

**THE INTERNATIONAL COURT OF JUSTICE AND  
SETTLEMENT OF AFRICAN DISPUTES: TRENDS AND  
PROSPECTS**

**BY**

**LUCY MUTHONI KAMBUNI  
G62/P/8190/2003**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE AWARD OF THE  
MASTERS OF LAWS (LLM) DEGREE, UNIVERSITY OF  
NAIROBI, FACULTY OF LAW.**

University of NAIROBI Library

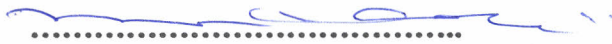


0495494 7

## DECLARATION

I, **LUCY M. KAMBUNI** do declare that this is my original work and has not been submitted either in part or in whole and is not currently being submitted for a degree in any other University.

**SIGNED:**



**Lucy M. Kambuni**

This Dissertation has been submitted for examination with my approval as a University supervisor.

**SIGNED:**



**DR. KITHURE KINDIKI (PhD)**



## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	i
<b>LIST OF ABBREVIATIONS</b> .....	iv
<b>TABLE OF CASES</b> .....	vi
<b>ACKNOWLEDGEMENTS</b> .....	xi
<b>DEDICATION</b> .....	xii

### CHAPTER 1: INTRODUCTION

1.0 Introduction.....	1
1.1 Problem Statement.....	3
1.2 Objectives of the Study.....	4
1.3 Hypotheses .....	4
1.4 Research Questions .....	5
1.5 Literature Review.....	5
1.6 Research Methodology.....	7
1.7 Limitations of the Study.....	7
1.8 Chapter Synopsis.....	9

### CHAPTER 2: THE INTERNATIONAL COURT OF JUSTICE

2.0 The Establishment of the ICJ.....	10
2.1 The Composition of the Court.....	12
2.2 The Jurisdiction of the Court.....	14

**CHAPTER 3: LANDMARK AFRICAN DISPUTES BEFORE THE COURT**

3.0	Historical Background.....	20
3.1	Continental Shelf ( Tunisia/Libyan Arab Jamihiriya) 1978-1982....	23
3.2	Continental Shelf (Libya v Malta).....	25
3.3	Case Concerning the Frontier Dispute( Burkina Faso v Mali)...	28
3.4	Case Concerning the Territorial Dispute ( Libya v Chad).....	31
3.5	Lockerbie Cases.....	33
3.6	Land and Maritime Boundary (Cameroon v Nigeria).....	37
3.7	Case Concerning Kasikili/Sedundu Island (Botswana v Namibia)..	41
3.8	Arrest Warrant Case (Democratic Republic of Congo v Belgium)..	43
3.9	Armed Conflicts on the Territory of the Congo Case..... (DRC v Burundi, Uganda and Rwanda)	47

**CHAPTER 4: ANALYSIS OF THE TRENDS AND PROSPECTS FOR AFRICA'S PARTICIPATION BEFORE THE ICJ.**

4.0	Introduction.....	49
4.1	The Nascent Years of the ICJ- Africa an Object of Justice.....	50
4.2	The Early Cases.....	53
4.3	The South West African Cases- Africa's Waterloo before the ICJ	54
4.4	International Justice for Africa Restored.....	57
4.4.1	The South West Africa Cases (1970-1971).....	58
4.4.2	The Western Sahara Advisory Opinion (1974-1975).....	60
4.4.3	The Nicaragua Case.....	61
4.5	Death Knell for the Cold War- (A Surge of Confidence in the Court).....	64
4.6	Structural Reconstruction and Re-composition of the Court (Increased Confidence for Africa).....	65
4.7	The Court in Support of Disadvantaged Members.....	68

4.8	Acceptability and Compliance with Judgments.....	68
-----	--	----

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

5.0	Conclusion.....	71
-----	-----------------	----

5.1	A Proliferation of Dispute Settlement Fora (An Incidental Benign Dent in the ICJ's docket).....	71
-----	--	----

5.2	Recommendations.....	82
-----	----------------------	----

5.3	The Future of the ICJ.....	91
-----	----------------------------	----

	<b>SELECTED BIBLIOGRAPHY.....</b>	<b>93</b>
--	-----------------------------------	-----------

## LIST OF ABBREVIATIONS

ACHPR	African Court on Human and Peoples Rights
AMU CJ	Court of Justice of the Arab Maghreb Union
AU	African Union
CACJ	Central American Court of Justice
CJAC	Court of Justice of the Andean Community
COMESA	Common Market for Eastern and Southern Africa
COMESA CJ	Court of Justice of the Common Market for Eastern and Southern Africa
DRC	Democratic Republic of Congo
EACJ	East African Court of Justice
ECJ CJ	Court of Justice of the European Communities
ECHR	European Court of Human Rights
EFTA CJ	Court of Justice of the European Free Trade Association
BEU CJ	Court of Justice of the Benelux Economic Union
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
OHCLA CJ	Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa
ICTY	International Criminal Tribunal for the former Yugoslavia
ITLOS	International Tribunal on the Law of the Sea

OAPEC JB	Judicial Board of the Organization of Arab Petroleum Exporting countries
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
SC	Security Council
SG	Secretary General
UNCLOS 111	Third United Nations Conference on the Law of the Sea (1973)
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UK	United Kingdom
UN	United Nations
US	United States of America
WTO	World Trade Organization

## TABLE OF CASES

### *Frontier Dispute*

(*Benin vs. Niger*) (2002-) available at <http://www.icj-cij.org/icjwww/igeneral/information/icjgnnot.html>.

### *Application of Convention on Prevention and Punishment of Crime of Genocide*

(*Bosnia & Herzegovina v. Yugoslavia*)

[1996] ICJ Rep. 803 (Preliminary Objections of July 11)

### *Kasikili/ Sedudu Island*

(*Botswana v Namibia*)[1999] ICJ Rep. also available at <http://www.icj.law.gla.ac.uk/docket/ibonaframe.htm>.

### *The frontier dispute*

(*Burkina Faso/Mali*), [1986]ICJ Rep.17.

### *Land and Maritime Boundary between Cameroon and Nigeria*

(*Cameroon vs Nigeria: Equatorial Guinea Intervening*) (1994-2002),[1994] ICJ Rep. also available at <http://www.cij.org/cjwww/docket/icn/icnframe.htm>.

### *Northern Cameroons*

(*Cameroon v United Kingdom*) filed on 30 May 1961, ICJ Rep. 1963, 15.

### *The Arrest Warrant Case,*

(*Democratic Republic of Congo v Belgium*)

International Court of Justice, Press Release 2002/04 bis, available at <http://www/icj-cij.org/icjwww/docket/iCOBE/iCOBEframe.htm>.

### *Armed Activities on the Territory of the Congo (New Application : 2002)*

(*Democratic Republic of the Congo vs. Rwanda Burundi and Uganda*) (2002-) ICJ Rep (2000), 39 ILM (2000)1100.

### *Maritime Delimitation in the Area between Greenland and Jan Mayen*



(*Denmark v Norway*)( *Order*) [1988] ICJ Rep. 66;

*South West African Cases*

(*Ethiopia vs South Africa*) (1960- 1966), and (*Liberia vs South Africa*) (1960-1966).

*Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border*, 13 April 2002, at <[http:// pca-cpa.org](http://pca-cpa.org)>.

*Protection of French Nationals and Protected Persons in Egypt*

(*France v Egypt*), 1949-1950, ICJ Rep.1950, 59.

*The Nationality Decrees Issued in Tunis and (French Zone) Morocco*

(*France v Great Britain*)PCIJ Series B, No. 4 (1923), 22.

*Passage Through the Great Belt*

(*Finland v Denmark*) ( *Provisional Measures*) [1991] ICJ Rep. 12.

*La Grand*

(*Germany v US*) (*Merits*) ( Unreported, ICJ, 27 June 2001) < [http:// www.icj-cij.org](http://www.icj-cij.org)> on 1 May 2003;

*Maritime Delimitation between Guinea – Bissau and Senegal*

( *Guinea-Bissau v Senegal*)Case Concerning the Arbitral Award of 31 July 1989) Judgment on 12 November 1991( [1991]ICJ Rep. 53)

*Maritime Delimitation Between Guinea-Bissau and Senegal*

( *Guinea-Bissau v Senegal*) ( *Order*) [1995] ICJ Rep. 423.

*Hungary vs Slovakia*, [1997]ICJ Rep.7.

*Sovereignty Over Pulau Ligitan and Pulau Sipandon*

( *Indonesia v Malaysia*) ( *Application by the Phillipines for Permission to Intervene*) ( Unreported ICJ, 23 October 2001)< [http:// www.icj-cij.org](http://www.icj-cij.org)> on 1 May 2003.

*Oil Platforms*

*Interhandel Case*, [1959] ICJ Rep.27

( *Iran v. U.S.*), < <http://www.icj-cij.org/icjwww/idocket/iop/iopframe>>, ( Counter-Claim Order of March 10, 1998);

( *Iran v US*)(*Order*) [1989] ICJ Rep.132.

*The Case of Phosphates in Morocco*

(*Italy v France*) [1953] ICJ Rep.121.

*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, [1996] ICJ Rep. 4 (July 8);

*Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep. 226 (July 8).

*Territorial Dispute*

( *Libya v Chad*) ( *Judgment*) [1994 ] ICJ Rep. 6.

*The Continental Shelf Case*

( *Libya v Malta*) [1985] ICJ Rep.16.

*The Continental Shelf Case*

(*Libyan Arab Jamahiriya v Tunisia 1978-1982*) The I.C.J. Yearbook No. 36, 3-6 (1981/82 ), 18.

*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*

( *Libya Arab Jamahiriya vs. United States of America*) ( 1992-2003) and *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*

( *Libya vs United Kingdom*)(1992-2003). *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep. 3.

*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*

( *Libya v. U.K.*), < [http:// www.icj-cij.org/icjwww/idocket/iluk/ilukjudgment](http://www.icj-cij.org/icjwww/idocket/iluk/ilukjudgment)>, ( *Preliminary Objections of Feb. 27, 1998*).



*Mavrommatis case* ( 1924 ) PCIJ Series A, No.2, p.34.

*Right of Passage over Indian Territory' Case between Portugal and India.*

*The Monte Confurco case.*

*Namibia Advisory Opinion Case in the Nuclear Weapons Opinion* [1996] 1 ICJ Rep. 226

*Certain Phosphates Lands in Nauru* *Certain Phosphates Lands in Nauru*

( *Nauru v. Australia* ), ( *Order* ) [1989] ICJ Rep. 12; [1992] ICJ Rep. 240 ( Preliminary Objections of June 26).

*Military and Paramilitary Activities in and Against Nicaragua*

( *Nicaragua v. United States of America* ) ( *Merits* ), [1986] ICJ Rep, 14.

*North Sea Continental Shelf Cases*, [1969] ICJ Rep.

*Vienna Convention on Consular Relations*

( *Paraguay v. U.S.* ), < <http://icj-cij.org/icjwww/idocket/ipaus/ipausframe> >, ( Provisional Measures of April 9, 1998).

*East Timor*

( *Portugal v Australia* ) ( *Judgment* ) [ 1995] ICJ Rep, 90.

( *Seychelles v France* ), Prompt Release, Case No. 8.

*The International Status of*

*South West Africa ( SWA ), Advisory Opinion*, [1950] ICJ Rep, 128. ( 11<sup>th</sup> July).

*Voting Procedure in matters affecting*

*South West Africa Advisory Opinion*, [1955] ICJ Rep, 67.

*Admissibility of Hearings of Petitioners by the Committee on*

*South West Africa, Advisory Opinion* [1956] ICJ Rep, 23.

*Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*  
(*Qatar v Bahrain*) ( *Order*)[1991] ICJ Rep, 50.

*Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*  
(*Qatar v Bahrain*) (*Merits*)[2001] ICJ Rep,40.

*Tadic*, Case No. IT-94 1 AR72 ( 2 October 1995) 24.

*Oscar Chinn Case*

(*United Kingdom v Belgium*) PCIJ Series A/B, No. 63 (1934).

*The Case Concerning Rights of Nationals of the United States in Morocco*  
(*United States v France*) [1952] ICJ Rep,186.

*United States Diplomatic and Consular Staff in Tehran*

(*U.S. v. Iran*), [1980] ICJ Rep,3 (May 24).

*Western Sahara, Advisory Opinion*, [1975] ICJ Rep,39.

*Yemen-Eritrea, First Stage* (Territorial Sovereignty and Scope of the Dispute), Award of 9 October 1998; *Second Stage* (Maritime Delimitation), Award of 17 December 1999, at <[http:// www. pca- cpa.org](http://www.pca-cpa.org)>

## ACKNOWLEDGEMENTS

To Dr Kithure Kindiki, my supervisor, without whose invaluable guidance this work would not have been completed. Thank you so very much!

## DEDICATION

This work is dedicated to my family.

My parents, Jediel and Eunice Nyaga. I will always be grateful to my father for planting the seed of the legal profession in my mind when I was barely ten years old.

My husband, Dr Fred Kambuni, and our children Allen, Binti and Cynthia.

For their unwavering support and patience despite the family time denied them as I struggled to get this work completed.

## CHAPTER ONE.

### INTRODUCTION

#### 1.0 Prologue

One of the primary purposes of a legal system, both domestic and international, is to adjudicate disputes. In the same way that domestic legal structures are designed to regulate relations between individual and other legal persons, international law has throughout its long history been concerned with disputes between states. The International Court of Justice (ICJ) (or World Court)<sup>1</sup> constitutes, both by jurisdiction and esteem, the most important organ for judicial settlement of disputes on the international arena. For nearly sixty (60) years now, the ICJ has been accessible to all states for the peaceful settlement of disputes. The Court's docket was however nearly empty three decades ago. Indeed for a few months in 1971, from 21 June to 30 August, there was not a single case before the Court; prior thereto, and before 1966, it was less than busy, and for some three years after 1971, there was little to do. Not surprisingly, it was the subject of some humour about there being few cases and many judges.<sup>2</sup>

It is indeed acknowledged that the state of the ICJ has improved remarkably in the recent times<sup>3</sup>. The observation of an experienced practitioner before the Court, made in 1991, read as follows

...no student or practitioner of international law will have failed to observe what has been going on at the International Court of Justice in the last year: the Court in the Hague is busier than it has ever been in its entire history-going all the way to its predecessor in the 1920s. Its docket is crammed, the cases before it diverse. Thanks to the steady performance of its duties

---

<sup>1</sup> In this thesis I shall use the terms ICJ, the World Court and The Court interchangeably.

<sup>2</sup> Mohamed Shahabuddeen, 'The World Court at the Turn of the Century' in A.S. Muller et al.(eds), *The International Court of Justice, Its Future Role After Fifty Years* ( 1997) Kluwer International at p.23.

<sup>3</sup> D.J.Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition, Page 988.



in the past decade, the Court has emerged yet again as one of the more viable international institutions in today's world.<sup>4</sup>

The growing work-load of the Court suggests a broad-based increase in confidence.

That confidence is due to a perception of the Court as being, not a parochial institution essaying to extend a regional law to a universal society, but a judicial forum representing all of that society and applying to its affairs a body of law which, however and wherever it began, now also belongs to all<sup>5</sup>

There has specifically been increased participation by African countries. This interest is attributed to *inter alia* the increase in confidence in the court post the Nicaragua Case<sup>6</sup>, the increased representation by way of judges in the I.C.J. and the institutional reform of the Court.

A concomitant development however has been the development in recent years of a proliferation of multiple fora for the settlement of international disputes, a process which is commonly referred to as the 'proliferation of international courts and tribunals'. An analysis of this phenomenon gains quintessential priority due to the fact that the I.C.J. does not sit at the top of any jurisdictional pyramid. The concern then is whether the Court shall notwithstanding the assailable disaggregation be recognized as the ultimate forum of international judicial settlement and particularly for Africa, the continent selected for the topical review in this thesis.

---

<sup>4</sup> Shahabuddeen, *ibid.* citing K. Highet, 'The Peace Palace Heats Up: The World Court in Business Again?' in 85 AJIL 646( 1991).

<sup>5</sup> Shahabuddeen, *ibid* at p. 25.

<sup>6</sup> *Nicaragua vs The United States of America.*, I.C.J. Reports 1984, p. 392.

## 1.1. Problem Statement

What factors help explain why African States initially distrusted the I.C.J.? Between 1960 and 1970 for example there was no dispute between African States<sup>7</sup> submitted to the Court and between 1971 and 1981, only one dispute between African States was brought before the Court.<sup>8</sup> Why did the post Nicaragua case era engender confidence internationally and particularly in African States towards the ICJ? In 1997 for example the Court entertained eight (8) cases on its list, including four cases initiated by African States.<sup>9</sup> There are two (2) African cases pending before the ICJ as from the year 2002.<sup>10</sup> What is the discernible and expected trend for African Cases before the ICJ? A related conundrum is the paucity of analytical literature on what the future portends for Africa's participation before the Court especially in the light of disaggregation of the international judiciary. How has the Court engendered itself to Africa and has it succeeded in giving expression to a global legal conscience and particularly for African actors? These are the main questions that this thesis seeks to answer.

---

<sup>7</sup> By dispute between African States I mean where both or more parties to the dispute are African, with the exception of the *South West African Cases ( Ethiopia vs South Africa ) ( 1960- 1966)*, and *(Liberia vs South Africa) (1960-1966)*, where the ICJ held that the claimant states lacked the necessary ' legal right or interest ' to bring these cases alleging that South West Africa had not complied with its obligations under the mandate for South West Africa / Namibia. In essence then this dispute was between an African state and a colonial power hence not intra- African per se. This thesis will look into both disputes between African states or where one of the parties is African.

<sup>8</sup> *The Continental Shelf Case ( Libyan Arab Jamahiriya vs Tunisia 1978-1982)* The I.C.J. Yearbook No. 36, 3-6 ( 1981/82 ).

<sup>9</sup> *Kasikili / Sedudu Island ( Botswana vs Namibia ( 1996-1999)*, *Land and Maritime Boundary between Cameroon and Nigeria ( Cameroon vs Nigeria: Equatorial Guinea Intervening ) (1994-2002)*, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie ( Libya Arab Jamahiriya vs. United States of America ) ( 1992-2003)* and *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie ( Libya vs United Kingdom)(1992-2003)*.

<sup>10</sup> *Armed Activities on the Territory of the Congo ( New Application : 2002 ) ( Democratic Republic of the Congo vs. Rwanda ) (2002- )* and *Frontier Dispute ( Benin vs. Niger ) ( 2002- )*

## 1.2 Objectives of the Study

The thesis aims to achieve the following objectives:

- i) Appraise the participation of African States before the ICJ,
- ii) Examine the dynamics and identify the salient trends of the jurisprudence of the ICJ with respect to African States
- iii) Granted the competing judicial fora, appraise the relevance of the ICJ in the international judicial system and particularly with respect to African actors.
- iv) Make recommendations for the reform of the Court towards a more effective and alluring dispensation of international justice and particularly for the purposes of achieving exponential participation of Africa before the Court.

## 1.3 Hypotheses

This thesis aims to test the following hypotheses:

- i) That in colonial times Africa is an object, and with decolonization, a veritable subject of international law, with the Court however being skewed in favour of the colonizer.
- ii) That the institutional reform of the Court and *inter alia*, the increased representation of Africa through increased judges has resulted in enhanced confidence and a marked progressive shift in the jurisprudential paradigms of the Court.
- iii) That the proliferation of dispute settlement bodies some regional and particular to Africa will have the potential of causing a dent, albeit a benign<sup>11</sup> one, into the docket of the ICJ but that ultimately, the ICJ remains the focal reference point in the international dispute settlement arena.

---

<sup>11</sup> I use this word because I do not hold the view that the dent in the Court's docket is cancerous- the significance of the Court is untrammelled unless by some strange stroke of deleterious mischief some international actors should fell the Court, a practical impossibility.



## 1.5 Research Questions

- i) What is the typology of Africa's participation before the ICJ and what are the discernible trends?
- ii) Is the ICJ relevant in the light of the proliferation of the international judiciary and what is Africa's landscape in this context?
- iii) What reforms are desirable towards increased institutional cohesiveness of the Court and specifically for increased and /or important participation of African actors?

## 1.4 Literature Review

The establishment of the ICJ has since its inception attracted the discourse of mainstream international law experts and theorists who have variously written<sup>12</sup> on popular topics for example the functions of the court generally, with a fair amount of scholarly interest being directed towards the jurisdictional constraints of the Court and challenges in enforcement of the Court's decisions. With regard to jurisdiction the main focus has been on the limitation dictated by the consensual nature of the process. The other active discourse has been the import of Article 36 of the Statute which contains the Optional Clause, whereby members *inter alia* declare

...that they recognize as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation and lastly, the nature or extent of the reparation to be made for the breach of an international obligation.

Akehurst<sup>13</sup> has in addition to considering the jurisdictional constraints discussed above also considered, at a general level, the distrust of international courts. It is my

---

<sup>12</sup> See for example, J.L. Briery, *The Law of Nations, An Introduction to the International Law of Peace*, 6<sup>th</sup> edition, from pg. 358, Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, from pg. 753, Max Sorensen, *Manual of Public International Law*, MacMillan (1968), from pg. 701, and Rebecca M.M. Wallace, *International Law, A Student Introduction*, 3<sup>rd</sup> Edition, from pg. 285.

<sup>13</sup> Michael Akehurst, *A Modern Introduction to International Law*, 3<sup>rd</sup> Edition, (London) from pg. 227.

thesis that Africa's shunning of the Court in the initial years was not as a result of the general jurisdictional challenges that beleaguer all subjects of international justice. Africa's distrust moved several notches higher than the disquiet often cited with respect to the Court and international enforcement procedures generally.

Two journal articles deserve specific positive mention however as the authors have sought to consider the subject under purview in this thesis, albeit not as deeply as this subject in my view ought to be delved into, as no doubt the said authors must have had limitations to contend with in their issue specific discourses.

Shiv R.S. Bedi<sup>14</sup> has carried out a statistical appraisal of the ICJ during the period 1946-1998. He has considered how the increase of Judges and the increased representation of Africa in this regard had the effect of increased African Cases till 1998. Similarly the regaining by African Countries of their freedom and independence resulted in the increased membership in the United Nations by African Countries. He has prepared a table of African Cases covering the period under review and a brief annotation of the same including a brief on the position taken by the African judges serving in the Court.

Peter Mwet Munya<sup>15</sup> has considered inter alia, the colonial experience and attitude of the African States towards the ICJ, and how this negatively impacted on the generation of African Cases before the Court. He has also considered the changed attitude of the African States towards the Court from the year 1982 until 1998. He attributes this shift to the changing global power equation and the structural transformation of the Court. He cites other factors such as the contribution of the Court in resolving African maritime and land boundary disputes.

This thesis seeks to build upon the foundation of Bedi and Munya and to catapult the discourse into a deeper interrogation of African participation before the Court and

---

<sup>14</sup> Shiv R.S. Bedi, 'African Participation in the International Court of Justice. A Statistical Appraisal (1946 - 1998)' in *African Yearbook of International Law*, (Kluwer Law International) Volume 6, 1998, pg.181.

<sup>15</sup> Peter Mwet Munya, 'The International Court of Justice and Peaceful Settlement of African Disputes: Problems, challenges and Prospects' in *East African Journal of International and Comparative Law*, Volume 1, 2002, pg.1.



seeks to draw out the extra hurdles beyond the general jurisdictional constraints that Africa has had to deal with in the past. Bedi indicates that his study is in essence a statistical appraisal. In the result he has not delved into the international politics of Africa's engagement with the Court during the years under purview. Munya's jurisprudential analysis is for selected African cases up till 1998. This thesis seeks to extend the discourse to jurisprudential highlights post 1998. The *Arrest Warrant Case* for example which is discussed at length in Chapter 3 brings to the fore phenomenal jurisprudence with respect to universal jurisdiction for international crimes *vis a vis* the immunities from jurisdiction in other states, both civil and criminal, of high ranking state officials. The interrogation of the relevance of the ICJ and specifically to Africa in the light of the proliferation of international courts and tribunals and the recommended reform of the ICJ in order to foster a more cohesive institutional framework are additional insights that augment both studies. African cases shall be discussed in depth in order to isolate the remarkable jurisprudence that comes through, which fact serves to preserve Africa's position in the annals of international jurisprudence. I am compelled to consider some areas for reform of the UN system, and especially those which directly impact on the legitimacy of the Court *vis a vis* the expectations of Africa. The view is that a reformed Court will increasingly secure its perch in the international landscape. It is hoped that this modest discourse shall enrich the scholarly discourse of the Court.

