African Perspectives on Inter-state Litigation

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African perspectives on inter-state litigation

Makane Moïse Mbengue

In a speech on January 16th, 1925, President Max Huber stated that on account of its judicial function the Court should rise above the clash of men’s interests and men’s passions – above those of party, of class, of nation and of race [...]. Thus, through its very being the Court retains and cultivates ideas common to the whole of humanity. It is asked of the Court that it should contribute to peace by deciding the disputes submitted to it. Perhaps it will make a yet greater contribution by inculcating a knowledge of that which, after all, unites mankind.¹

Deconstructing a myth: the African ‘mistrust’ towards international adjudication

It has been a long road since 1952, when the International Court of Justice (ICJ) rendered its judgment in the Case Concerning Rights of Nationals of the United States of America in Morocco.² Albeit the ‘legal interests of Morocco form[ed] the very subject-matter’³ of the dispute between France and the United States, Morocco could not be a party to the dispute because of its status at that time as a French protectorate. This situation was not unique to Morocco.⁴ It concerned the

³ By reference to the expression used by the ICJ to formulate the ‘Monetary Gold principle’, Monetary Gold Removed from Italy in 1943 (Italy v. France, United Kingdom and United States) (1954) ICJ Rep. 19, 32.
⁴ Morocco’s legal interests were also the subject matter of disputes before the Permanent Court of International Justice (PCIJ). See Nationality Decrees in Tunis and Morocco (Advisory Opinion), [1923] PCIJ (ser. B) No. 4; Phosphates in Morocco (Italy v. France), [1938] PCIJ (ser. A/B) No. 74. During the PCIJ era, in addition to the two aforementioned cases another case dealt with an African country, namely the Belgian Congo: see Oscar Chinn (United Kingdom v. Belgium), [1934] PCIJ (ser. A/B) No. 63. With respect to inter-state
quasi-totality\textsuperscript{5} of African countries that were subject to colonial or other dependent status.\textsuperscript{6} It is, then, not surprising that for more than half of the twentieth century, Africa contributed very little to the ‘development of modern judicial settlement of international disputes.’\textsuperscript{7}

arbitration, African countries were not involved during an important part of the twentieth century. As for proceedings before the PCIJ and the ICJ, some of their interests of a legal nature were occasionally engaged without their being able to be parties to arbitration proceedings. See, e.g., \textit{Deserters of Casablanca (France v. Germany)}, PCA, 22 May 1909.


However, after most African countries gained independence and acceded to international sovereignty, the situation evolved. From then on, African states progressively became fully aware of one of the essential features of their international legal personality: the competence or capacity to bring an international claim. As pinpointed by the ICJ, ‘this capacity certainly belongs to the State: a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar in form, and both the direct subjects of international law.’ Despite African states not being specifically the addressees of such a statement, it was of the utmost importance for those states. Indeed, it affirmed that accession to statehood would allow African states to have recourse – on an equal basis – to international adjudication in order to preserve their independence and, most of all, to benefit from the protection of the international rule of law. For newly born nations that were economically, socially, and politically among the weakest states within the international community, this was a crucial safety valve. Ultimately it would allow ‘the gnat [to have] the temerity to confront the eagle and the lion’.

Temerity from African states is exactly what transpired subsequently. As early as 1960 – at the peak of the wave of independence on the continent – two African states (Ethiopia and Liberia) seized the ICJ of two disputes with South Africa concerning the status of South West Africa. This was the first time that African states initiated contentious proceedings before the ICJ. The judgments of the Court on preliminary objections (1962 and 1871; Administration of certain properties of the State in Libya (Italy v. United Kingdom and United Kingdom of Libya), [1952/1953] 12 RIAA 357.

As defined by the ICJ, ‘Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.’ Reparation for injuries suffered in the service of the United Nations (Advisory Opinion), [1949] ICJ Rep. 174, 177.

Ibid., 177–8.


Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States) (Libyan Arab Jamahiriya v. United Kingdom), CR/97/20 (translation), Mr El-Murtadi Suleiman, 26, [3.20].
1966)\(^{12}\) in those cases have been subject to significant commentary,\(^ {13}\) and described as having ‘marked a watershed in the role of the Court’.\(^ {14}\) Beyond the legitimate criticisms that can be made of the 1966 judgment of the Court in the *South West Africa Cases*, it appears from the proceedings in those cases that African states are not traditionally opposed to the idea of international adjudication or, more specifically, to subjecting themselves to the jurisdiction of international courts and tribunals. To think the contrary is a misperception.\(^ {15}\) Very early, African states adhered to the idea that international courts and tribunals could be the main driving forces in the promotion and strengthening of the rule of international law.\(^ {16}\)


\(^{14}\) Ajibola, above n. 7, 356.

\(^{15}\) See, e.g., Antonio Cassese, *International Law in A Divided World* (Oxford: Clarendon Press, 1986), 205. Cassese considered that developing countries were reluctant to accept adjudication. Discussing international arbitration, he nonetheless acknowledged that ‘Western countries are very often no less reluctant than other States to resort to [arbitration]’.

