

Interview with Professor Dire Tladi, the South African Candidate for a Seat at the International Court of Justice

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Abstract

Mutondi Mulaudzi interviewed Professor Dire Tladi, SARChI Chair for Constitutional International Law and South Africa's candidate for election to the International Court of Justice (ICJ). If elected, Professor Tladi would be the first South African elected to the Court. The interview was conducted online on 28 July 2023. In this interview, Mutondi Mulaudzi and Dire Tladi discuss the latter's introduction to international law in his early career and his vision for his tenure at the Court if elected. The interview reveals the compelling reasons behind South Africa's selection of Professor Tladi to be its candidate for election. Tladi's background in government enables him to understand the limits of States; his role as a comprehensive international lawyer and involvement with the International Law Commission (ILC) provides him with a profound grasp of various facets of international law. Also, his experience as Counsel grants him insight into the thought processes of international legal practitioners. Having dedicated the entirety of his career thus far to the study and development of international law, Tladi's experience positions him as a 'triple threat' in the field. This interview has been edited for length and clarity.

Keywords: Dire Tladi; International Court of Justice; ICJ elections; international law

Interview, 28 July 2023¹

Early career: From the Moot Court to the International Court

MM (Interviewer): So just to start, can you share with me a little bit about how you were introduced to the field of international law? And what motivated you to become an international lawyer and scholar? Was it deliberate or did you fall into it?

DT (Dire Tladi): No, I definitely did not fall into it. I got introduced to international law, even before studying the subject. In my second year, I participated in the Africa Moot Court competition.² The competition is based on international human rights law problems, and that helped to develop an interest in international law or at the least, international human rights law. I was in my second year of law studies then, which meant that I was yet to do any course relating to either international human rights law or general international law. I must confess though, that my teammate was the star of the team. I was the weak link. The result of doing well in that competition was that we were then selected to represent the University of Pretoria in the Jessup Moot Court Competition³, which is based on pure public international law problems. We won the national rounds and came sixteenth in the international round, which was at the time the highest that the South African team had gone. It was from that point that I knew that international law was going to be my career choice.

MM Did you ever plan going the classic attorney–advocate route by doing your articles/pupillage or were you always somewhat convinced that academia would get your foot into the door, so to speak? Also, what route did you take when getting your career started?

DT: No, I always knew I was not going to do articles. Before going to university, I always knew I wanted to do law, but I did not want to do articles. In my high school, there was a programme called the ‘Work Experience Programme’. When I was in grade 11, during the June vacation, I had the opportunity to spend time at a law firm in Johannesburg. At the time, this firm was one of the biggest law firms in the country and I spent a month there, job-shadowing a candidate attorney. From just observing how she carried out her functions, I was very sure that legal practise was not what I would wish to do. So, when I finally went to university to study law, I was quite certain that legal practise was not what I wanted. In my search for what I would like to do with my law degree, I came across two options: a legal advisor, and being an academic. I was lucky

1 Video and audio versions of the interview are also available on <https://www.youtube.com/watch?v=aGoed0jSqHI> and <https://open.spotify.com/episode/4jh87K3T9VMkt2SMCz3KwC?si=552d15425cd4480e> respectively.

2 <https://www.chr.up.ac.za/moot> accessed 19 August 2023.

3 <https://www.ilsa.org/about-jessup/> accessed 19 August 2023.

that in my first year, I had good lecturers that inspired me to want to do what they were doing. That encouraged me, in no small measure, to pursue the academia route.

MM: Can you name a few of those teachers that inspired you?

DT: I would say that Frans Viljoen was probably the most inspirational of all.

MM: I think he is probably responsible for a lot of us ending up in the international law/human rights space.

DT: I can imagine. When I encountered him, he was much younger than when you encountered him. He was not even a professor; he was a senior lecturer. He was just so passionate about what he did and there was just something very inspirational about his passion for the subject. There were others too. Duard Kleyn was another inspiration.

MM: When you reflect on the ICJ's impact on international law, do you have any favourite cases or landmark or fundamental cases that you turn to?