## 1.5 Research Methodology

This study is principally library oriented and in this regard special effort has been made to collect primary and secondary data. The internet has been a rich source of information in this work as is evidenced by the record of the numerous web sites visited. Of importance also are global and regional treaties, charters, conventions, protocols and declarations which provide for dispute settlement bodies that are increasingly being resorted to by the global community and Africa specifically.

## 1.6 Limitations of the Study

The study of judicial settlement of disputes by the ICJ and specifically, the reasons for a docket which traditionally was uncrowded, calls for a broad arduous study of the

reasons for such constrictions, a depth which this thesis cannot achieve due to constraints on time and space. This subject calls for a detailed study of the UN system, the possible effect of this global network on Africa and considered thoughts for its reform towards an African specific accommodation. This is too broad a subject to attempt in this study and any mention of the subject in this study can only be cursory. Indeed I have in this regard limited the proposals for reform to the Security Council which I consider to be the 'real competitor' to the ICJ.

It is also not possible for this study to delve into an in depth study of the philosophical considerations of sovereignty of States and how this of necessity calls for political settlement of disputes including negotiation, inquiry, mediation, conciliation, and arbitration, as opposed to a direct resort to the jurisdiction of the ICJ. It is also not possible to consider in any sufficient detail the generally perceived shortcomings of international judicial dispute settlement mechanisms and particularly the enforcement limitations which of necessity would result in a lean conferment of jurisdiction by States. The focus of this study is on the factors that have specifically inhibited the confidence of African actors before the ICJ. As a result, the otherwise legitimate factors of jurisdictional constraints are not dealt with in respectable details. Similarly this study does not delve into the factors that have accounted for the multiplication of international judicial and quasi-judicial bodies which as earlier intimated have and will continue to nurse the benign dent in the Court's docket. Finally despite the fact that this thesis has a bias towards African cases it is neither possible to undertake a detailed analysis of the said cases nor indeed to consider the entire spectrum of the same. A deliberate effort is made to isolate specific African cases which the author finds indicative of the dynamic jurisprudence of the Court.

## **1.7 Chapter Synopsis**

In order to achieve the objectives spelt out above this study is structured into five chapters as follows:

The First Chapter of the thesis includes the introduction, a brief of the scope of the study, the literature review, the research methodology, the conceived limitations of the study and the chapter synopsis.

The Second Chapter considers the establishment and nature of the ICJ.

The Third Chapter addresses the landscape of selected Africa cases brought before the Court.

The Fourth Chapter addresses the analysis of the trends and prospects of Africa's participation before the ICJ, and specifically interrogates the early decades of the court and the cases that evolved (both pre and post cold war), the practical and philosophical underpinnings of the distrust of the Court by Africa, and the changing attitudes towards the Court in the years following. In this regard Cases entertained by the Court are discussed in so far as they relate to the issues under interrogation in this chapter. The Nicaragua case is specially discussed because it is widely conceived to be the international watershed of the enhanced confidence in the Court. Of importance also is an appraisal of the emergent levels of acceptability and compliance with the decisions of the Court.

The Fifth and the concluding Chapter addresses the question of reform of the Court and the proliferation of dispute settlement fora. In this context, I seek to locate the future participation of Africa before the Court and the future of the Court itself. In this regard recommendations are made towards engendering the World Court to the community of nations and Africa specifically.



## CHAPTER TWO

### THE INTERNATIONAL COURT OF JUSTICE

#### 2.0 The Establishment of the ICJ

Shaw<sup>16</sup> writes that the impetus to create a World Court for the international community developed as a result of the atmosphere engendered by the Hague Conferences of 1897 and 1907. The establishment of the Permanent Court of Arbitration, although neither permanent, nor a court, was a milestone in the consolidation of an international legal system. The conclusion of the First World War resulted in the Covenant of the League of Nations calling for the creation of a World Court and in 1920 the Permanent Court of International Justice (PCIJ) was created. The role of the Court was more ambitiously seen as that of offering 'a war-stricken world...the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.'<sup>17</sup> An analogous perceived role attends the ICJ and hence

...a temptation to see recourse to it as some kind of panacea for the ailments of a world riven by conflict. The natural inability of the Court to meet so improbably high a level of expectation has led to an impression that a process of marginalization has been tending to push it outward into the periphery of disputes settlement activity. To be sure, judicial process alone cannot banish war; but the facts show that in a proper case the Court does not shrink from pronouncing on questions involving the use of force<sup>18</sup>

The PCIJ was after the Second World War and pursuant to the San Francisco Conference, superseded by the International Court of Justice, described in Article 92 of the Charter as the United Nations, 'principal judicial organ'. It is in essence a continuation of the PCIJ, with virtually the same statute and jurisdiction and with a continuing line of cases.

---

<sup>16</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> edition, Cambridge University Press pg. 745.

<sup>17</sup> Report of the Rapporteur ( Nasrat Al-Farsy, Iraq) of Committee IV/1, 13 UNCIO 393 ( 1945).

<sup>18</sup> Mohamed Shahabuddeen, 'The World Court at the Turn of the Century' in A.S.Muller et als(eds), *The International Court of Justice, Its Future Role after Fifty Years* ( 1997) Kluwer Law International, at p.18.

In the views of Lauterpacht<sup>19</sup>, the primary purpose of the Court 'lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law.' He further notes that the Court has contributed to the solution of important or acute controversies. It has also prevented minor disputes from becoming a dangerous source of friction, which they might have become had they been left unsolved or allowed to be settled by the *ipse dixit* of an interested party. He importantly notes that what matters in maintaining the international rule of law is not the number of disputes actually decided by the Court but that a contemplated wrong was not proceeded with or that controversies have been settled without its intervention in conformity with justice for the reason that, in the absence of a satisfactory solution, one party was at liberty to bring the dispute before the Court.

In some cases the existence of the Court has given the Governments concerned the opportunity of an amicable and authoritative settlement of a dispute which, having regard to public feeling in their countries on the subject, they might have been reluctant to settle through diplomatic negotiations for fear of laying themselves open to factious criticism on the ground that they showed undue readiness to compromise in respect of a weighty national interest. Sir Lauterpacht<sup>20</sup> however cautions that it would be an exaggeration to assert that the Court has proved to be a significant instrument for maintaining international peace. The degree of achievement of this end by an international Court is dependent upon the state of political integration of the society whose law it administers. In the Statute of the Court its jurisdiction was rendered optional, but that option has not been generally exercised. Where States have accepted the compulsory jurisdiction of the Court they have done so in most cases, subject to far-reaching reservations which on occasions have gone to the length of reserving to the Government concerned the right to determine, after the dispute has been brought before the Court, whether it is bound to submit to the Court – a reservation the legal validity of which, is controversial.

---

<sup>19</sup> H. Lauterpacht, *The Development of International Law by the International Court* (1958), pg 3.

<sup>20</sup> Lauterpacht *ibid*, pgs 3-4.

It must at all times be recalled that at the international level, where recourse to the Court or arbitrator is purely consensual, the obligation to comply with their decisions derives directly and exclusively from the free choice made by those subject to their jurisdiction to submit to it. It is the application of the norm *pacta sunt servanda*.

Compliance rests principally in the hands of those subject to that jurisdiction, general international law confining itself to imposing upon them a mandatory result, which they must fulfil in good faith. The international judicial or arbitral decision system

finds its limitations in the vicissitudes of international life, which mean that certain cases of non-compliance are always possible, even though as practice shows, such cases happily remain rather rare.<sup>21</sup>

## 2.1 The Composition of the Court

The ICJ is a universal court. All member States of the United Nations are parties to the Statute. Non-United Nations Members<sup>22</sup> may also be party to the Statute.

Practically all States in the World, and totalling One hundred and Ninety One (191) are bound by the Statute<sup>23</sup>. The fifteen Members of the Court, no two of whom may be nationals of the same state,<sup>24</sup> are elected for nine years by the General Assembly and the Security Council of the United Nations. The election must be carried out in order to assure that the representative character of the Court is maintained, in order to accord with the Statute's edict<sup>25</sup> that 'the representation of the main forms of civilization and of the principal legal systems of the world should be assured.'

---

<sup>21</sup> Philippe Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes' in A.S. Muller et al. *ibid.* note 18 at p. 106.

<sup>22</sup> For example Switzerland until her recent election to be a member of the United Nations. Under Article 93 of the Charter of the United Nations, a State which is not a member of the United Nations may become a party to the Statute of the Court on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

<sup>23</sup> See the Report of the International Court of Justice 1 August 2002 – 31<sup>st</sup> July 2003.

<sup>24</sup> Article 3 of the Statute.

<sup>25</sup> Article 9 of the Statute of the Court.



In practice, the Court traditionally comprises one judge of the nationality of each of the Permanent Members of the Security Council (China, France, Russia ( now Russian Federation), United Kingdom and the United States of America). The remaining ten (10) seats are shared out geographically in accordance with the provisions of the Statute<sup>26</sup> of the Court and the usual United Nations practice.<sup>27</sup> In addition to the Members drawn from the five Permanent Members, there are currently three African judges, from Egypt, Madagascar and Sierra Leone. The Asian region is represented by a Japanese and a Jordanian Judge. Western Europe is represented by a German and a Dutch judge. Central and Eastern Europe is represented by a Slovak whilst Latin America has two judges, from Venezuela and Brazil.<sup>28</sup>

The aim of the election procedures relating to the composition of the Court is to produce a judicial body of independent members rather than State representatives. In the result, the Statute provides<sup>29</sup> that Judges of the nationality of each of the parties in a case before the Court shall retain their right to sit in the case. It is however submitted that this desired independence is watered down by the provision<sup>30</sup> that an *ad hoc* judge or judges may be chosen to sit in a case where the Bench does not include a judge or judges of the nationality of the parties. It is evident then that the composition of the Court seeks to meet not only the dictates of international law but also those of politics.

<sup>26</sup> See Chapter 1 of the Statute with respect to the organization of the Court.

<sup>27</sup> Every three years one third of the seats fall vacant. The last elections to fill such vacancies were held on 21<sup>st</sup> of October 2002. Sitting judges Shi Jiuyong ( China ) and Abdul G. Koroma ( Sierra Leone ) were re-elected; Messrs Hisashi Owada ( Japan ), Bruno Simma ( Germany ) and Peter Tomka ( Slovakia ) were re-elected with effect from 6 February 2003. In its new composition, the Court elected Mr Shi Jiuyong as its President and Mr Raymond Ranjeva as its Vice- President for a term of three years.

<sup>28</sup> See the Report of the International Court of Justice 1 August 2002 to 31<sup>st</sup> July 2003, and the I.C.J. Yearbook 2002-2003.

<sup>29</sup> Article 31 of the Statute of the Court.

<sup>30</sup> Article 31(2) and (3) of the Statute of the Court. As at the 31<sup>st</sup> of July 2003, the number of *ad hoc* judges stood at 37.

## 2.2 The jurisdiction of the Court

The Court possesses two types of jurisdiction, contentious jurisdiction involving States that submit a dispute by consent to the Court for a binding decision and advisory jurisdiction which concerns questions referred to the Court by the General Assembly, the Security Council or other organs and specialised agencies of the United Nations. With respect to the latter however advisory opinion sought should only refer to legal questions arising within the scope of their activities and the resultant advisory opinions are not binding.

The Court's incidental jurisdiction relates to a series of miscellaneous and interlocutory matters for example the power of the Court to decide a dispute as to its own jurisdiction in a given case, its general authority to control the proceedings, the ability to deal with interim measures of protection and the discontinuance of a case. The mainline jurisdiction on the other hand, concerns the power of the Court to render a binding decision on the substance and the merits of the case before it.

The Court has to decide disputes freely submitted to it by States in the exercise of their sovereignty. The consent of a State to appear before the Court takes one of three forms.

Firstly, a State may subscribe to a procedure known as the 'optional declaration of compulsory jurisdiction'<sup>31</sup> This was the compromise worked out when the proposal of the committee of Jurists appointed by the League of Nations and given the task of drafting the Statute of the PCIJ, failed to gain acceptance of the Council of the League. The Committee had proposed that the Court be equipped with compulsory jurisdiction. This was in line with opinion of the majority of the delegations at the San Francisco Conference. The argument was that compulsory jurisdiction would make 'the ICJ nearly resemble domestic courts, and it would symbolize an international effort to 'get serious' about international law'<sup>32</sup>. Indeed the Representative of the

---

<sup>31</sup> This is in line with the provisions of Article 36(2) of the Statute of the Court.

<sup>32</sup> Zachary D. Clopton, 'An Institutional Appraisal of I.C.J. Jurisdiction', p. 5, <http://ase.tufts.edu/hemispheres/2003/clopton.doc>, citing Gary L. Scott and Craig L. Carr, 'The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause,' *American Journal of International Law*, Vol. 81, no. 1 (January 1987), 70.



United Kingdom (UK) had suggested that a provision for compulsory jurisdiction of the Court be included in the UN Charter.<sup>33</sup> However powerful nations, and in particular the U.S. and the Soviet Union rejected the proposal and a delegate of the U.K. remarked that those States 'saw little reason to forsake the political benefits of their obvious strategic advantage by accepting a more than fictional equality with smaller States.'<sup>34</sup> The Council of the League had no otherwise than consider the concept of compulsory jurisdiction to be an affront to the sovereignty principle of the member States.

The purport of the concept of the Optional Clause is that the State accepts the compulsory jurisdiction of the Court for all disputes provided that the other State also accepts the same jurisdiction. As at the 31<sup>st</sup> of July 2003, 64 States had deposited with the Secretary- General of the United Nations a declaration of acceptance of the Court's compulsory jurisdiction.<sup>35</sup> Out of this number 18 countries are from Africa.<sup>36</sup> Out of this African number only 6 have made their declarations without any reservations.<sup>37</sup> Brierly<sup>38</sup> notes that many of these States have attached reservations to their acceptances. This limiting effect is multiplied by the fact that acceptance of the Optional Clause is on a reciprocal basis, each State only accepting compulsory jurisdiction *vis a vis* another State to the extent that the obligations undertaken in their respective declarations mutually correspond, and hence the declarations by both States must comprise that dispute within its scope.

---

<sup>33</sup> Zachary D. Clopton, *ibid*, quoting Jessup, 'Acceptance by the United States of the Optional Clause of the International Court of Justice,' p. 746.

<sup>34</sup> Zachary D. Clopton, *ibid*, on p. 5 citing Scott and Carr, *ibid*. at p. 58.

<sup>35</sup> See Bedi *ibid*. note 14.

<sup>36</sup> Botswana, Cameroon, Egypt, Gambia, Guinea- Bissau, Kenya, Liberia, Madagascar, Malawi, Mauritius, Nigeria, Senegal, Somalia, Sudan, Swaziland, Togo, Uganda, and Zaire. See also Shiv R. S. Bedi , *ibid* note 14 at p. 192.

<sup>37</sup> Cameroon, Egypt, Guinea-Bissau, Togo, Uganda and Zaire.

<sup>38</sup> J.L.Brierly, *The Law of Nations, An Introduction to the International Law of Peace*, 6<sup>th</sup> edition, Oxford University Press (1963) at pg 354-359.

The further limitation is that a defendant State, even when the declaration comprises the dispute within its scope, is always entitled to invoke a reservation in its opponent's declaration for the purpose of seeking to exclude the Court's jurisdiction in the case. Originally, the framers of the Charter assumed that reservations would be restrained. Waldock describes the idealized reservation as defining 'determinate, objective criteria' for the Court to evaluate.<sup>39</sup> The prevailing view as of 1945 was that reservations made in the past and particularly before the PCIJ did not limit in any substantial way the jurisdiction of the Court. Less than two decades after the creation of the ICJ, Max Sorensen observed the 'marked tendency to weaken and narrow the scope' of declaration made to the Court.<sup>40</sup>

Anand argues that certain 'declarations have been riddled with such damaging and unprecedented reservations that many of them can be regarded as negligible and confer jurisdiction on the Court in name only.'<sup>41</sup>

Brierly<sup>42</sup> notes that since the Second World War there has been a noticeable decline in the quality of acceptances of compulsory jurisdiction under the Optional Clause. There has been a tendency to resort to subjective forms of reservation designed to enable a State to determine for itself whether any case falls within the scope of its acceptance of the Court's jurisdiction. This affront is in direct contradiction with the Court's Statute, Article 36, paragraph 6 which expressly states that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.<sup>43</sup> Other States, having accepted the general jurisdiction of the Court, have subsequently renounced it for example, the United States of America after

---

<sup>39</sup> See Zachary D. Clopton, *ibid* at p. 8, quoting, Waldock, 'Decline of the Optional Clause', 270.

<sup>40</sup> Clopton, *ibid.* at p. 9, citing Max Sorensen, 'The International Court of Justice: Its Role in Contemporary International Relations', *International Organization*, vol. 14 no. 2 (Spring 1960), 267.

<sup>41</sup> Clopton, *ibid*, quoting Anand, 'Role of the 'new' Asian- African Countries in the Present Legal Order,' 392.

<sup>42</sup> Brierly, *ibid.* at p.358-359.

<sup>43</sup> The International Court of Justice, Statute of the International Court of Justice, 1945.



the Case with Nicaragua, or France after the case concerning nuclear tests in the Pacific.<sup>44</sup>

Reservations can exclude disputes for which a solution is not reached through diplomatic means, or for which the parties had agreed on some other methods of settlement<sup>45</sup>, or disputes occurring in time of war or conflict. A common form of reservation known as the 'automatic reservation' excludes disputes that come within the domestic jurisdiction of a State.<sup>46</sup> Other States have made reservations based on jurisdiction *ratione temporis* in that while submitting their declarations under Article 36(2), they have prescribed time qualifications for a dispute to come within the scope of the declaration. The questions of whether, when (in relation to the specific incident in question) and under what circumstances states have accepted that jurisdiction form a major component of the ICJ deliberations.

Secondly, the Court may be seised with jurisdiction where international conventions contain a provision whereby any dispute involving their interpretation or application is to be dealt with by the Court. This is commonly referred to as the inclusion of a jurisdictional clause in a treaty. Generally through this Compromissory clause the

---

<sup>44</sup>See Clopton, *ibid.* at p.9. Another example of the extreme application of reservations by States is Portugal. Reservation 3 of Portugal's Declaration states that 'the Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary- General of the United Nations and with effect from the moment of such notification' ( Declaration to the International Court of Justice( 1955) available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm#port>. The Court recognized the validity of this reservation in the '*Right of Passage over Indian Territory Case between Portugal and India*).

<sup>45</sup>Case Concerning the Arbitral Award of 31 July 1989( *Guinea-Bissau v. Senegal*) Judgment on 12 November 1991( ICJ Reports 1991at p. 53)The Case is indicative of the proposition that reservations may me made *ratione materiae*, excluding disputes where other means of dispute settlement have been agreed.

<sup>46</sup>The United States submitted such an amendment to its declaration in 1946 ( referred to as the Connally Amendment, based on a recommendation from U.S. Senator Connally. Judge Lauterpacht questioned the validity of this reservation as in his view it was repugnant to Article 36(6) of the Statute which gave the Court the power to determine its own jurisdiction. This 'self-judging' reservation, as Dwight D. Eisenhower called it ( see Clopton, *ibid.*, p.10, citing D'Amato) gave the United States the authority to decide what constitutes its 'domestic jurisdiction'. Thus the U.S. could veto ICJ by simply arguing that a case was within its domestic sphere. It is noteworthy that the U.S. did not( in the *Nicaragua Case*), apply the Connally Reservation when it was not in its interest to do so whilst the U.S. invoked the said reservation in the *Interhandel Case* with Switzerland. In the latter case, the U.S. agents argued that the right to interpret an international agreement was within the domestic jurisdiction of the United States.

States parties agree, in advance, to submit to the Court any dispute concerning the implementation and interpretation of the treaty. There are some 300 bilateral or multilateral treaties currently which contain provisions to this effect.

Bedi<sup>47</sup> notes that although there are many multilateral and bilateral treaties signed by African States with non- African States which contain jurisdictional clauses, sometimes accompanied by reservations, as at 1998, the disappointing fact was that there was no bilateral treaty signed between two African States and containing a clause conferring jurisdiction on the International Court. The positive fact however is that of the 15 cases originating from Africa as at 1998, 6 based their jurisdictional claims on the treaty clauses.<sup>48</sup>

Thirdly, States may submit a specific dispute to the Court by way of Special agreement ( *compromis* ). This commonly involves compromissory clauses inserted into conventional instruments whereby States accept that a specific dispute shall be submitted to the Court.<sup>49</sup> Finally, under the doctrine of *forum prorogatum*, the Court infers the consent of the State, expressed in an informal and implied manner, and after the case has been brought before it. The Court has upheld its jurisdiction even where consent has been given after the initiation of the proceedings, in an implied or informal way or by a succession of acts.<sup>50</sup>

Suffice to state that the jurisdictional structure of the Court remains elaborate and deliberate and is intended to cushion the sovereignty concerns of State Parties. The jurisdictional design being a political bargain ought and should have through out the existence of the Court, impartially accommodated the family of nations. One is

---

<sup>47</sup>Bedi, *Ibid.* note 14 at p.193.

<sup>48</sup> See Bedi, *ibid* and The ICJ Yearbook 1997-1998, Chapter IV, Section 111.

<sup>49</sup> A *compromis* was concluded between Hungary and Slovakia on 7 April 1993, by which they submitted to the Court the dispute concerning the Gabčíkovo Nagymaros Project, which concerned the construction and operation of a barrage system. *Hungary vs Slovakia*, ICJ Reports, 1997, p.7.

<sup>50</sup> In the *Mavrommatis* case, the court regarded it as immaterial that the ratification of the Treaty of Lausanne ( on the basis of which Greece, in part, invoked the court's jurisdiction) took place after the initiation of the proceedings. *Mavrommatis case* ( 1924 ) PCIJ Series A, No.2, p.34.

however wont to be reminded that politics is not about equality, it is about opportunity, wit and to a large extent, force. Where then do we site Africa in this elaborate international forum?

The next chapter highlights the landmark African disputes. This is in preparation for an analysis of the attendant reasons for the said wealth of jurisprudence made possible by Africa's contribution, notwithstanding her earlier avowed disillusionment with the Court in the earlier years.



## CHAPTER THREE

### LANDMARK AFRICAN CASES BEFORE THE ICJ

#### 3.0 Historical Background

A new era of confidence in the Court, the source of which is the subject of my next chapter, brought with it a marked increase of settlement of African disputes. The larger landscape of these cases comprises land boundary and maritime delimitation disputes ( Of all the territorial dispute cases brought before the ICJ since 1960, 57% were African, whereas only 33% (104 out of 315) of all bilateral boundaries world wide are in Africa),<sup>51</sup> and sad to state, this is yet another rough edge of Africa's colonial experience.

The formation of the State system in Africa was primarily the result of a process of destruction of the native social and political systems and of the imposition of artificial constructs, concerning boundaries, population and governmental institutions. Political decolonization could not erase this legacy.<sup>52</sup> The principle of *uti possidetis juris* –title to territory, holds that colonial boundaries, however arbitrarily drawn by the imperial powers, are to be respected. This is a concept that has gained prominence in the jurisprudence of the Court<sup>53</sup>

As Clifford Geertz (1973) argues<sup>54</sup>, postcolonial States are not only liable to 'dismember' peoples across borders, but they may also 'suffocate' heterogeneous groups within. Arbitrary boundaries have been certified to magnify the likelihood of international and domestic conflicts and weaken the stability of governments.<sup>55</sup> In

---

<sup>51</sup> Englebert *et al.*, *post* note 54, at p. 1101.

<sup>52</sup> Leopoldo Lovelace Jr, 'Has international Law Failed Africa?', a Paper prepared for the International studies Association, Annual Convention, Chicago, Illinois, February 21-24, 2001, p.1, available at <http://www.isanet.org/archive/lovelace.html>.

