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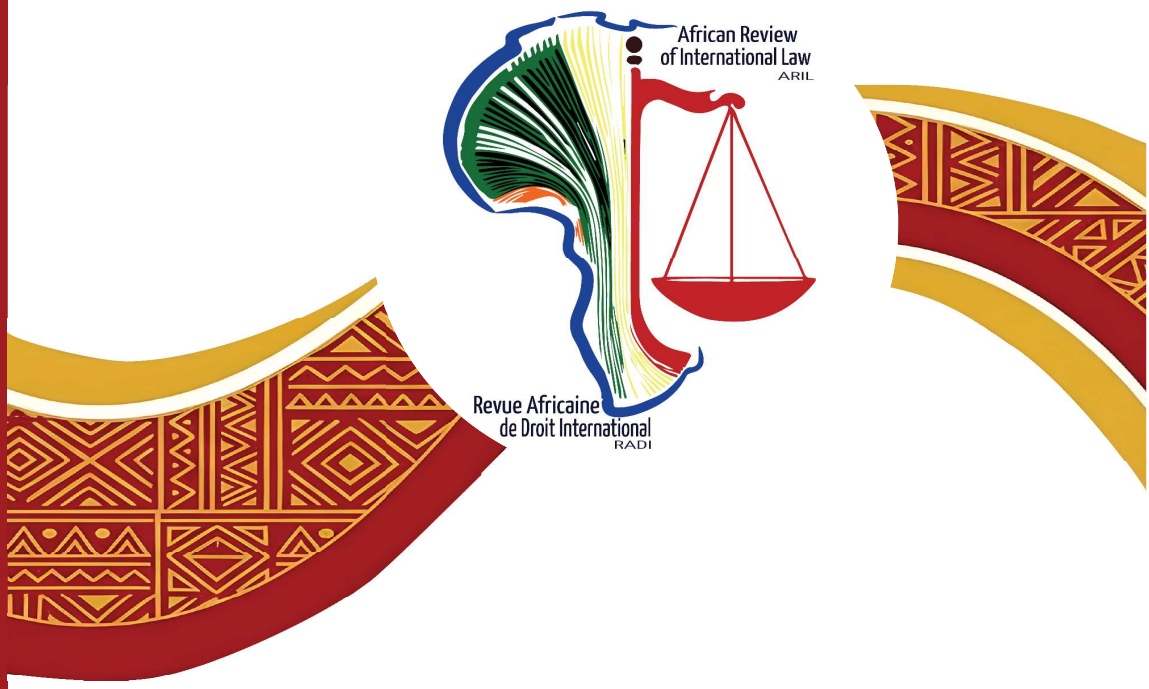

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TABLES OF CONTENTS / TABLE DE MATIERES

EDITORIAL

A LOOK AT AFRICA AND INTERNATIONAL LAW

by Maurice Kamto*

Nothing in humanity is a given *ne varietur*. History shows that human societies are not invariant. The history of the relationship of the African continent to the body of law that ancient European authors called the law of nations (jus gentium), and that subsequent developments have enshrined under the name of international law, confirms this assertion.

A close examination of the literature on international law suggests the distinction of three main moments in Africa's relationship with this subject: the time of the postulated ignorance of international law in the African space, the time of the denial of Africa's legal existence and its apprehension as an object of international law, and finally the time of the affirmation of African territorial and political formations as subjects of international law and their contribution to it.

The first is the exclusion of Africa from the productive and cognitive field of international law. It was no doubt self-evident to Western historians that Africa, whose European culture had done its best to impose the idea that it was devoid of civilization and unaware of the idea of progress and of State organization, could not have produced rules of international law. It could not have contributed in any way whatsoever to the history of international law. Although Nippold, one of the rare internationalists of the early twentieth century who was open to non-European societies, showed in his 1924 lecture at The Hague Academy of International Law that international law does not belong to any human civilization, country or continent, nothing was done. The dominant discourse on Africa, based on a racial, even racist, background, has continued to structure the discourse of most historians of international law: they have either ignored Africa in their work, or reproduced ethnological prejudices by presenting them as scientific analyses. It does not matter that African languages contain words corresponding to the basic concepts of international law such as country, king, boundary or border, pact or agreement, etc.; that there are now numerous works by African and non-African researchers, including a monumental *General History of Africa* produced by UNESCO, which establish the existence of important states in pre-colonial Africa: empires, particularly in West Africa between the twelfth century and the end of the ninetieth century, such as the empires of Ghana (third century - thirteenth century),

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Mali (twelfth century - seventeenth century) and Songhay (fifteenth century - sixteenth century) an abundance of kingdoms of different seize during the same period, for instance the kingdom of Dahomey (twelfth century - nineteenth century) in West Africa, the kingdoms of Ndongo-Matamba (sixteenth century - seventeenth century), Kongo (fourteenth century -nineteenth century), Bamoun (fourteenth century to the present day) in Central Africa, the kingdom of Zimbabwe, then of Monomotapa (fifteenth century - seventeenth century) in Southern and East Africa. Having proclaimed that this part of the world was ignorant of the law of nations before the creation of States through colonisation, it would no doubt have been very embarrassing to suddenly call into question what generations of students of international law had been taught.

This ideological discourse, which placed Africa outside the history of human societies, was assimilated by the authors of the main works on international law, no doubt as a result of a certain intellectual laziness. Until relatively recently, these authors were mainly Westerners. This is why it is important that Africans, like people from other regions of the world who have been excluded from international law, both in its history and in the production of its rules, should take their turn to speak out.

The second phase was colonisation. As we know, the Berlin Conference of 1884-85 laid down the procedures for conquering colonies in Africa and for securing and occupying them. Africa became the subject of international law. It was then that the doctrines of international colonisation law appeared or developed, with the central doctrine of *terra nullius* legitimising conquest and occupation. Once the territories coveted by the colonial powers had been declared vacant and masterless, their appropriation no longer came up against any legal principle. But what could be done where there were populations? Colonial ideology saw them as uncivilised peoples lacking the socio-political organisation to govern themselves. From then on, colonisation was carried out in the name of generosity and the humanism of the colonial powers, who believed themselves to be invested with a ‘‘civilising mission’’ in the territories to be colonised. This was the great moralizing and oh-so-hypocritical discourse of the Berlin Conference.

In this context, colonised peoples have no say whatsoever in matters relating to the future of their own territories. They were like minors under the tutelage of the colonial powers, who were supposed to lead them ‘‘gradually’’ to emancipation. The management of their territories was therefore the subject of exchanges, and sometimes even disputes, between the colonial powers. For example, the Oscar Chinn case, which pitted Great Britain against Belgium before the Permanent Court of International Justice (P.C.I.J.) over navigation on the River Congo, concerned compensation for the loss and damage suffered by the British subject Oscar Chinn as a result of certain measures taken by the Belgian government. The Belgian Government lost the case in a

judgment handed down on 12 December 1934. Of course, no African state intervened in the proceedings, and no African judge was a member of the Court at the time. This remained the case until the decolonisation of most African countries. Since then, these countries, which have formally become subjects of international law, have shown not only their willingness to contribute actively to the production of this law at universal level, but also their ability to innovate by producing regional law that is more in tune with their specific realities.

As early as 1960, two African States which were not formerly colonised, Ethiopia and Liberia, acting in their capacity as former member States of the League of Nations (LoN), each brought proceedings against South Africa in a case concerning the maintenance of the LoN mandate for South West Africa, and the duties and conduct of South Africa in its capacity as Mandatory. As is well known, after the judgment of 21 December 1962 in which the I.C.J. dismissed the preliminary objections raised by South Africa, the Court, in a judgment delivered on 18 July 1966 on the second phase of the proceedings, with its President casting the deciding vote (the votes being split 7 to 7), found that the applicants had not demonstrated their (legal) interest in bringing proceedings with regard to the subject-matter of their claims. Not only was the case referred to the Court by two African States, but the first judges of African origin to sit on the Court as *ad hoc* judges were Sir Louis Mbanefo of Nigeria, appointed by Ethiopia and Liberia, and J.T. van Wyk appointed by South Africa, at the height of apartheid.

The third period began with decolonisation and the emergence of new African states on the international scene, which intended to play a full part in the development of international law. In the second half of the 1970s and 1980s, along with other Third World countries, they began a global challenge to the international legal order that they discovered when they gained international sovereignty, in the context of their demands for a New International Economic Order (NIEO). African and Latin American authors were the main theoreticians of this protest movement, which generated the material and doctrinal corpus of international development law. At the same time, these States played an active part in the adoption of the main international conventions of a universal nature, particularly in the fields of the law of treaties, human rights, the law of the sea, environmental law, disarmament, international humanitarian law and international criminal law, within the framework of diplomatic conferences for the codification of international law. One of the most significant of these was the 1998 Rome Conference on the drafting of the Statute of the International Criminal Court (ICC), where Africa played a major role in introducing the crime of aggression into the Statute and played an active part in the Conference's drafting committee, even though it had difficulty making its voice heard.

In addition, Africa makes a significant technical contribution to the produc-

tion of contemporary international law within the emblematic framework of the United Nations International Law Commission, where African members have been appointed special rapporteurs and have produced remarkable work on subjects such as the *Draft Code of Crimes against the Peace and Security of Mankind*(DoudouThiam),*Succession in matters other than treaties*(Mohammed Bedjaoui), *Diplomatic protection* (Mohamed Bennouna then John Dugard), *Expulsion of aliens* (Maurice Kamto), *Imperative norms of general international law* (Jus cogens) (Dire Tladi), *Prevention and repression of maritime piracy and armed robbery at sea* (Yacouba Cisse). In this vein, it is worth noting the active presence of some of the most eminent African internationalists in various bodies for the study and teaching of international law, in particular the Institute of International Law, where some of them act as rapporteurs on subjects under study, and The Hague Academy of International Law, where they sit on the Curatorium and where, in addition to the special courses, they now have access to the prestigious general courses and the inaugural lecture.

The participation of Africans in international courts and tribunals, and consequently in international jurisprudence, has grown from a token presence in the 1960s to a presence of African judges and arbitrators in all general and universal courts and tribunals (International Tribunal for the Law of the Sea, ICC). We should also note the emergence of African counsels and litigators before these jurisdictions, although it is still timid: for example, it does not seem that they are really integrated into what has been called the ‘‘invisible bar’’ of the ICJ. Be that as it may, it is worth pointing out that judges from Africa are gradually, and no doubt still slowly, making their presence felt on the World Court, where three African members (Taslim O. Elias, Mohammed Bedjaoui and Abdulqawi Yusuf) have so far been appointed to the presidency in over sixty years. Added to this is the fact that since its creation, an African (Jean-Pelé Fomete Tamafo) has held the position of Deputy Registrar for the first time, as no national of the continent has ever held the position of Registrar.

Unquestionably, African states have enriched and strengthened universal international law from an original regional perspective, either by adopting conventions on subjects of universal international law to affirm the African approach to the issue in the light of the continent’s specific characteristics, or by adopting conventions on essentially regional issues. The former is the case, for example, in international humanitarian law with the 1969 OAU Convention Governing the Specific Aspects of Refugees in Africa, in environmental law with the 1991 Bamako Convention on the Ban on the Import into Africa of Hazardous Wastes, and in human rights with the 2003 Maputo Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. In the second case, mention should be made of the African Convention on the Conservation of Nature and Natural Resources of 1968, renewed

in 2003 in Maputo, the African Charter on Human and Peoples' Rights of 1981, the African Charter on the Rights and Welfare of the Child of 1990, the 2003 African Union Convention on Preventing and Combating Corruption, the 2006 African Youth Charter, the 2007 African Charter on Democracy, Elections and Governance, and the 2014 African Union Convention on Cybercrime and the Protection of Personal Data. These illustrations do not take into account the many sectoral agreements or agreements concluded in technical fields such as banking, insurance, business law (OHADA), economic integration, competition, continental free trade (ZLECAf), air transport, river basins, etc. The development of African regional law is set to continue, especially as African states have realised the benefits they can draw from it to resist international normative or institutional law that appears to be directed against them. As a result, these states threatened to withdraw en bloc from the ICC Statute and to introduce rules of regional criminal law different from the 1998 Rome Convention, particularly on the issue of immunity from prosecution of Heads of State in office and public officials, when they realised that the ICC, far from being a universal jurisdiction, is a kind of criminal court for Africans.

The development of African regional international law has been accompanied by an institutional vitality that borders on inflation, with continental institutions such as the African Union (AU) - the successor to the Organization of African Unity (OAU) - overshadowing a multiplicity of regional institutions of varying nature and varying dynamism. The serious ECOWAS crisis of 2023 is ample proof of the fragility of these regional institutions which, like continental institutions, are largely dependent on funding from foreign countries that use financial assistance to interfere heavily in the functioning of African institutions. In spite of this, there has been a good output of jurisprudence from both continental courts, such as the African Court on Human and Peoples' Rights, and (sub)regional courts, such as those of ECOWAS, SADEC, CEMAC and the East African Community.

While there is no doubt that an assessment, even a cursory one, of the contribution of African States to contemporary international law would easily lead to a positive conclusion, it is equally undeniable that this contribution still suffers from a lack of knowledge of the practice of these States, which is nonetheless abundant in certain areas of international law, and from insufficient and sometimes low-quality doctrinal production, which is linked to the lack or scarcity of scientific media for disseminating this production. It is impossible to over emphasize the need for a high-quality African doctrine to emerge that can hold its own in the global competition for knowledge by being accepted by the leading publishing houses and journals in the field, as well as in scientific media whose quality will impose its authority on the rest of the world. In other words, if Africa's contribution to international law is to flourish, the continent must have its own journals and other media

for disseminating the internationalist thinking of authors from the continent, without however ceasing to contribute to scientific publications outside Africa.

This is an opportunity to pay a warm tribute to the various predecessors of the African Review of international Law (ARIL) who paved the way, both nationally and internationally, and made a significant contribution to giving a voice to African internationalists. Some of these national or continent-wide journals and yearbooks have disappeared, faced with the obstacles encountered by all pioneers and, in the case of Africa, the difficulties of securing regular scientific contributions and the financial support of public or private institutions without which a voluntary scientific enterprise of this nature cannot survive.

The cessation in the early 2000s of the activities of the African Society of International and Comparative Law (ASICL), which was the counterpart of learned societies on other continents and for some years provided a framework for scientific meetings between African internationalists or those interested in Africa, created a great void. I felt this all the more keenly when we had the pleasure of taking part in one of its annual colloquia in South Africa. The vacuum created was all the more unbearable in a global context where African internationalists were struggling to make their voices heard. So, in 2009 I came up with the idea of launching an African international law society from the African continent itself. The idea matured over the course of 2010 and 2011, and once the legal foundations had been worked out, implementation was set for 2012. Invitations to join *African Society of International Law* (AfSIL) and to take part in its first scientific meeting were sent to almost all African figures in international law, both within and outside Africa. Many responded favourably. Although I had planned to organize the colloquium to launch the African Society of International Law in Yaoundé, my resignation from the Cameroon government in November 2011 made the project impossible. I had to find a venue in another country. I called on an old friend, Mr. Benjamin Boumakani, the then Secretary to the Government of the Republic of Congo Brazzaville, who took charge of all the practical organization and gave the participants in AfSIL's inaugural symposium a memorable welcome, for which he can never be thanked enough. AfSIL was thus launched in this Central African city, with the goodwill of the then Minister of Foreign Affairs of the Congo, around a colloquium on the theme: *La création d'État en droit international/Creation of State in International Law.* Its first board was established: Judge Raymond Ranjeva of Madagascar, former Vice-President of the I.C.J., did me the immense honour and friendship of agreeing to preside over the brand-new Society. He will do so with a sense of dignity and a keen awareness of the challenges that still confront us today. Professor Francis Botchway from Ghana, a lecturer at the University of Dubai, was Vice-Chairman, Dr Uche Ewelukwa from Nigeria, a lecturer at the University of Arkansas, was Secretary General, and Dr Yenkong Nganjoh Hodu

from Cameroon, a lecturer at the University of Manchester, was Treasurer. All are accomplished professors of international law today. Among the many participants at this very first AfSIL meeting was a young, dynamic professor, Mr Makane Moïse Mbengue from Senegal, a lecturer at the University of Geneva, who was appointed Deputy General Secretary. His commitment to AfSIL has never wavered.

With the launch of the *African Review of International Law* (ARIL), I am pleased to see this other pillar of the triad conceived at the time of the creation and launch of AfSIL, namely AfSIL itself, the Journal of International Law and the AfSIL *International Law Dissertation Prize*, take shape. Thanks to the prestige, authority and self-sacrifice of Judge Raymond Ranjeva, AfSIL's first President, and to the invaluable work and academic and personal talents of Professor Makane M. Mbengue, AfSIL's remarkable President-in-Office, who took over from him and is now happily steering the ship, as well as to the no less talented team that manages this Review, Africa now has a new high-level scientific tool for the promotion and dissemination of its practice and doctrine in international law. I would like to thank all of them for their dedication to this important cause, and congratulate them on the trust placed in them by their respective positions within the Review. It is a challenge that can only be met thanks to the common passion that drives us all at the heart of these essentially voluntary activities.

ARIL is published twice a year and will include articles on both public and private international law, as well as comparative law, in both English and French. The exceptional richness of its content can be discovered through the various headings in its table of contents. It will initially be published in electronic form, although this does not rule out the possibility of a paper version in the future.

This is also the place to express my gratitude to outstanding colleagues who accepted to serve on the Scientific Committee of the Revue, and some have authored contributions for this Inaugural Issue. In doing so, they enhanced the prestige of ARIL from its inception with their own.

I wish it every success.

November 2024

EDITORIAL

REGARD SUR L'AFRIQUE ET LE DROIT INTERNATIONAL

par Maurice Kamto*

En l'humanité rien n'est acquis *ne varietur*. L'histoire montre que les sociétés humaines ne sont pas dans l'invariance. L'histoire de la relation du continent africain au corpus normatif que les auteurs européens anciens appelaient droit des gens *(jus gentium),* et que les développements subséquents ont consacré sous l'appellation de droit international, confirme cette assertion.

Un examen attentif de la littérature de droit international suggère la distinction de trois moments principaux dans le rapport de l'Afrique à cette matière : le temps de la méconnaissance postulée du droit international dans l'espace africain, le temps de la négation de l'existence juridique de l'Afrique et de son appréhension comme objet de droit international, le temps, enfin, de l'affirmation des formations spacio-politiques africaines comme sujets du droit international et leur contribution à celui-ci.

Le premier moment est celui de l'exclusion de l'Afrique du champ productif et cognitif du droit international. Il est apparu sans doute comme une évidence aux historiens occidentaux que l'Afrique, dont leur culture avait fait de son mieux pour imposer l'idée qu'elle était dépourvue de civilisation et ignorait l'idée de progrès ainsi que le mode d'organisation de type étatique**,** ne pouvait pas avoir produit des règles du droit des gens. Elle n'aurait pu contribuer de quelque manière que ce soit à l'histoire du droit international. Bien qu'un Nippold, un des rares internationalistes du début du XX^{e} siècle ouverts sur les sociétés non européennes, ait montré dans son cours de 1924 à l'Académie de droit international de La Haye, que le droit international n'appartient à aucune civilisation humaine, aucun pays, aucun continent, rien n'y fit. Le discours dominant sur l'Afrique assis sur un fond racial, voire raciste, a continué à structurer le propos de la plupart des historiens du droit international : ceux-ci ont soit fait l'impasse sur l'Afrique dans leurs travaux, soit reproduit les préjugés ethnologiques en les présentant comme des analyses scientifiques. Peu importe que les langues africaines contiennent des mots correspondant aux concepts de base du droit international comme pays, roi, limite ou frontière, pacte ou accord etc. ; qu'il existe désormais de nombreux travaux de chercheurs africains et non africains, dont une monumentale *Histoire générale de l'Afrique* réalisée par l'UNESCO, qui établissent l'existence d'Etats importants dans l'Afrique précoloniale : des empires, notamment en Afrique de l'Ouest entre le XII^{e} s. et la fin XIX^{e} s., à l'instar des empires du Ghana (III^{e} s.-XIII^{e} s.), du Mali (XIII^{e} s.-XVII^{e} s.), Songhay (XV^{e} s.-XVI^{e} s.)) ;

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un foisonnement des royaumes de taille variable au cours de la même période, par exemple le royaume du Dahomey (XVII[e] s.-XIX[e] s.) en Afrique occidentale, les royaumes de Ndongo-Matamba (XVI[e] s.-XVII[e] s.), du Kongo (XIV[e] s.-XIX[e] s.), Bamoun (XIV[e] s. à nos jours) en Afrique centrale, le royaume de Zimbabwe, puis de Monomotapa (XV[e] s.-XVII[e] s.) en Afrique australe et orientale. Ayant proclamé que cette partie du monde ignorait le droit des gens avant la création d'Etats par la colonisation, il eût été sans doute très embarrassant de remettre soudain en question ce qu'on avait enseigné à des générations d'étudiants en droit international.

Ce discours idéologique, qui mettait ainsi l'Afrique hors de l'histoire des sociétés humaines, fut assimilé par les auteurs des principaux ouvrages de droit international, sans doute du fait d'une certaine paresse intellectuelle. Jusqu'à une période relativement récente, ces auteurs étaient essentiellement des Occidentaux. C'est pourquoi il importe que les Africains, comme les ressortissants d'autres régions du monde qui furent tenues à l'écart du droit international, dans son histoire comme dans la production de ses règles, prennent à leur tour la parole.

Le deuxième moment est celui de la colonisation. Les modalités de conquête des colonies en Afrique ainsi que de leur sécurisation et de leur occupation furent établies, comme on le sait, lors de la conférence de Berlin de 1884-85. L'Afrique devint objet du droit international. C'est alors qu'apparurent ou se développèrent les doctrines du droit international de la colonisation, avec la doctrine centrale de la *terra nullius* qui légitime la conquête et l'occupation. Car, à partir du moment où les territoires convoités par les puissances coloniales étaient déclarés vacants et sans maître, leur appropriation ne se heurtait plus à aucun principe juridique. Mais que faire là où il y avait tout de même des populations ? L'idéologie coloniale les considéra comme des peuplades non civilisées et dépourvues d'organisation sociopolitique pouvant leur permettre de s'administrer elles-mêmes. Dès lors la colonisation se fit au nom de la **générosité d'âme** et de l'humanisme des puissances coloniales, qui se crurent investies d'une « mission civilisatrice » dans les territoires à coloniser ; c'est le grand discours moralisateur et ô combien hypocrite de la Conférence de Berlin.

Dans cet ordre d'idées, les peuples colonisés n'interviennent en aucune façon dans les questions ayant trait au devenir de leurs propres territoires. Ils sont des sortes de mineurs sous tutelle des puissances coloniales qui doivent les amener « progressivement » à l'émancipation. La gestion de leurs territoires est donc l'objet d'échanges, parfois même de contentieux entre puissances coloniales. Ainsi, l'affaire *Oscar Chinn,* qui opposa devant la Cour permanente de justice internationale (C.P.J.I.) la Grande-Bretagne à la Belgique au sujet de la navigation sur le fleuve Congo, était relative à la réparation des pertes et des dommages qu'aurait subi le sujet britannique Oscar Chinn, du fait de certaines mesures prises par le Gouvernement belge. Ce dernier perdit le procès aux termes de l'arrêt rendu dans cette affaire le 12 décembre 1934. Bien évidemment, aucun Etat africain ne fut intervenant dans cette procédure, et aucun juge africain n'était membre de la Cour à cette époque. Il en sera ainsi, jusqu'à la décolonisation de la plupart des pays africains. Ces

pays devenus formellement des sujets de droit international ont montré depuis lors, non seulement leur volonté de contribuer activement à la production de ce droit au niveau universel, mais aussi des aptitudes à l'innovation à travers la production d'un droit régional plus en phase avec leurs réalités spécifiques.

Dès 1960, deux Etats africains non anciennement colonisés, l'Ethiopie et le Libéria, agissant en qualité d'anciens Etats membres de la Société des Nations (SdN), ont, chacun de son côté, introduit une instance contre l'Afrique du Sud dans une affaire concernant le maintien du mandat de la SdN pour le Sud-Ouest africain, et les devoirs et le comportement de l'Afrique du Sud en qualité de mandataire. Comme on le sait, après l'arrêt du 21 décembre 1962 par lequel la C.I.J. rejeta les exceptions préliminaires soulevées par l'Afrique du Sud, la Cour, par un arrêt rendu le 18 juillet 1966 sur la deuxième phase de la procédure, avec la voix prépondérante de son président (les voix étant partagées 7 contre 7), a constaté que les demandeurs n'avaient pas démontré leur intérêt (juridique) à agir au regard de l'objet de leurs demandes. Non seulement la Cour fut saisie de cette affaire par deux Etats africains, mais on vit siéger les premiers juges d'origine africaine au sein de cette juridiction en qualité de juges *ad hoc* : Sir Louis Mbanefo du Nigeria, désigné par l'Ethiopie et le Libéria, et J.T. van Wyk nommé par l'Afrique du Sud, au sommet de l'apartheid.

Le troisième moment s'ouvre avec la décolonisation et l'émergence d'Etats africains nouveaux sur la scène internationale, qui entendent participer pleinement au développement du droit international. Avec les autres pays du Tiers monde, ils engagent, dans la seconde moitié de la décennie 1970-80, la contestation globale de l'ordre juridique international qu'ils découvrent en accédant à la souveraineté internationale, dans le cadre de la revendication d'un Nouvel ordre économique international (NOEI). Des auteurs africains et latino-américains furent les principaux théoriciens de ce mouvement contestataire qui généra le corpus matériel et doctrinal du droit international du développement. Parallèlement, ces Etats participent activement à l'adoption des principales conventions internationales de caractère universel, notamment dans le domaine du droit des traités, des droits de l'homme, du droit de la mer, du droit de l'environnement, du désarmement, du droit international humanitaire, du droit international pénal, dans le cadre des conférences diplomatiques de codification du droit international. L'une des plus marquantes fut la Conférence de Rome de 1998 sur l'élaboration des Statuts de la Cour pénale internationale (CPI), où l'Afrique joua un rôle majeur dans l'introduction du crime d'agression dans lesdits Statuts et participa activement au comité de rédaction de la Conférence, même si elle eut du mal à y faire entendre sa voix.

En outre, l'Afrique apporte une contribution technique non négligeable à la production du droit international contemporain dans le cadre emblématique de la Commission de droit international des Nations Unies, où des membres africains ont été nommés rapporteurs spéciaux et ont produit des travaux remarquables sur des sujets tels que *Projet de code des crimes contre la paix et la sécurité de l'humanité* (Doudou Thiam), *Succession dans les matières autres que les traités* (Mohammed Bedjaoui), *Protection*

diplomatique (Mohamed Bennouna puis John Dugard), *Expulsion des étrangers* (Maurice Kamto), *Normes impératives de droit international général* (Jus cogens) (Dire Tladi), *Prévention et répression de la piraterie maritime et vol à main armé en mer* (Yacouba Cisse).

Dans cet ordre d'idées, il n'est pas superflu de relever la présence active des internationalistes africains parmi les plus éminents au sein de diverses instances de réflexion et d'enseignement du droit international, en particulier l'Institut de droit international où certains assument les fonctions de rapporteurs sur des sujets mis à l'étude, et l'Académie de droit international de La Haye où ils siègent au sein du Curatorium et où, en dehors des cours spéciaux, ils accèdent désormais à la délivrance des prestigieux cours généraux ainsi que de la conférence inaugurale.

En ce qui concerne la participation des Africains aux juridictions internationales, et par suite à la jurisprudence internationale, alors qu'elle fut plutôt symbolique dans les années 1960, elle n'a cessé de s'affirmer à travers la présence des juges et arbitres africains dans toutes les juridictions judiciaires (Tribunal international du droit de la Mer, CPI) et arbitrales, à caractère général ou universel. On notera par ailleurs l'apparition des conseils et plaideurs africains devant ces juridictions, bien qu'elle reste encore timide : par exemple, il ne semble pas qu'ils soient vraiment intégrés à ce qu'on a appelé le « barreau invisible » de la C.I.J. Qu'à cela ne tienne, il n'est pas sans intérêt de signaler l'affirmation progressive, sans doute encore lente, des juges originaires d'Afrique au sein de cette Cour mondiale où trois membres africains (Taslim O. Elias, Mohammed Bedjaoui, Abdulqawi Yusuf) ont, à ce jour, été portés à sa présidence en plus de soixante ans de présence. A cela s'ajoute le fait que depuis sa création, un Africain (Jean-Pelé Fomete Tamafo) occupe pour la première fois le poste de Greffier adjoint en son sein, aucun ressortissant du continent n'ayant jamais accédé aux fonctions de Greffier.

Incontestablement, les Etats africains ont enrichi et renforcé le droit international universel par une perspective régionale originale, soit en adoptant des conventions sur des sujets de droit international universel pour affirmer l'approche africaine de la question au regard des spécificités du continent, soit en adoptant des conventions sur des questions essentiellement régionales. Il en est ainsi, dans le premier cas de figure, par exemple en matière de droit international humanitaire avec la Convention de l'OUA de 1969 régissant les aspects propres aux réfugiés en Afrique, en droit de l'environnement avec la Convention de Bamako de 1991 sur l'interdiction d'importer en Afrique des déchets dangereux, en droits de l'homme avec le Protocole de Maputo à la Charte africaine des droits de l'homme et des peuples, relatif aux droit de la femme en Afrique de 2003. Dans le second cas, il y a lieu de mentionner la Convention africaine pour la conservation de la nature et des ressources naturelles de 1968, renouvelée en 2003 à Maputo, la Charte africaine des droits de l'homme et des peuples de 1981, la Charte africaine des droits et bien-être de l'enfant de 1990, la Convention de l'Union africaine sur la prévention et la lutte contre la corruption de 2003, la Charte africaine de la jeunesse de 2006, la Charte africaine de la démocratie, des élections et de la gouvernance de 2007, la Convention de

l'Union africaine sur la cybercriminalité et la protection des données à caractère personnel de 2014. Ces illustrations ne prennent pas en compte les nombreux accords sectoriels ou conclus dans des domaines techniques tels que ceux de la banque, des assurances, du droit des affaires (OHADA), de l'intégration économique, de la concurrence, du libre-échange continental (ZELECAf), de transport aérien, des bassins hydrographiques, etc. L'essor du droit régional africain est appelé à se poursuivre d'autant plus que les Etats africains ont compris le parti qu'ils peuvent en tirer pour résister à un droit international normatif ou institutionnel qui apparaîtrait comme orienté contre eux. C'est ainsi que ces Etats ont menacé de se retirer en bloc des Statuts de la CPI et de mettre en place des règles d'un droit pénal régional différent de la Convention de Rome de 1998, notamment sur la question de l'immunité pénale des Chefs d'Etats en fonction et des agents publics, lorsqu'ils ont réalisé que la CPI, loin d'être une juridiction à caractère universel, est une sorte de cour pénale pour Africains.

Le développement du droit international régional africain s'est accompagné d'une vitalité institutionnelle qui confine à l'inflation, les institutions continentales, à l'instar de l'instance faîtière qu'est l'Union africaine (UA) – successeur de l'Organisation de l'Unité africaine (OUA) -, surplombant une multiplicité d'institutions régionales de nature diverse et au dynamisme variable. La grave crise de la CEDEAO survenue en 2023 montre à suffisance la fragilité de ces institutions régionales qui, comme les institutions continentales, dépendent largement des financements de pays étrangers qui se servent du levier de l'assistance financière pour interférer lourdement dans le fonctionnement des institutions africaines. Malgré tout, on note une production jurisprudentielle de bonne facture des instances juridictionnelles tant continentales, en l'occurrence la Cour africaine des droits de l'homme et des peuples, que (sous-)régionales, à l'instar des Cours de justice de la CEDEAO, de la SADEC, de la CEMAC et de de la Communauté de l'Afrique de l'Est.

S'il ne fait pas de doute qu'une évaluation, même rapide, de la contribution des Etats africains au droit international contemporain aboutirait aisément à une conclusion positive, il est tout aussi indéniable que cette contribution souffre encore d'une méconnaissance de la pratique de ces Etats, pourtant abondante dans certains domaines du droit international, d'une production doctrinale insuffisante et parfois de faible valeur, ceci étant lié au manque ou à la rareté des supports scientifiques de diffusion de cette production. On ne saurait trop insister sur la nécessité de faire émerger une doctrine africaine de bonne facture qui puisse s'imposer dans la compétition mondiale des savoirs en se faisant accueillir dans les maisons d'édition et les veilles revues faisant autorité dans le domaine, mais également dans des supports scientifiques dont la qualité imposera l'autorité au reste du monde. En d'autres termes, l'épanouissement de la contribution de l'Afrique au droit international impose au continent de disposer de ses propres revues et autres supports de diffusion de la pensée internationaliste des auteurs du continent, sans cesser pour autant de contribuer aux publications scientifiques hors d'Afrique.

C'est l'occasion de rendre un vibrant hommage aux divers devanciers de la *Revue africaine de droit international (RADI)* qui ont ouvert la voie, tant au niveau national qu'au niveau international, et contribué de façon significative à donner la parole aux internationalistes africains. Certaines de ces revues et annuaires nationaux ou d'ambition continentale ont disparu, confrontés aux obstacles que rencontrent tous les pionniers et, s'agissant de l'Afrique, aux difficultés de s'assurer des contributions scientifiques régulières et l'appui financier des institutions publiques ou privées sans lequel une entreprise scientifique bénévole de cette nature ne peut survivre.

La cessation, au début des années 2000, des activités de la Société africaine de droit international et Comparée (SADIC), qui fut le pendant des sociétés savantes d'autres continents et offrit quelques années durant un cadre aux rencontres scientifiques entre internationalistes africains ou intéressés par l'Afrique, créa un grand vide. Je l'avais ressenti d'autant plus vivement que j'eus le plaisir de prendre part à un de ses colloques annuels en Afrique du Sud. Le vide créé devenait d'autant plus insupportable dans un contexte mondial où les internationalistes africains peinaient à faire entendre leur voix. C'est alors qu'en 2009 me vint l'idée de lancer une société africaine de droit international à partir du continent africain même. L'idée murit au cours des années 2010 et 2011, et, une fois ses bases juridiques élaborées, sa mise en œuvre fut fixée en 2012. Les invitations à adhérer à la SADI et à prendre part à sa première rencontre scientifique furent adressées à la quasi-totalité des figures africaines du droit international, en Afrique et hors du continent. Bon nombre répondirent favorablement. Alors que j'avais prévu d'organiser le colloque de lancement de la Société africaine de droit international à Yaoundé, ma démission du Gouvernement camerounais rendit le projet impossible. Il fallut trouver un lieu d'accueil dans un autre pays. Je sollicitais un vieil ami, M. Benjamin Boumakani, alors Secrétaire du Gouvernement de la République du Congo Brazzaville, qui prit en main toute l'organisation pratique et réserva aux participants au colloque inaugural de la SADI un accueil mémorable, dont il n'en sera jamais assez remercié. La SADI fut donc portée sur les fonts baptismaux dans cette ville d'Afrique centrale, avec la bienveillance du Ministre des Affaires étrangères du Congo d'alors, autour d'un colloque sur le thème : *La création d'Etat en droit international/Creation of State in International Law*. Son premier bureau fut établi : le Juge Raymond Ranjeva de Madagascar, ancien Vice-Président de la C.I.J., qui me fit l'immense honneur et l'amitié d'accepter d'assurer la présidence de la toute nouvelle Société. Il le fera avec hauteur et une conscience aigüe des enjeux qui m'oblige encore. Le Professeur Francis Botchway du Ghana, enseignant à l'Université de Dubaï, en fut le Vice-Président, Dr Uche Ewelukwa du Nigeria, enseignante à l'Université d'Arkansas, la Secrétaire Générale et Dr Yenkong Nganjoh Hodu du Cameroun, enseignant à l'Université de Manchester, le Trésorier. Les uns et les autres sont tous des professeurs accomplis de droit international aujourd'hui. Parmi les nombreux participants à cette toute première rencontre de la SADI, on pouvait noter déjà le dynamisme d'un jeune professeur, M. Makane Moïse Mbengue du Sénégal, enseignant à l'Université de Genève, désigné Vice-Secrétaire général. Son engagement pour la SADI ne s'est jamais démenti.

Avec le lancement de la *Revue africaine de droit international*, je suis heureux de voir prendre corps cet autre pilier de la triade conçue au moment de la création et du lancement de la SADI, à savoir la SADI elle-même, le Journal de droit international et la *Prix de thèse en droit international de la SADI*. Grâce au prestige, à l'autorité et l'abnégation du Juge Raymond Ranjeva, premier Président de la SADI, au travail inestimable et aux talents académiques et personnels du Professeur Makane M. Mbengue, remarquable Président en fonction de la SADI, qui a pris le relais à sa suite et mène avec bonheur la barque, ainsi qu'à la non moins talentueuse équipe qui assure la direction de la présente *Revue*, l'Afrique se dote d'un nouvel outil scientifique de haut niveau pour la promotion et la diffusion de sa pratique et de sa doctrine en droit international. Que les uns et les autres reçoivent ici nos remerciements pour leur dévouement à cette cause importante, et mes félicitations pour la confiance qui leur vaut leurs positions respectives au sein de la *Revue*. Il s'agit d'un défi qui ne peut être relevé que grâce à la passion commune qui nous anime tous au cœur de ces activités essentiellement bénévoles.

La RADI est une publication semestrielle qui accueillera tant les articles de droit international public que de droit international privé, voire de droit comparé, aussi bien en anglais qu'en français. On découvrira la richesse exceptionnelle de son contenu à travers les différentes rubriques de sa table des matières. Elle paraîtra d'abord sous une forme électronique, sans cependant exclure la possibilité d'une version papier dans l'avenir.
Je lui souhaite bon vent.

C'est également le lieu d'exprimer ma reconnaissance aux remarquables collègues qui ont accepté de faire partie du Comité scientifique de cette Revue, et pour certains, ont rédigé des contributions à ce numéro inaugural. Ce faisant, ils réhaussent de leur notoriété le prestige de la RADI dès sa naissance.

Novembre 2024

INTROCUCTORY REMARKS

by Makane Moïse Mbengue
President, African Society of International Law (AfSIL)

It is with profound emotion, and with a sense of humility commensurate with the scale of the undertaking, that I write these few lines to introduce the inaugural issue of the *African Review of International Law* (*ARIL*). For those of us who, over more than a decade, have laboured within the African Society of International Law to imagine, design, and bring this Review into being, the appearance of this first volume is the realisation of a long-cherished dream. A dream, it must be said, that has at times seemed elusive – but a dream that, like all those rooted in conviction and shared purpose, has refused to fade.

The vision of an African review of international law has always made perfect sense to accompany the growth and successes of AfSIL itself. From the outset, the Society was understood as a learned society in which African internationalists could convene and deliberate. Now, at least, it also has a journal that will give the scholarship of this learned society a permanent home, a platform of its own, and a voice that could carry far beyond the continent.

I should like, before all else, to pay tribute to those who carried this vision forward when carrying it was hardest. Professor Maurice Kamto, whose editorial opens this issue, was the 'Founding Father' and prime mover behind the creation of AfSIL in 2012, and his unwavering commitment to the idea that Africa must have its own scientific organs of expression in international law has been a constant compass. Judge Raymond Ranjeva, AfSIL's first President, gave the Society its initial dignity and direction. To them, and to the colleagues who have served and will serve on the editorial board of *ARIL*, I owe – and Africa owes – a debt that no foreword can adequately discharge. I take up the relay with humility, and with a deep awareness that this Review belongs not to any one of us but to a community of scholars, practitioners, judges, and students whose engagement will determine its trajectory.

* * *

Why an African review of international law, and why now?

The question is not new. It was implicit in Cheikh Anta Diop's lifelong insistence that African civilisations must be restored to their rightful place in the historical record, and that Africans must, in his memorable phrase, *« s'armer de science »* – arm themselves with science — in order to write their own narrative rather than receive the one written for them. For too long, the history of *jus gentium* has been told as though it began in the

chanceries of Westphalia and was perfected in the academies of Europe; for too long, Africa has appeared in that history as object rather than subject, as the territory upon which legal categories were imposed rather than as a contributor to their formation. The very doctrine of *terra nullius*, as Professor Kamto reminds us in his Editorial, was forged precisely to deny the legal personhood of African polities that had, in fact, governed themselves through sophisticated normative orders for centuries.

To launch *ARIL* is, in part, to take up Diop's injunction – to arm ourselves, scientifically and rigorously, with the tools of our discipline, and to deploy them in the service of a fuller, more honest, and more universal account of international law. It is to insist that the legal order under which we all live must be open to contributions from every corner of the world if it is to deserve the name of international law at all.

It is also, I believe, to inscribe ourselves in a longer arc — what Martin Luther King, drawing on Theodore Parker, called the moral arc of the universe, which "is long, but it bends toward justice." The bending, of course, is not automatic; it is the work of human hands, of patient argument, of institutions slowly built and stubbornly maintained. The work of this Review is, in its own modest way, part of that bending. The contributions assembled in this inaugural issue make the point in their different registers: from Dire Tladi's probing examination of intertemporal law and the denial of justice for the most egregious historical breaches, to Linos-Alexandre Sicilianos's reflections on the human dimension of international law in a time of poly-crisis, to Laurence Boisson de Chazournes's study of how the needs of riparian populations have been integrated into boundary delimitation, the essays gathered here testify to a discipline that is increasingly attentive to questions of justice that earlier generations of internationalists – particularly those who excluded Africa from their field of vision – were unable, or unwilling, to ask.

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The contents of this first issue are, I hope, a fair indication of the ambitions of the Review and of the breadth of voices it intends to host.

It opens, fittingly, with Professor Kamto's magisterial editorial – a panoramic survey of the three moments that have characterised Africa's relationship with international law: the moment of postulated ignorance, the moment of denial, and the moment of affirmation. To this is paired Yves Daudet's deeply personal essay, *« Il faut faire confiance à l'Afrique »*, which draws on six decades of engagement with the continent — from his first teaching post in Rabat, through Côte d'Ivoire and Mauritius — to argue that Africa's traditions of dialogue, of *« l'arbre à palabre »*, and of consensus-seeking offer indispensable resources for the rebuilding of an international order whose post-1945 architecture is visibly under strain. The juxtaposition of these two pieces – the African master surveying the field, and the European elder calling on his colleagues to trust Africa – sets the tone for what *ARIL* aspires to be: not a continental ghetto, but a cosmopolitan space in which African voices speak first and others are warmly invited to speak with them.

That cosmopolitan ambition is reflected in the diversity of the contributors who have honoured us with essays for this inaugural issue. Mario Oyarzábal, an Argentine member of the International Law Commission, offers a quantitative survey of African presence in the four leading institutions of our field – the *Institut de Droit international*, the Hague Academy, the ICJ, and the ILC — that is at once sobering and galvanising. Bing Bing Jia, of our Advisory Board, traces the chain of doctrinal innovation that flowed from the courageous request of seven African states organised within the Sub-Regional Fisheries Commission, an episode in which African states "wrote themselves into the chronicle of the institutional life" of ITLOS. Yuko Nishitani brings a Japanese perspective to the question of what private international law and the work of the Hague Conference owe to – and demand of – Africa, particularly in the protection of children in cross-border adoption and surrogacy. Giuditta Cordero-Moss, from Oslo, examines the rapidly modernising arbitration framework on the continent and the deeper questions of applicable law that it raises. Nilufer Oral, who co-chaired the ILC Study Group on sea-level rise, sets out with characteristic clarity what is at stake for Africa's 300,000 kilometres of coastline as the climate crisis advances. August Reinisch, writing from the vantage point of a sympathetic outsider, turns our attention to the extraordinary density of Africa's regional judicial landscape, demonstrating that the continent has been not only a field of experimentation for regional integration, but one of the most inventive laboratories of supranational adjudication in the contemporary world.

Alongside these voices from outside the continent, *ARIL* is, of course, first and foremost a forum for African scholarship. Professor Grégoire Jiogue's erudite study of the reception of French private international law in *Afrique noire francophone* recovers the long history of pre-colonial customary conflicts rules and traces, with great precision, the slow process by which African legislatures have begun to make this body of law their own. Ambassador Namira Negm's contribution, in a different register, shows how African states, institutions, lawyers and negotiators have helped shape the law through practice itself: in litigation, in multilateral negotiations, in the elaboration of regional legal frameworks, and in the articulation of principles of equity, development and human dignity. Dire Tladi, drawing on his decades of work as Special Rapporteur on *jus cogens*, confronts head-on the uncomfortable role that the doctrine of intertemporal law continues to play in shielding the gravest historical injustices from the law of reparations. Together, these essays demonstrate that African scholarship is fully equipped to engage at the highest doctrinal level with the most contested questions of contemporary international law – and that it does so, characteristically, with a willingness to ask hard questions that the mainstream has too often preferred to leave alone.

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Several themes weave through the issue and, I suspect, will continue to animate the Review in the years to come.

The first is the question of voice and representation. Several contributions in this issue document, with the discipline of numbers, the underrepresentation of African jurists in the institutions that have historically shaped our field. The data are not flattering, and they are not meant to be. They are meant to be a baseline – a measure against which the trajectory of the next decades can be assessed. The launch of this Review is itself one element of an answer; the dissemination platforms that an African discipline requires must be built, in part, by Africans themselves, even as we continue to engage and contribute to scientific publications elsewhere.

The second is the relationship between regional and universal international law. The contributions here on international watercourses, on the law of the sea and sea-level rise, on private international law and child protection, and on arbitration all illustrate the same point from different angles: African states are not passive recipients of universal norms but active interpreters, contributors, and, where necessary, dissenters. The OAU Refugee Convention, the Banjul Charter, the Maputo Protocol, the OHADA framework, the African Court on Human and Peoples' Rights – these all are not parochial deviations from a universal model, but distinctive contributions to its enrichment, as well as early fruits of a growing harvest.

The third is the dimension of justice – historical, intergenerational, and ecological. Whether one reads Tladi on reparations, Oral on the existential threat that sea-level rise poses to coastal communities of the continent, or Sicilianos on the human dimension of international law in a moment of poly-crisis, the same question recurs: can our discipline rise to the moral demands placed upon it, or will it retreat behind the procedural formalisms that have, on too many occasions in the past, served as instruments of injustice rather than its remedy?

The fourth – and the one closest, I confess, to my own heart – is the conviction that African international law scholarship is and should be plural. The voices in this issue are not univocal; they disagree on doctrine, on methodology, and on prescription. They include senior figures and emerging ones, francophones and anglophones, doctrinalists and empiricists, scholars based on the continent and in the diaspora, friends from Asia, the Americas, and Europe. That plurality is, to my mind, the surest guarantee that *ARIL* will become what it ought to become: a true *forum*, where ideas are tested rather than ratified, and where the only orthodoxy is intellectual seriousness.

* * *

A few words, finally, on what *ARIL* aspires to be in practical terms.

The Review will appear twice a year, in both English and French, and will publish work in public international law, private international law, and comparative law. We have chosen, for now, an electronic format – both because it is the most accessible, and because it is the format that allows the widest reach across the continent and beyond. A

paper edition will follow in due course. The Review is led by an editorial team whose dedication has made this first issue possible against considerable odds, and is supported by a scientific advisory board whose distinguished membership reflects the international standing the Review aspires to maintain. To all of them – and to the contributors to this inaugural issue, who agreed to entrust their work to a journal that did not yet exist – I extend my deepest thanks.

Africa's contribution to international law has, for too long, been measured by what others have said about Africa. With *ARIL*, that contribution will increasingly be measured by what Africans, and those who think with them, have said for themselves. Dr King's arc bends because hands pull on it. Cheikh Anta Diop's scientific rearmament happens because scholars take up the work. We have, in the pages that follow, a great deal of pulling and a great deal of work. May the readers of this inaugural issue feel, as I do, the simple joy of seeing a long-deferred dream finally come into being – and may they find in these pages the inspiration to make the dream their own.

IL FAUT FAIRE CONFIANCE À L'AFRIQUE !

*par Yves Daudet**

Mon premier contact direct, physique, avec l'Afrique remonte à presque soixante ans lorsque je partis rejoindre mon premier poste de ma carrière de professeur. C'était à la Faculté de droit de Rabat, dans le cadre de ce qu'on l'on appelait la « coopération culturelle » exercée pendant deux ans puis, plus tard en Côte d'Ivoire et, plus tard encore à l'Ile Maurice. C'est dire que je me suis trouvé dans ces pays à des périodes auxquelles l'indépendance avait été acquise de fraîche date et où l'on prétendait avoir réalisé la « décolonisation » selon une terminologie donc le caractère inapproprié pour ne pas dire mensonger est apparu très tôt, même s'il n'a été dénoncé que beaucoup plus tard, beaucoup trop tard, après être resté longtemps occulté.

On le sait bien aujourd'hui : l'Afrique, comme d'autres régions du « Sud global », n'est pas encore libérée du colonialisme et de ses empreintes qui ont réalisé un bouleversement dont la fulgurance et la profondeur s'illustrent en observant qu'entre l'Acte général de Berlin organisant la massification du colonialisme et la période de la déclaration d'indépendance des colonies, il s'est écoulé à peu près la même durée qu'entre celle-ci et aujourd'hui. En seulement deux ou trois générations deux ou trois générations ont été mises à bas les institutions les règles coutumières et les mentalités créées par la tradition lente dans tout un continent remodelé, reconfiguré, sinon souvent défiguré, par les forces coloniales de l'économie, de l'administration, de l'armée et de la religion qui se sont imposées avec une brutalité inouïe.

À ces années passées dans diverses régions d'Afrique, se sont ajoutées pour moi deux années dans la Caraïbe et de longs séjours en Haïti, que l'on dit être une partie d'Afrique, compte tenu de la connaissance de la provenance exacte des esclaves qui y furent introduits, pratiquement tous depuis le golfe de Guinée, principalement la région de l'actuel Bénin, créant ainsi une homogénéité du peuple des esclaves. D'où la force et l'importance toujours présente de la religion vaudou comme perpétuation du lien avec cette région. Compte tenu, surtout, du fait qu'Haïti, comme l'on sait fut la première république noire au monde proclamée indépendante le 1er janvier 1804 à la suite de la victoire des esclaves africains révoltés sur l'armée française de Bonaparte à Vertières le 18 novembre 1803. Ainsi, la décolonisation d'Haïti revêt-elle dans ce cas un visage particulier, d'autant qu'elle a été assortie d'une dette de cent cinquante millions de francs

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or destinée à compenser les « malheurs des colons », condition de la reconnaissance tardive de l'indépendance par la France par l'Ordonnance de Charles X du 17 avril 1825. La République d'Haïti s'est acquittée de cette dette colossale - même si elle fut réduite par la suite- et a refusé toute remise qui fut offerte par la Troisième République. Il en est résulté une double conséquence. D'une part une évidente légitimité encore accrue et comportant des éléments chiffrés justifiant une indemnisation par la France dès que des institutions politiques stables seront à nouveau établies et l'influence des gangs éteinte. D'autre part une grande fierté nationale conduisant Haïti à regarder l'ancien colonisateur droit dans les yeux et à exercer une extrême et presque farouche vigilance à l'égard de toute atteinte, ou risque d'atteinte, à une indépendance nationale conquise dans des conditions véritablement exceptionnelles. La construction de la fameuse citadelle Laferrière dans le nord du pays peu après l'indépendance a participé de ce souci d'être militairement protégé contre toute velléité de nouvelle incursion du colonisateur.

J'ose ajouter - tout en étant conscient de la critique qui peut m'être faite à cet égard - que, pour l'Afrique, le moyen, évidemment légitime, de s'affranchir de l'Occident et plus particulièrement de la France, ne me semble pas être de se tourner vers la Russie ou la Chine. Je reste perplexe devant les choix proclamés par des éléments de la jeunesse sénégalaise qui, en novembre 2024 ont estimé que mieux valait la Russie que la France à Dakar, comme il est dit aussi dans d'autres pays d'Afrique en nombre croissant. Je ne pense pas que ce questionnement de ma part résulte le moins du monde d'un réflexe du Français blessé que je serais si je considérais que l'on tombe alors de Charybde en Scylla. Je pense plutôt que se tourner vers la Russie est l'expression d'une forme de désespérance de la jeunesse africaine, totalement compréhensible mais traduisant une erreur dans la méthode qu'elle préconise pour y mettre fin.

