

# EMERGENCE OF NEW STATES IN AFRICA AND TERRITORIAL DISPUTE RESOLUTION: THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

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*This article examines the potential contribution of the International Court of Justice ('Court') in resolving current and emerging territorial disputes in Africa. The article contends that the Court as the principal judicial organ of the Charter of the United Nations ('UN Charter') has had a significant role in resolving territorial disputes on the continent. An in-depth discussion of various disputes the Court has addressed in the past demonstrates the unique role and capability of the Court to address potential disputes of a similar nature. The article further argues that the decision by some African countries to voluntarily submit their disputes to the Court and the willingness of those nations to implement the outcomes of such referrals demonstrates the growing belief among these countries in the pivotal role of the Court in furthering the principles and goals reflected in the UN Charter. On the basis of this positive contribution of the Court, this article contends that current and potential territorial disputes, such as those in Ethiopia and Sudan, should be referred to the Court for determination. The involvement of the Court in such disputes will not only contribute to the maintenance of international peace and security in Africa but will also enhance the international rule of law by encouraging countries to resolve their disputes peacefully.*

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## I INTRODUCTION

Since the League of Nations was founded, the quest to preserve ‘peace among nations’ has been the primary objective of the United Nations.<sup>1</sup> It is in pursuit of this goal that the *Covenant of the League of Nations* and the *Charter of the United Nations* (‘*UN Charter*’) made the peaceful settlement of disputes the defining feature of their mission.<sup>2</sup> However, the founding of these institutions did not completely prevent the use of force among nations as an important mechanism to attain foreign policy objectives. Indeed, it was the failure of the member states to honour the founding objectives of the League of Nations to resolve disputes peacefully that led to the devastation caused by the Second World War.<sup>3</sup>

In the aftermath of the Second World War, during the negotiations and eventual adoption of the *UN Charter* in San Francisco, the negotiators decided to incorporate the *Statute of the International Court of Justice* (‘*ICJ Statute*’) as an integral part of the *UN Charter*.<sup>4</sup> This decision was important in two aspects — namely reaffirming the pivotal role of peaceful settlement of disputes among nations and also providing a mechanism within which states could resolve their differences peacefully.<sup>5</sup> The incorporation of the *ICJ Statute* as an integral part of the *UN Charter* demonstrated the willingness of states to create a forum where disputes could be resolved peacefully bearing in mind the devastating consequences of the Second World War.

The primary goal of this inquiry is to examine the potential role of the International Court of Justice (‘Court’) in resolving territorial disputes in emerging states in Africa and consider the extent of the Court’s contribution to the maintenance of international peace and security in Africa. Additionally, the analysis will explore how the current and emerging border disputes in countries such as Sudan and Ethiopia can be resolved by the Court. These questions are relevant precisely because in the first twenty years of African independence only one case was submitted to the Court by an African state. This is in contrast to the period beginning in the 1980s when African states started frequenting the Court

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<sup>1</sup> John A Moore and Jerry Pubantz, *The New United Nations: International Organization in the Twenty-First Century* (Pearson Prentice Hall, 2006).

<sup>2</sup> *Covenant of the League of Nations* art 11; *Charter of the United Nations* art 1 (‘*UN Charter*’).

<sup>3</sup> Moore and Pubantz, above n 1; Ramesh C Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) 28–9. See also Hugh Miall, *The Peacemakers: Peaceful Settlement of Disputes since 1945* (Macmillan, 1992).

<sup>4</sup> See, eg, United Nations Conference on Trade and Development, *Dispute Settlement: General Topics — International Court of Justice*, UN Doc UNCTAD/EDM/Misc.232/Add.19 (2003) 5.

<sup>5</sup> See generally Frederick Northedge, *The League of Nations — Its Life and Times 1920–1946* (Leicester University Press, 1986); Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963).

to seek judicial intervention on matters relating to their territorial boundaries.<sup>6</sup> Can this confidence in the Court demonstrated by African states help enhance the role of the Court in addressing current and emerging territorial disputes in Africa? This article will further explore whether African countries that have sought the intervention of the Court have been willing to respect and implement the Court's decisions. These issues will be examined in light of the primary objective of the *UN Charter*: to promote the peaceful settlement of disputes among states.

## II THE *UN CHARTER* AND PEACEFUL SETTLEMENT OF DISPUTES

The primary goal of the *UN Charter* is to eliminate threats to peace and security while bringing about the settlement of disputes that could provide grounds to such threats.<sup>7</sup> This objective is attained by members undertaking to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations'.<sup>8</sup>

It has been observed that the requirement for peaceful settlement of disputes is a natural corollary of the prohibition of the use of force in the settlement of international disputes enshrined in art 2(4) of the *UN Charter*.<sup>9</sup> The objectives of this provision stem from the reality that the costs of conflicts are enormous and in most cases it is civilians who suffer. As such, it is within the interest of the international community to settle any dispute likely to endanger international peace and security before they result in conflict.

While attention tends to focus on the role of Chapter VII which provides for the powers of the UN Security Council ('UNSC') in 'maintenance of international peace and security', Chapter VI on peaceful settlement of disputes is arguably one of the most important Chapters precisely because it provides modalities for states to resolve their differences through peaceful means they deem appropriate.<sup>10</sup> The implication of this Chapter is clear; it makes the prevention of conflicts the central goal of the *UN Charter*. Specifically art 33 calls upon parties to a dispute — continuation of which is likely to endanger international peace and security — to seek resolution of the conflict first by way

<sup>6</sup> Mweti Munya, 'The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects' (1998) 7 *Journal of International Law and Practice* 159, 163. See also James Crawford, 'The General Assembly, the International Court and Self-Determination' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 585. On the attitudes of African states towards international law, see generally Ibrahim Shihata, 'The Attitude of New States toward the International Court of Justice' (1965) 19 *International Organization* 203; Yilma Makonnen, *International Law and the New States of Africa: A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa* (UNESCO, 1983).

<sup>7</sup> *UN Charter* Preamble, ch I.

<sup>8</sup> *Ibid* art 2(4). See generally John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law — Institutions and Procedures* (Oxford University Press, 1999).

<sup>9</sup> See also Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3<sup>rd</sup> ed, 2008) ch 2.

<sup>10</sup> *UN Charter* art 24(1); Tiyanjana Maluwa, 'The Peaceful Settlement of Disputes among African States, 1963–1983: Some Conceptual Issues and Practical Trends' (1989) 38 *International and Comparative Law Quarterly* 299, 300–1. See also *ibid* 254–5.

of ‘negotiations, inquiry, mediation conciliation, arbitration, judicial settlement or other peaceful means of their own choice’.<sup>11</sup> The *Manila Declaration* further reaffirms this, providing that ‘[e]very State shall settle its international disputes exclusively by peaceful means in such a manner that international peace, security and justice, are not endangered’.<sup>12</sup> It also reiterates the provisions of art 33 of the *UN Charter* which list various mechanisms that states can take to peacefully resolve their differences.<sup>13</sup> Similarly, the *Manila Declaration* encourages members to act in a spirit of good faith and cooperation and ‘make every effort to achieve pacific settlement of their local disputes through such regional arrangements or agencies before referring them to the [UNSC]’.<sup>14</sup>

The *UN Charter* does not prescribe any specific means of resolving disputes peacefully — rather it compels members to adopt various mechanisms as long as they are geared towards resolving such disputes amicably.<sup>15</sup> For example, by holding negotiations, the parties create an atmosphere of trust within which they can identify the problem and seek a solution to it. The importance of negotiation as a mechanism of peaceful settlement of disputes was reiterated by the Permanent Court of International Justice (‘PCIJ’) when it stated that ‘before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations’.<sup>16</sup> It is worth noting that the existence of active negotiations does not preclude the resort to other settlement procedures.<sup>17</sup> In other words, there is no general rule in international law mandating that negotiations be exhausted before a settlement can be sought by some other means.<sup>18</sup>

Further, states involved in disputes may alternatively decide to initiate an inquiry into a disputed issue and make recommendations on the proper modalities of addressing such issues. Inquiry as a means of settlement of disputes has been provided for in a number of bilateral and multilateral treaties, such as the *UN Charter*, *Hague Convention* and various declarations and decisions of

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<sup>11</sup> Peaceful settlement of disputes is provided for under *UN Charter* ch VI art 33(1). This provision was reaffirmed by the UN General Assembly in its *Declaration of the Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 6<sup>th</sup> Comm, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, Agenda Item 85, Supp No 18, UN Doc A/RES/2625(XXV) (24 October 1970) Preamble (‘*Friendly Relations Declaration*’); *Manila Declaration on the Peaceful Settlement of International Disputes*, GA Res 37/10, UN GAOR, 6<sup>th</sup> Comm, 37<sup>th</sup> sess, 68<sup>th</sup> plen mtg, Agenda Item 122, UN Doc A/RES/37/10 (15 November 1982) annex I paras 1–2 (‘*Manila Declaration*’).

<sup>12</sup> *Friendly Relations Declaration*, UN Doc A/RES/2625(XXV), annex I para 2; *Manila Declaration*, UN Doc A/RES/37/10, annex I para 2.

<sup>13</sup> *Friendly Relations Declaration*, UN Doc A/RES/2625(XXV), annex II para 2; *Manila Declaration*, UN Doc A/RES/37/10, annex I, para 5.

<sup>14</sup> *Manila Declaration*, UN Doc A/RES/37/10, annex I paras 5–6, annex II para 2.

<sup>15</sup> *UN Charter* art 33(1). See also *Manila Declaration*, UN Doc A/RES/37/10, annex II para 6.

<sup>16</sup> *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 15.

<sup>17</sup> See, eg, *ibid* 11–15.

<sup>18</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392, 440 [108].

UN bodies.<sup>19</sup> The function of inquiry is to ‘facilitate a solution of ... disputes by elucidating the facts by means of an impartial and conscientious investigations’.<sup>20</sup> Inquiry as a preliminary step to settle disputes has been used by both international organisations such as the UN and individual countries.<sup>21</sup> In its *UN Declaration on Fact-Finding*,<sup>22</sup> the UN General Assembly (‘UNGA’) argued for the use of fact-finding missions, subject to the consent of a state to whose territory it is to be sent.<sup>23</sup> The *UN Declaration on Fact-Finding* emphasises that both the UNSC and UNGA should give preference to the Secretary-General to entrust the conduct of the mission.<sup>24</sup> However, arguably there is an exception to this general requirement of consent as demonstrated by the decision of the UNSC to set up the fact finding mission in Iraq on weapon inspection in 1991.<sup>25</sup>

The UNSC by virtue of its responsibility to maintain international peace and security has an obligation under the *UN Charter* to ensure that disputes are settled amicably before they flare into conflicts.<sup>26</sup> While the UNSC may be considered a political body, its role is defined by the *UN Charter* as a legal instrument or an agreement between states.<sup>27</sup> Specifically, art 35 of the *UN Charter* empowers member states to submit their disputes before the UNSC if parties are unable to resolve the dispute and the UNSC may recommend measures on how to resolve the matter. The UNSC is not bound to recommend a specific measure to address a dispute though it is required to act within the framework of the *UN Charter*.<sup>28</sup> The use of force as a tool to settle disputes is undertaken as a last resort when all other mechanisms envisaged in the *UN Charter* have failed.<sup>29</sup> This aspect is reaffirmed by the widely held belief that the

<sup>19</sup> *UN Charter* art 33(1); *Convention for the Pacific Settlement of International Disputes*, signed 18 October 1907, 205 ConTS 233 (entered into force 26 January 1910) arts 9–37 (‘*Hague Convention*’). See generally Nissim Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (Oxford University Press, 1974); Thakur, above n 3, 28.

<sup>20</sup> *Hague Convention* art 9. See also United Nations, *Handbook on the Peaceful Settlement of Disputes between States* (United Nations, 1992) 24 [75]. See also *UN Charter* art 33.

<sup>21</sup> *Hague Convention* art 9.

<sup>22</sup> *Declaration on Fact-Finding by the United Nations in the field of the Maintenance of International Peace and Security*, GA Res 46/59, UN GAOR, 6<sup>th</sup> Comm, 46<sup>th</sup> sess, 67<sup>th</sup> plen mtg, Agenda Item 131, UN Doc A/RES/46/59 (9 December 1991) annex I para 6 (‘*Resolution on Fact-Finding*’).

<sup>23</sup> *Ibid.* For example, the UN Security Council used an inquiry to investigate the involvement of mercenaries in an invasion in Seychelles in 1981 and also in the fact finding mission to Darfur in 2003: Gérardine Meishan Goh, *Dispute Settlement in International Space Law: A Multi-Door Courthouse for Outer Space* (Martinus Nijhoff, 2007) 100; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc S/2005/60 (1 February 2005) 11. See also United Nations, above n 20, 111–27 concerning the role of UNSC.

<sup>24</sup> *Resolution on Fact-Finding*, UN Doc A/RES/46/59, annex II para 15.

<sup>25</sup> SC Res 712, UN SCOR, 46<sup>th</sup> sess, 3008<sup>th</sup> mtg, UN Doc S/RES/712 (19 September 1991).

<sup>26</sup> *UN Charter* art 24(1).

<sup>27</sup> See generally *ibid* arts 23–32. See, eg, SC Res 687, UN SCOR, 45<sup>th</sup> sess, 2981<sup>st</sup> mtg, UN Doc S/RES/687 (3 April 1991). However, it should be pointed out that there are risks and dangers of establishing the fact-finding mission without the consent of the state concerned and one of the major risks is the lack of cooperation from the domestic authorities which may dent the credibility of the outcome of the final report. See, eg, *Human Rights in Palestine and Other Occupied Arab Territories*, UN GAOR, 12<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009) [82].

<sup>28</sup> *UN Charter* art 24(2).

<sup>29</sup> *Ibid* arts 42–3.

primary responsibility of the UNSC is to address the threat to peace and security not necessarily by the use of force — instead it has an obligation to encourage members to resolve their differences peacefully.<sup>30</sup>

The UNGA as a deliberative organ of the UN may recommend appropriate measures in accordance with the *UN Charter*.<sup>31</sup> The involvement of the UNGA is crucial because it is the organ in which all the members of the UN enjoy representation.<sup>32</sup> Its involvement may be vital, especially when the dispute has a political dimension. Due to the broad composition of the membership of the UNGA, some members can easily promote dialogue on a bilateral or multilateral basis.<sup>33</sup> In contrast, membership of the UNSC is far more limited, and it is dominated by powerful states whose mediation role may be compromised due to their perceived biases in a particular dispute.<sup>34</sup> The UNSC and UNGA are not the only organs which have powers to resolve conflicts peacefully. The Secretary-General, using his or her good offices, can also undertake efforts to pursue peaceful settlement of disputes as stipulated in the *UN Charter* or consistent with it.<sup>35</sup>

The Court is an integral part of the *UN Charter*, with judicial mandate to settle disputes amicably.<sup>36</sup> It is the successor to the PCIJ, which was also a principal organ of the *Covenant of the League of Nations*.<sup>37</sup> The role of the Court in peaceful settlement of disputes has been reaffirmed in its various decisions. For example, during the hearing of *United States Diplomatic and Consular Staff in Tehran*,<sup>38</sup> when Iran raised an objection to the Court that it should not consider the hostage situation because it was part of a political conflict between two sovereign states, the Court disagreed.<sup>39</sup> The Court noted that ‘the resolution of a legal question could play a useful role in the peaceful settlement of disputes’.<sup>40</sup> Similarly, in *Border and Transborder Armed Actions*<sup>41</sup> involving

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<sup>30</sup> Rosalyn Higgins, ‘The Place of International Law in the Settlement of Disputes by the Security Council’ (1970) 64 *American Journal of International Law* 1, 9–10. See also Louis B Sohn, ‘The Security Council’s Role in the Settlement of International Disputes’ (1984) 78 *American Journal of International Law* 402, 402.