<sup>53</sup> As recently as 1992, the Court reaffirmed the validity of the principle in the Case concerning land, Island and maritime frontier dispute ( *El Salvador v Honduras, Nicaragua intervening, 1986-1992*).

<sup>54</sup> Cited by Pierre Englebert et al in 'Dismemberment and Suffocation, A Contribution to the Debate on African Boundaries, in *Comparative Political Studies*, vol. 35 No. 10, December 2002, 1093 at 1094.

<sup>55</sup> Englebert, *ibid.* at p. 1095.



many cases, colonial borders were created without knowledge of, or interest in, local territories and populations. Treaties among imperial powers and with local chiefs, as well as administrative decisions within single colonial empires, often resulted in straight lines or the use of rivers or other geographical features previously as likely to unite as to separate local populations. Astronomically based straight lines were a particularly popular mode of delimitation, for their expediency suited colonizers whose knowledge of the boundary zones was limited by the decision of the 1884-1885 Berlin Conference that occupation was not required for claims of colonial sovereignty.<sup>56</sup> There are a few cases however where more extensive exploration and consultation together with the advent of aerial photography, allowed colonizers to create more sensitive boundaries.<sup>57</sup> The decision by African Governments at the Cairo Summit in 1964 (Morocco and Somalia excepted), to endorse colonial boundaries guaranteed that the consequences of colonial expediency would endure throughout independence and sub-rule.<sup>58</sup> The entire African continent would otherwise have been cast into the throes of uncertainty were boundaries to be negotiated afresh. African countries have paid for their decision in terms of weakened internal dimensions of sovereignty and increased political instability.

Territorial conflicts have arisen over common claims over the same land especially where the same is resource rich (this was the case with the armed conflicts between Burkina Faso and Mali in 1974 and 1985 over the Agacher strip, which was rumoured to have oil reserves). The Phosphate deposits in Western Sahara have also influenced Moroccan claims over the region as have oil fields in the dispute about offshore islands between Cameroon and Nigeria. In general, unequal resources including water, oil, and other minerals, fisheries and access to the sea, seem to promote conflict.<sup>59</sup> Most African conflicts are conflicts historically arising from processes of

---

<sup>56</sup> Pierre Englebert, citing Prescott (1972), *ibid* at p.1096.

<sup>57</sup> Pierre Englebert, citing Brownlie (1979), and Prescott (1987) *ibid* note 54 at p.1096.

<sup>58</sup> Charter of the Organization of African Unity (OAU) article 3 and OAU 1964 Cairo Resolution.

<sup>59</sup> Pierre Englebert *et al*, citing Asiwaju (1993) and Prescott (1972), *ibid* note 54, at p. 1098.

State formation, where no initial third party self determination claims may be necessarily at stake.<sup>60</sup> Conflicts of that type are those between Botswana and Namibia over the Kasikili/Sedudu Island<sup>61</sup>, the Land and Maritime boundary conflict between Cameroon and Nigeria<sup>62</sup> which mainly centred on the Bakassi Peninsula, and the dispute between Tunisia and Libya<sup>63</sup> over the Northern Gulf of Gabes, which affects their continental shelf. The dispute between Guinea-Bissau after it achieved independence in 1974 may be considered in principle a conflict arising from their respective processes of State formation, as to what concerns the dimension of having a defined territory<sup>64</sup>. The conflict between Libya and Chad<sup>65</sup> compounds with a secessionist movement in Northern Chad.

The modern maritime entitlements over vast oceanic spaces over the continental shelf and over the exclusive economic zone have produced sharp disagreements among neighbouring nations about their delimitation, the definition of their borders many of which remain unsolved. Economic interests are only part of the picture, the rest of the contest being attributed to nationalistic pride. In so far therefore that the ICJ has been the forum of choice by African countries even in this specific body of disputes, its contribution to settlement of African disputes, despite the jurisprudential challenges that may be levelled against the said decisions, is phenomenal.

In this part then, I propose to discuss Africa disputes (many of them territorial boundary and maritime boundary delimitation based) brought before the Court and

---

<sup>60</sup> Leopoldo Lovelace Jr *ibid* note 52 at p. 8.

<sup>61</sup> 1999 ICJ Reports, *Kasikili/ Sedudu Island ( Botswana v Namibia)*.

<sup>62</sup> 1994 ICJ Reports, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*

<sup>63</sup> 1982 ICJ Reports, *Continental Shelf (Tunisia v Libya)*.

<sup>64</sup> 1991 ICJ Reports, *Maritime Delimitation between Guinea – Bissau and Senegal (Guinea-Bissau v Senegal)*.

<sup>65</sup> 1994 ICJ Reports, *Territorial Dispute, Libya v Chad*.



specifically cases post the *Namibia (South West Africa)* Advisory Opinion of 21<sup>st</sup> June 1971. It is however to be remembered that the nature of the legal principles applicable in the determination of land boundary and maritime boundary delimitation disputes are distinguishable. Principles of equity that play a key role in maritime boundary delimitation are inapplicable in land boundary cases.<sup>66</sup> The ICJ has also emphasized that the equity applied in maritime delimitation is to be differentiated from equity as obtains in municipal legal systems, where rigid rules of positive law are tempered by equity in order to achieve justice. This parallel does not exist in maritime delimitation where each boundary dispute is treated as a unique case.<sup>67</sup>

### 3.1 Continental Shelf ( Tunisia/Libyan Arab Jamahiriya) 1978-1982<sup>68</sup>

The Court was requested by the Special Agreement to render its judgment as to what principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to Tunisia and the area of the continental shelf appertaining to Libya. The Court was further to take its decision according to equitable principles, as well as the newly accepted trends' in the Third United Nations Conference on the Law of the Sea (UNCLOS 111). The parties were in agreement that in the delimitation of their respective continental shelf, each was entitled to the natural prolongation in accordance with the equitable principles enunciated by the court in the 1969 *North Sea Continental Shelf Cases*<sup>69</sup> and that the equidistance method would be inappropriate in the circumstances of the case.

<sup>66</sup> In the frontier dispute (*Burkina Faso/Mali*), 1986, I.C.J. 17 para. 27, December judgment, a chamber of the ICJ drew out the difference when it observed that 'in the field of territorial boundary delimitation there is no equivalent to the concept of 'equitable principles' so frequently referred to by the law applicable in the delimitation of maritime areas'.

<sup>67</sup> See Munya, citing Nelson *ibid.* note 16 at p. 29. It is also important to note that the ICJ specifically avoids referring to any equitable power *praeter legem*, that is merely to fill in the gaps in the law, let alone *contra legem*. Whatever international equity may be relevant has never taken the colour of benevolence and nor has it been visceral. On the other hand, international law itself admits, under the rubric of the autonomy of the parties, broad authority to contending parties to avoid its permissive, substantive norms, and select criteria which may be extra-legal. This is the purport of Article 38(2) of the Statute of the Court which recognizes the doctrine of *ex aequo bono*, the equity of the parties.

<sup>68</sup> *Tunisia v. Libya*, 1982 I.C.J. 18.

<sup>69</sup> ICJ Reports 1969.

The Court, deciding on the basis of custom as neither State was a party to the 1958 Convention on the Continental Shelf, emphasized that ‘the satisfaction of equitable principle is, in the delimitation process, of cardinal importance.’ The concept of natural prolongation was of some importance depending upon the circumstances, but not on the same plane as the satisfaction of equitable principles.<sup>70</sup> The Court also employed the ‘half-effect’ principle for the Kerkennah Islands<sup>71</sup>, and emphasized that each continental shelf dispute had to be considered on its own merits having regard to its peculiar circumstance. The Court was of the view that ‘the principles are subordinate to the goal’ and that ‘the principles to be indicated ... have to be selected according to their appropriateness for reaching an equitable result.’<sup>72</sup>

This proposition has led to criticism that the carefully drawn restriction on equity in the *North Sea Continental Shelf Cases* has been overturned, the element of predictability minimised, thus leading to dangers of an equitable solution based upon subjective assessments of the facts, regardless of the law of delimitation. This concern was also pointed out by Judge Gross in his dissenting opinion.

Alternative jurisprudence<sup>73</sup> however posits that the blame for the delay of and confusion in mapping out an intelligible regime of delimitation lies mainly with the *North Sea Continental Shelf Cases* adjudication in that the ICJ, uncomfortable with the apparent dominance of equidistance, took a wrong doctrinal turn and set sail upon the uncharted waters of an elusive equity that has haunted the delimitation process ever since. A divided ICJ boldly played down<sup>74</sup> the rule of equidistance as the natural

<sup>70</sup> ICJ Reports, 1982, p.18.

<sup>71</sup> *ibid.* para. 89.

<sup>72</sup> *ibid.* para.59.

<sup>73</sup> Phaedon John Kozyris, ‘Lifting the Veils of Equity in Maritime Entitlements: Equidistance with proportionality around the Islands, in ‘Denver Journal of International Law and Politics, 319, also available at <http://www.law.du.edu/ijl/online>.

<sup>74</sup> 1969 I.C.J. Reports, 3, paras. 37-46.

law of the continental shelf, a rule which had been incorporated in Article 6 of the Convention on the Continental Shelf, 1958, modified by the exception of special circumstances.

The dissenting six judges challenged the majority decision on extremely compelling grounds. The majority decision stated that

It is clear that what is reasonable and equitable must depend on its particular circumstances. There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances which characterize the area.<sup>75</sup>

Judges Oda, Gros and Evensen questioned the meaningful applicability of such equity in the case. Judge Gros criticized the ICJ for contenting itself with some generalities on the equidistance method without giving reasons why it would unquestionably 'lead to inequity'. Judge Evensen quoted Maitland to the effect that 'equity came not to destroy the law but to fulfil it'<sup>76</sup> in other words equity principles cannot operate in a void and in the *North Sea Case*, the equidistance principle was applied as a juridical starting point for the application of equity. Elsewhere however, the decision has been lauded as a shift from the problematic rule-oriented to result-oriented approach in the delimitation of the continental shelf.<sup>77</sup>

### 3.2 Continental Shelf (Libya v Malta)<sup>78</sup>

By the Special Agreement concluded between the Libyan Arab Jamahiriya and Malta the Court was requested to decide on the delimitation of the continental shelf between the two countries. The Court considered that it was not debarred by the terms of the Special Agreement from indicating a delimitation line. The Court further emphasized

---

<sup>75</sup> *Ibid*, note 68, para. 70.

<sup>76</sup> *Ibid*, note 68, para. 12, dissenting opinion by Evensen.

<sup>77</sup> Munya, *ibid*, note 15 at p.33.

<sup>78</sup> 1985, ICJ Reports, p.16. Judgement on merits on 3 June 1985.



that the delimitation contemplated by the Special Agreement related only to areas of continental shelf "which appertain" to the Parties, to the exclusion of areas which might "appertain" to a third State.<sup>79</sup>

The two Parties agreed<sup>80</sup> that the dispute was to be governed by customary international law. Malta was a party to the 1958 Geneva Convention on the Continental Shelf, while Libya was not; both Parties had signed the 1982 UNCLOS, but that Convention had not yet entered into force. In view of the major importance of this Convention - which had been adopted by an overwhelming majority of States, the Court held that it had the duty to consider how far any of its provisions may be binding upon the Parties as a rule of customary law.

The Court stated that the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law; and although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.

The Court listed<sup>81</sup> some of the equitable principles: the principle that there is to be no question of refashioning geography; the principle of non-encroachment by one Party on areas appertaining to the other; the principle of the respect due to all relevant circumstances; the principle that "equity does not necessarily imply equality" and that there could be no question of distributive justice. The Court noted<sup>82</sup> that although there was no closed list of considerations which a court may invoke, the only ones which would qualify for inclusion were those pertinent to the institution of the

---

<sup>79</sup> *Ibid*, paras 18-23.

<sup>80</sup> *Ibid*, note 78 paras 26-25.

<sup>81</sup> *Ibid*, paras 45-47.

<sup>82</sup> *ibid*, paras 48-54.

continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation. The Court considered<sup>83</sup> that if coastal States have an equal entitlement, *ipso jure* and *ab initio*, to their continental shelves, this does not imply equality in the extent of these shelves, and thus reference to the length of coasts as a relevant consideration cannot be excluded *a priori*. Noting that the law applicable to the present dispute was based on the criterion of distance in relation to the coast (the principle of adjacency measured by distance), and noting that the equitableness of the equidistance method is particularly marked in cases where the delimitation concerns States with opposite coasts, the Court considered that the tracing of a median line between the coasts of Malta and Libya, by way of a provisional step in a process to be continued by other operations, was the most judicious manner of proceeding with a view to the eventual achievement of an equitable result. The equidistance method was not the only possible method, and it must be demonstrated that it in fact leads to an equitable result - this can be ascertained by examining the result to which it leads in the context of applying other equitable principles to the relevant circumstances.

It was argued before the Court that there was considerable disparity in the length of the coastlines since the Maltese coast is 24 miles long and the Libyan coast 192 miles long.<sup>84</sup> The Court ruled that this was a relevant circumstance which warranted an adjustment of the median line, to attribute a greater area of shelf to Libya. A further geographical feature which the Court considered a relevant circumstance was the southern location of the coasts of the Maltese islands, within the general geographical context in which the delimitation was to be effected. Having weighed up the various circumstances in the case, the Court concluded that a shift of about two-thirds of the distance between the Malta-Libya median line and the line located 24' further north gave an equitable result, and that the delimitation line was to be produced by transposing the median line northwards through 18' of latitude<sup>85</sup>. It would intersect the

---

<sup>83</sup> *Ibid*, paras 60-64.

<sup>84</sup> *Ibid*, paras 65-73.

<sup>85</sup> *Ibid*, para 79.

15° 10' E meridian at approximately 34° 30' N. It would be for the Parties and their experts to determine the exact position. *Judges* Mosler, Oda and Schwebel dissented to the above majority decision.

In terms of doctrine, this case has been lauded<sup>86</sup> as a landmark case because the ICJ finally began the process of extricating itself from the morass of equitable theory. The Court stressed the need both for predictability and for reasoned decision-making, thus rehabilitating the importance of recognizable principles of general application and raising doubts about the uniqueness of each case and the possibility of seeking equity through ad hoc results.<sup>87</sup> The Court rejected<sup>88</sup> the notion that there is no legal limit to the considerations which may be taken into account and affirmed that only those that are pertinent to the institution of the continental shelf would qualify for inclusion.

### **3.3 Case Concerning the Frontier Dispute (Burkina Faso/ Republic of Mali), Judgment on 22 December 1986.<sup>89</sup>**

Ad hoc chambers, where the composition thereof is the result of a consensus between the parties and the Court, have been feted as providing the parties with flexibility of the choice of judges to hear the case and to that extent parallels arbitration. Shaw observes that of the first two matters before the Chambers of the Court,

...perhaps the most interesting from the perspective of the future of the development of the ICJ was the Burkina Faso/ Mali case, since African States have hitherto been most reluctant in permitting third party binding settlement of their disputes...<sup>90</sup>

Whilst this latter view is questionable, granted the conceded African tradition of negotiations in settlement of disputes as well as resort to traditional courts, the import

---

<sup>86</sup> Kozyris, *ibid.* note 73 at p. 342.

<sup>87</sup> Shaw *ibid.* note 16 at p.84.

<sup>88</sup> *ibid.* note 78 at para. 48.

<sup>89</sup> I.C.J. Reports, 1986 p. 554.

<sup>90</sup> See Shaw, *ibid.* note 16, at 749.



of Shaw's substantive observation is that Africa's confidence in the Court was no longer in doubt. In expressing acceptance of the revision of the 1978 rules of the Court, Africa had in essence openly endorsed the efforts towards the remodelling of the structure of the Court towards its impartial adjudication of disputes for the parties before it.

On the 16<sup>th</sup> of September 1983, a Special Agreement was concluded between the Republic of Upper Volta and the Republic of Mali, by which the two States agreed to submit to a Chamber of the Court a dispute relating to the delimitation of part of their common frontier, Agacher, ( a band of territory extending from the sector Koro( Mali) Djibo(Upper Volta) up to and including the region of the Beli) measuring about 100 miles. Both parties were until 1960, 'possessions' of France and with independence, the border dispute came to a head as each new State claimed entitlement. Indeed whilst the Court was seised with the case, fighting broke out on 25 December, 1985, and on 2 January 1986, both parties requested to indicate Provisional Measures. The Chamber indicated the Order on 10 January 1986.<sup>91</sup> Both parties were ordered to withdraw their troops and remain within the boundaries outlined by the Organisation of African Unity( OAU) Mediation Commission which sat in 1975.

The Case is also significant because the Court clearly expounded applicable rules in the delimitation of boundaries, rules which have in essence attained the status of customary international law. The Court noted<sup>92</sup> that both States derived their existence from the process of decolonization. Burkina Faso corresponded to the colony of Upper Volta and the Republic of Mali to the Colony of Sudan (formerly French Sudan). In the preamble to their Special Agreement, the Parties stated that the settlement of the dispute should be 'based in particular on respect for the principle of the intangibility of frontiers inherited from colonization'<sup>93</sup> The Court upheld<sup>94</sup> the

---

<sup>91</sup> I.C.J Reports, 1986, p.3.

<sup>92</sup> *Ibid.* para.19.

<sup>93</sup> The principle expressly stated in resolution AGH/Res. 16(1) adopted in Cairo in July 1964 at the first summit conference following the creation of the OAU, stated in part that all member States 'solemnly...pledge themselves to respect the frontiers existing on their achievement of national independence'.

principle of *uti possidetis* and noted that although the principle had been used in Spanish America, it is a principle of general scope, logically connected with the phenomenon of obtaining of independence wherever it occurs. Its obvious purpose was stated as that of preventing the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.

The Court further noted that the principle of *uti possidetis* appeared to conflict outright with the right to self-determination. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States to consent to the maintenance of colonial boundaries or frontiers, and to take account of this when interpreting the principle of self-determination of peoples-the sustenance of the principle of *uti possidetis* was by a deliberate choice on the part of African States.

In the case of colonial *effectivites*, that is the conduct of the colonial administrators as proof of the effective exercise of territorial jurisdiction in the area during the colonial period, the Court distinguished between certain situations. Where the act concerned corresponded to the title comprised in the *uti possidetis juris*, then the *effectivite* simply confirmed the exercise of the right derived from a legal title. Where the act did not correspond with the law as described, that is the territory subject to the dispute was effectively administered by a State other than the one possessing the legal title, preference would be given to the holder of the title. Thus where there was a clear *uti possidetis* line, this would prevail over inconsistent practice.<sup>95</sup>

The Chamber further held<sup>96</sup> that it could not decide *ex aequo et bono*, since the parties had not requested it to do so. The Court would however have regard to equity *infra legem*, - the form of equity which constitutes a method of interpretation of the law in

---

<sup>94</sup> *Ibid*, paras 20-26.

<sup>95</sup> *ibid*. Shaw note 16, p.359.

<sup>96</sup> *Ibid*, note 89 at paras 27-28.



force, and which is based on law. In this regard, the Court recognised<sup>97</sup> that Soum is a frontier pool; and that in the absence of any precise indication in the texts of the position of the frontier line, the line should divide the pool of Soum in an equitable manner'. This would be done by dividing the pool equally. Although equity did not always mean equality, where there are no special circumstances the latter is generally the best expression of the former. The Court also emphasized that 'to resort to the concept of equity in order to modify an established frontier would be quite unjustified<sup>98</sup>.

This case is indicative of the continuing unfolding jurisprudence of the Court which has led to increased maintenance of international peace and stability as between nations. In this 'political case', due to the intervention of the Court, not only did the cease fire continue, but both parties also honoured the Court's determination of the actual border dispute. The Heads of State of both States agreed to withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories. It could of course be argued that the disputants were desirous and had the political will of the respective national governments to resolve the dispute. The equally important factor also is that there was a judicial dispute settlement forum which enjoyed the confidence of both parties.

#### **3.4 Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad), Judgment on the 3 February 1994.<sup>99</sup>**

In this judgment the Court found<sup>100</sup> that the boundary between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad is defined by the Treaty of Friendship and Good Neighbourliness concluded on 10 August 1955 between the French Republic and the United Kingdom of Libya. The course of that boundary is,

---

<sup>97</sup> *Ibid*, paras 127-150.

<sup>98</sup> *ibid*. note 89.

<sup>99</sup> *Libya v. Chad*, ICJ Reports 1994, p.6.

<sup>100</sup> *Ibid*, para.77.

from the point of intersection of the 24th meridian east with the parallel 19°30' of latitude north, a straight line to the point of intersection of the Tropic of Cancer with the 16th meridian east; and from that point a straight line to the point of intersection of the 15th meridian east and the parallel 23° of latitude north.

The Court noted<sup>101</sup> that, in accordance with the rules of general international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The judgment in this case contributed significantly to the jurisprudence of the Court. The principle of *uti possidetis* is not able to resolve all territorial or boundary problems. Where there is a relevant applicable treaty, then this will dispose of the matter completely, as the Libya/Chad dispute concluded.<sup>102</sup> Further the Case reaffirmed the position of Article 31 of the Vienna Convention, (with respect to the interpretation of treaties), as reflecting customary international law. Of further significance is the Court's holding that there would be recourse to *travaux préparatoire* in the event that the terms of a treaty in question were not clear. The Court underlined that the 'interpretation must be based above all upon the text of the treaty'.<sup>103</sup> The Court further restated the legal position with respect to succession to boundary treaties generally, by declaring that 'once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court'.<sup>104</sup>

---

<sup>101</sup> *Ibid*, paras 23-56.

<sup>102</sup> See Shaw, *ibid*, note 17 at p. 358.

<sup>103</sup> ICJ Reports, 1994, 6 at p. 22.

<sup>104</sup> ICJ reports, 1994, 6 at p.37.

The case is of course another example of reference of a particular dispute to the ICJ by means of a Special Agreement or *Compromis*.

It has been observed that this dispute was submitted to the Court through the diplomatic persuasion of the parties by the OAU<sup>105</sup>, and the parties undertook to respect and implement the final judgment of the Court whatever the ramifications to the parties. The Case therefore seeks to underline the confidence with which African Countries hold the Court.

### 3.5 The Lockerbie Cases<sup>106</sup>

On 21 December 1988, Pan-Am flight 103, was headed for New York when a bomb exploded on board killing all 259 passengers (including 172 Americans and 66 British as well as 11 inhabitants of the village of Lockerbie in Scotland). As a result of investigations by US and UK police and intelligence organisations, the cause of the explosion was attributed to two Libyan nationals Fhimah and Megrahi stated to be Libyan intelligence agents, who were then charged with the destruction of the Pan-Am flight by the Lord Advocate of Scotland. It was further alleged by the US and the UK that the two were sponsored by the Libyan Government.

In 1991, the US, UK and initially France requested Libya to extradite the two nationals suspected of committing the crime. No extradition treaty exists between Libya and these other States. Libya refused their request to extradite and instead decided to prosecute the suspects themselves under domestic law. The requesting States found this unacceptable and decided to refer the matter to the United Nations Security Council for consideration. On 21 January 1992, the Security Council adopted

<sup>105</sup> Munya, *ibid.* note 15, citing Shabtai Rosenne.

<sup>106</sup> *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK)* *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US)* For a discussion of the cases, see, Andrew Coleman, 'The International Court of Justice and Highly Political Matters' *Melbourne Journal of International Law* vol. 4 (2003) at p. 56-59, also available at [http://www.buseco.monash.edu.au/depts/blt/research\\_list.pdf](http://www.buseco.monash.edu.au/depts/blt/research_list.pdf). Adede, post note 180 at p.58-61.



Resolution 731<sup>107</sup> which inter alia, urged Libya 'to respond fully and effectively to those requests' and called on Libya 'to provide a full and effective response' to requests for surrender. Libya sought declarations that the Montreal Convention was applicable in the dispute, that Libya had fully complied with its obligations but that the US and UK had breached its provisions *vis a vis* Libya. Libya submitted a request for the indication of provisional measures under Article 41 of the Statute against the US and the UK.<sup>108</sup> It sought to prevent the US and the UK from taking action to force Libya to surrender the two nationals alleged to have been responsible for the disaster. Libya also asked the Court to find that the Council had exceeded its Charter-delegated powers by infringing or threatening to infringe through the use of economic, air and other sanctions, the enjoyment and the exercise of the rights conferred on Libya by the Montreal Convention.