Ne craignons pas de le répéter, la colonisation fut un épisode tragique qui, visiblement, ne parvient pas à se refermer. Mais il faut à mon sens ajouter que la décolonisation assortie de formules de coopération ne fut rien d'autre qu'une autre colonisation revêtue des oripeaux de l'aide et l'assistance pour faciliter l'assise de la souveraineté et le développement alors qu'elle fut un moyen plus « soft » de perpétuer une présence en recyclant les anciennes pratiques. Sans doute certains « coopérants » ont-ils pu individuellement, grâce à leurs convictions et leur énergie propres, entreprendre des actions positives mais le système a vite fait apparaître ses perversions et la coopération s'est transformée en substitution. Aujourd'hui, un fort mouvement dénonçant la colonisation s'est développé. Je pense que la cible désignée n'est pas tant la colonisation au sens propre que, davantage encore la décolonisation qui a suivi ou les deux, avec cette décolonisation symbolisée par des présences militaires et celle de grandes entreprises opérant de manière dominante dans les pays.

J'ose encore ajouter qu'une part de responsabilité revient aux pays eux-mêmes

dont les dirigeants se sont installés dans le moule politique, administratif ou économique de l'ancien colonisateur en s'appuyant aveuglément sur les moyens de la coopération au lieu d'essayer de rechercher dans leur histoire et leurs traditions propres les moyens de retrouver et faire revivre leur souveraineté perdue. Il y a en effet dans l'histoire et la tradition africaines des éléments qui, par hypothèse sont adaptés aux besoins du continent mais qui pourraient aussi constituer une source d'inspiration pour une réforme du droit international dans son ensemble et son universalité, réforme aujourd'hui indispensable.

Depuis la fin des années soixante du siècle dernier, les revendications des pays du tiers-monde se sont exprimées pour réclamer une modification ou une élaboration de règles internationales nouvelles susceptibles de répondre à leurs besoins, principalement en matière économique. Les « décennies pour le développement » ont été successivement adoptées par l'Assemblée générale des Nations Unies à l'initiative de certains États africains, parmi lesquels en particulier l'Algérie, véritable aile marchante du groupe des 77 à cette époque. La doctrine s'est exprimée sur la valeur juridique des règles ainsi posées auxquelles elle n'a pu reconnaître qu'une valeur fortement recommandatoire en tant qu'elles étaient contenues dans des résolutions de l'Assemblée générale mais a considéré que le « droit du développement », s'il devait être défini d'un mot visait à une relecture du droit international à travers le prisme du développement. Les pays du groupe B refusant de lui conférer un caractère contraignant, en s'en tenant à une analyse du droit positif en vigueur. Par ailleurs, au nom des conceptions nationales du droit international, l'Afrique en a utilisé certaines règles et institutions susceptibles de s'adapter au continent africain (par exemple l'OUA qui deviendra l'Union africaine, la Cour Africaine des droits de l'homme et des peuples, les règles de l'OHADA etc.) et d'innombrables études ont porté sur l'Afrique et le droit international. Elles ont fait apparaître le décalage entre l'une et l'autre.

L'affaire se complique du fait que le droit international, fruit essentiellement de la volonté des États européens lors de sa mise en œuvre et des visions occidentales lors de son développement tel qu'il est reflété dans la Charte des Nations Unies est aujourd'hui sérieusement mis en cause et fait l'objet des violations les plus graves à l'égard desquelles les organes politiques des Nations Unies sont paralysés. Rien de très étonnant à cette situation si on observe la considérable transformation du monde depuis 1945, du point de vue du nombre et de la qualité des acteurs. Au plan de la gestion de la société internationale, c'est une banalité de relever l'inadaptation aux réalités et exigences du monde d'aujourd'hui des règles qui la régissent. A société nouvelle, droit nouveau. On ne raisonnerait pas autrement en droit interne.

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Or, je pense que la société internationale aurait tout intérêt à s'inspirer de l'Afrique

dans une entreprise de refonte nécessaire, un « restatement » général du droit international. L'Afrique a en effet beaucoup à dire dans ce domaine.

On ne rappelle pas assez souvent que c'est en Afrique qu'a commencé la fantastique aventure humaine et on a tendance à oublier la création il y a près d'un millénaire de grands empires tels que celui du Mali, ou précédemment celui du Ghana qui, du VIIIe au XIe siècle et depuis le Niger jusqu'au Sénégal, contribua à forger les consciences africaines. Premier modèle de construction impériale marquant le triomphe du principe territorial sur le principe lignager, le Ghana cristallisa la civilisation néo soudanaise. Il marqua donc profondément tout l'ouest africain, tandis que sa puissance s'appuyait sur le contrôle des routes de l'or. Plus tard, le colonisateur britannique ne lui donnera-t-il pas le nom de Gold Coast avant qu'il retrouve son nom d'origine à l'indépendance ? On doit ainsi être conscient du fait que l'Afrique a une très ancienne et longue tradition de l'organisation politique économique et sociale mise au service de buts soigneusement évalués.

On aura garde aussi de ne pas négliger la force de la culture et de l'art africains. S'ajoutant à la transmission orale dont on aurait grand tort de minimiser l'importance en raison de sa forme, il existe aussi toute une littérature ancienne dont les fameux manuscrits de Tombouctou ont rappelé l'importance lors de la menace de destruction par les islamistes d'AQMI les a visés en 2011. On rappellera que de nombreux autres écrits se trouvent dans d'autres villes du Mali, comme ailleurs, notamment au Niger, en Mauritanie ou en Afrique du sud. Quant à l'art africain, son immense richesse et sa remarquable variété va de la grande mosquée de Djenné, à l'art très particulier des royaumes du Dahomey en passant par la multitude de masques, bijoux et statuettes tels que par exemple au pays Ashanti, les bijoux d'or fondus à cire perdue et magnifiquement ciselés, les étonnantes statuettes, les poupées de bois, symboles de fécondité, dont on recherche les relations avec les miroirs égyptiens aux formes semblables, tandis que les poids à peser la poudre d'or rappellent les systèmes de mesures de l'Inde du sud et que les coupes ou vases funéraires évoquent l'art hispano-musulman, par la décoration dont ils sont ornés. Ou encore ces étranges sièges taillés dans une seule pièce de bois par des artisans à l'ingéniosité troublante ! Cette capacité créative ne s'est heureusement pas perdue et devrait constituer un socle à portée universelle car il est la traduction d'une culture dont le monde a aujourd'hui intensément besoin, celle du dialogue, de l'échange et de la compréhension mutuelle qui en découlent.

À cet égard, l'Afrique, dans son intimité profonde est bien un continent de dialogue. On prête à Jacques Chirac l'idée selon laquelle l'institution ancienne et coutumière de « l'arbre à palabre » constitue une expression de la démocratie directe par l'échange et le dialogue qui est profondément ancrée dans la culture africaine. Cette démocratie-là est donc plus adaptée aux besoins de l'Afrique que ne le sont les principes

de la démocratie occidentale, inscrits dans des constitutions écrites à l'indépendance par des juristes français inspirés par la Constitution française de 1958 !

En Côte d'Ivoire Houphouët Boigny qui exerçait un pouvoir fort savait parfaitement manier l'instrument du « dialogue » auquel il se référait à tout instant et les Ivoiriens avec lui. J'ai le souvenir, lorsque j'étais professeur à l'Université d'Abidjan dans les années soixante-dix de la place du dialogue dans mes rapports avec les étudiants et des effets très positifs qu'il entraînait, outre l'atmosphère sereine, équilibrée et respectueuse des uns envers les autres qu'il permettait de maintenir.

La réputation de sagesse africaine, la richesse culturelle et l'aptitude au dialogue sont des éléments majeurs des traditions africaines. Celles-ci, pour toutes les raisons que l'on sait et qu'il serait trop long de rappeler, ont été mises à mal par la colonisation. La décolonisation, à la suite, a recherché les voies de la légitime et nécessaire intégration dans la société internationale du moment, marquée par une domination, dans le droit international qui la régissait, des concepts inspirés par l'Occident. Ce fut le temps rappelé ci-dessus des efforts accomplis par le droit du développement et le début d'une recherche des voies et moyens par lesquels l'Afrique pouvait s'intégrer dans cet ordre qui se présentait à elle. On va alors se demander si l'Afrique ne devrait pas disposer d'un ou plusieurs sièges de membres permanents du Conseil de Sécurité ou si l'Assemblée générale ne devrait pas recevoir les moyens d'action à la mesure du nombre des États qui la composent et des équilibres géographiques.

Nous sommes aujourd'hui bien au-delà des démarches de cette nature conduisant à l'affrontement des points de vue, chacun conservant ses acquis à l'encontre des autres réclamant leur dû, pour aboutir finalement à un résultat clivant ne permettant pas de résoudre les problèmes et conduisant au mieux à les contourner, par exemple en acceptant une règle nouvelle mais sans lui conférer de caractère contraignant. Combien de formules creuses et grandiloquentes dépourvues de tout effet ont-elles été ainsi produites ? Tout au contraire, la réflexion et la reconstruction de l'ordre international devraient être conduites dans une perspective globalisante, universaliste et moins centrée sur les besoins propres et spécifiques des uns et des autres. Une méthode globale fait masse d'un ensemble et, par le jeu de compromis raisonnables et équilibrés, dégage le bénéfice de tous.

J'ai évoqué la sagesse africaine, le sens du dialogue et celui d'une démocratie du quotidien, c'est-à-dire aux effets pratiques. J'ai souligné les expériences anciennes nourries par des traditions restées vivantes et susceptibles d'irriguer le monde d'aujourd'hui si on veut bien les observer avec la considération qu'elles méritent. J'ai mis en avant la culture et l'art africains trop rarement relevés par les occidentaux (sauf dans des salles des ventes et chez des antiquaires spécialisés) alors qu'ils sont des sources

d'inspiration. Au total, dans le monde heurté et divisé, marqué par des conflits d'une force et d'une cruauté inouïes, dont les bases juridiques, normatives et institutionnelles, sont devenues fragiles du fait même des bouleversements qu'elles ne peuvent absorber et qui les paralysent, je pense que l'Afrique avec son sens du compromis et les atouts que j'ai indiqués, devrait se voir confier un rôle moteur dans un vaste mouvement de reconfiguration d'un ordre international nouveau.

J'ai parfaitement conscience du scepticisme amusé de ceux qui auront fait l'effort de lire ces pages. Pourtant, les Occidentaux à titre principal ont pu, avec plus ou moins de bonheur, concevoir et mettre en place des ordres nouveaux, celui de la Société des Nations, puis celui des Nations Unies, destinés à s'appliquer à tous. Si cette démarche universaliste doit être conservée, les rôles doivent être redistribués dans le pilotage de l'exercice. L'Afrique colonisée était absente au lendemain des deux guerres mondiales. Le monde a changé et l'Afrique est présente aujourd'hui, connaissant mieux que d'autres la signification de cette pierre angulaire du droit international qu'est la souveraineté. L'Afrique est capable de nous inspirer tous pour l'établissement d'un droit international rénové répondant aux besoins de tous, dans une démarche de compromis et de raison qu'elle est en mesure de promouvoir si l'on veut bien lui faire confiance comme elle le mérite de par ses racines profondes dans lesquelles elle doit savoir puiser.

REFLECTIONS ON A RECENT AFRICAN CONTRIBUTION TO INTERNATIONAL LAW

*by Bing Bing Jia**

INTRODUCTION

It gave me enormous pride to be invited to contribute to this exciting new journal on the African continent's impact upon the discipline of international law. Much, including from a historical perspective,[1] can been said of this topic, and my short piece looks at the way the advisory competence of the full International Tribunal for the Law of the Sea ("ITLOS" or "Tribunal") was founded by the Tribunal in 2015 in Case No. 21, in the instigation of which several African countries were instrumental.[2] This development may first appear to be of a modest, procedural nature, but its significance in activating the advisory competence of the full Tribunal is anything but. In May 2024, another advisory opinion was delivered by the full Tribunal in Case No. 31, touching on a substantive issue of global significance.[3] In this recent case, the Tribunal relied chiefly on the precedent of the 2015 AO, and especially the latter's interpretation of Article 21 of the ITLOS Statute, for purposes of securing jurisdiction. In view of this emergent trend of advisory proceedings at the Tribunal, the seven African countries, which organised themselves into the Sub-Regional Fisheries Commission (SRFC) before asking the Tribunal in 2013 for an advisory opinion on certain substantive issues of the law of the sea, truly wrote themselves into the chronicle of the institutional life of the Tribunal and, on a grand scale, left an indelible mark in the history of international law.[4]

I. Two Questions

The 2015 AO, with its founding of the advisory jurisdiction for the full Tribunal ("plenary advisory jurisdiction"), raises two questions for reflection.

On the one hand, there is the question of the legal basis for that jurisdiction. This

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* Of the Advisory Board of ARIL

1. For instance, on the contributionist scholarship of Africa, James Thuo Gathii, "Africa", in Bardo Fassbender, Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford, Oxford University Press, 2015, p(p). 415-418.

2. Case No. 21, *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4 ("2015 AO").

3. Case No. 31, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, *Advisory Opinion*, *21 May 2024*: *itlos.org* ("2024 AO")

4. Guinea, Cape Verde, The Gambia, Guinea Bissau, Mauritania, Senegal, and Sierra Leone. At the time their request for advisory opinion was transmitted to the Tribunal, all seven were States parties to the *United Nations Convention on the Law of the Sea* ("UNCLOS" or "Convention"), of 10 December 1982.

case does not have a precedent in the work of the International Court of Justice ("ICJ" or "Court"), although upon adoption the Statute of the ITLOS was modelled largely on the ICJ Statute.[5] Additionally, the 2015 AO adopted the ICJ's methodology in assessing issues of jurisdiction and discretion, and, for authorities, relied largely on the ICJ's jurisprudence. However, the ICJ possesses advisory jurisdiction by virtue of Article 65, ICJ Statute. It has not been thought that the Court can claim a new type of jurisdiction even though the ICJ Statute and the UN Charter are silent on it. The ITLOS *en banc* faced a similar question in Case No. 21 in respect of a request for advisory opinion, but gave an answer in this regard that seems to be without a precedent.

On the other hand, it may be wondered whether, in the light of the 2015 AO, advisory proceedings at the Tribunal may only be initiated by inter-governmental organizations such as the Sub-Regional Fisheries Commission thereby presenting a *ratione personae* aspect to this question. As will be shown, UNCLOS, including the ITLOS Statute as Annex VI to the Convention, seems not entirely clear in this regard.

II. Legal Basis for the Plenary Advisory Jurisdiction

It is a fact that the ICJ does not need to *infer* its full bench's advisory competence from the text of its Statute and the UN Charter, since the competence is expressly granted by the two instruments. It makes for shorter discussion by the Court in this connection, in comparison with its often lengthier decisions on jurisdiction in contentious proceedings. In the Advisory Opinion delivered by the ICJ in July 2024,[6] for instance, the Court spent only seven paragraphs on the question of jurisdiction,[7] by examining the conformity of the request of the UN General Assembly with the terms of Article 65 (1), ICJ Statute,[8] and Article 96 (1), UN Charter.[9] The examination was concerned with the status of the requesting body and the legal nature of the questions contained in the request. In contrast, the Court spent 19 paragraphs on the question of its discretion to entertain the request. The matter of jurisdiction, even in a case of such magnitude, exuded the air of a well-settled practice. This was remarkable, considering that UN member States and many international organizations had been invited to submit written statements to the ICJ prior to the opinion's delivery,[10] and in theory could have raised more jurisdictional

5. Myron. N. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Dordrecht, Martinus Nijhoff, 1989, Vol. v, A.VI. 10.

6. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024*, p. 753.

7. Five paragraphs, if counting out the paragraph setting out the conclusion of the Court and the paragraph on the need to reformulate the questions in the request.

8. "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

9. "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

10. Supra note 6, paras. 3, 7-8.

objections that those disposed of by the Court in just a few paragraphs. The notable point of this settled practice is that the ICJ only needs to ascertain the conformity *vel non* of a request with the jurisdictional conditions laid down in the abovementioned provisions of its Statute and the UN Charter concerning advisory opinions. In the July 2024 opinion, the Court was not even required by the circumstances of the case to deal with all jurisdictional conditions.[11]

The ITLOS, in contrast, does not have a plenary, as opposed to Chamber-based,[12] advisory jurisdiction upon its establishment, and this gap in jurisdiction has been recognised by itself to the extent that neither UNCLOS nor the ITLOS Statute provide explicitly for the plenary advisory jurisdiction.[13] In Case No. 21, the Tribunal ultimately relied on Article 21 of its Statute and an "other agreement",[14] a phrase used in that same provision in reference to an agreement separate from UNCLOS that confers jurisdiction on the Tribunal, jointly as the legal basis for establishing the plenary advisory jurisdiction.[15] The interpretation of that phrase, its qualification of "all matters specifically provided for",[16] and the implications drawn from the interpretation are fascinating, in that it seems that the plenary advisory jurisdiction can be inferred from an expansive interpretation of the phrase. A literal interpretation of that phrase might well lead to the conclusion reached by the Tribunal, but there is lingering doubt about that conclusion on considering the contextual aspect of Article 21.

It is common in international practice that a judicial body, upon establishment, is granted certain types of jurisdiction by something close to a legislative body, such as a diplomatic conference of States which effects the establishment by treaty. This is not the case with UNCLOS, as far as the plenary advisory jurisdiction is concerned. The context of UNCLOS even goes against such a jurisdiction. On the one hand, although it may be correct that the ITLOS Statute is on an equal footing as Part XV of UNCLOS,[17] it is difficult to overlook the title for Part XV, "Settlement of Disputes" and the fact that UNCLOS provides explicitly for advisory jurisdiction in the case of the Seabed Disputes Chamber in a different part, i.e., Part XI. On the other hand, the title for section 5 of Part XI reads "Settlement of Disputes and Advisory Opinions". It must therefore be presumed that, in the context of the Convention, the draftspersons were aware of the distinction between settlement of disputes and advisory proceedings. Of course, this presumption

11. For instance, the requirement in Art 96 (2), UN Charter, of legal questions "arising within the scope of their activities". Cf. ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion, I.C.J Reports 1996*, p. 71, para. 10.

12. Art 191, UNCLOS, and Art 40 (2), ITLOS Statute.

13. 2015 AO, para. 53.

14. Art 21: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

15. 2015 AO, para. 58; reaffirmed in the 2024 AO, para. 87. The Tribunal has acknowledged that Rule 138 of the *Rules of the Tribunal* does not provide for the jurisdiction: 2015 AO, para. 59.

16. Cf. 2015 AO, Declaration of Judge Cot, para. 3.

17. 2015 AO, para. 52 ("the Statute enjoys the same status as the Convention").

does not dispose of the argument for an expansive reading of the text of Article 21, ITLOS Statute. But that argument, if adopted by a tribunal or court, might cause other problems, as will be shown next.

What could be viable solutions if the Tribunal sought plenary advisory jurisdiction? Two possible solutions come to mind. First, UNCLOS, including Annex VI, may be amended. Secondly, a decision may be taken by the full Tribunal in line with the expansive argument mentioned in the preceding paragraph.

The first solution, by way of amendment, is obvious.[18] While the Tribunal did not consider it in Case No. 21, this solution is not unheard of in other courts.[19]

The second solution, which was effectively adopted in the 2015 AO, requires a comment, as it may raise the prospect of judge-made law. For the ICJ, a dispute regarding jurisdiction is within the power of the Court to decide under Article 36 (6), ICJ Statute, which provides the Court with the incidental--as it were--jurisdiction in recognition of the doctrine of *compétence de la compétence*. It is uncontroversial that, in order for the ICJ to adjudicate upon the jurisdiction over a contentious case, it must have the jurisdiction to determine whether it indeed has it. Similarly, Article 288 (4), UNCLOS provides for exactly the same jurisdiction to a court or tribunal referred to in Article 287. While this incidental jurisdiction is not provided for either institution to decide on a challenge to advisory jurisdiction, it is settled in the practice of the ICJ that the doctrine mentioned above also applies.[20]

When the ICJ's advisory jurisdiction is challenged, often by non-parties to the proceedings, the Court in practice need only consider whether the request it receives meets the conditions as set forth in Article 65 (1) of the Statute, and Article 96 of the UN Charter, which include, among others, the precondition to jurisdiction (i.e., existence of any legal question) plus the *ratione personae* aspect of that jurisdiction (i.e., the suitable body to make the request). It can then make a decision on whether it has jurisdiction to deal with the request, although the decision may read strange in an advisory opinion, which has no parties nor binding force. Be that as it may, the inclusion of a definitive finding by the Court on its jurisdiction to consider a request for advisory opinion is not only an

18. Arts 312-313, UNCLOS.

19. Protocol No. 2 to the 1950 (European) *Convention for the Protection of Human Rights and Fundamental Freedoms*, 6 May 1963 (entry into force 21 September 1970), replaced by Protocol No. 11 of 11 May 1994 (entry into force 1 November 1998), both at echr.coe.int.

20. For an earlier nod in favour of the competence, see PCIJ, *Interpretation of the Greco-Turkish Agreement of December 1, 1926*, *Advisory Opinion, 28 August 1928*, *P.C.I.J Series B*, No. 16, p. 20 ("as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction"). While the *dicta* were given in reference not to the Court's competence, notwithstanding their wide-ranging character, they were pertinent to that competence in the light of the terms of Art. 14 of the *Covenant of the League of Nations*. For the text of the provision, see *infra* note 24.

established practice of the Court,[21] but the incidental jurisdiction for making that definitive finding can be, presumably, derived from its primary jurisdiction established in Article 65 (1) of the Statute, and Article 96 of the UN Charter. The reason is that, for the primary jurisdiction to be exercisable, the Court must have incidental jurisdiction to determine the conformity of a request for advisory opinion with the jurisdictional conditions of the constitutive instruments. This reading is reflective of the doctrine of *compétence de la compétence*, which, if not expressly recognised by Article 65 (1) or Article 96, is embodied in general international law, assuming particular force in "an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation".[22] Even in a literal sense, the above view is justified, in that the doctrine of *compétence de la compétence* concerns a jurisdiction (over the dispute) of the jurisdiction of the Court, the former of which can only be incidental to the latter.

The provision of Article 68, ICJ Statute, may add extra support for this view.[23]

For the Tribunal, however, the concern with judge-made law might be greater, because of the silence of the constitutive instrument on the primary jurisdiction for advisory proceedings as exercisable by the full Tribunal. The example of the European Court of Human Rights is illustrative of the need to confer additional jurisdiction by way of agreement of the States parties to the constitutive treaty, and other international judicial bodies almost invariably provide expressly for both contentious and advisory jurisdiction in the constitutive treaties.[24] This puts the 2015 AO approach in spotlight, for it suggests a way to establish a new jurisdiction by judicial interpretation.

Another view of the 2015 AO's affirmation of the plenary advisory jurisdiction may cause less disquiet than the preceding one. It may be arguable that the 2015 AO only affirmed the plenary advisory jurisdiction in respect of the request in that case. The Tribunal accepted the jurisdiction conferred on it by the SRFC through an agreement among the latter's member States. The jurisdiction was confined to that agreement, which did so *ad hoc*. One who adopts this view need not answer whether there is the plenary advisory jurisdiction under the Convention. However, this view raises a further question

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21. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion*, *25 February 2019*, *I.C.J. Reports 2019*, p. 111, para. 54 (suggesting the established, effectively *proprio motu*, approach of the Court to the question of jurisdiction). Cf. Hugh. Thirlway, *The Law and Procedure of the International Court of Justice*, Oxford, Oxford University Press, 2013, Vol. II, p. 1718 (where he suggested that the conclusion of the Court that it has jurisdiction to give an advisory opinion constitutes *res judicata*, binding upon the Court).

22. *Nottebohm Case (Liechtenstein v. Guatemala), Preliminary objections, Judgment of 18 November 1953, I.C.J. Reports 1953*, p. 119. Also see p.120 of that Judgment.

23. "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." Art 40 (2), ITLOS Statute, resembles in wording to Art 68, but only to a limited extent.

24. To name but a few: *American Convention on Human Rights*, 1969, Art 64, and Art 2(2), Statute of the Inter-American Court of Human Rights, 1979 (https://www.oas.org/en/IACHR); *Protocol on the Community Court*, Economic Community of West Africa, A/P.2/791, 1991, Art 10 (www.courtecowas.org).

of the types of international organizations that are capable of conferring the jurisdiction, for, as it stands, neither the Convention nor ITLOS Statute contain rules to address this question. That is the second question arising from the 2015 AO.

III. Legal Standing to Trigger Advisory Proceedings

Article 65, ICJ Statute, complements the provision of Article 96, UN Charter, in that the latter provision empowers the UN General Assembly or Security Council, or UNGA-authorized UN organs and specialized agencies, to seek advisory opinions from the ICJ, although the former provides for the ICJ's advisory jurisdiction. Being a successor to the Permanent Court of International Law (PCIJ), which possessed advisory jurisdiction by virtue of Article 14 of the *Covenant of the League of Nations*,[25] the ICJ has the additional qualification of being the principal judicial organ of the UN, a universal inter-governmental organization. Its advisory function has the distinct but entirely understandable aim to assist the work of the parent body, the UN (through its political organs). When the UN Charter was being drafted, this function was perceived as a supplemental tool for the settlement of inter-state disputes, with its focus on the legal aspects of political disputes.[26] The accessibility to that function, being a matter "closely related to jurisdiction",[27] was also confined, under Article 96 (1) of the UN Charter, to the UN General Assembly or the Security Council, or, under Article 96 (2), to the General Assembly-authorized UN organs or specialized agencies.

In contrast, under Article 21, ITLOS Statute, there is no provision for assessing the competent organs or agencies of any international organization in respect of the non-existent advisory jurisdiction of the full ITLOS. The question would then be whether, in spite of the pedigree of the ITLOS Statute replicating the ICJ Statute, recognition of the plenary advisory jurisdiction of the ITLOS, as was upheld in the 2015 AO, is subject to similar limitations to the ICJ's advisory jurisdiction. This question goes to the aspect of the personal jurisdiction of the Tribunal. For one, Article 21 of the ITLOS Statute is not predicated on the status of each and every State member of an international organization seeking advisory opinions from the Tribunal; any such organization may, in principle, move the Tribunal to provide such opinions by an agreement. There is therefore the likelihood that one or more of those member States are not necessarily parties to UNCLOS.[28] Such is

25. "…The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

26. Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945,* Washington, Brookings Institution, 1958, p. 873.

27. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Preliminary Objections, Judgment, 18 November 2008, I.C.J. Reports 2008*, p. 442, para. 87.

28. Article 3 of Annex IX of UNCLOS recognises the possibility with international organizations participating in the Convention by stating: "An international organization may deposit its instrument of formal confirmation or of accession if a majority of its member States deposit or have deposited their instruments of ratification or accession." For other treaty-based organizations, there would be, *a fortiori*, no restriction on membership if they do not seek to become parties to UNCLOS. This potentially opens access to the ITLOS for any international organization under Article 21, ITLOS Statute, if without more conditions attached.

a likely consequence of the expansive interpretation given by the Tribunal in Case No.21. This is not a problem for the ICJ, as the UN members are *ipso facto* parties to the ICJ Statute.[29] However, in terms of the membership of UNCLOS, there may be the concern that non-party States may by way of forming international organizations enjoy the service of an UNCLOS-established judicial body on an *ad hoc* basis. But for an expansive reading of the provision of Article 21, ITLOS Statute, a brief look at the text of UNCLOS might have foreclosed that possibility.

Article 20, ITLOS Statute sets forth the elements of personal jurisdiction of the Tribunal as follows:

> "1. The Tribunal shall be open to States Parties.
>
> 2. The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."

Paragraph 1 is not exclusive of other entities than States parties. Paragraph 2 backs that up, but limits the entities to a "case" and to two types: those expressly provided for in Part XI, and those of a case submitted to the Tribunal by the parties to the case through an agreement. For entities other than States parties under Part XI, reference is made to the provision of Articles 187 and 191. For the second type, however, the phrase "all the parties to that case" in Article 20 (2) can only be interpreted as referring to a contentious case. The provision of Article 20 would thus appear impossible to fit in an expansive interpretation of Article 21 that purports to include the plenary advisory jurisdiction capable of being initiated by an international organization.

IV. Three Issues Left from the Discussion of Heading III

First, to still uphold the plenary advisory jurisdiction would involve two jumps in reasoning concerning the scope of jurisdiction of the Tribunal, that Article 21, the ITLOS Statute, is not subject to Article 288, UNCLOS,[30] and that Article 21 is uncontrolled by Article 20. This latter was not, however, discussed in the 2015 AO.

Secondly, it is settled that the initiative of advisory proceedings is not to be placed in the hands of one State, for fear that to do otherwise will affect the compulsory jurisdiction by an alternative route.[31] This may explain why the SRFC was the body that made the request

29. Art 93 (1).

30. 2015 AO, para. 52 ("article 21 of the Statute should not be considered as subordinate to article 288 of the Convention").

31. United Nations, "Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice", 39 *AJIL* (1945), Supplement: Official Documents (Jan. 1945), p.1, para. 70.

for advisory opinion in Case No.21. The general practice for international organizations to request advisory opinions appears to be much less controversial than the possibility for a single State to request it, even though it may be wondered what if the legal questions posed by that State are of general nature, and unrelated or only incidentally related to a dispute in which it has interest. But that query is not to detain us here.[32] The concern in this article is with the difficulty to rely on that general practice to justify the recourse to that jurisdiction by an organization not established under UNCLOS, which has been explored briefly in the preceding section.

Lastly, the separation of Article 21, ITLOS Statute from Article 288, UNCLOS, may give rise to the question whether "all matters" as referred to in Article 21 must be those concerning UNCLOS,[33] and it is not sufficient that Rule 138 (1) of the *Rules of the Tribunal* states that "[t]he Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion". Needless to say, Article 21 prevails over Rule 138 in case of conflict. A less defined scope for those "all matters", which is plain under Article 21, remains a source of future problems.

CONCLUSION

The main purpose of this article is to reflect on the interesting approach of the ITLOS to the question of the plenary advisory jurisdiction. The central point for this reflection is that the doctrine of *compétence de la compétence*, in its application to advisory proceedings, depends on the existence of the primary jurisdiction to provide advisory opinions by the full Tribunal, which could only come from the constitutive instruments of the Tribunal. A reversed order in the sequence of the two types of jurisdiction may bring problems. With all the trappings for advisory jurisdiction as developed by the ICJ, the Tribunal's own take on the legal basis for, and content of the plenary advisory jurisdiction may be compared. The question thus arising is whether the Tribunal's jurisdiction should perhaps be limited rather than expanded under Article 21 as well as other provisions of UNCLOS. In other words, the Tribunal's decision in the 2015 AO in this regard may warrant re-examination in the light of the contextual elements of UNCLOS, including Annex VI that is the ITLOS Statute.

In spite of what has been discussed above, it is a fact that the plenary advisory jurisdiction, as upheld in the 2015 AO, enjoys support of "most States parties to the Convention".[34] This indicates an evolution bypassing the tangle of an amendment

32. From this may arise a query as to what if the request comes from an agreement between two States conferring upon the Tribunal the plenary advisory jurisdiction over issues that may be of concern to them in the law of the sea area.

33. Sotirios-Ioannis Lekkas and Christopher Staker, "Annex VI, 21: Jurisdiction", in Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary,* Oxford, CH Beck, Hart and Nomos, 2017, at 2381.

34 . 2024 AO, para. 90.

procedure of the Convention, and, in the long run, may even be sufficient to achieve the same effect as an amendment. It is hoped that this evolving practice of the Tribunal may eventually dissipate the doubts raised here.

All this, at the end of the day, does not dilute the significance of the 2015 AO, which rewarded the courage of the seven member States of the SRFC of Africa with an overwhelmingly favourable opinion of law closely related to the purposes of UNCLOS.

AFRICAN JURISTS IN THE FOUR INTERNATIONAL LEGAL INSTITUTIONS: IDI, HAGUE ACADEMY, ICJ AND ILC. A SURVEY AND COMPARATIVE STUDY WITH OTHER REGIONS

*by Mario J.A. Oyarzábal**

I- OBJECT

There are four global institutions that aim to contribute to the development of international law through the performance of different functions- in order of establishment, they are the *Institut de Droit international* (scientific function), The Hague Academy of International Law (academic function), the International Court of Justice (judicial function), and the United Nations International Law Commission (codification function). The modest purpose of this note is to provide quantitative information about the participation of African jurists in these institutions which could lay the groundwork for future studies on their influence therein, as well as about Africa's engagement with - and contribution to - international law more generally. This information will be compared with that of other regions to unveil whether there is a shortage of African presence in the main international legal circles and, the case being, pave the way for future improvement through collective and individual action. In doing this, I hope to do my bit to help the new African Review of International Law (ARIL) achieve its important goal of disseminating the contribution and enhancing the voice of Africa in the field of international law.

This survey is based on data which is publicly available on the official websites of each of the four institutions, i.e., the IDI,[1] The Hague Academy,[2] the ICJ[3] and the ILC[4]. It also benefited from the research that I undertook for the review on ''The Hague Academy of International Law and Latin America'' to be published in the European Journal of International Law in 2024, Vol. 34 (5).

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1. https://www.idi-iil.org
2. https://www.hagueacademy.nl
3. https://www.icj-cij.org
4. https://legal.un.org/ilc/

II- African Jurists in the Institute of International Law

The Institute of International Law - better known by its French name, *Institut de Droit international (IDI)* - was founded in Ghent, Belgium in 1873 by a group of renowned international lawyers who decided to join together to create an institution independent of any governmental influence and capable of contributing to the development of international law and its implementation. The Institute meets in principle every two years in a different city to examine and, if appropriate, adopt Resolutions of a normative character. In 1904, the Institute was awarded the Nobel Peace Prize in recognition of its action in favour of State-to-State arbitration as a means of peaceful means of settling disputes. The Institute is the most respected scientific institution in the field of international law worldwide, and becoming a member is eagerly sought after by - and has been described as being a dream for - international lawyers.

Since its foundation over 150 years ago, the Institute has had 833 members, of which only 29 have been nationals of an African State: seven from Egypt (Abdullah El-Erian, elected in 1967; Boutros Boutros-Ghali, elected in 1973; Georges Abi-Saab, elected in 1981; Fuad Adb Al-Munim Riyad, elected in 1983; Ibrahim Shihata, elected in 1985; and Ahmed Sadek El-Kosheri elected in 1987); four from Senegal (Issak Forster, elected in 1963; Kéba Mbaye, elected in 1983; Abdoullah Cissé, elected in 2011; and Makane Moïse Mbengue, elected in 2021), three from Algeria (Mohammed Bedjaoui, elected in 1977; Ahmed Mahiou, elected in 2003; and Fatsah Ouguergouz, elected in 2021), three from South Africa (John Dugard, elected in 1995; Dire Tladi, elected in 2017; and Tiyanjana Maluwa, elected in 2021) and Tunisia (Yadh Ben Achour, elected in 1997; Ali Mezghani, elected in 2013; and Slim Laghmani, elected in 2023), two from Nigeria (Lewis Nwachukwu Mbanefo, elected in 1963; and Olufemi Elias, elected in 2015) and Ghana (Thomas Aboagye Mensah, elected in 1989; and Edward Kwakwa, elected in 2011), and one from Morocco (Mohammed Bennouna, elected in 1985), Kenya (Andronico Oduogo Adede, elected in 1991), Somalia (Abdulqawi Ahmed Yusuf, elected in 1999), Sierra Leone (Abdul Koroma, elected in 2003), Cameroon (Maurice Kamto, elected in 2005), and Tanzania (James Kateka, elected in 2009).

The Institute has celebrated only one session - out of 81 - in Africa, in Cairo under the Presidency of Boutros-Ghali in 1987, besides the one expected to take place in Rabat in 2025 under the Presidency of Bennouna. This is due to the fact that, save some exceptions, the sessions of the Institute take place in the country of which the President is a national, and there have been only two African Presidents. No Secretary-General has ever been African.

The Resolutions of the Institute are drafted under the Rapporteurship of one or more members. The only African co-Rapporteur of the 244 Resolutions adopted by the Institute since 1874 has been Bennouna-on Precedents and Case Law (Jurisprudence) in Interstate Litigation and Advisory Proceedings (adopted in 2023).

III - African Jurists in The Hague Academy

The Hague Academy of International Law, which recently celebrated its 100th anniversary, is a centre for teaching and research in public and private international law, aimed at furthering the scientific study of the legal aspects of international relations. Initially scheduled for 1914, due to the First World War the inauguration of the Academy had to be postponed and the first courses could only take place in 1923. To be invited by the *Curatorium* of the Academy to deliver a "special" course, and most importantly the "general" course, is widely considered a recognition that a professor or practitioner has achieved international stature. The lectures are published in the famous *Recueil des cours*, the flagship publication of The Hague Academy and indisputably the prime publication of its kind in international law worldwide.

Out of the 1437 courses (including general courses, special courses and inaugural conferences) published in the *Recueil* by 1044 authors of 80 different nationalities since 1923, 64 courses were authored by 54 jurists from 15 African countries, the first one in 1931 by Mégalos A. Caloyanni.

Out of the 169 general courses, five were given by African jurists—Georges Abi-Saab from Egypt, published in 1987; Trevor C. Hartley from South Africa, published in 2006; Mohammed Bedjaoui from Algeria, published in 2006; Ahmed Maiou from Algeria, published in 2009; and Mohammed Bennouna from Morrocco, published in 2018.

16 authors were Egyptian (19 courses), eight Tunisian (nine courses), five South African (six courses), five Algerian (eight courses), five Nigerian (five courses), three Senegalese (three courses), two Moroccan (four courses), two Madagascan (two courses), two Cameroonian (two courses), and one Ethiopian, one Kenyan, one Mauritian, one Somalian, one Zambian and one Mauritanian (one course each).

The African jurists having taught special courses and inaugural lectures are Mégalos A. Caloyanni (published in 1931), Louis Milliot (1949), Hanna Saba (1952, 1964), Fouad A. M. Riad (1963), Raoul Benattar (1967), Doudou Thiam (1969), Said El-Naggar (1969), Mohammed Bedjaoui (1970, 1976, 1996), Taslim Olawale Elias (1971), René Rodière (1972), Boutros Boutros-Ghali (1972, 2000), Wzzedine Abdallah (1973), Ahmed Sadek El-Kosheri (1973), Edwin Ifeanyichukwu Nwogugu (1976), Georges Abi-Saab (1979), David Adedayo Ijalaye (1981), Mohammed Bennouna (1982, 2002), Roger Jambu-Merlin (1983), Andronico Oduogo Adede (1983), Gamal Moursi Badr (1984), Emmanuel G. Bello (1985), Yilma Makonnen (1986), Mohamed Charfi (1987), Ibrahim F. I. Shihata (1987), A. Z. El Chiati (1987), Kéba Mbaye (1988), Samaan Boutros Farajallah (1991), U. U. Uche (1991), Abd-El-Kader Boye (1993), Ahmed Mahiou (1993), Yadh Ben Achour (1994), Trevor C. Hartley (1997), Abderrazak Moulay Rchid (1997), Raymond Ranjeva (1998), Omaia Elwan (2000), Ali Mezghani (2003), Maurice Kamto (2004), Mohamed Mohamed Salah (2005), M. I. Shaker (2006), Ahmed Abou-El-Wafa (2010),

Kalthoum Meziou (2011), Vera Gowlland-Debbas (2012), Monique Chemillier-Gendreau (2013), John Dugard (2014), Yusuf Abd al-Qawi (2014), Zinjela Mpazi (2015), Rafâa Ben Achour (2016), T. Kruger (2017), Frankin Berman (2019), L. Chedly (2021), Dire Tladi (2021), Brusil Miranda Metou (2022), Slim Laghmani (2023); and Salim Mollan KC (2023).

As for membership in the Academy's *Curatorium*, which is entrusted with selecting the lecturers, there have been 8 Africans (out of 103 members)—two Egyptian (Abdel Hamid Badawi, 1960-1965; and Boutros-Ghali, 1982-2016), two Senegalese (Mbaye, 1993-2003; Mbengue, since 2021), one Nigerian (Elias, 1976-1991), one Madagascan (Ranjeva, 2003-2021), one Cameroonian (Kamto, since 2013), and one Moroccan (Bennouna, 2016-2024). Boutros-Ghali was President of the *Curatorium* between 2004 and 2015 (the only African and first non-European to hold the office).

IV - African Jurists in the International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established by the Charter of the United Nations in 1945 and began its work in 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Court is composed of 15 judges, who are elected for terms of office of nine years by the UN Assembly and the Security Council. The number of seats to be occupied in principle by nationals of African States - in accordance with the system of equitable geographic representation used in the United Nations - has increased from one in 1946 to three in 1970.

Out of 115 judges, 16 have been nationals of African States: three Egyptian (Abdel Hamid Badawi, 1946/1965; Abdullah El-Erian, 1979-1981; and Nabil Elaraby, 2001/2006), three Nigerian (Charles D. Onyeama, 1967-1976; Taslim Olawale Elias, 1976-1991; Prince Bola Adesumbo Ajibola, 1991-1994), two Senegalese (Isaac Forster, 1964-1982; and Kéba Mbaye, 1982-1991), one Beninese (Louis Ignacio-Pinto, 1970-1979), one Algerian (Mohammed Bedjaoui, 1982-2001), one Madagascan (Raymond Ranjeva, 1991-2009), one Sierra Leonian (Abdul G. Koroma, 1994-2012), one Moroccan (Mohamed Bennouna, 2006-2024), one Somalian (Abdulqawi Ahmed Yusuf, since 2009), one Ugandan (Julia Sebutinde, since 2012) and one South African (Dire Tladi, since 2024).

Three African nationals have held the office of President of the ICJ (out of 27): Bedjaoui (1994-1997), Elias (1982-1985) and Yusuf (2018-2021); and six have been Vice-President: Badawi (1955-1958), Elias (1979-1982), Mbaye (1987-1991), Ranjeva (2003-2006), Yusuf (2015-2018), and Sebutinde (since 2024).

V - African Jurists in the International Law Commission

The International Law Commission (ILC) is the subsidiary organ of the United Nations General Assembly, established in 1947 and tasked with the promotion of the progressive development of international law and its codification. The members of the Commission are elected by the UNGA for a term of office of five years (three until 1968) and, as in the case of the members of the International Court of Justice, sit in their individual capacity and not as representatives of their Governments. Seats in the Commission are allocated among the different regions to ensure distribution between different forms of civilization and legal systems. Since 1981, the Commission is composed of 34 members, eight seats being allocated to nationals of African States plus one national from African States or Eastern European States in rotation. Previously, the Commission had one African member in the period after the membership of the Commission was enlarged from 15 to 21 seats in 1956, and ten African members in the period between 1961 and 1980 when the Commission had 25 seats.

The Commission has had 249 members between 1949 and the present day, of which 47 have been nationals of an African State: six from Nigeria (Taslim Olawale Elias, 1962–1975; Richard Osuolale A. Akinjide, 1982–1986; Bola Adesumbo Ajibola, 1987–1991; Bayo Ojo, 2007–2011; Mohammed Bello Adoke, 2011–2016; and Adegoke Ajibola Ige, elected in 2001, he died shortly after his election), five from Egypt (Abdullah El-Erian, 1957–1958, 1962–1978; Boutros Boutros-Ghali, 1979–1991; Nabil Elaraby, 1994–2001; Hussein A. Hassouna, 2007–2022; and Ahmed Amin Fathalla, since 2023), three from Algeria (Mohamed Bedjaoui, 1965–1981; Ahmed Mahiou, 1982–1996; and Ahmed Laraba, since 2012), three from Kenya (Frank X. J. C. Njenga, 1976–1991; Amos S. Wako, 2007–2022; and Phoebe Okowa, since 2023), two from Cameroon (Victor Kanga, 1962–1964; and Maurice Kamto, 1999–2016), two from Dahomey (now Benin) (Obed Pessou, 1962–1966; and Luis Ignacio-Pinto, 1967–1969), two from Madagascar (Alfred Ramangasoavina, 1967–1976; and Edilbert Razafindralambo, 1982–1996), two from Senegal (Doudou Thiam, 1970–1999; and Alioune Sall, since 2023), two from Ghana (Emmanuel Kodjoe Dadzie, 1977–1981; and Emmanuel Akwei Addo, 1997–2006), two from Sierra Leone (Abdul G. Koroma, 1982–1993; and Charles Chernor Jalloh, since 2017), two from the Sudan (Khalafalla El Rasheed Mohamed-Ahmed, 1982–1986; and Kamil E. Idris, 1992–1996; 2000–2001), two from South Africa (John R. Dugard, 1997–2011; and Dire D. Tladi, 2012–2022), two from Tanzania (James Lutabanzibwa Kateka, 1997–2006; and Chris M. Peter, 2012–2022), one from Zaire (Mikuin Leliel Balanda, 1982–1986), one from Morocco (Mohamed Bennouna, 1987–1998), one from Gabon (Guillaume Pambou-Tchivounda, 1992–2006), one from Mali (Salifou Fomba, 1992–1996, 2002–2011), one from Uganda (Peter C. R. Kabatsi, 1992–2001, 2002–2006), one from Mozambique (Pedro Comissario Afonso, 2002–2016), one from Tunisia (Fathi Kemicha, 2002–2011), one from Libya (Abdelrazeg El-Murtadi Suleiman Goudier, 2012–2016), one from Côte d'Ivoire (Yacouba Cissé, since 2017), one from Burkina Faso (Louis Savadogo, since 2023) and one from the Democratic Republic of the Congo (Ivon

Mingashang, since 2023).

As a general rule, the Presidency of the Commission rotates among the regional groups, ten Africans having served as Chairs of the Commission: Elias (1970), El-Erian (1976), Thiam (1981, 1986), Ajibola (1991), Mahiou (1996), Kabatsi (2001), Pambou-Tchivounda (2006), Kamto (2011), Comissário Afonso (2016), and Tladi (2022).

Out of 67 Special Rapporteurs, 10 have been Africans: twice El-Erian, on Representation of States in their relations with international organizations (1963, 1967–1971) and on Status, privileges and immunities of international organizations, their officials, experts, etc. (1977–1978); Bedjaoui, on Succession of States in respect of matters other than treaties (1968–1974, 1976–1981); Thiam, on Draft code of crimes against the peace and security of mankind (Part II) 1983–1995); Bennouna, on Diplomatic protection (1998); Dugard, on Diplomatic protection (2000–2006); Kamto, on Expulsion of aliens (2005–2014); Tladi, on Peremptory norms of general international law (jus cogens) (2016–2022); Jalloh, on Subsidiary means for the determination of rules of international law (since 2023); Cissé, on Prevention and repression of piracy and armed robbery at sea (2023); and Savadogo, also on Prevention and repression of piracy and armed robbery at sea (since 2024).

VI - Comparison with Other Regions

To compare the presence of African nationals in the four main international legal institutions, I resort to the system (and composition) of regional groups used for the distribution of posts at the United Nations to ensure ‘‘equitable geographic representation’’.[5] The system involves organizing member States into five geopolitical regional groups: the Group of African States (GAFS), the Asia and the Pacific Group (APG), the Eastern European Group (EEG), the Group of Latin American and Caribbean Countries (GRULAC), and the Western European and Others Group (WEOG). Having originated during the Cold War, this regional distribution took account of prevalent political factors at that time, and thus does not reflect the pre-war situation when the Institute of International Law and The Hague Academy were formed, nor the present situation where most EEG members are legally and politically closer to the WEOG. Using this methodology also ignores the evolution of the international community over time and the fact that most African and Asian Pacific States gained status as a State around and after the 1960s. Nevertheless, for lack of a better option, the survey based on the internationally agreed regional grouping helps portray the overall situation of the representation of African nationals in relation with nationals of other regions.

5. https://www.un.org/dgacm/en/content/regional-groups

As mentioned above, the Institute of International Law has had 833 members elected since its foundation 150 years ago, the majority of which have been nationals of WEOG States including the United States, which is formally not a member of the Group (708 members), followed well behind by APG nationals (55), EEG nationals (50), GRULAC nationals (46), and GAFS nationals (29). As of today, there are 17 African members: three South African and three Algerian; two Tunisian; and one Burundian, one Cameroonian, one Ghanaian, one Madagascan, one Moroccan, one Tanzanian, one Senegalese, one Sierra Leonian, one Somalian, and one Tunisian. The French national group alone has 13 members, the British has 10, while the German and the United States ones have nine each. The large majority of the Presidents have also been WEOG nationals (72) as opposed to four EEG nationals, three APG nationals, one GAFS national and one GRULAC national.

Similar disparities are observable in the participation of African scholars and practitioners in the courses of The Hague Academy of International Law, with 1107 of the total number of 1436 courses having been delivered by WEOG nationals, 131 by EEG nationals, 80 by GRULAC nationals, 58 by APG nationals, and 60 by GAFS nationals. Even more unfortunately, 153 general courses - out of 169 - were given by WEOG nationals, while only five were given by GAFS nationals, four by GRULAC nationals and three by APG nationals. In turn, the members of the *Curatorium* of the Academy - of whom there have been 104 throughout the Academy's one hundred years and who are charged with inviting the lecturers - have included 69 WEOG nationals, 11 APG nationals, 9 GRULAC nationals, 8 GAFS nationals, and 7 EEG nationals.

Disparities are also reflected in the overall number of African judges in the International Court of Justice and, to a lesser extent, of African members of the International Law Commission. Out of 115 ICJ Judges, 40 have been WEOG nationals, 23 GRULAC nationals, 20 APG nationals, and the GAFS and EEG have provided 16 each. The Court has had 12 WEOG Presidents, five APG Presidents, four GRULAC Presidents, and three of each GAFS and EEG Presidents.

In the case of the UN International Law Commission, WEOG nationals (76) also outnumber other regional groups if a historical perspective is taken, with APG nationals accounting for 55 members, GAFS nationals for 47 members, GRULAC nationals for 43 members, and EEG nationals for 28 members. In turn, the Presidency of the Commission has been held by 23 WEOG nationals (the Commission elected two Co-Chairs in 2023), 16 GRULAC nationals, 15 EEG nationals, 12 APG nationals, and 10 GAFS nationals. This disparity has been exacerbated by the appointment over time as special rapporteurs (who are charged with leading the development of a topic) of mostly WEOG nationals (33 members, 42 times), which more than doubles the appointments of Special Rapporteurs from all the other regional groups combined (ten GAFS members, one member twice; ten GRULAC members; eight EEG members; and six APG members, one twice).

VII - SUMMING UP

The results of the survey show that the representation of African jurists in the four international legal institutions has been (very) modest, even when only the period after the 1960s (where many African States became independent and joined the United Nations) is contemplated: less than 5% of the members of the Institute of International Law and of the courses taught at The Hague Academy of International Law, less than 15% of the Judges of the International Court of Justice, and less than 20% of the members of the UN International Law Commission, even though the GAFS is, with the APG, one of the two largest UN regional groups with 54 member States.

The African underrepresentation is more acute in the Institute of International Law and The Hague Academy (which are private institutions that originated in Europe in the late 19th century and early 20th century respectively) than in the International Court of Justice and the International Law Commission (which are UN organs where systems for ensuring geographic representation have been implemented). The elections of the members of the Institute and the lecturers and members of the *Curatorium* of The Hague Academy - as well as the Presidents of the Court - are peer-based, where the "electors" are not mandated to factor geographic considerations into their decision-making, notwithstanding the universal objectives that both institutions pursue which would benefit from legal and geographic diversity in their activities. Aimed at maintaining a high standard of excellence, the electoral system perpetuates their Eurocentric composition, as it is likely that persons propose and support candidates whose work they are more familiar with. Distance and higher travelling costs added to lesser exposure to the English or French languages (which are the "official" languages of both institutions) have also historically impaired the participation of non-European and other non-Western nationals who are not teaching or practicing in Europe.

Nevertheless, the object of this study is not to discuss the factors that have hindered a stronger presence of African jurist in the main international legal institutions, whether these factors be historical, structural or personal. Moreover, African colleagues would be better positioned to analyse the intra-African factors which may have contributed to the current situation. Rather, what I aimed to do in this contribution was to identify whether there is a participation deficit from African nationals which might not have allowed the adequate dissemination and consideration of Africa's legal traditions in the global discussions and the international law development process.

