Leiden Journal of International Law (2015), 28, pp. 605–621
 doi:10.1017/S092215651500031X

HAGUE INTERNATIONAL TRIBUNALS

INTERNATIONAL COURT OF JUSTICE

From Reluctance to Acquiescence: The Evolving Attitude of African States Towards Judicial and Arbitral Settlement of Disputes*

ABDULQAWI A. YUSUF**

Abstract
The attitude of African states towards judicial and arbitral settlement of disputes has substantially evolved since their accession to independence. The original reluctance to resort to the judicial settlement of disputes was due to a lack of trust in the system of 'international law' from which they were excluded prior to the UN Charter era and the rules of which were sometimes used to justify their colonization. There was also the issue of under-representation in international judicial or arbitral organs. That initial reluctance has more recently evolved into acquiescence at the universal level. Judicial institutions are also being established by the African states themselves.

Key words
Africa; arbitration; International Court of Justice; regional courts

1. INTRODUCTION

As a student of law at the Somali National University in the early 1970s, I decided to write my thesis on the mechanism for the peaceful settlement of disputes under the Charter of the Organization of African Unity (OAU). I was interested in this particular issue because of the territorial disputes, at that time, between Somalia and Kenya, on the one hand, and Somalia and Ethiopia, on the other, and because I wanted to explore the existence and efficacy of African mechanisms for the peaceful resolution of such disputes. As I studied the OAU Charter and its Protocol establishing the Commission of Mediation, Conciliation, and Arbitration, I was struck by the fact that there was no reference to judicial settlement of disputes. Indeed, the OAU Charter

* This article is based on a speech delivered by the author at the UCL/Baker & McKenzie Fourth Annual Lecture, on 14 May 2014, at University College London.

** Vice-President, International Court of Justice [A.Yusuf@icj-cij.org]. The author wishes to thank Liu Yang, university trainee at the Court, for his assistance in updating the initial text of the speech.

principle on dispute resolution called for 'the peaceful settlement of disputes by negotiation, mediation, conciliation, or arbitration',[1] and established a Commission of Mediation, Conciliation, and Arbitration governed by the Protocol.[2] Thus, neither the Charter nor the Protocol provided for the judicial settlement of disputes. Although arbitration was mentioned, no case was ever submitted for arbitration to the Commission, which simply disappeared after a long period of disuse.[3]

The deliberate omission of the judicial settlement of disputes from the OAU Charter and Protocol was a clear indication of the reluctance of African states during those years to use judicial means of dispute settlement. I believe that this reluctance was due to a lack of trust, but whence did this lack of trust come? In my view, the lack of trust related mainly to the law to be applied by the judicial organs; and it was most likely rooted in the misrepresentation of international law by the colonial powers and their frequent recourse to deceit in their legal relations with African countries during the process of colonization.

Examples of these misrepresentations abound. A few may be mentioned here. First, there is the Treaty of Wuchale/Uccialli negotiated between Emperor Menelik of Ethiopia and Count Pietro Antonelli of Italy.[4] The treaty was originally drafted in Amharic, including the later disputed Article 17, which gave the Ethiopian sovereign the authority to consult with Italy, if he so desired, about matters of foreign affairs. However, when the treaty was translated into Italian by Antonelli, he changed the language so that Article 17 authorized Italy to assume control over the foreign affairs of Ethiopia. Emperor Menelik only discovered this treachery when he began correspondence with other states, including Great Britain and Germany, which informed him of their intent to maintain relations with Ethiopia through Italy alone pursuant to the treaty. In 1893, Menelik denounced the Treaty of Wuchale notwithstanding substantial pressure from the Italians, who continued to maintain that Ethiopia was a protectorate. Italy refused to accept the Ethiopian position and went to war to conquer Ethiopia by force. However, Ethiopia defeated the Italian army in the battle of Adowa in 1896 and as a result was recognized for the first time as an independent state by the colonial powers.[5]

A second example of the misrepresentation of international law was the widespread abuse of the protectorate system. African sovereigns were made to understand very often in their dealings with the colonial powers that under the protectorate system their sovereignty over their lands would remain intact, but they often came

1 Charter of the Organization of African Unity, 479 UNTS 39, Art. 3.
2 Protocol of Mediation, Conciliation and Arbitration, Charter of the Organization of African Unity, 21 July 1964, 3 ILM 1116 (1964).
3 T. Maluwa, 'The Transition from the Organization of African Unity to the African Union', in A. A. Yusuf and F. Ouguergouz (eds.), *The African Union: Legal And Institutional Aspects* (2012), 27.
4 Treaty of Wuchale/Uccialli, Trattato di amicizia e di commercio tra il Regno d'Italia e l'Impero d'Etiopia (Treaty of amity and commerce between the Kingdom of Italy and the Ethiopian Empire), signed at Wuchale/Uccialli on 2 May 1889, text available in C. Rossetti, *Storia diplomatica dell'Etiopia durante il regno di Menelik II: trattati, accordi, convenzioni, protocolli, atti di concessione, ed altri documenti relativi all'Etiopia*, Turin: STEN (1910), at 41, available online at <https://archive.org/details/storiadiplomaticooross> (accessed 5 May 2015).
5 See A. Adu Boahen, *Africa Under Colonial Domination 1880–1935* (1985), 270.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

to discover later that the arrangements they signed were treated by the colonial powers as cession of *imperium*, and sometimes even of *dominium directum*.