On 31 March 1992, a mere three days after the close of the ICJ's oral hearings of Libya's request for provisional measures, the Security Council adopted Resolution 748<sup>109</sup> and ordered that the two suspects be extradited and imposed sanctions on Libya for non-compliance effective on April 15, 1992. On the 14<sup>th</sup> of April 1992, the Court, the composition of which was altered to take account of the parties to the action dismissed Libya's application on the ground that the circumstances of the case were not such as to require the exercise of the Court's power under Article 41. The order was mainly based on the consideration that an

...indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United Kingdom and the United States respectively by virtue of the Security Council Resolution 748 (1992)<sup>110</sup>.

<sup>107</sup> SC Res 731, UN SCOR, 47<sup>th</sup> Sess, 3033<sup>rd</sup> mtg, art 3, UN Doc S/RES/731 (1992).

<sup>108</sup> *Lockerbie Case (Provisional Measures)* 1992 ICJ Reports 3. Libya asserted that it had already taken measures necessary to comply with the Montreal Convention by submitting the case for prosecution to its own competent authorities, and asked "the Court to indicate . . . provisional measures to enjoin [both states] from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya".

<sup>109</sup> SC Res. 748, UN SCOR, 47<sup>th</sup> sess, 3063<sup>rd</sup> mtg. UN Doc S / RES/748(1992).

<sup>110</sup> *Ibid.* note 108 at p. 15, (*Libya v UK*) and p.127(*Libya v USA*).



The Lockerbie cases are considered to be highly political. The SC invoked Chapter VII of the UN Charter to adopt Resolution 748 and thus its action appeared to conflict with the Libyan request for provisional measures, and further with the Court's ability to consider the request. The conflict between the respective organs of the UN, both in the process of resolving the same dispute, raised the issue of the legal-political dichotomy, and the role of both in the resolution of highly political matters.<sup>111</sup> The matter also provided an opportunity for the ICJ to examine and clarify its relationship with the SC. The ICJ needed to examine whether it could function as a constitutional court exercising judicial review of the SC. Lockerbie is an important case because it coincided with the revival of the Council and the breakdown of the political checks and balances that had operated during the Cold War. It was also triggered by an innovative use of the Charter concept of 'threat to the peace.'

It is considered very significant in that it is the first time a significant section of the Court has intimated that it could exercise a power of judicial review in contentious cases.<sup>112</sup> There was an allusion by some of the Judges that under certain circumstances, a decision by the Council might be declared invalid by the Court. Acting President Oda stated that "a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened . . ." <sup>113</sup> The additional <sup>114</sup> notable significance of the *Lockerbie Cases* is that the Court affirmed that in highly political matters, its role as the principal judicial organ of the UN is to resolve legal questions so as to assist the UN to achieve its primary objective- the maintenance of peace and security. The Court further completely

---

<sup>111</sup> Andrew Coleman *ibid* note 106 at 58.

<sup>112</sup> Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' *Pace International Law Review*, Spring 1995 also available at <http://www.globalpolicy.org/wldcourt/roberts.htm> In this article the author has aptly discussed the Lockerbie cases with respect to judicial review *vis a vis* the ICJ. I have therefore quoted him extensively in this discussion.

<sup>113</sup> *ibid* note 108 at p.17, Declaration of Judge Oda.

<sup>114</sup> Andrew Coleman *ibid* note 106 at p.58-59.

rejected the 'traditional' dichotomy of legal-political questions, and this was particularly evident in the Dissenting Opinions of Judges Weeramantry and El-Kosheri.<sup>115</sup>

The decision of the ICJ in the Provisional Measures Application<sup>116</sup> has variously been contested, albeit not on the basis that the Court made a wrong decision *per se*.

Adede<sup>117</sup> refers to it as 'The disappointment of the Lockerbie ruling'. He notes that 'having taken such a high profile in ruling against a superpower,[in the Nicaragua Case], it was only natural that the Court's failure to maintain the same high profile in the Orders in the Lockerbie cases was a great disappointment'

Adede however accepts that the resolution was adopted under Chapter VI of the Charter and that Articles 25 and 103 of the Charter provide that SC decisions are binding for the parties and Charter commitments take precedence over any other treaty commitments of a member State of the UN. He concedes that 'among international lawyers it is rightly stated that the Court's reaction to Resolution 748 was correct'.

The Court obviously had no recourse but to interpret the Charter provisions faithfully and administer justice accordingly regardless of the recipient of the rough side of it. Forsythe<sup>118</sup> in his critique of Adede's position states that it was therefore not clear to him what Adede would have had the Court do '...except defer to the UN Security Council and its demand for extradition...if the Court had no legal basis to do otherwise, it is quixotic to expect the Court to so act. Courts only make policy within the somewhat malleable confines of legal boundaries.'

---

<sup>115</sup> See especially *Lockerbie Case (Provisional Measures)* 1992 ICJ 3, at para. 56, Dissenting Opinion by Judge Weeramantry, and at Para . 7, Dissenting Opinion by Judge El-Kosheri.

<sup>116</sup> *Ibid.* note 115.

<sup>117</sup> Adede *ibid.* note 106 at p.58 to 61.

<sup>118</sup> A.S.Muller et al, *ibid* note 18, 385 at p.394-395.

It is submitted that Forsythe's passionate critique is well-founded, save that this writer would agree with Adede that 'there is a clearly perceivable danger that such procedural detours [the injunction against States to submit to judicial scrutiny resolutions of the main organs of the United Nations] might be manipulated and misused'<sup>119</sup>

The *Lockerbie Cases* were subsequently determined by way of high-level diplomatic negotiations as between the parties and on 10 September 2003, the *Lockerbie cases* were removed from the Court's List at the joint request of the Parties.<sup>120</sup>

One of the real contributions by the ICJ in this case towards the quest to maintain peace and international security is that the decision assisted and guided other international courts and tribunals, such as the ICTY, when faced with highly political matters. The Appeals Chamber of the ICTY in *Tadic* was asked to consider its jurisdiction as established by the Security Council. It followed the example of the ICJ in the *Lockerbie decisions* (and other decisions such as the *Warrant Arrest Case*) that once a legal question was placed before it, the Tribunal would consider that question without political influences.<sup>121</sup> The ICTY in concluding that the Tribunal was acting *intra vires*, also adopted a similar approach and analysis to that of the ICJ in the *Lockerbie Case (Provisional Measures)*- that the Security Council is not itself 'above the law'<sup>122</sup>

### **3.6 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon and Nigeria: Equatorial Guinea intervening), Judgment on 10 October 2002.**<sup>123</sup>

<sup>119</sup> Adede *ibid* note 106, at p.60. The writer is especially reminded of the Security Council support to the US and UK in their invasion of Iraq, under the guise of destruction of Weapons of Mass Destruction that never were.

<sup>120</sup> The International Court of Justice, The Hague, Press Release 2003/29 of 10 September 2003.

<sup>121</sup> *Tadic*, Case No. IT-94 1 AR72( 2 October 1995) 24, and see Coleman *ibid.* note 106 at 71.

<sup>122</sup> See *Tadic, ibid*, and *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep. 3, 56 (Dissenting Opinion of Judge Weeramantry).

<sup>123</sup> International Court of Justice, Press Release 2002/26 bis, available at <http://www.cij.org/cjwww/docket/icn/icnframe.htm>.



On 29 March 1994 Cameroon filed an Application instituting proceedings against Nigeria concerning a dispute described as relating essentially to the question of sovereignty over the Bakassi Peninsula.<sup>124</sup> In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court. By an Order of 21 October 1999 the Court, considering that Equatorial Guinea had sufficiently established that it had an interest of a legal nature which could be affected by any judgment which the Court might hand down for the purpose of determining the maritime boundary between Cameroon and Nigeria, authorized it to intervene in the case to the extent, in the manner and for the purposes set out in its Application and fixed time-limits for the subsequent intervention proceedings.<sup>125</sup>

The Court noted<sup>126</sup> that after the First World War a strip of territory to the east of the western frontier of the former German Cameroon became the British Mandate over the Cameroons. It was thus necessary to re-establish a boundary, commencing in the lake itself, between the newly created British and French mandates. This was achieved through the Milner-Simon Declaration of 1919, which has the status of an international agreement. Although the two Mandatory Powers did not in fact "delimit on the spot" in Lake Chad or the vicinity, the Thomson-Marchand Declaration of 1929-1930, later approved and incorporated in the Henderson-Fleuriiau Exchange of Notes of 1931, which described the frontier separating the two mandated territories in considerably more detail than hitherto. The Court further pointed out that the Thomson-Marchand Declaration, as approved and incorporated in the Henderson-Fleuriiau Exchange of Notes, had the status of an international agreement.

---

<sup>124</sup> *Ibid.*, paras 1-29.

<sup>125</sup> (under Art. 85, para. 1, of the Rules of Court).

<sup>126</sup> *Ibid.*, note 123 paras 41-55.



The Court observed<sup>127</sup> that some of Nigeria's activities-the organization of public health and education facilities, policing and administration of justice-could, as argued by it, normally be considered to be acts *à titre de souverain*. The Court noted, however, that, as there was a pre-existing title held by Cameroon in this area of the lake, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of title from itself to Nigeria. Moreover, the facts and circumstances put forward by Nigeria concerned a period of some 20 years, which was in any event far too short, even according to the theory relied on by it.

The Court found that the evidence presented to it as reflected in the case file, showed that there was no acquiescence by Cameroon in the abandonment of its title in the area in favour of Nigeria. It therefore concluded that the situation was essentially one where the *effectivités* adduced by Nigeria did not correspond to the law, and that accordingly "preference should be given to the holder of the title"

With regard to the dispute over the Bakassi Peninsula the Court's task was neither to effect a delimitation *de novo* of the boundary nor to demarcate it but in reality simply a dispute over the interpretation or application of particular provisions of the instruments delimiting that boundary.<sup>128</sup> The Court cited the *Western Sahara Case* where it held that in territories that were not *terra nullius*, but were inhabited by tribes or people having a social and political organization, "agreements concluded with local rulers . . . were regarded as derivative roots of title"<sup>129</sup> The Court pointed out that even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be given effect today. The Court ruled in favour of Cameroon. The significance of this case is in underlining yet again the legality of colonial treaties and in appraising circumstances where *effectivites* would be considered to be reflective of a State's acquiescence to assumption of title by a rival State.

---

<sup>127</sup> *Ibid*, paras 62-70.

<sup>128</sup> *Ibid*, paras 193-225.

<sup>129</sup> *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 39, para. 80).

The decision has attracted compelling criticism. Dakas<sup>130</sup> charges that the Court obsessed itself with the ‘magical’ determination of the 1884 Treaty and failed to consider what the Kings and Chiefs of Old Calabar had in mind when they were entering into the treaty with the British. The Court thus brazenly ignored the unambiguous terms of the said treaty and instead embarked on a frolic of its own. He advances a profound proposition-that while the Court treats treaties of protection entered into between Great Britain and certain North African entities as having been entered into with ‘entities which retained thereunder a previously existing sovereignty under international law’, it dismisses similar treaties with entities in Sub-Saharan Africa as having been entered into “not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory”

Dakas also observes<sup>131</sup> that the interests of thousands of Nigerians in the Bakassi Peninsula have been imperilled. First they risk relocation to Nigeria. Secondly they could be subject to restrictions applicable to aliens and finally their property rights and particularly in respect of immovable property could be abridged or extinguished. In view of this he views the Courts direction that Nigeria expeditiously and without condition withdraws its administration and its military and police forces as wholly reckless and devoid of the imperatives of justice. He cautions<sup>132</sup> that against the mirror of human rights, the question of sovereignty over an inhabited territory must not be handled as though it were an abstract exercise. He quotes with approval Vice-President Justice Weeramantry, in the *Botswana and Namibia* case where he argued that where an entity is a common heritage or at least a common concern of mankind , judicial duty “reaches further than that of surveyors and cartographers who depict stipulated geographical features on the ground.”<sup>133</sup>

---

<sup>130</sup> Dakas CJ Dakas, ‘International Law on Trial: Bakassi and the Eurocentricity of International Law’, St Stephen BookHouse Inc. Jos , Nigeria (2003), at pp68-69.

<sup>131</sup> *Ibid* pp 80-81.

<sup>132</sup> *Ibid*, pp 89-90.

<sup>133</sup> *Post* note 134, (Dissenting Opinion of Judge Weeramantry, Para.81).

### 3.7 Case Concerning Kasikili/Sedudu Island (Botswana/Namibia) Judgment on 13 December 1999<sup>134</sup>

By a joint letter dated 17 May 1996, Botswana and Namibia transmitted to the Registrar the original text of a Special Agreement between the two States in order to found the jurisdiction of the Court<sup>135</sup> The context of this dispute was that in the spring of 1890, Germany and Great Britain entered into negotiations with a view to reaching agreement concerning their trade and their spheres of influence in Africa. The resulting Treaty of 1 July 1890 which both Botswana and Namibia acknowledged to be binding on them, delimited *inter alia* the spheres of influence of Germany and Great Britain in South-West Africa.

The Court noted<sup>136</sup> that neither Botswana nor Namibia was a party to the Vienna Convention on the Law of Treaties of 23 May 1969,<sup>137</sup> but that both of them considered that Article 31 of the Vienna Convention was applicable inasmuch as it reflected customary international law. The Court concluded<sup>138</sup> that, in accordance with the ordinary meaning of the terms that appear in the pertinent provision of the 1890 Treaty, the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel. While the treaty in question was not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accepted it as the treaty determining the boundary between their territories.

---

<sup>134</sup> International Court of Justice, Press Release 99/53 bis, available at <http://www.icj.law.gla.ac.uk/docket/ibona/ibonaframe.htm>.

<sup>135</sup> *Ibid*, paras 1-10.

<sup>136</sup> *Ibid*, paras 18-20.

<sup>137</sup> Article 31 of the Vienna Convention on the Law of Treaties states *inter alia* that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

<sup>138</sup> *Ibid*, note 134 at paras. 40-42.



The Court considered whether the long-standing, unopposed, presence of Masubia tribespeople on Kasikili/Sedudu Island constituted "subsequent practice in the application of the [1890] treaty which establishes the agreement of the parties regarding its interpretation"<sup>139</sup> The Court ruled<sup>140</sup> that there was nothing that showed that the intermittent presence on the Island of people from the Caprivi Strip was linked to territorial claims by the Caprivi authorities. Further, as far as Bechuanaland, and subsequently Botswana, were concerned, the intermittent presence of the Masubia on the Island did not trouble anyone and was tolerated, not least because it did not appear to be connected with interpretation of the terms of the 1890 Treaty. The Court thus found that the peaceful and public use of Kasikili/Sedudu Island, over a period of many years, by Masubia tribesmen from the Eastern Caprivi did not constitute "subsequent practice in the application of the [1890] treaty" as averred by Namibia. The Court observed<sup>141</sup> that even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it had not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence showed that the Masubia used the Island intermittently, according to the seasons and their needs, for exclusively agricultural purposes; this use, which began prior to the establishment of any colonial administration in the Caprivi Strip, seems to have subsequently continued without being linked to territorial claims on the part of the Authority administering the Caprivi. The Court inferred from this, first, that for Bechuanaland, the activities of the Masubia on the Island were an independent issue from that of title to the Island and, second, that, as soon as South Africa officially claimed title, Bechuanaland did not accept that claim, which precluded acquiescence on its part.

Namibia had thus not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for

---

<sup>139</sup> 1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (b)).

<sup>140</sup> *Ibid*, note 134 at paras 71-75.

<sup>141</sup> *Ibid*, at paras 90-99.

prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili/Sedudu Island. The Court's interpretation of Article III (2) of the 1890 Treaty led it to conclude<sup>142</sup> that the boundary between Botswana and Namibia around Kasikili/Sedudu Island followed the line of deepest soundings in the northern channel of the Chobe. Since the Court had not accepted Namibia's argument on prescription, it followed that Kasikili/Sedudu Island forms part of the territory of Botswana.

The significance of this case is in yet again underlining the international status and the legality of treaties entered into in colonial times. Of significance also is the recognition of the customary international law status of the provisions in the Vienna Convention on the Law of Treaties dealing with interpretation of treaties. Of importance also is the appraisal of circumstances where a State would be considered to have acquiesced to the occupation of its territory by another State.

### **3.8 Arrest Warrant of 11 April 2000( Democratic Republic of the Congo v. Belgium Judgment of 14 February 2002<sup>143</sup>**

The former Foreign Minister of the Democratic Republic of Congo, Abdoulaye Yerodia Ndombasi, was accused of breaching international humanitarian law, specifically by committing crimes against humanity by inciting racial hatred in August 1998. On 17 October 2000 the Democratic Republic of the Congo filed an Application instituting proceedings against the Kingdom of Belgium in respect of a dispute concerning an international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against Ndombasi.<sup>144</sup> After the proceedings were instituted, Mr. Yerodia ceased to hold office as Minister for Foreign Affairs, and subsequently ceased to hold any ministerial office.

---

<sup>142</sup> *Ibid*, paras 100-103.

<sup>143</sup> *The Arrest Warrant Case*, International Court of Justice, Press Release 2002/04 bis, available at <http://www/icj-cij.org/icjwww/docket/iCOBE/iCOBEframe.htm> and <http://www.icj-cij.org>.

<sup>144</sup> *Ibid*, paras 1-12.



The Court observed<sup>145</sup> that in international law it was firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. The Court founded the immunity on customary international law and noted that the immunities accorded to Ministers for Foreign Affairs thus were not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States thus a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability.

The Court stated that it had carefully examined State practice, and that it was unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. The Court added that it had also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which were specifically applicable to the latter<sup>146</sup> and that it found that these rules likewise did not enable it to conclude that any such exception existed in customary international law in regard to national courts. The Court concluded that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and inviolability then enjoyed by him under international law. Those acts engaged Belgium's international responsibility. The Court considered that the findings so reached by it constituted a form of satisfaction

---

<sup>145</sup> *Ibid*, paras 47-55.

<sup>146</sup> see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27.



which would make good the moral injury complained of by the Congo.<sup>147</sup> The Court accordingly considered that Belgium had, by means of its own choosing, to cancel the warrant in question and so inform the authorities to whom it was circulated.

In her compelling dissenting opinion<sup>148</sup>, Judge Van den Wyngaert voted against the Court's decision on the merits. Judge Van den Wyngaert found no legal basis under international law for granting immunity to an incumbent Minister for Foreign Affairs, and noted that there was neither conventional international law nor customary international law on the subject either. Before reaching the conclusion that Ministers for Foreign Affairs enjoy a full immunity from foreign jurisdiction under customary international law, the International Court of Justice should have satisfied itself of the existence of State practice (*usus*) and *opinio juris* establishing an international custom to this effect. A "negative" practice, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence for an *opinio juris* ("*Lotus*", *Judgment* No. 9, 1927, P.C.I.J., Series A, No. 10, p. 28), and abstinence can be attributed to many other factors, including practical and political considerations.

On the subject of (universal) jurisdiction, on which the Court did not make a pronouncement on in the Judgment, Judge Van den Wyngaert believed that international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens<sup>149</sup>. Universal jurisdiction is not contrary to the principle of complementarity in the Rome Statute for an International Criminal Court. In failing to address the dispute from a more principled perspective, the International Court of Justice had missed an excellent opportunity to contribute to the development of modern international criminal law. Major scholarly organizations and non-governmental organizations have taken clear positions on the subject of international accountability. The latter may be seen as the opinion of civil society, an opinion that cannot be completely discounted in the formation of customary international law

---

<sup>147</sup> *Ibid*, note 145 at paras 72-77.

<sup>148</sup> *Ibid*, note 145, Annex to Press Release 2002/4bis, pp 14-17.

<sup>149</sup> *Ibid*.

today. Other courts, for example, the House of Lords in the Pinochet case and the European Court of Human Rights in the Al-Adsani case had given more thought and consideration to the balancing of the relative normative status of international *ius cogens* crimes and immunities.

The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. Belgium, rightly or wrongly, wished to act as an agent of the world community and its new legislation had been applied, not only in the case against Mr. Yerodia but also in cases against Mr. Pinochet, Mr. Sharon, Mr. Rafzanjani, Mr. Hissen Habré, Mr. Fidel Castro, etc. It would therefore be wrong to say that the War Crimes Statute had been applied against a Congolese national in a discriminatory way. Granting immunities to incumbent Foreign Ministers could open the door to other sorts of abuse- recognizing immunities for other members of government. The ICJ, in its effort to close one 'pandora's box' for fear of chaos and abuse, may have opened another one: that of granting immunity and thus *de facto* impunity to an increasing number of government officials.

Whilst the decision may be criticized in view of the increasing recognition and willingness of the international community to prosecute crimes against humanity, it should be recognised that the Court performed its judicial function admirably. It responded to the specific legal question placed before it, rather than merely responding to the political pressure and desire of the international community to bring those accused of crimes of humanity to justice.<sup>150</sup> Judge Koroma asserted thus:

...The Court cannot, and in the present case, has not taken a neutral position in the issue of heinous crimes. Rather the Court's ruling should be seen as responding to the question asked

---

<sup>150</sup> Andrew Coleman *ibid* note 106 at p.60.

of it. The ruling ensures that the legal concepts are consistent with international law and legal tenets, and accord with legal truth.<sup>151</sup>

The Court, despite the valid critiques made with respect to decision as in this case and other cases that would be considered as 'highly political', has been considered to have played and to continue to play a critical role in the maintenance of peaceful relations.<sup>152</sup>

### **3.9 Armed Conflicts on the Territory of the Congo (Democratic Republic of Congo (DRC) v Burundi, Uganda and Rwanda)<sup>153</sup>**

The DRC claimed that the invasion of Congolese territory by Burundian, Ugandan, and Rwandan troops on 2 August 1998 constituted a violation of its sovereignty and of its territorial integrity as well as a threat to peace and security in Central Africa in general and in the Great Lakes Region in particular. The DRC accused the three States of having attempted to seize Kinshasa in order to overthrow the government and assassinate President Kabila, with the object of installing a government under Tutsi control.. The DRC asked the Court to declare that Burundi, Uganda, and Rwanda were guilty of acts of aggression as well as breaches of the laws of war and treaties relating to civil aviation. It made a request for provisional measures only against Uganda, as the chance of the Court's jurisdiction was perceived to be stronger in this case.<sup>154</sup>

Uganda averred<sup>155</sup> that all the relevant States and interested parties had expressly agreed to the resolution of outstanding issues exclusively by recourse to the

---

<sup>151</sup> *ibid*, note 148( Separate Opinion of Judge Koroma), pp 12-13.

<sup>152</sup> Coleman, *ibid*, note 106 at p.62, quoting Steinberger.

<sup>153</sup> Applications of 23 June 1999., Also for an excellent summary of the Case, see Christine Gray, ' The Use and Abuse of the International Court of Justice: Case Concerning the Use of Force After Nicaragua, EJIL( 2003), Vol. 14 No.5, 867-905 also available at <http://www/ejil.org/journal.vol 14/ No5/140867.pdf>.

<sup>154</sup> ICJ Reports ( 2000), 39 ILM ( 2000) 1100.

<sup>155</sup> Uganda Oral Argument, CR 2000/23, at p 8.



modalities established by the Lusaka Agreement and the subsequent peace process. The Lusaka Agreement had been recognized by the Security Council and endorsed by the latter in several resolutions as the only viable process for achieving peace. The Agreement effectively stood in place of interim measures. The request by the DRC for immediate and unilateral withdrawal of Ugandan forces was in fundamental conflict with the Lusaka Agreement. The DRC had submitted a draft resolution to the Security Council to demand the immediate withdrawal of Ugandan forces. When this failed, it came to Court to demand provisional measures. The DRC argued that the Lusaka Agreement did not preclude any other procedure for the peaceful settlement of disputes.<sup>156</sup> The Court held that whereas the Lusaka Agreement was an international agreement, binding on the parties, it did not, however, preclude the Court from acting in accordance with its Statute and Rules. Further, the Court was not precluded from indicating provisional measures in a case merely because a State which has simultaneously brought a number of similar cases before the Court seeks such measures in only one of them.<sup>157</sup>

It is submitted that the decision by the Court harnessed the Court's quintessential role as 'a tool of statecraft'. One would have expected that a regional arrangement between the three states would have been dispositive of the dispute between the parties. The fact of the reference to the Court is an affirmation that despite the proliferation of the international dispute settlement fora, the existence of the Court is in a sense secured as States surprisingly search for a broad-based judicial legitimacy.

