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OLD ORTHODOXIES AMID NEW EXPERIENCES: THE SOUTH WEST AFRICA (NAMIBIA) LITIGATION AND THE UNCERTAIN JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

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The obscurity into which the International Court of Justice seems to have languished brings to mind an observation made not long ago by Richard C. Hottelet, C. B. S. news correspondent writing in mitigation of charges that the United Nations was yielding its destiny by default. Wrote Hottelet:

> If the organization and its efforts seem pale, somewhat less than real — even ridiculous or contemptible to those with a craving for dramatic success — that is because it is regarded in the light of what it could have tried and should have done and might have been.[1]

Applied to any institutional decision process, such subjunctive criteria presume that there exist relatively stable expectations concerning the nature of the institution, the objectives it ought to be pursuing, and the limits of its capacity to pursue them. Specifically, with respect to the World Court, they presume some qualitative identification of the institution as an adjudicative process, one that derives from an empirically-oriented understanding of the bases of its authority to decide disputes, the sources of decisional criteria it applies, and the interaction constantly taking place between the Court and other institutionalized decision processes, especially the larger political process by which the Court's judgments are transformed into social action.[2]

Yet, in assessing the Court's apparent predicament, one is struck by the prominence in its jurisprudence of an assumption that courts of law are essentially homogeneous, that the Court is cast in substantially the same mold as courts of law are everywhere, inevitably cast. Arguably, this attitude serves to accommodate the diverse jurisprudential predispositions which the Court as an ecumenical judiciary collects. It does so, however, at the extravagant price of ignoring contextual and phenomenological differences.

1. *Dimensions of the Utility of International Adjudication*

In the *Conditions of Admission* case, the late Judge Alvarez wrote that:

*Member, New York Bar.

[1] Book review, Washington Post, October 25, 1970, at 5.

[2] This transformation is the focus of inquiry in W. M. REISMAN, NULLITY AND REVISION (1970).

> [T]he fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.[3]

The life of the Court, too, is an ongoing process. Neither the the United Nations Charter nor the Court's own Statute[4] reveals any eternal verities about international courts.[5] Each describes — the latter in greater detail — the formal structure of the Court, the more or less technical characteristics of its procedures and proceedings: for all purposes relevant to the present inquiry, its institutional shell. For its substantive character, indeed for that of any adjudicative institution, one must look not only to its conceptual and structural origins, but also to the internal commerce of people and ideas which are its lifeblood and to the interaction with contending social processes which identify its social experiences.

This is not to suggest that courts of law are invariably spontaneous exercises in political imagination, much less that diversity for its own sake is an institutional virtue. Rather, it is to suggest that courts of law are by their very nature social experiments, heterogeneous even when apparently isomorphic, which become and remain justifiable allocations of social decision prerogatives only to the extent that the cumulative effects of their judgments and the values[6] they comprehend conform to the needs and goal-objectives of the communities they serve.[7]

It follows that perceptions of the Court as an institution which are based for the most part upon its terminological identification as a "court," or even as the "principal *judicial* organ" of the U.N., are mistaken in assuming that its retention of what are thought to be traditional juridical conventions assures its worth to the world community. Seemingly constant or fundamental similarities among dispute settlement modalities identified as judicial ones can establish useful enough starting points or generalized parameters for distinguishing a particular process or its techniques from others. However, it becomes ironic and

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[3] *Conditions of Admission of a State to Membership in the United Nations*, [1947-48] I.C.J. Rep. at 68 (separate opinion). *See generally* E. Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794, 826-32 (1965).

[4] Hereinafter the "Charter" and the "Statute," respectively.

[5] *See* Goldie, *The Connally Reservation: A Shield for an Adversary*, 9 U.C.L.A. L. REV. 277, 280 (1962).

[6] The term "value" is used herein to refer to preferred events as a class. *See* H. LASSWELL & A. KAPLAN, POWER AND SOCIETY 56-73 (1950); and M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 31-36 (1960).

[7] *Compare* REISMAN, *supra* note 2, at 221.

self-defeating when such identifying generalities — themselves no more than the sum or average of past and current institutional adaptations to social and political conditions — deprive a contemporary institution such as the Court of the capacity to adapt to the unique social and political conditions with which it is empirically confronted.

The Court's capacity so to adapt depends upon the extent to which its jurisprudential values refer in rational, empirical terms to the needs and goal-objectives of the world community. To that extent, mere conformity to past or supposedly perfect models of juridical performance runs the risk of interfering with the development of a socially useful jurisprudence or, at best, of being no more than coincidental to it.

Jenks,[8] Reisman[9] and Rosenne,[10] each according to his own analytical style, have surveyed the elements of adjudication which have accorded it certain advantages over other decision modalities in the international arena. From their several approaches and notwithstanding differences in emphasis among them, four summary categories of advantageous qualities seem to emerge: (1) the relative fairness of the process (*e.g.*, disputants tend to be equalized, decision determinants tend to be generalized and applied consistently in like circumstances); (2) its substitution of persuasive strategies for those of raw or coercive force; (3) its restriction of the conflict to a largely symbolic adversarial battleground; and (4) the cathartic effects of its ritualized form of combat. Clearly, these categories are not parallel. Virtually all international litigation achieves the second and third, before it becomes certain whether the first and fourth have also been accomplished. For the Court, achieving all four outcomes appears to be desirable in terms of reacquiring popular acceptance.

Popular expectations about both the techniques of adjudication and their consequences do not always correspond to the essentials of institutional social utility. For instance, adjudication has now proved its case, so to speak, in so many societal settings that it is sometimes assumed to be an indispensable element of societal development[11] Rosenne notes that the inte-

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[8] C. W. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION (1964).

[9] REISMAN, *supra* note 2, especially ch. 8.

[10] S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965).

[11] Professor Reisman argues that "It is historically untenable to contend that some sort of adjudicative system is an invariable manifestation of community organization or that no community, as such, has ever existed without such a process." REISMAN, *supra* note 2, at 228. But he adds: "Historical studies and anthropological data do, however, suggest that

gration of the Court into the United Nations political system proceeded from an analogous assumption "that the world organization, already possessed of executive, deliberative and administrative organs, would be incomplete unless it possessed a fully integrated judicial system of its own."[12] Whether or not this assumption is supportable historically appears to depend upon the degree of generality with which one defines "judicial system."[13] From a contemporary vantage point, if one adheres to the formulation of social utility herein presented, the indispensability of adjudication to the development of an international public order certainly has yet to be proved.

