THIRD WORLD APPROACHES
to INTERNATIONAL LAW *Review*

TWAILR: Reflections ~ 53/2023

A Move away from Solitude: Judge Cançado Trindade's Contributions to a More Representative International Law

Mia Swart *

Introduction

One of the lasting legacies of Judge Antônio Augusto Cançado Trindade's life and work is his contribution to creating links and relationships between courts and systems of adjudication. These ties span national borders, oceans, and mountains. Specifically, they connect national courts, international courts, and regional courts. Whereas judicial cross-fertilisation, cross-dialogue, and cross-citation between national, regional, and international courts have become increasingly common over the last two decades, the intensity and frequency with which Judge Trindade at the International Court of Justice (ICJ) referred to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) made an especially strong contribution to highlighting this regional jurisprudence within the global community of courts. The work and composition of the ICJ have long reinforced western perspectives and positions. In light of this history, Judge Trindade's vigorous referencing of regional jurisprudence from the Global South is central to his disciplinary contribution and legacy.

By highlighting and citing the jurisprudence of the IACtHR, Judge Trindade indirectly also increased the status and importance of its sister court, the African Court of Human and People's Rights, and in turn increased the recognition of African regional human rights jurisprudence, judgments, and scholarship from the Global South more generally. In so doing, he helped address the structural neglect of voices from the Global South at the ICJ and in international law. His

* Visiting Professor, School of Law, University of the Witwatersrand.

long Judgments and Separate Opinions were full of references to Latin American and African regional and national jurisprudence. He persistently reminded his judicial colleagues that they should look Southward.

The regional and subregional human rights courts in Africa and Latin America can be described as the 'stepchildren' of the international community of courts. These courts are in a different position than a regional human rights court from the Global North, such as the European Court of Human Rights, which routinely gets much attention from courts such as the ICJ. Voeten has described 'large asymmetries' in the extent to which international courts rely on each other's judgements.[1] The work of African and Latin American regional courts is not only routinely neglected in international law scholarship, but many practising and academic lawyers are unaware of the very existence of some of these courts, particularly the subregional courts.[2] On occasion, Trindade said, 'The implementation of justice requires unity'.[3] He recognised that justice depends on unity not only between courts but between different regions of the world. He believed that cooperation among international courts and tribunals was important to form a uniform court practice and achieve maximum human rights protection.

It is but a small step from Judge Trindade's view that all human rights are interdependent,[4] an idea he expressed in his scholarship, to the acknowledgement that all regional human rights systems are interdependent and interrelated. He viewed the consolidation of human rights and human rights systems as urgent and integral to the full protection of human rights. Trindade gave expression to this idea when he wrote:[5]

> ... the international protection of human rights ... is a domain of protection which admits no steps backward ... They keep on asserting the universality of human rights at both normative and operational levels – as lucidly propounded six decades ago by the Universal Declaration of 1948.

[1] Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 *Journal of Legal Studies* 547.

[2] For more on the neglect of the Global South in international law see Brian-Vincent Ikejiaku, 'International Law is Western Made Global Law: The Perception of Third-World Category' (2014) 6 *African Journal of Legal Studies* 337.

[3] Vilniaus University Center of Ukrainian Law, 'Judge of International Court of Justice says the Implementation of Justice requires Unity' (7 September 2015) https://www.tf.vu.lt/news/judge-of-international-court-of-justice-says-the-implementation-of-justice-requires-unity/ (accessed 20 August 2023).

[4] A.A.C. Trindade, 'The Interdependence of all Human Rights – Obstacles and Challenges to their Implementation' (2002) 50:158 *International Social Science Journal* at 513.

[5] A.A.C. Trindade, *Universal Declaration of Human Rights* (UN Audiovisual Library of International Law, 2008) 1.

It is said that the ICJ is regularly cited by other international courts but rarely returns the favour.[6] Andenas and Leiss stated in 2017 that 'open reliance on decisions by other judicial bodies is a new departure for the ICJ'.[7]

It is a rare occurrence for the ICJ to cite its fellow international courts and tribunals in The Hague, such as the International Criminal Court (ICC), or previously the International Criminal Tribunal for the former Yugoslavia (ICTY), let alone the regional human rights courts such as the Inter-American Court of Human Rights or the African Court of Human and People's Rights. Any judicial engagement with the ICJ has been mostly one-way.[8] As this can be interpreted as a sign of arrogance, this did not always serve the ICJ well. It increased perceptions of the ICJ as a court not only located in the Global North but favouring Northern attitudes over the South, which in turn reinforced the idea that courts in the Global North were somehow more authoritative than their counterparts in the Global South. Judge Trindade's presence at the ICJ served as a vital bridge between the jurisprudence of the ICJ and regional human rights courts in the Global South.

The ICJ is not alone in traditionally not citing regional courts. Voeten points out that, contrary to its transnational reputation, the European Court of Human Rights rarely cites other courts in its judgements.[9] This again compounds a sense of Northern courts' bias against citing judgments from the Global South. Sandholz has written that judicial dialogue among the human rights courts occurs 'because the courts see themselves as embedded in, and contributing to, a global human rights legal system'.[10] The general reluctance of courts such as the ECtHR to cite jurisprudence from the regional and subregional African courts could be an indication that the ECtHR does not sufficiently appreciate the position and importance of the jurisprudence of these courts within the global human rights system.

Von Bogdandy and Venzke have pointed out the deficits of the narrow state-oriented understanding of international courts and have contrasted this approach with the community-oriented approach, which conceives of international courts as organs of the international community.[11] Trindade supported this idea in

---

[6] Ibid, 521.

[7] In 2017, Mass Andenas and Johann Leiss wrote that such reliance has gone from a rare exception to a growing practice: Mass Andenas & Johann Leiss, 'The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute' (2017) 77 *Zaöe RV,* at 909.

[8] Paula Almeida & Gabriela Porto 'The Impact of the Inter-American Court of Human Rights Jurisprudence in the International Court of Justice Case Law' 26 (2) (2019) *Revista Direitos Fundamentais & Democracia* 438.

[9] Voeten (2010) 547.

[10] Wayne Sandholz, 'Human Rights Courts and Global Constitutionalism: coordination through judicial dialogue' (2021) 10:3 *Global Constitutionalism,* at 439.

[11] Armin von Bogdandy & Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford, 2014) 3.

his academic work on a new *ius gentium*.[12] Trindade's universalism is evident from his frequent invocation of *erga omnes* and *ius cogens*. One example is Trindade's Dissenting Opinion in *Germany v Italy*.[13] Under Trindade's influence, the ICJ began cautiously accepting a more value-oriented perspective on international law. Increasingly, one finds traces of the idea of a communal legal order in the reasoning of the ICJ.[14]

This Reflection considers Judge Trindade's contributions to integrating regional perspectives on human rights into the global perspective of the ICJ. Indeed, it is in the realm of the region, which I have previously described as the ideal 'halfway house' between the national and the international,[15] that human rights might perhaps be best protected. As is the case in international courts such as the ICJ, regional and sub-regional courts also provide wronged individuals with an alternative to their national systems when such systems have failed to protect their rights.

Inter-American Jurisprudence

The ICJ started drawing on the jurisprudence of other courts in cases such as the *Genocide Case*. [16] Thomas Buergenthal referred to this as 'judicial cross-fertilisation'.[17] Trindade practised 'transjudicial communication' more than any other ICJ judge. Because of his prominent position on two courts, he also *embodied* such communication. Judge Trindade served as a judge at the Inter-American Court of Human Rights from 1995 to 2008 and as its president from 1999 to 2004. Thus, he was in a strong position to build jurisprudential bridges between the ICJ and the IACtHR. By October 2018, Judge Trindade had made 18 references to the jurisprudence of the IACtHR,[18] being considered the most activist judge in terms of cross-fertilisation. Trindade's references to the IACtHR covered procedural and substantive questions, including access to justice, interim measures, interpretation of human rights treaties, *jus cogens*, and reparations.

Dialogue and cross-fertilisation have also occurred between the major regional courts. The Inter-American Court has often cited the case law of the

[12] A.A.C. Trindade, 'International Law for Humankind: Towards a New Jus Gentium' (2005) 316 *Recueil des Cours*.

[13] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment*, 3 February 2012, 117-336, https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf (accessed 20 August 2023).

[14] Ibid, para 59.

[15] Mia Swart, 'Alternative Fora for Human Rights Protection' (2013) *Journal of South African Law* 3.

[16] Thomas Buergenthal, 'Lawmaking by the ICJ and Other International Courts' (2009) *ASIL Proceedings* 406.