In the next chapter I analyse the trajectory of Africa's participation before the Court, and seek to locate the reasons for the enhanced confidence in the Court.

---

<sup>156</sup> DRC Oral Argument, CR 2000/24 at 3.

<sup>157</sup> ICJ Reports( 2000), 39 ILM ( 2000) 1100 at paras 37-38.

## CHAPTER FOUR.

### INTERNATIONAL JUSTICE AND AFRICA-ANALYSIS OF THE TRENDS AND PROSPECTS FOR AFRICA'S PARTICIPATION BEFORE THE ICJ.

#### 3.0 Introduction

In 1899, the Hague Peace Conference adopted the Convention on the Pacific Settlement of International Disputes establishing the Permanent Court of Arbitration. This was the first institution intended to settle disputes between sovereign States through binding decisions based on international law. Cesare P. Romano<sup>158</sup> notes that at that time, most of the world, with the exception of the greater part of the American continent that was shielded by the Monroe Doctrine, was under European colonial domination.<sup>159</sup>

Since then the constituents of the international community are no longer limited to a small club of European and American States, as currently evidenced by the large membership of developing countries<sup>160</sup> both in the UN and the World Trade Organization (WTO). The International rule of law has also since advanced significantly as is evidenced by the proliferation of international judicial bodies, at both regional and global levels.<sup>161</sup> Romano importantly notes that there has been

---

<sup>158</sup> Cesare P.R. Romano, *International Justice and Developing Countries: A Quantitative Analysis*, in *The Law and of International Courts and Tribunals (LP ICT)* 2002, p. 367-399 also available at [http://www.pict.org/publications/pict\\_articles/Devlp\\_courts/Developing\\_countries\\_Part\\_1.pdf](http://www.pict.org/publications/pict_articles/Devlp_courts/Developing_countries_Part_1.pdf).

<sup>159</sup> The First Hague Conference was attended by 26 nations. Of these 19 were European States, while the rest of the non-colonised world was represented by only seven States, including the United States, the Ottoman Empire, Mexico, China, Japan, Persia, and Siam. Besides Mexico, no Latin American country was invited. However Latin American countries were invited and participated in the second Hague Conference in 1907.

<sup>160</sup> Romano notes that the contours of the notion, 'developing' are far from clear and a consensus does not exist as to which states are 'developing' and which are 'developed'. In practice, the inclusion of a State in one group or the other is more a matter of self-identification and political bargain rather than an objective process. For our purposes though the term 'developing' is used to describe the offshoots of the de-colonization process during the 1950's and early 1960's. These are the States that lagged behind in terms of economic development and include most African countries.

<sup>161</sup> There are currently no less than 16 such bodies ranging from general international law to human rights, trade, law of the sea, international criminal law e.t.c. In addition there are at least seventy other international institutions that exercise judicial or quasi-judicial functions, see Cesare P.R. Romano, *ibid* note 129, p. 368-369.



relatively sparse attention paid to developing countries, perspectives on international justice and the factors that determine their resort to international judicial bodies. He further posits that if justice should be available and applied to everyone in the same way, developing countries which make up slightly more than four-fifths of all States should be either plaintiffs or respondents in a comparable share of all international cases. Historically this was not the case, although in the last decade, in an increasing number of cases, developing countries have been more involved.<sup>162</sup>

#### **4.1 The Nascent Years of the ICJ- Africa an Object of Justice**

In the first 15 years of existence (1946-1960), the Court was used almost exclusively by Western European applicants and the United States of America.<sup>163</sup> Despite making up about three-fourths of the UN's membership, during that period developing countries appeared in only 13 out of a total of 33 contentious cases, and, even more significantly, developing countries were applicants in only five cases, all of which were brought against other developing countries. It was only with the end of the cold war that former socialist countries resorted to the jurisdiction of the Court.

When on the 26<sup>th</sup> of June 1945 the Charter of the UN, with the Statute of the ICJ annexed to it, was signed at San Francisco and when after obtaining the necessary ratifications both documents came into force on 24<sup>th</sup> October, 1945, only four African States- Egypt, Ethiopia, Liberia, and South Africa were parties to these instruments. This was not because the rest of Africa did not want to sign the UN Charter and its annexed Statute of the Court but because all other African countries were still under the yoke of colonialism. The qualification of sovereignty was therefore lacking. However, decade after decade, the African States regained their freedom and

---

<sup>162</sup> It must however be remembered that international litigation is only one of the many possibilities available to settle a dispute, and of all options, it is usually the last resort. States tend to go before international courts and tribunals when all other means, short of unfriendly or openly hostile acts have failed. States also can afford to keep their disputes on hold until they perceive the political temperature both nationally and internationally as conducive for adjudication of the disputes.

<sup>163</sup> The United States filed seven cases; France and the United Kingdom six each; Belgium two; Greece, Israel, Lichtenstein, Italy, Portugal and The Netherlands and Switzerland one each. The claims were either between themselves or against developing and socialist countries.



independence and were thus able to join the membership of the UN, and therewith became *ipso facto* parties to the Statute of the Court.<sup>164</sup> Thus in the 1950s six more African States gained independence<sup>165</sup>, in the 1960s the tally increased by 32<sup>166</sup>, in the 70s 8 countries were added<sup>167</sup>, in the 1980s one country<sup>168</sup> and in the 1990s two countries<sup>169</sup>. In the result Africa's participation increased to 53 in the 90s.<sup>170</sup>

In the colonial times Africa was an object of history<sup>171</sup>. When it appeared before the ICJ or its predecessor the PCIJ, this happened in a passive way, not because of a request by African States which were then non-existent but on the occasion of disputes between the colonial State and other European or Western States. The rights of the so-called 'colonial acquisitions' were never in issue, and international law was in essence utilized to advance European imperialism. Their concern was over their perceived legal rights in the respective colonial territories *inter se*. Several cases brought before the World Court are typical of this ignominious past.

---

<sup>164</sup> Shiv R. S. Bedi, *ibid* note 14, p. 188.

<sup>165</sup> Ghana, Guinea, Libya, Morocco, Sudan, and Tunisia.

<sup>166</sup> Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, Gambia, Cote d'Ivoire, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Swaziland, Togo, Uganda, Tanzania, Zaire, and Zambia.

<sup>167</sup> Angola, Cape Verde, Comoros, Djibouti, Guinea-Bissau, Mozambique, Sao Tome & Principe, and Seychelles.

<sup>168</sup> Zimbabwe.

<sup>169</sup> Eritrea and Namibia.

<sup>170</sup> For the complete table and dates when the African countries cited secured their independence, see Shiv. R.S. Bedi, *ibid* note 14 at p. 189-190.

<sup>171</sup> Generally see Charles Zorngibe, 'Africa and International Justice', <http://www.african-geopolitics.org/show.aspx?ArticleId=3536>.

Africa's discontent with the Court in these early years is attributed to various factors and namely, the nature of the colonial experience, purely exploitative and sanctioned as it were by the international community. The 'scramble for Africa' pursuant to the Berlin Conference of 1884-1885, which nearly decimated the pre-existing cultural, geographical and national affinities served to further harness Africa's distrust of a World Court initiative bred by the very colonizers who had subjugated her people. The World Court, in expressly recognising the 'trusteeship'<sup>172</sup> concept pursuant to the Charter provisions, further exacerbated the African distrust of the Court.

The first three decades of independent existence of African countries as sovereign States were thus marked with acute display of indifference and lack of faith toward the ICJ. This negativism toward the Court was not the result of the oft-cited preference by African communities of negotiation and consensus as the ideal dispute settlement mechanisms as opposed to resort to pre-constituted courts. Such assertions have no scientific basis since empirical evidence exists to show that informal mechanisms of dispute resolution based on negotiation and consensus co-existed with indigenous courts administering indigenous justice.<sup>173</sup> Neither was the said negativism the result of the general constraints of the Court earlier alluded to in this thesis.

The composition of the Court was a significant factor also in that from 1946- 1966, there was only one African Judge in the Court.<sup>174</sup> It is not surprising then that the Court was considered as the province for developed countries dispensing the white man's justice. African countries did not have the opportunity to take part in constructing the legal principles and the procedural outlines of the ICJ, and hence a large measure of distrust of an inherited legal system.

---

<sup>172</sup> Chapter XI of the Charter of the United Nations sets out elaborate details regarding the establishment of an international trusteeship system for the administration and supervision of territories held under a mandate or detached from enemy states as a result of the Second World War, or placed under the system by states responsible for their administration ( Article 77).

<sup>173</sup> See Munya, *ibid.* note 15, p.4-5, citing E.A. Keay et al, *The Native and Customary Courts of Nigeria*.

<sup>174</sup> Judge Badawi of Egypt.

## 4.2 The Early Cases.

*The Nationality Decrees Issued in Tunis and (French Zone) Morocco*<sup>175</sup> involved a dispute between France and Great Britain relating to nationality decrees issued in Tunis and the French Zone of Morocco on 8<sup>th</sup> November 1921, and the effect of the same on British subjects. The PCIJ was called upon to render an advisory opinion. The Court held *inter alia* that under the rules of international law relating to protectorates, France, jointly with the protected State, had exclusive jurisdiction over the matter and the question had to be determined by reference to the rules of international law.

In the '*Oscar Chinn*'<sup>176</sup> affair it was contended by the United Kingdom (on behalf of an English Company, Oscar Chinn) that Belgium, by enjoining a reduction of tariffs on a transport company under its control (Unatra) in effect therefore granting concessionary of transportation rights in return for a promise of pecuniary compensation, made it in fact impossible for other fluvial transporters to carry on their business seeing that, as any compensation was denied to them, they could no longer compete commercially with the company controlled by the Government. That actual discrimination, it was maintained was contrary to the treaty obligation assumed by Belgium to maintain commercial freedom and equality, as well as to freedom of fluvial navigation, in the Congo Basin, pursuant to the Convention of Saint-Germain of 1919. The Court considered that there was no discrimination *inter alia* because the recipient's Belgian nationality was not material, the subsidy having been granted on the basis of particular ties existing between the Belgian State and the Concessionary Company.

In the *case of Phosphates in Morocco*,<sup>177</sup> the dispute concerned Italy and France over the issuance of mining rights in Morocco, and the interpretation and application of the 1906 Treaty between the two States.

---

<sup>175</sup> PCIJ Series B, No. 4 (1923), p. 22.

<sup>176</sup> PCIJ Series A/B, No. 63 (1934).

<sup>177</sup> ICJ Reports, 1953 p. 121.



In *The Case Concerning Rights of Nationals of the United States in Morocco*<sup>178</sup>

France, Morocco's 'protective power', opposed the United States on the interpretation of Article 95 of the Algeciras Act of 1906, concerning the assessment of goods by the customs service: The Court rejected the two interpretations concluding that the customs authorities had the power to evaluate goods, but that they must proceed in 'reasonably good faith'. The United States wished to widen the exercise of its consular jurisdiction in Morocco, claiming its right to benefit from the clause of most favoured nation and the same advantages as those granted to Great Britain in 1856 and Spain in 1861. The Court dismissed the case referred by the United States since *inter alia* the two countries had given up these advantages respectively in 1937 and 1914.

#### 4.3 The South West African Cases-Africa's Waterloo Before the ICJ

The South West African Cases have been variously dramatically attributed with the demise of the confidence of Africa before the Court. The 1966 decision has been termed a 'technical victory'<sup>179</sup> for South Africa, a rude destruction of African confidence in the ICJ<sup>180</sup>. Rosenne aptly describes the contentious cases as giving 'rise to one of the most complicated and, in the view of many, frustrating pieces of litigation ever decided by any international tribunal'<sup>181</sup>The strong tautology applied in the analysis of these cases is explicable granted their far reaching ramifications.

In 1884, Germany declared a protectorate over South West Africa and in 1915, South Africa invaded and occupied German South West Africa. Following the end of the First World War (1914-1918), the territory came under the Mandate System, and

---

<sup>178</sup> ICJ Reports 1952, p. 186.

<sup>179</sup> John Dugard, *International Law A South African Perspective*, Juta & Co. Ltd 2000 at p. 375.

<sup>180</sup> A.O. Adede, 'Judicial Settlement in Perspective' in A.S. Muller, et al (eds) *The International Court of Justice, Its Future Role After Fifty Years*, Leiden Journal of International Law (1997) at p.51.

<sup>181</sup> Shabtai Rosenne, *The World Court, What It Is And How It Works*, Oceana Publications Inc; Dobbs Ferry, N.Y. 1973, at p. 134.

under Article 119 of the Versailles Treaty, Germany renounced all her rights and title over all her colonial possessions in favour of the Principal Allied and Associated Powers. In 1920, the territory was entrusted to South Africa by the League of Nations in terms of the Mandate for South West Africa. The Mandate prescribed two principles for the former German 'possessions': non annexation and the 'well-being and development' of the inhabitants of these territories form 'a sacred trust of civilization', and tutelage for these peoples 'not yet able to assume a full measure of self-government' was entrusted to advanced nations and exercised by them as mandatories on the League's behalf.<sup>182</sup> The mandate system obligated the Mandatory to promote the 'material and moral well-being and the social progress of the inhabitants'.<sup>183</sup>

In 1946, the League of Nations was dissolved, and in 1949, South Africa refused to account to the UN on its administration of South West Africa on the basis that these obligations ceased to exist with the demise of the League. In 1950, the ICJ delivered an advisory opinion on the *International Status of South West Africa*<sup>184</sup>, holding that the Mandate continued in force and that South Africa was obliged to account to the UN on its administration of the territory; and that the provisions of the Charter on the subject of the Trusteeship System were applicable to the territory in the sense that they provided a means by which the territory could be brought under the Trusteeship System but that there was no obligation on South Africa to do so. Due to the continued defiance of the Union of South Africa, the General Assembly (GA) which under the Charter could not refer a dispute before the Court drew the attention of the Member States to the possibility of bringing a contentious case against the Union, based on the submission to the jurisdiction contained in the Mandate.<sup>185</sup> This was the

---

<sup>182</sup> *The International Status of South West Africa (SWA), Advisory Opinion*, 1950 I.C.J. (11<sup>th</sup> July), and generally see John Dugard, *ibid* note 179, p.391-393, for a chronology of Namibia South West Africa.

<sup>183</sup> *Ibid* note 172.

<sup>184</sup> 1950 ICJ Reports 128.

<sup>185</sup> Resolution 1361 (XIV), 17 November 1959.

genesis of the decision by Ethiopia and Liberia to initiate the contentious proceedings as recommended by the GA.<sup>186</sup>

On 21<sup>st</sup> December 1962, by eight votes to seven, the Court contrary to South Africa's objection found that it had jurisdiction to adjudicate upon the merits. In the substantive hearing, Ethiopia and Liberia sought two major pronouncements by the Court-that the policy of apartheid is contrary to international law, and that the breaches of the Mandate perpetrated by South Africa must be remedied. South Africa maintained that the Mandate was no longer in force, and in the alternative that it was not in breach of any of its provisions. The Court found that the applicants could not be considered to have established any legal right or interest appertaining to them in the subject matter of the present claims, and accordingly, by the President's casting vote-the votes being equally divided- the Court decided to reject the claims. The Court's finding was extremely curious in that in deciding the case on the technical ground that Ethiopia and Liberia lacked sufficient legal interest to be vindicated *vis- a- vis* South Africa, the Court had departed from its 1962 finding that the two Applicants had the procedural right to institute the proceedings. As was cogently observed, the 1966 decision was

‘at best a painful reminder that international adjudication is suited only to the settlement of trivial questions of highly technical character’ and at worst ‘an endorsement of South Africa’s racial policies’<sup>187</sup>

Adede<sup>188</sup> has analysed the significance of the decision and the curious intrigues that led to the said decision. He notes some of the ‘fortuitous events’ associated with the decision and *inter alia* the fact that in 1966, the President of the Court was among the conservatives who voted in the minority in 1962 and had the occasion to exercise the

---

<sup>186</sup> For a detailed discussion of the South West African Cases, see Sir Hersch Lauterpacht *ibid* note 19 at p.277-281 and Rosenne *ibid* note 181 at p.132-137. Both Cases, *South West Africa ( Ethiopia v South Africa )* and *South West Africa ( Liberia v South Africa )*, were filed on the 4<sup>th</sup> November 1960, by application.

<sup>187</sup> A.O. Adede, citing R. Falk, *ibid* note 180 p.51.

<sup>188</sup> See Adede, *ibid*, note 180 at p.52-53.



casting vote; and the disqualification of Sir Muhammed Zafrulla Khan ( Pakistan) from the 1966 proceedings. Adede notes that the said Judge is reported to have been *furious to learn afterwards that the decision to ask him to disqualify himself from the 1966 proceedings was actively engineered by the President of the Court himself, Sir Percy C. Spender of Australia, in applying Article 24 of the Statute to the Court dealing with disqualification of a member of the Court to sit in a particular case.*<sup>189</sup>

The significance of this decision in the evolution of the Court cannot be gainsaid. It was the first case brought before the International Court of Justice by sovereign African States and challenging the colonial status quo. The other of its positive outcomes is that it caused an outcry in the legal communities of the world with the result that changes were precipitated by the GA towards a more equitable composition of the Court.<sup>190</sup> It is elsewhere noted that the decision so angered the majority of the GA to the point where its Fourth Committee refused to approve a financial appropriation for the Court.<sup>191</sup> This palpable disenchantment with the Court continued through the 1960s and the 1970s.

#### **4.4 International Justice for Africa Restored – A Positive Impartial**

##### **Jurisprudence Emerges.**

The most significant factor by far that served to launch Africa back into the Court's docket was the concerted effort by the Court post the 1966 decision to redeem itself as a universal and impartial court of international justice. In this regard several landmark decisions were delivered by the Court and began a watershed of a new era of confidence in the Court. We examine these cases in this part.

---

<sup>189</sup> Adede *ibid* note 188.

<sup>190</sup> Munya, *ibid* note 15 at p. 8.

<sup>191</sup> D.J.Harris, *ibid* note 3, at p. 988.

**4.4.1 Legal Consequences for States of the Continued Presence of South Africa in Namibia ( South West Africa) notwithstanding Security Council Resolution 276( 1970) ( 1970-1971).<sup>192</sup>**

The adventitious shock that was the 1966 decision sent ripples through the General Assembly and in its resolution 2145 ( XX1) of 27 October 1966, a decision was made to terminate the South West African Mandate and assume direct responsibility for the territory until its independence.<sup>193</sup> The UN returned to the advisory opinion route and the Security Council (SC) sought the Court's opinion on what were the legal consequences for States for the continued presence of South Africa in Namibia. That resolution was adopted by twelve votes to none, Poland, the U.S.S.R. and the United Kingdom abstaining.<sup>194</sup>

The advisory opinion was delivered on 21<sup>st</sup> June 1971. By thirteen votes to two the Court found that the continued presence of South Africa in Namibia was illegal, and that South Africa was under an obligation to withdraw its administration from Namibia forthwith and thus put an end to its occupation of the territory. By eleven votes to four the Court indicated that States Members of the UN were under an obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and to refrain from any such acts and in particular any dealings with the government of South Africa implying recognition or legality of, or lending support or assistance to, such presence and administration. It was also incumbent upon States which were not members of the UN to give assistance in the action which had been taken by the UN with regard to Namibia. The Court in reaching its decision, characterized the Declaration on the

---

<sup>192</sup> For a detailed analysis of the Case see, Rosenne, *ibid.* note 181 at 136-137.

<sup>193</sup> Numerous dispositions designed to cause South Africa to relinquish its hold on the territory came to no avail. At the instance of African States, on the 25<sup>th</sup> of January 1968, the SC adopted resolution 245(1968) in which it backed the GA's 1966 decision. This was followed by resolution 246(1968) censuring South Africa for its refusal to abide by the earlier resolutions.

<sup>194</sup> The hearings lasted for six weeks in February and March 1971 during which course South Africa requested that a plebiscite be held in the territory under the joint supervision of the Court and South Africa, and that South Africa should be permitted to adduce a considerable amount of evidence on factual issues. The Court declined to grant these requests.

Granting of Independence to Colonial Countries and Peoples, GA resolution 1514 (XV) of December 14<sup>th</sup> 1960, as having formed part of the law of decolonization. It noted the Charter of the UN made the principle of self-determination applicable to all non-self governing territories. As expected, South Africa repudiated this opinion and Prime Minister B.J.Vorster dismissed the same as politically biased.<sup>195</sup>

In resolution 301 ( 1971) of 20<sup>th</sup> October 1971 the Security Council, by twelve votes to one, with France and the United Kingdom (UK) abstaining, *inter alia* took note with appreciation of that opinion and expressed agreement with it. The Court had finally taken the golden opportunity to undo the damage that it had handed down onto the international community in the 1966 decision and the developing countries and Africa particularly, were overjoyed as is evidenced by the GA resolution 2871 accepting the opinion of the Court.<sup>196</sup>

In 1990, full effect was given to the 1971 *Namibia Opinion* when South Africa withdrew its administration and Namibia became independent. The Court was thus affirmed as the international community's conscience. Judge Weeramantry noted<sup>197</sup> that whilst the Court in this Opinion did not immediately cause the end of apartheid, it assisted and indeed paved the way for its end with the increased international public awareness of the illegality of the regime. He stated that

The Court's decision on the illegality of the apartheid regime had little prospect of compliance by the offending Government, but helped to create the climate of opinion which dismantled the structure of apartheid. Had the Court thought in terms of the futility of its decree, the end of apartheid may well have been long delayed, if it could have been achieved at all. The clarification of the law is an end in itself, and not merely a means to an end. When the law is clear, there is a greater chance of compliance than when it is shrouded in obscurity.<sup>198</sup>

<sup>195</sup> Dugard, *ibid* note 179 at p.390-391.

<sup>196</sup> G.A. Resolution 281, U.N GAOR, 26<sup>th</sup> Session, Supp. No. 29, at 105 U.N. Doc. A/ 8429 ( 1971).

<sup>197</sup> See Rosenne, *ibid.* note 181.

<sup>198</sup> The view has indeed been expressed that, in matters involving 'high policy', the influence of international law is minimal. However as Professor Brownlie has observed in dealing with this argument, it would be 'better to uphold a prohibition which may be avoided in a crisis than to do away with the standards altogether.' ( Judge Weeramantry referring to the *Namibia Advisory Opinion Case* in the *Nuclear Weapons Opinion* [1996] 1 ICJ Rep. 226 at 550 ( dissenting opinion). Thus the Court, in view of its impartiality is able to do what the Security Council cannot.



#### 4.4.2 The Western Sahara Advisory Opinion (1974-1975), Advisory Opinion of 16<sup>th</sup> October 1975.<sup>199</sup>

This case rose out of the decolonization of the territory of Western Sahara, controlled by Spain as the colonial power but subject to the irredentist claims by Morocco and Mauritania. The GA asked the Court for an opinion with regard to the legal ties between the territory at that time and Morocco and the Mauritanian entity. The Court stressed that the request for an opinion rose out of the consideration by the GA of the decolonization of Western Sahara and that the right of the people of the territory to self-determination constituted a basic assumption of the questions put to the Court. The Court concluded that the ties which had existed between the claimants and the territory during the relevant period of the 1880s were not such as to affect the application of resolution 1514(XV), the Colonial Declaration, in the decolonization of the territory and in particular the right to self-determination. The Court was of the view that it is a cardinal condition of a valid occupation that the territory in question is *terra nullius*- a territory belonging to no one at the time of the act alleged to constitute occupation.