A third example was the Congo Free State, which was neither free nor a state, but a large territory in the center of the continent privately controlled by King Leopold II of Belgium to exploit the lucrative rubber and ivory markets.[6]

A fourth example of misrepresentation was the mandate system of the League of Nations, which was viewed by African peoples as a means to obtain self-government, but which was treated as another form of colonialism by the European states.[7]

Thus, there was this historical misrepresentation of international law by the colonial powers that undermined the African states' trust in the law upon their independence. The origin of this distrust was described by a nineteenth century Pan-Africanist lawyer, Joseph Casely-Hayford of the Gold Coast (now Ghana) as follows:

> When the scramble for Africa began … men uttered pious words. But not all pious utterances are true. The pity of it is that those who uttered them knew them to be untrue. It was to save the soul of Africa. It was to rescue her from degradation … We know what happened in the Congo. We know what may happen … once "the pre-existing rights of private ownership" pass over to the Government in West Africa.[8]

Of course, Casely-Hayford was referring to King Léopold's so called Congo Free State and the reign of terror perpetuated therein, which was described by the African-American lawyer George Washington Williams as constituting 'crimes against humanity' —one of the first uses of that term— in a letter to the United States Secretary of State.[9]

Thus, it was first and foremost the law to be applied by the judicial institutions rather than the institutions themselves that was not trusted. Consequently, the African countries, upon acquiring their independence, set out to use their influence to make changes to that law and to reform it. They used the UN General Assembly, the International Law Commission (ILC), and the codification conferences of the United Nations to achieve this reform. In their view, the alteration of the sociological structure of the community of nations required a new set of rules or at least a modification of the old rules, which reflected the common customs and practices of the self-styled club of 'civilized nations', particularly insofar as such practices were used to sanction colonialism or to justify the subjugation of their peoples.

While they were engaged in this process of reform, particularly in the United Nations, the role of judicial institutions in applying the old law caught up with them, when in 1966, the International Court of Justice (ICJ) ruled against them in *Ethiopia and Liberia* v. *South Africa*, commonly referred to as the *South West Africa* contentious cases.[10] It might therefore be opportune at this juncture to turn to the relations between Africa and the ICJ and its predecessor the Permanent Court of

6 A. Hochschild, *King Leopold's Ghost* (1999), 118.
7 A. Yusuf, *Pan-Africanism and International Law* (2014), 22.
8 J. Casely-Hayford, *The Truth About The Western African Land Question* (2012), 19.
9 See Hochschild, *supra* note 6, at 112.
10 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966 [1966] ICJ Rep. 6.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

International Justice (PCIJ), since that relationship, particularly during the colonial period, may also have, to some extent, informed the immediate post-independence attitudes of African states towards the judicial settlement of disputes.

2. Africa, the PCIJ, and the ICJ

There are three distinct phases in the relations of African States with the ICJ and its predecessor, the Permanent Court of International Justice: in the first phase, the colonial phase, Africa is dealt with as an object of international law whose 'interests' are litigated by other states before the Court; in the second phase, the post-independence phase, African states are reluctant to submit their disputes to the Court and are confirmed in their skepticism by the *South West Africa* judgment of 1966;[11] in the final phase, the reconciliation phase, African states return to the Court, buoyed by its advisory opinions on self-determination in the 1971 *Namibia* and 1975 *Western Sahara* cases.[12]

2.1. The PCIJ and the early ICJ cases concerning Africa

How could this first phase of the relationship of Africa with the PCIJ and later the ICJ be characterized? According to former ICJ President Taslim O. Elias, Africa was merely treated as an object in the early PCIJ and ICJ cases.[13] Between 1922, the date when the PCIJ was established, and 1960, the symbolic year of African independence, legal disputes concerning foreign interests in African countries were dealt with by the PCIJ and the ICJ in five cases.[14] In four of those cases, African states were not proper parties before the Court; rather, claims involving their peoples, their territories, and their resources were raised and litigated by European colonial powers or other states. The fifth case was discontinued by the parties.

A brief overview of these cases will show the peculiar nature of the proceedings. In 1923, the PCIJ issued its advisory opinion on a dispute between France and Great Britain concerning the application to British subjects of the nationality decrees promulgated by France in Tunisia and Morocco (the *Nationality Decrees in Tunis and Morocco)*. The question put to the Court by the Council of the League was as follows:

> Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French Zone) on November 8th 1921, and their application to British subjects, is or is not, by international law, solely a matter of domestic jurisdiction.[15]

---

11 Ibid.

12 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion of 21 June 1971 [1971] ICJ Rep. 16; Western Sahara, Advisory Opinion of 16 October 1975 [1975] ICJ Rep. 12.

13 T. O. Elias, 'The Role of the International Court of Justice in Africa', (1989) 1 *Afr. J. Int'l & Comp. L.* 1, at 1.

14 *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion*, PCIJ Rep. (1923) Series B No. 4, at 7; *Oscar Chinn, Judgment*, PCIJ Rep. (1934) Series A/B No. 63, at 65; *Phosphates in Morocco*, PCIJ Rep. (1938) Series A/B No. 74, at 10; *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952 [1952], ICJ Rep. 176. There was also a case between France and Egypt, which was, however, discontinued *(Protection of French Nationals and Protected Persons in Egypt (France v. Egypt)*, Discontinuance, Order of 29 March 1950, [1950] ICJ Rep. 59).