<sup>31</sup> *UN Charter* art 10.

<sup>32</sup> *Ibid* art 9.

<sup>33</sup> See generally Derek Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’ (1994) 5 *European Journal of International Law* 89, 97.

<sup>34</sup> See Jacob Bercovitch and Scott S Gartner, *International Conflict Mediation: New Approaches and Findings* (Taylor & Francis, 2008) 136.

<sup>35</sup> Sohn, above n 30, 402. See, eg, *Report of the Secretary-General on His Mission of Good Offices in Cyprus*, UN SCOR, UN Doc S/2012/149 (12 March 2012).

<sup>36</sup> See Philip Allott, ‘The International Court and the Voice of Justice’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 17, 26. See also United Nations, above n 20, 66.

<sup>37</sup> Kathleen Renée Cronin-Furman, ‘The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship’ (2006) 106 *Columbia Law Review* 435, 437.

<sup>38</sup> (*United States of America v Iran*) (*Judgment*) [1980] ICJ Rep 3 (*‘Diplomatic and Consular Staff’*).

<sup>39</sup> *Ibid* 20.

<sup>40</sup> Cronin-Furman, above n 37, 442. For a comprehensive account of the Court’s role in the peaceful settlement of disputes, see Georges Abi-Saab, ‘The International Court as a World Court’ in Malgosia Fitzmaurice and Vaughan Lowe (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 3, 3–16.

Nicaragua and Honduras, the Court noted that ‘the purpose of recourse to the Court is the peaceful settlement of disputes’.<sup>42</sup> Similar to its predecessor, the Court is charged with a dual mandate — namely, adjudicatory and advisory.<sup>43</sup>

Despite the reaffirmation of the central role of the Court in dispute settlement, there has been an attempt to exclude the jurisdiction of the Court by other organs of the *UN Charter* on matters essentially considered political.<sup>44</sup> While the UNSC has the ‘primary responsibility of maintaining international peace and security’, the Court has observed that ‘primary responsibility’ does not mean ‘exclusive responsibility’.<sup>45</sup> In line with this observation, the Court has noted that the fact that a dispute involves political aspects, or that the Court’s decisions might have political implications, does not exclude the Court from exercising its jurisdiction.<sup>46</sup> In the case between Nicaragua and Honduras, the Court observed that

political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible.<sup>47</sup>

In the same case, the Court reiterated that it ‘cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement’.<sup>48</sup>

While the Court may be considered as the primary organ in resolving disputes between nations, its decisions are not binding on third parties and its jurisdiction is voluntary to states that accept to be bound by its decision.<sup>49</sup> Article 36 of the *ICJ Statute* provides the optional clause which empowers states to invoke the jurisdiction of the Court when they deem it necessary and appropriate to their disputes. Despite the voluntary and non-binding nature of the Court’s decisions for third parties, experience demonstrates that the Court’s decisions played a crucial role in defusing tensions among states, especially in cases where states committed themselves to implementing those decisions.<sup>50</sup>

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<sup>41</sup> (*Nicaragua v Honduras*) (*Judgment*) [1988] ICJ Rep 69 (‘*Border and Transborder Armed Actions*’).

<sup>42</sup> *Ibid* 91. In *Diplomatic and Consular Staff* [1980] ICJ Rep 3, 20, the Court noted that it should not decline to resolve legal issues comprising aspects of political disputes because ‘it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes’.

<sup>43</sup> *Statute of the International Court of Justice* arts 36, 65 (‘*ICJ Statute*’).

<sup>44</sup> *Border and Transborder Armed Actions* [1988] ICJ Rep 69, 91.

<sup>45</sup> *UN Charter* art 24. *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 163. See, eg, Scott S Evans, ‘The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review, and the Political Question Doctrine’ (1994) 18 *Maryland Journal of International Law and Trade* 21.

<sup>46</sup> *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 155.

<sup>47</sup> *Border and Transborder Armed Actions* [1988] ICJ Rep 69, 91 [52].

<sup>48</sup> *Ibid*.

<sup>49</sup> *ICJ Statute* art 36.

<sup>50</sup> See, eg, *Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgment)* [1994] ICJ Rep 6 (‘*Territorial Dispute*’); *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53 (‘*Arbitral Award*’).

## III THE COURT AND DISPUTE SETTLEMENT IN AFRICA

This section will examine the reasons why African countries were reluctant to embrace the Court even when the majority of them had attained their independence and had become full subjects of international law. This argument is made in light of the fact that it was not until the 1980s that the Court was seized with boundary disputes from the continent.<sup>51</sup> However, this trend flowed from the prevailing reality that before the decolonisation process in the 1960s, the entire continent (save for Ethiopia and Liberia) comprised colonies lacking *locus standi* before the Court: a scenario which made these states objects rather than subjects of international law.<sup>52</sup> During this period, the interaction between the Court and the continent was heavily predicated on the nature of the colonial experience, the history of the continent and the nature of international law itself.<sup>53</sup>

Although independent African countries began to use the Court more frequently following the end of the decolonisation process, several disputes in the continent were dealt with by the Court (or its predecessor, the PCIJ) well before the 1960s.<sup>54</sup> Admittedly, these disputes were distinguishable from the post-colonial disputes submitted before the Court. The earlier disputes addressed issues between colonial powers and were not concerned with issues relating to Africans or their interests.<sup>55</sup> One notable case addressed by the Court during this period was *Oscar Chinn*<sup>56</sup> — a dispute between colonial Britain and Belgium which centred on Mr Chinn, a British trader in Congo, who had suffered loss and damages as a result of measures taken against him by Belgian authorities in Congo contrary to the existing laws of the territory.<sup>57</sup> Another notable case was *Rights of Nationals of the United States of America in Morocco*,<sup>58</sup> which concerned the imposition of import levies on certain products that affected United States citizens trading within Morocco. As stated above, both these cases were between colonial powers and the rights of Africans were not the subject matter of the disputes.

International law, which applies to all states regardless of their specific and distinctive cultures and belief systems, is considered to be universal.<sup>59</sup> The

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<sup>51</sup> *ICJ Statute* art 36. See Ian Brownlie, 'The Peaceful Settlement of International Disputes' (2009) 8 *Chinese Journal of International Law* 267, 277–80. See also Munya, above n 6, 165.

<sup>52</sup> Gbenga Oduntan, 'How International Courts Underdeveloped International Law: Political, Economic and Structural Failings of the International Adjudication in relation to Developing States' (2005) 13 *African Journal of International and Comparative Law* 262, 270–2; Munya, above n 6, 165.

<sup>53</sup> Oduntan, above n 52, 270–2, 309, 313; Munya, above n 6, 165.

<sup>54</sup> Shabtai Rosenne, 'Decolonisation in the International Court of Justice' (1996) 8 *African Journal of International and Comparative Law* 564, 564–5; Munya, above n 6, 165–6.

<sup>55</sup> Munya, above n 6, 166.

<sup>56</sup> (*United Kingdom v Belgium*) (*Judgment*) [1934] PCIJ (ser A/B) No 63.

<sup>57</sup> See Rosenne, 'Decolonisation in the International Court of Justice', above n 54, 564–5.

<sup>58</sup> (*France v United States of America*) (*Judgment*) [1952] ICJ Rep 176.

<sup>59</sup> Antony Anghie, 'The Evolution of International Law: Colonial and Post Colonial Realities' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge, 2008) 35; Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265, 267.

universality claim is premised on the fact that international law as a set of common doctrines regulate relations among all nations.<sup>60</sup> Upon gaining independence, African countries were keen to be integrated into the community of nations. One way of achieving such integration was to recognise that international law should be at the heart of every effort undertaken to realise the dream of independence.<sup>61</sup> This recognition did not counter the traditional understanding of international law which considered colonial subjects, or non-European societies and their practices, as peripheral and inconsequential to the discipline.<sup>62</sup> International law was fully considered to be a creation of Europe and for Europeans.<sup>63</sup> Equally true is the fact that the ‘universalization of international law was principally a consequence of the imperial expansion which took place’<sup>64</sup> and indeed characterised much of the history of Africa. This conception of international law highly influenced Africa’s approach towards international judicial institutions such as the Court, precisely because African states regarded international institutions to be perpetuating the colonial status quo at the expense of African realities and their interests.<sup>65</sup> Several disputes would demonstrate Africa’s uneasy relationship with the Court in the wake of the decolonisation process.<sup>66</sup>

While other organs stipulated within the *UN Charter* such as the UNGA or the UNSC may take measures toward the peaceful settlement of disputes through different mechanisms, such as mediation and reconciliation among others, only the Court is mandated by the *ICJ Statute* to legally adjudicate disputes among states. Specifically art 36(3) of the *UN Charter* provides that:

In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the ICJ in accordance with the provisions of the [*ICJ Statute*].

Similarly, art 36(2) of the *ICJ Statute* states that:

The states parties to the present Statute may at any time declare that they recognise 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:

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<sup>60</sup> Simma, above n 59, 289. See also Arnulf Becker Lorca, ‘Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation’ (2010) 51 *Harvard International Law Journal* 475, 506, 524–5.

<sup>61</sup> See, eg, the objective expressed in *Constitutive Act of the African Union*, signed 11 July 2000, 2158 UNTS 3 (entered into force 26 May 2001) art 3(e).

<sup>62</sup> Munya, above n 6, 166. See generally Lorca, above n 60.

<sup>63</sup> Lorca, above n 60, 476–8.

<sup>64</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 32; Jonathan I Charney, ‘Universal International Law’ (1993) 87 *American Journal of International Law* 529; Anghie, ‘The Evolution of International Law’, above n 59, 36; Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff, 1995) 176–8.

<sup>65</sup> See generally Oduntan, above n 52; Rosenne, ‘Decolonisation in the International Court of Justice’, above n 54.

<sup>66</sup> See generally Munya, above n 6.

- (a) the interpretation of a treaty
- (b) any question of international law
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation
- (d) the nature or extent of reparation to be made for the breach of an international obligation.

To appreciate the role of the Court in dispute settlement in Africa it is essential to examine the historical interaction between Africa and the Court. The first attempt of African countries to make use of the Court was when the newly independent Republic of Cameroon, a former French Colony, brought a case against the UK.<sup>67</sup> To briefly recount the facts, the UK, under the mandate system of the League of Nations, had administered Northern and Southern Cameroon as a part of Nigeria, which was also one of its colonies.<sup>68</sup> Through a referendum conducted under the auspices of the UN, Southern Cameroon decided to join the newly independent Republic of Cameroon, while Northern Cameroon opted to join Nigeria.<sup>69</sup> Unhappy with the results in the Northern Cameroons, the Republic of Cameroon decided to seek the following an opinion from the Court. In its declaratory opinion, the Court stated:

in the application of the *Trusteeship Agreement for the Territory of the Cameroons* under British Administration approved by the General Assembly of the United Nations on 13 December 1946, the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations directly or indirectly flowing from that *Agreement*.<sup>70</sup>

As such, Cameroon wanted the Court ‘to declare the plebiscite ... null and void’ for having failed to meet the standards of the UNGA Resolution.<sup>71</sup>

The Court in upholding the preliminary objection by the UK, refused to adjudicate upon the merits of the case brought by the Republic of Cameroon.<sup>72</sup> While rejecting the claim, the Court noted that ‘[t]he decision of the General Assembly would not be reversed by the judgment of the Court’ or that ‘[t]he former Trust Territory of Northern Cameroons would not be joined to the Republic of Cameroon’.<sup>73</sup> The Court further observed that the amalgamation of Northern Cameroon and the Federation of Nigeria was a *fait accompli* and therefore any judgment which the Court might pronounce would have no

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<sup>67</sup> *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15 (‘*Northern Cameroons*’). See generally Tiyanjana Maluwa, *International Law in Post-Colonial Africa* (Kluwer Law International, 1999) 1–7. See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2007) 116–26.

<sup>68</sup> *Northern Cameroons* [1963] ICJ Rep 15, 21. See also Maluwa, ‘The Peaceful Settlement of Disputes among African States, 1963–1983’, above n 10, 95.

<sup>69</sup> *Northern Cameroons* [1963] ICJ Rep 15, 21.

<sup>70</sup> *Ibid* 17.

<sup>71</sup> *Ibid* 32.

<sup>72</sup> *Ibid* 38.

<sup>73</sup> *Ibid* 33.

effect.<sup>74</sup> In fact, the Court went further to note that its judgment should have some practical consequences to affect legal rights and obligations of the parties: something which could not be attained by ruling on the merits of this case.<sup>75</sup> This ruling had an implication on the attitude of African countries towards the Court. To some of them, the Court was seen as part of the efforts to thwart the right to self-determination by people who had been arbitrarily separated by colonial manoeuvre.<sup>76</sup>

Another opportunity for the Court to settle an African dispute in the early days of their independence arose when Ethiopia and Liberia instituted a claim to challenge the legality of the South African administration in South West Africa (present day Namibia).<sup>77</sup> In this case, the Court was asked to address the following issues:

- (a) whether South West Africa was still a territory under mandate and if so whether the mandatory obligation to furnish annual reports on its administration to the Council of the League had been replaced by an obligation to report to the UNGA;
- (b) whether in keeping with the mandate, the Republic of South Africa had promoted to the utmost material and moral well being and the social progress of the inhabitants of the territory;
- (c) whether the mandatory had, by acts and declarations, violated a number of provisions in the mandate, in particular, following a policy of racial segregation, by establishing military and naval bases and by creating administrative structures which amount to a unilateral modification of the terms of the mandate;
- (d) whether by attempting to modify the mandate without the consent of the UNGA, the legal successor of the Council of the League for this and other purposes, South Africa had violated the provisions in the mandate that the mandate can only be modified with the consent of the Council of the League of Nations.<sup>78</sup>

This case was significant in the sense that two independent African countries were instituting a legal claim against another African imperial power occupying a different African country. Although during the colonial period African countries demanded their independence from western powers, in this case it was African countries attempting to challenge another African country over its illegal occupation of a different African country. The significance of this case can also be seen in the context of the Court's decision and the basis for the decision itself. In a divided vote, with the deciding vote cast by the President, the Court further opined that the legal right or interest in the subject matter of the dispute 'must be

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<sup>74</sup> Ibid 33–5. For a history of this conflict, see Nicodemus F Awasom, 'Colonial Background to the Development of Autonomist Tendencies in Anglophone Cameroon, 1946–1961' (1998) 15 *Journal of Third World Studies* 163. For a history of the Northern Cameroons, see, eg, Victor T Le Vine, *The Cameroons: From Mandate to Independence* (University of California Press, 1964).

