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# VIRGINIA JOURNAL OF INTERNATIONAL LAW

## The Nuclear Tests Cases and the South West Africa Cases: Some Realism About the International Judicial Decision

JOHN DUGARD \*

Referring to the United States of the early 1930's, Thurman Arnold commented that realist jurisprudence is "good medicine for a sick and troubled society."<sup>1</sup> Although international society is seldom untroubled or free from malaise, until recently the International Court of Justice appeared to have escaped the contagion which has afflicted political organs of the international community.<sup>2</sup> However, two decisions of the Court during the past decade—the *South West Africa Cases (Second Phase)* of 1966<sup>3</sup> and the *Nuclear Tests Cases* of 1974<sup>4</sup>—suggest that all is not well with

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1. Arnold, *Judge Jerome Frank*, 24 U. CHI. L. REV. 633, 635 (1957).

2. Terry, *Factional Behavior on the International Court of Justice: An Analysis of the First and Second Courts (1945-1951) and the Sixth and Seventh Courts (1961-1967)*, 10 MELBOURNE U.L. REV. 59 (1975).

3. [1966] I.C.J. 6.

4. *Nuclear Tests Case (Australia v. France)*, [1974] I.C.J. 253; *Nuclear Tests Case (New Zealand v. France)*, [1974] I.C.J. 457. Although the subject matter of the Australian and New Zealand applications was the same, the Court dealt separately with the two actions. As a result, the two 1974 decisions are substantially similar. Earlier there were substantially similar orders of interim protection. *Nuclear Tests Case (Australia v. France) (Interim Measures of Protection)*, [1973] I.C.J. 99; *Nuclear Tests Case (New Zealand v. France) (Interim Measures of Protection)*, [1973] I.C.J. 135. In this article reference will be made to both decisions wherever possible.

the Court and that Thurman Arnold's "medicine" might appropriately be applied to its adjudicatory process. This study will compare these two decisions to examine certain common features which are best explained in the language and ideas of the realist movement.

## I. THE SOUTH WEST AFRICA CASES AND THE NUCLEAR TESTS CASES COMPARED

### A. *The South West Africa Cases*

The 1966 judgment of the International Court of Justice in the *South West Africa Cases* has achieved considerable notoriety and is generally viewed as a setback for the cause of international adjudication.<sup>5</sup> In this decision, the Court held that the applicant States (Ethiopia and Liberia) lacked the required *locus standi* to seek a ruling,<sup>6</sup> on, *inter alia*, the compatibility of the policy of apartheid with the U.N. Mandate for South West Africa. In so finding, the Court appeared to reverse its 1962 decision in the preliminary objections phase of the adjudication that the applicant States did have an interest in the subject matter of the proceedings sufficient to give them standing.<sup>7</sup> By its decision on a matter of an "antecedent character"<sup>8</sup>—the question of the interest of the applicant States in the subject matter of their claim—rather than on the actual merits of the case, the Court avoided the necessity of making any decision on the controversial issue of whether apartheid violated a norm in international law of nondiscrimination.<sup>9</sup> Because of the strength of the anticolonialism movement in the United Nations and the isolated and unpopular position of the Republic of South Africa in the world community, this highly publicized decision exposed the Court to widespread vilification and abuse.<sup>10</sup>

Thereafter, it was generally believed that the memory of the 1966 *South West Africa Cases* would deter the Court in subsequent

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5. For a bibliography of the extensive literature on this decision, see J. DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* 554-59 (1973).

6. [1966] I.C.J. at 51. This decision of the Court was reached as a result of the casting vote of its President, Sir Percy Spender, pursuant to I.C.J. STAT. art. 55 (2).

7. *South West Africa Cases (Preliminary Objections)*, [1962] I.C.J. 318, 342-44.

8. [1966] I.C.J. at 18.

9. For a thorough examination of the suggested norm of nondiscrimination and the part it played in the *South West Africa Cases*, see S. SLONIM, *SOUTH WEST AFRICA AND THE UNITED NATIONS* 244-77 (1973).

10. For an account of some of this criticism, see R. ANAND, *STUDIES IN INTERNATIONAL ADJUDICATION* 144-45 (1969).

decisions from seeking refuge in technical niceties in order to escape a politically explosive issue. Apparently, however, the Court did not benefit from the lesson of 1966, for in the *Nuclear Tests Cases* of 1974 it behaved in much the same manner. Yet, because of France's powerful position in the world, the support it continues to enjoy in Francophone Africa, and the division of opinion among States on the desirability of nuclear tests, the Court's 1974 ruling has largely escaped the opprobrium which greeted its earlier decision. Indeed, the *Nuclear Tests Cases* adjudication has passed almost unnoticed.

### B. *The Nuclear Tests Cases*

On May 9, 1973, Australia and New Zealand instituted proceedings against France as a result of a dispute concerning the legality of atmospheric nuclear tests conducted by the French Government in the South Pacific region. The applicant States claimed that these tests violated their rights under customary international law prohibiting such atmospheric explosions. This rule of law was allegedly based upon several U.N. resolutions condemning atmospheric tests and upon the 1963 Nuclear Test Ban Treaty.<sup>11</sup> Australia and New Zealand also claimed a right not to be subjected to radioactive fallout on their territories from nuclear tests conducted by another State. Finally, the applicants asserted their sovereign right to freedom of the high seas, including freedom of navigation and overflight without interference from nuclear testing.<sup>12</sup>

In order to establish the jurisdiction of the Court, Australia and New Zealand invoked articles 36 (1) and 37 of the Statute of the Court<sup>13</sup> and article 17 of the General Act for the Pacific Settlement of International Disputes of 1928.<sup>14</sup> These provisions, read together, confer jurisdiction on the Court with respect to "all dis-

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11. Multilateral Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water (Moscow Test Ban Treaty), done Aug. 5, 1963, [1963] 2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

12. [1974] I.C.J. at 360-62 (joint dissenting opinion); [1974] I.C.J. at 512-13 (joint dissenting opinion). Although the claims of Australia and New Zealand were substantially similar, the Court declined to join the two cases. For dissenting opinions on the joining issue, see *Nuclear Tests Case (New Zealand v. France) (Interim Measures of Protection)*, [1973] I.C.J. 135, 148 (Judge Forster), 149 (Judge Gros), 159 (Judge Petrán), 163 (Judge Ignacio-Pinto).

13. I.C.J. STAT. arts. 36 (1), 37.

14. General Act for the Pacific Settlement of International Disputes, September 26, 1928, 93 L.N.T.S. 345.

putes with regard to which the parties are in conflict as to their respective rights.”<sup>15</sup> In the alternative, the applicants relied upon their respective declarations made under the optional clause, article 36 (2) of the Court’s Statute, under which “states . . . may . . . declare that they recognize as compulsory . . . in relation to any other state accepting the same obligation, the jurisdiction of the Court . . . .”<sup>16</sup> The French Government did not appear before the Court at any stage. It instead informed the Court by letter that it considered the Court to be manifestly without competence or jurisdiction to hear the case.

Australia and New Zealand also sought interim protection under article 41 of the Court’s Statute,<sup>17</sup> and on June 22, 1973, the Court made the following order:

The Governments of Australia [New Zealand] and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian [New Zealand] territory.<sup>18</sup>

At the same time the Court decided that the proceedings should “first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application[s].”<sup>19</sup>

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15. *Id.* at 351.

16. I.C.J. STAT. art. 36 (2).

17. *Id.* art. 41.

18. Nuclear Tests Case (Australia v. France) (Interim Measures of Protection), [1973] I.C.J. 99, 106; Nuclear Tests Case (New Zealand v. France) (Interim Measures of Protection), [1973] I.C.J. 135, 142. The Court reached its decision by eight votes to six. At this stage of the proceedings the Court was composed of Vice President Ammoun (Lebanon) sitting as Acting President, and Judges Forster (Senegal), Gros (France), Bengzon (Philippines), Petrán (Sweden), Onyeama (Nigeria), Ignacio-Pinto (Dahomey), De Castro (Spain), Morozov (Soviet Union), Jiménez de Aréchaga (Uruguay), Sir Humphrey Waldock (United Kingdom), Nagendra Singh (India), and Ruda (Argentina), and Judge ad hoc Sir Garfield Barwick (Australia). President Lachs (Poland) and Judge Dillard (United States) did not take part in the proceedings. Judges Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh, and Sir Garfield Barwick made separate declarations in which they concurred in the decision of the Court, while dissenting opinions were delivered by Judges Forster, Gros, Petrán, and Ignacio-Pinto.

19. [1973] I.C.J. at 106; [1973] I.C.J. at 142.

In making its interim order the Court found it unnecessary at that point to "satisfy itself that it [had] jurisdiction on the merits of the case." Instead, it was sufficient that the claims of the applicants "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded."<sup>20</sup> This test was unacceptable to Judges Forster<sup>21</sup> and Gros,<sup>22</sup> who felt that the Court should have determined its jurisdiction and the admissibility of the applicants' claims before making any interim order of protection. While Judge Petrén was prepared to accept the Court's test, he did not believe that a prima facie case had been made out for jurisdiction or admissibility.<sup>23</sup>

France soon revealed its attitude to the Court's order. In July and August 1973, and again from June through September 1974, France carried out a series of atmospheric nuclear tests in the Pacific region which led Australia and New Zealand to protest to the Court that the interim order had been violated.<sup>24</sup>

In July 1974 the Court heard oral argument by counsel representing the applicant States on the questions of jurisdiction and admissibility, but France, as before, refused to participate in the proceedings. In light of the interim order of June 22, 1973, and the nature of the arguments addressed to the Court, a decision on jurisdiction and/or admissibility was anticipated. Instead, as in the 1966 *South West Africa Cases*, the Court reached a decision on a subject not argued before it.<sup>25</sup>

In its judgment of December 20, 1974, the Court acknowledged its determination of June 22, 1973, that it concern itself with the questions of its jurisdiction and of the admissibility of the application at this stage of the proceedings. Nevertheless, the Court declared that it was entitled

to go into other questions which may not be strictly capable of classification as matters of jurisdiction or ad-

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20. [1973] I.C.J. at 101; [1973] I.C.J. at 137. For discussions of this aspect of the Court's decision, see Elkind, *French Nuclear Testing and Article 41—Another Blow to the Authority of the Court?*, 8 VAND. J. INT'L L. 39 (1974); Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258 (1974); Note, *The International Court of Justice: The Nuclear Tests Cases: Judicial Silence v. Atomic Blasts*, 16 HARV. INT'L L.J. 614, 617-21 (1975).

21. [1973] I.C.J. at 111-13.

22. *Id.* at 122-23.

23. *Id.* at 126-27.

24. [1974] I.C.J. at 258; [1974] I.C.J. at 462. See Elkind, *supra* note 20, at 39-40.

25. For critical studies of the 1974 judgment, see Franck, *Word Made Law: The Decision of the I.C.J. in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612 (1975); Note, *supra* note 20.

missibility but are of such a nature as to require examination in priority to those matters.<sup>26</sup>

In this case, the Court continued, it was required first of all to examine a preliminary matter, namely whether a dispute still existed between the parties.<sup>27</sup> Although Australia had asked the Court to "adjudge and declare" that conducting further atmospheric nuclear tests in the South Pacific Ocean was contrary to international law,<sup>28</sup> the Court stated that the real objective of the Australian application was not to obtain a declaratory judgment, but to obtain a termination of the tests.<sup>29</sup> New Zealand's application was more similar to a request for a declaratory order,<sup>30</sup> but, according to the Court, the application's main objective was, like that of the Australian application, to obtain a termination of the tests.<sup>31</sup> In view of these perceived objectives the Court felt it necessary to examine certain events which had occurred subsequent to the filing of the applications, notably a number of public statements by the French Government *outside the Court* with regard to future nuclear tests.