The contribution of Africa to the development of general (universal) international law in general has been substantial. In the words of a distinguished scholar from the continent who is a member of the Institute of International Law, "postcolonial African States have been active participants in developing new rules of international law - and strengthening existing ones-through the adoption of path-breaking conventions that work to either (1) establish African commitment to new norms with potential global application

or (2) supplement existing global (United Nations) instruments with commitments specific to the African context".[6] Africa's contribution to the development of international law is particularly noticeable with regard to the history of international law and the jurisprudence of the International Court of Justice on territorial and border disputes, as well as in the fields of human rights and law of the sea.

I submit that a stronger presence of African jurists in the four international legal institutions has the potential to amplify the knowledge and influence of African practices and perspectives on international law, and ultimately strengthen the role of African States in the construction of international law. *Fiat!*

6. Tiyanjana Maluwa, "Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties", *Michigan Journal of International Law*, 2020, Vol. 41 (2), p. 327.

AFRICA AND INTERNATIONAL LAW: A QUICK LOOK INTO PRACTICE, COLLABORATIVE PROCESSES, AND INSTITUTIONAL ADAPTATION

*by Namira Negm**

International law is often presented as a universal system, grounded in shared principles and applicable to all States on equal terms. In practice, however, its development reflects historical and political circumstances that did not allow for equal participation. Africa, in particular, was largely excluded from the formative stages of the modern international legal order. African States entered an already established system, whose rules, institutions, and priorities had been defined in their absence.

This history has had lasting effects. It has shaped how international law has been applied to African States, how African interests have been represented within global institutions, and how authority is exercised in the international legal system. For a long time, Africa's role was framed largely in terms of compliance. African States were expected to implement norms they had little role in shaping, within institutional settings where their influence was limited.

Over time, this dynamic has begun to change. African States, regional institutions, and legal scholars have become increasingly engaged in the development, interpretation, and application of international law. This engagement has taken place through treaty negotiations, litigation before international courts, coordinated positions in multilateral forums, and the development of regional legal frameworks that have influenced debates beyond the continent. Africa's contribution to international law is therefore not confined to the regional sphere. It extends to the global legal order and reflects a growing assertion of agency and responsibility.

This article introduces few examples of Africa's contribution to international law through practice. It focuses on how African engagement has shaped norms, influenced institutions, and challenged assumptions about universality and authority. It argues that despite political and capacity constraints, Africa's contribution lies both in substance and in method: in the norms it has helped shape, and in the insistence that international law be more inclusive, responsive, and grounded in lived realities.

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I. Historical Context and Structural Marginalization

The modern international legal system took shape at a time when most African territories were under colonial rule. Core rules on sovereignty, territorial integrity, economic relations, and collective security were developed without African participation. When African States gained independence, they joined a legal order that was already consolidated and institutionalized.

This imbalance continues to shape Africa's position in global governance. Representation within key international institutions remains uneven, most visibly in the United Nations Security Council. African situations account for a substantial share of the Council's agenda, yet the continent remains without permanent representation. This structural gap has long raised concerns regarding legitimacy, accountability, and the equitable distribution of decision-making authority within the international system.

Marginalization has also shaped negotiating dynamics. African delegations often operate under significant capacity constraints, with limited personnel covering multiple negotiation tracks. Proposals advanced by African States are sometimes treated as regional concerns rather than contributions to general international law. In response, African States have increasingly relied on collective strategies, coordinated positions, and sustained engagement.

II. Africa as a Contributor to Normative Development

Africa's contribution to international law is particularly visible in areas where existing legal frameworks failed to address realities experienced on the continent.

Environmental Protection and Human Rights

African legal instruments were among the earliest to recognize the link between environmental protection and human rights. This reflected the reality that environmental degradation in many African States has immediate consequences for health, livelihoods, and human dignity. Environmental harm is regarded as a direct threat to daily life.

This approach is not merely theoretical. It has been reflected in practice, for example in cases brought before the African Commission on Human and Peoples' Rights, where environmental degradation was framed as a violation of the right to health and livelihood. The Ogoni case (SERAC v. Nigeria) is a clear illustration, where environmental damage caused by oil exploitation was linked directly to human rights violations. [1–2]

By framing environmental protection as a human rights issue, African instruments expanded the scope of legal protection available to individuals and communities. This approach has influenced broader legal developments, contributing to the growing

recognition of the right to a healthy environment in international and comparative jurisprudence.

The Common Heritage of Mankind

Africa's contribution is also evident in the development of principles governing global commons. During negotiations on the law of the sea, African States played an important role in advancing the principle of the common heritage of mankind, particularly in relation to the deep seabed. [3–4]

This position was not merely abstract. It was driven by concerns that, without safeguards, technologically advanced States would dominate access to seabed resources, replicating patterns seen during the colonial period. African States, often negotiating as part of the Group of 77, pushed for legal mechanisms that would ensure equitable benefit-sharing and prevent monopolization.

The incorporation of this principle into the United Nations Convention on the Law of the Sea introduced equity and shared benefit as core legal considerations, leaving a lasting mark on international resource governance.

III. Litigation and Legal Argument Before International Courts

Africa's engagement with international law has also taken shape through litigation and legal argument before international courts. African States have appeared in cases involving territorial sovereignty, boundary delimitation, self-determination, and treaty interpretation.

For example, cases such as Burkina Faso v. Mali required the Court to address colonial-era boundaries and apply principles such as *uti possidetis* juris. These cases did not only resolve disputes but helped clarify how international law addresses colonial legacies. [5]

Similarly, advisory proceedings such as the Chagos Archipelago case between Mauritius and the UK which was supported by a significant number of African States demonstrated a coordinated African legal positions on self-determination and decolonization. [6]

Through this practice, African States and legal professionals have contributed to jurisprudence that extends beyond the continent.

IV. Multilateral Negotiation and Climate Governance

Africa's influence is also evident in multilateral negotiations, particularly in the area of climate change. African States have consistently emphasized the human consequences of climate change, including displacement, loss of livelihoods, and irreversible harm.

This engagement has translated into concrete outcomes. A key example is the establishment of the Loss and Damage Fund, which African States, together with other developing countries, pushed for over several years. This reflected a clear position that climate negotiations must address not only mitigation and adaptation, but also the realities of harm already experienced. [7]

African negotiators, often working through the African Group of Negotiators, have also consistently advocated for climate finance, equity, and differentiated responsibilities. Despite capacity constraints, these coordinated efforts have influenced the structure and priorities of global climate frameworks.

The inclusion of loss and damage in the negotiations represents a shift in how climate obligations are framed and illustrates how sustained and coordinated African engagement can shape global outcomes.

V. Institutional Innovation and the Question of Intervention

Africa has also contributed to international legal debate through institutional innovation. Article 4(h) of the Constitutive Act of the African Union recognizes a right of intervention in cases of genocide, war crimes, and crimes against humanity. [8–9]

This provision is grounded in historical experience. It reflects lessons drawn from situations such as the Rwandan genocide, where delayed international response exposed the limits of strict non-intervention.

While implementation remains complex, Article 4(h) has influenced broader discussions on humanitarian intervention and the responsibility to protect. It demonstrates how regional legal frameworks can respond to gaps in global governance. [8–9]

VII. Regional Practice and Global Meaning

Africa's relationship with international law reflects a history of marginalization, but also a sustained effort to engage, contribute, and reform. Through norm development, litigation, negotiation, and institutional innovation, African States and legal professionals have shaped international law in ways that extend beyond the continent.

Africa's contribution is not limited to formal processes. Initiatives such as the African Continental Free Trade Area (AfCFTA) also reflect an effort to reshape economic governance through legal frameworks that respond to regional realities while engaging global systems. One of the AfCFTA's distinctive contributions lies in its focus not only on the liberalization of trade, but on its broader development agenda. While tariff reduction remains central, the Agreement explicitly links trade to industrialization, value addition, and inclusive growth. [10–11]

This approach contributes to international law by challenging the traditional separation between trade law and development. Classical trade frameworks have largely focused on market access and non-discrimination. The AfCFTA, by contrast, embeds development objectives within its legal structure, including through its Protocols on investment, competition policy, intellectual property rights, and digital trade. These instruments are designed not only to regulate trade but also to shape the conditions under which African economies can participate more equitably in the global economy.. [10–11]

From the perspective of regional approaches to international law, Africa's experience demonstrates that regional practice does not undermine universality. Rather, it strengthens it.

Conclusion

Africa's engagement with international law demonstrates that the continent is not merely a recipient of international norms, but an active participant in shaping them. Despite historical exclusion and continuing structural inequalities within global governance, African States and institutions have contributed to the development of international law through legal practice, collective negotiation, regional innovation, and sustained institutional engagement.

The examples discussed in this article illustrate that Africa's contribution extends across multiple fields, including human rights, environmental protection, climate governance, decolonization, trade, and collective security. In many instances, African practice has emerged from concrete historical and social realities, leading to legal approaches that emphasize equity, inclusion, development, and human dignity. These contributions have not remained confined to the regional level; they have influenced broader international debates and helped reshape understandings of universality within the international legal system.

At the same time, Africa's experience highlights the importance of participation in ensuring the legitimacy of international law. A legal order that aspires to universality cannot remain detached from the realities and perspectives of large parts of the world. African engagement therefore contributes not only to the substance of international law, but also to its ongoing adaptation and credibility as a truly global system.

As international law continues to confront challenges related to climate change, inequality, technological transformation, migration, global governance and global trading order, African perspectives and regional experiences are likely to play an increasingly important role. The continent's evolving legal practice reflects a broader shift toward a more representative and responsive international legal order, one in which universality is strengthened through inclusion rather than assumed through uniformity.

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5. Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, I.C.J. Reports 1986, 554.

6. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, 95.

7. United Nations Framework Convention on Climate Change (UNFCCC), "Funding Arrangements for Responding to Loss and Damage," adopted at COP27, Sharm el-Sheikh, 2022.

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THE LEGAL FRAMEWORK FOR ARBITRATION IN AFRICA: ISSUES OF APPLICABLE LAW

by Giuditta Cordero-Moss*

The legal framework for arbitral proceedings carried out in Africa is undergoing an important process of modernization and internationalization which so far resulted in a high number of African states (42 states) having ratified the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards. Specifically for investment arbitration, the 1965 ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States was ratified by 46 African states – not to mention the hundreds of bilateral investment treaties with one African state as a party. In addition, many states reformed their arbitration law on the basis of the UNCITRAL Model Law for International Commercial Arbitration (nearly 30 states according to The African Arbitration Association's Atlas;[1] 12 states according to the status page of the UNCITRAL).[2]

In such rapidly increasing internationalization of arbitration activity, it is crucial to understand the interaction between national law and the uniform regulation based on the mentioned international conventions, as well as the scope of harmonization driven by legislative reforms, modernization of institutional arbitration rules and the numerous soft law instruments available to an active arbitration community. This interaction creates a multifaceted picture and requires attention in respect of international arbitration in general – the need for attention is not peculiar to the legal framework for arbitration in Africa.

Literature is vast, and so are educational institutions dedicated to arbitration. The Hague Academy for International Law organized in 2021 a Research Centre under the direction of Diego Fernández Arroyo and myself,[3] to which among others many African scholars participated. The research was meant to shed light on the sources applicable to the various aspects of arbitration, both commercial arbitration and investment arbitration.

The Research Centre's work was presented in the occasion of the celebration of the Hague Academy's 100th anniversary, and later published in the book resulting of it.[4]

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1. https://africanarbitrationatlas.org/atlas/
2. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status
3. Diego Fernández Arroyo and Giuditta Cordero-Moss (eds.), *Applicable Law Issues in International Arbitration,* Leiden, Brill Nijhoff, 2023.
4. Federico Alberto Cabona, Giuditta Cordero-Moss and Wendinkonté Sylvie Zongo, ''The law applicable to arbitration", in Jean-Marc Thouvenin (ed.), *Challenges of International Law at the Time of the Centenary of the Hague Academy of International Law,* Leiden, Brill Nijhoff, 2024, pp. 483-508.

This article builds upon and reproduces parts thereof.

International arbitration is a multifaceted dispute resolution mechanism that is applied in disparate contexts – state to state disputes, investor-state disputes, commercial disputes, sports disputes, etc. Most of the attention in the last decades has been devoted to investor-state arbitration and to commercial arbitration. The 2021 Research Centre concentrated on these two arbitration forms. While they have many common features, they present also structural differences, which in turn may concern the selection of the law applicable to certain issues.

One of the characteristics of international arbitration is that it to a large extent relies on an international or harmonised legal framework. The effects of arbitration agreements and of arbitral awards, as well as the role of the courts in this context, are uniformly regulated in international conventions such as the already mentioned 1958 New York Convention or the ICSID Convention. For the issues that are not regulated by conventions, domestic arbitration law is to a large extent harmonised, especially thanks to the already mentioned UNCITRAL Model Law. Furthermore, where the applicable law grants discretion to the parties or to the arbitral tribunal, harmonization is enhanced by arbitration rules issued by arbitral institutions or, for ad hoc arbitration, by the UNCITRAL.

The result of this legal framework is a system in which party autonomy and the arbitral tribunal's discretion play a central role, and which aims at being autonomous and independent from domestic regulation.

Indeed, arbitral awards are final and binding, and domestic courts and ICSID annulment committees (also referred to as ad hoc committees), which have the authority to control that the awards comply with principles of due process and other criteria exhaustively listed, do not have the power to review the merits of the arbitral decisions. Arbitral tribunals, therefore, enjoy a considerable flexibility in selecting and applying the rules of law applicable to the dispute, even though they are constrained to respect the will of the parties. Large part of legal literature has strongly emphasized that this flexibility creates an expectation of delocalization: both from the procedural and from the substantive point of view, arbitration is described as a method for settling disputes that strives for uniformity on a transnational level and should not be subject to state laws.

The concept of a delocalised arbitration was originally developed in the context of investment arbitration. This is due to the special role that host state's law plays in investment arbitration. The object of investment disputes is the host state's conduct, and this may imply evaluating the host state's law. The host state's law cannot be evaluated under the host state's law itself: it is to be measured against parameters that are external to it – the applicable investment treaty, or public international law principles on investment protection. State law is thus integrated and corrected by public international law, in the

form of bilateral or multilateral treaties between the host state and the state of origin of the investor, or of customary public international law. An autonomous mechanism for dispute resolution was created with the ICSID Convention, which created a self-contained arbitration system for investor-state disputes. For investment arbitration, therefore, the procedural autonomy of arbitration as a method for settling disputes is an achieved fact - although it is achieved only in part, as not all investment disputes are subject to the ICSID Convention, either because the involved states are not bound by it, or because investment disputes are carried out in the framework of rules for commercial arbitration (whether institutional or ad hoc).

The autonomy of investment arbitration was confirmed in 1989 by the Institute of International Law, which, in a Resolution of its XVIII Commission, postulated the internationalization of investment arbitration.[5] The Institute took distance from a resolution that it had adopted in 1957. In 1957, the Institute's XIV Commission had stated that arbitration is subject to the law of the state where the arbitral tribunal has its seat, and that the private international law of the seat identifies the national law applicable to the merits of the dispute.[6] In 1989, the Institute emphasized the detachment of arbitration from any state law.

That local law cannot at the same time be the object of the evaluation and the source of the parameters according to which the evaluation is to be made, speaks for an internationalisation of investment arbitration. This internationalisation, however, does not necessarily mean delocalisation - as was pointed out by F.A. Mann in the debate preceding the 1989 Resolution. He affirmed:

> "I confess that I simply do not know what this means. Arbitrations take place on earth, in territories, in localities. They do not take place in a vacuum … I fear that, when you speak of ''delocalization'' you mean something like ''delegalization'', the rejection of the control of law. If, as I fear, this is a correct interpretation, the disagreement is fundamental and almost of a philosophical character… More than 50 years of very intensive and extensive practical experience have taught me that, when parties embark upon arbitration proceedings…, they want to win and want to be told with what degree of likelihood they will win. In other words, they want to know the *law*. They are not in the least bit interested in what you seem to understand by ''delocalization''. Nor are they interested in compromise solutions. On the contrary, they regard any tendency on the

5. Resolution of the XVIII Commission on ''Arbitration between states, state enterprises, or state entities, and foreign enterprises'', *Yearbook – Institute of International Law* (89), II, p. 324.

6. Article 11 of the Resolution on ''Arbitration in private international law'', *Yearbook – Institute of International Law* (57), II, p. 491; the XIV Commission had already prepared a report on this subject in 1952 (*Yearbook – Institute of International Law* (52), I, pp. 469-609), but a resolution could not be adopted because of the death of some members of the commission. In 1957, a new XIV Commission adopted a resolution largely based on the 1952 Report.

part of the arbitrators to adopt such solutions as a sign of weakness. In other words, they expect a judicial decision arrived at after a judicial process." [7]

However, the General Report embraced the theory of delocalisation:

"Realistically speaking, the principles and constraints that an adjudicatory process requires to be seen as reliable and legitimate can, in the case of non-domestic arbitration, derive only from a charter that all arbitrators are committed to follow. Earlier in this century, the jurisdictional theory provided that charter in the form of the law of the territory where the arbitration had its seat. With the jurisdictional theory's decline, party agreement became the only source for the needed charter. Accordingly, international arbitrators should faithfully carry out the instructions given them by the parties even if those instructions are inconsistent with the position taken by one or more legal orders with significant links to the arbitration." [8]

The delocalisation theory, therefore, finds it origin in the necessity to internationalise investment disputes. As Mann's criticism shows, the further step of detaching investment arbitration from any system of law is not necessary, but it reflects the prevailing approach in legal literature on arbitration.[9]

While it is appropriate to introduce an international dimension when state law is the object of the dispute, as it is in investment disputes, it can be questioned that parameters external to domestic law are necessary in commercial disputes. The object of a commercial dispute is the legal relationship between the parties, often regulated in a contract. The contract is the framework of the dispute, and it has to be measured against external parameters. These are to be found in the applicable state law. The need for a

7. *Yearbook – Institute of International Law* (89), I, p. 173.

8. Resolution of the XVIII Commission on "Arbitration between states, state enterprises, or state entities, and foreign enterprises", *Yearbook – Institute of International Law* (89), II, p. 324.

9. Literature on the subject matter is vast. Among the first who launched the delocalisation theory, see Berthold Goldman, "Frontières du droit et lex mercatoria", 9 *Archives de philosophie du droit*, 1964, p. 177; B. Goldman, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", 2 *Travaux du Comité français de droit international privé* ([1979] 1980), p. 221; Berthold Goldman, "Lex Mercatoria", 3 *Forum Internationale* (1983), p. 3; Berthold Goldman, "The Applicable Law: General Principles of Law – The Lex Mercatoria", in Julian D.M. Lew (ed.), *Contemporary Problems in International Arbitration* , Springer, 1986, p. 113; Berthold Goldman, "Nouvelles réflexions sur la Lex Mercatoria" in Christian Dominicé, Robert Patry and Claude Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive*, Bâle/Francfort-sur-le-Main, Helbing & Lichtenhahn, 1993, p. 241; Clive M. Schmitthoff, *The Unification of the Law of International Trade*, J. BUS. L., 1968 Annual Issue, 105.
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further layer of external parameters, external to the applicable law, is not evident.

Be that as it may, the delocalisation theory has quickly extended to cover also merely commercial disputes. It entails that arbitration is an autonomous system, not subject to state laws, and that arbitral tribunals are not expected to apply state laws to the merits of disputes.

The delocalisation theory quickly became central in the arbitration community, and influenced even national legislators. This brought about a regime of flexibility in the field of choice of law in arbitration: first of all, the selection mechanism has become more flexible, basically abandoning the traditional approach.[10] According to the traditional approach, as exemplified by the above mentioned 1957 Resolution of the Institute of International Law, the applicable law is designated by conflict rules belonging to the private international law of the state in which the arbitral tribunal has its seat. The more flexible approach gives the arbitral tribunal the discretion to determine which conflict rules to apply to designate the governing law.[11] This discretion may be used by comparing conflict rules belonging to the private international law of all states with a connection to the dispute, by relying on transnational conflict rules, or otherwise.

Going a step further, some arbitration laws[12] and the arbitration rules of many arbitral institutions[13] do not mention at all the mechanism of conflict rules. Instead, they give the arbitral tribunal the discretion to determine the law applicable to the substance of the dispute without the need to consider connecting factors or other criteria regulating the selection (the so-called *voie directe*).

Finally, many of these sources expressly give the parties the power to subject the dispute to sources not belonging to a governing law - so-called ‘‘rules of law’’, as opposed to ‘‘law’’. While the term ‘‘law’’ is usually interpreted to mean a domestic legal system or international conventions, ‘‘rules of law’’ are deemed to include non-national sources such as trade usages, generally accepted principles, and soft sources of law (publications by branch organisations such as codes of conduct, guidelines, or standard contracts). Soft sources codifying transnational rules have proliferated in the past decades – both in the procedural[14] and in the substantive field.[15]

Some sources[16] give the arbitral tribunal the power to apply ‘‘rules of law’’ on its

10. Some arbitration laws, such as the 2004 Norwegian Arbitration Act, still refer to the private international law of the seat, see section 31.
11. This can be illustrated by the UNCITRAL Model Law, article 28(2).
12. Such as the French Civil Procedure Code, article 1511.
13. Such as the arbitration rules of the International Chamber of Commerce (ICC) and the UNCITRAL Arbitration Rules.
14. For example, the Guidelines on Conflict of Interests issued by the International Bar Association (IBA).
15. For example, the Master Swap Agreement issued by the International Swap Dealers Association (ISDA).
16. Such as the French Civil Procedure Code, article 1511.

own motion, while others[17] only permit the parties to do so - which means that, failing a choice made by the parties, the tribunal shall apply a ''law''.

The field of choice of law in arbitration is, therefore, characterised by a high degree of flexibility and by multiple approaches. In addition, the large autonomy of arbitration has a central role in this context. Arbitral awards are final and binding, and courts only have a restricted authority to exercise control thereon. Which law has been applied by the tribunal, and how it has been applied, very often is not subject to court control. The parties and the arbitral tribunal, therefore, have important leeway in the selection of the sources they apply to the various issues.

The autonomy and flexibility of arbitration, however, are not absolute.

The international instruments that regulate arbitration make, in some contexts, reference to state law - for example, the New York Convention subjects the enforceability of the award to: (i) the law of each of the parties, as far as concerns their legal capacity to enter into the arbitration agreement; (ii) the law of the enforcement court, for the issues of arbitrability and of public policy; and (iii) the law of the seat of the arbitral tribunal, for the validity of the arbitration agreement and the regularity of the arbitral procedure (unless the parties have chosen a different state law).

Also, these international instruments do not cover all aspects of arbitration, thus leaving room for state regulation – for example, the New York Convention permits to refuse enforcement of the award if the award was set aside in its country of origin. Set aside proceedings, including grounds for setting aside an award, are not regulated in the New York Convention, and are therefore solely subject to the annulment court's own law.

Additionally, although court control and, for ICSID awards, committee control are not the same as a review in the merits, national law may be relevant to the application of the parameters for validity or enforceability of an award, even where these parameters are harmonised. For example, an award may be refused enforcement if it infringes public policy. While the public policy exception is generally deemed to be uniformly regulated in the New York Convention as far as concerns the criteria for exercising it (i.e., enforcement may be refused only to avoid a serious and concrete infringement of fundamental principles), the content of the public policy is determined by the court according to its own law.[18]

The selection of the applicable law, therefore, may have significance for the validity and enforceability of the arbitral award. In turn, this means that choice of law is

17. Such as the English Arbitration Act, article 46(1), or the UNCITRAL Model Law, article 28(2).

18. For a more extensive reasoning and references, see Giuditta Cordero-Moss, *International Commercial Contracts,* Cambridge, Cambridge University Press, 2024, 2nd ed., forthcoming, section 5.4.9.

relevant to the effectiveness of arbitration.

Furthermore, the selection of the applicable law has significance for the legitimacy of arbitration - both because it has an impact on the foreseeability of the outcome, and because it may ensure that relevant public interests are not disregarded. In turn, this means that choice of law is relevant to the scope of arbitrability, which is determined by state law and by state courts.[19]

All the above gives a manifold picture of the topic: there are different approaches to selecting the applicable law, and there are different sources that may be considered as applicable law. Furthermore, the law that is applicable to one issue is not necessarily the law that is applicable to other issues in the same dispute. Indeed, according to the private international law principle of severability (also known as *dépeçage*), a different law may apply to the procedural aspects and to the substantive aspects of the dispute, and within these two categories there are further possibilities for severing the applicable law. Quite irrespective of whether the private international law or the *voie direct* is applied, therefore, every issue may be subject to a different law.

In this plurality of approaches to choosing the applicable law in arbitration, the opposite extremes are represented by, on the one hand, the traditional approach based on private international law, and, on the other hand, the delocalisation theory. When described from a theoretical point of view, these opposite extremes seem to be irreconcilable. Both camps strongly believe in the correctness of their respective point of view – so much so, that the dichotomy has been defined as a "war of religions".[20]

In practice, however, the different approaches do not need to bring to dramatically different results. This is because neither approach is to be found in its absolute form, and the respective exceptions, concessions and reservations bring about a certain convergence between the extremes. Furthermore, elements from one approach may be relevant to the reasoning carried out under the other approach.

A first example of coexistence of the two approaches is the International Chamber of Commerce (ICC) arbitration. On the one hand, the ICC Arbitration Rules paved the way to the *voie directe* when, in the 1988 edition, they excluded any reference to private international law, thus permitting the arbitral tribunal to determine the law applicable to the merits without applying conflict rules and connecting factors. On the other hand, this does not mean that ICC arbitral tribunals choose the applicable law on the basis of

19. Cordero-Moss (n. 18), section 5.4.8.

20. Bruno Leurent, "Reflections on the international effectiveness of arbitration awards", *Arbitration International* 269, 1996, Vol. 12(3), p. 279.

arbitrary considerations. When scrutinising the draft awards, the ICC Court of Arbitration[21] pays considerable attention to the criteria according to which the law was chosen. These criteria are generally based on the connection between the disputed issue and the chosen law. Thus, although the ICC Arbitration Rules give the arbitral tribunal full discretion in the selection of the law, arbitral tribunals exercise this discretion in the respect of criteria corresponding to those originated in the private international law.

Another example of cross-fertilization between the two camps regards the arbitral tribunal's power to take into consideration overriding mandatory rules from laws different from the law that was chosen by the parties. A typical example would be a dispute on the breach of a contract: the contract contains a clause choosing the law of Ruritania as applicable, but the Respondent invokes as defence that the contract is invalid because it infringes EU competition law: if the contract is invalid, the Respondent has not breached it. However, according to the parties' choice, the contract is subject to the law of Ruritania, and EU law is irrelevant. According to the private international law approach, the choice of law made by the parties in the contract is a conflict rule, and its scope is limited to the rights and obligations between the parties. Competition law, therefore, is not covered by the parties' choice, and the arbitral tribunal may consider EU competition law (if it is applicable according to the relevant conflict rule) without violating the parties' choice. To the contrary, the delocalisation doctrine is based on the prevalence of party autonomy: in its absolute meaning, this would entail that the parties' choice is unlimited and binding on the arbitral tribunal. In the above example, therefore, EU competition law would be completely irrelevant. The position of the delocalisation theory, however, has gradually become less absolute. Arbitral tribunals are expected, even from a delocalised perspective, to give effect to overriding mandatory rules of third laws – in the above example, to EU competition law. Among other things, this is necessary to avoid that the award is set aside or refused enforcement, as an award seriously violating competition law may be deemed to infringe public policy. This is a first convergence between the two opposed camps. A further convergence may be emerging as far as concerns the method to select the relevant overriding mandatory rules. In the absence of conflict rules, arbitral tribunals run the risk of being expected to consider all laws – a result that is even more restrictive of party autonomy than the traditional approach. In determining which law's rules to consider, therefore, arbitral tribunals are recommended to give attention, among other things, to which law a court would consider.[22] By so doing, the delocalised arbitral tribunal would indirectly be inspired by private international law considerations. Although underpinned by different theories, therefore, the two approaches converge in the result.

Cross-fertilization occurs also in the opposite direction: while the private international law approach considers conflict rules as a useful tool that permits to render

21. Of which I had the honour of being a member from 2018 to 2024.

22. Luca Radicati di Brozolo, "Mandatory Rules and International Arbitration", *American Review of International Arb*itration 49, 2012, Vol. 23 (1), 66 ff.

predictable and enforceable decisions, it does not expect arbitral tribunals to apply every detail of every conflict rule. Conflict rules are deemed to be applicable only to the extent necessary to avoid that the award is set aside or refused enforcement.[23] In the above example, in case of serious infringement of fundamental principles of EU competition law, the award risks being set aside or refused enforcement. The arbitral tribunal, therefore, should apply conflict rules to determine whether EU competition law should be considered. In a different scenario, where application of a law different from the law determined by conflict rules would not have consequences on the validity or enforceability of the award, arbitral tribunals are not necessarily expected to apply conflict rules.

Furthermore, application of conflict rules does not necessarily mean that the arbitral tribunal only can consider a national law to the exclusion of soft sources. Even under the private international law systems that direct the arbitral tribunal to apply a ''law'' when the parties did not choose ''rules of law'', the tribunal is not prevented from considering rules reflecting commercial development and based on practice. Many national laws refer to trade usages and practices as one of their sources,[24] and national laws present some sources that require an autonomous interpretation inspired by ideals of harmonisation, such as those embedded in the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG). Therefore, applying a ''law'' does not mean that the arbitral tribunal is restricted to apply codified provisions or already established rules only. Hence, the gap between ''rules of law'' and ''law'' is not as deep as could be expected. Besides, it is not unusual that both ''rules of law'' and ''law'' may be relevant to a dispute, even assuming that the parties have chosen ''rules of law''. This is because often ''rules of law'' in the end will need the support of a ''law'' – because the transnational principles are not sufficiently precise, because of gaps, or otherwise.[25]

Finally, the opposition between the private international law approach and the delocalization theory may be questioned from another point of view, namely their respective friendliness to arbitration. Private international law is often criticised as an old fashioned and unnecessarily rigid method, which constrains party autonomy and the arbitral tribunal's discretion and is therefore unfriendly to arbitration. The delocalisation theory, in contrast, is often praised for enhancing party autonomy and the flexibility of arbitration, and thus for being arbitration friendly.

It is true that the delocalisation theory gives more flexibility than the private international law. However, it is questionable that more flexibility means more friendliness to arbitration. If the result of flexibility is that a court sets aside an award or refuses its enforcement (for example because the award, by following the parties' choice, infringed

23. See Cordero-Moss (n. 18), section 4.5.2(b).

24. See, for example, Article 346 of the German Commercial Code, Article 1(4) of the General Provisions on the Law (Preamble to the Italian Civil Code), and Article 1326 of the Italian Civil Code.

25. For a more extensive reasoning and references, see Cordero-Moss (n. 18), section 2.3.

the court's public policy), the parties will have spent considerable resources in obtaining an award that is not effective; moreover, the trust in arbitration as a system for dispute resolution will be eroded.

On the other hand, it is true that private international law restricts the parties' and the tribunal's power to disregard any law they please. However, it is questionable that this constraint means less friendliness to arbitration. Not only, as was just explained, recognising the limits to party autonomy enhances the effectiveness of arbitration; in addition, private international law gives a basis to determine the applicable law in a predictable manner. Predictability of the applicable law is crucial to the parties, who need to assess their respective legal situation before deciding whether to initiate arbitration proceedings or rather to seek a commercial solution to their differences. If selection of the applicable law is left to the discretion of the tribunal without any criteria guiding the exercise of such discretion, the parties will not be able to assess, prior to initiating the arbitration, whether they should have initiated the arbitration or sought a commercial solution. In addition, the application of conflict rules contributes to rendering valid and enforceable awards because it permits to balance public policy and excess of power: as was seen above, if application of the law chosen by the parties led to disregard of otherwise applicable rules which in turn might lead to infringement of public policy, the award may be set aside or refused enforcement. However, the award may be set aside or refused enforcement also if the tribunal exceeded its power, and disregarding the parties' choice of law runs the risk of being an excess of power. Considering the parties' choice as the exercise of a conflict rule permits solving this dilemma: the rule of party autonomy has a scope that is determined by the private international law to which it belongs, and matters that do not fall within party autonomy (such as competition law issues, to refer to the example made above) will be subject to the law designated by other conflict rules. Using the private international law, in other words, permits to ensure a predictable outcome, as well as a valid and enforceable award. In turn, this contributes to the credibility of arbitration as a mechanism for the settlement of disputes, and thus reduces the risk of an erosion of the scope of arbitrability.[26] The private international law approach, therefore, may result useful and even more arbitration friendly than the delocalised approach.

Although starting from opposed theories, therefore, the two approaches may, in practice, turn out to be complementary, rather than mutually exclusive.

The work made in the 2021 Research Centre confirms that there is no basis to postulate, in absolute terms, that only one approach is always correct. The issue of determining the applicable law in arbitration may be dealt with differently according to the different contexts, and it is influenced by the necessity to find a balance in the tension between party autonomy, the arbitral tribunal's powers, and court control.

26. On the relationship between court control and arbitrability, and the role that private international law can play, see Cordero-Moss (n. 18), section 5.4.8(c).

PRIVATE INTERNATIONAL LAW AND CHILD PROTECTION FROM THE PERSPECTIVE OF AFRICA

by Yuko Nishitani*

Introduction

Globalization is characterized as an expanded movement across borders of people, goods, services, capital, and information, rendering sovereign states interconnected and interdependent. It has, however, been seldom noted that this conventional discourse on globalization entailed "top-down processes of diffusion of economic and legal models from the global North to the global South".[1] While globalization diminished the state sovereignty and fragmented institutions and legal norms in the states of the Northern Hemisphere, it also confirmed their dominance in the global market and world order, adversely affecting other parts of the world. Globalization exacerbated the gap between North and South, rich and poor, strong and weak, and affluent capitalism and marginalized economies. This mapping likely remains unchanged even in the new era of reviving protectionism and the resurgence of states, as evidenced by COVID-19 and the wars in Ukraine and Gaza.[2]

Considering the current situation, we ought to ask how private international law or conflict of laws can play a role in alleviating the North-South divide and achieving shared responsibility in the international community. Global issues often cannot be effectively resolved by individual states. They require a collective effort and response. Problems such as human rights violations, child trafficking, climate change, corruption, terrorism, financial crises, poverty, and pandemics exemplify this need. Adverse effects of business activities often materialize in the Global South, as the Bhopal explosion (1984) and the Rana Plaza collapse (2013) indicate. Climate change is being experienced quite severely in Asia and Africa. Effective human rights protection and the combat against illicit practices can only be achieved by worldwide cooperation. To address these global issues, the voices of the Global South need to be heard. While public international law can define shared values and establish an overarching legal framework, private international law can complement its functions by ordering private enforcement, setting forth behavioural norms, implementing safeguards to protect weaker parties, and installing cooperation.[3]

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1. Boaventura de Sousa Santos, César A. Rodríguez-Garavito, "Law, Politics, and the Subaltern in Counter-Hegemonic Globalization", in de Sousa Santos, Rodríguez-Garavito (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality,* Cambridge, Cambridge University Press, 2005, p. 2.

2. See Takao Suami, "Dead or alive? Global constitutionalism and international law after the start of the war in Ukraine", *Global Constitutionalism,* 2023, Vol. 13 (2), pp. 1 ff.

3. Yuko Nishitani, "Public Interest in Private International Law", in Hague Academy of International Law (ed.), *Challenges of Inter-*

To celebrate the launch of the African Review of International Law, the underlying paper examines contemporary challenges and opportunities for private international law to realize globally shared responsibility and common interests. The focus is on safeguarding human rights and protecting children through international cooperation from the perspective of Africa. The HCCH[4] has been the key player in bridging between legal systems and establishing judicial and administrative cooperation. However, Africa's participation in the work of the HCCH has been limited, and its implementation has faced challenges.

Against this backdrop, this study first considers the HCCH membership and the presence of Africa in its legislative work (II). Second, this paper investigates the structure and function of the 1980 Child Abduction Convention and the 1993 Intercountry Adoption Convention,[5] as two major instruments of the HCCH grounded on international cooperation, from the perspective of Africa. This study will also address the HCCH Parentage/Surrogacy Project[6] (III). Some final remarks with future perspectives will conclude this paper (IV).

I. Presence of Africa at the HCCH

Arguably, the most effective way to achieve human rights protection as public goods in the international community is to implement a cooperation mechanism between states. The HCCH has played an important role in establishing a viable legal framework. While the earlier HCCH instruments focused on unifying classical private international law rules on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments, they proved ineffective in protecting children in adoption, custody, and child support cases.[7] Thus, HCCH instruments adopted since 1980 - *inter alia,* the 1980 Child Abduction Convention and the 1993 Intercountry Adoption Convention[8] - install cooperation between central authorities of the contracting states to safeguard children's rights pursuant to the UNCRC[9] and realize their best interests.

The HCCH currently has 91 members, which comprise 90 states and one Regional Economic Integration Organization (REIO), *i.e.,* the European Union (EU). Most members are from Europe and North and South America. While Japan is the oldest non-

national Law at the Time of the Centenary of the Hague Academy of International Law, Leiden, Brill Nijhoff, 2024, pp. 107 ff.

4. Hague Conference on Private International Law (HCCH), see https://www.hcch.net/.

5. For the HCCH Conventions, see https://www.hcch.net/en/instruments/conventions.

6. See https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

7. See the 1956 and 1958 Child Maintenance Conventions, 1961 Minors Protection Convention, 1965 Adoption Convention, and 1973 Maintenance Conventions (*supra* note 5).

8. See the 1996 Child Protection Convention and 2007 Child Support Convention (*supra* note 5).

9. United Nations Convention on the Rights of the Child (UNCRC), done at New York on 20 November 1989.

European member since 1904,[10] representation from Africa and Asia has been limited. The members from Africa only encompass Egypt (1961), Morocco (1993), South Africa (2002), Mauritius (2011), Zambia (2013), Burkina Faso (2013), Tunisia (2014), and Namibia (2021).[11]

Certainly, the HCCH conventions are open to non-members and allow them to accede. Some successful conventions - particularly the 1980 Child Abduction Convention and the 1993 Intercountry Adoption Convention - have gained over 100 state parties including non-members of the HCCH from Africa and Asia.[12] Furthermore, recent HCCH instruments on applicable law have a universal scope of application, equally designating the law of members and non-members.[13] In this respect, non-members can benefit from the HCCH instruments to some extent by joining them subsequently or having their law applied without becoming state parties. However, indirect *ex post* participation in the adopted conventions fundamentally differs from the members' competence. Only members can actively develop and suggest new projects, shape treaty negotiations, and determine the content and outcome of the law-making. The limited presence of Africa and Asia in the HCCH will result in major players - like the EU and the U.S. - determining future projects without sufficiently considering non-members' interests and needs.[14]

The circumstances seem to differ at UNCITRAL,[15] a sister organization of the HCCH and UNIDROIT,[16] aiming to harmonize international business and trade law. Because UNCITRAL is a forum of the United Nations with 193 member states, it has successfully adopted instruments to support developing economies, help refine their domestic legal systems, and facilitate the implementation of the rules introduced by the legislature. Thus, instruments adopted by the UNCITRAL encompass not only binding treaties, but also non-binding, soft law instruments, such as model laws, principles, legislative guides, practice guides, and model contractual clauses.[17] Considering the example of UNCITRAL, the HCCH may wish to further encourage the participation of African and Asian countries by expanding its membership and possibly proposing valuable projects for them, including the option of non-binding instruments. This will enable the HCCH to engage in inclusive legislative work by addressing the needs, concerns, and legal issues the Global South is facing. Given that many African and Asian countries have not yet enacted private

10. Masato Dogauchi, Keisuke Takeshita, "Wagakuni no Hague Kokusaishihô Kaigi heno Kamei ni kansuru Shiryô ni tsuite" [Archival Records on the Japan's Accession to the Hague Conference on Private International Law], *Jap. Yb Pr. Int'l Law,* 2005, Vol. 7, p. 140.

11. See https://www.hcch.net/en/states/hcch-members.

12. See *infra* notes 22 and 31.

13. Jürgen Basedow, "The Hague Conference and the Future of Private International Law – A Jubilee Speech", *Rabels Zeitschrift,* 2018, Vol. 82, pp. 924 ff.

14. Yuko Nishitani, "Challenges of Private International Law in Asia", *Korean J. Int'l & Comp. Law*, 2024, Vol. 12 (1), pp. 27 ff.

15. United Nations Commission on International Trade Law (UNCITRAL), see https://uncitral.un.org/.

16. International Institute for the Unification of Private Law (UNIDROIT), see https://www.unidroit.org/.

17. See Jürgen Basedow, "Internationales Einheitsprivatrecht im Zeitalter der Globalisierung", *Rabels Zeitschrift*, 2017, Vol. 81, pp. 16 ff.; see also https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf.

international law statutes, soft law instruments - like model laws and legislative guides - could help enhance national legislative reforms in these countries.[18]

II. HCCH Conventions and Child Protection

Among the recent HCCH instruments on child protection, the most important ones for Africa are the 1980 Child Abduction Convention and the 1993 Intercountry Adoption Convention. They are both grounded on administrative and judicial cooperation to give effect to children's rights protected under the UNCRC and materialize their best interests. Furthermore, the ongoing HCCH Parentage/Surrogacy Project deserves specific reflection given the thorny issues of cross-border surrogacy.

A. 1980 Child Abduction Convention

The 1980 Child Abduction Convention tackles cross-border parental child abduction. Once a parent wrongfully removes the child to or retains the child in another contracting state ("state of refuge") in breach of the other parent's rights of custody, the 1980 Convention requires in principle to promptly return the child to the state of habitual residence ("state of origin") (Art. 1). Only limited grounds for refusal apply, such as grave risk to the child in domestic violence or child abuse cases or objection of a mature child to being returned (Art. 13(1)(b) and (2)). Central authorities collaborate to locate the child's whereabouts, exchange information, facilitate the child's return, seek an amicable solution, and ensure access to the child (Art. 7 and 21). Judicial communication may occur through an informal channel of Hague Network judges to facilitate the child's safe return.[19]

According to this return mechanism, the state of origin determines custody issues on the merits, while preventing the taking parent from unilaterally finding a favorable forum in the state of refuge.[20] By swiftly restoring the *status quo,* the child is returned to the state of habitual residence as the family and social environment into which they are integrated. This prevents the child from getting used to the new circumstances in the state of refuge and allows the judge in the natural forum in the state of origin to decide on custody. The 1980 Convention also supports and enhances access to the child following abduction. The 1980 Convention envisions the realization of the child's best interests and the right to maintain personal relations and direct contact with both parents.[21]

The 1980 Child Abduction Convention has gained 103 contracting parties, including

18. See Nishitani (n. 14), pp. 43 ff.

19. See https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj

20. Elisa Pérez-Vera, *Explanatory Report,* para. 9 ff. (https://www.hcch.net/en/publications-and-studies/details4/?pid=2779&d-tid=3); Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis,* Oxford, Hart Publishing, 2013, pp. 33 f., 437 ff.

21. Art. 3(1), 9(3) and 10(2) of the UNCRC.

13 states from Africa.[22] As the experience of Japan shows, joining the 1980 Convention is not an easy task for non-Western legal systems in Asia and Africa, in which the "rights" and "obligations" of the parents are not clearly defined or legally enforceable.[23] In the case of Japan, domestic law permits a mother to take her child and move to her parents' home without the father's consent after their marital relationship breaks down, as often occurs in practice.[24] To join the 1980 Convention, Japan needed to change its stance toward cross-border cases and define a similar action by a Japanese mother living abroad, who takes her child back to Japan without the father's consent, as wrongful child abduction.

While installing return and enforcement proceedings at the Tokyo and Osaka Family Courts and the Central Authority at the Ministry of Foreign Affairs was challenging, the overall implementation of the 1980 Convention has been successful. It continues to evolve by improving access to the child and the method of child hearing.[25] As of January 2025, about 64% of all cases have been concluded by the parents' agreement in or outside the courts.[26] This practice accords with the emphasis on amicable resolution of disputes through in-court conciliation and out-of-court mediation in Japan. The 1980 Convention allows flexible implementation suited to the legal system and ensures the protection of children's rights by its return and access mechanism. Hopefully, African member states and non-member states of the HCCH are encouraged to join and enhance the operation of the 1980 Convention to build effective international cooperation with other countries.[27]

Notably, many signatories from Africa are actively engaged in the monitoring activities of the HCCH.[28] They attend Special Commissions and participate - also Kenya and Rwanda as non-members - in the Hague Network of Judges to examine the operation of the 1980 Convention and enhance judicial communication. In June 2024, South Africa convened the first forum on domestic violence to discuss the protection of battered mothers and children. Furthermore, Morocco and Tunisia play a cardinal role in the "Malta Process" to enhance the use of mediation in child abduction cases involving Islamic countries. By becoming familiar with the basic principles and return mechanism

22. Signatories from Africa: Botswana (2023), Burkina Faso (1992), Cabo Verde (2023), Gabon (2011), Guinea (2012), Lesotho (2012), Mauritius (1993), Morocco (2010), Seychelles (2008), South Africa (1997), Tunisia (2017), Zambia (2014), and Zimbabwe (1995), https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

23. For Japan, see Yuko Nishitani, "International Child Abduction in Asia", in Freeman, Taylor (eds.), *Research Handbook on International Child Abduction*, Cheltenham, Edward Elgar, 2023, pp. 200 ff.; for India, see Stellina Jolly and Saloni Khanderia, *Indian Private International Law*, New Dehli, Hart Publishing India, 2021, p. 157.

24. Supreme Court of Japan, 19 October 1993, *Minshu* 47-8, 5099; see Takami Hayashi, "Kokugai Tenkyo ni kansuru Kadai to Tenbo" [Issues and Perspectives of International Relocation], *Kokusaishiho Nenpo,* 2020, Vol. 22, p. 2.

25. Yuko Nishitani, "Abduction and Child Participation in Japan", *HCCH Judges' Newsletter,* 2024, Vol. 26, pp. 57 ff.

26. For statistics, see https://www.mofa.go.jp/mofaj/files/100012143.pdf.

27. Notably, outbound child abduction cases have been reported with concern by the U.S. Department of State in 2024 in relation to Egypt, Algeria, Côte d'Ivoire, Congo, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Mali, Morocco, Nigeria, Senegal, Sierra Leone, Somalia, South Africa, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. United States Department of State, "Annual Report on International Child Abduction 2024", https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data.html.

28. For the HCCH monitoring activities, see https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.

of the 1980 Convention through the "Malta Process", Islamic countries are encouraged to take further steps to join it despite the legal challenges in safeguarding children's rights against the father's custody.[29] It is hoped that African countries continue to be present in the HCCH networks and its monitoring activities in cross-border child abduction to strengthen the implementation of the 1980 Convention and improve their practice like other countries.

B. 1993 Intercountry Adoption Convention

The 1993 Intercountry Adoption Convention regulates the transfer of children for adoption from the state of their habitual residence ("state of origin") to the state of habitual residence of their adoptive parents ("receiving state"). It only allows adoption to proceed after the state of origin verifies the requirements for children (adoptability, subsidiarity, and the birth parents' consent) (Art. 4) and the receiving state confirms the eligibility and suitability of the adoptive parents (Art. 5). It is grounded on close cooperation between central authorities of the contracting states. They exchange information, exercise necessary control, protect children, monitor and support adoption practice, and provide post-adoption services (Art. 6-9). Based on administrative and judicial cooperation, the 1993 Convention implements control to combat and deter child trafficking, sales of children, and other illicit practices. It reinforces the obligation under the UNCRC to ensure the child's best interests in intercountry adoption (Art. 21).[30]

The 1993 Intercountry Adoption Convention has acquired 106 contracting parties, including 24 states from Africa.[31] While Africa has traditionally favored kinship care in an extended family without severing ties with the birth family, formalized adoption law was enacted by colonial rule and gradually established. Still, due to the adoption ban in Islam and the use of foster care by *kafala*, only non-Muslim children are eligible for adoption.[32]

Notably, signatories from Africa, like those from Asia, Latin America, and Eastern Europe, are states of origin. Children from these regions are moved to their adoptive parents residing in the U.S., Canada, Australia, or Western Europe (Italy, Spain, France,

29. See Nazia Yaqub, *Parental Child Abduction to Islamic Countries: A Child Rights Analysis of the Legal Framework*, Oxford, New-York, Dublin, Bloomsbury Publishing, 2022, pp. 25 ff.

30. Gonzalo Parra-Aranguren, *Explanatory Report,* para. 59 ff., https://www.hcch.net/en/publications-and-studies/details4/?pid=2279&dtid=3; Laura Martínez-Mora, "The Practical Operation and Impact of the 1993 Adoption Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption", in Nigel Lowe & Claire Fenton-Glynn (eds.), *Research Handbook on Adoption Law*, Cheltenham, Edward Elgar, 2023, pp. 346 ff.

31. Signatories from Africa: Angola (2024), Benin (2018), Botswana (2023), Burkina Faso (1996), Burundi (1998), Cabo Verde (2010), Congo (2020), Côte d'Ivoire (2015), Eswatini (2013), Ghana (2017), Guinea (2004), Kenya (2007), Lesotho (2012), Madagascar (2004), Mali (2006), Mauritius (1999), Namibia (2016), Niger (2021), Rwanda (2012), Senegal (2011), Seychelles (2008), South Africa (2003), Togo (2010), and Zambia (2015), https://www.hcch.net/en/instruments/conventions/status-table/?cid=69.

32. Julia Sloth-Nielsen, "Adoption in Africa", in Nigel Lowe & Claire Fenton-Glynn (eds.) (n. 30), pp. 286 ff.

Sweden, etc.).[33] At the turn of the 21st century, the HIV pandemic and resulting orphan crisis in Africa incited the adoption in the West of children from Ethiopia, South Africa, and Congo, among others (incl. Nigeria and Uganda as non-signatories).[34] The phenomenon of intercountry adoption reflects economic and social discrepancies between the Global North and the Global South. Western countries implement full adoption which terminates legal parentage by birth to give the child a new family in their best interests. While this mechanism has permitted adoptive parents to raise the child as their own to provide them with a "better life", it failed to address the child's loss of identity and relationship (family, language, culture, etc.) by entirely severing their ties with their birth parents and home countries. The emphasis was primarily on the interests of the adoptive parents, instead of the interests of children and their birth family.[35]

This structural problem readily led to the commercialization of intercountry adoption. It induced illicit practices, including sales of children, child trafficking, and pressuring poor families or single mothers to give up children by force, fraud, or payment. Under the 1993 Convention, central authorities in some countries have not been robust enough to implement strict regulations and protect children despite remarkable efforts and suggestions made by the HCCH.[36] Intercountry adoption could rather be used as "child laundering" to hide the wrongful, clandestine backstory of transferring children from the Global South to the Global North. Irregularities, abuses, sales of children, and child laundering were reported from Congo and Ethiopia, in addition to Cambodia, Vietnam, India, Nepal, and Guatemala.[37] Due to reported illicit practices, Kenya declared an indefinite moratorium on adoption by foreign parents in 2014, which is still in force.[38] Amid concerns that adoptive children face abuse and neglect abroad, Ethiopia banned adoption by foreign parents in 2018.[39] On the other hand, Ghana has overturned the 2013 moratorium on adoption[40] after implementing strict regulations and joining the 1993 Convention in 2017.[41]

Illicit practices were also reported on the part of receiving countries by authorities or revealed by adoptees years later in the U.S., Belgium, the Netherlands, Germany, and Switzerland.[42] To prevent illegal conduct, the U.S., Sweden, France, and other European

33. For statistics, see https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf.

34. Sloth-Nielsen (n. 32), p. 290.

35. David Smolin, "The legal mandate for ending the modern era of intercountry adoption", in Nigel Lowe & Claire Fenton-Glynn (eds.) (n. 30), pp. 392 ff.

36. The HCCH regularly convenes Special Commissions to monitor the implementation of the 1993 Convention and has published "Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption" in 2023. See https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.

37.. David Smolin (n. 35), p. 406.

38. See https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Kenya.html

39. Art. 193 of the Revised Family Code, No. 213, *Federal Negarit Gazetta,* Extra Ordinary Issue No. 1, 2000.

40. For the moratorium in 2013, see https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Government-bans-adoptions-283210.

