Chapter 11

South Africa in Africa: Assessing South Africa’s Participation in Organization of African Unity and African Union Treaties

Tiyanjana Maluwa

1 Introduction*

The year 1994 saw the birth of a new, post-apartheid South Africa. It also marked the appearance of the first edition of John Dugard’s International Law: A South African Perspective. I reviewed the book shortly after its publication, in large part because of the immense admiration I had developed for John’s work and his preeminent position as a scholar and teacher of international law and an advocate for human rights in South Africa. By the time of the publication of this book, I had had the good fortune of getting to know John personally, having first met him in 1992 in Dakar, Senegal, at a conference of the now defunct African Society of International and Comparative Law, of which we were both members. He has remained a friend and an inspiration ever since.

In my review, I noted that, inter alia, the book demonstrated that South Africa’s contribution to the development of international law was enormous, though unintended. John’s masterful treatment of the various topics – expanded substantially in subsequent editions of the book – pointed to a number of areas connecting apartheid-era South Africa to international law. Subsequent editions of the book have elaborated on post-apartheid South Africa’s continued engagement with, and contribution to, international law in multiple ways. This remains the only book, at least in the English language, to articulate a specifically national perspective of an African State on international law.


It cannot be denied that pre-1994 South Africa contributed to the development of international law in various ways. As Dugard rightly first noted twenty-two years ago, South Africa was rich in international law, and “international law had been applied by South African courts for more than a century in cases arising from the country’s vibrant commercial life and conflict-ridden history.”

Yet during the apartheid era, from 1948 to 1990, judges made little use of international law and mostly viewed it as an alien and hostile legal order; the courts and lawyers largely ignored it. South Africa contributed to the development of certain international law doctrines in a perverse and entirely fortuitous way that I would characterize as making a contribution by default. While apartheid South Africa necessarily negated some of the most fundamental principles of international law and international legality, in a paradoxical way some aspects of the country’s apartheid policy contributed to the development or strengthening of certain principles of international law. As I have observed elsewhere, “[in] an unwitting manner, South Africa became an agent of the development of international law over the years.”

The judicial interpretation and application of international law by the South African courts since 1994 has inevitably taken a different turn. The emergence of a South African perspective as well as the growth of a specifically South African contribution to the discipline that John had identified earlier has assumed even more vibrancy, thanks to the post-apartheid international law-friendly constitutional order. Externally, South Africa has also become an active participant in the political and diplomatic processes of international law-making through the United Nations (UN) and, to a lesser extent, regional

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5 See *supra* note 2, 380.