A communiqué had been issued by the French on June 8, 1974, which stated that "France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."<sup>32</sup> On July 25, 1974, the French President had stated at a press conference that "this round of atmospheric tests would be the last."<sup>33</sup> Statements to the same effect had been made on subsequent occasions in August and October 1974 by the French Minister of Defence (first on television and later at a press conference) and by the French Minister for Foreign Affairs (in addressing the General Assembly of the United Nations in September 1974).<sup>34</sup> Although neither of the applicant States viewed these utterances as a firm commitment to

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26. [1974] I.C.J. at 259; [1974] I.C.J. at 463.

27. [1974] I.C.J. at 260; [1974] I.C.J. at 463.

28. [1974] I.C.J. at 260.

29. *Id.* at 263.

30. In its application New Zealand asked the Court to adjudge and declare:

That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.

[1974] I.C.J. at 460.

31. *Id.* at 467.

32. [1974] I.C.J. at 265.

33. *Id.* at 266.

34. *Id.* The Court paid particular attention to the press conference statement since it was made in unqualified terms.

discontinue atmospheric tests,<sup>35</sup> the Court found that France had "made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests"<sup>36</sup> and that public statements of this kind were binding on France, since "interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."<sup>37</sup> In the judgment of the Court, these statements were made not *in vacuo* but rather "in relation to the tests which constitute the very object of the present proceedings." The declarations were meant by the French Government to indicate to the applicants its intention of terminating atmospheric tests.<sup>38</sup>

Because France had assumed the obligation of terminating its atmospheric nuclear tests in the South Pacific, in the eyes of the Court it followed that the applicant States had achieved their objective. This meant that there was no longer any dispute between the parties, and "the dispute having disappeared, the claim advanced by Australia [New Zealand] no longer has any object. It follows that any further finding would have no *raison d'être*."<sup>39</sup> In support of this conclusion the Court invoked the dictum in the *Northern Cameroons Case*<sup>40</sup> that "circumstances that have . . . arisen render adjudication devoid of purpose."<sup>41</sup>

In the *Nuclear Tests Cases* the Court reached its decision by nine votes to six.<sup>42</sup> In the majority were President Lachs (Poland) and Judges Forster (Senegal), Gros (France), Bengzon (Philippines), Petrén (Sweden), Ignacio-Pinto (Dahomey), Morozov (Soviet Union), Nagendra Singh (India), and Ruda (Argentina). Of these, Judges Forster,<sup>43</sup> Gros,<sup>44</sup> Petrén,<sup>45</sup> and Ignacio-Pinto<sup>46</sup> appended separate concurrences. The separate concurring opinions viewed the dispute as nonjusticiable from the outset on the

35. *Id.* at 268-69; [1974] I.C.J. at 473-74.

36. [1974] I.C.J. at 267.

37. *Id.* at 267-68; [1974] I.C.J. at 472-73. For a discussion of the far-reaching implications of this statement, see Franck, *supra* note 25.

38. [1974] I.C.J. at 269; [1974] I.C.J. at 474.

39. [1974] I.C.J. at 271; [1974] I.C.J. at 476.

40. [1963] I.C.J. 15, 38.

41. [1974] I.C.J. at 271; [1974] I.C.J. at 477.

42. It should be noted that Vice President Ammoun did not participate in the proceedings.

43. [1974] I.C.J. at 275; [1974] I.C.J. at 479.

44. [1974] I.C.J. at 276; [1974] I.C.J. at 480.

45. [1974] I.C.J. at 298; [1974] I.C.J. at 483.

46. [1974] I.C.J. at 308; [1974] I.C.J. at 493.



ground that there was no rule of law prohibiting atmospheric nuclear tests, and the conflict was thus of a political rather than of a legal nature. The main thrust of their opinions is summed up in a comment by Judge Petrán:

[T]he Court ought in my view to have formed an opinion from the outset as to the true character of the dispute which was the subject of the Application; if the Court had found that the dispute did not concern a point of international law, it was for that absolutely primordial reason that it should have removed the case from its list, and not because the non-existence of the subject of the dispute was ascertained after many months of proceedings.<sup>47</sup>

All six dissenting judges delivered opinions. Judges Onyeama (Nigeria), Dillard (United States), Jiménez de Aréchaga (Uruguay), and Sir Humphrey Waldock (United Kingdom) presented a joint opinion that went well beyond the confines of the majority judgment.<sup>48</sup> It rejected the majority's reasoning, particularly with regard to the interpretation of the applicants' claims. The judges emphasized that the applicant States had sought a declaration of the illegality of the French atmospheric tests and maintained that the Court had erred in treating such requests for a declaration of illegality merely as a petition for an order prohibiting further tests.<sup>49</sup> The joint dissenting opinion then turned to some questions left unanswered by the majority and concluded that the Court had jurisdiction by reason of article 17 of the General Act of 1928 and that the claims were admissible.<sup>50</sup> Judge De Castro (Spain)<sup>51</sup> and Judge ad hoc Sir Garfield Barwick (Australia)<sup>52</sup> also delivered dissenting opinions which upheld the jurisdiction of the Court and the admissibility of the applicants' claims. Judge De Castro, in an eminently realistic manner, dismissed the majority finding that the French declarations were legally binding. "In my view," he declared, "the attitude of the French Government warrants . . . the inference that it considers its statements on nuclear tests to belong to the political domain and to concern a question which,

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47. [1974] I.C.J. at 302.

48. *Id.* at 312; [1974] I.C.J. at 494.

49. [1974] I.C.J. at 316-17; [1974] I.C.J. at 494-99.

50. [1974] I.C.J. at 358-71; [1974] I.C.J. at 510-22. For a discussion of these matters, see Note, *supra* note 20, at 628-31.

51. [1974] I.C.J. at 372; [1974] I.C.J. at 524.

52. [1974] I.C.J. at 391; [1974] I.C.J. at 525.

inasmuch as it relates to national defence, lies within the domain reserved to a State's domestic jurisdiction." <sup>53</sup>

C. *The Nuclear Tests Cases and the South West Africa Cases: Some Comparisons*

Perhaps the most ironic feature of the judgment and other opinions in the *Nuclear Tests Cases* is the absence of reference to the precedent of the 1966 *South West Africa Cases*. The two decisions have much in common, yet none of the judges—with the exception of Judge De Castro <sup>54</sup>—seemed willing to acknowledge these similarities. The memory of the reaction to the 1966 decision clearly was still fresh, particularly in the minds of Judges Gros and Forster, who participated in the 1966 judgment. It is likely that both the concurring and the dissenting judges discreetly decided against drawing attention to this obvious precedent. Perhaps they saw this to be in the best interests of the Court, but that silence of this kind really serves the best interests of the Court is doubtful. At the very least, it is arguable that the cause of international adjudication would be more effectively promoted by a greater openness about judicial behavior on the International Court of Justice. Guided by this premise, this discussion will now focus upon the most striking similarities between the *Nuclear Tests Cases* and the *South West Africa Cases*.

1. *Judicial Surprise: Can the Principle of Proprio Motu Be Reconciled with the Audi Alteram Partem Rule?*

In the *South West Africa Cases*, after admitting evidence and hearing argument on the merits of the dispute, the Court on its own resurrected a matter which had been regarded by both the applicants and the respondent as finally settled in 1962, *i.e.*, the legal interest of the applicant States in the subject matter of their claim. Although this matter was generally hailed as a "new point," the Court itself was unwilling to make such an admission or to rely entirely on the principle of *proprio motu*, *viz.*, that on its own motion a court may, to prevent injustice, raise a matter not raised by the parties themselves. Instead the Court claimed that, although it had a "recognized right" under article 53 of the Court's Statute <sup>55</sup> to select *proprio motu* the basis of its decision, it had

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53. [1974] I.C.J. at 375. See Note, *supra* note 20, at 624-25.

54. [1974] I.C.J. at 375 n.1, 385 n.1, 386.

55. I.C.J. STAT. art. 53 provides:

1. Whenever one of the parties does not appear before the Court, or fails to

been unnecessary to do so in this case because South Africa had persisted in its written pleadings in its denial of the applicants' interest, with the result that the point was still before the Court.<sup>56</sup> Although this view is technically correct, it is equally clear that the possibility that the Court would re-examine the question of interest was not foreseen by either party and that the competence of the Court to do so without offending the principle of res judicata was not argued before the Court. For this reason the Court was widely regarded as having raised the matter *proprio motu* (an assessment which was endorsed by three dissenting opinions),<sup>57</sup> and critics expressed doubt about the propriety of acting *proprio motu* in this case. While one critic, Rosalyn Higgins, attacked the Court's decision to raise a "new point" *proprio motu* after four years of litigation,<sup>58</sup> another, Bin Cheng, asked

[i]n any event, why could the parties not have been told, during the hearings in 1965 in the second phase of the proceedings, that certain issues were deemed antecedent by the Court, or at least by some of its members, so that the parties could have submitted their arguments on these issues instead of on the ultimate merits of the case?<sup>59</sup>

Counsel for the applicants were clearly caught unaware, and Ernest Gross, who led their legal team, later commented that "the procedure followed by the Court did indeed introduce an element of surprise to at least one of the parties" and that "no intimation ever was given that any judge entertained doubt concerning the admissibility of the claim or the finality of the 1962 Judgment."<sup>60</sup>

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defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

56. [1966] I.C.J. at 19. See *id.* at 68-69 (Judge Van Wyk).

57. *Id.* at 240 (Judge Koretsky), 328 (Judge Jessup), 493-94 (Judge ad hoc Sir Louis Mbanefo).

58. Higgins, *The International Court and South West Africa: The Implications of the Judgment*, 42 INT'L AFF. 573, 581-82 (1966).

59. Cheng, *The 1966 South-West Africa Judgment of the World Court*, 20 CURRENT LEGAL PROB. 181, 212 (1967).

60. Gross, *The South West Africa Cases: An Essay in Judicial Outlook*, in ETHIOPIA AND LIBERIA VS. SOUTH AFRICA: THE SOUTH WEST AFRICA CASES 1, 4-5 (Occasional Paper No. 5, African Studies Center, U.C.L.A., 1968). For other discussions of the decision, see Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORGANIZATION 1, 5-6 (1967); Gross, *The South West Africa Case: What Happened?*, 45 FOREIGN AFF. 36, 44-45 (1966).

While the Court in the *South West Africa Cases* avoided acknowledging that it had decided a matter of vital importance on a point not raised before it, the Court in the *Nuclear Tests Cases* showed less embarrassment. It did not deny that its decision turned on a matter raised *proprio motu* and proceeded to explain why it had not felt bound to put the matter before counsel for the applicants. The Court declared that although it was "conscious of the importance of the principle expressed in the maxim *audi alteram partem*," *i.e.*, that both sides should be heard, it did not consider that "the interests of justice" required the proceedings to be reopened to give counsel an opportunity to address the Court on the legal ramifications of the statements made by the French Government after the close of the proceedings. Such a reopening of the case would have been justified, stated the Court, "only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties."<sup>61</sup> That, said the Court, was manifestly not the case, for the applicant States had themselves raised the matter of the French President's June 8, 1974, statement prior to the conclusion of the oral proceedings on July 11, 1974,<sup>62</sup> and had addressed the Court on the interpretation to be placed upon it. Moreover, the Australian Attorney General and the Prime Minister of New Zealand had commented upon the subsequent French statements.<sup>63</sup> Thus, the Court found that, since it already had the views of the applicants on the French statements, there was no obligation to consult the applicants about the basis of the decision.