<sup>75</sup> *Northern Cameroons* [1963] ICJ Rep 15, 34.

<sup>76</sup> Munya, above n 6.

<sup>77</sup> *South West Africa (Ethiopia v South Africa) (Judgment)* [1966] ICJ Rep 6, 17.

<sup>78</sup> For the specific issues presented to the Court by the parties in their Applications, Memorials and Counter-Memorials, see *ibid* 10–16.

clearly vested in those who claim them, by some text or instrument, or rule of law' and no such right or interests were found to be vested in individual members of the League of Nations.<sup>79</sup> This judgment not only caused consternation among newly independent African countries but it also confirmed their belief that the Court was one of the many tools employed by the West to maintain their hegemony over the nascent states in Africa. Indeed, one African commentator contended that:

There can be little doubt that the *South West Africa* cases have turned the African States from mere alienation to total disenchantment with the International Court [of Justice]. The Court could probably be called by the radical sceptics no less than the moderates, the 'western European Court of Justice,' determined to give legal protection to the colonial and imperial interests of southern Africa.<sup>80</sup>

This decision of the Court can further be attributed to the Cold War politics when the Court was reluctant to involve itself in issues that were relevant to the protection and advancement of human rights such as the right to self-determination.<sup>81</sup> This reluctance can be attributed to the reality that the big power rivalries were keen to advance their interests and not willing to accept the Court's intervention in issues they considered primarily within the purview of their national competences.<sup>82</sup> Furthermore, the fact that most African countries were still under colonial rule potentially inhibited the role of the Court to clearly pronounce itself on such issues because these colonised territories lacked standing to invoke the intervention of the Court.<sup>83</sup> The intervention of the Court could have significantly challenged the role and legitimacy of colonial powers in their colonised territories; hence the reluctance of these powers to submit to the Court's jurisdiction.<sup>84</sup> The composition of the Court also cast doubt on its neutrality and impartiality because while it purported to serve as an international dispute settlement institution, the Court was not representative of all regions of the world: a state of affairs that changed in the early 1970s.<sup>85</sup>

Despite this difficult interaction between the Court and the continent, two things significantly changed the African perspective of the Court from one of an imperialist agent to that of a universal institution spearheading global justice. This argument is well demonstrated in the two subsequent decisions of the Court relating to the question of decolonisation and self-determination, issues which

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<sup>79</sup> Ibid 17.

<sup>80</sup> Felix C Okoye, *International Law and the New African States* (Sweet & Maxwell, 1972) 203.

<sup>81</sup> Oduntan, above n 52, 270–2. See also Edward McWhinney, *Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (Martinus Nijhoff, 1999) 16–23.

<sup>82</sup> Munya, above n 6, 175–6.

<sup>83</sup> Ibid.

<sup>84</sup> Shabtai Rosenne, 'The Cold War and the International Court of Justice: A Review Essay of Stephen M Schwebel's *Justice in International Law*' (1995) 35 *Virginia Journal of International Law* 669, 674–80.

<sup>85</sup> See generally Edward McWhinney, 'The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy' (2006) 5 *Chinese Journal of International Law* 3, 10–12.

were of practical importance to African countries.<sup>86</sup> The first case which contributed towards a positive interaction between the Court and the continent was the South African occupation over Namibia.<sup>87</sup> Despite the determination by the UNGA of the mandate of South Africa through *Resolution 2145 (XXI)* for the failure to ‘fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa [in 1966]’, South Africa had defied UNGA *Resolution 2145 (XXI)* and continued its occupation of the territory.<sup>88</sup> With *Resolution 284*, the UNSC decided to seek an Advisory Opinion from the Court on the following question: ‘[w]hat are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding UNSC *Resolution 276 (1970)*?’<sup>89</sup>

After addressing the preliminary objections of South Africa, the Court went forward to rule on the merits of this question. It stated that the UNGA, through *Resolution 2145 (XXI)* had repudiated the mandate of South Africa in the territory of South West Africa.<sup>90</sup> It further noted that the Government policy of apartheid, which constituted a denial of fundamental human rights, was a flagrant violation of the purposes and principles of the *UN Charter*. More importantly, the Court went on to state that the presence of South Africa in Namibia was illegal and the country was under a legal obligation to withdraw its administration.<sup>91</sup> It further compelled the member states of the UN

to recognize the illegality of South Africa’s presence in Namibia ... and to refrain from any acts ... [or] dealings with the Government of South Africa, implying recognition of the legality, of or lending support or assistance to, such presence or administration.<sup>92</sup>

Through *Resolution 2871*, the UNGA — which by then had a significant number of African representatives — unanimously accepted the Court’s Advisory Opinion.<sup>93</sup> African countries were pleased with this ruling, and generally considered it as evidence that the Court recognised the importance of issues which mattered to them: in particular, decolonisation and self-determination.<sup>94</sup> The implication of this ruling was immense precisely

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<sup>86</sup> See generally Samuel K N Blay, ‘Changing African Perspectives on the Right of Self-Determination in the Wake of the *Banjul Charter on Human and Peoples’ Rights*’ (1985) 29 *Journal of African Law* 147, 149–50. See also Bruno Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’ (2012) 3 *Journal of International Dispute Settlement* 1.

<sup>87</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 (‘*Namibia*’).

<sup>88</sup> GA Res 2145 (XXI), UN GAOR, 21<sup>st</sup> sess, 1454<sup>th</sup> plen mtg, Agenda Item 65, UN Doc A/RES/2145(XXI) (27 October 1966) para 3; McWhinney, above n 85, 11.

<sup>89</sup> SC Res 284/1970, UN SCOR, 21<sup>st</sup> sess, 1550<sup>th</sup> mtg, UN Doc S/RES/284 (29 July 1970) para 1.

<sup>90</sup> *Legal Consequences for States* [1971] ICJ Rep 16, 47.

<sup>91</sup> *Ibid* 58.

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

<sup>93</sup> GA Res 2871 (XXVI), UN GAOR, 4<sup>th</sup> Comm, 26<sup>th</sup> sess, 2028<sup>th</sup> plen mtg, Agenda Item 66, UN Doc A/RES/2871(XXVI) (20 December 1971) para 3.

<sup>94</sup> Munya, above n 6, 185–6.

because it reaffirmed the important role of the decolonisation process long championed by African countries.<sup>95</sup>

Another case concerning the question of self-determination was *Western Sahara (Advisory Opinion)*.<sup>96</sup> With Morocco firmly laying a territorial claim on Western Sahara, after Spain and Mauritania acquiesced and supported the claim to the right of the Sahrawi people to self-determination, the UNGA called upon the Court to give an Advisory Opinion on the matter.<sup>97</sup> It is important to note that shortly before the decision to seek this Advisory Opinion,<sup>98</sup> the international community adopted two landmark covenants on human rights which collectively reaffirmed the primacy of the right to self-determination. As such, the claim of the right to self-determination was considered not only as a principle recognised by the *UN Charter* but also as a fully-fledged right contained in both human rights covenants: the *International Covenant on Civil and Political Rights*<sup>99</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>100</sup> The major questions the Court was asked to determine were:

I Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

If the answer to the first question is in the negative,

II What were the legal ties between this territory and the Kingdom of Morocco and Mauritanian entity?<sup>101</sup>

At the outset it would be useful to understand the historical background of this claim. The Western Sahara dispute constitutes one of the most divisive issues relating to the right to self-determination within African states. Morocco continues to claim sovereignty over the area, while Mauritania previously claimed sovereignty over it.<sup>102</sup> Morocco's claim to Western Sahara is based on 'geographical, historical and ethno-cultural ties' while the claim of Mauritania was based on ethnic, cultural, linguistic and economic ties and the need to reunify its people.<sup>103</sup> Mauritania has since abandoned its claim over the territory and fully supports the claim to the right of self-determination by the Sahrawi

<sup>95</sup> Ibid 221–2.

<sup>96</sup> [1975] ICJ Rep 12, 14.

<sup>97</sup> José I A Cuervo, 'The Ancient History of Western Sahara and the Spanish Colonisation of the Territory' in Karin Arts and Pedro P Leite (eds), *International Law and the Question of the Western Sahara* (International Platform of Jurists for East Timor, 2006) 25, 28.

<sup>98</sup> GA Res 3292 (XXIX), UN GAOR, 4<sup>th</sup> Comm, 29<sup>th</sup> sess, 2318<sup>th</sup> plen mtg, Agenda Item 23, UN Doc A/RES/3292(XXIX) para 1 ('Resolution 3292');

<sup>99</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1(1) ('ICCPR').

<sup>100</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1(1); *Western Sahara* [1975] ICJ Rep 12, 31; *UN Charter* art 1 para 2.

<sup>101</sup> *Resolution 3292*, UN Doc A/RES/3292(XXIX), para 1.

<sup>102</sup> For a history of the conflict, see Sidi M Omar, 'The Position of the Frente Polisari' in Karin Arts and Pedro P Leite (eds), *International Law and the Question of the Western Sahara* (International Platform of Jurists for East Timor, 2006) 37, 41.

<sup>103</sup> Gebre H Tesfagiorgis, 'Self-Determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea' (1987) 6 *Wisconsin International Law Journal* 75, 97. For an historical account of this conflict, see Thomas M Franck, 'The Stealing of the Sahara' (1976) 70 *American Journal of International Law* 694, 694–6. See also Karin Arts and Pedro P Leite (eds), *International Law and the Question of the Western Sahara* (International Platform of Jurists for East Timor, 2007) ch 1.

people.<sup>104</sup> Morocco has maintained its claim to the territory of Sahara despite the long established view in international law that ‘boundary readjustments must come as an expression of the democratically expressed will of those subject to the readjustment’.<sup>105</sup> Western Sahara was denied its right to a referendum on independence during the decolonisation process of the 1960s despite repeated attempts by the UN to persuade Spain, and later Morocco, to implement several UNGA resolutions: compliance would have required those occupying powers relinquish their territorial claims and grant independence to their colonial territories.<sup>106</sup> Despite the international pressure, Spain maintained ‘that its African territories as provinces of the metropolitan Spain were not subject to self-determination’, while Morocco argued that Western Sahara was part of its legitimate territory.<sup>107</sup>

In its Advisory Opinion the Court stated that the evidence ‘does not establish any tie of territorial sovereignty between Western Sahara [and Morocco]’ and did not display Morocco’s ‘effective and exclusive State activity in Western Sahara’.<sup>108</sup> Against this background the Court recognised the inherent right of the Sahrawi people to self-determination and called for an immediate referendum in Western Sahara.<sup>109</sup> As Lloyd points out, the Court ‘has affirmed that for a right to be exhausted, it must be more than simply offered, it must be exercised’.<sup>110</sup> Despite the fact that the decision was rendered more than 40 years ago, Western Sahara has, tragically, never been allowed to exercise that right.<sup>111</sup> The issue of Western Sahara was considered in light of foreign domination and many African countries supported the right to self-determination of the Sahrawi people on the basis of solidarity among third world countries.<sup>112</sup>

It can be convincingly argued that these two decisions strongly helped to enhance the role and credibility of the Court as an impartial arbiter keen to make the African states full subjects of international law with the same rights and entitlements as other members of the international community.<sup>113</sup> In both Advisory Opinions, the Court was called upon to make judicial pronouncements

<sup>104</sup> See generally Lauri Hannikainen, ‘The Case of *Western Sahara* from the Perspective of *Jus Cogens*’ in Karin Arts and Pedro P Leite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor, 2007) 59, 67.

<sup>105</sup> Franck, above n 103, 697–8. For a discussion of Morocco’s claim on Western Sahara and Ethiopia’s claim on Eritrea, see, eg, Tesfagiorgis, above n 103, 119–20. For a discussion of Nigeria’s claim on Cameroon, see, eg, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275.

<sup>106</sup> Franck, above n 103, 701–9. See, eg, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15<sup>th</sup> sess, 947<sup>th</sup> plen mtg, Agenda Item 87, UN Doc A/RES/1514 (XV) (14 December 1960) para 4. See also *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73E of the Charter*, GA Res 1541 (XV), UN GAOR, 4<sup>th</sup> Comm, 15<sup>th</sup> sess, 948<sup>th</sup> plen mtg, Agenda Item 38, UN Doc A/RES/1541(XV) (15 December 1960) annex I; *UN Charter* art 73 para (e).

<sup>107</sup> Franck, above n 103, 701; Tesfagiorgis, above n 103, 97.

<sup>108</sup> *Western Sahara* [1975] ICJ Rep 12, 49.

<sup>109</sup> See generally Franck, above n 103, 709–11; *Western Sahara* [1975] ICJ Rep 12, 36–7; Angela Lloyd, ‘The Southern Sudan: A Compelling Case for Secession’ (1995) 32 *Columbia Journal of Transnational Law* 419, 436.

<sup>110</sup> Lloyd, above n 109, 437 (emphasis in original).

<sup>111</sup> *Ibid.*

<sup>112</sup> Franck, above n 103, 697–8. See generally Lloyd, above n 109, 435–9.

<sup>113</sup> *Namibia* [1971] ICJ Rep 16; *Western Sahara* [1975] ICJ Rep 12.

on situations involving a clash between the aspirations of the indigenous people of a territory and those of the occupying state; albeit both occupying powers being African countries.<sup>114</sup> These Advisory Opinions also helped reaffirm the role of the Court as a universal institution representing the plural legal systems of the world. It is these events which greatly influenced the positive attitude of African countries towards the Court.<sup>115</sup> Furthermore, the decision of the African countries to seek the intervention of the Court can also be attributed to the decision of the UNGA to widen the composition of the bench in order to reflect the realities of global diversity and variety of legal systems. The following Part will examine the role of the Court in the peaceful settlement of specific territorial disputes brought before the Court.

#### IV THE CONTRIBUTION OF THE COURT IN TERRITORIAL DISPUTES IN AFRICA

Determining the precise contribution of the Court to the peaceful settlement of disputes among African states necessitates an examination of specific disputes resolved by the Court. Given that referring a dispute to the Court is a voluntary act of the disputing states, and solely binding upon the states themselves, the Court's contribution also arguably demonstrates the confidence and mutual trust which states have placed in the impartiality and fairness of the Court. Below we consider some of the cases that have been submitted to the Court.

##### A Continental Shelf (Tunisia v Libyan Arab Jamahiriya)<sup>116</sup>

Tunisia granted the first petroleum concession on the continental shelf at the beginning of the 1960s.<sup>117</sup> In 1968, Libya began a similar process of granting concessions which abutted the grid system created by the Tunisian grants.<sup>118</sup> Both parties' continental shelf claims were far more extensive than the areas which were subject to the concessions.<sup>119</sup> The parties could not reach an agreement following negotiations, and this led to formal protest by both countries.<sup>120</sup> Diplomatic efforts led to the negotiations and the signing of a special agreement in 1977.<sup>121</sup>

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<sup>114</sup> See generally *Namibia* [1971] ICJ Rep 16; *Western Sahara* [1975] ICJ Rep 12.

<sup>115</sup> See generally Munya, above n 6.

