Africa before the International Courts

The Generational Gap in International Adjudication and Arbitration

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"Come my friends, 'tis not too late to seek a newer world." Tennyson

I. INTRODUCTION

Most treatises on this subject are uniformly keen to express the idea that it is in Europe that the concept of settling international disputes by subjecting the disputants to arbitration by disinterested third parties first took root.1 It has even been suggested that there was an attraction in the European mind which sought to transfer the absolute values of discipline and the need for respect of the law in the nation-State to the international community.2 These accounts invariably ignore important precedents and antecedents which constitute the very foundation upon which much of the present-day achievements of international law are based.3

Western writers, jurists and judges have up until very recently assumed that developing States have no commercial law of their own and that they have no international legal outlook or contributions to make to the law and practice of

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international adjudication. Although those assumptions have changed somewhat favourably in recent times, other deep-seated prejudices and lack of appreciation of the particular demands of developing States have hardly changed in the law and practice of the main international courts and tribunals. The suspicions and misunderstandings between the developed and developing States and their jurists are, however, mutual regarding the substance, mode and conduct of international proceedings. The accusations that have been exchanged include everything from bias in the law and practice applied by predominantly Western judges and arbitrators to dilatory and incompetent presentation of cases by developing States and a complete lack of appreciation of international adjudication and arbitration on the part of the latter.

It is therefore important to examine the law and practice of the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA), particularly in their resolution of disputes involving African States. Although the two institutions are fundamentally different in terms of the services they render, they remain relevant for the resolution of the majority of disputes involving African States. It has also been said that there is a natural connection and logical continuum between the existence of the PCA and the ICJ. It is also clear that the fortunes of both institutions cannot but be close to each other. Judge Shi Jiuyong captured this reality when he wrote:

"Today, the International Court of Justice and the Permanent Court of Arbitration are complementary institutions within the community of nations, each having its own unique role to play in the global network of mechanisms of third party dispute resolution. The flexibility of facilities afforded by the Permanent Court enables it to play a role which the International Court of Justice, being of an adjudicatory nature and limited in jurisdiction, cannot replace. Relations between the two institutions have always been close. They do not merely share the premises of the Peace Palace in The Hague. Many Members of the International Court of Justice, past and present, were or are Members of the Permanent Court. By the Statute of the International Court of Justice, Members of national groups of the Permanent Court have an important role to play in the nomination of candidates for election to the International Court of Justice."\(^4\)

Unfortunately, there is no unanimity of academic opinion on the usefulness of these premier institutions. For some, including the much older States and the scholars that originate there, both Courts complement each other and have been more or less complete successes. To others, especially the new generation of States and some of their legal scholars, the Courts are farcical, fictional and failures, and the basis for their continuing existence is considered fathomless. Indeed, the very efficacy of judicial settlement of international disputes and international arbitration is continuously questioned.

Thus, the problem this article addresses is that of an appraisal of the efficacy of international adjudication and arbitration in the resolution of African disputes, with