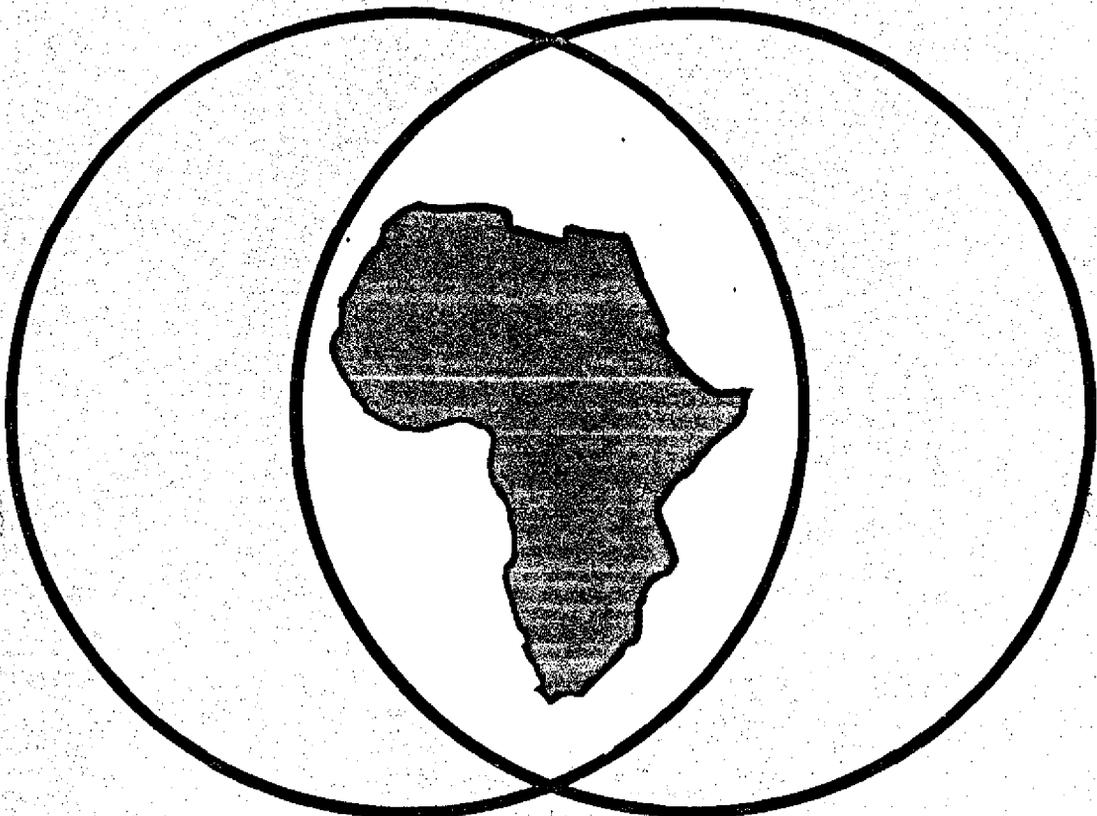


# SOUTHWEST AFRICA AND THE INTERNATIONAL COURT

TWO VIEWPOINTS  
ON THE 1971  
ADVISORY  
OPINION



THE SOUTH AFRICAN INSTITUTE  
OF INTERNATIONAL AFFAIRS.

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# South West Africa and the International Court

TWO VIEWPOINTS ON THE 1971  
ADVISORY OPINION

John Dugard  
E. M. Grosskopf

With an introduction by Professor Marinus Wiechers  
and a foreword by Advocate D. P. de Villiers

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# Foreword

“Although I respect the humanitarian sentiments and the avowed concern for the welfare of the peoples of South West Africa which so clearly underline the Opinion of the Court in this case, I cannot as a jurist accept the reasoning on which it is based.”

This was the opening sentence of the dissenting opinion of Judge Sir Gerald Fitzmaurice in the 1971 Advisory Proceedings on South West Africa in the International Court. In masterly understatement it typified a clash which had run like a refrain through the forensic exchanges of some 21 years.

The Court proceedings derived from highly charged political disputes at the United Nations: indeed the Court's judgments and opinions were sought as potential weapons in the political warfare. So it was almost inevitable that arguments against South Africa in Court would feed on the emotional content of a rampant anti-colonial campaign at the U.N. The Court would in effect be urged to arrive at certain results in order to better the lot of people allegedly oppressed by reason of the colour of their skins. Even the factual basis of oppression would often be taken for granted, though denied by South Africa, the arguer simply relying on the terms of U.N. resolutions. The South African reply would be that such an approach was a denial of the essential disciplines of the judicial process. Those disciplines required that disputed allegations of fact should be proved, which meant that they could not be assumed to be true on the mere say-so of majorities in a political body. Similarly, so the reply would run, legal conclusions could legitimately flow only from an application of established principles of law, and it was not the business of a court to alter or ignore these in order to arrive at a result which it considered desirable from a humanitarian or political point of view, or to avoid a result which it considered undesirable in those ways.

All this may sound very elementary. Yet the thrust-and-parry along these lines was not confined to the well of the Court: it was all too evident on the bench itself. Repeatedly the reasoning of judges who gave Judgements or Opinions unfavourable to South Africa (and popular in terms of ruling political sentiments at the U.N.) was attacked by colleagues as being based on unwarranted assumptions, question-begging and legally invalid criteria. In voicing one of these criticisms in 1971, Sir Gerald Fitzmaurice went so far as to warn that

“those thinking of having recourse to the international judicial process at the present time must pay close attention to the elaborate explanation of its attitude on this kind of matter which the Court itself gives in its Opinion.”

This explains why the litigation on South West Africa is said to have put the International Court itself on trial. In effect the question for States which might consider submitting themselves to its jurisdiction is whether they can, on the part of the majority of the judges, expect a judicial or a political approach to the question at issue.

It is in the above context that Mr. Grosskopf and Prof. Dugard, in their contributions to this book, debate the performance of the majority of the Court in the Advisory Proceedings of 1971. Prof. Dugard argues that the judges applied a perfectly legitimate, if fairly new, legal approach and philosophy. Mr. Grosskopf differs strongly. Their treatment of the subject is incisive and enlightening.

The South African Institute of International Affairs has shown commendable interest in the South West Africa affairs and has created several opportunities for opposing and varying points of view to be expounded by experts, for the enlightenment of the members of the Institute and of the public generally. The publishing of this debate on the legal aspects is a further and very valuable step in this process, on which the Institute is to be warmly congratulated.

# Introduction

MARINUS WIECHERS

On 11 June, 1950, the International Court of Justice gave an Opinion on the international status of South West Africa. The Opinion ran to a mere sixteen pages. Was it to be foreseen at that time that the controversy over South West Africa would, in the next twenty-one years, grow into the *cause célèbre* of modern international law? The territorial dispute about South West Africa has, over the years, grown in proportion and dimension. Now it encompasses such fundamental problems as the rôle and powers of the United Nations, the responsibilities of the international community, the international protection of human rights, the breaking up of the last ramparts of colonial rule, the relevance of international adjudication and, finally, the basis of international co-operation itself. Seen in this light, the South West Africa issue may afford the solution to many key issues which still obstruct international goodwill and progress. On the other hand, the development of the whole dispute can also be seen by some as a prolonged petty obstinacy which has assumed proportions above and beyond its intrinsic importance.

Since the creation of the United Nations in 1945, the dispute about South West Africa has run a tumultuous course, both in the debating halls of the world organisation and in the austere court rooms of the Peace Palace. As far back as 1946, South Africa insisted that the mandate for South West Africa had lapsed with the demise of the League of Nations, and that she was under no obligation to conclude a new trusteeship agreement with the United Nations which would place the Territory under the control and supervision of the General Assembly. This attitude of the South African government led the General Assembly to ask for an Advisory Opinion of the International Court on the legal status of the Territory. In its Advisory Opinion of July 1950, the Court stated that, in its view, the mandate had survived the League of Nations and that although South Africa was, in her capacity as mandatory, under no obligation to conclude a new trusteeship agreement, she had to accept the supervision of the General Assembly of the United Nations as far as the South African administration of the Territory was concerned. South Africa immediately rejected the Opinion and reiterated her view that she was under no obligation to account to the General Assembly for her administration.

In 1955 and 1956, the General Assembly again called on the Court for Advisory Opinions on the voting procedure to be adopted in the Assembly on South West African matters and on the question of whether the Assembly was empowered to hear petitions from inhabitants of the Territory. In both these Opinions the Court based its views on the previous opinion of 1950, and stated that the General Assembly was empowered, within the purview of its Charter powers, to carry out an effective supervision of the Mandatory's administration.