DT: I would not say that I have favourite cases. However, the two *South West Africa* cases or the four *South West Africa* cases⁴, depending on how you look at it, I think together are incredible in terms of their impact further down the line. Secondly, I think they are also interesting in terms of how different they are in terms of the outcome. And lastly, I think they are also interesting in terms of how they challenge me as somebody who is always very critical of people that stretch the law or bend the law to the point where it is no longer recognisable as law anymore. But these cases challenge that perception of mine because in a sense, many of the things that we are proud of today happened because of those cases. In the *Namibia*⁵ opinion for example, the Court, presumably, in order to achieve a particular outcome, bent the law to the point of non-recognition. I think Apartheid South Africa's argument that the resolutions were not properly adopted was probably correct. It is also probably correct to say that the Security Council resolutions were not properly adopted.

Another case that has had lasting impact is the *North Sea Continental Shelf* case⁶, which is very interesting because in fact, it did not really have an outcome. The Court essentially told the parties that we cannot help you. Yet, the decision had a lasting impact in terms of fundamental approaches to the sources of international law and the

4 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*; Second Phase, International Court of Justice (ICJ) (18 July 1966); *South-West Africa Cases; Advisory Opinion Concerning the International Status*, International Court of Justice (ICJ) (11 July 1950).

5 *South West Africa Cases; Advisory Opinion Concerning the International Status*, International Court of Justice (ICJ) (11 July 1950).

6 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports 1969 International Court of Justice (ICJ) (20 February 1969) 3.

relationship between them. The same applies to the *Nicaragua* case⁷. Although, I think *Nicaragua* is also impactful, more substantively in terms of the law on the use of force, and try as they may, it is also difficult to get away from it, even though so many big scholars today try to downplay the decision in *Nicaragua*. There are also many interesting modern cases as well. One example is the *Chagos* case,⁸ but I think there are limitations there.

MM: Did you always aspire to become a judge at the ICJ or was it a goal that only emerged at a certain point in your career?

DT: It was not always a goal, but it became one. ‘Goal’ is a strong word because it is not as if everything I did was aimed at becoming a judge. However, I would say as I progressed in my career, the idea started becoming concrete. I have always understood that success in international law, in fact, success in life in general, is based on what you do, but there is also quite a lot of luck involved in it. So, it was not a goal, but something that I thought would be great. Great for me, but also great in terms of the opportunity to contribute to international law from a different perspective. I must emphasise that a lot of it is based on luck, and I am very conscious of the fact. There is a huge chance I might lose, but I have a pretty good chance of winning, and part of the reason for that is because someone who also deserved to win and become a judge did not become a judge, and that is John Dugard. Had he won, my run would have been a lot more difficult, because I would be another South African trying to take the seat.

A Triad of Expertise: Government, Academia and the ILC

MM: In your campaign video, you express that you have sort of worn multiple hats in international law. You have worked in government; you have had a career in academia, and you have been a member of the ILC.⁹ You have also had some experience as a practitioner. How do you believe that these roles will complement or shape your approach as a judge at the ICJ?

DT: I think that my role as an academic is important just because it provided me with the knowledge of international law and so it is fundamental, and I think that is very important, especially considering the kind of academic that I am. I focus on international law, broadly speaking, and I do not have a specialisation, so to speak.

My role as a government employee is useful because it helps one see and understand international law from the perspective of States, which is not always a good thing.

7 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*; Merits, International Court of Justice (ICJ) (27 June 1986)

8 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, ICJ GL No 169, ICGJ 534 (ICJ 2019).

9 Dire Tladi, ‘Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur’ (2019) <<https://digitallibrary.un.org/record/3798216?ln=en>> accessed 19 August 2023.

However, I think it is useful because a lot of times, we academics judge States without factoring in the constraints that States have to navigate. I always say if I look at the things that I wrote before I worked for government compared to the things that I wrote after, there is a vast difference in tone and approach. This is not just because of intellectual maturity; of course, intellectual maturity is part of it, but it is not the only explanation. The other explanation is also just this ability to understand that the action of States is not always based on pure evil.

My role as a practitioner, acting as an expert or counsel before international tribunals is useful because it is important to know and understand how courts work. For me, the ILC is the melting pot of it all because it combines all of these.

Three Pillars of Vision: Work Ethic, Solidarity and Open-mindedness

MM: If you had to choose three words or phrases to describe your vision for fulfilling your role as a judge if elected, what would they be and why?

DT: The first word or phrase is ‘work ethic’.

The second word is ‘solidarity’. My vision of international law is an international law that promotes solidarity. Understanding, of course, that the function of a judge is to apply the law, but I guess in this context my hope is that the way in which I understand international law will be such as to help contribute to the Court facilitating a solidarity-based international law. There are different ways that courts can help contribute to that without manufacturing law, because I also do not like the idea of manufacturing laws.

The third word or phrase is ‘open-mindedness’, an open mind about different arguments that are put forward.

MM: This next question may be easier for you to answer, because right now you are sort of an outsider looking in and you are an academic. What do you perceive as the current challenges facing the ICJ and how would you address these challenges if elected?

DT: I obviously cannot talk about the jurisprudence. However, I would say at the moment, one of the biggest challenges is the significant increase in the Court’s caseload. It is a good challenge to have. Obviously, the response should not be to not want more cases because more cases mean that, at least in theory, States trust the Court. But it does mean that the Court is going to have to grapple with the tension between retaining the quality of its work and quick turnaround.

The other challenge, which is not so much a challenge for the Court, but rather for the system, is that a lot of the cases are contentious jurisdiction cases. This implies that States are dragging each other to court and that, of course, increases the possibility of

non-compliance. I think that is a challenge for the system. I do not think the Court necessarily needs to concern itself with that.

MM: Some cases at the ICJ may involve significant political pressure and outside influences. How would you approach maintaining impartiality and upholding the rule of law in the face of such pressures?

DT: I think it is tough. I am giving the Court the benefit of the doubt. Which is to say that I believe they have done that. Even when the Court has reached a decision that I question, one thing I respect is that such decision has been arrived on the basis of law and not the result of political pressure or geopolitical circumstances. I have always been opposed to narratives and I think it is important for judges to ignore narratives, but I also know that it is hard for judges to ignore narratives. Well, it is hard for human beings to ignore narratives because very often, a narrative might mean giving 'Dire' the real freedom to do what he wants, even though the thing that he wants to do is a bad thing. Once the narrative that what 'Dire' wants to do is a bad thing or an evil thing takes hold, the question is whether or not the Court must now act consistent with that narrative, at the expense of law. And my position is that this should not be the case. I pause to add that there is a tension between what I have just shared with you and what I said about the *Southwest Africa* cases because that was an instance, I think, where probably narrative played a role, right? The only thing I can say in my own defence is that at least I own my inconsistencies and I do not hide from them.

MM: If elected, you would be the first South African elected to the ICJ. What perspectives or qualities do you think your training as a South African lawyer brings and how could these positively impact the Court's proceedings?

DT: I have never thought about that. I do not know that there is anything specific about my training that would influence my position as an ICJ judge, if elected. What I do think will certainly help is seeing things from a different perspective and having another voice from the Global South, and hopefully, an influential voice from the Global South. It is easy to have voices from the Global South, but you have to be able, I think, to engage with people who have different views, and more importantly, be able to convince them.

MM: I think a big part of the role of the judges at the ICJ, particularly with the Judicial Fellowship Programme and the Clerkship Programme is to contribute to the future of international law by training future international lawyers. What would your role be in that sense?

DT: I cannot speak to the ICJ specifically because I do not know what opportunities there are, but I will just say that I am a very strong supporter of the idea of promoting future generations of international lawyers. That is why for me, the most important thing that I do at the university is supervising and mentoring PhD students. I always tell my PhD students that I will know that I am a successful international lawyer if I walk into

a room, and it causes a stir, not because of my achievements but because I get recognised as the former supervisor of someone who has just done something phenomenal.

During my time at the ILC, I also saw how those that got opportunities were generally from the Global North. As soon as I got a little bit of funding, I really made sure that I had research assistants from the Global South. This included students from South Africa, India, and Latin America. This deliberate act on my part is because I think it is critical that the future stars of international law look different from what the stars of international law look like today.

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