[17] Ibid.

[18] Paula W Almeida, 'The Impact of the Inter American Court of Human Rights' (2019) 75 *Revista da Faculdad de Direito UFMG* 419.

ECtHR, especially in its early decisions.[19] The Inter-American Court relied heavily on its European counterpart to develop its own regional understanding of human rights. The IACtHR heard its first contentious case in 1988. The timing of the case coincided with the wave of democratisation in Latin America and the emergence of a new generation of constitutions in Latin American countries, such as Brazil in 1988, Colombia in 1991, and Paraguay in 1992. These constitutions were progressive in the sense that they shared features such as greater protection of socioeconomic rights and special consideration for international human rights law.[20] Under the IACtHR, rights-based litigation became an integral feature of legal and political life in Latin America.[21] The IACtHR also became a beacon for the implementation of the new discipline of transitional justice. No other regional court did as much to develop transitional justice mechanisms as actively and innovatively as the IACtHR. Being positioned at both the IACtHR and later at the ICJ, Judge Trindade was a central promotor and implementer of transitional justice. In cases such as *Barrios Altos v Peru*,[22] *Awas Tingni v Nicaragua*,[23] and *Street Children v Guatemala*,[24] Trindade made major contributions to questions such as the limitations to amnesty, the rights of indigenous peoples, and reparations, respectively.

Trindade's liberal citation of the jurisprudence of regional courts was revolutionary and in contrast with the general citation practices of the ICJ. To this day, the ICJ is more comfortable with self-citation than citing jurisprudence from Africa and Latin America. In a 2018 article, Alschen and Charlotin identified 1865 references in ICJ judgments to its own decisions or those of its predecessor, the PCIJ, between 1948 and 2013.[25] The ICJ frequently cites itself,[26] occasionally cites judgments from courts in the Global North, both regional and national, and rarely

[19] See for example *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism Advisory Opinion OC-5/85*, 13 November 1985, para 69, https://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf (accessed 20 August 2023). For more examples in the realm of freedom of expression see Eduardo Bertoni, 'The Inter-American Court of Human Rights: A Dialogue on Freedom of Expression Standards' (2009) *European Human Rights Law Review* 3.

[20] Alexandra Huneeus, 'The Inter-American Court of Human Rights' in Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen (eds.), *International Court Authority* (Oxford, 2018) 201.

[21] Rachel Sieder, Line Schjolden & Alan Angell, *The Judicialisation of Politics in Latin America* (Palgrave Macmillan, 2009).

[22] *Barrios Altos v Peru*, *Judgement*, 14 May 2001, https://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (accessed 20 August 2023).

[23] *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, *Judgement*, 31 August 2001, https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (accessed 20 August 2023).

[24] '*Street Children' (Villagran-Morales et al) v Guatemala*, Judgement, 19 November 1999, https://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf (accessed 20 August 2023).

[25] Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29:1 *European Journal of International Law* 83.

[26] Ibid. The author found that the ICJ cited itself in 80 percent of the 126 cases that formed part of the study.

cites decisions from the Global South.[27] One reason for the sparse instances of African citations might be the relative youth of the African human rights system, with the African Court of Human and People's Rights established in 1998. According to Alschen and Charlotin, the increasing self-citation of the ICJ is a wish to emphasise the legacy of its 'settled jurisprudence' and assert its role and relevance at a time when competing adjudicatory venues are proliferating. In their view, the rather feverish self-citation is not only used ritualistically to pay tribute to past decisions but argumentatively.[28]

African Jurisprudence

The 2010 *Ahmadou Sadio Diallo* case has been described as the 'apogee' of human rights protection at the ICJ.[29] In his separate opinion in *Diallo*, Trindade cited the case law of not only the European and Inter-American systems but also the African regional human rights law system.[30]

In the *Diallo* case, the ICJ found violations of the two human rights treaties at issue, at the universal level, the 1966 UN Covenant on Civil and Political Rights and at the regional level the 1981 African Charter on Human and Peoples' Rights. In his Separate Opinion, Trindade wrote:[31]

> Much to the credit of both Guinea and the DRC, the ICJ is now called upon to settle a dispute brought into its cognizance, in the course of the proceedings on the merits, on the basis of two human rights treaties (the 1966 Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights) which have a prominent place in the contemporary corpus juris of the international law of human rights.