After more than a decade of United Nations deadlock on South West Africa, two ex-members of the League, Ethiopia and Liberia, were requested by the General Assembly, in 1959, to institute litigious proceedings against South Africa in terms of the jurisdictional clause of the mandate. This jurisdictional clause provides members of the League with the opportunity of approaching the International Court for a Judgment if a dispute between themselves and a mandatory as to the obligations under the mandate cannot be settled by negotiation. South Africa immediately raised preliminary objections to the jurisdiction of the Court in the matter, but, in its Judgment of December 1962, the Court refused to uphold these objections and proceeded with a hearing on the merits of the case. After prolonged debate, both written and oral, on the merits of the case, the Court delivered its Judgment in 1966, rejecting the claims by Ethiopia and Liberia on the ground that they lacked the necessary legal right and interest, and that they could therefore not request a binding and final Judgment from the Court, particularly in so far as the conduct provisions of the mandate were concerned.

The Judgment of 1966 gave rise to vehement protests both in and outside United Nations circles, and in October 1966, the General Assembly took the unprecedented step of revoking the mandate for South West Africa and assuming United Nations responsibility for the Territory. In a series of ensuing resolutions, the General Assembly and the Security Council, acting on the assumption that the mandate had been terminated, issued requests to South Africa to end her administration of the Territory and enjoined other states, members as well as non-members of the Organisation, not in any way to recognise the continued presence of South Africa. All this culminated in resolution 276 of the Security Council. On the recommendation of a committee created to investigate means of rendering its resolutions effective, the Security Council in July 1970, for the first time in the history of the United Nations, then asked the World Court for an 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".

On 21 June, 1971, the Court delivered its Opinion in which it endorsed the revocation of the mandate by the General Assembly as well as all other actions taken by the Assembly and the Security Council since October 1966. Acting on the basis of the Opinion, the Security Council then authorised the Secretary General of the Organisation to establish contacts with the South African Government with a view to the withdrawal of the South African presence in the Territory and the attainment of full independence for South West Africa. This resulted in various contacts between the Secretary-General or his representatives and members of the South African Government. In the report of the personal representative of the Secretary-General, who visited the Territory towards the end of 1972, the view was expressed that certain agreements were reached between himself and the Government of South Africa as to the future independence of South West Africa.\*

At the moment the crucial question remains whether the South African Government will in future accept the 1971 Opinion and act on the basis of

\* After further discussions between the Government and the Secretary-General, this period of negotiations was ended by Security Council Resolution 342 of 11 December, 1973.

that Opinion, just as it remains to be seen whether that Opinion did in effect constitute practical advice for the United Nations.

It has often been said that the controversy about South West Africa has for too long been cloaked in intricate, legalistic idiom and niceties. However, it must not be forgotten that law does still provide the best and most acceptable means of solving an international dispute. At the same time law affords the most solid basis on which states can conduct their foreign relations with other states. Seen in that light, international law is not merely a set of rules which can be applied mechanically; it must be realised that international law also serves as a vehicle for conveying and giving expression to philosophical and moral values.

The legal foundation of the South West Africa dispute cannot be ignored or denied. What can create differences of opinion, however, is the rôle and characteristics of the law which has to be applied in order to solve that dispute. For us here in South Africa and South West Africa, these differences of opinion are not merely manifestations of an abstract academic debate, since they relate directly to our own position in this southern part of Africa.

In the following papers by two eminent South African lawyers, widely divergent opinions about the theoretical soundness of the 1971 World Court Opinion on South West Africa, as well as the underlying philosophy of that Opinion, are set out. These papers do not simply present a theoretical, albeit thought-provoking, discussion of a highly intricate legal problem, but also pose a direct challenge to every thinking, responsible South African to judge and assess for himself the possible solutions to a problem which concerns us all.

Does the Advisory Opinion of the World Court of 1971 propose a legally sound and realistic solution to the South West Africa problem? Does it indicate the means whereby the material and moral progress of the inhabitants of the Territory can best be promoted? These are vital questions both for the United Nations and for South Africa. It is in this regard that the papers by Mr. Grosskopf and Professor Dugard are recommended for their acumen and learning.

# The 1971 Advisory Opinion

E. M. GROSSKOPF

The most recent Advisory Opinion of the International Court of Justice on South West Africa,<sup>1</sup> was not well received in South Africa. Shortly after the Opinion was handed down in June 1971, the Prime Minister stated that it displayed the results of political manoeuvring rather than of objective adjudication. More recently, Mr. Justice van Wyk, who was Judge *ad hoc* in the 1962–1966 South West Africa proceedings, accused the Court of substituting mere mumbo-jumbo for sound legal reasoning, and of employing meaningless legal jargon in order to reach predetermined conclusions. These are strong words. One may well ask oneself: Were they justified?

Both the speakers mentioned above supported their assessments of the Court's performance by referring to, *inter alia*, collateral issues such as the Court's refusal to have certain Judges recused, the failure to appoint an *ad hoc* Judge, and the sitting of the Court behind closed doors in the initial stages of the proceedings. Some of these features do in fact provide what is perhaps the most obvious evidence of the Court's attitude. Their significance is easily understood, even by a layman. Strong apologists of the Court have not attempted to defend these decisions.

For the purposes of this paper, however, I propose disregarding these collateral issues, and confining myself to the main basis upon which the Opinion rested.

I believe that one can take the reasoning of the Court on each of its major findings, and show that there is a basic and obvious flaw in it – a flaw which cannot be explained by invoking (as some have done) approaches based on natural law, teleological methods of interpretation or similar vague and undefined concepts.

The first major question with which the Court was faced, was whether the Council of the League of Nations had the power to revoke a mandate. The mandate system was established after the First World War as part of the new international order which would operate under the aegis of the League of Nations – indeed the mandate system was embodied in Article 22 of the Covenant of the League. In determining what the incidents of the mandate system were, one must therefore have regard to the intentions of those who created this whole co-ordinated new order at that time. And, it must be emphasised, the authors of the system had a completely free hand. They could in law establish whatever kind of mandate system and whatever kind of League of Nations they desired. In particular, the extent of supervision to be exercised by the League of Nations over the administration of mandated territories could be of whatever kind or whatever degree the parties wished. It was entirely open to the parties to make mandates revocable or irrevocable, or revocable only under certain conditions laid down by them.

It is well known that the mandate system, and in particular the system of C-mandates, under which South West Africa fell, formed a compromise between two divergent attitudes. On the one hand, certain states claimed annexation of the former German colonies occupied by them. South Africa was one of these claimant states. On the other hand, President Wilson of the United States of America wanted complete international administration of all former enemy colonies. The compromise which was reached, fell somewhere between these two extremes. The question to be determined by the Court in 1971 was whether C-mandates were so near to annexation as not to be revocable under any circumstances, or whether the element of international supervision was strong enough to include a right of revocation.

The mandate instruments made no provision for revocation. During the life-time of the League, no mandate was revoked against the will of the mandatory, and no attempt was ever made to do so.

In order to ascertain whether the mandate was nevertheless revocable, one would therefore have to examine the intentions of the authors of the system, as such intentions might be gathered from the nature of the institution, the relevant documents, the debates at the Peace Conference, general presumptions of law, etc.

In this regard there was one feature which was of great significance. Under the Covenant of the League, any Member of the League not represented on the Council, was entitled to be invited to send a representative to sit as a Member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League. And decisions of the Council required the agreement of all the Members of the League represented at the meeting. There was nothing in the Covenant to indicate that these provisions did not apply to mandates. If they were applicable, the result would have been that the mandatory would have had a veto right in respect of any proposal relating to its mandate.

In the 1955 Advisory Opinion on the Voting Procedure, there was disagreement between two of the Judges who wrote individual opinions on the question whether the mandatory did indeed have a veto power when its own mandate was under discussion before the Council.<sup>2</sup> This conflict was resolved in the course of the contentious proceedings between Ethiopia and Liberia and South Africa. In the 1962 Judgment, the Court stated unambiguously that "under the unanimity rule the Council could not impose its own view on the mandatory" because the mandatory "was entitled to send a representative to such a meeting to take part in the discussion and to vote".<sup>3</sup> This finding of the Court formed an essential link in its reasoning leading to the conclusion that the Court had jurisdiction in that matter. The finding was confirmed by the differently constituted Court in 1966. Then the Court said:

In the Council, which the mandatory was entitled to attend as a member for the purposes of any mandate entrusted to it, if not otherwise a member – the vote of the mandatory, if present at the meeting, was necessary for any actual 'decision' of the Council, since unanimity of those attending was the basic voting rule on matters of substance in the main League organs. Thus there could never be any formal clash between the mandatory and the Council as such.<sup>4</sup>

There are also other passages to the same effect.

