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Namibia*(South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future

JOHN DUGARD**

South Africa could hardly have been expected to welcome the recent Advisory Opinion of the International Court of Justice on Namibia¹ in which the Court held that South Africa's continued presence in Namibia is illegal, that she is obliged to withdraw her administration immediately from the territory, and that States are legally obliged to refrain from acts which might imply recognition of this illegal occupation.² The anticipated response was a firm reminder from the South African Government that the Opinion was *only* advisory, coupled with some technical, legalistic objection to the reasoning of the Court. This would have been in line with the reaction to the 1950 Advisory Opinion on the *International Status of South West Africa*³ when the Court first held South Africa to be accountable to the United Nations for her administration of South West Africa. On that occasion the South African Government announced, in moderate and restrained language, that it would not accept the Opinion, first, because it was advisory, and, secondly, because certain "new facts" had come to light subsequent to the rendering of the Opinion which cast serious doubts on its validity.⁴ But there was no room for restraint in 1971.

On the night of the Court's Opinion, in a radio address to the nation, the Prime Minister, Mr. B.J. Vorster, repudiated the Opinion and questioned the integrity of the Court. Mr. Vorster, himself a

*Although the word Namibia is used outside Southern Africa to describe the territory of "South West Africa" the latter is still the official South African name for the territory. For the convenience of foreign readers the author has elected to use the term "Namibia".

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

2. *Id.* at 58.

3. [1950] I.C.J. 128.

4. 5 U.N. GAOR, Fourth Committee 196, Paras. No. 47-52 at 361-64 (1950).

lawyer, launched a two-fronted attack of the Court in which he charged that the Opinion was legally untenable, and that the Court had been "packed" for the proceedings. On the first count he alleged that "the argument of the Court will not stand up to the test of juridical analysis," that it "is not only entirely untenable, but is clearly and demonstrably the result of political manoeuvring instead of objective jurisprudence," that it ignored the 1966 decision of the Court in the *South West Africa Cases* and in so doing rejected "principles that had been built up through the long years of jurisprudence of the International Court and its predecessor, the Permanent Court." On the second count, Mr. Vorster contended that after the 1966 decision "South Africa's enemies" declared that "the Court would in future have to be packed with persons who would see to it that a verdict favourable to South Africa would not again be forthcoming from that quarter and they, in fact, took great pains to see that this happened in the election of judges in 1966 and 1969." This "packed" court, he continued, had adopted "a steamroller approach" to the proceedings and it was "not surprising that the opinions of the majority were clearly politically motivated, however, they tried to clothe them in legal language."⁵ Similar charges were levelled at the Court by some of the South African lawyers who had appeared before the Court⁶ and Mr. Justice J.T. Van Wyk, the South African *ad hoc* judge in the 1962-1966 proceedings, stated that "no fair-minded lawyer could possibly accept [the Opinion]."⁷

The purpose of the present study is to examine these accusations with a view to showing that, although the 1971 Opinion, like other decisions of the Court, is not a model of perfection, it is substantially in accordance with the jurisprudence of the Court and worthy of serious consideration. Thereafter the writer will discuss the general response to the Opinion and volunteer some tentative suggestions about the future of Namibia.

IS THE OPINION JURIDICALLY TENABLE?

South Africa's repudiation of the Court's opinion is motivated by hostility to the legal philosophy of the Court and to the methods of interpretation it employs. The history of the dispute before the Inter-

5. The Rand Daily Mail, June 22, 1971, at 4, col. 5.

6. See the statements of Mr. D.P. de Villiers S.C., The Star (Johannesburg), June 22, 1971, at 5, col. 2, and Mr. R.F. Botha M.P., The Star, July 27, 1971, at 8, col. 3.

7. The Star, June 21, 1971, at 1, col. 1.

national Court over Namibia has been marked by a conflict between strict constructionists and those judges who prefer liberal and sociological methods of treaty interpretation. In 1966 the strict constructionists triumphed. In 1971 they did not. This is the root cause of South Africa's antagonism towards the Court.

This confrontation between the two legal philosophies was clearly articulated by Judge Tanaka in his Dissenting Opinion in the 1966 *South West Africa Cases* when he declared:

In short the difference of opinions on the questions before us is in the final instance attributed to the difference between two methods of interpretation: teleological or sociological and conceptional or formalistic.⁸

South Africa's legal representatives were fully aware that the outcome of the proceedings was largely dependent on the methods of interpretation employed by the Court and recognized in their written submissions that "the approach adopted by the Court may have an important, if not decisive, bearing on the ultimate conclusions reached."⁹

Although Judge Tanaka identifies the nature of the jurisprudential conflict he exaggerates the extent of the rift. The teleologists and the formalists are at opposite ends of the spectrum, but in the middle there is a less hostile but equally important division between the right-wing adherents of the teleological school who rely on the doctrine of effectiveness in the interpretation of constitutive treaties and those who espouse restrictive methods of interpretation. However exhilarating Judge Tanaka's exposition of the international judicial function in his 1966 Dissenting Opinion may be, it remains an extreme statement in which he goes so far as to advocate the introduction of methods *libre recherche scientifique* or *Freirecht* into the international judicial process.¹⁰

Within the ranks of the liberal interpreters it is essential to distinguish between the extreme teleologists and the more moderate "pro-effectiveness" judges. The extreme teleologists, in the words of

8. [1966] I.C.J. 278. See further on this difference in jurisprudential outlook among members of the Court: Cheng, *The First Twenty Years of the International Court of Justice*, 1966 THE YEARBOOK OF WORLD AFFAIRS 241, at 246; L. Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS 312, at 370-404 (1967).

9. South African written submissions, Vol. 1, chap. 2, at 11.

10. [1966] I.C.J. 278.

the high-priest of textuality, Sir Gerald Fitzmaurice, contend that

. . . a treaty must be interpreted—and not only interpreted, but as it were assisted or supplemented—by reference to its objects, principles and purposes, as declared, known or to be presumed. In this way, gaps can be filled, corrections made, texts expanded or supplemented, always so long as this is consistent with, or in furtherance of, the objects, principles, and purposes in question.¹¹

This extreme approach, which has found favour with individual judges of the International Court of Justice such as Judges Azevedo,¹² Alvarez¹³ and Tanaka, has not received the support of the majority of the Court and has recently been rejected by the Vienna Convention on the Law of Treaties.¹⁴ The moderate teleologists, on the other hand, do not go so far. They assert that in the interpretation of multilateral treaties of a humanitarian or constitutive nature the rule *ut res magis valeat quam pereat* or principle of maximum effectiveness should be invoked to give effect to the common intention of the parties. According to this

Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and meaning can be attributed to every part of the text.¹⁵

11. *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, at 8 (1951).

12. Dissenting Opinion in Competence of Assembly Regarding Admission to the United Nations, [1950] I.C.J. 4, at 23.

13. *Id.* at 18-19.

14. See the commentary of the International Law Commission on Articles 27 and 28 of the Draft Articles on the Law of Treaties in 61 AM. J. INT'L L. 350 (1967). See also Shabtai Rosenne, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 COLUM. J. TRANS-NAT'L L. 205, at 221 (1966).

15. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points*, 33 BRIT. Y. B. INT'L L. 203, at 211 (1957).

Even Sir Gerald Fitzmaurice concedes that "[r]egarded in this way, the teleological principle has a useful role to play without going beyond the bounds of legitimate interpretation."¹⁶ In this sense the teleological principle of interpretation has been frequently used by the International Court,¹⁷ particularly in advisory opinions,¹⁸ and has received the blessing of the Vienna Convention on the Law of Treaties, which provides in Article 31 that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*."¹⁹

The "conceptional or formalistic" school of interpretation may also be divided into several categories. Some favour a "textual approach" which places emphasis on the text of the treaty while others favour an "intentions approach" according to which the prime goal of treaty interpretation is to ascertain the intentions of the parties.²⁰ This school's philosophy has been incorporated into the Vienna Convention on the Law of Treaties' provisions on interpretation,²¹ although, as has been pointed out, provision is still made for the application of the principle of effectiveness. Right-wing adherents of this school, preoccupied with textuality and the common intention of the parties—which is usually a fiction in any event—often ignore the main purpose or object of a treaty and fall back on restrictive interpretation in favour of State sovereignty.

Related to the division of opinion over the role of the object and purpose in the interpretation of a treaty is that over the place of the principle of contemporaneity and subsequent conduct. Strict constructionists take the view that treaty terms are to be interpreted in accordance with the meaning they possessed at the time the treaty was entered into²² and that the subsequent conduct of parties to a treaty is only relevant to show the original intention of signatories.²³ Teleologists, on the other hand, argue that humanitarian and constitutive

16. *Supra* note 11, at 8.

17. Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794, at 815 (1965).

18. *Supra* note 8, at 370 and 385.

19. See the Commentary of the International Law Commission on Articles 27 and 28 of the Draft Articles on the Law of Treaties: 61 AM. J. INT'L L. 351-2 (1967).

20. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L. Q. 47, 61 (1970).

21. *Supra* note 14, arts. 31 and 32.

22. *Supra* note 15, at 225.

23. Separate Opinion of Sir Percy Spender in the Expenses Case [1962] I.C.J. 151, 189-192; *supra* note 17, at 826-7.

treaties must be interpreted in the light of contemporary standards and that subsequent conduct is relevant to show contemporary expectation rather than original intention.²⁴

The dispute over the correct legal approach to the interpretation of the legal instruments related to the Namibian issue is more complex than a crude division between teleologists and strict constructionists. Amongst the "teleologists" there are extremists and moderates; those concerned with ascertaining the original intention of the parties and those for whom the contemporary expectations of the international community are paramount; those for whom the basis of international law remains consent and those for whom general consensus is now the basis of the international legal order.²⁵ Jurisprudentially they are more easily identifiable. They share in common an antipathy towards positivism and its strict insistence on the separation between law and morality. The strict constructionists are a more homogeneous group. Textual deviation is permitted only in the interests of State sovereignty and consent remains the basis of international law. Positivism is their guiding creed.²⁶

In 1950 the teleologists (in the broad sense) triumphed. Faced with the situation caused by the demise of the League of Nations and the failure of South Africa to place her mandated territory under trusteeship the Court held that the Mandate continued in force and that, in order to render this survival effective, South Africa was obliged to submit to the supervision of the United Nations in respect of her administration of the territory.²⁷ Commenting on this Opinion Sir Hersch Lauterpacht wrote that "such importation, on the part of the Court, of the rules of succession in relation to international organizations is no more than an example of legitimate application of the principle of effectiveness to basic international instruments" and "this application of the principle of effectiveness" constituted "the main feature of the Opinion of the Court in this case."²⁸ The 1955²⁹ and

24. *Supra* note 17, at 827-32.

25. R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 19-23 (1970).

26. Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORG. 1, 14 (1967); Friedmann, *The Jurisprudential Implications of the South West Africa Case*, 6 COLUM. J. TRANSNAT'L L. 1, 4 (1967).

27. *International Status of South-West Africa*, [1950] I.C.J. 128, 136-37.

28. H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 280 (1958). *See also* his Separate Opinion in the Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. 22, 56.

29. *Advisory Opinion on Voting Procedure-South West Africa*, [1955] I.C.J. 66, and 99, 104-05 (Separate Opinion of Sir Hersch Lauterpacht).

1956³⁰ Advisory Opinions which spelt out the permissible scope of the General Assembly's supervisory powers were also characterized by end-oriented methods of treaty interpretation.

The 1962 decision of the International Court in the First Phase of the *South West Africa Cases* adopts a similar approach. In that case the Court refused to accept a strictly textual interpretation "where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained."³¹ The Court identified "the primary, overriding purpose" of the mandates system as the promotion of 'the well-being and development' of the people of the Territory under Mandate"³² and proceeded to interpret ambiguities in the institution to accord with this purpose.

In 1966—owing to the death of Judge Badawi, the illness of Judge Bustamante and the recusal of Sir Muhammad Zafrulla Khan—the formalists found themselves in the majority and adopted an interpretation which completely ignored the object and purpose of the Mandate.³³ In a burst of rampant restrictive interpretation in favour of State sovereignty the Court repudiated the "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"³⁴ and, in true positivist tradition, distinguished firmly between law and morality in rejecting "humanitarian consideration" as a guide to treaty interpretation.³⁵

In 1971 the teleologists were again victorious: the principle of effectiveness was invoked to give full effect to the purpose of the Mandates' system, contemporary expectations of the international community received abundant attention and the line between law and policy was blurred.

At the outset, after dismissing South Africa's preliminary objections, the Court enunciates its view of the nature of the mandates

30. Advisory Opinion on Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. 22, and 28, 32; Separate Opinion of Sir Hersch Lauterpacht, *id.* at 44-46, and 50, 55-56.

31. *South West Africa Cases*, Preliminary Objections, [1962] I.C.J. 318, and 336.

32. *Id.* at 329. See further Gross, *supra* note 8, at 378.

33. For detailed comments on the methods of interpretation employed in 1966, see Gross, *supra* note 8, at 321 and 380; *supra* note 26; and Dugard, *The South West Africa Cases: Second Phase* 1966, 83 SOUTH AFRICAN LAW JOURNAL 429, 447 (1966).

34. *South West Africa Cases*, Second Phase, [1966] I.C.J. 6, and 48.

35. *Id.* at 34.

system and identifies its objects and purposes. The Mandates system was founded on "the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization.'"³⁶ This trust "had to be exercised for the benefit of the peoples concerned"³⁷ and the Covenant and the Mandate established definite legal obligations—in the form of accountability to the League of Nations—"for the attainment of the object and purpose of the Mandate."³⁸ The Court rejected the South African contention that the "C" Mandates were "in their practical effect not far removed from annexation" on the ground that "it puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from these negotiations."³⁹ Moreover, it could not "tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose."⁴⁰

The Court firmly repudiated the principle of contemporaneity according to which treaties are to be interpreted according to their meaning at the time they are signed.⁴¹ The Court held that the subsequent post World War II development of international law in regard to non-self-governing territories made the principles of self-determination and decolorization applicable to Namibia. Although it was "mindful . . . of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion" the Court declared that it was obliged to take into account the fact that the concepts embodied in the Covenant, such as "well-being and development" and "sacred trust," were "not static, but were by definition evolutionary" and parties to the Covenant "must consequently be deemed to have accepted them as such." In interpreting the mandates' instruments the Court was obliged to take into account "the subsequent development of law, through the Charter of the United Nations and by way of customary law" and "the framework of the entire legal system prevailing at the time of the interpretation." Developments during the last fifty years, said the Court, left "little

36. [1971] I.C.J. 28. In this respect the Court endorsed the 1950 finding of the Court: [1950] I.C.J. 131.

37. [1971] I.C.J. 28.

38. *Id.* at 30; *see also* Separate Opinion of Judge Padilla Nervo, *id.* at 106.

39. *Id.* at 28.

40. *Id.* at 30.

41. *Supra* note 22.

doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.”⁴²

Judge de Castro in an erudite and convincing Separate Opinion also describes the interpretative method to be employed. He states that

While it is true that the common intention of the parties must be taken into account, it is also true that in all systems of law it has been necessary to provide for the possibility of lacunae; there are rules for filling out the parties' expression of their will, and for this purpose the case law of municipal courts takes into account what the parties may reasonably have intended; it is in this way that endeavours have been made to fill the gaps in texts.

For this purpose the subject and purpose of the convention is to be taken into account.⁴³

He emphasizes that special rules of interpretation apply to the Charter and other constitutive treaties. “The Charter would not appear to fall within the framework of the Convention on the Law of Treaties. To interpret it, one should not apply by analogy the rules of municipal law on contracts, but rather rules for the interpretation of laws and statutes.”⁴⁴ Finally, like the majority, he rejects the principle of contemporaneity for interpreting the Charter “because interpretation necessarily undergoes a process of development, and, as in municipal law, must adapt itself to the circumstances of the time and to the requirements, so far as they are foreseeable, of the future. The text breaks away from its authors and lives a life of its own.”⁴⁵

In sharp contrast to these views are those of Sir Gerald Fitzmaurice, in dissent, who opposes effective methods of treaty interpretation,⁴⁶ insists on the principle of contemporaneity,⁴⁷ favours restrictive interpretation in favour of State sovereignty⁴⁸ and recalls, in true positivist fashion, the distinction between law and morality.⁴⁹

42. [1971] I.C.J. 31. See also Separate Opinions of Judge Padilla Nervo, *id.* at 112, and Vice-President Ammoun, *id.* at 72.

43. *Id.* at 183. See also Separate Opinion of Judge Dillard, *id.* at 157.

44. *Id.* at 184.

45. *Id.*

46. *Id.* at 224.

47. *Id.* at 223.

48. *Id.* at 268.

49. *Id.* at 220.

The interpretative approach of the Court outlined above is clearly apparent in its reasoning on the merits of the case, which can be divided into three parts: the succession of the United Nations to the supervisory powers of the League of Nations, the validity of the revocation of the Mandate, and consequences for States of the revocation.