The Court ruled that Morocco and Mauritania had no valid claims to the Sahara based on historic title and that, even if they could establish a valid claim to the territory, contemporary international law – the Law of the UN gave priority to the right of self-determination for the Sahrawis. The decision was received with jubilation by African States for whom the principle of self-determination was sacrosanct in view of the common history of colonial bondage. It is noted that indeed even prior to the handing out of the Advisory Opinion, the Organization of African Unity (OAU) had already recognised the statehood of Western Sahara by admitting the territory to the membership of the OAU, albeit under acrimonious and controversial circumstances.<sup>200</sup> Thus the Court in both Advisory opinions came across to the

---

<sup>199</sup> G.A. Res. 3292, U.N.GAOr, 29<sup>th</sup> Sess. Supp. No.31, at 103-104, U.N. Doc. A/9632 ( 1974), I.C.J. Reports, 1975, p.12.

<sup>200</sup> Munya, *ibid.* note 15 quoting J. Naldi; 'The Organization of African Unity and the Sahara Arab Democratic Republic, 26 J. AFR.L. 152( 1982).

international community, particularly African States as a progressive almost activist judicial forum.<sup>201</sup>

#### 4.4.3 The Nicaragua Case<sup>202</sup>

It is remarked that the confidence in the ICJ reached a high peak after the final judgment on the merits of 27 June 1986 in the *Nicaragua Case*.<sup>203</sup>

The case is famed for three reasons: Firstly it is concerned with one of the most sensitive issues in international law, namely, the prohibition of the use or threat of force in international relations, as stipulated in Article 2(4) of the UN Charter, in other multilateral treaties and in general or under customary international law. Secondly, the case severely tested the system of the Court's jurisdiction on the basis of the 'Optional Clause', and finally, the case is considered as the *locus classicus* of 'highly political matters'<sup>204</sup> or non-justiciable issues and the questioned ability of the Court's ability to make a valid contribution to the resolution of such matters. Hence a decision reached by the Court and perceived to have been impartial and neutral was bound to have a reverberating positive effect not just for Africa but the entire family of nations.

Nicaragua in effect argued the US action was yet another example of a major power flouting international law at the expense of a weaker nation. The US challenged the jurisdiction and the admissibility of the Case. It averred that its actions constituted collective self-defence in response to requests from El Salvador, Honduras and Costa Rica for assistance against armed aggression by Nicaragua, and challenged that Nicaragua had staged attacks on El Salvador in early 1981, and had conducted cross-border military attacks on Honduras and Costa Rica. The U.S argued that it was

---

<sup>201</sup> Munya, *ibid* note 15, p. 22, quoting Dugard who argues that the judges in the Namibia case adopted a teleological as opposed to a positivist interpretation of the law and thus achieved a decision consistent with the Judges' 'fondness for social justice'. (John Dugard, Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future, 11 COLUM.J.TRANS.L. 13, 35, 37(1972).

<sup>202</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)*, 1986 ICJ Rep. 14.

<sup>203</sup> Adede, *ibid.* note 180, p. 55.

<sup>204</sup> These are disputes where highly political issues are predominant, where national interests or perceived national interests of states are threatened. See Andrew Coleman, *ibid* note 106 at p.31.



obliged to provide assistance to these countries in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance. The Court rejected the argument of collective self-defence and held that by training, arming and providing overall military support for the contras, the US had breached its obligation under customary international law not to intervene in the affairs of another State. The US had also challenged the jurisdiction of the Court on the basis that Nicaragua had declared that it would accept the compulsory jurisdiction of the Permanent Court in 1929 but had not ratified this and hence Nicaragua was not a party to the said Statute and could not therefore rely on article 36(5). The US lost the jurisdictional decision on the complaint since in the Court's view it was possible for Nicaragua to transform a potential commitment to the compulsory jurisdiction of the Court into an effective one. Nicaragua would therefore be deemed to have given its consent to the transfer of its 1929 Declaration to recognize the PCIJ's compulsory jurisdiction to the ICJ when it signed and ratified the Charter, thus accepting the Statute and its Article 36(5). Nicaragua's Optional Clause Declaration constituted a valid title for jurisdiction<sup>205</sup>.

The US therefore sought to withdraw its consent to compulsory jurisdiction and effectively its consent for the remainder of the case. The Court held that the non-appearance of the respondent State did not result in an 'automatic judgment, in accordance with Article 53 of the Statute of the Court, in favour of the appearing party'<sup>206</sup>. The Court would proceed on the basis of a fundamental commitment to justice for both parties to the dispute before it. The Court itself asked questions, and assumed the role of a cross-examiner. The Court rejected the argument of Collective Self-defence and held that by training, arming, and providing overall military support for the Contras, the US had breached its obligation under customary international law not to intervene in the affairs of another State. Further, in mining of harbours and attacks on Nicaraguan port facilities, the US had breached its obligations under customary international law not to use force against another State and not to violate the sovereignty of another State. These attacks had also placed the US in violation of its obligations pursuant to the Treaty of Friendship, Commerce and Navigation

---

<sup>205</sup> ICJ Reports, 1984, p. 392, 403-412, and Shaw *ibid*, note 16, pp.760-761.

<sup>206</sup> *Ibid*, note 202 at p.28.



between the parties.<sup>207</sup> In the result, the Court ordered the US to make reparations to Nicaragua for all injury caused by the said breaches.

The decision was in essence a levelling of the Court's ground in order to facilitate equal ventilation of grievances. Unlike the SC where the US as a superpower possesses a veto and therefore pushes agenda that favour its position, the Court proved itself a forum where the parties appear before it on the basis of equality, and where legal considerations are the determinant factors. As such, the Court appears to have acted as the international community's conscience.<sup>208</sup> This case was therefore a burst of confidence for all the actors before the Court.<sup>209</sup> The Court after Nicaragua was 'drowned under a deluge of diverse cases, in many instances initiated by States that had never previously used the Court as a means of conflict resolution.'<sup>210</sup> Highet remarked that

... The Court like a phoenix, appears to have emerged from the ashes of Nicaragua. It has become a hot court-perhaps even a 'hot bench' in the American phrase. It is positioned, for the first time in its collective seventy-year history, to become the great international judicial institution that its friends and supporters always knew it could be.<sup>211</sup>

---

<sup>207</sup> *Ibid.* note 202.

<sup>208</sup> The European Economic Community twice urged the US to cease its intervention because of the Community's concern that the impression of the US as an 'uncontrollable gunslinger' was particularly hypocritical. This caused such a degree of distrust among the European Members of NATO that it threatened to cause NATO's collapse.

<sup>209</sup> Falk argues that while a number of factors contributed to the House's defeat of contra aid, Nicaragua's suit and its focus on international law, the Reagan Administration's ham-handed attempts to escape judgment, and the Court's rulings in Nicaragua's favour on interim measures and (later) jurisdiction indisputably played their part. (Richard Falk, 'The World Court's Achievement' 81 *American Journal of International Law* 106, cited by Andrew Coleman, *ibid.* note 106, p.63.

<sup>210</sup> Coleman *ibid.* note 106 at p.72., A total of nine cases were brought in a two-year period following Nicaragua: *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Order)* [1988] ICJ Rep. 66; *Aerial Incident of 3 July 1988 (Iran v US) (Order)* [1989] ICJ Rep. 132; *Certain Phosphates Lands in Nauru (Nauru v Australia) (Order)* [1989] ICJ Rep. 12; *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal) (Judgment)* [1991] ICJ Rep. 53; *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep. 6; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep. 90; *Maritime Delimitation Between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal) (Order)* [1995] ICJ Rep. 423; *Passage through the Great Belt (Finland v Denmark) (Provisional Measures)* [1991] ICJ Rep. 12; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain) (Order)* [1991] ICJ Rep. 50. Eight of these cases were brought by Application and the Court, not a Chamber, heard all nine cases.

<sup>211</sup> Highet, 'The Peace Palace Heats Up: The World Court in Business Again? (1991) 85 *American Journal of International Law* 646, quoted by Andrew Coleman *ibid.*, p.72.

Coleman notes that

'...The year 1991 marked a turning point for the ICJ. Developing Nation States were greatly heartened by the ICJ's decision in Nicaragua as it proved indeed that the Court was capable of acting impartially, and further was capable of making a significant contribution in highly political matters. The trend of increased confidence in the Court continued, with all 11 cases (at different stages of resolution) before the ICJ in October 1993. In the period 1993-94, there were 12 contentious cases and one request for an advisory opinion before the ICJ, and the Court also delivered judgment in two cases. This reflects a trend of increased confidence in the Court that continues to the present day. The ICJ began 2001 with 24 cases pending and during the year added a further three, delivered three judgments, and finished the year with one case in deliberation. An additional 22 were on the Court's docket. Put simply, the Court has never been busier.<sup>212</sup>

As Tiefenbrun notes, the Court now 'plays the role of a teacher, an advisor, a source of developing international law, and the hope of a world built on law and justice'<sup>213</sup>

#### 4.5 Death Knell for the Cold War- A Surge of Confidence in the Court

The changed global power equation with the end of the Cold War and the demise of Communism precipitated a busier work docket for the Court. Justice Guillaume<sup>214</sup> notes that from 1920-1930, when political tensions were somewhat reduced, the Court had a large number of cases. From 1930-1940, the situation became more precarious and the Court had fewer and fewer cases. During the Cold War, the Court had few cases and in 1972, it had none at all and the Judges spent a year revising the Rules of the Court. In 1999, there were 24 cases on the Court's list. The crucial element in this upsurge of cases is attributed to the end of the Cold War,

---

<sup>212</sup> Andrew Coleman *ibid*, note 106 at p. 73. The three judgments were *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain ( Qatar v Bahrain) (Merits)*[2001] ICJ Rep.40; *La Grand ( Germany v US) (Merits)* ( Unreported, ICJ, 27 June 2001) < [http:// www.icj-cij.org](http://www.icj-cij.org)> on 1 May 2003; *Sovereignty Over Pulau Ligitan and Pulau Sipandon ( Indonesia v Malaysia) ( Application by the Phillipines for Permission to Intervene)* ( Unreported ICJ, 23 October 2001)< [http:// www.icj-cij.org](http://www.icj-cij.org)> at 1 May 2003.

<sup>213</sup> Coleman, *ibid* p.73, citing Susan Tiefenbrun, 'The Role of the World Court in Settling International Disputes: A Recent Assessment' ( 1997) *Loyola of Los Angeles International and Comparative Law Journal* 1at 24.

<sup>214</sup> Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, Given at the University of Cambridge ( Lauterpacht Research Centre for International Law), p.3, available at [http://www.uu.nl/content/world\\_court\\_0.20205.pdf](http://www.uu.nl/content/world_court_0.20205.pdf).



...for it is not increased tension which produces an increase in litigation. Rather it is *détente*, which reinforces the desire for pacific settlements and prompts recourse to the courts<sup>215</sup>

It has also been noted<sup>216</sup> that the attitude of African States towards international adjudication was tangibly influenced by the East-West Conflict. The military and financial support that the US and the Soviet Union provided to protagonists in African disputes encouraged African States to perceive their disputes in political and military terms. This practice acted as a disincentive to African States from seeking judicial resolution of their disputes since military support to each side by a superpower assured each side of a military victory. Adede<sup>217</sup> notes that the beginning of *perestroika* was marked *inter alia* by a radically new approach articulated by Mikhail Gorbachev, concerning the role of the ICJ and its compulsory jurisdiction in which in an article entitled '*The Realities and Guarantees of a Secure World*', Gorbachev stated that the capacities of the International Court should not be forgotten, and its mandatory jurisdiction should be recognized by all on mutually agreed upon conditions. This was an explicit shift from the Marxist view of the law that perceived the UN System and the Court as corrosive tools of capitalist western campaign. During the late 80s positive changes took place regarding the position of the former socialist States with respect to the ICJ.

#### **4.6 Structural Reconstruction and Re-composition of the Court- Increased Confidence for Africa.**

The structural transformation of the Court including the creation of chambers within the Court at the request of certain States and more importantly a reconstituted Court, was another factor in the enhanced confidence of the Court. Bedi<sup>218</sup> notes that African States did not hide their disappointment with the outcome of the South West African Cases, and two other cases dealt with by the Court, one brought by a European State

---

<sup>215</sup> Judge Guillaume, *ibid*.

<sup>216</sup> See Munya, *ibid*, note 15 at p. 13.

<sup>217</sup> Adede, *ibid* note 180,p.62-63.

<sup>218</sup> Bedi, *Ibid*. note 14, p.183-184.



against an African State, *France v. Egypt*<sup>219</sup> and the other by an African State against a European State, *Cameroon v. United Kingdom*<sup>220</sup>, during the period 1946-1966. In both cases the outcome for the African States was not very pleasant. African States could not overlook the imbalance in the composition of a World Court which included only one African judge. They decided to press ahead to ameliorate the situation and increase their own participation in the Court. The discontent peaked in the GA of 1966, immediately after the judgment of the South West African Cases.

When the triennial election of 1966 took place, the Afro-Asian group mounted a strong campaign for an additional African judge.<sup>221</sup> It was thus, that Judge Onyeama of Nigeria was elected to be a member of the Court and the African participation was raised to two. Further pressure by the African group during the 1969 triennial elections added Judge Ignacio-Pinto of Benin to the membership of the Court, thus raising the African judge tally to three. It is now the traditional practice that three seats for judges are reserved for the Africa region. The current composition of the Court corresponds to that of the Security Council thus: Africa 3, Latin America 2, Asia 3, Western Europe and other States 5 and Eastern Europe 2.

Of the 18 Presidents of the Court elected between the period 1946 and 1998, there were two from African States<sup>222</sup>, and of the 13 Vice-Presidents of the Court between 1946 and 1998, 3 were from Africa<sup>223</sup>.

---

<sup>219</sup> *Protection of French Nationals and Protected Persons in Egypt ( France v Egypt)*, 1949-1950. Pursuant to the Order of 29 March 1950, the case was discontinued ( ICJ Reports 1950, p.59.)

<sup>220</sup> *Northern Cameroons ( Cameroon v United Kingdom)* filed on 30 May 1961. Preliminary Objections to the Court's jurisdiction were filed by the United Kingdom on 14<sup>th</sup> August 1962 and on 2<sup>nd</sup> December 1963, the Objections were upheld and the Court found that it could not adjudicate upon the merits of the claim( ICJ Reports 1963, p.15).

<sup>221</sup> Bedi, *ibid* note 14 at p.185-4-185.

<sup>222</sup> Nigeria's Judge Elias ( 1982-1985), and Algeria's Judge Bedjaoui ( 1994-1997).

<sup>223</sup> Egypt's Judge Badawi ( 1955-1958), Nigeria's Judge Elias ( 1979-1982) and Senegal's Judge Mbaye (1987 -1991, elected for two terms).

The review of the rules of the Court, an added factor in the favourable regard towards the Court, is said to have been triggered mainly by the *Beagle Channel Case*<sup>224</sup> involving a frontier dispute between Chile and Argentina where the parties rather than settle for the judges of the Court sitting as such, selected five judges of the ICJ to sit as an *ad hoc* tribunal. This was a confirmation of the long-held views by several jurists in international law that a judicial forum in which parties had the influence on selection of judges would be a more legitimate and acceptable process of adjudication and this, without compromising the integrity of the Court and the precedential value of its judgment.<sup>225</sup> In addition in certain cases the proceedings are rendered shorter, simpler and less expensive.<sup>226</sup> A thorough revision of the rules of the Court was undertaken<sup>227</sup> in 1972 and 1978 in order to 'facilitate recourse to chambers',<sup>228</sup> and 'accord to the parties a decisive influence in the composition of the *ad hoc* chambers',<sup>229</sup> The current rules expressly name the three different chambers namely, the Chamber of Summary Procedure, Special Chambers, and Ad Hoc Chambers, and provide for procedural rules relating to the manner of electing the members of the Chamber( secret ballot) and filling of vacancies that may arise.<sup>230</sup>

---

<sup>224</sup> 52 ILR 93, and Munya, *ibid* note 15, quoting Rosenne on the developments leading to the establishment of *ad hoc* Chambers.

<sup>225</sup> Munya, *ibid.* note 15, p.17, quoting Gill.

<sup>226</sup> Munya, *ibid.* note 15, p. 17, quoting Justice Shigeru Oda.

<sup>227</sup> Article 26 of the amended Statute relating to the formation of the *ad hoc* chambers provides that the Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases, and that the Court may at any time form a chamber for dealing with a particular case and that the number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties, and that cases shall be determined by the Chambers if the parties so request.

<sup>228</sup> Shabtai Rosenne, quoted in Munya, *ibid.* note 15 at p. 17.

<sup>229</sup> Judge Jimenez De Arechaga quoted in Munya *ibid.* at p. 17.

<sup>230</sup> Articles 15, 16, 17 and 18 respectively. The critics of the *ad hoc* chamber institution have charged that there are inherent dangers in parties dictating which Judges should sit in a chamber as happened in Gulf of Maine Case. It is however to be noted that the ultimate power of the Court to determine the composition of the Court is not taken away by the new rules.

#### 4.7 The Court- In Support of the Disadvantaged Members.

Judge Guillaume<sup>231</sup> cites another factor, namely, the establishment of a UN legal aid fund for poorer countries, as an impetus for the renewed confidence. The Trust Fund was set up by the UN Secretary -General in 1989 to provide assistance to States unable to afford the full expenses of proceedings initiated before the Court, by way of a Special Agreement. In the Annual Report of the Court however,(2002-2003), Justice SHI Jiuong, the current President of the Court remarked that although the Trust Fund had undoubtedly played a useful role, that role has been a limited one and that it was

... a matter of surprise that, since the Fund's creation, only four States have approached it, one of which in fact decided not to draw on the sums promised because of the complexity of the procedures involved. It seemed to the Court that these procedures could be simplified, and we note that the Secretary- General has been kind enough to take action in this regard.<sup>232</sup>

#### 4.8 Acceptability and Compliance with Judgements.

The *Nicaragua* and post *Nicaragua* decisions by and large manifest the impartiality of the Court's decisions, and the integrity of the Court itself. This reinforces the Court's position and the respect it currently enjoys in the eyes of the Community of Nations and in particular, 'the developing States' or the 'Weaker States' As Kahn<sup>233</sup> notes

The Security Council may provide for a great power veto, but there is no similar reflection of political power within the International Court of Justice. Just for this reason, appeals to international law have been one of the tools available to weaker States in their battles with more powerful States.

The decisions of the court have largely been complied with. Critics quick to denigrate the relevance of the Court have always decried the lack of enforcement mechanisms of the decisions of the Court. Without international law however, the world would have been confronted with outright anarchy, chaos and uncertainty and international

---

<sup>231</sup> Judge Guillaume, *ibid.* note 214.

<sup>232</sup> *ibid* note 28 at p.86.

<sup>233</sup> Andrew Coleman *ibid.* note 106, at p. 70, citing Paul Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order'(2000) 1 Chicago Journal of International Law,1,1.



relations as we know it today would have been impossible.<sup>234</sup> To further quote Oyebode,

International law is largely obeyed...on the basis of self-interest and reciprocity. There may be no power capable of deterring a State hell-bent on violating the norms of international law but since States are domiciled on the same planet Earth, a would-be transgressor that refuses to consider the fall-out from its illegal behaviour can only pursue its illegitimate course of action to its detriment. In fact, the ample opportunity available for reprisals or retorsial acts serves as the main bulwark for securing the efficacy of international law.<sup>235</sup>

It is to be recalled that in the Nicaragua case, despite the US walking out on the process when the Court declined to uphold the US objection on jurisdiction, the US was forced by the public opinion of its own citizens to cease the contra aid.<sup>236</sup>

A recent case of non-compliance is Nigeria following the October 10, 2002, Judgement of the Court in which Bakassi was awarded to Cameroon.<sup>237</sup> The judgment attracted the vitriol of Nigerians who have described it as 'Eurocentric...a travesty and cunning if brutal re-enactment of colonial injustices...'<sup>238</sup>

Oyebode<sup>239</sup> cites various reasons why Nigeria must eventually comply with the said decision. First, non-compliance could incur the wrath of the Security Council, which once moved by an aggrieved Cameroon, may take measures in accordance with Article 94(2) of the Charter, and in line with Chapter VII provisions impose sanctions. Second non-compliance could call into question Nigeria's democratic ideals, and undermine its own government's ability of enforcing court decisions within the municipal domain. Third, Nigeria would in the future be unable to invoke the

---

<sup>234</sup> Akin Oyebode, 'International Law and Politics: An African Perspective, Bolabay Publications, Lagos( 2003) at p.4.

<sup>235</sup> Oyebode, *ibid.* at p. 5.

<sup>236</sup> See Falk, *ibid* note 209.

<sup>237</sup> *Ibid* note 123.

<sup>238</sup> Dakas CJ Dakas 'International Law on Trial: Bakassi and the Eurocentricity of International law'. St Stephen BookHouse Inc. Jos( 2003), p. 95, also quoting The Guardian, October 22, 2002.

<sup>239</sup> Oyebode, *ibid.* p. 100-103.

jurisdiction of the Court should Nigeria remain in contempt. Fourth Nigeria would be considered a pariah State and reignite a resurgence of armed conflict between Cameroon and Nigeria. These, I submit are reasons why most States must of necessity comply with the decisions of the Court. It is thus indisputable that Court is in essence the centre for global diplomacy and in the final chapter I recommend reforms that would further engender greater confidence in the Court.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 Conclusion**

This thesis sought to show that in colonial times Africa is an object, and with decolonization, a veritable subject of international law, with the Court initially however being skewed in favour of the colonizer. The first *South West African Case* is reminiscent of this dark era. With increased representation of Africa through increased judges in the ICJ, and the resounding jurisprudential paradigm shift exemplified by *Nicaragua* however, confidence in the Court is enhanced. No doubt any measure that would serve to further entrench this confidence in the Court is worth considering. There is especial need to interrogate the necessary reforms of the Court in view of the proliferation of dispute settlement bodies some regional and particular to Africa. I argue, in the section following, that proliferation has the potential of causing a dent, albeit a benign<sup>240</sup> one, into the docket of the ICJ but that ultimately, the ICJ remains the focal reference point in the international dispute settlement arena. Indeed the Court, subject to continued pronouncement of jurisprudence weighted by good reasoning and unparalleled depth, is well poised to bring some sobriety into the current proliferation and protect international law from possible disorder.

#### **5.1 A Proliferation of Dispute Settlement Fora- An Incidental Benign Dent in the ICJ's docket.**

Romano<sup>241</sup> observes thus:

...the last decade has seen a remarkable increase in the number of international judicial bodies, at both regional and global levels. No less than 16 such bodies are currently active in fields ranging from general international law to human rights, trade, law of the sea, and international criminal law. They generate a ponderous and steady flow of judgments, advisory

---

<sup>240</sup> I use this word because I do not hold the view that the dent in the Court's docket is cancerous- the significance of the Court is untrammelled unless by some strange stroke of deleterious mischief some international actors should fell the Court, a practical impossibility.

<sup>241</sup> Cesare P. Romano, *ibid.* note 158 at p 368-369.



opinions, orders, and warrants. Aside from these international judicial bodies, there are at least seventy other international institutions that exercise judicial or quasi-judicial functions.

The proliferation of international jurisdictions has been attributed<sup>242</sup> largely to the expansion of international law into domains that were once either solely within States' domestic jurisdiction for example criminal justice or were not the object of multilateral discipline for example international trade services, or were simply *vacua legis* for example natural resources of the high seas or common heritage of mankind. As States increasingly vest specialized international organizations with the power to create international legal standards, the transfer of the power to interpret and uphold those standards naturally follows. Other legitimate reasons include the desire for secrecy, control over the membership of the forum, panels with perceived regional sensitivities, preclusion of third state intervention, and forums that can resolve disputes in which non-state actors may appear as parties.<sup>243</sup>

The triumph of the market-economy paradigm and libertarian doctrines, the resultant globalisation and the opening up of markets and lifting of trade barriers to foster international trade has in turn necessitated the establishment of judicial bodies to settle resultant disputes. No State can now hold out against this global integration granted the homogeneity of interests and values that call for protection. Thus these international fora are necessary complements to the ICJ, especially in matters involving parties that are incapable of being litigants before the ICJ. The various international dispute settlement bodies serve the core objectives of international law, namely, help the international community avoid disputes, and once a dispute arises to assist in its resolution. Such dispute settlement bodies may enjoy compulsory jurisdiction that is out of reach of the ICJ. Thus the reach of international law is expanded significantly.