The unanimity principle applying to the Council, must, to put it at its lowest, surely be a feature militating very strongly against any notion that mandates were intended to be revocable. If the authors of the system had wished mandates to be revocable against the wishes of the mandatory, it is difficult to imagine that they would have made it impossible in the normal course for the Council to exercise its power of revocation.

How did the Court deal with this topic in 1971? The question which it had to decide, it will be borne in mind, was whether there was an intention on the part of the authors of the mandate to provide for a unilateral right of revocation on the part of the Council. In answering this question, the Court started off from the premise or postulate that the mandate being a Treaty, was capable of revocation in the event of a breach. Even as the initial step in a chain of reasoning, it is highly debatable whether the mandate could be considered a treaty with the incidents usually pertaining thereto, for if the mandate were a treaty at all, it was certainly one of a novel and unique type. In the 1962 Judgment the Court described it as "a special type of instrument composite in nature and instituting a novel international regime".<sup>8</sup>

However, if the Court had commenced its reasoning by saying that *prima facie* a mandate instrument was revocable, unless there were indications to the contrary, it would have been a comprehensible attitude, even though all lawyers might not have agreed therewith. But the Court did not approach the matter in this way at all. For it said:

It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also *postulate an impossibility*. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.<sup>9</sup> (Italics added)

The phrase "postulate an impossibility" is a gem. The Court commences to postulate that which has to be proved, namely that the mandate was revocable. All indications to the contrary are then brushed aside, and why? Because they contradict the Court's premise. There must be very few Courts which have ever been so obvious in their question-begging.

I now turn to the powers of the General Assembly. The General Assembly, it will be recalled, purported in 1966, in Resolution 2145, to terminate the mandate for South West Africa and to declare that South Africa has no other right to administer the Territory. It would appear to be obvious that the General Assembly, which was brought into being by the states who signed or acceded to the Charter, can have only such powers as are bestowed upon it by the Charter either expressly or by necessary implication. And this has indeed often been so stated by the International Court, also in respect of powers sought to be exercised with respect to mandates by the General

Assembly as purported successor to the Council of the League of Nations. In the 1950 Advisory Opinion, the Court stated that the competence of the General Assembly to exercise rights of supervision derived from Article 10 of the Charter.<sup>7</sup> This Article empowers the Assembly "to discuss any questions or any matters within the scope of the present Charter . . . and . . . make recommendations to the Members of the United Nations or to the Security Council or to both". This is the corner-stone of its powers. With immaterial exceptions, it can do no more than discuss and recommend. In 1955, the Court again emphasised that

it is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find the rules governing the making of its decisions in connection with those functions.<sup>8</sup>

If the General Assembly can only discuss and make recommendations, whence can it derive the power to revoke a mandate, or to make a binding declaration that South Africa has no other right to administer the Territory? The Court did not say. It merely states the following:

It would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.<sup>9</sup>

It is hardly necessary to labour this point. The Court failed completely to indicate any provision which could authorise the Assembly's action. It has simply evaded the issue entirely. As Sir Gerald Fitzmaurice said:

The whole of this most important aspect of the matter, resulting from the Court's own jurisprudence as it was enunciated in the 1955 Voting Procedure case, is now completely ignored, and not even mentioned in the present Opinion of the Court; – for the sufficient reason no doubt that there is no satisfactory answer that can be given to it.<sup>10</sup>

The third of the issues for consideration in this paper relates to the powers of the Security Council. Under Chapter VII of the Charter, the Security Council can take decisions binding on its Members after it has determined the existence of a threat to the peace, breach of the peace, or act of aggression. Attempts within the Security Council to secure such a determination concerning the issue of South West Africa have always failed. It was accordingly accepted in the 1971 Court proceedings that the Security Council resolutions which were in issue<sup>11</sup> were not adopted under Chapter VII. Whence then could the Security Council have derived the competence to make decisions binding on Members of the nature for instance, of calling upon them not to have any relations with South Africa which would recognise South Africa's title to the Territory of South West Africa?<sup>12</sup> The Court sought to find it in Chapter V of the Charter, and in particular Article 24.<sup>13</sup> This article describes the role of the Security Council. In terms thereof the Council has primary responsibility for the maintenance of international peace and security, and in carrying out its duties under this responsibility, it acts on behalf of members of the U.N. The Article continues as follows:

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.

If words have meaning, this Article would appear to lay down that, in the field of peace-keeping, the specific powers of the Security Council were to be derived not from Article 24 itself, but from the Chapters mentioned therein. This interpretation did not, however, appeal to the Court. It found that Article 24 itself bestows residuary powers on the Security Council to take decisions binding on all Members of the Organisation in respect of all situations which "*might* lead to a breach of the peace."<sup>14</sup> Virtually any situation may be said with some justification to be one which *might* lead to a breach of the peace. The only limitations on these powers according to the Court, are those contained in the Principles and Purposes found in Chapter I of the Charter<sup>15</sup> – which are so widely stated as to be virtually all-encompassing.

It may well be asked: by what process of reasoning did the Court attribute these vast powers to the Security Council on the strength of a text which in its ordinary meaning would not appear to justify the interpretation placed upon it? The answer is: by no process of reasoning whatsoever. The Court merely quoted as authority a statement by the Secretary-General of the Organisation made in 1947. The correctness of that statement had, of course, been strongly and extensively argued during the proceedings. But not a word of reasoning did the Court advance in support thereof – no reasoning even by the Secretary-General was produced, merely his bare assertion that these powers are conferred by Article 24.<sup>16</sup>

The last aspect of the Opinion to which I would advert, is its treatment of the factual issues.

The Court held in effect that the United Nations, as a party to a Treaty, was entitled to cancel the mandate on the grounds of its breach by South Africa. On ordinary principles therefore, if the matter came before a Court, the Court would have to determine whether a breach had actually been committed. The grounds urged by the Assembly in its debates and its resolution, were that South Africa had oppressed the inhabitants of the Territory and had denied them rights of self-determination. To counter these allegations, South Africa offered during the hearing to present detailed factual evidence on the situation in South West Africa and also to hold a plebiscite of the inhabitants. The plebiscite would of course have been relevant both to the charges of oppression and to the charges of denial of self-determination. In the result, the Court found that the refusal by South Africa to submit reports to the United Nations constituted a sufficient ground for cancelling the mandate.<sup>17</sup> To expose the weaknesses of this finding would take me beyond the limits to which I have been restricted in presenting this paper. However, I do wish to point out one consequence of this finding, namely that any other suggested or alleged violations by South Africa of the mandate accordingly became entirely irrelevant to the Court's reasoning. For the same reason the Court then no longer needed any evidence relating to the merits of the South African administration in the Territory, or the wishes of its inhabitants and it so indicated to the South African government.<sup>18</sup> By the

same token there was then no longer any cause or justification for the Court to comment on these matters.

Nonetheless the Court devoted about a full page of its Opinion to a discussion of the supposed iniquities of apartheid and reached the conclusion that it constituted a violation of the Purposes and Principles of the Charter of the United Nations.<sup>19</sup> This conclusion would under any circumstances have been irrelevant.<sup>20</sup> In the light of the Court's finding on the facts, it became, if possible, even more so. Quite clearly the Court did not wish to give an Opinion without condemning apartheid.<sup>21</sup> Equally clearly it did not want to be delayed or confused in this task by listening to evidence concerning the South African policies or by ascertaining the wishes of the inhabitants. This feature of the case on top of the others mentioned above, clearly shows the light in which the Court saw its task. It produced a propaganda piece dressed up as a legal opinion.

#### NOTES AND REFERENCES

1. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports*, 1971, p. 16. This Advisory Opinion will be cited hereafter as the 1971 Opinion.
2. Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, *I.C.J. Reports*, 1955, pp. 85-86 and 99-100. This Advisory Opinion will be cited hereafter as the 1955 Opinion.
3. South West Africa, Preliminary Objections, Judgment, *I.C.J. Reports*, 1962, pp. 236-7. This judgment will be cited hereafter as the 1962 Judgment.
4. South West Africa, Second Phase, Judgment, *I.C.J. Reports*, 1966, p. 44.
5. 1962 Judgment, p. 331.
6. 1971 Opinion, p. 49.
7. International Status of South West Africa, Advisory Opinion, *I.C.J. Reports*, 1950, p. 137.
8. 1955 Opinion, p. 76.
9. 1971 Opinion, p. 50.
10. *Ibid.*, p. 289.
11. More particularly Resolution 276 (1970).
12. As Resolution 276 (1970) purports to do.
13. 1971 Opinion, p. 51-52.
14. *Ibid.*
15. *Ibid.* p. 52.
16. *Ibid.*
17. *Ibid.* p. 50.
18. *Ibid.* p. 21.
19. *Ibid.* p. 56-7.
20. The case was concerned with alleged breaches of the Mandate, not of the Purposes and Principles of the Charter.
21. 1971 Opinion, p. 31.