<sup>116</sup> (*Judgment*) [1982] ICJ Rep 18 ('*Continental Shelf*').

<sup>117</sup> *Ibid* 35.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid*.

<sup>121</sup> 'Special Agreement between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya', *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* [1982] I ICJ Pleadings 21.

By this agreement the Court was asked to determine

[w]hat principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and to the area of the continental shelf appertaining to the Republic of Tunisia, and the court shall take its decision according to equitable principles, and the relevant circumstances which characterize the area as well as the new accepted trend in the Third United Nations Conference on the Law of the Sea.<sup>122</sup>

The Court was additionally asked to specify the practical mechanism by which the aforesaid principles and rules applied in this particular situation to enable experts of both parties to delimit the contested areas.<sup>123</sup>

In its decision the Court stated that

[t]he result of the application of equitable principles must be equitable ... The equitableness of a principle must be assessed in light of its usefulness for the purposes of arriving at equitable result ... From this consideration it follows that the term 'equitable principles' cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.<sup>124</sup>

The significant element of this decision was the willingness of the Court to agree with both parties that the case be decided on the basis of equitable principles, in order to achieve an equitable solution which would enhance cooperation between the parties.

The decision of the Court was also significant in other respects. It helped clarify particular aspects of the law, especially regarding questions of equitable principles and natural prolongation.<sup>125</sup> The Court noted three aspects of the law of continental shelf in which natural prolongation may be an essential element.

These elements include:

- (a) forming the basis of a legal claim to the shelf;
- (b) defining the seaward limit of the continental shelf;
- (c) delimiting the continental shelf between the adjacent or opposite states.<sup>126</sup>

The Court further noted that natural prolongation is a physical fact and not a legal concept that includes consideration of historic rights or equitable principles in identifying its limits.<sup>127</sup> Of further significance was the willingness of both countries to entrust the determination of the case to the Court. Not only did this avoid a potential diplomatic row or a fully-fledged conflict between Libya and Tunisia, it also cemented the friendly relations between the parties and hence avoided any potential conflict premised on natural resources.

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<sup>122</sup> Ibid 23.

<sup>123</sup> Ibid.

<sup>124</sup> *Continental Shelf* [1982] ICJ Rep 18, 59 [70].

<sup>125</sup> Ibid 59–60 [70]–[72].

<sup>126</sup> Ibid 58–9 [67]–[69], 68 [90].

<sup>127</sup> Ibid 58.

## B Continental Shelf (Libyan Arab Jamahiriya v Malta)<sup>128</sup>

The dispute between Libya and the Republic of Malta was submitted to the Court by way of special agreement concluded by the parties in July 1982.<sup>129</sup> In this dispute the Court was asked to decide

what principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Libyan Arab Republic and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such area by an agreement as provided for in Article III.<sup>130</sup>

Article III provided that:

Following the final decision of the International Court of Justice the Government of the Republic of Malta and the Government of the Libyan Arab Republic shall enter into negotiations for determining the area of their respective continental shelves and for concluding an agreement for that purpose in accordance with the decision of the Court.<sup>131</sup>

Despite their differences, both parties agreed that the delimitation should be effected in accordance with equitable principles, taking into account relevant circumstances in order to achieve equitable results for both parties.<sup>132</sup> Libya contended that the rift zone separating the seabed and the subsoil divided the continental shelf into two distinct natural prolongations.<sup>133</sup> Libya claimed that it was entitled to the area of the continental shelf north of the Libyan landmass and that Malta was entitled to the area south of Malta.<sup>134</sup> Regarding Malta's request that the Court apply the equidistance method, Libya argued that the application of this method would result in an inequitable outcome.<sup>135</sup> Malta stated that in 1965 it had informed Libya of its intention to delimit its continental shelf by means of a median line, but until Libya made a counter proposal in 1973, Libya remained silent in the face of Malta's claim to such delimitation.<sup>136</sup> Malta further contended that this conduct could be viewed

either as a cogent reflection of the equitable character of Malta's position or as evidence of acquiescence by Libya in Malta's position or as precluding Libya in law as in fact from challenging the validity of Malta's position.<sup>137</sup>

Malta also cited economic and security factors to support its arguments, contending that it was a small developing state devoid of energy resources in the mainland.<sup>138</sup>

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<sup>128</sup> (*Judgment*) [1985] ICJ Rep 13 [1] ('*Libyan Arab Jamahiriya v Malta Case*').

<sup>129</sup> *Ibid.*

<sup>130</sup> 'Special Agreement', *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] 1 ICJ Pleadings 3.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Libyan Arab Jamahiriya v Malta Case* [1985] ICJ Rep 13, 18–19 [11]–[12].

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid* 18 [11].

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid* 28–9 [24].

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* 41 [50].

Responding to the contentions of the parties, the Court opined that its primary duty was to lay down the principles and rules of international law which should enable the parties to effect a delimitation of the areas of the continental shelf between them in accordance with equitable principles so as to achieve equitable results.<sup>139</sup> The Court rejected Malta's economic and security imperative observing that rules governing continental shelf delimitation do not leave room for considerations of the economic development of the states concerned.<sup>140</sup> The Court went on to state that such considerations are totally unrelated to the underlying intention of the rules of international law.<sup>141</sup> Indeed, while rejecting this claim the Court opined that:

The principle that although all States are equal before the law and are entitled to equal treatment, 'equity does not necessarily imply equality'<sup>142</sup> nor does it seek to make equal what nature has made unequal.<sup>143</sup>

### C Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)<sup>144</sup>

This case concerned the maritime dispute between Senegal and Guinea-Bissau. The major issue in this dispute was the validity of the arbitral award delivered in July 1989 by the Arbitration Tribunal for the Determination of the Maritime Boundary, established within the framework of the 1985 arbitration agreement between Senegal and Guinea-Bissau.<sup>145</sup> At some point in April 1960 an agreement ('*1960 Agreement*') was signed between France and Portugal for the purpose of defining the maritime boundary between the Republic of Senegal (a French territory) and Guinea-Bissau (a Portuguese territory).<sup>146</sup> Through the *1960 Agreement* the parties duly established the maritime boundary between their respective territories.<sup>147</sup>

After independence, a dispute between the two countries arose regarding the delimitation of their colonial boundaries. Beginning in 1977, Senegal and Guinea-Bissau embarked on diplomatic negotiations to defuse the dispute. In these negotiations, Senegal sought to reaffirm the validity of the 1960 boundaries, while Guinea-Bissau rejected them and called for a fresh delimitation without reference to the *1960 Agreement*.<sup>148</sup> Both parties, '[r]ecognizing that they have been unable to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary', decided to refer the matter to the Tribunal.<sup>149</sup> The Tribunal consisted of three

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<sup>139</sup> Ibid 55 [76].

<sup>140</sup> Ibid 41 [50].

<sup>141</sup> Ibid.

<sup>142</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 49 [91].

<sup>143</sup> *Libyan Arab Jamahiriya v Malta Case* [1985] ICJ Rep 13, 30–1 [46].

<sup>144</sup> (*Judgment*) [1991] ICJ Rep 53.

<sup>145</sup> Ibid 55 [1].

<sup>146</sup> For details of the *1960 Agreement*, see *ibid* 57 [12].

<sup>147</sup> Ibid.

<sup>148</sup> Ibid. See generally Munya, above n 6, 210–11.

<sup>149</sup> *Arbitral Award* [1991] ICJ Rep 53, 57–9 [14].

members: Mr Mohammed Bedjaoui, Mr Andre Gros and Mr Julio A Barberis.<sup>150</sup> Mr Barberis also served as the President of the Tribunal.<sup>151</sup>

The Tribunal was requested to address the following questions:

- 1 Does the *Agreement* concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
- 2 In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?<sup>152</sup>

On procedural matters, the Tribunal was requested to give a unanimous decision, and to draw a boundary line on the map by appointing experts to assist with the preparation of the map.<sup>153</sup> The Tribunal was also bound to give reasons for its decision.<sup>154</sup>

The Tribunal held that the *1960 Agreement* between France and Portugal was valid, noting that:

The *1960 Agreement* does not delimit those maritime spaces which did not exist at that date, whether they be termed exclusive economic zone, fishery zone or whatever ... [but that] the territorial sea, the contiguous zone and the continental shelf ... are expressly mentioned in the *1960 Agreement* and they existed at the time of its conclusion.<sup>155</sup>

In responding to the question brought before it, the Tribunal observed:

The *Agreement* concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that *Agreement*, namely the territorial sea, the contiguous zone and the continental shelf.<sup>156</sup>

In his declaration which was appended to the judgment, the President of the Tribunal, Mr Barberis, stated that the *1960 Agreement* had the force of law between the Republic of Guinea-Bissau and Republic of Senegal with respect to the territorial sea, the contiguous zone and continental shelf.<sup>157</sup> However, he observed that it did not have the force of law between the parties with respect to the waters of the exclusive economic zone or the fishery zone.<sup>158</sup>

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid 59 [15].

<sup>152</sup> See art 2 of the *1960 Agreement* reproduced in ibid 58.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> 'Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau', *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1989] ICJ Pleadings 1.

<sup>156</sup> Ibid 152–3 [88] (Mr Barberis).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

In his dissenting opinion, Mr Bedjaoui, in reference to the declaration by Mr Barberis, observed that

[t]he declaration by the President of the Tribunal shows to what an extent the Award is incomplete and inconsistent with the letter and spirit of the Arbitration *Agreement* with regard to the single line desired by the Parties. Since it emanates from the President of the Tribunal himself, that Declaration, by its very existence as well as by its contents, justifies more fundamental doubts as to the existence of a majority and the reality of the Award.<sup>159</sup>

The decision of the Tribunal was contested by the Republic of Guinea-Bissau which attempted to rely on the declaration by the President of the Tribunal to question the validity of the award itself.<sup>160</sup> Indeed, it was because of the rejection of the decision by Guinea-Bissau that the parties decided to refer the matter to the Court.<sup>161</sup>

Guinea-Bissau in its application contended that the award was non-existent because it was not supported by a majority of members of the Tribunal.<sup>162</sup> The Court rejected the arguments of Guinea-Bissau observing that what the President of the Tribunal had in mind was the need for the Tribunal to have been more precise in its answers.<sup>163</sup> The Court further observed that even if there had been any contradiction between the view expressed by President Barberis, such contradiction could not prevail over the position which President Barberis had taken when voting for the award.<sup>164</sup> The Court stated that '[i]n agreeing to the award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the *1960 Agreement*'.<sup>165</sup>

The Court further observed that the arbitral award of 31 July 1989 was binding on both parties. While the Court acknowledged 'that the Award has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal',<sup>166</sup> it noted the willingness of Senegal to negotiate with Guinea-Bissau a boundary for the exclusive economic zone.<sup>167</sup> Based on this observation, the Court advised the parties to refer the matter again to the Court in the event that they fail to negotiate an amicable and acceptable solution to the dispute.<sup>168</sup> The significance of this decision lies not only in the reluctance of the Court to set aside the award of the Tribunal but also the willingness of the Court to recognise peaceful settlement of this dispute through negotiations between the parties.

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<sup>159</sup> Ibid 208 [161] (Mr Bedjaoui).

<sup>160</sup> Ibid 9–10 [10].

<sup>161</sup> *Arbitral Award* [1991] ICJ Rep 53, 61 [21].

<sup>162</sup> Ibid.

<sup>163</sup> Ibid 63–4 [30]–[31].

<sup>164</sup> Ibid 64–5 [33].

<sup>165</sup> Ibid.

<sup>166</sup> Ibid 74 [66].

<sup>167</sup> Ibid 74–5 [67].

<sup>168</sup> Ibid 75 [68].

D Frontier Dispute (Burkina Faso v Republic of Mali)<sup>169</sup>

Burkina Faso and Mali were formerly a part of what was called French West Africa.<sup>170</sup> The dispute centred on ownership of a 100 mile strip of land (commonly known as the Agacher Strip) between the two countries — an area reportedly rich in mineral resources. While the Organization of African Unity ('OAU') and other individual African countries had tried to mediate, their efforts had failed to resolve the dispute.<sup>171</sup> In September 1983, by special agreement, both parties decided to refer the matter to the Court.<sup>172</sup> Burkina Faso's claim to the area was grounded upon the frontier delimited by the French colonial administration and the principle of *uti possidetis*, which connotes that frontiers inherited from colonial powers cannot be altered without the voluntary consent of the parties.<sup>173</sup> To prove its claim it relied on old colonial maps, which it considered to be authentic.<sup>174</sup>

Mali challenged the assertion of Burkina Faso, contending that the disputed area had historically and geographically formed part of what was French Sudan. Mali also rejected Burkina Faso's reliance colonial maps, arguing that such maps were contradictory and largely conflicted with existing legal documents. It further contended that most of the inhabitants of the area were ethnically Malian contrary to the assertion of Burkina Faso.<sup>175</sup> The Court was requested to answer the following question:

What is the line of frontier between the Republic of Upper Volta and the Republic of Mali in the disputed area as defined [by the parties]? The disputed area consists of a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of Beli.<sup>176</sup>

A significant aspect of this dispute from the start was the commitment made by the parties to be bound by the decision of the Court and to demarcate the frontier within one year of the judgment being rendered.<sup>177</sup>

The Court made a useful distinction between the determination of a land boundary and the delimitation of the continental shelf.<sup>178</sup> This distinction was crucial because in the case of the continental shelf, if it affected the interests of third parties, the Court could decline jurisdiction over the matter.<sup>179</sup> After examining the evidence submitted by the parties, the Court noted that the maps 'cannot in themselves alone be treated as evidence of a frontier'.<sup>180</sup> Rather, they

<sup>169</sup> (*Judgment*) [1986] ICJ Rep 554 ('*Frontier Dispute*').

<sup>170</sup> For a historical overview of this case, see Gino Naldi, '*Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali): Uti Possidetis in an African Perspective*' (1987) 36 *International and Comparative Law Quarterly* 893, 893.

<sup>171</sup> *Ibid* 894.

<sup>172</sup> *Frontier Dispute* [1986] ICJ Rep 554.

<sup>173</sup> Naldi, '*Frontier Dispute*', above n 170, 894.

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid*.

<sup>176</sup> Reproduced in *Frontier Dispute* [1986] ICJ Rep 554, 557–8 [2].

<sup>177</sup> *Ibid*. See also Naldi, '*Frontier Dispute*', above n 170, 894.

<sup>178</sup> *Frontier Dispute* [1986] ICJ Rep 554, 578 [47].

<sup>179</sup> Dapo Akande, 'The Role of the International Court of Justice in the Maintenance of International Peace' (1996) 8 *African Journal of International and Comparative Law* 592, 595.