(a) *The Succession of the United Nations to the League of Nations*

Despite the abundance of judicial authority for the propositions that the Mandate for South West Africa survived the demise of the League of Nations and that the United Nations inherited the League's powers of supervision over the Mandate, contained in the Advisory Opinions of 1950, 1955 and 1956, in the judgment of the Court in the First Phase of the *South West Africa Cases* (1962) and in the dissenting opinions of several judges in the Second Phase (1966), the Court considered it necessary to deal at greater length with this issue than that of the revocation itself.⁵⁰ This part of the Opinion adds little to the previous findings of the Court apart from its rejection of the "new facts"⁵¹ which came to light after the 1950 Opinion,⁵² and one suspects that this section, with its frequent references to previous pronouncements of the Court, is designed to emphasize the continuity of the Court's jurisprudence and the present Court's respect for precedent.

Legitimate teleological methods of interpretation are employed to confirm the 1950 Advisory Opinion: the Court seeks to give effect to the common intention of the signatories of the United Nations Charter and of the Members of the League of Nations on the dissolution of that body by invoking the principle of effectiveness and by resorting to the *travaux préparatoires*. Fundamental to the Court's reasoning is the presumption against the lapse of "an institution established for the fulfilment of a sacred trust . . . before the achievement of its *purpose*"⁵³ and the philosophy that "[i]t would have been contrary to the *overriding purpose* of the Mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappear-

50. It is difficult not to agree with Sir Gerald Fitzmaurice, in his dissent, that the Court devotes too much attention to this question and too little to the real issue, that of the revocation: *id.* at 220.

51. *Supra* note 4.

52. [1971] I.C.J. 36. See also Separate Opinion of Judge de Castro, *id.* at 194; *contra*, Dissenting Opinion of Sir Gerald Fitzmaurice, *id.* at 247-50.

53. *Id.* at 32 (*italics added*).

ance of international supervision.”⁵⁴ Article 80 (1) of the Charter is therefore construed as preserving the rights of peoples in mandated territories to continued international supervision pending the placing of the mandated territory under trusteeship or independence⁵⁵ and the General Assembly of the United Nations is found to be the appropriate forum for exercising this supervision by the combined operation of Articles 80 and 10 of the Charter.⁵⁶ That South Africa accepted this state of affairs, says the Court, was shown by its statements and conduct before the League of Nations and the United Nations in 1946.⁵⁷ The Court might have added that statements made by General Smuts in the South African House of Assembly⁵⁸ during this period provided further evidence of South African acceptance of the United Nations’ succession to the supervisory powers of the League. Speaking in a debate on the future of South West Africa on 15 March 1946, General Smuts declared that he intended asking the United Nations for permission to incorporate South West Africa into the Union of South West Africa, and that in the event of refusal he would fall back on the *status quo*. What he understood by the *status quo* is made clear from an exchange of views between him and Mr. Eric Louw, the National Party’s spokesman on foreign affairs:

The Prime Minister: I am only bound to stick to the *status quo* in the absence of our coming to an agreement.

Mr. Louw: A *status quo* minus the old League?

The Prime Minister: Yes, we had an obligation under the League to render reports, and if no agreement can be come to, then under Article 80 it is our obligation to continue to render reports.

Mr. Louw: Does not your reference to a *status quo* rather suggest that the League still exists? Do you mean a *status quo* without a League?

The Prime Minister: Yes.

....

Mr. Louw: Can we take it that the use of the term ‘continuance of the *status quo*’ is equivalent in your mind with annexation?

54. *Id.* at 33 (italics added).

55. *Id.* at 33-35.

56. *Id.* at 36-38.

57. *Id.* at 39-40.

58. That an international court may take statements made in the course of debates in a domestic legislature into account is shown by the fact that both Judges de Castro (*id.* at 194) and Gros (*id.* at 341) rely on such statements.

The Prime Minister: No, it is a continuance of the present regime, of our full government and administrative and legislative power plus the obligation to render annual reports.

Mr. Louw: To whom?

The Prime Minister: To UNO. UNO is the only authority to which reports can be made.

Mr. Louw: Does that mean that as under the old mandatory system the people of the territory can send petitions to UNO? In other words, can the natives there send petitions to UNO?

The Prime Minister: Yes.

Mr. Louw: Are you agreeable to that?

The Prime Minister: Yes, I am because the word 'peoples' is specifically mentioned [in article 80].⁵⁹

The Separate Opinions of Judges Dillard and de Castro⁶⁰ endorse the interpretative approach of the majority to the question of succession. Judge Dillard declares that

While sweeping generalizations are no substitute for close analytical reasoning, I yet venture to say that whenever a long-term engagement, of whatever nature, is so interrupted, emphasis in attempting a reasonable interpretation and construction of its meaning and the obligations it imposes shifts from a textual analysis to one which stresses the object and purpose of the engagement in the light of the total context in which the engagement was located.⁶¹

Sir Gerald Fitzmaurice alone finds that the United Nations did not succeed to the League's supervisory powers and thereby advocates the judicial overthrow of four previous findings of the Court.⁶² Such an anarchic approach to precedent is rightly rejected by the other dissenting voice, Judge Gros, who accepts that the status of South West Africa was defined by the Court in 1950 and "it is in accordance with sound principles of interpretation that the Court should safeguard the

59. 56 HOUSE OF ASSEMBLY DEBATES cols. 3680-1 (March 15, 1946).

60. Judge de Castro relies heavily on both the *travaux préparatoires* and the doctrine of effectiveness in his analysis of this issue. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 190-199.

61. *Id.* at 157.

62. *Id.* at 227-263.

operation of its Opinion of 11 July 1950 not merely with regard to its individual clauses but in relation to its major purpose.”⁶³

(b) *The Revocation of the Mandate*

Although it was not requested⁶⁴ to review the validity of Resolution 2145 (XXI) terminating the Mandate, the Court rightly considers it to be its duty to do so.⁶⁵ It finds that the Mandate was an agreement in the nature of a treaty,⁶⁶ which rendered it liable to termination in the event of a fundamental breach. The principle that treaties may be terminated in this way is a customary rule of international law (now codified in Article 60 (3) of the Vienna Convention on the Law of Treaties) and a general principle of law which was to be considered as impliedly included in the Mandates system.⁶⁷ “The silence of a treaty as to the existence of such a right,” said the Court, “cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law.”⁶⁸ South Africa’s contention that a mandatory State would have been able to veto any resolution of revocation by reason of the unanimity rule which prevailed in the proceedings of the Council of the League is rejected as it “would not only run contrary to the general principle of law governing termination on account of breach, but would also postulate an impossibility.”⁶⁹ The Court then held that in accordance with the 1966 decision of the Court in the *South West Africa Cases* it was for the General Assembly, as the political successor to the Council of the League, to decide whether the mandatory had violated her obliga-

63. *Id.* at 335, citing the Separate Opinion of Sir Hersch Lauterpacht, Opinion of June 1, 1956, [1956] I.C.J. 45.

64. On the contrary, several speakers in the Security Council Debate, which lead to the request for the Opinion, expressed their opposition to the Court’s reviewing this resolution. See the Separate Opinion of Judge Onyeama for a survey of these statements. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 141-142.

65. *Id.* at 45. See also the Separate Opinion of Judges Petrén (*id.* at 131), Onyeama (*id.* at 143-145), Dillard (*id.* at 151-152), de Castro (*id.* at 180-182), Fitzmaurice (*id.* at 301-304), and Gros (*id.* at 331-332). *Contra*, Nervo, *id.* at 105.

66. In this respect it relies on the finding of the Court in *South West Africa Cases*, [1962] I.C.J. 330.

67. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 46-48.

68. *Id.* at 47. See also Separate Opinion of Judge de Castro, *id.* at 216. *Contra*, Separate Opinion of Judge Fitzmaurice, *id.* at 266-268.

69. *Id.* at 49.

tions under the Mandate.⁷⁰ It had made the appropriate findings in accordance with its supervisory powers and Resolution 2145 (XXI) was therefore to be seen as valid.

In reaching this conclusion⁷¹ the Court relies on precedent, in the form of its own previous rulings on the South West Africa issue, and on acceptable methods of treaty interpretation. Its finding that there is a presumption in favour of the inclusion of a general principle of treaty law in a treaty arrangement except where it is clearly excluded is simply an adoption of the rule of statutory interpretation that the legislature is presumed not to intend to alter the existing law—a rule which is accepted in South Africa.⁷² The Court also invokes the *travaux préparatoires* to elucidate the original intentions of the founding fathers of the Mandates system⁷³ and the views of Members of the Permanent Mandates Commission to show the contemporary expectations of those most closely involved in the supervision of the Mandates system.⁷⁴ Although there is no express reference to teleological methods of interpretation in this part of the Court's Opinion it is clear that the Court is influenced in its choice of alternative rules of interpretation by the intention expressed at the beginning of the Opinion to give effect to the objects of the Mandates system, notably the well-being of the inhabitants and their right to self-determination.