# The 1971 Opinion and the Future

JOHN DUGARD

The official South African response to the latest Advisory Opinion of the International Court of Justice on South West Africa (or Namibia)<sup>1</sup> has been extravagantly violent. No less a legal luminary than Mr Vorster himself has declared that the Opinion is legally "untenable" and is "clearly and demonstrably the result of political manoeuvring instead of objective jurisprudence".<sup>2</sup> In similar vein, Mr Justice Van Wyk, South African *ad hoc* Judge in the 1962-66 South West Africa proceedings, has accused the Court of "substituting mere mumbo-jumbo for sound legal reasoning".<sup>3</sup>

One may speculate whether it would not have been diplomatically wiser, in this age of "looking outwards", for Mr Vorster to have adopted a more restrained stance, and to have confined his comments to a reminder that the Opinion was *only* advisory coupled with some legalistic objection to the Court's reasoning framed in more moderate language. After all, this was the response to the 1950 Opinion<sup>4</sup> which was politically and legally equally unpalatable to South Africa. But it is too late now. Mr Vorster has spoken and the substance of his complaints must be examined.

Mr Vorster and Judge Van Wyk level two accusations at the Court. First, they contend that the Court has adopted an unacceptable, even an "illegal", form of reasoning in reaching its conclusion. Secondly, they complain that the Court was deliberately "packed" for the proceedings. I shall examine both these charges and attempt to refute them.

## IS THE COURT'S REASONING REALLY UNACCEPTABLE?

The history of the dispute before the International Court of Justice over South West Africa has been marked by a conflict between legal philosophies. South Africa is a firm supporter of one legal ideology, namely positivism, and a bitter opponent of natural law and sociological theories of law. The latest Opinion firmly rejects positivism as a guiding legal creed, and herein lies the explanation to Mr Vorster's hostility towards it.

The traditionalists and positivists see international law as a body of rules between sovereign states to which states have expressly or impliedly consented.<sup>5</sup> This school sees the sovereign state as the cornerstone of the international legal order and Article 2 (7) of the Charter, prohibiting interference in the domestic affairs of states, as an overriding provision. Because positivists insist on maintaining a rigid distinction between law and morals, and between law and politics, at all times, they refuse to accept the human rights provisions in the Charter as legal rights and the concept of self-determination as a legal concept. This school adopts an extremely narrow approach to treaty interpretation and to the judicial function. It contends that the main

purpose of treaty interpretation is to discover the common intention of the original signatories by reference to the text of the treaty and the preparatory works – that is, the records of conferences which preceded the signing of the treaty.<sup>6</sup> Where there is any doubt over the meaning of a particular provision, it is to be resolved in favour of state sovereignty. In other words, a treaty should always be interpreted to interfere as little as possible with state rights. This school requires a treaty to be interpreted in the light of the meaning attached to words at the time the treaty was signed. (This is the principle of contemporaneity.)<sup>7</sup> Moreover, constitutive treaties, such as the United Nations Charter, and humanitarian treaties, such as the Mandate for South West Africa, are to be interpreted in accordance with the ordinary rules of treaty interpretation. Finally, this school condemns judicial legislation and naively believes that the judge's task is limited to declaring the law.

The South African Government and most South African international lawyers see this philosophy not only as the preferable one, but as the only one. The South African lawyer's attitude to international law is simply a reflection of his attitude to domestic law where positivism is viewed as the only acceptable jurisprudential creed.<sup>8</sup> On the home front, South African lawyers accept the two cardinal principles of Austinian positivism, that law is the command of a political superior to a political inferior and that law and morals must be firmly separated. This results in the docile acceptance of abhorrent laws by the majority of the legal profession and an extremely narrow approach to the judicial function. Judges regard it as their sole duty in interpreting a statute to find the intention of the Legislature by invoking statutory rules of interpretation. Legal values, such as the liberty of the individual, and policy considerations are discarded as legally irrelevant in the interpretative process. Moreover value-theories of law, such as those propounded by natural lawyers and legal sociologists, are repudiated as they fail to distinguish clearly between law and morals, between law and politics. With this approach to domestic law it is small wonder that most South African lawyers become right-wing adherents of legal positivism on the international front.

Legal positivism, however, is not the only acceptable legal philosophy on the international scene. Since World War II there has been a revival of natural law ideology which emphasises the role of international law in the protection of human rights and minimises the importance of state sovereignty. More recently the sociological theory of law, vigorously propounded by the jurist, Roscoe Pound, in the United States, has found support among international lawyers. According to this school, international law is not merely a body of rules but is a fast developing "continuing process of authoritative decisions".<sup>9</sup> This school insists that international law must keep up with the new standards and expectations of the international community, and argues that strict consent as the basis of international law has been supplemented by general consensus in the political organs of the United Nations.<sup>10</sup> Inevitably this results in a depreciation of state sovereignty.

Natural lawyers and legal sociologists share much in common. First, they are more concerned about the international community and the welfare of peoples throughout the world than they are about the sovereign rights of states. Secondly, they do not insist on maintaining a rigid distinction between law and morality. This means that they rely heavily on legal values and

policy consideration – such as human rights and self-determination – as guide to the development of international law.

This modern school comprising natural lawyers and legal sociologists favours dynamic liberal methods of treaty interpretation, particularly in the case of constitutive or humanitarian treaties. It shows a distinct preference for teleological methods of interpretation according to which a treaty is to be interpreted to give the maximum effect to its object and purpose.<sup>11</sup> This means that where there is any ambiguity in a treaty that interpretation which most advances its purpose and object is to be preferred. Restrictive interpretation in favour of state sovereignty is discarded. The principle of contemporaneity is also rejected and treaties are interpreted in accordance with present-day community expectations rather than the intention of the original signatories.<sup>12</sup> Finally these schools rightly believe that the judge does not merely declare the law: he has to choose between competing legal rules whenever there is any gap or uncertainty in the law and, in making this choice, he must be guided by the humanitarian, moral and social purposes of the law.<sup>13</sup>

In short, natural lawyers and legal sociologists prefer the interpretative method employed by the Supreme Court of the United States, while legal positivists model their approach on that of the Privy Council and, one may add, our own present Appellate Division.

The 1971 Advisory Opinion on South West Africa is a victory for the “new” international law and a defeat for the positivists. Teleological methods of interpretation triumphed over restrictive interpretation in favour of state sovereignty. This is clear from an analysis of the Court’s reasoning.

At the outset, after rejecting South Africa’s preliminary objections, the Court enunciates its view of the mandates system and identifies the system’s objects, purposes and goals. It finds that the mandates system was founded on the principle of non-annexation and on the principle that the well-being and development of the peoples of mandated territories was to form a “sacred trust of civilization”.<sup>14</sup> It rejects the South African contention that the “C” Mandates were not far removed from annexation on the ground that this would defeat the “object and purpose” of the system.<sup>15</sup>

The concepts of “well-being and development” and “sacred trust”, said the Court, were “not static, but evolutionary” and parties to the League Covenant “must consequently be deemed to have accepted them as such”.<sup>16</sup> This meant that these concepts and the mandates instruments were to be interpreted in the light of subsequent developments in the field of self-determination and decolonisation. Developments during the last 50 years said the Court left “little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned”.<sup>17</sup> This constitutes a clear repudiation of the principle of contemporaneity.