<sup>180</sup> *Frontier Dispute* [1986] ICJ Rep 554, 583 [56].

are generally extrinsic evidence of varying reliability, which might be used with other evidence of a circumstantial nature to establish the facts in question.<sup>181</sup> After an in-depth examination of the evidence, the Court proceeded to fix a frontier line by drawing a series of straight lines from the western end to Niger's frontier, which was to be demarcated by the parties.<sup>182</sup> As to whether the Court could have applied a French law which was in force during the period, the Court observed that 'becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power' as part of the ordinary operation of the machinery of state succession.<sup>183</sup> It further observed that the principle of *uti possidetis* freezes the territorial title. As such, French colonial law may play the role only as one factual element among others or as evidence indicative of what has been called the 'colonial heritage'.<sup>184</sup>

What is significant in this case is that in determining the matter, the Court relied on the principle of *uti possidetis* and proceeded to delimit the line between Mali and Burkina Faso.<sup>185</sup> As it was an express request by the parties that the Court resolve their dispute on the basis of *uti possidetis*, the Court invoked and relied on the principle of *uti possidetis*.<sup>186</sup> On the importance of this principle, the Court observed that '[i]ts obvious purpose is to prevent 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'.<sup>187</sup>

Indeed, the Court further observed that the *Charter of the Organization of African Unity* ('OAU Charter') made indirect reference to the principle of *uti possidetis*.<sup>188</sup> Commenting on this commitment of the OAU member states to the principle of *uti possidetis*, the Court noted that the affirmation of this principle by African statesmen or by organs of the OAU are not attempts to introduce a new principle or extend a rule previously applied in another continent to Africa. The Court stated that these affirmations are declaratory rather than constitutive as they recognise and confirm an existing principle.<sup>189</sup> The Court also observed that the obligation to respect pre-existing international frontiers in the event of

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181 Ibid.

182 Ibid.

183 *Frontier Dispute* [1986] ICJ Rep 554, 568 [30].

184 Naldi, '*Frontier Dispute*', above n 170, 895.

185 *Frontier Dispute* [1986] ICJ Rep 554, 565 [20].

186 Ibid. For a discussion of this principle, see generally Malcolm N Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 *British Yearbook of International Law* 75; Malcolm N Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford University Press, 1986); Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's University Press, 2002). See also Tomas Bartos, '*Uti Possidetis — Quo Vadis?*' (1997) 18 *Australian Year Book of International Law* 37; Emile Yakpo, 'The African Concept of *Uti Possidetis* — Need for Change?' in Emile Yakpo and Tahar Boumedra (eds), *Liber Amicorum: Judge Mohammed Bedjaoui* (Kluwer Law International, 1999) 271; Constantine Antonopoulos, 'The Principle of *Uti Possidetis Juris* in Contemporary International Law' (1996) 49 *Revue Hellenique de Droit International* 29; Steven R Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 *American Journal of International Law* 590.

187 *Frontier Dispute* [1986] ICJ Rep 554, 565 [20].

188 Ibid 565–6 [22].

189 Ibid 566 [24].

state succession derives from a general rule of international law whether or not it is grounded in the principle of *uti possidetis*.<sup>190</sup>

The Court made a further observation on the impact of the principle of *uti possidetis* on the right to self-determination:

At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of people.<sup>191</sup>

It can be argued that the Court agreed with the parties on the application of the principle of *uti possidetis* as a way of reaffirming the sanctity of colonial boundaries as a mechanism to maintain peaceful relations among African nations by eliminating the possibility of irredentist claims based on previous colonial administrations.<sup>192</sup>

However, what should be noted is that the implication of self-determination may transcend colonial borders. If the right to self-determination were to take effect solely within defined colonial boundaries, no clash with the principle of *uti possidetis* would occur because both principles would be mutually compatible.<sup>193</sup> Indeed while the 'inalienable right to self-determination' is guaranteed under the *UN Charter* and a plethora of international human rights instruments, the principle of *uti possidetis* is not expressly mentioned. Rather, it is reflected in various instruments adopted by African countries, such as the *Cairo Resolutions*.<sup>194</sup> After the delivery of the final judgment by the Court, the heads of state of both countries wrote to the President of the Court accepting the judgment, thanking the Court for its work, and reaffirming their willingness to implement the decision of the Court in its entirety.<sup>195</sup>

#### E Territorial Dispute (Libya Arab Jamahiriya v Chad)<sup>196</sup>

This dispute concerned a title to a region of about 530 000 square kilometres along the Aouzou Strip comprising the entire frontier between the two states.<sup>197</sup> The origin of the dispute can be attributed to the decision of France, as a colonial regime over Chad, to enter into an agreement with Libya in 1955 recognising the

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<sup>190</sup> Ibid.

<sup>191</sup> Ibid 566–7 [25].

<sup>192</sup> Ibid 566 [24].

<sup>193</sup> Ibid 566–7 [25]–[26].

<sup>194</sup> *Resolutions Adopted by the First Ordinary Session of the Assembly of the Heads of State and Government Held in Cairo*, 1<sup>st</sup> sess, OAU Docs AHG/Res.1(1)–AHG/Res.24(1) (17–21 July 1964) (collectively, '*Cairo Resolutions*'). See also Naldi, '*Frontier Dispute*', above n 170, 900.

<sup>195</sup> *Frontier Dispute* [1986] ICJ Rep 554, 649 [178].

<sup>196</sup> (*Judgment*) [1994] ICJ Rep 6.

<sup>197</sup> Ibid 10 [3]; Munya, above n 6, 218.

border between Libya and the French colony of Chad.<sup>198</sup> Although Chad gained its independence in 1960, Libya did not dispute the demarcated border until 1973 when it brought a fresh claim repudiating its agreement with France concluded in 1955.<sup>199</sup> Different attempts were made by both the OAU and France to mediate the conflict but in vain.<sup>200</sup> After failed negotiations between the parties, in 1973 the dispute led to war and Libya forcibly annexed and occupied the area.<sup>201</sup> This action by Libya led to the breakdown of the diplomatic relations between the two countries. After the resumption of diplomatic relations between the two in October 1988, both states agreed to resolve the dispute by peaceful means in accordance with the *UN Charter* and the *OAU Charter*. Consequently in 1989, the two countries signed a framework agreement on the peaceful settlement of the territorial dispute between the two countries. Through this, the parties committed to settle the dispute through all political means, within a period of one year.<sup>202</sup>

The question put before the Court was framed differently by the parties. Libya wanted the Court to decide upon the limits of their respective territories in accordance with the rules of international law applicable in the matter while taking into account the territorial dispute between the parties.<sup>203</sup> Chad wanted the Court to determine the course of the frontier between them in accordance with the principles and rules of international law applicable in the matter between the parties.<sup>204</sup> In other words, while Libya proceeded on the basis that there was no boundary between the two and wanted the Court to determine one, Chad proceeded on the basis that the boundary existed but wanted the Court to locate it.<sup>205</sup>

Libya based its claim on ‘a coalescence of rights and titles: those of the indigenous inhabitants ... and those of a succession of sovereign States’,<sup>206</sup> while Chad based its claim on the *Treaty of Friendship and Good-Neighbourliness* (*‘Friendship Treaty’*)<sup>207</sup> concluded by the French Republic and the United Kingdom of Libya in August 1955. In determining the matter the Court observed that the *Friendship Treaty* created and determined the location of the frontier between the parties.<sup>208</sup> The Court went further to observe that no treaty or agreement between Chad, Libya or France ever questioned the

<sup>198</sup> Munya, above n 6, 218–19.

<sup>199</sup> Ibid. See also Gino Naldi, ‘Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)’ (1995) 44 *International and Comparative Law Quarterly* 683. See also Mathews M Ricciardi, ‘Title to the Aouzou Strip: A Legal and Historical Analysis’ (1992) 17 *Yale Journal of International Law* 301, 369.

<sup>200</sup> *Territorial Dispute* [1994] ICJ Rep 6, 10 [3].

<sup>201</sup> Munya, above n 6, 218. See also Naldi, ‘*Territorial Dispute*’, above n 199, 683; Ricciardi, above n 199, 369.

<sup>202</sup> *Territorial Dispute* [1994] ICJ Rep 6, 9–10 [2].

<sup>203</sup> Ibid 12–14 [17].

<sup>204</sup> Ibid.

<sup>205</sup> On the role of Organization of African Unity in the Libya–Chad conflict, see William Zartman, ‘Mediation by Regional Organizations: The OAU in Chad and Congo’ in Jacob Bercovitch (ed), *Studies in International Mediation: Essays in Honor of Jeffrey Z Rubin* (Palgrave Macmillan, 2002) 80, 84–8.

<sup>206</sup> *Territorial Dispute* [1994] ICJ Rep 6, 15 [21].

<sup>207</sup> *Treaty of Friendship and Good-Neighbourliness*, France–United Kingdom of Libya, signed 10 August 1955, 1596 UNTS 264 (*‘Friendship Treaty’*). See also Munya, above n 6, 219.

<sup>208</sup> *Territorial Dispute* [1994] ICJ Rep 6, 22 [43], 26 [57].

authenticity of the frontier between the two countries.<sup>209</sup> Rather, subsequent treaties accepted and acted upon the existence of this frontier.<sup>210</sup> While awarding the disputed territory to Chad, the Court reaffirmed that the *Friendship Treaty* concluded between France and Libya in 1955 was valid and was the basis for the border demarcation between them.<sup>211</sup> Indeed, the Court noted art 2 of another agreement concluded in 1974<sup>212</sup> between the parties reaffirmed that ‘frontiers between the two countries are a colonial conception in which the two peoples and nations had no hand, and this matter should not obstruct their co-operation and fraternal relations’.<sup>213</sup>

The Court also had to decide whether the parties could terminate the treaty after 20 years (as stipulated by the *Friendship Treaty*, provided that one year notice is given).<sup>214</sup> The Court held that termination was not possible. Making reference to its previous decision in the case of *Temple of Preah Vihear*, the Court observed that once a boundary is established it has ‘a legal life of its own, independent of the [*Friendship Treaty*]’.<sup>215</sup> The Court further noted that any other approach would ‘vitiate the fundamental principle of the stability of boundaries’.<sup>216</sup> A boundary established by a treaty achieves a life of its own independent of the treaty in question unless the parties decide to change the boundary by mutual consent.<sup>217</sup>

After the Court’s decision, in separate letters addressed to the UN Secretary-General, governments of both countries committed to abide by the judgment and noted the role of the Court in bringing the dispute to a satisfactory end.<sup>218</sup> This marked the end of 20 years of Libyan occupation of the Aouzou Strip.<sup>219</sup> It is worth noting that in order to fully implement this decision, both parties sought assistance from the UN. Indeed, through *Resolution 915* of May 1994, the UNSC authorised the establishment of UN Aouzou Strip Observer Group to oversee the withdrawal process as requested by the parties.<sup>220</sup>

One can convincingly argue that a weaker country like Chad cannot easily compel a powerful country like Libya to concede such a strategic territory through military superiority. Thus, political and economic considerations were also likely to have played a part. For example, Colonel Muammar Gaddafi’s

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<sup>209</sup> Ibid.

<sup>210</sup> Ibid 34–5 [66]–[67].

<sup>211</sup> Ibid.

<sup>212</sup> For details of this agreement, see *ibid* 34 [67].

<sup>213</sup> *Friendship Treaty* art 2.

<sup>214</sup> *Territorial Dispute* [1994] ICJ Rep 6, 37 [72]. See also Munya, above n 6, 220.

<sup>215</sup> *Territorial Dispute* [1994] ICJ Rep 6, 37 [72]. See also *Temple of Preah Vihear (Cambodia v Thailand) (Judgment)* [1962] ICJ Rep 6 (‘*Temple of Preah Vihear*’).

<sup>216</sup> *Territorial Dispute* [1994] ICJ Rep 6, 37 [72].

<sup>217</sup> Ibid 37 [72]–[73]. See also *Temple of Preah Vihear* [1962] ICJ Rep 6.

<sup>218</sup> Ali Ahmed Elhouderi, *Letter Dated 6 April 1994 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General*, UN Doc S/1994/402 (13 April 1994) annex; Laoumaye Mekonyo Koumbairia, *Letter Dated 13 April 1994 from the Permanent Representative of Chad to the United Nations Addressed to the Secretary-General*, UN Doc S/1994/424 (13 April 1994) annex. See also Aloysius P Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2007) 18 *European Journal of International Law* 815, 829–30.

<sup>219</sup> Ibid.

<sup>220</sup> Boutros Boutros-Ghali, ‘A Grotian Moment’ (1995) 18 *Fordham International Law Journal* 1609, 1611.

decision to recognise and offer economic support to the regime of President Hissène Habré helped soften Chad's resolve to continue fighting in a conflict that had already claimed thousands of victims.<sup>221</sup> The falling oil prices in the world market and rising national debt also significantly affected the capability of Libya to continue the war.<sup>222</sup> Though the Habré regime continued its claim on Aouzou Strip through diplomatic channels, the regime was overthrown by Idriss Derby with the full backing of Libya changing the trajectory of the dispute — Libya was confident that because of its support for the new administration in N'djamena, the contested area would be resolved in its favour.<sup>223</sup> However, when the Court awarded the entire strip to Chad, Libya keen to promote its positive image regionally and internationally, accepted the decision.<sup>224</sup> Libya also considered compliance with the Court's decision to be a diplomatic opportunity for strengthening ties with other North African countries.<sup>225</sup> This aspect was crucial because of Gaddafi's quest to 'advanc[e] regional solidarity [and] achiev[e] the Community of Sahel and Saharan States in 1998'.<sup>226</sup>

#### F Kasikili/Sedudu Island (Botswana v Namibia)<sup>227</sup>

The centre of the dispute between Botswana and Namibia concerned the island known to Botswana as Sedudu and to Namibia as Kasikili.<sup>228</sup> The island which is approximately 3.5 kilometres long is located in the Chobe River and divides the Namibian Caprivi Strip located in the north from Botswana's Chobe National Park in the south.<sup>229</sup> The origin of this dispute can be attributed to the agreement signed between Germany and Britain in July 1890 as the administrators of the colonies.<sup>230</sup>

Differences between the two countries over the contested island began not long after Namibia earned its independence in February 1990. In 1992, both countries, in a quest to resolve the dispute amicably, entered into negotiations facilitated by Zimbabwe which resulted in the *Kasane Communiqué*.<sup>231</sup> Through this agreement the parties committed to resolve the issue peacefully and agreed to submit the determination of the boundary around Kasikili/Sedudu to a joint

<sup>221</sup> Millard J Burr and Robert O Collins, *Africa's Thirty Years War: Libya, Chad, and the Sudan, 1963–1993* (Westview Press, 1999) 236.

<sup>222</sup> *Ibid* 237.

<sup>223</sup> *Ibid* 240.

<sup>224</sup> Colter Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434, 441.

<sup>225</sup> *Ibid*.

<sup>226</sup> *Ibid* 442 (citations omitted).

<sup>227</sup> (*Judgment*) [1999] ICJ Rep 1045 ('*Kasikili/Sedudu Island*').

<sup>228</sup> For a comprehensive account of the history of this dispute, see Tiyanjana Maluwa, 'Disputed Sovereignty over Sedudu (or Kasikili) Island (Botswana–Namibia): Some Observations on the International Legal Aspects' (1993) 5 *African Journal of International and Comparative Law* 113. See also James Gathii, 'Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*' in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill, 2003) 75.

<sup>229</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, 1053 [11].

<sup>230</sup> *Ibid* 1054 [13].