This seems equally true of a host of other assumptions about and popular attitudes towards adjudication, notwithstanding the rear guard contention that the sum of all popular expectations about adjudication, regardless of the empirical validity of each of them, has contributed to the durability of adjudication as a social decision process. Illustrating popular enchantment with non-vital aspects of adjudication, Professor Reisman alludes to the "compelling romanticism attached to a dramatic arena (with an audience) in which individual champions match skills in a duel for high stakes;" with the assumption that "truth will tell" in an adversarial process; and with the depiction of adjudication as the acme of civilized dispute resolution.[15] One might add, as a further illustration, the contagious illusion that the rigorous constraints of strict reason, faithfully observed by judges, assures absolutely their neutrality and that of the judgment criteria (*i.e.*, the *law*) they invoke.[16]

In terms of consciously enhancing the contemporary worth of the Court, reliance upon essentially irrational attitudes towards adjudication is a doubtful strategy. The spread of scientific inquiry to the social sciences is exposing all of our social institutions to the intolerant glare of systematic, rational scrutiny, exposure to which our legal institutions, for the most part, have not previously been subjected to such a degree. As Rosenne observes,[14] attention to realities, harsh though they may be,

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as the interaction rate of a society increased, and some structural specialization developed, institutionalized and ritualized decision processes emerged." *Id.* at 229.

[12] S. ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 36 (1962).

[13] *See* Schwartz & Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. SOC. 159, 168 (1964).

[14] *Supra* note 10, at 6.

[15] REISMAN, *supra* note 2, at 7. As to the last-mentioned of these, compare JENKS, *supra* note 8, especially ch. 11.

[16] Discussed recently in Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court* 84 HARV. L. REV. 769 (1971).

cannot spoil an institution of proved and accepted worth. It can, to the contrary, help to rid it of impediments to its continuing social merit.

It is not essential to a rejection of irrationality as a strategy for enhancing the social worth of the Court that one reject all expectations of dubious empirical validity, or even outright misconceptions of the nature of adjudicative techniques, are bound to compromise the integrity of the process or lead to its disintegration once exposed. To begin with, this simply is not the case. It is no longer a novel proposition that bell, book and candle have as legitimate a claim to the history of adjudication as a social decision process as do, say, reason and social justice. Indeed, in our own country's judicial history the generous allocation of decision-making prerogatives to courts of law, although owing in part to the Supreme Court's early and successful appropriation of the power to review the acts of other branches of government for their constitutionality,[17] seems to have its ultimate source in some essentially emotional attitudes toward authority and decisiveness which in our society are transferred in a collective way to judicial tribunals, especially our highest ones. Whether this generosity would have been as lavish if popular attitudes towards adjudication were required to undergo some test of empirical validity is problematical. Nonetheless, if social influence is a proper measure of institutional vigor, then one cannot help but observe, in the spirit of de Tocqueville, that we have become highly accustomed to reducing to legal value symbols and to resolving in judicial combat an imposing variety of social conflicts embracing contending social values.[18]

The point, in any event, is not that all irrational attitudes must be swept away in the name of institutional integrity, regardless of whether the institution expires in the process. It is that any inquiry whose purpose is the redirection of institutional energies to more empirically relevant ends cannot be oblivious to transempirical directives when these are apparent or implicit in the institution's work product. It is, moreover, that such redirection of energies must proceed rationally to be worthwhile.

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[17] *Cf.* A. M. BICKEL, THE LEAST DANGEROUS BRANCH (1962), especially ch. 1.

[18] A circumstance not always regarded as wholesome, *e.g.*, D. Acheson, *The Purloined Papers,* New York Times, July 7, 1971 at 37, col. 1.

2. *Dangers Inherent in Reified Concepts of Institutional Identity*

Reified concepts of the Court's identity, often concepts which assume fixed characteristics about the institution on the basis of its terminological identity alone, usually appear in the form of statements that the Court, because it is a court of law — or the judges, because they are juridical beings — *must* adhere to some line of reasoning or, in the negative, *must not* undertake some proposed inquiry or follow some proposed line of reasoning. To do otherwise, so the logic suggests, is to deprive the resulting judgment of its *judicial* character. Taken literally, the norm appears to prohibit inquiry into the decision to which it leads, let alone its policy content. It runs, to borrow Karl Llewellyn's phrase, in deductive form with an air or expression of single-line inevitability.[19] Thus, in the *Case Concerning the Northern Cameroons,* Preliminary Objections, the Court observed:

> There are inherent limitations on the exercise of the judicial function which the Court, as a Court of Justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[20]

Because the consequences of "losing" the presumed judicial character are often, as here, left ominously vague, and because that character tends to be identified on an *ad hoc,* rather than a systematic basis, the sentiment expressed in *Northern Cameroons* by the Court easily lends itself to service as euphemistic rationale for decisional preferences which result, consciously or unconsciously, from unidentified policy considerations. One recalls in this vein a comment of the late Judge Lauterpacht—indicative of his judicial perspective although in fact written in 1949 prior to his election to the Court—in which he noted . . . that judicial rules of construction are:

> not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means . . . [T]he very choice of any single rule or of a combination . . . of them is the result of a judgment arrived at independently of any rules of construction, by reference to considerations of good faith, of justice, and of public policy.[21]

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[19] K. LLEWELLYN, THE COMMON LAW TRADITION — DECIDING APPEALS 38 (1960).

[20] [1963] I.C.J. Rep. at 29.

[21] *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties,* 26 BRIT. Y. B. INT'L L. 48, 52 (1949).

Accordingly, there is cause for suspicion when the Court appears to resign itself to purportedly unalterable rules of inquiry. No doubt, there are practical limits beyond which the Court itself, operating within its distinctive political environment, ought to pursue the resolution of a question before it. It is when presumed limits are pronounced in the name of judicial verities, without reference to empirical distinctions among courts, that the Court's submission to the fates of adjudication tends to become illusory self-denial of the existence of judicial choice. The more ambiguous the source or reference of the presumed imperatives, naturally, the more likely it is that a denial of judicial choice serves to conceal — even from the judges themselves — the fact that the judges, not the imperatives, are actually responsible for the results which follow.

The presence of imperatives which conceal judicial volition is most apparent in cases whose outcome promises to be controversial, where the nature of the dispute before them leaves the judges with no real alternative to performing transparently coordinate political functions. Especially for an undecided judge, the illusion of preordained passivity serves to soothe an uneasy conscience and, perhaps, to persuade him to accede to what is apt to be the more unpopular of several possible rulings. Willy-nilly, a judge may reason (or instinctively feel), in merely *being* a judge he is not *doing* anything for which it would be proper to hold him personally accountable.