\(^{16}\) See Mahiou, above n. 6, 7. According to the author, ‘Les Etats africains ayant pensé que la Cour incarne une justice universelle, elle ne pouvait que les aider à mettre en place un système fondé aussi bien sur le respect du droit que sur la paix et l’harmonie des relations internationales: leur approche du droit international est qu’il ne peut y avoir de règlement harmonieux que par le passage devant le juge qui devient un élément essentiel pour la revendication d’une conscience juridique internationale.’ See also the dissenting opinion of Judge Badawi (*Northern Cameroons (Cameroon v. United Kingdom), (Preliminary Objections)*, [1963] ICJ Rep. 150), where he stresses the importance for Cameroon to obtain a ‘declaratory judgment’ – i.e. to obtain a simple declaration of facts and legal findings concerning irregularities in the administration of the administering authority throughout the period of trusteeship and not a judgment of an executory character.
Accordingly, they did not hesitate to participate in landmark advisory proceedings for the United Nations system\(^\text{17}\) or to initiate disputes against other African states or non-African states.\(^\text{18}\) What prompted a cautious attitude, not to say a ‘hostile reaction’,\(^\text{19}\) of African states vis-à-vis the system of international adjudication (and, in particular, the ICJ), was a feeling of dismay after the 1966 judgment in the *South West Africa Cases*.\(^\text{20}\)

And here, too, it is a misperception to think that only African states were disappointed by the 1966 judgment of the Court in the *South West Africa Cases*.\(^\text{21}\)

‘Mistrust’ should not be confused with ‘distrust’. What occurred after 1966 was mere ‘distrust’ in the ability of the ICJ properly to defend the peculiar interests of African states.\(^\text{22}\) Hence, till the end of the 1970s, African states refrained from submitting disputes to the ICJ through the contentious procedure. Nonetheless, trust in peaceful settlement of disputes through international adjudication has been strongly advocated and reiterated by African nations since their independence.\(^\text{23}\)

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\(^{18}\) See *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, [1963] ICJ Rep. 15.

\(^{19}\) Higgins, above n. 13, 774.

\(^{20}\) See Abi-Saab, above n. 13, 5. Referring to the 1966 judgment, the author explains that ‘it thrust the Court into an acute crisis, having shattered the confidence of large parts of the world, particularly the Third World, in the Court as it then was’.

\(^{21}\) Higgins, above n. 13, 774: ‘The dismay expressed, sometimes in terms of great vehemence, has not by any means been limited to Africans.’


\(^{23}\) See, e.g., the speech of Mr Engo, Assistant Agent for the Federal Republic of Cameroon, ‘This Court, Mr President, is a great symbol of hope for all young nations which, conceived by political evolution, have only in the recent past been born into a world imprisoned in confusion and unrest. Its very presence on this international arena gives credence to the existence of these young nations. We are here because we consider this to be the only civilized and desirable way to settle disputes between any two States. We are indeed
consider that African states ‘have been suspicious of the established mechanisms of judicial settlement’. Even after the 1966 episode, some African states continued to participate in advisory proceedings before the ICJ, and in such a way to contribute to the development of international law.

Furthermore, by the end of the 1970s, twelve African states were already parties to the system of the optional clause under Article 36(2) of the Statute of the ICJ. Today, twenty-two African states have made declarations recognizing the compulsory jurisdiction of the Court. This means that half of the African states that are parties to the system of compulsory jurisdiction became so at a time when African states were wrongly perceived as being suspicious of third-party adjudication. Treaty practice also shows that, at an early stage, African states have been willing to accept dispute settlement clauses in multilateral treaties, in particular, compromissory clauses referring to the ICJ. This is the case for fundamental
delighted that we can, in this way, resolve a dispute without resort to political animosity and perhaps violence'. ICJ Pleadings, Oral arguments, Documents, Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Public hearing of 25 September 1963, 314.

24 Ajibola, above n. 7, 353. See also Perrin, above n. 6, 17 (‘le continent fut longtemps considéré – avec l’Asie – comme la région la plus réticente à l’acceptation de la juridiction internationale’). In practice, it is rare to find examples of such a strong suspicion. One can maybe think of the DéCISION du Président du Conseil arbitral franco-tunisien (France, Tunisie), taken after Tunisian arbitrators decided not to sit in an arbitration under the 1955 General Convention between France and Tunisia, 12 RIAA 271.


26 In the present contribution, the end of the 1970s is taken as a critical date since it marks the end of the period during which African states refrained from having recourse to the ICJ. Indeed, in 1978, Tunisia and Libya submitted their dispute over the continental shelf to the ICJ. See Special Agreement between Tunisia and the Libyan Arab Jamahiriya (notified to the Registry of the ICJ on 1 December 1978), ICJ Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Vol. I, 3.


28 And at a time when Sir Humphrey Waldock had already described the ‘Decline of the Optional Clause’, (1955–6) 32 BYIL 244.
treaties such as the 1948 Genocide Convention, the 1966 Convention on the Elimination of All Forms of Racial Discrimination, and the 1967 Protocol relating to the status of refugees.

When referring to multilateral treaties, especially noteworthy is the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly referred to as the ICSID Convention). Despite not dealing purely with inter-state litigation, this instrument, which established the International Centre for Settlement of Investment Disputes (ICSID), is perhaps the first dispute settlement treaty that has been so widely ratified by African states and in record time. Although the ratification of the ICSID Convention does not constitute ipso jure consent to ICSID arbitration, the popularity of that

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32 Art. 64 is the only provision of the ICSID Convention that provides for inter-state litigation.


34 Consent may be given in a clause included in an investment agreement (e.g., a bilateral investment treaty (BIT)), providing for the submission to the ICSID of future disputes
instrument on the African continent confirms a strong adherence to the idea of international adjudication. It also reveals that the more adjudicatory mechanisms purport to integrate African states’ concerns, the more those states would be attracted to them. In other words, ‘attractiveness of adjudication’ is a key, not to say a determinant, factor in the political choice that would lead an African state to opt in or to opt out of a given judicial or arbitral mechanism. Attractiveness being the raison d’être of the ICSID system, it is, then, not surprising that a vast majority arising out of that agreement or in a compromis regarding a dispute which has already arisen. Consent can also be given by a host state in its national investment legislation. On the issue of consent to ICSID arbitration through national investment, see Makane M. Mbengue, ‘National Legislations and Unilateral Acts of States’, in T. Gazzini and E. de Brabandère (eds.), The Sources of Rights and Obligations in Transnational Investment Law (The Hague: Martinus Nijhoff Publishers, 2012) 183. See also Makane M. Mbengue, ‘Consent to Arbitration through National Investment Legislations’, (2012) 2(4) Investment Treaty News 7.


36 The preamble of the ICSID Convention refers to ‘the need for international cooperation for economic development, and the role of private international investment therein’ (first preambular paragraph of the ICSID Convention).


38 Although referring to developing countries in general, see for a similar position in the context of GATT 1947, W. J. Davey, ‘Dispute Settlement in GATT’, (1987) 11 Fordham International Law Journal 90: ‘Developing countries have only seldom made use of the dispute settlement system . . . In large part, this seems to be a consequence of their belief that the system is, at best, designed to deal with disputes between the major developed countries. It is thought to be futile for them to invoke the system because GATT will not give a sympathetic ear to their claims and that even if they win their case they will not have the diplomatic or economic muscle to ensure that the decision is implemented’. See also M. L. Busch and E. Reinhardt, ‘Developing Countries and GATT/WTO Dispute Settlement’, (2003) 37 Journal of World Trade 719 (where they assert, ‘The underlying presumption, of course, is that developing countries were especially ill-served by GATT’s diplomacy’).

39 See ICSID, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States’, (1965) 1 ICSID Rep. 25, paras. 9 and 12: ‘The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private
of African nations expressed their consent to be bound by the ICSID Convention.

The same infatuation did not extend to the Permanent Court of Arbitration (PCA) for several decades after the independence of most African countries. The Hague Conventions of 1899 and 1907 were, indeed, conceived as reflecting essentially the concerns of former colonial powers and were concluded at a time when the overwhelming majority of African nations were not members of the international community. Third-party adjudication can never be attractive to a state or group of states when it tends to legitimating or imposing a core of values that are not wholly shared by the said state(s).

Indeed, adherence to international capital into those countries which wish to attract it... adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.'


Shabtai Rosenne, The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents (The Hague: T.M.C. Asser Press, 2001), xxvi ('All the European Powers with overseas possession of the epoch took part in both Peace Conferences, and the Conventions when ratified were, according to the international law of the time, applicable to all their territories... there is no sign in the records of either Conference of any input from any of the overseas territories or of any consideration of their interests'). See also Martti Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in Yves Daudet (ed.), Topicality of the 1907 Hague Conference, the Second Peace Conference, Hague Academy of International Law, workshop, 2007 (The Hague: Martinus Nijhoff Publishers, 2008) 135 ('The 1899 Conference was still a European affair'), and 139 ('The Second Peace Conference was from the beginning to the end, with the brief Russia interlude, an American affair').

adjudication is a matter of ideology. And, so often, ideology aligns with relatedness.

A reality: the African ‘ideology’ of adjudication

Each continent is governed by different ideological paradigms of adjudication. To a certain extent, African states have moulded an African ideology of international adjudication that is based on two axioms: the ‘axiom of regionalization’ and the ‘axiom of de-legalization’.

The axiom of regionalization

Soon after gaining independence, regionalization of dispute settlement – that is settling disputes at the level of the continent – appeared as the preferred option for African states. The Organization of African Unity (OAU) even had dispute settlement as one of its main institutional objectives. Not surprisingly, the OAU Charter set forth provision for the creation of a Commission of Mediation, Conciliation and Arbitration. The idea was that the Commission of Mediation, Conciliation and Arbitration would have a sort of primary responsibility in the pacific settlement of disputes among African states. Recourse to universal adjudicatory mechanisms like the ICJ would only be a last resort, in situations where a dispute was not referred to the Commission or where the latter would reveal itself inefficient in solving a dispute. This gradual approach has been explicitly

‘Without prejudice to the many achievements of the PCA in its 104 years of existence, it is possible to argue that its record with relation to Africa has been less than satisfactory.’

See Koskenniemi, who uses the formula ‘Adjudication as ideology’, above n. 43, 127.

For instance, Europe and the Americas are the sole continents that have concluded general dispute settlement treaties: the American Treaty on Pacific Settlement (signed 30 April 1948, entered into force 6 May 1949), 30 UNTS 84 (commonly known as the Pact of Bogotá) and the European Convention for the Pacific Settlement of Disputes (signed 29 April 1957, entered into force 30 April 1958), 320 UNTS 243.

Albeit very rare in practice, one could also mention an ‘axiom of solidarity’. See Abi-Saab, who explains that Ethiopia and Liberia filed applications in the South West Africa cases on behalf of African countries. Abi-Saab, ‘Cours général’, above n. 22, 255.


For the first time, regionalization of dispute settlement coincided with a tendency to create a certain hierarchy between regional diplomatic forums of dispute settlement and universal adjudicatory bodies. Indeed, although the OAU Commission of Mediation, Conciliation and Arbitration could also deal with arbitration, it was in its nature more diplomatic than anything else. This hierarchy can be seen as a logical consequence of the dispute settlement ‘culture’, not to say ideology, of adjudication in Africa. African states are by definition more attracted to negotiation than to adjudication.\footnote{See P. Mweti Munya, ‘The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects’, (1998) 7 Journal of International Law and Practice 164. The author explains that ‘the first three decades of independent existence of African countries as sovereign states was characterized by an attitude of indifferency and lack of faith displayed toward the International Court of Justice. Some scholars found explanations for this supposedly African skepticism towards the International Court of Justice rooted in both the African and Oriental cultures. Both cultures prefer negotiation and consensus as the ideal modes of dispute resolution.’} Nevertheless, should that trend be perceived as a disdain for judicial resolution of disputes?\footnote{See, e.g., R. P. Anand, ‘Attitudes of the “New” Asian African Countries towards the International Court of Justice’, in Frederik E. Snyder and Surakiart Sathirathai (eds.), Third World Attitudes towards International Law: An Introduction (The Hague: Brill, 1987) 17: ‘It is thought that the policies and attitudes of these newly independent states about international law and relations are affected by their religious and cultural traditions and that these explain their intransigent behavior and attitude, for instance, toward judicial settlement of their international disputes.’} Or, should preference for diplomacy (i.e., negotiations) or ‘mutually agreed solutions’ be considered as an African ‘exception’? It is difficult to reach hard and fast conclusions.

For instance, with respect to the first query, some scholars emphasize structural reasons to explain the weight that was given in theory to the OAU Commission of Mediation, Conciliation and Arbitration in the
African system of dispute settlement. In practice, the OAU Commission of Mediation, Conciliation and Arbitration never became operational and, therefore, failed to show that African states were more attracted to negotiation than to adjudication compared with any other member states of the international community.

This remark leads to the second question of whether it is an African exception to favour a culture of diplomacy rather than a culture of adjudication. The answer should be negative. True, the resort by African states to international courts and tribunals ‘is still an exceptional method’; yet ‘this is also true for the rest of the members of the international community’. Furthermore, postmodern international adjudication procedures go as far as incorporating diplomacy into adjudicatory processes. Let’s think for instance, about the WTO dispute settlement mechanism, which clearly prioritizes diplomacy over adjudication in the settlement of international trade disputes.

Unexpectedly, the failure of the OAU Commission of Mediation, Conciliation and Arbitration did not result in a status quo ante in which African states would reject the establishment of forums where they could settle their disputes through diplomatic means or judicial means. Rather, it was compensated with a sort of ‘baby boom’ in the creation of regional courts on the African continent. Of course, this is not to say that there is a cause and effect relationship between the non-success of the OAU Commission of Mediation, Conciliation and Arbitration and the proliferation of regional courts and tribunals at the level of the African continent. However, it is noteworthy that the failure of a mechanism that was

52 See J. G. Merrill, International Dispute Settlement, 4th edn (Cambridge University Press, 2005), 284 (‘the OAU was a much looser type of regional organization with an emphasis on moral rather than legal obligations and on respect for the members’ sovereignty’).


55 Ibid.

56 See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3(7): ‘Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.’
characterized by its diplomatic features did not bring African states to repeat the experience, but rather to consolidate another path. This path can be designated as ‘regionalization of adjudication’. It confirms the fact that African states are not – were never, truly speaking – allergic to international adjudication of disputes. They just prefer, whenever possible, to settle those disputes at the regional level. It can even be said that regional diplomatic means of dispute settlement and regional mechanisms of adjudication evolved in parallel in Africa.

Regionalization of adjudication is today a true axiom of the African ‘ideology’ of adjudication. Some courts and tribunals, albeit extinct nowadays, were created quite early after decolonization. This is the case of the defunct East African Community Court of Appeal (1967–77), the East African Community Common Market Tribunal (1967–77), the Economic Community of West African States Tribunal (1975–91), and the Court of Justice of the Economic Community of Central African States (1983). Certain other defunct courts were created later on, such as the Court of Justice of the Arab Maghreb Union (1989) and the Court of Justice of the African Economic Community (1991). For the time being, there are at least eight functional regional courts and tribunals: the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997), the Court of Justice of the Common Market for Eastern and Southern Africa (1998), the Court of Justice of the African Union (2003), the Court of Justice of the Economic Community of West African States (ECOWAS) (2001), the Court of Justice of the West African Economic and Monetary Union (1996), the East African Court of Justice (2001), the Southern Africa Development Community (SADC) Tribunal (2000), and the African Court of Human and Peoples’ Rights. The phenomenon of the proliferation or multiplication of international courts and tribunals is, therefore, an issue that arose not only at the international level but also at the regional level in the case of Africa.

What prompted the increase in the establishment of African courts and tribunals was the desire of African states to keep their ‘options

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59 Ibid., It should be noted that the SADC Tribunal was de facto suspended in 2010 at the SADC Summit of Heads of State and Government.
In the settlement of their disputes. In other words, by promoting the development of regional courts and tribunals, African states were able to design a system of adjudication à la carte, where they could decide between relying solely on diplomacy or resorting to regional courts or to universal courts and tribunals. This being said, it is important to underline that adjudication à la carte does not only refer to the options that African states allow themselves to use in the context of inter-state litigation. It also encompasses the options in terms of adjudication that African states grant to other subjects of international law or non-state actors in order to challenge an African state.

One thing for sure is that regionalization of adjudication can presumably entail competition between African courts and universal courts. In its turn, the competition, if not well managed, could provoke fragmentation in the interpretation of international law by those different courts and tribunals. But cross-fertilization, or at least informal co-ordination, can arise from the use of different courts at both the African and the universal level. Indeed, it is not to be presumed that African states, by subjecting themselves to regional courts and tribunals, intend to opt out of general international law. Not at all. Regionalization of adjudication implies adaptation as well as adjustment of the application of international law and its interpretation to African realities. It does not implicate any contracting out of general international law.

Still, problems of judicial dialogue or divergent interpretations can emerge in practice. For example, the Hissène Habré saga was dealt with, on one hand, by two African courts, the African Court of Human and Peoples’ Rights and the ECOWAS Court of Justice, and, on the other hand, by the International Criminal Court (ICC) in The Hague. The African Court of Human and Peoples’ Rights was unable to proceed in view of the refusal of Senegal to submit to its jurisdiction. The Senegalese government took the position that the African Court of Human and Peoples’ Rights had no jurisdiction to hear an application filed in August 2008 against the Republic of Senegal, aimed at the withdrawal of the ongoing proceedings instituted by that state, with a view to charging, trying, and sentencing Hissène Habré. The African Court of Human and Peoples’ Rights based its decision on the fact that Senegal had not made a declaration accepting its jurisdiction to entertain such applications under Art. 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court of Human and People’s Rights.

62 Michelot Yogogombaye v. Republic of Senegal, African Court of Human and Peoples’ Rights, Application No. 001/2008, Judgment of 15 December 2009. In December 2009, the African Court of Human and Peoples’ Rights ruled that it had no jurisdiction to hear an application filed in August 2008 against the Republic of Senegal, aimed at the withdrawal of the ongoing proceedings instituted by that state, with a view to charging, trying, and sentencing Hissène Habré. The African Court of Human and Peoples’ Rights based its decision on the fact that Senegal had not made a declaration accepting its jurisdiction to entertain such applications under Art. 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court of Human and People’s Rights.
hand, by the ICJ. The indirect clash between the ECOWAS Court of Justice and the ICJ deserves to be mentioned.

In a judgment of November 2010, the ECOWAS Court of Justice ruled on an application filed in October 2008, in which Habré – ruler of Chad from 1982 until his overthrow in 1990 – requested the court to find that his human rights would be violated by Senegal if proceedings were instituted against him. Having observed that evidence existed pointing to potential violations of Habré’s human rights as a result of Senegal’s constitutional and legislative reforms, the ECOWAS Court of Justice ordered Senegal to comply with the principle of non-retroactivity. The ECOWAS Court of Justice stressed that the mandate that Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Habré to take place ‘within the strict framework of special ad hoc international proceedings’. The ECOWAS judgment was, therefore, basically stating that Senegal could not prosecute Habré by submitting his case to its competent authorities for the purpose of prosecution. Only a special tribunal with an international character could do so according to the ECOWAS Court of Justice.

The ICJ, on its side, found that Senegal’s duty to comply with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) ‘[could not] be affected by the decision of the ECOWAS Court of Justice’. It thus took a different direction from the ECOWAS Court of Justice and considered that Senegal, by failing to submit Habré’s case to its competent authorities for the purpose of prosecution, breached the Convention against Torture.

It is not within the ambit of the present contribution to deal further with issues of judicial consistency, coherence, and dialogue between African courts and tribunals and universal courts. What is crucial to take into account is that regionalization of adjudication at the level of the African continent does not lead to limitations regarding the jurisdiction of universal courts and tribunals. African regional courts might have more weight when a dispute concerns two African states. However, African states do not only interact with other African states. They also interact with other (non-African) states, and through that interaction, African states might have no other choice than to accept the jurisdiction of more universal

63 Hissène Habré v. Republic of Senegal, ECOWAS Court of Justice, Judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010.
international courts and tribunals to settle their disputes with those other states.

Even when disputes concern only African states, resistance to universal mechanisms of inter-state adjudication can be exercised if an African state party to a given dispute would prefer to use the regional option. This is exactly the attitude that Nigeria evinced in the *Cameroon v. Nigeria* case before the ICJ. Among the preliminary objections raised in that case by Nigeria, one consisted of claiming that the settlement of boundary disputes within the Lake Chad region was subject to the exclusive competence of the Lake Chad Basin Commission, and in this context the procedures of settlement within that Commission were obligatory for the concerned African states. For Nigeria, the exclusive competence of the Lake Chad Basin Commission meant that it was not possible for Cameroon to invoke Nigeria’s Declaration recognizing the compulsory jurisdiction of the ICJ (Art. 36(2) of the ICJ Statute). In response, the ICJ recalled what it said in the *Nicaragua* case, according to which ‘the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court’.

In *Cameroon v. Nigeria*, the ICJ went even further and stated that ‘[w]hatever their nature, the existence of procedures for regional negotiation cannot prevent the Court from exercising the functions conferred upon it by the Charter and the Statute’. It is true that in *Cameroon v. Nigeria*, the ICJ was not dealing with a regional court or tribunal; nevertheless, the attitude of the ICJ in *Belgium v. Senegal*, discussed above, shows that it would be quite impossible for an African state to oppose the option of a regional court to prevent the ICJ or another ‘universal’ court or tribunal from exercising jurisdiction when a title of jurisdiction is conferred on the said court or tribunal.

Therefore, options in inter-state litigation might turn out *ex post facto* to be non-options. In particular, that transformation might arise in the African context, where states are sometimes keen to use mechanisms of international adjudication that are ‘de-legalized’ – that is, that put aside a *legal settlement* in favour of a *political settlement*. Such situations occur because the African perspective of inter-state litigation is also governed by what may be called an ‘axiom of de-legalization’.

67 *Land and Maritime Boundary between Cameroon and Nigeria*, above n. 65, 307, [68].
As correctly pinpointed by Judge Schwebel, ‘there will always be disputes with a high degree of political or ideological content which States simply do not wish to present, or to have resolved, in legal terms . . . Often a State is unwilling to submit to adjudication unless it is confident of winning.’

This observation sums up quite well the attitude of African states towards international legal disputes that arise in their relations. Quite often, the preferred option of African states has been to seek political settlement rather than legal settlement. And, herein lies the true reason for the failure of the OAU Commission, or for the reluctance of African states to have recourse to third-party adjudication. Maluwa explains:

> [T]he evidence relating to the readiness and willingness of African states to submit their disputes to third-party conflict resolution and management leaves a lot to be desired. And even in the limited area of political or diplomatic settlement, the overriding function of the various *ad hoc* commissions of mediation and conciliation has been merely to act as ‘tension reducers’ rather than to prescribe definitive solutions to the disputes in question . . . In general, the *ad hoc* commissions have tended to avoid pronouncing on the international legal rights and wrongs of the disputants or, still less, to apportion *culpa* in all such disputes.

In practice, African states have been keener to use ‘solitary diplomacy’ (i.e. good offices under the aegis of a head of state) and/or *ad hoc* mediation or conciliation committees or commissions to settle their disputes. Specifically, in the context of boundary disputes, which is the most common type of dispute between African states, the latter have preferred to

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68 Schwebel, above n. 60, 667.

69 Despite the diplomatic character of the OAU Commission of Mediation, Conciliation and Arbitration, African states were surely suspicious that dispute settlement under the auspices of the Commission would be more a legal type of settlement than a political type of settlement.


71 On this concept see Maluwa, above n. 70, 309. The author gives the following examples of successful mediation under the aegis of a head of state: Emperor Haile Selassie and President Modibo Keita of Mali in the Morocco–Algeria conflict of 1963, President Abbud of Sudan in the Ethiopia–Somalia dispute of 1964, President Mobutu Sese Seko of Zaïre in the Rwanda–Burundi dispute of 1966.

72 Ibid., 310–13. The author deals with two examples of conciliation commissions involving African states. One, established in 1964 to look into the Congo conflict, comprised Cameroon, Ethiopia, Guinea, Somalia, Nigeria, Egypt, Tunisia, Kenya, and Upper Volta. Another, established in 1966 to reconcile Ghana and Guinea over certain disputes arising from the overthrow of President Nkrumah’s government in Ghana, was composed of Kenya, Sierra Leone, and Zaïre.
set up technical boundary committees. These technical committees are also a good illustration of the reluctance of African countries to submit their territorial disputes to international adjudication, and most precisely to the ICJ or to inter-state arbitration. Technical boundary committees are not always composed of lawyers and, if they are, those cohabit with other disciplines. As such, technical boundary committees are, most of the time,\(^{73}\) governed by the axiom of ‘de-legalization’ of dispute settlement processes in Africa.

The Frontier Dispute (Benin/Niger) case is a perfect illustration of how African states can sometimes postpone for decades the settlement of territorial disputes through international adjudication. It took about forty years for Benin and Niger finally to agree to submit their territorial dispute to the ICJ. Meanwhile, the two states did their best to find a solution outside a courtroom and, in particular, within technical boundary commissions. It is interesting to recall the steps that led Benin and Niger to go before the ICJ, after decades of attempts to ‘de-legalize’ their territorial dispute. The frontier dispute started with incidents that occurred on the island of Létè on the eve of the independence of Benin and Niger, in 1959 and 1960 respectively. Following those events, the two states set up a process for the friendly settlement of their frontier dispute. In 1961 and 1963, two Dahomey (the former name of Benin)–Niger joint commissions met to discuss the matter. In October 1963, the crisis between Dahomey and Niger deepened, in particular regarding the island of Létè. Each state subsequently published a White Paper containing their respective positions regarding the frontier dispute. However, the issue of sovereignty over the island of Létè was not resolved and there were further incidents in subsequent years, notably in 1993 and 1998. On 8 April 1994, Benin and Niger concluded an agreement to establish a joint commission for the delimitation of their common border, whose terms of reference included the enumeration, collection, and analysis of documents relating to the frontier and the precise establishment thereof. The commission held six meetings between September 1995 and June 2000. Since efforts to arrive at a negotiated solution to the dispute were unsuccessful, the commission

\(^{73}\) There are some exceptions in practice. For instance, the dispute relating to the boundary between Ethiopia and Eritrea was submitted to the Eritrea–Ethiopia Boundary Commission, composed solely of international lawyers (Sir Elihu Lauterpacht, Prince Bola Adesumbo Ajibola, W. Michael Reisman, Judge Stephen Schwebel and Sir Arthur Watts). The Permanent Court of Arbitration served as registry for this commission. See Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eritrea/Ethiopia), Eritrea–Ethiopia Boundary Commission, 13 April 2002, (2002) 41 ILM 1057.
proposed that the two states bring the dispute before the ICJ by Special Agreement. The Special Agreement was signed in Cotonou on 15 June 2001 and entered into force on 11 April 2002. It is interesting to note that, in the case of Benin and Niger, it was the technical boundary commission itself that recommended to both states that they seize the ICJ. Thus this demonstrates that even if African states insist in a particular context on opting for a ‘de-legalized’ dispute settlement process, the bodies that they put in place can then acknowledge their limits and advocate the use of the third-party adjudication.