Commenting on the *Diallo* case, Andenas wrote that the ICJ's use of sources from other international and regional bodies as sources of authority 'indicates solutions to fragmentation problems'.[32]

---

[27] Almeida (2019) 154, 165.

[28] Alschner and Charlotin (2018) 83.

[29] Bruno Simma, 'Human Rights before the International Court of Justice: Community Interest coming to Life?' in Christian J. Tams, and James Sloan (ed.), *The Development of International Law by the International Court of Justice* (Oxford, 2013) 579, at 593.

[30] Separate Opinion of Judge Trindade, *Ahmadou Sadio Diallo* (*Guinea v DRC*) (Merits), 30 November 2010, 729, https://www.icj-cij.org/public/files/case-related/103/103-20120619-JUD-01-01-EN.pdf (accessed 3 September 2023).

[31] *Ahmadou Sadio Diallo* (*Guinea v DRC*) (Merits), *Separate Opinion of Judge Trindade,* 30 November 2010, 729 at 735, https://www.icj-cij.org/public/files/case-related/103/103-20120619-JUD-01-01-EN.pdf (accessed 3 September 2023).

[32] Andenas Mads and Bjorge Eirik, 'Diallo: Human Rights in the International Court of Justice' (2011) 60 *International and Comparative Law Quarterly* 811.

Trindade continued to cite the IACtHR right up to his final Separate Opinion in the *Chagos Advisory Opinion*.[33] *Chagos* was the perfect opportunity to showcase cases like *Suriname* in the IACtHR.[34] Trindade also quoted from his judgement in the *Yakye Axa* case, a case that also concerned the forced displacement of a local community:

> One cannot live in constant exile and displacement. Human beings share a spiritual need for roots. The members of traditional communities attribute particular value to their land, which they consider belongs to them, and alternatively, they 'belong' to their land.[35]

In this last Separate Opinion, Trindade referred not only to the IACtHR but also stated that the former Organisation of African Unity (OAU) as well as its successor, the African Union (AU), 'have both categorically condemned the military basis established in the island Diego Garcia (in Chagos)'.[36] Trindade highlighted the African regional position with regard to the Chagos Islands. He quoted from a resolution of the OAU that stated that 'the militarization of Diego Garcia is a threat to Africa' and that the OAU demanded that Diego Garcia be returned to Mauritius'.[37] Trindade further highlighted the position of the AU and African countries such as Botswana on the principle of self-determination.[38] According to Trindade, the AU General Assembly resolution 1514(XV) of 1960 crystallised customary international law on decolonisation and self-determination.[39] Trindade must have derived deep satisfaction from the fact that the position long held by the AU and OAU ultimately prevailed in *Chagos*.

Institutional Unity

The expansion of regional human rights systems worldwide is largely attributable to the success of regional human rights institutions. It can be argued that these

---

[33] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Separate Opinion of Judge Trindade* (2019) ICJ.

[34] In his Separate Opinion in the *Chagos Case*, Judge Trindade cited the Judgments of the IACtHR in the cases of *Mayagna Awas Tingni Community v. Nicaragua*, *Judgement,* 31 August 2001, https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf *Y* (accessed 3 September 2023)*, Yakye Axa Indigenous Community v. Paraguay*, *Judgement,* 17 June 2005, https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed 3 September 2023), *Moiwana Community v. Suriname, Judgement,* 15 June 2005, https://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf (3 September 2023), *Sawhoyamaxa Indigenous Community v. Paraguay*, *Judgment,* 29 March 2006, https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf (accessed 3 September 2023), *Saramaka People v. Suriname* , *Judgment,* 26 November 2007, https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf (accessed 3 September 2023).

[35] *Yakye Axa Indigenous Community v Paraguay*, *Separate Opinion,* 17 June 2005, 152, https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed 3 September 2023).

[36] Supra Note 32, para 52.

[37] OAU resolution AHG/Res. 99(XVII), 04 July 1980.

[38] Supra Note, para 88.

[39] AU GA Res 1514 (XV), 14 December 1960.

courts have protected human rights with greater efficiency than the global UN human rights treaty system.[40] Flexible reparations, including creative reparations ordered by the IACtHR, such as apologies, are but one admirable feature of these regional courts that exceeds the protection provided by UN bodies. Trindade can be credited for cross-fertilisation and more robust dialogue between the global and regional courts to enable improved protection of human rights at the global level. Trindade opposed not only the fragmentation of human rights but also the fragmentation of human rights protection. This was one motivation for the intensity with which he built bridges across courts.