This calls to mind an observation of Justice Holmes, *viz*:

> I think it is important to remember whenever a doubtful case arises, with analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. . . . When there is doubt the simple tool of logic does not suffice, and even if it is disguised or unconscious, the judges are called upon to exercise the sovereign prerogative of choice.[22]

In the tradition of legal realism, Justice Holmes' insights seem self-evident. Yet, when competition between social ideas finds its way into the courtroom, courts come under attack for venturing beyond their rightful limits and efforts are made to distinguish judicial functions from political ones. Where constitutional guidelines distribute authority among various branches of government, typically the case in national political systems, the distinction concentrates on the branch of government whose authority the courts are allegedly usurping. However, the U.N.

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[22] "Law in Science and Science in Law," in *Collected Legal Papers* 229 (1920), cited in E. ROSTOW, THE SOVEREIGN PREROGATIVE (1962), at xiii.

political system is not possessed of an analogous distribution of political authority and, as Rosenne points out, "while it is frequently possible in the Charter to differentiate between [particular] *functions,* it is quite another matter when it comes to differentiating either the organs, or the applicable techniques."[23] Often, when the Court itself considers whether or not to deal with a particular issue because the issue is intertwined with *political* considerations, its frame of reference is a reified concept of the Court as a judicial — which is sometimes to say, non-political — institution.[24] Justiciability tends to be regarded as an unchanging quality, reified along with the Court's institutional identity.

3. *The South West Africa Litigation*

What brings these thoughts to mind is the prolonged South West Africa litigation, particularly its two most recent episodes. The litigation, it will be recalled, grew out of the extension by the Republic of South Africa of its domestic racial policies into territory — "South West Africa" or, as it is now called in the U.N., "Namibia" — it administers as the result of a League of Nations mandate (hereinafter the "Mandate"). The original gravamen of the complaint against South Africa was that its administration of the Mandate has been inconsistent with applicable international standards and a violation of its obligations under Article 2 of the Mandate "to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory." South Africa has denied the charges and has maintained that, in any event, with the dissolution of the League of Nations the League's supervisory rights over the administration of the Mandate have lapsed and neither the U.N. nor former members of the League have succeeded to the League's legal rights or interests therein.

The legal issues to which the dispute has been reduced have been overshadowed, by and large, by its political, indeed ideological, content. Legality, as dispensed by the Court, has been a symbol for social propriety, for conformity with the Charter

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[23] Rosenne, *supra* note 10, at 3.

[24] The present writer has previously had occasion to describe the distinction between judicial and political tasks appearing in the Court's own jurisprudence. Gordon, *supra* note 3, at 800. He concluded then, as he does now that the Court would one day be drawn to the conclusion that legal and political tasks are not mutually exclusive, that adjudication is a social process which rightly and inherently interacts with all other important institutions and processes of organized society, and that especially for the Court, given its hybrid judicial-diplomatic character — little is accomplished and much is concealed from analysis by any attempt to place the two functional areas in dialectical opposition.

or, to the extent that general principles of international law circumscribe the goal-objectives of the Charter, for conformity with general international law. However, for the Court, the matter has also evoked root questions of its competence to hear and decide a dispute which has been social and political, as well as, above all, controversial.

By 1966 the matter had come before the Court in one context or another on five occasions. In 1950, responding to a request from the General Assembly, the Court handed down an advisory opinion[25] to the effect that the Territory was still under international mandate; that South Africa retained her international obligations under the Mandate; that the supervisory powers, particularly the right to receive and examine annual reports from South Africa, previously exercised by the League, were to be exercised by the U.N.; and that South Africa was not competent to modify the international status of the Territory without the U.N.'s consent. In 1955[26] and 1956,[27] in each instance at the request of the General Assembly, the Court handed down further opinions confirming the supervisory role of the U.N. over South Africa's administration of the Mandate.

(a) *The South West Africa Cases*

The parties to the Statute do not undertake to be bound by the Court's advisory opinions, however, and South Africa not unexpectedly refused to accept the three opinions pertaining to the Mandate. In reaction, the Empire of Ethiopia and the Republic of Liberia, the only African States other than South Africa which had been members of the League, initiated contentious proceedings against South Africa in 1960, attempting thereby to transform the Court's previous opinions into a "binding" judgment which might be enforced by the Security Council under Article 94 of the Charter.[28] The applicants asked the Court to confirm its earlier rulings and to declare, in so many

[25] International Status of South West Africa, [1950] I.C.J. Rep. 128.

[26] Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, [1955] I.C.J. Rep. 67.

[27] Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. Rep. 23.

[28] Article 94 of the Charter provides as follows:

> 1. Each Member of the United Nations undertakes to comply with the decisicn of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

words, that South Africa had violated its obligations under the Mandate.

In 1961, South Africa raised certain preliminary objections[29] which, under the Court's procedural rules, had the effect of suspending the proceedings on the merits. The objections were based upon the language of Article 7(2) of the Mandate, which provides that:

> if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.

and Article 37 of the Statute, which states that:

> whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall be referred to the International Court of Justice.

South Africa contended that the Mandate was not a "treaty or convention in force" within the meaning of Article 37; neither of the applicants could be described as "another member of the League of Nations" as required for *locus standi* by Article 7(2) of the Mandate; there was no dispute as envisaged by Article 7(2) in that no material interests of the applicants or of their nationals were involved; and the applicants had made no attempt to negotiate a settlement of the dispute with South Africa.

By a vote of eight to seven, the Court dismissed these objections, remarking at one point that:

> [T]he manifest scope and purport of the provisions of [Article 7] indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its members.[30]

However, in 1966, in the proceedings on the merits — the so-called *Second Phase*,[31] — the Court in effect reversed itself, this time when a seven to seven tie vote was broken, pursuant to the Statute,[32] by the casting vote of the President of the Court, Sir Percy Spender. The Court decided that the applicants had not established any legal right or interest in the subject matter of their claim, that is, in the observance by South Africa of its obligations under the Mandate.

To reach this conclusion, the Court chose to review the

[29] South West Africa Cases, Preliminary Objections, [1962] I.C.J. Rep. 319.
[30] *Id.* at 343.
[31] South West Africa Cases, Second Phase, [1966] I.C.J. Rep. 4.
[32] Art. 55(2).

entire mandate system, not just the Mandate itself, for it felt that the Mandate enjoyed certain features in common with the other mandates. The substantive provisions of mandates, the Court found, could be divided into two categories: first, those articles defining the mandatory's obligations in respect of the inhabitants of the territory and toward the League (which the Court labelled "conduct" provisions); and second, articles conferring rights relative to the mandated territory directly upon members of the League as individual States, or in favor of their nationals (which the Court called "special interests" provisions). The Court determined that the dispute before it related solely to the conduct provisions of the Mandate and that these provisions did not confer any legal right or interest in individual members of the League. Not even the subsequent dissolution of the League could have invested its members with legal rights or interests in the conduct provisions, the Court said, inasmuch as the mandatories were agents of the League, not of its members individually, so that it followed that the applicants could not possess after the League's dissolution rights of intervention they had not possessed while it was still in existence. Therefore, case dismissed.