<sup>231</sup> For details on the *Kasane Communiqué*, see *ibid* 1058 [15].

team of technical experts.<sup>232</sup> In the report issued in August 1994, the joint team declared that it had failed to resolve the issue and recommended that the matter should be settled peacefully within the applicable framework of rules and principles of international law.<sup>233</sup> In February, the three Presidents from Botswana, Namibia and Zimbabwe met in Harare to consider the joint team's report.<sup>234</sup> After negotiations, they decided to submit the matter to the Court for a final and binding determination.<sup>235</sup> While Namibia based its claim on the *Anglo-German Treaty of 1890*,<sup>236</sup> it also relied on the conduct of the Masubia tribe from the eastern Caprivi Strip as an important element to reaffirm its claimed title over the island.<sup>237</sup> Namibia contended that it had a prescriptive title to the island based on the following conduct of the Masubia tribe:

The control and use of Kasikili Island by the Masubia of Caprivi, the exercise of jurisdiction over the Island by the Namibian governing authorities, and the silence by Botswana and its predecessors persisting for almost a century with full knowledge of the facts.<sup>238</sup>

Botswana based its sovereignty claim on the island solely on the *Anglo-German Treaty of 1890*, which had stipulated that the sovereignty over the island lay with Botswana.<sup>239</sup> The Court was requested to:

Determine, on the basis of the *Anglo-German Treaty* of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island.<sup>240</sup>

Reading this question brought before the Court, it is clear that the Court was asked to determine two issues: 'the boundary between Botswana and Namibia around Kasikili/Sedudu Island and the legal status of the island'.<sup>241</sup> In both questions the Court had to address the *Anglo-German Treaty of 1890* and the rules and principles of international law. In examining the *Anglo-German Treaty of 1890* the Court stated that though neither country was party to the *Vienna Convention on the Law of Treaties*,<sup>242</sup> both countries considered art 31 of that *Convention* to be applicable on the basis that it reflects customary international law.<sup>243</sup> The Court further observed that the reference to the *Anglo-German Treaty of 1890* would in any event have entitled it to apply the general rules of international treaty interpretation so the additional reference to 'rules and

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<sup>232</sup> Ibid 1057–8 [14]–[15].

<sup>233</sup> Ibid 1058 [15].

<sup>234</sup> Ibid 1058 [16].

<sup>235</sup> Ibid.

<sup>236</sup> *Anglo-German Treaty of 1890*, signed 1 July 1890, 173 ConTS 272.

<sup>237</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, 1092–3 [71].

<sup>238</sup> Ibid 1092–4 [71]–[72]. See also Malcolm Shaw, 'Case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*' (2000) 49 *International and Comparative Law Quarterly* 964, 965.

<sup>239</sup> Shaw, '*Kasikili/Sedudu Island*', above n 238, 966.

<sup>240</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, 1048–9 [1].

<sup>241</sup> Ibid 1058 [17].

<sup>242</sup> *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>243</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, 1059 [18].

principles of international law' as specified by the parties must signify something else.<sup>244</sup>

In reaffirming its position Namibia cited four conditions which must be fulfilled to enable the position of the state to mature into prescriptive title:

- 1 The possession of the ... state must be exercised *à titre de souverain*.
- 2 The possession must be peaceful and uninterrupted.
- 3 The possession must be public.
- 4 The possession must endure for a certain length of time.<sup>245</sup>

Namibia contended that it had fulfilled these conditions for many years since the German colonial rule throughout the independent Namibia without any protestation from the Bechuanaland authorities or the later independent Botswana.<sup>246</sup> Namibia concluded by stating that

[t]he continued control and use of Kasikili Island by the people of the Eastern Caprivi, the exercise of jurisdiction over the Island by the governing authorities in the Caprivi Strip, and the continued silence of those on the other side of the Chobe ... confirmed the interpretation of the Treaty ... [whereby] Article III ... attributes Kasikili Island to Namibia.<sup>247</sup>

Botswana countered by noting that

the Namibian argument based upon subsequent conduct of the parties rests upon extraordinarily weak foundations, both in conceptual and in factual terms. The conceptual foundations are weak because ... the 'subsequent conduct' argument of Namibia is an argument grounded in acquisitive prescription ... the purpose of which is to destroy and to supplant a pre-existing title.<sup>248</sup>

Botswana argued that by addressing prescriptive title, the Court would be going beyond the question addressed to it by the parties, which was to solely determine the boundary between the parties in accordance with the *Anglo-German Treaty of 1890* and determine the legal status of the island in accordance with the rules and principles of international law.<sup>249</sup> Botswana further contended, in substance, that

there is no credible evidence that either Namibia or its predecessors exercised State authority in respect of Kasikili/Sedudu and that even if peaceful, public and continuous possession of the Island by the people of Caprivi had been proved, it could not have been *à titre de souverain*.<sup>250</sup>

In addressing the arguments and counter arguments of both parties, the Court observed that it 'need not concern itself with the status of acquisitive prescription in international law'.<sup>251</sup> Rather it simply concluded that the conditions cited by Namibia were not satisfactory and hence its claim on acquisitive prescription

<sup>244</sup> Ibid 1102–3 [93].

<sup>245</sup> Ibid 1103–4 [94]. See also Shaw, 'Kasikili/Sedudu Island', above n 238, 964–78.

<sup>246</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, 1103–4 [94].

<sup>247</sup> Ibid 1092–3 [71].

<sup>248</sup> Ibid.

<sup>249</sup> Ibid 1101–3 [91]–[93].

<sup>250</sup> Ibid 1104–5 [95].

<sup>251</sup> Ibid 1105 [97].

could not be accepted.<sup>252</sup> The Court noted that ‘even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*’ or that they were exercising functions of state authority there on behalf of those authorities.<sup>253</sup> The Court further observed that Namibia had not established any acts of state authority capable of providing alternative justification for prescriptive title, carried out by its predecessors or by itself with regard to Kasikili/Sedudu, in accordance with the conditions set out by Namibia with the necessary degree of ‘precision and certainty’.<sup>254</sup>

In its decision by eleven votes to four, the Court held that since it had rejected the acquisitive prescription argument by Namibia, it follows that the island of Kasikili/Sedudu belonged to and formed part of the territory of Botswana.<sup>255</sup> An important aspect of this decision is also reflected in the desire of the Court to make arrangements for the wellbeing of local people in the disputed area. The Court made reference to the *Kasane Communiqué*, in which the presidents of Botswana and Namibia declared, *inter alia*, that:

- (c) existing social interaction between the people of Namibia and Botswana should continue;
- (d) the economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river;
- (e) navigation [between the two countries] should remain unimpeded including free movement of tourists.<sup>256</sup>

Based on the *Kasane Communiqué* the Court held that

the nationals of Namibia, and vessels flying its flag, are entitled to, and shall enjoy, a treatment equal to that accorded by Botswana to its own nationals and to vessels flying its own flag. Nationals of the two States, and vessels, whether flying the flag of Botswana or Namibia, shall be subject to the same conditions as regards navigation and environmental protection.<sup>257</sup>

Indeed, to effect the decision of the Court, both parties set up a joint technical commission that officially demarcated the entire disputed area in accordance with the Court’s decision.<sup>258</sup> The commission concluded its work in 2003.<sup>259</sup>

As already seen in this discussion, compliance with the Court’s decision is also underpinned by the political and economic considerations of the parties. In this case, Namibia and Botswana are not only neighbours but they also enjoy close cooperation in trade and commerce.<sup>260</sup> Therefore, it would have been self-defeating for both countries to reject the decision of the Court precisely because it would have led to diplomatic animosity, and likely also to negative

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<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid* 1105–6 [98].

<sup>254</sup> *Ibid* 1105–6 [98]–[99].

<sup>255</sup> *Ibid* 1106 [101]; Shaw, ‘*Kasikili/Sedudu Island*’, above n 238, 977.

<sup>256</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, 1106–7 [102].

<sup>257</sup> *Ibid* 1107–8 [103].

<sup>258</sup> Paulson, above n 224, 455.

<sup>259</sup> *Ibid.*

<sup>260</sup> See generally Maluwa, ‘The Peaceful Settlement of Disputes among African States, 1963–1983’, above n 10, concerning the importance of the disputed area for local livelihood.

economic and social consequences for both parties. For example, Botswana, being a landlocked country, significantly depends on Namibia for access to international waters for the import and export of its goods. As such, an amicable solution to this dispute was in the best interests of both parties to safeguard cooperation among them.

### G Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)<sup>261</sup>

The peaceful settlement of this dispute concretised the belief that an international tribunal can be an expedient way of breaking a negotiating impasse in situations where a government's freedom to negotiate is constrained by domestic considerations.<sup>262</sup> This dispute concerned the sovereignty over the Bakassi Peninsula between Nigeria and Cameroon, an area of approximately 1000 square kilometres.<sup>263</sup> The economic importance of this region was considerable: its natural resources included an estimated 24 billion barrels of proved oil reserve, as well as rich fish stock.<sup>264</sup> Having failed to resolve the matter amicably in March 1994, Cameroon instituted proceedings against Nigeria 'relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula'.<sup>265</sup> In its application, Cameroon contended that the 'delimitation [of the maritime boundary between the two States] has remained a partial one and [that], despite many attempts to complete it, the parties have been unable to do so'.<sup>266</sup> To 'avoid further incidents between the two countries', Cameroon requested that the Court 'determine the course of the maritime boundary between the two States beyond the line fixed in 1975'.<sup>267</sup> In June 1994, Cameroon filed an additional application to extend the subject of the dispute to include the 'question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad'.<sup>268</sup> Cameroon asked the Court to merge the two applications and 'specify definitively' the frontier between two states from Lake Chad to the sea.<sup>269</sup>

Cameroon based its claim of sovereignty over this territory on a number of treaties and agreements between Germany and Britain and later between Nigeria and Cameroon.<sup>270</sup> Cameroon also cited the parties' exchange of diplomatic notes.<sup>271</sup> But crucially, Cameroon argued that treaties between Britain and

<sup>261</sup> (*Preliminary Objections*) [2002] ICJ Rep 303 ('*Land and Maritime Boundary*').

<sup>262</sup> See, eg, J Ndumbe Anyu, 'The International Court of Justice and Border-Conflict Resolution in Africa: The Bakassi Peninsula Conflict' (2007) 18 *Mediterranean Quarterly* 40, 53–4 discussing the importance of this area full of natural resources.

<sup>263</sup> For a historical background of this conflict, see *ibid.* See generally Piet Konings, 'The Anglophone Cameroon–Nigeria Boundary: Opportunities and Conflicts' (2005) 104 *African Affairs* 275; A T Aghemelo and S Ibhasebhor, 'Colonialism as a Source of Boundary Dispute and Conflict among African States: The World Court Judgment on the Bakassi Peninsula and Its Implications for Nigeria' (2006) 13 *Journal of Social Science* 177.

<sup>264</sup> Anyu, above n 262, 53–4.

<sup>265</sup> *Land and Maritime Boundary* [2002] ICJ Rep 303, 312 [1].

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.* See also Anyu, above n 262, 45.

<sup>269</sup> *Land and Maritime Boundary* [2002] ICJ Rep 303, 312 [3].

<sup>270</sup> Anyu, above n 262, 47–8.

<sup>271</sup> *Ibid.* See also *Land and Maritime Boundary* [2002] ICJ Rep 303, 331–2 [34].

Germany signed in March and April 1913 making provision for settlement of their frontiers were definitive and binding in demonstrating that the Bakassi Peninsula belonged to Cameroon.<sup>272</sup> It further contended that the *Thomson-Marchand Declaration*<sup>273</sup> of 1930 had confirmed the earlier boundary set in 1913.<sup>274</sup> Cameroon contended that as the holder of conventional territorial title to the disputed areas, it need not demonstrate the effective exercise of its sovereignty over those areas because a valid conventional title prevails over any *effectivités* to the contrary.<sup>275</sup>

On the other hand, Nigeria reasserted its title based on three claims:

- 1 long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation of title;
- 2 effective administration by Nigeria, acting as sovereign and an absence of protest; and
- 3 manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over Darak and the associated Lake Chad villages.<sup>276</sup>

While addressing the claims of Nigeria, the Court stated that ‘the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law’.<sup>277</sup> Making reference to its earlier decision in the *Fisheries Case*,<sup>278</sup> observed that “‘historical consolidation’ referred to, in connection with external boundaries of the territorial sea, allows land occupation to prevail over established treaty title’.<sup>279</sup> The Court rejected Nigeria’s historical basis for its territorial claim, hold that twenty years of connection were far too short to confer such a title on Nigeria.<sup>280</sup> The Court making reference to its earlier decision in *Burkina Faso/Republic of Mali* observed that

where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration.<sup>281</sup>

On the sovereignty over Lake Chad, the Court held that ‘there was no acquiescence by Cameroon in the abandonment of its title in the area in favour of

<sup>272</sup> Anyu, above n 262, 48. See also *ibid* 300 [45].

<sup>273</sup> *Exchange of Notes between His Majesty’s Government in the United Kingdom and the French Government respecting the Boundary between British and French Cameroons*, 34 UKTS 863 (signed and entered into force 9 January 1931) (‘*Thomson-Marchand Declaration*’).

<sup>274</sup> For a history of *Thomson-Marchand Declaration*, see *Land and Maritime Boundary* [2002] ICJ Rep 303, 331–2 [34].

<sup>275</sup> *Ibid* 351 [64].

<sup>276</sup> *Ibid* 349.

<sup>277</sup> *Ibid* 352 [65].

<sup>278</sup> *Fisheries (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116.

<sup>279</sup> *Land and Maritime Boundary* [2002] ICJ Rep 303, 352 [65].

<sup>280</sup> *Ibid*.

<sup>281</sup> *Frontier Dispute* [1986] ICJ Rep 554, 587 [63]. See also *Land and Maritime Boundary* [2002] ICJ Rep 339, 353–4 [68].

Nigeria'.<sup>282</sup> The Court concluded that the situation was essentially one where the *effectivité* adduced by Nigeria did not correspond to the law, and that accordingly 'preference should be given to the holder of the title'.<sup>283</sup> On the sovereign ownership over the Bakassi Peninsula, the Court observed that it was unable to accept Nigeria's contention that until its independence in 1961, and notwithstanding the *Anglo-German Agreement*<sup>284</sup> of 11 March 1913, the Bakassi Peninsula had remained under the sovereignty of the kings and chiefs of Old Calabar.<sup>285</sup> The Court stated that it saw no evidence that Nigeria thought that upon independence it was acquiring Bakassi from the kings and chiefs of Old Calabar because Nigeria itself raised no query as to the extent of its territory in this region upon attaining independence.<sup>286</sup> Based on all the agreements signed between Cameroon and Nigeria, the Court opined that 'it is clear from each one of these elements that the Parties took it as a given that Bakassi belonged to Cameroon'.<sup>287</sup> The Court accordingly concluded that the boundary between Cameroon and Nigeria in Bakassi is delimited by arts XVIII and XX of the *Anglo-German Agreement* and that sovereignty over the peninsula lies with Cameroon.<sup>288</sup>

It is pertinent to note that while it is evident that the Court played a decisive role in resolving this dispute between Nigeria and Cameroon, it is clear that these two countries were not prepared to go to war because of this contested territory. This aspect was reinforced by the reality that both countries were not only facing domestic challenges but they were keen to reaffirm their commitment to democracy and the rule of law.<sup>289</sup> This played a significant role in compelling them to seek the Court's intervention and respect the outcome of the judicial process.<sup>290</sup> The fact that Nigeria has been keen to reassert its regional influence meant that it could not simply disregard the Court's decision and still maintain its claim to a leadership role in the region: as such, compliance with the Court's decision was also in its interests.<sup>291</sup> Compliance with the decision can also be attributed to the growing international diplomatic pressure on Nigeria to accept and implement the Court's decision.<sup>292</sup> For example, the British High Commission to Nigeria reiterated to the Nigerian Government that decisions of the Court are binding and not subject to appeal and emphasised that Nigeria had an obligation to comply with the decision fully.<sup>293</sup> It is also worth noting that an

<sup>282</sup> *Land and Maritime Boundary* [2002] ICJ Rep 339, 354–5 [70].