15 *Nationality Decrees Issued in Tunis and Morocco*, PCIJ Rep. (1923) Series B No. 4, at 7.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

The Court replied to the question in the negative and concluded that 'the dispute referred to it in the Resolution of the Council of the League of Nations of October 4th, 1922, is not, by international law, solely a matter of domestic jurisdiction'.[16]

In 1934, the *Oscar Chinn* case, a diplomatic protection claim brought by Great Britain against Belgium over the freedom of trade in the waterways of the Belgian Congo, was referred to the PCIJ by the two states through a special agreement.[17] The Court was asked to determine whether certain measures taken and applied by the Belgian Government in relation to fluvial transport in the Congo and complained of by the British Government, in view of the loss and damage allegedly suffered by Mr. Oscar Chinn's company, were in conflict with the international obligations of the Belgian government towards the government of the UK. The Court held that this was not the case.[18]

In 1938, the PCIJ dealt with the *Phosphates in Morocco* case, regarding a dispute over the prospecting and exploitation of phosphates in Morocco.[19] In that case, Italy brought a claim against France under the open door regime instituted by the 1906 Algeciras Act and the Franco-German Treaty of 1911. It requested the Court to declare that the monopolization of the Moroccan phosphates was inconsistent with the international obligations of France and that it was incumbent upon France and its Moroccan protectorate to respect the rights acquired by an Italian company known as *Miniere e Fosfati*.

The Court found that it had no jurisdiction to adjudicate on the dispute since the dispute did not arise with regard to situations or facts subsequent to the ratification of the acceptance by France of the compulsory jurisdiction of the Court.

Finally, we come to a case dealt with by the ICJ before 1960, and that is the *Rights of Nationals of the United States of America in Morocco*, in which France instituted an action against the United States of America in relation to the preferential treatment claimed by the United States of America for its nationals in Morocco on the basis of its treaty with Morocco of 1836 and of the General Act of Algeciras of 1906.[20] France considered that the Government of the United States of America was not entitled to claim that the application of all laws and regulations to its nationals in Morocco requires its express consent.

The Court held that the US was entitled, by virtue of the provisions of its treaty with Morocco of 1836, to exercise in the French zone of Morocco consular jurisdiction in all disputes civil or criminal between its citizens; but that it was not entitled to claim that the application to its citizens of laws and regulations in the French zone of Morocco required its consent.[21]

16 Ibid.
17 *Oscar Chinn*, Judgment, PCIJ Rep. (1934) Series A/B No. 63, at 65.
18 Ibid., at 89.
19 *Phosphates in Morocco*, PCIJ Rep. (1938) Series A/B No. 74, at 10.
20 *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952 [1952] ICJ Rep. 176.
21 Ibid., at 212–3.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

In light of the above described pattern of litigation of foreign interests in African countries and of acts taking place on African territories by other states before the PCIJ and later the ICJ, it is no surprise that the newly-independent African states might have felt that the Court participated in the objectification of African states and sanctioned their exclusion from the scope of international law during that period.[22]

2.2 The reluctance to use the Court: The South West Africa cases

As new subjects of international law, the newly independent African states were eager to contribute to the development of international law. Their most immediate goal, in the context of Pan-Africanism, was to ensure the liberation of the entire continent from colonial and racist rule. They were determined, in the first instance, to utilize international law in the realization of those objectives. Second, as pointed out above, they wanted to reform the pre-existing rules of international law to bring them into line with the radical changes in the structure, composition, and interests of the international community. In both endeavours, they joined hands with the post-colonial states of Asia and Latin America, some of which were eager to de-link international law from colonial and imperial, expansionist ideologies.

It was in this context that 43 member states of the Afro-Asian group at the United Nations submitted a draft declaration on the granting of independence to colonial countries and peoples on 28 November 1960.[23] Although the USSR delegation to the General Assembly also proposed a draft declaration, it was the draft resolution sponsored by the Afro-Asian states that was finally adopted by the UN General Assembly on 14 December 1960.[24]

After solemnly proclaiming 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations', the UN General Assembly declared that: 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.[25]

The adoption of this declaration by the UN General Assembly, without a single dissenting vote, constituted a turning point in the international relations of Africa with the outside world and in the law governing those relations. Many representatives of the Afro-Asian group at the United Nations referred to the Bandung Conference of 1955[26] and the principles they adopted therein, and to the conferences of African

22 See Elias, *supra* note 13, at 1.

23 Draft resolution, submitted by Afghanistan, Burma, Cambodia, Cameroun, Central African Republic, Ceylon, Chad, Congo (Brazzaville), Congo (Leopoldville), Cyprus, Dahomey, Ethiopia, Federation of Malaya, Gabon, Ghana, Guinea, India, Indonesia, Iran, Iraq, Ivory Coast, Jordan, Laos, Lebanon, Liberia, Libya, Madagascar, Mali, Morocco, Nepal, Niger, Nigeria, Pakistan, Philippines, Saudi Arabia, Senegal, Somalia, the Sudan, Togo, Tunisia, Turkey, United Arab Republic and Upper Volta. UN Doc. A/L. 323 and Add. 1–6, (28 November 1960).