41. See https://www.mogcsp.gov.gh/central-adoption-authority/

42. Martínez-Mora (n. 30), pp. 359 ff.

countries halted accepting children from the suspect states of origin. On 21 May 2024, the Netherlands ultimately decided to entirely terminate the practice of intercountry adoption to eradicate illicit practices.[43] The impact of these measures suspending intercountry adoptions may be relatively limited since the overall number of intercountry adoptions has consistently declined. The number of children accepted in receiving states dropped from 45,485 (2004) to 3,700 (2022).[44] However, careful assessment and monitoring are still needed to ensure that an intercountry adoption does not take place by manipulating the child's habitual residence and fabricating it as a domestic adoption.[45]

It is important to note that essential problems have shifted from adoption to surrogacy. Intending parents increasingly turn to international surrogacy due to the difficulties of finding suitable adoptive children and the desire to have their own genetically linked children. Same-sex couples, who are hindered from having children in their home countries, also seek refuge abroad.[46] Cross-border surrogacy, however, entails serious problems like intercountry adoption. This requires a global solution, as is contemplated by the HCCH.

C. HCCH Parentage/Surrogacy Project

At present, the HCCH Parentage/Surrogacy Project is advancing as legislative work.[47] It targets legal parentage in general, including cross-border surrogacy cases. States have divergent positions on the prohibition or admissibility and the requirements for authorizing surrogacy.[48] Intending parents from Western Europe, the U.S., Canada, Australia, and Japan ("receiving states") frequently bypass surrogacy bans or restrictions in their own countries and travel to regions in Eastern Europe (Ukraine and Russia), Africa, Asia, or Latin America ("states of origin") to take advantage of the less stringent regulations and lower costs associated with surrogacy there. Commissioning parents enter surrogacy arrangements through local agencies, have surrogate mothers give birth to children, and bring the children back to their home countries. Such "procreation tourism" often entails illicit and abusive practices, exploitation of surrogate mothers, child trafficking, and lack of protection of children by denying their legal parentage.[49]

43. See https://www.government.nl/latest/news/2024/05/21/no-new-inter-country-adoptions-effective-immediately

44. For statistics, see (n. 33).

45. For the determination of the child's habitual residence, see https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf.

46. See Karen Smith Rotabi & Nicole F. Bromfield, *From Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers,* Routledge, 2017.

47. See https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy; for an overview, see Laura Martínez-Mora, "Surrogacy and the Hague Conference on Private International Law", in Katarina Trimmings, Sharon Shakargy & Claire Achmad (eds.), *Research Handbook on Surrogacy and the Law*, Cheltenham, Edward Elgard, 2024, pp. 295 ff.

48. While Germany, France, Italy, and Spain prohibit surrogacy, the UK, Greece, Israel, Canada, and Australia accept altruistic surrogacy under strict conditions, and the U.S. and some other countries allow commercial surrogacy.

49. Yuko Nishitani, "Surrogacy under the Shadow of Globalization", *NYU J. Int'l Law & Politics,* 2024, Vol. 56, pp. 308 ff.

In Africa, infertility is culturally shunned and socially stigmatized. Thus, an increasing number of surrogacy clinics have been operating in, *e.g.,* Ghana, Uganda, Kenya, Nigeria, and South Africa. They also attract intending parents from abroad. Some of the clinics in Africa have been a destination for medical personnel from Thailand, India, and Cambodia after these countries encountered serious problems in cross-border surrogacy and tightened their regulations to shut down medical services to foreign intending parents.[50] Surrogacy remains largely unregulated in Africa today, except in South Africa and Ghana.[51] This made the African surrogacy market accessible and attractive to intending parents from abroad, in addition to its inexpensive services and high success rate. With the mushrooming fertility clinics and presumably also due to the war in Ukraine, cross-border commercial surrogacy is increasingly attracted and diverted to Africa.[52] This will make African countries more vulnerable to illicit practices, abuse of surrogate mothers, and child trafficking.

This situation indicates the need to tackle these problems in the global arena. The Draft HCCH instrument currently developed in the Parentage/Surrogacy Project[53] aims to respect children's rights and ensure certainty and continuity of their status by recognizing foreign judgments on legal parentage in general, including surrogacy cases. It encompasses different scenarios in surrogacy, where legal parentage is established in the state of origin by pre-birth or post-birth order, or by parental order or adoption decree in the receiving state. At the same time, this instrument provides necessary conditions and safeguards to refuse recognition, insofar as a surrogate mother did not give proper consent before insemination or after childbirth, was a minor, was implicated in fraud or illicit practices, or the recognition runs counter to public policy.[54] Notably, the regulation of surrogacy practices must be left to individual states. Nor is direct administrative cooperation between central authorities conceivable in this instrument due to the varying stances on surrogacy among states. Still, ensuring the recognition of foreign judgments on legal parentage with necessary conditions and safeguards is a viable pathway to enhance human rights protection and stability and continuity of the status in cross-border surrogacy.

In this important project, it is crucial to listen to the voices from African and Asian states as the most affected venues of wrongful, unethical practices of surrogacy. It is hoped that the HCCH Council of General Affairs and Policy will acknowledge the feasibility of this project in March 2026 to institute formal legislative work with treaty negotiations.

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50. See Julia Sloth-Nielsen, "Surrogacy in Africa", in Katarina Trimmings, Sharon Shakargy & Claire Achmad (eds.) (n. 47), pp. 503 ff.; for the background in Asia, see Yuko Nishitani (n. 49), pp. 315 ff.

51. Julia Sloth-Nielsen (n. 50), pp. 506 ff.; idem, "Surrogacy in South Africa", in Jens M. Scherpe, Claire Fenton-Glynn & Terry Kaan (eds.), *Eastern and Western Perspectives of Surrogacy*, Cambridge, Intersentia Publishers, 2019, pp. 185 ff.

52. See Sloth-Nielsen (n. 50), pp. 505 ff., p. 522.

53. For further details, (n. 6).

54. The author is a delegate of Japan for the Working Group in this project and has access to the current unpublished draft instrument.

III. Conclusion

As this paper has discussed, issues surrounding international child protection highlight a significant divide between the Global North and the Global South, similar to other global concerns such as business and human rights, climate change, corruption, and terrorism. In cross-border child abduction, adoption, and surrogacy cases, it is crucial to address and collaborate with African and Asian countries to achieve global welfare and human rights protection in the international community. The HCCH has been playing an important role and can hopefully gain more representation and participation from Africa and Asia. From an academic and comparative perspective, the African Review of International Law will serve as a vital platform for discussions, deliberations, and exchange of ideas. The author warmly congratulates the foundation of this important journal and looks forward to working with colleagues from Africa.

LA RÉCEPTION DES RÈGLES DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS EN AFRIQUE NOIRE FRANCOPHONE

par Grégoire JIOGUE*

La définition du droit international privé est acquise en doctrine. Il s'agit du « *droit spécial, applicable aux personnes privées impliquées dans les relations juridiques internationales* »[1], ou de « *la matière qui - par un ensemble de méthodes et de règles juridiques - organise le règlement des relations internationales entre personnes privées* »[2]. Il résulte de ces deux définitions quasi-identiques que l'élément caractéristique fondamental du droit international privé est l'existence d'une relation internationale entre personnes privées. Au regard de cet élément caractéristique mis en exergue, on peut légitimement se poser la question de savoir s'il n'a pas existé, avant l'instauration de la domination française sur les territoires d'Afrique noire qui sont devenus des États, un droit international privé coutumier, différent du droit coutumier substantiel qui était le seul droit en vigueur dans ces territoires avant la « colonisation »[3]. Plusieurs éléments militent en faveur de la thèse de l'existence d'un droit international coutumier précolonial.

En premier lieu, les territoires d'Afrique noire étaient constitués sous forme d'empires, de royaumes et de groupements ethniques qui étaient des entités autonomes, organisées comme de véritables « États » modernes, avec un pouvoir central exercé par un souverain, une population et des frontières bien délimitées à l'intérieur desquelles s'appliquaient les règles coutumières propres à chacune de ces entités territoriales, un système judiciaire chargé de trancher les litiges, etc. Il y avait donc une pluralité d'ordres juridiques qui est la première condition nécessaire à l'existence du droit international privé, qu'il soit coutumier ou contemporain[4].

En deuxième lieu, en raison des déplacements de personnes et de biens d'une entité territoriale autonome à une autre, qui ne sont pas un phénomène contemporain, ainsi que des unions matrimoniales qui se nouaient déjà à l'époque entre ressortissants d'entités territoriales différentes, il se créait entre des personnes privées des relations internationales dont le règlement n'était pas toujours effectué par l'application directe du

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1. Pierre Mayer, Vincent Heuzé et Benjamin Remy, *Droit international privé*, Paris, LGDJ, 12e éd., 2019, n°2, p. 26.

2. Sandrine Clavel, *Droit international privé*, HyperCours, Paris, Dalloz, 5e éd., 2018, n°2, p. 1.

3. Grégoire Jiogue, « Quel avenir pour le modèle juridique français en Afrique ? » *in* Rémy Cabrillac (sous la dir. de), *Quel avenir pour le modèle juridique français dans le monde ?*, Paris, Economica, 2011, p. 83 et s.

4. Clavel (note 2), n°17, p. 11.

droit coutumier substantiel d'une entité territoriale donnée, mais était organisé par le droit international privé coutumier de l'une des entités territoriales avec lesquelles la relation affectée d'un élément d'extranéité présentait des points de contact. Ainsi, la deuxième condition requise pour qu'il y ait existence du droit international privé était remplie, à savoir la présence d'une relation internationale entre personnes privées.

Le troisième élément qui milite en faveur de l'existence du droit international privé coutumier dans les territoires d'Afrique noire avant l'instauration de la domination française est tiré de la reconnaissance de l'existence d'un droit international privé « archaïque »[5] en Europe, c'est-à-dire un ensemble de « *méthodes mises en œuvre pour appréhender les situations juridiques « internationales », avant le XII^e siècle et l'ébauche d'une doctrine de droit international privé par les statutistes* »[6]. Le droit international privé, fût-il archaïque, existait donc en Europe à une époque où existaient des empires, des royaumes, des cités et des seigneuries, exactement comme en Afrique noire avant l'instauration de la domination française. Et pour la doctrine internationaliste européenne :

> « [j]usqu'au XII^e siècle en effet, deux principaux systèmes seront successivement mis en œuvre. Le système de la personnalité des lois en vertu duquel chaque individu se voit appliquer la loi de son groupe d'appartenance, puis le système de la territorialité des lois en vertu duquel toutes les personnes situées sur un territoire et toutes les actions réalisées sur ce territoire sont soumises à la loi de ce territoire. Il s'agit dans les deux cas de définir le domaine d'application d'une loi donnée : telle loi s'applique aux personnes appartenant à tel groupe ethnique, telle loi s'applique aux personnes se trouvant dans le ressort du territoire du souverain qui l'a édictée »[7].

Il résulte de ce qui précède que la thèse de l'existence du droit international privé coutumier dans les territoires d'Afrique noire avant l'instauration de la domination française n'est pas une simple vue de l'esprit, mais une réalité historique. Ce droit international privé coutumier, qui était nécessairement unilatéraliste, était soit personnaliste, soit territorialiste. Mais avec l'instauration de la domination française sur certaines de ces entités territoriales, l'un des éléments qui fondaient l'existence de ce droit international privé coutumier a disparu, à savoir l'autonomie de ces entités territoriales et des ordres juridiques coutumiers qui leur étaient consubstantiels. En effet, les empires, les royaumes et les groupements ethniques qui étaient jusqu'alors autonomes, ont été intégrés dans des entités territoriales plus vastes constituées sous forme de pays et qui ont reçu les dénominations ci-après : Sénégal, Guinée, Côte d'Ivoire, Dahomey (actuel Benin),

5. Clavel (note 2), n°29, p. 16 ; dans le même sens, Mayer, Heuzé et Remy (note 1), n°7 et s., p. 29 et s. et n°50 et s., p. 58 et s. Les auteurs reconnaissent que les conditions d'apparition du droit international privé étaient réunies depuis l'antiquité.
6. Clavel (note 2), n°29, p. 16.
7. Clavel (note 2), n°29, p. 16.

Soudan (actuel Mali), Mauritanie, Niger, Haute-Volta (actuel Burkina Faso), Gabon, Moyen Congo (actuel Congo), Ou-Bangui-Chari (actuel Centrafrique) et Tchad[8].

C'est dans ces nouvelles entités territoriales autonomes les unes par rapport aux autres qu'a été introduit le droit français dans son ensemble et le droit international privé français en particulier. Le contenu de cette branche spécifique du droit privé, qui va retenir l'attention dans le cadre de cet article, ne se réduit pas aux seules règles de droit international privé qui sont l'ensemble des solutions retenues par le droit positif français pour résoudre les conflits de lois qui se posent à propos de chacune des grandes matières du droit privé (état et capacité des personnes, mariage, successions, régimes matrimoniaux, filiation, biens, responsabilité, contrats, etc.) et les conflits de juridictions, mais, comprend également l'ensemble des méthodes « *qui permettent de sélectionner et/ou d'identifier, parmi les règles de droit substantiel posées par les différents ordres juridiques ayant des liens avec une situation internationale donnée, celle qui sera en définitive appelée à régler cette situation* »[9]. Ces méthodes sont constituées de la méthode conflictuelle qui est considérée unanimement par la doctrine française comme la méthode fondatrice du règlement du conflit de lois, et des méthodes concurrentes que sont la méthode des règles matérielles, la méthode des lois de police et la méthode de la reconnaissance des situations[10].

L'ambition de notre article n'est pas d'embrasser tout le vaste domaine du droit international privé, mais de nous limiter à l'étude de la réception des seules règles de droit international privé français en Afrique noire francophone. La question qui mérite d'être posée à cet égard est de savoir quelles ont été les méthodes de réception de ces règles dans cette partie de l'Afrique. Le constat qui s'impose est qu'il n'y a pas un régime spécifique de réception des règles de droit international privé français en Afrique noire francophone. Celle-ci s'est faite suivant les mêmes méthodes de réception du modèle juridique français dans son ensemble dans le monde en général et en Afrique en particulier[11]. Ainsi, comme pour les autres branches du droit privé français, il y a eu d'une part réception par l'intégration directe des règles de droit international privé français dans les ordres juridiques des territoires/États d'Afrique noire francophone (I) et, d'autre part, réception indirecte de ces règles comme source d'inspiration de leurs propres droits par les États d'Afrique noire francophone (II).

8. Le Togo et le Cameroun qui étaient déjà sous la domination allemande ont été placés sous celle de la France par le mécanisme du mandat d'abord et de la tutelle ensuite.

9. Clavel (note 2), n°10, p. 5.

10. Sur l'étude de ces différentes méthodes, voir Clavel (note 2), p. 7 et s. ; Mayer, Heuzé et Remy (note 1), p. 94 et s.

11. Sur les méthodes d'exportation du modèle juridique français à l'étranger et en Afrique en particulier, V. Michel Grimaldi, « L'exportation du Code civil », *Pouvoirs*, n° 107, 2003, p. 91 ; Adolphe Minkoa She, « Le Code civil des français, un modèle utilisé dans les pays d'Afrique Francophone », *in* Thierry Revet (sous la dir. de), *Code civil et modèles : Des modèles du Code au Code comme modèle*, Paris, LGDJ, p. 523 et s.

I. L'intégration directe des règles de droit international privé français dans les ordres juridiques des territoires/États d'Afrique noire francophone

La réception par l'application directe des règles de droit international privé français en Afrique noire francophone s'est faite par la contrainte pendant la période sous domination française sur cette partie de l'Afrique (A). Mais après leur accession à l'indépendance, l'application directe des règles de droit international privé français dans les nouveaux États d'Afrique noire francophone est devenue volontaire par la consécration constitutionnelle du maintien à titre transitoire dans leurs ordres juridiques du droit hérité de la domination française (B).

A. L'intégration directe dans les ordres juridiques par la contrainte pendant la période sous domination française

L'exportation des règles de droit international privé français dans les territoires d'Afrique noire francophone a obéi au même schéma que l'exportation de l'ensemble du modèle juridique français dans le monde. En effet, en droit international privé, l'introduction dans les territoires placés sous domination française de l'article 3 du Code civil de 1804[12], qui est originellement la seule source légale des règles de droit international privé français, et de l'abondante jurisprudence rendue soit sous le visa de cet article 3, soit sous celui des principes généraux du droit international privé, s'est d'abord faite par la contrainte. Ainsi, pendant toute la période de la domination française sur ces territoires jusqu'à leur accession respective à l'indépendance, toutes les règles de droit international privé français d'origine légale et jurisprudentielle y ont été appliquées directement par la force, qu'il s'agisse des règles de conflits de lois, des règles relatives au fonctionnement de la règle de conflit, des règles relatives à l'application de la loi étrangère, et des règles relatives à la compétence des tribunaux du for dans les litiges internationaux.

Sans prétendre à l'exhaustivité, les principales règles de conflit de lois françaises qui ont été introduites et appliquées directement dans les territoires d'Afrique noire placés sous la domination française sont les suivantes : les immeubles sont régis par la loi du lieu de leur situation (*lex rei sitae)*[13] ; l'état et la capacité d'un individu sont régis par sa loi nationale[14] ; la loi applicable à la substance des contrats est celle que les parties ont adoptée (loi d'autonomie)[15] ; la loi compétente pour régir la responsabilité civile

12. Sur les dates d'introduction du Code civil de 1804 dans les différents pays d'Afrique Noire francophone, V. Guillaume Henri Camerlynck, Roger Decottignies, *Code civil de l'Union française*, Paris, L.G.D.J., 1950, p. 53.

13. Cette règle de conflit bilatérale a été tirée de l'article 3 alinéa 2 du Code civil de 1804 par l'arrêt *Stewart c. Marteau* (Cass. civ. 14 mars 1837, *S.* 1837, 1, 95 ; *D.P.* 1837, 1, 275).

14. Cette règle de conflit bilatérale a été tirée de l'article 3 alinéa 3 du Code civil de 1804 par l'arrêt *Busqueta* (Cour de Paris, 13 juin 1814, S. 1814, 2, 393).

15. Cette règle de conflit a été posée par l'arrêt *American Trading C°* (Cass. civ., 5 décembre 1910, *Rev. Dr. Int*., 1911, 395 ; *Clunet*, 1912, 1156 ; S. 1911, 1, 129).

extracontractuelle est la loi du lieu où le délit a été commis (*lex loci delicti*)[16].

S'agissant des règles relatives au fonctionnement de la règle de conflit, celles qui ont été introduites et appliquées directement dans les territoires d'Afrique noire placés sous la domination française concernent principalement le principe de la qualification *lege fori* posé par l'arrêt *Caraslanis*[17], l'admission du renvoi au premier degré par l'arrêt *Forgo*[18] et du renvoi au second degré par l'arrêt *De Marchi*[19].

Quant aux règles relatives à l'application de la loi étrangère, celles en vigueur pendant la période de la domination française sur les territoires d'Afrique noire et qui ont été introduites et appliquées directement dans ces territoires concernent le principe posé par l'arrêt *Lautour*[20] selon lequel la charge d'établir le contenu du droit étranger repose sur les parties, en l'occurrence la partie dont la prétention est régie par ladite loi, le principe de l'éviction de la loi étrangère et sa substitution par la loi française en raison de sa contrariété avec l'ordre public français posé par le même arrêt *Lautour*[21], ou en raison de la fraude à la loi française posée par l'arrêt *Princesse de Beauffremont*[22], et l'admission de l'effet atténué de l'ordre public par l'arrêt *Rivière*[23].

Enfin, si les règles relatives à la compétence des tribunaux français dans les litiges internationaux étaient inexistantes dans le Code civil de 1804 rendu applicable par la force dans les territoires d'Afrique noire placés sous domination française, ce vide juridique a été comblé par la Cour de cassation française qui a énoncé dans l'arrêt *Patino*[24] un principe général de compétence des juridictions françaises à l'égard des étrangers. Cette jurisprudence étant intervenue pendant la période de la domination française sur les territoires susvisés, elle faisait donc partie des règles de droit international privé français qui y ont été imposées.

16. Cette règle de conflit a été posée par l'arrêt *Lautour* (Cass. civ., 25 mai 1948, *GADIP*, n° 19 ; *Rev. Crit. DIP* 1949, 89, note Battifol ; *D*. 1948, 357, note P. L.-P. ; *S.* 1949, 1, 21, note M.-L. Niboyet ; *J.C.P*. 1948, II, 4532, note Vasseur).

17. Cass. civ.1re, 22 juin 1955, *GADIP*, n° 27. *Rev. Crit. DIP* 1955, 723, note H. Batiffol.

18. Req. 22 février 1882, *GADIP*, n° 8 ; D. 1882. 1. 301.

19. Cass. civ., 7 mars 1938, *De Marchi*, *Rev. crit. DIP* 1938, 472, note H. Batiffol ; Cass. civ. 1er févr. 1972, Rougeron, *Rev. crit. DIP* 1973, 313, note Droz.

20. Cass. civ., 25 mai 1948, préc.

21. Arrêt préc. Cette jurisprudence a été confirmée par l'arrêt *Patino* rendu après l'indépendance de la plupart des pays d'Afrique noire francophone (Civ. 1re, 15 mai 1963, 1er arrêt, *GADIP*, n° 38).

22. Cass. civ., 18 mars 1878, *GADIP*, n° 6 ; *JDI* 1878. 505 ; S. 1878. 1. 193, note C. Levillain.

23. Cass. civ., 1re, 17 avril 1953, *GADIP*, n° 26 ; *Rev. Crit. DIP* 1953, 412, note H. Batiffol ; *JDI* 1953, 860, note R. Plaisant.

24. Cass. civ., 21 juin 1948, *JCP* 1948, II, n° 4422, note Lerebourg-Pigeonnière ; *Rev. Crit. DIP* 1949, p. 554, note Francescakis. Cette jurisprudence a été confirmée par l'arrêt *Scheffel* : Cass. civ., 30 oct. 1962, *GADIP*, n°37.

B. L'intégration directe dans les ordres juridiques par la consécration constitutionnelle du maintien à titre transitoire du droit hérité de la domination française

Avec la fin de la domination française suite à l'accession à l'indépendance des Etats d'Afrique noire francophone, l'imposition du modèle juridique français en général et des règles de droit international privé français en particulier prenait également fin. Les jeunes États susvisés avaient désormais entre leurs mains non seulement leur destin politique, mais également leur destin juridique. Mais la plupart de ces États ont opté dans leurs premières Constitutions pour la continuité de la législation issue de la domination française dans tous les domaines non encore réglementés par les textes nationaux[25]. Bien que ces dispositions constitutionnelles dont la teneur mérite d'être présentée aient une portée générale (1), il va de soi qu'elles s'appliquent aux règles de droit international privé héritées de la domination française par les États d'Afrique noire francophone (2).

1. La teneur et la portée générale des dispositions constitutionnelles transitoires

Le principe de continuité de la législation issue de la domination française a été consacré par les Constitutions des États qui appartenaient jadis à l'Afrique Occidentale Française (A.O.F.)[26] et à l'Afrique Équatoriale Française (A. E. F.) [27] ainsi que celles du Cameroun et du Togo qui étaient successivement soumis au régime du mandat et de la tutelle. On peut ainsi lire à l'article 53 de la Constitution camerounaise du 4 mars 1960 ce qui suit : « *La législation résultant des lois, décrets et règlements applicables au Cameroun à la date de prise d'effet de la présente constitution reste en vigueur dans ses dispositions qui ne sont pas contraires aux dispositions de celle-ci, tant qu'elle n'aura pas été modifiée par la loi ou par les textes réglementaires* »[28].

Les mêmes dispositions transitoires sont contenues dans les Constitutions des autres États d'Afrique centrale qui appartenaient jadis à l'A.E.F. Il en est ainsi de la Constitution de la République du Congo du 2 mars 1961[29], de la loi Constitutionnelle n°4/59 du 19 février 1959 promulguant la Constitution de la République du Gabon[30], de

25. Sur cette question, voir Adolphe MINKOA SHE (note 11) et les auteurs cités, note 4, p. 524.

26. Il s'agit des pays ci-après : Sénégal, Guinée, Côte d'Ivoire, Dahomey (actuel Benin), Soudan (actuel Mali), Mauritanie, Niger, Haute-Volta (actuel Burkina Faso).

27. Il s'agit des pays ci-après : Gabon, Moyen Congo (actuel Congo), Ou-Bangui-Chari (actuelle Centrafrique), Tchad.

28. Toutes les constitutions camerounaises postérieures ont affirmé le maintien en vigueur de la législation antérieure (l'article 46 de la constitution du 1er septembre 1961 et l'article 68 de la constitution de 1996 contiennent en substance la même disposition).

29. Son article 77 disposait : « *Les lois et règlements actuellement en vigueur, lorsqu'ils ne sont pas contraires à la présente Constitution, restent applicables tant qu'ils n'auront pas été modifiés ou abrogés* ». Cette disposition transitoire est reprise dans la Constitution du 25 octobre 2015.

30. Son article 48 disposait : « *Les lois et règlements administratifs en vigueur à la date de promulgation de la présente Constitution et qui ne sont pas contraires à ses dispositions demeurent applicables tant que leur modification ou leur abrogation ne sont pas intervenues dans les conditions fixées par la présente Constitution* »

la Constitution de la République Centrafricaine du 16 février 1959[31] et de la Constitution de la République du Tchad du 31 mars 1959[32].

Le même principe de continuité de la législation issue de la domination française se retrouve dans les Constitutions des États qui appartenaient jadis à l'A.O.F. Il en est ainsi de la Constitution de la République du Sénégal du 24 juin 1959[33], de la Constitution de la République de Dahomey (l'actuel Benin) du 15 février 1959[34], de la Constitution de la République de Haute-Volta (actuel Burkina Faso) du 27 novembre 1960[35], de la loi n°60-1 A.N.-R. M. portant modification de la Constitution du 23 janvier 1959 modifiée par la loi n°60-23 A. I.-R. S. du 26 juillet 1960 de la République Soudanaise (actuel Mali)[36].

La Constitution de la République de Niger du 12 mars 1959 ne comportait aucune disposition transitoire relative à la continuité de la législation issue de la domination française, mais celle du 25 novembre 2010 (adoptée par référendum le 31 octobre 2010) a comblé ce vide en disposant en son article 182 : « *La législation actuellement en vigueur reste applicable, en ce qu'elle n'a rien de contraire à la présente Constitution, sauf abrogation expresse* ». Comme la Constitution de la République de Niger du 12 mars 1959, celle de la République de Côte d'Ivoire du 26 mars 1959 ne comportait aucune disposition transitoire relative à la continuité de la législation issue de la domination française, mais celle du 3 novembre 1960 a comblé ce vide en disposant en son article 76 : « *La législation actuellement en vigueur en Côte d'Ivoire reste applicable, sauf l'intervention de textes nouveaux, en ce qu'elle n'a rien de contraire à la présente Constitution »*[37].

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31. L'article 45 de la Constitution de la République Centrafricaine du 16 février 1959 article 45 disposait : « *Les lois et règlements antérieurs à la date de la promulgation de la présente Constitution demeurent en vigueur en tout ce qui n'est pas contraire aux dispositions qui précèdent tant qu'ils n'ont pas été abrogés ou modifiés par les autorités compétentes* ». Cette disposition transitoire a été reprise par l'article 157 de la Constitution du 30 mars 2016.

32. Son article 60 alinéa 1 disposait : « *En tout ce qui n'est pas contraire à la présente Constitution, les dispositions législatives et réglementaires antérieures sont maintenues en vigueur »*. Cette disposition transitoire a été reprise *in extenso* par la loi constitutionnelle n°18-60 du 28 novembre 1960 (art. 77) et la loi constitutionnelle n°2/62 du 16 avril 1962 (art. 87). Elle a été maintenue dans la Constitution du 31 mars 1996 et du 7 janvier 2024.

33. Son article 48 disposait : « *A moins que les autorités de la République du Sénégal n'en aient décidé autrement, les lois et règlements actuellement en vigueur continueront à avoir leur plein effet en tout ce qu'ils n'ont pas de contraire à la présente constitution* ». Celle du 22 janvier 2001 a repris en son article 107 les mêmes dispositions transitoires.

34. Son article 58 disposait : « *Sauf lois ou règlements nouveaux décidés par l'Assemblée Législative ou le Gouvernement du Dahomey, la législation en vigueur au Dahomey résultant des lois, décrets et règlements reste applicable en ce qu'elle n'a rien de contraire à la Constitution du 4 octobre 1958 et à la présente Constitution* ». La loi n° 90-32 du 11 décembre 1990 (à jour de sa révision par la loi n° 2019-40 du 07 novembre 2019 portant révision de la loi n°90-32 du 11 décembre 1990 portant Constitution de la République du Bénin a maintenu en son article 158 les mêmes dispositions transitoires.

35. Son article 76 disposait : « *La législation actuellement en vigueur en Haute-Volta reste applicable, sauf l'intervention de textes nouveaux, en ce qu'elle n'a rien de contraire à la présente Constitution* ». Cette disposition transitoire a été reprise par la Constitution du 2 juin 1991 (plusieurs fois modifiée) dont l'article 173 dispose : « *La législation en vigueur reste applicable en ce qu'elle n'a rien de contraire à la présente Constitution, jusqu'à l'intervention des textes nouveaux ».*

36. Son article 51 disposait : « *La législation en vigueur demeure valable dans la mesure où elle n'est pas contraire à la présente constitution et dans la mesure où elle n'a pas fait l'objet d'une abrogation expresse* ». Cette disposition transitoire a été reprise *in extenso* par l'article 51 de la Constitution de la République du Mali (ex-Soudan), version de la loi 60-1 du 22 septembre 1960 et par la Constitution du 22 juillet 2023 en son article 189.

37. Cette disposition transitoire est reprise *in extenso* par la 3e constitution du 8 novembre 2016.

Enfin, la Constitution de la République du Togo du 9 avril 1961, qui ne faisait pas partie de l'A.O.F., mais était placé sous la domination française, comportait la même disposition transitoire. Son article 60 disposait en effet : « *La législation applicable au Togo à la date de la prise d'effet de la Constitution reste en vigueur dans ses dispositions qui ne sont pas contraires à celles de la présente loi* ».

2. L'application des dispositions constitutionnelles transitoires aux règles de droit international privé héritées de la domination française

Les dispositions constitutionnelles transitoires suscitées étaient fort opportunes car les États d'Afrique noire francophone ne pouvaient pas se doter de textes nationaux dès le lendemain de leur accession à l'indépendance. Ces dispositions constitutionnelles transitoires de portée générale s'appliquaient naturellement aux règles de droit international privé français qui étaient déjà applicables en Afrique noire francophone pendant la période de la domination française. En effet, il n'y a pas dans les Constitutions de ces États de dispositions qui excluent ces règles de droit international privé français du champ d'application de ces dispositions transitoires.
Sur le fondement de ces dispositions transitoires, l'article 3 du Code civil de 1804 et les règles jurisprudentielles françaises antérieures aux dates d'accession des États d'Afrique noire francophone à l'indépendance sont devenus des sources directes voulues - et non plus imposées - du droit international privé de ces États.

Cette situation n'a cependant pas changé dans les États qui n'ont pas adopté, depuis leur accession à l'indépendance, de textes nationaux comportant des règles de droit international privé tels que le Cameroun, le Tchad et le Niger. Mais, même dans certains États qui ont déjà adopté de tels textes nationaux tels que le Benin, la Côte d'Ivoire, le Congo, le Burkina Faso, le Mali et le Togo, les dispositions transitoires ont été conservées dans leurs Constitutions récentes[38]. Ce maintien pourrait se justifier par la volonté de ces Etats de garder dans leurs ordres juridiques respectifs celles des règles de droit international privé français antérieures à leur accession à l'indépendance qui n'auraient pas été reprises expressément par les textes nationaux, à condition qu'elles ne soient pas contraires aux autres textes et aux Constitutions en vigueur dans ces États.

Il convient de préciser que la législation en vigueur visée par les dispositions constitutionnelles transitoires des États d'Afrique noire francophone, mêmes celles des

38. Pour le Benin, voir l'article 158 de la loi n° 90-32 du 11 décembre 1990 (à jour de sa révision par la loi n° 2019-40 du 07 novembre 2019) ; Pour la Côte d'Ivoire, voir l'article 183 de la Constitution du 8 novembre 2016 ; pour le Congo, voir l'article 243 de la Constitution du 25 novembre 2015 ; Pour le Burkina Faso, voir l'article 173 de la constitution du 2 juin 1991 (plusieurs fois modifiée) ; Pour le Mali, voir l'article 189 de la constitution du 22 juillet 2023 ; Pour le Togo, voir l'article 99 de ka loi n°2024-005 du 6 mai 2024 portant Constitution de la République Togolaise.

Constitutions les plus récentes, est la législation française qui était déjà applicable dans les territoires de ces États avant leur accession à l'indépendance, ce qui exclut la législation française postérieure aux dates respectives d'accession à l'indépendance de ces États, même si cette législation est antérieure aux Constitutions entrées en vigueur après ces dates. Cependant, si la législation française postérieure aux indépendances de ces États ne peut pas recevoir application directe dans ces États sur le fondement des dispositions constitutionnelles transitoires, elle peut néanmoins constituer une source d'inspiration des législations nationales élaborées par ces États.

II. La réception des règles de droit international privé français comme source d'inspiration de leurs droits par les États d'Afrique noire francophone

Quelques précisions nécessaires méritent d'être faites (A) avant d'illustrer l'influence des règles de droit international privé français sur les législations des États d'Afrique noire francophone (B).

A. Les précisions nécessaires sur la réception des règles de droit international privé français comme source d'inspiration

Trois précisions méritent d'être faites sur la réception des règles de droit international privé français comme source d'inspiration par les États d'Afrique noire francophone dans l'édiction de leurs propres règles de droit international privé.

D'une part, seuls sont concernés par le recours aux règles de droit international privé français ceux des États qui ont adopté après leur accession à l'indépendance des textes comportant des règles de droit international privé. Il s'agit du Benin[39], de la Côte d'Ivoire[40], du Congo[41], du Burkina Faso[42], du Gabon[43], du Mali[44], de la Centrafrique[45], du Sénégal[46] et du Togo[47].

D'autre part, les matières sur lesquelles les États susvisés ont édicté des règles de

39. Loi n°2002-07 portant Code des personnes et de la famille.
40. Code des personnes et de la famille.
41. Loi n°073/84 du 17 octobre 1984 portant Code de la famille.
42. Code des personnes et de la famille.
43. Loi n°15/72 du 29 juillet 1972 portant Code civil.
44. Loi n°11-080/AN-RM portant Code des personnes et de la famille.
45. Loi n°97-13 portant Code de la famille.
46. Code de la famille.
47. Loi n°2012-014 du 6 juillet 2012 portant modification de l'ordonnance n°80-16 du 31 janvier 1980 portant Code des personnes et de la famille.

droit international privé varient d'un État à un autre.

Le Bénin a édicté des règles de droit international privé relatives[48] aux règles de conflit de lois en matière de statut personnel, de mariage, de divorce et de séparation de corps, d'effets personnels et patrimoniaux du mariage, de filiation, d'état et de capacité des personnes, d'obligations alimentaires, de successions, de testaments et de libéralités.

La Côte d'Ivoire a édicté des règles de droit international privé relatives aux lois de police, aux règles de conflits de lois en matière immobilière et de statut personnel[49], au mariage[50], en matière de donations entre vifs et aux testaments[51].

Le Congo a édicté des règles de droit international privé relatives[52] aux lois de police, aux règles de conflit de lois en matière immobilière, de statut personnel, de régimes matrimoniaux et successions, de mariage, de divorce et séparation de corps, de filiation, à l'éviction de la loi étrangère et sa substitution par la loi congolaise en raison de sa contrariété à l'ordre public congolais ou de fraude à la loi congolaise, au renvoi au premier degré, et à la compétence internationale des tribunaux congolais.

Le Burkina Faso a édicté des règles de droit international privé relatives[53] au renvoi au premier degré et au second degré, à la carence du droit étranger désigné compétent[54], à l'éviction de la loi étrangère désignée compétente, aux règles applicables lorsque le droit étranger désigné applicable est celui d'un État dont le système juridique n'est pas unifié, à l'éviction du droit étranger et sa substitution par le droit burkinabè en raison de sa contrariété à l'ordre public burkinabè ou de fraude au droit burkinabè, aux règles de conflit de lois en matière d'état et capacité des personnes, de mariage, de la séparation de corps et de divorce, de régimes matrimoniaux, de filiation, de protection des incapables, d'obligations alimentaires, de successions, de testaments et de libéralités.

Le Gabon a édicté des règles de droit international privé relatives[55] aux lois de police, à l'éviction de la loi étrangère et sa substitution par le droit gabonais en raison de sa contrariété à l'ordre public gabonais ou de fraude au droit gabonais, aux règles de conflit de lois en matière d'état et capacité des personnes, de mariage et de divorce, de

48. Cf. articles 962 à 1016 de la loi n°2002-07 portant Code des personnes et de la famille.
49. Cf. article 3 du Code civil ivoirien.
50. Cf. article 25 de la loi n°2019-570 du 26 juin 2019 relative au mariage.
51. Cf. article 61 de la loi n°64-380 du 7 octobre 1964 relative aux donations entre vifs et aux testaments.
52. Cf. articles 819 à 833 de la loi n°073/84 du 17 octobre 1984 portant code de la famille.
53. Cf. articles 1005 à 1050 du Zatu an VII du 16 novembre 1989 portant institution et application d'un Code des personnes et de la famille.
54. Cf. article 1005 alinéa 4 du Zatu an VII du 16 novembre 1989 portant institution et application d'un Code des personnes et de la famille.
55. Cf. articles 30 à 56 de la loi n°15/72 du 29 juillet 1972 portant Code civil (Première partie).

filiation, de tutelle et de protection des incapables, de responsabilité civile délictuelle, de quasi-contrats, de biens, de régimes matrimoniaux, de successions et de contrats.

Le Mali a édicté des règles de droit international privé relatives[56] aux lois de police, aux règles de conflit de lois en matière d'état et de capacité des personnes et en matière immobilière.

La Centrafrique a édicté des règles de droit international privé relatives[57] aux lois de police, aux règles de conflit en matière immobilière, d'état et de capacité des personnes, de régimes matrimoniaux, de successions, de donations, de mariage, de divorce et de séparation de corps, d'effets du mariage, de filiation, à l'éviction de la loi étrangère et sa substitution par la loi centrafricaine en raison de sa contrariété à l'ordre public centrafricain ou de fraude à la loi centrafricaine, à la neutralisation des effets des droits acquis à l'étranger pour des raisons d'ordre public, à l'admission du renvoi au premier degré, et à la compétence internationale des tribunaux centrafricains.

Le Sénégal a édicté des règles de droit international privé relatives[58] aux lois de police, aux règles de conflit concernant l'état et la capacité des personnes, les régimes matrimoniaux, les successions, les donations, le mariage, le divorce et la séparation de corps, les effets extrapatrimoniaux du mariage, la filiation, les effets patrimoniaux du mariage, à l'éviction de la loi étrangère et sa substitution par la loi sénégalaise en raison de sa contrariété à l'ordre public sénégalais ou de fraude à la loi sénégalais, à la neutralisation des effets des droits acquis à l'étranger pour des raisons d'ordre public, et à la compétence internationale des tribunaux sénégalais.

Le Togo a édicté des règles de droit international privé relatives[59] aux lois de police et de sûretés, aux règles de conflit de lois concernant l'état et la capacité, les régimes matrimoniaux, les successions, le mariage, les effets patrimoniaux du mariage, le divorce et la séparation de corps, la filiation, les testaments et les donations, à l'éviction de la loi étrangère et sa substitution par la loi togolaise en raison de sa contrariété à l'ordre public togolais ou de fraude à la loi togolaise, à la neutralisation des effets des droits acquis à l'étranger pour des raisons d'ordre public, au renvoi au premier degré.

Il résulte de ce qui précède que dans les matières où les États d'Afrique noire francophone ayant édicté des règles de droit international privé n'ont pas légiféré, tout comme dans les États qui n'ont pas adopté de textes comportant des règles de droit

56. Cf. article 15 de la loi n°11-080/AN-RM portant Code des personnes et de la famille.

57. Cf. articles 1090 à 1113 de la loi n°97-13 portant Code de la famille.

58. Cf. articles 840 à 853 du Code de la famille.

59. Cf. articles 707 à 732 de la loi n°2012-014 du 6 juillet 2012 portant modification de l'ordonnance n°80-16 du 31 janvier 1980 portant Code des personnes et de la famille.

international privé après leur accession à l'indépendance, les règles de droit international privé applicables sont celles qui étaient imposées dans ces États pendant la période de la domination française et qui ont été maintenues dans leurs ordres juridiques en vertu des dispositions constitutionnelles qui ont consacré le maintien à titre transitoire des règles de droit international privé français.

La troisième précision concerne les règles de droit international privé français qui ont été ou peuvent être la source d'inspiration des règles de droit international privé édictées ou à édicter par les États d'Afrique noire francophone. Sur ce point, rien n'interdit à ces États de s'inspirer de toutes les règles de droit international privé français en vigueur au moment de l'élaboration de leurs propres textes, c'est-à-dire aussi bien les règles de droit international privé français antérieures à leur accession à l'indépendance, que celles postérieures à celle-ci, même les plus récentes.

B. L'illustration de d'influence des règles de droit international privé français sur les législations des États d'Afrique noire francophone

Dire que les États d'Afrique noire francophone ont réceptionné les règles de droit international privé français comme source d'inspiration de leurs propres règles de droit international privé ne signifie pas qu'il y a identité ou convergence intégrale entre ces différentes règles. Dans de nombreuses matières en effet, les règles de droit international privé français sont différentes de celles édictées par les États d'Afrique noire francophone. L'étude de ces règles ne présente aucun intérêt pour notre travail. En revanche, l'étude des règles de droit international privé français et africain qui sont identiques ou convergentes est fort intéressante car dans ces hypothèses, il y a une forte présomption que les droits africains se sont inspirés du droit français. Ces règles de droit international privé sont relatives aux lois de police et de sûreté du for, à certaines règles de conflit de lois, aux règles relatives au fonctionnement de la règle de conflit et aux règles relatives à l'application de la loi étrangère.

S'agissant des lois de police et de sûreté du for, les droits gabonais, malien, centrafricain, sénégalais, togolais, ivoirien et congolais comportent une disposition identique à celle de l'article 3 alinéa 1 du Code civil français selon laquelle les lois de police et de sûreté obligent tous ceux qui habitent le territoire du for ou bien régissent tous les faits qui se produisent sur le territoire du for[60].

Pour ce qui est des règles de conflit de lois, celles qui vont retenir l'attention sont

60. Pour le droit gabonais (article 40 du Code civil (Première partie)) ; pour le droit malien (article 15 alinéa 3 du code des personnes et de la famille) ; pour le droit centrafricain (article 1090 du Code de la famille) ; pour le droit sénégalais (article 841 alinéa 2 du Code de la famille) ; pour le droit togolais (article 708 alinéa 2 du Code des personnes et de la famille) ; pour le droit ivoirien (article 3 alinéa 1 du Code des personnes et de la famille) et pour le droit congolais (article 820 alinéa 2 du Code de la famille).

relatives à l'état et la capacité des personnes, à la formation du mariage et à ses effets, aux délits et quasi-délits, et aux meubles et immeubles.

En droit français, l'état et la capacité des personnes sont régis par la loi nationale[61]. Les droits burkinabè, gabonais, sénégalais, togolais et béninois se sont inspirés de l'arrêt *Busqueta* qui a bilatéralisé en droit français la règle de conflit unilatérale consacrée par l'article 3 alinéa 3 du Code civil, et ont consacré des règles de conflit bilatérales soumettant l'état et la capacité des personnes à la loi nationale[62]. En revanche, les droits ivoirien, congolais, centrafricain et malien ont consacré des règles de conflit unilatérales[63] en soumettant l'état et la capacité des personnes respectivement aux lois ivoirienne, congolaise, centrafricaine et malienne. Mais comme en droit français avec l'article 3 alinéa 3 du Code civil qui est une règle de conflit unilatérale qui a été bilatéralisée par la jurisprudence française, ces règles de conflit unilatérales peuvent être aussi bilatéralisées par la jurisprudence de ces pays.

Relativement à la formation du mariage, le droit français distingue entre les conditions de fond et les conditions de forme. Les premières sont régies par la loi personnelle de chacun des époux[64], autrement dit, la loi nationale de chacun des époux. Les États d'Afrique noire francophone ayant édicté des règles de droit international privé relatives à la matière soumettent les conditions de fond du mariage à la même règle de conflit que le droit français, même si les textes ne sont pas formulés exactement de la même manière[65]. Les conditions de forme du mariage quant à elles sont régies en droit français par la loi du lieu de célébration du mariage[66], tout comme dans les États d'Afrique noire

61. Arrêt *Busqueta* préc.

62. Pour le Burkina Faso (articles 1013, 1017 à 1021 du Code des personnes et de la famille) ; pour le Gabon (article 32 alinéa 1 du Code civil (Première partie). L'alinéa 2 de l'article 32 dispose cependant que « *[p]euvent néanmoins être régis par la loi gabonaise, les nationaux des États étrangers qui y ont leur domicile depuis plus de cinq ans* ») ; pour le Sénégal (article 841 alinéa 3 du Code de la famille) ; pour le Togo (articles 708 alinéa 3 et 709 du Code des personnes et de la famille) ; pour le Bénin (articles 973, 997 à 1 000 du Code des personnes et de la famille).

63. Pour le droit ivoirien (article 3 alinéa 3 du Code des personnes et de la famille) ; pour le droit congolais (article 820 alinéa 3 du Code de la famille) ; pour le droit centrafricain (articles 1092 et 1093 du Code de la famille (même en cas de double nationalité)) ; pour le droit malien (article 15 alinéa 1 du Code des personnes et de la famille).

64. Cf. article 202-1 alinéa 1er du Code civil qui résulte de la loi du 17 mai 2013.

65. Pour le droit burkinabè (article 1022 du Code des personnes et de la famille : loi de la nationalité commune ou loi de la nationalité de chacun des époux en cas de nationalités distinctes) ; pour le droit gabonais (article 34 du Code civil (Première partie) : loi qui régit l'état de chacun des époux. Le droit gabonais refuse cependant la polygamie dans deux hypothèses : à l'étranger qui acquiert la nationalité gabonaise sans perdre sa nationalité d'origine si elle n'est pas admise dans sa première patrie ou si, étant admise, il y a renoncé ; à l'étranger qui acquiert la nationalité gabonaise et perd sa nationalité d'origine s'il est marié et que la polygamie n'était pas admise dans sa partie d'origine ou si, étant admise, il y avait renoncé) ; pour le droit centrafricain (article 1100 du Code de la famille : loi nationale de chacun des époux) ; pour le droit sénégalais (article 843 alinéa 1 du Code de la famille. Ce texte dispose que les conditions de fond du mariage sont appréciées selon la loi relativement à l'annulation du mariage et à ses effets. Il ne peut s'agir que de la loi nationale des époux ou de chacun des époux) ; pour le droit togolais (cf. article 712 alinéa 1 du Code des personnes et de la famille : loi nationale de chacun des époux) ; pour le droit béninois (article 931 alinéas 1 et 2 du Code des personnes et de la famille : loi nationale commune des époux ou loi nationale de chacun des époux en cas de nationalités différentes) ; pour le droit ivoirien (article 25 alinéas 1 de la loi du 26 juin 2019 relative au mariage : loi nationale de chacun des époux) ; pour le droit congolais (article 822 alinéa 1 du Code de la famille : loi nationale de chacun des époux)

66. Cf. article 202-2 du Code civil qui résulte de la loi du 17 mai 2013.

francophone qui ont édicté des règles de droit international privé relatives à la matière[67]. Relativement aux effets du mariage, le législateur français a retenu plusieurs règles de conflit dans le but de saisir toutes les hypothèses envisageables. Il est en effet prévu que lorsque les époux ont la même nationalité, la loi applicable aux effets du mariage est leur loi nationale commune, en application de l'article 3 alinéa 3 du Code civil. En revanche, lorsqu'ils sont de nationalité différente, la loi applicable est celle de leur domicile commun[68], et à défaut de domicile commun, la loi applicable est celle du for[69]. De nombreux États d'Afrique noire francophone qui ont édicté des règles de droit international privé relatives aux effets du mariage, ont opté comme le droit français pour une pluralité de règles de conflit, avec cependant de petites différences. Ces États peuvent être classés en deux groupes[70] sur la base de la similitude des règles de conflit de lois.

Le premier groupe est constitué du Burkina Faso et du Bénin. Dans ces deux droits[71], lorsque les époux ont la même nationalité, la loi applicable aux effets du mariage est leur loi nationale commune. En revanche, lorsqu'ils sont de nationalité différente, la loi applicable est celle du domicile commun, et à défaut du domicile commun actuel, la loi du dernier domicile commun pourvu que l'un des époux ait conservé ce domicile[72]. Lorsqu'aucun des critères de rattachement précédents n'est rempli, les effets du mariage sont régis par la loi du for.

Le deuxième groupe de pays est constitué de la Centrafrique, du Sénégal, du Togo et du Congo. Dans ces différents droits[73], lorsque les époux ont la même nationalité, la loi applicable est leur loi nationale commune. En revanche, lorsqu'ils sont de nationalité différente, la loi applicable est celle de leur domicile commun, et à défaut de domicile commun actuel, la loi de leur résidence commune[74]. Lorsqu'ils n'ont ni domicile commun

67. Pour le Burkina Faso (article 1023 du Code des personnes et de la famille) ; pour le Gabon (article 34 alinéa 1 du Code civil (Première partie) ; pour la Centrafrique (article 1101 alinéa 1 du Code de la famille) ; pour le Sénégal (article 843 alinéa 2 du code de la famille) ; pour le Togo (article 712 alinéa 2 du Code des personnes et de la famille) ; pour le Benin (article 982 alinéa 1 du Code des personnes) ; pour la Côte d'Ivoire (article 25 alinéas 1 et 2 de la loi du 26 juin 2019 relative au mariage) et pour le Congo (article 822 alinéa 2 du Code de la famille)

68. Arrêt *Rivière*, 17 avril 1953, préc. ; arrêt *Lewandowsky* : Cass. civ., 15 mars 1955, *Rev. crit. DIP* 1955, 320, note Battifol ; arrêt *Chemouni* : Cass. civ., 19 févr. 1963, *Rev. crit. DIP* 1963, 559, note G.H.

69. Arrêt *Tarwid* : Cass. civ., 15 mai 1961, *Rev. crit. DIP* 1961, 547, note Battifol.

70. Le Gabon est le seul État d'Afrique noire francophone dont les solutions se démarquent fondamentalement de celles du droit français. Le droit gabonais soumet en effet les effets du mariage à la loi gabonaise soit lorsque l'état de l'un des époux est régi par cette loi (Cf. article 36 du Code civil (Première partie), soit lorsque le mariage, célébré valablement au Gabon, n'est pas reconnu pour des raisons de fond ou de forme dans le pays étranger dont la loi régissait normalement l'état des époux à l'époque de la célébration du mariage de ces derniers (article 37 du Code civil (Première partie).

71. Pour le droit burkinabè (article 1024 du Code des personnes et de la famille) ; pour le droit béninois (article 983 du Code des personnes et de la famille).

72. Le critère de rattachement fondé sur le dernier domicile commun constitue le point de différence entre le droit français et les droits burkinabè et béninois.

73. Pour le droit centrafricain (article 1102 et 1104 du Code de la famille) ; pour le droit sénégalais (article 843 alinéa 3 et 846 du Code de la famille) ; pour le droit togolais (cf. article 713 du Code des personnes et de la famille) et pour le droit congolais (article 822 alinéa 3 du Code de la famille).

74. Le critère de rattachement fondé sur la résidence commune constitue le point de différence entre le droit français et les droits

ni résidence commune, les effets du mariage sont régis par la loi du juge saisi ou du for. En matière de délits et quasi-délits, la *lex loci delicti* consacrée en droit français par l'arrêt *Lautour*[75] a été reprise par le droit gabonais[76] qui est le seul à avoir édicté une règle de conflit relative à la matière.