Professor Dugard subsequently summarized the Court's explanation of its different treatment in 1966 of the issue, apparently resolved in applicants' favor in 1962, of their standing to sue:

> In brief the Court held that in 1962 it had been faced solely with a question of jurisprudence and that it had not been called upon to decide whether the applicants had an interest in the due performance by South Africa of her obligations under the Mandate (even if it had done so in a 'provisional' way). This was a question for determination at the merits stage, irrespective of whether it was classified as a question relating to the merits but of an 'antecedent character' or as a question relating to the admissibility of the claim.[33]

The "antecedent character" of the question demanded its resolution at the outset of the Court's consideration of the merits of the rival claims, the Court held. To say the least, this priority struck some observers as contrived, result-oriented, and in any event the result of, not the reason for, the majority's decision to deny applicants' claim. At the same time, incidentally or not, treating the question as antecedent and deciding it against

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[33] The reader's attention is drawn to this concise and lucid summary of the South West Africa litigation through 1966 by Professor John Dugard of the University of Witwatersrand, Johannesburg, which appears under the title, *The South West Africa Cases, Second Phase, 1966,* 83 S. AFR. L. J. 429, 440 (1966).

the applicants at the outset enabled the court to avoid the gravamen of their complaint.

One auxiliary participant in the litigation, recalling its planned and inadvertent strategies, has likened litigation to a two-person zero-sum game in which plaintiff and defendant stand to win or lose the same precisely defined amount.[34] Even assuming there are only two litigants, matters often do not work out so neatly in practice, especially if one is inclined to regard the court as a third participant in any litigation and the relevant community as a fourth. Yet, to the extent that what were at stake in the *South West Africa Cases* were, first, a value symbol and, second, an effort to transform a previous judicial allocation of that value symbol into effective social action, South Africa may be said to have "won" and the applicants, for the time being at least, to have "lost." For this to have happened it was not essential that the Court decide the substantive issues in South Africa's favor. Even without deciding these issues, the Court left the impression that international law does not forbid what South Africa is doing in the Territory. That this impression is not strictly justified by the logic or specific holding of the decision does not alter the fact that it was widely enough held for South Africa thereafter to adopt a posture of legality for its administration of South West Africa.[35]

It could hardly have escaped notice that one practical explanation for the Court's change of heart between 1962 and 1966 was the intervening change in the composition of the bench. Judges Badawi and Bustamente, each of whom had voted against South Africa's preliminary objections, were unable to participate in the merits phase because of ill health (Judge Badawi died during the pendency of the proceedings). Judge Zafrullah Khan, apparently against his own wishes, was persuaded to recuse himself, perhaps because of the partisanship implicit in his having been appointed *ad hoc* judge by the applicants prior to being elected to the Court as a regular member. Such shifts in the Court's ideological center of gravity, not surprising in view of the length of the litigation,[36] serve to remind its critics that the Court is not as utterly depoliticized a process

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[34] D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 L. IN TRANS. Q. 8 (1967).

[35] When the Security Council later came to reintroduce the matter to the judicial arena, *infra*, one factor bearing on its decision to do so was a desire to deny this posture to South Africa. *See S.W. Africa Plea to World Court*, The Times (London), July 31, 1970.

[36] Dugard, *supra* note 33, at 434.

as some abstract theory would have it. Indeed, judicial history everywhere testifies to its interplay with social tensions, however abrasive they may be, however momentous the interests at stake, however reluctant courts may be to become involved in what appears as open competition with other decision-making institutions. If Professor Falk is correct in describing as carelessness the failure of Afro-Asian countries to oppose the election of judges to the Court who held views antithetical to their main concerns,[37] perhaps a contributing factor was a mistaken assumption that courts of law are by their very nature insulated from social and political tensions.

It should be kept in mind that the 1966 decision did not specifically disturb the Court's previous findings, in 1950, to the effect that the U.N. had succeeded to the supervisory functions of the League.[38] The general thrust of the Court's holding in 1966 was that the Court itself was not suited to resolve the question before it, because it is just a court of law. The reasoning was foreshadowed in 1962 in the joint dissenting opinion of Judges Fitzmaurice and Spender, their voice later becoming that of the majority in the *Second Phase*:

> The proper forum for the appreciation and application of a provision of this kind [i.e., Article 2 of the Mandate] *is unquestionably* a technical or political one, such as (formerly) the Permanent Mandate Commission, or the Council of the League of Nations — or today (as regards Trusteeships), the Trusteeship Council and the Assembly of the United Nations. (Emphasis added.)[39]

Unquestionably? But then what is the source of an unquestionable directive for the Court to eschew the interpretation of an instrument which allegedly gives rise to international legal obligations, a task, the Court regularly declares, which is a distinctly *judicial* one?[40]

American courts have found that whether or not they are ideally suited in each instance to deal with the disputes they are asked to resolve, there is little likelihood that they will readily be forgiven for attempting to excuse themselves from the task, particularly if in doing so they appear to be deciding the dispute obliquely and arbitrarily, according to some implicit

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[37] Falk, *Realistic Horizons for International Adjudication*, 11 VA. J. INT'L L. 314, 319 (1971).

[38] See Dugard, *The Revocation of the Mandate for South West Africa*, 62 AM. J. INT'L L. 78, 82 (1968).

[39] [1962] I.C.J. Rep. at 467.

[40] *E.g.*, P.C.I.J. ser. B, No. 10, at 17; P.C.I.J. ser. B, No. 13, at 23; Conditions of Admission case, *supra* note 3, at 61; Certain Expenses of the United Nations, [1962] I.C.J. Rep. at 155-56; and the *Namibia* opinion, *infra* at 24.

partisanship. Courts tend to be judged less by the niceties of their internal logic than by the social consequences of their decisions;[41] thus, for the Court to declare itself unfit to decide a matter which had been before it for five years is to raise grave doubts abouts its capacity to deal empirically with the content of contemporary international legal disputes.