---

<sup>242</sup> For an excellent discussion on this subject see Romano, *post.* note 245 at p. 729-735.

<sup>243</sup> Jonathan I. Charney, 'The Impact of the International Legal System of the Growth of International Courts and Tribunals' *International Law and Politics*[1999], Vol. 31:697 at 698, also available at <http://www.nyu.edu/pubs/jilp/main/issues/31pdf/31q.pdf>.

Another factor which has already been alluded to elsewhere in this thesis, is the single impetus towards internationalization of the judicial process that resulted in the death of the cold war and bi-polar arrangements towards late 80s and early 90s. This event precipitated the establishments of no less than ten international judicial fora.<sup>244</sup>

Romano notes<sup>245</sup> that the existing international judicial institutions that comprise the necessary criteria of an international judicial body are *inter alia* the ICJ, the International Tribunal on the Law of the Sea (ITLOS), The European Court of Human Rights (ECHR), The Inter-American Court of Human Rights (IACHR), Court of Justice of the Common Market for Eastern and Southern Africa (COMESA CJ), Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (OHCLA CJ), and Court of Justice of the Arab Maghreb Union (AMU CJ). With a minimum degree of flexibility, the list could include the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the WTO.<sup>246</sup> Recent additions to this list are the International Criminal Court (ICC), and the African Court on Human and People's Rights (ACHPR).

On the whole it has been observed<sup>247</sup> that the dispute settlement procedures of the ICJ and of the General Agreement on Tariffs and Trade (GATT) and the WTO<sup>248</sup> in

---

<sup>244</sup> The establishment of the ICTY in 1993, with the full consensus of the SC would not have happened during the Cold War era. Russia would have resisted any interference in its Slavic ideological turfs.

<sup>245</sup> Cesare P. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' in *International Law and Politics* [1999] Vol.31, 709-751 at p. 712, also available at <http://www.nyu.edu/pubs/jilp/main/issues/31/pdf/31r.pdf>.

There is no consensus on the taxonomy of the myriad institutions established to settle disputes and / or control the implementation of international law. Romano proposes a classification that designates only permanent judicial fora into the term 'International Courts', and *ad hoc* or transient institutions into the term 'International Tribunals.'

<sup>246</sup> See Romano, *ibid.* note 245 p.715-718. Other international judicial institutions under this list are: Court of Justice of the European Communities (ECJ) together with its Court of First Instance (CFI), Central American Court of Justice (CACJ), Court of Justice of the Andean Community (CJAC), Court of Justice of the European Free Trade Association (EFTA CJ), Court of Justice of the Benelux Economic Union (Benelux CJ), Judicial Board of the Organization of Arab Petroleum Exporting Countries (OAPEC JB).

<sup>247</sup> Romano, *ibid.* note 158.

<sup>248</sup> The GATT dispute settlement mechanism was developed during the period 1947-1995.

particular have seen a surge of activity especially by Southern governments. The reason is partly because they represent the two international fora open to all States and only to States. The other reason is that the GATT/ WTO dispute settlement procedures have a life-span that is almost identical to the ICJ. Unlike the case of ICJ and ITLOS, in the GATT/WTO system the objective is not to determine whether the rights of a party have been violated, but rather whether the benefits that the parties expected to derive from the substantive rules of the system have been nullified or impaired, or whether the achievement of any objective of the agreement is being impaired. The other positive feature of the system is that there has been a shift from a dispute settlement system where the establishment of a panel could be blocked by the respondent to a system where it cannot be blocked, and where the progression of a case is automatic and subject to a strict time-table.<sup>249</sup>

A recent and promising dispute settlement mechanism is the ITLOS established under the 1982 United Nations Convention on the Law of the Sea,(UNCLOS) which entered into force in 1996. This is a nascent forum which is bound to increasingly gain greater significance as jurisprudence continues to emerge. During the 90's ITLOS had eight disputes submitted before it one of which was by Seychelles against France.<sup>250</sup> My submission is that there is great potential for use of this forum by Africa, the effect whereof will be to sustain the benign dent in the ICJ. Indeed it has been noted that of the cases ITLOS heard in the 90s, 75% involved a developing country<sup>251</sup> and hence in my view there is a high probability of Africa's increased participation in this forum in the future.

---

<sup>249</sup> Under GATT, a panel could be established only if the Contracting parties decided so, whilst under the WTO, the right of a complainant government to a panel process is established, preventing blocking by a respondent at the close of consultations. Strict time- limits for the formation of the panels and the issuing of panel and appellate reports have also been established.

<sup>250</sup> *The Monte Confurco case*( Seychelles v France), Prompt Release, Case No. 8.

<sup>251</sup> Romano *ibid* note 158 p.399.



International litigation is usually a last resort, after States have given negotiation, mediation and arbitration a try. States make use of ad hoc arbitration by way of arbitral tribunals and this has the effect of reducing the disputes that are finally brought before the ICJ. Notable examples are the *Yemen-Eritrea arbitration*, where a five-judge tribunal decided a certain dispute over certain Islands in the Red Sea as well as the maritime delimitation<sup>252</sup>, and the *Ethiopia- Eritrea arbitration*,<sup>253</sup> which settled the dispute boundary in that region.

Peck notes that in the post-cold war period, with the West's preoccupation with political and economic problems in Eastern Europe and the former Soviet Union and the concurrent scaling down of superpower interest in African conflicts, the OAU began seriously to reappraise its role.<sup>254</sup> Towards this paradigm shift, at its 1990 Summit, OAU issued a landmark declaration, the 'Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World'. At its July 1993 meeting, the Secretary-General submitted to the 58<sup>th</sup> General Session of the Council of Ministers and the 29<sup>th</sup> Ordinary Session of the Assembly of the Heads of State and Government in Cairo, a further report which covered all aspects of the Mechanism, including ideas for its institutional and operational details and financing. The Assembly then adopted its Declaration on the Establishing Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution with emphasis on anticipatory and preventive measures, and concerted action in peace-making and peace-building to obviate the need to resort to the complex and resource demanding peace-keeping operations.<sup>255</sup>

---

<sup>252</sup> Yemen-Eritrea, First Stage ( Territorial Sovereignty and Scope of the Dispute), Award of 9 October 1998; Second Stage ( Maritime Delimitation), Award of 17 December 1999, at <[http:// www. pca-cpa.org](http://www.pca-cpa.org)>, and see also Romano *ibid* note 129.

<sup>253</sup> Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border, 13 April 2002, at <[http:// pca-cpa.org](http://pca-cpa.org)>.

<sup>254</sup> Connie Peck, ' The Organization of African Unity' at p. 162, available at [http://wwics.si.edu/subsites/ccpdc/pubs/role/chap\\_09.pdf](http://wwics.si.edu/subsites/ccpdc/pubs/role/chap_09.pdf).

<sup>255</sup> OAU Declaration, 1993b.

The OAU Mechanism was a potentially important breakthrough in the prevention and management of conflict, since it established a regular forum where conflicts could be discussed by a representative group of member States, as well as a mechanism for empowering the Secretary-General and the Secretariat to become active in conflict prevention and resolution. Through the use of good offices by the Secretary-General, eminent persons, special envoys, representatives of the Secretary-General, and missions from the Secretariat, the OAU has been active in the Congo, Gabon, Sierra Leone, Somalia, Rwanda, Burundi, Sudan, Nigeria, Cameroon, Niger, Guinea, Lesotho, and the Comoros.<sup>256</sup> It does then follow that should the AU system manage African disputes in the manner anticipated, the docket of the ICJ should experience a corresponding reduction, though benign of disputes before it. This would be a trend towards regional peace which is specifically encouraged in the Charter.<sup>257</sup>

Before the adoption of the ACHPR Protocol, the protection of rights under the African Charter for Human and Peoples' Rights<sup>258</sup> rested solely on the African Commission, a quasi-judicial body with no binding powers, modelled on the UN Human Rights Committee. The subject matter jurisdiction of the ACHPR is predicated under Articles 3 and 7 of the Protocol on the African Court in which it is provided that the Court has the jurisdiction to adjudicate disputes brought against a State party to the Protocol in which it is alleged that the State has violated the African Charter on Human and Peoples' Rights (the African Charter) or any other instrument that the State has ratified. Under Article 3(1) of the Protocol on the African Court, the jurisdiction of the African Court shall extend to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter; this Protocol and any other relevant human rights instrument ratified by the States concerned.' When this

---

<sup>256</sup> See Connie Peck, *ibid* note 254 at p. 165, quoting Bakwesegha ,(1996) and Ibok (1996).

<sup>257</sup> Article 54 of the Charter of the UN.

<sup>258</sup> The African Charter on Human and Peoples' Rights was adopted on June 27, 1981, and entered into force on October 21, 1986. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights was adopted by the Assembly of Heads of State and Government of the Organization of African Unity ( OUA) on June 8, 1998 during the 34<sup>th</sup> Summit of the OAU, in Ouagadougou, Burkina Faso. On June 24, 2004, the Protocol to the ACHR came into force establishing the African Court on Human and Peoples' Rights.

article is read together with article 7 which provides that ‘the Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned’, the inescapable conclusion is that the jurisdiction of the ACHPR is wider than that of the other regional human rights courts.

Under the Protocol of the Court, the Court will exercise direct jurisdiction over all human rights instruments ‘ratified by the States concerned’. This conceptually extends to all regional, sub-regional, bilateral and multi-lateral and international treaties.<sup>259</sup> The significance of this broad jurisdictional mandate is that a person whose rights are not adequately protected in the Charter can easily hold the State concerned accountable by invoking another treaty to which that State is a party—either at the UN level or sub-regional level. A caution has already been sounded that such broad jurisdiction of the Court would cause ‘jurisprudential chaos’<sup>260</sup> The establishment of the ACHPR will certainly be phenomenal in the settlement of African disputes and the resultant reduction of the work load of the ICJ and to quote Romano,<sup>261</sup>

...very few of those agreements contain judicial mechanisms of ensuring their implementation, and therefore, at least potentially, several African States could end up with a dispute settlement and implementation control system stronger and with more bite than the one ordinarily provided for by those treaties for the rest of the world.

The COMESA CJ has jurisdiction to hear and determine any matter ‘arising from an arbitration clause contained in a contract which confers such jurisdiction which the Common Market or any of its institutions is a party, and’<sup>262</sup> secondly, ‘arising from a dispute between Member States regarding the Treaty if the dispute is submitted to it under a special agreement between the Member States concerned.’<sup>263</sup>

---

<sup>259</sup> The ACHPR is potentially a judicial arm for a panoply of human rights concluded under the aegis of the UN.

<sup>260</sup> C. Heyns’ The African Regional Human Rights System: In need of Reform? (2001) 2 African Human Rights Law Journal 167.

<sup>261</sup> Romano, *ibid* note 246 at 722.

<sup>262</sup> Article 28(a) of the Comesa Agreement.

<sup>263</sup> Article 28(b) of the Comesa Agreement, *ibid*.



Under the former provision, there is potential for inter-state dispute settlement of matters that would ordinarily be within the province of the ICJ. The reality however is that disputes settled by this Court have been more within the core concerns of the Agreement, namely, the Common Market as opposed to issues of general international law.

The jurisdiction of the East African Court of Justice ( EACJ) is liberally provided for and has the potential of having a significantly expanded jurisdiction. Under Article 27 of the Statute of the Court, the Court shall initially have jurisdiction over the interpretation and application of the treaty, and under Article 27(2), the Court shall have other original, appellate, human rights and other jurisdiction as will be determined by the council at a suitable subsequent date. To that end the partner States shall conclude a protocol to operationalize the extended jurisdiction. There is again a great potential of dispute settlement in matters that would be within the province of the ICJ, depending on the jurisdiction donated by the States parties and determined by the Council. The EACJ is however not operational yet and it remains to be seen what impact it shall have towards the resolution of East African disputes.

The future landscape of the Court cannot adequately be mapped out without placing the Court into a historical international judiciary context. Both the PCIJ and the ICJ have through out their existence been sited within an environment of ad hoc tribunals. The World Court has never stood alone as the sole tribunal to settle disputes in accordance with international law. It has always co-existed with other third-party dispute settlement forums.<sup>264</sup> Charney notes that recent developments are changing the international environment as a result of the establishment of more permanent tribunals, and perhaps, the use of fewer ad hoc tribunals.<sup>265</sup> States have thus always preferred a system with multiple options for third party settlement of international disputes. The international community however

---

<sup>264</sup> Charney, *ibid* note 243 at 697-698.

<sup>265</sup> Charney , *ibid*.

... will not and cannot establish a hierarchy of international tribunals that would place the ICJ or any other tribunal at the apex of international law serving as the 'Supreme Court of International Law' due primarily to the fact that a universal, or near universal, agreement of States to 'anoint any particular forum with this status seems practically and politically impossible, and that such a Supreme Court would undermine the community's desire for diverse forums.'<sup>266</sup>

Charney significantly remarks that '...Review by a court of general jurisdiction would compromise the very features that make the alternative forums attractive in the first place, such as the special qualities of the panel members. Thus a significant number of independent international tribunals will remain a part of the international legal system for the foreseeable future.'<sup>267</sup>

Romano notes that the international judicial bodies that grant standing to non-state entities far out number judicial bodies whose jurisdiction is limited to disputes between sovereign States.<sup>268</sup> The effect of this is that the ICJ will despite the proliferation remain relevant. Does the proliferation threaten to undermine the unity of international law or otherwise threaten the coherence of the international legal system? Judge Gilbert Guillaume<sup>269</sup> indicates that there is now an overwhelming risk of overlapping jurisdictions, and an open door for forum shopping. Whilst forum shopping may engender a spirit of competition between courts, stimulate jurisprudential excellence and innovation inclusive of specialized law for specific areas, there are worrisome possibilities. Underlying the choice of forum may be a pursuit of jurisprudence that is favourable to the interests represented at the material time. As Judge Guillaume observes, '...The law of the marketplace, under the pressure of the media, cannot be the law of justice.'<sup>270</sup> Overlapping jurisdictions engender a further worrying consequence- the increased risk of contradictory

---

<sup>266</sup> Charney, *ibid* at p. 698.

<sup>267</sup> Charney, *ibid* at p.698-699.

<sup>268</sup> Romano, *ibid* note 246 at p.709-751.

<sup>269</sup> Judge, Guillaume, *ibid.* note 182 at p. 12.

<sup>270</sup> Judge Guillaume, *ibid.* at p. 13.

judgments. A possible partial remedy would be a deliberate desistance from aggravating the currently crowded judicial environment and considering whether the need for judicial review presented cannot be adequately met by an existing judicial forum. As Judge Guillaume observes however, there is a tendency of the various judicial fora to handle the cases before them in a very individualistic fashion so that positive precedential guidance may never be drawn from past decisions of other courts. This is not in deference to the doctrine of *stare decisis* which is not accepted in international law.<sup>271</sup> Nevertheless, judges often invoke previous decisions of the Court, in order to support their decision in a particular case. Invoked previous judgments do not, however, constitute a binding precedent, but are merely treated as ‘a statement of what the Court regarded as the correct legal position.’<sup>272</sup> If a precedent is based upon such a principle and a correct statement of the law, the Court cannot decide an analogous case in a contrary sense, so long, as the principle retains its value.<sup>273</sup>

Guillaume’s<sup>274</sup> remedy to the ‘scattering’ of international legal jurisprudence is the extension to the ICJ of functions analogous to those of a supreme court in national systems with the ICJ being accorded the power of appeal or review over the decisions of other international courts. This result can only be achieved through the demonstrable political will of the community of nations. It must also be recalled that during the creation of the Court concessions to power were required, lowering the sovereignty costs of joining to encourage powerful nations to acquiesce. As earlier submitted however, it is highly unlikely that any Court would be granted a supreme perch in the global judicial system.

---

<sup>271</sup> Article 59 of the Statute of the Court provides that the decision of the Court has no binding force except as between the parties and in respect to that particular case.

<sup>272</sup> Shahabuddeen, 1996:63, quoted by Emilia Justyna Powell and Sara McLaughlin Mitchell, ‘The International Court of Justice and the World’s Three Legal Systems’ at p. 10, <http://rubagalo.polisci.uiowa.edu/~fredb/workshop/powellmitchell04.pdf>.

<sup>273</sup> Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, ICJ Rep. 1950, p.104, Judge Zorčić, dissenting opinion, in M. Shahabuddeen, 1996: 237, quoted by Powell and Mitchell, *ibid*.

<sup>274</sup> Judge Guillaume, *ibid*. note 214.



Charney however holds the view that ongoing international tribunals tend to follow the reasoning of their prior decisions. Furthermore, the views of the ICJ when on point, are given considerable weight, and those of other international tribunals often are considered and hence, ‘the variety of international tribunals functioning today do not appear to pose a threat to the coherence of an international legal system’,<sup>275</sup> Charney<sup>276</sup> however admits that these specialized tribunals were formed to serve the interest of the States that established them within the treaty regime for which they were created. There is thus presented a risk that their own centrifugal forces will drive them in directions away from the core of international law. As a result these specialized tribunals could develop greater variations in their determinations of general international law and damage the coherence of the international legal system. In the absence of a hierarchical system for international law, Charney proposes two factors to act as counter-forces to the centrifugal forces. First, the ICJ must maintain its intellectual leadership role in the field. Second, the other tribunals and the ICJ should be encouraged to increase the dialogue that already exists between them. Additionally the ICJ could write its judgments and opinions so as to appear more like a Supreme International Court and overtly consider alternative theories on the international law as used by the various other tribunals. An interpretation of a rule of general international law that was produced by a tribunal and subsequently examined and rejected by the ICJ would make it difficult for that tribunal to continue to maintain its view. International courts could also be encouraged, in certain cases that pose a jurisprudential challenge, to utilize the advisory opinion procedure provided for in Article 96 of the UN Charter. These requests would be transmitted through the GA or the SC of the UN.

Charney notes that it is not clear that in the future significant numbers of new tribunals will be created and that ‘we may be approaching the end of the trend to establish new international tribunals, especially standing tribunals.’ He further notes that it is difficult to argue that these forums have taken cases away from the ICJ,

---

<sup>275</sup> Charney, *ibid* note 243 p.700.

<sup>276</sup> See Charney *ibid*. pgs 706-707.

thereby denying the Court its rightful role in the adjudication of international law and that 'it does not appear likely that a decline of the ICJ is on the horizon, even with the increased number of forums deciding international legal issues'<sup>277</sup> As submitted earlier in this thesis, the case load of the Court significantly increased in the 80s and 90s even at the height of the proliferation of international dispute settlement bodies. Charney<sup>278</sup> notes that during the said period, the Court handled some of the 'hottest' cases from perspective of international politics that it ever has faced.<sup>279</sup> It is, I submit not feasible that the Court will have its case load significantly dented.

It is my view that the proliferation does and will continue to have an impact on the ICJ. I have preferred to refer to describe the said impact as merely benign because the preponderance of research carried out shows that the ICJ continues to maintain an unparalleled existence. The ICJ remains untrammelled and there is no real indication that this position will cease in the future.

## 5.2 Recommendations

There is a consensus that the ICJ and the UN system as a whole must embrace reform if the needs of the world community are to be met in a greater impartial and judicious manner. The Secretary General (SG) of the UN, Kofi Annan, in his address to the fifty-ninth session of the GA, on the 21<sup>st</sup> of March, 2005, issued a report which has

---

<sup>277</sup> Charney, *ibid.*

<sup>278</sup> Charney, *ibid.* at p. 701.

<sup>279</sup> For example, *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v. Yugo)* 1996 I.C.J. 803 (Preliminary Objections of July 11); *Certain Phosphates Lands in Nauru (Nauru v. Australia)*, 1992 I.C.J. 240 (Preliminary Objections of June 26); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (Judgment on Merits of June 27); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24); *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 (Feb. 3) 'Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.)', <<http://www.icj-cij.org/icjwww/idocket/iluk/ilukjudgment>>, (Preliminary Objections of Feb. 27, 1998); *Oil Platforms (Iran v. U.S.)*, <<http://www.icj-cij.org/icjwww/idocket/iop/iopframe>>, (Counter-Claim Order of March 10, 1998); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 4 (July 8); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8); *Vienna Convention on Consular Relations (Paraguay v. U.S.)*, <<http://icj-cij.org/icjwww/idocket/ipaus/ipausframe>>, (Provisional Measures of April 9, 1998).

received world-wide acclaim titled '*In larger freedom: towards development, security and human rights for all*'<sup>280</sup>. He importantly remarked<sup>281</sup> that

After a period of difficulty in international affairs, in the face of both new threats and old ones in new guises, there is a yearning in many quarters for a new consensus on which to base collective action. And a desire exists to make the most far-reaching reforms in the history of the United Nations so as to equip and resource it to help advance this 21<sup>st</sup> Century agenda.

The ICJ is in fact and in law an integral part of the UN, being one of its principal organs, and more particularly its principal judicial organ. It is thus understandable that the ills that plague the UN system and with respect to which there is dire need for reform must as a matter of course impact upon the Court.

As Shahabuddeen has noted,

A court which abstracts itself out of the life of the community which it serves is sentencing itself out of existence; on the other hand, to descend into the arena is to lose the sense of judicial mission. The Court understands the need for maintaining a careful balance between the competing considerations.<sup>282</sup>

A brief discussion of the UN SC is timely because it is the UN organ that is most likely to impinge upon the province of the Court if the SC Permanent Members fail to exercise the requisite restraint. The SC is a political body, endowed with 'primary responsibility for the maintenance of international peace and security' and acts in this respect on behalf of all members of that organization'.<sup>283</sup> The authority of the SC is further harnessed by Article 103 which provides that in the event of a conflict between the obligations of member states under the Charter and their obligations under any other international agreement, the former are to prevail.<sup>284</sup> Shaw notes that

---

<sup>280</sup> Available at [http://www.un.org/larger\\_freedom/sg-statement.html](http://www.un.org/larger_freedom/sg-statement.html).

<sup>281</sup> *Ibid* note 280, para.2.

<sup>282</sup> Mohamed Shahabuddeen, *ibid* note 18 at p.18.

<sup>283</sup> Article 24 (1) of the UN Charter. By Article 25 of the Charter, 'Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. The Council enjoys enormous powers as detailed in Chapters VI and VII of the Charter.

<sup>284</sup> This was the prime reasoning of the majority in the *Lockerbie Cases*. There is however some intense debate on whether this injunction should prevail over treaty provisions which are in the nature of obligations *ius cogens*, a concept which operates in superiority to both customary international law and treaty and to which the Security Council itself in international law must defer. The broad consensus is that the norms of *ius cogens* must prevail.



in the course of such activities the raw factors of power and influence become manifest and in a world where there is in effect one dominating superpower, that State may exercise crucial leverage.<sup>285</sup> The SC has variously come under intense criticism granted its history of deference to the whims of the five (5) Permanent Members with a special right of veto.<sup>286</sup> This privilege is predicated on the practically unlimited power that the victors of the World War II, arrogated to themselves in order to ensure their permanent control over world affairs and the UN Organization therefore. To quote Dr. Hans Kochler,

...there is no true international legitimacy in the present world constellation. Any decision about international peace and security-especially on the basis of Chapter VII of the Charter-is determined by the interests of particular member states, which override the interests of the weaker states. The UN Charter with its provisions in favour of a strong Security Council...serves as a convenient cover for old-fashioned realpolitik...<sup>287</sup>

Judge Bedjaoui has called for a balance sheet to be drawn up in order for the UN system as a whole to be able to deal effectively with the post- Cold War World and has concluded by noting that

It is found increasingly inadmissible that international political organs should take liberties with the Charter or adopt a relaxed attitude towards international law when it is they, surely, even more than states, that have been given the duty of fortifying international law's credibility and reliability.<sup>288</sup>

The increased activities of the SC acting within the context of its binding authority have thus raised important questions as to the evolution of the UN constitutional system and as to the relation between such actions and general international law.

<sup>285</sup> Shaw *post* note 288 at p. 224.