En matière mobilière et immobilière, la règle de conflit bilatérale, la *lex rei sitae,* tirée par l'arrêt *Stewart c/ Marteau*[77] de l'article 3 alinéa 2 du Code civil qui ne vise que les immeubles, et étendue par la jurisprudence française aux meubles[78], a été consacrée par le droit gabonais aussi bien pour les immeubles que les meubles[79], et par les droits malien, centrafricain et ivoirien uniquement pour les immeubles[80].

Les règles relatives au fonctionnement de la règle de conflit concernent le renvoi au premier degré et au second degré.

Sur le premier point, la solution de la jurisprudence française qui admet le renvoi au premier degré[81] a été adoptée par les droits[82] burkinabè, centrafricain, sénégalais, togolais et congolais. Sur le second point, la solution de la jurisprudence française qui admet le renvoi au second degré[83] a été adoptée par le droit burkinabè[84] qui est le seul droit des États d'Afrique noire francophone à avoir édité une règle de droit international privé relative à la question.

Les règles relatives à l'application de la loi étrangère concernent la charge d'établir le contenu de cette dernière et son éviction en raison de sa contrariété à l'ordre public du for ou de la fraude au droit du for.

Relativement à la charge d'établir le contenu de la loi étrangère, la jurisprudence

centrafricain, sénégalais, togolais et congolais.

75. Cass. civ., 25 mai 1948 préc.

76. Cf. article 41 du Code civil (Première partie).

77. Cass. civ., 14 mars 1837 préc.

78. Cass. req., 19 mars 1872, 1, DP 1874. 1. 475, S. 1872, 1, 238 ; Cass. req., 24 mai 1933 : arrêt *Kantoor de Mas* : Cass. req., 24 mai 1933, *S.* 1935, 1, 253, note H. Batiffol ; *Rev. ctit. DIP* 1934, 142, note J. P. N. ; Cass. civ., 1er, 8 juillet 1969, Sté DIAC, *GADIP*, n°48 ; *Rev. crit. DIP* 1971, 75, note Ph. Fouchard ; *JDI* 1970, 916, note Derruppé ; *JCP* 1970, II, 16 182, note H. Gaudemet-Tallon.

79. Cf. article 44 du Code civil (Première partie).

80. Pour le droit malien (article 15 alinéa 2 du Code des personnes et de la famille) ; pour le droit centrafricain (article 1091 du Code de la famille) et pour le droit ivoirien (article 3 alinéa 2 du Code des personnes et de la famille).

81. Cass. civ., 24 juin 1878, *Forgo* préc. ; Cass. req., 9 mars 1910, Soulié, *RDIP* 1910, 870. ; Cass. req, 10 mai 1939, *Birchall*, *S.* 1942, 1, 73, note Niboyet.

82. Pour le droit burkinabè (article 1005 alinéa 2 du Code des personnes et de la famille) ; pour le droit centrafricain (article 1097 du Code de la famille) ; pour le droit sénégalais (article 852 du Code de la famille) ; pour le droit togolais (article 732 du Code de la famille) et pour le droit congolais (article 830 du Code de la famille).

83. Cass. civ., 7 mars 1938, *De Marchi*, *Rev. crit. DIP* 1938, 472, note H. Batiffol ; Cass. civ. 1er févr. 1972, *Rougeron*, *Rev. crit. DIP* 1973, 313, note Droz.

84. Cf. article 1005 alinéa 3 du Code des personnes et de la famille.

française a admis dans un premier temps que cette charge pesait essentiellement sur le demandeur, plus précisément sur l'auteur de la prétention soumise à la loi étrangère[85], et que le juge n'était pas tenu de rechercher d'office la teneur de la loi étrangère[86]. Après la parenthèse des arrêts *Rebouh* et *Schule*[87], puis *Coveco*[88] et *Mutuelles du Mans*[89] qui opéraient une distinction entre droits disponibles et indisponibles[90], la Cour de cassation française a, dans deux arrêts du 18 juin 2005[91], mis fin au régime qu'elle avait instauré en matière de droits disponibles, et a généralisé l'obligation pour le juge de rechercher d'office le contenu de la loi étrangère. Les droits centrafricain, sénégalais, togolais et congolais, dont les textes comportant les règles de droit international privé sont antérieurs aux arrêts de la Cour de cassation du 18 juin 2005 susvisés, se sont logiquement alignés sur la solution adoptée en droit français par la jurisprudence *Lautour* qui date du 25 mai 1948[92], en disposant que le contenu de la loi étrangère est établi par le plaideur qui s'en prévaut et, au besoin, à la diligence du juge[93].

Sur la question de la contrariété de la loi étrangère désignée par la règle de conflit du for à l'ordre public du for, les droits burkinabè, gabonais, centrafricain, sénégalais, togolais et congolais se sont tous alignés sur la solution posée en droit français par l'arrêt *Lautour*[94] selon laquelle dans une telle hypothèse, la loi étrangère contraire à l'ordre public du for doit être évincée et remplacée par la loi du for[95]. Enfin, sur la question de la fraude à la loi, le droit français a connu une évolution. Dans un premier temps, la jurisprudence a sanctionné dans l'arrêt *Princesse de Beauffremont*[96] la fraude à la loi française et marqué son hostilité à la sanction de la fraude à la loi étrangère dans l'arrêt

85. Voir Cass. civ., 25 mai 1948, *Lautour* préc.

86. Cass. civ., 1re, 13 juin 1967, Bull. civ. I, n° 212, p. 154.

87. Cass. civ., 1re, 11 octobre 1988 et 18 octobre 1988, *Rev. crit. DIP* 1989, 368, *JDI* 1989, 349, note Alexandre ; *JCP* 1989, II 21 327, note Courbe.

88. Cass. civ., 1re, 4 décembre 1990, *JDI,* 1991, 372, note Bureau ; *Rev. crit. DIP* 1991, 558, note Niboyet-Hoegy.

89. Cass. civ., 1re, 26 mais 1999, *Rev. crit. DIP* 1999, 707, 1er espèce, note Muir Watt.

90. Pour les droits disponibles, la charge de la preuve de la loi étrangère pesait encore sur les parties, mais c'était à celle qui se prévalait de la loi étrangère qu'il incombait de rapporter la preuve de la différence entre cette loi et la loi française, faute de quoi c'est cette dernière qui était appliquée. S'agissant en revanche des droits indisponibles, la jurisprudence imposait au juge l'obligation de rechercher d'office le contenu de la loi étrangère.

91. Cass. civ., 1re, 28 juin 2005 et Cass. com., 28 juin 2055, *Rev. crit. DIP* 2005, 645, note B Ancel et H. Muir Watt. ; *D*. 2005, pan. 2748, obs. H. Kenfack ; *D*. 2006, pan. 1495, obs. Courbe et Jault-Seseke.

92. Pour le droit centrafricain (article 1094 alinéa 1 du Code de la famille) ; pour le droit sénégalais (article 850 alinéa 1 du Code de la famille) ; pour le droit togolais (article 728 alinéa 1 du Code de la famille) ; pour le droit congolais (article 828 alinéa 1 du Code de la famille).

93. Cependant, contrairement à la Centrafrique, au Sénégal, au Togo et au Congo qui se sont alignés sur la jurisprudence *Lautour*, le Burkina Faso, dont le Code civil est de 1989, date antérieure aux arrêts de la Cour de cassation du 18 juin 2005, a anticipé sur la solution adoptée par ces arrêts en décidant que le contenu du droit étranger est établi d'office (article 1008 alinéa 1 *in limine* du Code des personnes et de la famille).

94. Arrêt préc. Cette jurisprudence a été confirmée par l'arrêt Patino : Cass. civ., 1re, 15 mai 1963, 1er arrêt, *GADIP*, n° 38.

95. Pour le droit burkinabè (article 1010 du Code des personnes et de la famille) ; pour gabonais (article 30 du Code civil (Première partie)) ; pour le droit centrafricain (article 1095 du Code de la famille) ; pour le droit sénégalais (article 851 alinéa 1 du Code de la famille) ; pour le droit togolais (article 730 du Code de la famille) ; pour le droit congolais (article 829 alinéa 1 du Code de la famille).

96. Cass. civ., 18 mars 1878, *GADIP*, n° 6 ; *JDI* 1878. 505 ; S. 1878. 1. 193, note C. Levillain.

Mancini[97]. Mais par la suite, elle a affirmé que l'exception de fraude devait jouer, que la loi fraudée soit française ou étrangère[98]. Les droits burkinabè, gabonais, centrafricain, sénégalais, togolais et congolais se sont alignés sur la solution ancienne posée par l'arrêt *Princesse de Beauffremont* qui se limite à la sanction de la fraude à la loi du for[99].

97. Cass. civ., 5 févr. 1929, *S.* 1930, 1, 181, note Audinet ; Paris 12 décembre 1963, *JDI* 1965, 122, obs. Bredin.

98. Cass. civ., 17 mai 1983, *Rev. crit. DIP* 1985, 346, note Ancel ; Cass. civ., 2 octobre 1984, *JDI* 1985, 495, note Audit, *Rev. crit. DIP* 1986, 91, note Jobard-Bachellier.

99. Pour le droit burkinabè (article 1011 du Code des personnes et de la famille) ; pour gabonais (article 31 du Code civil (Première partie)) ; pour le droit centrafricain (article 1095 du Code de la famille) ; pour le droit sénégalais (article 851 alinéa 1 du Code de la famille) ; pour le droit togolais (article 730 du Code de la famille) ; pour le droit congolais (article 829 alinéa 1 du Code de la famille).

THE WEALTH OF REGIONAL COURTS IN AFRICA: AN OUTSIDER'S PERSPECTIVE

by August Reinisch* and Maria José Escobar Gil**

Africa has a remarkably rich regional cooperation landscape. It is home to more than 15 regional economic communities and organizations.[1] Some of them possess sophisticated, independent judicial bodies tasked with settling a variety of disputes, ranging from inter-institutional disputes to disputes instituted by Member States, individuals and the regional organizations themselves. Due to space constraints, this article will examine only five African regional courts belonging to the Economic Community of West African States, the East African Community, the Common Market for Eastern and Southern Africa, the West African Economic and Monetary Community, and the South African Development Community. These five were selected based on their accessibility and the extent of their activities.

Economic Community of West African States

The Economic Community of West African States ('ECOWAS') was established in May 1975 in order to 'foster the ideal of collective self-sufficiency for its member states' and to form a unified trading block.[2] The ECOWAS constituent treaty foresaw a community tribunal tasked with overseeing the interpretation of the instrument.[3] However, it was not until 1991 that a Community Court of Justice (and not a tribunal) was established through a protocol ('1991 Protocol').[4] Since it actually started operating in 2001,[5] the ECOWAS Court has experienced important reforms, most notably through a 2005 Protocol,[6] modifying the 1991 Protocol and expanding the Court's jurisdiction. As

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1. Philomena Apiko and others, 'Regional Organisations in Africa. What are the Political Economy Dynamics?' European Centre for Development Policy Management Synthesis Report, 2022, available at: https://ecdpm.org/application/files/7416/6426/6763/PEDRO-Spark-1.-Overview.pdf , p. 1.

2. ECOWAS, 'About ECOWAS', available at: https://www.ecowas.int/about-ecowas/

3. Articles 4(1)(d), 11 Treaty of the Economic Community of West African States (adopted 18 May 1975, entered into force 28 May 1975) 1010 UNTS 17.

4. Protocol on the Community Court of Justice (adopted 6 July 1991, entered into force 5 November 1996) 2375 UNTS 178 ('Protocol on the Community Court of Justice'); Salomon T. Ebobrah 'Court of Justice of the Economic Community of West African States (ECOWAS)' in Hélène Ruiz Fabri (ed.) *Max Planck Encyclopedia of International Procedural Law*, online edn., May 2019, para. 4.

5. Franca Ofor 'Presentation on the Community Court of Justice', p. 1, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/StrasbourgPresentations/ecowas-court.docx

6. Supplementary Protocol amending the Protocol on the Community Court of Justice, ECOWAS document A/SP.1/01/05, 19 January 2005 ('2005 Supplementary Protocol').

will be discussed below, the 2005 Protocol granted the ECOWAS Court jurisdiction to hear human rights cases, although it did not give individuals direct standing in disputes involving a Member State's failure to fulfill an ECOWAS obligation.

Jurisdiction of the Court

According to the modified 1991 Protocol, the ECOWAS Court is competent to examine cases brought by either Member States or the President of the ECOWAS Commission concerning the failure of Member States to fulfill their ECOWAS obligations;[7] and cases concerning the determination of the legality of ECOWAS acts brought by either Member States, the ECOWAS Council of Ministers or the President of the ECOWAS Commission.[8] The ECOWAS Court can also decide on disputes regarding the interpretation and application of the ECOWAS Treaty, instruments and acts;[9] as well as those involving the non-contractual liability of ECOWAS, and actions for damages against a Community institution or an official of the Community for acts or omissions in the exercise of their official functions.[10]

The ECOWAS Court can adjudicate on staff disputes (after the exhaustion of appeal processes available under the ECOWAS staff rules and regulations),[11] and cases submitted by individuals concerning violations of human rights in the territory of ECOWAS Member States.[12] Moreover, private persons can also access the ECOWAS Court for the determination of a conduct of ECOWAS officials that violates their rights.[13]

National courts can refer to the ECOWAS Court an issue for interpretation (at their own initiative or at the request of the party to a dispute) whenever there is a question involving the interpretation of the ECOWAS Treaty and other Protocols or regulations.[14] Moreover, ECOWAS institutions, the President of the ECOWAS Commission, and Member States may all request the ECOWAS Court to issue advisory opinions.[15]

Parties can conclude an agreement where it is provided that the ECOWAS Court

7. Articles 9(1)(d), 10(a) Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol. The 2005 Supplementary protocol refers to the Executive Secretary. However, the ECOWAS Executive Secretariat was transformed into the ECOWAS Commission following institutional reform in 2006. See: Article 1 Supplementary Protocol Amending the Revised Treaty, A/SP.1/06/06, 14 June 2006
8. Articles 9(1)(c) and 10(b) Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol.
9. Ibid., Article 9(1)(a)(b).
10. Ibid., Article 9(1)(g), (2).
11. Ibid., Article 9(1)(f); Article 10(e).
12. Ibid., Articles 9(4) and 10 (d).
13. Ibid., Article 10(c).
14. Ibid., Article 10(f).
15. Ibid., Article 11.

will settle disputes arising from it,[16] while the ECOWAS Authority of Heads of State and Government can vest the Court with power to hear any other case that does not fit in those provided in the modified 1991 Protocol.[17] Lastly, the ECOWAS Court also has the power to act as an 'arbitrator' until an ECOWAS Arbitral Tribunal foreseen in the revised treaty[18] is established.[19]

Practice

The ECOWAS Court has been described as 'one of the crown jewels of the [regional] integration process',[20] having reportedly delivered 402 judgments on a total of 678 cases between 2001 and January 2024.[21] However, the ECOWAS Court's contribution to the West African integration process has less to do with trade than with human rights. Indeed, the ECOWAS Court has earned recognition for its human rights mandate.[22] Of the more than 300 cases available through the Court's database[23] and official law reports,[24] a notable majority originate from human rights complaints against ECOWAS Member States. Aside from these types of cases, some of the publicly available decisions also deal with staff disputes,[25] disputes arising from agreements to which the ECOWAS or its institutions are parties,[26] and advisory opinions.[27] It is interesting to note that the ECOWAS

16. Ibid., Article 9(6).

17. Ibid., Article 9(8).

18. Article 16 Revised Treaty of the Economic Community of West African States (adopted 24 July 1193, entered into force 23 August 1995) 2373 UNTS 233.

19. Article 9(5) Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol.

20. Olu Jacobs, '20 Years of the ECOWAS Court of Justice', Premium Times, 24 September 2022, available at: https://www.premi-umtimesng.com/opinion/555841-20-years-of-the-ecowas-court-of-justice-by-olu-jacobs.html?tztc=1

21. Adoba Echono, 'ECOWAS Court records highest number of Judgments in 2023', Voice of Nigeria, 30 January 2024, available at: https://von.gov.ng/ecowas-court-records-highest-number-of-judgments-in-2023/

22. Solomon T. Ebobrah 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' *Journal of African Law* vol. 54 (2010), pp. 1-25; Karen J. Alter, Laurence R. Helfer, Jacqueline R. McAllister 'A New International Human Rights Court for West Africa: the Ecowas Community Court of Justice' *AJIL* vol. 107 (2013), pp. 737-779; Cassandra Betts 'An analysis of the ECOWAS Community Court of Justice's Treatment of Right to Life Claims from 2015-2022' CHRLP Working Paper Series, vol. 11 (2022), p. 4

23. The database can be accessed through this link: http://www.courtecowas.org/decisions-3/

24. There are nine Law Reports available through the ECOWAS Court website, covering the years 2004- 2017. They can be found through this link: http://www.courtecowas.org/law-reports/

25. See for example: *Komlan Raymond Koudo v. ECOWAS Parliament*, ECOWAS Court of Justice, ECW/CCJ/JUD/39/21, judgment of 27 October 2021; *Francis Elie Gnimagnon and others v. The ECOWAS Commission*, ECOWAS Court of Justice, ECW/CCJ/JUD/15/22, judgment of 28 March 2022.

26. See for example: *Vision kam Jay Investment Limited v. President of the Commission & ECOWAS Commission,* ECOWAS Court of Justice, ECW/CCJ/JUD/24/16, judgment of 6 October 2016; *ECOWAS Bank for Investment and Development v. Cross River State*, ECOWAS Court of Justice, ECW/CCJ/JUD/01/21, judgment of 5 February 2021.

27. The ECOWAS Court has rendered at least three advisory opinions, all three resulting from requests submitted by either the President of the ECOWAS Commission or its predecessor, the ECOWAS Executive Secretary. See: *Request for advisory opinion from the Executive Secretary of ECOWAS, relating to Article 23(11) of the Rules of Procedure of the Community Parliament and the provisions of Article 7(2) and 14 (2)(f) of the Protocol on the Community Parliament,* ECOWAS Court of Justice, ECW/CCJ/ADV. OPN/01/05, opinion of 5 December 2005; *Request for Advisory Opinion Sought by the President of Ecowas Commission on Renewal of the Tenure of Director General and Deputy Director General of Giaba*, ECOWAS Court of Justice, ECW/CCJ/ADV.OPN/ 01/

Court has been described as having a 'narrower mandate for economic cases'[28] due to Member States and ECOWAS officials being the only ones entitled to submit complaints regarding Member States' failure to fulfill ECOWAS obligations.[29] Perhaps because of this, private parties have also made use of the ECOWAS's Court human rights mandate to submit actions against Member States regarding regional economic integration.[30]

Concerning the ECOWAS Court's human rights jurisdiction, it should be highlighted that private persons have brought human rights complaints against the Community itself, although the Protocol does not expressly provide standing for ECOWAS in such cases.[31] In fact, the ECOWAS Court has taken different stances on whether human rights complaints can be brought against the Community at all. On the one hand, the ECOWAS Court has held that '[it is settled law that] all claims for human rights violations brought before [the EOWAS] Court must be against the proper parties who are States, not institutions within the Community'[32] because only States have ratified the relevant human rights instruments.[33] On the other hand, the ECOWAS Court has also asserted that

> '[…] within the ECOWAS Community, apart from Member States, other entities that can be brought to this Court for alleged violation of human rights are the institutions of the Community because, since they cannot, as a rule, be sued before the domestic jurisdiction, the only avenue left to the victims for seeking redress for grievance against those institutions is the Community Court of Justice.'[34]

08, opinion of 16 June 2008; *Advisory Opinion Requested by the President of the Ecowas Commission*, ECOWAS Court of Justice, ECW/CCJ/ADV.OPN/01/16, opinion of 6 December 2016.

28. Karen J. Alter, Laurence R. Helfer, Jacqueline R. McAllister 'A New International Human Rights Court for West Africa: The Ecowas Community Court of Justice' *AJIL* vol. 107 (2013), pp. 737-779, at p. 756.

29. *Ibid.,* p. 757-758; Article 10(a) Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol.

30. Solomon T. Eborah 'The ECOWAS Community Court of Justice: a dual Mandate with Skewed Authority' in Karen Alter and others (eds.) *International Court Authority*, Cambridge, Cambridge University Press, 2018, pp. 82-102, p. 100. See for example: *Femi Falana and another v. the Republic of Benin and others*, ECOWAS Court of Justice, ECW/CCJ/JUD/02/12, judgment of 24 January 2012; *Sunday Charles Ugwuaba v. State of Senegal*, ECOWAS Court of Justice, ECW/CCJ/JUD/25/19, judgment of 28 June 2019.

31. Article 10(d) Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol. This Article states that individuals have access to the Court 'on application for relief for violation of their human rights; the submission of application for which shall: i. Not be anonymous; nor ii. Be made whilst the same matter has been instituted before another International Court for adjudication.'

32. See for example: *Dorothy Etim v. President of the Commission and the Commission*, ECOWAS Court of Justice, ECW/CCJ/JUD/03/24, judgment of 30 January 2024, para. 36.

33. *Marie Molmou and others v. Republic of Guinea*, ECOWAS Court of Justice, 2016, p. 349, as reported in *Dorothy Etim v. President of the Commission* (fn 32), para. 35. The same line of reasoning was applied by the ECOWAS Court in a case involving the Central Bank of West African States: *Bama Boubie and others v. Ivory Coast*, ECOWAS Court of Justice, ECW/CCJ/JUD/05/18, 19 February 2018, pp. 4-5.

34. See: *Peter David v. Ambassador Ralph Uwechue*, ECOWAS Court of Justice, ECW/CCJ/RUL/03/10, ruling of 11 June 2010, para. 47; *SERAP v. Nigeria*, ECOWAS Court of justice, ECW/CCJ/APP/08/09, ruling of 10 December 2010, paras. 71, 72; *Hembadoon Chia and others v. Nigeria and another*, ECOWAS Court of Justice, ECW/CCJ/JUD/21/18, judgment of 3 January 2018, p. 14. The Court also referenced this quote to establish that institutions of the Community could be sued in: *Sarah Kingsley Odoro v. ECOWAS Commission and two others*, ECOWAS Court of Justice, ECW/CCJ/JUD/06/21, judgment 10 March 2021, para. 61.

It is important to point out that the ECOWAS Court addressed this already in passing in a 2015 judgment concerning an application for revision.[35] It stated that the ECOWAS Court should not have entertained a human rights application as it was filed in the first place, considering it was also submitted against entities that were not States.[36] The ECOWAS Court concluded that the application against the ECOWAS and its institutions should have been 'one for damages for acts or omissions of a Community Institution or Official in the performance of official duties or functions (Article 9(2) of the 2005 Protocol on the Community Court of Justice) or for annulment of the measures taken against her by her employer (Article 10 (c) of the 2005 Protocol).'[37]

East African Community

The Treaty for the Establishment of the East African Community ('EAC Treaty') entered into force in July 2000. According to the EAC Treaty, one of the aims of the EAC is to strengthen the EAC 'partner' States' economic, social, cultural, political and technological ties in order to ultimately form a political federation.[38] As such, the East African Court of Justice ('EACJ'), one of the organs of the EAC,[39] is tasked with ensuring 'adherence to law in the interpretation and application of and compliance with [the EAC Treaty].'[40] The EACJ became operational in November 2001[41] and heard its first case in 2005.[42] Since the EAC Treaty's amendment in 2007,[43] the EACJ consists of a first instance division and a second instance division, competent to hear appeals of decisions issued by the former.[44]

Jurisdiction

The EACJ has jurisdiction over the interpretation and application of the EAC Treaty, as well as 'any other' jurisdiction determined by the EAC Council.[45] So far, a

35. *Rose Mbatomon Ako v. the West African Monetary Agency and others*, ECOWAS Court of Justice, ECW/CCJ/JUD/28/15, judgment of 2 December 2015.
36. Ibid., paras. 9.7, 9.8.
37. Ibid., para 9.7.
38. Preamble Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000, amended 20 August 2007), 2144 UNTS 255 ('EAC Treaty').
39. Ibid., Article 9(1) (e) EAC Treaty.
40. Ibid., 23(1) East African Treaty
41. East African Court of Justice, 'About us', available at: https://www.eacj.org/?page_id=19#
42. Justice Initiative, 'Fact Sheet: East African Court of Justice', June 2023, available at: https://www.justiceinitiative.org/uploads/9b05fd31-bffa-41d5-af36-de7432c6a125/fact-sheet-east-african-court-justice-20130627.pdf
43. Harrison Otieno Mbori, 'Preliminary Ruling: East African Court of Justice (EACJ)', in Hélène Ruiz Fabri (ed.) *Max Planck Encyclopedia of International Procedural Law*, online edn., June 2023, para. 2.
44. Article 23(3) EAC Treaty.
45. Article 27 EAC Treaty. The Treaty specifically mentions the possibility of the EAC Council granting the EACJ human rights jurisdiction. The EAC Council has not done so yet.

protocol concluded in 2015 foresees the extension of the EACJ's jurisdiction to cover certain trade and investment issues, as well as cases involving the EAC's Monetary Union Protocol.[46] Interestingly, when deciding on the protocol, the EAC Summit chose to not give the EACJ explicit jurisdiction to hear human rights issues but requested consultations with the African Union on this matter.[47] However, since its 2007 landmark case of *James Katabazi and others v. Uganda and another,* the EACJ has found a way to hear human rights cases through a creative reading of its interpretation powers.[48] In the *Katabazi* case, the EACJ recognized that it may not 'adjudicate on disputes concerning violation of human rights *per se*',[49] but also clarified that it would not 'abdicate its jurisdiction of interpretation […] merely because the reference includes allegations of human rights violation.'[50] As such, the Court used the complainant's request for interpretation of Articles 6(d), 7(2), and 8(1)(c) of the EAC Treaty to affirm its jurisdiction to hear the case, which involved human rights complaints. Perhaps it is useful to point out that the first two articles refer to the fundamental and operational principles of the EAC, more concretely to good governance, which includes democracy, the rule of law, and the recognition, promotion, and protection of human rights following the provisions of the African Charter on Human and Peoples' Rights.[51] Similarly, Article 8(1)(c) obliges Partner States to 'abstain from any measures likely to jeopardize the achievement of [EAC] objectives'.[52] To put it another way, in the *Katabazi* case, the EACJ concluded that its jurisdiction to interpret the EAC Treaty enabled it to hear at least certain human rights cases.

Additionally, EAC Partner States may refer a matter to the court when they consider that another Partner State or an EAC organ or institution either failed to fulfill a community obligation or infringed the EAC Treaty,[53] or when they seek to determine the illegality of an EAC action because it is *ultra vires*, contrary to the EAC Treaty, the rule of law or an abuse of power.[54] The Secretary-General may also refer matters to the EACJ after fulfilling certain conditions whenever he or she considers that a Partner State has breached the EAC Treaty or failed to fulfill its obligations arising from it.[55]

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46. *Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice* (adopted 20 February 2015), available at: http://repository.eac.int . Local media reports that, as of March 2024, the protocol has not been ratified by all EAC Partner States, which according to Article 5 of the Protocol, is a requirement of its entry into force: Luek Anami 'Uganda, Burundi delay protocol to give EACJ teeth', The East African, 23 March 2024, available at: https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-burundi-delay-protocol-to-give-eacj-teeth-4565940 .
47. EAC IRC Repository, Communiqué the 15th Ordinary Summit of the EAC Heads of State (30 November 2013), para. 16.
48. *James Katabazi and others v. Uganda and another*, EACJ, ref. no. 1 of 2007, judgment of 1 November 2007, pp. 14-16.
49. Ibid., p. 15.
50. Ibid., p. 16.
51. Articles 6(d), 7(2) EAC Treaty.
52. Ibid., Article 8(1)(c).
53. Ibid., Article 28(1).
54. Ibid., Article 28(2).
55 Ibid., Article 29.

Private persons residing in a Partner State may seize the EACJ in order to determine the legality of an act of a Community institution or Partner State (except when the act in question was reserved to an institution of a Partner State through the EAC Treaty) on the grounds that the act is unlawful or infringes the EAC Treaty.[56] The Court can also hear disputes between the EAC and its employees if they arise from the employment terms and conditions or the interpretation of the pertinent staff rules and regulations.[57] It may also hear matters arising from 'arbitration' clauses in contracts or agreements to which the Community or its institutions are a party, as well as disputes between Partner States concerning the EACJ Treaty and covered by a special agreement granting jurisdiction to the EACJ, or concerning commercial contracts or agreements by which parties have done the same.[58]

Courts from Partner States can also request preliminary rulings from the EACJ if they consider they are necessary for them to reach a judgment on an issue involving the EAC Treaty or the validity of any EAC acts.[59] Lastly, the EAC Summit, Council, or Partner States may request advisory opinions from the EACJ for matters involving the EAC Treaty and affecting the Community.[60]

Practice

The EACJ has pronounced an ambitious vision of being 'a world class Court dispensing Justice for a united and prosperous Community.'[61] To do this and to enhance access to the Court, the EACJ has introduced rotational court sessions in its Partner States.[62] In its first 20 years, the EACJ received almost 640 cases, with the majority reportedly involving human rights issues.[63] Until at least October 2019, ninety-five percent of the EACJ's caseload was reportedly human rights related,[64] a remarkable statistic for a judicial institution without an explicit human rights mandate.

56. Ibid., Article 30.
57. Ibid., Article 31.
58. Ibid., Article 32.
59. Ibid., Article 34.
60. Ibid., Article 36.
61. East African Court of Justice, 'EACJ 20th Anniversary Report 2001-2021', available at: https://www.eacj.org/wp-content/uploads/2022/11/THE-EAST-AFRICAN-COURT-OF-JUSTICE-Final-Report-letter.pdf, p. ix.
62. EACJ, 'EACJ Court Rotational Sessions se to take off in Kampala', 1 November 2022, available at: https://www.eacj.org/?news=eacj-court-rotational-sessions-set-to-take-off-in-kampala
63. See: 'East African Court of Justice Remarks by hon. Justice Nestor Kayobera President of East African Court of Justice During a Judicial Dialogue between Regional and Sub Regional Courts in Africa', 27 June 2022, available at: https://www.african-court.org/wpafc/east-african-court-of-justice-remarks-by-hon-justice-nestor-kayobera-president-of-east-african-court-of-justice-during-a-judicial-dialogue-between-regional-and-sub-regional-courts-in-africa/
64. Remarks by Alain Nsengiyumva, personal assistant to the president of the EACJ, Workshop on Regional Arrangements for the Promotion and Protection of Human Rights, 21-22 October 2019, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/Cooperation/2019/Geneva/Alain_Nsengiyumva.docx

The EACJ's dockets have received not only contentious cases but also requests for both advisory opinions[65] and a preliminary ruling.[66] Furthermore, aside from human rights matters, the EACJ has heard submissions on areas such as the EAC Customs Union and Common Market,[67] labor disputes between the EAC and its staff,[68] and obligations of the EAC Secretary General.[69]

Common Market for Eastern and Southern Africa

According to the Treaty Establishing the Common Market for Eastern and Southern Africa ('COMESA Treaty'), COMESA was set up in order 'to strengthen and achieve convergence of [Member States] economies through the attainment of a full market integration.'[70] The COMESA Treaty foresees in Article 7 a Court of Justice ('COMESA Court of Justice'),[71] which received its first case in 1999[72] and has both a first instance and an appellate division.[73] The COMESA Court of Justice is tasked with '[ensuring] the adherence to law in the interpretation and application of [the COEMSA] Treaty',[74] and can adjudicate on all matters referred to it pursuant to the COMESA Treaty.[75]

Jurisdiction of the Court

Member States may bring actions to the Court against the COMESA Council or other Member States for failing to fulfill a COMESA obligation or for the infringement of the COMESA Treaty.[76] They may also seize the COMESA Court to challenge the legality of any act of the COMESA Council because it is *ultra vires*, contrary to the COMESA Treaty or the rule of law or an abuse of power.[77]

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65. See: *Request by the Council of Ministers of the East African Community for an Advisory Opinion,* EACJ, app. no. 1/2008, opinion of 24 April 2009; *Request by the Council of Ministers of the East African Community for an Advisory Opinion Made Pursuant to Articles 14 (4) And 36 of the Treaty for the Establishment of the East African Community and Rule 75 (4) of the East African Court of Justice Rules of Procedure*, EACJ, app. no. 1/2015, opinion of 19 November 2015.
66. *The AG of Ruanda v. Tom Kyahurwenda,* EACJ, case stated no. 1/2014, preliminary ruling of 31 July 2015.
67. See for example: *British American Tobacco (U) Ltd v. Attorney General of Uganda*, EACJ, ref. no. 7/2017, judgment of 26 March 2019; *OLA Energy Uganda limited v. The Attorney General of the Republic of Uganda*, EACJ, ref. no. 6/2020, judgment of 11 October 2024.
68. See for example: *Angela Amudo v. the Secretary General of the East African Community,* EACJ, claim no. 1/2012, judgment of 26 September 2014.
69. *East African Law Society v. the Secretary General of EAC*, EACJ, ref. no. 7/2014, judgment of 22 March 2016.
70. Preamble Treaty establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 8 December 1994) 2314 UNTS 265 ('COMESA Treaty').
71. Ibid., Article 7(1)(c).
72. COMESA, 'COMESA Annual Report 2009', available at: https://www.comesa.int/wp-content/uploads/2019/02/2009-Comesa-Annual-Repport.pdf, p. 82
73. Article 19(2) COMESA Treaty.
74. Ibid., Article 19(1).
75. Ibid., Article 23.
76. Ibid., Article 24 (1).
77. Ibid., Article 24 (2).

Furthermore, the Secretary-General may submit a matter to the Court after fulfilling certain conditions whenever it considers that a Member State has breached the COMESA Treaty or failed to fulfill its obligations arising from it.[78]

Persons residing in COMESA member States can seize the COMESA Court of Justice in order to determine the legality of an act by the Council or a member State (after exhausting local remedies) because the act is unlawful or infringes the COMESA Treaty.[79] In addition, COMESA employees may bring suit against COMESA for disputes arising from the Staff rules and employment contracts.[80] Moreover, damages claims can be brought by any person to the COMESA Court of Justice against COMESA or its institutions for acts of their employees in the performance of their duties.[81]

National courts may (or must, whenever there is no judicial remedy against the judgment to be pronounced) request preliminary rulings regarding the application or interpretation of the COMESA Treaty or the validity of COMESA acts.[82] The COMESA Authority, the Council, or a Member State can request advisory opinions from the COMESA Court of Justice for questions of law relating to the COMESA treaty and affecting COMESA.[83]

Lastly, the COMESA Court of Justice also has jurisdiction to hear disputes arising from an 'arbitration' clause in a contract that gives jurisdiction to the COMESA Court and to which COMESA or its institutions are a party, as well as disputes between Member States concerning the COMESA Treaty if such dispute is submitted under a special agreement.[84]

Practice

The COMESA Court of Justice database only holds a limited number of documents resulting from the Court's activities.[85] More concretely, it contains 37 documents[86] arising from around thirteen different disputes. This is clearly not a comprehensive sample, as by

78. Ibid., Article 25.
79. Ibid., Article 26.
80. Ibid., Article 27 (1).
81. Ibid., Article 27 (2).
82. Ibid., Article 30.
83. Ibid., Article 32.
84. Ibid., Article 28.
85. The COMESA Court of Justice database can be accessed through this link: https://comesacourt.org/court-decisions/
86. At least two documents seem to be repeated: *Eastern African Trade and Development Bank v. the Republic of Burundi,* COMESA Court of Justice, ref. no. 1/2006, judgment of 16 August 2006; *Eastern African Trade and Development Bank v. the Republic of Zambia*, COMESA Court of Justice, ref. no. 1/2010, order of 7 March 2011.

2009 the Court had already decided 50 cases.[87] The COMESA Court of Justice has also issued (at least) an advisory opinion,[88] which does not seem to be available online.

Commentators have highlighted the overall prominence of staff disputes in the COMESA Court of Justice's dockets.[89] However, out of the cases available through the database, only three deal with employment issues.[90] Other cases involve disputes between private parties and Member States[91] (also complaints filed by private parties against Member States and COMESA jointly);[92] COMESA institutions and Member States;[93] as well as non-employment-related disputes between private parties and COMESA.[94]

West African Economic and Monetary Union

The West African Economic and Monetary Union ('WAEMU'; also known by its French acronym, UEMOA) was created in 1994 to 'build a harmonized and integrated economic space in West Africa.'[95] The WAEMU Treaty foresees a Court of Justice as one

87. This number includes interlocutory applications. COMESA Annual Report 2009 (fn 72), p. 82.

88. Bedlu Asfaw Mehari 'COMESA Court Issues Landmark Advisory Opinion', 16 October 2015, available at:https://comesacourt.org/blog/2015/10/16/comesa-court-issues-landmark-advisory-opinion/#:~:text=on%205%20February%202015%20in,or%20entities%20and%20the%20Institutions

89. James Thuo Gathii 'The COMESA Court of Justice' in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and Michelle Q. Zang (eds.), *The Legitimacy of International Trade Courts and Tribunals*, Cambridge, Cambridge University Press, 2018, pp. 315- 348, at p. 314-315.

90. This can be evidence by the following judgments: *PTA Bank and another vs. Martin Ogang,* COMESA Court of Justice, ref. no. 1B/2000, judgment of 29 March 2001; *Kabeta Muleya v. COMESA and Erastus J.O. Mwencha*, COMESA Court of Justice, ref. no. 2/2001, judgment of 23 April 2001; *Collins Hwalimo Dube v. COMESA*, COMESA Court of Justice, ref. no. 1/2013, judgment of 11 May 2015.

91. *The Republic of Kenya and the Commissioner of Lands v. Costal Aquaculture ltd.,* COMESA Court of Justice, ref. no. 3/2000, judgment of 19 October 2001; *Standard Chartered Financial Services ltd. and others v. Court of Appeal for the Republic of Kenya*, COEMSA Court of Justice, ref. no. 4/2022, judgment of 20 November 2002; *INTELSOLMAC v. Rwanda Civil Aviation Authority*, COMESA Court of Justice, ref. no. 1/2009, judgment of 7 May 2010; *Polytol Paints and Adhesives Manufacturers co. ltd. v. the Republic of Mauritius*, COMESA Court of Justice, ref. no. 1/2012, judgment of 31 August 2013; *Malawi Mobile limited v. the Government of the Republic of Malawi and another*, COMESA Court of Justice, ref. no. 1/2015.

92. See for example: *Agiliss ltd v. The Republic of Mauritius and others*, COMESA Court of justice, ref. no. 1/2019, judgment 31 August 2022.

93. See for example: *Eastern African Trade and Development Bank v. the Republic of Burundi,* COMESA Court of Justice, ref. no. 1/2006, judgment of 16 August 2006*; Eastern African Trade and Development Bank v. the Republic of Zambia*, COMESA Court of Justice, ref. no. 1/2010, order of 7 March 2011. Both decisions result from disputes concerning the Bank's immunity.

94. See for example: *Malawi Mobile limited v. COMESA*, COMESA Court of Justice, ref. no. 1/2007, 15 August of 2018. This case concerned the eligibility of two COMESA judges following the case of *Malawi Mobile limited v. the Government of the Republic of Malawi and another* (fn 91). It also resulted in new decisions, relating, among others, to costs. See for example: *Malawi Mobile limited v. COMESA*, COMESA Court of Justice, tax cause 1/2018, ruling of 30 January 2019; *Malawi Mobile limited v. COMESA*, COMESA Court of Justice, tax appeal 1/2019, ruling of 3 September 2019; *Malawi Mobile limited v. COMESA*, COMESA Court of Justice, rev. app. 1/2019, ruling of 10 November 2019. Furthermore, both *Kabeta Muleya v. COMESA and Erastus J.O. Mwencha*, COMESA Court of Justice, ref. no. 1/2003, judgment of 4 April 2003 and *Kabeta Muleya v. COMESA,* COMESA Court of Justice, ref. no. 1/2003, judgment of 1 July 2003 concern a defamation lawsuit resulting from the labor case *Kabeta Muleya v. COMESA and Erastus J.O. Mwencha* (fn 90).

95. WAEMU, 'Presentation of WAEMU', available at: https://www.uemoa.int/en/presentation-of-uemoa

of the organs of the Union.[96] This Court was established in 1995[97] and is meant to ensure the interpretation and application of the WAEMU Treaty.[98]

Jurisdiction

Both Member States and the WAEMU Commission may, after the fulfillment of certain conditions, bring an action to the WAEMU Court if they consider that a Member State has not complied with its treaty obligations.[99] Moreover, private persons (when affected), Member States, the WAEMU Council or the WAEMU Commission may request the WAEMU Court to assess the legality of any binding WAEMU act.[100] The WAEMU Court may also decide on actions concerning decisions of the WAEMU Commission on competition matters,[101] as well as on disputes between WAEMU and its employees.[102] It has also exclusive jurisdiction to declare the non-contractual liability of WAEMU for damages caused by its organs or agents in the performance of their functions and can determine the liability of WAEMU staff for misconduct in the exercise of their functions at the request of WAEMU.[103] In addition, the WAEMU Court may act as an 'arbitrator' if there is an agreement between Member States to this effect (parties to the agreement may also choose the applicable procedure), and if the dispute concerns the interpretation or application of the WAEMU Treaty.[104]

As for advisory opinions, they can be given by the WAEMU Court for any draft text submitted by the WAEMU Commission, and, at the request of the Council of Ministers, the Commission, the Conference of heads of States or a Member State, for the application or interpretation of acts governed by Community law.[105] The WAEMU Commission, Council of Ministers, and Member States can also request the WAEMU Court to issue an opinion regarding the compatibility of an international agreement with the WAEMU Treaty.[106]

Lastly, the WAEMU Court is also open to national courts which may (or must, whenever there is no judicial remedy against the judgment to be pronounced) request

96. Article 16 Treaty on the West African Economic and Monetary Union (adopted 10 January 1994, entered into force 1 August 1994, revised 29 January 2003), available at: uemoa.int/

97. UEMOA, Cour de Justice: Mission, available at: https://courdejusticeuemoa.org/mission/

98. Article 1 Protocole Additionnel N°1 Relatif aux Organes de Controle de l'UEMOA, available at: https://courdejusticeuemoa.org/wp-content/uploads/2019/12/Protocole-additionnel.pdf

99. Article 15(1) Regulation relating to the Rules of Procedure before the Court of Justice of the West African Economic and Monetary Union, regulation No. 1/96/CM (5 July 1996) ('Rules of procedure WAEMU').

100. Ibid., Article 15(2).

101. Ibid., Article 15(3).

102. Ibid., Article 15(4).

103. Ibid., Article 15 (5).

104. Ibid., Article 15(8).

105. Ibid., Article 15(7)

106. Ibid.

preliminary rulings for issues concerning the WAEMU Treaty and WAEMU acts.[107]

Practice

The Court has been referred to as an 'administrative tribunal' and 'legal counsel' because of the number of advisory opinions it renders and labor disputes it hears.[108] There are currently 22 advisory opinions[109] and 54 judgments[110] available through the WAEMU Court's database. It is interesting to note that of the 54 judgments at least 21 concern labor matters.

From public information, it seems that most disputes heard by the court concern disputes between private persons and WAEMU or its institutions. Aside from these, the Court has received two cases submitted by private parties against WAEMU member States,[111] two cases between WAEMU Member States and WAEMU,[112] and six requests for preliminary rulings.[113] As for advisory opinions, only three have been requested by States,[114] the other 19 being requested by either WAEMU or its institutions.[115]

Southern African Development Community

The Southern African Development Community ('SADC') was established in 1992 through the Treaty of the Southern African Development Community[116] (amended in

107. Ibid., Article 15(6).

108. Ousseni Illy 'The WAEMU Court of Justice' in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and Michelle Q. Zang (eds.), *The Legitimacy of International Trade Courts and Tribunals*, Cambridge, Cambridge University Press, 2018, pp. 349 – 364 at p. 351.

109. The judgment database can be accessed through this link: https://courdejusticeuemoa.org/arrets/

110. The advisory opinion database can be accessed through this link: https://courdejusticeuemoa.org/avis/

111. *Sonitel s.a and Sahel com s.a v. Niger*, WAEMU Court of Justice, no. 1/2010, judgment of 16 June 2010; *El Hadji Aboubacar v. Niger*, WAEMU Court of Justice, no. 1/2013, judgment of 16 January 2013.

112. *Senegal v. WAEMU Commission*, WAEMU Court of Justice, no. 01/2017, judgment of 21 February 2017; *WAEMU Commission v. the Constitutional Court of Benin*, WAEMU Court of Justice, no. 005/2020, judgment of 8 July 2020. Ivory Coast was named as an applicant alongside an individual in proceedings instituted against the WAEMU Council and Commission in the case of *Laurent Gbagbo and Ivory Coast v. WAEMU Council and WAEMU Commission*, WAEMU Court of Justice, no. 01/2013, judgment of December 2013.

113. Four were requested by Burkina Faso, one from Togo and one from Senegal.

114. *Demande d'avis introduite par Le Ministre de la Justice de l'Etat du Burkina Faso relative à l'article 6 du Règlement no. 05/CM/UEMOA du 25 septembre 2014 relatif à l'harmonisation des règles régissant la profession d'avocat dans l'espace UEMOA*, WAEMU Court of Justice, no. 02/2020, opinion of 7 July 2020; *Demande d'avis introduite par la Ministre de la Justice de l'Etat du Burkina Faso relative aux articles 24, 27 et 30 du Règlement no. 005/CM/UEMOA du 25 septembre 2014 relatif à l'harmonisation des règles régissant la profession d'avocat dans l'espace UEMOA,* WAEMU Court of Justice, no. 01/2021, opinion of 25 October 2021; *Demande d'avis introduite par le Ministre de l'Economie et des Finances de l'Etat du Mali, relative a la conformite de la transposition de la Directive no. 04/2009/CM/UEMOA du 27 Mars 2009 instituant un guichet unique de depot des etats financiers dans les Etats membres de l'UEMOA dans la legislation fiscale malienne,* WAEMU Court of Justice, no. 01/2024, opinion of 10 January 2024.

115. Most of these opinions have been requested by the WAEMU Commission or its president.

116. Treaty of the Southern African Development Community (adopted 17 August 1992, entered into force 30 September 1993, amended 2001) 32 ILM 116 ('SADC Treaty').

2001),[117] with the goal of ensuring 'through common action, the progress and well-being of the people of Southern Africa'.[118] One of the organs of the SADC foreseen by the SADC Treaty is a Tribunal, tasked with '[ensuring] the adherence to and the proper interpretation of [the SADC Treaty] and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'[119] The SADC Treaty also prescribed that a Protocol would further specify the powers, functions and other matters related to the Tribunal.[120] This protocol finally became a reality in 2000 ('2000 Protocol'),[121] and the SADC Tribunal received its first case in 2007.[122]

In 2012, the SADC Tribunal was indefinitely suspended when the SADC Summit of Heads of State resolved that a 'new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.'[123] This decision followed significant pushback from the government of Zimbabwe after a set of unfavorable human rights decisions initiated by the case of *Campbell and others v. Zimbabwe*[124] and stemming from the country's controversial land reform. In practice, Zimbabwe challenged the Tribunal's existence arguing that the 2000 Protocol was not in force.[125]

Jurisdiction

The Tribunal had jurisdiction over all disputes relating to the interpretation and application of the SADC Treaty and other SADC acts (as well as their validity),[126] and matters covered by agreements between States or States and the Community that conferred jurisdiction to it.[127] Concretely, it could hear applications between States,[128] between States and private persons whenever these had exhausted local remedies,[129] between private persons (including SADC staff for issues relating to their employment) and the

117. Agreement amending the Treaty of the Southern African Development Community (adopted 14 August 2001, entered into force 14 August 2001) 3063 UNTS 328.

118. Preamble SADC Treaty.

119. Ibid., Article 16(1).

120. Article 16(2) SADC Treaty.

121. Protocol on the Tribunal of the Southern African Development Community and Rules of Procedure thereof (7 August 2000), available at: https://www.sadc.int/document/protocol-tribunal-and-rules-thereof-2000 ('2000 Protocol').

122. *Mtingwi v. SADC Secretariat*, SADC Tribunal, case no. 1/2007, judgment of 27 May 2008.

123. SADC, 'Final communiqué of the 32nd Summit of SADC Heads of State and Government' (18 August 2012), para. 24.

124. For the decision on the merits see: *Campbell and Others v. Zimbabwe*, SADC Tribunal, case no. 2/2007, judgment of 28 November 2008.

125. For an analysis of Zimbabwes's arguments see: Henok Birhanu Asmelash, 'Southern African Development Community Tribunal' in Hélène Ruiz Fabri (ed.), *The Max Planck Encyclopedia of International Procedural Law*, February 2016, available at www.mpepil.com/, paras. 43- 48.

126. 2000 Protocol Article 14 (a)(b).

127. Ibid., Article 14 (c).

128. Ibid., Article 15 (1).

129. Ibid, Article 15 (2).

SADC,[130] and between the SADC and Member States.[131] The SADC Tribunal could also issue preliminary rulings 'in procedures of any kind and between any parties before the courts or tribunals of States',[132] as well as advisory opinions at the requests of the SADC Summit or Council.[133]

It is important to highlight that after what was decided by the SADC Summit in 2012 regarding the 2000 protocol, a new protocol limiting the Tribunal's jurisdiction to inter-State disputes[134] was indeed adopted in 2014.[135] This new protocol has not yet entered into force.

Practice

Although there is no official database containing old rulings, commentators have pointed out that the SADC Tribunal appears to have issued 19 decisions.[136] Out of these, 14 constituted cases brought forward by private parties against Member States, an important number concerning violations of human rights, while five addressed labor disputes between the SADC and its employees.[137] Similar to the EACJ, the SADC found that it could hear human rights complaints because it had jurisdiction to interpret the SADC Treaty, which foresaw human rights as one of its principles[138].[139]

Concluding Observations

Regardless of the trajectory of a particular REIO court and of the volume of its output, it seems that individuals have (or had, in the case of the SADC Tribunal) a rather strong formal standing in the five courts analyzed. Most notably, in practice, cases brought forward through either human rights actions or labor complaints represent an important number of the cases reaching the dockets of these courts. Commentators have noted the overall scarcity of inter-State disputes[140] and also cases involving States and the

130. Ibid., 18- 19.

131. Ibid., Article 17.

132. Ibid., Article 16 (1). Article 16 (2) states that: 'The Tribunal shall not have original jurisdiction but may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State for a preliminary ruling in accordance with this protocol.'

133. Ibid., Article 20.

134. Henok Birhanu Asmelash, 'Southern African Development Community Tribunal' (fn 125), para. 56.

135. SADC, 'Final communiqué of the 34th Summit of SADC Heads of State and Government' (18 August 2014), para. 18.

136. For an overview of each case, see Erika de Wet, 'The rise and fall of the Southern Africa Development Community: implications for dispute settlement in South Africa' *ICSID Review*, vol. 28 (2013), pp. 45-63, at p. 48.

137. Ibid.

138. Article 4(c) SADC Treaty.

139. *Campbell and Others v. Zimbabwe*, SADC Tribunal, case no. 2/2007, ruling of 13 December 2007.

140. Matthew Happold and Owiso Owiso 'Inter-state dispute settlement and Africa's supranational courts' in Joanna Gomula and Stephan Witttich (eds.), *Research Handbook on International Procedural Law*, Cheltenham, Edward Elgar Publishing, 2024, pp. 307-328 at p. 327.

organizations themselves do not seem to be abundant.

The rich case-law created by private party litigants demonstrates that the idea of non-State actors being empowered to challenge the exercise of legislative and administrative powers by REIOs (transferred to them by member States) has become strongly entrenched in Africa. In some cases, this empowerment of private parties even permits them to challenge member States for infringing REIO law. While the actual use of the often very far-reaching jurisdictional powers of the African REIO courts surveyed here diverges, providing for them demonstrates a peculiar contribution to the law of international courts and tribunals.

INTERNATIONAL WATERCOURSES, BOUNDARY DELIMITATION AND HUMAN NEEDS: AN AFRICAN PERSPECTIVE

by Laurence Boisson de Chazournes*

INTRODUCTION

African States recognized very early on that international law plays a crucial role in protecting and managing international watercourses and other sources of fresh water. Their protection and management require cooperation. International law helps with finding and reaching cooperative solutions to international water problems. It brings stability and predictability. There is also a proactive feature enshrined in cooperation insofar as international law prescribes the adoption of certain behaviours by states. African states have not shied away from this need and have adopted various communitarian practices to facilitate the sharing of resources.

Uses of international watercourses are intrinsically linked to boundary delimitation. International rivers and lakes often play a role in delimiting territories. The method used in this context has an impact on uses such as navigation, fishing or the generation of hydro-electric energy. Riparian populations may also be affected when a boundary interferes with their daily activities.

A number of disputes between African States shed light on various ways to ensure that human needs of these populations are safeguarded. The present contribution will analyze how judgments rendered by international courts and tribunals as well as inter-state negotiated agreements have heeded these fundamental needs.[1]

I. A Multifaceted Approach to Human Needs

As will become evident, courts and tribunals have sought to adopt a multifaceted approach so that human needs are taken into account in boundary delimitation over international watercourses. The first case of note is the *Kasikili/Sedudu* dispute in which

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1. The present contribution draws on Laurence Boisson de Chazournes, *Fresh Water in International Law,* Oxford, Oxford University Press, 2nd ed., 2021, pp. 12-17.

the International Court of Justice (ICJ) stressed that the parties should cooperate to avoid hampering the socio-economic activities routinely performed by the communities of the area. It referred to an agreement reached by the two countries, Namibia and Botswana, who had brought the case before the Court. In the words of the Court:

> "102.The Court observes … that the Kasane Communiqué of 24 May 1992 records that the Presidents of Namibia and Botswana agreed and resolved that:
> "*(c)* existing social interaction between the people of Namibia and Botswana should continue;
> *(d)* the economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river;
> *(e)* navigation should remain unimpeded including free movement of tourists".
>
> 103.The Court, which by the terms of the Joint Agreement between the Parties is empowered to determine the legal status of Kasikili/Sedudu Island concludes, in the light of the above-mentioned provisions of the Kasane Communiqué, and in particular of its subparagraph *(e)* and the interpretation of that subparagraph given before it in this case, that the Parties have undertaken to one another that there shall be unimpeded navigation for craft of their nationals and flags in the channels of Kasikili/ Sedudu Island (…)."[2]

Previously, in his Separate Opinion to the *Case Concerning the Frontier Dispute (Burkina Faso* v. *Republic of Mali)*, Judge ad hoc Georges Abi-Saab, while accepting the conclusions of the Chamber on the limits of the *uti possidetis* principle, called for a more generous application of *infra legem* equity in the interpretation and application of the law. His argument relied precisely on the need to take account of the basic needs of populations, especially given that the issue at stake was the delimitation of "pools" in a desert area where access to water has a crucial importance.[3]

More recently, in its judgment of 16 April 2013,[4] the ICJ provided an interesting perspective on the consideration of riparian populations' access to water resources in its choice of a boundary delimitation method. Human needs were taken into account in deciding where to draw the boundary delimitation. The Court stated that:

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2. See *Case Concerning the Kasikili/Sedudu Island (Botswana* v. *Namibia), Judgment, I.C.J. Reports 1999,* pp. 1106-1108, paras. 102 - 103.

3. See *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali), Judgment, Judge ad hoc Georges Abi-Saab (Separate Opinion), I.C.J. Reports 1986,* pp. 662-663, para. 17.

4. *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports, 2013,* p. 44.

> "…In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other. Accordingly, the Court concludes that, on the basis of the Arrêté, the endpoint of the frontier line in the region of Bossébangou is located in the River Sirba. This endpoint is more specifically situated on the median line because, in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary."[5]

More generally, human needs may be taken into account when *effectivités* are relied upon in identifying a boundary.[6] Indeed, in practice, human activities have been asserted by states as evidence of *effectivités.* They can include activities such as fishing, hunting or agriculture.[7] In particular, fishing activities have been highlighted to show that states exercise authority over a certain area. Fishing activities can indeed play an important role in guaranteeing the income and sustenance of local populations.

Customary rights of local populations may also be taken into account even if not decisive for the identification of a boundary. The *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia* of 13 April 2002 is an example of how continued use and access rights have been established on the basis of customary practice. The Eritrea-Ethiopia Boundary Commission deciding the issue was of the view that "[r]egard should be paid to the customary rights of the local people to have access to the river".[8]

In the *Frontier Dispute (Benin/Niger)* case of the ICJ concerning the boundary delimitation along the Niger and Mekrou rivers, as well as the ownership of several river islands, inhabitants in both states used the waters of the rivers. The Court found that:

> "The boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya,

5. *Ibid*., p. 85, para. 101.

6. For the interplay between *uti possidetis juris* and *effectivités,* see *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 586, para. 63.

7. Marcelo Gustavo Kohen, Mara Tignino, "Do people have rights in boundaries' delimitations?", in Laurence Boisson de Chazournes, Christina Leben, and Mara Tignino (eds.), *International Law and Freshwater: The Multiple Challenges*, Cheltenham, Edward Elgar, 2013, p. 104.

8. *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, *ILM*, Vol. 41, p. 1057.

> the boundary passes to the left of these islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river and Niger has title to the islands between that boundary and the left bank of the river.''[9]

That said, it went on to emphasise that this was ''without prejudice to any private law rights which may be held in respect of those islands''.[10]

In a dispute between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) that was referred to arbitration,[11] a tribunal was required by the Arbitration Agreement to determine whether or not the experts of the Abyei Boundaries Commission (ABC) ''exceeded their mandate'' in defining and demarcating certain areas as provided for in the relevant legal instruments.[12] The Award resulted in Bahr el Arab (Kiir River), which is the main river in the area, together with most of its major tributaries, such as the Ragaba ez Zarga and Ragaba el Shaib, falling largely within the newly delimited area of Abyei. The grazing and other traditional rights of the Misseriya and Ngok Dinka (who resided to the north and south of the Abyei Area) were taken into consideration as the Award stated that:

> ''[t]he exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award) remains unaffected. ''[13]

In other words, the Tribunal found that, under the relevant principles of international law as applied to boundary disputes, traditional rights have usually been deemed to remain unaffected by any territorial delimitation and that the transfer of sovereignty in the context of a boundary delimitation should not be construed to extinguish traditional rights to the use of land. Taking into account its mandate requiring it to delimit ''on a map'' the boundaries of the Abyei Area, the Tribunal stressed that territorial boundaries should not, however, be taken to imply that the Parties are entitled to disregard other territorial relationships that people living in, and in the vicinity of, the Abyei Area have historically

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9. *Frontier Dispute (Benin/Niger), Judgment*, *I.C.J. Reports 2005*, p. 133, para. 103.

10. *Ibid*., p. 141, para. 118.

11. *The Government of Sudan v The Sudan People's Liberation Movement/Army (Abyei Arbitration), Final Award of the PCA of 22 July 2009*. Electronic version available at: https://pcacases.com/web/sendAttach/18820

12. *The Government of Sudan v The Sudan People's Liberation Movement/Army*, paras. 2, 395. Art 2(c) of the Arbitration Agreement provides that if the tribunal determines that the experts ''exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e., delimit) on map the boundaries of the area'', para. 395. On this decision, see Wendy J. Miles and Daisy Mallett, ''The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts'', *Journal of International Dispute Settlement*, 2010, Vol. 1(2), p. 313.

13. Miles and Mallett (n. 12), p. 267, para. 770.

maintained.[14]

Finally, the way in which human needs were considered in the boundary delimitation dispute between Cameroon and Nigeria is particularly noteworthy. Following the decision of the Court in the *Nigeria/Cameroon* case,[15] an agreement was negotiated between the two parties with the assistance of then-Secretary General Kofi Annan. The agreement that was reached makes provision for human needs[16] and reads as follows:

> "1. Cameroon, after the transfer of authority to it by Nigeria, guarantees to Nigerian nationals living in the Bakassi Peninsula the exercise of the fundamental rights and freedoms enshrined in international human rights law and in other relevant provisions of international law.
> In particular, Cameroon shall:
> (a) not force Nigerian nationals living in the Bakassi Peninsula to leave the Zone or to change their nationality;
> (b) respect their culture, language and beliefs;
> (c) respect their right to continue their agricultural and fishing activities;
> (d) protect their property and their customary land rights;
> (e) not levy in any discriminatory manner any taxes and other dues on Nigerian nationals living in the zone; and
> (f) take every necessary measure to protect Nigerian nationals living in the zone from any harassment or harm."

II. The Integration of Human Needs in Boundary Delimitation: Multiple Pathways

The taking into account of human needs in the context of boundary delimitation over international watercourses in Africa follows various pathways. The case law of the ICJ and other judicial bodies appear to suggest that where the title of the territory is clear, human needs or customary rights won't affect that title. However, those customary rights over the resource, particularly where they are concerned with subsistence, may be preserved. Moreover, where the title is not clear, equitable considerations and the assessment of *effectivités*, which can include the human uses of a watercourse, may be taken into account in resolving the dispute.

Taking human needs into consideration allows courts and tribunals to go beyond the mere concept of a "river border" and to embrace a more complex vision of a watercourse,

14. *The Government of Sudan v The Sudan People's Liberation Movement/Army*, p. 259, para. 748. In his Dissenting Opinion, however, Judge Al-Khasawneh considered that the Award did not "take the rights of the Misseriya into consideration", p. 267, para 203.

15. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, *Preliminary Objections*, *Judgment, I.C.J. Reports 1998*, p. 275.

16. See Bakassi Peninsula: The Greentree Agreement Between Cameroon and Nigeria, Art 3. Electronic version available at: http://www.cameroon-info.net/stories/0,17737,@,greentree-accord-to-reinforce-icj-verdict.html.

one which is cognizant of a range of activities, such as fishing and navigation, which are essential to the everyday life of the respective riparian communities. African state practice and judicial decisions involving rivers in Africa reveal the various ways that human needs can be safeguarded and preserved, as well as providing plentiful best practices that other parts of the world may benefit from.

SEA LEVEL RISE, IMPLICATION FOR AFRICA AND THE WORK OF THE INTERNATIONAL LAW COMMISSION

by Nilufer Oral*

INTRODUCTION

Since 1990, the Intergovernmental Panel on Climate Change has been warning about the impacts of climate change on the ocean, including sea level rise.[1] For decades, the world has been on an accelerated pathway to climate change. In 2024 the World Meteorological Organization was among several scientist bodies that reported the warmest year on record - at a temperature of around 1.55°C above pre-industrial levels, including ocean temperatures.[2] The ocean has been warming at historic rates and, with the rise in atmospheric temperatures, ice sheets and glaciers are also melting at record levels.

The combination of a warming ocean and melting cryosphere is producing accelerated levels of sea level rise.[3] The IPCC Special Report on the Ocean and Cryosphere in a Changing Planet reported with virtually certainty that the global mean sea level is rising and indicated (with high confidence) that this will continue to accelerate.[4] As reported in the IPCC Sixth Assessment Report, human influence has warmed the climate at a rate that is unprecedented;[5] the global ocean has warmed faster over the past century than since the end of the last deglacial transition (around 11,000 years ago) (medium confidence), and the global mean sea level has risen faster since 1900 than over any preceding century in at least the last 3000 years (high confidence). The Sixth Assessment Report also finds it likely that the global mean sea level rise by 2050 will range between 0.15 and 0.23 m in very low greenhouse gas emission scenarios, and between 0.20 and 0.29 m in the very high emission scenarios.[6]

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1. Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The IPCC 1990 and 1992 Assessments* (1992), Section VI.
2. ''WMO Confirms 2024 as Warmest Year on Record at about 1.55°C above Pre-Industrial Level'' (*World Meteorological Organization*, 10 January 2025) https://wmo.int/news/media-centre/wmo-confirms-2024-warmest-year-record-about-155degc-above-pre-industrial-level. (last accessed: 6 April 2026). Global sea surface temperatures set a new record at 1.1C above pre-industrial level
3. Hans-Otto Portner, Valerie Masson-Delmotte, Panmao Zhai et al., ''The Ocean and Cryosphere in a Changing Climate. A Special Report of the Intergovernmental Panel on Climate Change'', *IPCC,* 2019, https://www.ipcc.ch/site/assets/uploads/sites/3/2019/12/SROCC_FullReport_FINAL.pdf (last accessed: 6 April 2026).
4. Portner, Masson-Delmotte, Zhai et al. (n. 3).
5. Hoesung Lee, José Romero (eds.), ''Climate Change 2023. Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change'', *IPCC*, 2023 https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf (last accessed: 6 April 2026).
6. Lee, Romero (eds.) (n. 5), p. 81.

Sea level rise from climate change will directly impact some seventy States. Small island States and low-lying coastal areas are especially vulnerable to the destructive impacts and combined effects of rising sea levels, increased storm surges and king tides. Small Island States for decades have been vocal in raising awareness of the devastating impacts of sea level rise. Climate change induced sea level rise is threatening the territorial integrity of many small island States and in some cases threatening to submerge entire islands, raising questions related to Statehood. Sea level rise also raises questions as to maritime entitlements with coastal States enjoying sovereign rights over vast swathes of ocean areas and associated resources. These can be affected if the loss of territory results in loss of maritime space under international law. Even partial inundation by rising sea levels and storm surges can produce significant adverse impacts on the livelihoods of millions of people living in low-lying coastal areas, such as forced displacement and migration either internally or across borders. Many parts of the world are vulnerable to sea level rise. Africa in particular is a region that is at high risk of the adverse impacts of climate change and sea level rise.

Climate change, sea level rise and Africa

Overall, African States are disproportionately burdened by the effects of climate change.[7] With a coastline of 300,000 km, spanning thirty-nine countries, the effects of climate change for the continent are significant.[8] As explained by Sierra Leone at the recent High-Level Meeting at the General Assembly on "Sea Level Rise and its Legal Dimensions", sea level rise is causing its shorelines to retreat by 2.9-meters per year, threatening coastal habitats and communities.[9] Similarly, Morocco highlighted that the phenomenon may cause its coastlines to retreat by up to 15-meters by 2030.[10] In 1993 and 1994, its Ministry of Infrastructure found that seven of the documented beaches along its coast had disappeared and sixteen were at high risk of degradation.[11]

Sea level rise and water salinisation, alongside land degradation and erosion, droughts, and intense rainfall, also disrupt agricultural systems and food security.[12] The increase in groundwater salinity is particularly noted in Northern Africa.[13] For example,

7. "Africa Faces Disproportionate Burden from Climate Change and Adaptation Costs", *World Meteorological Organization*, 2 September 2024, https://wmo.int/news/media-centre/africa-faces-disproportionate-burden-from-climate-change-and-adaptation-costs, (last accessed: 6 April 2026).

8. Michalis Vousdoukas et al., "African Heritage Sites Threatened as Sea-Level Rise Accelerates", *Nature Climate Change,* 2022, Vol. 12, p. 256.

9. "Multi-Stakeholder Panel, Sea-Level Rise and Its Legal Dimensions", *UN Web TV*, 25 September 2024, https://webtv.un.org/en/asset/k10/k106txklsn, (last accessed: 6 April 2026)

10. Multi-Stakeholder Panel (n. 6).

11. Multi-Stakeholder Panel (n. 6).

12. Ahmadou Aly Mbaye and Fama Gueye, "Climate Change and Food Security in the Sahel", *Brookings*, 28 August 2024, https://www.brookings.edu/articles/climate-change-and-food-security-in-the-sahel/, (last accessed: 6 April 2026).

13. Caradee Wright et al., "Climate Change and Human Health in Africa in Relation to Opportunities to Strengthen Mitigating Potential and Adaptive Capacity: Strategies to Inform an African "Brains Trust"", Annals of Global Health, Vol. 90 (1), 2024.

Sierra Leone has emphasised that industries like agriculture are particularly vulnerable to the negative consequences of sea level rise, threatening food security.[14] Similarly, Nigeria stated that sea level rise poses significant threats to its coastal communities, ecosystem and economic stability.[15]

Displacement of persons is another risk that looms for African States due to climate change and sea level rise.[16] The coastal cities most affected by rising sea-levels are also among the most populated in the regions. The IPCC suggests that, by 2030, the low-lying coastal regions of Africa could be populated by up to 116 million people.[17] Between 2020 and 2030, the populations in its seven largest coastal cities are expected to increase by 40%.[18] They will likely see the "highest rate of population growth and urbanisation in the world" and,[19] as explained by the IPCC, this "will be a major driver of exposure to sea-level rise in the next 50 years."[20] The IPCC further concludes that sea-level rise and the related episodic flooding will contribute to large-scale displacement, resulting in a net migration of approximately 750,000 people out of the coasts in East Africa between 2020 and 2050…"[21]

If global warming reaches the 1.7-degree Celsius threshold, up to 40 million people could migrate away from the coasts in Sub-Saharan Africa.[22] In the case of 2.5-degree Celsius warming, this could increase to 86 million people.[23] Alexandria is home to 57% of Egypt's population. Sea-level rise of 0.5 meters could displace over 2 million people, while a 1-meter rise may displace 6 million people.[24] In Lagos, sea-level rise caused by an increase in global temperatures by 3°C could displace approximately a third of the city's population.[25] In Maputo and Matola, around 3 million people are vulnerable to rising sea levels.[26] In fact, densely populated coastal regions often have

14. Multi-Stakeholder Panel (n. 9).
15. Multi-Stakeholder Panel (n. 9).
16. Kanta Kumari Rigaud et al., ''Groundswell Africa: Internal Climate Migration in the Lake Victoria Basin Countries'', Washington DC, *World Bank Group*, 2021, p. xxxi.
17. World Meteorological Organisation (n. 7).
18. The Africa Center for Strategic Studies, ''Rising Sea Levels Besieging Africa's Booming Coastal Cities'', *Africa Center*, 8 November 2022, https://africacenter.org/spotlight/rising-sea-levels-besieging-africas-booming-coastal-cities-lagos-dakar-alexandria-maputo-nile/, (last accessed: 6 April 2026).
19. The Africa Center for Strategic Studies (n. 6).
20. ''Fact Sheet - Africa'' (IPCC 2022) Sixth Assessment Report, 1.
21. Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022 - Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, Cambridge University Press, 2023 https://www.cambridge.org/core/product/identifier/9781009325844/type/book.
22. IPCC (n. 21), p. 1291.
23. IPCC (n. 21), p. 1291.
24. Africa Centre for Strategic Studies (n.18).
25. Africa Centre for Strategic Studies (n.18).
26. Africa Centre for Strategic Studies (n.18).

poor coastal planning, likely to exacerbate coastal erosion.

The economic losses caused by the phenomenon are also considerable, and likely to be higher for African State; they are estimated to lose between 2% and 5% of their gross domestic products because of climate change.[27] For example, ocean warming could result in a 30% fall in Africa's USD 25 billion annual fisheries sector income by 2050. West Africa will be particularly hard hit. While globally ocean warming is predicted to reduce fish catches by 7.7 percent and revenues by 10.4 percent by 2050 under a high CO2 emissions scenario,[28] some parts of West Africa could face a decrease of as much as 26 percent. This could be even higher for countries closer to the equator - as much as a 53 percent decrease in fish in Nigeria, 56 percent in Cote d'Ivoire, and 60 percent in Ghana.[29]

The World Bank estimates the overall cost of sea level rise to the coastal countries in Africa at some USD 3.8 billion in damages annually.[30] At the 2024 6th Committee Meeting, Eritrea conveyed the following:

> *"With approximately 5% of the national population living in coastal areas, sea-level rise will pose a profound threat to coastal communities in Eritrea as their livelihoods depend on artisanal fishing and fishery products. Fishing is an inherited economic tradition that closely attaches these communities to the sea. The rising of the Red Sea level will disrupt these traditional livelihoods and could lead to economic hardship. Additionally, we recognize the threat that sea-level rise could pose on our tourism aspirations."*[31]

The IPCC has confirmed that beach erosion caused by sea level rise will adversely impact tourism sectors..."[32] This is likely to be exacerbated by the effects on African heritage sites. Ten locations of cultural significance have been recognised as being exposed by sea level rise in the high emission scenario, including seven World Heritage sites in the Mediterranean.[33]

Economic hardships are compounded by the fact that States must invest considerable resources in climate adaptation and mitigation efforts, and the financial burden of this

27. Worl Meteorological Organization (n. 7).
28. Vicky W. Y. Lam et al., "Projected Change in Global Fisheries Revenues under Climate Change", *Scientific Reports*, 2016, No. 32607, Vol. 6.
29. Vicky W. Y. Lam et al. (n. 28).
30. Vousdoukas et al. (n. 8), p. 1366.
31. Statement of Eritrea, 23 October 2024, New York, *United Nations*, https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/22mtg_eritrea_1.pdf, (last accessed: 6 April 2026).
32. Vousdoukas et al. (n. 8), p. 1339.
33. Vousdoukas et al. (n. 8), p. 1395.

is significantly higher for African States.[34] The Egyptian government, for example, has committed USD 200 million to coastal protection efforts. The financial burden of climate adaptation is significantly higher on African States.[35] They may be forced to divert up to 9% of their budgets to climate change response.[36]

Climate change and sea level rise pose enormously complex challenges to the international community, with certain regions, such as Africa being at particular risk. Adding to the physical challenges created by climate change and sea level rise are the gaps in the existing international law framework to respond to these challenges. For example, gaps in the regimes on the law of the sea, human rights, migration, statehood and more. If the international community is to adopt a collective approach to addressing the multidimensional effects of climate change and sea level rise it is essential that there be clear international norms and framework to build on.

International law and sea level rise

International Law Association

The international law aspects of sea level rise first emerged from concerns related to the law of the sea. Indeed, these concerns were first highlighted by a few scholars as far back as 1990 in relation to the possible impacts on baselines and maritime zones.[37] Some years later, in 2008, the Baselines Committee of the International Law Association recognized the potential serious implications that sea level rise could pose for baselines and associated maritime entitlements under the law of the sea. In light of these concerns, in 2012 the International Law Association established the Committee on International Law and Sea Level Rise. The Committee addressed issues related to impacts on baselines, maritime zones and their limits, and maritime boundaries, the impacts on statehood and the rights of affected populations. The work of the Committee ended in 2024.

The Committee's resolutions expressed the view that States may preserve their maritime baselines and boundaries, notwithstanding physical changes to their coasts caused by sea level rise, highlighting the need for legal stability, certainty and predictability.[38] It

34. World Meteorological Organisation (n. 7).

35. Michael Oppenheimer, Bruce Glavovic et al., ''Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities'', *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* Cambridge, Cambridge University Press, 2019, p. 366.

36. Michael Oppenheimer, Bruce Glavovic et al. (n. 35).

37. *For example*, David Caron, ''When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level'', *Ecology Law Quarterly*, 1990, Vol. 17, p. 621; Soons Aha, ''The Effects of a Rising Sea Level on Maritime Limits and Boundaries'', *Netherlands International Law Review*, Cambridge, Cambridge University Press, 1990, Vol. 37 (2), pp. 207 - 232.

38. Committee on International Law and Sea Level Rise, ''Resolution 5/2018''; Committee on International Law and Sea Level Rise, ''Resolution 01/2024'' https://www.ila-hq.org/en/documents/ila-resolution-1-committee-on-international-law-and-sea-level-rise-en.

completed its work in 2024.[39]

The International Law Commission

The International Law Commission (ILC), which is a subsidiary body of the UN General Assembly with the mandate for the progressive development of international law and its codification, placed the topic of sea level rise in relation to international law first on its long-term work programme in 2018 and then on its current work programme in 2019. In addition, in 2018, the Federated States of Micronesia made a formal request under article 17 of the Statute of the International Law Commission for it to place the topic of "Legal implications of sea-level rise" on its long-term work programme. This was the first direct request made to the Commission by a Member States. [40] In 2019 the Commission established a study group with five co-Chairs appointed to address issues related to the law of the sea, statehood and protection of persons.[41]

The work of the Commission consisted of a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues. The study group was to analyse the existing international law, including treaty and customary international law, in accordance with the Commission's mandate, so as to contribute to the endeavours of the international community to respond to these issues and to assist States in developing practicable solutions in order to respond effectively to the issues prompted by sea level rise.[42] The Study Group did not intend to undertake a progressive development and codification approach given the insistence of States to not alter the United Nations Convention on the Law of the Sea.[43] Certain limits were placed on the scope, which expressly excluded environment, climate change per se, causation, responsibility or liability.[44]

Between 2020 and 2024, the Co-Chairs, on rotating basis, starting with law of the sea and followed by statehood and protection of persons, prepared a set of issues papers

39. Committee on International Law and Sea Level Rise (n. 38).

40. Report of the Study Group of the International Law Commission on sea-level rise in relation to International Law, first issues paper by Bogdan Aurescu and Nilüfer Oral (2020), UN doc. A/CN.4/740, ("ILC Study Group Report"), para. 15.

41. The five Co-Chairs, on a rotating basis, are Bogdan Aurescu, Yacouba Cissé, Patrícia Galvão Teles, Nilüfer Oral and Juan José Ruda Santolaria.

42. Bogdan Aurescu et al., "Sea Level Rise in Relation to International Law", *Yearbook of the International Law Commission 2018*, Vol II.

43. FIP (n. 40), para. 13; *See also* Statement of Cyprus, "Summary Record of the 23rd Meeting" (Sixth Committee 2018) Official Records A/C.6/73/SR.23, para. 50; Statement of Greece "Summary Record of the 21st Meeting" (Sixth Committee 2018) Official Records A/C.6/73/SR.21, para. 68; Statement of Slovakia, "Summary Record of the 21st Meeting" (Sixth Committee 2018) Official Records A/C.6/73/SR.21, para. 28; Statement of Indonesia, "Summary Record of the 24th Meeting" (2018) Official Records A/C.6/73/SR.24, para. 64; Statement of Fiji, on behalf of the Pacific small island developing States, "Summary Record of the 27th Meeting" (Sixth Committee 2019) Official Records A/C.6/74/SR.27, para. 79; Statement of Chile, "Summary Record of the 17th Meeting" (Sixth Committee 2021) Official Records A/C.6/76/SR.17.

44. Aurescu et al. (n. 42), para. 14.

and additional papers on their respective sub-topics.[45] In 2025, the three sub-topics will be addressed in a final consolidated report.

Each of the papers is discussed by the members of Study Group and published in the annual report of the Commission. In turn, the Sixth Committee (Legal Committee) of the General Assembly provides both oral and written statements. Additionally, in response to the request by the Study Group for practice related to the issues covered by the work of the Commission on sea level rise, States provide written submissions to the Commission. This information provided by States is critical for the work of the Commission in mapping State practice, gauging the current state of international law on these issues and obtaining the views of States. In general, the work of the Commission not being academic is very much driven by State practice and the views of States. The practice and views of States are especially important as sea level rise is a phenomenon that has emerged subsequently to the adoption of many legal instruments, such as the United Nations Convention on the Law of the Sea,[46] the Montevideo Convention,[47] the Convention relating to the Status of Refugees,[48] as well as a number of human rights instruments. Consequently, there are many gaps in the existing international law framework in relation to sea level rise, that State practice may help fill. The current paper will focus on the law of the sea issues that arise.

In relation to the law of the sea, the first issues paper recognized that UNCLOS was adopted before climate change became an issue of international concern and therefore did not address it.[49] This view was shared by States as well.[50] Consequently, the Convention is silent on climate change and sea level rise.

The Co-Chairs of the ILC Study Group also examined in detail the consequences on States' rights and obligations under a scenario where the baseline would be required to move landward as a result of sea level rise.[51] For example, the competence of a coastal State to regulate foreign shipping would change. In the internal waters the coastal State has full prescriptive and enforcement competence, however, in the territorial waters, foreign

45. FIP (n. 40); International Law Commission, "Additional paper to the first issues paper" (International Law Commission 2023) A/CN.4/761; "Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria" (International Law Commission 2022) A/CN.4/752; "Additional Paper to the Second Issues Paper (2022) by Patrícia Galvão Teles and Juan José Ruda Santolaria" (International Law Commission 2024) A/CN.4/774.

46. Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397 (UNCLOS).

47. Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, Treaty Series, Vol. CLXV, No. 3802, p. 19.

48. Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, Vol. 189, No. 2545, p. 137.

49. FIP (n. 40), para. 78.

50. For example, Statement of Maldives, seventy-second session of the International Law Commission (2021), p.11, http://legal.un.org/docs/?path=../ilc/sessions/72/pdfs/english/slr_maldives.pdf&lang=E ; Statement of the Pacific Island Forum, seventy-second session of the International Law Commission (2021), p. 2, http://legal.un.org/docs/?path=../ilc/sessions/72/pdfs/english/slr_pif.pdf&lang=E.

51. Statement of Maldives (n. 50), Statement of the Pacific Island Forum (n. 50).

flagged vessels enjoy innocent passage that the coastal State cannot impede. Likewise, if part of the territorial sea were to become part of the exclusive economic zone, instead of innocent passage rights, foreign flagged vessels gain greater navigational freedoms akin to those in the high seas.[52]

The most dramatic loss to the coastal State is if part of its EEZ becomes high seas. In the high seas, all States enjoy the long-standing customary right of freedom of the high seas, which comprises freedom of navigation, freedom of overflight, marine scientific research, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted under international law, freedom of fishing and freedom of scientific research. The loss of EEZ space would deprive the coastal State of its sovereign rights over all the living and non-living resources in a vast expanse of ocean space. The potential loss of sovereign rights to explore, exploit, conserve, and manage the living and non-living natural resources of the waters superjacent to the seabed, and of the seabed and its subsoil.[53] The coastal State would likewise lose its competence to determine the total allowable catch of the living resources in their EEZ and sell the surplus living resources to third States. This is a major source of revenue for many developing States, including African States. For example, African coastal States derive important economic benefits from fisheries access agreements, especially with the European Union. The European Union has concluded sustainable fisheries partnership agreements with 15 African States.[54]Article 56(1)(b)(iii) of UNCLOS also provides the coastal State with jurisdiction to protect and preserve the marine environment. Many States are establishing large marine protected areas in their EEZs. For example, marine protected areas of a combined 60,000 km^2 have been established by West African States. [55]

However, if an ambulatory baseline approach were to be applied in the face of sea level rise, requiring adjustments to existing lawfully established baselines and maritime zones, this careful balance of rights and obligations would be disrupted and result in economic loss and, not to mention, potentially disturb peaceful relations.

One of the Co-Chairs (Yacouba Cissé) also prepared a study on the practice of African States regarding maritime delimitation at the first meeting of the Study Group. He had examined the legislative, constitutional and conventional practice of 38 African coastal States, as well as relevant judicial decisions rendered by international courts, in order to assess whether coastal States were supportive of ambulatory or fixed maritime limits. The outcome of the survey was that, while there was some African legislative and constitutional practice on baselines and maritime borders, such practice was diverse.

52. UNCLOS (n. 46), art. 58 (1).

53. UNCLOS (n. 46), art. 56.

54. Eric Pichon, "The African Union's Blue Strategy", European Parliament, 2019, p. 2, https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635574/EPRS_ATA(2019)635574_EN.pdf.

55. Tanya Merceron et al., "State of West African Marine Protected Areas 2022", *IUCN*, 2022, p. 251, https://portals.iucn.org/library/sites/library/files/documents/2024-006-En.pdf.

As such, it was not possible to infer the existence of *opinio juris* in favour of or against permanent or ambulatory baselines or maritime boundaries. He concluded that there was no generalized African practice.[56]

There is also the question of the status of islands versus rocks (and low-tide elevations) under UNCLOS. Article 121 of the Convention defines an island as a "naturally formed area of land, surrounded by water, which is above water at high tide". According to article 121, an island that cannot sustain human habitation or an economic life of its own is a "rock" and only entitled to a territorial sea. Whereas an island that can sustain human habitation or an economic life is entitled to the full panoply of maritime entitlements (territorial sea, continental shelf and EEZ).

The difference in terms of maritime space can be vast. For example, a small island could generate up to 431,014 km^2 of maritime area, whereas a "rock" is limited to only a belt of territorial sea that would generate a much smaller area of 1550 km.[57] Indeed, many small island States in the Pacific are also considered large ocean States. The total area of the exclusive economic zone (EEZ) for the Pacific Island region is approximately 30 million square kilometers. The EEZs in this region are rich in biodiversity and contain a variety of marine resources. The coastal State enjoys the exclusive sovereign rights to explore, exploit, conserve, and manage the living and non-living natural resources of the waters superjacent to the seabed, and of the seabed and its subsoil.[58]

Another question that looms with sea level rise concerns the status of archipelagic States entitled to use an archipelagic baseline under article 47 of UNCLOS, which provides in paragraph 1:

"[a]n archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1" (article 47, paragraphs 2 to 9, sets forth the conditions for establishing such baselines).

What if, due to sea level rise, an "outer most island" or "drying reef" is submerged and results in a change to the conditions allowing for using an archipelagic baseline? The Convention does not say and there is no State practice. Yet, the consequences can be quite significant. Archipelagic waters are governed by a special regime that has similarities with and differences from the regime of the territorial sea. Similar to the territorial sea, foreign

56. Report of the International Law Commission, (2021), A/76/10, para. 259-260.

57. Clive Schofield, "The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation" in Seoung-Yong Hong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, The Hague, Martinus Nijhoff Publishers, 2009, pp. 19-37, especially, p. 21.

58. UNCLOS (n. 46), Art. 56.

ships are granted the right of innocent passage in archipelagic waters, which can only be suspended if necessary for security reasons.[59] However, there are important differences between the two regimes that are especially relevant for third States. Although the right of overflight in archipelagic waters is recognized under UNCLOS, this is not the case for innocent passage in the territorial sea. Moreover, UNCLOS recognizes a special regime of archipelagic sea lanes and air routes, which the archipelagic State may designate with the approval of the International Maritime Organization.[60] Third States also have certain non-navigational rights in the archipelagic waters under article 51(1).

There are several archipelagic States who are at risk from being impacted by sea level rise.[61] This vulnerability is not theoretical, but is a genuine risk that several of the 22 archipelagic States are facing.[62]

Developments since 2020 towards stable baselines and maritime zones

The First Issues Paper (FIP) had mapped in detail the possible legal effects of sea-level rise in relation to law of the sea.[63] Through this study, it made several preliminary observations concerning in particular the question of whether baselines or maritime zones were ambulatory and required updating if the coastline changed due to sea level rise. The FIP observed that UNCLOS "does not prohibit expressis verbis such preservation" and that "nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, to stop updating these notifications in order to preserve their entitlements."[64] Importantly, the FIP drew attention to the consequences of an ambulatory approach, which could bring into question existing lawfully established maritime delimitations, in turn creating legal uncertainty. The practical solution to this would be to preserve existing maritime zones notwithstanding the coastal changes produced by sea-level rise to maintain legal stability, certainty and predictability. In addition, despite the views of some scholars, the FIP was of the view that "sea-level rise is not a fundamental change of circumstance under article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as maritime boundaries enjoy the same regime of stability as any other boundaries."[65]

59. UNCLOS (n. 46), Art. 52.
60. UNCLOS (n. 46), Art. 53.
61. David Freestone and Clive Schofield "Sea Level Rise and Archipelagic States: A Preliminary Risk Assessment," *Ocean Yearbook*, 2021, Vol. 35 (1), pp. 340-387.
62. APFIP (n. 45), p. 86.
63. Report of the International Law Commission (n. 51), para. 15.
64. FIP (n. 40), para. 104.
65. FIP (n. 40), para. 104.

Much progress has been made since the topic of sea level rise was first raised within the Sixth Committee. In 2017, some fifteen States requested the inclusion of this topic in the programme of work of the Commission.[66] In 2018, 26 Statements welcomed the decision of the Commission to place the topic of sea level rise on its long-term programme, including a number of African States and the African Group.[67] Likewise, the African Group supported the decision of the Commission to place the topic of sea level rise in relation to international law on its current work programme.[68] By 2021, 67 delegations delivered 69 statements in the Sixth Committee that referred to the topic. More importantly, where only a limited number of States has expressed clear views on the issues related to the law of the sea within a short span of time, a very strong convergence among States across regions has emerged in response to some of these very important questions outlined above.

The support by States for the approach of preserving baselines and maritime zones in the interest of legal stability, certainty and predictability gained much momentum, as outlined in the additional paper to the first issues paper (APFIP).[69] On the issue of "legal stability" in relation to sea-level rise, the APFIP made a number of preliminary remarks, including the following:

"(i) that legal stability is linked to the preservation of maritime zones; (ii) States affected by sea-level rise are not required to update their notifications of coordinates and charts even if the physical coast moves landward because of sea-level rise. (iii) No States - not even those with national legislation providing for ambulatory baselines - have expressed positions contesting the option of preserving baselines or maritime zones that have been lawfully established."[70]

A number of African States, through submissions to the Commission or in Statements at the Sixth Committee, addressed the issue of legal stability and the

66. FIP (n. 40), para. 8 (Indonesia ("Summary Record of the 24th Meeting" (Sixth Committee) Official Records A/C.6/72/SR.24, para. 126), Marshall Islands, on behalf of the Pacific small island developing States (i.e., Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) ("Summary Record of the 22nd Meeting" (Sixth Committee) Official Records A/C.6/72/SR.22, paras. 51-53), Micronesia (Federated States of) ("Summary Record of the 20th Meeting" (Sixth Committee 2021) Official Records A/C.6/72/SR.20, paras. 63–66), Peru ("Summary Record of the 22nd Meeting" (Sixth Committee) Official Records A/C.6/72/SR.22, para. 116), Romania (on file with the Codification Division), and Tonga ("Summary Record of the 20th Meeting" (Sixth Committee 2021) Official Records A/C.6/72/SR.20, para. 32).

67. Gambia, on behalf of the African Group ("Summary Record of the 20th Meeting" (Sixth Committee 2018) Official Records A/C.6/73/SR.20, para. 28), Malawi ("Summary Record of the 24th Meeting" (Sixth Committee) Official Records A/C.6/73/SR.24, para. 42), Mauritius ("Summary Record of the 21st Meeting" (Sixth Committee) Official Records A/C.6/73/SR.21, para. 17), Seychelles ("Summary Record of the 24th Meeting" (Sixth Committee) Official Records A/C.6/73/SR.24, paras. 11-12), and South Africa ("Summary Record of the 23rd Meeting" (Sixth Committee) Official Records A/C.6/73/SR.23, para. 15).

68. Sierra Leone, on behalf of the African Group ("Summary Record of the 23rd Meeting" (Sixth Committee) Official Records A/C.6/74/SR.23, para. 39), Sierra Leone ("Summary Record of the 29th Meeting" (Sixth Committee) Official Records A/C.6/74/SR.29, paras. 70-71).

69. APFIP (n. 45), pp. 10-40.

70. APFIP (n. 45), para. 98.

preservation of baselines and maritime zones. Some of these are highlighted in the APSIP. [71] At the seventy-eighth session in 2023, Cameroon stated the following:

> "[t]he preservation of baselines and maritime rights expresses not only the fundamental principles of equity and legal stability, but also notions relating to climate justice deeply rooted in human rights and the general principles of international law. […] The principle of the immutability of borders is fundamental and the States, whose national legislation provides for shifting baselines, must continue to interpret the Convention as prescribing the use of fixed baselines." [72]

Cote d'Ivoire also shared the view "in favour of the immutability and intangibility of maritime borders".[73] At the seventy-ninth session in 2024, Eritrea emphasised "the need for stable maritime zones" and stressed " that baselines and maritime boundaries are preserved and that the sovereign and jurisdictional rights of States over their maritime spaces, in accordance with traditional sources of international law, are protected."[74] Sierra Leone's statement emphasized the importance of the principle of the stability of baseline and maritime zone as "vital to preserving the economic livelihoods of African coastal and small island States, which depend on maritime resources for survival."[75]

Several regional bodies have also taken clear positions in favour of preserving baselines and maritime zones in the interest of legal stability, certainty and predictability. The first came one year after the publication of the; FIP the Pacific Islands Forum issued its landmark Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise.[76] According to the Declaration there is "no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations."

The eighteen PIF Member States declared they would preserve their maritime boundaries once established and duly notified to the UN Secretary-General in accordance with the UNCLOS, and that they "intend to maintain these zones without reduction,

71. APFIP (n. 45), paras. 55-56; Statement by the Republic of Sierra Leone, 28 October 2021, https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/20mtg_sierraleone_2.pdf; Statement of Egypt, 28 October 2021, https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg (Arabic only). *See also* "Summary Record of the 20th Meeting" (Sixth Committee 2021) Official Records A/C.6/76/SR.20, para. 58; Statement of Algeria, 1 November 2021, https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtgalgeria_2.pdf (Arabic only). *See also* "Summary Record of the 22nd Meeting" (Sixth Committee 2021) Official Records A/C.6/76/SR.22, para. 99.

72. Statement of Cameroon, "Summary Record of the 25th Meeting" (Sixth Committee 2023) Official Records A/C.6/78/SR.25.

73. Statement of Côte d'Ivoire, "Summary Record of the 28th Meeting" (Sixth Committee 2023) Official Records A/C.6/78/SR.28.

74. Statement of Eritrea, "Summary Record of the 25th Meeting" (Sixth Committee 2024) Official Records A/C.6/79/SR.20.

75. Ibid, Statement of Sierra Leone, p. 19.

76. "Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise", 6 August 2021, https://forumsec.org/sites/default/files/2024-03/2021%20Declaration%20on%20Preserving%20Maritime%20Zones%20in%20the%20face%20of%20Climate%20Change-related%20Sea-level%20rise.pdf

notwithstanding climate change-related sea-level rise". They further declared their intention to not "review and update the baselines and outer limits of [their] maritime zones as a consequence of climate change-related sea-level rise."[77]

The Declaration was subsequently affirmed by other regional bodies, notably, the Declaration of the Heads of State and Government of the Alliance of Small Island States adopted on 22 September 2021 (39 members);[78] the Climate Vulnerable Forum (58 members: 27 members from Africa and the Middle East, 20 members from Asia and the Pacific and 11 members from Latin America and the Caribbean); [79] the Organization of African, Caribbean and Pacific States (79 members from Africa, the Caribbean and the Pacific).[80]

In 2024, the Apia Commonwealth Ocean Declaration was adopted at the Commonwealth Heads of Government Meeting on 26 October 2024, which stated that:

> "In view of the urgent threat of climate change-related sea-level rise, and the fundamental need to secure the rights, entitlements, and interests of all states and peoples of the Commonwealth, affirm that members can maintain their maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with UNCLOS, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise."[81]

In addition, the APFIP examined a number of principles including the principle of permanent sovereignty over natural resources in relation to the right of coastal States to preserve existing sovereign rights over marine resources notwithstanding the effects of sea level rise on the coastal configuration. The Co-Chairs made several preliminary observations, including that:

> "(a) the principle of permanent sovereignty over natural resource is a rule of customary international law according to which a State cannot be deprived

77. AOSIS Leaders' Declaration, 16 September 2021, https://www.dropbox.com/scl/fi/xzug4dfa8h9wqnc36115l/AOSIS-Leaders-Declaration-Endorsed-16.09.2021.doc?dl=0%3C&rlkey=tsjd305o5hmr0a9lr3qb7gb0m.

78. AOSIS Leaders' Declaration (n. 77), para. 41.

79. Dhaka-Glasgow Declaration of the Climate Vulnerable Forum, 2021, https://cvfv20.org/wp-content/uploads/2024/08/Dhaka-Glasgow-Declaration-of-the-CVF_Final-1.pdf.

80. *See* Declaration of the Seventh Meeting of the Organization of African, Caribbean and Pacific States Ministers in Charge of Fisheries and Aquaculture, of 8 April 2022, *See* 7th Meeting of OACPS Ministers in Charge of Fisheries and Aquaculture (Organisation of African, Caribbean and Pacific States 2022) Declaration ACP/84/093/22, https://www.oacps.org/wp-content/uploads/2022/05/Declaration_-7thMMFA_EN.pdf, p. 8.

81. APIA Commonwealth Ocean Declaration', HGM (24)(8), 2024, https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2024-10/hgm248apia-commonwealth-ocean-declaration.pdf.

of its inherent and inalienable sovereign right over its natural resources, including marine resources; (b) the loss of marine natural resources important for the economic development of States as a result of sea-level rise would be contrary to the principle of the permanent sovereignty over natural resources. The legal and practical solution of the preservation of existing maritime entitlements would be in line with this principle."[82]

CONCLUSION

Climate change and sea level rise are global phenomena already directly impacting many coastal States in different regions, and in particular, pose significant risks to African coastal States with a coastline of some 300,000 km, spanning thirty-nine countries, the effects of climate change for the continent are significant. These risks range from loss of coastal territory, impacts on fishing, food security and even threats to cultural heritage. The economic losses coupled with impacts of coastal communities in Africa are projected to be extremely serious.

Moreover, practically every State on the planet will be impacted indirectly, especially as hardships from climate change and sea level rise lead to internal and cross-border displacements. In some very extreme cases, some island States may become completely submerged raising questions on statehood. However, this article has focused specifically on the serious impacts of sea level rise in relation to maritime zones and entitlements with a focus on Africa, and the work of the International Law Commission on this issue.

Climate change and sea level rise were not the concerns of the international community - or any State - when UNCLOS was negotiated and adopted. Consequently, the Convention does not address issues such as whether the baselines from which maritime zones are measured must be reviewed and updated if sea level rise results in changes to the coastline. If so, the implications would require major changes to existing maritime zones and associated entitlements, which could trigger instability and conflict in relations between States. Coastal States in particular would stand to lose existing rights over vast areas of ocean space, and in particular sovereign rights over their EEZ, which could become part of the high seas. The economic consequences, especially the potential loss from fisheries and other natural resources could have significant negative impacts on the economies of States, such as for West African coastal States.

For a number of years efforts have been made to address these gaps and find solutions. The International Law Association between 2018 and 2024 adopted resolutions calling for the preservation of baselines and marine entitlements that have been properly established in accordance with UNCLOS, "on the grounds of legal certainty and

82. APFIP (n. 45), para. 194.

stability".[83] However, the ILA is a private organization without direct relationship to States. Consequently, it was an important step for the International Law Commission, a subsidiary body of the UNGA, to establish the Study Group on sea level rise in relation to international law in 2019. Since then, the developments have been significant as by 2024 a very strong convergence of views has emerged in the Sixth Committee in favour of an interpretation and application of UNCLOS and international law that allows for States to preserve existing baselines and maritime zones that have been duly established and notified as required under UNCLOS. In addition, this approach has been adopted by several regional bodies that include African States such as Climate Vulnerable Forum and the Organization of African, Caribbean and Pacific States. Many African Member States have also expressed their views in the Sixth Committee and the General Assembly in relation to sea level rise.

In conclusion, in 2019 when the ILC undertook its work on sea level rise, it was not clear how these complex issues would be addressed by States. However, in a very short period of time, States have expressed strong support for a practical approach taking into account the need to ensure legal stability, certainty and predictability as well as in the interest of peaceful relations, adopting the view that sea level rise from climate change is not a legal reason for States to lose existing lawful rights over their maritime spaces. However, the final consolidation will require additional concrete steps such as an interpretative declaration by the State Parties to UNCLOS, a resolution by the General Assembly or some other option. African States, especially through the African Union, can play a very important role in this final phase of crystallizing international law in relation to sea level rise and the law of the sea.

83. Resolution 5/2018 (n. 38) ; Resolution 01/2024 (n. 38).

RÉFLEXIONS SUR LA DIMENSION HUMAINE DU DROIT INTERNATIONAL DANS LE CONTEXTE ACTUEL

par Linos-Alexandre Sicilianos*

INTRODUCTION

La communauté internationale vit actuellement au rythme d'une poly-crise, marquée tout particulièrement par les conflits dramatiques en Ukraine, dans la bande de Gaza et au Soudan ou par les bouleversements en Syrie. On pourrait y voir les signes d'un retour en force de la violence du pouvoir, susceptible de faire démanteler à son passage tout l'édifice construit avec tant d'efforts depuis la fin de la Seconde Guerre mondiale. Il n'empêche que pour la première fois de son histoire la Cour internationale de justice (CIJ) - organe judiciaire principal de l'ONU - est saisie des aspects juridiques clés de plusieurs de ces crises, que les instruments relatifs aux droits de l'homme servent de fondement de la compétence de la Cour et que des dizaines d'États interviennent dans les procédures y relatives. Autrement dit, loin d'être marginalisé ou détruit, le droit international - y compris les conventions principales de protection des droits de l'homme - est appelé plus que jamais à jouer son rôle dans la conjoncture actuelle. Dans ce contexte particulièrement complexe, il importe de repenser la physionomie du droit international et notamment la place de l'être humain dans cet ordre juridique.

Jusqu'à une époque relativement récente, l'opinion dominante au sein de la doctrine était que le droit international public régissait au premier chef les relations interétatiques, et en second lieu le phénomène des organisations internationales, et que la protection internationale des droits de l'homme et le droit international humanitaire n'étaient qu'une ramification du droit international général, parallèle au tronc de celui-ci. Exprimant la version la plus poussée de cette conception générale, certains auteurs n'ont pas hésité à affirmer que l'individu était le « jouet » des relations interétatiques, qu'il était un simple « objet » du droit international et que sa place dans l'ordre juridique international correspondait à celle de l'animal domestique (*sic*) dans l'ordre juridique interne. À adopter ces points de vue, on aboutirait de manière quasi inéluctable à conclure que le droit international est demeuré à peu près immuable depuis le début du XX^e^ siècle et qu'il reste la branche la plus « déshumanisée » du droit, au sens où il ignore en fait le facteur humain.

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D'étrange façon, certains purs tenants des droits de l'homme – lesdits « droits-de-l'hommistes » – ont contribué à leur manière à renforcer les positions ci-dessus des « internationalistes généralistes » en soulignant à l'envi les particularités (incontestables) des règles internationales relatives aux droits de l'homme, donnant ainsi l'impression que l'ensemble des dispositions et institutions concernées constituait un « régime auto-suffisant » (*self-contained regime*) qui évoluait de manière indépendante en tant que sous-système à part de l'ordre juridique international. En d'autres termes, dans leur tentative de mettre en exergue l'importance de la protection (internationale) des droits de l'homme, les « droits-de-l'hommistes » agissent - sans forcément en avoir conscience - dans la logique de la fragmentation du droit international.

Nous avons essayé de démontrer ailleurs[1] qu'aucune des positions ci-dessus - apparemment contradictoires mais, en dernière analyse, convergentes - ne correspond à la réalité actuelle et aux évolutions récentes du droit international. Il est vrai que les règles internationales relatives aux droits de l'homme présentent quatre spécificités fondamentales : elles visent à la protection d'acteurs non étatiques, et principalement de personnes physiques ; elles n'ont pas de caractère synallagmatique ; elles ne sont pas soumises en principe à la condition de réciprocité ; et elles génèrent des obligations « objectives » pour les États. Par ailleurs, plusieurs instruments dans ce domaine instaurent un système plus ou moins efficace de « garantie collective ». Cependant, cela ne signifie en aucun cas que la protection internationale des droits de l'homme se situe en marge du droit international, bien au contraire. Droit international général et droits de l'homme interagissent à différents niveaux et dans une large gamme de questions particulières. Le droit international constitue le socle juridique de la protection internationale des droits de l'homme (I), et en même temps, les droits de l'homme sont un facteur important d'évolution du droit international général (II).

I. L'influence du droit international général sur la protection des droits de l'homme

La position selon laquelle le tronc du droit international constitue le socle juridique de la protection internationale des droits de l'homme signifie que les principes et les règles internationaux relatifs aux droits de l'homme devront être interprétés et appliqués - par les organes de contrôle internationaux aussi bien que nationaux - en tenant compte du droit international général, et plus précisément en conformité avec lui. La nécessité d'harmoniser l'interprétation des traités relatifs aux droits de l'homme avec le droit international est désormais une position constante des organes de contrôle, juridictionnels et quasi juridictionnels, à caractère universel et régional. Partant de cette constatation, on comprend que le droit international général va tantôt dans le sens de la promotion de la

1. Voir Linos Alexandre Sicilianos, « La dimension humaine du droit international. Cours général de droit international public », *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 440, Leiden, Brill Nijhoff, 2024.

protection des droits de l'homme, tantôt la freine.