This reasoning was strongly criticized by the judges filing the joint dissent,<sup>64</sup> who insisted that the applicants should have been given an opportunity to address the Court on the objectives of their applications and on the status of the French declarations. Neither of these matters was fully examined in the hearings, which were expressly directed to a consideration of matters of admissibility and jurisdiction.<sup>65</sup> The dissenters concluded that:

No-one doubts that the Court has the power in its discretion to decide certain issues *ex proprio motu*. The real question is not one of power, but whether the exercise of

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61. [1974] I.C.J. at 264-65; [1974] I.C.J. at 468-69.

62. Most of the French statements were made after the conclusion of the proceedings. See [1974] I.C.J. at 266; [1974] I.C.J. at 471.

63. [1974] I.C.J. at 261-62; [1974] I.C.J. at 465-66.

64. See text at notes 49-50 *supra*.

65. [1974] I.C.J. at 317, 322-23; [1974] I.C.J. at 500, 505-06.

power in a given case is consonant with the due administration of justice. . . . [W]e are of the view that, in the circumstances of this case, to decide the issue of "mootness" without affording the Applicant any opportunity to submit counter-arguments is not consonant with the due administration of justice.<sup>66</sup>

Judge ad hoc Sir Garfield Barwick was even more critical of the Court's failure to reopen the proceedings. He maintained that the purpose of the reference by counsel for Australia in the course of the oral proceedings to the French President's June 8, 1974, statement had been to illustrate French obduracy to the interim order rather than to question whether the objective of the proceedings had been achieved.<sup>67</sup> Commenting on the failure of the Court to recall counsel, he added:

a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to mind an unfamiliar, and indeed, a quaint but unconvincing affectation.<sup>68</sup>

The behavior of the Court in the *South West Africa Cases* and in the *Nuclear Tests Cases* deserves several comments. First, particularly when one of the parties is not present, it is clear that the Court has the power to raise matters *proprio motu* in order to satisfy itself that it has jurisdiction and that "the claim is well founded in fact and in law."<sup>69</sup> Nevertheless, this is a power that should be used sparingly.<sup>70</sup> Second, it would be a useful guideline for the Court in the course of preliminary proceedings to raise only preliminary matters *proprio motu* and at the merits stage to raise only matters pertaining to the merits. This policy would certainly curb the element of surprise and overcome many of the objections to the conduct of the Court in the *South West Africa Cases* and in

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66. [1974] I.C.J. at 323; [1974] I.C.J. at 506.

67. [1974] I.C.J. at 441-42.

68. *Id.* at 442.

69. In his individual opinion in the Anglo-Iranian Oil Co. Case (Jurisdiction Issue), [1952] I.C.J. 93, 116, Lord McNair stated:

An international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*. That aspect does not exhaust the matter. The Court itself, acting *proprio motu*, must be satisfied that any State which is brought before it by virtue of such a Declaration has consented to the jurisdiction.

70. I. S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 467-68 (1965); I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* 56-68 (1965).

the *Nuclear Tests Cases*. In the 1962 *South West Africa Cases* the Court, acting *proprio motu*, raised as a matter antecedent to the preliminary objections filed by the respondent the question whether a dispute existed between the parties.<sup>71</sup> Although difficult to categorize in terms of jurisdiction or admissibility, such a question is clearly preliminary in nature and was appropriately raised at the preliminary stage. On the other hand, in the *South West Africa Cases* of 1966 the Court raised a preliminary issue (a matter of an "antecedent character") during the hearing on the merits, while in the *Nuclear Tests Cases* the Court, when it was considering jurisdiction and admissibility, raised an issue which arguably belonged to the merits.<sup>72</sup>

Third, it is improper for the Court to take a new point *proprio motu* in its final deliberations and to base a finding upon this point without first allowing counsel to present their views on the matter. Such procedure is contrary to the *audi alteram partem* rule which, as a general principle of law, forms part of the law binding on the Court under article 38 (1) (c) of its Statute.<sup>73</sup> Of course, a determination made *proprio motu* is unobjectionable if it serves to inform counsel of a matter to be argued at a later stage. Thus, no harm resulted in the *Prince Von Pless Administration Case*<sup>74</sup> when at the preliminary stage the Court raised the question whether it had jurisdiction to hear a particular matter and joined this issue to the merits, with the result that argument on the issue was reserved for the merits stage. In both the *South West Africa Cases* and the *Nuclear Tests Cases*, however, the Court raised a matter *proprio motu* which terminated the dispute without affording counsel an opportunity to present argument on the interpretation placed by the Court on the point in question. It is quite clear that arguments were not heard on the applicants' *locus standi* at the merits stage of the *South West Africa Cases* even though the

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71. [1962] I.C.J. at 328.

72. See [1974] I.C.J. at 324-26 (joint dissenting opinion), 391 (dissenting opinion of Judge ad hoc Sir Garfield Barwick); [1974] I.C.J. at 507-08 (joint dissenting opinion).

73. See K. CARLSON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 40 (1946); B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 290 (1953); W. REISMAN, *NULLITY AND REVISION* 585 (1971). I.C.J. STAT. art. 38(1)(c) provides:

1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

....

(c) the general principles of law recognized by civilized nations . . . .

74. (Preliminary Objection), [1933] P.C.I.J., ser. A/B, No. 52, at 11, 15-16.

matter might still have been technically before the Court. Similarly, the applicants in the *Nuclear Tests Cases* were given no indication that the French statements, only one of which was before the Court at the time of argument, would be used by the Court in such a manner. These two decisions are most difficult to reconcile with the *audi alteram partem* rule and the requirement of equality of treatment before the Court.

In its 1956 Advisory Opinion on the *Administrative Tribunal of the International Labour Organisation*<sup>75</sup> the International Court went to great lengths to ensure that there would be an equality of treatment between UNESCO and its officials in proceedings involving an "appeal" against a decision of the ILO's Administrative Tribunal. The Court declared that "[t]he judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court."<sup>76</sup> By neglecting to inform Australia and New Zealand of its intention to base a decision on the French statements and its consequent failure to allow the applicants to "submit their views and their arguments" on this subject, the Court surely undermined its judicial character. Ironically, the clearest statement on the principle involved is to be found in the writings of Sir Gerald Fitzmaurice, who was himself a member of the majority in the 1966 *South West Africa Cases*. In a collection of essays written in honor of Lord McNair, he stated:

It may be objected, and with force, that a necessary ingredient of any sound legal system is that of "certainty" of the law—that the parties in going to law, must be able, not indeed to predict the outcome, but to be reasonably sure as to the legal basis from which that outcome will proceed, and the principles which will be applied in reaching it;—in short the parties must be able to feel that a court of law will not go off at a tangent and decide the case on some wholly new footing thought up by itself and not discussed in the course of the argument. This objection is justified in the sense that although the jurisprudence of the International Court firmly establishes its right to raise points, and decide on the basis of them *proprio motu*, it should at least raise them before deciding them, and this not merely in its private deliberations

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75. *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against UNESCO*, [1956] I.C.J. 77.

76. *Id.* at 86.

but at the public hearing, so that the parties may have an adequate opportunity of arguing them.<sup>77</sup>

## 2. Preliminary Objections: Do They Conceal the Political Decision?

Preliminary objections have played a much more important role in the jurisprudence of the present Court than in that of the Permanent Court of International Justice.<sup>78</sup> According to Shabtai Rosenne, one of the leading commentators on the jurisprudence of the present Court, the handling of preliminary objections has become "in some respects the most political aspect of all the Court's activities."<sup>79</sup> This is hardly surprising, for when a respondent State denies the competence of the Court to hear an application, it is in many instances serving notice that it will refuse to accept an adverse decision. This warning is not to be taken lightly by a tribunal haunted by the spectre of noncompliance, and, in all probability, it explains the reluctance of the Court to confront the merits in such cases.

Article 67 (3) of the Court's Rules, as revised in 1972, provides that proceedings on the merits of a dispute shall be suspended upon the filing of a preliminary objection.<sup>80</sup> Preliminary objections are traditionally divided into two groups: objections to the jurisdiction of the Court, in which it is claimed "that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim;" and objections to the admissibility of the claim, in which the tribunal is requested to "rule the claim to be inadmissible on some ground other than its ultimate merits."<sup>81</sup> However, these two classes of preliminary objections are not exhaustive,<sup>82</sup> as indicated by article 67 (1) of the Rules

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77. Fitzmaurice, *Judicial Innovation—Its Uses and Its Perils—As Exemplified in Some of the Work of the International Court of Justice during Lord McNair's Period of Office*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW* 24, 26 (1965).

78. While the Permanent Court of International Justice, the predecessor of the present Court, declined jurisdiction in the preliminary phase only twice, today's Court has declined jurisdiction in the preliminary phase in five cases, and in four other cases it has decided on preliminary grounds after the case had been argued on the merits. Rosenne, *The 1972 Revision of the Rules of the International Court of Justice*, 8 *ISRAEL L. REV.* 197, 235-36 (1973).

79. *Id.* at 236.

80. *I.C.J.R.* 67(3).

81. Fitzmaurice, *The Law and Practice of the International Court of Justice 1951-54: Questions of Jurisdiction, Competence, and Procedure*, 34 *BRIT. Y.B. INT'L L.* 1, 12-13 (1958). See also I. SHIHATA, *supra* note 70, at 107-12.

82. Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 *AM. J. INT'L L.* 1, 18 (1973).



of Court which refers—in addition to these two species—to any “other objection the decision upon which is requested before any further proceedings on the merits . . . .”<sup>83</sup>

The present article 67 of the Rules directs the Court to dispose of “exclusively” preliminary objections before proceeding to the merits,<sup>84</sup> although arguably it does not abolish the inherent power of the Court in appropriate circumstances<sup>85</sup> to attach to the merits a preliminary objection. This rule, which seeks to “avoid the delay and expense involved in a double discussion of the same questions at both the preliminary stage and the stage of the merits,”<sup>86</sup> is a direct response to the *South West Africa Cases*.<sup>87</sup> As noted above, in the *South West Africa Cases* the Court, after dismissing all of the respondent’s preliminary objections in an apparently final decision in 1962, upheld in 1966 at the merits stage one of the preliminary objections—now categorized as a matter of an “antecedent character.”<sup>88</sup>

In the 1973 *Nuclear Tests Cases (Interim Measures of Protection)* the Court sought to circumscribe the scope of the second phase of the proceedings by expressly directing that such phase should consider the questions of the jurisdiction of the Court and the admissibility of the claim.<sup>89</sup> Unfortunately, the Court did not instruct parties to address it on any “other objection the decision upon which is requested before any further proceedings on the merits . . . .”<sup>90</sup> Although it might be argued that such objections were implied by reason of article 67 (1) of the Rules of Court, it appears that the applicant States were led to believe that only questions of jurisdiction and of the admissibility of the application were before the Court.<sup>91</sup>

The applicant States surely were entitled, both in terms of the Rules of Court and in terms of the 1973 interim order, to assume

83. I.C.J.R. 67 (1) .

84. I.C.J.R. 67 (7) provides that in its judgment on the preliminary objection the Court “shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.”

85. Jiménez de Aréchaga, *supra* note 82, at 13-18; Rosenne, *supra* note 78, at 242-44.

86. Jiménez de Aréchaga, *supra* note 82, at 1. See the separate opinion of Judge Petrán, [1974] I.C.J. at 304.

87. Rosenne, *supra* note 78, at 198, 235.

88. [1966] I.C.J. at 18.