The IACtHR has been particularly progressive on transitional justice questions, including reparations. The Court has ordered a variety of remedies for violations of the American Convention on Human Rights, including medical and psychological care for victims of human rights violations,[41] information on the whereabouts of forcefully disappeared persons,[42] as well as measures of satisfaction such as apologies and the establishment of monuments.[43]

African countries have made progress with regard to a 'pooling' of their resources with regard to economic integration at subregional levels.[44] In addition to the African Commission and the African Court of Human and Peoples' Rights, African sub-regional courts have also become a significant site of progressive human rights jurisprudence. The most significant of the subregional institutions are the ECOWAS Community Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Community (SADC Tribunal). The ECOWAS court has an explicit human rights mandate.[45] In terms of the EACJ, the EAC states still have to adopt a protocol that will provide the court with explicit human rights jurisdiction. It has, however, been argued that this court has an implied human rights mandate.[46] As most subregional African courts were established relatively recently, it is too early to say that subregional African courts have provided significant human rights protection in African countries. Nevertheless, the potential for a new layer of human rights protection in Africa exists.

---

[40] Anne F Bayefsky, *How to Complain to the UN Human Rights Treaty System* (Brill, 2003) 173.

[41] *Case of Manuel Cepeda Vargas v. Colombia*, *Judgment,* 26 May 2010, https://www.corteidh.or.cr/docs/casos/articulos/seriec_213_ing.pdf (accessed 3 September 2023).

[42] *Case of Radilla-Pacheco v. Mexico*, *Judgment,* 23 November 2009, https://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf (accessed 3 September 2023).

[43] *Case of La Cantuta v. Peru*, *Judgment,* 29 November 2006, 236. https://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf (accessed 3 September 2023).

[44] Mia Swart, 'Alternative fora for human rights protection? An evaluation of the human rights mandates of the African subregional courts' (2013) 437 *Journal of South African Law*.

[45] Protocol A/P1/7/91 of 6-0701991 amended by Protocol A/SP1/01/05, 19 January 2005.

[46] Commentators point to the extensive references to human rights under the 1999 EAC treaty and the human rights questions already decided by the EACJ. The 1999 Treaty includes respect for good governance, respect for the rule of law and respect for human rights among its fundamental principles.

Conclusion

Viljoen describes the African Court of Human and Peoples' Rights as entering into a judicial landscape that is 'truly post-modern … a landscape of institutional proliferation imitation and duplication'.[47] This is the landscape that the ICJ should also navigate, respect, and find a place in. In the context of commenting on cross-pollination and dialogue between different jurisdictions, L'Heureux Dubé commented that judgments in different countries build on each other. In her view, judges around the world should look to each other for persuasive authority, rather than some judges being 'givers' of law while others are 'receivers'.[48]

The greater the readiness of international counsel and judges to cite African and Latin American cases, the greater the general level of awareness of the case law of regional and subregional courts in international law more generally. This will lead to regional jurisprudence having an increased impact internationally and to international courts gaining legitimacy in parts of the world where they have hitherto been regarded as representing the Global North. International courts are not isolated 'little empires' as Judges Pellonpaa and Bratza put it in their concurring opinion in the *Al Adsani Case*.[49] International courts, whether criminal courts or other tribunals, are not supposed to function as self-sufficient systems that ignore the work of other international, regional, and national institutions. In its work and through its composition, the ICJ has long reinforced western perspectives and positions. To overcome such perceptions, it is not enough for international courts such as the ICJ to cite regional courts such as the IACtHR and the African Court on Human and Peoples' Rights. For Judge Trindade's influence to have an ongoing effect, his judicial colleagues will have to continue the work he started. The consideration and citation of regional jurisprudence should become essential, substantive, and normal; not merely a decorative or superficial way of incorporating the world into the World Court.

[47] Frans Viljoen, *International Human Rights Law in Africa* (Brill, 2012) 451.

[48] Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Review* 17.

[49] *Al Adsani v The United Kingdom, Concurring Opinion of Judge Pellonpaa, joined by Judge Bratza,* 21 November 2001, https://hudoc.echr.coe.int/ (accessed 3 September 2023).