A. L'influence positive

Le droit international est mis au service des droits de l'homme à quatre niveaux principalement. Le premier se situe dans le système des *sources du droit international*. En effet, on observe une tendance croissante des organes internationaux de contrôle dans le domaine des droits de l'homme à invoquer des principes et des règles provenant de différentes sources du droit international, en dehors et au-delà de l'instrument conventionnel qu'ils ont compétence pour appliquer, afin d'interpréter de la manière la plus extensive possible les droits matériels et procéduraux que prévoit l'instrument en question. Faisant large usage de l'article 31, paragraphe 3 c), de la Convention de Vienne sur le droit des traités, les organes internationaux de contrôle prennent en compte d'autres instruments conventionnels relevant du domaine des droits de l'homme - favorisant ainsi une interprétation cohérente des droits en question - ainsi que des conventions en dehors de ce cadre, des règles coutumières du droit international, des principes généraux du droit, la jurisprudence internationale, des actes d'organisations internationales - même quand il s'agit de *soft law* - et, plus récemment, des opinions des « publicistes les plus distingués des différentes nations ». Cette tendance revêt un intérêt particulier pour ce qui est de l'articulation entre les droits de l'homme et le droit international de l'environnement. En d'autres termes, les traités relatifs aux droits de l'homme ne sont ni interprétés ni appliqués « dans le vide », mais en liaison avec l'ordre juridique international dans son ensemble et dans son contexte.

Le droit international vient aussi « au secours » de la protection internationale des droits de l'homme sous un autre angle, lié à la notion fondamentale de la juridiction de l'État. Cette notion est le point de référence par excellence pour ce qui est du champ d'application des conventions internationales relatives aux droits de l'homme *ratione personae* et surtout *ratione loci*. Les principes du droit international mènent à l'élargissement du champ d'application de ces conventions. En particulier, la question de l'application « extraterritoriale » des droits de l'homme a préoccupé à plusieurs reprises un assez grand nombre d'organes de contrôle - juridictionnels et quasi juridictionnels - y compris la CIJ.

L'importance de cette question a été mise en évidence à l'occasion de l'affaire de Guantánamo. Cependant, au-delà de cette affaire qui, nous voulons l'espérer, est conjoncturelle, la question de l'application extraterritoriale des conventions relatives aux droits de l'homme acquiert une importance accrue au vu, notamment, de l'expansion des activités étatiques au-delà de leur territoire pour faire face à des défis importants, comme le contrôle de l'immigration, ainsi que de la multiplication des opérations militaires de forces multinationales, avec ou sans mandat du Conseil de sécurité de l'ONU, comme cela s'est produit avec les bombardements dans l'ex-Yougoslavie en 1999. À l'occasion

de cette dernière affaire, la Cour européenne des droits de l'homme (CourEDH) a semblé prendre ses distances par rapport à sa jurisprudence constante. Toutefois, des affaires postérieures ont ramené la Cour près de ses positions traditionnelles.

Bien que la jurisprudence pertinente de la CourEDH soit devenue assez complexe, dans les grandes lignes, l'ensemble des organes internationaux de contrôle se situe dans la logique de la règle fondamentale du droit international général selon laquelle l'État est responsable des actes (ou omissions) de ses organes commis sur son territoire ou *en dehors* de celui-ci. L'avis consultatif, rendu par la CIJ le 19 juillet 2024, concernant les *Conséquences juridiques découlant des politiques et pratiques d'Israël dans le territoire palestinien occupé, y compris Jérusalem-Est*, a réaffirmé avec force le principe de l'application extraterritoriale des instruments relatifs aux droits de l'homme.

Dans le prolongement de cette constatation, on relève également l'influence plus générale des règles du droit international sur la *responsabilité de l'État* dans la protection des droits de l'homme. Conformément aux règles d'attribution, l'État est responsable de *tous* les actes ou omissions *de tous* ses organes - y compris les entités habilitées à l'exercice de prérogatives de puissance publique - même quand ils agissent en excès de pouvoir, voire du comportement des organes *de facto*. Ce principe de base du droit international général est d'un grand secours aux organes internationaux de contrôle dans le domaine des droits de l'homme, en leur permettant de protéger les droits en question contre tout agissement étatique illicite, voire arbitraire. Un deuxième principe fondamental du droit de la responsabilité des États vient compléter le premier : il concerne la responsabilité de l'État pour son propre comportement en relation avec des actes ou des omissions de particuliers. L'affirmation de la responsabilité étatique en tel cas sert de soubassement juridique à toute la théorie de l'effet horizontal indirect des traités internationaux relatifs aux droits de l'homme et des obligations positives des États qui en découlent.

Par ailleurs, les articles de la Commission du droit international sur la responsabilité de l'État relatives à la réparation du dommage causé par le fait internationalement illicite, bien que concernant en principe les relations entre États, peuvent s'appliquer par analogie aux relations entre États et particuliers dans le domaine des droits de l'homme et sont effectivement appliquées fidèlement, notamment dans la jurisprudence très riche de la CourEDH en la matière. En outre, le système de la Convention européenne des droits de l'homme (CEDH) dispose du mécanisme de surveillance du Comité des Ministres, dont la pratique puise systématiquement, elle aussi, dans le droit international général. En effet, au-delà du contrôle du versement du montant de la « satisfaction équitable », le Comité des Ministres exige souvent la prise de mesures « individuelles » de mise en conformité des États aux arrêts de la CourEDH, sur la base du principe de la *restitutio in integrum*. En dehors des mesures individuelles, le Comité des Ministres mais aussi la Cour elle-même demandent aux États de prendre des « mesures générales », c'est-à-dire de modifier leur législation ou leur pratique administrative. Ces mesures générales constituent la forme par excellence de « garantie de non-répétition » du fait internationalement illicite, c'est-à-dire

de la violation constatée d'un droit humain déterminé.

Dans un ordre d'idées analogue, la Cour interaméricaine des droits de l'homme se fonde elle aussi sur le droit coutumier relatif à la responsabilité de l'État, tel que codifié par la Commission de droit international des Nations Unies (CDI), pour développer une riche jurisprudence en matière de réparation, qui va souvent bien au-delà de la compensation pécuniaire, en indiquant des mesures d'ordre symbolique ou non en guise de satisfaction ou de garanties de non-répétition.

L'examen de la contribution positive du droit international à la protection des droits de l'homme est complété par l'exploration du rôle que jouent les règles du droit en question en *période d'état d'urgence*, comme un conflit armé, international ou non, ou autre danger menaçant la vie de la nation. La pandémie du Covid-19, ainsi que la prolifération des conflits armés dans le monde ont remis à l'ordre du jour cette problématique. On sait, en effet, que certains des traités internationaux parmi les plus importants relatifs aux droits de l'homme contiennent des clauses qui permettent aux États parties de déroger, en de telles périodes, aux droits protégés. Cependant, la possibilité de déroger n'est pas illimitée, mais subordonnée à certaines conditions. L'une d'entre elles est la compatibilité des dérogations avec le droit international, ce qui signifie que ce dernier fonctionne de manière limitative à l'égard des dérogations, et donc de façon protectrice pour les droits de l'homme. Les États ne peuvent invoquer les clauses de dérogation pour justifier des actes contraires au droit humanitaire ou incompatibles avec des règles de *jus cogens*. Le droit international humanitaire spécifie et complète le droit des droits de l'homme en période de conflit armé (et d'occupation), fonctionnant du même coup comme garde-fou contre les dérogations qui risqueraient d'anéantir toute notion de droit dans des circonstances anormales de ce type.

En outre, la définition de certaines violations des droits de l'homme en tant que crimes contre l'humanité est un critère pour déterminer les limites des dérogations autorisées. En effet, il serait logiquement et juridiquement absurde qu'un acte attribué à l'État et engageant en même temps la responsabilité pénale internationale de ses auteurs pour crime contre l'humanité puisse être justifié sur la base des clauses de dérogation. Par ailleurs, les dérogations aux droits de l'homme en cas de circonstances exceptionnelles ne peuvent mener à contourner les principes généraux de légalité et d'État de droit. Autrement dit, les organes internationaux de contrôle invoquent le droit international humanitaire, le droit international pénal et le droit international général pour élargir la liste des droits de l'homme qui ne souffrent pas de dérogation en période d'état d'urgence.

Cependant, le droit international n'intervient pas toujours de manière à promouvoir les droits de l'homme. Dans certains cas, les règles en vigueur du droit international général freinent la protection efficace de ces droits.

B. L'influence restrictive

Cela vaut, tout d'abord, pour ce qui est de *l'immunité juridictionnelle de l'État*, institution réglementée au premier chef par le droit international et qui repose sur l'égalité souveraine entre les États et plus particulièrement sur le principe coutumier *par in parem non habet jurisdictionem*. En effet, l'invocation de l'immunité juridictionnelle oppose un obstacle procédural à l'examen au fond de requêtes susceptibles de soulever des questions de droits de l'homme. Il est vrai que l'immunité juridictionnelle de l'État n'est pas absolue. En droit international contemporain, cette règle est soumise à des exceptions, surtout pour ce qui est des actes *jure gestionis*. Mais pour ce qui est des actes *jure imperii*, l'immunité juridictionnelle reste presque absolue, maintenant l'État lui-même hors de portée. Sur la base de la théorie de la « hiérarchie normative », il est soutenu souvent avec vigueur - aussi bien par une partie des auteurs que par des juges nationaux et internationaux - qu'en cas de violation de règles de *jus cogens* dans le domaine des droits de l'homme et du droit international humanitaire, l'immunité juridictionnelle de l'État est infléchie, y compris pour les actes *jure imperii*. Cependant, ce point de vue ne semble pas dominer. Les arrêts rendus à ce propos par la CourEDH et la Cour internationale de Justice vont en sens inverse, et le « dialogue » entre elles semble, du moins pour le moment, fermer la porte à de telles évolutions dans la jurisprudence internationale. Le bouclier de protection d'un noyau dur d'intérêts étatiques, bien qu'attaqué, continue à résister fermement, conduisant parfois à des phénomènes de déni de justice qui heurtent la conscience humaine.

S'agissant *des immunités des fonctionnaires étatiques*, il convient de distinguer entre les immunités personnelles et les immunités fonctionnelles. Les immunités personnelles et en particulier l'immunité juridictionnelle pénale du cercle restreint de personnes qui représentent l'État sur le plan international restent valables même dans le cas où ces personnes sont accusées d'avoir commis des crimes internationaux et en particulier des crimes qui violent des droits humains fondamentaux. Cela signifie que, sous réserve de la compétence des tribunaux pénaux internationaux (ou internationalisés) ou de la levée éventuelle de l'immunité juridictionnelle par les autorités compétentes de leur État, les personnes en question ne peuvent être poursuivies pénalement, être arrêtées ou jugées par les autorités de poursuite ou les autorités judiciaires d'un État étranger. L'immunité juridictionnelle pénale et l'inviolabilité de la personne de ces individus est « totale » et couvre non seulement les actes liés à l'exercice de leurs fonctions, mais aussi leurs actes privés. Les immunités personnelles cessent d'être applicables quand les personnes protégées cessent d'exercer leurs fonctions.

Au contraire, selon l'opinion la plus correcte, les immunités fonctionnelles cèdent le pas quand un autre organe de l'État est accusé d'avoir commis un crime international. Cela signifie que les organes de l'État qui ne le représentent pas (ou plus) internationalement peuvent être poursuivis, arrêtés ou jugés par les autorités compétentes d'un État étranger, même si, comme c'est d'habitude le cas, le crime international est lié à l'exercice (et à l'abus) d'un pouvoir public et ne constitue pas simplement un acte privé.

Cette règle coutumière a émergé progressivement après la Seconde Guerre mondiale et vise à combattre l'impunité des crimes internationaux et à rendre plus efficace la protection des droits de l'homme qui sont violés par de tels actes, internationalement punissables.

La différence de statut juridique entre les immunités personnelles et les immunités fonctionnelles est due au fondement juridique différent des unes et des autres. Contrairement aux immunités fonctionnelles, qui reposent exclusivement sur la théorie des besoins fonctionnels, les immunités personnelles ont une base justificative double. Elles sont fondées à la fois sur la théorie des besoins fonctionnels et sur la théorie de la représentation. L'objectif des immunités personnelles n'est pas simplement de garantir l'exécution sans entraves de leurs fonctions par les personnes protégées, mais en même temps - et principalement - de garantir la normalité des relations internationales. À la phase présente d'évolution du droit international, cet objectif semble l'emporter sur la nécessité de combattre l'impunité, ce qui constitue une limitation incontestable à la protection efficace des droits de l'homme.

Ces observations sont valables, jusqu'à un certain point, pour les *organisations internationales* et la protection des droits de l'homme. Bien qu'il soit difficile d'imaginer que les organisations internationales intergouvernementales puissent commettre des violations graves de ces droits, les problèmes ne manquent pas dans la pratique. Cependant, la garantie du fonctionnement normal des organisations internationales mène à l'application de l'immunité juridictionnelle, y compris dans les cas où le requérant invoque une violation de ses droits fondamentaux. On constate même que la distinction entre actes *jure imperii* et *jure gestionis* ne s'applique pas aux organisations internationales, dont l'immunité juridictionnelle est quasi absolue. Il est vrai que la CourEDH tente de modérer les effets juridiques de l'immunité juridictionnelle des organisations internationales sur la base du principe de la « protection équivalente » et du dogme de « l'harmonisation systémique ». Cependant, les organisations internationales en tant que telles restent toujours hors de portée. Ce qui pèse particulièrement sur le jugement de la Cour de Strasbourg, c'est la nécessité que les organisations internationales fonctionnent sans entraves, en tant qu'acteurs par excellence de la coopération internationale.

Au-delà de l'immunité juridictionnelle, la constatation de la *responsabilité des organisations internationales* est une affaire très difficile. Il est vrai que, même si ces organisations ne sont pas parties contractantes aux traités relatifs aux droits de l'homme, elles ont des obligations internationales dans ce domaine en vertu de différents fondements juridiques, notamment sur la base du droit international coutumier. Cependant, en l'absence d'obligations conventionnelles claires, les limites exactes de leurs obligations ne sont pas toujours nettement visibles, en particulier pour ce qui est des conditions de dérogation aux droits protégés en cas d'état d'urgence. Ce dernier problème revêt une importance particulière du fait que dans la pratique, il se pose des questions de droits de l'homme principalement en liaison avec les mesures prises par les organisations internationales

pour le maintien et l'imposition de la paix et de la sécurité internationales, c'est-à-dire dans ce genre de situations d'exception.

Les dispositions mises au point par la Commission du droit international relativement à l'attribution de faits internationalement illicites aux organisations internationales ont été mal interprétées, comme l'a montré la décision problématique rendue par la CourEDH dans l'affaire *Behrami et Saramati* et dans d'autres affaires connexes concernant les activités de la KFOR. Il est vrai que, à l'occasion de l'intervention en Irak, la CourEDH s'est harmonisée aux règles coutumières relatives à l'attribution. Cependant, si l'on excepte l'Union européenne, où la Cour de Luxembourg a réussi à préserver un équilibre subtil entre les impératifs de la sécurité et de la liberté, dire que la responsabilité des organisations internationales dans le domaine des droits de l'homme est engagée est très problématique. En effet, les mécanismes de contrôle existants - organes juridictionnels régionaux et comités d'experts indépendants de l'ONU - n'ont pas en principe de compétence à leur égard. Par ailleurs, les tribunaux administratifs et les commissions de réclamations qui fonctionnent dans le cadre de certaines organisations internationales disposent de compétences limitées *ratione personae* et *ratione materiae*, qui couvrent une gamme réduite des droits et libertés internationalement protégés. Par conséquent, l'immunité juridictionnelle des organisations internationales aussi bien que les obstacles variés posés à l'engagement de leur responsabilité internationale mettent un frein à la protection des droits de l'homme.

II. L'influence des droits de l'homme sur l'évolution du droit international général

Après avoir examiné la manière dont le droit international général influe, de façon positive ou limitative, sur la protection des droits de l'homme, il importe d'aborder le phénomène inverse, c'est-à-dire l'influence exercée sur l'évolution du droit international par la nécessité de garantir une protection plus efficace des droits de l'homme et, plus généralement, par les valeurs qui sont attachées à ces droits. Cette influence ne se limite pas à un secteur concret, mais concerne une large gamme de questions. Dans de nombreux cas, les droits de l'homme ont mené à des évolutions plus ou moins modérées du droit international, c'est-à-dire à la refonte et à la modernisation de règles traditionnelles, de méthodes de production du droit et d'institutions, de sorte à répondre de manière plus complète aux besoins actuels, en prenant de plus en plus en compte le facteur humain. Mais dans d'autres cas, les valeurs incarnées par les droits de l'homme et la nécessité de garantir leur protection plus efficace ont entraîné des ruptures et des bouleversements plus profonds en droit international, qui ont affecté toute la physionomie de cet ordre juridique.

A. L'influence modérée

Les évolutions modérées du droit international survenues sous l'influence des droits de l'homme tournent autour de trois axes importants, qui sont : le système des sources du droit international, les relations extérieures de l'État et le droit de la mer.

En effet, les droits de l'homme exercent une influence, tout d'abord, sur *le droit des traités* et notamment sur toute une série de questions liées à plusieurs étapes de la « vie » des traités internationaux, depuis leur négociation et leur rédaction - souvent avec l'intervention appuyée d'acteurs non étatiques -, la formulation de réserves et l'appréciation de la validité et des conséquences juridiques de ces dernières, l'interprétation des traités et leur adaptation aux besoins actuels - y compris en s'écartant de la volonté initiale des parties contractantes -, jusqu'à leur suspension ou leur dénonciation. La Convention de Vienne sur le droit des traités envisage expressément les traités « de caractère humanitaire » comme une catégorie spéciale seulement en liaison avec la question de leur suspension ou de leur dénonciation pour cause de violation substantielle antérieure (article 60, paragraphe 5). Pour ce qui est des autres questions, et notamment celle des réserves et de l'interprétation évolutive, les adaptations nécessaires du « régime de Vienne » suivent la voie du droit coutumier.

La contribution des droits de l'homme à la *vision de la coutume internationale* n'est pas moins importante. La nécessité de garantir une protection plus efficace des droits de l'homme a mis en évidence les problèmes que génère dans la pratique la conception traditionnelle concernant les éléments constitutifs de la coutume et la relation qui les unit, contribuant à une vision nouvelle qui accorde un accent particulier à l'*opinio juris*. En outre, la manière de concevoir le sens et le contenu de la « pratique » s'élargit progressivement afin d'englober non seulement la pratique « sur le terrain » - qui provient en majeure partie de certains agents de l'administration - mais aussi l'ensemble des faits de tous les organes étatiques. Cette approche élargie de la pratique étatique est en harmonie avec la théorie relative à la responsabilité internationale de l'État, et notamment avec les règles d'attribution. Par ailleurs, la conception actuelle de la pratique internationale englobe aussi celle des autres « usagers » du droit international, en proportion, bien entendu, du « poids spécifique » dont chacun d'eux dispose dans le devenir international. Cette conception garantit la cohérence de la théorie relative à la coutume avec l'approche actuelle de la question des « sujets » du droit international. Plus généralement, la vision de la coutume cesse d'être purement « statocentrique » comme dans le passé, elle n'est pas fondée uniquement sur la volonté des États, et notamment de leur noyau dur, mais se situe dans un cadre beaucoup plus large, englobant de plus en plus « d'usagers » du droit international.

Des évolutions similaires se laissent observer concernant des institutions et des règles traditionnelles importantes en rapport avec les *relations extérieures de l'État*.

Concernant la *reconnaissance internationale*, les droits de l'homme ont contribué à la limitation du pouvoir discrétionnaire traditionnel de l'État en la matière et à l'émergence et la consolidation de l'obligation de ne pas reconnaître des situations liées à des violations de règles de *jus cogens* ou d'obligations *erga omnes*, ainsi que de l'obligation connexe de ne pas fournir d'aide ou de concours visant au maintien de ces situations. L'avis consultatif de la CIJ sur les *Conséquences juridiques découlant des politiques et pratiques d'Israël dans le territoire palestinien occupé, y compris Jérusalem-Est* a insisté tout particulièrement sur ce principe.

Les évolutions récentes concernant les *institutions de la protection diplomatique et de l'assistance consulaire* vont dans le même sens. Plus précisément, la protection diplomatique n'est plus envisagée seulement comme un droit de l'État, mais aussi comme un moyen de protéger des droits individuels. La construction traditionnelle selon laquelle, en exerçant une protection diplomatique, l'État exerce un droit qui lui appartient exclusivement, est qualifiée de « fiction juridique » et tenue pour dépassée. Sous certaines conditions, et notamment en cas de violations graves des droits de l'homme, la question est désormais posée de l'obligation de l'État de protéger ses citoyens à l'étranger ou du moins d'examiner avec attention leur demande en ce sens. On observe des évolutions comparables concernant la question de la restitution au national lésé d'une partie importante, voire de l'intégralité du montant de l'indemnisation versée par l'État contrevenant. La jurisprudence de la Cour internationale de Justice ainsi que de la CourEDH dans des affaires interétatiques importantes a contribué de manière décisive à renforcer cette règle. Par ailleurs, le champ d'application de la protection diplomatique a été considérablement élargi, aussi bien *ratione materiae* - dans la mesure où la protection diplomatique n'est plus limitée au niveau minimum de protection des étrangers, mais est exercée sur la base plus large du droit relatif aux droits de l'homme - que *ratione personae*. En effet, le principe traditionnel de la « nationalité des réclamations » a été infléchi afin de protéger certains groupes vulnérables comme les réfugiés, les apatrides ou les membres d'équipage de navires, indépendamment de leur nationalité. La Charte des droits fondamentaux de l'Union européenne va aussi dans le même sens pour ce qui est de la protection des citoyens de l'Union se trouvant dans une situation vulnérable. Par ailleurs, la codification de la protection diplomatique par la Commission du droit international s'inspire clairement de la jurisprudence des organes de contrôle dans le domaine des droits de l'homme, relativisant la règle coutumière traditionnelle concernant l'épuisement des voies de recours internes.

Ces évolutions sont renforcées par celles qui s'observent dans le domaine de l'assistance consulaire. La CIJ a pris ses distances par rapport à une approche purement interétatique de l'institution et a qualifié de droits individuels certains des droits visés à l'article 36 de la Convention de Vienne sur les relations consulaires. La Cour interaméricaine des droits de l'homme est allée plus loin en qualifiant ces droits de droits de l'homme et en les reliant au droit à un procès équitable et, sous certaines conditions, au droit à la vie. D'autres traités relatifs aux droits de l'homme se réfèrent à différentes formes

d'assistance consulaire, non seulement en faveur de personnes incarcérées, mais aussi à propos d'étrangers sous le coup d'une expulsion, de victimes de trafic d'êtres humains, de mineurs non accompagnés, de victimes de violences, etc. En d'autres termes, on assiste à un élargissement important de l'institution *ratione personae*, mais aussi *ratione materiae.*

Nous relevons aussi des évolutions notables concernant la *succession d'États en matière de traités internationaux*. Malgré les ambiguïtés de la pratique, il semble exister une nette tendance au renforcement d'une règle coutumière concernant la succession automatique à certaines catégories de traités, en particulier les traités relatifs aux droits de l'homme. Même si l'on n'admet pas qu'une telle règle s'est déjà cristallisée, il est difficile de nier que la continuité des obligations conventionnelles dans ce secteur est présumée et qu'il appartient à l'État successeur intéressé de renverser cette présomption en faisant connaître clairement sa volonté contraire. En tout état de cause, la pratique en matière de traités relatifs aux droits de l'homme a influencé incontestablement le droit international général relatif à la succession d'États en matière de traités.

Ces observations valent aussi pour le *droit de la mer*. Bien qu'à première vue, ce domaine du droit international semble purement statocentrique, le développement des activités en mer, ainsi que la crise migratoire ont conduit à la prise en compte du facteur humain. Les traités relatifs aux droits de l'homme ne s'appliquent pas seulement aux zones maritimes où l'État côtier exerce sa souveraineté (ou des droits souverains), mais aussi en haute mer. L'État du pavillon est appelé à établir sa juridiction concernant la répression de la criminalité maritime, y compris les crimes transnationaux qui constituent en même temps des violations graves de droits humains fondamentaux, comme la traite d'êtres humains, le trafic de migrants, de drogues, etc. L'emploi de la force en vue de la répression de la criminalité en mer doit se faire dans le respect des droits humains concernés, comme le droit à la vie. Par ailleurs, le cadre juridique de recherche et de sauvetage vise, en dernière analyse, à protéger ce droit. En outre, le principe fondamental de non-refoulement s'applique *mutatis mutandis* en mer. En d'autres termes, le droit de la mer, le droit relatif aux droits de l'homme et en particulier le droit des réfugiés se complètent l'un l'autre et doivent être appliqués sur la base d'une approche holistique. Cependant, au-delà de ces évolutions plus ou moins modérées survenues sous l'influence des droits de l'homme, ces derniers ont contribué de manière décisive à de réels *bouleversements* qui modifient la physionomie du droit international actuel, apportant un nouveau souffle à la branche.

B. L'influence drastique

Cette contribution concerne des secteurs clés, et en particulier la théorie des « sujets » du droit international, ainsi que la structure même de l'ordre juridique international.

La théorie des *« sujets » du droit international* a subi des changements importants depuis la création de la branche. Ce parcours évolutif, loin d'être toujours linéaire et

cohérent, se distingue par des volte-face et des revirements. Certaines des opinions et distinctions classiques - notamment la conception statocentrique des sujets et la distinction qui va de pair entre sujets et objets du droit international - semblent désormais dépassées. Il en va de même de certains des critères traditionnels sur la base desquels la qualité du sujet de l'ordre juridique international était reconnue (ou non). D'une manière plus générale, la diversité sans cesse croissante de la vie internationale et l'avènement sur la scène internationale de toutes sortes de « facteurs privés » très différents les uns des autres mettent en évidence la difficulté de la doctrine traditionnelle à enregistrer les évolutions rapides de la pratique. La notion de « participant » et, davantage encore, celle d'« usager » du droit international reflètent plus adéquatement la réalité contemporaine et ont la dynamique requise pour couvrir aussi les évolutions à venir.

Dans ce cadre, les droits de l'homme ont joué et continuent de jouer un rôle primordial. L'adoption de la Déclaration universelle des droits de l'homme a marqué un jalon dans *l'émergence de l'individu sur la scène internationale*, en constituant une source d'inspiration et un point de référence pour toute une série de traités relatifs aux droits civils, politiques, sociaux, économiques et culturels, aussi bien au niveau universel qu'au niveau régional. Au-delà de la Déclaration universelle et de son influence déterminante, la reconnaissance du droit (collectif) des peuples à l'autodétermination et d'autres droits des peuples – tout particulièrement par la Charte africaine des droits de l'homme et des peuples -, le renforcement de la dimension collective des droits minoritaires et l'annonce plus récente d'une série de droits en faveur des peuples autochtones (aussi bien purement collectifs que « mixtes ») constituent trois étapes importantes dans la contribution plus générale des droits de l'homme à la vision de la question des « sujets » du droit international.

Parallèlement au développement impressionnant des droits de l'homme matériels, principalement individuels mais aussi collectifs, « l'arsenal » international procédural pour la protection plus efficace de ces droits a été considérablement renforcé, surtout depuis la fin du XX^{e} siècle. Bien qu'il soit toujours conditionné à son acceptation unilatérale par les États, le droit de communication individuelle a été introduit désormais dans presque tous les instruments conventionnels qui constituent le tronc du système protection des Nations Unies. Sur le plan régional, le droit de recours individuel a été amplement renforcé aussi bien dans le cadre de la Convention américaine des droits de l'homme, où les requérants ont désormais un *locus standi* devant la Cour interaméricaine, que - et surtout - en relation avec la CEDH. Débarrassé de la condition de son acceptation par les parties contractantes, le droit de requête individuelle devant la CourEDH a développé une vive dynamique, qui contribue au caractère unique du système européen de protection des droits de l'homme, tout en mettant à l'épreuve les ressources du système. L'instauration d'un mécanisme de réclamations collectives dans le cadre de la Charte sociale européenne et le développement incessant d'autres formes de participation de l'individu et des acteurs de la société civile devant les organes internationaux de contrôle dans le domaine des droits de l'homme composent une image radicalement différente de celle qui dominait il y a quelques années encore.

L'ensemble de la problématique relative à l'importance du « facteur privé » en droit international actuel acquiert un autre aspect, qui se situe aux antipodes de la reconnaissance de droits et tourne autour de la *responsabilité pénale individuelle* en droit international. Cette question est à la fois ancienne et nouvelle. En effet, la quasi-totalité des auteurs, classiques et contemporains, reconnaît à l'individu la qualité de sujet direct du droit international dans certaines « situations anormales », qui vont de la piraterie et du trafic d'êtres humains au génocide, aux crimes de guerre, aux crimes contre l'humanité et autres actes criminels prévus par des traités internationaux, notamment dans le domaine du terrorisme international. L'importance croissante des droits de l'homme et du respect de la dignité humaine, ainsi que la nécessité qui s'ensuit de lutter contre l'impunité de ceux qui portent odieusement atteinte à ces valeurs fondamentales ont été un facteur important dans le long parcours qui a mené à la création de la Cour pénale internationale et au développement progressif et à la consolidation d'un *corpus* cohérent de règles matérielles et procédurales de répression pénale internationale.

La relation intrinsèque entre les droits de l'homme et le droit pénal international se manifeste à double sens. Le second est mis au service des premiers, dans la mesure où il tend à la punition des auteurs de violations graves des droits fondamentaux. En effet, il est évident qu'aussi bien le génocide que les crimes de guerre et les crimes contre l'humanité constituent des violations graves de normes qui sont au cœur des droits de l'homme internationalement protégés. Inversement, les droits de l'homme se mettent au service du droit pénal international en fournissant un point de référence pour l'interprétation et l'application de toutes ses règles matérielles et procédurales, et en particulier pour le déroulement normal et équitable du procès pénal international. D'une manière plus générale, les droits de l'homme ont joué un rôle décisif dans l'émergence de l'individu comme « sujet passif » du droit international.

La reconnaissance de l'individu, des minorités, des autochtones, et plus généralement des peuples en tant que « sujets », ou mieux, en tant qu'« usagers » du droit international s'est inévitablement accompagnée d'évolutions marquantes dans *la structure même de l'ordre juridique international*. Tant que le droit international réglementait presque exclusivement les relations entre États, la volonté souveraine de ces derniers, en combinaison avec le principe de l'égalité souveraine des États, avait conduit à la création d'un ordre juridique plat, sans valeurs supérieures nécessitant une protection accrue. Le droit international n'était qu'un ensemble de règles à caractère supplétif réglementant les relations synallagmatiques entre des sujets égaux et similaires, les États. Ces derniers étaient en mesure de modifier ces règles en passant un accord contraire, ainsi que de s'auto-excepter du respect de règles coutumières en déclarant leur « objection persistante » dès la phase d'élaboration des règles en question.

Ces éléments structurels du droit international traditionnel ont commencé à chanceler avec l'adoption de la Charte des Nations Unies et l'introduction d'un nouvel édifice de valeurs fondé sur la paix, les droits de l'homme et le principe d'autodétermination

des peuples. Dans ce cadre, les organes des Nations Unies, et en particulier la Cour internationale de Justice et la Commission du droit international, ont joué un rôle de premier plan dans l'émergence et la consolidation des notions d'obligations *erga omnes* et de normes de *jus cogens* respectivement. L'invocation et l'approfondissement de ces notions ont conduit progressivement à la stratification des obligations et des règles internationales, c'est-à-dire à un système désormais régi par une logique de hiérarchisation, même si celle-ci n'a pas encore la même netteté que celle qui caractérise l'ordre juridique interne.

Les traités relatifs aux droits de l'homme ont préparé le terrain à ces évolutions. Comme on le sait, la CEDH, tout d'abord, puis toute une série d'autres conventions, régionales et universelles, ont introduit l'institution du recours interétatique. Cette institution souligne le fait que les obligations conventionnelles dans le domaine des droits de l'homme sont valables *erga omnes partes* et que toute partie contractante a un intérêt juridique à ce qu'elles soient respectées par les autres États contractants. Cette approche a été mise en valeur par la jurisprudence des organes de la CEDH, en particulier la CourEDH tout d'abord, et a été confirmée plus récemment par la Cour internationale de Justice. En effet, certaines des conventions fondamentales de l'ONU relatives aux droits de l'homme - la Convention sur le génocide, la Convention internationale pour l'élimination de la discrimination raciale et la Convention contre la torture - constituent la base de la compétence de la CIJ, y compris pour ce qui est de plusieurs affaires pendantes touchant à des crises internationales de premier plan. Dans ce contexte, la Cour a souligné à plusieurs reprises le caractère *erga omnes partes* des obligations qui découlent de ces instruments. L'« humanisation » du contentieux de la CIJ qui en résulte constitue une évolution majeure du droit international contemporain.

La plupart des conventions qui prévoient l'institution du recours interétatique sont antérieures au fameux *obiter dictum* de la Cour internationale de Justice dans l'affaire *Barcelona Traction*, qui constitue un *locus classicus* pour ce qui est de la notion d'obligations *erga omnes*. Par ailleurs, certaines des obligations fondamentales dans le domaine des droits de l'homme, prévues dans les instruments conventionnels internationaux susmentionnés, sont citées comme exemples d'obligations *erga omnes* dans cet *obiter dictum* historique. Il s'agit en particulier de l'interdiction du génocide, de l'esclavage et de la discrimination raciale. Sur les quatre exemples concrets mentionnés par la Cour internationale de Justice dans l'affaire susmentionnée, trois sont directement liés à la protection des droits de l'homme. Une observation analogue vaut pour ce qui est de l'enrichissement progressif de la notion d'obligations *erga omnes*. Cela ressort aussi bien de la jurisprudence internationale des dernières décennies, et notamment celle de la CIJ, que de la pratique d'autres organes de l'ONU, en particulier l'Assemblée générale. Par conséquent, il ne semble pas excessif de dire que les droits de l'homme non seulement ont contribué de manière déterminante à l'émergence et à la consolidation de la notion d'obligation *erga omnes*, mais qu'ils correspondent aussi à la plus grande partie de ces obligations.

Par ailleurs, les droits de l'homme ont contribué de manière déterminante à la problématique qui tourne autour de la notion de *jus cogens* et à son émergence en droit international, comme le montre d'ailleurs le fait que la plupart des exemples de normes de *jus cogens* qui ont été donnés notamment par la CDI, mais aussi par des organes juridictionnels internationaux (et nationaux) proviennent du domaine de la protection internationale des droits de l'homme et du droit international humanitaire. Les droits de l'homme restent le « fer de lance » dans l'enrichissement de la liste des normes de *jus cogens*, tout en contribuant à d'autres points de la problématique, comme les relations des obligations *erga omnes* et des normes de *jus cogens*, ou l'élargissement du concept traditionnel lui-même de *jus cogens* en droit international afin d'y inclure le « *jus cogens* régional » et, plus généralement, des normes de *jus cogens* découlant de conventions multilatérales et fonctionnant comme telles entre les parties contractantes.

L'introduction des notions de normes de *jus cogens* et d'obligations *erga omnes* en droit de la *responsabilité internationale* a été d'une importance stratégique pour la physionomie d'ensemble des réglementations qui régissent le domaine en question et pour celle de leur codification par la CDI. La nécessité d'une protection plus efficace des droits de l'homme et des valeurs qu'ils incarnent a joué un rôle capital dans ces évolutions, et concrètement, pour ce qui est de l'élimination du dommage comme élément constitutif de la responsabilité internationale, pour les conséquences juridiques plus spécifiques de violations graves de normes de *jus cogens*, pour l'invocation de la responsabilité par des États non directement lésés par des violations d'obligations *erga omnes (partes)* - cas très fréquent dans le domaine des droits de l'homme - et pour la faculté de prendre des contre-mesures « collectives ».

Les limites de la « compétence nationale » des États dépendent directement de la mutation de la responsabilité internationale, ainsi que de l'émergence et de la consolidation des normes de *jus cogens* et des obligations *erga omnes*. Le développement du droit conventionnel et du droit coutumier dans le domaine des droits de l'homme, l'instauration d'un réseau dense de mécanismes internationaux de protection, conventionnels et non conventionnels, ainsi que - et principalement - l'acceptation du fait que ces droits correspondent, par nature, à des obligations ayant valeur juridique supérieure, ont inévitablement mené à un rétrécissement important du « domaine réservé » des États. Il est à noter que les organes internationaux de contrôle de l'application des droits de l'homme, juridictionnels et quasi juridictionnels, interviennent dans des matières qui touchent au noyau du pouvoir étatique, comme la répression pénale, l'organisation du système d'administration de la justice, le fonctionnement des services de sécurité et de renseignements, les activités de l'armée et de la police, le contrôle des frontières, des flux migratoires, etc.

Dans le prolongement de ces constatations concernant la transformation du droit de la responsabilité internationale et le rétrécissement de la sphère de compétence nationale des États, nous retrouvons aussi toute la problématique de la refonte du

système de *sécurité collective*, régi notamment par le Chapitre VII de la Charte des Nations Unies. L'importance de ce Chapitre pour la structure et le fonctionnement du système international en général, et plus particulièrement pour le maintien, l'imposition et le rétablissement de la paix et de la sécurité internationales, est évidente. Au-delà des conjonctures politiques, qui ont joué sans aucun doute un rôle très important dans la « résurgence » du Chapitre VII, l'expansion étonnante des activités du Conseil de Sécurité est étroitement liée à l'élargissement de la notion de « menace pour la paix » visée à l'article 39 de la Charte. Selon la conception contemporaine de cette notion, la source des menaces en question ne se limite plus dans le domaine militaire, mais elle concerne aussi les domaines politique, économique, social et environnemental. De nouvelles menaces, comme les pandémies ou le changement climatique, semblent influencer le concept de « menace contre la paix et la sécurité internationales ». On aboutit ainsi à une approche holistique des « menaces », drastiquement différente de celle qui prévalait dans le temps. Cet élargissement significatif, qui se caractérise par la prise en compte du facteur humain, mène souvent à une activation du système de sécurité collective en raison de violations graves d'obligations *erga omnes* et de normes de *jus cogens*, et en particulier en cas de violations étendues et systématiques des droits de l'homme et du droit international humanitaire.

Les quatre domaines d'action les plus importants du Conseil de sécurité dans le cadre du système de sécurité collective prévu par la Charte des Nations Unies - opérations de paix, sanctions n'impliquant pas l'emploi de la force, opérations autorisées et administration territoriale internationale - ont été considérablement influencés par la problématique générale des droits de l'homme. La physionomie de l'ensemble du système a été radicalement reconsidérée et ne cesse de se transformer à la lumière des valeurs que reflètent les droits en question et le droit international humanitaire. Cela ne signifie pas que le système fonctionne de manière satisfaisante ou qu'il ne soit pas susceptible d'autres améliorations importantes. Cependant, pour être substantielles, ces améliorations devront être inspirées par les valeurs en question et correspondre à la « responsabilité de protéger » endossée collectivement par les chefs d'État et de gouvernement dès 2005. L'émergence et la consolidation de cette notion comporte un symbolisme significatif, qui reflète l'importance des droits de l'homme dans l'ordre juridique international actuel.

Plus généralement, toutes les évolutions et les bouleversements ci-dessus composent une image du droit international général très différente de celle que projetaient les théoriciens classiques de la branche, mais aussi certains auteurs contemporains éminents. Malgré les fortes résistances, le « modèle statocentrique » a subi des fissures essentielles, dont les conséquences sont visibles dans divers secteurs d'importance clé. Les droits de l'homme et les valeurs qu'ils incarnent ont influé sur les sources du droit international, sur toute une série d'institutions traditionnelles liées aux relations extérieures de l'État, sur le droit de la mer, sur la théorie des « sujets » de l'ordre juridique international, sur la conception de la responsabilité internationale, sur le fonctionnement du système de sécurité collective et, en définitive, sur la structure même et la physionomie en général de la branche.

INTERTEMPORAL LAW AND THE DENIAL OF JUSTICE

by Dire Tladi*

INTRODUCTION

In a recent publication in the *American Journal of International Law*, I addressed the question of *jus cogens* and its splendid isolation from the rules on reparations. In particular, that article sought to show that the mainstream understanding that *jus cogens* has no effect in the determination of reparation was problematic. The article did not address the frequently discussed question of reparations for historical breaches. But I did note that historical injustices that are often the subject of reparation discussions "implicate … norms that are generally accepted as *jus cogens* such as slavery, racial discrimination and genocide" and, moreover, that "many of these injustices take place in the context of a breach of another *jus cogens* norm, namely the right of self-determination." Latin America and Asia have suffered greatly from these injustices, but perhaps no other continent has suffered from the violations like Africa.

As we all know, the main obstacle to reparations for these violations is the principle of intertemporal law. To recall, according to that principle "a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled." In the context of historical injustices, this means that acts such as slavery, genocide in Namibia, British atrocities against the Mau Mau in Kenya, British atrocities in India, including the Jallianwala Bagh massacre and other colonial-era atrocities, amongst many other violations do not attract the second rules of international law. Other atrocities, such as the Nazi atrocities in the Second World War and the Armenian genocide, also come within the purview of these historical injustices. To this, the forthcoming article made the following observation:

> "The rule of intertemporal … has had the effect of excluding from the reach of international law some of the most egregious violations of *jus cogens* norms in human history. Violations that, to borrow and adapt a famous statement from the International Court of Justice, amount to a 'denial of the' most basic rights of people, including 'the right of existence of entire human groups' and the right to fully determine their political status and freely pursue their economic, social and cultural development in accordance with basic tenets of dignity and which should 'shock[s] the conscience of mankind and result[s] in great losses to humanity,

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and which [are] contrary to moral law and to the spirit and aims' of an international community.''

In the final sentence that article declared that it did not address the "intertemporal law" question but that the same concerns motivating the search for ending the conceptual isolation of *jus cogens* and reparations should animate concerns about how intertemporal law helps to insulate historical injustices from the law of reparations in international law.

This issue of reparations for me highlights the uncomfortable reality and tension concerning international law, Africa and colonialism. On the one hand, colonialism is a blemish on the history of humanity - one of the most egregious beaches against humanity, whose consequences continue to be felt long after its official end, and will likely continue to be felt for decades or even centuries to come. Yet, on the other hand, international law continues to respect, normatively, many of the legacies of colonialism, mainly as a consequence of intertemporal law. It is this intertemporal law that, for example, is said to prevent the application of reparations obligations to former colonial powers for the unconscionable atrocities committed in history.

Let me pause here to say that there are consequences of intertemporal law that I believe, though uncomfortable, are necessary. For example, in the context of colonial borders in general, another legacy of colonialism, intertemporal law is seen in the entrenchment of legal principles such as *uti possidetis juris* - which is reflected in the African context in the African Union's principle concerning the respect for colonial borders. In the context of the *uti posseditis juris* principle, Africa is caught between the proverbial rock and a hard place. The principle of the respect of colonial borders is not just a legal principle that has been accepted as such by States, including those most affected by it, but it is also a principle of necessity. Thus, it is not possible, as far I can see, to imagine a world without the principle, which would not thrust formerly colonized territories into untold chaos. Put differently, the principle of respect for colonial borders is not sweet dessert but is rather a bitter pill that has to be swallowed by post-colonial States, in particular African states, especially for the sake of peace and stability. It is not clear to me that the application of the concept of intertemporal law to reparations for historic injustices falls within the same categories.

I. Intertemporal Law, *Jus Cogens* Violation and Contemporary International Law

The application of intertemporal law to reparations for egregious violations of *jus cogens* norms such as the prohibition of slavery, the prohibition of racial discrimination, the prohibition of genocide and the right of self-determination is not only bitter but cannot even be justified as a pill for the sake of peace and stability. The only interest that is served by this bitter pill is the interest of those responsible for these most egregious violations.

Unlike the principle of *uti possidetis juris,* intertemporal law in the context of reparations does not leave African States between a rock and hard place! No! it leaves them between, on the one hand a hard rock and, on the other the garden of Eden; between injustice and justice.

The principle of intertemporal law as it is applied to reparations reflects, in some ways, the generally accepted principle of law that law does not apply retrospectively. In the context of the law on State responsibility, this rule is given effect to in Article 13 of the international Law Commission Articles on State Responsibility. Article 13 of the Articles on State Responsibility provides that an "act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." Applied to the issue of reparations for egregious violations, conduct which did not constitute a breach of an international law at the time it took place could not subsequently attract any the consequences of illegal acts under international law.

I pause here to note that one possible way around intertemporal law, and Article 13 of the Articles on State Responsibility, is the notion that an act, though not initially unlawful, may, if it continues post the emergence of a norm, would attract State responsibility and thus the duty to make reparation, on the basis of a continuing act. This is provided for in Article 14 of the Articles on State Responsibility. The former Special Rapporteur on Contemporary Forms of Racism alluded to the concept of a continuing act in the context of historical breaches. As an example of how the continuing act concept might apply to breaches of a *jus cogens*, consider territory acquired through the prohibition on the use of force prior to the emergence of that peremptory rule. Such acquisition might, though not in breach of international law *ab initio*, render the title ineffective because the maintenance of the title would, in and of itself, amount to a breach of the *jus cogens* norm and thus attract entail State responsibility.

But here, I think it is important to make a distinction between the continuing acts and continuing effects. To give another example, violations of the right to self-determination might, for example, lead to underdevelopment and poverty, lack of infrastructure and other similar effects. That these effects are continuing would not necessarily imply a continuing act attracting the duty to make reparation. This position is confirmed by the International Law Commission in the Articles on State Responsibility which stated first that "State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent" but second that "even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility." So, in the end, to my mind, if we stay within the realm of the mainstream and intertemporal law, the African State, ravaged by historical colonisation, remains a prisoner of these rules, unable to secure justice, notwithstanding the continuing effects of breaches.

I believe that the application of intertemporal law to reparations for serious breaches of norms that constitute *jus cogens* is contrary to basic principles of justice and morality and should therefore be contrary to international law. But before making that point, I would like to explore the potential justifications for this mainstream approach.

As a first reason, it might be said that the conception of *jus cogens* that is now accepted in modern doctrine, due in large part to the Vienna Convention, seems to be that *jus cogens* norms are not immutable. If a norm were today accepted as *jus cogens*, under a theory that viewed *jus cogens* as immutable, the peremptory character of the norm could be relied upon even prior to its recognition as such by positive law. Yet, the ruling theory today seems to be that *jus cogens* norms can evolve, be modified, be replaced by new *jus cogens* norms, cease to exist and so on. The natural law theory of *jus cogens* norms being immutable, and therefore, having the force of law independent of recognition and acceptance, seems to have been jettisoned in the process of the mainstreaming of *jus cogens*, beginning with Vienna Convention process, and now apparently confirmed by the ILC's most recent project on *jus cogens*. Second, as a practical matter, it may be pointed out that seeking reparations for historic violations would only serve to destabilize international relations. This latter argument would thus seek to recreate the "between a rock and hard place" argument. The third reason that one might put forward, which is related to the second reason, is that the principle of intertemporal law is part of the law and cannot simply be discarded. In other words, whatever our views of justice and morality, ultimately what matters for purposes of reparations is international law and international law on this subject is clear.

Let me begin with the *jus cogens* reason. The principle of intertemporal law would not provide a hurdle for the consideration of historic breaches under a natural law conception of *jus cogens* where peremptoriness is derived from morality and was seen as immutable. Under this conception, a *jus cogens* norm is seen as having always had that status thus barring the application of intertemporal law. The shift, inspired by positivism, to a concept of *jus cogens* based on "acceptance and recognition" by the "international community of States" may be seen as undermining the natural law character and thus immutability. This understanding seems also buttressed by Article 64 of the Vienna Convention which provides for *jus cogens* that "emerges".

I am not convinced that *jus cogens* can be explained purely by reference to positivism. The very rationale for the immense power and reach of *jus cogens* is that the norms in question are "so fundamental to the international community" as to have "the capacity to bind *sans* consent." They "bind *sans* consent" because of the moral force underlying them. The ILC Conclusions, and their reference to "fundamental values of international community" as a characteristic of the *jus cogens* bears this out. In this context I agree with the view that the binding and peremptory force of *jus cogens* is best understood as an interaction between natural law and positivism, or as an interaction between recognition and morality. The natural law basis of *jus cogens* "needs positivism

to manifest its content in an objective fashion". In this context, the notion of "acceptance and recognition" as a requirement of *jus cogens* creates the objective conditions for the power of *jus cogens*, preventing arbitrariness. But that requirement cannot serve to prevent any and all force or consequence of *jus cogens* prior to such acceptance and recognition. It is therefore not beyond the realm of argument that once a norm is accepted and recognised as a norm of *jus cogens* (the objective manifestation), breaches of that norm taking place, at any point, even prior to its acceptance and recognition as *jus cogens* by States, should have *some* consequences, including for reparations.

I would like to illustrate the interaction between positivism and natural law, between "acceptance and recognition" and morality, by reference to slavery and the slave trade. In the 1815 Vienna Declaration on the Abolition of the Slave Trade, the States Parties asserted that they "[had taken] into consideration that the commerce, known by the name of 'the Slave Trade', has been considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality". Here you have a treaty by 8 States, 4 of which were principal actors in the slave trade, recognizing not just that there existed a moral imperative (represented through the principles of humanity) prohibiting the slave trade, but also that this moral imperative *has existed through all ages*. The same sentiment was expressed nearly 186 years later by world leaders in the Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance:

> "We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences."

To be fair, while the position I have presented above is arguable, it is certainly not mainstream and is probably unlikely to carry the day at an international court or tribunal. I would be very surprised, for example, if the same International Court of Justice that has had to be brought kicking and screaming to the point of simply referring to *jus cogens*, were to provide such a novel and far-reaching interpretation of *jus cogens*. At any rate, even apart from the Court's somewhat chilly relationship with *jus cogens*, the type of theoretical gymnastics required to give the acceptance and recognition retroactive effect (plausible though it may be), is unlikely to be undertaken by the International Court of Justice, especially given Article 71 of the Vienna Convention on the Law of Treaties, which pull in a different direction.

Given the unlikely success of the theoretical argument put forward above - the interaction between positivism and natural law to achieve a sort of retroactivity - I wish to turn my attention to the second and third reasons, which are the more pragmatic and empirical reasons. I will address these two reasons together. The second reason I highlighted above, namely the practical problem, that jettisoning intertemporal law in this context of historical abuses would destabilize international law and relations, is very revealing. At the heart of this argument is the assumption that allowing claims for reparation for historical breaches will place States that had engaged in these violations in an uncomfortable situation. It suggests that the comfort of those States that are responsible for these egregious violations is more important that the justice that the victims of these violations deserve. Given the lasting impacts of some of the most egregious violations and atrocities of the past, it seems incongruous that international law's response appears to be, by virtue of intertemporal law, "tough luck". It is not just the lasting impacts and not just the egregiousness of atrocities and violations - it the combination of the two that makes the orthodox position difficult to swallow.

The third reason essentially takes the attitude that "the law is what it is" and if you don't like it, again "tough luck." In response, let me begin by saying that I am willing to accept that under the mainstream view, contemporary international law indeed precludes historic abuses, including those committed on the continent, on the basis of intertemporal law. Accepting this mainstream view as being reflective of contemporary international law, the question that must be asked is why *must this be the law*? Because a Swiss lawyer, Max Huber, said so in 1928? Is this statement of 1928 sufficiently potent to override the imperative of justice? Should law not be responsive to the needs of the society it governs? It is the question of change in international law that I now turn to.

II. Ending the Injustice: Final Thoughts

Arguments based on justice and morality are often met with the Pierre-Joseph Proudhon famous quip "Whoever says humanity wants to cheat". But does anyone deny the immorality and injustice, the inhumanity, of these breaches? Slavery, colonialism, denial of self-determination, racial discrimination and all the other violations that accompanied these breaches. Nor do I think it can be questionable that the denial of a right for those egregious violations is itself unjust. This is not just because of the immorality of those violations but also because the consequences of those violations have been particularly serious and continue to be felt today. Indeed, the consequences of some of these breaches are not only serious and ongoing but are the reason for some of the most serious ills facing our world - the same ills, such as poverty and underdevelopment, are some of the reasons that have caused me elsewhere to question whether we can ever speak of an "international community". To ignore the relationship between the immorality of past conduct and the state of the modern world is to acquiesce to international law's role as a contributor to injustice, thus reinforcing the idea of international law as an instrument of oppression, and

perpetuating the idea that "international law tends to reflect the interests of the dominator while marginalizing the subjugated" and their interests. Legal rules and doctrines, such as intertemporal law, are seemingly established and interpreted to escape the consequences of violations against the marginalised.