<sup>283</sup> *Frontier Dispute* [1986] ICJ Rep 554, 587 [63]. See also *ibid*.

<sup>284</sup> *Agreement between the United Kingdom and Germany respecting the Frontier between Nigeria and the Cameroons, from Yola to the Sea and the Regulation of Navigation on the Cross River*, 281 ConTS 23 (signed and entered into force 11 March 1913) ('*Anglo-German Agreement*'). See also *Land and Maritime Boundary* [2002] ICJ Rep 339, 355–7 [75].

<sup>285</sup> *Land and Maritime Boundary* [2002] ICJ Rep 339, 400 [194].

<sup>286</sup> *Ibid* 405–6 [207].

<sup>287</sup> *Ibid* 410–1 [214].

<sup>288</sup> *Ibid* 416 [225].

<sup>289</sup> See generally Jean-Germain Gros (ed), *Democratization in Late Twentieth-Century Africa: Coping with Uncertainty* (Greenwood Press, 1998), concerning the political issues surrounding the 'democratization of African States'.

<sup>290</sup> Llamzon, above n 218, 836–7.

<sup>291</sup> *Ibid* 837.

<sup>292</sup> *Ibid* 836.

<sup>293</sup> Paulson, above n 224, 451.

unsuccessful party may accept the Court's decision, yet still criticise the Court for the outcome, especially where the decision is domestically politically unpopular, as was the case in Nigeria.<sup>294</sup>

#### V EVALUATION OF THE COURT'S CONTRIBUTION IN TERRITORIAL DISPUTE SETTLEMENT IN AFRICA

The preceding discussion has demonstrated the crucial role the Court has played since its founding in contributing to the peaceful settlement of territorial disputes on the continent. However, it is worth noting that this contribution should not obscure the 'rocky relationship' between the Court and the continent in the wake of the decolonisation process. The Court has contributed significantly to the maintenance of international peace and security on a continent fraught with protracted conflicts.<sup>295</sup> This argument is predicated on the reality that most of the disputes resolved by the Court were concerned with areas rich in natural resources. Without the Court's intervention, these disputes had the potential to cause instabilities or even full-fledged war.<sup>296</sup>

It is important to note that while countries have been willing to comply with decisions of the Court, they have not done so purely to demonstrate their willingness to obey international law. Rather there have been external factors or motives that have significantly contributed to the way countries respond to the decisions of the Court.<sup>297</sup> In general, it can be argued that countries have swiftly complied with the Court's decisions when such decisions align with their domestic or political interests. For example, despite the Court's decision reaffirming the right to self-determination for people of Western Sahara through a fair referendum, Morocco has been reluctant to comply with this decision despite the efforts of the UN and the OAU, later known as the African Union ('AU'), to compel Morocco to honour its obligation as determined by the Court.<sup>298</sup> The reluctance of Morocco can partly be attributed to its unwillingness to give up the territory it considers its own, the strategic location of the territory, and the natural resources in the contested territory.<sup>299</sup> However, the fact that there has been a lack of consensus by the international community on how to compel Morocco to comply with the Court's decision has not only emboldened Morocco to tighten its grip on the territory but has also inhibited a comprehensive and unified response by the international community challenging Morocco's position.<sup>300</sup> While both parties insist on a political solution, it is nearly four decades since the Court gave its decision.

The involvement of the Court in resolving territorial disputes in Africa further demonstrates African countries' growing confidence in the Court as an appropriate avenue to resolve their differences. Indeed, this confidence has also been reflected by the willingness of some African countries to submit to the

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<sup>294</sup> Llamzon, above n 218, 849.

<sup>295</sup> See Munya, above n 6.

<sup>296</sup> Anyu, above n 262.

<sup>297</sup> Llamzon, above n 218.

<sup>298</sup> International Crisis Group, 'Western Sahara: Out of the Impasse' (Middle East/North Africa Report No 66, 11 June 2007) 6–9.

<sup>299</sup> *Ibid* 12.

<sup>300</sup> See generally *ibid*.

Court disputes unrelated to territorial boundaries. For example, the Republic of Guinea submitted its dispute against Democratic Republic of the Congo on the rights of a citizen who was allegedly mistreated by the DRC authorities.<sup>301</sup> This submission reaffirms not only the willingness of parties to seek intervention of the Court to settle their disputes, but also the role and supremacy of the rule of law as the guiding framework to settle disputes among states. While it would have been possible for Guinea to take measures such as suspension of its diplomatic relations with DRC or retaliate with similar measures on DRC citizens in Guinea, they opted to submit their dispute to the Court.

The contribution of the Court has further been manifested in the extent to which African countries have been willing to comply with the judgments rendered by the Court. In most cases, parties have subsequently written to the President of the Court to thank him or her for the Court's assistance in resolving their disputes.<sup>302</sup> This demonstrates not only the confidence in the work of the Court but also the growing appreciation of the central role of the Court as the neutral arbitral avenue. Despite some painful choices that the countries have had to take to implement the decisions of the Court, such as the relocation of population or loss of sovereignty over resource-rich territories, African nations have been willing to implement the Court's decisions to reaffirm the central role of the rule of law in resolving international disputes.<sup>303</sup> The choice of the Court as a neutral arbiter eliminates the likelihood of bitter confrontation between governments and their peoples, especially local communities, who may be unwilling to accept the outcome of the dispute. For example, if the state were to decide to negotiate the settlement bilaterally, there is a possibility that some sections of that state's society might accuse the government of having 'conceded too much' or for having 'short changed' them, founded on nationalistic rhetoric or fears over the loss of their livelihood.<sup>304</sup>

With the significant legitimacy that the Court enjoys, and its success in resolving disputes, it is likely that people will respect the decisions of the Court.<sup>305</sup> For example, after the Court's decision on the Bakassi Peninsula between Nigeria and Cameroon, President Obasanjo of Nigeria hailed the agreement to implement the decision of the Court as 'a great achievement in conflict resolution, which practically reflects its cost effectiveness' and adding that the 'agreement "should represent a model for the resolution of similar conflicts in Africa"'.<sup>306</sup> Similarly, President Biya of Cameroon observed that the agreement 'was an efficient instrument to implement the Court's decision bringing a definitive conclusion to our border conflict'.<sup>307</sup> These statements were issued by the heads of state of both parties despite the rhetoric in both countries

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<sup>301</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 103.

<sup>302</sup> See, eg. Munya, above n 6, 221.

<sup>303</sup> Paulson, above n 224, 436–7, states that there has been 'no substantial defiance' of ICJ judgments.

<sup>304</sup> *Ibid* 450–1.

<sup>305</sup> *Ibid* 436–7.

<sup>306</sup> Anyu, above n 262, 52.

<sup>307</sup> United Nations, 'Nigeria, Cameroon Sign Agreement Ending Decades-Old Border Dispute; Sets Procedures for Nigerian Withdrawal from Bakassi Peninsula' (Press Release, AFR/1397, 12 June 2006).

and despite the fact that Nigeria stood to lose a major oil reserve in the Bakassi region. Similarly, after the Court's decision, President Nujoma of Namibia went on record stating that 'Namibia would abide by the verdict of the ICJ and respect it fully'.<sup>308</sup>

The decisions of the Court have contributed to the maintenance of peaceful neighbourliness among the affected communities by taking into account their primary interests in the disputed areas. This aspect is crucial because territorial disputes often persist due to the failure to address the interests of those affected by the decision of the Court.<sup>309</sup> An especially illuminating example of this is seen in the Court's adjudication of the dispute between Botswana and Namibia.<sup>310</sup> Though this decision was notable for its determination of the boundary in favour of Botswana, its importance lay in the way it addressed the concerns of the local people who had inhabited the island and used its resources for many years. As discussed above, the Court cited the *Kasane Communiqué* and observed that the local population should be permitted to carry on their lives with minimal interference.<sup>311</sup> This decision was significant because it acknowledged that local communities in the area had co-existed for many years and depended on the resources in the area for their livelihood. It would have been an injustice and an indifference to their plight to order their removal without offering them an alternative to earn their living. Consequently, such decisions contribute to the settlement of disputes between states, while also enhancing mutual co-existence of the local population and mitigating any possible disruption in the lives of the local population.

By the adoption of the *OAU Charter* and the *Cairo Resolutions* on state borders, African countries committed themselves to the doctrine of *uti possidetis* which required them to respect and observe colonial boundaries as bequeathed to them by their departing colonial regimes.<sup>312</sup> This commitment has been reaffirmed by the Court in various judgments which have stated that the maintenance of status quo territorial boundaries in Africa is the best means to preserve what has been achieved by people who have strenuously struggled for their independence.<sup>313</sup> While the principle of *uti possidetis* has not completely succeeded in eliminating territorial disputes on the continent, it is a principle which has been reaffirmed as vital to maintaining international peace and security.<sup>314</sup> By reaffirming this principle, the Court has enhanced the commitment of African countries to avoid territorial claims which would have otherwise led to more conflicts on the continent. Admittedly, it has been observed that *uti possidetis* has been the source of most territorial conflicts in

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<sup>308</sup> Paulson, above n 224, 455.

<sup>309</sup> See generally Munya, above n 6, concerning the historical distrust of the Court by the African states.

<sup>310</sup> *Kasikili/Sedudu Island* [1999] ICJ Rep 1045.

<sup>311</sup> *Ibid* 1106–7 [102].

<sup>312</sup> Aman Mahrar McHugh, 'Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice' (2005) 49 *Howard Law Journal* 209, 214.

<sup>313</sup> See generally Munya, above n 6 for a discussion of the plight of the African states following colonisation.

<sup>314</sup> See generally Shaw, 'The Heritage of States', above n 186.

Africa because of its colonial nature. That said, if Africa were to attempt to redraw its borders today, it would essentially open up a Pandora's Box.<sup>315</sup>

The decisions of the Court have also reaffirmed the critical role of diplomacy and the UN in resolving disputes among states in Africa.<sup>316</sup> Mindful that the Court lacks any enforcement mechanism, the UN Secretary-General has assumed an important role in convincing parties to implement the Court's decisions, especially when there is strong public opinion against the implementation of a decision, as demonstrated by the Nigeria–Cameroon dispute.<sup>317</sup> This article contends that the role of institutions, such as the good offices of the UN Secretary-General and the work of the AU Commission, will be critical to support efforts for the full implementation of the Court's decisions.<sup>318</sup> Indeed, the critical support of these institutions is demonstrated by the central role played by former UN Secretary-General Kofi Annan in brokering the agreement between Cameroon and Nigeria to implement the decision of the Court.<sup>319</sup> In some cases, the 'political costs' of implementing the decision may outweigh the desire to uphold the rule of law through implementation of the Court's decision.<sup>320</sup> A state may be unwilling to implement the decision if it is anxious on how the implementation would be perceived domestically.<sup>321</sup>

The events in Ethiopia and Eritrea, and Morocco reinforce the argument that while the Court may be critical in resolving territorial disputes in Africa as it has done over the years, it is essential that the international diplomatic efforts be decisive to compel parties to fulfil their obligations as determined by the Court.<sup>322</sup> For example, had Eritrea fully cooperated with the UN in finding solutions to this dispute, it would have undermined Ethiopia's claim to reject the decision of the Boundary Commission.<sup>323</sup> Yet, Eritrea's support for destabilising elements in the region in response to Ethiopia's behaviour continue to cast Eritrea in a negative light, and reinforce Ethiopia's claim that Eritrea is a rogue state bent on destabilising the region.<sup>324</sup> In the process, this has caused the UNSC to be distracted from the main issue of Ethiopia's refusal to comply with the Boundary Commission's decision on the demarcation of the border, and instead focus on Eritrea's behaviour as the major obstacle to peace in the Horn of Africa.<sup>325</sup> As such, sustained diplomatic negotiations and support from the international community will be critical to enable the parties to implement the Court's decision.

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<sup>315</sup> See generally Yakpo, above n 186; Ratner, above n 186.

<sup>316</sup> Llamzon, above n 218, 852.

<sup>317</sup> Ibid 836–8.

<sup>318</sup> See Krista E Wiegand and Emilia Justyna Powell, 'Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes' (2011) 55 *Journal of Conflict Resolution* 33, 40.

<sup>319</sup> Ibid. See also Anyu, above n 262, 50–2.

<sup>320</sup> Llamzon, above n 218, 849.

<sup>321</sup> Ibid.

<sup>322</sup> See generally *ibid*.

<sup>323</sup> See generally Christine Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17 *European Journal of International Law* 699.

<sup>324</sup> Ibid.

<sup>325</sup> See generally Oduntan, above n 52, 274–81.

## VI POTENTIAL CONTRIBUTION OF THE COURT IN TERRITORIAL DISPUTES IN EMERGING STATES IN AFRICA

Having analysed specific cases where the Court has made a contribution in resolving territorial disputes peacefully, it is useful to examine the potential role of the Court in addressing current and future disputes in emerging states in Africa. This examination is significant because of the growing trend in different parts of the continent suggesting that the territorial disputes are more likely to arise between new states than among post-independence states determined by the former colonial powers.<sup>326</sup> Further, the failure of arbitral tribunals to resolve territorial disputes in some African countries provides a compelling need to examine the potential role of the Court in resolving these disputes.<sup>327</sup> The ongoing border conflicts between Ethiopia and Eritrea and between Sudan and the Republic of South Sudan, highlight the growing tension between new states predicated on territorial boundaries.<sup>328</sup> To appreciate the current challenge of border disputes in Africa, it is worth considering these two examples in detail with regard to the significance of the possible involvement of the Court.