89. [1974] I.C.J. at 259; [1974] I.C.J. at 463. Cf. [1974] I.C.J. at 396 (dissenting opinion), where Sir Garfield Barwick acknowledges that the Court of 1974 took a wider view of admissibility than did counsel.

90. I.C.J.R. 67 (1) .

91. [1974] I.C.J. at 397-98 (dissenting opinion of Sir Garfield Barwick) .

that only matters of an *exclusively* preliminary nature would be dealt with in the 1974 proceedings. Yet the Court's conclusion that the applications no longer had any objective was arguably a finding on a matter pertaining to the merits rather than on an exclusively preliminary matter.

The Court certainly saw the question on which its decision turned as a preliminary matter, one which required attention even before the questions of jurisdiction and admissibility were considered. However, despite the widely acknowledged confusion about the definition of "questions of jurisdiction and admissibility," the Court was unprepared to categorize the point in issue as one of jurisdiction or admissibility.<sup>92</sup> It is also unclear whether the Court viewed the matter as one of an "exclusively" preliminary character because it merely classified the matter as one of an "essentially" preliminary nature. This failure, or refusal, to categorize the question was condoned by Judge Gros who, after stressing that the Court has generally avoided a classification of preliminary objections,<sup>93</sup> declared:

The concept of a merits phase has no meaning in an unreal case, any more than has the concept of a jurisdiction/admissibility phase . . . . In a case in which everything depends on recognizing that an Application is unfounded and has no *raison d'être*, and that there was no legal dispute of which the Court could be seized, a marked taste for formalism is required to rely on the inviolability of the usual categories of phases. To do so would be to erect the succession of phases in examination of cases by the Court into a sort of ritual, totally unjustified in the general conception of international law, which is not formalistic.<sup>94</sup>

As undesirable as it may be formally to classify preliminary objections into questions of jurisdiction or of admissibility, such classification does at least serve to identify the issue as one of a preliminary nature, requiring attention before examination of the merits. Where the Court fails to categorize an objection formally it should at least satisfy itself that the objection is of an *exclusively*

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92. *Id.* at 259; [1974] I.C.J. at 463. Judge Petré emphasizes that the Court did not find on matters of jurisdiction or admissibility. [1974] I.C.J. at 302 (separate opinion).

93. [1974] I.C.J. at 277 (separate opinion). See also *id.* at 301 (separate opinion of Judge Petré), 365 (joint dissenting opinion).

94. *Id.* at 278.

preliminary character, as required by article 67 (7) of its Rules.<sup>95</sup> As the joint dissenting opinion states, “[i]n the Court’s practice the emphasis has been laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility.”<sup>96</sup> Yet the 1974 judgment makes little attempt to explain why the question raised *proprio motu* should be viewed as a preliminary question at all. The joint dissenters are most convincing in their argument that the Court decided the legal effect of statements made by the French Government on nuclear tests in the Pacific—the very crux of the merits—“without any prior finding that the Court is properly seized of the dispute and has jurisdiction to entertain it.”<sup>97</sup>

One of the dangers inherent in the informal approach proposed by Judge Gros is that the parties may not be aware of the scope of the preliminary hearings. In the *Nuclear Tests Cases* the applicants, as directed by the Court in 1973, confined their arguments to questions of jurisdiction and admissibility without trespassing on the merits. They had no intimation from the Court that there were other preliminary matters closely connected with the merits that required argument. Too much informality in dealing with preliminary objections, coupled with the *proprio motu* power, transforms the preliminary objections hearing into a juridical minefield which the applicant enters at its own peril.

In addition, the Court did not find it necessary to examine the question of whether a rule of customary law outlawing atmospheric nuclear tests had come into existence. This is not surprising since this question was generally perceived as belonging to the merits stage of the proceedings. Nevertheless, two of the judges comprising the majority, Judges Petrán and Gros, argued that the question of the existence or non-existence of a rule of customary law was an essentially preliminary matter. Judge Petrán, while concurring in the Court’s order, argued that the applications should have been dismissed for the “absolutely primordial reason”<sup>98</sup> that the dispute did not concern a point of international law. He argued that

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95. See note 84 *supra*.

96. [1974] I.C.J. at 363. See also *id.* at 397-98 (dissenting opinion of Sir Garfield Barwick).

97. *Id.* at 324-25. Significantly, Judge Ignacio-Pinto in his concurring separate opinion expresses regret that the Court “did not devote more of its efforts to seeking a way of first settling the questions of jurisdiction and admissibility.” *Id.* at 310-11.

98. *Id.* at 302.

what is first and foremost necessary is to ask oneself whether atmospheric tests of nuclear weapons are, generally speaking, governed by norms of international law, or whether they belong to a highly political domain where the international norms of legality or illegality are still at the gestation stage.<sup>99</sup>

After a cursory examination of the development of customary law relating to nuclear tests, he concluded that the applicant's claim was inadmissible<sup>100</sup> because it "belongs to the political domain and is situated outside the framework of international law as it exists today."<sup>101</sup> A substantially similar approach was adopted by Judge Gros.<sup>102</sup>

As was stressed by the joint dissenting opinion,<sup>103</sup> it is a novel notion that the possible existence of a rule of customary law upon which the outcome of the merits depends should be canvassed as a preliminary objection. In its past practice the Court has clearly regarded the determination of the existence of a rule of customary law as a matter belonging to the merits.<sup>104</sup> Nevertheless, this entire area is worthy of serious consideration. In many municipal law systems<sup>105</sup> the question of the existence of a rule of law is disposed of as a preliminary matter, on demurrer or exception,<sup>106</sup> and there is no doubt that such a procedure would preclude many of the delays which the 1972 Rules of Court aim to avoid. Moreover, this procedure might make the Court more attractive to States unwilling to proceed through expensive preliminary proceedings to the merits stage only to be informed that customary law had not advanced to the level proposed by the applicants. An exception or

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99. *Id.* at 302-03.

100. *Id.* at 304-05.

101. *Id.* at 306.

102. *Id.* at 286, 288.

103. *Id.* at 364-68; [1974] I.C.J. at 516-19.

104. The Court dealt with the question of the existence of a rule of customary law at the merits stage in the following cases: *Columbian-Peruvian Asylum Case*, [1950] I.C.J. 266, 276-77; *Fisheries Case*, [1951] I.C.J. 116; *Right of Passage Case*, [1960] I.C.J. 6, 36-44; *North Sea Continental Shelf Cases*, [1969] I.C.J. 3, 41-45; *Fisheries Jurisdiction Case*, [1974] I.C.J. 175, 193-200. In the *Right of Passage Case* and the *Fisheries Jurisdiction Case* the merits phases were preceded by hearings on preliminary objections, but the Court left the question of the existence of a rule of customary law for the decision on the merits.

105. In many of these systems a litigant may except or demur to pleadings which do not disclose a cause of action. This enables the Court to decide a doubtful question of law as a preliminary matter. For definitions of demurrer and exception, see 71 C.J.S. *Pleading* § 211 (1951).

106. The word "exception" appears in the French text of article 67 of the Rules of Court.

preliminary objection of this kind cannot, however, be described as "exclusively" preliminary, and only an amendment of the Rules of Court could admit this as a new type of preliminary objection.

In any event, the Rules of Court governing preliminary objections should be formalized so that the parties to a dispute may know exactly (or with a fair degree of certainty) which matters are viewed by the Court as belonging to the preliminary phase and which are seen as merits issues. In the *South West Africa Cases* the Court was condemned for resurrecting a preliminary matter at the merits stage. In the *Nuclear Tests Cases* the exact opposite occurred; a merits issue was introduced at the preliminary stage. Either course of judicial action is undesirable because of the element of unfair surprise created thereby. This surprise can best be avoided by defining the issues to be decided at the preliminary stage and informing the parties accordingly.

### 3. Customary Law: Caution and Avoidance

The jurisprudence of the International Court of Justice reveals a number of instances in which the Court has adopted a cautious approach toward the creation of new rules of customary law.<sup>107</sup> In the *Asylum Case*<sup>108</sup> the Court denied the existence of a rule of customary law governing the granting of asylum in diplomatic premises, binding upon South American States, on the grounds that the precedents cited revealed an inconsistency in State practice. In the *Fisheries Case*<sup>109</sup> it held that, although the principle of limiting bays to indentations less than 10 miles wide was supported by State practice, this principle had "not acquired the authority of a general rule of international law." In the *Right of Passage Case*<sup>110</sup> the Court preferred to rely on an established local practice rather than to pronounce on a general international custom in support of a right of passage, and in the *North Sea Continental Shelf Cases*<sup>111</sup> it rejected the argument that the equidistance principle was a rule of customary law governing the delimitation of continental shelf areas between adjacent States. Lastly, the Court in the *Fisheries Jurisdiction Case*<sup>112</sup> found that Iceland had

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107. See C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 225-65 (1964).

108. [1950] I.C.J. 266, 277.

109. [1951] I.C.J. 116, 131.

110. [1960] I.C.J. 6, 43-44.

111. [1969] I.C.J. 3, 41-45.

112. [1974] I.C.J. 175, 200. In this case the Court took note of the present attempts to codify international law on fisheries jurisdiction at the Third U.N. Conference on the Law of the Sea and commented: "In the circumstances, the Court, as a court of law,

exceeded her rights under international law by unilaterally extending her fishing zone to a 50-mile limit, but it avoided the vexing question of the permissible width of fishing zones under customary international law.

Caution of this kind is inevitable in a system where adjudication is premised upon consent and where many States still claim that consent is the basis of all customary law.<sup>113</sup> It is hardly surprising, therefore, that the Court abstained from committing itself on such highly debatable and controversial rules of customary law as a norm of nondiscrimination (*South West Africa Cases*) and a rule prohibiting nuclear tests (*Nuclear Tests Cases*). On the other hand, it is regrettable that this was done under the guise of procedural niceties. The majority opinions in the *South West Africa Cases* and the *Nuclear Tests Cases* provide no indication of the difficulties that confronted the Court at the merits stage of each case. However, the strong disagreements manifested in the separate opinions certainly point in this direction.

The separate and dissenting opinions in the *South West Africa Cases* indicate a split among the judges on the issue of whether a norm of nondiscrimination had been generated in the political organs of the United Nations.<sup>114</sup> Judges Tanaka<sup>115</sup> and Nervo<sup>116</sup> were prepared to acknowledge that such a norm had been created and that "the formation of a custom through the medium of international organizations is greatly facilitated and accelerated . . ."<sup>117</sup> On the other hand, Judge Jessup,<sup>118</sup> Judge ad hoc Van Wyk,<sup>119</sup> and, in all likelihood, the silent majority<sup>120</sup> were unwilling to ap-

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cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down." *Id.* at 192.

113. The notion that a State is not bound by a rule of customary law unless it has previously consented to that rule is properly criticized and rejected in A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 187-88 (1971). Nevertheless, as D'Amato concedes, there is still support for this view from nations, such as the Soviet Union and France, which emphasize the sovereignty of the State in the international legal order.

114. See S. SLONIM, *supra* note 9, at 299-302.

115. [1966] I.C.J. at 291-94.

116. *Id.* at 464, 469.

117. *Id.* at 291 (Judge Tanaka).

118. *Id.* at 432-33. While opposed to the existence of a *norm* of nondiscrimination, Judge Jessup suggested that a *standard* of nondiscrimination might be used to measure the fulfillment of South Africa's obligations under the Mandate.

119. *Id.* at 169-70.

120. With the exception of Judge ad hoc Van Wyk, none of the judges comprising the majority committed themselves on this matter. Not surprisingly, the Soviet judge, Koretsky, studiously avoided this issue in his dissenting opinion. Judge ad hoc Sir Louis Mbanefo

prove the idea that repeated resolutions of the U.N. General Assembly might have legislative effect. Consequently, they refused to endorse the existence of a norm of nondiscrimination.

The separate and dissenting opinions in the *Nuclear Tests Cases* disclose similar disagreement over the existence of a rule of customary law relating to military power and national defense. The dissenting judges took the view that the Court should determine at the merits stage the question of the existence of a rule of customary international law prohibiting atmospheric nuclear tests which result in the deposit of radioactive fallout on other States. Nevertheless, by rejecting the suggestion that the applicants' claim that the existence of such a rule was frivolous<sup>121</sup> and by denouncing the argument that the Court would be obliged to engage in judicial legislation in order to accede to the applicants' claim,<sup>122</sup> the dissenters intimated that there was some support for such a rule of customary law. Judges Gros,<sup>123</sup> Petrón,<sup>124</sup> and Ignacio-Pinto,<sup>125</sup> on the other hand, found that there was no rule of customary law prohibiting atmospheric nuclear tests and that these tests "belong to a highly political domain where the norms of legality or illegality are still at the gestation stage."<sup>126</sup> In reaching this conclusion, Judge Petrón expressed doubts about the role of General Assembly resolutions in the evolution of customary international law.<sup>127</sup> Such doubts, it will be remembered, were also a primary reason for opposition to the norm of nondiscrimination alleged in the *South West Africa Cases*.

Judge Nagendra Singh remained silent on the subject of a rule of customary law prohibiting atmospheric nuclear tests. He had

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and Judges Wellington Koo and Forster preferred to base their finding that apartheid violated the provisions of the Mandate on the unreasonableness of this policy rather than on its incompatibility with a norm of nondiscrimination. *Id.* at 233-35 (Wellington Koo), 482-83 (Forster), 489-90 (Mbanefo).

121. [1974] I.C.J. at 321, 365-66 (joint dissenting opinion), 436 (Sir Garfield Barwick); [1974] I.C.J. at 504 (joint dissenting opinion).

122. The joint dissenting opinion states:

[W]e cannot fail to observe that, in alleging violations of its territorial sovereignty and of rights derived from the principle of the freedom of the high seas, the Applicant also rests its case on long-established—indeed elemental—rights, the character of which as *lex lata* is beyond question.

[1974] I.C.J. at 367; [1974] I.C.J. at 519.

123. [1974] I.C.J. at 288.

124. *Id.* at 302-06.

125. *Id.* at 311.

126. *Id.* at 303 (Judge Petrón).

127. *Id.* at 306.

concluded in his 1959 study on *Nuclear Weapons and International Law*<sup>128</sup> that such tests give rise to State responsibility.

#### 4. *The Spectre of Noncompliance*

The International Court of Justice is rightly concerned about its own authority since any undermining of this authority must inevitably harm the cause of international adjudication. In the mid-sixties, the Court was clearly weakened by the refusal of several States, and hence of the United Nations itself, to implement the Court's advisory opinion in the *Expenses Case*.<sup>129</sup> Several scholars have suggested that the memory of this experience haunted the Court in 1966 in the *South West Africa Cases* and may have prompted it to choose a procedural escape route rather than to render a decision which the Republic of South Africa might refuse to accept and which the political organs of the United Nations might fail to enforce.<sup>130</sup> Considerations of this kind must have weighed even more heavily with the Court in the *Nuclear Tests Cases*, for by the time it rendered judgment in 1974, France had already twice violated the 1973 interim order<sup>131</sup> and thereby had served notice on the Court of the strong likelihood that it would treat a final order on the merits in the same cavalier fashion. Furthermore, although the Republic of South Africa appeared before the Court at both stages of the *South West Africa Cases* and gave no intimation of its likely reaction to an adverse decision, France treated the Court with disrespect from the outset. Not only did France bluntly refuse to appear even for argument of preliminary objections, but it also stated that it considered the Court to be "manifestly" without competence to hear the case.<sup>132</sup> In addition, the Court was no doubt aware of France's denunciation of the General Act of 1928<sup>133</sup> and of its withdrawal of its acceptance of the Court's jurisdiction under the optional clause following the commencement of proceedings in the *Nuclear Tests Cases*.<sup>134</sup> In

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128. N. SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 227-35 (1959).

129. [1962] I.C.J. 151. In this advisory opinion the Court determined that assessments made by the U.N. General Assembly were legitimate under U.N. CHARTER art. 17, para. 2.

130. See R. ANAND, *supra* note 10, at 144-45; Falk, *supra* note 60, at 1, 20-21; Higgins, *supra* note 58, at 589-90.

131. [1974] I.C.J. at 258.

132. *Id.* at 255-57. See the justification of this attitude advanced by Judge Gros. *Id.* at 290. *Contra, id.* at 401 (dissenting opinion of Sir Garfield Barwick).

133. *Id.* at 343.

134. This withdrawal was effected on January 2, 1974. See [1973-1974] I.C.J.Y.B. 49. See also Note, *supra* note 20, at 636-37.



these circumstances it is likely that the Court feared that France would curtly reject any adverse decision by the Court and that the French representative<sup>135</sup> would veto any attempt aimed at the enforcement of an adverse decision by the Security Council.

### 5. *Political and Legal Disputes*

Early international law drew a distinction between "political" or nonjusticiable disputes and "legal" or justiciable disputes.<sup>136</sup> The meaning of the term "political dispute" is imprecise, but Rosalyn Higgins has suggested<sup>137</sup> that it covers four contentions. First, the matter affects a State's "vital interests." Second, the dispute is incapable of objective judicial interpretation on the ground that there are no existing rules of law to determine the dispute. Associated with this notion is the argument that the international judge should refrain from filling in "gaps" in the law by means of judicial innovation. Third, the motives of a State seeking a judicial determination are questionable on the ground that the State is seeking to promote certain political objectives rather than resolve a genuine legal controversy. According to this view, "for a dispute to be 'legal,' and suitable for adjudication by the Court, it is necessary that the intention of the applicant be 'legal' and not 'political.'" <sup>138</sup> Fourth, post-adjudicative compliance is in doubt since the subject of the dispute affects the "vital interests" of a State.

The argument that certain disputes are "political" and hence beyond judicial determination is inimical to international adjudication since it creates an escape route from the jurisdiction of the Court even where the Court may have jurisdictional authority under the optional clause or under a treaty in force. It is therefore difficult to disagree with the view of Sir Hersch Lauterpacht that there is an "imperative necessity" for abandoning this doctrine which "has become an obstacle in the way of legal progress."<sup>139</sup> In recent years a better understanding of the relationship between law and politics has developed in scholarly and professional quarters, and one might have expected that the concept of the

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135. Note, *supra* note 20, at 616-17. See generally I. SHIHATA, *supra* note 70, at 186-88.

136. See generally H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933).

137. Higgins, *Policy Considerations and the International Judicial Process*, 17 *INT'L & COMP. L.Q.* 58, 65 (1968).

138. *Id.* at 71.

139. H. LAUTERPACHT, *supra* note 136, at 434-35.

political, nonjusticiable dispute had been relegated to the history of international law and replaced by the notion that a dispute "is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law."<sup>140</sup> Unfortunately, this belief or expectation is destroyed by judicial pronouncements in both the *South West Africa Cases* and the *Nuclear Tests Cases*, pronouncements which suggest that the doctrine of the "political" dispute is alive and well and living at the Hague.

In their joint dissenting opinion in 1962 in the *South West Africa Cases*, Sir Percy Spender and Sir Gerald Fitzmaurice expressed misgivings as to "whether the issues arising from the merits are such as to be capable of objective legal determination." The applicants were seeking a finding that apartheid violated article 2 of the Mandate, which requires the Mandatory to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory,"<sup>141</sup> and Judges Spender and Fitzmaurice found this provision to be lacking in the necessary "objective criteria" for a legal decision. Consequently they stated that the "proper forum for the appreciation and application of a provision of this kind [article 2] is unquestionably a technical or political one."<sup>142</sup> Although the Court of 1966 did not acknowledge this objection to its competence, it may have been one of the unarticulated considerations which prompted the Court to avoid passing judgment on the merits of the dispute. Significantly, when article 2 was considered by the South African Appellate Division in 1969 in the course of an unsuccessful attempt to persuade that court to endorse the revocation of the Mandate, it too found that this provision was not capable of legal determination.<sup>143</sup> Such an approach, which takes no account of the many occasions on which courts are required to attribute meaning to such vague terms as due process, unreasonable restraint of trade, equal protection of the laws, and good moral character,<sup>144</sup> is inspired by the classical view that certain disputes are political and hence nonjusticiable.<sup>145</sup>

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140. H. Kelsen, *THE LAW OF THE UNITED NATIONS* 525 (Tucker ed. 1966). See Higgins, *supra* note 137, at 74.

141. Mandate for South-West Africa, 2 LEAGUE OF NATIONS OFF. J. 89 (1921).

142. [1961] I.C.J. at 466-67.

143. *S. v. Tuhadeleni*, [1969] 1 S. Afr. L.R. 153, 172 (App. Div. 1968). For a discussion and criticism of this approach, see Dugard, *South West Africa and the "Terrorist Trial,"* 64 AM. J. INT'L L. 19, 36-38 (1970).

144. See the comment to this effect in the dissenting opinion of Judge Jessup in the *South West Africa Cases*, [1966] I.C.J. 6, 435.

145. See Falk, *supra* note 60, at 15.

In the *Nuclear Tests Cases* of 1974, the majority carefully refrained from stating that it viewed the dispute as "political" and therefore as nonjusticiable, but all four of the concurring judges who handed down separate opinions suggested that this view was part of the silent inspiration for the decision. Judge Ignacio-Pinto repeatedly stressed the "all too markedly political character of this case"<sup>146</sup> and "the absence of any guiding light of positive international law."<sup>147</sup> Judge Forster, in stating that "in the domain of its national defense" France, like any other State, possessed "absolute sovereignty," strongly suggested that national defense falls within the nonjusticiable land of vital interests.<sup>148</sup> Judge Petré preferred to view the dispute as nonjusticiable on the ground that, in accordance with Rosalyn Higgins' second category of "political" disputes, there existed no rule of customary law to resolve the dispute. He maintained that "the claim submitted to the Court by Australia belongs to the political domain and is situated outside the framework of international law as it exists today."<sup>149</sup> Judge Gros viewed the dispute as "political" under several meanings of the word. First, he was influenced by considerations affecting France's vital interests. He observed that "the Applicant's claim to impose a certain national defense policy on another State is an intervention in that State's internal affairs in a domain where such intervention is particularly inadmissible." He cited with approval<sup>150</sup> a passage from Sir Hersch Lauterpacht's *The Function of Law in the International Community* to the effect that "it is . . . doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests."<sup>151</sup> Second, he endorsed Judge Petré's view that the dispute was nonjusticiable because of the lack of any applicable customary rule.<sup>152</sup> Finally, he categorized the dispute as a conflict of political interests and warned:

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146. [1974] I.C.J. at 308. See also *id.* at 309, 311. In his dissenting opinion in 1973 in the *Nuclear Tests Cases (Measures of Interim Protection)*, Judge Ignacio-Pinto expressed a similar view. [1973] I.C.J. at 133.

147. [1974] I.C.J. at 311.

148. *Id.* at 275.

149. *Id.* at 306.

150. *Id.* at 283.

151. H. LAUTERPACHT, *supra* note 136, at 188. The passage cited does not fully reflect Lauterpacht's views, for in the same paragraph he pleads for the abandonment of concepts such as "vital interests." *Id.* at 189.

152. [1974] I.C.J. at 288.

There is a certain tendency to submit essentially political conflicts to adjudication in the attempt to open a little door to judicial legislation and, if this tendency were to persist, it would result in the institution, on the international plane, of government by judges; such a notion is so opposed to the realities of the present international community that it would undermine the very foundations of jurisdiction.<sup>153</sup>

However, this line of reasoning was rejected by the joint dissenting opinion, which stated that

a dispute is political, and therefore non-justiciable, where the claim is demonstrably rested on other than legal considerations, e.g., on political, economic or military considerations. In such disputes one, at least, of the parties is not content to demand its legal rights, but asks for the satisfaction of some interest of its own even although this may require a change in the legal situation existing between them. In the present case, however, the Applicant invokes legal rights and does not merely pursue its political interest; it expressly asks the Court to determine and apply what it contends are existing rules of international law.<sup>154</sup>

The joint dissent then denied the suggestion that political motives may convert an otherwise legal dispute into a political one and wisely added:

Few indeed would be the cases justiciable before the Court if a legal dispute were to be regarded as deprived of its legal character by reason of one or both parties being also influenced by political considerations.<sup>155</sup>

## II. SOME REALISM ABOUT THE INTERNATIONAL COURT OF JUSTICE.

The U.S. realist movement<sup>156</sup> has effectively exposed the judicial process in the United States by drawing attention to the extra-legal or quasi-legal factors which influence the judicial decision-making process. In particular, it has shown that a judge's decision

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153. *Id.* at 297.

154. [1974] I.C.J. at 366; [1974] I.C.J. at 518.

155. [1974] I.C.J. at 366; [1974] I.C.J. at 518.

156. For an excellent study of the history of this movement, see W. TWING, *KARL LEWELLYN AND THE REALIST MOVEMENT* (1973).

represents not merely the application of legal rules. Rather, it is the product of an intermingling of legal principles and subconscious or unarticulated stimuli such as the judge's background and his views on political, economic, and social matters. Justice Oliver Wendell Holmes, whom the realists hailed as "the completely adult jurist,"<sup>157</sup> recognized this process when he stated:

The language of the judicial decision is mainly the language of logic. . . . [But] behind that logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.<sup>158</sup>

More provocatively outspoken was Judge Jerome Frank, who argued that a judge seldom works out a conclusion from principle, but rather in most cases reaches his conclusion first and then finds legal rules to justify it. The conclusion is really a judicial "hunch,"<sup>159</sup> produced by the interaction of rules of law and concealed factors such as the judge's education, race, and class, and his political and moral prejudices.<sup>160</sup> In short, "a judge's decisions are the outcome of his entire life-history."<sup>161</sup>

These revelations have been widely accepted within the United States, but in other jurisdictions they have been less well received, and there is a tendency to attempt to confine the realist thesis to the U.S. scene. However, the realist message does have a wider application. Although its scope may be more expansive under the U.S. system, with its opportunity for judicial review and its competing versions of the common law found in the fifty states, the realist analysis is applicable to any system in which the judge has a secured independence and room for judicial maneuvering in the application of the law.<sup>162</sup> This conclusion is supported by the British experience. The myth of British judicial neutrality has been questioned in recent times by studies<sup>163</sup> which suggest that

157. J. FRANK, *LAW AND THE MODERN MIND* 253 (English ed. 1949).

158. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897). See also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-68 (1921).

159. This term is borrowed from the equally provocative thesis advanced by Judge Joseph C. Hutcheson, Jr., in *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

160. J. FRANK, *supra* note 157, at 105.

161. *Id.* at 115.

162. W. FRIEDMANN, *LEGAL THEORY* 451 (5th ed. 1967).

163. B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 46-47, 114-21, 307-08 (1967);

certain decisions<sup>164</sup> on social welfare and trades union legislation have amounted to "conservative politics in the guise of analytical jurisprudence."<sup>165</sup> Such studies bear out the observation made by one of Great Britain's leading international lawyers, Sir Hersch Lauterpacht, in the early 1930's:

In matters of economic policy and in disputes involving the opposing interests either of capital and labour, or generally of the wealthy and the poor, the impartiality of courts composed, as a rule, of judges belonging by birth, training, and community of sentiment and interests to one section of the population, has never been universally admitted.<sup>166</sup>

The realist thesis is par excellence applicable to the International Court of Justice since its judges are drawn largely from the overt political arena (in the case of judges who have held political office in their own country or served in their country's delegation to the United Nations) or from the covert political scene (in the case of judges who have served in their country's foreign office). Moreover, no dispute which reaches the Court is devoid of political implications and consequences, and these inevitably affect the Court's decisions.<sup>167</sup> Although judges of the Court, like their British counterparts, may prefer to suppress this fact, its truth remains inescapable.

The 1966 *South West Africa Cases* and the 1974 *Nuclear Tests Cases* illustrate only too clearly the relevance of the realist argument. Both decisions turned on procedural niceties and were couched in impeccable legal language and reasoning. Ostensibly they were exercises in pure logic. But were these technical procedural points the "very root and nerve" of the decision? Or were other considerations, considerations not articulated in the respective judgments, of greater importance?

It is at least arguable that in both decisions the majority judges were troubled by the justiciability of the dispute because of its "political" character, by the fear of noncompliance with an adverse

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E. McWHINNEY, JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD 44-48 (1969); Jennings, *Judicial Process at Its Worst*, 1 MODERN L. REV. 111 (1937).

164. E.g., *Roberts v. Hopwood*, [1925] A.C. 578, 594; *Prescott v. Birmingham Corp.*, [1955] Ch. 210.

165. Cohen, *Theory and Definition in Jurisprudence*, 29 ARISTOTELIAN SOC'Y 213, 234-35 (Supp. Vol. 1955).

166. H. LAUTERPACHT, *supra* note 136, at 216-17.

167. *Id.* at 204, 225.

judgment, and by the wisdom of giving the Court's imprimatur to a new customary rule forged in recent State practice and in the political organs of the United Nations. No indication of these considerations appears in the Court's judgment in either case. However, as discussed earlier, there is abundant evidence that these matters weighed heavily with at least some of the judges who constituted the majority, and it is surely not too farfetched to infer that some of their brothers were likewise troubled. In short, it may be argued that the Court in both instances preferred to decide each case on a "legal" point of a preliminary (or antecedent) nature in technical legal language in order to avoid becoming embroiled in the "political" consequences of a judgment on the merits.<sup>168</sup> In both cases, however, this choice resulted in a straining of the rules of procedure and in a refusal to apply the *audi alteram partem* rule, as if the Court were unwilling to have its premises questioned in open court.

For a greater understanding of the decisions in these two cases, it is necessary to probe the backgrounds and beliefs of individual judges. It is not possible within the limits of the present study to attempt a full-scale examination of the "entire life histories" of judges of the International Court of Justice. On the other hand, certain factors which may have influenced judicial behavior in these cases are common knowledge, and the following discussion will briefly focus upon these factors. In embarking upon this survey, the author is mindful of the unpopularity of such a line of research. However, this subject cannot be shirked in the interests of politeness. In the words of Sir Hersch Lauterpacht:

It is undoubtedly one of the most urgent problems of the political organization of the international community, a problem the consideration of which requires a combination of conscientious abstention from imputation of motives with the determination not to avoid the issue because of the necessity of taking into account factors of a psychological and personal nature.<sup>169</sup>

To draw attention to these factors is to make no suggestion of judicial bias. It is suggested only that such factors may have con-

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168. In 1958 Sir Gerald Fitzmaurice, one of the members of the majority in the 1966 *South West Africa Cases*, acknowledged that a finding against jurisdiction might prove to be a solution "in those cases where the necessity of giving a decision on the merits would involve unusual difficulty or embarrassment for the tribunal." Fitzmaurice, *supra* note 81, at 12 n.3. See also 1 S. ROSENNE, *supra* note 70, at 185-86, 269-70.

169. H. LAUTERPACHT, *supra* note 136, at 203.

tributed subconsciously to the judicial decisionmaking process in the 1966 *South West Africa Cases* and in the 1974 *Nuclear Tests Cases*.

### A. Education

Both the time and the place of a judge's legal education may leave an indelible mark on his attitude toward the law.<sup>170</sup> Americans familiar with the differences between the Yale and Harvard approaches to international law will readily appreciate the importance of first impressions gained at law school and understand the extent to which this experience may influence a lawyer in later life. More important, however, is the time factor. The international lawyer educated in the pre-World War II era—when international law was only a set of rules governing relations between States and international adjudication was seen as inappropriate for the settlement of “political” disputes—will understandably find it difficult to adjust to a legal order in which the international protection of human rights occupies a prominent place, consensus vies with consent as the basis of customary law, and the International Court of Justice is seen as an appropriate forum for the settlement of disputes affecting the “vital interests” of States. Considerations of this kind may well have contributed to the 1966 decision in the *South West Africa Cases*, in which the average age of the 12 permanent members of the Court was 70 and Judge Winiarski was 82! But it was not a major factor, since the dissenting judges on average were slightly older than the conservative majority.<sup>171</sup> The average age of the Court in the 1974 *Nuclear Tests Cases* was lower, a mere 65. Thus, even though age was probably not a determining factor in the two decisions under consideration, it is at least arguable that attempts should be made to introduce an age limit of 75 years<sup>172</sup> for judges on the International Court of Justice, in light of the lasting influence of a lawyer's initial legal training and the rapid developments in the international legal order since World War II.

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170. In the *Anglo-Iranian Oil Co. Case (Jurisdiction Issue)*, [1952] I.C.J. 93, 161, Judge Levi Carneiro stated that “[i]t is inevitable that every one of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin.”

171. The average age of the minority was almost 72 while the average age of the majority was 68.

172. In 1954 the Institute of International Law recommended 75 years as the maximum age for judges. 1 S. ROSENNE, *supra* note 70, at 169.



### B. *Professional Experience*

In explaining the divergent approaches of judges in the 1966 *South West Africa Cases*, the late Wolfgang Friedmann suggested that "more significant than nationality may be the fact that Judges Spender, Fitzmaurice and Gros came to the Court from long careers of legal and diplomatic service for their respective governments rather than from a judicial or professorial background."<sup>173</sup>

Undoubtedly the professional background of a judge forms an important part of his "life history." Moreover, there is every likelihood that a judge accustomed to serving a government will be more sympathetic to the notion of State sovereignty, and hence to the exclusion of "political disputes" from international adjudication, than a former professor of international law with no direct professional links with his government. On the other hand, it is difficult to attribute too much significance to this factor in the 1966 *South West Africa Cases*.<sup>174</sup> Although it is true that Judges Spender, Fitzmaurice, and Gros had served their respective governments for many years in the international field before their appointment to the Court, it should be borne in mind that Judges Winiarski and Morelli were essentially academics in origin, while Judge Spiropoulos had a distinguished career in education and diplomacy before his appointment to the Court. Furthermore, while it is true that three members of the minority—Judges Jessup, Tanaka, and Forster—had distinguished academic and judicial careers, each of them had also served his respective government in some capacity. The remaining three dissenters—Judges Wellington Koo, Koretsky, and Nervo—rivalled Judges Spender, Fitzmaurice, and Gros in terms of their governmental service.

Friedmann's thesis is more applicable to the *Nuclear Tests Cases*, in which judges with past careers in government constituted the majority<sup>175</sup> and those with predominantly academic-judicial backgrounds<sup>176</sup> were in the minority. Of course, this is not an entirely satisfactory explanation for judicial divergences in light of the fact that most judges of the International Court of Justice have "mixed" professional backgrounds in which either an aca-

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173. Friedmann, *The Jurisprudential Implications of the South West Africa Case*, 6 COLUM. J. TRANSNAT'L L. 1, 3 (1967).