The approach is also apparent in the separate concurring opinions. Judge De Castro of Spain, in a convincing opinion, stresses that gaps may be filled in treaties by reference to the object and purpose of the treaty and warns that interpretation of a constitutive treaty must adapt to the circumstances of the time. “The text”, he says, “breaks away from its authors and lives a life of its own”.<sup>18</sup>

This teleological philosophy is apparent in all the major findings of the Court which I shall now briefly examine.

a) *Article 27 (3)*

South Africa argued that Resolution 284 of the Security Council requesting an Advisory Opinion was invalid because the Soviet Union and the United Kingdom had abstained from voting when it was adopted. Article 27 (3) of the Charter requires the concurring votes of all Permanent Members for the adoption of a resolution and, so it was argued, an abstention could not be described as a "concurring" vote. This argument, however, is contrary to the uniform practice of the Security Council since 1946. The Court therefore finds that the interpretation placed on Article 27 (3) by the Security Council whereby an abstention is to be viewed as a concurring vote is to be preferred as it accords with the contemporary expectations of parties, particularly the Permanent Members themselves.<sup>19</sup> The principle of contemporaneity is ignored and the subsequent practice of States in the United Nations is taken into account as a guide to treaty interpretation to show contemporary expectation and not the original intention of the signatories.<sup>20</sup>

b) *The succession of the United Nations to the supervisory powers of the League of Nations*

Here the Court applies teleological methods of interpretation in the same way as did the Court of 1950 when it first held that the United Nations had succeeded to the supervisory powers of the League of Nations.<sup>21</sup> Fundamental to the Court's reasoning is the presumption against the lapse of "an institution established for the fulfilment of a sacred trust . . . before the achievement of its purpose".<sup>22</sup> Article 80 (1) of the Charter is therefore construed as preserving the rights of peoples in mandated territories to continued international supervision,<sup>23</sup> and the General Assembly is found to be the appropriate forum for exercising this supervision by the combined operation of Articles 80 and 10 of the Charter.<sup>24</sup> As in 1950, the Court finds that official South African statements in 1946 showed an acceptance of this state of affairs.<sup>25</sup>

In supporting this finding Judge Dillard of the United States declares:

Whenever a long-term engagement is interrupted, emphasis in attempting a reasonable interpretation of its meaning and the obligations it imposes shifts from a textual analysis to one which stresses the *object and purpose* of the engagement in the light of the total context in which the engagement was located.<sup>26</sup>

The finding that the United Nations succeeded to the supervisory powers of the League is supported by all judges except Judge Fitzmaurice.<sup>27</sup> Even Judge Gros of France supports the majority on this issue.<sup>28</sup>

c) *The revocation of the mandate*

The Court finds that the Council of the League could unilaterally have terminated the mandate for South West Africa and that the United Nations succeeded to this power. Although the League Covenant and the mandate for South West Africa are silent on the question of revocation the Court finds that the mandate was a treaty and that a treaty may always be terminated in the event of a material breach. This is a customary rule of law which must be implied except where it is expressly excluded.<sup>29</sup> "The silence of a treaty as to the existence of such a right", said the Court, "cannot be

interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law".<sup>30</sup> The finding that there is an implied right of revocation in the mandate was supported by members of the Permanent Mandates Commission and by most commentators on the mandates system.<sup>31</sup> Looked at from the point of view of interpretation this finding accords with our own rule of statutory interpretation that this legislature is presumed not to alter the existing common law.<sup>32</sup> One may even compare the Court's reasoning with that of Williamson JA in *SA Defence and Aid Fund v The Minister of Justice*<sup>33</sup> in which he held that, where a statute invading individual liberty is silent on the right of the individual to make representations, the *audi alteram partem* rule – a common-law rule – protecting that right is to be implied.

This part of the Court's Opinion is also a product of teleological reasoning, as implicit in the finding that the mandates system contained an implied right of revocation is the acknowledgment of the ultimate purpose of the system – namely the well-being of the peoples of the territory under international supervision and their right to self-determination and independence.

The majority does not deal satisfactorily with the South African argument that revocation would have been impossible in the League era because of the unanimity requirement in proceedings of the Council of the League which would have permitted South Africa to veto any resolution of revocation. The terse comment that such an argument was unacceptable because it "would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility"<sup>34</sup> fails to take into account the fact that the Court had on two previous occasions, namely in 1962<sup>35</sup> and 1966,<sup>36</sup> affirmed the unanimity rule. It is submitted, however, that neither of these decisions is conclusive for on both occasions the applicability of the unanimity rule was simply assumed without thorough examination<sup>37</sup> and without it being necessary for the Court to make a finding on this matter. The only occasion on which the Court was called upon to pronounce on the full implications of the unanimity rule in respect of the South West Africa dispute was in 1955 in the *Voting Procedure Advisory Opinion* when the Court expressly left the question undecided.<sup>38</sup>

The weakness of the majority judgment on that subject is, however, remedied by the excellent Separate Opinion of Judge De Castro of Spain. He shows that the purpose of the unanimity rule was to safeguard the sovereignty of states upon which the League was founded. These considerations were, however, inapplicable to the mandates system as a mandatory state did not have sovereignty over its mandated territory. Consequently the normal veto did not apply to matters affecting mandated territories. This was borne out by the fact that a mandatory state never once exercised its veto in the days of the League.<sup>39</sup> The President of the Court, Sir Muhammad Zafrulla Khan, in a separate declaration, also rejects the applicability of the unanimity rule on the ground that it was unsupported by practice in the League Council and would have defeated "the declared purpose of the mandates system".<sup>40</sup>

The finding of the Court that it was for the General Assembly and not the Court to decide whether South Africa had committed a material breach of the mandate justifying termination by applying *apartheid*<sup>41</sup> follows logically from the 1966 decision of the Court that it was for a *political* and not a legal body to decide whether the mandate had been violated.<sup>42</sup> Although it would

have been *politically* preferable for the General Assembly to have first sought an Advisory Opinion from the Court on this matter, it is difficult to understand Sir Gerald Fitzmaurice's objection to this part of the Court's Opinion<sup>48</sup> in the light of the 1966 majority-Judgment and his own statement in 1962 that "the proper forum" for the appreciation and application of the provision in the mandate obliging South Africa to "promote to the utmost" the well-being of the inhabitants "is unquestionably a technical or political one".<sup>44</sup> In passing it may be mentioned that in 1968 the South African Appellate Division adopted an approach similar to that of Sir Gerald in *S v Tuhadeleni and others*.<sup>45</sup>

Once the Court had held that it was for the General Assembly to decide whether South Africa had violated her obligations under the mandate by applying *apartheid* to the Territory that was logically the end of the matter as far as the Court was concerned.<sup>46</sup> Unfortunately, however, the Court later saw fit, without having examined evidence in this matter, to find that the policy of separate development violates the purposes and principles of the Charter of the United Nations.<sup>47</sup> This finding was as unnecessary as it was unfortunate and exposes the Court to the kind of criticism levelled at it by Mr Vorster.

#### d) *The legal consequences for states of the revocation*

Resolutions of the General Assembly are recommendatory and are not legally binding upon states. The Court, however, appears to find that Resolution 2145 (XXI), revoking the mandate, derives its full legal force from confirmation by the Security Council. This is a satisfactory solution as, although it is a situation not expressly provided for in the Charter, it is analogous to the procedure described in Article 6 of the Charter dealing with expulsions of members from the United Nations. At the same time it approximates to the procedure of the Council of the League which required the consent of the principal powers for the revocation of a mandate.<sup>48</sup>

The interpretation I have placed on this aspect of the Court's finding is not shared by all. Some argue that the Court found that Resolution 2145 (XXI) was legally binding without the endorsement of the Security Council and that in so finding it has conferred wide legislative powers upon the General Assembly. It is readily conceded that the Court is extremely vague and ambiguous on this matter. First, it suggests that Resolution 2145 (XXI) was binding *per se* by declaring that the General Assembly's normally recommendatory powers do not debar it "in specific cases" from adopting "resolutions which make determination or have operative design"<sup>49</sup> and that "by Resolution 2145 (XXI) the General Assembly terminated the Mandate".<sup>50</sup> Later, however, it states that, "lacking the necessary powers to ensure the withdrawal of South Africa from the territory", the General Assembly enlisted the co-operation of the Security Council<sup>51</sup> which implies that Resolution 2145 (XXI) obtained its full effect from the combined operation of the resolutions of both political bodies. In his separate opinion, Judge Dillard states that, although the majority were divided on this issue the reasoning of the Court is "mainly based" on the view that subsequent Security Council resolutions "served to convert a recommendation (Resolution 2145 (XXI)) into a binding decision operative as against non-consenting States".<sup>52</sup>

Not so satisfactory is the finding of the Court that Resolution 276, in

which the Security Council directed South Africa to withdraw from South West Africa, and other states to refrain from acts which might imply recognition of South Africa's administration, is binding.<sup>63</sup> The Court adopts an extreme teleological approach here in finding that the Council has implied powers not expressly conferred upon it in the Charter to take binding resolutions in situations other than those provided for in Chapter VII (i.e. in situations adjudged by the Security Council to threaten international peace). The better view is that Resolution 276 has its source in Chapter VI of the Charter and is only recommendatory. In this respect I prefer the dissenting views of Judges Petrén<sup>64</sup> and Onyeama<sup>65</sup> that states are only obliged to apply the customary rules of non-recognition to South Africa's administration of South West Africa.