In citing an unquestionable state of judicial propriety, the Court might have been expected to refer to the Charter, its ultimate constitutive instrument, but it did not. In its *Awards of the Administrative Tribunal Opinion*,[42] the Court had taken the position that it would be inconsistent with the Charter's expressed aim of advancing the cause of freedom and justice for individuals, and with the preoccupation of the U.N. to promote this aim, for there to be no judicial or arbitral remedy available for the claims of the U.N.'s own staff. In its self-denial of the propriety of a judicial remedy for the inhabitants of the Territory, however, the Court seemed to be unaware or unwilling to concede that it, too, derives its institutional objectives from the Charter. Certainly, the charge that the Territory's inhabitants were being systematically deprived of their individual freedom and justice is as deserving of judicial attention as the grievances which the U.N.'s administrative tribunal is likely to hear.

In fact, the case's humanitarian aspects were so pronounced that the Court felt obliged to explain its refusal to consider them, *viz*:

> Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.
>
> . . . Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set forth. Such considerations do not, however, in themselves amount to rules of law. All States are interested — have an interest — in such

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41 *Cf.* A. M. Bickel, The Supreme Court and the Idea of Progress 175 (1970).

42 Advisory Opinion on the Effects of Awards of Compensation by the United Nations Administrative Tribunal, [1954] I.C.J. Rep. 57. *See also* Judge Read's dissenting opinion in Anglo-Iranian Oil Co., [1952] I.C.J. Rep. 143-44.

> matters. But the existence of an 'interest' does not of itself entail that this interest is specifically juridical in character.[43]

It has been suggested earlier that transempirical imperatives which stem from reified concepts of the Court's institutional identity are apt to become the sleeves of judicial legerdemain. The preceding excerpt is an example of a jurisprudential habit which has lingered on without any regard for a change in juridical environment. For if one simply accepts its appropriateness in the world community, and if its logic is to be taken at its word, then in the absence of an authoritative legislature of international law even the most widely-shared community expectations — rules, principles, standards, goal-objectives — will be unlikely to possess "sufficient expression in legal form," until they have been translated into non-preambular treaty prescriptions. Yet, one knows that the Court does not — under Article 38(1) of its Statute it cannot — ignore custom or general principles of law recognized internationally. The Court's invocation of presumed juridical imperatives thus only serves to conceal how the individual judges go about deciding which community expectations should be judicially supported, which expectations should qualify as sufficiently important or fundamental to be vindicated against what are presumed to be natural limits of the judicial process.[44]

(b) *The Namibia Opinion*[45]

Professor Falk has suggested that some members of the Court may have been subconsciously reacting to the experience of the Court's *Certain Expenses* opinion[46] and decided that it was better for the Court not to decide at all than to decide and then have its decision ignored:

> In essence, the Fitzmaurice-Spender view of the ICJ role, which carried the day, opposed entrusting any role to the Court which might make it carry out judicially the will of the political organs of the U.N.; better not to decide at all.[47]

In any case, following the announcement of the Court's decision, the General Assembly took matters into its own hands, passing a resolution[48] which declared that:

> South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral

[43] [1966] I.C.J. Rep. 24.

[44] *Cf.* BICKEL, *supra* note 17, at 55.

[45] Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. Rep. 16.

[46] Certain Expenses of the United Nations, [1962] I.C.J. Rep. at 155-56.

[47] Falk, *supra* note 37, at 317-18.

[48] G. A. Res. 2145 (XXI); 61 AM. J. INT'L L. 649 (1967).

> and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate.

and decided that:

> the Mandate conferred upon his Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations.

The General Assembly continued to pursue the matter, implementing the foregoing resolution with one establishing a United Nations Council for Namibia to administer the Territory until independence.[49]

It is worth recalling that the General Assembly did not ask the Court for assistance in determining the lawfulness of South Africa's administration of the Territory. Professor Dugard noted at the time[50] that the General Assembly had refrained from doing so because (1) the Court might have declined to give an opinion in accordance with the ruling in the *Eastern Carelia Case*[51] that its advisory machinery should not be used for obtaining a decision in an actual dispute between States; (2) after the 1966 decision the Assembly was reluctant to send the matter back to the Court at all; (3) advisory opinions are not binding and South Africa had refused to accept the three earlier ones; and (4) an advisory opinion dealing with South Africa's compliance with the Mandate could do no more than augment the judicial guidance the Assembly had already received in the separate opinions of those judges who, in 1966, did direct their attention to the ultimate merits of the dispute. Of the six judges (out of fourteen) who examined the compatibility of South Africa's administration of the Mandate in terms of the obligation "to promote to the utmost" the welfare of the inhabitants of the Territory, only the South African, Judge *ad hoc* Van Wyk, found in favor of South Africa.[52]

The General Assembly, accordingly, arrived at its own findings and enlisted the cooperation of the Security Council, which thereupon proceeded on the basis of the Assembly's resolution. On March 29, 1969, the Council called upon South Africa to immediately withdraw its administration from the

[49] G. A. Res. 2248 (s-v), 5 U.N. GAOR Supp. 1, at 1, U.N. Doc. A/6657 (1967). *See generally,* Dugard, *supra* note 38; and Engers, *The United Nations Travel and Identity Document for Namibians,* 65 AM. J. INT'L L. 571 (1971).

[50] Dugard, *supra* note 38, at 82-83.

[51] Eastern Carelia Case, [1923] P.C.I.J. ser. B, No. 5.

[52] [1966] I.C.J. Rep. 140-193.

Territory;[53] on August 12, 1969, it once again called upon South Africa to withdraw, "in any case before 4 October 1969;"[54] on January 30, 1970, it decided *inter alia* to establish an *ad hoc* sub-committee to study, in consultation with the Secretary-General, ways and means by which the relevant resolutions of the Council could be effectively implemented;[55] and, finally, on July 29, 1970, the Council adopted a recommendation of the sub-committee and requested the Court to render an advisory opinion on the question:

> What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?[56]

Nearly a year later, on June 21, 1971, the Court handed down an opinion in which it found (1) (by a vote of 13 to 2) that the continued presence of South Africa in the Territory being illegal, South Africa is under an obligation to withdraw its administration therefrom immediately and thus put an end to its occupation of the Territory; (2) (by a vote of 11 to 4) that Members of the U.N. are under an obligation to recognize the illegality of South Africa's presence in the Territory and the invalidity of its acts on behalf of the Territory, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration. The latter conclusion was supplemented with one which found it incumbent upon States which are not members of the U.N. to give assistance, within the scope of the foregoing, in the action which has been taken by the U.N. with regard to the Territory.[57]