The conflict between Ethiopia and Eritrea stems from the contested border area of Badme.<sup>329</sup> Eritrea gained its independence from Ethiopia in 1993 after a bitter and contentious conflict between the Ethiopian Government through Eritrea's armed resistance group under the umbrella of Eritrea People's Liberation Front ('EPLF').<sup>330</sup> The independence of Eritrea, unlike other classical examples of self-determination in Africa, was agreed upon between the newly Ethiopian Government under Meles Zenawi (the current Prime Minister of Ethiopia) and the EPLF, who fought alongside against Mengistu Haile Mariam's rule in Ethiopia.<sup>331</sup> Thus, Eritrea's self-determination was the culmination of a successful military alliance between Ethiopian People's Revolutionary Democratic Front and the EPLF, who jointly succeeded in unseating the Government in Addis Ababa that had consistently stifled Eritrea's self-determination efforts.<sup>332</sup> While the alliance between Eritrea and Ethiopia was strengthened by the common goal of ousting Mengistu, this alliance and friendship ended immediately after Eritrean independence due to a failure to agree on the boundary demarcation surrounding the Badme area.<sup>333</sup> Having failed to agree on the demarcation of their borders, both countries moved their troops to claim Badme and a full scale war erupted between these two former

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<sup>326</sup> Aghemelo and Ibhasebhor, above n 263, 178–9.

<sup>327</sup> See generally McHugh, above n 312.

<sup>328</sup> See generally Gray, above n 323.

<sup>329</sup> Ibid 663–4.

<sup>330</sup> See Ruth Iyob, 'The Ethiopian–Eritrean Conflict: Diasporic vs Hegemonic States in the Horn of Africa, 1991–2000' (2000) 38 *Journal of Modern African Studies* 659, 663–4. See also Richard Cornwell, 'Ethiopia and Eritrea: Fratricidal Conflict in the Horn' (1998) 7 *Africa Security Review* 62.

<sup>331</sup> See generally Iyob, above n 330, 659.

<sup>332</sup> See generally Charles Mazinge, 'Southern Sudan and the Right to Self-Determination in Contemporary Africa: Examining Its Basis under International Law' (2010) 53 *German Yearbook of International Law* 541.

<sup>333</sup> Iyob, above n 330, 669–70.

allies — a war which is estimated to have claimed the lives of more than 70 000 people.<sup>334</sup>

While Ethiopia and Eritrea had committed themselves to respect the outcome of the Boundary Commission, which was established as part of the *Algiers Agreement*<sup>335</sup> to delimit and demarcate the boundary between the two countries, it was Ethiopia that failed to honour part of its obligation of the outcome.<sup>336</sup> The Boundary Commission had ‘found that a large part of the contested western border sector belonged to Eritrea’.<sup>337</sup> Ethiopia rejected these findings and instead filed a ‘Request for Interpretation, Correction and Consultation’, which essentially amounted to substantive challenge of the Boundary Commission’s decision.<sup>338</sup> This application was rejected by the Boundary Commission which reaffirmed its findings.<sup>339</sup> In a letter to the UN Secretary-General in September 2003, the Ethiopian Government characterised the Boundary Commission’s decision on Badme as ‘illegal, unjust and irresponsible’.<sup>340</sup> The UNSC called upon Ethiopia to cooperate fully with the Boundary Commission without conditions in order to resolve the dispute. Ethiopia contested this resolution as unfair.<sup>341</sup>

While it is clear that the findings largely reaffirmed the claims of Eritrea, it is the actions of Eritrea that made international support to resolve this dispute complicated. For example from 2004, Eritrea refused to cooperate with the UN Special Envoy appointed to help resolve the dispute.<sup>342</sup> The peaceful resolution of this dispute was complicated by Eritrea’s limited cooperation with the UN Mission in Ethiopia and Eritrea (‘UNMEE’).<sup>343</sup> In December 2005, Eritrea asked Canadian, US and European peacekeepers to withdraw from UNMEE, thereby impeding the resolution of this dispute.<sup>344</sup> However, there are other political considerations that have undermined the peaceful resolution of this dispute — especially the continued international condemnation of Eritrea by both the UN and the AU for its alleged support for al Shabaab and other destabilising elements in the region.<sup>345</sup>

The dispute between Sudan and the Republic of South Sudan is also premised on the disputed border between the two countries.<sup>346</sup> South Sudan became

<sup>334</sup> See generally Majinge, above n 332, 562–3. See also McHugh, above n 312, 212–15.

<sup>335</sup> *Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the Resettlement of Displaced Persons, as well as Rehabilitation and Peacebuilding in Both Countries*, 2138 UNTS 94 (signed and entered into force 12 December 2000) (‘*Algiers Agreement*’).

<sup>336</sup> Gray, above n 323, 703.

<sup>337</sup> *Ibid* 707.

<sup>338</sup> See *ibid* 707–8.

<sup>339</sup> *Ibid*.

<sup>340</sup> *Progress Report of the Secretary-General on Ethiopia and Eritrea*, UN SCOR, UN Doc S/2003/1186 (19 December 2002) [10].

<sup>341</sup> *Ibid*. See also Gray, above n 323, 709.

<sup>342</sup> Gray, above n 323, 709.

<sup>343</sup> Eritrea eventually ceased cooperating entirely: see *ibid*.

<sup>344</sup> *Ibid*.

<sup>345</sup> See, eg, *Progress Report of the Secretary-General on Ethiopia and Eritrea*, UN SCOR, UN Doc S/2003/1186 (19 December 2002).

<sup>346</sup> See Roberto Belloni, ‘The Birth of Sudan and the Challenges of Statebuilding’ (2011) 10 *Ethnopolitics* 411.

independent in July 2011 after an overwhelming referendum vote in favour of succession from Sudan in January 2011.<sup>347</sup> Earlier, during the negotiations of the Comprehensive Peace Agreement, both parties had agreed to negotiate their territorial borders before the end of the interim period in 2011.<sup>348</sup> Based on these negotiations, the parties agreed to form the Abyei Boundary Commission ('ABC') to delimit their boundary.<sup>349</sup> The Sudanese Government's rejection of the ABC's decision prompted the parties to refer the matter to the Permanent Court of Arbitration ('PCA') headquartered in The Hague.<sup>350</sup> The PCA was requested to determine

[w]hether or not the ABC Experts had, on the basis of the agreement of the parties as per the [Comprehensive Peace Agreement], exceeded their mandate which is 'to define (ie delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the *Abyei Protocol*, and reiterated in the *Abyei Appendix* and the *ABC Terms of Reference and Rules of Procedure*.<sup>351</sup>

It is worth noting that in their submission parties had made an express commitment to respect and implement the final decision rendered by the PCA once issued.<sup>352</sup> Later on the parties reneged on that commitment stating that the decision did not take into account 'all available evidences' and the ABC had 'exceeded its mandate' as confirmed by the PCA.<sup>353</sup> This response by the parties was significant precisely because it rendered the decision of the ABC irrelevant.

What has been the implication of this rejection? Since the Boundary Commission came to its decision in 2009, both parties have been reluctant to implement it, and heightened tension between the parties prompted them to position troops along their respective borders.<sup>354</sup> What complicates this dispute is the reality that the contested area has a proven reserve of oil and other natural resources.<sup>355</sup> This makes concession from either party difficult. Given that the parties failed to resolve their territorial disputes before separation, the possibility that they will do so easily after secession of South Sudan is highly unlikely.<sup>356</sup> Indeed, given the current tension between South Sudan and Sudan, the border dispute between the two has a potential to escalate into a fully-fledged war.<sup>357</sup>

What contribution can the Court make to resolving emerging territorial disputes in new states such as South Sudan or Eritrea? This author contends that, based on its previous record of involvement in Africa, the Court has the potential

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<sup>347</sup> Ibid 415.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid 416.

<sup>350</sup> Ibid.

<sup>351</sup> *Delimiting Abyei Area (Government of Sudan v Sudan People's Liberation Movement/Army) (Arbitration Agreement)* (Permanent Court of Arbitration, Case No GOS-SPLM53004, 7 July 2008) art 2(a).

<sup>352</sup> Ibid.

<sup>353</sup> See Salman M A Salman, *The World Bank, the Abyei Territorial Dispute between Northern and Southern Sudan and the Decision of the Permanent Court of Arbitration* (July 2010) <<http://go.worldbank.org/M0SRDKU7H0>>.

<sup>354</sup> See also Belloni, above n 346, 416–17.

<sup>355</sup> Ibid 417.

<sup>356</sup> Ibid.

<sup>357</sup> *Report of the United Nations Secretary-General to the UN Security Council on the Situation in Abyei*, UN SCOR, UN Doc S/2011/603 (29 September 2011).

to address the existing or potential territorial disputes affecting some countries on the continent. This argument is based on the fact that in most cases parties to territorial disputes have been unwilling to comply with decisions of other bodies such as arbitral tribunals.<sup>358</sup> This rejection can be attributed to the nature of the function and composition of arbitral tribunals. In most cases, compliance with their decisions is voluntary and greatly relies on the good will of the parties.<sup>359</sup> Admittedly, even the implementation of the decisions of the Court is predicated on the good will of states. Yet this should not obscure the fact that the Court is the principal judicial organ enshrined in the *UN Charter* carrying a significant moral and legal legitimacy.<sup>360</sup> Indeed, over the past four decades of the Court's involvement on the continent, it has proved that it is an institution which commands legitimacy among African countries, as evidenced by the willingness of African states to submit their disputes to the Court and implement the decisions of the Court, irrespective of domestic political or social considerations.

As already demonstrated in this article, the acceptance of the decisions of the Court by parties to the conflict has not only enhanced the credibility of the Court but it has also concretised the ability of the Court to prove itself as a reliable institution keen to contribute to the peace and stability of the continent. Perhaps a question worth asking is whether a territorial dispute between Ethiopia and Eritrea can be successfully resolved by the Court, given the failure of Ethiopia to respect the outcome of the Boundary Commission. This author argues that submitting the dispute to the Court is likely it, given that the Court has resolved numerous complex territorial disputes. For example, the conflict between Libya and Chad that resulted in a fully-fledged war, was resolved by the intervention of the Court.<sup>361</sup> Arguably, the implementation of the Court's decision was significantly helped by the combination of factors such as diplomatic pressure and support, especially the intervention of the Secretary-General and the UNSC.<sup>362</sup> In addition to the diplomatic involvement of the UN, it is clear that the position of the Court as the judicial body of the UN compelled the parties to abide by the decision.

A similar question may be asked concerning the Court's ability to contribute to the peaceful resolution of territorial boundaries between Sudan and South Sudan. This author contends that the Court can play a meaningful role in resolving the current territorial standoff between Sudan and South Sudan. The parties can gain significant advantages by seeking the resources of the Court. It is the only international judicial institution enshrined in the *UN Charter* which commands global respect, and is unlikely to be influenced by political considerations of the parties.<sup>363</sup> Unlike the decisions of the arbitral tribunals — some of which have been rejected by the parties concerned, especially when they do not address some of their political considerations — thus far, no country in Africa has rejected a decision of the

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<sup>358</sup> McHugh, above n 312, 234–6.

<sup>359</sup> *Ibid* 228–33.

<sup>360</sup> *Ibid* 238.

<sup>361</sup> Michelle L Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Martinus Nijhoff, 2009) 115.

<sup>362</sup> *Ibid* 121.

<sup>363</sup> *ICJ Statute* art 16; *UN Charter* art 92.

Court.<sup>364</sup> Indeed, examining the record of implementation of decisions of the Court in Africa, especially in hotly contested areas such as the Bakassi Peninsula between Nigeria and Cameroon, parties have been keen to implement the rulings of the Court, despite some domestic concerns.<sup>365</sup> It is on the basis of this record that the author contends that the Court can play a significant role in addressing the complex dispute on territorial boundaries between Sudan and South Sudan. Given this positive record of the implementation of the Court's decisions, it is highly unlikely that parties will submit the matter to the Court and reject or ignore the outcome. Indeed, it has been observed that cases of noncompliance with final judgments of the Court are very rare.<sup>366</sup>

## VII CONCLUSION

This article has demonstrated the ways in which the Court has played a crucial role in the peaceful settlement of territorial disputes in Africa over the years. Despite the earlier reluctance of many African countries to embrace the Court due to the apparent failure of the Court to address issues important to them such as self-determination and decolonisation, African countries have increasingly referred their disputes to the Court. This demonstrates the growing confidence in the capability of the Court to impartially adjudicate disputes among African states. It has also been shown that despite the central role of the Court in resolving disputes, it has no enforcement mechanism to implement its decisions, which means that full implementation will depend on the good will of the parties to fulfil their obligations.

The article further contended that the decisions of the Court have significantly contributed to the respect and upholding of the international rule of law among states on the continent. The willingness of parties to accept the decisions of the Court has been remarkable. This is demonstrated by the decision of the Nigerian Government to cede the region of Bakassi to Cameroon, despite the growing anger among sections of its people. Similarly, the measures undertaken by Libya to relinquish the Aouzou Strip to Chad demonstrate that when countries are committed to resolving their differences the Court can play a decisive role. Perhaps, in what may be considered an innovative approach the Court has been willing to take into account local realities in resolving territorial disputes. For example, while considering state interests in a dispute between Namibia and Botswana, the Court also gave primacy to the rights and welfare of the local people around the area. It specifically encouraged the parties to ensure that activities essential for the survival of these people should not be hindered by the Court's decision. Indeed, Botswana agreed with the Court to allow free navigation in the waters by Namibia's vessels. Each of these actions undertaken by various disputing parties to comply with the decisions of the Court manifested a remarkable commitment to the preservation and furtherance of the international rule of law — a core attribute of the work of the Court.<sup>367</sup>

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<sup>364</sup> Paulson, above n 224, 436–7. See generally McHugh, above n 312.

<sup>365</sup> See McHugh, above n 312.

<sup>366</sup> Paulson, above n 224, 436–7.

<sup>367</sup> For example cases, see *ibid* 439–56.

While it is clear that many territorial disputes continue to plague the continent, the willingness of some of these states to refer their cases to the Court has been remarkable. Currently, Burkina Faso and Niger have a pending territorial dispute before the Court.<sup>368</sup> This increased referral of disputes by African states to the Court affirms the confidence which disputing parties have in the Court's ability to resolve territorial disputes on the continent. If referred to the Court, some complex border disputes such as Eritrea and Ethiopia, and Sudan and the South Sudan, stand a better chance of being resolved, provided that the parties are willing and able to implement the decisions of the Court, with or without the assistance of the international community through the UN. However, it has further been argued that taking into account the existing examples between Popular Front for the Liberation of Saguia el-Hamra and Río de Oro,<sup>369</sup> Morocco and Ethiopia–Eritrea, the sustained role of the UN and the AU to facilitate international and regional diplomatic support will be crucial for the full and timely implementation of the Court's decisions. The importance of referring the disputes in both Sudan–South Sudan and Ethiopia–Eritrea cannot be underestimated, given the human and material loss that have been occasioned by ensuing conflicts in both cases. Such reference and compliance with the decisions of the Court would not only enhance its credibility but, additionally, could also enhance the respect of the international rule of law among states — an aspect critical to the maintenance of the international peace and security underpinned by the *UN Charter* and a plethora of other international treaties.

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<sup>368</sup> See International Court of Justice, 'Burkina Faso and Niger Jointly Submit a Frontier Dispute to the International Court of Justice' (Unofficial Press Release, No 2010/24, 21 July 2010) <<http://www.icj-cij.org/docket/files/149/15981.pdf>>.

<sup>369</sup> See, eg, SC Res 1920, UN SCOR, 65<sup>th</sup> sess, 6035<sup>th</sup> mtg, UN Doc S/RES/1920 (30 April 2010).