Although I disagree with the Court I would not describe this finding as totally unacceptable. In many respects it resembles the 1949 decision of the Court in the *Reparations for Injuries Case*,<sup>66</sup> in which the Court attributed wide implied powers to the United Nations when it found that international personality for the United Nations and the right of the United Nations to sue a state for injury to an official were implied in the Charter. In both these cases the Court has resorted to far-reaching teleological methods of interpretation designed to give the maximum effect to the Charter.

The major feature of the Court's Opinion is undoubtedly its teleological reasoning. As I understand the objections to the Court's Opinion raised by some of the South African "legal team" this is an impermissible, even an "illegal", method of treaty interpretation. In their view, the strict, formalist approach is the only legally tenable one.

But is this so? My contention is that the teleological method of treaty interpretation has been employed in most of the Court's Advisory Opinions<sup>67</sup> and is now, and has been since 1946, a basic part of the Court's jurisprudence.

In its 1950,<sup>68</sup> 1955<sup>69</sup> and 1956<sup>60</sup> Advisory Opinions on South West Africa the Court relied heavily on teleological methods of interpretation. It did so again in its 1962 Judgment on the preliminary objections in the *South West Africa Cases*.<sup>61</sup> On that occasion the Court refused to apply a strictly textual approach "where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained".<sup>62</sup> In 1966, in the Second Phase of the *South West Africa Cases*<sup>63</sup> it did not, but that was because the formalists or positivists suddenly found themselves in the majority as a result of the death,<sup>64</sup> illness<sup>65</sup> and recusal<sup>66</sup> of three teleologists.

The teleological method has been employed by the Court in other notable Opinions, particularly in the *Reparations for Injuries Case* of 1949<sup>67</sup> and in the *Expenses Case* of 1962.<sup>68</sup> It has been frequently invoked by judges with vastly differing, legal and political backgrounds, including the British judge on the Court from 1955 to 1959, Sir Hersch Lauterpacht.<sup>69</sup> It was used by Sir Percy Spender, in the *Expenses Case*,<sup>70</sup> and even the high priest of textuality, Sir Gerald Fitzmaurice, had this to say in 1963:

In the case of general multilateral conventions of a sociological, welfare or humanitarian character there is some room for the application of certain specifically teleological criteria of interpretation.<sup>71</sup>

The matter has been well summed up by Edward Gordon, an American commentator, who, after a thorough examination of the Court's method of interpretation wrote in 1965:

Teleological consistency may be expected as a norm for judges whose fondness for social justice exceeds their fondness for legal neatness, but what may be surprising is that end-oriented interpretation has been accepted by all but a handful of judges.<sup>72</sup>

The legitimacy of the teleological method of interpretation has not been affected by the 1969 Vienna Convention on the Law of Treaties.<sup>73</sup> Article 31 of that Convention expressly directs that a treaty be interpreted "in the light of its object or purpose". Although the International Law Commission, in compiling the draft of this treaty, expressed itself strongly against *extreme* methods of teleological interpretation,<sup>74</sup> it is clear from its endorsement of purpose-oriented interpretation in Article 31 that it was not opposed to more moderate forms of teleological interpretation.<sup>75</sup> In any event, as Judge De Castro points out,<sup>76</sup> the Vienna Convention is designed to deal with ordinary treaties, not great constitutive or humanitarian treaties like the Charter or the mandate. Here special rules of interpretation apply, as revealed by the consistent practice of the Court in its interpretation of the Charter.

South Africans should not be too dismayed by the teleological method of interpretation which seeks to give the maximum effect to treaties or statutes. After all, it was employed by our own Appellate Division in the two *Harris* cases of the 1950s<sup>77</sup> and by Schreiner JA in the *Senate Case*<sup>78</sup> – a dissenting judgment which I still find preferable to that of the majority.

The latest Opinion of the International Court cannot be described as a model of perfection and much of its reasoning suffers from the brevity which has characterised past decisions of the Court.<sup>79</sup> This is, however, one of the hazards of a large Court with judges drawn from different legal cultures who "can more easily reach an agreement on the disposition of the dispute than on the grounds for the disposition".<sup>80</sup> On the other hand, despite these inevitable weaknesses in reasoning, the Court's Opinion is substantially in accordance with its own jurisprudence and those who deny this simply show their own lack of understanding of modern theories of jurisprudence and ignorance of past decisions of the Court.

## II WAS THE COURT "PACKED" FOR 1971?

Undoubtedly the 1966 Judgment in the *South West Africa Cases* had some influence on subsequent elections to the Court.<sup>81</sup> Sir Kenneth Bailey of Australia and Antonio de Luna of Spain were probably unsuccessful in the November 1966 elections because the former was an Australian<sup>82</sup> and the latter the national of a colonial power.<sup>83</sup> Otherwise, however, it is impossible to point to any judge who was included or excluded from the Court because of his views on Southern Africa.

African representation on the Court has been increased from one<sup>84</sup> in 1966 to three<sup>85</sup> in 1971. But African representation in other international bodies has also been increased in the past few years. In any event, one of these judges, Charles Onyeama of Nigeria, is trained in the English positivist tradition and should be more acceptable than Latin-American teleologists,

particularly since he voted for South Africa on many of the issues in 1971.

The allegation that the Court was deliberately packed for 1971 fails to take into account the fact that after 1966 the Afro-Asian States rejected the Court as an instrument of social change in South West Africa,<sup>80</sup> and that even in 1970 they were extremely unenthusiastic about the Finnish proposal that an Advisory Opinion be sought.<sup>87</sup>

It is to be regretted that Judge Morozov did not recuse himself from the case and that the Court did not permit South Africa to appoint an *ad hoc* judge.<sup>88</sup> In rejecting these applications made by South Africa relating to its composition, the Court erred on the side of an extremely narrow, literal interpretation of its own Statute – completely out of keeping with its teleological reasoning on the merits of the case. With the knowledge of hindsight, however, one can safely say that even if these applications had been upheld, the Opinion of the Court on the merits would not have been materially different.

The truth, however unpalatable, is that the 1971 Court is no different from previous courts. As required by its Statute it still comprises “jurisconsults of recognised competence” and represents the major legal systems and main form of civilisation.<sup>89</sup> As before, it is teleological in outlook in the interpretation of constitutive and humanitarian treaties.

Allegations of Court “packing” are as unfortunate as they are lacking in substance. Politically this is an unwise line of attack for the Government to pursue as its own record in this field is not above criticism. Who, after all, introduced the High Court of Parliament Bill in 1952 and later enlarged the Appellate Division from five to eleven<sup>90</sup> for the purposes of the *Senate* case?<sup>91</sup>

## THE FUTURE

The 1971 Opinion was sought mainly to put pressure on the United Kingdom and France (which have consistently opposed the legality of the revocation of the Mandate) to support Security Council action against South Africa over South West Africa. Despite the fact that the International Court has given its full legal blessing to the action of the Security Council, the Council has not succeeded in persuading the United Kingdom and France to adopt a more activist policy. On 20 October 1971, these two powers abstained from voting on a resolution of the Security Council accepting the Court's Opinion and calling upon South Africa to withdraw from South West Africa.<sup>92</sup>

This will not, however, be the end of the matter. The United Kingdom, France and the United States (which has accepted the Court's Opinion) will be under new pressure – which can only intensify with Peking seated in the Security Council – to support coercive measures against South Africa to compel her to leave South West Africa. Although these powers have consistently resisted attempts to force them to support enforcement action against South Africa in the past, they will find it difficult to adopt a purely negative attitude on this matter in the future.

In these circumstances there is an urgent need for statesmanship on the part of the political leaders of South Africa and her trade partners. The *status quo* is fraught with potential dangers, as illustrated by the 1971

Caprivi Strip incident.\* (As it forms part of South West Africa, South Africa's title to the Caprivi Strip is denied by the United Nations – with the result that little sympathy can be expected from that quarter in respect of South African protestations against violations of “her” territorial sovereignty there by insurgents.) At present the only alternative to the *status quo* seems to be confrontation with the United Nations. If this is to be avoided an attempt must be made to find a *via media*. It is believed that the plebiscite proposed to the Court in 1971 offers such a way out, and is worth consideration by the major western powers which might succeed in persuading the South African Government to repeat this offer to the Security Council.

Unfortunately the Afro-Asian States appear to be opposed to any plebiscite co-sponsored by South Africa and prefer, like Sir Muhammad Zafrulla Khan,<sup>93</sup> to insist on South Africa's withdrawal from the territory as a pre-requisite to a plebiscite. One suspects that much of the opposition to a plebiscite on the part of these States is motivated by the pessimistic belief that the people of South West Africa have been so brainwashed by the South African authorities that they are incapable of considering another form of government. This belief is as unfortunate as it is uninformed. There was local opposition to South African rule before the Court handed down its Opinion and this appears to have intensified in the past few months. The Herero (6,6 of the total population)<sup>94</sup> are traditionally opposed to the South African administration and have welcomed the Court's Opinion;<sup>95</sup> the Rehoboth Basters (2,2 of the population) have appealed to the Security Council to implement the Court's decision;<sup>96</sup> the Damara (8,7 of the population) have adopted a wait-and-see attitude;<sup>97</sup> and, most significantly, the largest group in the territory, the Ovambo (45,9 of the population) are beginning to show signs of dissatisfaction with South Africa's administration.<sup>98</sup> Recently, two churches representing half the population of South West Africa – over 300 000 of a population of 610 000 – the Evangelical Lutheran Ovambo-Kavango Church and the Evangelical Lutheran Church of South West Africa, have condemned *apartheid* and appealed to the South African Government for a “separate and independent State” in South West Africa,<sup>99</sup> and their leaders, Bishop Leonard Auala and Pastor Paulus Gowaseb, have confronted Mr Vorster with their grievances.<sup>100</sup>

In the light of these demands for political and social change by the leaders of the different groups in South West Africa, the major powers should do their utmost first, to persuade South Africa to revive her plebiscite proposal and, secondly, to persuade the Security Council to consider the matter on its merits. The latter is likely to be the hardest task of all but it is imperative that the indigenous inhabitants be consulted on their future and, if this can only be done by accepting South Africa as co-sponsor, it is a small price to pay for the cause of self-determination. Rather than reject any signs of co-operation from the South African authorities the United Nations should concentrate on obtaining acceptable conditions for the holding of the plebiscite. The following are some of the most basic terms which should be included in any plebiscite agreement:

\* Question considered by Security Council in Oct. 1971. (See Council Resolution 300.)

1. The people must be permitted to choose between the *status quo*, United Nations Trusteeship and immediate independence.
2. The plebiscite must take the form of a free vote by all inhabitants of South West Africa above the age of 18 or 21. This would seem to be acceptable to the South African Government which has denied<sup>101</sup> that it envisages the type of consultation with the tribal leaders staged by General Smuts for the benefit of the United Nations in 1946.
3. The United Nations and South Africa must agree to accept the decision of the majority of the voters.
4. There must be a joint United Nations-South Africa committee charged with the task of supervising the campaign.
5. The plebiscite must not be held immediately, but should be set for a date between one and three years hence in order to give both the United Nations and the South African Government ample opportunity to put their views to the people.
6. All political leaders must be allowed to express their views freely provided this is done without threats or intimidation. (The main task of the joint United Nations-South Africa supervising committee would be to control campaigning.)
7. All South West African political prisoners must be released and exiles permitted to return to enable them to participate in the campaigning which would precede the plebiscite.
8. Consultations must be held between the leaders of all groups in South West Africa to enable them to discuss their future and to formulate the alternatives to be placed before the people. (For instance, if immediate independence is preferred by some leaders, it would be essential to decide in advance whether a federal or unitary form of government were envisaged.)

The Government of South Africa, the United Nations and the International Court of Justice all profess allegiance to the concept of self-determination. It is difficult to see how this could be better promoted than by a free plebiscite. If the parties involved are genuinely concerned about self-determination and the best interests of the peoples of South West Africa or Namibia, rather than the promotion of their own ideologies, this surely is the best course.

#### FOOTNOTES

1. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *ICJ Reports*, 1971, p. 16.
2. *Rand Daily Mail*, Johannesburg, 22 June, 1971.
3. Address to students at the University of Cape Town on 17 August, 1971, (unpublished).
4. International Status of South West Africa, *ICJ Reports*, 1950, p. 128. For South Africa's response to this Opinion in the General Assembly, see *General Assembly Official Records*, 5th Session, 4th Committee, 196th Meeting, paras. 47-52.
5. For a discussion of this approach to international law, see J. L. Brierly, *The Basis of Obligation in International Law*, 1958, p. 9-18.
6. I. M. Sinclair, "Vienna Conference on the Law of Treaties", 1970, 19, *International and Comparative Law Quarterly*, p. 47 at p. 61.

7. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4. Treaty Interpretation and other Treaty Points", 1957, 33, *British Year Book of International Law*, p. 203 at p. 225.
8. For a discussion of the extent to which positivism dominates the domestic legal scene, see the present writer's "The Judicial Process, Positivism and Civil Liberty", 1971, 88, *South African Law Journal*, p. 181.
9. Rosalyn Higgins, "Policy Considerations and the International Judicial Process", 1968, 17, *International and Comparative Law Quarterly*, p. 58 at p. 59.
10. Richard A. Falk, *The Status of Law in International Society*, 1970, p. 19-23.
11. Fitzmaurice, note 7 supra, at p. 225.
12. Edward Gordon, "The World Court and Interpretation of Constitutive Treaties", 1965, 59, *American Journal of International Law*, p. 794 at p. 827-832.
13. Higgins, note 9 supra, at p. 62.
14. *ICJ Reports*, 1971, p. 28. In this respect the Court endorses its 1950 finding: *ICJ Reports*, 1950, p. 131.
15. *ICJ Reports*, 1971, p. 28, p. 30.
16. *Ibid*, p. 31.
17. *Loc cit*.
18. *Ibid*, p. 184, citing Judge Alvarez in *ICJ Reports*, 1950, p. 18. See, too, the separate opinions of Judges Ammoun (*ibid*, p. 72), Nervo (*ibid*, p. 112) and Dillard (*ibid*, p. 157). *Sed contra*, see the positivist approach of Judge Fitzmaurice (*ibid*, p. 220-224).
19. *Ibid*, p. 22.
20. This is made clear by Judge Dillard in his separate opinion, *ibid*, p. 153-4.
21. International Status of South West Africa, *ICJ Reports*, 1950, p. 128 at p. 136-7. See, too, Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 280.
22. *ICJ Reports*, 1971, p. 32. Italics added.
23. *Ibid*, p. 33-35.
24. *Ibid*, p. 36-38.
25. *Ibid*, p. 39-40.
26. *Ibid*, p. 157. Italics added.
27. *Ibid*, p. 227-263.
28. *Ibid*, p. 335.
29. *Ibid*, p. 46-48.
30. *Ibid*, p. 47.
31. *Ibid*, p. 48-49. For a survey of these views, see the present writer's "The Revocation of the Mandate for South West Africa", 1968, 62, *American Journal of International Law*, p. 78 at p. 85-86.
32. L. C. Steyn, *Die Uitleg van Wette* 1963, p. 96; H. R. Hahlo and Ellison Kahn, *The South African Legal System and its Background*, 1968, p. 202.
33. 1967 (1) SA 263 (AD) at p. 277.
34. *ICJ Reports*, 1971, p. 49.
35. South West Africa Cases, Preliminary Objections, *ICJ Reports*, 1962, p. 319 at p. 336-337.
36. South West Africa, Second Phase, *ICJ Reports*, 1966, p. 6 at p. 46.
37. In 1962, the Court assumed that the unanimity rule applied in order to substantiate its argument that there was a need for judicial protection of the inhabitants of mandated territories because the League Council could not impose its will on a delinquent mandatory state: *ICJ Reports*, 1962, at p. 336-337. In 1966, it was assumed in order to illustrate the view that the mandates system did not envisage the dictation of terms to a mandatory but rather the negotiation of such terms: *ICJ Reports*, 1966, at p. 46.
38. *ICJ Reports*, 1955, p. 67 at p. 74. It should, however, be recalled that on this occasion the British Judge, Sir Hersch Lauterpacht, found that South Africa would not have been able to veto a resolution of the League Council concerning South West Africa: *ibid* p. 98-106.
39. *ICJ Reports*, 1971, p. 199-207. *Sed contra*, Sir Gerald Fitzmaurice *ibid*, 272-277.
40. *Ibid*, p. 60-61.
41. *Ibid*, p. 49.
42. *ICJ Reports*, 1966, p. 29. See further, Dugard, note 31 supra, at p. 81-82.