<sup>286</sup> Shaw *ibid.* at p. 223 notes that under the provisions of Article 27(2) of the UN Charter, decisions of the Security Council are to be made by an affirmative vote of nine members 'including the concurring votes of the permanent members'. This has been interpreted by consistent practise to mean that voluntary abstention from voting by a permanent member does not prevent the adoption of resolutions.

<sup>287</sup> Dr Hans Kochler, 'The United Nations and International Democracy: The Quest for UN Reform', at p. 3, *Studies in International Relations*, XXII. Vienna: International Progress Organization, 1997. ISBN 3-900704-16-3.

<sup>288</sup> Malcolm N. Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function', in A.S.Muller et al *ibid* note 14, quoting M.Bdejaoui, 'The New World Order and the Security Council 129-130 (1994).

Shaw<sup>289</sup> aptly discusses the effects of Resolution 687(1991) adopted by the SC under Chapter VII. He argues that some of the consequential activities undertaken by the SC, more correctly described as secondary level actions after the initial response has been taken to restore international peace and security should not fall within the wide discretion of the SC, but should be tested against the prevailing principles of international law. It is the process of curbing the Council's 'judicial drift', the characterization by the Council of a legal situation as either illegal, null and void, demanding international non – recognition, imposing arms embargoes, recognizing and dealing with an ousted regime as authoritative rather than the regime in actual control, imposing peace conditions, defining and guaranteeing boundaries, and defining state responsibility issues, and establishing international criminal tribunals.<sup>290</sup>

What is the function and the role of the ICJ faced with a newly assertive SC? There are incessant charges of a protectionist SC which has the power capacity and the Charter support to dilute the effectiveness of the ICJ's judicial parameters and particularly the enforcement of its decisions, in 'highly political' disputes particularly those that touch on any of the Permanent Members of the SC. A classic example of this truism is the US's reaction in the SC to Nicaragua. The latter sought SC enforcement of the Order of the Court after the decision was delivered, but the US vetoed this attempt and also a later draft of a similar resolution. After the US vetoed the SC draft resolution, Nicaragua then went to the General Assembly which adopted a resolution on 6 November 1986 urgently calling for compliance with the Court's decision.<sup>291</sup> However it was not peer pressure group which eventually forced the US to change its position and policies regarding Nicaragua-it was internal pressure brought about by the Court's decision. Coleman notes that the contentious jurisdiction of the ICJ, being voluntary in nature, has prompted the argument that the

---

<sup>289</sup> Shaw *ibid.* at p. 227.

<sup>290</sup> Shaw *ibid.* at p. 234-235.

<sup>291</sup> Judgment of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and against Nicaragua: Need for Immediate Compliance, GA Res 41/31, UN GAOR, 41<sup>st</sup> Sess, 53<sup>rd</sup> plen mtg, Supp 53, 23 UN Doc A/RES/41/L.22 ( 1986). The vote was 93 Members in favour, three against ( US, El Salvador and Israel), 43 abstentions. See, Coleman *ibid.* note 106 at p.63.

enforceability of the Court is best achieved through pressure applied by other States.<sup>292</sup>

It seems likely that the Court will continue whenever possible to avoid any direct challenge to SC decisions under Chapter VI of the Charter. Thus the Court would almost certainly accept as authoritative a determination of aggression by the SC, even if it is less likely expressly to acknowledge that the SC's power is exclusive.<sup>293</sup>

Difficult questions thus abound as to the nature of the complementary role that the Court has repeatedly claimed for itself. The Court's consistent position has been that there is no doctrine of separation of powers as between itself and the SC as avails between the SC and the General Assembly under the provisions of Article 12 of the UN Charter.

The SG, commenting on the relationship between the Councils of the UN, namely the SC, the Economic and Social Council (ECOSOC), and the Trusteeship Council (TC), notes thus:-

...Overtime, the division of responsibilities between them has become less and less balanced: the Security Council has increasingly asserted its authority and, especially since the end of the cold war, has enjoyed greater unity of purpose among its permanent members but has seen that authority questioned on the grounds that its composition is anachronistic or insufficiently representative...<sup>294</sup>

The SG further states:-

By adhering to the Charter of the United Nations, all Member States recognize that the Security Council has the primary responsibility for the maintenance of international peace and security and agree to be bound by its decisions. It is therefore of vital importance, not only to the organization but to the world, that the Council should be equipped to carry out this responsibility and that its decisions should command world wide respect. In the Millennium Declaration, all States resolved to intensify their efforts "to achieve a comprehensive reform of the Security Council in all its aspects" ( See General Assembly resolution 55/2, para.30). This reflected the view, long held by the majority, that a change in the Council's composition is needed to make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today, and thereby more legitimate in the eyes of the world. Its working methods also need to be more efficient and transparent. The Council must be not only more representative but also more able and willing to take action when action is

---

<sup>292</sup> See Coleman *ibid.* note 106 at p. 63.

<sup>293</sup> Christine Gray, *ibid.* note 153 at p.898.

<sup>294</sup> *Ibid* note 280 at para. 165.



needed. Reconciling these two imperatives is the hard test that any reform proposal must pass. Two years ago, I declared that no reform of the United Nations would be complete without reform of the Security Council. That is still my belief. The Security Council must be broadly representative of the realities of power in today's world...<sup>295</sup>

The SG then proceeds to urge the Member States to consider the two options, models A and B, proposed in the Report or any other viable proposals and 'agree to take a decision on this important issue before the summit in September 2005',<sup>296</sup>

As the September Summit<sup>297</sup> approached there was intense lobbying and consultations as each region considered its stakes high in the proposed enlarged membership of the SC. On the 26<sup>th</sup> of July 2005, PTI reported from London that the G4 had struck a deal with the AU with regard to the SC expansion and reported thus:-

In a significant breakthrough, the Group of Four and the African Union have agreed to present a joint resolution to the United Nations on expansion of the Security Council after the African nations dropped their demand for veto rights for new permanent members. After hectic parleys with the foreign ministers of G-4 nations comprising India, Germany, Japan and Brazil, representatives of the African Union agreed to drop their demand for a veto rights for new permanent members of the expanded Security Council. The G-4 reciprocated by acceding

---

<sup>295</sup> *Ibid* note 280 at paras. 167-169. The SG supports the position set out in the report of the High-level Panel on Threats, Challenges and Change (A/59/565) concerning the reforms of the Security Council,... namely that they should in honouring Article 23 of the Charter, increase the involvement in decision-making of those who contribute most to the United Nations financially specifically in terms of contributions to United Nations assessed budgets, bring into the decision-making process countries more representative of the broader membership, especially of the developing world, and that the effectiveness of SC should not be impaired.

<sup>296</sup> *Ibid*, para. 170. Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas. This would give Africa with its 53 Member States and currently the only region without a permanent seat, two permanent seats and 4 proposed new permanent seats. Model B provides for no new permanent seats but creates a new category of eight four- year renewable term seats and one new two-year non-permanent (and non-renewable ) seat, divided among the major regional areas. This would give Africa two proposed four- year renewable seats and four proposed two –year seats ( non-renewable). Both models would result in an increase of the membership of the SC to 24.

<sup>297</sup> The Millennium Summit was a three day high level plenary meeting , the largest gathering of world leaders in the history of mankind. More than 160 presidents, prime ministers and kings attended the summit which commenced in New York on the 14<sup>th</sup> of September 2005.

to the AU proposal to add five new non-permanent members of the Security Council, making it a 26-member body.<sup>298</sup>

Regrettably however, and as expected in view of the attendant play of international realpolitik, the September Summit came to a close without the anticipated substantive reforms of the UN system and particularly a more representative restructuring of the SC<sup>299</sup>. A Diplomatic Editor of the Sunday Herald wryly wrote thus:

If the United Nations were a shipwreck, the lifeboats would be inefficient and out of date, half the crew would row in one direction, the other half would row in another and the officer with a hand on the tiller would be unsure which bearing to take. As it approaches its 60<sup>th</sup> birthday—the actual date is October 21—that is how one senior US diplomat views the venerable world organization at this crucial juncture of its history... “The party’s almost over, the reckoning could almost be at hand” the diplomat told the Sunday Herald. “Once again we’ve been given platitudes when we wanted action, once again the UN has declined to confront the realities of the 21<sup>st</sup> century power structures. It was a once-in-a-lifetime opportunity to make the UN grow up, and I’m sorry to say this but we may have blown it.”...At the conclusion of last week’s agenda, the disappointment over the UN’s failure to adopt a new reformist policy was almost tangible as the world’s leaders left New York, at the end of their much-touted summit to give the organisation a new beginning for a new century. Under the leadership of Jean Ping of Gabon, a committee had spent months producing secretary-general Kofi Annan’s programme for far-reaching reforms but events conspired to give it a half-baked look...Secondly, and perhaps most decisively, the US appointed John Bolton as ambassador, who then demanded an unacceptable number of changes to the reform document. President Bush had justified the appointment by claiming that Bolton was just the man needed to reform the UN, but the huge list of demands simply clogged up the system and made sure the discussion would be reduced to point-scoring. As a result of the US intervention and its refusal to countenance any changes in the membership of the Security Council, Annan was left to concede defeat: “We have not achieved the sweeping and fundamental reform that I and many others believed is required. Sharp differences, some of them substantive and legitimate, have played their part in preventing that.”...Whenever reform is in the air at the UN the debate reduces itself to a collision of different principles and ideologies, with the US and its allies in one camp and the rest of the world in the other...<sup>300</sup>

A restructured SC, in order to reflect some element of trans-national democracy, is admittedly illusory. Article 108 of the Charter provides that amendments to the Charter shall come into force when adopted by two thirds of the members of the General Assembly and ratified by two thirds of the Members of the United Nations, *including all the permanent members of the SC* (emphasis mine). It follows that any

<sup>298</sup> Available at <http://www1.mid-day.com/news/world/2005/July/114861.htm>

<sup>299</sup> See the Reuters Report in the Sunday Nation (a Kenyan Daily), September 18, 2005 at p. 25.

<sup>300</sup> Trevor Royle, ‘After 60 years of high ideals...how has it come to this?’ The Sunday Herald- 18 September 2005 available at <http://www.sundayherald.com/51795>



amendment that is not desirable to any of the five SC members would not sail through. The destiny of the Court is very much tied up with the SC as far as proposed amendments to the Statute of the Court are concerned since under the provisions of Article 69 of the Statute of the Court, the same procedure for amendment avails so that the wishes and the whims of the SC cannot be wished away. It has been variously suggested that the desirable principal reform would be the abolishment of the veto privilege and tackling the composition of the membership of the SC. The 'permanent membership' would be replaced with a regional membership along the lines of the Organization of the African Unity (now AU), with seats rotating around each regional grouping according to a jointly approved scheme.<sup>301</sup> As the establishment of this global security structure comprising all member states remains elusive under the present circumstances of national sovereignty and power politics, the formation of more or less coherent regional power structures on the basis of common economic and security interests seems more realistic.<sup>302</sup> The *Lockerbie cases* demonstrate the need for reform of the Charter and the Statute of the Court. A warning has however been sounded-that the Court has not been endowed with the power of judicial review, and neither it appears is it desirable so to do, for

...one cannot simply replace one organ asserting ever encroaching dominance with another such organ without seriously threatening the rather fragile institutional arrangements within the UN structure<sup>303</sup>

Nonetheless, from the 'springs of the proper exercise of its judicial function, it may embark on a series of actions that too are part of the general complex of judicial review'<sup>304</sup>. Thus the Court can consider the resolutions and actions of the UN and will 'approach this task with care and with the respect due to other principal organs'<sup>305</sup>.

---

<sup>301</sup> Dr Hans Kochler, *ibid* note 287 at p.10.

<sup>302</sup> Kochler *ibid*. Thus the development of the European Union, the Association of the South –East Asian Nations (ASEAN), the Common Market for Southern Africa (COMESA) and to a large extent the African Union( AU), are representative of the emerging regional structures, in the framework of which particularly smaller states may better be able to articulate their legitimate interests and defend their international position.

<sup>303</sup> Shaw *ibid* note 288 at p. 256.

<sup>304</sup> Shaw *ibid* at p. 256-257.



The SC should thus be virtually overhauled and of crucial importance will be reforms that check the 'the judicial drift' of the SC. Several 'on the spot' reforms that do not necessitate an overhaul of the current Charter provisions (which would be an exercise of intense political bargaining), have been proposed<sup>306</sup>. One possibility is the appointment of an independent legal counsel for the SC, another is the development of a high-powered committee of international legal advisers drawn on a part-time basis from the ranks of the members of the Council working specifically and jointly to provide speedy advice.<sup>307</sup> A reform of the SC would it is submitted have the trickle down effect of harnessing the Court's relevance and standing internationally. Reform of the internal procedures of the Court is however the province of the Court. In this regard the Court has already taken steps to increase its efficiency. The Court has urged the litigating parties to submit clearer, more succinct written pleadings, and made its orders and judgments quickly and easily accessible to all through its new web site.<sup>308</sup> However the Court operates within very constricted budgetary provisions, a fact which must impact on its ability to undertake extensive reforms and entertain a heavy case load. A gross disparity has been noted in the funds appropriated to the ICJ (\$ 11 million) as compared to those appropriated to the ICTY( \$70 million), a fact which 'reflects a lack of interest on the part of the international community to strengthen the ICJ to a point where it might serve as the Supreme International Court.'<sup>309</sup>

---

<sup>305</sup> Shaw *ibid.*

<sup>306</sup> Shaw *ibid.* at p.258-259.

<sup>307</sup> Shaw *ibid.*

<sup>308</sup> See Charney *ibid* note 243 p. 703 and also, <<http://www.icj-cij.org>> He posits that even if the Court were willing to change the traditional procedures of the Court in fundamental ways, it is not clear that States would be amenable to such substantial changes since when sovereign States litigate against each other, they do not want to be restricted by procedures that restrict their ability to present their cases as fully and completely as they wish.

<sup>309</sup> Charney, *ibid* p. 703.

### 5.3 The Future of the ICJ

Despite the various shortfalls of the ICJ, the Court has made major strides in the development of international law. R.P. Anand argues that the Court 'has become one of the chief instrumentalities for the gradual development and growth of international law.'<sup>310</sup> Keohane, Moravcsik and Slaughter define this in institutional terms and state that

what distinguishes legalized regimes is their potential for setting in motion a distinctive dynamic built on precedent, in which decisions in a small number of disputes create law that may govern by analogy a vast array of future practices.<sup>311</sup>

The ICJ epitomizes this grand process. The Court has frequently ruled on issues of international customary law. The Court has thus become the primary vehicle for the transformation of the unwritten customary law into written legal precedents that have variously been cited by the international judiciary. It has been observed that the ICJ has

a cache that makes its pronouncements on questions of general international law particularly significant...the international community is predisposed to take the Court's views on this law quite seriously, and if the Court maintains a high level of competence and expresses its views in well-reasoned ways, it will continue to exert influence on the course of general international law that is well beyond its nominal jurisdiction.<sup>312</sup>

It is of import that the ICJ is the only international Court of general jurisdiction, and hence matters come before it to be determined on the basis of general international law. All other standing tribunals are only presented with cases arising within the context of the treaty regime within which they exist. Thus, '...the ICJ's decisions reflect the perspective of a court unsullied by narrow limitations that a special regime may impose on a forum'<sup>313</sup>. The leadership role of the ICJ is thus strengthened so that

---

<sup>310</sup> Clopton, *ibid.* note 32 at p. 7, quoting, R.P. Anand, 'Role of the 'New' Asian-African Countries in the Present Legal Order' *American Journal of International Law*, Vol. 56, No. 2 (April, 1962), 392.

<sup>311</sup> Clopton, *ibid.* at p. 7, quoting Keohane, Moravcsik and Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational,' 480.

<sup>312</sup> Charney, *ibid.* note 243 at p. 705.

<sup>313</sup> Charney, *ibid.*

whilst other tribunals may decide disputes, ‘it remains for the ICJ to place its imprimatur on the law it examines’<sup>314</sup>

The ICJ has been described as ‘a tool of statecraft’<sup>315</sup> – a part of the general diplomatic machinery at the disposal of States. It is often diplomatically logical for a State to refer a case to the ICJ in order to insulate it from other policy areas. It has been suggested that for example New Zealand took advantage of this option as ‘...a way of isolating the [nuclear test] dispute from her otherwise cordial relations with France’<sup>316</sup> Thus whatever might have been the variations from time to time in attitudes to the Court, there is growing acceptance of the Court as a centralized piece of judicial equipment and an indispensable component of the global order.<sup>317</sup> As Charney<sup>318</sup> notes, judgments of the Court continue to be the most analyzed and the most frequently referenced of all the decisions by tribunals that address international law questions, a fact unlikely to change in the foreseeable future.

My view is that it is the important cases that the ICJ decides, as opposed to a large tally of cases that underline the relevance of the Court to Africa and the world at large. In the meanwhile, with a view to harmonizing the substantive rules by some measure and engendering some sobriety in the face of proliferation, there ought to be a judicial dialogue, initiated by the international judiciary in order to resolve similar questions of law

---

<sup>314</sup> Charney, *ibid.*

<sup>315</sup> Clopton, *ibid* note 32. p.7

<sup>316</sup> Clopton, *ibid.* p.8, quoting Dana D. Fischer, ‘Decisions to use the International Court of Justice: Four Recent Cases,’ *International Studies Quarterly*, Vol. 26, no. 2 (June 1982), 258.

<sup>317</sup> Shahabuddeen *ibid.* note 18 at p. 29.

<sup>318</sup> Charney, *ibid* note 243.



## SELECTED BIBLIOGRAPHY

### Textbooks

Akin Oyeboade, 'International Law and Politics: An African Perspective, Bolabay Publications, Lagos( 2003)

A.S. Muller et al (eds), 'The International Court of Justice, Its Future Role After Fifty Years' Kluwer Law International (1997)

Dakas CJ Dakas, 'International Law on Trial: Bakassi and the Eurocentricity of International Law. St Stephen Book House Inc. Jos (2003)

D.J.Harris, 'Cases and Materials on International Law', 5<sup>th</sup> Edition.

H. Lauterpacht, 'The Development of International Law by the International Court( 1958)

J.L.Brierly, 'The Law of Nations, An Introduction to the International Law of Peace' 6<sup>th</sup> Edition, Oxford University Press( 1963)

John Dugard, 'International Law, A South African Perspective, Juta & Co. Ltd 2000

Malcolm N. Shaw 'International Law' 4<sup>th</sup> Edition, Cambridge University Press.

Max Sorensen 'Manual of Public International Law' MacMillan (1968)

Michael Akehurst, 'A Modern Introduction to International Law, 3<sup>rd</sup> Edition, ( London)

Rebecca M.M. Wallace, 'International Law, A Student Introduction' 3<sup>rd</sup> Edition.

Shabtai Rosenne, 'The World Court, What It Is And How It Works', Oceana Publications Inc; Dobbs Ferry, N.Y. (1973)

### Website Information, Articles and Reports

Andrew Coleman, 'The International Court of Justice and Highly Political Matters' Melbourne Journal of International Law vol. 4 ( 2003) at 56 also available at [http://www.buseco.monash.edu.au/depts/blt/research\\_list.pdf](http://www.buseco.monash.edu.au/depts/blt/research_list.pdf)

A.O.Adede, 'Judicial Settlement in Perspective' in A.S.Muller et al(eds) 'The International Court of Justice, Its Future Role After Fifty Years, Leiden Journal of International Law ( 1997).

Cesare P.R.Romano, 'International Justice and Developing Countries: A Quantitative Analysis, The Law and International Courts and Tribunals( LPICT) 2002, p.367-399, also available at [http://www.pict.org/publications/pict\\_articles/Devlp\\_courts/Developing\\_countries\\_Part\\_1.pdf](http://www.pict.org/publications/pict_articles/Devlp_courts/Developing_countries_Part_1.pdf).

Cesare P. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' in *International Law and Politics*[1999] vol.31, 709-751 also available at <http://www.nyu.edu/pubs/jilp/main/issues/31/pdf/31r.pdf>

Charles Zorgbibe, 'Africa and International Justice', <http://www.african-geopolitics.org/show.aspx?ArticleId=3536>.

Christine Gray, 'The Use and Abuse of the International Court of Justice: Case Concerning the Use of Force After Nicaragua, *EJIL*( 2003), vol.14 No.5, 867-905, also available at <http://www/ejil.org/journal.vol14/No.5/140867.pdf>.

Christof Heyns, 'The African Regional Human Rights System: In need of Reform?' (2001) 2 *African Human Rights Law Journal* 167.

Connie Peck, 'The Organization of African Unity' available at <http://wwics.si.edu/subsites/ccpdc/pubs/role/chap09.pdf>

Emilia Justyna Powell and Sara McLaughlin Mitchell, 'The International Court of Justice and the World's Three Legal Systems' available at <http://rubagalo.polisci.uiowa.edu/~fredb/workshop/powellmitchell04.pdf>

H.E. Judge Gilbert Guillaume, President of the International Court of Justice, Speech Given at the University of Cambridge( Lauterpacht Research Centre for International Law) available at <http://www.uu.nl/content/worldcourt0.20205.pdf>.

Hans Kochler, 'The United Nations and International Democracy: The Quest for UN Reform' *Studies in International Relations*, XX11 Vienna: International Progress Organization, 1997. ISBN 3-90074-16-3.

Jonathan I. Charney, 'The Impact of the International Legal System of the Growth of International Courts and Tribunals' *International Law and Politics*[1999], vol.31 at 697, also available at <http://www.nyu.edu/pubs/jilp/main/issues/31/pdf/31q.pdf>

Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' *Pace International Law Review*, Spring 1995 also available at <http://www.globalpolicy.org/wldcourt/roberts.htm>

Kofi Annan, 'In Larger Freedom: Towards Development, Security and Human Rights of All, available at <http://www.un.org/largerfreedom/sg-statement.html>.

Leopoldo Lovelace Jr, 'Has International Law Failed Africa?' a Paper prepared for the International Studies Association, Annual Convention, Chicago, Illinois, February 21-24, 2001 available at <http://www.isanet.org/archive/lovelace.html>

Malcolm N. Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function, in A. S. Muller et al( eds), *The International Court of Justice, Its Role After Fifty Years*( 1997) Kluwer Law International.

Mohamed Shahabuddeen, 'The World Court at the Turn of the Century' in A. S. Muller et al( eds), *The International Court of Justice, Its Future Role after Fifty Years*(1997) Kluwer Law International, at p. 18.



Peter Mweti Munya, 'The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects' East African Journal of International and Comparative Law, Volume 1, 2002 at p. 1

Phaedon John Kozyris, 'Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality around the Islands', Denver Journal of International Law and Politics, 319 also available at <http://www.law.du.edu/ijl/online>

Philippe Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes' in A.S. Muller et al( eds), The International Court of Justice, Its Future Role after Fifty Years( 1997) Kluwer Law International.

Pierre Englebert et al 'Dismemberment and Suffocation, A Contribution to the Debate on African Boundaries', Comparative Law Studies, Vol. 35 No.10, December 2002, 1093

PTI, London, 26<sup>th</sup> July, 2005, available at <http://www1.mid-day.com/news/world/2005/july/114861.htm>.

Report of the International Court of Justice 1 August 2002-31<sup>st</sup> July 2003.

Shiv R. S. Bedi, 'African Participation in the International Court of Justice. A Statistical Appraisal (1946-1998)' African Yearbook of International Law,( Kluwer Law International ) Volume 6, ( 1998) at 181.

Sunday Nation, September 18, 2005.

Trevor Royle, 'After 60 years of High Ideals...How Has It Come To This? Sunday Herald – 18<sup>th</sup> September 2005 available at <http://www.sundayherald.com/51795>.

Zachary D. Clopton, 'An Institutional Appraisal of ICJ Jurisdiction', available at <http://ase.tufts.edu/hemispheres/2003/clopton.doc>

Juan Antonio Carrillo Salcedo, 'Reflections on the existence of a Hierarchy of Norms in International Law' available at <http://www.ejil.org/journal/vol8/no4/art2.pdf>

### **Conventions and Instruments**

The Charter of the United Nations and the Statute of the International Court of Justice (1945)

African [Banjul] Charter on Human and Peoples, Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3.

OAU 1964 Cairo Resolution

The Protocol to the African Court on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights