec les mécanismes régionaux et les Nations unies dans la préservation de la paix. Il lui est assigné les missions initialement définies à l'Acte constitutif de l'Union dont l'article 4 (h) énonce « le droit de l'Union d'intervenir dans un État membre sur décision de la Conférence, dans certaines circonstances graves, à savoir les crimes de guerre, le génocide et les crimes contre l'humanité ». Cette disposition est complétée par le protocole portant amendement à l'acte constitutif de l'UA qui permet également à l'Organisation d'intervenir en cas de « menace grave de l'ordre légitime afin de restaurer la paix et la stabilité dans l'État membre de l'Union sur recommandation du Conseil de Paix et de Sécurité ».[31]

L'Union pourra ainsi intervenir dans certaines circonstances graves qu'elle détermine : crime de guerre, le génocide, le crime contre l'humanité, la menace grave de l'ordre légitime. Mais une interprétation restrictive de ce dispositif serait de nature à limiter l'action du système, tout comme une interprétation extensive pourrait elle aussi être source de conflit entre l'Organisation et ses États membres. En tout état de cause, quelle que soit l'interprétation choisie, la nécessité de sauvegarder la paix doit être privilégiée. Ainsi, l'Union a opté pour une interprétation large de ses missions en menant quelques opérations d'envergure au sein de ses États membres. Tel est le cas de sa première intervention, la mission de l'Union africaine aux Comores en vue de restaurer la démocratie. L'Union africaine y est intervenue à la demande de l'État central afin de déloger le Colonel Baccar qui s'était autoproclamé président sur l'île d'Anjouan. Si la préservation et la restauration de l'état de droit n'est pas mentionné *expressis verbis* dans les missions prévues à l'article 4 (h) de l'Acte constitutif de l'Union, il convient de reconnaître que la démocratie constitue un principe

30 Le Conseil de Paix et de Sécurité de l'Union est créé par l'Acte additif à l'Acte Constitutif de l'Union africaine, en son art 9. Voir Protocole sur les amendements à l'Acte constitutif de l'Union africaine Adopté par la 1ère session extraordinaire de la Conférence de l'Union à Addis-Abeba (Ethiopie), le 3 février 2003 et par la 2ème session ordinaire de la Conférence de l'Union à Maputo (Mozambique), le 11 juillet 2003 ; D Lecoutre (n 29).

31 Article 4(h) de l'Acte additif à l'Acte Constitutif de l'Union africaine.

de l'Union qu'elle entend faire respecter.[32] L'intervention aux Comores participe ainsi du « droit des États membres de solliciter l'intervention de l'Union pour restaurer la paix et la sécurité, conformément à l'article 4(j) de l'Acte constitutif ».[33]

La gravité des circonstances devant justifier une intervention fait l'objet d'une interprétation qui varie suivant le contexte et le type de menace. Il y a ainsi une interprétation dynamique des situations de crises par le Conseil de paix et de sécurité. Cela peut être problématique et il convient sans doute d'avoir en la matière un cadre d'action plus précis. En effet les interprétations de certaines situations peuvent donner lieu à une abstention alors qu'une action est requise. Ainsi, pour des situations similaires, le Conseil peut considérer que l'une ne nécessite pas une intervention et arriver à une conclusion différente dans l'autre. Cette interprétation dynamique des situations de crises par le Conseil de paix et de sécurité rend difficile le contrôle des actions du système par les acteurs extérieurs, notamment les organisations de la société civile, les partenaires internationaux, qui en dernier lieu ne peuvent que s'appuyer sur les principes de l'Union pour apprécier le niveau d'intervention au sein du système de sécurité mis en place.

En effet, l'action du Conseil de paix et de sécurité est guidée par les principes de l'Union. Ainsi, elle a déployé la MIAB, Mission de l'Union africaine au Burundi en tant que mission de pré déploiement amorcée en février 2003 et achevée en 2004. Son rôle a été de préparer la mission de l'Opération des Nations Unies au Burundi (ONUB) destinée à superviser la mise en œuvre des accords-de-cessez-le-feu des 7 octobre et 2 décembre 2002.[34] Par la suite, Le CPS a également mis en place le 19 janvier 2007 la Mission de l'Union africaine en Somalie (AMISON) entérinée ensuite par le Conseil de sécurité des Nations Unies,[35] avec pour mission la protection des institutions fédérales de transition afin que celles-ci soient à mesure d'assumer leurs fonctions. Le CPS s'est par ailleurs affirmé en autorisant

32 Le principe démocratique ressort dès le Préambule de l'Acte Constitutif de l'Union africaine où Chefs d'Etat et de Gouvernement sont '[r]ésolus à promouvoir et à protéger les droits de l'homme et des peuples, à consolider les institutions et la culture démocratiques, à promouvoir la bonne gouvernance et l'Etat de droit'. Il est de nouveau rappelé tant dans les objectifs de l'Union (art 3(g)), que dans ses principes (art 4(m)).

33 Protocole relatif à la création du Conseil de paix et de sécurité de l'Union africaine, art 4 (k).

34 OUA, Décision organe central§MEC/AMB/Comm. (XCI), adopté par la 91 session ordinaire de l'Organe central du Mécanisme pour la prévention, la gestion et le règlement des conflits au niveau des Ambassadeurs, Adidis Abéba, 2 avril 2003.

35 Voir S/RES/1744(2007) du 20 février 2007.

le déploiement d'une force multinationale mixte africaine dans la lutte contre le groupe terroriste Boko haram.

Si ces quelques actions peuvent être inscrites à son crédit, force est de reconnaître qu'après une décennie d'existence, ces actions doivent être regardées comme isolées, comparées à la situation sécuritaire sur le continent où des actions importantes sont beaucoup attendues du mécanisme de sécurité ainsi mis en place. Ce bilan en demi-teinte découle en partie des lourdeurs du processus décisionnel.

2.1.2 La politisation regrettable du processus décisionnel

L'article 2 alinéa 1 du protocole portant création du Conseil de paix et de sécurité fait de lui « l'organe permanent de décision dans la prévention, la gestion et le règlement des conflits ». La formulation de cette disposition laisserait ainsi une certaine autonomie au CPS sur les questions relatives au maintien de la paix et de la sécurité sur le Continent. Dans la réalité cependant, son rôle reste très limité. Ainsi qu'il résulte de l'article 8(3) du Protocole, le Conseil a davantage une maîtrise des questions de procédure en son sein que des questions de fond qui relèvent de la compétence des organes politiques.

L'autorisation d'intervention émane ainsi de la Conférence des chefs d'État et de gouvernement qui prend à cet effet une décision avec l'approbation du Conseil de paix et de sécurité et du président de la Commission. L'approbation du Conseil ne peut en fin de compte qu'être relative, ce dernier ne pouvant créer un obstacle à des missions qui rentrent dans son domaine de compétence. De ce mécanisme décisionnel, il appert que le Conseil, organe technique, se trouve contraint de s'aligner sur les positions des organes politiques, quand bien même il aurait des points de vue contraires aux politiques élaborées en cours. Il ressurgit ici le problème de l'articulation des rapports entre les organes techniques et les organes politiques qui avait marqué négativement le fonctionnement de l'OUA ; les organes politiques ayant tendance à faire ombrage aux organes techniques.[36] Ces crises institutionnelles viennent ainsi s'ajouter aux crises sécuritaires qui nécessitent pourtant une concertation entre les différents organes.

La Conférence demeure ainsi le maillon principal du processus décisionnel. Ce sont les chefs d'État et de gouvernement composant la Conférence qui sont à l'origine des politiques de sécurité. Le succès de

36 Voir D Lecoutre 'La présidence en exercice de l'Union africaine. Enjeux et perspectives d'une institutionnalisation' (2009) 208 *ISS Papier* 12.

ces politiques dépend en dernière analyse de leur volonté. Ils peuvent ainsi paralyser toute initiative entreprise par le Conseil de paix et de sécurité toutes les fois que les mesures envisagées ne répondent pas à leur aspiration, ou qu'ils n'entendent pas « lâcher » l'un des leurs. C'est en considération de cette réalité que d'aucuns ont pu qualifier la Conférence de « syndicat de chefs d'État ».[37] Cette étiquette jadis accolée à l'OUA[38] demeure d'actualité avec toujours plus d'acuité.[39]

Autre difficulté, c'est à la Commission de l'UA, organe exécutif de l'Organisation, que revient le contrôle de l'exécution des décisions prises en matière de maintien de la paix et de la sécurité. Il aurait toutefois fallu que le CPS y soit associé, car, ces décisions s'inscrivent dans l'accomplissement des missions qui lui sont dévolues au sein du système de sécurité.

En définitive, l'autonomie du Conseil de paix et de sécurité reste théorique. Il doit composer avec des organes politiques. La forte politisation du processus décisionnel en matière de maintien de la paix enferme ledit organe dans la volonté des chefs d'État qui à bien des égards hésitent à prendre des actions fortes.[40] En s'inspirant des rapports entre Conseil de sécurité des Nations Unies et le Secrétaire général de la dite organisation,[41] le CPS et les organes politiques sont invités à s'accorder

37 A Glaser & S Smith *L'Afrique sans africains. Le rêve blanc du continent noir* (1994) 100 ; M Debos ' La création de la Cour africaine des droits de l'homme et des peuples. Les dessous d'une ingénierie institutionnelle multicentrée ' (2005) 60 *Cultures & Conflits* 8 disponible sur http://journals.openedition.org/conflits/1934 consulté le 10 février 2022

38 Voir R Badouin 'Chronique d'Afrique noire' (1964) 5(19) *Tiers-Monde Amérique Latine – Europe* 568; A Kabou *Et si l'Afrique refusait le développement* (1991)208.

39 Il convient toutefois de relativiser le propos comme le dit Y-A Chouala qui considère notamment que les discussions au sujet de la transition politique en Côte d'ivoire des années 2000 sont un indice qui vient éroder cette qualification. Y-A Chouala 'Éthique et politique internationale africaine du XXIe siècle : Les normes de civilité à l'épreuve du jeu réaliste des États' (2006) 25(2-3) *Politique et Sociétés* 198.

40 L'Union africaine a notamment été critiquée pour sa réaction tardive lors de la gestion de la crise en Libye. On a pu y voir l'influence du guide libyen d'alors sur ses homologues. Voir S Seelow 'Libye : le cessez-le-feu de l'Union africaine dans l'impasse' *Le Monde,* 11 avril 2011 disponible sur https://www.lemonde.fr/afrique/article/2011/04/11/libye-le-cessez-le-feu-de-l-union-africaine-dans-l-impasse_1505973_3212.html consulté le 10 février 2022.

41 Voir H Cassan 'Le Secrétaire général et le Conseil de sécurité à l'épreuve du chapitre VII : un coupe tumultueux', in SFDI, *Le Chapitre VII de la Charte des Nations Unies* (1994) 244.

pour bien accomplir les missions de paix. Cela implique notamment l'amélioration du cadre normatif pertinent.

2.2 La mise en place d'un cadre normatif novateur peu décisif

Le cadre normatif actuel du système africain de sécurité semble créer une rupture apparente avec l'ancien mécanisme de sécurité. Tout en consacrant la sécurité humaine comme principe cardinal (2.2.1), les instruments juridiques font œuvre utile en codifiant les principes traditionnels africains (2.2.1). Seulement, dans un cas comme dans l'autre, on constate une portée limitée des normes ainsi consacrées.

2.2.1 La codification des principes traditionnels africains de règlement des différends

Sur cette question, l'apport du continent africain au droit international est plus significatif que l'on pourrait l'imaginer. Deux éléments de la tradition africaine méritent à cet égard d'être mis en lumière : l'arbre à palabre et le principe de solidarité.

Le concept de « l'arbre à palabre »[42] puise son origine dans la configuration des lieux de rencontre.[43] Dans les traditions ancestrales africaines, une tierce personne aux protagonistes était chargée de les réunir afin de les écouter, recueillir leurs points de divergence et les aider à trouver une solution apaisée. Les échanges sont guidés par le principe de « famille africaine ».[44] Le statut de la tierce entité est ainsi le gage de la neutralité. Il était alors perçu comme une attitude déloyale le fait pour un protagoniste de manquer du respect à cette dernière. Cette approche déclinée sous la forme de la médiation[45] est désormais largement codifiée dans les instruments juridiques internationaux et africains de règlement

42 Voir MM Mubiala, '*Regional Perspective :* Le régionalisme africain en droit international' disponible sur https://legal.un.org/avl/ls/Mubiala_IL_video_1.html consulté le 12 février 2022.

43 Il s'agit du grand arbre couvert de feuilles servant d'ombrage et où l'on se retrouve pour discuter des problèmes de société.

44 Bedjaoui (n 19) 86.

45 Aux termes l'art 1 de l'Acte uniforme OHADA relatif à la médiation, le terme 'médiation' 'désigne tout processus, quelle que soit son appellation, dans lequel les parties demandent à un tiers de les aider à parvenir à un règlement amiable d'un litige, d'un rapport conflictuel ou d'un désaccord (ci-après le 'différend') découlant d'un rapport juridique, contractuel ou autre ou lié à un tel rapport, impliquant des personnes physiques ou morales, y compris des entités publiques ou des États'.

des différends. C'est le cas notamment dans le domaine du droit des affaires.[46] De même, le Conseil de paix et de sécurité assume des fonctions dans le « rétablissement de la paix, y compris les bons offices, la médiation, la conciliation et l'enquête ».[47] La pratique des accords de paix intra étatiques constitue ainsi l'un des domaines qui illustre parfaitement le recours à la médiation dans la résolution des crises africaines.

Les États africains veulent en effet éviter la voie des modes de règlement juridictionnel des différends. La création au sein de l'OUA, de la Commission de médiation, de conciliation et d'arbitrage à travers le protocole du 21 juillet 1964 marquait en même temps la réticence des États africains à l'égard du droit international de règlement des différends, surtout le refus par ces derniers de soumettre leur différend à un mécanisme n'ayant rien de strictement africain. Tel était le cas du recours à la Cour internationale de justice.[48]

Toutefois, l'application de ce principe dans la recherche des solutions aux crises africaines a connu des fortunes diverses.[49] Si la pratique semble aujourd'hui fortement remise à l'ordre du jour,[50] son efficacité en matière de règlement des différends, notamment frontaliers, connaît peu de succès conduisant de plus en plus les Etats africains à aller devant le juge international dans le but de trouver une solution à leur problème afin d'éviter l'enlisement des crises politiques. Par conséquent, le recours à ce mécanisme par l'Union devrait se faire désormais avec beaucoup plus de prudence, même si elle compte sur le principe de solidarité pour donner plus d'essor à ses actions.

Le principe de solidarité est une consécration de l'entraide africaine. Il trouve son origine dans le partage commun du fardeau. Le principe

46 L'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) s'inscrit par exemple dans la volonté des Etats africains de mettre en place un droit unifié devant régir le domaine des affaires et contribuer en conséquence au développement. Voir R Nemedeu 'La paix en Afrique par la sécurisation des affaires à travers le règlement arbitral (OHADA)' in Boukongou & Tcheuwa (n 15) 217-230.

47 Protocole relatif à la création du Conseil de paix et de sécurité, art 6(1)(d).

48 Voir Bipoun-Woum (n 18) 254 et suivants.

49 Voir Bedjaoui (n 19) 85-99.

50 Voir Metou 'La médiation de l'Union africaine dans la résolution des crises internes de ses États membres' (2018) 31*(2)* *RQDI* 39–69. L'auteure souligne particulièrement son 'efficacité toujours relative' et met notamment en exergue l'exigence d'une impartialité du médiateur, le plus souvent mis en mal en raison de la politisation de sa désignation qui dans bien de cas est un ancien chef d'Etat appelé à discuter avec son homologue. Une telle analyse peut difficilement être contredite. La relation de 'fratrie' qui existe entre les chefs d'Etat et de gouvernement, les conduit souvent à s'abstenir de porter un jugement sur les actions de leurs homologues.

s'applique dans divers domaines : le droit des réfugiés,[51] l'aide aux déplacés internes, le soutien à la réinstallation, et plus spécifiquement en matière de maintien de la paix et de la sécurité. Il s'agit pour les États membres d'apporter un soutien à un État lorsque ce dernier fait face à des crises internes. Le principe requiert une non-indifférence des États africains aux problèmes qui sévissent dans un autre État. Sa traduction juridique est perçue à travers notamment la Convention de l'OUA sur les réfugiées,[52] innovation par rapport à l'instrument juridique international qui existe en la matière.[53] Ainsi, tout en reconnaissant l'instrument onusien applicable au niveau international[54] le texte africain donne une définition plus large du « réfugié » permettant donc de lui apporter une protection plus accrue[55] par rapport au texte onusien.[56]

De ce fait, s'il revient aux États d'accomplir ce devoir de solidarité en matière de maintien de la paix, ces derniers reconnaissent expressément que le Conseil de paix et de sécurité en s'acquittant des devoirs de maintien de la paix agit en leur nom. Dès lors, ils s'engagent à appliquer les décisions du Conseil et d'apporter leur « entière coopération au Conseil et de faciliter toute action qu'il entreprendrait en vue de la prévention, de la gestion et du règlement des crises et des conflits ».[57] Plus encore, aux termes de l'article 4 du Pacte de non-agression de l'Union africaine, les États parties « s'engagent à se prêter mutuellement assistance pour leur défense et leur sécurité communes contre tout acte d'agression ou menace

51 Il s'agit ici pour les Etats africains d'apporter leur soutien à l'Etat sur le territoire duquel des personnes ont pu trouver refuge en dotant ce dernier des moyens de tout ordre afin de lui permettre de réaliser les missions qui sont attendus de lui. Le principe est désormais largement répandu au plan international avec ce qui est désormais convenu d'appeler 'la conférence des donateurs' en soutien à une crise qui sévit dans une région donnée.

52 La Convention de l'OUA régissant les aspects propres aux problèmes des réfugiées en Afrique, adoptée par la Conférence des Chefs d'Etat et de Gouvernement lors de la Sixième Session Ordinaire, Addis-Abeba, 10 septembre 1969, entrée en vigueur 20 juin 1974.

53 Convention de 1951 relative au statut des réfugiés, art 1.

54 Préambule de la Convention de 1951 sur le statut des réfugiés.

55 Article 1 de la Convention de 1951 sur le statut de réfugiés : 'Le terme 'réfugié' s'applique également à toute personne qui, du fait d'une agression, d'une occupation extérieure, d'une domination étrangère ou d'événements troublant gravement l'ordre public dans une partie ou dans la totalité de son Etats d'origine ou du Etats dont elle a la nationalité, est obligée de quitter sa résidence habituelle pour chercher refuge dans un autre endroit à l'extérieur de son Etats d'origine ou du Etats dont elle a la nationalité'.

56 Pour une étude comparative des deux instruments juridiques, voir J Castillo *Les interprètes de la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés : Étude du point de vue de la France (2016)* 318 s.

57 Protocole CPS, art 7.

d'agression » et « s'engagent individuellement et collectivement, à agir par tous moyens, contre toute agression ou menace d'agression contre un État ».[58] Les États doivent ainsi adopter une double attitude : une attitude positive consistant à apporter leur concours à l'accomplissement de ces missions, et une attitude négative consistant pour eux à s'abstenir de poser tout acte de nature à compromettre la bonne réalisation des objectifs de maintien de la paix et de la sécurité.

2.2.2 La prise en compte restrictive de la sécurité humaine

La sécurité humaine constitue un cadre normatif global ainsi qu'il ressort du Document de Kampala de l'OUA de 1991 qui fait référence à la sécurité des peuples. Il décline la sécurité comme englobant « tous les aspects de la société, y compris les dimensions économiques, politiques et sociales de la vie individuelle, familiale, communautaire, locale nationale. La sécurité d'une nation doit être construite en termes de sécurité des citoyens à vivre en paix et à disposer d'un accès aux ressources élémentaires de la vie, tout en participant aux affaires de sa société en toute liberté et en jouissant de tous les droits humains fondamentaux ». En optant pour la sécurité humaine, les États africains entendent s'investir dans tous les domaines de la sécurité. Toutefois, cet idéal est loin d'être atteint. De nombreux domaines constitutifs de la sécurité humaine ne sont pas suffisamment régis par des règles juridiques et ceux qui le sont connaissent un déficit de mise en œuvre desdites règles. Ainsi, de nombreux pans de la sécurité humaine restent encore au stade de discours politique sans réelle concrétisation effective.

Dès lors, le développement qui est un moyen de réalisation de la sécurité économique collective a peine à porter des fruits. Il n'est pas contesté l'apport de l'Afrique au développement à l'échelle international du droit au développement[59] et du droit du développement. Toutefois, la réalisation de ce droit sur le continent africain est encore très loin d'être une réalité. En effet, les États africains ont pris conscience de ce que ce droit ne pouvait véritablement se réaliser dans un climat de conflit. C'est ainsi qu'aux considérations économiques qui président à la création des organisations régionales d'intégration économique, s'est adjoint progressivement le volet sécuritaire ; l'objectif recherché étant de sécuriser le développement. Toutes les fois que des conflits, sévissent dans une partie d'un État, le

58 Pacte de non-agression de l'Union africaine, art 4(a) et (b).

59 Voir à ce sujet les travaux de Keba Mbaye : 'Le droit au développement comme droit de l'homme. Leçon inaugurale' (1972) *Revue des droits de l'homme* ; 'Le droit au développement' (1980) 21 *Ethiopiques* ; 'Le droit au développement en droit international' in *Études de droit international en l'honneur du juge Manfred Lachs* (1984) 163-177. Voir dans cet ouvrage le chapitre de Misha Ariana Plagis qui y est consacré.

produit intérieur brut de cet Etat, indicateur du développement est impacté négativement.[60] Il suffit pour s'en convaincre de regarder la situation de la CEDEAO où les échanges économiques intracommunautaires ont subi un important recul avec la crise post-électorale ivoirienne des années 2010. Dans l'autre sens, les mauvaises politiques économiques, ou des politiques mal appliquées sont le plus souvent source des conflits.[61] Sur un tout autre plan, les instruments économiques sont également mobilisés dans le champ de la sécurité collective[62] soit en tant que sanction à l'encontre des États, soit en tant mesure de reconstruction post-conflit.

La sécurité collective environnementale constitue le parent pauvre dans le système africain de sécurité, non pas en raison d'un cadre normatif insuffisamment élaboré, mais des difficultés persistances dans leur mise en œuvre.[63] De nombreux conflits trouvent leur naissance dans des crises climatiques que connaît le continent. Aussi, le tarissement de certaines ressources, engendré par les crises climatiques, occasionnent bien souvent des conflits entre diverses communautés. Tel est notamment le cas de la crise du Darfour. A l'origine de la crise, il y a une compétition pour des ressources agro-pastorales de plus en plus limités.[64] C'est une situation

60 La Banque Mondiale évalue le coût d'un conflit sur un pays en développement moyen à environ 30 années de croissance de PIB tandis que le taux de pauvreté en raison des crises prolongées peut être supérieur de plus de 20 points à celui des autres. Voir Banque Mondiale *Rapport sur le développement dans le monde : Conflits, sécurité et développement* (2001) vi.

61 C'est le cas des crises de la faim de l'année 2008 dont le continent africain a le plus été impacté. On pourrait aussi évoquer la crise sécuritaire dans le Delta du Niger, les actions dites de ' coupeurs de route ' dans la partie septentrionale du Cameroun, de la Xénophobie de l'étranger en Afrique du Sud ; chacune de ses situations trouvant sa cause dans la pauvreté.

62 Sur la question, voir L Boisson De Chazournes ' Les dimensions économiques de la sécurité collective : quelques constats et interrogations ' in SFDI, *Les métamorphoses de la sécurité collective. Droit, pratique et enjeux stratégique* (2005) 149-169.

63 Voir S Maljean-Dubois 'La contribution de l'Union africaine à la protection de la nature en Afrique : de la Convention d'Alger à la Convention de Maputo' in *Liber Amicorum Raymond Ranjeva* (n 22) 205-2018, P Talla, 'Droit international de l'environnement et développement durable', in *Liber Amicorum Raymond Ranjeva* (n 22) 597-610 ; RADE *La protection de l'environnement par les juridictions africaines : avancées nationales et régionales,* (2020).

64 Voir M Lavergne 'Le réchauffement climatique à l'origine de la crise du Darfour ? La recherche scientifique menacée par le déni de la complexité' (2010) (4)(204) *Revue Tiers Monde* 69-88 ; United Nations Environment Programme 'Sudan post-conflict environmental assessment ' disponible sur https://postconflict.unep.ch/publications/UNEP_Sudan.pdf consulté le 12 février 2022.

similaire en Somalie[65]. Ces situations soulèvent également la délicate question des réfugiés climatiques.[66]

Ainsi, au-delà de la question du respect du principe de la souveraineté permanente des États sur leurs ressources naturelles invoquée dans le cadre de l'affaire des *Activités armées sur le territoire du Congo* devant la Cour internationale de Justice,[67] ce sont d'autres questions tout aussi importantes à l'instar de la protection de l'environnement qui méritent d'être posées. La recherche des solutions à ces crises doit également s'orienter vers l'efficacité de la réglementation de l'accès à ces ressources qui connaissent de plus en plus un épuisement tant du fait de leur exploitation irrationnelle que de l'impact climatique en raison d'activités humaines.[68] Ainsi, malgré l'érection de la question environnementale en valeur constitutionnelle dans divers ordres juridiques africains, les moyens déployés pour sa protection sont loin de permettre d'atteindre les objectifs espérés.[69] La question de la sécurité collective sanitaire ne peut être écartée de cette analyse.

Les crises sanitaires survenues sur le continent africain ont permis d'ériger les problèmes de santé en éléments de la sécurité collective. Dans sa résolution 2177 (2014) adoptée le 18 septembre 2014, le Conseil de sécurité des Nations Unies a « jug[é] que l'ampleur extraordinaire de l'épidémie d'Ebola en Afrique constitue une menace pour la paix et la sécurité internationales ».[70] Ainsi, sans se référer expressément au Chapitre VII de la Charte, le problème sanitaire est posée pour la première fois

65 Voir (2014) 96(4) *American Journal of Agricultural Economic*s 1157-1182 ; CE Werrell & Fr Femia 'Avec le changement climatique, la menace de nouveaux conflits' (2018) 2 *Le Courrier de l'UNESCO* 21.

66 Voir notamment A Epiney 'Réfugiés écologiques et droit international' in Ch Tomuschat, E Lagrange & Stefan Oeter (dir) *The Right to Life* (2010) 371-402 ; J-J Gouguet 'Réfugiés écologiques : un débat controversé' (2006) 382.

67 *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, 168.

68 Tel est le cas de l'exploitation des ressources naturelles partagées. Dans ce cas précis, la construction par l'Ethiopie d'un barrage sur le fleuve Nil est de nature à compromettre l'usage de l'Egypte, Etats qui tire également des ressources de ce fleuve. Les deux Etats concernés doivent autant que faire se peut parvenir à un accord ce sans quoi la situation risque de muer en une véritable crise sécuritaire entre ces Etats.

69 Ainsi, la protection juridictionnelle qui lui est réservée ne permet que très peu de réduire les germes conflictuels pouvant naître de son absence de protection.

70 S/RES/2177 (2014) du 18 septembre 2014.

comme une menace pour la paix.[71] Toute la question est de savoir comment le système africain de sécurité entend gérer ces nouvelles menaces à la paix et à la sécurité. En effet, ces crises sanitaires éprouvent la capacité du système sanitaire africain en matière de préservation de la santé.[72] Elles ont permis de mettre en exergue la fragilité des politiques de santé au sein des organisations régionales d'intégration économique et à l'échelle du continent tout entier et la résurgence des replis souverainistes remettant en cause la logique d'intégration. Dès la survenance de la fièvre à virus Ébola, de nombreux États ont pris des mesures restrictives afin de préserver leur territoire et leurs populations.[73] Si de telles mesures peuvent être regardées comme participant à des politiques préventives, c'est la contribution de ces États non touchés qui conduit à s'interroger sur la mise en œuvre du principe de solidarité qui est pourtant si ancré dans le discours politique africain. Ainsi, ces crises dénotent la fragilité de la coopération sanitaire et la raréfaction des financements dont la recherche demeure externalisée.

Ces quelques secteurs de la sécurité collective permettent de relever la difficulté des Etats africains à mettre en place de véritables politiques de sécurité collective. A ces carences normatives, s'ajoutent les difficultés opérationnelles.

3 Les difficultés d'opérationnalisation de la paix par le droit

La posture des États africains à l'égard du droit international de la sécurité collective est double. Il y a d'une part la permanence d'une méfiance à l'égard du droit international que ces derniers considèrent à tort leur être étranger, et d'autre part une défiance à l'égard du droit régional africain dont ils ont eux-mêmes pourtant contribué à l'élaboration. Dans un cas comme dans l'autre, ceci affecte l'efficacité opérations de paix. De nombreuses difficultés constituent des entraves à la réalisation de la paix

71 Sur cette resolution, voir notamment L Burci Gian 'Ebola, the Security Council and the securitization of public health' (2014) 11 *QIL, Zoom-in* 27-39; M Arcari & P Palchetti 'The Security Council as a global 'health-keeper? Resolution 2177 (2014) and Ebola as a threat to the peace' (2014) 11 *QIL, Zoom-in* 1-3; H De Pooter *Le droit international face aux pandémies: vers un système de sécurité sanitaire collective?* (2015).

72 *LE NEMRO, Dossier Spécial : La Covid-19 et le droit (*2020).

73 Tel était notamment le cas du Sénégal, de l'Afrique du Sud, du Ghana, le Kenya. L'appel de la présidente de la Commission de l'Union africaine, A Nkosazana Dlamini-Zuma, à lever les restrictions aux voyages 'afin que les gens puissent se déplacer entre pays et faire du commerce et afin de favoriser les activités économiques', n'avait alors connu qu'une réponse en demi-teinte ; Voir 'Ebola : l'Union africaine contre la fermeture des frontières' *Le Monde* disponible sur https://www.lemonde.fr/planete/article/2014/09/08/ebola-reunion-d-urgence-de-l-union-africaine_4483369_3244.html consulté le 8 mars 2022.

par le droit. Certaines sont inhérentes au cadre normatif (3.1), tandis que d'autres lui sont plus ou moins externes (3.2).

3.1 Les difficultés inhérentes au cadre normatif

Les divers textes produits par le Conseil de paix et de sécurité de l'Union africaine sont intitulés « communiqué ». Dès lors, il est difficile de les ranger au même niveau que les « résolutions » du Conseil de sécurité des Nations Unies qui qui a des missions similaires. Plus encore, le contenu de ces « communiqués » varie d'une session à une autre, d'une crise sécuritaire à une autre, ce qui est de nature à créer la confusion autour des énoncés de cet organe. C'est pourtant de la clarté de ces textes que dépendent le sens et la portée des énoncés tant pour ceux chargés de les appliquer que pour les observateurs appelés à en contrôler la mise en œuvre. Au-delà des décisions de cet organe, on assiste à des concepts difficilement saisissables donnant lieu à une pluralité d'interprétation (1). La diversité des strates de production normative est tout aussi problématique (2).

3.1.1 L'indétermination conceptuelle propice à une pluri-interprétation

La mise en œuvre d'une norme, quelle que soit son origine tient avant tout à la norme elle-même. Elle tient à sa construction, à son sens et sa portée. L'interprétation[74] de la norme dépend ainsi non seulement de son environnement, mais aussi des facteurs qui concourent à son élaboration.

La recension des normes régissant le maintien de la paix et de la sécurité collective en Afrique fait ressortir des principes pas toujours très clairs. C'est le cas par exemple de situations pouvant donner lieu à des interventions qu'il est difficile de définir objectivement : « menace d'agression » ou encore « menace grave de l'ordre légitime »[75]. Ces concepts sont d'autant plus flous que les instruments juridiques qui les consacrent ne les définissent pas. Ceci ouvre la voie à une diversité d'interprétation possible suivant le contexte. On a ainsi proposé de voir dans la « menace grave de l'ordre légitime », un besoin de lutte contre

74 L'interprétation doit être perçue comme l'opération qui consiste à déterminer le sens et la portée d'une institution. Il s'agit pour les l'Etat de percevoir le sens et la portée des obligations qui découlent pour eux de la souscription à un instrument juridique international. Voir en ce sens, P-M Dupuy, *Droit international public* (2002) 309. Voir *Dictionnaire de droit international public et privé,* De même, voir S Sur, ' L'interprétation en droit international public' in P Amselek (dir), *L'interprétation et droit* (1995) ; *L'interprétation en droit international public*, (1974). Ainsi, la détermination du sens et de la portée d'un traité par un Etat déterminera autant la manière avec laquelle ce dernier entend le mettre en œuvre.

75 *Protocole sur les amendements à l'Acte constitutif de l'Union africaine,* art 4.

les changements anticonstitutionnels de gouvernement et les atteintes à la légitimité démocratique[76].

On peut essayer de donner un contenu à ce concept en faisant recours à la jurisprudence de la Commission africaine des droits de l'homme et des peuples qui dans sa *Résolution sur les régimes militaires* affirme que « le meilleur gouvernement est celui qui est élu par et responsable devant le peuple » et reconnaît que « la prise du pouvoir par la force par tout groupe de civils ou militaires est contraire aux dispositions des articles 13(1) et 20(1) de la Charte africaine des droits de l'homme et des peuples ».[77] Mais il faut bien reconnaître que des contestations populaires peuvent tout aussi être légitimes. Devrait-on dès lors mener une intervention contre une population qui manifeste son mécontentement à l'encontre d'un gouvernement qui a perdu de sa légitimité ?

On retrouve ainsi dans le système africain de sécurité la projection au niveau communautaire des pratiques ayant cours dans les ordres internes. En effet, le concept de « menace de trouble à l'ordre public » est le plus souvent invoqué par les pouvoirs publics pour s'opposer à des manifestations publiques qu'ils jugent de nature à porter atteinte à la sécurité des biens et des personnes. Ce faisant sont interdites toute manifestation projetée.[78] Certains, notamment les membres de la classe politique dite de l'opposition, y voient un prétexte pour les pouvoirs publics de « museler » leurs adversaires dans le jeu démocratique, tandis que d'autres, très souvent les membres de la classe politique affiliée au régime, perçoivent dans cette approche une saine exécution des compétences dévolues aux pouvoirs publics en matière de maintien de l'ordre. Il est donc possible que cette imprécision du concept crée de tels antagonismes d'appréciation également au niveau africain.

La même observation est valable pour la « menace d'agression ». Aux termes du Pacte, la menace d'agression « signifie tout acte ou déclaration hostile d'un État, groupe d'États, organisation d'États ou acteur(s) non étatique(s) qui, sans déclaration de guerre, pourrait aboutir à un acte d'agression ».[79] Cela laisse croire à la déclinaison de la tentative punissable

76 Voir J Kazadi Mpiana, 'L'Union africaine face à la gestion des changements anticonstitutionnels de gouvernement' (2012) , vol. 25 n°2, *RQDI,* 101-141.

77 CADHP, *Résolution sur les régimes militaires*, Rés AG CADHP, 16ème sess, ACHPR/Res.10(XVI) 94 (1994), p 1.

78 Tels sont les cas du Cameroun, de la Somalie, de la Côte d'Ivoire, de la République démocratique du Congo. Voir J-M Manga, A R Mbassi, 'De la fin des manifestations à la faim de manifester : revendications publiques, rémanence autoritaire et procès de la démocratie au Cameroun' (2017) vol 2, n° 146, *Politique africaine,* 73 à 97

79 *Pacte de non-agression et d'assistance commune de l'Union africaine,* (2005), art 1(q).

que l'on retrouve en droit pénal interne. Or, l'agression doit être objectivée. Elle implique la volonté manifeste d'un État d'attaquer un autre État.[80] Dans le cas de la menace d'agression, il s'agir d'établir ce qui ne s'est pas encore produit. On glisse subrepticement vers la légitime défense préventive avec toutes ses controverses.[81]

Qu'il s'agisse de la menace d'agression ou de la menace contre l'ordre légitime, les instruments juridiques tant continentaux que communautaires ne renseignement pas véritablement sur leur contenu.[82] On est ainsi en présence des dispositions « ambiguës »,[83] incertaines et controversées.[84] Or, le déploiement d'une intervention coercitive doit reposer sur des éléments précis ne laissant pas place à des interprétations disparates au risque d'y voir une intervention dans les affaires intérieures d'un État membre sans fondement.

Le principe de l'autonomie institutionnelle[85] qui imprègne le droit international irrigue également les normes de droit régional africain de la sécurité collective et du maintien de la paix. Tout en instaurant la démocratie comme un principe du droit de l'Union africaine, les institutions africaines ont pris le soin de laisser aux États membres une large autonomie dans sa réalisation. Le contrôle qu'en font les institutions africaines révèle une posture ambivalente marquée par un regard plus poussé dans certains cas et moins décisive dans d'autres. Ayant relevé des irrégularités lors des consultations électorales au Cameroun, la mission d'observation de l'Union africaine, à la suite de l'élection du 7 octobre 2018, a recommandé

80 CIJ, 6 nov. 2003, arrêt, *Plates-formes pétrolières*, *Recueil* 2003, § 64.

81 En ce sens, voir N Mouelle Kombi, *La guerre préventive et le droit international*, Paris, éd. Danoïa, 2007; S Laghmani : ' La doctrine américaine de la préemptive self-defense ' in Rafâa Ben Achour, Slim Laghmani (dir), *Le droit international à la croisée des chemins*, *force du droit et droit de la force* (2004) 137-184.

82 Voir CEDEAO, Protocole d'assistance mutuelle en matière de défense, Freetown, 29 mai 1981, *RTNU*, 1992, art 2.

83 R Van Steenberghe, *La légitime défense en droit international public,* (2012) 383.

84 M Kamto, *L'agression en droit international,* (2010) 66.

85 Tout comme le principe de l'autonomie constitutionnelle, le principe de l'autonomie institutionnelle exprime la liberté reconnue aux Etats quant aux choix des modalités organiques et procédurales pour l'accomplissement des obligations qu'ils ont des instruments juridiques internationaux. Sur l'autonomie constitutionnelle, voir, V Huet, 'L'autonomie constitutionnelle de l'État : déclin ou renouveau ?' (2008) vol. 73, n°1 *Revue française de droit constitutionnel* 65-87. Sur l'autonomie institutionnelle, voir B Diallo, 'Principe de l'autonomie institutionnelle et procédurale des Etats-parties face à l'application des Actes uniformes du droit OHADA' (2012) 9.16 *jurifis, édiction spéciale, n°12 ;* J Rideau, *Droit institutionnel de l'Union et des Communautés européennes* (2006), 986s ; Cl Weisse-Marchal, *Le droit communautaire et la responsabilité extracontractuelle des Etats membres : principes et mise en œuvre,* Thèse de doctorat, Université de Lorraine,

à tous les acteurs politiques et électoraux d'« [engager] un dialogue politique inclusif visant à promouvoir les réformes politiques, juridiques et électorales afin de consolider la démocratie, la gouvernance, la paix et la stabilité ». Peu de temps après, elle réitérera son appel à l'issue du double scrutin municipal et législatif du 9 février 2020.

C'est toujours après coup que les institutions africaines font des recommandations à tel point qu'on est à se demander ce que valent les phases préparatoires des élections auxquelles elles ont pris part. Pourtant, la meilleure opération de maintien de la paix consiste à être plus offensive que défensive, en s'attaquant aux sources des conflits et les résoudre avant que ceux-ci ne mènent aux conflits. La multiplicité des crises post électorales est ainsi la preuve de la défaillance de la mise en œuvre de l'aspect préventif du maintien de la paix. Or la situation sur le continent africain démontre amplement que la résolution des conflits post-électoraux est toujours difficile, les moyens employés étant constamment critiqués par les parties prenantes au processus électoral pour leur incapacité à trouver des solutions pérennes et durables. Vu sous cet angle, le système d'alerte institué au sein du système africain de sécurité, qui permet d'identifier à la base les situations conflictogènes et de s'y attaquer à la source montre des faiblesses. C'est cette faiblesse du mécanisme qui explique le caractère répétitif de certaines crises et des recommandations des institutions africaines.[86]

Face à des situations de violations de ses principes, le système africain procède plus par la condamnation que par la prise des actions efficaces. Cela peut s'expliquer sans doute par la nature des instruments qui sont utilisés. Si l'on peut reconnaître une certaine portée juridique aux recommandations[87] au sein des organisations internationales, le contexte africain, comme le révèle la pratique, ne lui accorde aucune valeur normative.

3.1.2 La diversité des strates de production normative et le problème de leur coordination

Au-delà du niveau de production normative propre aux communautés, il y a celle reconnu aux États en ce que ce sont eux qui constituent le

86 La Mission d'observation elle-même dans ses conclusions et recommandations 'rappelle que certaines de ces recommandations avaient déjà été formulées lors de l'élection présidentielle du 7 octobre 2018'. UA, Mission d'observation électorale de l'Union africaine pour les élections couplées législatives et municipales du 9 février en République du Cameroun, Déclaration préliminaire, Yaoundé, 11 février 2020, p.10.

87 M Virally 'La valeur juridique des recommandations des organisations internationales' (1956) 2 *AFDI*, 66-96.

dernier maillon de mise en œuvre ou d'exécution des décisions prises au niveau communautaire. Ainsi, dans certains domaines c'est aux États qu'il appartient d'adopter des mesures d'ordre interne pour donner effet aux normes édictées au niveau supra national. Dans le cadre du système de sécurité africain, le rôle des Etats aboutit souvent à des résultats problématiques. Tel est le cas par exemple de la restriction des droits et libertés dans le cadre de la lutte contre le terrorisme.

Ainsi, la lutte contre l'organisation islamiste Al Qaeda au Maghreb islamique (AQMI) et ses ramifications, dont Boko Haram, a imposé des défis majeurs au système africain de sécurité. La réaction du système africain a tout d'abord consisté en l'élaboration d'un cadre normatif au niveau international africain et la nécessité de sa mise en œuvre dans les ordres juridiques internes des États.

En vue de donner plein effet aux instruments juridiques internationaux africains, les ordres juridiques ont pris prétexte du contexte ambiant pour élaborer des lois liberticides.[88] Du coup se pose la question de savoir si le droit ainsi mis en place ne dessert pas en définitive la paix qu'il est censé garantir. On assiste en effet dans le système africain à un paradoxe marqué par la mise en veille de certains droits conventionnellement protégés au nom de la lutte contre certaines crises. Il existe ainsi de façon implicite une sorte d'hiérarchie entre divers droits, certains pouvant être moins respectés que d'autres. Pourtant, le défi normatif à relever est celui de l'équilibre entre tous les droits garantis. Les États ne devraient pas prendre prétexte de la lutte contre le terrorisme pour enfreindre les libertés individuelles et partant la remise en cause de l'État de droit.

3.2 Des obstacles imputables aux destinataires de la norme

En dépit de la volonté affichée des chefs d'État et de gouvernement africain de parvenir à un continent exempt de conflit et où règne la paix, condition de tout développement de l'être humain, le système qu'ils ont entendu mettre en place fait face à d'importants défis. Si l'un de ces défis est la concrétisation de la volonté affichée, reste la situation propre à certains États. Ainsi, en présence des États faillis (3.2.1), il est difficile de construire un ensemble sécuritaire car la sécurité est d'abord une affaire de chaque État avant d'être celle de l'ensemble des États. Ces derniers doivent par ailleurs faire face au défi de lutte contre le désarmement (3.2.2) et la

88 Voir J-M Sorel 'Cadre universel et cadre national en matière de lutte contre le terrorisme : la difficile greffe d'instruments universels dans le droit national' in AD Olinga (dir), *Droit international, droits nationaux et lutte contre le terrorisme en Afrique* (2017) 21-47 ; A Koagne Zouapet 'Un cheval de Troie dans la citadelle ? définition du terrorisme et exercice des libertés publiques en Afrique' in Olinga (n 88) 65-84.

nécessité de tenir un discours commun sur les questions de sécurité en Afrique lorsqu'ils sont débattus hors du continent (3.2.3).

3.2.1 La prégnance des États fragiles et la problématique d'une puissance africaine

Le principe de solidarité inscrit au sein du système africain de sécurité veut que les États puissent apporter leur concours à l'accomplissement des missions de paix et de sécurité. Mais cette action ne peut reposer que sur quelques États en raison de la fragilité des autres qui les rend peu aptes à s'investir dans les opérations de maintien de la paix décidées par le Conseil de paix et de sécurité de l'Union. Les États faillis ou en faillite constituent ainsi un obstacle à l'éclosion d'un système de paix et de sécurité. En dépit de l'usage de termes moins offensants, tels que « effondrement provisoire de l'État »[89] ou de « faillite relative de la catégorie d'État »[90], il n'en demeure pas moins qu'il s'agit d'Etats incapables de répondre aux besoins de leurs citoyens.[91]

Si le propre de tout système est d'impulser une entraide entre ses membres, il convient de souligner que la présence de ces États fragiles contraint les autres États à des efforts supplémentaires.

Se pose par ailleurs la question d'une puissance africaine capable non seulement d'imposer son point de vue aux autres Etats membres de l'UA, mais aussi de servir de locomotive et d'impulsion dans la traduction effective des politiques sécuritaires du système. Ainsi, la situation de la Libye qui est aujourd'hui un État quasi failli est considérée pour beaucoup comme une perte à l'échelon du Maghreb en matière de sécurité.[92] Cette catégorie d'Etats constitue un foyer d'insécurité nécessitant des efforts supplémentaires pour les États voisins.

89 AD Olinga 'L'autorité de l'Etat et la gestion des conflits internes' in FE Boulaga et AD Olinga (dir), *Le génocide rwandais. Les interrogations des intellectuels africains* (2006) 86.

90 L Sindjoun 'Explication de l'Afrique dans la science des relations internationales : tout est possible' (2009) 2 *RCEI* 9.

91 RH Jackson, 'Quasi States: Sovereignty, *international Relations and the Third World* (1990).

92 Une opinion contraire considère que la Libye de Muammar Kadhafi a plus utilisé la CEN-SAD comme un outil pour asseoir sa puissance que de servir de maillon essentiel dans la conduite des politiques d'intégration à l'échelle de cette région. Mais il convient de relativiser le propos dans la mesure où les évolutions ultérieures semblent faire regretter la situation actuelle non seulement pour le continent africain, mais également par les puissances occidentales qui doivent désormais s'investir davantage plus que par le passé en matière de sécurité à l'échelle de cette région.

Sous ce rapport, se pose la question d'une politique de sécurité intégrée qui reste encore difficile.[93] En effet, le secteur militaire est toujours considéré comme l'un des domaines de souveraineté dont les États entendent y avoir une totale maîtrise et l'assumer sans partage et ni laisser la moindre intrusion par une tierce personne. Ainsi, quand bien même il est fait état de l'intégration militaire, la réalisation opérationnelle souffre de nombreuses lacunes. Le besoin impératif des États de parfaire premièrement leur sécurité intérieure avant de se déployer sur des terrains extérieurs témoigne sinon des difficultés opérationnelles, mais des contraintes dont font face ces États dans le respect de leurs engagements internationaux en matière de sécurité.

3.2.2 Les défis de la lutte contre le désarmement

L'apport de l'Afrique au développement du droit du désarmement, notamment la réglementation de la circulation des armes légères et de petit calibre (ALPC)[94] dont on reconnaît la dangerosité est reconnue[95] et est indéniable.[96] Mais entre le discours juridique et la pratique, il y a un hiatus. Les conséquences de ces armes sur les populations sont très importantes. On estime à près de 80% de civils les victimes des ALPC.[97] Par le passé, il était évoqué les armes en circulation liées à la chute de l'ancienne Union soviétique.[98] Depuis peu, l'argument est axé sur les armes orphelines de la chute du régime libyen. A ces deux arguments, il convient d'ajouter celui de la violation de nombreux embargos sur les armes. Dans ce contexte, l'Afrique continuera à faire l'objet des conflits impliquant les ALPC.

En 2019, dans sa résolution 2457(2019), le conseil de sécurité des Nations unies saluait l'engagement de l'Union africaine à 'faire taire les

93 Voir O Kourouma 'Mutualisation des puissances et sécurité en Afrique : pour un approche neopragmatiste dur rôle du Droit' (2019) 7 *Paix et Sécurité Internationales* 85-116.

94 Voir notamment S Lorthois-Louembet *Le droit du micro-désarmement en Afrique* (2009).

95 ONU *Rapport du groupe d'experts gouvernementaux sur les armes de petit calibre*, A/52/298, 27 août, 1997, para. 17.

96 Voir notamment le Plan d'action pour la mise en œuvre de la stratégie de l'Union africaine sur le contrôle de la prolifération et du trafic des armes légères et de petit calibre ; la Convention de la CEDEAO sur les armes légères et de petit calibre, leurs munitions et autres matériels connexes, du 14 juin 2006.

97 Voir ONU, Conseil de sécurité *Armes légères. Rapport du Secrétaire général,* S/2002/1033, 20 sept. 2002, para. 4 ; ONU, Conseil de sécurité *Armes légères et de petit calibre,* Rapport *du secrétaire général,* S/2015/289, 27 avril 2015, paras. 19-22.

98 Conseil de sécurité des Nations Unies, Déclaration du président relative aux menaces à la paix et à la sécurité internationale du 24 février 2010, document S/PRST/2010/4, para. 3.

armes en 2020' en Afrique.[99] En même temps, les institutions africaines reconnaissent que malgré des avancées, certains États africains restent encore pris au piège du cercle vicieux des conflits liés aux ALPC.[100]

3.2.3 La problématique d'une politique extérieure de défense du système africain de sécurité et de l'autonomie financière

Au-delà de la coopération institutionnelle qu'entretiennent les organisations africaines avec leurs partenaires extérieurs, se pose le problème d'une politique africaine extérieure commune de défense et de sécurité. En tant que système formant un tout, les États africains devraient avoir un discours uniforme sur les questions de sécurité lorsque celles-ci sont débattues au sein des instances extérieures africaines. Or, il est impérieux pour les institutions internationales africaines d'adopter une position commune, en l'absence de laquelle elles continueront à se plaindre de leur « rejet » par la communauté internationale.

L'adoption de la résolution du Conseil de sécurité autorisant l'intervention des États de l'Organisation du Traité de l'Atlantique Nord (OTAN) en Libye[101] est l'une des matérialisations significatives de cette absence de position commune. Alors que l'Union africaine était orientée vers la recherche d'une solution à la crise libyenne les États africains présents lors du vote au Conseil de sécurité des Nations Unies[102] ont marqué leur accord à l'intervention de l'OTAN, contrariant ainsi les efforts de l'Union africaine.[103] Cette situation illustre la capacité des États africains à aller à l'encontre des décisions prises par l'UA dans son effort de recherche des solutions africaines aux crises africaines. Le système africain est ainsi mis à mal par l'attitude des États qui au travers des normes matérialisent une certaine volonté de réaliser la paix par le droit[104], mais ont une réelle propension à entraver la mise en œuvre effective desdites normes.

99 S/2019/169 *Coopération entre l'organisation des Nations Unies et les organisations régionales et sous-régionales aux fins du maintien de la paix et de la sécurité internationales.*

100 Déclaration du Haut représentant de l'UA chargé de l'objectif de faire taire les armes en Afrique, M. Ramtane Lamamra, CS/13721, 27 février 2019.

101 Résolution 1973 (2011), adoptée par le Conseil de sécurité à sa 6498e séance, le 17 mars 2011, S/RES/1973 (2011)

102 Les pays africains qui siégeaient au Conseil de sécurité à savoir le Gabon, l'Afrique du Sud et le Nigeria, ont voté en faveur de la résolution 1973(2011).

103 Voir T Mbeki 'Union Africaine : une décennie d'échecs' in *Courrier international, Hebdo,* 27 septembre 2012, 39 ; J Ping 'Éclipse sur l'Afrique. Fallait-il tuer Kadhafi ?' (2014) *Michalon ;* 'Le médiateur Jacob Zuma accuse l'OTAN de saper les efforts de paix' disponible à https://www.france24.com/fr/20110531-libye-union-africaine-mediateur-jacob-zuma-accuse-otan-saper-efforts-paix-raids consulté le 16 avril 2022.

104 Il convient de relativiser le propos dans la mesure où les Etats entendent avoir la

Le système africain de sécurité souffre enfin de problèmes liés à son opérationnalisation. Comme tout système, la mise en œuvre des dispositifs de maintien de la paix nécessite des moyens importants. Ces moyens sont de plusieurs ordres : les ressources humaines, les moyens matériels, et les moyens financiers. La revendication d'une africanisation des opérations de maintien de la paix devrait avant tout s'accompagner des ressources nécessaires. Force est de constater qu'en la matière les États africains pèchent par une absence de volonté criarde d'accorder aux différentes institutions les moyens dont elles ont besoin pour leur fonctionnement. Il se pose de façon générale un réel problème de financement pérennes par les organisations régionales africaines.[105]

En se dotant des ressources pérennes, le conseil de paix et de sécurité de l'Union devrait ne plus attendre l'apport financier des États membres lorsqu'elle entreprend une mission de paix. Excepté quelques réussites, les opérations de l'Union africaine sont entravées par l'attente des contributions des États membres qui sont le plus souvent en retard dans leurs obligations financières au sein des organisations africaines mais à jour dans d'autres organisations où, il faut le reconnaitre, leurs contributions ne sont pas importantes.

Face à ces difficultés, le système est enclin à solliciter des financements extérieurs. Si le recours à ce mode de financement s'inscrit dans la promotion de la coopération institutionnelle entre l'Union africaine et les autres organisations internationales, il n'est pas sans intérêt de s'interroger sur la véritable autonomie du système africain de sécurité.

totale maîtrise dans l'application des instruments juridiques, surtout quand ils se trouvent impliqués. La position de certains Etats à l'égard des instruments juridiques de protection des droits de l'homme en est une illustration. Voir en ce sens D Pavot, 'Le retrait de la déclaration du Rwanda permettant aux individus et ONG de saisir la Cour africaine des droits de l'homme et des peuples' (2017)30, n°2, *RQDI*, 221–237; A Koagne Zouapet, 'Victim of its commitment … You, passerby, a tear to the proclaimed virtue': Should the epitaph of the African Court on Human and Peoples' Rights be prepared? ' [En ligne] https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/

105 Dans le cadre des Nations Unies, la solution a pris la forme de la création d'un Fonds de réserve constamment alimenté. Voir D Dormoy, ' Aspects récents du financement des opérations de maintien de la paix' (1993) 39 *AFDI*, 131-156. L Nyabeyeu Tchounkeu, 'Actualisation et universalisation du financement des opérations de maintien de la paix de l'Organisation des Nations Unies' (2013), n° 2 *RDIDC*, 185-210.

4 En guise de conclusion

Aux termes de ces quelques réflexions, il ne fait de doute que le rapport des États africains au droit international est double. Ce rapport est marqué par une méfiance de ces derniers à ce droit qu'ils récusent sous le prétexte de n'avoir pas contribué à son élaboration et cherchent alors à élaborer un droit qui leur est propre, le droit international régional africain. Seulement, et c'est le second point qu'il convient de souligner, le rapport de ces États africains envers ce droit régional est également marqué de défiance. La mise en œuvre de ce droit connaît des résistances importantes, ce qui affecte son efficacité et son effectivité en matière de maintien de la paix et de sécurité.

Dès le début des années 1960, les États africains, en lien avec les Etats non-alignés affirment que « la sauvegarde de la paix et la promotion du bien-être des peuples constituent une responsabilité collective qui découle des aspirations naturelles de l'humanité de vivre dans un monde meilleur ».[106] Ils entendaient ainsi prendre part activement à ce projet commun. Cette volonté matérialisée au fil des ans dans la panoplie des instruments juridiques élaborés au niveau régional africain était ainsi le gage pour sortir le peuple africain des affres des conflits et de l'insécurité.

Plus d'un demi-siècle après, ces affirmations semblent restées au seul stade de proclamation, les États africains continuant d'être une « préoccupation » pour la communauté internationale. Il suffit pour s'en convaincre de jeter un coup d'œil à la liste des questions africaines inscrites à l'ordre du jour des organisations mondiales et régionales autres que africaines. Il est important que les Etats africains se dotent des moyens de passer des discours aux actes par la mise en place d'instruments et mécanismes adaptés. Pour cela, ils doivent apporter des réformes nécessaires tant au cadre juridique, qu'au cadre opérationnel.

106 *Programme pour la paix et la coopération internationale. Déclaration adoptée par la Conférence du Caire*. Octobre 1964 in A Moneim El Naggar *Réflexions sur la politique de non-alignement* (1965) 53.

13 La contribution de l'Afrique a la promotion et à la protection des droits de l'homme : Mise en évidence d'un système « *sui generis* » soixante ans après les indépendances

Rostand Fressynet Banzeu

1 Introduction

La dynamique de la promotion et de la protection des droits de l'homme en Afrique est sans conteste un objet d'étude à part entière, dans l'ordre juridique mondial de la garantie de la dignité humaine.[1] En effet, la particularité du contexte historique de son émergence à l'aube de la naissance des Etats Africains avec le vent des indépendances des années 1960, a certainement fermenté la production et la construction progressive d'un mouvement propre à l'Afrique, de promotion et de protection des droits de l'homme. L'on se souvient de cette formule révélatrice de Verdier : « chaque société développe sa propre vision du monde et de l'homme et à chaque culture correspond un système de valeur, une conception de l'homme, de ses droits et obligations dans la société ».[2]

Au-delà de son contexte historique atypique, cette dynamique affirme sa singularité par une exubérance à la fois normative et institutionnelle[3] qui a poussé la doctrine[4] à poser la question de la mise en cohérence du système « africain » de promotion et de protection des droits de l'homme à la recherche d'une certaine « lisibilité systémique »[5] claire et, d'une efficacité optimale, dans l'atteinte de son objectif principal : protéger l'humain.

1 AD Olinga (dir) *La protection internationale des droits de l'homme en Afrique, Dynamique, Enjeux et Perspectives trente ans après l'adoption de la Charte Africaine des Droits de l'Homme et des Peuples* (2012) 321.

2 R Verdier 'Droits des peuples et droits de l'homme à la lumière de l'anthropologie' (1983) *Droit et Cultures* 87.

3 AD Olinga 'l'émergence progressive d'un système africain de garantie des droits de l'homme et des peuples' in Olinga (n 1) 17.

4 JL Atangana 'Avancées et limites du système africain de protection des droits de l'homme : la naissance de la Cour Africaine des droits de l'homme et des peuples' (2003) 3 *Droits fondamentaux*. KO Kufuor *The African Human Rights system: Origin and evolution*, (2010) 182. M Mubiala, *le système régional africain de protection des droits de l'homme* (2005) 324.

5 Olinga (n 3) 15. HK Takam, *le système africain de protection des droits de l'homme, un système en quête de cohérence* (2014) 196.

Que faut-il entendre par système *« sui generis »* en matière de garantie des droits humains ? Pour le Pr Alain Didier Olinga, :

> l'on est en présence d'un système régional de protection des droits lorsque l'on se trouve en présence de quatre choses : un énoncé normatif des droits matériels à garantir, une architecture institutionnelle spécialement dédiée à la protection des normes au niveau régional ; une articulation cohérente des éléments normatifs entre eux et des éléments de l'armature institutionnelle entre eux ; la capacité de l'armature institutionnelle dédiée à la garantie régionale des droits d'agir dans un double mouvement maîtrisé d'autonomie et de complémentarité avec les autres rouages internationaux de garantie des droits.[6]

Quant à l'expression « *sui generis* », elle signifie « de son propre genre » désignant une situation juridique dont la nature singulière empêche de la classer dans une catégorie déjà connue.[7] C'est dire qu'un système *« sui generis »* de garantie des droits humains est un ensemble qui réunit les quatre éléments définis plus haut et, qui dégage une particularité, une spécificité qui la distingue dans l'univers des systèmes à la fois régionaux et universel de garantie des droits de l'homme. Sur la base de cette définition, peut-on affirmer que le système africain de garantie des droits humains présente une originalité qui peut permettre d'y voir un système « *sui generis* » ?

L'on peut apporter une réponse liminaire affirmative, sur la base des quatre critères proposés dans la définition mentionnée plus haut et sur lesquels des développements plus approfondis seront faits dans l'analyse, ainsi qu'il suit. En premier lieu, il existe bel et bien un ensemble normatif de droits matériels à garantir articulé autour de la Charte africaine des droits de l'homme et des peuples. Cet ensemble à la différence des systèmes européen et interaméricain de garantie des droits humains, se

6 Olinga (n 3) 16. Sur cet essai de définition du système africain de promotion et de protection des droits de l'homme, la proposition du Pr. Kofi Oteng Kufuor est assez intéressante : 'The African human rights system can be described as consisting of three sets of interlocking laws and organizations: first it consists of the mesh of human-rights specific charters, protocols, declarations, and decisions of human rights tribunals, the product of deliberate decision-making by the Organization of African Unity and its successor, the African Union. Second, the African human rights system also includes the human rights provisions of treaties that primarily do not deal with the protection and promotion of human rights, especially subregional economic integration treaties and the decisions of tribunals and courts established under these treaties. Third, the African human rights system can also be expanded to include developments within the domestic jurisdiction of the members' of the system that draw on developments emanating from the regional level*'*, K O Kufuor, Introduction, in K O Kufuor (n 4) 1.

7 R Guillien, J Vincent, S Guinchard & G Montagnier (dir) *Lexique des termes juridiques* (2010) 685.

distingue par sa richesse et sa densité, recoupant des segments spécifiques du droit international des droits de l'homme tels que l'environnement, la gouvernance démocratique, le maintien de la paix et, des groupes spécifiques de personnes telles que la femme, l'enfant, le jeune, le réfugié, ou la personne handicapée.

En second lieu, il existe aussi une architecture institutionnelle entièrement dédiée à la protection des droits humains. Il s'agit pour l'essentiel d'une architecture hybride qui allie un organe quasi-juridictionnel, à savoir la Commission africaine des droits de l'homme et des peuples, et un organe juridictionnel, à savoir, la Cour africaine des droits de l'homme et des peuples, appelée à devenir plus tard, la Cour africaine de justice, des droits de l'homme et des peuples, qui au regard de l'étendue de sa compétence *ratione materiae*, sera une juridiction unique en son genre. Il va sans dire que cette architecture institutionnelle intègre les juridictions des communautés économiques régionales qui au-delà de leur mandat originel de garantes de l'ordre juridique communautaire, ont pu connaître du contentieux des droits humains, contribuant ainsi au renforcement de leur garantie en Afrique. Ce qui est sans conteste un autre élément de l'originalité du système africain de promotion et de protection des droits de l'homme.

En troisième lieu, sur la cohérence des éléments normatifs entre eux et des organes de l'architecture institutionnelle entre eux, il y a assurément un travail de mise en cohérence qui doit être fait pour assurer une meilleure lisibilité du système. Les analyses subséquentes permettront d'y revenir.

En quatrième lieu, sur la capacité de l'armature institutionnelle dédiée à la garantie régionale des droits d'agir dans un double mouvement maîtrisé d'autonomie et de complémentarité avec les autres rouages internationaux de garantie des droits, des efforts remarquables sont faits, et peuvent être complétés par des actions mélioratives.

Dès lors, l'on est en présence d'un système régional qui à travers son identité propre, a réussi à dégager une contribution dont les points saillants semblent concourir à l'enrichissement du droit international des droits de l'homme.

En conséquence, entre universalisme et régionalisme, spécificité et globalité, la mise en évidence d'un système africain de promotion et de protection des droits de l'homme est une option d'analyse qui permet d'objectiver la contribution de l'Afrique à l'enrichissement et à l'édification d'un ordre juridique mondial des droits de l'homme, ferment sacré de la

civilisation de l'universel[8]. Plus encore, la singularité du système africain de promotion et de protection des droits de l'homme s'apprécie plus par complémentarité que par opposition au système universel. Il s'agit d'un particularisme qui vient enrichir et renforcer le standard universel de préservation de la dignité humaine dans ses divers segments et, qui rappelle simplement le sens et l'essence de notre humanité : protéger l'homme partout et en tout temps.

A ce titre il sera question dans cet exercice, d'analyser l'apport de l'Afrique dans la dynamique internationale de promotion et de protection des droits de l'homme à travers les deux piliers centraux de l'architecture du système : une contribution normative riche, diversifiée et à harmoniser, complétée par une contribution institutionnelle dense, exubérante et à organiser dans la perspective d'une meilleure mise en cohérence des éléments du système, pour une protection optimale des droits de l'homme en Afrique.

2 Une contribution normative riche, diversifiée et à harmoniser

Le pilier normatif, bâti autour de la Charte Africaine des droits de l'homme et des Peuples et ses multiples instruments connexes, a permis à l'Afrique de proposer à la fois de nouveaux concepts, d'encadrer de nouveaux champs du droit international des droits de l'homme comme celui de la gouvernance démocratique, et de secréter une interprétation dynamique et non moins originale des notions de droits humains. Cette production normative se présente comme un facteur d'enrichissement de la dynamique de promotion et de protection des droits de l'homme dans le système mais, nécessite une certaine harmonisation pour plus d'efficacité.

2.1 La diversité normative du système africain comme élément d'enrichissement de la promotion et de la protection des droits de l'homme

La singularité du système africain de garantie des droits humains qui se dégage de la richesse des normes édictées en la matière peut se décliner sous trois aspects : d'abord au niveau de la Charte africaine des droits de l'homme et des peuples, en tant qu'instrument conventionnel de référence dans la garantie des droits humains en Afrique, ensuite à travers le souci d'aménager une protection spécifique aux personnes vulnérables en tenant compte des valeurs culturelles africaines et enfin, par l'entrée

8 CK Mabana 'Leopold Sédar Senghor et la civilisation de l'universel' (2011) 3 *Diogène* 3.

dans un champ nouveau du droit international, celui de la gouvernance démocratique.

2.1.1 La Charte africaine des droits de l'homme et des peuples : un instrument novateur au service de la promotion et de la protection des droits de l'homme en Afrique depuis près de 40 ans

Si l'on ne peut nier que *«* la lecture systémique est rentré dans l'ordre de la banalité »[9] dans l'exercice de l'analyse de la dynamique de la garantie des droits de l'homme à l'échelle régionale, il reste pertinent de remarquer que l'Afrique a réussi à bâtir une architecture propre de protection des droits de la personne humaine qui porte les traits d'un véritable système émergent, dont le point de départ est visiblement la Charte africaine des droits de l'homme et des peuples, adoptée à Nairobi en 1981.

Perçu comme étant le « pilier d'un véritable système régional de protection des droits de la personne »[10] ou encore comme le « noyau juridique central »,[11] de l'architecture normative du système, la Charte est la racine, la fondation qui porte le système dans son ensemble. Elle est assurément le référentiel à partir duquel le législateur africain a réussi à développer patiemment et progressivement, des instruments conventionnels complémentaires qui constituent l'armature du système actuel. L'ancien juge Fatsah Ouguergouz affirme à ce titre que : « du fait de sa vocation générale, la Charte africaine telle que complétée par ses deux protocoles, est indéniablement le plus important de tous les instruments de protection des droits de l'homme adoptés 'par' et 'pour' les seuls Etats africains ; elle est donc à ce titre, l'instrument juridique de référence en la matière ».[12]

Instrument conventionnel innovant dont l'originalité conceptuelle n'est plus à démontrer,[13] la Charte est aujourd'hui la clé de voute du

9 Olinga (n 3) 13-14.

10 M Kamto 'Introduction générale' in M Kamto (dir) *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme et des peuples. Commentaire article par article* (2011) 2.

11 M Kamto (n 10) 18-19.

12 F Ouguergouz 'La Charte africaine des droits de l'homme et des peuples, un instrument vivant et évolutif de promotion et de protection des droits de l'homme en Afrique', texte prononcé à l'occasion du colloque sur la commémoration du 30e anniversaire de la Charte africaine des droits de l'homme et des peuples (fichier de l'auteur).

13 'L'originalité de la Charte africaine réside autant dans la consécration de certains concepts, anciens ou nouveaux que dans l'association dynamique de ces mêmes concepts dans un instrument unique'. F Ouguergouz *La Charte Africaine des droits de l'homme et des peuples, une approche juridique des droits de l'homme entre tradition et*

système africain de garantie des droits humains. Cette originalité est d'autant plus évidente que la Charte est le seul instrument de protection des droits de l'homme qui consolide l'indivisibilité et l'interdépendance des droits de l'homme.[14] Elle a le mérite de reconnaître et de garantir dans un instrument unique, les droits civils et politiques,[15] les droits économiques sociaux et culturels[16] et les droits dits de 3e génération.[17]

La Charte reconnaît en effet que les droits de l'homme quel que soit leur nature constituent un tout indivisible[18] qui doivent être garantis

modernité, (1993) 367. Allant dans le même sens, le professeur Frederic Sudre affirme que : 'les dispositions de la Charte relatives au droit des peuples (…) sont (…) l'expression la plus achevée de la tendance moderne à la collectivisation des droits de l'homme (…). A cet égard, la Charte présente la singularité de faire cohabiter des concepts apparemment antinomiques : individu et peuple (…), droits individuels et droits collectifs (…)'. F Sudre *Droit européen et international des droits de l'homme* (2011) 172. Pour AB Fall 'La Charte Africaine a le mérite de souscrire à l'universalisme des déclarations et proclamations universelles des droits de l'homme, tout en insérant dans ses dispositions des éléments propres aux sociétés africaines'. AB Fall 'La Charte africaine des droits de l'homme et des peuples : entre universalisme et régionalisme' (2009) 129 *Le Seuil* 90.

14 C Anno affirme dans ce sens que 'Despite the existence of multiple international human rights instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR), the African Charter consolidates the notion that rights are interdependent and indivisible by presenting them in one instrument'. C Anno 'The African charter on human and peoples' rights: how effective is this legal instrument in shaping a continental human rights culture in Africa?' (2014) *le Petit Juriste* disponible à https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/ (dernière consultation, le 4 Novembre 2020). Renchérissant, le professeur V Nmehielle, affirme que: 'The fact that the African Human Rights Charter contains elaborate provisions for the substantive protection of human rights in all areas without being hampered by the traditional divide between civil and political rights on the one hand and economic, social and cultural rights on the other remains one of its unique characteristics. Its extension of human rights protection to what has been termed "group" or "collective" rights that ordinarily were not classified as falling either within civil and political rights, or economic, social and cultural rights, is also an enduring legacy.'' V Nmehielle 'Development of the African Human Rights System in the last decade' (2004) 3 *Human Rights Brief* 1.

15 Voir arts 2 à 13 de la Charte Africaine des droits de l'homme et des peuples.

16 Voir arts 14 (droit de propriété), 15 (droit de travailler), 16 (droit à la santé), 17 (droit à l'éducation) de la Charte Africaine des droits de l'homme et des peuples.

17 Voir arts 22 (droit des peuples au développement économique, social et culturel), 23 (droit des peuples à la paix), 24 (droit des peuples à un environnement satisfaisant) de la Charte Africaine des droits de l'homme et des peuples.

18 'The African Charter was able to proclaim that civil and political rights and socio-economic rights are indivisible. (…) socio-economic rights and civil and political rights are symbiotic, they depend on each other in a two-way manner.' C Mbazira, 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: twenty years of redundancy, progression and significant strides' (2006) *African*

comme tel. Par exemple, le droit au respect de sa vie et à l'intégrité physique et morale de sa personne, n'a de sens et de pertinence que si parallèlement, l'Etat a pris toutes les mesures nécessaires pour assurer la santé des populations, dans un environnement sain et satisfaisant.

Cette interdépendance qui est réaffirmée dès le préambule de la Charte[19] est plus qu'une simple affirmation de principe, mais constitue à la réalité, le « standard » africain de promotion et de protection des droits de l'homme qui vient ainsi enrichir le droit international des droits de l'homme. La Commission Africaine des Droits de l'Homme et des Peuples (la Commission) a eu l'occasion de le rappeler dans l'affaire *SERAC c Nigeria* en ces termes : « En clair, les droits collectifs, environnementaux, économiques et sociaux sont des éléments essentiels des droits de l'homme en Afrique. La Commission Africaine appliquera n'importe lequel des droits contenus dans la Charte Africaine. La Commission saisit cette occasion pour clarifier qu'il n'y a pas de droit dans la Charte Africaine que l'on ne puisse mettre en œuvre ».[20]

Ainsi, la Charte se présente comme un instrument vivant, dynamique qui régule la vie des hommes et des femmes en Afrique. La Commission et la Cour africaines des droits de l'homme et des peuples à travers leur travail d'interprétation[21] ont réussi à en faire le bréviaire de la promotion et de la protection des droits de l'homme en Afrique.

Par exemple, la Commission a eu l'occasion de développer le contenu normatif des droits économiques, sociaux et culturels tels que définis par la Charte dans l'optique de renforcer leur protection par la définition claire de l'étendue des obligations qui pèsent sur l'Etat concernant cette catégorie de droits. C'est à ce titre que le professeur Christopher Mbazira souligne l'action remarquable de la Commission à l'occasion de l'affaire *SERAC et autres c Nigeria* susmentionnée en ces termes :

Human Rights Law Journal, 338.

19 'Convaincus qu'il est essentiel d'accorder désormais une attention particulière au droit au développement ; que les droits civils et politiques, sont indissociables des droits économiques, sociaux et culturels, tant dans leur conception que dans leur universalité, et que la satisfaction des droits économiques, sociaux et culturels garantit la jouissance des droits civils et politiques' Voir, Préambule, Charte africaine des droits de l'homme et des peuples, du 27 Juin 1981.

20 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) c Nigeria* (2001) RADH 63 (CADHP 2001) para 68.

21 'L'activité jurisprudentielle de la Commission est à l'image d'un 'travail de dégrossissage' et de 'polissage' des dispositions de la Charte' R Banzeu 'Les instances quasi-juridictionnelles' in Olinga (n 1) 100.

> « The most innovative stance by the Commission is its reading into the Charter of the rights to shelter and food, rights which are not explicitly protected by the Charter. According to the Commission, the right to food is implicitly recognized in such provisions as the right to life, the right to health and the right to economic, social and cultural development, which are expressly recognized under the Charter. This right, held the Commission, is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation ».[22]

Il en est de même lorsque la Commission a eu à donner des éléments complémentaires pour mieux comprendre les exigences de garantie du droit à la santé tel que défini par l'article 16 de la Charte lors de l'affaire Puhorit et Autres contre la Gambie. La Commission affirme que: « [l]a jouissance du droit à la santé telle que largement connue est essentielle dans tous les aspects de la vie et du bien-être d'une personne, mais aussi dans la réalisation de tous les autres droits humains et libertés fondamentales. Ce droit comprend le droit à des structures de santé, l'accès aux biens et services qui doit être garanti à tous, sans discrimination d'aucune sorte ».[23]

Cette interprétation trouve toute sa pertinence dans le contexte actuel marqué par, par la pandémie du coronavirus, qui a remis en cause la capacité des systèmes de santé des pays africains et du monde entier, à garantir le droit à la santé de tous, sans aucune discrimination. Dans ce contexte particulier, la Commission a mobilisé l'un de ses outils de promotion des droits de l'homme qui est celui du Communiqué de presse, pour rappeler aux Etats leurs obligations fondamentales en vertu du droit à la santé tel que garanti par les dispositions de l'article 16[24] de la Charte. Elle déclare à cet effet qu' : « [o]utre les mesures de prévention et de confinement, les Etats parties à la Charte africaine devraient faire tout ce qui est en leur pouvoir pour faciliter l'accès aux traitements et aux soins des personnes infectées par le virus, y compris en exigeant des institutions sanitaires privées et des acteurs sociaux dotés d'infrastructures, qu'ils organisent cette dernière pour garantir cet accès ». [25]

22 C Mbazira (n 18) 350.

23 *Purohit et Moore c Gambie* (2003) RADH 98 (CADHP 2003) para 80.

24 'Toute personne a le droit de jouir du meilleur état de santé physique et mentale qu'elle soit capable d'atteindre. Les Etats parties à la présente Charte s'engagent à prendre les mesures nécessaires en vue de protéger la santé de leurs populations et de leur assurer l'assistance médicale en cas de maladie'. Article 16 de la Charte africaine des droits de l'homme et des peuples.

25 Commission africaine des droits de l'homme et des peuples *Déclaration à la presse sur une réponse efficace fondée sur les droits de l'homme au nouveau virus COVID-19 en Afrique du 24 Mars 2020*. Voir aussi, le Communiqué de presse sur l'impact de la pandémie

Cette démarche interpellative[26] de la Commission rentre dans son agenda de promotion des droits de l'homme sur la base de la Charte.

Dès lors, la Charte est une convention originale africaine qui depuis plus de 40 ans a animé, orienté, guidé la dynamique de promotion et de protection des droits de l'homme en Afrique. A travers les morceaux choisis présentés ci-dessus, l'on se rend compte de la réalité de la protection des droits de l'homme par la Charte en Afrique. Le travail de « polissage » de la Charte par la Commission a permis de préciser le contenu normatif de celle-ci, par la clarification des concepts et la précision de l'étendue des obligations des Etats parties. Il s'agit d'une action continue à encourager, car la promotion et la protection des droits de l'homme est une œuvre dynamique, évolutive qui doit s'adapter et s'ajuster continuellement, pour se renouveler, tout en restant cohérente avec la mission principale et originelle de préservation de la dignité humaine.

Toutefois, il convient de souligner que la réalisation effective des droits humains garantis par la Charte dépend à la fois de la volonté des Etats à mettre en œuvre les recommandations de la Commission dans le cadre des affaires pour lesquelles, elle a déjà vidé sa saisine et, de la disponibilité des moyens matériels, humains et financiers, surtout en ce qui concerne les droits économiques, sociaux et culturels.

En conséquence, près de 40 ans après l'entrée en vigueur de la Charte africaine des droits de l'homme et des peuples, quel est le regard que l'on peut porter sur l'attitude des Etats africains à l'égard des décisions rendues par les organes de protection de ladite Charte ? Cette attitude concourt -elle à raffermir ou à fragiliser la dignité humaine en Afrique ? Il s'agit là d'interrogations qui méritent sans doute une attention toute particulière et sur lesquelles les chercheurs devraient se pencher. Pour l'avenir et dans la perspective d'un système plus cohérent et harmonieux de garantie des droits humains, la Charte restera avec ses enrichissements actuels et

COVID-19 sur les droits économiques, sociaux et culturels en Afrique du 4 juin 2020 ; Statement of the African Commission on Human and Peoples' Rights on Elections in Africa during COVID-19 pandemic, 22 July 2020 disponibles à https://www.achpr.org/, (dernière consultation le 15 novembre 2020).

26 Au-delà des déclarations, la Commission a réussi à dégager jusqu'ici un corpus important de *soft law* qui prend la forme soit d'observations générales, de directives, de lignes directrices, de résolutions ou d'études sur des questions de droits de l'homme en Afrique. Ces éléments contribuent à enrichir la portée régulatrice de la Charte, sa compréhension, son appropriation et son application par les différents acteurs du système.

ultérieurs,[27] le vecteur central de la préservation de la dignité humaine en Afrique.

2.1.2 La protection singulière des personnes vulnérables : l'enfant, le jeune, les réfugiés et les déplacés internes

Dans le chantier de l'édification progressive d'un corpus normatif africain des droits de l'homme, l'Afrique a pu construire un régime juridique spécial visant des groupes humains vulnérables. Il va sans dire que la dynamique universaliste en la matière a suivi le même mouvement, définissant un paquet minimum normatif[28] de valeurs, principes, droits et prérogatives inhérentes à ces personnes vulnérables. Sans remettre en cause ce standard universel de protection, l'Afrique a su prendre en compte ses réalités sociologiques et culturelles propres, pour définir des règles particulières de protection à l'égard des réfugiés, des déplacés internes, des enfants et des jeunes.

S'agissant des réfugiés, l'Afrique se distingue avec la Convention de l'Organisation de l'Unité Africaine régissant les aspects propres aux problèmes des réfugiés en Afrique du 10 septembre 1969.[29] « C'est le premier instrument juridique à se préoccuper de façon spécifique des droits des individus en détresse en Afrique ».[30]

Complément[31] régional à la Convention des Nations Unies relative au statut des réfugiés de 1951, elle se singularise en ce sens qu'« elle élargit[32]

27 Voir JN Atemengue 'La Charte africaine des droits de l'homme et des peuples et ses enrichissements ultérieurs' in Olinga (n 1) 39-61.

28 Sans être exhaustif, ce paquet minimum normatif inclut notamment, une protection juridique spéciale inhérente à la condition spécifique de la personne vulnérable, la prise en compte des traditions et valeurs culturelles de chaque peuple, la non-discrimination, la famille.

29 Entrée en vigueur le 20 juin 1974, elle a été ratifiée par 46 Etats africains à l'exception 9 Etats notamment Djibouti, l'Erythrée, Madagascar, le Maroc, la Mauritanie, la Namibie, la République arabe sahraouie démocratique, la Somalie et Sao Tome et Principe.

30 JJ Andela 'les instruments africains traitant des droits de l'homme en dehors du champ conventionnel de la Charte africaine des droits de l'homme et des peuples' in Olinga (n 1) 65.

31 A l'occasion d'une session du groupe de travail du Comité exécutif sur les solutions et la protection du Haut-Commissariat des Nations Unies pour les réfugiés (HCR), le groupe africain affirme que 'la Convention des Nations Unies de 1951, le Protocole de 1967 et la Convention de l'OUA de 1969 doivent être considérés comme formant un tout', unhcr.org, (dernière consultation le 12 novembre 2020).

32 Il est important de mentionner que le continent américain s'est aussi distingué en matière de protection des réfugiés en adoptant après l'Afrique en 1984 la Déclaration de Carthagène sur les réfugiés dont l'un des traits caractéristiques est l'adoption d'une

la définition du réfugié et offre une protection juridique à une catégorie plus large de personnes face aux problèmes croissants des réfugiés sur le continent. Cette définition plus large a permis l'application de la Convention à des groupes de réfugiés ainsi qu'à des réfugiés isolés ». [33]

Par ailleurs, sur la question de l'asile, à la différence de la Convention de 1951 qui laisse l'octroi de l'asile à la discrétion des Etats, la Convention de l'OUA en fait une obligation à la charge des Etats membres. Ce qui renforce la protection des personnes demandant l'asile en Afrique, privilégiant leur sécurité et garantissant leur bien-être, sur le fondement de l'hospitalité, valeur culturelle africaine. Les dispositions de l'article 2 alinéa 1 sont assez claires en la matière : « [l]es Etats membres de l'OUA s'engagent à faire tout ce qui est leur pouvoir, dans le cadre de leurs législations respectives, pour accueillir les réfugiés, et assurer l'établissement de ceux d'entre eux qui, pour des raisons sérieuses ne peuvent ou ne veulent pas retourner dans leur pays d'origine ou dans celui dont ils ont la nationalité ».

Cela étant, la mise en œuvre de cette Convention reste encore problématique sur le terrain. Elle n'a pas encore réussi à endiguer le problème de la protection des réfugiés en Afrique. En effet, la réalité des chiffres sur les réfugiés en Afrique reste préoccupante. Par exemple, le Haut-Commissariat des Nations Unies pour les réfugiés (HCR), dénombre plus de 623 400 réfugiés centrafricains qui sont « toujours à l'abri » au Cameroun, au Tchad, en République Démocratique du Congo et au Congo.[34] L'affirmation du HCR peut laisser penser que tout au moins l'accueil et la protection des réfugiés est une réalité en Afrique centrale. Seulement c'est sans compter sur les traumatismes que subissent les nombreux réfugiés qui arrivent dans les camps du HCR, ayant parfois au prix de leur survie tout abandonné[35] et qui restent menacés par la faim et la malnutrition.[36]

définition élargie du réfugié qui s'est avéré être un élément crucial de la protection des réfugiés d'origine centre-américaine dans les années 1980 et qui continue de l'être pour des milliers de réfugiés dans les Amériques.

33 UNHCR *Personnes couvertes par la Convention de l'OUA régissant les aspects propres des réfugiés en Afrique et par la Déclaration de Carthagène sur les réfugiés présenté par le groupe africain et le groupe latino-américain*, EC/1992/SCP/CRP.6, 6 avril 1992.

34 https://www.unhcr.org/fr/urgence-en-republique-centrafricaine.html, (dernière consultation, le 21 décembre 2020).

35 'J'ai tout perdu : ma maison, ma chair, mon identité. Mes enfants dorment par terre.' Zainaba, veuve et mère de 4 enfants, déplacé à Bangui disponible sur unhcr.org, (dernière consultation, le 12 novembre 2020).

36 Dans un communiqué de presse du 9 juillet 2020, le HCR et le Programme Alimentaire Mondial, attirent l'attention sur le fait que les réfugiés en Afrique sont menacés par la faim et la malnutrition en raison de l'aggravation des pénuries alimentaires causées par la crise de COVID-19 disponible sur unhcr.org, (dernière consultation le 12 novembre 2020).

Tout compte fait, selon les propos de Georges Abi Saab, cette Convention est le témoignage concret de la solidarité et de la générosité humanitaire de l'Afrique, gages culturels de la protection des réfugiés sur le continent.[37]

S'agissant des déplacés internes, l'Afrique se démarque avec un instrument conventionnel pionnier en la matière. Il s'agit de la Convention de l'Union Africaine sur la protection et l'assistance aux personnes déplacées en Afrique, dite Convention de Kampala du 23 octobre 2009,[38] « premier instrument international de caractère contraignant spécifiquement dédié à la protection de ce groupe humain vulnérable ».[39]

Elle vient ainsi renforcer le régime de la protection internationale des déplacés internes dont la situation était encadrée jusque-là par un élément de la *soft law* à savoir, les principes directeurs[40] relatifs au déplacement des personnes à l'intérieur de leur propre pays, adoptés en 1998.[41] En effet, selon les propos de Walter Kälin,[42] la Convention de Kampala permet de « durcir le droit souple » en intégrant les principes directeurs dans un instrument conventionnel régional. Il est ainsi espéré que la Convention de Kampala, inspire d'autres initiatives de « *hard law* » au niveau régional[43] ou l'élaboration d'une Convention des Nations Unies sur les droits des personnes déplacées à l'intérieur de leur pays.[44]

37 'Et pourtant, l'Afrique a toujours su rester solidaire et généreuse humanitairement parlant, comme le démontre la Convention africaine sur les réfugiés de 1969 qui a adopté la version la plus large jusqu'ici du principe de non-refoulement ; comme le confirme également les faits : la majorité des réfugiés dans le monde se trouvent en Afrique et dans des pays parmi les plus démunis du continent.' G Abi-Saab 'Avant-propos' in F Ouguergouz (n 13) XXIII.

38 Elle est entrée en vigueur le 6 décembre 2012 et a déjà été ratifiée par 31 Etats africains.

39 Andela (n 30) 67.

40 Voir en ce sens, J-P Lavoyer 'Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays : quelques observations sur la contribution du droit international humanitaire' (2010) 80 *Revue Internationale de la Croix Rouge* 503 -516.

41 Lesdits principes ont été adoptés sous l'impulsion de Francis M. Deng, représentant du secrétaire général des Nations Unies sur les droits de l'homme des personnes déplacées.

42 Walter Kälin est un juriste suisse qui a été nommé en 2004 comme Représentant du Secrétaire Général des Nations Unies sur les droits de l'homme des personnes déplacées. Ancien membre du Comité des droits de l'homme des Nations Unies, il est professeur de droit constitutionnel et international à la faculté de droit de l'université de Berne.

43 En janvier 2009, une proposition de recommandation pour protéger les droits fondamentaux des personnes déplacées de longue date en Europe a été présentée par Mme Corien Jonker au Conseil de l'Europe et envisageait l'élaboration d'une 'convention européenne contraignante sur la protection et l'assistance en faveur des personnes déplacées à l'intérieur de leur propre pays en Europe'.

44 Le 17 Avril 2018, un plan d'action pour faire progresser la prévention, la protection et

A l'instar de la situation des réfugiés, la réalité des chiffres des déplacés internes est toute autant préoccupante en Afrique. A titre d'exemple, le Soudan du Sud compte près de 2 millions de déplacés internes[45] qui dans la crainte d'attaques imminentes font face à l'insécurité alimentaire. Cet état de choses contraste avec l'un des objectifs de la Convention de Kampala qui vise à « promouvoir et renforcer les mesures régionales et nationales destinées à prévenir ou atténuer, interdire et éliminer les causes premières du déplacement interne, et prévoir des solutions durables. » Mais cela ne sape pas le mérite de cette convention qui au-delà de son entrée en vigueur a besoin de devenir un outil vivant, dynamique au service de la protection effective des déplacés internes en Afrique.

S'agissant de l'enfant, l'Afrique a su se démarquer par le développement d'un régime protecteur spécial inhérent aux réalités de l'environnement social, économique, politique et culturel africain. Ce régime protecteur qui vient enrichir[46] le standard international de protection de l'enfant au niveau mondial repose sur la Charte Africaine des droits et du bien-être de l'enfant (CADBE) adoptée le 1er juillet 1990 et, entrée en vigueur le 29 novembre 1999.[47] Le professeur Vincent Nmehielle relève ainsi que « [t]he Child Rights Charter was Africa's enlistment to the ideals of the UN Convention on the Rights of the Child (UN Child Rights Convention) but with an African emphasis because of the perceived exposure of the African child 'to a particular set of dangerous circumstances' as stated by Gino Naldi in his contribution to The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000 (2002 ».[48]

les solutions pour les personnes déplacées dans leur propre pays a été lancé à l'issue d'un processus de collaboration entre la Rapporteure spéciale des Nations Unies sur les personnes déplacées dans leur propre pays, le HCR, le bureau des Nations Unies pour la coordination des affaires humanitaires, les Gouvernements et les ONGs. Dans le même ordre d'idées, C Cournil relève qu''il ne fait aucun doute que la Convention de Kampala participera à l'émergence d'un véritable cadre normatif contraignant pour les PDIPP sur le continent africain. Il faut espérer que cette étape aura des conséquences par ricochet sur l'ensemble des droits des PDIPP, notamment en Europe'. C Cournil 'l'émergence d'un droit pour les personnes déplacées internes' (2009) 22, *Revue Québécoise de droit international*, 24.

45 Les chiffres sont de l'Agence des Nations Unies pour les réfugiés actualisés au 31 juillet 2020 disponible sur unhcr.org dernière consultation le 12 novembre 2020.

46 Dans le même sens, H Gherari, relève à propos de la CADBE que 'l'œuvre normative de l'OUA est naturellement à saluer dans la mesure où elle renforce la protection des droits de l'enfant'. H Gherari 'la Charte africaine des droits et du bien-être de l'enfant' (1991) 22 *Etudes internationales*, 750.

47 A ce jour, la Charte africaine des droits et du bien-être de l'enfant a été ratifiée par 49 Etats africains à l'exception de la République Démocratique du Congo, du Maroc, de la Somalie, du Sud Soudan, de la Tunisie et de la République arabe sahraouie démocratique.

48 Nmehielle (n 14) 2.

Au-delà de ses insuffisances[49], la CADBE est une 'convention progressiste'[50] qui suivant le modèle de la Charte africaine des droits de l'homme et des peuples reconnaît à l'enfant africain des droits spécifiques[51] et des devoirs. Par exemple, la CADBE protège particulièrement l'enfant africain contre les pratiques négatives sociales et culturelles (article 21) ainsi que l'enfant réfugié[52] ou déplacé à l'intérieur d'un pays (article 23) ; ou encore contre l'apartheid[53] (article 26).

Bien plus, la CADBE reconnaît à l'enfant des devoirs sous le vocable de « responsabilités » envers sa famille, la société, l'Etat et la communauté. Ceci confirme la dimension communautaire qui, en tant que trait caractéristique de la société traditionnelle africaine où l'enfant se situe par rapport au groupe, a fortement été pris en compte dans le chantier de la construction d'un corpus normatif africain de promotion et de protection des droits de l'enfant. Le professeur Alain Didier Olinga précise qu'« il s'agit au-delà de la consécration des droits de ce dernier, d'organiser les conditions de son bien-être, c'est-à dire une évolution harmonieuse et équilibrée dans un milieu ou en ensemble de structures favorables à son épanouissement : la famille, la nation, l'Afrique ».[54]

La richesse de la production normative de l'Afrique en matière de promotion et de protection des droits de l'homme se matérialise par la place spécifique accordée aux jeunes. S'il est vrai que l'Afrique n'est pas

49 Sur les insuffisances de la Charte africaine des droits et du bien-être de l'enfant, le professeur Olinga relève que '[d]u point de vue matériel, certains droits importants consacrés dans la Convention des Nations Unies ne sont pas garantis : il en est ainsi du droit au regroupement familial dans un Etat étranger, de l'accès de l'enfant à l'information et de façon générale, les relations entre les médias et l'enfant ; il en est de même du droit de l'enfant à la sécurité sociale et aux assurances sociales, du droit de l'enfant à un niveau de vie suffisant ; il en est ainsi enfin de la situation des enfants appartenant aux minorités ethniques, religieuses ou linguistiques.' AD Olinga 'La Charte Africaine sur les droits et le bien-être de l'enfant' (1996) 106 *Penant*, *Revue de droit des pays d'Afrique*, 67-68.

50 JD Boukongou 'le système africain de protection des droits de l'enfant, exigences universelles et prétentions africaines' (2006) 5 *CRDF* 98.

51 Sur ces droits spécifiques, JM Abelungu note que 'le standard africain de protection des enfants contre le recrutement et la participation des enfants aux hostilités est plus protecteur que le système universel' JM Abelungu, 'le système africain de protection des droits de l'homme et la question des enfants soldats' (2019) 3 *Annuaire africain des droits de l'homme*, 4.

52 C d'Orsi 'Legal protection of refugee children in Africa: positive aspects and shortcomings' (2019) 3 *African human rights yearbook*, 298 -317.

53 'L'empreinte africaine est néanmoins présente et dérive d'une préoccupation (l'apartheid) ou d'une approche culturelle (responsabilité des enfants) particulière au continent'. H Gherari (n 42), 751.

54 Olinga (n 3) 55.

pionnière dans la mise en place d'un instrument conventionnel au niveau régional relatif à la jeunesse,[55] il n'en demeure pas moins qu'elle a pu produire une charte originale qui se singularise par son ancrage dans les « vertus et valeurs des traditions historiques et des civilisations africaine ».[56] Il s'agit de la Charte africaine de la jeunesse adoptée le 2 juillet 2006 et entrée en vigueur le 8 août 2009.

Cette Charte se démarque à deux niveaux. D'abord par la définition du jeune qui selon le préambule su texte est toute personne âgée de 15 à 35 ans. Or pour les Nations Unies, le jeune désigne toute personne âgée de 15 à 24 ans. Cette extension de la borne supérieure de l'âge du jeune s'explique assurément par la prise en compte des considérations propres à l'Afrique[57] afin de répondre aux besoins du jeune africain. Mais elle agrandit la proportion des personnes pouvant bénéficier des droits et prérogatives reconnus aux jeunes. Ce qui est de bon augure pour le jeune africain.

Ensuite, la charte africaine de la jeunesse consacre des droits spécifiques qui visent à répondre aux préoccupations spécifiques du jeune africain. Entre autres l'on peut mentionner par exemple le droit au développement social, économique, politique et culturel (article 10) ; le droit à une éducation de bonne qualité (article 13) avec une précision des critères d'une éducation de bonne qualité aux alinéas 3 et 4 de l'article 13. A cet effet, une éducation de qualité reconnue et garantie au jeune africain est une éducation disponible, accessible, basée sur le respect des droits de l'homme, des valeurs et cultures traditionnelles africaine. Bien plus, à l'image de la Charte africaine des droits de l'homme et des peuples, la Charte reconnaît des devoirs à l'égard du jeune (article 26).

Il appert clairement que la Charte vient renforcer le régime de protection du jeune en droit international des droits de l'homme par la consécration des droits et prérogatives qui lui sont propres et qui visent à répondre aux préoccupations inhérentes à sa qualité de jeune.[58] Il vient

55 L'Amérique est pionnière en la matière avec l'adoption le 11 octobre 2005 de la Convention ibéro-américaine sur les droits des jeunes par l'Organisation ibéro-américaine de la jeunesse. Elle est entrée en vigueur le 1er Mars 2008.

56 Préambule Charte Africaine de la jeunesse du 2 Juillet 2006.

57 JJ Andela 'Peut-on parler aujourd'hui de l'émergence d'un droit international des jeunes ?' (2016) *Revue Belge de Droit International*, 367.

58 'En définitive, même si ce texte n'est pas révolutionnaire dans la mesure où il n'a pas prévu de mécanisme pour garantir l'effectivité de tous ces droits et devoirs, il a au moins le mérite d'adresser de front des problèmes qui affectent les jeunes africains'. Andela (n 57) 368.

ainsi enrichir et compléter le droit international des jeunes en pleine émergence[59] qui consolide la garantie de la dignité humaine en Afrique.

2.1.3 Droit de la gouvernance démocratique

S'il est un domaine où la singularité de la contribution de l'Afrique à la dynamique de la promotion et de la protection des droits de l'homme s'affirme avec une certaine netteté, c'est bien celui de la gouvernance démocratique. En effet, la décennie 1990 est de manière historique l'indice temporel marquant du temps de la démocratie[60] qui s'est traduit par un mouvement des transitions[61] démocratiques en Afrique. Contexte fécond de l'aspiration profonde des peuples africains à l'idéal commun de bonne gouvernance, enraciné dans le respect des droits de l'homme,[62] l'Afrique s'est engagée dans la construction progressive d'un ordre démocratique régional en tant que socle fondamental d'expression et de la jouissance effective des droits et libertés politiques,[63] mais aussi et surtout, comme critère essentiel de la dignité humaine, du bien-être et de la paix.

Cet ordre démocratique régional a pour pilier la Charte africaine de la démocratie, des élections et de la gouvernance[64] adoptée le 30

59 'En l'état actuel des choses, on est encore en présence d'un droit international en construction, un droit en phase de maturation, bref un droit émergent, dans la mesure où les dispositions de portée universelle relèvent encore de la soft law, tandis que celles qui ont acquis une force obligatoire sont circonscrites à des espaces régionaux précis'. Andela (n 57*)* 370.

60 A Chollet, *Les temps de la démocratie*, (2011), 5.

61 L'année 1990 est une année marquante dans l'histoire politique africaine avec la décision de la grande majorité des Etats Africains d'engager le chantier de la construction des Etats démocratiques à travers l'adoption des lois sur les libertés publiques, l'ouverture au multipartisme, la compétition électorale et l'alternance politique. Par exemple, le Cameroun s'est doté d'un ensemble de lois marquant la transition démocratique en 1990, notamment, les lois du 19 décembre 1990 sur les libertés d'association, de réunion et de manifestation, la loi sur les partis politiques, la loi sur la communication sociale pour ne citer que celles-ci.

62 AD Olinga 'l'Afrique en quête d'une technique d'enracinement de la démocratie constitutionnelle' in M Kamto (dir) *L'Afrique dans un monde en mutations, dynamiques internes, marginalisation internationale* (2010) 165-189.

63 AD Olinga, 'l'impératif démocratique dans l'ordre régional africain' (1999) 8 *Revue africaine des droits de l'homme*, 55-76.

64 Voir en ce sens, N Ngarhodjim 'Charte africaine de la démocratie, des élections et de la gouvernance : une analyse critique' (2007) *Africa governance monitoring and advocacy project*, disponible sur www.afrimap.org, (dernière consultation le 12 novembre 2020). Il convient de relever aussi que la Cour Africaine des Droits de l'Homme et des Peuples à l'occasion de l'affaire APDH contre Côte d'Ivoire reconnait que la Charte Africaine de la démocratie, des élections, et de la gouvernance est un instrument des droits humains. B Kioko affirme en ce sens que 'In deciding that the ACDEG is a human rights instrument, the ACtHPR gave a clear indication thaty it will not hesitate in the

janvier 2007 et entrée en vigueur le 15 février 2012. Outil conventionnel innovant en ce sens qu'il essaye de définir un standard de société démocratique par la saisine d'un champ nouveau du droit international, cette charte « consolide dans le patrimoine juridique des peuples africains 'un droit à la démocratie[65] jusque-là balbutiant, à savoir la démocratie libérale et pluraliste, d'inspiration occidentale, autrefois formulé sous le prisme du droit des peuples à l'autodétermination ».[66] « Aussi loin que l'on recule dans l'histoire constitutionnelle connue des Etats, cette Charte est une originalité par son objectif. Car elle vise à mettre en place une organisation politique continentale et un mode d'exercice du pouvoir politique préalablement accepté par les Etats à l'échelle régionale. Cette Charte évoque une sorte de constitution politique internationale, qui est un idéal à atteindre dans le projet panafricaniste de Kwame Nkruma ».[67]

A la réalité, il est utile de noter que ce corpus normatif singulier est développé sous l'égide de l'instance faitière que constitue l'Union Africaine qui à travers son acte constitutif pose les jalons de l'œuvre de construction de l'unité africaine sur les principes fondamentaux de la démocratie, du respect des droits de l'homme, de l'état de droit, et de la bonne gouvernance.[68] Ces principes ont concouru jusqu'ici au développement progressif d'un droit africain des droits de l'homme axé en priorité sur la préservation de la dignité humaine, de la paix et à la promotion du bien-être de la personne humaine.

Cette priorité est encore plus perceptible avec la consécration révolutionnaire et unique[69] par l'Acte Constitutif de l'Union Africaine,

future to find other instruments ratified by the relevant state as justiciable before it so long as they contains rights that can be enjoyed by individuals.' B Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' (2019) 63, *Journal of African Law*, 61.

65 'Les Etats parties ont en effet reconnu et accepté la démocratie comme 'un droit fondamental' et ils ont pris l'engagement de promouvoir la démocratie, les droits de l'homme et le principe de l'Etat de droit'. B Tchikaya, 'La Charte africaine de la démocratie, des élections et de la gouvernance' (2008) 54 *Annuaire français de droit international*, 523.

66 Andela (n 57) 74-75.

67 Tchikaya (n 65) 516.

68 L'article 4 de l'Acte Constitutif de l'Union Africaine énonce un ensemble de principes essentiels qui gouvernent l'œuvre de l'intégration africaine avec une emphase perceptible sur l'exigence du 'respect des principes démocratiques, des droits de l'homme, de l'état de droit et de la bonne gouvernance'.

69 The Constitutive Act of the African Union is 'the only international treaty containing such a right' B Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 IRRC 807-808.

d'un droit d'intervention[70] de l'organisation dans un Etat membre, dans des circonstances graves telles que les crimes de guerre, le génocide et les crimes contre l'humanité pour protéger l'humain. Ce droit d'intervention met en exergue l'importance de la « responsabilité de protéger » au nom de l'inviolabilité de la vie humaine qui doit rester sacrée en tout temps et en tout lieu. Loin de remettre en cause le sacro-saint principe de la souveraineté étatique, il contribue à le consolider car que vaut la souveraineté si elle n'est pas capable de garantir et de préserver la dignité humaine ?

2.2 Les perspectives d'amélioration de l'architecture normative : harmonisation, vulgarisation et appropriation pour renforcer la sauvegarde de la dignité humaine en Afrique

Au-delà de la floraison normative du système africain de promotion et de protection des droits humains dont la singularité est désormais évidente, il convient dans la vision d'assurer une meilleure efficacité de cette richesse normative, d'œuvrer à son appropriation par les peuples par une vulgarisation planifiée et maîtrisée et, une harmonisation de l'architecture normative pour une meilleure lisibilité du système.

2.2.1 Vulgariser pour une meilleure appropriation des droits par les peuples en Afrique

L'instauration d'une véritable culture des droits de l'homme en Afrique est assurément l'un des critères de leur garantie optimale pour le bien-être et l'épanouissement des hommes et des peuples. Celle-ci passe par le renforcement de la vulgarisation des instruments africains de promotion et de protection des droits de l'homme auprès de l'ensemble des couches sociales en Afrique, pour contribuer à leur enracinement dans la conscience collective et à leur appropriation en tant que régulateurs de la vie humaine.

Cette vulgarisation passe par le travail de promotion régulier desdits instruments qui est déjà fait par une multiplicité d'acteurs en Afrique, mais qui nécessite un renforcement certain tout au moins à deux niveaux :

L'enseignement des droits de l'homme sur la base des instruments africains de la maternelle au cycle universitaire par leur intégration dans les curricula de formation par les Etats. Cette pratique permettrait une appropriation par la base qui se développerait et se consoliderait de manière progressive, de l'enfance jusqu'à l'âge adulte.

70 Voir art 4(h) de l'Acte Constitutif de l'Union Africaine.

Ensuite, un renforcement de la promotion des instruments africains de garantie des droits de l'homme par la doctrine à travers une activité scientifique de recherche entièrement dédiée aux dits instruments. Cela peut prendre la figure de la création et de l'animation des revues africaines des droits de l'homme, des rencontres scientifiques annuelles portées par les sociétés savantes sur la dynamique, les enjeux et les perspectives de la garantie des droits humains en Afrique.

Le Centre for Human Rights[71] de l'Université de Pretoria en Afrique du Sud fait un travail remarquable dans ce sens à travers moults activités[72] dont la démultiplication sur le continent serait un atout pour l'instauration de cette véritable culture des droits de l'homme en Afrique. A titre d'exemple, l'Annuaire Africain des Droits de l'homme[73] est un cadre scientifique de promotion des droits de l'homme en Afrique qui contribue à faire des instruments africains, des outils vivants et dynamiques au service de la garantie des droits de l'homme.

Bien plus, l'œuvre de construction d'une culture des droits de l'homme en Afrique passe aussi par la ratification par les Etats africains du paquet des instruments conventionnels de promotion et de protection des droits de l'homme. A ce jour, la grande majorité desdits instruments a obtenu le minimum conventionnel requis de ratifications par les Etats qui est de quinze (15) pour entrer en vigueur. Mais au-delà du défi de leur ratification par l'ensemble des Etats africains, la culture des droits de l'homme en Afrique passe par un effort accru de sensibilisation et d'éducation des peuples sur leurs prérogatives en tant que sujet de droits et d'obligations.

71 Crée en 1986 au sein de la faculté de droit de l'Université de Pretoria, le Centre for Human Rights est à la fois un département académique et une organisation non gouvernementale qui se positionne comme le leader dans l'éducation aux droits humains en Afrique. Le Centre travaille à une plus grande sensibilisation aux droits de l'homme, à une large diffusion des travaux de recherches sur les droits de l'homme en Afrique et à l'amélioration des droits des femmes, des personnes vivant avec le VIH, des peuples autochtones, des minorités sexuelles et d'autres groupes défavorisés ou marginalisés sur le continent.

72 Parmi ces activités, le Centre for Human Rights a pu initier et développer un cycle de formation aux droits humains comprenant des programmes de Masters et un programme doctoral. Des concours de procès simulés des droits de l'homme aux niveaux national et régional (africain), et des publications sur les questions des droits de l'homme portées principalement par le Pretoria University Law Press.

73 L'Annuaire Africain des droits de l'homme est une revue scientifique publiée conjointement depuis 2017 par la Cour Africaine des Droits de l'Homme et des Peuples, la Commission Africaine des Droits de l'Homme et le Comité africain d'experts sur les droits et le bien-être de l'enfant pour encourager les études sur la promotion et la protection des droits de l'homme et offrir un forum d'interaction constructif sur le système avec les universitaires et les observateurs.

Dans l'idéal, les droits de l'homme devraient devenir un vécu social fécondé par une conscience individuelle et collective du respect de la personne humaine, en tant que trésor sacré de tous les peuples, de toutes les nations et de toutes les civilisations.

2.2.2 Harmoniser[74] pour une meilleure lisibilité du système

La production des normes dans le système africain de garantie des droits humains ne semble pas répondre à un exercice planifié et maîtrisé dans la logique de la construction d'un système cohérent de nature à faciliter sa lisibilité opérationnelle.

Dès lors, dans le souci d'injecter une dose d'harmonie dans l'armature du système normatif, il serait intéressant de positionner clairement la Charte Africaine des droits de l'homme et des peuples comme étant la charnière conventionnelle centrale du système autour de laquelle s'articulerait les autres instruments normatifs spécifiques à des groupes propres ou à des sujets spécifiques, adoptés par le mécanisme du protocole additionnel à la Charte.

A l'image de la Charte internationale des droits de l'homme[75] qui comprend la Déclaration universelle des droits de l'homme de 1948 et les deux pactes internationaux relatifs respectivement aux droits économiques, sociaux et culturels et aux droits civils et politiques et de 1966 et ses protocoles facultatifs, l'on aurait « une sorte de Charte unique africaine des droits de l'homme et des peuples, par rattachement des instruments ultérieurement adoptés à la Charte de 1981 ».[76]

Bien plus, il faut convenir avec le Professeur Vincent Nmehielle que : « the normative development of the African Human Rights System has not been static, but it has neither succumbed to every suggestion for the

74 Dans son article cité plus haut, le professeur Olinga suggère plusieurs autres orientations pour la mise en cohérence du système africain de garantie des droits humains. Parmi ces orientations figure celle du 'paquet conventionnel minimum' qui 'serait constitué par les conventions les plus hautement expressives des valeurs partagées entre membres de la famille des nations africaines'. Ce paquet minimum aurait l'avantage de définir un socle commun, une sorte de noyau dur en tant minimum incompressible de règles auxquelles tous les Etats africains doivent adhérer et qui contribuerait à renforcer de manière significative la protection des droits de l'homme en Afrique. Il suggère par ailleurs, de faire jouer à la Commission de l'Union Africaine pour le droit international un rôle central pour organiser et discipliner le processus de production de normes africaines de droits de l'homme par la voie conventionnelle. Olinga (n 3) 27-29.

75 Haut-Commissariat des Nations Unies aux droits de l'homme, fiche d'information No 2 (Rev.1) 1.

76 Olinga (n 3) 27.

African Human Rights Charter's revision. It has rather been informed by various needs that may arise by the use of additional protocols, conventions, or other quasi-normative tools such as declarations, rules of procedure, or resolutions".[77]

3 Une contribution institutionnelle dense, exubérante et à organiser

La dimension institutionnelle du système africain de garantie des droits humains est constituée d'une architecture hybride qui allie à la fois des organes politiques,[78] des organes quasi-juridictionnels[79] et des organes juridictionnels[80] *stricto sensu*. S'il est vrai que cette architecture fait montre d'une certaine exubérance qui fait craindre une forme « d'embouteillage opérationnel »,[81] il n'en demeure pas moins qu'elle fait sa mue.

L'Afrique est en effet engagée sur la voie de la mise en place d'une juridiction unique, qui a vocation à centraliser la garantie des droits humains dans sa dimension juridictionnelle. Il s'agit de la future Cour africaine de justice, des droits de l'homme et des peuples[82] qui suivant le protocole adopté le 27 juin 2014[83] cumulera en son sein trois sections :

77 Nmehielle (n 14) 2.

78 Au sujet des organes politiques crées au sein de l'Union africaine, l'on a notamment, la Conférence de l'Union, le Conseil exécutif, le Conseil de paix et de sécurité, le Parlement panafricain, la Commission de l'Union, le Conseil économique, social et culturel et le Mécanisme africain d'évaluation par les pairs.

79 Pour ce qui est des organes quasi-juridictionnels de protection des droits de l'homme en Afrique, l'on dénombre 02 organes, notamment la Commission africaine des droits de l'homme et des peuples institué par l'art 30 de la Charte Africaine des droits de l'homme et des Peuples, et le Comité africain d'experts sur les droits et le bien-être de l'enfant, institué par l'art 32 de la Charte africaine des droits et du bien-être de l'enfant. Voir R Banzeu 'les instances quasi-juridictionnelles' in Olinga (n 1) 91-114.

80 Au sujet des organes juridictionnels, l'on a pour l'essentiel la Cour de justice de l'Union prévue par les arts 5 et 18 de l'Acte Constitutif de l'Union Africaine et la Cour africaine des droits de l'homme et des peuples, créée par le Protocole de Ouagadougou du 10 Juin 1998.

81 Olinga (n 3) 23.

82 Il convient de préciser que la dénomination de la Cour unique a changé avec le Protocole de Malabo de 2014 qui amende celui de Sharm El-Sheikh de 2008. L'on est ainsi passé de la Cour africaine de justice et des droits de l'homme à la Cour africaine de justice, des droits de l'homme et des peuples. L'article 8 du Protocole de Malabo précise très clairement à cet effet que 'dans le Protocole et le Statut où qu'il apparaisse, "Cour africaine de justice et des droits de l'homme" est supprimé et remplacé par "Cour africaine de justice, des droits de l'homme et des peuples"'.

83 En juin 2014, l'Union africaine a adopté le Protocole portant amendements au Protocole portant Statut de la Cour africaine de justice et des droits de l'homme qui ajoute une compétence pénale à la cour unique.

une section générale, une section des droits de l'homme et des peuples et une section de droit international pénal.[84] S'il est vrai que ce pilier dégage une certaine originalité, sur laquelle il convient de s'appesantir, il n'en demeure pas moins évident qu'une meilleure structuration de l'ensemble de l'architecture institutionnelle en prenant en compte l'articulation judicieuse des rapports entre toutes les institutions dans la logique de la mise en place d'un système africain plus cohérent et plus efficace de promotion et de protection des droits de l'homme, reste nécessaire.

3.1 La Cour Africaine de Justice des Droits de l'Homme et des Peuples : un organe juridictionnel atypique

La Cour africaine de justice et des droits de l'homme créée par le Protocole de Sharm El-Sheikh est une juridiction mort-née. Avant même que son Protocole entre en vigueur[85], l'Union Africaine a décidé de créer une nouvelle juridiction régionale dénommée la Cour africaine de justice, des droits de l'homme et des peuples en tant que nouveau successeur juridictionnel de la Cour africaine des droits de l'homme et des peuples.[86] Comme sa devancière, il s'agit d'une juridiction unique en son genre qui soulève des inquiétudes quant à son opérationnalisation.

3.1.1 Une originalité africaine entre régionalisme et universalisme

La future Cour africaine de justice, des droits de l'homme et des peuples est à n'en point douter un organe juridictionnel à part entière dans le paysage juridictionnel international. Car il s'agit d'une juridiction qui fusionne à elle seule les compétences exercées par au moins cinq juridictions internationales autonomes notamment, la Cour internationale de Justice, la Cour de Justice de l'Union Européenne, la Cour interaméricaine des droits de l'homme, le défunt Tribunal administratif des Nations Unies et la Cour pénale internationale.

84 R Banzeu *La Cour africaine de justice et des droits de l'homme* (2011) 204. T Barsac 'La Cour Africaine de justice et des droits de l'homme' (2012) 32 *Perspectives internationales* 132. A Soma 'l'Africanisation du droit international pénal' in *L'Afrique et le droit international pénal* (2015) 32.

85 A ce jour, le Protocole de Sharm El-sheikh a été signé par 33 Etats et ratifié par seulement 8 Etats. Or il a besoin d'un minimum de 15 ratifications pour entrer en vigueur suivant les dispositions de l'art 9 dudit Protocole.

86 Le préambule du Protocole de Malabo précise à cet effet que : 'Ayant en outre à l'esprit la relation complémentaire entre la Commission africaine des droits de l'homme et des peuples et la Cour africaine des droits de l'homme et des peuples, ainsi que son successeur, la Cour africaine de justice, des droits de l'homme et des peuples'.

Au sujet de la structure de la Cour, l'article 6 alinéas 1 et 2 du Statut[87] de la nouvelle juridiction prévoit que « la Cour est composée de trois (3) sections : une Section des affaires générales, une Section des droits de l'homme et des peuples et une Section du droit international pénal. La section du droit international pénal de la Cour est dotée de trois (3) Chambres : une Chambre préliminaire, une Chambre de première instance et une Chambre d'appel ». À ce jour, il n'existe aucun équivalent d'une juridiction avec des compétences aussi larges en droit international. C'est une juridiction qui rompt avec la pratique actuelle du phénomène juridictionnel dans l'ordre juridique international. A l'évidence les trois grandes Sections ainsi déclinées vont fonctionner comme des mini-juridictions spécialisées, regroupés au sein d'un organe juridictionnel principal, avec un bureau unique constitué de quatre organes, notamment, la présidence, le bureau du Procureur, le Greffe et le Bureau de la défense.[88]

Au sujet de sa compétence matérielle, la Cour jouit d'une compétence matérielle extrêmement large. Elle sera compétente pour traiter un contentieux africain substantiel et diversifié recoupant pratiquement toutes les questions de droit international. Qu'il s'agisse du contentieux de l'Union Africaine, du contentieux de la fonction publique de l'Union Africaine, du contentieux des droits de l'homme et des peuples et du contentieux pénal africain. La largesse du champ matériel de la compétence de la cour se précise encore au niveau du contentieux pénal international où à la différence de la Cour Pénale Internationale qui est compétente pour connaître de quatre principaux groupes d'infractions notamment, les crimes de guerre, les crimes contre l'humanité, le génocide et le crime d'agression, la Cour pourra connaître de près de quatorze groupes d'infractions avec la possibilité d'en ajouter d'autres.[89] En plus des quatre infractions relevées précédemment, la Cour pourra connaître du crime relatif au changement anticonstitutionnel de gouvernement, de la piraterie, du terrorisme, du mercenariat, de la corruption, du blanchiment d'argent, de la traite des personnes, du trafic illicite de stupéfiants, du trafic illicite de déchets dangereux et de l'exploitation illicite des ressources naturelles.[90]

87 Le Statut de la Cour africaine de justice, des droits de l'homme et des peuples est annexé au Protocole de Malabo et fait partie intégrante dudit Protocole. Il abroge certaines dispositions du Statut de la Cour africaine de justice et des droits de l'homme.

88 Voir l'art 2 du Protocole de Malabo.

89 Les alinéas 2 et 3 de l'art 28 A du Statut de la Cour africaine de justice, des droits de l'homme et des peuples prévoient à cet effet que 'La Conférence peut étendre sur consensus des Etats parties, la compétence de la Cour à d'autres crimes afin de refléter le développement du droit international. Les crimes relevant de la compétence ou dévolution à la Cour ne doivent souffrir d'aucune limitation.'

90 Voir art 28 A du Statut de la Cour africaine de justice des droits de l'homme et des peuples.

Compétence large et ambitieuse qui a le mérite tout au moins d'enrichir le champ du contentieux pénal international par l'introduction de « nouvelles » infractions renforçant par la même occasion le régime de la préservation de la dignité humaine sur le continent. Mais, cette compétence est malheureusement limitée par l'accès des individus et des organisations non gouvernementales qui reste conditionnée par la déclaration de l'Etat acceptant la compétence de la Cour pour recevoir des requêtes individuelles.[91]

3.1.2 Ebauche de quelques préoccupations au sujet de la nouvelle juridiction

A priori, deux préoccupations majeures peuvent être soulevées au regard de cet organe juridictionnel innovant. Le risque de dilution des contentieux spécialisés qui pourrait déteindre sur l'efficacité de la cour à jouer pleinement son rôle en matière de garantie des droits humains, et le risque financier.

« Qui trop embrasse, mal étreint ». La Cour court le risque de perdre l'acuité et la dextérité que requièrent le traitement des contentieux spécialisés comme celui des droits de l'homme et des peuples et qui soulèvent parfois des questions complexes, en raison de la trop grande largesse[92] de sa compétence *ratione materiae.*[93] En matière de droits de

91 Sont admis à ester devant la Cour, les Etats parties au Protocole de Malabo, les organes de l'Union Africaine, les membres du personnel de l'Union, la Commission africaine des droits de l'homme et des peuples, le Comité africain d'experts sur les droits et le bien-être de l'enfant, les organisations intergouvernementales africaines accréditées auprès de l'Union ou de ses organes et les institutions nationales des droits de l'homme. Or, la densité de la jurisprudence de la Commission Africaine des Droits de l'Homme et des Peuples est largement tributaire de l'accès des individus et organisations non gouvernementales à la Commission. Il faut en conséquence espérer que les Etats africains lèveront dans un futur proche, le verrou procédural de la déclaration préalable de l'Etat autorisant les requêtes individuelles devant la Cour Unique.

92 L'ancien juge Fatsha Ouguergouz le relevait déjà au sujet de la Cour africaine de justice et des droits de l'homme en affirmant que 'la future cour sera ainsi une juridiction, qui en termes imagés, possèdera le même type de compétences de pas moins de quatre organes réunis : la cour européenne des droits de l'homme, la cour de justice de l'union européenne, la cour internationale de justice et le défunt tribunal administratif des Nations Unies… C'est me semble-t-il un champ de compétences extrêmement vaste pour une seule juridiction'. Propos recueillis par l'Institut Amadeus le 20 Septembre 2010, http://www.amadeusonline.org/publications/entretien-du-mois/juge-fatsah-ouguergouz/, (dernière consultation le 9 novembre 2020).

93 Allant dans le même sens, Amnesty International estime qu'il s'agit d'une 'Cour surchargée' en relevant que 'l'élargissement des compétences de la Cour africaine de justice et des droits de l'homme à des crimes relevant du droit international et à d'autres crimes transnationaux et organisés va alourdir sa charge de travail et ainsi entraver sa capacité à remplir son mandat. Ce sera la première Cour régionale et internationale à détenir une compétence aussi étendue'. Voir Amnesty International

l'homme, la section des droits de l'homme et des peuples de la nouvelle Cour aura cinq (5) juges.

Or la Cour africaine des droits de l'homme et des peuples est composée de 11 juges. Cette réduction du nombre de juges pourrait déteindre sur la capacité de la Cour à vider sa saisine plus rapidement. A titre illustratif, au 29 juillet 2020, la Cour africaine des droits de l'homme et des peuples était saisie de 285 affaires sur lesquelles elle a clôturé 100 et transféré quatre à la Commission africaine des droits de l'homme et des peuples. Cent quatre-vingts une affaires étaient encore pendantes.

Par ailleurs, l'argument de rationalisation financière évoquée pour justifier la création de cette juridiction unique en son genre, ne convainc pas totalement. En effet, la nouvelle juridiction aura besoin de ressources financières conséquentes pour fonctionner de manière optimale et remplir le rôle qui est le sien. A titre illustratif, le budget de l'actuelle Cour africaine des droits de l'homme et des peuples pour l'année 2019 était de 13,9 millions de dollars.[94] Or le budget final pour le procès d'Hissène Habré devant les Chambres Africaines Extraordinaires au Sénégal était de 8,6 millions d'euros.[95] Par ailleurs le coût d'exploitation annuel moyen du Tribunal Spécial pour la Sierra Leone est estimé à 30 millions de dollars.[96] Ceci démontre clairement que les Etats africains devront donner à la Cour africaine de justice des droits de l'homme et des peuples les moyens financiers nécessaires à son bon fonctionnement. Or cela est inquiétant lorsque l'on sait par exemple que la Commission et la Cour africaines des droits de l'homme et des peuples se sont toujours montrées inquiètes au sujet des « maigres » ressources qui leur sont octroyées par l'Union Africaine pour leur fonctionnement.[97] Bien plus, l'Union Africaine a eu à reconnaître elle-même sa « situation financière désastreuse » et a manifesté son inquiétude face à sa dépendance accrue à l'égard des partenaires financiers pour financer ses programmes et ses institutions.[98]

Protocole de Malabo, incidences juridiques et institutionnelles de la cour africaine issue d'une fusion et à compétence élargie (2016) 26.

94 A titre comparative, le budget de la Cour Européenne des Droits de l'Homme pour l'année 2020 s'élève à 73 333 300 Euros. Disponible sur : https://www.echr.coe.int/Documents/Budget_FRA.pdf

95 Voir B Reed 'Victims bring a dictator to justice: The case of Hissène Habre', (2017) *Bread for the World* 29

96 Amnesty International (n 83) 34.

97 Amnesty International (n 83) 32.

98 Voir Décision sur les sources alternatives de financement de l'Union africaine, Assembly/AU/Dec.364 (XVII), (3-4).

Insolite et progressiste, la Cour africaine de justice, des droits de l'homme et des peuples est une juridiction « *sui generis* » qui par son unicité rame à contrecourant du phénomène de prolifération des juridictions internationales.[99] S'il est vrai que la largesse du champ de sa compétence matérielle présente les risques de fragmentation du droit,[100] il convient d'y voir un outil régional qui viendra compléter et enrichir le droit international dans ses divers segments par une jurisprudence audacieuse, mesurée et cohérente dans une lisibilité systémique maîtrisée. Dès lors, l'on peut convenir avec le professeur Mathias Forteau que « l'avènement d'une nouvelle juridiction est toujours le signe d'une avancée de la justice. Encore faut-il qu'elle soit dotée des moyens nécessaires à sa mission ».[101]

3.2 Le nécessaire réaménagement de l'architecture institutionnelle : organisation, et cohérence pour une meilleure garantie des droits de l'homme en Afrique

En l'état actuel, le paysage institutionnel du système africain de garantie des droits des droits humains ne projette pas la vision d'un ensemble coordonnée, bien articulé, où les différents organes du système jouent chacun en ce qui le concerne sa partition et rien que sa partition. Assurément le constat de la difficulté de mobilisation des ressources financières suffisantes pour faire fonctionner le système de manière efficace, est un argument supplémentaire qui plaide pour la rationalisation dudit système qui peut s'opérer tout au moins sur deux plans : au niveau institutionnel et opérationnel.

99 En effet, jusqu'ici l'on a assisté à une multiplication des juridictions internationales sous l'impulsion des mouvements d'intégration régionale notamment en Europe, en Amérique et en Afrique. Cette multiplication a débouché sur la création des organes juridictionnels spécialisés pour connaître des contentieux spécifiques et surtout pour préserver l'ordre juridique établi au sein des espaces régionaux. Cela est vrai en matière de droits de l'homme, de droit communautaire, et dans une certaine mesure de droit pénal. Seulement, la future Cour africaine de justice, des droits de l'homme et des peuples va fusionner à elle seule les compétences de cinq juridictions internationales distinctes. mais cela ne signifie aucunement que son avènement va faire disparaître les juridictions internationales spécialisées en Afrique.

100 'Dans l'esprit de beaucoup, le régionalisme a une forte connotation négative, ne serait-ce que par l'impression qu'un affermissement du droit international régional comporte des risques de fragmentation et d'affaiblissement du droit international général'. Soma (n 74), 9. Allant dans le même sens, Forteau affirme qu''à sa manière, la Cour africaine de justice et des droits de l'homme réduit pourtant en partie cette fragmentation puisqu'elle est le résultat de la fusion de deux autres juridictions qui ont vocation, de ce fait à disparaître. Mais il faut concéder que sa large compétence ratione materiae lui donne le pouvoir d'empiéter sur le champ de compétence de bien d'autres juridictions ou mécanismes quasi-juridictionnels, à commencer par la Cour internationale de justice, avec lesquels elle se trouvera directement en concurrence'. M Forteau 'Avant-propos' T Barsac (n 74) 6.

101 M Forteau (n 89) 6.

3.2.1 Rationalisation institutionnelle

Le professeur Olinga a suggéré les pistes pour la construction d'un système plus cohérent: « la construction d'un système plus cohérent devrait reposer sur un nombre de principes, parmi lesquels l' 'harmonisation' et l' 'appropriation' en ce qui concerne les instruments normatifs, la 'complémentarité', la 'subsidiarité', la 'coordination' et la 'synergie' en ce qui concerne les rouages institutionnels et leur déploiement opérationnel ».[102] Mettant en exergue les principes qu'il propose comme lignes directrices dans le chantier de l'édification d'un système plus cohérent, il suggère « d'éviter autant que faire se peut la multiplication des mécanismes institutionnels, et d'utiliser de manière optimale et efficiente les mécanismes existants ».[103]

Sur ce point, il semble que les chefs d'Etats et de Gouvernement qui ont adopté le Protocole de Malabo aient été attentifs en partie à cette suggestion. Au lieu de procéder à la création d'une juridiction régionale pénale autonome, ils ont choisi d'adjoindre simplement une compétence pénale internationale à la future Cour africaine de justice, des droits de l'homme et des peuples.

L'on peut s'interroger sur l'opportunité pratique d'une telle démarche alors même qu'au-delà des difficultés financières, les Etats africains dans leur grande majorité restent encore méfiants envers les modes juridictionnels de règlement des différends.[104] En effet, le très faible taux de signature et de ratification du Protocole de Malabo est assez illustratif en la matière : depuis son adoption le 27 juin 2014, seulement quinze Etats l'ont signé et aucun ne l'a encore ratifié.[105] Bien plus, le Bénin, le 21 Avril 2020 et la Côte d'Ivoire, le 29 Avril 2020 ont respectivement retiré la déclaration autorisant les requêtes individuelles devant la Cour africaine des droits de l'homme et des peuples, réduisant ainsi à sept, le nombre

102 Olinga (n 3) 27.

103 Olinga (n 3) 29.

104 C'est sans doute cette méfiance des Etats Africains envers les modes juridictionnels de règlement des différends qui pousse les juges africains à réaffirmer fortement leur compétence comme l'affirme A Koagne Zouapet en ces termes 'En parcourant les décisions des instances juridictionnelles supranationales africaines, on est tout de suite frappé par le soin mis par les juges à réaffirmer de façon forte leur compétence. Cela s'explique sans doute par la répugnance qu'ont les Etats africains pour les modes juridictionnels de règlement des différends'. A Koagne Zouapet 'Le champ opératoire de l'activisme judiciaire supranational en Afrique. Une tentative de systématisation' (2020) 28 *African Journal of International and Comparative Law*, 26.

105 Voir Liste des pays qui ont signé, adhéré ou ratifié le Protocole de Malabo.

d'Etats africains ayant fait ladite déclaration sur les 30 Etats ayant ratifié le Protocole de Ouagadougou.

Cet état de choses est un précédent dangereux[106] qui soulève des inquiétudes quant au traitement que les Etats africains vont donner à la future Cour unique qui a le mérite « d'arrimer institutionnellement la Cour à l'Union Africaine ».[107]

En tout état de cause, d'autres orientations ont été suggérées dans la perspective de mise en cohérence de l'armature institutionnelle du système de garantie des droits humains en Afrique. Il s'agit notamment de la répartition claire des taches entre les différents organes, et une meilleure articulation des niveaux d'intervention et des modalités d'action.[108]

3.2.2 Rationalisation opérationnelle

Au-delà des suggestions de mise en cohérence du système faites par la doctrine,[109] il semble judicieux de réitérer l'importance capitale d'un outil simple mais pratique : celui du dialogue des organes ou des institutions.

En tant qu'organe central du système africain de garantie des droits humains, la future Cour africaine de justice, des droits de l'homme et des peuples devrait emprunter « la voie du dialogue judiciaire, celle d'un 'tête à tête' permanent et constant »[110] avec les instances quasi-juridictionnelles et les autres organes du système au niveau africain, mais aussi avec les institutions des systèmes européen, interaméricain et universel de protection des droits de l'homme. Il va sans dire que l'adjonction d'une compétence pénale internationale à la future Cour unique suggère le même exercice avec la Cour pénale internationale et les tribunaux pénaux internationaux encore fonctionnels. Concrètement, ce dialogue judiciaire pourrait prendre la forme des rencontres annuelles ou biannuelles à un double niveau.

106 Voir dans ce sens A Koagne Zouapet 'Victim of its commitment … You, passerby, a tear to the proclaimed virtue : Should the epitaph of the African Court on Human and Peoples' Rights be prepared?' (2020) *Ejil:Talk*, disponible sur https://www.ejiltalk.org/, (dernière consultation le 22 novembre 2020).

107 Ouguergouz (n 13) 240.

108 Olinga (n 3) 30-32.

109 Olinga (n 3) 32-33. Voir aussi V Ayeni 'The African Human Rights architecture: reflections on the instruments and mechanisms within the African Human Rights System' (2019) *Beijing Law Review*302-316. F Ouguergouz 'The reform of the African System of Human Rights protection' (2007) 101 *Proceedings of the ASIL Annual Meeting* 427-431.

110 R Banzeu (n 74) 96.

Premièrement, au niveau africain, la Cour unique pourrait initier et promouvoir des rencontres avec l'ensemble des juridictions et institutions du système africain de promotion et de protection des droits de l'homme. Ces rencontres réuniraient autour de la même table, la Cour africaine de justice, des droits de l'homme et des peuples, la Commission africaine des droits de l'homme et des peuples, le Comité africain d'experts sur les droits et le bien-être de l'enfant, les juridictions des communautés économiques régionales, les institutions nationales de promotion et de protection des droits de l'homme et les organisations non gouvernementales.

La pratique des rencontres annuelles est déjà une réalité entre la Cour africaine des droits de l'homme et des peuples et la Commission africaine des droits de l'homme et des peuples. Elle est formalisée et reconnue par leurs règlements intérieurs respectifs[111] et donne l'opportunité à ces deux instances du système africain de mieux apprécier la relation de complémentarité qu'elles doivent entretenir dans l'accomplissement du mandat de promotion et de protection des droits de l'homme en Afrique, de manière cohérente et harmonieuse.

C'est ainsi qu'à l'occasion de la rencontre inaugurale[112] entre ces deux institutions, qui s'est tenue du 26 au 27 Juillet 2012 en Algérie, l'honorable juge Gérard Niyungeko a indiqué que « [l]'objectif de la présente rencontre devrait donc être d'évaluer les timides pas franchis par les deux institutions dans la voie de leur collaboration institutionnelle, d'identifier les lacunes et les problèmes existants, et de trouver les voies et moyens les plus appropriés pour rendre cette relation de complémentarité le plus fluide et le plus intense possible, en vue d'une protection plus étendue et plus efficace des droits de l'homme sur le continent »[113]

111 L'article 115 alinéa 1 du Règlement intérieur de la Commission africaine des droits de l'homme et des peuples, de 2010, précise clairement que 'conformément à l'art 2 du Protocole, la Commission se réunit avec la Cour au moins une fois par an et, en cas de besoin, s'assure des bonnes relations de travail qui existent entre les deux institutions'. Dans le même sens, la règle 34 du Règlement intérieur de la Cour africaine des droits de l'homme et des peuples, du 1er Septembre 2020, intitulée 'Réunion entre la Cour et la Commission', précise que 'en vue de renforcer la complémentarité prévue à l'art 2 du Protocole, la Cour se réunit avec la Commission au moins une fois par an et chaque fois que cela s'avère nécessaire'.

112 Il convient de noter qu'avant cette première rencontre, la Cour et la Commission ont eu l'occasion d'avoir des rencontres de coordination (Arusha, juin 2009, Dakar, octobre 2009, et Arusha en avril 2010), qui leur ont permis d'adopter des règlements intérieurs harmonisés.

113 Voir Allocution d'ouverture de la première rencontre entre la Cour et la Commission de l'Honorable juge Gerard Niyungeko, alors président en exercice de la Cour disponible sur http://www.african-court.org/wpafc/premiere-rencontre-annuelle-entre-la-cour-africaine-des-droits-de-lhomme-et-des-peuples-et-la-commission-africaine-des-droits-de-lhomme-et-des-peuples/?lang=fr (dernière consultation, le 26 décembre 2020).

Ces rencontres annuelles qui ont l'avantage de créer un forum permanent d'échanges et de discussion sur la question des droits de l'homme en Afrique dans la perspective d'une mise en cohérence de l'ensemble du système africain, devraient s'étendre aux autres organes et institutions du système africain, tels que mentionnés plus haut, à l'initiative de la Cour ou de la Commission eu égard à l'expérience[114] déjà accumulée en la matière. Ces rencontres annuelles permettront de prévenir les potentiels conflits de juridiction ou de compétence et de poser les bases d'une jurisprudence harmonisée au service de la stabilité et de la garantie de la dignité humaine en Afrique. Il serait tout aussi utile d'associer la Commission de l'Union Africaine sur le droit international [115] à ces rencontres qui en tant qu'organe consultatif indépendant, a entre autres, comme objectif primordial, d'assurer la codification et le développement progressif du droit international y compris des droits l'homme en Afrique.

Deuxièmement, au niveau international, il serait judicieux de matérialiser ce dialogue par des rencontres formelles biannuelles entre la Cour africaine de justice, des droits de l'homme et des peuples avec les autres juridictions régionales des droits de l'homme, notamment la Cour européenne des droits de l'homme et la Cour interaméricaine des droits de l'homme. Eu égard, à l'élargissement de la compétence *ratione materiae* de la future Cour Unique, le dialogue doit aussi inclure la Cour internationale de Justice et la Cour pénale internationale. Ces dialogues pourraient prendre la forme de colloques, de symposiums ou des visites de travail entre les juges de la Cour africaine et les juges des juridictions susmentionnées et stimuler ainsi par le dialogue[116], un

114 La 2e rencontre annuelle entre la Cour et la Commission s'est tenue du 18 au 19 juillet 2013 à Nairobi. Elle a permis aux deux institutions de réfléchir sur les stratégies communes de promotion et de protection des droits de l'homme dans le cadre de la relation de complémentarité qu'elles doivent entretenir pour préserver la dignité humaine en Afrique.

115 Créée le 30 janvier 2009, la Commission de l'Union Africaine sur le droit international a débuté ses activités le 3 mai 2010. Il s'agit d'un organe consultatif indépendant qui doit jouer un rôle central en matière de codification et de développement progressif du droit international en Afrique. Toutefois, son bilan d'activités, 10 ans après, donne de maigres résultats sur la question de la promotion et de la protection des droits de l'homme en Afrique. Il faut vivement espérer que cet organe va à l'avenir accorder une place importante à cette question, dans la perspective de valoriser la contribution de l'Afrique au développement progressif du droit internationale des droits de l'homme. Voir B Tchikaya 'La Commission de l'Union Africaine sur le droit international, bilan des trois premières années' (2012) *Annuaire Français de Droit International* 307-3017 ; B Tchikaya 'Les orientations doctrinales de la Commission de l'Union Africaine sur le droit international' (2017) *Revue québécoise de droit international* 113- 128.

116 Au niveau africain, la Cour a lancé le Dialogue judiciaire africain, qui est une rencontre biannuelle qui réunit l'ensemble des principaux acteurs du système africain des droits de l'homme. Il faut vivement souhaiter que cette dynamique se poursuive et débouche

partage d'expériences et de bonnes pratiques sur les questions de droits de l'homme.[117] A titre d'exemple, l'on peut mentionner la création du Forum international des droits de l'homme, comme cadre de dialogue permanent entre les trois Cours régionales des droits de l'homme dont la session inaugurale s'est tenue du 28 au 29 Octobre 2019 à Kampala. Les travaux de cette première session dudit forum se sont achevés par la Déclaration de Kampala[118] qui fait mention de la signature par les trois juridictions régionales des droits de l'homme, d'un *Mémorandum of Understanding* sur l'opérationnalisation[119] du forum international des droits de l'homme.

Le croisement des idées dans ce cadre pourrait contribuer à nourrir substantiellement le travail de la Commission du droit international des Nations Unies[120] au sujet de la codification et du développement progressif du droit international des droits de l'homme.

Ce dialogue reste une voie essentielle pour la mise en cohérence du système africain de promotion et de protection des droits de l'homme. Il devrait permettre de définir un fond commun, une politique générale devant

sur des déclarations ou résolutions concrètes pour l'harmonie du système africain de promotion et de protection des droits de l'homme.

117 Il est important de préciser que ce dialogue entre la Cour Africaine des Droits de l'Homme et des Peuples, la Cour européenne des droits de l'homme et la Cour interaméricaine des droits de l'homme est une réalité qu'il convient d'encourager fortement. En effet, à l'occasion du 40e anniversaire de l'entrée en vigueur de la Convention américaine sur les droits de l'homme et de la création de la Cour interaméricaine des droits de l'homme, les présidents des trois Cours régionales ont eu une rencontre qui a débouché sur la Déclaration de San José, du 18 juillet 2018 qui crée un cadre formel de rencontres entre les trois organes juridictionnels, sous la forme d'un Forum Permanent. Voir https://www.echr.coe.int/Documents/San_Jose_Declaration_2018_ENG.pdf, (dernière consultation, le 27 décembre 2020).

118 La Déclaration de Kampala a été signée le 29 octobre 2019 par les présidents des trois cours régionales des droits de l'homme disponible sur https://www.echr.coe.int/Documents/Kampala_Declaration_ENG.pdf, (dernière consultation, le 27 décembre 2020).

119 En ce qui concerne les modalités pratiques de la tenue du Forum international des droits de l'homme, la Déclaration de Kampala, précise par exemple que le forum se tiendra de façon biannuelle, à travers des sessions privées et publiques, sur une base rotative. Elle prévoit aussi que le Forum va stimuler les échanges et les discussions sur les questions essentielles des droits de l'homme, ainsi que la partage d'expérience sur les méthodes de travail. Elle prévoit aussi la publication annuelle d'un rapport électronique sur les principaux arrêts des trois cours régionales. Le 1er rapport intitulé 'Joint Law Report 2019' a été publié en 2019 et est disponible sur https://www.echr.coe.int/Documents/Joint_Report_2019_AfCHPR_ECHR_IACHR_ENG.pdf (dernière consultation, le 27 décembre 2020).

120 La Commission du droit international a été créée par l'Assemblée Générale des Nations Unies en 1947 et a pour mandat, en vertu de l'art 13(1)(a) de la Charte des Nations Unies, de développer la coopération internationale et d'encourager le développement progressif du droit international et sa codification.

orienter les différents acteurs du système à œuvrer de concert, chaque acteur jouant sa partition, afin de produire une jurisprudence rigoureuse, harmonisée, toujours et uniquement au service de la préservation de la dignité humaine en Afrique.

4 Conclusion

Loin de se positionner comme un ordre juridique régional distinct et entièrement à part, l'Afrique a pu au gré des mutations politiques, idéologiques et sociales secrété progressivement un paquet de normes et d'institutions originales, qui concourent à enrichir le patrimoine commun de valeurs liées à la préservation et à la protection de la dignité humaine, largement partagées au sein de la communauté internationale.

Ce qui importe le plus en fin de compte, c'est que la personne humaine vivant en Afrique, du Nord au Sud, de l'Est à l'Ouest, puisse jouir pleinement de la construction de ce système « *sui generis* », s'épanouir et se réaliser en tant que sujet de droits et d'obligations, mais surtout, en tant que valeur sacrée de l'humanité.

14 Est-ce le commencement de la fin ? À propos du retrait des déclarations des États permettant aux individus et aux organisations non gouvernementales de saisir la Cour africaine des droits de l'homme et des peuples

*Francesca Mussi et Giuseppe Pascale**

1 Introduction

Le système africain de protection des droits de l'homme est fondé sur la Charte africaine des droits de l'homme et des peuples (ci-après « Charte africaine ») de 1981, à laquelle aujourd'hui tous les États africains sont parties, exception faite du Royaume du Maroc.[1] Après avoir énoncé les droits civils et politiques, la première partie de la Charte africaine consacre un ensemble de droits économiques, sociaux et culturels ainsi que des droits collectifs ou droits des peuples. La deuxième partie prévoit la création d'une Commission africaine des droits de l'homme et des peuples (ci-après « Commission africaine ») comme organisme « quasi-juridictionnel » qui peut recevoir des communications, aussi bien de la part des États que des individus, concernant la violation présumée des droits garantis dans la première partie. Chaque communication, lorsqu'elle est examinée au fond, peut conduire la Commission à rendre un rapport non contraignant contenant des recommandations adressées à l'État défendeur dont la responsabilité internationale a été établie.

* Ce chapitre représente le résultat d'une recherche que les deux auteurs ont conduite ensemble ; toutefois, on tient à préciser que G Pascale a écrit les paragraphes 1-3, alors que F Mussi a rédigé les paragraphes 4-7.

1 La Charte africaine des droits de l'homme et des peuples, connue aussi comme Charte de Banjul, a été adoptée à Nairobi le 27 juin 1981, au cours de la 18ème session de la Conférence des Chefs d'État et de Gouvernement de l'Organisation pour l'Unité africaine (OUA), et est entrée en vigueur le 21 octobre 1986. Elle a été complétée par trois Protocoles normatifs (à savoir : le Protocole relatif aux droits des femmes; le Protocole relatif aux droits des personnes âgées ; le Protocole relatif aux droits des personnes handicapées), lesquels pour la plupart élargissent la portée des droits de l'homme déjà proclamés par la Charte africaine elle-même ou s'intéressent à la sauvegarde de groupes particulièrement vulnérables (à ce sujet, voir récemment R Ben Achour 'Les Protocoles normatifs à la Charte africaine des droits de l'homme et des peuples' (2020) 4 *Annuaire africain des droits de l'homme* 83-98). Pour approfondir plus en détail le système africain de protection des droits de l'homme, surtout en ce qui concerne les aspects qui seront considérés dans ce chapitre, l'on renvoie à G Pascale *La tutela internazionale dei diritti dell'uomo nel continente africano* (2017) et à la bibliographie incluse. Les sources des données qui seront fournies dans cette étude proviennent, sauf indication contraire, du site de la Cour africaine, fr.african-court.org, et de celui de l'Union africaine www.au.int/fr.

Le système africain s'est enrichi d'une Cour africaine des droits de l'homme et des peuples (ci-après « Cour africaine »), créée en 1998 par un protocole spécifique auquel trente États ont adhéré à ce jour.[2] La Cour est une juridiction internationale, qui peut rendre des arrêts contraignants, et dont l'action est complémentaire de celle de la Commission africaine en vertu de l'article 2 de son Protocole constitutif. Sa compétence matérielle est très vaste : elle peut connaître de toutes les affaires dont elle est saisie et qui concernent l'interprétation et l'application de la Charte africaine, du Protocole l'instituant et de tout autre instrument relatif aux droits de l'homme ratifié par les États intéressés.[3] La compétence personnelle de la Cour – qui est celle qui intéresse davantage dans le cadre de cette étude – est également très étendue et diversifiée.[4] Plus précisément, l'article

2 Le Protocole relatif à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour des droits de l'homme et des peuples, autrement dit Protocole de Ouagadougou, a été adopté le 10 juin 1998, lors de la 34ème session de la Conférence des Chefs d'État et de Gouvernement de l'OUA, et est entré en vigueur le 25 janvier 2004. Avec le Protocole de Sharm el-Sheikh, adopté le 1er juillet 2008 lors de la 11ème session ordinaire de la Conférence des Chefs d'État et de Gouvernement de l'Union africaine (UA), les États africains ont prévu la fusion de la Cour africaine des droits de l'homme et des peuples avec la Cour de justice de l'UA (dont le Protocole, adopté à Maputo en 2003, est en vigueur depuis 2009) afin de créer une Cour unique, c'est-à-dire la nouvelle Cour africaine de justice et des droits de l'homme. Le Protocole de Sharm el-Sheikh n'a cependant été ratifié que par huit États (Angola, Bénin, Burkina Faso, Congo-Brazzaville, Gambie, Libéria, Libye et Mali). Afin qu'il entre en vigueur, il est nécessaire d'obtenir le dépôt de quinze instruments de ratification. Enfin, le Protocole de Malabo, adopté le 27 juin 2014, à l'occasion de la 23ème session ordinaire de la Conférence des Chefs d'État et de Gouvernement de l'UA, souhaite attribuer à la future Cour africaine unique une compétence aussi dans le domaine du droit international pénal. Bien que le Protocole de Malabo ait été signé par quinze États, aucun d'entre eux ne l'a encore ratifié.

3 La compétence *ratione materiae* exceptionnellement vaste de la Cour africaine a été plus affirmée que démontrée jusqu'à maintenant. Voir Pascale (n 1) 233-235 et, plus récemment, A Rachovitsa 'On new "Judicial Animals": the curious case of an African Court with material jurisdiction of a global scope' (2019) 19 *Human Rights Law Review* 255-289. Mais, voir aussi G Pascale 'La Dichiarazione universale dei diritti umani nella prassi della Commissione africana e nella giurisprudenza della Corte africana dei diritti umani e dei popoli' in S Tonolo & G Pascale (dirs) *La Dichiarazione universale dei diritti umani nel diritto internazionale contemporaneo* (2020) 85-108 où l'on souligne que parfois la Cour africaine a étonnement établi la violation de la Déclaration universelle des droits de l'homme, même s'il s'agissait d'un acte de toute évidence non contraignant.

4 Dans ce domaine les États rédacteurs du Protocole ont choisi une solution qui apparaît comme intermédiaire entre celle du système européen et celle du système interaméricain. Dans le système européen en effet les États ainsi que les individus, les groupes d'individus et les ONG peuvent directement saisir la Cour européenne (arts 33 et 34 de la Convention européenne). Au contraire, dans le système interaméricain, seule la Commission interaméricaine et les États parties à la Convention américaine peuvent saisir la Cour interaméricaine (art 61(1) de la Convention américaine) ; il faut toutefois que l'État défendeur ait précédemment accepté la compétence contentieuse de la Cour (art 62). L'adoption dans le système africain d'une solution intermédiaire

5(1) du Protocole autorise la saisine de la Cour par : la Commission africaine ; l'État partie qui aurait précédemment saisi la Commission africaine ; l'État partie contre lequel une communication aurait été précédemment introduite devant la Commission africaine ; l'État partie dont le ressortissant serait victime d'une violation des droits de l'homme ; les organisations intergouvernementales africaines. Chaque État partie au Protocole, lorsqu'il en effectue la ratification, accepte de façon automatique et sans autres conditions la compétence de la Cour s'agissant des requêtes introduites à son égard par les sujets sus cités. L'article 5(3) du Protocole ajoute que les individus et les organisations non gouvernementales (dorénavant : ONG)[5] peuvent aussi saisir la Cour. Toutefois, il faut que l'État concerné ait au préalable effectué la déclaration d'acceptation de la compétence de la Cour pour les requêtes des individus et des ONG, conformément à l'article 34(6) du même Protocole, auquel l'article 5(3) renvoie.[6] Au fil du temps, dix États avaient notifié cette déclaration, à savoir le Bénin, le Burkina Faso, la Côte d'Ivoire, la Gambie, le Ghana, le Malawi, le Mali, le Rwanda, la République Unie de Tanzanie et la Tunisie. Quatre d'entre eux ont toutefois par la suite retiré leur déclaration : le Rwanda (29 février 2016), la République Unie de Tanzanie (21 novembre 2019), le Bénin (24 mars 2020) et la Côte d'Ivoire (28 avril 2020). En conséquence, à la date du 30 novembre 2020, il n'y a désormais que six

entre les deux que l'on vient de rappeler a été probablement déterminée au vu de l'environnement social, historique et politique du continent africain, pas encore enclin à une libéralité majeure.

5 Il y a d'autres conditions que les ONG – qui sont particulièrement actives dans le système africain – doivent respecter afin d'introduire des requêtes devant la Cour africaine. Selon l'art 5(3) du Protocole, la Cour peut être saisie uniquement par les ONG qui sont *qualifiées* et *dotées du statut d'observateur auprès de la Commission africaine*. La deuxième condition présente une nature objective, étant probablement liée à la relation de complémentarité qui doit subsister entre la Cour et la Commission africaines. Au contraire, en ce qui concerne la première condition, il faut souligner que l'adjectif *qualifiées* n'est pas utilisé dans les versions française et portugaise du Protocole mais seulement dans la version anglaise, où est précisément employé le mot 'relevant'. Il s'agit en outre d'une condition fuyante, qui n'est aucunement définie.

6 L'art 5(3) du Protocole prévoit que '[l]a Cour peut permettre aux individus ainsi qu'aux ONG dotées du statut d'observateur auprès de la Commission d'introduire des requêtes directement devant elle, conformément à l'art 34(6) de ce Protocole'. Selon ce dernier article, 'à tout moment à partir de la ratification du présent Protocole, l'État doit faire une déclaration acceptant la compétence de la Cour pour recevoir les requêtes énoncées à l'art 5(3) du présent Protocole. La Cour ne reçoit aucune requête en application de l'art 5(3) intéressant un État partie qui n'a pas fait une telle déclaration'.

États (parmi les cinquante-quatre États parties à la Charte africaine) qui permettent aux individus et aux ONG de saisir la Cour africaine.[7]

Après avoir précisé quelques questions préliminaires et générales concernant l'extension dans le temps ou la « durée » des traités sur les droits de l'homme et, en particulier, des traités instituant des organes ou organismes chargés du contrôle du respect des droits de l'homme, deux points principaux seront abordés dans le présent chapitre. En premier lieu, il s'agira de définir si et selon quelle procédure les États peuvent révoquer leur déclaration unilatérale d'acceptation de la compétence de la Cour africaine en matière de requêtes des individus et des ONG. Vu le silence du Protocole à ce propos, la pratique récente pourra contribuer à donner une réponse : le premier acte de retrait, émanant du Rwanda, ainsi que la pertinente jurisprudence de la Cour pourront notamment servir de point de repère. En second lieu, on cherchera à mieux encadrer la signification générale de cette pratique afin d'avoir une lecture éclairée et systématique des quatre cas de retrait. En d'autres termes, on s'interrogera sur la portée et le sens de ces retraits pour comprendre s'il s'agit de simples mouvements autonomes et indépendants les uns des autres ou, au contraire, de signes d'une crise systématique affectant la Cour africaine. Le cas échéant, on vérifiera si des options différentes de la Cour africaine sont offertes aux niveaux régional et subrégional pour la protection juridictionnelle des droits de l'homme en Afrique.

2 Quelques questions préliminaires et générales

De nos jours, la grande majorité de la doctrine estime que les traités sur les droits de l'homme sont applicables *sine die ad quem* ; cela veut dire que ces traités sont considérés comme instituant des régimes juridiques essentiellement irrévocables. Plus précisément, selon cette perception, le *dies ad quem* d'un traité sur les droits de l'homme peut être « identifié »

7 Certains auteurs faisaient reposer beaucoup d'espoirs sur la possibilité offerte aux États de permettre aux individus et aux ONG de saisir la Cour africaine. Voir entre autres J Allain & A O'Shea 'African disunity: comparing human rights law and practice of North and South African states' (2002) 24 *Human Rights Quarterly* 86-87 ainsi que L Boisson de Chazournes & MM Mbengue 'Article 34' in M Kamto (dir) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création d'une Cour africaine des droits de l'homme: commentaire article par article* (2011) 1517. Toutefois, il s'agissait d'espoirs soumis au bon vouloir des Etats, dont les attentes semblent aujourd'hui partiellement trahie.

uniquement si celui-ci prévoit une clause expresse sur le retrait.[8] Si une telle clause n'existe pas, le traité devra s'appliquer *sine die ad quem*.[9]

En effet, en l'absence d'une clause sur le retrait, un État qui aurait l'intention de se retirer d'un traité sur les droits de l'homme ne pourrait pas avoir recours à l'article 56(1) de la Convention de Vienne sur le droit des traités, c'est-à-dire aux deux exceptions ici prévues en relation à la règle générale de la « sainteté » des traités.[10] Cet article dispose qu'un traité, qui ne contient pas de dispositions relatives à son extinction et qui ne prévoit pas qu'on puisse le dénoncer ou s'en retirer, ne peut faire l'objet d'une dénonciation ou d'un retrait, sauf : a) qu'il soit établi qu'il était dans l'intention des parties d'admettre la possibilité d'une dénonciation ou d'un retrait ; ou b) que le droit de dénonciation ou de retrait ne puisse pas être déduit de la nature du traité.

La majorité de la doctrine exclut l'applicabilité de ces deux exceptions aux traités sur les droits de l'homme en se fondant sur trois arguments. Premièrement, en l'absence d'une clause expresse, il serait invraisemblable que les États parties à un traité stipulé dans une matière aussi sensible que la protection internationale des droits de l'homme aient eu à l'origine l'intention de permettre la possibilité d'un retrait. Deuxièmement, les traités sur les droits de l'homme n'ayant évidemment pas le but de

8 Même si la Convention de Vienne sur le droit des traités de 1969 utilise les deux termes de 'retrait' et de 'dénonciation', on préfère employer ici le mot 'retrait'. En général, ce dernier est plus convenable lorsque l'on se réfère aux traités multilatéraux : les effets du traité multilatéral s'éteignent uniquement à l'égard de l'État qui s'est retiré tout en restant en vigueur pour les autres États parties. Au contraire, le mot 'dénonciation' devrait être utilisé concernant les traités bilatéraux : dans ce cas, l'exercice du retrait mène à l'extinction totale du traité bilatéral. À propos de cette terminologie, voir F Capotorti 'L'extinction et la suspension des traités' (1971) 134-III *Recueil des cours de l'Académie de droit international de La Haye* 465-466.

9 Surtout T Meron 'International law in the age of human rights. General course on public international law' (2003) 301 *Recueil des cours de l'Académie de droit international de La Haye* 208, affirme qu'aujourd'hui il y a un « trend in the international community to refuse to admit the possibility of denunciation of or withdrawal from multilateral conventions in the field of human rights ». Voir également Y Tyagi 'The denunciation of human rights treaties' (2008) 79 *British Yearbook of International Law* 86-193 ; D Russo *L'efficacia dei trattati sui diritti umani* (2012) 71 ss. Pour une analyse plus générale sur le retrait des États par les traités qui n'ont pas une clause spécifique, au-delà de ceux sur les droits de l'homme, voir E Triggiani 'La denuncia dei trattati fondata sulla loro natura' (1978) 15 *Comunicazioni e studi* 469-528 ; K Widdows 'The unilateral denunciation of treaties containing no denunciation clause' (1982) 53 *British Yearbook of International Law* 83-114. Il faut souligner que la doctrine précitée suggère la spécialité de certaines règles applicables aux traités sur les droits de l'homme sans nécessairement soutenir en même temps que la protection internationale des droits de l'homme constitue un *self-contained regime*.

10 À cet égard, voir par exemple les auteurs précités (n 9).

constituer des régimes juridiques temporaires, la possibilité de s'en retirer ne pourrait pas être déduite de la nature de ces traités. Enfin, les traités sur les droits de l'homme poursuivent l'objectif d'assurer la plus grande participation des États : il serait donc incohérent d'admettre la possibilité de s'en retirer en l'absence d'une clause expresse.

Le Comité des Nations Unies sur les droits de l'homme a confirmé cette approche lors de la tentative de la Corée du Nord de se retirer en 1997 du Pacte international relatif aux droits civils et politiques. Étant donné que dans le Pacte il n'y a aucune clause expresse prévoyant la faculté de retrait, le Comité déclara que le Pacte ne constituait pas un traité dont la nature permettrait de déduire une faculté de retrait. Le Comité ajouta aussi qu'en général les obligations conventionnellement acceptées par les États dans le domaine de la protection internationale des droits de l'homme ont une nature irréversible, la seule exception admise étant celle imputable à une éventuelle clause expresse sur la faculté de retrait.[11] La reconstruction juridique du Comité avait été anticipée par l'*aide-mémoire* du Secrétaire général des Nations Unies du 23 septembre 1997 : il s'agit d'un document qui recueille et examine les réactions et les déclarations de nombreux États, pour la plupart s'opposant à la tentative de retrait opérée par la Corée du Nord.

De manière plus générale, il semble difficile de supposer l'application concrète aux traités sur les droits de l'homme d'autres causes d'extinction des traités prévues par le droit international général et/ou par la Convention de Vienne sur le droit des traités.[12] Ces causes d'extinction pourraient être invoquées seulement *in abstracto*, notamment si l'on tient encore compte de la matière plutôt sensible faisant l'objet des traités sur les droits de l'homme.[13] Par ailleurs, en ce qui concerne spécifiquement les causes d'extinction des traités dues à la violation substantielle du traité par une des contreparties ou à la survenance d'un conflit armé, l'interdiction de leur application aux traités sur les droits de l'homme est bien établie.[14]

11 Voir Comité des droits de l'homme des Nations Unies Observation générale 26 : continuité des obligations (8 décembre 1997) UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1.

12 En particulier, l'applicabilité aux traités sur les droits de l'homme de la cause d'extinction connue comme clause *rebus sic stantibus* (prévue par une norme coutumière et énoncée par l'art 62 de la Convention de Vienne) mériterait un approfondissement mais les limites d'espace de ce chapitre l'empêchent.

13 Russo (n 9) 70 ss, et la bibliographie incluse. Pour une synthèse, voir aussi 163-165.

14 Il est notoire que la règle selon laquelle il y a extinction d'un traité en conséquence da sa violation ne vaut pas pour les traités sur les droits de l'homme. Voir l'art 60(5) de la Convention de Vienne, qui cite expressément les traités ayant un caractère humanitaire, généralement interprété de façon extensive, incluant ainsi à la fois les traités de droit international humanitaire que ceux sur les droits de l'homme. À ce propos, voir

La pratique (ou plutôt : l'absence de pratique)[15] relative à la Charte africaine et à son Protocole portant création de la Cour africaine tend à confirmer l'orientation de la doctrine majoritaire que l'on vient de synthétiser.

La Charte africaine ne contient pas de clause expresse prévoyant la faculté de retrait des États.[16] Lors des négociations de Banjul de la Charte, le Congo-Brazzaville, le Niger et la République Centrafricaine proposèrent d'établir une telle clause. Cependant, la majorité des États s'y opposa arguant de l'incompatibilité d'une telle clause avec l'objet et le but de la future Charte.[17] On peut donc présumer que la Charte africaine s'applique *sine die ad quem.* Il en va de même pour la compétence de la Commission africaine, créée directement par la Charte. En effet, à notre connaissance, aucun État n'a essayé jusqu'à présent de se retirer de la Charte et en conséquence de se soustraire à l'action de la Commission. On pourrait supposer que cela dépend du caractère exclusivement non-contraignant des rapports que la Commission peut rendre. Mais le Protocole portant création de la Cour africaine – qui fait de toute évidence partie de la catégorie des traités sur les droits de l'homme – ne prévoit pas non plus de clause sur le retrait. Et les États parties n'ont pas tenté à ce jour de s'en retirer. Ce qu'il importe de souligner ici est donc que les États africains semblent disposés à opter pour une applicabilité *sine die ad quem* des traités sur les droits de l'homme même quand ces derniers portent création de juridictions internationales, compétentes par définition pour prononcer des arrêts contraignants.

S Forlati *Diritto dei trattati e responsabilità internazionale* (2005) 137-139. Pareillement, l'impossibilité de retenir l'explosion d'un conflit comme cause d'extinction des traités sur les droits de l'homme est prévue par l'art 7 du *Projet d'articles sur les effets des conflits armés sur les traités*, adopté par la Commission du droit international en 2011, et aussi dans la lettre f) de l'Annexe auquel le même art 7 renvoie. À ce sujet, N Ronzitti *Introduzione al diritto internazionale* (2016) 227-229.

15 Une absence de pratique peut souvent démontrer une orientation ou même confirmer l'existence d'une norme coutumière. Voir l'étude de M Alexis *Le silence de l'État comme manifestation de sa volonté* (2018).

16 La Charte africaine diffère des autres conventions régionales sur les droits de l'homme qui prévoient des clauses sur le retrait. Voir l'art 58 de la Convention européenne et l'art 78 de la Convention américaine.

17 Voir la documentation recueillie par F Ouguergouz *The African Charter on human and peoples' rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 787 ss. Avant l'élaboration de la Charte africaine, lorsque les États africains voulaient permettre que l'on puisse se retirer d'un traité régional sur les droits de l'homme, ils inséraient une clause spécifique à cet effet. Voir par exemple l'art 13 de la Convention de l'OUA de 1969 régissant les aspects propres aux problèmes des réfugiés en Afrique.

Il faut néanmoins signaler qu'en même temps les États africains ne semblent pas disposés à permettre que l'action de ces juridictions internationales soit toujours inéluctable. En effet, l'on a déjà indiqué que quatre d'entre eux ont récemment effectué un rétropédalage, en retirant leur déclaration portant acceptation de la compétence de la Cour s'agissant des recours des individus et des ONG. Comme on l'expliquera dans la suite du chapitre, ces quatre États ont retiré leur déclaration en dépit du fait qu'il n'y ait aucune disposition en ce sens dans le Protocole de Ouagadougou. Il s'agit d'un résultat *grave* en raison du fait que la grande majorité des requêtes présentées aux juridictions internationales vouées à la sauvegarde des droits de l'homme sont introduites par des individus.[18] Mais il s'agit d'un résultat *pas trop grave*, si l'on considère que le retrait de la déclaration ne peut pas s'assimiler à un retrait du Protocole de Ouagadougou dans son entièreté ; en effet, on verra que tous les États qui ont fait le retrait de leur déclaration ont pris soin à chaque fois de mettre en évidence qu'ils restaient parties au Protocole voire qu'ils continuaient de soutenir la Cour africaine.

Ce résultat ne semble *pas trop grave* non plus si on le compare aux tentatives de certains groupes d'États africains de remettre en question la compétence développée en matière de protection internationale des droits de l'homme par certaines cours subrégionales africaines, telles que la Cour de Justice de la Communauté économique des États de l'Afrique de l'Ouest (CEDEAO), la Cour de Justice de la Communauté d'Afrique de l'Est (CAE) ou le Tribunal de la Communauté de développement d'Afrique australe (en anglais : *Southern African Development Community* (SADC)). Les tentatives en ce sens concernant les deux premières Cours ont finalement échoué, mais celle relative au Tribunal de la SADC a abouti et a donc démontré, entre autres, que l'extinction d'un traité portant création d'une juridiction internationale compétente dans le domaine des droits de l'homme sur la base du consentement unanime de toutes les parties contractantes est une hypothèse rare dans les relations internationales contemporaines mais qui demeure tout à fait possible, surtout dans certains contextes.[19]

18 Les statistiques officielles indiquent qu'au 22 octobre 2020, la Cour africaine a reçu un total de 295 requêtes, dont 278 ont été déposées par des individus, 14 par des ONG, 3 par la Commission africaine ; aucune requête n'a été introduite par les États ou par les organisations intergouvernementales africaines. Voir fr.african-court.org/index.php/affaires/affaires-contentieuses 'consulté le 22 octobre 2020)

19 À propos des événements concernant le Tribunal de la SADC et pour une analyse de la possibilité de remettre en vigueur ses fonctions initiales, voir F Mussi 'From the *Campbell* case to a recent ruling of the Constitutional Court of South Africa : is there any hope to revive the Tribunal of the Southern African Development Community?' (2020) 28 *African Journal of International and Comparative Law* 110-137. Voir également plus en général les réflexions dans la section conclusive du présent chapitre.

3 Le point de repère offert par le retrait de la déclaration du Rwanda

Conformément à l'article 34(6) du Protocole portant création de la Cour africaine, le 22 janvier 2013 le Rwanda avait déposé la déclaration permettant à la Cour d'examiner les requêtes introduites par les individus et les ONG.[20] Trois ans après, plus exactement le 29 février 2016, cette déclaration a été retirée.[21] D'un point de vue procédural, le Rwanda a effectué le retrait de la déclaration en suivant un « parallélisme de forme » déduit de l'article 34(7) du Protocole de Ouagadougou. Cette disposition établit que les États doivent déposer leur déclaration auprès du Secrétaire général de l'Organisation de l'Unité Africaine (OUA) (cet organe est aujourd'hui remplacé par le Président de la Commission de l'Union Africaine (UA)). Par conséquent, le Rwanda a notifié l'acte révoquant sa déclaration au Président de la Commission de l'UA. En ce qui concerne la substance du retrait, le Gouvernement rwandais a motivé sa décision par la nécessité d'empêcher les fugitifs ayant fait l'objet de condamnations nationales, suite au génocide de 1994, de saisir la Cour africaine et de bénéficier ainsi d'un « espace d'action supplémentaire ». Il est vrai que l'explication fournie par le Rwanda pour justifier son retrait ne suscite pas d'intérêt particulier sur le plan juridique : il ne fait aucun doute que la justice internationale a un caractère consensuel et que les États sont des sujets souverains capables de décider librement, sur la base de n'importe quelle motivation politique, de se soumettre ou non à la compétence des juridictions internationales.[22] En tout état de cause, il a été argué que le réel objectif du Rwanda était de faire déchoir une série de requêtes déjà

20 Le Rwanda avait ratifié le Protocole le 25 mai 2004 et la Charte africaine le 21 octobre 1986.

21 L'acte de retrait n'a pas été publié mais il existe un communiqué de presse du Ministère de la justice rwandais sur le site www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf et sur celui du Centre for Human Rights de l'Université de Pretoria www.up.ac.za/en/faculty-of-law/news/post_2254556-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court (consulté le 2 décembre 2020). Pour quelques remarques, D Pavot 'Le retrait de la déclaration du Rwanda permettant aux individus et ONG de saisir la Cour africaine des droits de l'homme et des peuples' (2017) 30 *Revue québécoise de droit international* 221-237 ; D Pavot & C Chevalier 'Réflexions sur l'interprétation des actes unilatéraux des États à la lueur de la décision de la Cour africaine des droits de l'homme et des peuples du 3 juin 2016 dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda* (2018) 95 *Revue de droit international et de droit comparé* 85-112 ; O Windridge 'Assessing *Rwexit*: the impact and implications of Rwanda's withdrawal of its art 34(6) declaration before the African Court on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 243-258.

22 Au contraire, Pavot (n 21) 225-228 est très attentif à la motivation politique formellement fournie par le Rwanda, à laquelle il adresse beaucoup de critiques.

introduites par des individus devant la Cour africaine.[23] Il semble que le Rwanda visait en particulier à provoquer l'effacement de la requête relative au cas *Ingabire Victoire Umuhoza*, concernant la dirigeante des forces d'opposition au Président du Rwanda.[24] En atteste la chronologie du retrait : comme précédemment souligné, l'acte unilatéral de retrait de la déclaration rwandaise a été notifié le 29 février 2016 auprès du Président de la Commission de l'UA, qui l'a transmis le 3 mars suivant à la Cour, laquelle avait programmé de reprendre le jour suivant l'examen de l'affaire en question.

En effet, immédiatement après avoir révoqué sa déclaration, le Rwanda prétendait que la Cour africaine ne devait pas poursuivre l'examen de l'affaire *Ingabire Victoire Umuhoza*. Dès réception de la notification, la Cour a aussitôt suspendu l'examen au fond de l'affaire. Toutefois, cette suspension n'a guère été dictée par les prétentions du Rwanda mais par la nécessité de la Cour de se pencher sur les nombreuses questions inédites que le retrait rwandais soulevait. En particulier, un contrôle de validité préliminaire de l'acte de révocation était essentiel afin d'en apprécier la valeur en rapport à la radiation de l'affaire *Ingabire Victoire Umuhoza* demandée par le Rwanda. Mais la compétence de la Cour pour effectuer ce contrôle n'était pas évidente. Selon le Gouvernement rwandais, seule la Commission de l'UA était compétente à ce sujet, puisque l'acte de

23 Voir Human Rights Centre de l'Université de Pretoria (n 21). Voir aussi International Justice Resource Center Rwanda Withdraws Access to African Court for Individuals and NGOs (document publié le 14 mars 2016) https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos (consulté le 2 décembre 2020) et Fédération internationale des droits de l'homme Retrait de la déclaration spéciale du Rwanda à la Cour africaine : un recul pour la protection des droits humains (document publié le 17 mars 2016) https://www.fidh.org/fr/regions/afrique/rwanda/retrait-de-la-declaration-speciale-du-rwanda-a-la-cour-africaine-un (consulté le 2 décembre 2020).

24 La requérante dénonçait un état de détention qui durait depuis de nombreuses années, sans avoir la permission de rencontrer ni ses avocats ni sa famille, en vertu de chefs d'accusation dénués de tout fondement et vérifiés à la suite d'un procès politisé qui avait conduit à l'arrêt de la Haute Cour de Kigali du 30 octobre 2012, confirmé par l'arrêt de la Cour Suprême du Rwanda du 13 décembre 2013. Selon la requérante, les deux procès n'avaient été ni indépendants ni impartiaux en raison des ingérences gouvernementales. La requérante demandait alors à la Cour africaine de vérifier la violation par le Rwanda du principe de l'égalité des parties devant la loi, du droit à un procès équitable et de la liberté d'expression et d'opinion, proclamés respectivement par les arts 3, 7 et 9 de la Charte africaine, ainsi que par la Déclaration universelle des droits de l'homme de 1948 et par le Pacte international relatif aux droits civils et politiques de 1966. En outre, la requérante priait la Cour africaine d'imposer aux autorités rwandaises de la relâcher immédiatement, de rouvrir les procès internes la concernant et aussi de réformer le Code pénal rwandais dans la partie relative aux délits idéologiques et politiques.

révocation avait été déposé auprès du Président de la Commission de l'UA.[25]

La Cour africaine a surmonté par la suite son incertitude initiale. Dans son arrêt interlocutoire du 3 juin 2016, elle s'est déclarée compétente pour évaluer la validité de l'acte de révocation rwandais sur le fondement de l'article 3(2) de son Protocole constitutif.[26] Cette disposition incorpore le principe général de *Kompetenz-Kompetenz* et définit donc la Cour comme juge unique de sa propre compétence.[27]

Dans cet arrêt, la Cour africaine a admis la validité de l'acte de révocation émis par le Rwanda. Ce faisant, elle s'est éloignée de la jurisprudence antérieure de la Cour interaméricaine des droits de l'homme, qui avait interdit la tentative du Pérou de révoquer sa déclaration d'acceptation de la compétence de la Cour interaméricaine en raison de l'absence d'une clause spécifique à ce propos.[28] L'approche de la Cour africaine semble plus juste en ce qu'elle est cohérente avec les *Principes directeurs applicables aux déclarations unilatérales des États susceptibles de créer des obligations juridiques*, approuvés en 2006 par la Commission du droit international des Nations Unies. Bien que l'article 10 des *Principes directeurs* affirme que les actes unilatéraux des États ne peuvent pas être révoqués de façon arbitraire, le commentaire à cet article précise quand même qu'une telle règle n'est pas susceptible d'interprétation restrictive

25 Voir Cour africaine, requête 003/2014, *Ingabire Victoire Umuhoza c. Rwanda*, ordonnance relative au dépôt des observations sur les questions de procédure, 18 mars 2016, accompagnée des opinions dissidentes des juges R Ben Achour et F Ouguergouz. Il convient d'expliquer que le 4 janvier 2016, c'est-à-dire avant la notification du retrait de la déclaration rwandaise, la Cour avait informé les parties qu'elle tiendrait une audience publiques le 4 mars 2016 aux fins de les entendre sur les exceptions préliminaires soulevées par le défendeur ainsi que sur le fond de l'affaire. Malgré le retrait ensuite notifié par le Rwanda, cette audience publique a été maintenue (mais le Rwanda a décidé de ne pas comparaître). La Cour a toutefois fait preuve d'incohérence dans l'ordonnance adoptée le 18 mars suivant, par laquelle elle s'est proposée de statuer en premier lieu sur la question du retrait au lieu des exceptions préliminaires. Pour plus de détail, voir l'opinion dissidente du juge F Ouguergouz jointe à cette ordonnance.

26 L'article 3(2) du Protocole prévoit qu''[e]n cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide'.

27 Cour africaine, requête 003/2014, *Ingabire Victoire Umuhoza c. Rwanda*, arrêt sur le retrait de la déclaration, 3 juin 2016, paragraphes 49-52. Le même jour la Cour a adopté une ordonnance séparée sur certaines questions procédurales précédemment soulevées par la requérante.

28 Autrement dit, en l'absence d'une clause spécifique, selon la Cour interaméricaine, le Pérou n'avait aucune faculté de se retirer partiellement de la Convention américaine des droits de l'homme, en ce qui concerne les dispositions qui portent création de la Cour interaméricaine. La seule possibilité qui s'offrait au Pérou était celle de se retirer totalement de la Convention américaine. Cour interaméricaine, *Ivcher Bronstein c. Pérou*, arrêt du 24 septembre 1999, paragraphes 51 ss.

et admet de ce fait la révocabilité générale des actes unilatéraux qui ne créent pas de situations juridiques pour d'autres sujets selon un fondement « contractuel ». On peut qualifier de la sorte les déclarations étatiques permettant à la Cour africaine d'examiner les requêtes des individus et des ONG. Il ne semble pas que la combinaison de ces déclarations puisse créer un système juridique de type « contractuel », c'est-à-dire fondé sur une rencontre de volontés avec d'autres sujets, à l'instar de ce qui se produit par exemple s'agissant des déclarations d'acceptation de la compétence obligatoire de la Cour internationale de justice, effectuées par les États en vertu de l'article 36(2) de son Statut.[29] D'ailleurs, la Commission du droit international elle-même a exclu l'applicabilité des *Principes directeurs* aux déclarations d'acceptation de la juridiction de la seule Cour internationale de justice, sans faire mention d'autres cours et tribunaux internationaux.[30]

Ce raisonnement semble approuvé par l'opinion individuelle du juge Fatsah Ouguergouz jointe à l'arrêt. Celui-ci n'a pas contesté le fond de la décision mais la manière dont la Cour africaine est arrivée à cette décision. Il a notamment déploré l'insuffisance de l'arrêt quant à ses argumentations juridiques.[31] En effet, il est notoire que le régime juridique international applicable aux actes unilatéraux des États est entouré d'une remarquable incertitude. En particulier, il n'est pas clair si et dans quelle mesure les règles applicables aux traités, en vertu de la Convention de Vienne sur le droit des traités ou du droit international général, sont également susceptibles d'application aux actes unilatéraux des États.[32] Dans son

29 À ce sujet, voir MI Papa 'La dichiarazione italiana di accettazione della competenza obbligatoria della Corte internazionale di giustizia: profili problematici di diritto internazionale e costituzionale' (1 juillet 2015) *Osservatorio costituzionale* à 5 et 15-16 ; G Asta 'The regime of declarations of acceptance of the jurisdiction of the International Court of Justice: a difficult path towards coherence' (2021) 104 *Rivista di diritto internazionale* 41-65. En général, sur les déclarations en tant qu'actes unilatéraux des États, voir D Carreau & F Marrella *Droit international* (2018) 253 ss.

30 *Annuaire de la Commission du droit international* (2006) II-2 161 ss., notamment la note 924. Voir à ce propos les commentaires critiques de Asta (n 29) 43.

31 *Ingabire Victoire Umuhoza* (n 27) opinion individuelle du juge F Ouguergouz publiée l'11 avril 2017.

32 De 1997 à 2006, la Commission du droit international des Nations Unies a travaillé sur la question du régime juridique applicable aux actes unilatéraux des États. Il s'agissait d'un problème très difficile à traiter, à tel point que rapidement un débat est né entre les membres de la Commission : certains considéraient que le droit des traités devrait s'appliquer aussi aux actes unilatéraux, d'autres estimaient cette analogie trop simpliste. Suite à des discussions particulièrement âpres, les *Principes directeurs applicables aux déclarations unilatérales des États susceptibles de créer des obligations juridiques* ont été approuvés en 2006. La Cour internationale de justice a également contribué à la définition du régime juridique des actes unilatéraux. Les arrêts de départ sont sans doute ceux de 20 décembre 1974 sur les *Essais nucléaires (Australie c France)*, arrêt, *CIJ Recueil* 1974, p. 253 ss., paragraphes 42-46, et *Essais nucléaires (Nouvelle-Zélande c France)*, arrêt, *CIJ Recueil* 1974, p. 457 ss., paragraphes 45-49. Ici la

arrêt, la Cour s'est bornée à très brièvement affirmer que tel n'était pas le cas, sans approfondir ce problème. La Cour a ensuite publié un *rectificatif de l'arrêt relatif au retrait de la déclaration rwandaise* dans lequel – en effet sans aucune explication – elle a ajouté que « la Convention de Vienne ne s'applique pas directement à la déclaration mais peut s'appliquer par analogie » et que, plus généralement, « la Cour africaine peut s'en inspirer en cas de besoin ».[33]

En tout état de cause, concernant la substance du retrait rwandais, la Cour africaine a précisé que la déclaration permettant aux individus et aux ONG de la saisir constituait un acte unilatéral facultatif du Rwanda, qui l'avait émis en sa qualité d'État partie au Protocole de Ouagadougou. Par conséquent, bien que liée à un traité (le Protocole), cette déclaration conservait sa propre autonomie : la déclaration rwandaise pouvait être considérée comme relevant exclusivement de la volonté souveraine du Rwanda, qui en était l'auteur et qui pouvait donc unilatéralement et légitimement la révoquer si et quand il jugeait bon de le faire.[34] En définitive,

Cour a souligné que le caractère contraignant d'un engagement international assumé par déclaration unilatérale repose sur la bonne foi et que les États intéressés peuvent donc exiger que l'obligation ainsi créée soit respectée. Dans l'affaire de 26 novembre 1984 sur les *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c États-Unis d'Amérique)*, compétence et recevabilité, arrêt, *CIJ Recueil* 1984, p. 392 ss., paragraphe 63, la Cour s'est référée à la nécessité qu'un délai raisonnable soit respecté pour que la déclaration unilatérale de retrait soit valide. La Cour a toutefois précisé que l'application par analogie des règles énoncées par la Convention de Vienne sur le droit des traités aux actes unilatéraux n'est pas cependant automatique. Deux ans après, en 1986, elle a laissé entrevoir la possibilité d'appliquer aux actes unilatéraux les règles d'interprétations contenues notamment dans l'art 31 de la Convention de Vienne. Voir *Différend frontalier (Burkina Faso c Mali)*, arrêt, *CIJ Recueil* 1986, p. 554 ss., paragraphe 40. Dans l'affaire de la *Compétence en matière de pêcheries (Espagne c Canada)*, compétence de la Cour, arrêt, *CIJ Recueil* 1998, p. 432 ss., para 46, la Cour a observé que 'les dispositions de la Convention de Vienne peuvent s'appliquer seulement par analogie dans la mesure où elles sont compatibles avec le caractère *sui generis* de l'acceptation unilatérale de la juridiction de la Cour'. Pour une analyse plus étendue de la jurisprudence que l'on vient de mentionner, voir Asta (n 29).

33 Voir le paragraphe ii) du *Rectificatif de l'arrêt relatif au retrait de la déclaration* que la Cour a publié le 5 septembre 2016 par rapport à l'arrêt de 3 juin précédent. En effet, on va observer (n 35) que la Cour africaine s'est inspirée de l'art 56(2) de la Convention de Vienne sur le droit des traités lorsqu'elle a défini le délai de préavis de douze mois que le Rwanda aurait dû donner. À propos du *rectificatif* et plus en général du *modus procedendi* de la Cour, voir les critiques de Windridge (n 21) 253-254 et les considérations plus nuancées de Pavot (n 21) 232-234. Sur la possibilité avancée par la Cour africaine d'appliquer par analogie la Convention de Vienne aux actes unilatéraux, Pavot & Chevalier (n 21) 100, partagent l'opinion que la Cour a été sibylline à ce sujet, évitant d'affronter les problèmes qui entourent la question.

34 *Ingabire Victoire Umuhoza c Rwanda* (n 27) paras 53-59. En particulier, au paragraphe 58, on lit que '[l]a souveraineté des États prescrit que les États sont libres de s'engager et qu'ils conservent le pouvoir discrétionnaire de retirer leurs engagements'.

la Cour africaine a admis que les États sont des sujets souverains capables de décider de la « fixation » d'une sorte de *dies ad quem* de la compétence des cours et tribunaux internationaux, même quand ces derniers agissent en matière de protection internationale des droits de l'homme et même s'il n'y a aucune clause conventionnelle portant faculté de retrait. Cela vaut surtout à l'égard de la compétence relative aux requêtes introduites par les individus et les ONG, qui devraient être la « sève » de l'action de protection des droits de l'homme menée par la Cour africaine et par toutes les juridictions internationales similaires.

Dans ce cadre, la Cour africaine a posé une seule condition pour permettre à l'acte de retrait rwandais d'exercer ses effets. Selon la Cour, il faut que l'État qui révoque sa déclaration donne un préavis de douze mois,[35] à la fin duquel le retrait pourra opérer. Ce délai serait dicté par les principes généraux de la bonne foi et de la sécurité juridique.[36] Dans leur opinion dissidente conjointe, les juges Gérard Niyungeko et Augustino Ramadhani se sont montrés favorables à propos de la nécessité de respecter un préavis, tout en critiquant le délai de douze mois, qu'ils ont estimé excessif. De l'avis des deux juges, un préavis de six mois aurait suffi, car le droit d'exercer un recours devrait être garanti aux seuls requérants qui sont en train de saisir la Cour au moment où l'État concerné notifie son acte de retrait, celui-ci étant alors un droit acquis des requérants.[37] Au contraire, un auteur a manifesté son inquiétude vis-à-vis du retard de six mois (du 29 février au 5 septembre 2016, car l'arrêt du 3 juin a été publié à la même date que son *rectificatif*) avec lequel la Cour a finalement rendu l'arrêt disponible au public. Ce retard a réduit le délai réel du préavis, de fait passé à environ six mois. En outre, si l'on prend en compte les difficultés auxquelles les particuliers en Afrique sont systématiquement confrontés

35 Pour établir que le préavis doit avoir une durée de douze mois, la Cour africaine a pris en compte l'art 56(2) de la Convention de Vienne sur le droit des traités et l'art 78(1) de la Convention américaine relative aux droits de l'homme. Elle a considéré aussi l'art 58(1) de la Convention européenne des droits de l'homme mais finalement a préféré ne pas s'inspirer du délai de six mois prévu ici. On a déjà rappelé que la Charte africaine n'a pas de clause relative au retrait d'un Etat partie.

36 *Ingabire Victoire Umuhoza* (n 27) paras 60-66. Au paragraphe 62, la Cour observe que '[…] la notification du délai de préavis est essentielle pour assurer la sécurité juridique et empêcher une suspension soudaine de droits ayant inévitablement des conséquences sur les tiers que sont, en l'espèce, les individus et les ONG titulaires de ces droits'. Il s'agit d'une sorte de réponse à la question 'est-ce à dire qu'un État après avoir fait une déclaration peut la dénoncer à tout moment ?', posée il y a quelques années par Boisson de Chazournes & Mbengue (n 7) 1534, à la lumière du fait que 'le Protocole ne prévoit aucune disposition quant à sa dénonciation'.

37 *Ingabire Victoire Umuhoza* (n 27) opinion dissidente conjointe des juges G Niyugenko & A Ramadhani publiée le 3 février 2017.

lors de la saisine d'une juridiction internationale,[38] cela a impliqué que les requérants qui à ce moment-là voulaient utiliser leur dernière possibilité pour introduire une requête contre le Rwanda devant la Cour africaine ont probablement eu un temps insuffisant à leur disposition.[39]

Enfin, il faut remarquer que dans son arrêt la Cour africaine a nié *sic et simpliciter* tout effet rétroactif de l'acte rwandais de retrait de sa déclaration. Elle a donc confirmé sa compétence pour vider toutes les affaires contre le Rwanda dont elle était déjà saisie, notamment l'affaire *Ingabire Victoire Umuhoza*.[40] La Cour a appliqué le principe général de la *perpetuatio iurisdictionis*, selon lequel une procédure judiciaire qui est correctement engagée aux termes du droit en vigueur à la date du dépôt de la requête continue jusqu'au prononcé de la décision définitive.[41]

En réponse, le Rwanda a décidé de ne plus comparaitre devant la Cour africaine pour la suite de cette procédure et de toute autre procédure à son égard. Toutefois, cette stratégie processuelle ne lui a apporté aucun succès. La Cour a en effet poursuivi l'examen de l'affaire *Ingabire Victoire Umuhoza* conformément au Règlement de procédure de 2010, qui stipulait dans l'article 55(1) que « lorsqu'une partie ne se présente pas ou s'abstient de faire valoir ses moyens, la Cour peut, à la demande de l'autre partie, rendre un arrêt par défaut après s'être assurée que la partie défaillante a dûment reçu notification de la requête et communication des autres pièces de la procédure ».[42] Même si la Cour n'a pas explicitement rappelé

38 Pour une vue d'ensemble, voir G Niyungeko 'La problématique de l'accès des particuliers à la Cour africaine des droits de l'homme et des peuples en matière contentieuse' in A Alen et al (dir) *Liberae Cogitationes : Liber Amicorum Marc Bossuyt* (2013) 481-497.

39 Voir Windridge (n 21) 255-256.

40 *Ingabire Victoire Umuhoza* (n 27) paras 67-68. Le paragraphe 68 est clair : '[l]a notification par le défendeur de son intention de retirer sa déclaration n'a aucun effet sur les affaires pendantes devant la Cour'. Par la suite, dans le paragraphe iii) du *rectificatif* de l'arrêt, la Cour a précisé que '[…] le retrait par le défendeur de sa requête n'a aucun effet sur la requête en l'espèce, et la Cour continuera donc à l'examiner'.

41 Sur le principe général de la *perpetuatio iurisdictionis* dans le procès international, voir Cour internationale de justice, *Affaire Nottebohm (Liechtenstein c Guatemala)*, exception préliminaire, arrêt du 18 novembre 1953, *CIJ Recueil* 1953, p. 122. En doctrine, voir F Marongiu Buonaiuti 'La sentenza della Corte internazionale di giustizia relativa al caso Germania c. Italia : profili di diritto intertemporale' (2012) 6 *Diritti umani e diritto internazionale* 338.

42 Dans le texte, on cite le Règlement de procédure adopté par la Cour africaine le 2 juin 2010, applicable à l'époque de l'examen de l'affaire *Ingabire Victoire Umuhoza*. Le 25 septembre 2020 la Cour a adopté un nouveau Règlement de procédure, qui est maintenant en vigueur. En particulier, l'art 55(1) du Règlement de 2010 a été substitué par l'art 63(1) et son contenu a été partiellement modifié. La Cour s'est donnée un nouveau Règlement afin de favoriser l'harmonisation avec la Commission africaine

cette disposition, une lecture attentive de l'arrêt sur le fond révèle une minutieuse description de la procédure suivie devant la Cour, témoignant ainsi du respect de l'article 55(1) du Règlement[43] : d'un côté, la requérante avait formellement demandé à la Cour de rendre un arrêt par défaut et, de l'autre, la Cour avait vérifié que l'État défendeur avait dûment reçu une communication de toutes les pièces de la procédure.[44] La Cour africaine a donc pu, à juste titre, continuer à examiner le cas *Ingabire Victoire Umuhoza* sur le fond. C'est ainsi que la Cour a par la suite établi la responsabilité internationale du Rwanda pour la plupart des violations des droits de l'homme alléguées par la requérante.[45]

des procédures dans le système africain de protection des droits de l'homme, car la Commission s'était dotée elle-même quelques mois avant, le 4 mars 2020, d'un nouveau Règlement de procédure. Sauf indication contraire, c'est à ces nouveaux textes qu'il est fait référence dans la suite du texte.

43 À la suite du défaut de comparution du Rwanda, la Cour africaine a, afin de procéder à la vérification des faits, eu recours à des éléments extrajudiciaires, s'inspirant ainsi de la pratique de la Cour internationale de justice. À propos de cette pratique, voir A Zanobetti Pagnetti *La non comparizione davanti alla Corte internazionale di giustizia* (1996).

44 Cour africaine, requête 003/2014, *Ingabire Victoire Umuhoza c Rwanda*, arrêt sur le fond, 24 novembre 2017, paragraphes 34-47. Il apparaît opportun de souligner que l'art 55(1) du Règlement n'exige pas de la Cour qu'elle fasse une description minutieuse de la procédure – ce qu'elle fait pratiquement dans tous ses prononcés – mais qu'elle procède aux notifications nécessaires. En outre, l'aspect le plus important est en réalité que la Cour s'assure au préalable que les prétentions du requérant 'sont fondées en fait et en droit', comme le demande l'art 55(2).

45 Dans son arrêt définitif, la Cour africaine s'est longuement attardée sur le droit à un procès équitable selon l'art 7 de la Charte africaine dont elle a souligné les différentes déclinaisons et les aspects qu'on devrait toujours garder à l'esprit dans le contexte africain. La Cour a ensuite affirmé que le Rwanda était responsable de la violation du droit à la défense et par conséquent du principe d'égalité devant la loi. Elle a confirmé aussi la responsabilité de l'État défendeur pour avoir violé la liberté d'expression et d'opinion de la requérante. Enfin, la Cour a ordonné au Rwanda de rétablir la requérante dans ses droits et de faire un rapport à ce propos dans un délai de six mois. La Cour a évité de s'ingérer dans certaines questions propres à l'ordre juridique intérieur rwandais, c'est-à-dire la réouverture du procès concernant la requérante et sa libération, en renvoyant chaque décision à ce sujet aux autorités rwandaises. En outre, contrairement à ses arrêts précédents (Cour africaine, requêtes 009/11 & 011/11, *Tanganyika Law Society, The Legal and Human Rights Centre et Reverend Christopher R. Mtikila c République Unie de Tanzanie*, arrêt du 14 juin 2013, para 126, et requête 004/13, *Lohé Issa Konaté c Burkina Faso*, arrêt du 5 décembre 2014, para 176) ou postérieurs (voir *Ally Rajabu* citée ensuite), dans cet arrêt la Cour a choisi de ne pas prendre position sur la demande de la requérante relative à une réforme structurelle, à savoir celle d'une partie du Code pénal rwandais. Voir *Ingabire Victoire Umuhoza* (n 44). La Cour a ensuite rendu un autre arrêt sur les réparations, surtout à caractère pécuniaire, que le Rwanda devra fournir à la requérante. Voir Cour africaine, requête 003/2014, *Ingabire Victoire Umuhoza c Rwanda*, arrêt sur les réparations, 7 décembre 2018.

4 Le retrait de la déclaration de la République Unie de Tanzanie

Le retrait de la déclaration rwandaise n'est pas resté longtemps un cas isolé. Le 14 novembre 2019, le Ministre des affaires étrangères et de la coopération de la République Unie de Tanzanie, M. Palamagamba J.A.M. Kabudi, a pris un acte de révocation de la déclaration d'acceptation de la compétence de la Cour africaine antérieurement déposée sur le fondement de l'article 34(6) du Protocole portant création de la Cour.[46] Cet acte de retrait a été notifié au Président de la Commission de l'UA le 21 novembre suivant.

Les raisons ayant conduit la République Unie de Tanzanie à effectuer le retrait de sa déclaration ne sont pas claires. L'acte de révocation ne fournit pas, en effet, de justifications spécifiques à cet égard, se bornant à affirmer que ce retrait se justifiait par le fait que « the Declaration has been implemented contrary to the reservations submitted by Tanzania when making its Declaration ».[47] Lors du dépôt de sa déclaration de l'article 34(6) du Protocole portant création de la Cour le 9 mars 2010, la République Unie de Tanzanie avait en effet indiqué que le pouvoir de la Cour de connaître les recours introduits par les individus et les ONG ne seraient recevables que « once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania ».[48]

D'un côté, la référence à l'épuisement des voies de recours internes contenue dans la déclaration tanzanienne paraît redondante au regard du fait qu'une telle condition est, en tout état de cause, prévue par les articles 6(2) du Protocole portant création de la Cour et 56 de la Charte africaine. D'un autre côté, la terminologie utilisée interroge quant à la volonté de la République Unie de Tanzanie de formuler effectivement une réserve au sens du droit international. Selon l'article 2(1)(d) de la Convention de Vienne sur le droit des traités, le mot « réserve » se réfère à un acte unilatéral rendu par un État au moment où il exprime la volonté d'accepter un traité multilatéral pour exclure ou modifier l'effet juridique de certaines dispositions du traité dans leur application à l'État même.

46 Voir la note de synthèse rédigée par la Mission permanente de la République Unie de Tanzanie auprès de l'UA qui indique l'acte unilatéral de révocation, https://en.african-court.org/images/Declarations/retrait/NV%20to%20MS%20-%20Withdrawal%20Tanzania_E.PDF (consulté le 26 novembre 2020).

47 Note de synthèse (n 46)

48 Voir le document disponible sur le site www.african-court.org/en/images/Declarations/Declaration_Tanzania.PDF (consulté le 26 novembre 2020).

Cependant, dans le cas visé, la République Unie de Tanzanie ne semble pas avoir subordonné son propre consentement à une exclusion spécifique ou bien à une modification des effets juridiques d'une disposition, mais paraît plutôt s'être limitée à avancer une simple indication sur la mise en œuvre de sa déclaration rendue sur le fondement de l'article 34(6) du Protocole portant création de la Cour. À la lumière de cela, il paraît plus correct de qualifier la manifestation de volonté de la République Unie de Tanzanie comme une pure déclaration interprétative vouée à préciser la signification que cet État a voulu attribuer à sa déclaration d'acceptation de la compétence de la Cour pour les requêtes des individus et des ONG, précédemment formulée.

Une telle interprétation est en parfaite conformité avec les *Lignes directrices sur les réserves aux traités*, approuvées par la Commission du droit international des Nations Unies (CDI) en 2011 et contenues dans le *Guide de la pratique sur les réserves aux traités*. En particulier, le paragraphe 2 de la ligne directrice 1.5.3. prévoit qu'« [u]ne restriction ou condition figurant dans une déclaration par laquelle un État ou une organisation internationale accepte, en vertu d'une clause du traité, une obligation qui n'est pas imposée par d'autres dispositions du traité ne constitue pas une réserve ». Bien que n'ayant pas un caractère juridiquement obligatoire, cette indication ultérieure conduit à conclure que, à défaut de la terminologie utilisée, la République Unie de Tanzanie n'a pas formulé une réserve au sens du droit international.

Finalement, la formulation extrêmement large de l'acte de retrait et la totale absence de références ponctuelles en ce qui concerne, à la fois, les recours spécifiques ainsi que les dispositions de la Constitution tanzanienne prétendument violées, rendent impossible d'établir si, et dans quelle mesure, la Cour africaine a agi de façon à générer une réaction si extrême de la part de la République Unie de Tanzanie.

S'il apparait difficile d'identifier un fondement strictement juridique, certaines considérations peuvent, cependant, être formulées sur le plan politique. Comme il a été souligné par la doctrine,[49] la décision de la République Unie de Tanzanie de révoquer sa propre déclaration, selon l'article 34(6) du Protocole portant création de la Cour, pourrait être la conséquence du fait que cet État a comparu comme défendeur dans la plupart des affaires introduites par des individus et des ONG, tant déjà

49 Voir en ce sens, N De Silva 'Individual and NGO access to the African Court on Human and Peoples' Rights: the latest blow from Tanzania' (16 décembre 2019) *EJILTalk!* Disponible à www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/ (consulté le 26 novembre 2020).

réglées[50] qu'actuellement pendantes devant la Cour.[51] Par ailleurs, l'on ne saurait oublier que, durant ces dernières années, la République Unie de Tanzanie a fait l'objet d'une série de décisions défavorables adoptées par la Cour africaine, dont la plus récente concerne l'affaire *Ally Rajabu*,[52] qui a été étrangement rendue une semaine après la notification par la Tanzanie du retrait à l'UA, témoignant peut-être une tentative du Pays de dissuader la Cour de rendre son arrêt.

Dans cette affaire, un recours avait été introduit en 2015 par cinq ressortissants tanzaniens condamnés à la pendaison par la Cour suprême de Tanzanie continentale, en 2011, et par la Cour d'appel de Tanzanie, en 2013, pour avoir commis un homicide. En particulier, les requérants se plaignaient de la violation du droit au procès équitable pour des procédures qui ont eu lieu devant les Tribunaux nationaux (article 7 de la Charte africaine), mais également de la violation du droit à la vie, résultant de l'imposition obligatoire de la peine de mort en cas d'homicide prévue par la section 197 du Code pénal national (article 4 de la Charte africaine), et du respect de la dignité humaine (article 5 de la Charte africaine).[53]

Après avoir vérifié la satisfaction des conditions procédurales permettant l'accès à la Cour, celle-ci a examiné l'affaire sur le fond et a condamné la Tanzanie pour violation des articles 4 et 5 de la Charte africaine. Pour la Cour, l'imposition automatique de la peine de mort pour homicide est une mesure qui enlève au juge le pouvoir discrétionnaire de déterminer la peine et, en plus, que la condamnation à mort par pendaison aurait un caractère en soi dégradant. Outre l'imposition du paiement d'une indemnisation financière en faveur des demandeurs pour les dommages moraux subis, la Cour a également ordonné à l'État défendeur d'adopter une série de mesures. Ainsi, dans le délai d'un an à partir de la notification de la décision, la Tanzanie est tenue d'adopter toutes les mesures nécessaires pour éliminer l'imposition automatique de la peine de mort en cas d'homicide, rouvrir la procédure pénale à l'encontre des victimes, publier dans les trois mois de la décision et rendre accessible, pendant au moins un an, le texte de l'arrêt sur des sites *web* institutionnels

50 Selon les statistiques fournies par la Cour, mises à jour au 27 novembre 2020, la Tanzanie a été intimée dans 43 sur 94 cas conclus disponible sur https://en.african-court.org/index.php/cases#finalised-cases (consulté le 26 novembre 2020).

51 Selon les statistiques fournies par la Cour, mises à jour au 27 novembre 2020, la Tanzanie était partie dans 100 affaires sur les 202 pendantes devant elle. Voir le site https://en.african-court.org/index.php/cases#pending-cases (consulté le 26 novembre 2020).

52 Cour africaine, requête 007/2015, *Ally Rajabu & autres c République Unie de Tanzanie*, arrêt du 28 novembre 2019.

53 *Ally Rajabu c Tanzanie* (n 52) para 14.

de la magistrature tanzanienne et du Ministère des affaires juridiques et constitutionnelles et, enfin, faire un rapport sur l'état d'exécution de la décision tous les six mois, tant que la Cour estimera que la décision n'a pas été complètement exécutée.[54]

Il est intéressant de souligner que, dans le cas d'espèce, la Cour africaine, contrairement à ce qu'elle faisait très souvent, ne s'est pas bornée à vérifier la responsabilité de l'État défendeur pour violation des droits de l'homme, mais est allée plus loin en imposant l'adoption de mesures affectant la structure même de l'ordre juridique tanzanien et considérées comme nécessaires. Comme elle l'avait déjà fait dans sa décision de 2013 dans l'affaire *Tanganyika Law Society*,[55] l'organe juridictionnel régional africain a imposé à la Tanzanie des mesures générales à adopter afin de pallier ce qu'elle considère une insuffisance systémique de son ordre juridique, et relative en l'espèce à l'élimination de l'imposition automatique de la peine capitale en cas d'homicide. Si cela apparaît sans doute appréciable au regard des standards internationaux en matière de protection des droits fondamentaux, il est vraisemblable que la décision de la Cour africaine dans le cas *Ally Rajabu* ait été perçue par la Tanzanie comme une nouvelle ingérence dans des questions relevant de l'ordre interne. Ce qui l'a amenée à s'y opposer farouchement en retirant sa déclaration déposée sur le fondement de l'article 34(6) du Protocole portant création de la Cour. En ce sens, il n'est pas surprenant que, en dépit de l'écoulement du premier délai de six mois, la Cour africaine n'ait pas encore reçu de la part de la Tanzanie le rapport sur l'exécution de la décision au niveau national, ni aucune information concernant la réalisation de la réforme structurelle demandée dans la décision *Ally Rajabu*.

En l'état actuel, la Cour africaine ne s'est pas expressément prononcée sur la question du retrait de la déclaration tanzanienne. À la lumière de sa décision dans l'affaire *Ingabire Victoire Umuhoza*, il ne semble pas exister de raisons de croire que la Cour s'écartera de ce précédent. Dans une telle hypothèse, la déclaration de retrait devra être considérée comme valide et commencera à effet un an après la notification au Président de la

54 *Ally Rajabu c Tanzanie* (n 52) para 171.

55 Voir Cour africaine *Tanganyika Law Society* (n 45). Dans cette affaire, la Cour africaine avait demandé à l'État défendeur d'adopter des mesures constitutionnelles et législatives en matière de droits électoraux. Voir les commentaires de G Pascale 'Carta africana ed elettorato passivo : la prima sentenza di merito della Corte africana dei diritti dell'uomo e dei popoli' (2014) 8 *Diritti umani e diritto internazionale* 208-214 ; V Piergigli 'La Corte africana dei diritti dell'uomo e dei popoli giudica sulla violazione dei diritti di partecipazione politica e delle regole democratiche in Tanzania' (14 mars 2014) *Federalismi.it* 1-17.

Commission de l'UA. Elle n'aura, cependant, pas d'effet pour les affaires en cours, en application du principe général de la *perpetuatio iurisdictionis*.[56]

Le retrait de la déclaration d'acceptation de la compétence de la Cour africaine concernant les recours individuels effectué par la Tanzanie constitue, sans doute, un important revers pour la protection des droits fondamentaux de l'individu sur le continent africain, d'autant plus qu'il s'agit de l'État qui abrite le siège de la Cour. À l'occasion de l'installation de cet organe juridictionnel africain, la Tanzanie avait manifesté, bien que de façon théorique, son plein soutien à l'activité de la Cour en se déclarant prête à « putting [its] human rights record under close scrutiny »[57] et consciente que « to be known as the Justice and human rights capital of Africa, [Tanzania] must face up to this challenge ».[58] Quelques années après, il semblerait que la Tanzanie soit en train de s'éloigner de cette position.

D'ailleurs, au début de l'année 2020, deux autres États, le Bénin et la Côte d'Ivoire, ont décidé de mettre fin de façon unilatérale à la compétence de la Cour africaine pour les recours introduits contre eux par les individus et les ONG.

5 Le retrait de la déclaration du Bénin

Les modalités et la période de retrait par le Bénin de sa déclaration, déposées le 8 février 2016, apparaissent particulièrement ambiguës. Le texte de l'acte de retrait, disponible sur le site de la Cour africaine, a été signé par le ministre des affaires étrangères et de la coopération, M. Aurélien Agbénonci, en date du 24 mars 2020.[59] Un communiqué de presse du Ministre de la justice et de la législation, M. Joseph Djogbénou, datant du 28 avril 2020, peut aussi être consulté sur le site du Gouvernement béninois, dans lequel est citée une double notification de l'acte au Président de la Commission de l'UA, en date du 16 mars 2020.[60]

56 Voir n 41.

57 Voir les déclarations datant de 2012 du Ministre de la justice et des affaires constitutionnelles de la République Unie de Tanzanie de l'époque, Monsieur Mathias Chikawe, au journal local *The New Times* disponible sur www.newtimes.co.rw/section/read/59202 (consulté le 27 novembre 2020).

58 Déclaration du Ministre de la justice (n 57)

59 Voir le document disponible sur https://en.african-court.org/images/Declarations/retrait/Retrait%20du%20benin.pdf (consulté le 27 novembre 2020).

60 Voir le communiqué de presse disponible sur le site www.gouv.bj/actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/ (consulté le 27 novembre 2020).

Bien que comportant des formulations légèrement différentes, l'acte de retrait et le communiqué de presse font référence à un ensemble de motivations qui auraient déterminé le Bénin à retirer sa déclaration. Cet Etat se dit préoccupé par le fait que la Cour africaine prononce depuis quelques années des décisions dans des domaines ne relevant pas de son champ de compétence et souvent marquées par des incohérences. Ces décisions, engendrant de graves ingérences de la part de la Cour africaine dans les différents ordres nationaux, auraient également conduit la Tanzanie et le Rwanda à retirer leur déclaration.

Les justifications avancées par le Bénin cachent, de façon plus ou moins voilée, la référence à deux différentes séries d'ordonnances en indication de mesures provisoires de la Cour africaine qui ont provoqué une vive réaction de la part de cet Etat. L'accusation d'« incompétence » se réfère aux ordonnances de la Cour rendues dans les affaires *Ghaby Kodeih*[61] et *Ghaby Kodeih & Nabih Kodeih*,[62] la première ordonnance étant d'ailleurs mentionnée expressément à la fois dans l'acte de retrait et par le communiqué de presse. Au travers de ces ordonnances, l'organe juridictionnel panafricain aurait provoqué, selon le Bénin, un désordre au sein de la communauté entrepreneuriale, en particulier concernant les banques créancières, et aurait généré une incertitude juridique capable d'influencer négativement l'attractivité économique de l'État.

Ces ordonnances ont été adoptées par la Cour dans le cadre de deux procédures lancées par un entrepreneur dans le secteur hôtelier portant respectivement, sur l'opposition à une procédure d'exécution forcée entamée par une banque de crédit par la saisie et la vente successive à l'enchère d'un immeuble grevé d'une hypothèque de propriété d'une société dont le requérant était le seul actionnaire, et sur la démolition d'une structure construite de façon non conforme au permis de construire. À la suite de cela, le requérant a introduit un recours devant la Cour africaine en se plaignant, dans le premier cas, de la violation du droit de saisir les juridictions nationales compétentes (article 7(1)(a) de la Charte africaine), du droit d'être jugé dans un délai raisonnable par une juridiction impartiale (article 7(1)(d) de la Charte africaine) et du droit de propriété (article 14 de la Charte africaine). Dans la deuxième affaire, la plainte des requérants concernait la violation des principes du procès équitable (article 7 de la Charte africaine) et du droit de propriété (article 14 de la Charte africaine). En même temps, deux demandes en

61 Cour africaine, requête 006/2020, *Ghaby Kodeih c Bénin*, ordonnance portant mesures provisoires du 28 février 2020.

62 Cour africaine, requête 008/2020, *Ghaby Kodeih & Nabih Kodeih c Bénin*, ordonnance portant mesures provisoires du 28 février 2020.

indication de mesures conservatoires avaient été introduites et accueillies favorablement par la Cour africaine. Dans l'affaire *Ghaby Kodeih*, la Cour imposait la suspension de la procédure d'exécution, tout en décidant que la propriété de l'immeuble restait au requérant tant que la cause n'avait pas été tranchée sur le fond. Dans l'affaire *Ghaby Kodeih & Nabih Kodeih* la Cour ordonnait que l'hôtel, désormais construit, ne soit pas démoli dans l'attente de la décision sur le fond. Cependant, pour le Bénin, la Cour africaine se serait dans ce cas mêlée à des questions allant au-delà de son champ de compétence puisqu'il s'agissait de litiges concernant des opérateurs commerciaux, litiges qui auraient alors dus être traités devant la Cour d'appel de Cotonou et la Cour commune de justice et d'arbitrage de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA),[63] seules compétentes dans ces domaines.

Bien qu'elle n'ait pas été expressément mentionnée dans l'acte de retrait ni dans le communiqué de presse, l'accusation d'« ingérence » de la Cour africaine dans les affaires intérieures du Bénin semble également se référer à l'ordonnance portant mesures provisoires prononcée par la Cour africaine le 17 avril 2020 dans l'affaire *Sébastien Germain Ajavon*.[64] Celle-ci a été adoptée suite à un recours présenté le 29 novembre 2019 par le requérant, homme d'affaire et principal opposant politique au Président du Bénin, qui fut condamné à 20 ans de prison pour trafic international de stupéfiants. Selon le requérant, le procès devrait s'analyser un complot organisé de toutes pièces par les autorités gouvernementales contre lui dans le but de le discréditer et l'éliminer de la scène politique béninoise en vue des élections législatives prévues le 17 mai 2020 pour lesquelles son parti avait été exclu pour des raisons administratives.

M. Ajavon a saisi la Cour africaine sur le fondement de l'article 5(3) du Protocole en se plaignant de la violation d'une série de droits contenus

63 L'OHADA est une organisation internationale créée par le Traité relatif à l'harmonisation du droit des affaires en Afrique, souscrit à Port Louis le 17 octobre 1993 et successivement modifié par un traité de révision en 2008. Actuellement, l'organisation se compose de 17 États membres (Bénin, Burkina Faso, Cameroun, Comores, Congo-Brazzaville, Côte d'Ivoire, Gabon, Guinée, Guinée-Bissau, Guinée Équatoriale, Mali, Niger, République Centrafricaine, République Démocratique du Congo, Sénégal, Tchad et Togo). L'OHADA a été créée avec l'objectif d'harmoniser progressivement ce que l'on nomme 'droit des affaires' entre les États membres afin de garantir un environnement juridique favorable aux initiatives commerciales par le biais de l'amélioration des dispositions commerciales et le renforcement du système judiciaire, dont elle est garante. En doctrine voir A Polo 'L'OHADA: histoire, objectifs, structures' in P Fouchard (dir) *L'OHADA et les perspectives de l'arbitrage en Afrique* (2000) 9-29.

64 Voir Cour africaine, requête 062/2019, *Sébastien Germain Ajavon c Bénin*, ordonnance portant mesures provisoires du 17 avril 2020.

dans différents instruments internationaux.[65] Par ailleurs, le 9 janvier 2020, celui-ci a adressé à la Cour africaine une demande en indication de mesures provisoires, craignant que l'absence de participation aux élections lui cause un préjudice irréparable. La Cour africaine s'est prononcée en faveur du requérant, en imposant au Bénin de reporter les élections dans l'attente que la Cour examine le recours présenté par M. Ajavon et de lui rendre compte dans un délai d'un mois les mesures imposées. Celles-ci n'ont cependant pas été respectées. Au contraire, selon certains journaux, les élections ont eu lieu à la date originairement prévue, sans la participation des principaux partis d'opposition et sans même que le Bénin n'en rende compte à la Cour africaine.

La résistance opposée par le Bénin est allée jusqu'à une menace de dissolution de la Cour africaine. Le communiqué de presse, rendant public le retrait de la déclaration d'acceptation de la compétence de la Cour pour les recours individuels, fait mention de la volonté du Président béninois d'inviter ses homologues africains, lors de la prochaine Conférence des Chefs d'États et des Gouvernement de l'UA, à reformer la Cour, faisant implicitement référence à la future Cour africaine de justice et des droits de l'homme.[66]

65 Dans le cas spécifique, le requérant se plaignait de la violation du droit à l'égalité devant la loi (art 3 de la Charte africaine), à la vie et à l'intégrité physique et morale (art 4 de la Charte africaine), au respect de la dignité humaine (art 5 de la Charte africaine), à la liberté et à la sûreté personnelle (art 6 de la Charte africaine), à la défense en milieu judiciaire (art 7(1)(c) de la Charte africaine), à constituer librement des associations (art 10 de la Charte africaine), de réunion (art 11 de la Charte africaine), au libre accès aux fonctions publiques (art 13 de la Charte africaine), à travailler dans des conditions égales et satisfaisantes (art 15 de la Charte africaine) ; il se plaignait aussi de la violation de l'indépendance des tribunaux (art 26 de la Charte africaine), des principes relatifs à l'État de droit (art 2(2) de la Charte africaine pour la démocratie, les élections et le bon gouvernement), de la liberté d'accéder au pouvoir étatique et à son exercice (art 3(2) de la Charte africaine pour la démocratie, les élections et le bon gouvernement), des principes relatifs à la promotion de la démocratie et des droits de l'homme (art 4(1) de la Charte africaine pour la démocratie, les élections et le bon gouvernement), des règles régissant la modification et/ou la révision des Constitutions (art 10 de la Charte africaine pour la démocratie, les élections et le bon gouvernement), des principes qui qualifient le recours à des modifications constitutionnelles et législatives instrumentales à l'inverse du critère de l'alternance démocratique telle que des moyens illégitimes pour maintenir le pouvoir pouvant être sanctionnés par l'UA (art 23 de la Charte africaine pour la démocratie, les élections et le bon gouvernement), des principes relatifs au bon gouvernement politique, avec particulière référence à l'État de droit (art 32(8) de la Charte africaine pour la démocratie, les élections et le bon gouvernement), du droit de voter et d'être élu au cours des élections (art 25 du Pacte international relatif aux droits civils et politiques) et, enfin, des règles procédurales de l'art 22 du Pacte international relatif aux droits économiques, sociaux et culturels.

66 Voir n 2.

Comme pour la Tanzanie, la Cour africaine ne s'est pas encore prononcée de façon expresse sur le retrait unilatéral du Bénin. Cela se justifie sans doute par le fait que les règles posées dans le cas rwandais sont applicables *mutatis mutandis*.

6 Le retrait de la déclaration de la Côte d'Ivoire

Chronologiquement, la Côte d'Ivoire est le dernier État à avoir mis unilatéralement fin à la compétence de la Cour africaine pour les recours introduits par des individus et des ONG. L'acte de retrait signé par le Premier Ministre ivoirien de l'époque, M. Amadou Coulibaly, notifié au Président de la Commission de l'UA le 28 avril 2020, est disponible sur le site de la Cour.[67] Le document ne fournit pas d'indications concernant les motivations de la décision de retrait. Les informations à ce propos sont contenues dans un communiqué de presse rendu le jour suivant par le Ministre de la communication et des médias, M. Sidi Tiémoko Touré.[68] Selon ce document, la décision aurait été prise à la suite de « graves et intolérables agissements » consistant dans des atteintes présumées à la souveraineté nationale et au fonctionnement correct de l'ordre judiciaire, causant ainsi un grave préjudice à la stabilité de l'ordre juridique national.[69]

La date de la déclaration de retrait laisse supposer que la décision de retrait serait une réaction à l'ordonnance portant mesures provisoires adoptée par la Cour africaine le 22 avril 2020 dans l'affaire *Guillaume Kigbafori Soro*.[70] Cette affaire est relative à un recours de 20 citoyens ivoiriens, dont la plupart étaient des personnalités politiques bien connues, accusés de détournement de fonds publics, vol de biens publics et conspiration contre l'autorité étatique en décembre 2019. Parmi ces hommes politiques, M. Guillaume Soro, ex Premier Ministre et Président de l'Assemblée nationale de Côte d'Ivoire, qui avait récemment annoncé sa candidature aux élections présidentielles prévues pour le mois d'octobre 2020 et qui planifiait à cet effet son retour en Côte d'Ivoire afin de lancer sa campagne électorale. À la suite de ces accusations, 19 candidats ont été

67 Document disponible sur https://en.african-court.org/images/Declarations/retrait/retrait%20withdrawal%20Cote%20d'ivoire.pdf (consulté le 28 novembre 2020).

68 Communiqué de presse disponible sur www.gouv.ci/_actualite-article.php?recordID=11086 (consulté le 28 novembre 2020).

69 Communiqué de presse (n 68).

70 Cour africaine, requête 012/2020, *Guillaume Kigbafori Soro & autres c Côte d'Ivoire*, ordonnance portant mesures provisoires du 22 avril 2020. Voir l'analyse de T Davi & E Amani 'Another one bites the dust: Côte d'Ivoire to end individual and NGO access to the African court' (19 mai 2020) *EJILTalk!* www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/ (consulté le 28 novembre 2020).

arrêtés et mis en détention provisoire. Quant à M. Soro, un mandat d'arrêt international a été émis à son encontre, l'empêchant de retourner dans son pays sous peine d'arrestation. Les requérants ont donc saisi la Cour africaine en se plaignant de la violation du droit à un procès équitable (article 7 de la Charte africaine), de la liberté de circulation (article 12 de la Charte africaine), du droit à la protection de la famille (article 18 de la Charte africaine et article 23 du Pacte international relatif aux droits civils et politiques) et du principe de l'égalité devant la loi (article 14 du Pacte international relatif aux droits civils et politiques). Ils formulaient également une demande en indication de mesures provisoires afin de suspendre l'exécution du mandat à l'encontre de M. Soro, obtenir la libération des autres requérants et leur permettre de retrouver le plein exercice des droits civils et politiques dans l'attente du jugement sur le fond. Prenant en compte la situation particulièrement grave et urgente, notamment le cas de Guillaume Soro qui souhaitait se présenter comme candidat aux élections présidentielles, la Cour africaine a intégralement accueilli les demandes des requérants dans l'ordonnance du 22 avril 2020.

Quelques jours plus tard, la Côte d'Ivoire a procédé au retrait de la déclaration faite en vertu de l'article 34(6) du Protocole portant création de la Cour. Comme indiqué par plusieurs organes de presse,[71] la Cour de justice d'Abidjan a parallèlemnt condamné M. Soro à 20 ans de prison pour détournement de fonds et blanchiment d'argent, ce qui a eu pour conséquence de l'exclure des élections présidentielles. Malgré la condamnation par la justice ivoirienne, le 6 septembre les avocats de M. Soro ont déposé trois requêtes auprès du Conseil constitutionnel de la Côte d'Ivoire : une d'inconstitutionnalité du scrutin ; une défendant l'éligibilité de leur client ; une mettant en cause l'éligibilité du Président Alassane Ouattara, qui briguait un troisième mandat bien que la Constitution ivoirienne limite à deux au maximum le nombre de mandats.[72] Le 14

71 Voir notamment 'Guillaume Soro condamné à 20 ans de prison par un tribunal ivoirien pour détournement de fonds' (28 avril 2020) *VOA Afrique* www.voaafrique.com/a/cote-d-ivoire-justice-guillaume-soro-condamn%C3%A9-%C3%A0-20-ans-de-prison-par-un-tribunal-ivoirien-pour-d%C3%A9tournement-de-fonds-/5395667.html ; 'Côte d'Ivoire : Guillaume Soro condamné à vingt ans de prison pour 'recel de détournement de deniers publics'' (28 avril 2020) *Le monde* www.lemonde.fr/afrique/article/2020/04/28/cote-d-ivoire-soro-condamne-a-20-ans-de-prison-pour-recel-de-detournement-de-deniers-publics_6038046_3212.html ; 'Côte-d'Ivoire : Guillaume Soro, confiné à Paris, condamné à Abidjan' (29 avril 2020) *Libération* www.liberation.fr/planete/2020/04/29/cote-d-ivoire-guillaume-soro-confine-a-paris-condamne-a-abidjan_1786796 (tous consultés le 28 novembre 2020).

72 Voir 'Présidentielle en Côte d'Ivoire: le clan Soro a déposé trois requêtes auprès du Conseil constitutionnel' (12 septembre 2020) *Radio France internationale* www.rfi.fr/fr/afrique/20200912-pr%C3%A9sidentielle-en-c%C3%B4te-d-ivoire-le-clan-soro-trois-requ%C3%AAtes-aupr%C3%A8s-conseil-constitu (consulté le 28 novembre 2020).

septembre le Conseil Constitutionnel a sans surprise jugé irrecevable la candidature de M. Soro et approuvé cependant celle de M. Ouattara,[73] ensuite proclamé vainqueur de la présidentielle du 31 octobre.[74] Le lendemain, la Cour africaine a dû prendre une nouvelle ordonnance pour exiger le respect de sa première ordonnance et le sursis à exécution de tous les actes pris à l'encontre de M. Soro subséquemment à l'ordonnance du 22 avril 2020.[75]

Tout comme dans les cas tanzaniens et béninois, la Cour africaine ne s'est pas exprimée au sujet du retrait unilatéral. Cependant, rien ne justifie qu'elle adopte une position différente de celle prise au sujet du retrait rwandais.

7 La Cour africaine des droits de l'homme et des peuples est-elle en danger d'extinction? Implications juridiques

La résistance opposée par certains États africains à l'œuvre des tribunaux internationaux ou sous régionaux n'est pas un phénomène nouveau. En ce qui concerne ces dernières, particulièrement pertinent est le cas des organes juridictionnels prévus dans le cadre des différentes communautés économiques subrégionales, créées au sein de la Communauté économique africaine. Tout en ayant comme finalité principale de contribuer à la réalisation de la coopération et de l'intégration économique entre les États membres des communautés économiques subrégionales, ces organes se sont souvent arrogé des compétences importantes en matière de droits de l'homme.[76] Ces compétences ont commencé par une initiative judiciaire

73 Conseil Constitutionnel, décision CI-2020-ep-009/14-09/cc/sg du 14 septembre 2020 portant publication de la liste définitive des candidats à l'élection du Président de la République du 31 octobre 2020, www.conseil-constitutionnel.ci/archives-et-decisions/decision-ndeg-ci-2020-ep-00914-09ccsg-du-14-septembre-2020-portant-publication (consulté le 28 novembre 2020).

74 Voir 'En Côte d'Ivoire, le Conseil constitutionnel valide la réélection d'Alassane Ouattara pour un 3e mandat' (9 novembre 2020) *Le monde* www.lemonde.fr/afrique/article/2020/11/09/en-cote-d-ivoire-le-conseil-constitutionnel-valide-la-reelection-de-ouattara-pour-un-3e-mandat_6059116_3212.html ; 'Côte d'Ivoire : la réélection d'Alassane Ouattara confirmée par le Conseil constitutionnel' (9 novembre 2020) *France24* www.france24.com/fr/afrique/20201109-c%C3%B4te-d-ivoire-la-r%C3%A9%C3%A9lection-d-alassane-ouattara-confirm%C3%A9e-par-le-conseil-constitutionnel (tous consultés le 28 novembre 2020).

75 Cour africaine, requête 012/2020, *Guillaume Kigbafori Soro & autres c Côte d'Ivoire,* ordonnance portant mesures provisoires du 15 septembre 2020.

76 ES Nwauche 'Regional economic communities and human rights in West Africa and the African Arabic countries' in A Bösl & J Diescho (dir) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 319-347; F Viljoen 'The realization of human rights in Africa through sub-regional institutions' (1999) 7 *African Yearbook of*

puis, comme on le verra ci-après, elles ont été confirmées dans certains cas par des dispositions conventionnelles. Dans d'autres cas, la compétence de ces juridictions reste encore fondée uniquement sur l'initiative judiciaire. Ces organes juridictionnels se sont par conséquent confrontés à plusieurs occasions à la difficulté de choisir de garantir une protection concrète des droits fondamentaux dans le continent africain tout en courant le risque que leur activicté soit exposée à des résistances de la part des Etats soumis à leur juridiction à la suite de décisions défavorables fallacieusement qualifiées d'ingérences au sein des ordres juridiques nationaux.

Par exemple, la Cour de Justice de la CEDEAO s'est retrouvée dans cette situation après la décision rendue dans l'affaire *Chief Ebrimah Manneh*.[77] La Gambie, déclarée responsable d'actes de tortures envers un journaliste, n'a pas seulement refusé d'exécuter la décision, mais a également proposé de modifier le Protocole additionnel de la CEDEAO afin de limiter la compétence de la Cour en matière de droits de l'homme et d'introduire la condition de l'épuisement préalable des recours internes. Cette proposition s'est toutefois confrontée à l'opposition de la part du Conseil des Ministres de la justice de la CEDEAO.[78] De la même manière, la Cour de Justice de la CAE a subi une opposition du Kenya après la décision prononcée dans l'affaire *Prof Peter Anyang' Nyong'o*.[79] En effet, à la suite de l'adoption d'une mesure provisoire qui empêchait la CAE de reconnaître comme légitimement élus les membres choisis par le Kenya pour le représenter lors de l'Assemblée législative de la CAE, l'État a menacé de retirer ses propres juges au sein de la Cour de Justice afin de paralyser son activité avant le prononcé de la décision sur le fond. Le Kenya a donc réussi à convaincre les autres États membres de modifier le Traité instituant la CAE. Cela se traduit par une limitation de la juridiction de la Cour et par l'introduction d'un un délai de deux mois reconnu aux personnes privées pour contester les décisions des institutions et des États membres. Cependant, l'État n'a pas réussi à empêcher la Cour de prononcer la décision qui a définitivement reconnu l'irrégularité de la procédure d'élection des membres kenyans à l'Assemblée législative de la CAE.

International Law 185-214.

77 Cour de Justice de la CEDEAO, requête ECW/CCJ/APP/04/07, *Chief Ebrimah Manneh c Gambie*, arrêt du 5 juin 2008.

78 Justice ministers endorse experts' decision on ECOWAS juridiction (14 décembre 2009) disponible sur www.ifex.org/west_africa/2009/10/14/gambian_proposal_defeated (consulté le 28 novembre 2020).

79 Cour de Justice de la CAE, requête 1/2006, *Prof Peter Anyang' Nyong'o & autres c Kenya*, arrêt du 30 mars 2007.

Au contraire, en ce qui concerne le Tribunal créé dans le cadre de la SADC, les évènements suivant la décision dans l'affaire *Mike Campbell*[80] l'ont privé de son autorité dans une large mesure. Le refus du Zimbabwe d'exécuter la décision du Tribunal a eu pour conséquence l'examen de la même affaire trois fois de suite par le Tribunal. Celui-ci a chaque fois saisi le Sommet des Chefs d'État afin qu'il prenne les mesures appropriées pour l'exécution de la décision conformément à l'article 32(2) du Protocole relatif au Tribunal et aux règles de procédures adopté le 7 août 2000. L'opposition du Zimbabwe à la décision et sa détermination à ne pas s'y conformer ont conduit le Sommet à décider de suspendre l'activité du Tribunal et à annoncer, en 2012, l'intention de vouloir modifier le mandat du Tribunal afin d'en faire un organe dédié exclusivement à la résolution de litiges entre États et à l'interprétation des actes normatifs de l'organisation.

Dans le cas de la Cour africaine aussi, à la lumière du *timing*, il est possible d'imaginer que les décisions du Rwanda, de la République Unie de Tanzanie, du Bénin et de la Côte d'Ivoire de mettre fin de façon unilatérale à sa compétence en matière de recours introduits par les individus et par les ONG, en ce qui les concerne, constituent une réaction aux décisions défavorables adoptées envers ces États. Toutefois, en l'état actuel, il n'est pas possible d'identifier une volonté explicite des États de remettre en cause l'existence de la Cour.[81] la pratique examinée pourrait plutôt représenter la manifestation d'une série de critiques systémiques adressées à la Cour.[82] Le Rwanda et, de manière plus nuancée, la Tanzanie, paraissent accuser l'organe juridictionnel africain de s'ingérer dans des questions strictement internes, comme la participation des partis politiques d'opposition à la vie publique et l'application automatique de la peine de mort en cas d'homicide. Le Bénin et la Côte d'Ivoire semblent, en revanche, retenir la Cour africaine « coupable » de menacer le principe de souverainété étatique par une excessive « générosité » dans l'accueil des mesures provisoires sollicitées par les requérants ; par ailleurs souvent

80 Tribunal SADC, requête 2/2007, *Mike Campbell (Pvt) Ltd & autres c Zimbabwe*, arrêt du 28 novembre 2008. A ce sujet voir l'analyse de Mussi (n 19).

81 En ce sens, voir en particulier l'affirmation de la Côte d'Ivoire à la fois dans l'acte de retrait ('[…] conformément à ses engagements internationaux, la Côte d'Ivoire continue de demeurer partie à la Charte africaine des droits de l'homme et des peuples ainsi qu'à son Protocole additionnel instituant la Cour africaine des droits de l'homme et des peuples') et dans le communiqué de presse ('[c]ette décision est prise sans préjudice de l'engagement du gouvernement à demeurer partie à la Charte africaine des droits de l'homme et des peuples, ainsi qu'à son Protocole additionnel relatif à la Cour africaine des droits de l'homme et des peuples').

82 En ce sens SH Adjolohoun 'A crisis of design and judicial practice? curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 33.

basées sur des ordonnances caractérisées par des incongruités et un manque de rigueur méthodologique,[83] surtout au moment de la vérification de sa compétence et des questions de recevabilité.[84]

Même si le but ultime des États africains qui ont retiré leur déclaration au titre de l'article 34(6) du Protocole portant création de la Cour africaine n'était pas de priver la Cour de ses fonctions, l'on ne saurait ignorer le fait que ces retraits pèsent, de fait, sur la juridiction de la Cour, ainsi que, indirectement, sur le développement du système africain de protection des droits de l'homme dans son ensemble.[85] Au vu du caractère facultatif de la déclaration, les décisions du Rwanda, de la Tanzanie, du Bénin et de la Côte d'Ivoire représentent un dangereux précédent. Et ce, aussi bien par rapport aux six États (restants) qui ont à ce jour formulé la déclaration propre de l'article 34(6) du Protocole portant création de la Cour, qu'aux autres Etats parties n'ayant pas encore effectué ladite déclaration. En ce qui concerne les premiers, si le (Burkina Faso, la Gambie, la Guinée Bissau,

83 Il est important de souligner qu'une telle critique a été exprimée par certains juges de la Cour africaine elle-même. La contribution du juge algérien F Ouguergouz est particulièrement significative en ce sens. Il a en effet, au cours de ses mandats, formulé au total seize opinions séparées dans lesquelles il a clarifié ou approfondi l'analyse de différentes questions qui n'étaient pas, selon lui, traitées par la Cour de manière adéquate (voir par exemple l'opinion séparée du 15 décembre 2009 dans l'affaire *Michelot Yogogombaye c Sénégal*, en référence à la juridiction *ratione personae* de la Cour). Pour une analyse doctrinale, A Koagne Zouapet 'Victim of its commitment … you, passerby, a tear to the proclaimed virtue : should the epitaph of the African Court on Human and Peoples' Rights be prepared?' (5 mai 2020) *EJILTalk!* www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/ (consulté le 28 novembre 2020) ; Rachovitsa (n 3) 289 ; SH Adjolohoun 'Les grands silences jurisprudentiels de la Cour africaine des droits de l'homme et des peuples' (2018) 2 *Annuaire africain des droits de l'homme* 31 ; L Burgorgue-Larsen 'Decompartmentalization: the key technique for interpreting regional human rights treaties' (2018) 16 *International Journal of Constitutional Law* 208-210 ; R Murray 'A comparison between the African and European Courts of human rights' (2002) 2 *African Human Rights Law Journal* 220.

84 Les ordonnances rendues dans les cas *Ajavon* et *Soro*, soulèvent en fait certaines critiques tout d'abord au niveau formel, en référence à la subsistance alléguée à première vue de la juridiction de la Cour africaine et à la possibilité, de la part des États convenus, d'objecter une exception d'irrecevabilité. Ensuite, au niveau substantiel, en relation à l'irréparabilité du dommage qu'elles visent à éviter. En ce qui concerne le premier point, voir S Mwin Sôg Mè Dabiré 'Les ordonnances de la Cour africaine des droits de l'homme et des peuples en indication de mesures provisoires dans les affaires *Sébastien Ajavon c Bénin* et *Guillaume Soro et autres c Côte d'Ivoire* : souplesse ou aventure?' (2020) 4 *African Human Rights Yearbook* 476-496. Plus en général, voir G Pascale 'Provisional measures under the African human rights system' in FM Palombino et al (dir) *Provisional measures issued by international courts and tribunals* (2021) 253-275.

85 En ce sens, voir N De Silva & M Plagis 'A Court in crisis: African states' increasing resistance to Africa's Human Rights Court' (19 mai 2020) *Opinio Juris*, https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/ (consulté le 29 novembre 2020).

le Ghana, le Malawi, le Mali, le Niger et la Tunisie) devaient décider de suivre leur exemple, l'on parviendrait, dans les faits, à la quasi-paralysie de la Cour africaine dans la mesure où elle n'a jusqu'à présent jamais été saisie de recours interétatiques[86] et que les affaires de saisine par la Commission africaine sont très peu nombreuses. S'agissant du second groupe d'Etats, la pratique examinée court le risque d'augmenter la défiance envers la Cour et dissuader ceux-ci d'effectuer la déclaration d'acceptation de la compétence pour les recours introduits par des individus et des ONG.

Enfin, ces retraits ont eu comme effet de réduire considérablement la charge de travail – pourtant déjà réduite – de la Cour,[87] avec le risque que le développement de sa jurisprudence connaisse un coup d'arrêt et que son autorité, qui est garante de la protection des droits fondamentaux sur le continent africain, soit mise en doute.[88] Cela représenterait un incontestable pas en arrière pour une Cour relativement « jeune » qui, en raison de son activité limitée, a souvent eu recours lors de ses décisions à des emprunts jurisprudentiels d'autres organismes de protection des droits de l'homme – en premier lieu, la Cour européenne des droits de l'homme – et qui a été accusée pour cette raison de ne pas valoriser de façon adéquate les particularités du système africain.[89]

Outre les implications juridiques produites en relation à la Cour africaine et à la réduction de son activité, ces retraits conduisent également à s'interroger sur les voies de recours à la disposition des victimes alléguées de violations des droits de l'homme perpétrées par le Rwanda, la Tanzanie, le Benin et la Côte d'Ivoire qui ne pourraient plus se plaindre des violations de leurs propres droits fondamentaux directement devant la Cour.

Comme cela a été dit dans l'introduction, le système africain de protection des droits de l'homme prévoit, à côté d'un mécanisme juridictionnel de garantie, c'est-à-dire la Cour africaine des droits de l'homme et des peuples un mécanisme quasi-juridictionnel, à savoir

86 Il vaut la peine de souligner que rares sont les recours interétatiques présentés aux cours régionales de protection des droits de l'homme et que celles-ci connaissent donc essentiellement les recours individuels. Sur ce point, lire L Henkin 'Inter-state responsibility for compliance with human rights obligations' in L Chand Vohrah et al (dirs) *Man's inhumanity to man. Essays on international law in honour of Antonio Cassese* (2003) 383-399.

87 Selon les statistiques fournies par la Cour (mises à jour au 28 novembre 2020), sur 201 affaires actuellement pendantes, 164 concernaient le Rwanda, la République Unie de Tanzanie, le Bénin et la Côte d'Ivoire. Voir les données disponibles sur le site https://en.african-court.org/index.php/cases#pending-cases.

88 Voir De Silva (n 49).

89 Voir Koagne Zouapet (n 83).

la Commission africaine des droits de l'homme et des peuples. Parmi les fonctions attribuées à cette dernière, en matière de vérification des violations des droits de l'homme commis par les Etats parties à la Charte africaine, figure une fonction de réception et d'examen des communications pouvant être présentées par des États (articles 48 et 49 de la Charte africaine), mais aussi par d'autres sujets (article 55 de la Charte africaine), c'est à dire des individus et des ONG (article 115 du Règlement intérieur de la Commission).[90] Par ailleurs, l'article 5(1)(a) du Protocole portant création de la Cour autorise la Commission africaine à saisir la Cour au contentieux, bien qu'à la lumière de l'article 130 du Règlement de procédure de la Commission une telle prérogative doive être exercée avant que la Commission ne se soit prononcée sur la recevabilité de la communication qui lui a été présentée. Ceci, à condition que l'État défendeur ait ratifié le Protocole relatif à la Cour africaine et que l'auteur de la communication donne son consentement au renvoi. Quand les circonstances décrites ci-dessus sont remplies, grâce au rôle de « filtre » exercé par la Commission africaine, la Cour africaine pourrait donc être compétent pour connaitre les violations des droits de l'homme reconnues dans des communications et présentées à l'origine à la Commission par des requérants qui n'auraient pas pu saisir directement la Cour.

A la lumière de ces considérations, il est possible d'affirmer que, à partir du jour où le retrait des déclarations unilatérales d'acceptation de la compétence de la Cour africaine par par le Bénin et par la Côte d'Ivoire, commencera à produire ses effets, les individus qui se considéreraient victimes de violations des droits fondamentaux perpétrées par ces États doivent se tourner vers la Commission en supposant que celle-ci, avant de se prononcer sur la recevabilité des communications, saisisse la Cour. C'est déjà le cas pour la République Unie de Tanzanie, depuis le 22 novembre 2020, soit une année après la notification au Président de la Commission de l'UA de son acte de retrait. Enfin, depuis le 2 juin 2020, date à laquelle le nouveau Règlement de procédure de la Com-mission est entré en vigueur, en vertu de son article 145, la même voie de recours peut être intentée contre le Rwanda, lequel avait dès le 29 février 2016 notifié au Président de la Commission de l'UA l'acte de retrait de la déclaration rendue ex article 34(6) du Protocole portant création de la Cour.[91]Cependant, l'on

90 Article 115(1) du Règlement intérieur de la Commission : '[u]ne communication soumise en vertu de l'art 55 de la Charte africaine peut être adressée au Président de la Commission par toute personne physique ou morale, par l'intermédiaire de son Secrétaire'.

91 À la lumière de ce que prévoient les dispositions combinées des articles 5(1)(a) du Protocole sur la Cour africaine et 118(3) du Règlement de la Commission africaine adopté en 2010, dans le laps de temps écoulé entre le 1 mars 2017 – jour où le retrait de la déclaration unilatérale d'acceptation de la compétence de la Cour africaine pour

ne pourrait ignorer qu'à ce jour la Commission africaine a soumis à la Cour un nombre extrêmement limité d'affaires, considérées comme étant d'importance particulière.[92] De plus, là où la Commission devrait décider de ne pas saisir la Cour africaine, l'examen des communications individuelles présentées à la Commission se conclurait par la présentation d'un rapport adressé à l'État intéressé, les requérants courant le risque de ne pas voir concrètement mises en œuvre les recommandations adressées à l'État, y compris celles portant sur les éventuelles réparation, eu égard au caractère non contraignant des recommandations de la Commission.[93]

En parallèle, il est nécessaire de souligner que la protection juridictionnelle des droits fondamentaux dans les quatre États africains qui ont jusque-là retiré leur déclaration pourra être également assurée au niveau subrégional dans le cadre des différentes communautés économiques subrégionales par les organes juridictionnels mis en place lorsqu'ils exercent leurs attributions en matière des droits de l'homme.

En ce qui concerne le Rwanda et la Tanzanie, il convient de préciser que ces États sont membres de la CAE et, qu'en tant que tels, ils sont soumis à la juridiction de la Cour de Justice instituée en son sein.[94] Bien qu'aucun instrument juridique n'ait attribué à cette Cour une compétence spécifique en matière de protection des droits de l'homme,[95] celle-ci a

les recours individuels précédemment déposé par le Rwanda a commencé à produire ses effets – et le 2 juin 2020 – date d'entrée en vigueur du nouveau Règlement de la Commission – ceux qui entendaient assigner le Rwanda en justice pour dénoncer des violations des droits humains pouvaient s'adresser à la Commission a fin de la pousser, lorsqu'elle constatait une grave et importante violation des droits fondamentaux au sens indiqué par l'article 58 de la Charte africaine, à saisir la Cour.

92 Selon les données disponibles sur le site internet de la Cour, la Commission n'a introduit que trois recours devant la Cour : le premier relatif au cas *Grande Jamahiriya arabe libyenne populaire et socialiste*, qui s'est conclu en mars 2013 par l'effacement du recours devant la Cour à la lumière de l'évolution de la situation politique en Lybie; le deuxième à propos du cas de la *Forêt de Mau*, s'étant conclu par une décision sur le fond rendue par la Cour en mai 2017; le troisième dans le cas *Saïf al-Islam Gheddafi*, conclu, lui aussi, par une décision sur le fond rendue en juin 2016. Voir les données disponibles sur le site https://en.african-court.org/index.php/cases/2016-10-17-16-18-21 (consulté le 29 novembre 2020).

93 L'article 59 de la Charte africaine prévoit que toutes les mesures adoptées par la Commission aient un caractère confidentiel tant que la Conférence des Chefs d'États et de Gouvernement de l'UA n'en décide pas autrement.

94 L'institution d'une Cour de Justice dans le cadre de la CAE est prévue par l'art 9(1)(e) du Traité fondateur de 1999. Conformément à l'art 30, les individus peuvent saisir la Cour d'un recours en illégalité contre une loi, une directive, une décision ou initiative d'une institution de la Communauté ou d'un État partenaire.

95 Comme prévu par l'art 27(2) du Traité instituant la CAE, les États membres ont commencé une procédure de négociation en vue de l'adoption d'un Protocole spécifique immédiatement après l'entrée en vigueur du traité fondateur. La procédure

déclaré qu'il ne lui est pas interdit de connaître de la résolution des litiges « même relatifs » à la protection des droits fondamentaux[96] et, dans les faits, elle a prononcé des décisions dans lesquelles a été mise en cause la responsabilité des États intimés pour ces violations.[97] Ces considérations conduisent à voir dans la Cour de Justice de la CAE une voie de recours supplémentaire pour les individus qui qui se plaindraient de violation de leur droits fondamentaux par le Rwanda ou la Tanzanie et qui ne peuvent désormais plus avoir recours directement à la Cour africaine.