43. *ICJ Reports*, 1971, p. 299–301.
44. Joint dissenting opinion with Sir Percy Spender, *ICJ Reports*, 1962, p. 319 at p. 467.
45. 1969 (I) SA 153 (AD) at p. 172. See, further, Dugard, "South West Africa and the 'Terrorist Trial'", 1970, 64, *American Journal of International Law*, p. 19 at p. 37.
46. The separate opinions of Judges Petré (1971, p. 132–3) and Dillard (ibid, p. 150) lend support to this view.
47. *Ibid*, p. 57.
48. See further on this Dugard, note 31 supra at p. 96. Sed contra, Sir Gerald Fitzmaurice, *ICJ Reports*, 1971, p. 283.
49. *Ibid*, p. 50.
50. *Ibid*, p. 51.
51. *Loc cit*.
52. *Ibid*, p. 164.
53. *Ibid*, p. 51–54.
54. *Ibid*, p. 33–137.
55. *Ibid*, p. 147–148.
56. *ICJ Reports*, 1949, p. 174 at p. 179, 182.
57. Leo Gross, "The International Court of Justice and the United Nations", 1967, 120, *Recueil des Cours*, p. 312 at p. 370, 385.
58. *ICJ Reports*, 1950, p. 128 at p. 136–7.
59. *ICJ Reports*, 1955, p. 67 at p. 99, p. 104–5 (separate opinion of Sir Hersch Lauterpacht).
60. *ICJ Reports*, 1956, p. 22, 28, 32 (majority), p. 44–6, 50, 55–6 (separate opinion of Sir Hersch Lauterpacht).
61. *ICJ Reports*, 1962, p. 318.
62. *Ibid* at p. 336.
63. *ICJ Reports*, 1966, p. 6 at p. 48.
64. Judge Badawi of Egypt.
65. Judge Bustamante of Peru.
66. Judge Khan of Pakistan.
67. *ICJ Reports*, 1949, p. 174 at p. 179, 182.
68. *ICJ Reports*, 1962, p. 151 at p. 168.
69. See, Sir Gerald Fitzmaurice "Hersch Lauterpacht – the Scholar as Judge", 1963, 39, *British Year Book of International Law*, p. 133 at p. 158–164.
70. Separate opinion, *ICJ Reports*, 1962, p. 151 at p. 186.
71. Note 69 supra at p. 139.
72. "The World Court and the Interpretation of Constitutive Treaties", 1965, 59, *American Journal of International Law*, p. 794 at p. 815.
73. Cf the argument to this effect in South Africa's written submissions, vol. 1 p. 11 ff.
74. See the commentary of the International Law Commission on articles 27 and 28 of the Draft Articles on the Law of Treaties in 1967, 61, *American Journal of International Law*, p. 350.
75. *Ibid*, 351–2.
76. *ICJ Reports*, 1971, p. 184. Sir Gerald Fitzmaurice also recognises the need for a different approach to constitutive treaties: "Judicial Innovation – Its Uses and its Perils", in *Cambridge Essays in International Law*, 1965, p. 24.
77. *Harris v Minister of the Interior* 1952 (2) SA 428 (AD), and *Minister of the Interior v Harris* 1952 (4) SA 769 (AD).
78. *Collins v Minister of the Interior* 1957 (1) SA 552 (AD) at p. 571.
79. Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, vol 2, p. 617.
80. Leo Gross, "Treaty Interpretation: the Proper Role of an International Tribunal", 1969, *Proceedings of the American Society of International Law*, p. 108 at p. 110.
81. Elections to the Court are held every three years in respect of five vacancies: Article 13 of the Court's Statute.
82. L. C. Green, "South West Africa and the World Court", 1966, 22, *International Journal*, p. 39 at p. 66.
83. E. Landis "South West Africa Cases: Remand to the United Nations", 1967, 52, *Cornell Law Quarterly*, p. 627 at p. 668.
84. Judge Forster of Senegal.

85. Judges Forster, Onyeama (Nigeria) and Ignacio-Pinto (Dahomey).
86. See the statements cited in South Africa's written submissions of 1971, vol 1, p. 129-130.
87. See the statements referred to in Judge Onyeama's separate opinion, *ICJ Reports*, 1971, p. 141-2.
88. See *ICJ Reports*, 1971, pp. 18-19.
89. Articles 2 and 9.
90. Appellate Division Quorum Act 27 of 1955.
91. *Supra* note 78.
92. *The Star*, Johannesburg, 21 October, 1971.
93. *ICJ Reports*, 1971, p. 65-66.
94. This percentage figure and the subsequent figures are based on the 1970 census figures: *Statistical News Release*, Department of Statistics, 23 September, 1971, No. 64.
95. *Rand Daily Mail*, Johannesburg, 6 July, 1971.
96. *Ibid*.
97. *Rand Daily Mail*, Johannesburg, 5 August, 1971. The chief of the Damara, Dawid Goroseb, is reported as saying that his people did not wish to become involved in international politics at this stage.
98. *The Star*, Johannesburg, 13 August, 1971. *Sunday Times*, Johannesburg, 22 August, 1971.
99. *The Star*, Johannesburg, 19 July, 1971. For the text of their letter, see 1971, 15 *Sash*, no. 2, p. 15.
100. *The Star*, Johannesburg, 18 and 20 August, 1971. *Sunday Times*, Johannesburg, 22 August, 1971.
101. Plebiscite proposal, published in 10 *International Legal Materials* 417 (March 1971).

# Addendum

E. M. GROSSKOPF

Since preparing my paper, I have had the benefit of reading Professor John Dugard's contribution. Professor Dugard sees the legal dispute concerning South West Africa essentially as a conflict between legal philosophies. On the one hand, there are the positivists, and on the other, those described as supporters of natural law, or of sociological theories of Law, or of a teleological philosophy, etc. The 1971 Opinion, Professor Dugard says, represented a victory for the latter.

I do not propose traversing Professor Dugard's comments in detail, since I believe that his basic theme is demonstrably unsound. At the outset, I am, however, faced with the problem that he does not define his legal philosophy with any precision. He seems to be saying no more than that in international law the ends may justify the means – the ends being the political, social and moral causes sought to be advanced, and the means being the legal reasoning employed in advancing those causes. I am perhaps exposing myself as a "traditionalist" and a "right-wing adherent of legal positivism" in rejecting this philosophy, but I comfort myself with the knowledge that practical international lawyers throughout the world share my lack of enthusiasm for this process of "judicial legislation" (as Professor Dugard himself describes it).

At present I am, however, concerned not so much with Professor Dugard's legal philosophy as with the Court's. The Court itself did not (explicitly at any rate) base any of its findings on natural law, or on a teleological, sociological, etc., philosophy.<sup>1</sup> Had the Court done so, it might have advanced (or at least clarified) its legal philosophy, e.g. by explaining how it sets about choosing the "policy consideration" to which it gives effect, or by indicating to what extent and according to what criteria it gives effect to policy considerations at the expense of the wording of an instrument or the expectations of its authors. Such an exposition would probably not have imbued sovereign states with any greater enthusiasm for the Court than at present, but it would at least have been instructive.

But the truth of the matter is, of course, that the talk about natural law, teleological theories, sociological philosophies, etc., is a gloss placed upon the Court's Opinion by well-disposed academics like Professor Dugard. The Court's real philosophy is a simple one, clearly ascertainable between the very lines of Professor Dugard's paper. Thus, whereas all the major findings of the Court are said to display a "teleological philosophy", Professor Dugard concedes that the Court "does not deal satisfactorily" with the South African argument on one major point;<sup>2</sup> that a major finding "was as unnecessary as it was unfortunate";<sup>3</sup> that another major finding was "not so satisfactory" and displays "an extreme teleological approach";<sup>4</sup> and, finally, that in decisions affecting its composition "the Court erred on the side of an ex-

tremely narrow, literal interpretation of its own Statute – completely out of keeping with its teleological reasoning on the merits of the case.”

Why did the Court veer between two extremes, between on the one hand, “an extremely teleological approach” and, on the other, “an extremely narrow literal interpretation”, with some irrelevant findings and unsatisfactory reasoning *en route*? Is there not perhaps some other philosophy which would account for these apparently divergent attitudes? Can one perhaps find some feature which is common to all the Court’s decisions; the relevant ones, and the irrelevant ones; the “teleological” ones and the “positivist” ones? Such a feature is of course readily apparent: all these decisions were adverse to South Africa. To any objective observer that feature clearly shows the true philosophy underlying the Court’s Opinion.

## NOTES

1. A good example of this is the Court’s interpretation of the mandate instrument. This interpretation, Professor Dugard says, “constitutes a clear repudiation of the principle of contemporaneity” – the principle which, above all others, Professor Dugard regards as the hallmark of the positivist philosophy. But what does the Court say? Far from repudiating the principle of contemporaneity, it purports to apply it. It expressly recognises “the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion . . .” (p. 31).
2. I.e., the argument that revocation would have been impossible in the League era because of the unanimity requirement in proceedings of the Council of the League.
3. I.e., the finding that the policy of separate development violates the purposes and principles of the Charter of the U.N.
4. I.e., the finding on the powers of the Security Council.