The majority's terse, unreasoned rejection of the unanimity rule in the proceedings of the Council of the League as an obstacle to revocation is unsatisfactory—even if one bears in mind that a majority judgment is the lowest common denominator of divergent judicial views.⁷⁵ This weakness is, however, remedied by the excellent Separate Opinion of Judge de Castro. He emphasizes that the purpose of the unanimity rule was to safeguard the sovereignty of States and to

70. *Id.* Clearly the Court in 1966 did not envisage its decision to be used in this way, but, as the present writer pointed out in 1968, this conclusion is a logical consequence of the 1966 decision. Dugard, *The Revocation of the Mandate for South West Africa*, 62 AM. J. INT'L L. 78, 82 (1968).

71. *Id.* The author anticipated the conclusion of the Court.

72. L. STEYN, *DIE UITLEG VAN WETTE* 96 (1963); H. HAHLO & E. KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 202 (1968).

73. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 48. See also the Separate Opinion of Judge de Castro, *id.* at 211-212.

74. *Id.* at 48-49. See also Judge de Castro, *id.* at 212-213.

75. S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 618 (1965); GROSS, *Treaty Interpretation: the Proper Role of an International Tribunal*, *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 110 (1969).

prevent the League from interfering in their domestic affairs. These considerations were, however, inapplicable to the Mandates system as a Mandatory State did not have sovereignty over its mandated territory.⁷⁶ Mandatory States were therefore denied the right of veto in matters affecting their mandated territories. Moreover "[a]n interpretation of Articles 22, 4 and 5 of the Covenant which would justify the refusal of the mandatory to fulfil the obligations which it has accepted by the mandate instrument and by the signature of the Covenant, could be classified as *interpretatio in fraudem legis*."⁷⁷ In reaching this conclusion he relies on the principle of effectiveness,⁷⁸ the preparatory works⁷⁹ and the subsequent conduct of States in the League Council.⁸⁰ The President of the Court, Sir Muhammad Zafrulla Khan, in a declaration appended to the Opinion, also rejects the applicability of the unanimity rule on the ground that it was unsupported by practice in the League Council and would have defeated "the declared purpose of the mandates system."⁸¹

Another flaw in the majority's reasoning on this part of the Opinion relates to the subsequent "reversal" of its finding that it was for the General Assembly to determine whether South Africa was guilty of a fundamental breach of the Mandate. This conclusion followed logically from the 1966 decision of the Court and it is incomprehensible why the Court later saw fit, without having examined evidence on this matter, to find that the policy of separate development violates the purposes and principles of the Charter of the United Nations.⁸² In this respect the reasoning of Judge Petrén is more satisfactory than that of the majority. He finds that the General Assembly is the competent organ to determine whether there has been a material breach and that, although it might have been preferable for the Court to have given an advisory opinion first on this matter, once the Assembly has made such a determination that is final.⁸³

The finding that the General Assembly was competent to determine a fundamental breach is vigorously attacked by Sir Gerald

76. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 199-207. *Contra*, Fitzmaurice, *id.* at 272-277.

77. *Id.* at 206.

78. *Id.* at 202-203, and 206.

79. *Id.* at 202-204.

80. *Id.* at 205.

81. *Id.* at 60-61.

82. *Id.* at 57.

83. *Id.* at 132-133. *See also* Dillard, *id.* at 150.

Fitzmaurice, who insists that Assembly should first have approached the Court for an advisory opinion.⁸⁴ Although this may have been a preferable course *politically* it is difficult to understand how Sir Gerald could insist on it as a legal prerequisite in the light of the finding of the majority in 1966 and of his own statement in 1962 that the "proper forum for the appreciation and application of a provision of this kind [article 2 of the Mandate] is unquestionably a technical or political one."⁸⁵

(c) *The Legal Consequences of the Revocation*

Resolutions of the General Assembly are recommendatory and not legally binding, except in certain limited cases. Did Resolution 2145 (XXI) fall within one of these exceptions or was it a recommendation which acquired full legal effect only on receiving the endorsement of the Security Council? The Court's decision on this point is not absolutely clear but it appears to favour the view that Resolution 2145 (XXI) obtained its full legal force from the combined operation of the resolutions of both political bodies.⁸⁶ Although the judges constituting the majority were divided on this issue⁸⁷ the "combined effect" view is preferable as it is analogous to the procedure described in Article 6 of the Charter dealing with the expulsion of a Member of the United Nations and does not constitute a procedure foreign to the United Nations. At the same time it approximates to the procedure of the Council of the League which required the consent of the principal powers for the revocation of a Mandate.⁸⁸

Having determined that the revocation is legally binding the Court then turns to the legal consequences for States of Resolution 276

84. *Id.* at 299-301. See also *id.* at 221-223 and 266 n.43.

85. Joint Dissenting Opinion with Sir Percy Spender, South West Africa Cases, [1962] I.C.J. 319, 467.

A similar view was expressed by the South African Appeal Court. *State v. Tuhadeleni*, 1969 1 S. Afr. L. R. 153, 172 (A.D.). See also Dugard, *South West Africa and the "Terrorist Trial"*, 64 AM J. INT'L L. 19, 37 (1970).

86. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 50-51. This view is confirmed by the Separate Opinion of Judge Dillard, *id.* at 164.

87. The following Judges favour the view that the General Assembly alone was competent to terminate the Mandate with full legal effect: Khan, *id.* at 61; Petrén, *id.* at 131; Onyeama, *id.* at 146-147; Dillard, *id.* at 163-165. Those in favour of the "combined effect" were Judges Nervo, *id.* at 113-114 and de Castro, *id.* at 189, and 218.

88. See *supra* note 70, at 96, and *supra* note 85, at 20. This view is rejected by Fitzmaurice. Advisory Opinion on the Legal Consequences for the States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 283.

in which the Security Council declared that "the continued presence of the South African authorities in Namibia is illegal" and called upon all States "to refrain from any dealings with the Government of South Africa" which were inconsistent with the finding of illegal presence. In what is undoubtedly the most revolutionary feature of the Opinion the Court finds that this resolution is legally binding upon States despite the fact that it does not emanate from Chapter VII of the Charter. The reasoning of the Court is as follows: The Security Council was acting in the exercise of its primary responsibility, the maintenance of international peace and security, when it adopted Resolution 276. The legal basis of the resolution was Article 24 (1) of the Charter, which does not restrict the Security Council to the specific powers mentioned in Article 24 (2) but also confers implied "general powers" upon the Council to discharge its primary responsibility which are limited only by the fundamental principles and purposes of the Charter. It was clear from the wording of Resolution 276 and the circumstances in which it was adopted that it was intended to be binding upon Member States under Article 25.⁸⁹ In finding that the resolution was binding the Court stated:

Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter. Moreover that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.⁹⁰

This conclusion, said the Court, was in line with the *Reparations for Injuries Case*⁹¹ and was necessary if the Security Council was not to be deprived of "its essential functions and powers under the Charter."⁹² The Court held that under Resolution 276

89. *Id.* at 51-53. See also Judge Nervo, *id.* at 118-120.

90. *Id.* at 53.

91. Advisory Opinion on Reparation for Injuries suffered in the Service of the United Nations, [1949] I.C.J. 174, 178.

92. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 54.

- (i) South Africa is obliged to withdraw its administration from Namibia;
- (ii) member States of the United Nations are obliged to recognize the illegality of South Africa's presence in South West Africa and to refrain from acts which might imply recognition of the legality of South Africa's presence, such as the entering into or application of treaties with South Africa extending to Namibia, and the sending of diplomatic or consular representatives to South Africa with Namibia included in their jurisdiction;
- (iii) non-member States are required, but not legally obliged, to recognize the illegality of South Africa's presence.⁹³

This reasoning is opposed by five judges. Judge Gros describes it as a modification of the principles of the Charter which could convert the Security Council into a world government.⁹⁴ Sir Gerald Fitzmaurice insists that "only when the Council is acting under Chapter VII, or possibly in cases under Chapter VIII, will its resolutions be binding on member States. In other cases their effect would be recommendatory or hortatory only."⁹⁵ Judge Petrén⁹⁶ too finds that Resolution 276 is recommendatory as it was not adopted under Chapter VII. South Africa's obligation to withdraw arises from Resolution 2145 (XXI) and member States are only obliged to apply the customary law rules of non-recognition to South Africa's administration of Namibia. He concedes, however, that Resolution 276 may authorize States to "[take] up a position in their legal relationships with South Africa which would otherwise have been in conflict with rights possessed by that country."⁹⁷ Judge Onyeama adopts a similar approach.⁹⁸ Although he does not formally dissent from the majority on this issue Judge Dillard attempts to confine its finding to the issue of Namibia alone.⁹⁹

The Court's finding that Resolution 276 is covered by Articles 24 and 25 is an example of the application of an extreme teleological method of interpretation. Although the exact scope of Article 25 has never been absolutely certain¹⁰⁰ it has generally been assumed that

93. *Id.* at 54-56.

94. *Id.* at 340-41.

95. *Id.* at 293; *see also id.* at 297-98.

96. *Id.* at 133-37.

97. *Id.* at 137; *see* Dugard, *Legal Effect of United Nations Resolutions on Apartheid*, 83 S. Afr. L. J. 44, 59 (1966).

98. [1971] I.C.J. 147-49.

99. *Id.* at 150; *see also id.* at 165-67. Judge De Castro also seeks to limit the implied powers under Article 24 to matters affecting the Mandate, *id.* at 186-88.

100. *Id.* at 165 (per Judge Dillard); L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 207-11 (3d ed. 1969); H. KELSEN, *THE LAW OF THE UNITED NATIONS* 95-98 (1951).

Article 25 applies only to "decisions" taken under Chapter VII.¹⁰¹ The way in which the Court interprets Article 24 (1) to confer general powers upon the Security Council, not confined to those specifically mentioned in Article 24 (2), and then cloaks these powers with full binding force under Article 25, certainly gives the maximum effect to the provisions in question, but one may seriously enquire whether this interpretation does not overstep the blurred line between permissible and impermissible judicial legislation.¹⁰² The better view is that expressed by Judge Petrén that Articles 24 and 25 cannot be used to evade the conditions laid down by Chapter VII for coercive measures of the kind included in Resolution 276 and that in the absence of a finding that the situation in Namibia threatens international peace the resolution is only recommendatory.¹⁰³

(d) *Abstentions in the Security Council*

One final matter relating to treaty interpretation must be mentioned and that is the validity of resolutions of the Security Council passed in the face of an abstention by one or more of the permanent members. Although the practice of accepting an abstention by a permanent Member as a concurring vote within the meaning of Article 27 (3) of the Charter is of respectable vintage and dates back to 1946 it has recently been questioned by South Africa in respect of resolutions of the Council dealing with both Rhodesia and Namibia.¹⁰⁴ As the Soviet Union and the United Kingdom abstained from voting for Resolution 284, which made the request for the advisory opinion on Namibia, South Africa contended that the Court should refrain from giving an Opinion on the ground that Resolution 284 was itself invalid. The Court rejects this preliminary objection on the ground that States in the Security Council, particularly the permanent members had "consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965

101. GOODRICH, HAMBRO & SIMONS, *supra* note 100, at 207-11; Shapira, *The Security Council Resolution of November 22, 1967—Its Legal Nature and Implications*, 4 ISRAEL L. REV. 229, at 230-33 (1969); but see J. CASTANEDA, *LEGAL EFFECTS OF UNITED RESOLUTIONS 71-75* (1969).

102. See the helpful comment on this subject by Judge Tanaka in 1966. South West Africa Cases (2d phase), [1966] I.C.J. 277.

103. [1971] I.C.J. 136.

104. *Note Verbale* from the South African Government to the Secretary General, 21 U.N. SCOR, Annex 1, at 21-22, U.N. Doc. S/9463 (1969).

of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."¹⁰⁵

The majority, and Judges Nervo¹⁰⁶ and de Castro,¹⁰⁷ appear to view this practice as a valid interpretation of the Charter *and* as evidence of a new customary rule modifying the letter of the Charter. Judge Dillard, on the other hand, finds that the wording of Article 27 (3) is ambiguous and that "[i]n the absence of such a precise prescription the subsequent conduct of the parties is clearly a legitimate method of giving meaning to the Article in accordance with the expectations of the parties, including, in particular, the permanent members."¹⁰⁸ The majority is correct in its refusal to distinguish sharply between interpretation and custom for, as Dr. Rosalyn Higgins has pointed out, "subsequent practice" in reality "covers two concepts, first treaty interpretation by the parties, and second, developing custom."¹⁰⁹

SOUTH AFRICA'S APPROACH TO INTERNATIONAL LAW AND TO THE INTERNATIONAL JUDICIAL PROCESS

The Court's reliance on teleological methods of interpretation is horrifying to the average South African lawyer. To him such methods are not only foreign, they are "illegal." Mr. Justice J.T. van Wyk, South African *ad hoc* Judge in the 1962-1966 contentious proceedings, describes the Opinion as "clearly wrong" and adds:

My accusation against the 1971 Court is that it arrived at its cardinal conclusions without advancing any principled reasons in support thereof. An analysis leads irresistibly to a finding that the majority judges first decided what their conclusion should be and then set out to find reasons for rejecting any contentions inconsistent therewith. Where no reasons, however weak, could be found none were advanced. I accuse those judges of substituting mere mumbo-jumbo for sound legal reasoning. Their meaningless legal jargon may

105. [1971] I.C.J. 22.

106. *Id.* at 117.

107. *Id.* at 185-87.

108. *Id.* at 153-54.

109. Higgins, *The Development of International Law by the Political Organs of the United Nations*, PROC. AM. SOC'Y INT'L L. 119 (1965).

impress the uninformed, but cannot bear even superficial analysis.¹¹⁰

This outburst on the part of one of South Africa's leading judges can only be explained in the light of the South African legal profession's attitude towards law and jurisprudence on the home front. The approach to international law is simply a reflection of domestic attitudes.

Nineteenth century positivism is the guiding jurisprudential creed of modern South Africa.¹¹¹ The legal profession blindly accepts the two cardinal beliefs of John Austin: that law is the command of a political superior to a political inferior, and that law and morality (including legal values) must be firmly separated. This results in the docile acceptance of abhorrent laws by the majority of the legal profession and in an extremely narrow approach to the judicial function. Judges regard it as their sole duty in interpreting a statute to find the intention of the legislature by invoking technical rules of statutory interpretation. Legal values and policy considerations are discarded as legally irrelevant and play little part in the choice of rules as the judges delude themselves that they are merely *declaring* the law. This approach applies equally to constitutional instruments which, in accordance with the tradition of the Privy Council,¹¹² are generally treated as ordinary statutes.¹¹³ Value theories of law are ignored on the ground that they fail to distinguish between law and morals; the American realists' incisive analysis of the judicial process is rejected as inapplicable to the superhuman South African judiciary; and the interpretative method employed by the United States Supreme Court is seen as the exercise of a political, not a legal, function.

110. Justice J.T. van Wyk, Address to the Law School of the University of Cape Town, Aug. 17, 1971 (unpublished).

111. See generally Dugard, *The Judicial Process, Positivism, and Civil Liberty*, 88 S. Afr. L. J. 181 (1971).

112. The Privy Council has often been criticized on the ground that it takes too narrow and positivistic an approach to the interpretation of constitutional instruments. L. JAFFE, *ENGLISH AND AMERICAN JUDGES AS LAWMAKERS* 25-27 (1969); E. MCWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* 16, 28-30 (1956); Jennings, *Constitutional Interpretation: The Experience of Canada*, 51 HARV. L. REV. 1 (1937); Palley, *The Judicial Committee of the Privy Council as Appellate Court—the Southern Rhodesian Experience*, 1967 PUB. LAW 8.

113. An important exception to this approach was the stand of the South African Appellate Division in the early 1950's when it refused to approve legislative attempts to remove the Cape Colored voters from the voters' roll. *Harris v. Minister of the Interior*, 1952 2 S. Afr. L. R. 428 (A.D.) and *Minister of the Interior v. Harris* 1952 4 S. Afr. L. R. 769 (A.D.). The court later reverted to a non-teleological approach. *Collins v. Minister of the Interior*, 1957 1 S. Afr. L. R. 552 (A.D.).

This domestic approach is reflected in the South African attitude towards international law and the international judicial process. Here, too, an extreme positivist stance is adopted. International law is seen as a body of rules between states to which they have consented.¹¹⁴ The principle of non-intervention in the domestic affairs of States remains the cornerstone of the international legal order and overrides the whole Charter.¹¹⁵ And, as in domestic law, the rigid distinction between law and morals and law and politics must be maintained.

The general result of the adoption of such positivist philosophy is summed up by Professor Wolfgang Friedmann:

the positivist . . . is led by his philosophy to discourage inquiry into the inter-relation between the changing needs of society and the response of the law. Quite apart from the relation of national sovereignty to international order, the positivist thus tends to regard international law in relative isolation from the social transformation of international society. He will tend to take the principles and rules slowly developed in previous centuries by State practice, custom and treaty, as fixed. He will, for example, regard the principle that only States can be subjects of international law not as a state of affairs subject to constant re-examination in the light of changing conditions, not as a condition produced by the political conditions of the formative era of international law, but as immutable.¹¹⁶

This approach on the part of South African international lawyers manifests itself in the total rejection of the notion that customary rules or standards of international behaviour may be created in the political organs of the United Nations¹¹⁷ and in the refusal to accept human rights and self-determination as legal rights or legal values worthy of

114. This approach is evident in the South African arguments against the norm of nondiscrimination alleged by the Applicants in the 1966 proceedings: I.C.J. Pleadings, South West Africa, vol IX, 629-36, 653-54. For a jurisprudential description of the positivist view, see J. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 9-18 (1958).

115. See the statement to this effect by Mr. B. Fourie in the Security Council. 15 U.N. SCOR, 851st meeting 8 (1960).

116. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 76-77 (1964).

117. See [1966] I.C.J. Pleadings, South West Africa, vol. IX, 653-54, vol. X, 40, and the separate opinion of Mr. Justice Van Wyk in the 1966 South West Africa Cases [1966] I.C.J. 169-70.

consideration by an international tribunal.¹¹⁸ Moreover the International Court of Justice is required to adopt the same narrow approach to the judicial function as that taken by South African and British Courts.¹¹⁹ Consequently the Court is expected to interpret all treaties (including the Charter) restrictively in the interests of State sovereignty, to refrain from applying teleological methods of interpretation to all treaties (including those of a constitutive and humanitarian nature), to apply the principle of contemporaneity by examining a treaty text in the light of concepts and linguistic usages current at the time of its execution, and to invoke the subsequent conduct of parties to a treaty as a guide to the original common intent of the signatories only.¹²⁰

In the light of this approach to international law it is small wonder that Sir Gerald Fitzmaurice's Opinion of 1971 is hailed as the only correct statement of the law and his more extravagant condemnations of the Court accepted as gospel truth. Sir Gerald's declaration that he "cannot as a jurist accept the reasoning"¹²¹ of the majority of 1971 is similar to Judge Jessup's statement that the majority decision of 1966 was "completely unfounded in law."¹²² It shows his complete disagreement with the legal philosophy of the Court and that he and the majority are, to use Sir Gerald's own words, "operating on different wavelengths."¹²³ But it does not mean, as Mr. Vorster and his advisers appear to believe, that the Court used non-legal methods or invoked a non-legal philosophy. As has already been shown,¹²⁴ the teleological method of interpretation is a recognized tool of interpreta-

118. See the doubts expressed about the binding nature of the human rights provisions in the Charter by South Africa's legal representatives in 1965 (I.C.J. Pleadings, South West Africa, vol X, 60-66) and by Mr. Justice Van Wyk in 1966 (Separate Opinion [1966] I.C.J. 165). South Africa's insistence that Article 2(7) of the United Nations Charter is an overriding provision in effect denies the human rights provisions any legal effect.

119. See [1966] I.C.J. Pleadings, South West Africa, vol. IX, 643-5. For a description of the British attitude, see Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L COMP. L.Q. 58 (1968).

120. For an explanation of South Africa's approach to treaty interpretation, see South Africa's written submissions to the Court in 1971: volume 1, chapter 2 (10-43), and the oral submission made by Mr. D.P. de Villiers S.C. in 1962 (I.C.J. Pleadings, South West Africa, vol VII, 37-64). See also Cilliers, *Die Suidwes-Afrika saak en die Volkereg*, 34 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 25, at 33 and 42-3 (1971).

121. [1971] I.C.J. 220. See also [1971] I.C.J. 223, 251-2, 257, 263.

122. [1966] I.C.J. 325.

123. [1971] I.C.J. 257.

124. Above

tion: it has been used by the International Court in all its previous decisions on South West Africa, except that of 1966;¹²⁵ it has been employed by the Court in two of its most noteworthy decisions involving interpretations of the Charter, the *Reparations for Injuries Case*¹²⁶ and the *Certain Expenses of the United Nations Case*;¹²⁷ it has been invoked by judges with vastly differing legal and political backgrounds, including the British judge on the Court from 1955 to 1959, Sir Hersch Lauterpacht;¹²⁸ and it has been approved in its more moderate form by even Sir Gerald Fitzmaurice¹²⁹ and Sir Percy Spender.¹³⁰ As Edward Gordon comments in his 1965 study of the Court's methods of interpretation:

Teleological consistency may be expected as a norm for judges whose fondness for social justice exceeds their fondness for legal neatness, but what may be surprising is that end-oriented interpretation has been accepted by all but a handful of judges.¹³¹

South Africa's argument that the Vienna Convention on the Law of Treaties rejects the teleological method of interpretation is perhaps correct in respect of ordinary treaties. But this rejection does not extend to constitutive and humanitarian treaties such as the United Nations Charter, the Covenant of the League of Nations and the Mandate for South West Africa, where special rules of interpretation apply designed to adapt the letter of the treaty to circumstances of the time and contemporary expectations.¹³² It would be a sad day for

125. Above

126. [1949] I.C.J. 174, 179 and 182. See Gross, *supra* note 8, at 392.

127. [1962] I.C.J. 151, 168. See Gross, *supra* note 8, at 396-400.

128. Fitzmaurice, *Hersch Lauterpacht-The Scholar as Judge*, 39 BRIT. Y.B. INT'L L. 133, 158-64 (1963); Rosenne, *Sir Hersch Lauterpacht's Concept of the Task of the International Judge*, 55 AM. J. INT'L L. 825, 829 (1961).

129. In 1963 Sir Gerald Fitzmaurice wrote that "[i]n the case of general multilateral conventions of a sociological, welfare or humanitarian . . . character, there is some room . . . for the application of certain specifically teleological criteria of interpretation." Fitzmaurice, *supra* note 128, at 139.

130. Separate Opinion, *Certain Expenses of the United Nations*, [1962] I.C.J. 186.

131. *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794, 815 (1965).

132. See the comments of Judge de Castro: [1971] I.C.J. 184. Sir Gerald Fitzmaurice also recognizes the need for a different approach to constitutive treaties in *Judicial Innovation—Its Uses and its Perils*, CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 24 (1965).

international adjudication if the International Court of Justice were to model itself on the Privy Council and the present South African Appellate Division and treat great conventions on whose future mankind depends as if they were ordinary treaties. The interpretative method employed by the United States Supreme Court is the better domestic model in this rapidly changing world.¹³³

The conflict between South Africa (and Sir Gerald Fitzmaurice) and the 1971 majority relates not only to the interpretative method to be employed, but also to the nature of the judicial function. The former see it as the task of the judge to apply the "correct rule of law" with no consideration for legal or humanitarian values. The latter accepts that in uncertain areas the judge must make a choice between alternative rules and that "[i]n making this choice, especially when the balance is very fine, one inevitably must have consideration for the humanitarian, moral and social purposes of the law."¹³⁴

However much the South African Government may dislike teleological and sociological approaches to international law, they are as much part of the jurisprudential fabric of the international legal order as are the tenets of positivism. In its 1971 Opinion the Court has adopted a form of reasoning foreign to most South African lawyers, but it remains a recognized and acceptable form of *legal* reasoning and, in all the circumstances, is preferable to the extreme formalistic approach of the 1966 Court. Mr Vorster's charge that the Court's Opinion is "legally untenable" is itself untenable and shows a lack of understanding of the nature of international law and the international judicial process.

WAS THE COURT PACKED?

The accusation that the International Court was "packed" for the 1971 proceedings can be disposed of briefly. Undoubtedly the July 1966 judgment in the *South West Africa Cases* influenced the subsequent elections to the Court of November 1966 and 1969. On the other

133. C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 461 (1964). Cf. Gross, *supra* note 8, at 401-4 and 431.

134. Higgins, *supra* note 119, at 62. See also Judge Ammoun's comments on the judicial function, [1971] I.C.J. 88-9, and G. Wilfred Jenks' examination of the extent to which international public policy has influenced the International Court, *supra* note 133, ch. 8. Since writing this article my attention has been drawn to E. Gordon, *Old Orthodoxies amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice*, 1 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 65 (1971). In this article the author examines the international judicial process and the Court's jurisprudence on the South African (Namibian) cases.

hand, it is false to allege that the Court was consciously "packed" for this Opinion.

Two jurists were probably unsuccessful in the 1966 Court elections because of the decision of the Court in the Second Phase of the *South West Africa Cases*. These were Sir Kenneth Bailey of Australia, who suffered for the part played by his compatriot, Sir Percy Spender, in that case,¹³⁵ and Antonio de Luna of Spain, whose apparent offence was that he was the national of a colonial power.¹³⁶ Otherwise it is difficult to identify any specific persons who were omitted by reason of their views on Southern Africa or who were elected expressly for that reason. For instance, it would be ridiculous to suggest that the nomination and election of Judge Dillard was in any way influenced by his views on Namibia.

As far as the general composition of the Court is concerned it is true that the African representation has been increased from one in 1966 to three in 1971, but this is simply in line with the demands of the African States to greater representation in United Nations bodies.¹³⁷ One of these judges, however, Charles D. Onyeama of Nigeria, represents the conservative English common-law tradition and should be more acceptable to South Africa than Latin-American jurists with their teleological outlook, particularly since he dissented from the majority on several of the issues in 1971. For the rest the Court represents the "main forms of civilization and . . . the principal legal systems of the World," as required by Article 9 of its Statute. Like pre-1966 judges the present judges show a preference for a functional and teleological approach to the interpretation of constitutive and humanitarian treaties but, as has been shown, this is nothing new. The sad truth is that South Africa is out of step with the world and the twentieth century, both politically and legally, and inevitably this manifests itself in a failure to comprehend the jurisprudence of the Court.

The allegations of "packing" fail to take into account the fact that after the 1966 decision the Afro-Asian States totally rejected the Court as an instrument of change in Namibia and resisted attempts to have

135. Green, *South West Africa and the World Court*, 22 INT'L J. 39, 66 (1966-7).

136. Landis, *The South West Africa Cases: Remand to the United Nations*, 52 CORNELL L. Q. 627, 668 (1967).

137. Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 282 (1971).

the matter referred back to the Court.¹³⁸ Even in 1970 Afro-Asian States showed a lack of enthusiasm for the Finnish proposal that the Court be approached and revealed their deep distrust of the Court by warning that it should not attempt to interfere with the political functions of the United Nations by reviewing Resolution 2145 (XXI).¹³⁹

While there is no evidence to support the accusations of Court "packing" there was much substance in *at least* one of South Africa's applications for recusal (namely in respect of Judge Morozov)¹⁴⁰ and in its request for the appointment of an *ad hoc* judge, as is shown by the dissents of Judges Petrén,¹⁴¹ Onyeama,¹⁴² Dillard,¹⁴³ Fitzmaurice¹⁴⁴ and Gros¹⁴⁵ on these issues. One suspects that an extra-legal factor may have influenced some of the judges among the majority on this subject. Doubtlessly some recalled that the recusal of Sir Muhammad Zafrulla Khan in 1966 had drastically affected the outcome of those proceedings and did not want this to happen again. However unfortunate this aspect of the Court's Opinion¹⁴⁶ may be, one can safely say, with the knowledge of hindsight, that even if South Africa had succeeded in her request for three recusals and the appointment of an *ad hoc* judge, the Opinion of the Court on the merits of the case would not have been materially different.

The allegations about Court "packing" are as unfortunate as they are lacking in substance and are best forgotten. Politically it is an unwise line of attack for the South African Government to take because its own record in the sphere of Court "packing" is not without blemish. After all, it was the National Party Government which in 1955¹⁴⁷ enlarged the South African Appellate Division from five to eleven in order to obtain a favourable judgment when it sought to remove the Cape Coloured voters from the electoral roll.

138. Landis, *supra* note 136, at 669; *see also* the statements cited in South Africa's written submissions, vol. 1, 129-30.

139. *See* the statements referred to in Judge Onyeama's Opinion, [1971] I.C.J. 141-2. During the Security Council debate, the Zambian delegate, Mr. Mwaanga, stated that despite the changes in the composition of the Court there was still some uncertainty about the possible outcome of the Opinion which troubled him. 7 U.N. MONTHLY CHRONICLE 33 (Aug.-Sept. 1970).

140. Written Submission, vol. 1, 121-128.

141. [1971] I.C.J. 128-30.

142. *Id.* at 138-41.

143. *Id.* at 152-53 (dissenting on the appointment of an *ad hoc* judge only).

144. *Id.* at 308-17.

145. *Id.* at 323-31.

146. *Id.* at 18-19 and 24-27.

147. Appellate Division Quorum Act 27 of 1955. *See also* Beinart, *The South African Appeal Court and Judicial Review*, 21 MOD. L. REV. 587 (1958).

REACTION TO THE OPINION AND THE FUTURE

While the previous advisory opinions of the International Court of Justice on South West Africa had important international repercussions they had little impact on South West African and South African political attitudes. The 1971 Advisory Opinion, on the other hand, in addition to inducing a predictable international response, has provoked a completely unpredicted reaction within South West Africa itself which has transformed the dispute from an essentially international issue into a domestic struggle for self-determination and independence with United Nations backing. The international response to the Opinion will be described first. This will be followed by a discussion of the reaction to the Opinion in South West Africa. Thereafter the writer will conclude with a general comment on the options open to decision-makers concerned with the future of Namibia.

(a) The Response of the United Nations to the Opinion

On 27 September 1971 the Security Council met to consider "the situation in Namibia" in the wake of the Court's Opinion. After several adjournments, on 20 October 1971, it adopted Resolution 301 by thirteen votes to none with two abstentions, in which it accepted the Court's Opinion. At the same time it called upon States to terminate treaty relations with South Africa where it acts on behalf of Namibia, sever diplomatic and consular relations extending to Namibia and refrain from dealings with South Africa which might entrench its authority over Namibia.

Predictably, the United Kingdom and France, encouraged by the dissent of their national judges in the 1971 proceedings, were the two abstainers. Thus the Security Council's resort to the Court for legal endorsement of its action on Namibia failed in its main objective—to obtain the full support of the major Western powers on its approach to the Namibian question. Like Judges Gros and Fitzmaurice, however, France and the United Kingdom differed in their approach. While both rejected the Court's Opinion,¹⁴⁸ the French delegate in the Security Council argued that South Africa was under an obligation to negotiate in good faith with the United Nations for the establishment of an international regime in South West Africa.¹⁴⁹

148. 8 U.N. MONTHLY CHRONICLE 14, 19 (November 1971). See the criticism directed at certain aspects of the British delegate's statement by Rosalyn Higgins in *The Advisory Opinion on Namibia: Which United Nations Resolutions are Binding under Article 25 of the Charter?*, 21 INT'L & COMP. L.Q. (1972) (in the press).

149. 8 U.N. MONTHLY CHRONICLE 14 (November 1971).

(b) *South West African Reaction to the Opinion*

The South African Government's proposal to the International Court of Justice¹⁵⁰ that the population of South West Africa be consulted in a plebiscite on whether it would prefer South African administration to that of the United Nations strongly suggested that the Government was certain of an affirmative answer.¹⁵¹ The response of the local population groups to the Advisory Opinion, however, suggests that the Government had gravely misjudged local opinion and that a plebiscite might have resulted in a 'no' to the South African administration.

Predictably, the Herero (6.6 percent of the total population), who have consistently opposed South African administration, welcomed the Opinion.¹⁵² The Rehoboth Basters (2.2 percent of the Population) were equally pleased and appealed to the Security Council to implement the Court's decision.¹⁵³ The most significant response, however, came from the Ovambo, the largest group in the territory (45.9 percent of the population) upon whose support the South African Government had clearly relied. On 30 June 1971 the leaders of two churches representing over half the population of South West Africa—including the Ovambo—condemned apartheid and appealed to the South African Government for a "separate and independent State in South West Africa." In an open letter to Mr. Vorster, Bishop Leonard Auala of the Evangelical Lutheran Ovambo Kavango Church¹⁵⁴ and Pastor Paulus Gowaseb of the Evangelical Lutheran Church in South West Africa¹⁵⁵ declared that apartheid violates the Universal Declaration of Human Rights and that:

The Church Boards' urgent wish is that in terms of the declarations of the World Court and in co-operation with

150. For the terms of this proposal, see 10 INT'L LEG. MATERIALS 417 (March 1971). The Court rejected this proposal because the Mandate had been lawfully terminated with the result that South Africa's "acts on behalf of or concerning Namibia are illegal and invalid": [1971] I.C.J. at 57-58.

151. Before the Advisory Opinion was delivered Mr Justice Van Wyk stated that "it has been claimed by experts on South West Africa, that possibly 80% of the population might prefer South Africa's administration and all that it entails to that of the United Nations": *The Request for an Advisory Opinion on South West Africa*, ACTA JURIDICA 219, 228 (1970).