Once it decided to render an opinion, the Court was obliged to deal with two substantive issues: first, the competence of the U.N. to supervise the Mandate; and second, the liability of the Mandate to (unilateral) revocation.[58] With respect to the first of these, the Court relied heavily on its 1950 opinion, observing that the well-being and development of the inhabitants of the mandated territories formed a "sacred trust of civilization." The best method of giving practical effect to this

[53] S. C. Res. 264 (1969).
[54] S. C. Res. 269 (1969).
[55] S. C. Res. 276 (1970).
[56] S. C. Res. 284 (1970).
[57] [1971] I.C.J. Rep. 31-32.
[58] In his dissenting opinion, Judge Fitzmaurice writes that in respect of both these issues, "[T]he findings of the Court involve formidable legal difficulties which the Opinion turns rather than meets, and sometimes hardly seems to notice at all."

principle, the Court said, quoting from Article 22 of the Covenant of the League, was for "the tutelage of such peoples . . . [to] be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it. . . ." The acceptance of a mandate on these terms constituted the assumption of a binding legal obligation, the Court found, and the question of *quis custodiet ipsos custodes?* had been given in terms of the Mandatory's accountability to international organs. Annexation of the mandated territories, towards which the Court felt South Africa was hinting, was deemed fundamentally at odds with the foregoing principles.

South Africa had suggested that if it were maintained the Mandate had lapsed, then she — South Africa — would have the right to administer the Territory by reason of a combination of factors: its original conquest; its long occupation; the continuation of the sacred trust basis agreed to in 1920; and "because its administration is to the benefit of the inhabitants of the Territory and is desired by them."[59] This latter point was supported, in effect, by two offers made by South Africa during the hearings. The first of these, deferred by the Court at the time (March, 1971), but subsequently rejected in light of its findings, proposed the holding of a plebiscite in the Territory under the Court's supervision, to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations."[60] The second proposal, disposed of in an identical way by the Court, was for the Court to permit South Africa to present material bearing on the actual state of well-being and development of the inhabitants. In deferring action on the two proposals, the Court had said it did not want to anticipate, or appear to anticipate, its decision.

The problem which the proposals posed for the Court was that either of them would have put it into competition with the General Assembly, since that body had presumably borne in mind the administration of the Mandate in reaching its findings. It will be recalled that the Security Council had not asked the Court to review the Assembly's findings and that the Court's 1966 decision had left the distinct impression that the Court prefers to leave such matters to other organs of the U.N. When the Court ultimately came to reject South Africa's two

[59] [1971] I.C.J. Rep. 43.
[60] *Id.* at 20.

proposals, therefore, it did so on the grounds that it had already determined that the Mandate had been validly terminated by the General Assembly and that "in consequence South Africa's presence in Namibia and its acts on behalf of or concerning Namibia are illegal and invalid."[61]

Several governments had challenged the Assembly's adoption of resolution 2145 on the grounds that it had acted *ultra vires*. The Court was thus confronted with the problem of whether to assume the validity of the Assembly's action or to subject it to judicial review. The canons of interpretation open to the Court were rife; it could find support for the proposition that, on the one hand, it completely lacked authority to review actions taken by other organs of the U.N. without their specific request to do so or, on the other hand, that judicial review was implicitly authorized in the Security Council's request for an advisory opinion (since it must have foreseen that no *legal* organ would find legal consequences in action which had been invalid *ab initio*).

What the Court chose to do was to say one thing and do another; that is, to first declare itself without authority to initiate judicial review, and, having satisfied one and all on that score, to immediately thereupon declare it would undertake such a review *in the exercise of its judicial function*:

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for [this] advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from these resolutions.[62]

In context, "will consider" appears to be a euphemism for "has already decided to reject" and "in the course of its reasoning" seems to mean "in rationalizing conclusions it has arrived at through other determinants." In political terms, the Court was saying that it recognized itself to be without authority to review or act as appellate court from actions taken by other principal organs without their specific request to do so, but that no harm would be done by its undertaking the forbidden review in the instant case. And no harm was done, the Court upholding the validity of both the Assembly's and the Council's actions.

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[61] *Id.* at 57-58.
[62] *Id.* at 45.

The Council's action was relatively easy to identify as being in furtherance of its responsibilities under Chapter V of the Charter. The Assembly's action was held to be a termination of a relationship on account of "a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship." To the contention that, since the Covenant had not explicitly conferred upon the Council of the League the right to terminate a mandate for misconduct of the mandatory, the U.N. could not have succeeded to any such power, the Court responded by invoking a general principle of law that a right to terminate on account of breach must be presumed to exist in all treaties, except — the Court remembered its 1950 finding that South Africa could not unilaterally modify the status of the Territory — as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character. Thus, in the Court's view, the revocability of the mandates by the supervisory power had been envisaged from the outset of the mandate system.

It had been maintained that the Assembly, not being a judicial organ and not having previously referred the matter to such an organ, was not competent to make its findings as to the status of the Mandate. Referring for the only time in its opinion to its 1966 decision, the Court recalled that the applicants had been told in that case that they lacked the right to require the due performance of the sacred trust and that any divergencies of view concerning the conduct of a mandate had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League.

> To deny to a political organ of the United Nations which is a successor of the League in that respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.[63]

That, and little more, is the gist of the opinion. If the Court in 1966 saw fit to deny a judicial remedy, the Court in 1971 was not going to forbid a political one, for such a double denial would amount to denying that the inhabitants of the Territory could be protected under international law; in other words, that their human rights were recognizable as legal ones. Correspondingly, the 1971 opinion should probably be read as putting national sovereigns on record that they are answerable

[63] *Id.* at 49. The Court also rejected an argument that resolution 2145 was invalid as a transfer of territory. *Id.* at 50.

at law for deprivations of human rights when they are acting in an international fiduciary capacity.

One aspect of the Court's handling of the case certain to be criticized long after the furor of the dispute has subsided is its insensitivity to charges of juridical bias, specifically directed against the Republic of South Africa, its Government and its representatives. Several of the separate opinions went out of their way to commend the presentation of South Africa's case, perhaps in recognition of the sometimes preemptory way in which its various objections and requests were denied. Throughout the history of the Court, and its predecessor, the Permanent Court of International Justice, the fact and appearance of impartiality have been scrupulously maintained by the Court. Article 17(2) of the Statute provides that

> No member [of the Court] may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

Paragraph 3 of Article 17 leaves to the Court the resolution of any doubts as to the applicability of the provision in a given instance, but the substance, clearly, puts a burden of proof on a judge accused of violating the provision. In the *South West Africa Cases,* as noted, Judge Zafrullah Khan had reluctantly recused himself from sitting, a circumstance which has never been publicly explained, but one nonetheless which hindsight shows to have been decisive in the outcome of the judgment. In *Namibia,* Zafrullah Khan was the President of the Court.

In *Namibia,* South Africa had objected to the participation of three of the judges: Zafrullah Khan, Padilla Nervo and Morozov. In each case, the objection was based upon what had allegedly been statements and active participation by the judge in the South West Africa dispute in his former capacity as representative of his government at the U.N. during the pendency of the debates over the dispute. In Judge Morozov's case, these activities allegedly continued through the period in which the General Assembly was taking its substantive action upon which the Security Council's request for an advisory opinion was based. In Judge Zafrullah Kahn's case, attention was also drawn to his having been named as *ad hoc* judge by Ethiopia and Liberia in the *South West Africa Cases,* prior to his election as a regular member of the Court.[64]

[64] *See* Statement of the Government of South Africa dated November 19, 1970, at 121-26 and Annexes B, C, D and F to ch. IV thereof [hereinafter cited as 1970 statement].

The Court rejected all three objections, citing its refusal to accede to a similar objection to the composition of the bench by South Africa in the *South West Africa Cases*[65] (but neglecting to point out that the vote to deny South Africa's objection in that instance had been a mere 8 to 6), and also citing four PCIJ "precedents" which, presumably, bear on the point at issue.[66] The Court took no note of Zafrullah Khan's having recused himself in 1966.

The present writer must acknowledge his inability to comprehend the similarity between the situations involved in the precedents and the statements and activities complained of by South Africa *in extensio*. One of the precedents, in fact, turned on a specific finding that the previous functions whose compatibility was in question (the judge himself having asked the Court for guidance) were not objectionable "since they had been exercised before the dispute actually before the Court had arisen."[67] Inasmuch as the Court's opinion in Namibia integrates the General Assembly's action in adopting resolution 2145 with the subsequent Security Council action leading to the request for an advisory opinion, it is difficult to see how the precedent applies, particularly in the case of Judge Morozov.

The Court must have regarded the instances it cited as verification of the principle that service as a representative of one's government does not in itself bring Article 17 into play. However, the judges to whom South Africa had objected were ones who it maintained had played such leading and outspoken roles in the attacks on South Africa as to far exceed the normal bounds of representative advocacy. Indeed, it is difficult to perceive the rational basis on which the Court was able to conclude that previous activities of the three judges did other than cast doubt on the impartiality of the judges themselves and, for that matter, on the bench as a whole. It is possible, of course, that the Court drew upon material not available to the public, in which case it would have been more candid to reveal the existence of such sources than to cite previously decided instances of dubious comparability. It should be noted that five judges expressed serious reservations about the Court's rejection of South Africa's objections to the composition of the bench.

South Africa's request for the appointment of an *ad hoc*

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[65] Order dated 18 March 1965.

[66] P.C.I.J. ser. A, No. 1, at 11; P.C.I.J. ser. C, No. 84, at 535; P.C.I.J. ser. E, No. 4, at 270; P.C.I.J. ser. E, No. 8, at 251.

[67] P.C.I.J. ser. E, No. 4, at 270. *See also* P.C.I.J. ser. E, No. 6, at 282; and *compare* P.C.I.J. ser. E, No. 7, at 287.

judge was also rejected.[68] From the Court's opinion, it appears that this denial resulted from a finding that the Court was not acting "upon a legal question actually pending between two or more States," these being the words of Rule 83 of the Court's rules of procedure which brings into play Article 31 of the Statute (that being the provision for the appointment of *ad hoc* judges). South Africa, recalling the 1962 decision, contended that if it had been correctly decided, then the relevant legal question before the Court did indeed relate to an existing dispute between South Africa and other States.[69] The existence of such a dispute was also relevant to South Africa's claim that the Court, in the exercise of its discretion under Article 65(1) of the Charter, ought to decline to give an opinion.

South Africa advanced two sets of factors for the Court to bear in mind in deciding whether or not to entertain the question posed by the Security Council. The first was the immensity of the political pressure to which the Court had been subjected as a result of its 1966 decision and the continuing pressure it was allegedly under to "make amends" by deciding against South Africa in the instant case.[70] The Court replied in the imperative:

> It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside interference or interventions whatsoever, in the exercise of the judicial functions entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.[71]

Self-righteous indignation often, as here, is a diversionary tactic, avoiding the question by pretending that it is so preposterous that its mere consideration is an unworthy enterprise. Nevertheless, say what it will, the Court had been put on notice — and publicly, too — that its choice was between coming into harmony with the attitude toward South Africa prevailing in the General Assembly and Security Council, on the one hand, and going out of existence, on the other.[72] The correct response

[68] Order dated 29 January 1971.

[69] 1970 statement, *supra* note 64, at 101.

[70] *Id.* at 104 *passim*.

[71] [1971] I.C.J. Rep. at 23.

[72] Even in the General Assembly's Sixth Committee (Legal), the Court was under attack. An initiative in that Committee to study ways of enhancing the role of the Court evoked little enthusiasm other than from its twenty initial sponsors, some outright hostility — mostly from the Soviet Union, which maintains that the existing allocation of competence among the U.N.'s organs ought not be reconsidered — and fairly widespread apathy. Sponsors of the initiative were obliged to seek safety in a compromise resolution postponing until the twenty-sixth session of the General Assembly consideration of the question

for the Court to have given would have consisted of an examination of its collective predispositions, to determine whether the circumstances in which the question came before the Court precluded its impartial adjudication. The statement that courts of law, by their very nature, act independently of all outside interference or interventions whatsoever is simply untenable; they do not always do so, and as South Africa maintained, ought to decline to hear any case presented in which the judiciary's collective impartiality or freedom from outside interference is seriously in doubt. In the international arena, that doubt may be resolved in the first instance by the Court itself, and in the final analysis by the political process which transforms the Court's rulings into social action. The Court, in effect, chose to leave the matter entirely to the political process. If you doubt our integrity, it appeared to say, that is too fundamental an objection for us to consider ourselves.