However, recourse to technical boundary committees can raise difficulties subsequently when African states decide in fine to submit their disputes to third-party adjudication. Indeed, since it is not based on a legal settlement – but, rather, political or technical – African states still attempt to have the work of these commissions validated by international courts and tribunals or to use international courts in order to unfreeze the process within a given technical committee.

For instance, in the Continental Shelf (Tunisia/Libya) case (which was the first African dispute brought before the ICJ after more than ten years of boycott by African countries following the South West Africa Cases), the special agreement required the ICJ to clarify the principles and rules of international law that might apply for the delimitation of the area of the continental shelf and to specify precisely the practical way in which the aforesaid principles and rules applied, so as to enable the experts of the two countries to delimit those areas without any difficulties. Both states disagreed on the meaning of the special agreement at this level. According to Tunisia, the ICJ was required to take into account all the elements of fact and law regarding the practical methods and instruments to be used, ‘up to the ultimate point before the technical work’. For Libya, the Court was not authorized to carry the matter ‘right up to the ultimate point before the purely technical work’ and also was ‘not invited to set out the specific method of delimitation itself’. It is then clear that from Libya’s point of view, the ICJ was supposed to facilitate the technical determination of the continental shelf by the experts of the two countries and not really to proceed with the delimitation itself. The ICJ noted that regardless of the two states’ dispute settlement options, the Court is first

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74 The historical facts of the case are available in Frontier Dispute (Benin/Niger), [2005] ICJ Rep. 90, 107, [20]–[22].
75 Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits), [1982] ICJ Rep. 18, 38, [25].
76 Ibid., 39, [27].
77 Ibid., 39, [28].
78 Ibid.
and foremost an organ of law. Consequently, once seized of a contentious case, the Court ‘is to render a judgment in a contentious case . . . which will have therefore the effect and the force attributed to it under Article 94 of the Charter of the United Nations and the said provisions of the Statute and the Rules of Court’.  

Here is another example of an indirect clash between the willingness of African states to control – this time, through a *compromis* (special agreement) – not only the jurisdiction of an international court but also the international judicial function per se.  

This is a peculiarity of some of the African territorial disputes submitted to international courts and tribunals, particularly when those states try to create a certain continuum between international courts and tribunals and the (non-legal) work of their technical boundary commissions.  

Some international courts and tribunals might see a sort of legal continuum between their activity – which is rooted in international law – and the activity of those ‘de-legalized’ mechanisms in the African context. In this regard we can consider the *Abyei* arbitration between the government of Sudan and the Sudan People’s Liberation Movement/Army. There, the arbitral tribunal was more deferential to the work conducted by the Abyei Boundary Commission (ABC) experts, a body (or a technical boundary commission) that the arbitral tribunal itself qualified as composed of ‘individuals known and recognized in the fields of Sudanese and African history, geography, politics, public affairs, ethnography, and culture’.  

Noteworthy is the fact that the tribunal stressed the characteristics of ‘de-legalized’ dispute settlement mechanisms in Africa. For example, it indicated that the ABC experts ‘were to apply the procedures of “scientific analysis and research” [and that] there was no reference to the application of international law, whether substantive or procedural [in the work of the ABC experts].’  

The tribunal also underlined that, ‘Unlike traditional judicial or arbitral proceedings, the ABC’s procedures were markedly informal (“informal yet businesslike”), the proceedings

79 Ibid., 39–40, [40].  
81 *In the matter of an arbitration before a tribunal constituted in accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People’s Liberation Movement/Army on delimiting Abyei Area and the Permanent Court of Arbitration Optional Rules for arbitrating disputes between two parties of which only one is a state, between the Government of Sudan and the Sudan People’s Liberation Movement/Army, PCA, Final award, 22 July 2009*, [467].  
82 Ibid., [468].
were not conducted in a confrontational fashion, and an atmosphere of cooperation was sought.\(^{83}\) Despite those features,\(^ {84}\) the arbitral tribunal went as far as to conclude that the ABC experts as a body had *compétence de la compétence*\(^ {85}\) (like any international court or tribunal), and that the tribunal would follow the ‘interpretation’ of the ABC experts as long as that interpretation was ‘reasonable’\(^ {86}\) (e.g., the interpretation was considered reasonable if the ABC experts did not exceed their mandate).

The approach that was endorsed by the arbitral tribunal in the *Abyei* arbitration remains original, if not unique. It might encourage African states to submit their territorial disputes to international adjudicatory mechanisms should they need an international court and tribunal to strengthen the determinations of their technical commissions, such as a technical boundary commission, or to validate them. ‘De-legalized’ disputes can sometimes address de facto legal issues\(^ {87}\) and as such can be given more weight when African states resort to international adjudication. For the time being, it seems that there is instead resistance from ‘universal’ international courts and tribunals to follow African states down that path.

Recently, the ICJ had occasion to state clearly its position vis-à-vis delimitation carried out by African technical boundary commissions. In the *Frontier Dispute (Burkina Faso/Niger)* case, Burkina Faso requested the Court to adjudge and declare that one part of its frontier with Niger followed a course that was already determined by a joint technical commission established in 1997. In other words, for the sake of *res judicata*, Burkina Faso wanted the Court to include in the operative part of its

\(^{83}\) Ibid., [469].