Des considérations analogues analogues, bien que concernant un organe juridictionnel créé dans le cadre d'une autre communauté économique régionale, peuvent être formulées en ce qui concerne le Bénin et la Côte d'Ivoire. Ces États sont, en effet, membres de la CEDEAO et sont par conséquent soumis à la juridiction de la Cour de Justice instituée en son sein.[98] Bien que la principale activité de la Cour de Justice de la CEDEAO consiste à assurer le respect du droit et des principes d'équité dans l'application du traité fondateur dont le domaine d'application originaire concerne l'intégration économique, celle-ci a mis, depuis son entrée réelle en fonction, la protection des droits de l'homme au centre de ses préoccupations conformément aux articles 2(1)(a), 4(g) et 56(2) du Traité de la CEDEAO. Cette compétence a été expressément consacrée par le Protocole de 2005. À ce jour, la Cour de Justice de la CEDEAO représente, en effet, le seul organe juridictionnel subrégional africain qui détienne une compétence en matière de protection des droits fondamentaux conventionnellement prévue et a produit la jurisprudence la plus abondante et d'une certaine importance.[99] Par ailleurs, sur le plan

de négociation a cependant subi un coup d'arrêt en 2007 et a récemment repris, mais sans avancées significatives. Sur ce point, voir J Gathii 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative and International Law* 268-271.

96 Cour de Justice de la CAE, requête 01/2007, *James Katabazi & 21 autres c Secrétaire général de la Communauté & Ouganda*, arrêt du 1 novembre 2007, section sur la recevabilité.

97 Voir par exemple l'arrêt rendu le 1 décembre 2011 dans l'affaire *Plaxeda Rugumba c Secretary General of the East African Community & Attorney General of Rwanda*, requête 08/2010.

98 L'institution d'une Cour de Justice dans le cadre de la CEDEAO est prévue par l'art 15 du Traité fondateur dans sa version rédigée en 1993, vue l'absence de prévision de celle-ci dans le texte originaire de 1975. Selon l'art 15(2), a été adopté le 6 juillet 1991 à Abuja le Protocole sur le statut, la composition, les pouvoirs et la procédure de la Cour, qui est entré en vigueur le 5 novembre 1996. Ce Protocole a été successivement modifié par un Protocole supplémentaire adopté en 2005, qui a formellement étendu la compétence de la Cour de Justice de la CEDEAO au domaine de la protection internationale des droits de l'homme.

99 Voir par exemple les deux arrêt rendus le 27 octobre 2008 dans l'affaire *Hadijatou Mani Korau c Niger*, requête ECW/CCJ/JUD/06/08, qui constitue l'un des premiers cas relatifs à la lutte contre l'esclavage conclu avec succès au niveau international, et le

de la procédure, il est important de rappeler que la Cour de Justice de la CEDEAO peut être saisie directement par les individus, sans qu'ils aient à remplir la condition de l'épuisement préalable des voies de recours internes, qui est pourtant une condition d'admissibilité traditionnelle des requêtes en matière de droits de l'homme devant les organes internationaux juridictionnels ou quasi-juridictionnels. Finalement, en ne fondant pas ses compétences spécifiques dans ce domaine sur un document proclamant les droits garantis, la Cour peut connaitre des violations alléguées de tout instrument de protection des droits fondamentaux, quel qu'il soit et pourvu qu'il soit contraignant pour l'État intimé. Ces circonstances conduisent à considérer la saisine de la Cour de Justice de la CEDEAO comme une alternative valable – en sus du recours possible à la Commission africaine – pour les individus qui se considéreraient victimes de violations des droits fondamentaux perpétrées par le Bénin ou la Côte d'Ivoire.

29 juin 2018 dans l'affaire *Gabriel Inyang & Linus Iyeme c Nigéria*, requête ECW/CCJ/JUD/20/18, qui a imposé des contraintes claires à l'utilisation des tribunaux militaires par les États pour poursuivre des civils pour des infractions non militaires.

15 Africa and Africans in the system of international law: Facts and figures

Apollin Koagne Zouapet, Marie Fall, Yacouba-Sylla Koïta and Germain Tiérowé Dabire

To assess the place of Africa in the elaboration, application and development of international law, it seemed useful to take stock of the presence of Africa and Africans within certain institutions. The data gathered and presented here does not pretend to be exhaustive, but presents an instantaneous, fragmented but revealing vision of the place that Africa occupies within international law, 60 years after independence. Although this was not the objective at the beginning of this work, in compiling the data in the tables we realised that patterns of national or sub-regional 'preference' in certain branches of international law were emerging. For example, there is a strong presence of nationals from certain areas of the continent in the field of international criminal law, which contrasts with a virtual non-existence in the field of 'general' litigation. We have limited ourselves to the presentation of the raw data, leaving the reader to use the keys that seem relevant or appropriate to him or to her to understand, explain and hopefully question these data.

From a methodological point of view, the choice was made for permanent jurisdictional institutions, due to the difficulty to have access to the decisions of the *ad hoc* arbitral tribunals and their composition. The United Nations (UN) human rights bodies were examined because of their role in the development of international human rights law and the values it embodies in the international legal order. Finally, technical bodies and learned societies that play a crucial role in the development of international law were also examined. The bodies and institutions selected were mainly those elected by individuals, based on competence, to the exclusion of bodies where states are elected. This explains, for example, why, despite the important role it plays in the relevant branch of international law, the United Nations Commission on International Trade Law (UNCITRAL) is not examined. Finally, the data collected was mainly on the official websites of each of the institutions. They were supplemented as far as possible by other sources of information. However, this was sometimes not enough to fill in the gaps and fragmented and insufficient information on certain sites.

1 Africa in international courts and tribunals and other dispute settlement mechanisms

1.1 International Court of Justice (ICJ)

1.1.1 African states having made the declaration recognising the jurisdiction of the Court as compulsory (article 3(2) Statute of the Court)

States	**Date of the declaration**	**States**	**Date of declaration**
Botswana	16 March 1970	Liberia	20 March 1952
Cameroon	3 March 1994	Madagascar	2 July 1992
Côte d'Ivoire	29 August 2001	Malawi	12 December 1966
Democratic Republic of the Congo	8 February 1989	Mauritius	23 September 1968
Egypt	22 July 1957	Nigeria	30 April 1998
Equatorial Guinea	11 August 2017	Senegal	2 December 1985
Gambia	22 June 1966	Somalia	11 April 1963
Guinea-Bissau	7 August 1989	Sudan	2 January 1958
Guinea, Republic of	4 December 1998	Swaziland	26 May 1969
Kenya	19 April 1965	Togo	25 October 1979
Lesotho	6 September 2000	Uganda	3 October 1963
22 states out of the 74 states having made the declaration (29,72 per cent)			

1.1.2 Members of the Court

Name and nationalities	**Position**	**Period**
Prince Bola Adesumbo Ajibola (Nigeria)	Judge	1991-1994
Abdel Hamid Badawi (Egypt)	Judge	1946-1965
	Vice-President	1955-1958
Mohammed Bedjaoui (Algeria)	Judge	1982-2001
	President	1994-1997
Mohamed Bennouna (Morocco)	Judge	2006-current
Abdullah El-Erian (Egypt)	Judge	1979-1981
Nabil Elaraby (Egypt)	Judge	2001-2006
Taslim Olawale Elias (Nigeria)	Judge	1976-1991
	Vice-President	1979-1982
	President	1982-1985
Isaac Forster (Senegal)	Judge	1964-1982
Louis Ignacio-Pinto (Benin)	Judge	1970-1979
Abdul G Koroma (Sierra Leone)	Judge	1994-2012
Kéba M'Baye (Senegal)	Judge	1982-1991
	Vice-President	1987-1991

Charles D Onyeama (Nigeria)	Judge	1967-1976
Raymond Ranjeva (Madagascar)	Judge	1991-2009
	Vice-President	2003-2006
Julia Sebutinde (Uganda)	Judge	2012- current
Abdulqawi Ahmed Yusuf (Somalia)	Judge	2009-current
	Vice-President	2015-2018
	President	2018-2021

1.1.3 African ad hoc judges

Name and nationalities	**Appointing state**	**Cases**
Georges Abi-Saab (Egypt)	Mali	Frontier Dispute (Burkina Faso/Republic of Mali)
	Chad	Territorial Dispute (*Libyan Arab Jamahiriya v Chad*)
Adetobunboh A Ademola (Nigeria)	Ethiopia	South West Africa (*Ethiopia v South Africa*)
	Liberia	South West Africa (*Liberia v South Africa*)
Prince Bola Adesumbo Ajibola (Nigeria)	Nigeria	Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria: Equatorial Guinea intervening*)
	Nigeria	Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria*), Preliminary Objections (*Nigeria v Cameroon*)
Philémon Beb à Don (Cameroon)	Cameroon	Northern Cameroons (*Cameroon v United Kingdom*)

Mohammed Bedjaoui (Algeria)	Guinea, Republic of	Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*)
	Nicaragua	Territorial and Maritime Dispute (*Nicaragua v Colombia*)
	Niger	Frontier Dispute (*Benin v Niger*)
	Marshall Islands	Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v India*)
	Marshall Islands	Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v Pakistan*)
	Marshall Islands	Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v United Kingdom*)
Mohamed Bennouna (Morocco)	Benin	Frontier Dispute (*Benin v Niger*)
Alphonse Boni (Côte d'Ivoire)	Morocco	Western Sahara
Sayeman Bula-Bula (Democratic Republic of the Congo)	Democratic Republic of the Congo	Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*)
Joseph Chesson (Liberia)	Ethiopia	South West Africa (*Ethiopia v South Africa*)
	Liberia	South West Africa (*Liberia v South Africa*)

Christopher JR Dugard (South Africa)	Rwanda	Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Rwanda*)
	Rwanda	Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*)
	Malaysia	Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (*Malaysia v Singapore*)
	Costa Rica	Certain Activities carried out by Nicaragua in the Border Area (*Costa Rica v Nicaragua*)
	Costa Rica	Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v Costa Rica*)
	Malaysia	Application for Revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (*Malaysia v Singapore*)
	Malaysia	Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (*Malaysia v Singapore*)
Ahmed Sadek El-Kosheri (Egypt)	Libyan Arab Jamahiriya	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*)
	Libyan Arab Jamahiriya	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States of America*)

Nabil Elaraby (Egypt)	Bahrain, Egypt, Saudi Arabia and United Arab Emirates	Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (*Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar*)
	Bahrain, Egypt and United Arab Emirates	Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (*Bahrain, Egypt and United Arab Emirates v Qatar*)
James L Kateka (United Republic of Tanzania)	Uganda	Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*)
	Equatorial Guinea	Immunities and Criminal Proceedings (*Equatorial Guinea v France*)
Ahmed Mahiou (Algeria)	Bosnia and Herzegovina	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*)
	Guinea, Republic of	Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*)
	Bosnia and Herzegovina	Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections (*Yugoslavia v Bosnia and Herzegovina*)
	Niger	Frontier Dispute (*Burkina Faso v Niger*)
Auguste Mampuya Kanunk'a Tshiabo (Democratic Republic of the Congo)	Democratic Republic of the Congo	Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*)
Jean-Pierre Mavungu Mvubidi-Ngoma (Democratic Republic of the Congo)	Democratic Republic of the Congo	Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Rwanda*)
	Democratic Republic of the Congo	Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*)

Sir Louis Mbanefo (Nigeria)	Ethiopia	South West Africa (*Ethiopia v South Africa*)
	Liberia	South West Africa (*Liberia v South Africa*)
Kéba M'Baye (Senegal)	Senegal	Arbitral Award of 31 July 1989 (*Guinea-Bissau v Senegal*)
	Cameroon	Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria: Equatorial Guinea intervening*)
	Cameroon	Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria*), Preliminary Objections (*Nigeria v Cameroon*)
Thomas A Mensah (Ghana)	Nicaragua	Territorial and Maritime Dispute (*Nicaragua v Colombia*)
Navanethem Pillay (South Africa)	The Gambia	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v Myanmar)*
JT van Wyk (South Africa)	South Africa	South West Africa (*Ethiopia v South Africa*)
	South Africa	South West Africa (*Liberia v South Africa*)
Abdulqawi Ahmed Yusuf (Somalia)	Djibouti	Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)

1.1.4 Registry

Name and nationalities	Position	Period
Jean-Pelé Fomété (Cameroon)	Deputy-Registrar	2013-current

1.2 Dispute Settlement under the United Nations Convention on the Law of the Sea (UNCLOS)

1.2.1 Choice of procedure under article 287 and optional exceptions to applicability of Part XV, Section 2, of the Convention under article 298 of the Convention

States	Choice of procedure Declarations under article 287 (numbers indicate the order of preference)				Optional exceptions to applicability of Part XV, Section 2, of the Convention (Declarations under article 298)
	International Tribunal for the Law of the Sea (ITLOS)	International Court of Justice (ICJ)	An arbitral tribunal constituted in accordance with Annex VII	A special arbitral tribunal constituted in accordance with Annex VIII	Declarations indicating that the state does not accept any one or more of the procedures provided for Part XV, Section 2 (compulsory procedures entailing binding decisions) with respect to one or more of the following categories of disputes
Algeria (upon ratification and on 22 May 2018)	1	Declares that, in order to submit a dispute to the International Court of Justice, prior agreement between all the Parties concerned is necessary in each case	-	-	-

Angola (upon ratification)	1	-	-	-	-
Cape Verde (upon ratification)	1	2	-	-	Disputes referred to in article 298, paragraph 1(b) of the Convention
Democratic Republic of Congo (upon ratification)	1	-	-	-	Disputes referred to in article 298, paragraph 1(a)(i) of the Convention
Egypt (upon ratification and on 16 February 2017)	-	-		-	Disputes referred to in article 298, paragraph 1(a), (b) and (c) of the Convention
Equatorial Guinea (on 20 February 2002)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1(a) of the Convention
Gabon (23 January 2009)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1(a) of the Convention
Ghana (15 December 2009)	-	-		-	Declaration dated 15 December 2009 was withdrawn on 22 September 2014
Guinea Bissau (upon ratification)	-	Guinea-Bissau rejects the ICJ jurisdiction for any types of disputes		-	Consequently, Guinea-Bissau does not accept the jurisdiction of the International Court of Justice with respect to articles 297 and 298

Kenya (24 January 2017)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1(a)(i) of the Convention
Madagascar (on 20 December 2012)	1	-	-	-	-
Togo (on 9 April 2019)	1	1	-	-	Disputes referred to in article 298, paragraphs 1(b) and (c) of the Convention
Tunisia (upon ratification and on 22 May 2001)	1	-	2	-	Disputes referred to in article 298, paragraph 1(a), (b) and (c) of the Convention
United Republic of Tanzania (upon ratification)	1	-	-	-	-

Source: United Nations Division for Ocean Affairs and the Law of the Sea

1.2.2 Members of the International Tribunal of the Law of the Sea (ITLOS)

Name and nationalities	**Position**	**Period**
Paul Bamengo Ela (Cameroon)	Judge	1996-2008
Boualem Bouguetaia (Algeria)	Judge	2008-current
	Vice-President	2014-2017
Albert J. Hoffmann (South Africa)	Judge	2005-current
	Vice-President	2011-2014
	President	2020-current
José Luis Jesus (Cape Verde)	Judge	1999-current
Maurice Kamga (Cameroon)	Judge	2020-current
James Kateka (Tanzania)	Judge	2005-current
Mohamed Mouldi Marsit (Tunisia)	Judge	1996-2005

Thomas A Mensah (Ghana)	Judge	1996-2005
	President	1996-1999
Tafsir Malick Ndiaye (Senegal)	Judge	1996-2020
Joseph Sinde Warioba (Tanzania)	Judge	1996-1999

1.2.3 African ad hoc judges at the ITLOS

Name and nationalities	**Appointing state**	**Cases**
Thomas Mensah (Ghana)	Bangladesh	Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)
	Ghana	The 'ARA Libertad' Case (Argentina v Ghana), Provisional Measures
	Ghana	Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)

1.2.4 Registry

None

1.3 International Criminal Court (ICC)

1.3.1 African state parties to the Rome Statute

States	**Date of ratification, accession, or adhesion**	**States**	**Date of ratification, accession, or adhesion**
Benin	22 January 2002	Liberia	22 September 2004
Botswana	8 September 2000	Madagascar	14 March 2008
Burkina-Faso	16 April 2004	Malawi	19 September 2002
Cape Verde	10 October 2011	Mali	16 August 2000
Central African Republic	3 October 2001	Mauritius	5 March 2002
Chad	1 January 2007	Namibia	25 June 2002
Comoros	1 November 2006	Niger	11 April 2002
Congo	3 May 2004	Nigeria	27 September 2001

Côte d'Ivoire	15 February 2013	Senegal	2 February 1999
Democratic Republic of the Congo	11 April 2002	Seychelles	10 August 2010
Djibouti	5 November 2002	Sierra Leone	15 September 2000
Gabon	20 September 2000	South Africa	27 November 2000
Gambia	28 June 2002	Tunisia	24 June 2011
Ghana	20 December 1999	Uganda	14 June 2002
Guinea	14 July 2003	United Republic of Tanzania	20 August 2002
Kenya	15 March 2005	Zambia	13 November 2002
Lesotho	6 September 2000	33 states out of the 123 states parties (26,82 per cent)	

1.3.2 African members of the International Criminal Court (ICC)

Name and nationalities	**Position**	**Period**
Reine Alapini-Gansou (Benin)	Judge	2018-current
Joyce Aluoch (Kenya)	Judge	2009-2018
Solomy Balungi Bossa (Uganda)	Judge	2018-current
Fatoumata Dembele Diarra (Mali)	Judge	2003-2014
Chile Eboe-Osuji (Nigeria)	Judge	2012-2021
	President	2018-2021
Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo)	Judge	2015-current
	Second Vice-President	2021-current
Akua Kuenyehia (Ghana)	Judge	2003-2015
Sanji Monagen (Botswana)	Judge	2009-2018
	Vice-President	2012-2015
Daniel David Ntanda Nsereko (Uganda)	Judge	2008-2012
Navanethem Pillay (South Africa)	Judge	2003-2012
Miatta Maria Samba (Sierra Leone)	Judge	2021-current

1.3.3 Office of the Prosecutor

Name and nationalities	**Position**	**Period**
Fatou Bensouda (The Gambia)	Prosecutor	2012-current
	Deputy-Prosecutor	2004-2012

1.3.4 Registry

None

1.4 International Criminal Tribunal for the former Yugoslavia (ICTY)

1.4.1 African judges

Name and nationalities	**Position**	**Period**
Georges Michel Abi-Saab (Egypt)	Judge	1993-1995
Fatoumata Dembele Diarra (Mali)	Judge ad litem	2001-2003
Elizabeth Gwaunza (Zimbabwe)	Judge ad litem	2008-2013
Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo)	Judge ad litem	2006-2016
Koffi Kumelio Afande (Togo)	Judge	2013-2016
Mohamed Bennouna (Maroc)	Judge	1998-2001
Amin El Abbassi El Mahdi (Egypt)	Judge	2001-2005
Bakone Justice Moloto (South Africa)	Judge	2005-2017
Adolphus Godwin Karibi-Whyte (Nigeria)	Judge	1993-1998
	Vice-President	1995-1997
Prisca Matimbe Nyambe (Zambia)	Judge ad litem	2009-2012
Florence Ndepele Mwachande Mumba (Zambia)	Judge	1997-2005
	Vice-President	1999-2001
Mandiaye Niang (Senegal)	Judge	2013-2016
Arlette Ramaroson (Madagascar)	Judge	2011-2015
Vonimbolana Rasoazanany (Madagascar)	Judge ad litem	2003-2006
Fouad Abdel-Moneim Riad (Egypt)	Judge	1995-2001
William Hussein Sekule (Tanzania)	Judge	2013-2015
Andresia Vaz (Senegal)	Judge	2005-2013

1.4.2 Office of the Prosecutor

None

1.4.3 Registry

None

1.5 International Criminal Tribunal for Rwanda (ICTR)

1.5.1 African judges

Name and nationalities	Position	Period
Florence Rita Arrey (Cameroon)	Judge ad litem, judge	2003-2012
	Vice-President	2011-2012
Solomy Balungi Bossa (Uganda)	Judge ad litem	2003-2013
Gberdao Gustave Kam (Burkina-Faso)	Judge ad litem	2004-2012
Laïty Kama (Senegal)	Judge	1995-2001
	President	1995-1999
Lee G Muthoga (Kenya)	Judge ad litem	2003-2012
Navanethem Pillay (South Africa)	Judge	1995-2003
	Vice-President	1997-1999
	President	1999-2003
Mparany Mamy Richard Rajohnson (Madagascar)	Judge ad litem	2009-2013
Arlette Ramaroson (Madagascar)	Judge	2001-2011
	Vice-President	2005-2007
William H Sekule (Tanzania)	Judge	1995-2013
Andrésia Vaz (Senegal)	Judge	2001-2005
	Vice-President	2003-2005

1.5.2 Office of the Prosecutor

Name and nationalities	Position	Period
Richard Goldstone (South Africa)	Prosecutor	1994-1996
Hassan Bubacar Jallow (The Gambia)	Prosecutor	2003-2015
Bongani Majola (South Africa)	Deputy Prosecutor	2003-2012
Bernard Muna (Cameroon)	Deputy Prosecutor	1997-2002
Honore Rakotomana (Madagascar)	Deputy Prosecutor	1995-1997

1.5.3 Registry

Name and nationalities	Position	Period
Andronico Adede (Kenya)	Registrar	1995-1997
Adama Dieng (Senegal)	Registrar	2001-2012
Bongani Majola (South Africa)	Registrar	2012-2015
Lovemore Munlo (Malawi)	Deputy Registrar	2001-2006

Agwu Ukiwe Okali (Nigeria)	Registrar	1997-2001

1.6 International Residual Mechanisms for Criminal tribunals (IRMCT)

1.6.1 African judges

Name and nationalities	**Position**	**Period**
Florence Rita Arrey (Cameroon)	Judge	2012-current
Solomy Balungi Bossa (Uganda)	Judge	2012-2018
Mustapha El Baaj (Morocco)	Judge	2019-current
Elizabeth Ibanda-Nahamya (Uganda)	Judge	2018-2023
Gberdao Gustave Kam (Burkina-Faso)	Judge	2012-2021
Joseph Masanche (Tanzania)	Judge	2012-current
Lee G. Muthoga (Kenya)	Judge	2012-current
Bakone Justice Moloto (South Africa)	Judge	2017-2019
Prisca Matimbe Nyambe (Zambia)	Judge	2012-current
Mparany Mamy Richard Rajohnson (Madagascar)	Judge	2013-2018
Mahandrisoa Edmond Randrianirina (Madagascar)	Judge	2019-current
Aminatta Lois Runeni N'gum (The Gambia)	Judge	2012-current
Fatimata Sanou Touré (Burkina Faso)	Judge	2021-current
William H Sekule (Tanzania)	Judge	2012-current

1.6.2 Office of the Prosecutor

Name and nationalities	**Position**	**Period**
Hassan Bubacar Jallow (The Gambia)	Prosecutor	2012-2016

1.6.3 Registry

Name and nationalities	**Position**	**Period**
Olufemi Elias (Nigeria)	Registrar	2017-2020
Abubacarr M Tambadou (The Gambia)	Registrar	2020-current

1.7 Permanent Court of Arbitration (PCA)

1.7.1 African arbitrators

Arbitrators listed here are all those designated by the organisation on its rosters, not only those who have actually been involved in a dispute

resolution. The information available on the PCA website is limited to arbitrators currently on the roster, and does not provide information on old lists.

Name and nationalities	**Position**	**Period**
Francis Atoke (Uganda)	Arbitrator	2018-current
Mohamed Bennouna (Morocco)	Arbitrator	2010-current
El Hassan El Guassem (Morocco)	Arbitrator	2016-current
Nabil Elaraby (Egypt)	Arbitrator	2005-current
Mostafa Faress (Morocco)	Arbitrator	2010-current
Mohamed S Helal (Egypt)	Arbitrator	2020-current
Peter Kabatsi (Uganda)	Arbitrator	2018-current
Charles Kajimanga (Zambia)	Arbitrator	2020-current
Nigel Kalonde Mutuna (Zambia)	Arbitrator	2020-current
Bart M Katureebe (Uganda)	Arbitrator	2018-current
Mostafa Maddah (Morocco)	Arbitrator	2010-current
Andrianantenaina Manitra Emilson (Madagascar)	Arbitrator	2015-current
Githu Muigai (Kenya)	Arbitrator	2016-current
Willy M Mutunga (Kenya)	Arbitrator	2016-current
Benjamin Odoki (Uganda)	Arbitrator	2018-current
Phoebe Okowa (Kenya)	Arbitrator	2016-current
Abdel Raouf Mohamed (Egypt)	Arbitrator	2021-current
Mohamed S Abdel Wahab (Egypt)	Arbitrator	2021-current
Amos Wako (Kenya)	Arbitrator	2016-current
Arbitrators members of the Court: 18 Africans out of 267 members of the Court appointed Arbitrators of the Specialised Panels: 1 African out of 33 arbitrators appointed		

1.7.2 Secretary-General

None African out of 13 Secretaries-General elected

1.8 International Centre for Settlement of Investment Disputes (ICSID)

1.8.1 African arbitrators and conciliators

Arbitrators and conciliators listed here are all those designated by the organisation on its rosters, not only those who have actually been involved in a dispute resolution. The information available on the ICSID website

is limited to arbitrators currently on the roster and does not provide information on old lists.

Name and nationalities	**Position**	**Name and nationalities**	**Position**
Mohamed Abdel Raouf (Egypt)	Conciliator	Adéle Kalambay Ndaya Moleka (Democratic Republic of the Congo)	Arbitrator
Seyni Abdou (Niger)	Arbitrator	Sixte Sizimwe Kazirukanyo (Burundi)	Arbitrator
Hamidou Abdourahamane (Niger)	Conciliator	Gaston Kenfack Douajni (Cameroon)	Arbitrator
Taiwo Akinola Abidogun (Nigeria)	Arbitrator	El Houcine Khalifa (Morocco)	Arbitrator and conciliator
Brigitte Ada Nnengue (Cameroon)	Conciliator	Farooq Khan (Kenya)	Conciliator
Olufunke Adekoya (Nigeria/Great Britain)	Arbitrator	Elisifa Kinasha (Tanzania)	Arbitrator
Jemal Ould Agatt (Mauritania)	Arbitrator and conciliator	Ken Kiplagat (Kenya)	Conciliator
Sena Agbayissah (Togo)	Arbitrator and conciliator	Victoire Kolingar-Lhermenier (Chad)	Arbitrator and conciliator
Désiré Aïhou (Benin)	Arbitrator	Colins Leprince Kombou (Cameroon)	Conciliator
Clare Akamanzi (Rwanda)	Conciliator	Hounaké Kossivi (Togo)	Arbitrator and conciliator
Awan Shawkat Al-Khasawneh (Sudan)	Arbitrator	Albert Kouda (Central African Republic)	Conciliator
Augustine O Alegeh (Nigeria)	Conciliator	Y Kyesimira (Uganda)	Conciliator
Phillip Aliker (Ugandan/United State/ Great Britain)	Conciliator	El Oualid Laggoune (Algeria)	Arbitrator
Samba Amineta Sarr (Mali)	Arbitrator and conciliator	Abdelkader Lahlou (Morocco)	Arbitrator and conciliator

Emmanuel Amofa (Ghana)	Arbitrator	M.J.A. Lukwaro (Tanzania)	Arbitrator
Mohamed Sameh Amr (Egypt)	Arbitrator and conciliator	Verdiana Nkwabi Macha (Tanzania)	Arbitrator
Lalaoniaina Odile Andrianarisoa (Madagascar)	Arbitrator and conciliator	P.T. Mafike (Lesotho)	Conciliator
Jean Paul Angoennah Essyngone (Gabon)	Arbitrator	Mohamed Fadhel Mahfoudh (Tunisia)	Arbitrator
Ace Anan Ankomah (Ghana)	Arbitrator	Maïnassara Maïdagi (Niger)	Arbitrator
Stella Anukam (Nigeria)	Conciliator	Yakubu Chonoko Maikyau (Nigeria)	Conciliator
Mbaigangnon Athanase (Chad)	Arbitrator and conciliator	T Makeka (Lesotho)	Arbitrator and conciliator
Nidhoim Attoumane (Comoros)	Arbitrator and conciliator	Abubakar Malami (Nigeria)	Arbitrator
A Awoonor-Renner (Sierra Leone)	Conciliator	Joseph Mande-Djapou (Central African Republic)	Conciliator
Momolue B Tamba (Liberia)	Arbitrator	M Matshiya (Zimbabwe)	Conciliator
Flavien Bachabi (Benin)	Conciliator	Angelo Matusse (Mozambique)	Arbitrator and conciliator
Robert Bafakulera (Rwanda)	Arbitrator	Marie-Madeleine Mborantsuo (Gabon)	Arbitrator
Ambroise Marie Balima (Burkina Faso)	Conciliator	Samuel Mcintosh (Liberia)	Arbitrator
Arthur Ballé (Benin)	Conciliator	A.L.O. Metzger (Sierra Leone)	Arbitrator
Philip AZ Banks III (Liberia)	Arbitrator	Justice B.K. Molai (Lesotho)	Arbitrator and conciliator
Désiré Basset (Mauritius)	Arbitrator and conciliator	Athaliah Lesiba Molokomme (Botswana)	Arbitrator and conciliator
Amani Issaka Bawa (Niger)	Conciliator	Sanji Mmasenono Monageng (Botswana)	Arbitrator and conciliator
Farid Ben Belkacem (Algeria)	Arbitrator	S Monts'i (Lesotho)	Conciliator

Abdessatar Ben Moussa (Tunisia)	Conciliator	Salim Moollan (Mauritius/France/ Great Britain)	Arbitrator and conciliator
Hocine Benissad (Algeria)	Conciliator	Honoré Moundounga (Gabon)	Conciliator
T Bere (Zimbabwe)	Conciliator	Said Mohamed Mshangama (Comoros)	Arbitrator and conciliator
Vincent Kizito Beyuo (Ghana)	Conciliator	K.M.I.M. Msita (Tanzania)	Arbitrator
Sami Bostanji (Tunisia)	Conciliator	V Mudimu (Zimbabwe)	Arbitrator
Francis Botchway (Ghana)	Arbitrator	Anita Mugeni (Rwanda)	Arbitrator
Belgacem Boudra (Algeria)	Conciliator	Richard Mugisha (Rwanda)	Arbitrator
Ahcène Bououden (Algeria)	Conciliator	Githu Muigai (Kenya)	Arbitrator
Flavien Bachabi (Benin)	Conciliator	Philip Murgor (Kenya)	Arbitrator
Robert Bafakulera (Rwanda)	Arbitrator	Peter Mutharika (Malawi)	Arbitrator and conciliator
Ambroise Marie Balima (Burkina Faso)	Conciliator	D.J.K. Nabeta (Uganda)	Conciliator
Arthur Ballé (Benin)	Conciliator	Adamou Namata (Niger)	Arbitrator
Philip AZ Banks Iii (Liberia)	Arbitrator	Gérard Niyugeko (Burundi)	Arbitrator
Désiré Basset (Mauritius)	Arbitrator and conciliator	Dieudonné Luaba Nkuna (Democratic Republic of the Congo)	Conciliator
Amani Issaka Bawa (Niger)	Conciliator	Mururu Norman (Kenya)	Conciliator
Farid Ben Belkacem (Algeria)	Arbitrator	Etienne Nsie (Gabon)	Arbitrator
Abdessatar Ben Moussa (Tunisia)	Conciliator	Faustin Ntezilyayo (Rwanda)	Conciliator
Idriss Bouziane (Morocco)	Arbitrator and conciliator	Semei Nyanzi (Uganda)	Conciliator
Stephane Broquet (Chad)	Arbitrator and conciliator	Modeste Obiang Ndong (Gabon)	Conciliator

Tom Walter Buruku (Uganda)	Arbitrator	Mercy Louise Ohene (Ghana)	Conciliator
Olatunde Busari (Nigeria)	Arbitrator	JJ Oloya (Uganda)	Conciliator
Ousmane Camara (Senegal)	Arbitrator	Ucheora Onwuamaegbu (Nigeria/Great Britain)	Arbitrator
Mohamed Chemloul (Algeria)	Arbitrator	Emmanuel Opoku Awuku (Ghana)	Arbitrator
Ravindra Chetty (Mauritius)	Arbitrator and conciliator	Taoufik Ouanes (Tunisia/Swiss)	Arbitrator
SJ Chihambakwe (Zimbabwe)	Arbitrator	Gertrude M. Ouedraogo (Burkina Faso)	Conciliator
Sibili Franck Compaore (Burkina Faso)	Arbitrator	Guillaume Pambou Tchivounda (Gabon)	Conciliator
Rufino D'almeida (Benin)	Arbitrator	Josiane Marie Chantal Razafinarivo (Madagascar)	Arbitrator and conciliator
Brigitte Dia (Niger)	Conciliator	Rivoniaina Razafindrakoto (Madagascar)	Arbitrator and conciliator
Alioune Diagne (Senegal)	Arbitrator	Tarek Riad (Egypt)	Arbitrator and conciliator
Boubacar Sidiki Diarrah (Mali)	Arbitrator and conciliator	Guy Rossatanga-Rignault (Gabon)	Arbitrator
Raymond Dossa (Benin)	Arbitrator	Damou Sako (Guinea)	Arbitrator and conciliator
C Dube (Zimbabwe)	Conciliator	Ali Salim (Comoros)	Arbitrator and conciliator
P Dube (Zimbabwe)	Conciliator	Aloysus Sama (Cameroon)	Conciliator
Kolongele Eberande (Democratic Republic of the Congo)	Conciliator	Léopold Samba (Central African Republic)	Arbitrator
Chukwuma Uchenna Ekomaru (Nigeria)	Conciliator	Mamba Sano (Guinea)	Arbitrator and conciliator
El Hassan El Guassim (Morocco)	Arbitrator and conciliator	Mohamed Sayari (Tunisia)	Conciliator

Mostafa Elbahabety (Egypt)	Conciliator	Galaye Seck (Senegal)	Arbitrator
Kow Essuman (Ghana)	Conciliator	Fabien Segatwa (Burundi)	Arbitrator
Mahmoud Fawzy Adl-Bary Asar (Egypt)	Arbitrator and conciliator	Mougnal Sidi (Cameroon)	Arbitrator
Dodo Dan Gado (Niger)	Conciliator	Winfred Smallwood (Liberia)	Conciliator
Célestin Gaombale (Central African Republic)	Arbitrator	Frank W Smith (Liberia)	Conciliator
Mangowa A Ghanney (Ghana)	Conciliator	Levy Sobangue (Central African Republic)	Conciliator
Ghazi Gherairi (Tunisia)	Arbitrator	Boubacar Sow (Mali)	Arbitrator and conciliator
AB Gooding (Sierra Leone)	Conciliator	Francis M Ssekandi (Uganda)	Arbitrator
Antoine Grothe (Central African Republic)	Conciliator	Isaac Tamba (Cameroon)	Arbitrator
Raouf Gulbul (Mauritius)	Arbitrator and conciliator	Maître Tchitchao Tchalim (Togo)	Arbitrator and conciliator
James S. Guseh (Liberia)	Arbitrator	Yenan Timothee (Chad)	Arbitrator and conciliator
MS Gwaunza (Zimbabwe)	Arbitrator	Adama Traore (Burkina Faso)	Conciliator
Karim Hafez (Egypt)	Arbitrator	Sékou Traore (Mali)	Arbitrator and conciliator
Kassimou Harimia (Comoros)	Arbitrator and conciliator	F Tuboku-Metzger (Sierra Leone)	Conciliator
Ali Haroun (Algeria)	Arbitrator	Dorothy Udeme Ufot (Nigeria)	Arbitrator
Maryan Mohamed Salah Hassan (Somalia)	Arbitrator and conciliator	L. Uriri (Zimbabwe)	Arbitrator
Fadimatou Hayatou (Cameroon)	Conciliator	Bernadette Uwicyeza (Rwanda)	Arbitrator
Donia Hedda Ellouze (Tunisia)	Arbitrator	Amos S Wako (Kenya)	Arbitrator
Ferhat Horchani (Tunisia)	Conciliator	Georges Gérard Wamba Makollo (Cameroon)	Arbitrator

Luciano Hounkponou (Benin)	Arbitrator	Edward William Fashole Luke (Botswana)	Arbitrator and conciliator
Norbert Issialh (Gabon)	Conciliator	Mwilanya Wilondja (Democratic Republic of the Congo)	Arbitrator
Raphael Jakoba (Madagascar)	Arbitrator and conciliator	Francess Wright (Sierra Leone)	Arbitrator
HM Joko-Smart (Sierra Leone)	Arbitrator	Célestin Tunda Ya Kasende (Democratic Republic of the Congo)	Arbitrator and conciliator
Victor Kafando (Burkina Faso)	Arbitrator	Seyni Yaye (Niger)	Arbitrator
Tshibangu Kalala (Democratic Republic of the Congo)	Arbitrator and conciliator	Ignace Yerbanga (Burkina Faso)	Arbitrator
Adéle Kalambay Ndaya Moleka (Democratic Republic of the Congo)	Arbitrator	Guled Yusuf (Somalia)	Conciliator
Isabelle Kalihangabo (Rwanda)	Conciliator	Abdulqawi Ahmed Yusuf (Somalia)	Arbitrator
Jacqueline Kamau (Kenya)	Conciliator	Dobo Martin Zonou (Burkina Faso)	Arbitrator
Emmanuel Kamere (Rwanda)	Conciliator		
Njeri Kariuki (Kenya)	Arbitrator		
Victor Kafando (Burkina Faso)	Arbitrator		
Tshibangu Kalala (Democratic Republic of the Congo)	Arbitrator and conciliator		
Panel of arbitrators and/or conciliators : 184 Africans out of 695 designated			

1.8.2 Secretary-General

Name and nationalitiy	**Position**	**Period**
Ibrahim FI Shihata (Egypt)	Secretary General	1983-2000

1.8.3 Dispute Settlement Mechanism of the World Trade Organisation (Panels and Appellate Body)

According to the information available on the WTO website, only Africans sitting on panels are listed.