24 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES 1514 (XV), 14 December 1960. Also see UN. Doc. A/PV.947 (14 December 1960), at 1274.

25 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES 1514 (XV), 14 December 1960, para. 1.

26 Asian-African Conference: Communiqué, Bandung, 24 April, 1955, available at <http://www.cvce.eu/obj/final_communique_of_the_asian_african_conference_of_bandung_24_april_1955-en-676237bd-72f7-471f-949a-88b6ae513585.html> (accessed 5 May 2015).

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

states at Accra in 1958,[27] at Monrovia in 1959,[28] and at Addis Ababa in 1960[29] that reaffirmed those principles. For them, the draft declaration they were now submitting for adoption by the UN General Assembly was the culmination of those principles. As subjects of international law, the newly independent African states, acting in concert with the Asian states, were able to lay the ground for new rules and principles of international law which would put to an end the subjugation and domination of a people by another, be it in the name of a 'civilizing mission' or other pretexts based on implied inequality of peoples or imperial expansion. Of particular importance for the African and Asian states sponsoring the declaration was the fact that colonialism was declared not only to be contrary to the UN Charter, but also to be 'an impediment to the promotion of world peace and cooperation'. In their eyes, with the adoption of this declaration, colonialism was to be outlawed by the United Nations. Although at the time of its adoption as a UN General Assembly resolution, the declaration was of a recommendatory nature and did not have the force of law, its provisions gradually acquired the status of customary international law, thanks to the follow-up it received from the principal organs of the United Nations. As noted by the ICJ in its advisory opinion on *Namibia* in 1971:

> A further important stage in this development was the Declaration on the Granting of independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence".[30]

The Court then went on to state: 'the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.[31]

Unfortunately, in 1966 the Court had not yet taken full cognizance of the changes represented by the adoption of that Declaration by the UN General Assembly or by the transformation of the composition and interests of the international community. This lack of appreciation of the profound changes that occurred in the international community led the Court in 1966 to its controversial judgment on the *South West Africa* case.[32]

It might be worthwhile to recall briefly the origins of the case. In 1960, Ethiopia and Liberia instituted proceedings before the Court relating to the continued existence of the League of Nations Mandate for South West Africa (Namibia) and the continued duty of Apartheid South Africa to promote to the utmost the well-being and progress of the inhabitants of the territory and to report to the General Assembly of the

27 Resolution Adopted by All-African Peoples' Conference, First Conference, Accra, 5–13 December 1958, see G. King (ed.), *Documents on International Affairs 1958* (1962), at 583.
28 Resolution Adopted by the All-African Peoples' Conference, Second Conference, Tunis, 25–30 January 1960, see R. Hott, J. Major, and G. Warner (eds.), *Documents on International Affairs 1960* (1964), at 349.
29 Resolution Adopted by the All-African Peoples' Conference, Third Conference, Cairo, 23–31 March 1961, see C. Legum, *Pan-Africanism: A Short Political Guide* (1962), at 247.
30 *South West Africa* Advisory Opinion of 21 June 1971, *supra* note 12, at 31.
31 Ibid.
32 *South West Africa* Judgment of 18 July 1966, *supra* note 10.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

United Nations.[33] Their expectation was that the principal judicial organ of the United Nations would do its part to recognize and confirm the unlawfulness of territorial annexation under the guise of the system of mandates in the post-Charter era. Instead, the Court dismissed the case with the President's casting vote (the votes being equally divided) on the grounds that Ethiopia and Liberia lacked the legal right in the proceeding to establish standing before the Court.[34]

This judgment of the Court led to an extended period of disaffection of African States towards the Court. Between 1966, the year of the *South West Africa* judgment, and 1978, when Tunisia and Libya approached the Court through a special agreement for the delimitation of their continental shelf, no African state submitted a dispute to the Court. Instead, African states concentrated their efforts to reform international law and its institutions, including the composition of the ICJ, where African states insisted on a more equitable representation. As a result of their efforts at the UN General Assembly and Security Council for better representation on the bench, the African continent was given a third seat and African judges were elected at both the 1966 and 1969 triennial elections, increasing the number of African judges on the Court from two to three, which remains the practice to this day.[35]

2.3 The reconciliation phase: The role of the advisory opinions on *Namibia* and *Western Sahara*

The attitude of the African states towards the Court appears to have positively evolved as a result of the advisory opinions rendered by the Court in the *Namibia* and *Western Sahara* cases, in which it first recognized the principle of self-determination — which was central to the fight for liberation and decolonization waged by African states — and later declared it to be a right of peoples under international law.[36] Why should these advisory opinions be considered to constitute the turning point in relations between African states and the Court? Two reasons are especially relevant: first, the uncertain status of self-determination as a right under international law in the UN Charter, and second, the Court's explicit recognition of the evolution of international law as a result of the changes in the composition of the international community and of the reform of international law through the United Nations system.

It should perhaps be recalled that as late as 1971, the meaning and relevance of self-determination in international law was still contested. Some scholars characterized it as an 'incidental phrase' which was simply to be viewed as a basis for friendly

33 Ibid.
34 Ibid., at 34, para. 48.
35 See S. Bedi, 'African Participation in the International Court of Justice: A Statistical Appraisal', in A. A. Yusuf, (ed.) *African Yearbook of International Law* (1988), at 134. The discontent of African states played a significant role when the triennial election of 1966 took place. The Afro-Asian group challenged the Court's composition and lobbied for an additional African judge. Their advocacy was repeated in the triennial election of 1969, and since then it has become practice to have three African judges on the Court.
36 *South West Africa* Advisory Opinion of 21 June 1971, *supra* note 12; *Western Sahara* Advisory Opinion of 16 October 1975, *supra* note 12.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

relations among states.[37] Others, such as Gerald Fitzmaurice, who was a judge of the ICJ at the time of the *Namibia* advisory opinion, objected to the notion of a legal right of self-determination and went so far as to describe it as 'nonsense' for the simple reason, in his view, that 'a non-existent entity', i.e. a people, could not be 'the possessor of a legal right'.[38]

Just as significant as the recognition of self-determination as a right under international law was the shift in the interpretative practice of the Court to recognize the evolution of the principles and rules of international law in reviewing the validity of colonial institutions like the mandates. As the Court noted in the 1971 *Namibia* case:

> The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law… In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[39]

Of course, the development of the law that the Court references in the *Namibia* case includes the actions of African states in initiating and ensuring the adoption by the UN General Assembly of key resolutions clarifying the right of self-determination under international law, particularly resolution 1514(XV) of 1960,[40] and resolution 2625(XXV) of 1970.[41] African states were quick to take note of this belated recognition and confirmation by the Court of the supervening changes in international law. They also welcomed the new approach to the interpretation of the principles and rules of international law by the principal judicial organ of the United Nations as a sign that the Court had potential as a forum for the resolution of disputes concerning the interests of African states.

2.4. Africa at the ICJ: From reconciliation to acquiescence

While the *Namibia* and *Western Sahara* advisory opinions went a long way towards restoring the trust of African states with respect to the Court, the use of the Court by African states as a forum for the settlement of disputes did not take off again until 1978 with the *Tunisia-Libya Continental Shelf* cases[42] followed in 1982 by *Libya-Malta*, again on the continental shelf,[43] and in 1983 by the *Frontier Dispute* case between Mali and Burkina Faso, which was adjudicated by a chamber of the Court.[44] Throughout

37 For a criticism of that approach, see E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century', (1978) 159 *Recueil des Cours* 101.

38 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 221, at 233, para. 19 (Dissenting Opinion of Judge Gerald Fitzmaurice).

39 *South West Africa* Advisory Opinion of 21 June 1971, *supra* note 12, at 31, para. 53.

40 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES 1514 (XV), 14 December 1960.

41 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES 2625 (XXV), 24 October 1970.

42 *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, [1982] ICJ Rep. 18.

43 *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep. 13.

44 *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

the 1980s, African States were parties in five cases before the Court of which four cases related to intra-African disputes.[45]

In the 1990s, African states were parties to 11 cases before the Court, nine of which concerned intra-African disputes.[46] Among the latter was the *Armed Activities on the Territory of the Congo* case, which was the first opportunity that the Court had to adjudicate questions of state responsibility arising from a multi-state (Rwanda, Burundi, Uganda, and the Congo) intra-African armed conflict.[47] Finally, since 2000, African states have been parties in seven cases before the Court of which three related to intra-African disputes.[48] The increasing willingness of African states to bring intra-African disputes to the Court is clear evidence not only of acquiescence, but also of the confidence that African states have in the Court as an effective forum for the settlement of inter-state disputes.

It testifies to the fact that African states have come to feel more comfortable with the law itself and were now willing to submit to its application. They had — as a matter of fact — contributed to the reform and universalization of international law in the past three to four decades, under the auspices of the United Nations, and thus had reason to have more confidence in an inter-state normative system to the evolution of which they had made substantive inputs as independent states.

---

45 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 10 December 1985; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, [1982] ICJ Rep. 18; *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep. 13; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep. 53.

46 *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, [1994] ICJ Rep. 6; *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Order of 8 November 1995, [1995] ICJ Rep. 423; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objection, Judgment of 27 February 1998, [1998] ICJ Rep. 9; *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)*, Preliminary Objection, Judgment of 27 February 1998, [1998] ICJ Rep. 115; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep. 303; *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, [1999] ICJ Rep. 1045; *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)*, Judgment of 25 March 1999, [1999] ICJ Rep. 31; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, [2010] ICJ Rep. 639; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)*, Order of 30 January 2001, [2001] ICJ Rep. 4; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Order of 30 January 2001, [2001] ICJ Rep. 6.

47 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)*, Order of 30 January 2001, [2001] ICJ Rep. 4; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Order of 30 January 2001, [2001] ICJ Rep. 6.

48 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3; *Frontier Dispute (Benin v. Niger)*, Judgment of 12 July 2005, [2005] ICJ Rep. 90; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. 6; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16 November 2010, [2010] ICJ Rep. 635; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, [2008] ICJ Rep. 177; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. 422; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44.

3. African regional courts and the judicial settlement of disputes

The need for economic development, and the drive for political and economic integration in the continent has led more recently the African states, who originally rejected judicial settlement of disputes under the OAU Charter, to consider the possibility of establishing judicial institutions for the settlement of disputes arising from the integration treaties. Since the late 1990s, five primary regional courts have been established as dispute settlement mechanisms under the Regional Economic Communities (RECs) including: the Economic Community of West African States (ECOWAS) Court,[49] the *Communauté Economique et Monétaire de l'Afrique Centrale* (CEMAC) Court of Justice,[50] the Common Market of Eastern and Southern Africa (COMESA) Court of Justice,[51] the Southern African Development Community (SADC) Tribunal,[52] and the East African Community (EAC) Court of Justice,[53] in addition to the African Court of Justice which will be merged with the African Court of Human and Peoples' Rights once the relevant AU protocols come into force.

The aforementioned African regional courts are empowered to hear disputes between states parties to regional economic integration schemes; to interpret their respective treaties; to ensure adherence to the law; to hear disputes regarding violations of the treaty and/or protocols, and to adjudicate disputes between the community and its agents, officials or staff. Does this proliferation of courts for the regional settlement of inter-state disputes indicate an increasing acceptance of, and acquiescence to, the judicial resolution of disputes by African states?

While the creation of these courts can be said to constitute a clear change of attitude toward the judicial settlement of disputes in general, it appears that the reluctance to use judicial means of dispute settlement has not been fully overcome even in the context of regional integration schemes. Two problems faced by these courts since their establishment may be highlighted in this regard. First, their continued underutilization by the member states for inter-state disputes arising under the treaties establishing the RECs; and second, the resistance by the member states against attempts by some of the courts to expand their jurisdiction to the consideration of issues relating to human rights.

3.1. The underutilization of African regional courts by African states

The regional courts are underutilized with respect to their intended purpose — the adjudication of disputes arising from the interpretation and application of regional

49 See 1991 Protocol A/P.L/7/91 on the Community Court of Justice, 1975 Treaty of The Economic Community of West African States (ECOWAS), 28 May 1975, UNTS Volume 1010 I-14843; 1993 Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993, UNTS Volume 2373, I-42835.

50 1996 Convention Régissant la Cour de Justice de la C.E.M.A.C., 05 July 1996, available at: <http://www.cemac.int/sites/default/files/documents/files/Convention_Cour_de_Justice.pdf> (accessed 5 May 2015).

51 1994 The Common Market of Eastern and Southern Africa (COMESA) Treaty, Art. 7.

52 1992 Treaty of The Southern African Development Community, Art. 9.

53 1999 Treaty for the Establishment of the East African Community, Art. 9.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

economic integration treaties — because there is a manifest preference by member states to use other methods of dispute settlement, such as negotiation or mediation, to deal with trade disputes, or disputes over issues of economic integration. They also seem to favour, in some cases, recourse to other judicial bodies or to non-judicial ones for the settlement of disputes that would have ordinarily come under the jurisdiction of the regional courts. For example, some courts, such as the CEMAC court, face competition from other dispute settlement mechanisms, like the OHADA arbitration organizations.[54] Others, such as the East African Court of Justice compete with national courts that have almost exclusive jurisdiction over claims relating to the Community market protocol, and a regional body established to address matters arising under the Community customs union.[55]

While a number of cases concerning the interpretation of treaties of the Regional Economic Communities (RECs) have been brought before the aforementioned courts, the fact that these cases were heard by the courts is partly due to the proactive role of the courts themselves, their willingness to assert their jurisdictions, and in some cases, to adopt an expansive interpretation of such jurisdiction, as well as their eagerness to show their independence from the member states.

Is the underutilization due to the lack of a well-developed inter-state normative system at the regional level, and thus to the lack of predictability of the law to be applied by the courts? This may indeed be one of the reasons for underutilization. It happens often that regional economic integration treaties are neither comprehensive nor well elaborated enough to regulate the entire range of issues arising from the integration scheme. Moreover, despite the recent emergence of a wide-ranging African public law, consisting of charters, conventions, and protocols addressing various aspects of Pan-African objectives, including the Abuja treaty on an African Economic Community (AEC), as well as the Constitutive Act of the African Union itself,[56] the process of economic integration both at the regional and continental levels seems to be fraught with problems. The relationship between the AU, the AEC, and the RECs remains to be properly defined; there is much overlap in the membership of the RECs themselves, which gives rise to legal uncertainties in the respective obligations of member states.

Thus, while the inter-state normative system, both at the level of the RECs and of the AU/AEC with regard to economic integration, arguably needs to be further clarified and developed to allow the Regional Courts to play their proper role, the continued underutilization of the courts for dispute settlement by the member states effectively undermines their capacity to contribute to the further development and refinement of the law governing economic integration among African states. Underutilization does not, however, mean lack of utilization. The fact that these judicial institutions have been created by the African states clearly shows that there

54 Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), see also Common Court of Justice and Arbitration.
55 2004 Protocol for the Establishment of the East African Community Customs Union.
56 See A. Yusuf, *Pan-Africanism and International Law* (2004) at 18.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

is more trust and acceptance of the judicial settlement of disputes in the continent, and that this method of dispute settlement is bound to grow in the near future.

3.2 Resistance to a perceived jurisdictional overreach by the courts

The second major hurdle faced by African regional courts is the perception of jurisdictional overreach by these courts, particularly with respect to human rights cases. It was as a result of this perceived overreach that at least one court, the SADC tribunal, was dissolved by a decision of an extraordinary summit meeting of the member states of the community in 2011.

The ECOWAS Community Court is the only regional court explicitly granted jurisdiction to hear human rights claims. However, some of the other regional courts have interpreted their jurisdiction under their respective treaties as empowering them to consider human rights complaints to varying degrees of success. For example, the East African Court of Justice (EACJ), in a case concerning human rights, *Katabazi* v. *Secretary General of the East African Community*, stated that even though it did not have explicit jurisdiction over human rights issues, it would not 'abdicate from exercising jurisdiction under Article 27(1) of the Treaty merely because the reference includes allegation of human rights violation'.[57] In other words, the court was of the view that it would not refuse to rule on a case where allegations of human rights violations were incidental to the case itself. It then decided the case on the basis of Article 23(1) of the EAC treaty under which the community court is empowered to ensure adherence to the law on the interpretation and application of the Treaty. According to the Court, 'where the law has not been adhered to by a Member government, [it] could exercise jurisdiction'.

The SADC Tribunal has dealt with perhaps one of the best-known 'human rights' cases brought before African regional courts in the recent past, that of *Campbell* v. *Zimbabwe*.[58] Soon after the establishment of the SADC tribunal, Mike Campbell and ultimately 77 other individuals brought a case against the state of Zimbabwe before the tribunal challenging its land acquisition and redistribution policy.[59] The SADC tribunal found jurisdiction and determined that Campbell et al. had a right to fair hearing and access to justice, and that the effects of the law, felt by Zimbabwean white farmers only, constituted indirect discrimination or a substantive inequality.

In response to these events, and after sustained political efforts by the government of Zimbabwe, the tribunal was suspended in 2010 pending review of its role and mandate, and was dissolved by an extraordinary summit meeting in 2011. The dissolution of the SADC tribunal shows that while it might not be uncommon for tension to exist between the government of a member state and a regional court (as when the regional courts become a court of last resort on human rights issues, for instance), there is need for change in the perception of the role of regional courts so

57 *Katabazi v. Secretary General of the East African Community*, (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007), available at <http://www.saflii.org/ea/cases/EACJ/2007/3.html> (accessed 5 May 2015).

58 *Mike Campbell (Pvt) LTD and Others v. Republic of Zimbabwe*, SADC (T) 02/2007, Judgment of 13 December 2007, available at <http://www.sadc-tribunal.org/?cases=mike-campbell-pvt-ltd-and-another-v-the-republic-of-zimbabwe-2> (accessed 5 May 2015).

59 Ibid.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

that they are seen as partners in the broader goals of regional economic integration, respect for the rule of law and human rights in the region as a whole. This perception will perhaps grow further throughout the continent once the activities of the African Court of Human and People's Rights pick up pace and after the protocol of its merger with the African Court of Justice comes into effect.

4. African states and arbitration: Acquiescence with an undercurrent of opposition

Finally, I will say a few words about the attitudes of African states towards investor–state arbitration. It should perhaps be noted at the outset that if African states were able to contribute to a certain extent to the reform of international legal rules governing the political relations between states, they did not have much success in modifying the rules relating to economic relations and co-operation for development, which are the rules most often at stake in investor–state arbitration. African states face two problems with respect to investment law and arbitration, which I will briefly describe below.

4.1. Africa takes a passive approach in the progressive development of international investment law through BITs

The first problem is the passive approach to the reform of international legal rules and standards in the context of bilateral investment treaties (BITs). From an initial post-independence attitude of hostility towards foreign investment in the 1960s, African states have more recently adopted an attitude of complete submission to the conditions and norms dictated by investors and their states in a rush to attract more foreign investment. Thus, when they totally rely on the model BITs of other states and, in many cases, sign model treaties without closely scrutinizing them or trying to negotiate some changes to them, they do not contribute to the progressive development of international investment law. There is also an apparent lack of capacity or underutilization of local capacity to recalibrate foreign model BITs to take account of local realities and development needs. The recent creation of the African Legal Support Facility (ALSF) by the African Development Bank and the establishment of the African Institute of International Law (AIIL) in Arusha (Tanzania) with the endorsement of the African Union could gradually bring about some change to this situation through their awareness-raising and capacity-building activities.[60]

At the same time, some African states have started, over the past few years, to explore the possibility of developing new approaches that would better balance investment protection with the ability of governments to regulate in the

60 2009 Agreement for the Establishment of the African Legal Support Facility, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/Agreement%20for%20the%20Establishment%20of%20the%20African%20Legal%20Support%20Facility%20%28ALSF%29.pdf> (accessed 5 May 2015); Decision on the Establishment of an African Institute of International Law in Arusha, The United Republic of Tanzania, Doc: Assembly/AU/14(XVIII) Add.5, 2012.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

public interest. They have tried to do that mainly in the context of African regional integration schemes to lend some strength to their negotiating capacity with foreign governments, although some efforts are also being made at the state level to conclude BITs that better reflect local development needs, such as the Benin-Canada BIT of 2013.[61] A first example of the regional approach is the Agreement for the COMESA Common Investment Area (CCIA).[62] According to COMESA:

> The CCIA Agreement is a precious investment tool whereby the COMESA Secretariat contemplates to create a stable region and good investment environment, promote cross border investments and protect investment, and thus enhance COMESAs attractiveness and competitiveness within COMESA Region, as a destination for Foreign Direct Investment (FDI), and in which domestic investments are encouraged.[63]

The Agreement includes a provision on 'settlement of investment disputes through negotiations and arbitration mechanism'. The CCIA Agreement seeks to offer a new approach that is sensitive to the realities of African states in the formulation of future BITs, which provide, according to the agreement, 'investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States'.[64] The only problem is that although the CCIA Agreement was adopted in 2007, it has not yet come into force for lack of the required number of ratifications.

Another example, is the model BIT developed by the Southern Africa Development Community (SADC), which includes several provisions designed to protect states, including an expropriation clause that takes into account the public interest in determining compensation; a clause permitting regulation in the social and public interest; as well as provisions prohibiting investors from engaging in corruption, and permitting states to raise counterclaims against investors. In addition, the SADC model BIT imposes obligations on investors to provide information about their investment to the host states; to conduct environmental and social impact assessments; to comply with minimum standards for human rights, environment and labour, and to act transparently with regard to investments involving the government.[65] In essence, it does what most model BITs do not do, which is to hold investors accountable in creating and maintaining an environment for investment that is responsive to the needs of African states.

61 2013 Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments.
62 2007 Investment Agreement for the COMESA Common Investment Area.
63 Ibid.
64 Ibid., Art. 1.
65 SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, Article 12–18, Available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 5 May 2015).

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

4.2. The near absence of African arbitrators in investor–state arbitration proceedings

The second problem facing African states is the near absence of African arbitrators and counsel in investor–state proceedings involving African states. In a recent study on 'Investment Arbitration Involving African States', it has been pointed out that:

> Of the eighty-five ICSID proceedings in which a tribunal or conciliation commission has been constituted, there are sixty-nine proceedings (81%) in which the African State party did not appoint an African arbitrator or conciliator or, if the State defaulted to make an appointment, ICSID did not appoint an African on its behalf.[66]

While it is true that African states themselves bear a major part of the responsibility for this lack of representation in light of the fact that they have failed to appoint an African arbitrator 90% of the time when given the opportunity to do so,[67] the law firms that act on behalf of the African States in investor–State arbitrations are also partly responsible for the situation, given that as observed by the author, African States predominantly appoint international law firms to represent their interests. These law firms, are in general, much more familiar with European and American arbitrators than with African arbitrators and it is known that counsel often has a decisive role in a party's selection of the arbitrator.[68]

The long-term viability of the investor–state dispute settlement system involving African states depends on changes to this situation. This is for two reasons. First, whenever there is a lack of representation, states are less likely to accept results as legitimate, as was the case with the Afro-Asian group at the UN with respect to the *South West Africa* case. That case also shows that the composition of a dispute settlement body can play a significant part in whether the body is perceived as legitimate.

Second, the absence of African arbitrators on investor–state tribunals inhibits the consideration of the special interests and needs of African states in the development of international arbitration standards. In effect, we can think of the development of international arbitration law as occurring in roughly two stages. First is the conclusion of investment treaties, a process in which African states are currently highly represented, but in which they have so far played a limited role in terms of having their developmental needs adequately reflected. The second stage is the interpretation and development of the standards established in those treaties by arbitrators, drawing on their legal backgrounds and training in national and international jurisdictions to issue judgments that are often cited by other tribunals as evidence of a particular rule or practice. However, the underrepresentation of Africans on investor–state arbitral tribunals means that African views and perspectives are currently not fully taken into account in the development of international investment law.

66 K. Daele, 'Investment Arbitration Involving African States', in L. Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide* (2013), at 418.
67 Ibid.
68 Ibid., at 418.

https://doi.org/10.1017/S092215651500031X Published online by Cambridge University Press

5. Concluding remarks

The Constitutive Act of the African Union (AU) provides for the establishment of an African Court of Justice as one of the organs of the union.[69] The Protocol of the Court approved by the Assembly of Heads of State and Government on 23 July 2003 has not yet come into force, since the AU decided to merge the Court of Justice with the African Court of Human and Peoples' Rights and to establish an African Court of Justice and of Human and Peoples' Rights.[70]

In the meantime, the reluctance of African states to use judicial mechanisms for the peaceful settlement of disputes appears to have gradually evolved into acquiescence not only at the universal level, but even at the continental level where judicial institutions are being established to deal with inter-state disputes although these institutions are substantially underutilized at present.

Disputes on the interpretation and application of the treaties establishing the AU, its institutions and the RECs are, however, likely to increase as Pan-African integration advances and as investment and trade in goods and services expands in the various regions of Africa. Thus, despite their current underutilization, it appears to me that the continental Court of Justice as well as the regional courts have brighter days, and a promising future ahead of them in the promotion of the rule of law in the African continent as well as in the consolidation of economic and political integration.

69 2000 Constitutive Act of the African Union, Art. 5.
70 2003 Protocol of The Court of Justice of The African Union.