South Africa had put forward a second combination of factors which, it said, compelled the conclusion that, even if the Court were entitled to render an advisory opinion, it should as a matter of judicial discretion decline to do so. Article 65(1) of the Statute authorizes the Court — but does not require it — to give an advisory opinion on "any legal question" asked of it by an authorized body. South Africa conceded that there is no precise line between "legal" and "political" questions and that a "political" question may also be a "legal" one.[73] However, it felt that the question posed by the Security Council was so intertwined with political issues and had a political background in which the Court itself had become so embroiled that the proper exercise of the Court's judicial functions was seriously compromised. Moreover, South Africa contended, the relevant legal dispute related to an existing dispute between South Africa and other States, a circumstance which the Permanent Court, in the *Eastern Carelia* case, had regarded as rendering the advisory machinery of the Court inappropriate. Finally, South Africa argued, in order to answer the question posed by South Africa the Court would have to decide legal and factual issues which were actually in dispute, a circum-

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of whether to establish an *ad hoc* committee to study the role of the Court. Those who maintain hope for the prospects of international adjudication will seek to enlist enough diplomatic support to establish the committee, but even now the prospects for any substantive recommendations the committee may ultimately make are regarded as uncertain. Had the Namibia opinion gone in favor of South Africa, uncertainty might have become improbability.

[73] 1970 statement, *supra* note 64, at 102.

stance which *Eastern Carelia* also noted as a factor leading to its conclusion not to hear the question therein posed.

In that case, the Council of the League had requested an opinion on whether the Peace Treaty of October 14, 1920 between Finland and Russia and an annexed Declaration thereto by the Russian Delegation regarding the autonomy of Eastern Carelia placed Russia under an obligation to Finland to carry out the Treaty's provisions with respect to that region. Russia, not a Member of the League, had categorically refused to take part in the League's consideration of the dispute and had objected to the Court's hearing the case on the further grounds that it was a matter falling within Russia's own domestic jurisdiction.

Article 14 of the Covenant of the League, in effect at the time of the *Eastern Carelia* case, authorized the Permanent Court to render an advisory opinion on "any dispute or question referred to it" by an authorized organ. The difference in language between this Article 14 and Article 65 of the Statute has had the effect, *inter alia,* of encouraging the Court to emphasize that treaty interpretation, for example, is a distinctly judicial task;[74] however, as South Africa rightly maintained in its Statement,[75] this did not mean that the interpretation of an international instrument was invariably a task the Court ought to undertake.

In *Eastern Carelia,* the Court had declined to give an advisory opinion on several grounds, the first being that the opinion bore upon an actual dispute between Finland and Russia and that

> It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.[76]

In addition, the Permanent Court had felt it inexpedient to attempt to deal with the question because it turned upon a determination of factual issues which the Court, in the absence of Russia's cooperation, would be at a disadvantage in making. In *dicta* for which the case has become noted, the Court then said:

> The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Fin-

[74] See Gordon, *supra* note 3, at 800.
[75] 1970 statement, *supra* note 64, at 101.
[76] P.C.I.J. ser. B, No. 5, at 27.

> land and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court.[77]

Distinguishing *Eastern Carelia,* the Court in *Namibia* pointed out, *inter alia,* that South Africa had been a Member of the United Nations, had been bound by the decision of its competent organ to request an advisory opinion, and had actually appeared before the Court and addressed itself to the merits. The Security Council's request did not relate to a legal dispute actually pending between two or more States (or, for that matter, between South Africa and the U.N.):

> It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks advice from the Court on the consequences and implications of these decisions.[78]

Some fact-finding is inherent in all advisory opinions, the Court noted, adding that this had been true of the three previous advisory opinions on South West Africa in which South Africa had not seen fit to question the propriety of the Court's giving

Recalling its *Genocide Convention* opinion,[79] the Court ob-

an opinion.

Recalling its *Genocide Convention* opinion,[79] the Court observed that a "reply to a request for an Opinion should not, in principle, be refused."[80] It found no compelling reasons to refuse to do so in the instant case:

> Moreover, [the Court] feels that by replying to the request it would not only 'remain faithful to the requirements of its judicial character' . . . , but [would] also discharge its functions as 'the principal judicial organ of the United Nations'. . . .[81]

The point the Court chose not to stress, once again, was that the international law prevailing in the days of the *Eastern Carelia* case (1923) was sovereignty-oriented, that the Premanent Court's *dicta* grew out of the notion that it could not compel Russia to reach a pacific settlement. In other parts of its *Namibia* opinion, the Court gave a detailed account of the

[77] *Id.* at 29.
[78] [1971] I.C.J. Rep. at 24.
[79] Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. Rep. at 19.
[80] [1971] I.C.J. Rep. at 27.
[81] *Id.* The reference to remaining faithful to the requirements of its judicial character alludes to the Court's Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Consultative Organization, [1960] I.C.J. Rep. at 150.

changes in international law since the Mandate's origin, observing at one point that

> its interpretation [of the Mandate] cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. . . . In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[82]

In *Namibia, unlike the South West Africa Cases,* the Court saw as its duty, or perhaps as its only life-sustaining choice, following the political lead of the General Assembly and the Security Council. From the standpoint of institutional wisdom the Court's conclusion was understandable. Whether or not it will serve the Court in the long run, however, remains to be seen, for the Court is not apt to be judged favorably, in Hottelet's terms of reference, for merely surviving.

Nor, after the current anti-South Africa sentiment has gone its historical way, is the Court's too avid rejection of that government's every claim likely to impress future analysts of the principal judicial organ. Denunciation of South Africa's racial policies may indeed be called for and one may not reasonably doubt that the Mandate has been abused in this respect. That the Court accepted as its own concurrent responsibility such denunciation may be laudable in its own right, but does not entirely redeem an otherwise uninspired judicial performance.

Some Concluding Observations

The South West Africa litigation presented the Court with prodigious problems, not so much because of the nature of the dispute, as is often maintained, but because the dispute's history attaches to two distinct periods in the modern development of international law, periods which have been accompanied by corresponding changes in the nature of adjudication generally, and the adjudicative process of the Court in particular. What distinguishes the *South West Africa Cases* from the *Namibia* opinion, as much as the specific holdings themselves, are the divergent expectations concerning the nature of the Court as a decision-making process, the juridical relevance of the objectives of the Charter and the social outcome of the Court's judgments, and the role the Court should play within the larger political process of which its decision-making is a part. These divergent attitudes must be inferred; neither of the two judgments pauses to consider them rationally.

[82] [1971] I.C.J. Rep. at 31.

Were the judges to have adopted an attitude of existential responsibility for developing the institution in accordance with the requirements of international life, then the troublesome litigation discussed herein by now would have served the purpose of enhancing the potential utility of the Court to the world community. However, beset by a decline in popular enchantment with international adjudication as a dispute settlement modality, the judges have instead chosen to cling publicly to outworn jurisprudential banners and to accept the verity of reified concepts which, for the most part, are alienated from rational and empirical judicial analysis. Dancing to rhythms the band is no longer playing, the Court remains inelegantly out of step, its latest judgment more popular than its earlier one, but no less an attempt to vindicate old orthodoxies in the face of new experiences.