Name and nationalities	**Position**	**Period**
Georges Michel Abi-Saab (Egypt)	Member of the Appellate Body	2000-2008
Yonov Frederick Agah (Nigeria)	Panelist	Current
Minoarison Andrianarivony (Madagascar)	Panelist	Current
Navin Beekarry (Mauritius)	Panelist	Current
Acha Bhuglah (Mauritius)	Panelist	Current
Said El-Naggar (Egypt)	Member of the Appellate Body	1995-2000
Ibrahim El-Seginy (Egypt)	Panelist	Current
Magdi Ahmed Farahat (Egypt)	Panelist	Current
Abdelrahman Fawzy (Egypt)	Panelist	Current
James T Gathii (Kenya)	Panelist	Current
Mohamed A Gawad Allam (Egypt)	Panelist	Current
Marie Gosset (Côte d'Ivoire)	Panelist	Current
Samy Affify Hatem (Egypt)	Panelist	Current
Yenkong Ngangjoh Hodu (Cameroon)	Panelist	Current
Gertrude Nimako-Boateng (Ghana)	Panelist	Current
George C Nnona (Nigeria)	Panelist	Current
Emmanuel Opoku Awuku (Ghana)	Panelist	Current
Alain Piquemal (Djibouti)	Panelist	Current
Tarek Fouad Riad (Egypt)	Panelist	Current
Shree Baboo Chekitan Servansing (Mauritius)	Member of the Appellate Body	2014-2018
Magda Shahin (Egypt)	Panelist	Current
Ahmed Sharaf Eldin (Egypt)	Panelist	Current
Amadou Tankoano (Niger)	Panelist	Current
David Unterhalter (South Africa)	Member of the Appellate Body	2006-2013
Andrew Waruhiu (Kenya)	Panelist	Current
Mohamed Mounir Zahran (Egypt)	Panelist	Current

Members of the Appellate Body: 4 Africans out of 27 Appellate Body members appointed *Panelists: 22 Africans out of 464 designated*

2 Africa in UN human rights mechanisms and institutions

2.1 African members of the Human Rights Committee (CCPR)

Name and nationalities	Position	Period
Ahmed Amin Fathalla (Egypt)	Member	2009-2020
	Vice-Chairperson	2017-2019
	Chairperson	2019-2021
Abdelfattah Amor (Tunisia)	Member	1999-2011
	Vice-Chairperson	1999-2003
Yadh Ben Achour (Tunisia)	Member	2012-2022
	Vice-Chairperson	2013-2015
Mohamed Ben-Fadhel (Tunisia)	Member	1977-1978
Lazahri Bouzid (Algeria)	Member	2009-2016
	Vice-Chairperson	2011-2013
Néjib Bouziri (Tunisia)	Member	1979-1986
	Vice-Chairperson	1983-1985
Abdoulaye Dieye (Senegal)	Member	1979-1982
Mahjoub El Haiba (Morocco)	Member	2009-2012, 2021-2024
Omran El-Shafei (Egypt)	Member	1987-1999
	Vice-Chairperson	1992-1999
Maurice Glele Ahanhanzo (Benin)	Member	2001-2008
	Vice-Chairperson	2005-2007
Christof Heyns (South Africa)	Member	2017-2020
	Vice-Chairperson	2019-2021
Bamariam Koita (Mauritania)	Member	2017-2020
Duncan Laki Muhumuza (Uganda)	Member	2015-2022
Rajsoomer Lallah (Mauritius)	Member	1977-2008
	Vice-Chairperson	1979-1983
	Chairperson	1989-1991
Wafaa Ashraf Moharram Bassim (Egypt)	Member	2021-2024
Birame Ndiaye (Senegal)	Member	1983-1994
	Vice-chairperson	1985-1989
Bacre Waly Ndiaye (Senegal)	Member	2023-2026
Kheshoe Parsad Matadeen (Mauritius)	Member	2013
Marat Sarsembayev (Morocco)	Member	2011-2012

Dheerujlall Baramlall Seetulsingh (Mauritius)	Member	2014-2016
	Vice-chairperson	2015-2016
Fulgence Seminega (Rwanda)	Member	1977-1978
Imeru Tamerat Yigezu (Ethiopia)	Member	2021-2024
Ahmed Tawfik Khalil (Egypt)	Member	2001-2008
	Vice-chairman	2007-2008
Kobauyah Tchamdja Kpatcha (Togo)	Member	2021-2024
Amos Wako (Kenya)	Member	1984-1992
	Vice-chairperson	1991-1992
Zonke Zanele Majodina (South Africa)	Member	2007-2014
	Vice-Chairperson	2009-2011
	Chairperson	2011-2013

2.2 African members of the Committee on Economic, Social and Cultural Rights (CESCR)

Name and nationalities	**Position**	**Period**
Mohamed Ezzeldin Abdel-Moneim (Egypt)	Member	2005-2024
	Vice-Chairperson	2009-2011
	Chairperson	2021-current
Ade Adekuoye (Nigeria)	Member	1995-1998
Mahmoud Samir Ahmed (Egypt)	Member	1995-2002
	Vice-Chairperson	1999-2001
Madoe Virginie Ahodikpe (Togo)	Member	1993-1996
Mohammed Amarti (Morocco)	Member	2021-2024
Clement Atangana (Cameroon)	Member	1999-2018
	Vice-Chairperson	2001-2003
Abdel Halim Badawi (Egypt)	Member	1991-1994
Asraf Ally Caunhye (Mauritius)	Member	2019-2026
Ibrahim Alibadawi El Sheikh (Egypt)	Member	1987-1990
Abdessatar Grissa (Tunisia)	Member	1993-2004
	Vice-Chairperson	1996-1998
Azzouz Kerdoun (Algeria)	Member	2003-2018
	Vice-Chairperson	2003-2014
Samba Cor Konate (Senegal)	Member	1987-1992
Mohamed Lamine Fofana Guinea)	Member	1987-1992
Sandra Liebenberg (South Africa)	Member	2017-2020
	Vice-Chairperson	2017-2019
Alexandre Muterahejuru (Rwanda)	Member	1987-1994

Peters Sunday Omologbe Emuze (Nigeria)	Member	2019-2026
Ariranga Govindasamy Pillay (Mauritius)	Member	1997-2016
	Vice-Chairperson	2007-2009
	Chairperson	2011-2012

2.3 African members of the Committee on the Elimination of Discrimination against Women (CEDAW)

Name and nationalities	**Position**	**Period**
Charlotte Abaka (Ghana)	Member	1991-2002
	Vice-Chairperson	1997-1998
	Chairperson	2001-2002
Brenda Akia (Uganda)	Member	2023-2026
Emna Aouij (Tunisia)	Member	1991-2002
	Vice-Chairperson	1995-1996
Tendai Ruth Bare (Zimbabwe)	Member	1995-1998
Meriem Belmihoub-Zerdani (Algeria)	Member	2003-2014
	Vice-Chairperson	2005-2006
Huguette Bokpe Gnacadja (Benin)	Member	2003-2006
Louisa Chalal (Algeria)	Member	2015-2022
Dorcas Coker-Appiah (Ghana)	Member	2003-2010
Aruna Devi Narain (Mauritius)	Member	2017-2022
Hadja Assa Diallo Soumare (Mali)	Member	1987-1990
	Vice-Chairperson	1987-1988
Esther Eghobamien-Mshelia (Nigeria)	Member	2023-2026
	Vice-Chair	2023-current
Farida Abou El-Fetouh (Egypt)	Member	1983-1986
Naéla Gabr (Egypt)	Member	1999-2003, 2007-2022
	Vice-Chairperson	2007-2008
	Chairperson	2009-2010
Hilary Gbedemah (Ghana)	Member	2013-2024
Hazel Gumede Shelton (South Africa)	Member	2007
Antonia Guvava (Zimbabwe)	Member	1998
Akua Kuenyehia (Ghana)	Member	2003
Fatima Kwaku (Nigeria)	Member	2001-2004
Maya Morsy (Egypt)	Member	2023-2026
Landra Mukayiranga (Rwanda)	Member	1982-1986
	Vice-Chairperson	1982-1984
Mavivi Myakayaka-Manzini (South Africa)	Member	1999-2002

Theodora Oby Nwankwo (Nigeria)	Member	2013-2020
Ahoua Ouedraogo (Burkina Faso)	Member	1993-2000
	Vice-Chairperson	1999-2000
Pramila Patten (Mauritius)	Member	2003-2018
Kongit Sinegiorgis (Ethiopia)	Member	1985-2000
Mervat Tallawy (Egypt)	Member	1987-1998
	Chairperson	1991-1992
Franceline Toe Bouda (Burkina Faso)	Member	2019-2022
Violet Tsisiga Awori (Kenya)	Member	2009-2012
Rose Ukeje (Nigeria)	Member	1987-1994
	Rapporteur	1989-1990
	Vice-Chairperson	1993-1994
Aicha Vall Verges (Mauritania)	Member	2017-2020
Kissem Walla Tchangai (Togo)	Member	1989-1992

2.4 African members of the Committee on the Elimination of Racial Discrimination (CERD)

Name and nationalities	**Position**	**Period**
Mahmoud Aboul-Nasr (Egypt)	Member	1970-1978, 1986-2010
	Chairperson	1998-2000
Hamzat Ahmadu (Nigeria)	Member	1982-1998
	Vice-Chairperson	1992-1994
Nourredine Amir (Algeria)	Member	2002-2026
	Vice-Chairperson	2002-2004, 2012-2018
	Chairperson	2018-2020
Jean-Marie Apiou	Member	1982-1986
Jacques Baudin (Senegal)	Member	1978-1982
Andrew Chigovera (Zimbabwe)	Member	1994-1998
Fatimata-Binta Victoire Dah (Burkina Faso)	Member	2004-2020
	Vice-Chairperson	2006-2008, 2010-2012
	Chairperson	2008-2010
Bakari Sidiki Diaby (Ivory Coast)	Member	2018-2026
Hamilma Embarek Warzazi (Morocco)	Member	1974-1978
Régine Esseneme (Cameroon)	Member	2022-2026
Kokou MawuenaIka Kana (Dieudonné) Ewomsan (Togo)	Member	2006-2014
François Lonsény Fall (Guinea)	Member	2000-2002
	Vice-Chairperson	2000-2002
Abdel Moneim M Ghoneim (Egypt)	Member	1978-1986

Brahima Guisse (Senegal)	Member	2020-2024
	Rapporteur	2023-current
Adedokun A Haastrup (Nigeria)	Member	1970-1976
Afiwa-Kindéna Hohoueto (Togo)	Member	2014-2018
Christopher O Hollist	Member	1976-1978
Patricia Nozipho January-Bardill (South Africa)	Member	2000-2008, 2012-2016
	Vice-Chairperson	2004-2006
George O Lamtey (Ghana)	Member	1974-1994
	Vice-Chairperson	1982-1987, 1990-1992
	Chairperson	1988-1990
Chris Maina Peter	Member	2008-2010
Yemhelha Mint Mohamed (Mauritania)	Member	2016-2020
Mohamed Omer Beshir (Sudan)	Member	1986-1990
Doris Owusu Addo (Ghana)	Member	1970-1974
Oladapo Olusola Papowora (Nigeria)	Member	1982-1986
Vadili Rayess (Mauritania)	Member	2021-2024
Waliakoye Saidou (Niger)	Member	2010-2014
Mazalo Tebie (Togo)	Member	2022-2026
Mohamed Aly Thiam (Guinea)	Member	2002-2004
Faith Dikeledi Pansy Tlakula (South Africa)	Member	2020-2024
Yeung Kam John Yeung Sik Yuen (Mauritius)	Member	2013-2026
	Vice-chairperson	2020-2022
Shuaib Uthman Yolah (Nigeria)	Member	1978-1982

2.5 African members of the Committee on the Rights of the Child (CRC)

Name and nationalities	**Position**	**Period**
Suzanne Aho Assouma (Togo)	Member	2015-2027
	Vice-Chairperson	2017-2019
Agnes Akosua Aidoo (Ghana)	Member	2007-2015
Ms Joyce Aluoch (Kenya)	Member	2003-2008
	Vice-Chairperson	2003-2005
Hynd Ayoubi Idrissi (Morocco)	Member	2015-2027
Hoda Badran (Egypt)	Member	1991-1995
	Chairperson	1991-1995
Akila Belembaogo (Burkina Faso)	Member	1991-1997
	Chairperson	1995-1997

Benyam Dawit Mezmur (Ethiopia)	Member	2013-2025
	Vice-Chairperson	2013-2015
	Chairperson	2015-2017
Kamla Devi Varmah (Mauritius)	Member	2009-2013
Amina Hamza El Guindi (Egypt)	Member	1999-2002
	Vice-Chairperson	2001-2002
Azza el-Ashmawy (Egypt)	Member	2010-2011
Kamel Filali (Algeria)	Member	2003-2011
	Vice-Chairperson	2007-2009
Moushira Khattab (Egypt)	Member	2003-2010
Hatem Kotrane (Tunisia)	Member	2003-2019
	Vice-Chairperson	2011-2013
Cephas Lumina (Zambia)	Member	2017-2021
Gehad Madi (Egypt)	Member	2011-2023
	Vice-Chairperson	2019-2021
Esther Margaret Queen Mokuane (South Africa)	Member	1997-2001
	Vice-Chairperson	1999-2001
Swithun Mombeshora (Zimbabwe)	Member	1991-1995
Aissatou Alassane Moulaye Sidikou (Niger)	Member	2019-2027
Awa N'Deye Ouedraogo (Burkina Faso)	Member	1997-2001, 2003-2007
	Vice-Chairperson	2001-2003
Awich Pollar (Uganda)	Member	2005-2013
Zara Jean Ratou (Chad)	Member	2021-2025
Ann Skelton (South Africa)	Member	2017-2025

2.6 African members of the Committee against Torture (CAT)

Name and nationalities	Position	Period
Essadia Belmir (Morocco)	Member	2006-2021
	Vice-Chairperson	2008-2021
Hassib Ben Ammar (Tunisia)	Member	1992-1995
Guibril Camara (Senegal)	Member	1996-2007
	Vice-Chairperson	1998-2007
Alexis Dipanda Mouelle (Cameroon)	Member	1987-1997
	Vice-Chairperson	1988-1993
	Chairperson	1994-1996
Sayed Kassem El Masry (Egypt)	Member	1998-2005
Abdoulaye Gaye (Senegal)	Member	2008-2015
Satyabhooshun Gupt Domah (Mauritius)	Member	2012-2015
Abdelwahab Hani (Tunisia)	Member	2016-2019
Abderrazak Rouwane (Maroc)	Member	2022-2025
Habib Slim (Tunisia)	Member	1995

2.7 African members of the Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

Name and nationalities	Position	Period
Khaled Cheickna Babacar (Mauritania)	Member	2020-2023
Mouhammed Charef (Morocco)	Member	2020-2023
Fatima Diallo (Senegal)	Member	2020-2025
	Vice-Chairperson	2021-current
Abdourhamana Dicko (Mali)	Member	2010-2017
	Vice-Chairperson	2016-2017
Ahmed Hassan El Borai (Egypt)	Member	2004-2015
	Vice-Chairperson	2004-2006
Abdelhamid El Jamri (Morocco)	Member	2004-2015
	Vice-Chairperson	2006-2008
	Chairperson	2008-2012
Khedidja Ladjel (Algeria)	Member	2012-2015
Mamane Oumaria (Niger)	Member	2018-2021
Myriam Poussi (Burkina Faso)	Member	2008-2011, 2020-2023
Lazhar Soualem (Algeria)	Member	2020-2022
Ahmadou Tall (Senegal)	Member	2010-2021
	Vice-Chairperson	2014-2016
	Chairperson	2018-2019
Germain Zong-Naba Pime (Burkina Faso)	Member	2012-2015
Raymond Gbètoho Zounmantoun (Benin)	Member	2022-2025

2.8 African members of the Committee on the Rights of Persons with Disabilities (CRPD)

Name and nationalities	Position	Period
Soumia Amrani (Morocco)	Member	2021
Danlami Umaru Basharu (Nigeria)	Member	2015-2022
	Vice-Chairperson	2017-2019
	Chairperson	2019-2022
Lotfi Ben Lallohom (Tunisia)	Member	2008-2014
	Vice-Chairperson	2010
Imed Eddine Chaker (Tunisia)	Member	2017-2020
Alfred Kouassi Kouadio (Côte d'Ivoire)	Member	2023-2026
Martin Mwesigwa Babu (Uganda)	Member	2013-2020
Abdelmajid Makni (Morocco)	Member	2021-2024

Samuel Njuguna (Kenya)	Member	2017-2024
Gertrude Oforuwa Feoame (Ghana)	Member	2019-2026
Coomaravel Pyaneandee (Mauritius)	Member	2015-2018
Edah Wangechi Maina (Kenya)	Member	2008-2014
	Vice-Chairperson	2009-2012

2.9 African members of the Committee on Enforced Disappearances (CED)

Name and nationalities	**Position**	**Period**
Mouhammed Ayat (Morocco)	Member	2017-2025
	Vice-Chairperson	2018-2019; 2022-current
	Chairperson	2020-2021
Moncef Baati (Tunisia)	Member	2017-2021
Mamadou Badio Camara (Senegal)	Member	2011-2015
	Vice-Chairperson	2011-2013
Matar Diop (Senegal)	Member	2019-2023
Enoch Mulembe (Zambia)	Member	2011-2013

2.10 African members of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

Name and nationalities	**Position**	**Period**
Uju Agomoh (Nigeria)	Member	2023-2026
Hameth Saloum Diakhate (Senegal)	Member	2019-2026
Hamida Dridi (Tunisia)	Member	2021-2024
Satyabhooshun Gupt Domah (Mauritius)	Member	2017-2024
Gnambi Garba kodjo (Togo)	Member	2015 -2022
Radhia Nasraoui (Tunisia)	Member	2015-2018
Andrew Christoffel Nissen (South Africa)	Member	2023-2026
Abdallah Ounnir (Morocco)	Member	2017-2024
	Vice-Chairperson	2018-2020
Haimond Ramdan (Mauritania)	Member	2017-2020
Paul Lam Shang Leen (Mauritius)	Member	2011-2016
Fortuné Gaétan Zongo (Burkina Faso)	Member	2011-2014
	Vice-Chairperson	2012-2015

2.11 Africa in Human Rights Council (HRC) Subsidiary Bodies and special procedures

2.11.1 African members of the Advisory Committee

Name and nationalities	Position	Period
Mohamed Bennani (Morocco)	Member	2015-2017
	Vice-Chairperson	2017
Nadia Amal Bernoussi (Morocco)	Member	2020-2023
Rabah Boudache (Algeria)	Member	2022-2025
Lazhari Bouzid (Algeria)	Member	2017-2020
	Vice-Chairperson	2019
	Chairperson	2020
Sebastião da Silva Isata (Angola)	Member	2022-2025
Hoda Elsadda (Egypt)	Member	2014-2016
	Vice-Chairperson	2014
Halima Embarek Warzazi (Morocco)	Member	2008-2012
	Chairperson	2009-2010
Baba Kura Kaigama (Nigeria)	Member	2008-2011
Alfred Ntunduguru Karokora (Uganda)	Member	2011-2016
Bernards Andrews Nyamwaya Mudho (Kenya)	Member	2008-2010
Obiora Chinedu Okafor (Nigeria)	Member	2011-2017
	Chairperson	2015
Mona Omar (Egypt)	Member	2017-2019
Dheerujlall Seetulsingh (Mauritius)	Member	2008-2023
	Vice-Chairperson	2010-2011; 2014
Cheikh Tidiane Thiam (Senegal)	Member	2019-2021
Frans Viljoen (South Africa)	Member	2021-2024
Imeru Tamrat Yigezu (Ethiopia)	Member	2013-2018
	Vice-Chairperson	2016; 2018
Mona Zulficar (Egypt)	Member	2008-2013
	Vice-Chairperson	2008-2009; 2011-2012

2.11.2 African thematic mandate holders

Name and nationalities	**Position**	**Period**
Aua Balde (Guinea-Bissau)	Member of the Working group on Enforced or Involuntary Disappearances	2020-current
J'bayo Adekanye (Nigeria)		2000-2008
Houria Es-Slami (Morocco)		2014-2020
Kwadwo Faka Nyamekye (Ghana)		1980-1981
Jeremy Sarkin (South Africa)		2008-2014
Najat Maalla M'jid (Morocco)	Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material	2008-2014
Mama Fatima Singhateh (Gambia)		2020-current
Selondji Roland Jean-Baptiste Adjovi (Benin)	Member of the Working Group on Arbitrary Detention	2014-2020
Laity Kama (Senegal)		1992-2001
Mumba Malila (Zambia)		2020-current
Malick El Hadji Sow (Senegal)		2008-2014
Leila Zerrougui (Algeria)		2001-2008
E Tendayi Achiume (Zambia)	Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance	2017-2022
Maurice Glèlè-Ahanhanzo (Benin)		1993-2002
Doudou Diène (Sénégal)		2002-2008
Githu Muigai (Kenya)		2008-2011
Mutuma Ruteere (Kenya)		2011-2017

Urmila Bhoola (South Africa)	Special Rapporteur on contemporary forms of slavery, including its causes and its consequences.	2014-2020
Koumbou Boly Barry (Burkina Faso)	Special Rapporteur on right to education	2016-2022
Okechukwu Ibeanu (Nigeria)	Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes	2004-2010
Fatma-Zohra Ouhachi-Vesely (Algeria)		1995-2004
Tlaleng Mofokeng (South Africa)	Special Rapporteur on the right of everyone of the highest attainable standard physical and mental health	2020-current
Maya Sahli (Algeria)	Member of the Working group of experts on people African descent	2008-2014
Sabelo Gumedze (South Africa)		2014-2021
Catherine S Namakula (Uganda)		2021-current

Najat Al-Hajjaji (Libya)	Member of the Working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	2005-2011
Anton Katz (South Africa)		2011-2018
Chris Kwaja (Nigeria)		2018-current
Obiora C Okafor (Nigeria)	Independent Expert on human rights and international solidarity	2017-current
Christof Heyns (South Africa)	Special Rapporteur on extrajudicial, summary or arbitrary executions	2010-2016
Bacre Waly Ndiaye (Senegal)		1992-1998
Amos Wako (Kenya)		1982-1992
Emna Aouij (Tunisia)	Member of the Working group on discrimination against women and girls	2011-2017
Meskerem Techane (Ethiopia)		2017-current
Rashida Manjoo (South Africa)	Special Rapporteur on violence against women, its causes and consequences	2009-2015
Maina Kiai (Kenya)	Special Rapporteur on the rights to freedom and peaceful assembly and of association	2011-217
Clement Nyaletsossi (Togo)		2018-current

Saad Alfarargi (Egypt)	Special Rapporteur on the right to development	2017-current
Ikponwosa Ero (Nigeria)	Independent expert on the enjoyment of human rights by persons with albinism	2015-2021
Muluka-Anne Miti-Drummond (Zambia)		2021-2027
Livingstone Sewanyana (Uganda)	Independent expert on the promotion of a democratic and equitable international order	2018-current
Michael Addo (Ghana)	Working group on the issue of the human rights and transnational corporations and other business enterprises	2011-2018
Githu Muigai (Kenya)		2018-2022
Damilola Olawuyi (Nigeria)		2022-current
Attiya Waris (Kenya)	Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights	2021-current
Fantu CHERU (Ethiopia/United States of America)		2000-2002
Bernards Andrew Nyamwaya Mudho (Kenya)		2002-2008
Cephas Lumina (Zambia)		2008-2014

Idriss Jazairy (Algeria)	Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights	2015-2020
Ambeyi Ligabo (Kenya)	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	2002-2008
Margaret Sekaggya (Uganda)	Special Rapporteur on the situation of human rights defenders	2008-2014
Francis Deng (Sudan)	Special Rapporteur on the human rights of internally displaced persons	1992-2004
Chaloka Beyani (Zambia)		2010-2016
Abdelfattah Amor (Tunisia)	Special Rapporteur on freedom of religion or belief	1993-2004
Joy Ngozi Ezeilo (Nigeria)	Special Rapporteur on trafficking in persons, especially women and children	2008-2014

2.11.3 African country mandate holders

Name and nationalities	Position	Period
Yao Agbetse (Togo)	Independent Expert on the situation of human rights in Central African Republic	2019-current
Marie-Thérèse Keita Bocoum (Côte d'Ivoire)		2014-2019
John Dugard (South Africa)	Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967	2001-2008
Mohamed Charfi (Tunisia)	Independent expert on the situation of human rights in Somalia	1995-1996
Isha Dyfan (Sierra Leone)		2020-current
Fanuel Jariretundu Kozonguizi (Namibia)		1993-1994
Bahame Nyanduga (Tanzania)		2014-2020
Yash Ghai (Kenya)	Special Rapporteur on the situation of human rights in Cambodia	2005-2008
Suliman Baldo (Sudan)	Independent Expert on the situation of human rights in Mali	2013-2018
Alioune Tine (Senegal)		2013-2020
Sheila B Keetharuth (Mauritius)	Special rapporteur on the situation of human rights in Eritrea	2012-2018
Mohamed Abdelsalam Babiker (Sudan)		2020-current
Fortuné Gaetan Zongo (Burkina Faso)	Special Rapporteur on the situation of human rights in Burundi	2022-current

3 Africa in United Nations International Law Commission (ILC)

Name and nationalities	**Position**	**Period**
Emmanuel Akwei Addo (Ghana)	Member	1997-2006
Mohammed Bello Adoke (Nigeria)	Member	2011-2006
Bola Adesumbo Ajibola (Nigeria)	Member	1987-1991
Richard Osuolale A Akinjide (Nigeria)	Member	1982-1986
Mikuin Leliel Balanda (Zaire/Democratic Republic of the Congo)	Member	1982-1986
Mohamed Bedjaoui (Algeria)	Member	1965-1981
	Special Rapporteur on Succession of States in respect of matters other than treaties	1968-1974, 1976-1981 (13 reports)
Mohamed Bennouna (Morocco)	Member	1987-1998
	Special Rapporteur on Diplomatic protection	1998 (1 report)
Boutros Boutros-Ghali (Egypt)	Member	1979-1991
Yacouba Cissé (Côte d'Ivoire)	Member	2017-current
Pedro Comissario Afonso (Mozambique)	Member	2002-2016
Emmanuel Kodjoe Dadzie (Ghana)	Member	1977-1981
CJR Dugard (South Africa)	Member	1997-2011
	Special Rapporteur on diplomatic protection	200-2006 (7 reports)

Abdullah El-Erian (Egypt)	Member	1957-1958
		1962-1978
	Special Rapporteur on representation of states in their relations with international organisations	1963, 1967-1971 (6 reports)
	Special Rapporteur on status, privileges and immunities of international organisations, their officials, experts, etc	1977-1978 (2 reports)
Nabil Elaraby (Egypt)	Member	1994-2001
Taslim Olawale Elias (Nigeria)	Member	1962-1975
Abdelrazeg El-Murtadi Suleiman Goudier (Libya)	Member	2012-2016
Khalafalla El Rasheed Mohamed-Ahmed (Sudan)	Member	1982-1986
Ahmed Amin Fathalla (Egypt)	Member	2023-current
Salifou Fomba (Mali)	Member	1992-1996
		2002-2011
Hussein A Hassouna (Egypt)	Member	2007–2022
Kamil E. Idris (Sudan)	Member	1992-1996
		2000-2001
Adegoke Ajibola Ige (Nigeria)	Member	Died shortly after his election
Luis Ignacio-Pinto (Dahomey/Benin)	Member	1967-1969
Charles Chernor Jalloh (Sierra Leone)	Member	2017-current
Peter CR Kabatsi (Uganda)	Member	1992-2006
Maurice Kamto (Cameroon)	Member	1999-2016
	Special Rapporteur on expulsion of aliens	2005-2014 (9 reports)
Victor Kanga (Cameroon)	Member	1962-1964
James Lutabanzibwa Kateka (Tanzania)	Member	1997-2006
Fathi Kemicha (Tunisia)	Member	2002-2011
Abdul G Koroma (Sierra Leone)	Member	1982-1993
Ahmed Laraba (Algeria)	Member	2012-current
Ahmed Mahiou (Algeria)	Member	1982-1996

Ivon Mingashang (Democratic Republic of the Congo)	Member	2023-current
Frank XJC Njenga (Kenya)	Member	1976-1991
Bayo Ojo (Nigeria)	Member	2007-2011
Hassan Ouazzani Chahdi (Morocco)	Member	2017-
Guillaume Pambou-Tchivounda (Gabon)	Member	1992-2006
Obed Pessou (Dahomey/Benin, Senegal)	Member	1962-1966
Chris M Peter (Tanzania)	Member	2012-2022
Phoebe Okowa (Kenya)	Member	2023-current
Hassan Ouazzani Chahdi (Morocco)	Member	2023-current
Alfred Ramangasoavina (Madagascar)	Member	1967-1976
Edilbert Razafindralambo (Madagascar)	Member	1982-1996
Alioune Sall	Member	2023-current
Louis Savadogo (Burkina Faso)	Member	2023-current
Doudou Thiam (Senegal)	Member	1970-1999
	Special Rapporteur on draft code of crimes against the peace and security of mankind (Part II)	1983-1995 (13 reports)
Dire D Tladi (South Africa)	Member	2012-2022
	Special Rapporteur on peremptory norms of general international law (*jus cogens*)	2016-2022 (5 reports)
	President	2022
Amos S Wako (Kenya)	Member	2007-2022
48 Africans elected to the ILC out of a total of 250 members of the Commission so far 8 African Special Rapporteurs designed out of a total of 61		

4 Academies and learned societies

4.1 Institut de Droit International (IDI)

The Institute's website does not provide information on deceased members of the Institute, and it therefore is impossible to draw up a complete list of all Africans who have been elected to the Institute. Information on

honorary members is incomplete and, for example, does not indicate the year of election to the Institute.

Name and nationalities	**Position**	**Period**
George Michel Abi-saab (Egypt)	Associate member	1981-1985
	Titular Member	1985-current
Mohamed Bedjaoui (Algeria)	Titular Member	1977-2010
	Vice-President	Strasbourg 1997, Berlin 1999
	Emeritus member	2010-current
Ghali Boutros-Boutros (Egypt)	President	1985-1987
Abdoullah Cisse (Senegal)	Associate Member	2011-current
Tladi Dire (South Africa)	Associate Member	2017-current
John Dugard (South Africa)	Associate Member	1995-1999
	Titular Member	1999-current
Olufemi Elias (Nigeria)	Associate Member	2015-current
Maurice Kamto (Cameroon)	Associate Member	2005-2013
	Titular Member	2013-current
James Kateka (Tanzania)	Associate Member	2009-2013
	Titular Member	2013-current
Abdul G Koroma (Sierra Leone)	Associate Member	2003-2007
	Full Member	2007-current
Edward Kwakwa (Ghana)	Associate Member	2011-2017
	Full Member	2017-current
Ahmed Mahiou (Algeria)	Associate Member	2003-2007
	Full Member	2007-
Makane Moïse Mbengue	Associate Member	2021-current
Ali Mezghani (Tunisia)	Associate Member	2013-current
Gérard Niyungeko (Burundi)	Associate Member	2019-current

Raymond Ranjeva (Madagascar)	Associate Member	1995-2001
	Full Member	2001-
	Vice-President	1993-1995
Fouad Riad (Egypt)	Emeritus member	2007-
Abdulqawi Ahmed Yusuf (Somalia)	Full Member	2005-
No African has so far been elected Secretary-General of the Institute		

4.2 International Academy of Comparative Law (IACL)

The Institute's website does not provide any information on former (deceased) members of the Institute, nor on the date of election of members. This table therefore shows the African members of the Institute as indicated on the IACL website at the beginning of 2021.

Name and nationalities	**Position**	**Name and nationalities**	**Position**
Roland Adjovi (Benin)	Associate Member	Makane Moïse Mbengue (Senegal)	Associate Member
Rodolphe Biffot (Gabon)	Associate Member		Vice-President
Abdoullah Cissé (Senegal)	Associate Member	Kalthoum Meziou (Tunisia)	Associate Member
Marius Johannes de Waal (South Africa)	Associate Member	Benyam Mezmur (Ethiopia)	Associate Member
Jacques Etienne du Plessis (South Africa)	Titular Member	Richard Frimpong Oppong (Ghana)	Associate Member
Delphine Emmanuel-Adouki (Congo)	Associate Member	Elsabe Schoeman (South Africa)	Associate Member
Charles Manga Fombad (Cameroon)	Associate Member	Amr A Shalakany (Egypt)	Associate Member
Maurice Kamto (Cameroon)	Associate Member	Julia Jane Sloth-Nielsen (South Africa)	Associate Member
Babacar Kante (Senegal)	Associate Member	Deon Hurter van Zyl (South Africa)	Associate Member
Ibrahima Ly (Senegal)	Associate Member	Daniel Visser (South Africa)	Associate Member
Ahmed Mahiou (Algeria)	Emeritus member	Abdoulaye Wade (Senegal)	Member

Salvatore Mancuso (South Africa)	Associate Member	Slimane Yahia-Cherif (Algeria)	Emeritus member

4.3 The Hague Academy of International Law

4.3.1 Curatorium

Name and nationalities	**Position**	**Period**
Mohammed Bennouna	Member	2017-current
Boutros Boutros Ghali (Egypt)	Member	1980-2015
	Vice-President	2002-2003
	President	2003-2015
Maurice Kamto (Cameroon)	Member	2014-current
Kéba M'Baye (Senegal)	Member	1989-2001
	Vice-President	1996-2001
Makane Moïse Mbengue (Senegal)	Member	2021-current
Raymond Ranjeva (Madagascar)	Member	2003-2021

4.3.2 Courses

Name and nationalities	**Type**	**Title**	**Volume Recueil des Cours**
Ezzedine Abdallah (Egypt)	Special Course	La Convention de la Ligue arabe sur l'exécution des jugements : étude comparative du droit conventionnel comparé avec le droit interne	138 (1973)
George Michel Abi-Saab (Egypt)	Special Course	Wars of national liberation in the Geneva Conventions and Protocols	165 (1979)
	General Course	Cours général de droit international public	207 (1987)

Ahmed Abou-El-Wafa (Egypt)	Special Course	Les différends internationaux concernant les frontières terrestres dans la jurisprudence de la Cour internationale de Justice	343 (2009)
Andronico Oduogo Adede (Kenya)	Special Course	Legal trends in international lending and investment in the developing countries	180 (1983)
Gamal Moursi Badr (Egypt)	Special Course	Agency: unification of material law and of conflict rules	184 (1984)
Mohammed Bedjaoui (Algeria)	Special Course	Problèmes récents de succession d'états dans les états nouveaux	130 (1970)
	Special Course	Non-alignement et droit international	151 (1976)
	Inaugural Lecture	Le cinquantième anniversaire de la Cour internationale de Justice	257 (1996)
	General Course	L'Humanité en Quête de Paix et de Développement	324 (2006) and 325 (2006)
Emmanuel G Bello (Nigeria)	Special Course	The African Charter on Human and Peoples' Rights: A legal analysis	194 (1985)
Rafâa Ben Achour (Tunisia)	Special Course	Changements anticonstitutionnels de gouvernement et droit international	379 (2016)
Yadh Ben Achour (Tunisia)	Special Course	Souveraineté étatique et protection internationale des minorités	245 (1994)

Mohammed Bennouna (Morocco)	Special Course	Le droit international relatif aux matières premières	177 (1982)
	Special Course	Les sanctions économiques des Nations Unies	300 (2002)
	General Course	Le droit international entre la lettre et l'esprit. Cours général de droit international public (2016)	383 (2017)
Boutros Boutros-Ghali (Egypt)	Special Course	Le principe d'égalité des Etats et les organisations internationales	100 (1960)
	Special Course	La Ligue des Etats arabes	137 (1972)
	Inaugural Lecture	Le droit international à la recherche de ses valeurs : paix, développement, démocratisation	186 (2000)
Abd-El-Kader Boye (Senegal)	Special Course	Le statut personnel dans le droit international privé des pays africains au sud du Sahara : conceptions et solutions des conflits de lois : le poids de la tradition négro-africaine personnaliste	238 (1993)
Mohamed Charfi (Tunisia)	Special Course	L'influence de la religion dans le droit international privé des pays musulmans	203 (1987)
Lotfi Chedly (Tunisia)	Special Course	L'efficacité de l'arbitrage commercial international	400 (2019)

Masato Dogauchi (Mauritania)	Special Course	Four-step analysis of private international law	315 (2005)
Zaki El Chiati (Ehypt)	Special Course	Protection of investment in the context of petroleum agreements	204 (1987)
Ahmed Sadek El-Kosheri (Egypt)	Special Course	Le régime juridique créé par les accords de participation dans le domaine pétrolier	147 (1975)
Samaan Boutros Farajallah (Egypt)	Special Course	Le Conseil de Coopération des Etats Arabes du Golfe	228 (1991)
David Adedayo Ijalaye (Nigeria)	Special Course	Indigenisation measures and multinational corporations in Africa	171 (1981)
Maurice Kamto (Cameroon)	Special Course	La volonté de l'état en droit international	310 (2004)
	General Course	Le droit international et le polycentrisme normatif	2021 (Not yet published)
Ahmed Mahiou (Algeria)	Special Course	Le cadre juridique de la coopération sud-sud : quelques expériences ou tentatives d'intégration	241 (1993)
	General Course	Le droit international ou la dialectique de la rigueur et de la flexibilité : cours général de droit international	337 (2008)
Slim Laghmani (Tunisia)	Special Course	Islam et droit international	2022 (Not yet published)

Keba Mbaye (Senegal)	Special Course	L'Intérêt pour agir devant la Cour Internationale de Justice	209 (1988)
Makane Moïse Mbengue (Senegal)	Special Course	Les juridictions internationales et la science	2019 (Not yet published)
Brusil Miranda Metou (Cameroon)	Special Course	Le contrôle international des dérogations aux droits de l'homme	2020 (Not yet published)
Kalthoum Meziou (Tunisia)	Special Course	Migrations et relations familiales	345 (2009)
Abderrazak Moulay Rachid (Morocco)	Special Course	Les droits de l'enfant dans les conventions internationales et les solutions retenues dans les pays arabo-musulmans	268 (1997)
Gérard Niyungeko (Burundi)	Special Course	Les juridictions internationales africaines	2019 (Not yet published)
Edwin Ifeanyichukwu Nwogugu (Nigeria)	Special Course	Legal problems of foreign investments	153 (1976)
Paul Gerard Pougoue (Cameroon)	Special Course	L'arbitrage dans l'espace OHADA	380 (2016)
Raymond Ranjeva (Madagascar)	Special Course	Les organisations non gouvernementales et la mise en oeuvre du droit international	270 (1997)
Fouad AM Riad (Egypt)	Special Course	L'entreprise publique et semi-publique en droit international privé	108 (1963)
Mohamed Ibrahim Shaker (Egypt)	Special Course	The evolving international regime of nuclear non-proliferation	321 (2006)

Mpazi Sinjela (Zambia)	Special Course	intellectual property: cross-border recognition of rights and national development	372 (2015)
Doudou Thiam (Senegal)	Special Course	Le fédéralisme africain	126 (1969)
Abdulqawi Ahmed Yusuf (Somalia)	Special Course	Pan-Africanism and international law	013)

4.3.3 Co-directors of the Centre for Studies and Research in International Law and International Relations

Name and nationalities	**Title of the Research**	**Volume**
Maurice Kamto (Cameroon)	The Access of Individuals to International Justice/L'accès de l'individu à la justice internationale	39 (2019)
Ahmed Mahiou (Algeria)	La sécurité alimentaire/ Food Security and Food Safety	(2006)

4.3.4 Diplomas

Name and nationalities	**Period**	**Name and nationalities**	**Period**
George Michel Abi-Saab (Egypt)	1964	SC Konate (Senegal)	1986
Ahmed Abou El Wafa Moha D Hassan (Egypt)	1980	Nagla Saad Nassar (Egypt)	1996
Philémon LB Beb A Don (Cameroon)	1957	Mathias Niyonzima (Burundi)	1984
EG Bello (Nigeria)	1975	Gérard Niyungeko (Burundi)	1984
Mohamed Bennouna Louridi (Morocco)	1970	A Nkolombua (Zaïre/Democratic Republic of the Congo)	1974

Hichem Blouza (Tunisia)	1996	FH Panford (Ghana)	1976
BE Eyo (Nigeria)	1960	Michael Polonsky (South Africa)	1970
Ibrahima Fall (Senegal)	1973	BK Spitz (South Africa)	1960
Mamadou Hébié (Burkina Faso)	2010	Alain-Guy Tachou Sipowo (Cameroon)	2011
LL Kato (Tanzania)	1973	Sylvanus Azedon Tiewul (Ghana)	1974
Apollin Koagne Zouapet (Cameroon)	2019	Jean Yangoumale (Central African Republic)	1983

Postface
Afterword

L'ouvrage que l'on vient de lire, *Soixante ans après les indépendances, l'Afrique et le droit international : regards d'une génération*, remet sur les rails l'épineuse question de l'Afrique et le droit international ou plus exactement, il pose cette interrogation cruciale : le droit international en Afrique est-il un droit international africain ? Autrement dit, le droit international tient-il compte des réalités ou spécificités africaines ?

Sur les ombres d'une telle préoccupation, le présent recueil, avec ses quinze (15) contributions lumineuses, apporte des éclairages utiles à la réflexion. Les diverses contributions posent des questions concrètes et apportent des réponses précises pouvant enrichir le débat sur l'efficacité du droit international universel transposé dans le système juridique africain.

La lecture de l'ouvrage est plaisante, la réflexion d'ensemble est stimulante. Mais, au-delà de la forme et du fond du texte lui-même, le plus grand mérite de ce recueil est probablement son contexte.

Cet ouvrage vient donner un regain de vitalité à la recherche scientifique et juridique par ses apports à une meilleure compréhension -sinon appréhension- du droit international en Afrique. En outre, il offre une vision africaine du droit international. C'est donc à la fois un ouvrage juridique mais, et surtout, africain.

Vu sous l'angle juridique, le contexte africain, qui est le nôtre, permet de se réjouir de cet apport scientifique. En effet, la parution d'un recueil d'articles de recherche (de belle facture d'ailleurs) est certes de moins en moins un événement sur notre continent, toutefois cela n'est ni quotidien, ni anodin. Un chemin important de réflexion juridique et de diffusion doctrinale a été parcouru, mais l'horizon des enjeux est encore éloigné.

Vu sous l'angle africain, la variété des contributions, autant que celle des contributeurs, de ce recueil sont de bon augure. Une œuvre de jeunes chercheurs résolument tournés vers le Droit international, abordant des thématiques pleinement africaines, c'est assurément un gage de réussite sur le chemin de la consolidation du droit en Afrique.

La lecture de *Soixante ans après les indépendances, l'Afrique et le droit international: regards d'une génération*, s'achève par une double suggestion au lecteur : l'ouvrage est à relire et il peut servir utilement pour le contenu de la pratique et de l'enseignement du droit international en Afrique.

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Professeure agrégée à la Faculté des sciences juridiques politiques et sociales de Tunis- Université de Carthage
Directrice du Master de recherche en Droit et politiques de l'Union africaine
Membre élue et Présidente de la Commission de l'Union africaine pour le Droit international (CUADI)
Conseillère de SEM. Paul KAGAME sur la réforme institutionnelle de l'Union africaine

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