\(^{84}\) Ibid., [483], where the tribunal concludes as follows: ‘Given the ABC’s singular characteristics, a majority of the Tribunal has no difficulty in concluding that the ABC possessed important decision-making powers in addition to its fact-finding functions. While the ABC Experts were not lawyers but persons recognized in the fields of “history, geography and other relevant expertise,” they were required to arrive at a final and binding decision. Although the Parties did not require the ABC Experts to apply international law or legal reasoning to the delimitation of the boundaries of the Abyei Area but scientific methods, they did require the ABC Experts to arrive at a decision that would resolve the dispute with final and binding consequences. It is this essential decision-making function that, in the view of the Majority, is a defining characteristic of the ABC.’

\(^{85}\) Ibid., [502]–[503].

\(^{86}\) Ibid., [504].

\(^{87}\) Maluwa gives the example of the Létè island dispute between Benin and Niger. He explains, ‘Legal arguments were invoked by both parties throughout the duration of the dispute (1960–1965) although what was sought and achieved – partly through direct negotiations between the disputants and partly through the mediation of the Conseil de l’Entente – was not a legal settlement as such but a political settlement.’ Maluwa, above n. 70, 301, n. 6.
judgment the line of the common frontier fixed by the joint technical commission. According to Niger, since there already existed an agreement between the parties regarding the sector at stake, there was no need for the ICJ to include a reference to the said sector in the operative part of its judgment. For Niger, it was sufficient that the Court took note of the agreement in question in the reasoning of its judgment, ‘and settle the only dispute which remains between the Parties, namely that relating to the part of the frontier in respect of which the Joint Technical Commission was unable to conclude its work successfully, and on which the Parties have therefore not been able to reach agreement.’

The ICJ refused categorically to accede to Burkina Faso’s request. The Court recalled to Burkina Faso that in the light of the special agreement concluded between Burkina Faso and Niger, the Court was only supposed to ‘place on record the Parties’ agreement’ regarding the delimitation of the frontier made by the Joint Technical Commission, and not ‘to delimit itself the frontier according to a line that corresponds to the conclusions of the Joint Technical Commission upon which the two Parties have agreed.’ The Court explained that ‘it is one thing to note the existence of an agreement between the Parties and to place it on record for them; it is quite a different matter to appropriate the content of that agreement in order to make it the substance of a decision of the Court itself.’ It rejected Burkina Faso’s request as it considered that the said request exceeded the special agreement between Burkina Faso and Niger. However, noteworthy is the passage of the judgment in which the Court declared that even if the compromis requested the Court to do so (that is, to delimit a frontier on the basis of the conclusions of a technical boundary commission), the Court would not give effect to such a request. Indeed, in a powerful dictum the Court stated,

A special agreement allows the parties to define freely the limits of the jurisdiction, stricto sensu, which they intend to confer upon the Court. It cannot allow them to alter the limits of the Court’s judicial function: those limits, because they are defined by the Statute, are not at the disposal of the parties, even by agreement between them, and are mandatory for the parties just as for the Court itself.

It is interesting to note that this is the second time in its history that the ICJ has emphasized through the formulation of new dicta not only the

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89 Ibid., [43].
90 Ibid.
91 Ibid., [46] (emphasis added).
limits of its judicial function but also the limits that are imposed on states when taking the option to seize an international court of a dispute. In both cases, it has been in the context of ‘African disputes’ that the Court has come up with new and strong formulations of those limits. It did so in 1963 in the Northern Cameroons case, which can be considered as an African dispute since Cameroon was the applicant state and the subject matter concerned self-determination and territorial issues in Africa. The judgment of the Court in the Frontier DISPUTE (Burkina Faso/Niger) not only reiterated what the Court said in 1963, but also added another ‘layer of protection’ with the above-mentioned dictum.

Concluding remarks

The message sent to African states is clear: no control can be exercised by states over third-party adjudication once they decide to have recourse to it. Bowett once affirmed that ‘the basic reason for avoiding legal settlement is simply that states prefer to retain control over the settlement process, so as to ensure that any settlement is acceptable to them or, if that cannot be achieved, that no settlement is reached’. Maluwa went further and advanced the argument that the issue of ‘control of the settlement process provide[s] the key to much that is seemingly puzzling in the attitude of African states toward the settlement of disputes, in general’. If ‘control’ is the sine qua non for more adherence to and use by African states of the system of international courts and tribunals, then there is no hope for greater involvement of African states in international adjudication. The reaction of the ICJ to Burkina Faso’s request shows that any idea of control is illusory, and, in particular, in a context where the international judicial function has matured.

Moreover, and with all due respect to scholars like Maluwa, it is quite often groundless to think that the main factor that dictates the choice

92 ‘[E]ven if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court’s judicial integrity.’ Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections), [1963] ICJ Rep. 15, 29. See also Frontier Dispute (Burkina Faso/Niger), above n. 88, [45].


94 Maluwa, above n. 70, 314.
of African states in relation to international adjudication is linked to ‘control’. The most important factor is ‘confidence’. As Jenks correctly highlighted, ‘the essence of the question is confidence: confidence in the stability and adequacy of the law, and confidence in the integrity and predictability of the courts and tribunals administering the law’.\textsuperscript{95} Since their accession to sovereignty, African states have progressively built a culture of adjudication. They have put more trust and confidence in third-party adjudication, and thus have had greater recourse to international courts and tribunals (in the sense of universal courts). It cannot be doubted that, in future, African states will be even more involved in international adjudication processes and contribute more actively to the development of international law.