To me "Whoever says 'intertemporal law' wants to cheat" because there is nothing indispensable about intertemporal law and its application to reparations for historic injustices. Rules of international law change all the time. For example, the recognition of individual criminal responsibility, entrenchment of the international human rights system, the development of international environmental law and the codification of the exclusive economic zone, bear evidence that international law can change in response to changes in society. If international law can countenance the undermining of sovereignty through the shrinking of policy space of States (mainly developing States) as a result of jurisprudence of investment tribunals, why must the principle of intertemporal law have the status of holy cow.

In her 2019 Special Rapporteur report, Tendayi Achiume implores States and others "involved in the interpretation and articulation of international law" to "do more to" ensure that the structure and principles of international law are not used to create hurdles for a more just system of reparations. This is in pursuit of a project for justice and one that should be universally supported. States and scholars from across regions and the geopolitical spectrum and international courts and tribunals, should in my view, be actively pursuing the transformation of international law to ensure justice for the victims of some of the most egregious violations in human history.

REVIEW ISSUE N° 1 CALL FOR PROPOSAL

The African Review of International Law (ARIL), in French *Revue Africaine de Droit International* (RADI), is the scientific journal of the African Society of International Law (AfSIL). The Review, which aims to become one of the leading scientific publications on international law, is primarily intended as a forum for African international lawyers' reflection and research on issues of interest to Africa. It is established as a pioneer forum to collect and disseminate the practice of African States and institutions relating to international law, provide a forum for reflection and discussion on the role of Africa in international law, provide a framework for the conception and development of an African approach to international law, popularise African thought and African authors, particularly young people, of international law.

Ultimately, the Review should be published quarterly. For the first years of its existence, it will be published twice a year, in January and July. ARIL publishes articles on public international law, private international law, and comparative law, drafted in English or French. ARIL publishes electronically and grants open access to African universities and research centres based in Africa.

All articles are submitted to a double-blind peer review.

ARIL invites you to submit your papers on public international law, private international law, and comparative law for publication in the first issue, scheduled for release in the second half of 2026. In addition to general articles, contributions may include reviews on:

1. The practice of African States and institutions relating to public or private international law. The practice may be national or international and it may take the form of positions on topical issues.

2. The case law of the courts and tribunals of the African regional economic communities and other legal integration initiatives. These include the decisions of CEMAC Court of Justice, the ECOWAS Court of Justice, the WAEMU Court of Justice, the EAC Court of Justice, the SADC Tribunal, the OHADA Common Court of Justice and Arbitration, the OAPI Arbitration and Mediation Centre.

3. The case law of continental mechanisms for the protection and promotion of human rights. This includes the case law of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

4. The decisions and awards of international courts and arbitral tribunals involving African states and organisations or dealing with issues that are or could be of interest to Africa.

5. The courts and tribunals include International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the WTO dispute settlement mechanism, international investment or trade arbitration awards involving African States and UN human rights treaty mechanisms.

Contributions may also be critical reviews of books on Africa or international law issues that impact Africa. Preference will be given to authors who remain little known outside the continent to expose their ideas beyond the African shores.

Proposed articles, reviews, and book reviews must be submitted by ***September 2026***, via the Review's email address ***aril.info25@gmail.com***

All proposed contributions must comply with the submission guidelines.

APPEL A CONTRIBUTION N°1 DE LA REVUE

La Revue Africaine de Droit International (RADI), en anglais *African Review of International Law* (ARIL), est la revue scientifique de la Société Africaine de Droit International (SADI). Ayant pour objectif de devenir l'une des principales publications scientifiques en matière de droit international, la Revue se veut avant tout un forum de réflexion et de recherche pour les juristes internationaux africains sur les questions intéressant l'Afrique. Il s'agit d'un cadre pionnier visant à recueillir et diffuser la pratique des États et institutions africains en matière de droit international, offrir un espace de réflexion et de discussion sur le rôle de l'Afrique dans le droit international, fournir un cadre pour la conception et le développement d'une approche africaine du droit international, vulgariser la pensée africaine et les auteurs africains – en particulier les jeunes – de droit international.

À terme, la Revue devrait être publiée trimestriellement. Pour les premières années de son existence, elle sera publiée deux fois par an, en janvier et en juillet. La RADI publie des articles de droit international public, de droit international privé et de droit comparé, rédigés en anglais ou en français. Ces articles sont publiés sous forme électronique et sont librement accessibles aux universités africaines et aux centres de recherche basés en Afrique.

Tous les articles sont soumis à une évaluation en double aveugle par des pairs.

La RADI vous invite à soumettre vos articles de droit international public, de droit international privé et de droit comparé pour publication dans le premier numéro, dont la parution est prévue pour le second semestre 2026. Outre les articles généraux, les contributions peuvent être des chroniques sur :

1. La pratique des États et institutions africains en matière de droit international public ou privé. Cette pratique peut être nationale ou internationale. Les contributions peuvent consister en des prises de position sur des questions d'actualité.

2. La jurisprudence des cours et tribunaux des communautés économiques régionales africaines et d'autres initiatives d'intégration juridique. Il s'agit

notamment des décisions de la Cour de justice de la CEMAC, de la Cour de justice de la CEDEAO, de la Cour de justice de l'UEMOA, de la Cour de justice de la CAE, du Tribunal de la SADC, de la Cour commune de justice et d'arbitrage de l'OHADA, du Centre d'arbitrage et de médiation de l'OAPI.

3. La jurisprudence des mécanismes continentaux de protection et de promotion des droits de l'homme. Il s'agit notamment de la jurisprudence de la Cour africaine des droits de l'homme et des peuples, de la Commission africaine des droits de l'homme et des peuples et du Comité africain d'experts sur les droits et le bien-être de l'enfant.

4. Les décisions et les sentences des cours internationales et des tribunaux d'arbitrage impliquant des États et des organisations africains ou traitant de questions qui sont ou pourraient être d'intérêt pour l'Afrique. Il s'agit notamment de la Cour internationale de justice, du Tribunal international du droit de la mer, de la Cour pénale internationale, du mécanisme de règlement des différends de l'OMC, des sentences arbitrales internationales en matière d'investissement ou de commerce impliquant des États africains et des mécanismes des traités des Nations unies relatifs aux droits de l'homme.

5. Les contributions peuvent être également des revues critiques d'ouvrages sur l'Afrique ou sur des questions de droit international ayant un impact sur l'Afrique. La préférence sera donnée aux auteurs qui restent peu connus en dehors du continent afin d'exposer leurs idées au-delà des frontières africaines.

Les propositions d'articles, de chroniques et de revues critiques d'ouvrages doivent être soumises avant ***septembre 2026***, par l'intermédiaire de l'adresse électronique de la Revue ***aril.info25@gmail.com***

Toutes les contributions proposées doivent respecter les directives de soumission.

STYLISTIC GUIDE OF THE REVIEW

Guidelines for authors

Dear colleagues,

We thank you for your interest in publishing in the *African Review of International Law* (ARIL). Please find below the guidelines for drafting and submitting your manuscript for publication in the volume.

I. Ethical and legal conditions

Manuscripts submitted for publication must be owned by the author(s) and must not have been published in a scientific journal or book, or submitted to a journal for publication. Texts that have previously been presented as working papers or at a conference should be indicated as such in a footnote. In all cases, authors must ensure that they hold all the publication rights for their manuscript in the planned work.

II. Publication date

Articles are first published on the Journal's website as they are accepted. Volumes are compiled and published twice a year, in January and July.

III. Guidelines for the presentation of manuscripts

Authors are invited to follow the recommendations below for the submission of their manuscript.

A. Length and formatting

Manuscripts should be between 8,000 and 15,000 words in length. The main text style should be in Times New Roman font, size 12, 1.15 line spacing, with text margins of 2.5 cm. The manuscript must be paginated in continuous pagination.

Footnotes should be in Times New Roman font, size 10, single spaced. They should be numbered consecutively throughout the manuscript, with no spaces between them.

B. Structure

It is recommended that authors follow the structure below for the presentation of their manuscript:

INTRODUCTION

I. First-level heading 1

A. Second-level heading 1

1. Third-level heading 1

2. Third-level heading 2

B. Second-level heading 2

1. Third-level heading 1

2. Third-level heading 2

II. First-level heading 2

…

Conclusion

C. Language, spelling and presentation

Manuscripts may be submitted in English or French. Authors are encouraged to use resources and references in other languages. However, quotations must be translated into English or French. English-language manuscripts should use British spelling.

1. Gender-inclusive language

It is *ARIL* policy to communicate in a gender-inclusive way. This can be achieved by:

- Replacing the pronoun with “an”, “a”, “the” or “one”, or omitting the pronoun completely:

  “A judge must wear his robe” becomes “A judge must wear a robe”.

"A staff member in Antarctica earns less than he would in New York" becomes "A staff member in Antarctica earns less than one in New York".

"The Deputy-Registrar should consult his staff" becomes "The Deputy-Registrar should consult staff".

- Repeating the noun:

"A judge's assistant respects both his privacy and his best interest" becomes "A judge's assistant respects the judge's privacy and best interests".

- Using the plural:

"A staff member must notify his supervisor" becomes "staff members must notify their supervisor".

- Using both feminine and masculine pronouns:

"He or she", "him or her" (not he/she or s/he). This device should be used sparingly, however.

- Using a neutral equivalent:

Use "humankind" rather than "mankind", "spokesperson" rather than "spokesman", etc.

More information on the guidelines of the United Nations on the topic (https://www.un.org/en/gender-inclusive-language/guidelines.shtml).

2. Hyphenation

- Avoid using a hyphen unless clarity or usage demands one; if in doubt, leave it out.

- When compound adjectives (two or more words that join together to modify a noun) such as "high-profile" or "well-known" precede a noun, hyphenation usually lends clarity, e.g. a well-known principle. When such compounds follow the noun they modify, hyphenation is often unnecessary, e.g. the principle is well known.

- A hyphen should not be used when the compound consists of two nouns (e.g. trade union action), is derived from a proper name (e.g. New York streets, Latin American countries), is formed by an adverb ending in -ly plus an adjective (e.g. smartly dressed man, highly paid worker) or consists of a foreign language expression not normally hyphenated (e.g. *ad hoc* committee, per diem allowance).

- A hyphen should be used to join a prefix to the main word: *(a)* when the prefix ends and the main word begins with the same vowel (e.g., re-elect, pre-eminent); and *(b)* when certain prefixes are used to make a hybrid or occasional formation (e.g. ex-Minister, inter-State, non-contributory, pro-reform, post-war, quasi-public).

- Geographical terms are hyphenated, e.g. north-east, south-west, etc.

- When spelled out, numbers are hyphenated, e.g. thirty-three, ninety-nine.

3. Italics

Italics are used for:

- Titles of cases and case references:

  The Corfu Channel case; Vivian v. *Moat* (1876).

  Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53, p. 22.

- Titles of books, periodicals, documents, etc. (BUT not the titles of news articles or official reports):

  Halsbury's Laws of England; International Law Review.

  Official Journal; the *Daily Telegraph* (BUT *The Times*).

- Names of ships:

  H.M.S. *Dreadnought*; S.S. *Wimbledon*.

- Foreign words (when not anglicized) and Latin words which are not in common usage (e.g. *ratione materiae*, *terra nullius*), but check the ICJ Word List since, for historical reasons, there are some exceptions (e.g. *ad hoc*, *de facto*). While italics are not used for non-English names of organizations, firms, ministries and the like, they are used for names of foreign institutions such as courts (the Paris *Cour d'appel*, the French *Cour de cassation*). Foreign titles of books, periodicals, reports, articles, etc. should be treated as if they were in English: titles of books, periodicals and reports are italicized, but titles of articles are not.

- Annotations to the text which are between square brackets or parentheses:

  [Translation by the Registry], *[Seal of the Legation]*, *(Signed)*, etc.

- Emphasis: sentences, words or letters to which attention is specially drawn. Where words in a quotation have been deliberately italicized or underlined, this fact is indicated by inserting "emphasis added" directly after the quotation in parentheses or in a footnote. Where the emphasis comes from the original, "emphasis in the original" is indicated in the same way.

> "Article 41 of the Convention is also relevant in this regard, since it establishes that the duty of members of the mission to respect the laws and regulations of the receiving State is '*[w]ithout prejudice* to their privileges and immunities'" (emphasis added).

- The indications *(a)*, *(b)*, *(c)*, etc., when listing items in a text or at the beginning of subdivided paragraphs:

> *(a)* The Court has decided that . . .
>
> As is shown in paragraph *(c)* below.

4. Quotations

- Quotations are given in double quotation marks (curly, NOT straight).

- When the text of a quotation extends into three or more lines of running text, it is separated from the body of the text.

> For example:
>
> In the final submissions requesting Mr Teodoro Nguema Obiang Mangue's referral for trial and in the order of 5 September 2016 which effectively proceeds with that referral, the prosecuting authorities continued to argue that the building was private property to avoid having to respect its inviolability:
>
> > "All the converging evidence gathered during the investigation points to the fact that these steps were taken in an attempt to protect the private assets of the son of the President of the Republic of Equatorial Guinea from the judicial attachment measures undertaken in the building, which is the private property of Teodoro NGUEMA OBIANG MANGUE and is for his personal use, by claiming that it should enjoy diplomatic protection."
>
> NOT:
>
> In the final submissions requesting Mr Teodoro Nguema Obiang Mangue's referral for trial and in the order of 5 September 2016 which effectively

> proceeds with that referral, the prosecuting authorities continued to argue that the building was private property to avoid having to respect its inviolability: "All the converging evidence gathered during the investigation points to the fact that these steps were taken in an attempt to protect the private assets of the son of the President of the Republic of Equatorial Guinea from the judicial attachment measures undertaken in the building, which is the private property of Teodoro NGUEMA OBIANG MANGUE and is for his personal use, by claiming that it should enjoy diplomatic protection."

- Shorter quotations remain within the body of the text.

> In that letter, Equatorial Guinea called on France to "ensure the protection of those premises" against intrusion or interference by private individuals.

- The original capitalization, spelling, etc., of the quotation should be preserved. Use [sic] to signal obvious mistakes in the quoted text.

> "The sole object of the provision is to choose an [sic] specific means for the friendly resolution of the dispute."

- Use square brackets for any words that need to be inserted or if a different grammatical form is required.

> The Court stated that "[it] ha[d] jurisdiction".

- Where words in a quotation have been deliberately italicized or underlined, this fact is indicated by inserting "emphasis added" directly after the quotation, in parentheses or in a footnote. Where the emphasis comes from the original, indicate "emphasis in the original" in the same way.

> "Article 41 of the Convention is also relevant in this regard, since it establishes that the duty of members of the mission to respect the laws and regulations of the receiving State is "*[w]ithout prejudice* to their privileges and immunities" (emphasis added).
>
> "The continuing nature of the requirement to perform those obligations is reinforced by the fact that they form part of the *fundamental rules* governing relations between States." (Emphasis in the original.)
>
> [1] p. 45, para. 2; emphasis added.

- A quotation within a quotation begins and ends with single quotation marks, e.g. "The Applicant contended that the objection was 'inadmissible' for two reasons"; use double quotations again for any third-level quotation.

- If a quotation forms an essential grammatical part of the sentence in which it appears, it begins with a lower-case letter and the final punctuation is placed outside the quotation marks.

  The Court stated that "[t]he task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned".

- If a quotation ends with a comma or semi-colon, the punctuation is placed outside the quotation marks.

  "we will recognize the award",

- If the quotation consists of one or more full sentences, the full stop or final punctuation is placed inside the quotation marks.

  "The expenses of the Organization shall be borne by the Members."

  It was "clearly stated by the United Nations Charter. The Organization's cash position is critical."

- If the preceding phrase ends with "that" and the quotation consists of more than one sentence, the quotation is introduced by a colon and begins with a capital letter, and the final punctuation is placed inside the quotation marks.

  Article 8 of the Rules of Court provides that:

  "This declaration shall be made at a public sitting in the case in which the judge *ad hoc* is participating. If the case is being dealt with by a chamber of the Court, the declaration shall be made in the same manner in that chamber."

- When ellipses replace one or more words, they are spaced normally inside the quotation marks and are not enclosed in square brackets. If a complete paragraph is omitted in a quotation, this must be shown by a line of spaced points. When the end of a quotation is replaced by an etc. which is not in the original text, the etc. is placed outside the quotation marks.

  "Expenses shall be apportioned among Member States . . . in accordance with the scale of assessments."

  "1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

. . . . . .

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory."

During the discussion, Mr Jones recalled that the Charter provides that "[e]xpenses shall be apportioned . . . in accordance with the scale of assessments".

"Norway claims sovereignty over an area of 4 miles", etc.

5. Spelling

- Use United Nations spelling, which generally follows standard British spelling. Set the language to UK English in Word documents. Consult the *Oxford English Dictionary* or the *New Oxford Dictionary for Writers and Editors*. If more than one spelling is provided, use the first form listed.
- Use dg rather than dge, e.g. judgment, acknowledgment.
- Use -our rather than -or, e.g. colour (not color).
- Use -re rather than -er, e.g. centre (not center).
- Use -ize rather than -ise, e.g. realize, emphasize (but see the ICJ Word List for exceptions, such as analyse, advise, comprise, revise, etc.), and -ization, -izer and -izing for derivate forms. Organization is spelled with a "z", unless the body referred to uses "s", e.g. South Pacific Regional Fisheries Management Organisation.
- Write technology-related terms as single words, without initial caps, e.g. internet, email, website BUT Wi-Fi.
- Do not change the spelling of direct quotes; use [sic] to indicate a spelling error if necessary.
- Do not change the spelling of the names of bodies in other English-speaking countries, e.g. the United States Department of Defense.
- For the correct spelling of names of countries and their adjectives of nationality, consult the United Nations Multilingual Terminology Database (UNTERM):

  https://unterm.un.org/unterm2/en/country and see the United Nations Editorial Manual Online: https://www.un.org/dgacm/en/content/editorial-manual.

6. Dates

- Dates should follow the pattern: day month year (e.g. 12 February 2025). If the day of the week is included, it should not be followed by a comma (e.g. Friday 17 May 1963).
- Reference to a range of days in the body of a document should be expressed in words (not with a hyphen or en dash), e.g. from 12 to 19 April. However, a dash can be used in footnotes or tables, e.g. 12-19 April.
- Reference to years should follow the pattern: 1963-1964. This indicates a two-year period. If a one-year period overlaps two years (e.g. a financial year), use a slash: 2022/2023.
- In referring to decades, use the form "in the thirties" or the form "in the 1930s" (no apostrophe in either case), NOT "in the 30's".
- In referring to centuries, spell out the ordinal number in full, e.g. twenty-first century, on this fifth day. Note, however, that figures might be more appropriate in less formal documents. When using figures, do not use superscript for the ordinal indicator (19th, 20th).

7. Time

- Times are given in the 12-hour format using a.m. and p.m., e.g. 10 a.m. NOT 10:00 a.m., 1.30 p.m., 6 p.m.
- Midday is expressed as "12 noon".

For further information, see the section on numbers, dates and time in the United Nations Editorial Manual (https://www.un.org/dgacm/en/content/editorial-manual/numbers-dates-time) or refer to the University of Oxford Style Guide (University of Oxford Style Guide.pdf).

D. References

It is strongly recommended that footnotes be presented in a way that provides as complete information as possible.

1. Books

First and Last Names, *Title in italics*, City, Publisher, year, Vol., p(p).

Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Leiden, Brill Nijhoff, 2016, Vol. I, p. 15.

2. Articles

2.1. Journal articles

First and Last Names, "Title of the article", *Journal in italics*, year, Vol. (issue), p(p).

Maria Irene Papa, "Litigating Collective Obligations before the International Court of Justice: Progress, Challenges and Prospects", *The Law and Practice of International Courts and Tribunals*, 2024, Vol. 23 (1), p. 38.

2.2. Chapters in edited books

First and Last Names, "Title of the contribution" in First and Last Name(s) (ed(s).), *Title of the book in italics*, City, Publisher, year, p(p).

Vera Gowland-Debbas, Mathias Forteau, "Article 7 UN Charter" in Andreas Zimmerman, Christian J. Tams et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford, Oxford University Press, 2019, p. 141.

3. Working papers

First and Last Names, "Title of the paper", *Name of the working paper series in italics*, year, paper No., p(p).

Sze Hong Lam, "Unequal Treaties: Revisiting China's approaches toward colonial injustice", *Grotius Centre Working Paper Series*, No. 2023/102-PIL, p. 3.

4. Unpublished theses

First and Last Names, *Title of the thesis in italics*, University, Type of document, year, p(p).

Ana Luísa Bernardino, *Becoming an International Court: The Construction of the Identity of International Courts and Tribunals*, Graduate Institute of International and Development Studies, PhD Thesis, 2024, p. 133.

Nnamdi S. S. Umenze, Enforcement of Victims' Right to Reparation for Violation of International Humanitarian Law by Peacekeepers, University of Pretoria, Master's Thesis, 2024, p. 10.

5. Blog posts and online documents

First and Last Names, "Title of the blog post", *Name of the blog in italics*, year, URL (last accessed: date), para(s).

Jannika Jahn, Marlene Letsch, "Progress through disruption?: What Role for the ICJ in the Advisory Opinion on Climate Change", *EJIL: Talk!*, 2025, https://www.ejiltalk.org/progress-through-disruption-what-role-for-the-icj-in-the-advisory-opinion-on-climate-change/ (last accessed: 12 February 2025), para. 12.

6. Cases

6.1. International Court of Justice cases

Full Case Name (Party v. *Party), [Phase], Type of Decision, I.C.J. Reports XX (Volume)*, p(p). XX, para(s). XX.

Certain Iranian Assets (Islamic Republic of Iran v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 40, para. 100.

Certain Iranian Assets (Islamic Republic of Iran v. *United States of America), Judgment, I.C.J. Reports 2023 (I)*, p. 63, para. 18.

6.2. Other court cases

The names of other court, tribunal and arbitration cases should be presented in the style used by the institution in question.

Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)

Arbitration Between the Republic of Croatia and the Republic of Slovenia

7. ILC

- International Law Commission, "Draft principles on protection of the environment in relation to armed conflicts, with commentaries", 2022, UN doc. A/77/10, principle 20.

- Report of the Study Group of the International Law Commission on the Fragmentation of International Law, finalized by Mr Martti Koskenniemi (2006), UN doc. A/CN.4/L.682 ("ILC Study Group Report"), para. 56.

- *Yearbook of the International Law Commission 2018*, Vol. II, Part 2, pp. 20-21, paras. 14-30.

E. Cross-references in footnotes

Last Name (n. first footnote reference), p(p).

Abi-Saab (n. 10), p. 18.

If multiple articles or books by the same author are cited in the manuscript:

Last Name, Short-form title of the book *[in italics]* or article *[in quotation marks]* (n. first footnote reference), p(p).

Abi-Saab, *The Concept of International Organization* . . . (n. 13), p. 15.

Abi-Saab, "The State of the System . . . " (n. 12), pp. 14-15.

Ibid. may only be used if the previous reference is the same. If the title and page number are the same, simply write *Ibid.* If it is the same reference but on a different page, please state the page number after *Ibid.*

Mbengue (note 43), p. 382.

Ibid., p. 384.

Ibid.

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GUIDE STYLISTIQUE DE LA REVUE

Instructions à l'attention des auteurs

Chers collègues,

Nous vous remercions de l'intérêt que vous avez à publier un article dans la *Revue Africaine de droit international* (RADI). Vous trouverez ci-dessous des instructions relatives à la rédaction et à la soumission de votre manuscrit en vue de sa publication dans ce volume.

I. Éthique et conditions juridiques

Les manuscrits soumis pour publication doivent appartenir à l'auteur ou aux auteurs et ne doivent pas avoir été publiés dans une revue ou un ouvrage scientifique, ni soumis à une revue pour publication. Pour les textes qui ont au préalable été présentés comme document de travail ou dans une conférence, cette information doit figurer en note de bas de page. Dans tous les cas, le ou les auteurs doivent s'assurer qu'ils détiennent tous les droits nécessaires à la publication de leur manuscrit dans l'ouvrage en projet.

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Les articles sont publiés d'abord sur le site internet de la Revue au fur et à mesure de leur acceptation. Les volumes sont compilés et reliés deux fois par an, en janvier et en juillet.

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Les auteurs sont invités à se conformer aux recommandations ci-dessous pour la présentation de leur manuscrit.

A. Longueur et règles formelles

La longueur des manuscrits doit être comprise entre 8 000 et 15 000 mots. Le texte principal doit être présenté comme suit : Times New Roman, taille 12, interligne 1,15, marges de 2,5 cm. La pagination du manuscrit doit être continue.

Les notes de bas de page doivent être présentées comme suit : Times New Roman, taille 10, interligne simple. Elles doivent être numérotées de façon continue tout au long du manuscrit, et il ne doit pas y avoir d'espaces entre elles.

B. Structure des manuscrits

Il est recommandé aux auteurs de présenter leur manuscrit selon la structure suivante :

INTRODUCTION

I. TITRE PRINCIPAL 1

A. Sous-titre 1

1. Idée 1

2. Idée 2

B. Sous-titre 2

1. Idée 1

2. Idée 2

II. TITRE PRINCIPAL 2

…

CONCLUSION

C. Langue, orthographe et présentation

Les manuscrits peuvent être soumis en français ou en anglais. Les auteurs sont encouragés à utiliser des ressources et des références dans d'autres langues. Toutefois, les citations doivent être traduites en français ou en anglais. Les manuscrits en langue anglaise doivent être rédigés selon l'orthographe britannique.

1. Langage inclusif

La RADI a pour politique de communiquer d'une manière neutre sur le plan du genre. Il est donc recommandé d'utiliser un langage inclusif dans toute la mesure du possible.

2. Trait d'union

Le trait d'union s'emploie seulement entre les éléments qui sont l'un et l'autre inférieurs à cent, sauf s'ils sont joints par la conjonction « et ».

dix-sept ; trente-cinq ; quatre-vingt-un ; quatre-vingt-onze ; vingt et un ; cent dix ; deux cent trente-deux ; quatre cent vingt et un.

3. Usage des italiques

En règle générale, l'italique sert à attirer l'attention du lecteur sur un mot, une phrase ou un passage dans un texte.

- Exemple : « *Le droit des traités* est l'un des nombreux autres domaines dans lesquels le souci constant de la Cour de prendre en considération l'évolution de la réalité juridique a trouvé à s'exprimer ».

- Exemple : « La Cour a également apporté une contribution notable dans le développement d'autres domaines classiques du droit international, comme celui du *droit d'asile* ».

- Exemple : « Au cours des 20 dernières années, la Cour a eu de plus en plus fréquemment l'occasion de se pencher sur le *droit de l'environnement* ».

Dans un texte entièrement composé en italique, les termes qui régissent l'emploi des italiques sont saisis en romain.

Il est superflu de guillemeter des mots ou des textes dactylographiés en italique.

Il est admis que dans certains cas l'anglais emploie les guillemets et le français l'italique :

- the word "Judgment", le mot « arrêt ».

4. Citations

- Citations de trois lignes maximum : la citation est placée dans le texte.

La réserve de la Bolivie se lit comme suit : « La délégation de Bolivie estime que les procédures pacifiques peuvent également s'appliquer aux différends relatifs à des questions résolues par arrangement entre les parties contractantes. »

- Citations de plus de trois lignes : la citation est séparée du corps du texte.

La réserve de l'Équateur se lit comme suit :

> « La délégation de l'Équateur, en souscrivant à ce pacte, formule une réserve expresse relativement à l'article VI et à toute disposition qui viole les principes proclamés ou les stipulations contenues dans la Charte des Nations Unies, dans la Charte de l'Organisation des États américains ou dans la Constitution de la République de l'Équateur, ou qui n'est pas en harmonie avec ceux-ci. »

5. Orthographe

- Ne pas modifier l'orthographe des citations directes ; utiliser des crochets [] pour corriger une erreur d'orthographe dans une citation.

- Ne pas modifier le nom des institutions lorsqu'il est en français, par exemple : ministère de l'Europe et des affaires étrangères.

Pour obtenir l'orthographe correcte du nom des États et de leurs gentilés, veuillez consulter le portail terminologique des Nations Unies (UNTERM) : https://unterm.un.org/unterm2/fr/country.

6. Dates

- Dates : le 1er septembre 1996, le 5 juin 1997.

- Siècles : le XXIe siècle.

D. Références

Il est fortement recommandé de présenter les notes de bas de page de manière à fournir des informations aussi complètes que possible.

1. Ouvrages

Prénom Nom, *Titre en italique*, ville, maison d'édition, année, (volume), page.

Robert Kolb, *La Cour internationale de Justice*, Paris, A. Pedone, 2016, p. 15.

2. Articles

2.1. Articles de revues

Prénom Nom, « Titre du document », *Nom de la revue en italique*, année, volume, numéro, page.

> Kei Nakajima, « Faut-il établir l'existence d'un autre différend pour que des demandes reconventionnelles soient déclarées recevables ? Une étude complémentaire sur la notion de différend devant la Cour internationale de Justice », *Revue belge de droit international*, 2020, nº 1, p. 282.

2.2. Chapitres dans un ouvrage collectif

Prénom Nom, « Titre de la contribution », *in* Prénom Nom (sous la dir. de), *Titre du livre en italique*, ville d'édition, maison d'édition, année, page.

> Mario J.A. Oyarzabal, « Les tractations électorales sont-elles évitables », *in* Jean-Marc Thouvenin, Jessica Joly Hébert (sous la dir. de), *La Cour internationale de Justice à 75 ans*, Paris, Pedone, 2023, p. 57.

3. Documents de travail

Prénom Nom, « Titre du document », *Nom de la série de documents de travail en italique*, année, numéro, page.

> Sze Hong Lam, « Unequal Treaties: Revisiting China's approaches toward colonial injustice », *Grotius Centre Working Paper Series*, n° 2023/102-PIL, p. 1.

4. Mémoires et thèses non publiés

Prénom Nom, *Titre du document en italique*, nom de l'université, type de document, année, page.

> Brusil Miranda Metou, *Le rôle du juge dans le contentieux international : cas de la Cour internationale de Justice*, Université de Yaoundé II, thèse de doctorat, 2012, p. 133.

> Fritz Robert Saint-Paul, *L'exécution des décisions de la Cour internationale de Justice : faiblesses et malentendus*, Université de Montréal, mémoire en vue de l'obtention du grade de maîtrise en droit international (LLM), 2006, p. 10.

5. Articles de blogs et documents en ligne

Prénom Nom, « Titre du document », *nom du blog en italique*, année, lien Internet (consulté le [date])

> Nicole Osuji, « Les preuves open source au soutien de la poursuite d'auteurs de crimes de guerre : analyse du mandat d'arrêt Al-Werfalli de la Cour pénale internationale à la lumière de la pratique internationale, allemande, néerlandaise et suédoise », *Les blogs pédagogiques*, 2024, https://blogs.parisnanterre.fr/article/les-preuves-open-source-au-soutien-de-la-poursuite-dauteurs-de-crimes-de-guerre-analyse-du-1 (consulté le 13 février 2025).

6. Affaires

6.1. Affaires de la Cour internationale de Justice

Nom de l'affaire au long [avec Partie c. Partie], [procédure, le cas échéant], type de décision, C.I.J. Recueil [année] (numéro de volume, le cas échéant), p. XX, par. XX.

> *Certains actifs iraniens (République islamique d'Iran c. États-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (I)*, p. 40, par. 100.
>
> *Certains actifs iraniens (République islamique d'Iran c. États-Unis d'Amérique), arrêt, C.I.J. Recueil 2023 (I)*, p. 63, par. 18.

6.2. Affaires d'autres cours et tribunaux

Pour citer des affaires d'autres cours et tribunaux, il convient de suivre la présentation employée par l'institution concernée.

> *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar)*
>
> *Arbitrage entre la République de Croatie et la République de Slovénie*

7. CDI

- Nations Unies, rapport de la Commission du droit international, soixante-treizième session, 2022, *Documents officiels de l'Assemblée générale, soixante-dix-septième session, Supplément nº 10*, A/77/10, principe 20.

- Nations Unies, rapport du groupe d'étude de la Commission du droit international sur la fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international, 13 avril 2006, doc. A/CN.4/L.682, par. 56.

- *Annuaire de la Commission du droit international*, 2018, vol. II, deuxième partie, p. 20-21, par. 14-30.

E. Renvois dans une note de bas de page

Nom (note + nº de la première référence), page X.

Abi-Saab (note 10), p. 18.

Si l'auteur est cité pour plusieurs livres ou articles :

Nom, Titre du livre ou de l'article en format court (nº de la première référence), page.

Abi-Saab, *Les exceptions préliminaires…* (note 13), p. 15.

Abi-Saab, « La coutume dans tous ses états … » (note 12), p. 14-15.

Ibid. ne peut être utilisé que si la référence précédente est la même. Si l'ouvrage et la page sont les mêmes, écrire simplement *Ibid.* S'il s'agit de la même référence mais à une page différente, bien vouloir indiquer la page après *Ibid.*

Kamto (note 28), p. 78

Ibid., p. 34

Ibid.

Pour toutes questions, demandes de précisions ou, de façon générale, pour toutes difficultés rencontrées dans le cadre de la rédaction de votre manuscrit, n'hésitez pas à nous contacter à l'adresse ***aril.info25@gmail.com***

UPCOMING EVENTS

International Conference

REGIONAL APPROACHES TO INTERNATIONAL LAW: WHAT ROLE IN A DIVIDING WORLD

26 - 28 August 2026

The event will bring together scholars, practitioners, and students to reflect on the role of regional perspectives in shaping international law at a moment of fragmentation, contestation, and realignment. By situating the debate in the Global South, the Conference aims to interrogate how regions articulate, contest, or reinforce the universality of international law, and how regional practices may contribute to or challenge the cohesion of the international legal order.

At a moment marked by geopolitical realignment, normative fragmentation, and renewed debates over universality, the conference seeks to treat "the regional" not as a mere deviation from general international law, but as a site of norm-creation, institutional imagination, and practical problem-solving. By foregrounding perspectives from the Global South, we aim to map convergences and frictions across legal traditions, identify how regional practices travel and transform across borders, and assess their implications for adjudication, law-making, and institutional design.

Different perspectives and approaches to the main question will be discussed.

Belo Horizonte

Federal University of Minas Gerais Law School

THEMES

- Regions, Regionalism, and Regional in International Law
- Regional Approaches and Critical Approaches to International Law
- Regional Approaches and Law-making in the International Legal Order
- Regional Approaches, Universality and Unity of International Law
- Regional Approaches and Imperialism in International Law
- Regional Approaches and Regional Organisations
- Regional Approaches and the Global South
- Regional Approaches, Methods and Methodology of International Law
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To find all the relevants informations about this Conference mail to rail.brazil2026@gmail.com

African Society of International Law

15th ANNUAL CONFERENCE

AFRICA AND THE CHALLENGE OF REPARATION IN INTERNATIONAL LAW

6-7 November 2026

Reparation is undoubtedly one of the main challenges in international relations and international law. This can be seen by looking at international news, where mention is regularly made of reparation in relation to many different contexts and subjects. Observation of recent practice in the international courts and tribunals also confirms the central role of reparation in the contemporary world. There has been an increase in both the number of judicial bodies hearing claims for reparation and the number of disputes and advisory opinions related to this issue, either directly or indirectly. Paradoxically, this omnipresence of reparation in international relations contrasts with the relative lack of interest, and therefore of studies, it generates among international law researchers. Despite the codification efforts and progressive development of the law by the United Nations International Law Commission, many questions remain unresolved and undoubtedly deserve further consideration.

The fifteenth annual AfSIL conference aims to explore all of these issues, opening up discussion on the very concept of reparation in international law. The Conference should not only provide a space for theoretical reflection on the nature and purpose of reparation in international law, but also analyse the dynamics, convergences and divergences in current practices regarding reparation in the international legal order. The Conference will also be an opportunity to reflect on specific African proposals, contributions and demands regarding reparation.

Kigali, Rwanda

THEMES

- Foundations, functions and content of reparation in international law
- Africa, theoretical approaches to reparation and justice
- Africa and the codification of rules on reparation in international law
- Equity considerations and reparation in international law
- Jus cogens, obligations erga omnes and reparation
- Reparation, common law and special regimes in international law
- Africa and reparation for past crimes (incl. colonialism, slavery, apartheid)
- Reparation before international courts and tribunals
- Non-contentious reparation in international law
- Reparation and unilateral sanctions in international law

REGISTRATION

Participants can register at
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NOTICE

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CONTACTS

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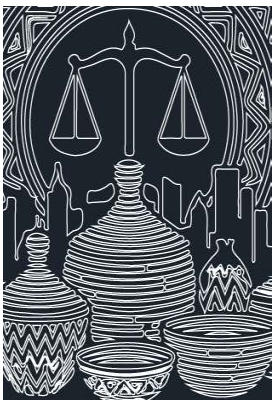

15th ANNUAL CONFERENCE
PROVISIONNAL PROGRAM

With the support of the Rwandan Ministry of Justice

Kigali, Rwanda
06 - 07 November 2026

FRIDAY, 6 November 2026

OPENING CEREMONY

Chair: **MS. TAFADZWA PASIPANODYA**, *Partner, Foley Hoag LLP & Vice-President, AfSIL*

- **H.E. DR. EMMANUEL UGIRASHEBUJA**, *Minister of Justice, Republic of Rwanda*
- **PROF. MAKANE MOÏSE MBENGUE**, *University of Geneva & Sciences Po Paris, President of AfSIL*
- **DR. APOLLIN KOAGNE ZOUAPET**, *Legal Officer, International Court of Justice*

KEYNOTE SPEECH

- **H.E. JUDGE DIRE TLADI**, *Judge, International Court of Justice*

Coffee Break & Conference Photo

PANEL I | Foundations of Reparation: Afrocentric Frameworks and Decolonial Reimagining Jus Cogens

- **Mr. Mukhtar Adesunkanmi**, *Political Officer, Commonwealth Secretariat*, "Reparations for Africa: Between Political Demands and Expert Debate – Testing the Waters of International Law"
- **Dr. Ernest Yaw Ako**, *Senior Lecturer, University of Cape Coast School of Law* & **MRS. Julia Selman-Ayetey**, *Dean, Faculty of Law, University of Cape Coast*, "Developing an Afrocentric Framework for Reparative Justice in International Law"
- **Dr. Idriss Fofana**, *Assistant Professor of Law*, *Harvard Law School*, "Wrongs of the International Community as a Whole"
- **Dr. Laura Salvadego**, *Associate Professor of International Law, University of Macerata*, "What "Reparations" for Transatlantic Slave Trade?"
- **Dr. Dennis Schmidt**, *Assistant Professor, Durham University*, "Beyond Origins: International Law as Worldmaking and the Decolonial Imagination"

Lunch

PANEL II | Overcoming Temporality and Doctrinal Defenses to Reparations

- **Dr. Adejoké Babington-Ashaye**, *Founder, Amaryllis Sage LLC; Co-Chair, Blacks of American Society of International Law Task Force*, "From Historical Wrong to Continuing Responsibility: Reparations for Transatlantic Enslavement in International Law and Africa's Claim"
- **Dr. Tamer Morris**, *Senior Lecturer, University of Sydney*, "The Standard of 'Civilization' and Colonisation: A Legal Standard in Time"
- **Dr. Ronald Ong'udi**, *Member, National Environmental Tribunal (Kenya); Managing Partner, Allamano & Associates* & **Mr. Lewis Morara**, *Trainee Advocate, Allamano & Associates*, "Echoes from the Past: Temporal Justice and Procedural Dilemmas in Reparations Law"
- **Ms. Britta Redwood**, *Assistant Professor, Benjamin N. Cardozo School of Law,* "The Last Defense: Non-Retroactivity and the Limits of Legal Obstruction to Reparations"
- **Dr. Sara Wissmann**, *Postdoctoral Researcher, University of Salzburg*, "CERD's Contouring of Continuing Breaches : Reparations for Transatlantic Slave Trade"

Coffee Break

PANEL III | Architecture of Reparation: Responsibility, Design and Feasibility

- **Dr. Ifeoma Lynda Agbo**, *Lecturer, University of Port Harcourt, "*Hybrid African-Centred Framework Integrating Corrective, Distributive, Restorative, and Transitional Justice Theories"
- **Ms. Rosalind Elphick**, *Legal Advisor, Iran-United States Claims Tribunal,* "Capacity to Pay Conundrum in Comparative Analysis"
- **Ms. Katherine Krudys**, *Associate, White & Case LLP*, "From Chorzów Factory to Contemporary Claims: Applying Investor-State Arbitration Principles to Reparations for Historic Wrongs"
- **Dr. Vera Piovesan**, *Assistant Professor, University Centre for Conflict and Post-Conflict Justice, Charles University*, "The Role of Local Stakeholders in Reparations after International Criminal Trials: A Dialogical Process of Transformative Justice"
- **Dr. Norbert Tóth**, *Associate Professor, Ludovika University of Public Service; Co-Chair, ASIL Minorities in International Law Interest Groud,* "Secondary/Indirect International Legal Responsibility for Colonisation? The Responsibility of European States Not Directly Involved in the Colonisation of Africa"

PANEL IV | Fiscal, Financial, and Structural Reparations

- **Mr. Keith Busingye**, *Head of Department, Public and Comparative Law, King Ceasor University*, "Reparations for Historical and Contemporary Wrongs in Africa: Re-Imagining International Law through Restorative Justice and Structural Transformation"
- **Prof. Jay Butler**, *Professor of Law, University of Virginia School of Law*, "Global Tax for Repair"
- **Dr. James Gathii**, *Wing-Tat Lee Chair in International Law & Professor of Law, Loyola University Chicago School of Law*, "Reverse Reparations: Sovereign Debt, Race, and the Political Economy of Compensation in Zimbabwe"
- **Ms. Eva Keïta**, *Associate, Withers Bergman LLP* & **Ms. Melanie Keita**, *Co-founder, Melanin Kapital Limited,* "The Architecture of Non-Reparation in International Law: Development Aid and the Normative Foreclosure of Reparation Claims"

FIRESIDE CHAT

- **Dr. Martins Paparinskis,** *Member & Special Rapporteur on compensation for the damage caused by internationally wrongful acts, UN International Law Commission & Professor of Public International Law, University College London*

COCKTAIL Reception | AfSIL 15th Anniversary Celebration

- **Remarks by Prof. Maurice Kamto, Founder of AfSIL**
- **2026 African Society of International Law Award for Excellence in International Law & Practice**

SATURDAY, 7 November 2026

PANEL V | Regional Remedies in Practice: African Court & Other Mechanisms

- **Dr. Moustapha Fall**, Lecturer & Researcher in Public Law, Cheikh Anta Diop University, "La réparation des violations des droits de l'homme devant la Cour de justice de la CEDEAO"
- **Mr. Lassana Koné**, *Senior Lawyer, Forest Peoples Programme "Indigenous Peoples' Land Rights*, Structural Injustices and the Challenge of Restitution under the Batwa Case in the Democratic Republic of Congo"
- **Dr. Misha Ariana Plagis**, *Legal Advisor, Register of Damage (Ukraine); Associate Editor, The ACtHPR Monitor*, "50 Ways to (Not) Comply: Authority and the Micro-Politics of Compliance with Decisions of the African Court on Human and Peoples' Rights"
- **Mr. Sylvain Burume Rutakangwa***, Chargé des pratiques professionnelles, Université Libre des Pays des Grands Lacs/Goma*, "La réparation non pécuniaire devant la Cour africaine des droits de l'homme et des peuples: vers une justice restauratrice à l'africaine?"
- **Dr. Frédéric Foka Taffo**, *Political Affairs Officer, European Union Delegation; Executive/ Research Director, CREPEG*, "La réparation de la violation des droits humains par omission devant les mécanismes africains de protection des droits humains"

PANEL VI | Reparation Before International Courts: Quantification, War Damages, and Evidentiary Challenges

- **Mr. Ahmed Abdel-Hakam**, *Partner, Volterra Fietta; Co-Chair, Dispute Resolution Section, AfSIL*, "Reparation for Unlawful Exploitation of Natural Resources in Times of War: What Does the Hague Convention of 1907 Say and How It Has Been Interpreted by International and National Courts?"
- **Judge Thomas Y. Abraha,** "Revisiting the Unenforced Final Damages Awards of the Eritrea-Ethiopia Claims Commission: A Challenge to the African Framework of Insuring Justice through Reparation?"
- **Samson Ristom Asfaha**, *Visiting Lecturer and researcher, Department of Law, College of Business and Social Sciences (Eritrea)*, "Economic Limitation as a Challenge to Reparative Justice: Rethinking Full Reparation in African War Reparation Practice"
- **Mr. Mohit Khubchandani**, *Adjunct Lecturer of International Law and Arbitration, Yerevan State University* & **Mr. Jason Rudall**, *Associate Professor of Public International Law, Grotius Centre, Leiden University*, "Evidence, Equity and Capacity in Environmental Reparation: Lessons from the ICJ's Armed Activities Case and Ground Realities for Africa"

- **Dr. Lauri Mälksoo**, *Professor of International Law, University of Tartu; Member, Institut de Droit International; Member, Venice Commission*, "Russia's War against Ukraine and the Question of Reparations, including its Potential Impact on Africa"

Coffee Break

PANEL VII | Victims, Communities, and Transformative Justice

- **Mr. Shreyas Chandar**, *Guest Lecturer, Department of International Law, Tamil Nadu Dr. Ambedkar Law University*, "Who are the Right Holders of Reparations—Individual or Collective: Proposal for a Normative Humanistic Conceptions for the Orphaned Victims in Africa"
- **Dr. Daniel R. Ruhweza**, *Senior Lecturer-At-Law; Head, Department of Law and Jurisprudence, Makerere University; Coordinator, HRDA Programme* & **Mr. Jesse Mugero***, Programme Associate, International Centre for Transitional Justice*, "Children Born of War as a Test-Case for Rethinking Reparation in International Law: Comparative Lessons from Uganda, Rwanda, and Sierra Leone"
- **Ms. Parvathavarthinie**, *PhD Candidate & Doctoral Researcher, Tamil Nadu Dr. Ambedkar Law University* & **Mr. Mujahid Ul Islam**, "Reparations for Children Born of Genocidal Rape in Post-Conflict Rwanda: Shattering Stigma and Seeding Social Belonging"
- **Dr. Wenceslas Busane Ruhana Mirindi**, *Professor of Law & Vice-Rector Emeritus, Université Catholique de Bukavu*, "Quelle réparation pour les peuples autochtones pygmées victimes d'injustices historiques en Afrique centrale?"
- **Dr. Alain-Guy Sipowo**, *Assistant Professor of Victimology, School of Criminology, Université de Montréal*, "Who Is the Victim? Victimological Challenges in International-Law Reparations Claims for Slavery and Colonialism"

PANEL VIII | Criminal Accountability and Victim-Centered Reparation

- **Mr. Oluwatosin Senami Adegun**, *LLD Candidate & Tutor, Centre for Human Rights, University of Pretoria*, "Criminal Liability of Corporate Entities for Complicity in Killings in Trans-Atlantic Slave Trade: US and UK Cases"
- **Mr. Kyalondawa Junior Babingwa**, "Les défis de la réparation des violences sexuelles en tant que crimes de droit international devant les juridictions militaires congolaises et la CPI"
- **Ms. Udodilim Nnamdi**, *Independent Legal Expert, Mercor Intelligence,* "Starvation as Genocidal Strategy: Comparative Lessons from Biafra and Contemporary Gaza"
- **Ms. Victoria Ogochukwu Okeke**, *Student, Kabarak University School of Law*, "Indigence, Legitimacy and the Africanisation of Reparations at the International Criminal Court"
- **Dr. Élisée Judicaël Tiehi**, *Associate Researcher, Jean-Bodin Center, University of Angers*, "Le principe de faisabilité en matière de réparation devant la Cour pénale spéciale de la République centrafricaine"

Lunch

PANEL IX | Reparation, the Environment, and Structural Redistribution

- **Dr. Boubacar Sidi Diallo**, *Professor & Head of the Department of International Law, Adam*

Mickiewicz University, "L'exploitation coloniale des ressources naturelles en Afrique à l'aune du jus cogens et des obligations erga omnes : fondements juridiques d'un droit aux réparations et à la restauration environnementale"

- **Mr. Olusegun Gbede**, *Lecturer, Royal Docks School of Business and Law, University of East London; Doctoral Researcher, University of Leicester* & **Dr. Olalekan Bello**, *Lecturer, Leicester Law School; Associate Director, Institute for Environmental Futures*, "From Carbon Colonialism to Legal Redress: Historical Responsibility and Climate Reparations in Africa"
- **Dr. Zhenni Li**, *Associate Legal Officer, International Court of Justice*, "Reparation as Redistribution: Reconstructing a Just International Legal Order"
- **Dr. Étienne Marque**, *Lecturer, Institut Catholique de Paris*, "Reclaiming the Riverbed: Ubuntu-Based Investment Law as a Catalyst for Africa's Global Rebalancing and Reparation"
- **Dr. Elena Pribytkova**, *Senior Research Fellow, Centre for International Law, National University of Singapore,* "Countering Digital Colonialism and Eco-Colonialism: Reparations or Assistance?"

Coffee Break

PANEL X | Non-Contentious Pathways: Truth Commissions, Administrative Schemes, and Sanctions

- **MR. YOUSSEF AZIZ & Mr. Max Han**, *Law Clerks, Constitutional Court of South Africa*, "Binding Authority and the Promise of Reparation: National Human Rights Institutions in African Transitional Contexts"
- **Ms. Janna Greve**, *PhD Researcher, Institute of Criminology, Catholic University of Leuven*, "A Restorative Approach to Reparations for Past Crimes? Beyond the Court Room: Elevating the Voices of Communities. Lessons from Colombia's Transitional Justice Framework"
- **Mr. Ryan Mak**, *PhD Candidate & Researcher in Public International Law, University of Hong Kong*, "Healing the Wounds: Truth Commissions and the Path to Reparative Justice for Colonial Crimes in Africa"
- **Ms. Eliza Roberts**, *Attorney & Early Career Researcher*, "The Wonders of Wakanda: Reparations that Build, Not Just Pay"
- **Mr. Christopher Ozomgi**, *Associate, White & Case LLP*, "Full Reparation in Conditions of State Fragility: Equity and Reparative Design in Post-Authoritarian Sudan

PANEL XI | Structural Limits, Systemic Responses, and Alternative Reparative Frameworks

- **Ms. Shafaq Farooq**, *Masters Student, Higher School of Economics (Moscow)*, "Unilateral Sanctions as 'Quasi-Reparations'? Reframing Economic Coercion in African International Law Contexts"
- **Mr. Kanyiri Kariuki***, Associate, G&A Advocates*, "From Mau Mau to the African Union: Colonial Reparations and the Structural Limits of International Law"
- **Mr. Pacharo Kayira***, Deputy Permanent Representative of Malawi to the UN in Geneva,* "Africa and Reparation for Past Crimes: Trans-Saharan and Indian Ocean Slave Trades"
- **Dr. Jeremy I. Levitt**, *Distinguished Professor of International Law, FAMU College of Law;*

Editor, Oxford University Press African Renaissance Law and Policy, "Unresolved Questions in Africa's Reparations Discourses and Movements"

- **Dr. Michal Saliternik**, *Associate Professor, Netanya Academic College School of Law*, "Reconstruction Without Responsibility: Gaza, Africa, & the Future of Reparation in International Law"

CLOSING CEREMONY

- **PROF. MAKANE MOÏSE MBENGUE**, *University of Geneva & Sciences Po Paris*
- **Mr. Michael Butera**, *Chief Technical Advisor, Ministry of Justice, Republic of Rwanda*

PRE-CONFERENCE EVENT | 5 November 2026 @ 4PM
YOUNG ICSID x AfSIL
Africa and Reparation under the ICSID Framework

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- to provide a framework for the conception and development of an African approach to international law;
- to popularise African thought and African authors, particularly young people, of international law;
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Sommaire / Contents

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