174. The information about judges in this section is derived from the biographies of judges contained in various issues of the I.C.J.Y.B.

175. Judges Lachs, Gros, Petrán, Ignacio-Pinto, Morozov, Nagendra Singh, and Ruda. Judges Forster and Bengzon have predominantly judicial backgrounds.

176. Judges Dillard, De Castro, Jiménez de Aréchaga, Onyema, and Sir Humphrey Waldock.

democratic or judicial career is combined with service to the judges' respective governments in the field of international law and organization.

### C. *Legal Philosophy*

Two main jurisprudential approaches have surfaced in the recent judgments and opinions of the Court—the positivist (or formalist) and the teleological (or sociological).<sup>177</sup> Positivists see international law as a body of rules to which States have consented and stress State sovereignty as the cornerstone of the international legal order.<sup>178</sup> As a consequence, they adopt a highly cautious approach to judicial innovation and to the creation of new rules of customary law.<sup>179</sup> Opposed to this school are those who emphasize the community interest over State sovereignty, and who are prepared to accept the innovative role of the judge and the accelerated growth of custom in an interdependent world. This group is united by its common antagonism to rigid legal positivism and includes members of the sociological and natural law schools as well as judicial moderates. In the field of treaty interpretation this group is often described as the teleological school, for it seeks to give maximum effect to the object and purpose of treaties.

The 1966 *South West Africa Cases* were generally hailed as a victory for the positivist approach.<sup>180</sup> The majority refused to decide the question of the existence of a norm of nondiscrimination at all. Indeed, it condemned judicial innovation and interpreted the Mandate documents in a restrictive manner most favorable to the sovereignty of South Africa.<sup>181</sup> The *Nuclear Tests Cases* of

177. See the comment to this effect by Judge Tanaka in his dissenting opinion in the *South West Africa Cases*, [1966] I.C.J. 6, 278.

178. J. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 9-18 (1958).

179. H. LAUTERPACHT, *supra* note 136, at 65-69.

180. See J. DUGARD, *supra* note 5, at 374; Falk, *supra* note 60, at 13; Friedmann, *supra* note 173, at 3; Pollock, *The South West Africa Cases and the Jurisprudence of International Law*, 23 INT'L ORGANIZATION 767 (1969).

181. It may be urged that the Court is entitled to engage in a process of "filling in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision.

[1966] I.C.J. at 48.

1974 reflect a similar philosophy, albeit by omission rather than commission. A finding on a controversial rule of customary law was avoided, and the sovereignty of France in the domain of national defense was allowed to remain unchallenged. Ironically, several of the judges<sup>182</sup> who had adopted a dynamic, teleological approach in the 1971 *Namibia Opinion*<sup>183</sup> found themselves in a positivist majority in 1974, with Judge Gros alone displaying a consistently cautious, positivist approach. In some measure this switching of jurisprudential horses may be attributed to an identifiable tendency on the part of judges to adopt a less restrained and more innovative approach to the judicial function in advisory proceedings than in contentious proceedings.<sup>184</sup> At the same time, this switch suggests that while certain judges, such as Judge Gros, are consistent in their approach to the law, other judges are more flexible and less easily categorized in jurisprudential terms.<sup>185</sup> However important a particular legal philosophy may be to certain judges, it cannot be considered as a clear determinant in the decisionmaking processes of all judges. Like education and professional experience, it is simply one of the many factors which influence the judicial decision.

#### D. Race

In a dispute with strong racial features, such as the conflict over Namibia, the racial factor must inevitably play some part in judicial decisionmaking. No African or Asian judge who had himself grown up in a world of colonialism and racial discrimination could have been expected to erase this memory in dealing with the question of apartheid in Namibia. Indeed, it is hardly surprising that all the African and Asian judges on the Court in 1966 voted

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182. Judges Lachs, Forster, Bengzon, Petré, Ignacio-Pinto, and Morozov.

183. 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. 16. For a discussion of this subject, see Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 14 (1972); Dugard, *The Opinion on South West Africa ("Namibia"): The Teleologists Triumph*, 88 S. AFR. L.J. 460 (1971).

184. Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS (Fr.) 312, 370, 385 (1967).

185. Slonim draws attention to a number of examples of this jurisprudential flexibility on the part of judges in the history of the *South West Africa Cases* before the Court. For instance, one finds "Judge Winiarski among the 1950 and 1956 majorities (*i.e.*, in the 'liberal' camp), but later among the 1962 minority and the 1966 majority (*i.e.*, in the 'conservative' camp)." S. SLONIM, *supra* note 9, at 356.

with the minority.<sup>186</sup> But this factor should not be overemphasized, since Judge Onyeama voted against the majority in the 1971 *Namibia Opinion* with respect to its second finding on consequences for States arising out of Security Council Resolution 276 (1970).<sup>187</sup> Furthermore, race was not a factor in the dispute in the *Nuclear Tests Cases*, and there is no suggestion that it played any part in the final decision.

#### E. *Ideological Attitude Toward International Adjudication*

The Soviet Union's attitude on the judicial settlement of disputes is well known. It objects to any suggestion of compulsory adjudication and endorses the classical view that "political" disputes are not capable of judicial determination.<sup>188</sup> Thus, Soviet Foreign Minister Andrei Vyshinskii stated in 1946 that "[d]ecisions of the International Court ought to have a binding force, but submission of the dispute to the Court ought to be facultative and be agreed to in each separate case."<sup>189</sup> The position of the Soviet Union is manifested in the decisions of Communist judges, and it is hardly surprising that both Judge Morozov (Soviet Union) and Judge Lachs (Poland) agreed with those judges who saw the *Nuclear Tests Cases* as an essentially "political" dispute which affected the "vital interests" of a sovereign State and which was therefore nonjusticiable.

#### F. *National Interest*

Ad hoc judges have consistently voted for the State which has appointed them, and the record of titular judges has been little

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186. Judges Wellington Koo, Tanaka, and Forster and Judge ad hoc Sir Louis Mbanefo.

187. U.N. Security Council Resolution 276 declares that the continued presence of South African authorities in Namibia is illegal and calls upon all members of the United Nations to refrain from any dealings with the Government of South Africa that would imply recognition of the legality of the South African presence in Namibia. The Court in its advisory capacity held that member States were obliged to abide by the terms of this resolution. [1971] I.C.J. at 58. Judge Onyeama, while agreeing that South Africa's occupation of Namibia was illegal, dissented to the majority's finding that the language of Resolution 276 was obligatory. *Id.* at 148.

188. With regard to the Communist point of view, as reflected above all in the position taken by the Soviet Union, it is believed that as a matter of political theory the dichotomy between justiciable and non-justiciable disputes is erected almost to the level of a dogma, leaving little room for flexibility and stressing the political element of most international disputes and their un-amenability to judicial settlement.

1 S. ROSENNE, *supra* note 70, at 106.

189. Quoted in K. GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW* 476 (1970). See generally *id.* at 473-77.

better when their own State has been involved.<sup>190</sup> To expect a judge to vote against his own nation on an important issue is probably asking too much at the present stage of international adjudication. Although this is known and accepted, there may also be occasions on which a judge who is not a national of one of the parties to the dispute is influenced, albeit subconsciously, by the interest of his own country in the outcome of the proceedings.<sup>191</sup>

This phenomenon may be illustrated by the voting record of Judge Nagendra Singh of India in the *Nuclear Tests Cases*. Judge Singh undoubtedly has strong views on the legality of nuclear weapons and nuclear tests. In 1959 he published a comprehensive study<sup>192</sup> in which he denounced as illegal both the use of nuclear weapons in war and the testing of nuclear weapons in peace. In June 1973 he was a member of the majority which issued an interim order restraining France from proceeding with atmospheric tests pending a final decision in the *Nuclear Tests Cases*.<sup>193</sup> Yet in December 1974 he changed company and sided with the new majority, which in the main had been the minority in 1973. The issues of 1974 were admittedly different from those of 1973, and there is no contradiction in legal principle between his two decisions. Nevertheless, several important events occurred between the two phases of the proceedings which may have *subconsciously* influenced the learned judge. On May 18, 1974, India detonated its first nuclear weapon, thus joining the nuclear club.<sup>194</sup> In 1973, after the interim order in the *Nuclear Tests Cases*, India informed the Court that it regarded the 1928 General Act for Pacific Settlement of International Disputes<sup>195</sup> as having lapsed. (Later, in September of 1974, India issued a new declaration under the optional clause.<sup>196</sup>)

In predicting the voting patterns of neutral judges in international litigation it is necessary to recall Sir Hersch Lauterpacht's 1933 comment:

Frequently . . . a neutral State is vitally interested in the outcome of the dispute. The permanent identity of interests of small States as opposed to Great Powers; the

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190. H. LAUTERPACHT, *supra* note 136, at 230-32; I S. ROSENNE, *supra* note 70, at 204-05.

191. H. LAUTERPACHT, *supra* note 136, at 204-05, 225.

192. See N. SINGH, *supra* note 128, at 227-35.

193. [1973] I.C.J. 99, 106, 108.

194. 20 KEESING'S CONTEMPORARY ARCHIVES 26,585 (1974).

195. See text at notes 12-16 *supra*.

196. [1974] I.C.J. at 297.

abiding community of interests of States bound by ties of common race, culture and language; the less immutable but equally strong solidarity of interests of States bound by political alliances, by transient agreements for *ad hoc* purposes, or by jealousies against neighbours richer and more powerful than themselves; and even the accidental identity of interests in particular claims and policies—all this renders the impartiality of neutral judges a problem which is not to be lightly dismissed.<sup>197</sup>

### G. Regional Loyalties

The *Nuclear Tests Cases* suggest that regional groupings have an important influence on judicial behavior. In this decision there was a noticeable split between Francophone and Commonwealth judges. The two Francophone African judges, Forster (Senegal) and Ignacio-Pinto (Dahomey), and the French national judge, Gros, were part of the majority, while the Commonwealth judges, Onyeama (Nigeria), Waldock (United Kingdom), and Barwick (Australia), were in the minority. Judge Nagendra Singh was the odd man out, a Commonwealth judge who sided with France. This division supports the thesis of G. J. Terry, advanced in a recent study, that Commonwealth judges have constituted one of the few consistent factions on the Court.<sup>198</sup>

### III. CONCLUSION

The quasi-legal or extra-legal factors so cursorily surveyed above are but a few of the factors in the "life-history" of a judge which may consciously or subconsciously influence a judicial decision. Factors of this kind cannot be relied upon completely in predicting decisions of the Court or of individual judges. On the other hand, the foregoing discussion of the *South West Africa Cases* and the *Nuclear Tests Cases* demonstrates that such considerations cannot be ignored. Some may argue that this line of research should not be pursued because it threatens the reputation for impartiality of members of the Court. Others may suggest that to probe the allegiances and background of the man is to undermine his office.<sup>199</sup>

197. H. LAUTERPACHT, *supra* note 136, at 225.

198. Terry, *supra* note 2, at 96-97, 113.

199. The attitude of the Court toward the prediction of judicial behavior is reflected in a communiqué issued by the Court on March 26, 1974, in response to a statement made by the Australian Prime Minister on the eve of the Court's interim order in the *Nuclear Tests Cases*, to the effect that the Court was expected to decide in favor of Australia by eight votes to six. In its communiqué the Court expressed

These charges have repeatedly been levelled at the realists, but they are rebutted by Jerome Frank's observation that "the honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice."<sup>200</sup> The aim of the realists or the constructive skeptics (a term preferred by Jerome Frank) is not to undermine a judicial system, but to improve its quality by promoting an awareness of its true nature.

A greater understanding and knowledge of the extra-legal factors which may influence each of the 15 judges of the International Court of Justice might lead States to adopt a less sanguine approach to judicial settlement, particularly where the "vital interests" of a State are affected. Municipal law precedents on the subject of judicial abstention are instructive in this regard. Thus, for example, the "activist" Supreme Court of the United States carefully refrained from being drawn into the controversy over the legality of U.S. involvement in Vietnam.<sup>201</sup> More recently, the U.S. Supreme Court in *DeFunis v. Odegaard*<sup>202</sup> declined to pronounce upon the vexing question of the constitutionality of benign discrimination in favor of minority groups. If one bears in mind that municipal tribunals, which function in vastly more homogeneous and cohesive societies than the international community, sometimes prefer the path of judicial restraint (or ti-

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its strong disapproval of the making, circulation or publication of all statements anticipating or purporting to anticipate or forecast the manner in which judges of the Court will cast their votes in a pending case; and reiterate[d] its view that any making, circulation or publication of such statements is incompatible with the fundamental principles governing the good administration of justice.

[1973-1974] I.C.J.Y.B. 128. For a full discussion of this incident, see the dissenting opinion of Judge Gros in [1974] I.C.J. at 293-96.

200. J. FRANK, *supra* note 157, at 138.

201. For a study of the behavior of the U.S. Supreme Court on this subject, see Rothenbuhler, *The Vietnam War and the American Judiciary: An Appraisal of the Role of Domestic Courts in the Field of Foreign Affairs*, 33 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 312 (1973).

202. 416 U.S. 312 (1974). There are a number of interesting similarities between this case and the *Nuclear Tests Cases*. For example, both turn on the issue of mootness. The dispute in *DeFunis* between the majority, 416 U.S. at 318, and Justice Brennan, *id.* at 348-49, as to whether the mere "voluntary cessation" of allegedly illegal conduct serves to moot a case is equally applicable to the conduct of the French Government in the *Nuclear Tests Cases*. "Faced with a very controversial issue which divided the nation, the Supreme Court decided not to decide at that point and let time create the consensus needed before a Court can make a decision. The I.C.J. followed a similar course [in the *Nuclear Tests Cases*]." Note, *supra* note 20, at 634.

midity) to that of bold activism, it becomes easier to appreciate the dilemma of the International Court of Justice, whose jurisdiction is voluntary and whose very existence is still questioned in the international community.

The Court has handled matters of "graver political implications" than its predecessor, but at the same time it has had quantitatively less work.<sup>203</sup> If the Court is to win the confidence of those States skeptical of or hostile to international adjudication, it may have to devote less attention to controversial litigation such as the *South West Africa Cases* and the *Nuclear Tests Cases*. Since the Court itself has no power to choose the cases it will hear, the burden is upon States to be more cautious in presenting to the Court highly "political" disputes which affect "vital" State interests. The hasty and overzealous submission of such disputes can only result in: (a) "avoidance decisions" along the lines of the *South West Africa Cases* and the *Nuclear Tests Cases*; (b) a further decline in the number of acceptances of the compulsory jurisdiction of the Court; and (c) the refusal of States to appear before the Court even for the purpose of contesting jurisdiction—as in the case of Iceland in the *Fisheries Jurisdiction Cases*,<sup>204</sup> France in the *Nuclear Tests Cases*, and India in the *Case Concerning Trial of Pakistani Prisoners of War*.<sup>205</sup> International lawyers should, therefore, bear in mind the words of J. L. Brierly:

The most difficult disputes, those that endanger international peace, are never likely to be settled by courts; the disputes which endanger civil peace inside the state are not settled in that way either.<sup>206</sup>

The suggestion that States should assess the capabilities of the Court in the realist perspective before resorting to it for the settlement of disputes with highly charged political implications is but one of the consequences of an application of the realist thesis to international adjudication. Once it is accepted, and openly

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203. I S. ROSENNE, *supra* note 70, at 2, 93.

204. [1973] I.C.J. 3, 5, 7.

205. [1973] I.C.J. 347 (order removing the case from the Court's list at the request of Pakistan following the negotiations with India). After Pakistan had filed an application instituting proceedings against India, the Indian Government addressed two letters to the Court informing it that "there was no legal basis whatever for the jurisdiction of the Court in the case and that the Application of the Government of Pakistan was without legal effect." [1973-1974] I.C.J.Y.B. 123-24.

206. J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 124 (1944). For a realistic assessment of the role of international adjudication, see Waldock, *General Course on Public International Law*, 106 *RECUEIL DES COURS* (Fr.) 1, 104-20 (1962).



acknowledged, that personality considerations may affect the judicial decision, the Rules of Court might profitably be reviewed in an attempt to minimize the effects of extra-legal factors.

Two examples come to mind in the light of the experience gained from the *South West Africa Cases* and the *Nuclear Tests Cases*. At the present time elections are held every three years to fill five places on the International Court of Justice.<sup>207</sup> This triennial renewal of the membership of the Court is a welcome arrangement, for it ensures that the Court will not become isolated from current developments in international law. However, this procedure has one serious drawback. It permits different phases of the same case to be heard by a differently constituted Court. This practice is allowed to occur because article 13 (3) of the Court's Statute, which requires retiring judges to "finish any case which they may have begun," has been interpreted to apply to each phase of the proceedings. Thus, if elections occur between the preliminary objections and the merits hearing, it is possible that a Court with five different judges and a new President<sup>208</sup> may adjudicate on the merits.<sup>209</sup> The same result is sometimes achieved when a judge prevented by illness from sitting at one of the initial phases resumes his place on the Court at a later point in time. Such changes in the composition of the tribunal may cause the later Court to reconsider matters believed to have been settled at an earlier phase or to refuse to follow a direction issued by an earlier Court. Thus, in the *South West Africa Cases* the Court of 1966, which had undergone changes in composition in 1964 as a result

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207. I.C.J. STAT. art. 13.

208. Article 13 (2) of the Rules of Court provides that "[i]f a case is begun before a periodic election of Members of the Court and continues after such election, the duties of President shall be discharged by the Member of the Court who presided when the case was last under examination." In its practice, however, the Court has interpreted this provision to apply only to each separate phase. Thus, in a number of cases, different Presidents have presided over different phases of the same proceedings. 1 S. ROSENNE, *supra* note 70, at 193.

209. In the *Right of Passage Case*, the Court expressly decided that it might hear different phases of the case with a differently constituted Court. In that case, six preliminary objections were raised, of which four were rejected and two joined to the merits. After the judgment on the four preliminary objections, the composition of the Court changed, and the second phase of the proceedings was heard with two newly appointed judges under a new President. See 1 S. ROSENNE, *supra* note 70, at 199; S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 111 (3d rev. ed. 1973); [1958-1959] I.C.J.Y.B. 108. In the *Barcelona Traction Case (Second Phase)*, [1970] I.C.J. 3, there were five participating judges who had not sat for the Preliminary Objections hearing in 1964. See [1964] I.C.J. 6.

of an election, reconsidered a matter which the Court of 1962 appeared to have finally decided. Similarly, in the *Nuclear Tests Cases*, the Court of 1974, which had been slightly reconstituted due to illnesses,<sup>210</sup> failed to follow the directions of the 1973 Court that later proceedings consider questions of jurisdiction and admissibility.<sup>211</sup> It can be argued that in both cases the new composition of the Court did not affect the ultimate outcome, but the principle involved remains unchanged. If international judges, like their domestic counterparts, are influenced by extra-legal considerations, every effort should be made to exclude new influences of this kind at different stages of the proceedings. It must also be borne in mind that an applicant State may have been motivated to resort to litigation by the composition of the Court at a particular time.<sup>212</sup> If the makeup of this tribunal is likely to change between phases of the proceedings, States may quite understandably be deterred from applying to the Court. Therefore, the present practice of allowing different judges to hear different parts of the same proceedings should be altered. If the Court considers itself bound by its present interpretation of article 13 (3) of its Statute and article 13 (2) of its Rules, it is suggested that the alteration be effected by an amendment to the Rules of Court.<sup>213</sup>

Finally, it may be argued that the *Nuclear Tests Cases* have demonstrated the inadequacies of the 1972 Rules of Court relating to preliminary objections. Political considerations and inarticulate forces flourish in the fertile field of preliminary objections where they may be concealed in the language of logic and technicality. In these circumstances there is a need for greater clarification of what is meant by preliminary objections. The present distinction drawn in article 67 (1) of the Rules of Court between questions of jurisdiction, admissibility, and "other" matters not relating to the merits, is far too vague and permits the type of elastic interpretation adopted in the *Nuclear Tests Cases*. Questions of jurisdiction have a reasonably clear meaning and relate primarily to the

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210. In 1973 Judges Lachs and Dillard were absent because of illness. In 1974 Judge Ammoun was absent.

211. It is clear that the majority in 1973 wished to deal only with questions of jurisdiction and admissibility in the narrow meaning of these terms. According to Judge Gros, a majority of judges [in 1973] . . . had made up their minds to deal in [the 1974] phase solely with questions of the jurisdiction of the Court *stricto sensu*, and of the legal interest of the Applicant, and to join all other questions to the merits, including the question whether the proceedings had any object.

[1974] I.C.J. at 289 (separate opinion).

212. P. JESSUP, *THE PRICE OF INTERNATIONAL JUSTICE* 57 (1971).

213. See Rosenne, *supra* note 78, at 214.

competence of the Court to hear disputes in terms of treaties in force or declarations under the optional clause.<sup>214</sup> Admissibility, on the other hand, is a largely uncharted field and at present is interpreted in some quarters as a *portmanteau* concept for any issue not relating exclusively to the merits of the case. While it would be undesirable to enumerate exhaustively matters judged to be questions of admissibility, it might at least be possible to list the main types of admissibility cases in order to give prospective litigants a better indication of the types of preliminary hurdles that will have to be overcome before the Court hears the merits of a case.<sup>215</sup> Such a list might include matters affecting the legal interest of the applicant, the non-exhaustion of local remedies, and the nationality of the injured party in cases of State responsibility. This task will undoubtedly be difficult, but in light of the fairly extensive literature on this subject, it should not be impossible to enumerate the main categories of objections to admissibility recognized by the present Court and its predecessor.<sup>216</sup>

The Rules might also provide for a preliminary objection that the claim fails to disclose a cause of action, which would enable the Court at the outset to examine the question of the existence of a rule of customary law. Such an objection would permit one of the main issues in many disputes to be handled at the preliminary stage, thereby avoiding the unnecessary delays which the 1972 Rules of Court seek to eliminate.

The U.S. legal realists have taught us that absolute certainty in the law is an unattainable ideal. This should not, however, prevent lawyers from attempting to introduce certainty in areas which are demonstrably vague and unclear. The *South West Africa Cases* and the *Nuclear Tests Cases* demonstrate that if a greater measure of certainty is to be obtained in the international judicial process, there is a need for more precise Rules of Court with respect to preliminary objections brought before the International Court of Justice.

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214. See text at note 16 *supra*.

215. The following comment by Leo Gross on preliminary objections made before the drafting of the 1972 Rules of Court is still valid today.

It would seem desirable, if it were possible, for the sake of sound administration of justice, to avoid complexities which delight jurists but baffle governments, and to devise a procedure which would be not only fair but also generally intelligible particularly to governments, the actual and potential clients of the Court.

Gross, *supra* note 184, at 433.

216. See C. DE VISSCHER, *ASPECTS RECENTS DU DROIT PROCEDURAL DE LA COUR INTERNATIONALE DE JUSTICE* (1966); I. S. ROSENNE, *supra* note 70; I. SHIHATA, *supra* note 70.