152. *The Star*, July 6, 1971, at 5, col. 3.

153. *Id.*

154. Membership estimated at 180,000.

155. Membership estimated at 110,000.

UNO of which South Africa is a member, your Government will seek a peaceful solution to the problems of our land and will see to it that Human Rights be put into operation and that South West Africa may become a self-sufficient and independent State.¹⁵⁶

In December 1971 the Ovambo showed their opposition to the South African administration in more concrete form when 13,000 Ovambo labourers outside the homeland went on strike against labour conditions. The main source of grievance was the contract labour system which regulated the employment of some 40,000 Ovambo in the southern sector or "police zone." In terms of this system an Ovambo employee entered into a contract for a fixed term (twelve or eighteen months in most cases) with a white employer in the southern sector via the agency of a recruiting body, the South West Africa Native Labour Association (SWANLA). While in the southern sector he was unable to change his employment as breach of the contract constituted a criminal offence. At the expiry of his contract he was obliged to return to Ovamboland before seeking new employment. This seriously restricted the bargaining power of Ovambo workers and wages were kept pitifully low. For instance, there was a minimum cash wage for experienced general workers of only R8.25 per month.

In December 1971, Ovambo workers downed tools in a number of industries and were immediately sent home to Ovamboland by the authorities. The strike, however, spread and by the end of December some 13,000 Ovambo had been "repatriated" and white employers were compelled to rely on white school boys who were paid a minimum wage of R109 per month!

In January 1971, following negotiations between the South African and the Ovambo Governments, SWANLA was abolished as a negotiator of labour contracts and a new system introduced. In terms of this the Ovambo Government accepts responsibility for establishing labour employment offices; Ovambo workers are permitted to enter into agreements with employers setting out the full terms on their labour contracts; and workers are given greater freedom to change their employment.¹⁵⁷

After the conclusion of this agreement Ovambo workers started returning to employment in the southern sector but the response was

156. The text of this letter appears in 15 SASH: THE BLACK SASH MAGAZINE 15 (No. 2, 1971).

157. Rand Daily Mail, January 21, 1972, at 3, col. 1.

not altogether satisfactory from the point of view of the South African Government. Moreover there were sporadic acts of violence in the territory. Consequently on 4 February the Government introduced regulations modelled on the Transkeian emergency proclamations of 1960¹⁵⁸ to Ovamboland. These prohibit unauthorized meetings of more than five persons, permit detention without trial and impose severe restrictions on freedom of political expression.¹⁵⁹ Government spokesmen have vehemently denied that Ovamboland is in a state of emergency, but it is clear that the Government is deeply concerned about developments among what, until recently, were regarded as its most loyal supporters in South West Africa.

(c) *The Secretary-General's Visit to South Africa and Namibia*

In February 1972 the Security Council held a special meeting on African problems in the Ethiopian capital of Addis Ababa at which it adopted two resolutions on Namibia. In Resolution 310 it reaffirmed its previous resolutions on Namibia, condemned "the recent repressive measures against the African labourers in Namibia," and called upon the South African Government "to end immediately these repressive measures and to abolish any system of labour which may be in conflict with basic provisions of the Universal Declaration of Human Rights." Resolution 309 was more conciliatory in tone and authorized the new Secretary-General, Dr. Kurt Waldheim, to enter into discussions "with all parties concerned"—including South Africa—on the future of Namibia. In carrying out this mandate he is to act in consultation with a group of the Security Council composed of the representatives of Argentina, Somalia and Yugoslavia.

After it had invited Dr. Waldheim to visit South Africa and Namibia in response to this resolution, the South African Government expelled its harshest white critics in Namibia, the Anglican Bishop of Damaraland, the Rt. Rev. Colin O'Brien Winter, and three of his assistants, from the territory in an obvious attempt to stifle opposition to the South African administration during the Secretary-General's visit.¹⁶⁰

158. Proclamations R400 of 1960 (Government Gazette Extraordinary 6582 of 30 November 1960) and R413 of 1960 (Government Gazette Extraordinary 6594 of 14 December 1960) introduced a state of emergency in the Transkei. Despite the subsequent development of this territory towards self-government the regulations have not yet been withdrawn.

159. Proclamation R17 (Government Gazette 3377 of 4 February 1972) (Reg. Gaz. 1568).

160. The Star, Johannesburg, Feb. 28, 1972, at 5, col. 1; Sunday Times, Johannesburg, Feb. 27, 1972, at 2, col. 5.

Dr. Waldheim visited South Africa and Namibia for five days at the beginning of March. After preliminary discussions in Cape Town with the South African Prime Minister, Mr B.J. Vorster, he flew to Namibia where he visited Ovambo (Ovamboland) and Windhoek. Here he met both supporters and opponents of the South Africa Government's policies. The former were represented by leaders of the Ovambo and Kavango Legislative Assemblies, and by representatives of the Damara people and the Federal Coloured People's Party. The latter were represented by leaders of the National Convention, a united front consisting of the following organizations opposed to South African rule: the two Herero bodies, the National Unity Democratic Organization (NUDO), the South West African National Union (SWANU), the Basters' Volksparty, the Voice of the People (representing the Namas and Damaras) and the Ovambo controlled South West African Peoples Organization (SWAPO). At its meeting with Dr. Waldheim the National Convention demanded the immediate removal of South African administration from Namibia.¹⁶¹ After two busy days in Namibia Dr. Waldheim returned to Cape Town for further talks with Mr. Vorster.

No joint communique was issued after these talks but Dr. Waldheim stated that there was some common ground in the professed aim of both the South African Government and the United Nations to promote self-determination and independence for the people of Namibia.¹⁶² This common ground is illusory. The United Nations is committed to self-determination and independence for Namibia as a whole, as a single multi-racial nation. The South African Government is committed to self-determination and independence for the different peoples or "nations" of South West Africa in separate ethnic homelands.¹⁶³

(d) *The Future*

Although there have been several suggestions of ways in which the dispute over Namibia in its present form might be returned to the International Court,¹⁶⁴ it seems unlikely that the Court will again be consulted unless fresh legal difficulties arise. The Court has given its

161. Rand Daily Mail, Mar. 9, 1972, at 1, col. 5; The Star, Mar. 10, 1972, at 23, col. 4.

162. The Star, Mar. 9, 1972, at 3, col. 1.

163. The Star, Mar. 11, 1972, at 3, col. 1; The Sunday Times, Mar. 12, 1972, at 3, col. 2.

164. See, for example, the suggestion put forward by Arthur W. Rovine and Anthony A. D'Amato that South Africa's obligations under Chapter XI of the

full approval to United Nations action and it seems probable that the dispute will assume a greater political character, premised, of course, upon the legal foundation of the 1971 Advisory Opinion.

Member States of the United Nations appear to be divided on the correct approach to be adopted towards the political resolution of the dispute. Three approaches have emerged: first, uncompromising confrontation with South Africa; secondly, negotiation and dialogue; thirdly, negotiation backed by coercive measures. The first course will not win the support of the Western powers and the second is clearly unacceptable to most Afro-Asian States. This leaves the third course which is likely to be pursued with the emphasis vacillating between coercion and negotiation. This is already apparent from the three Security Council resolutions adopted since the 1971 Advisory Opinion. Two have urged States to take coercive measures against South Africa but the third has authorized the Secretary General to enter into talks with the South African Government on the future of Namibia.

The Western powers, particularly the United States, occupy a pivotal position in the future of Namibia as ultimately they will determine whether the emphasis is to fall on coercion or negotiation in the resolution of the dispute. Obviously they will be under great pressure in the United Nations to support coercive measures against South Africa, for not only has the Court held that South Africa is in unlawful occupation of Namibia but it has also found that the policy of *apartheid* violates South Africa's obligations under the Charter.¹⁶⁵ Although the Court confines its comments to *apartheid* "in a territory having an international status"¹⁶⁶ they must clearly be seen as apposite to *apartheid* in South Africa,¹⁶⁷ as the undertaking in the Charter to promote human rights is not limited to territories with an international status. The Court's Opinion will therefore provide a legal basis for intensified efforts by Afro-Asian States to drive the major Western powers into taking enforcement action against southern Africa. If they adopt a completely negative attitude it is not impossible that the

Charter relating to non-self-governing territories continue to apply to her unlawful occupation of Namibia and that "any State that is a member of the United Nations may bring an action against South Africa in the International Court of Justice, under the Court's compulsory jurisdiction, to enforce South Africa's obligations under Chapter XI." *Written Statement of the International League for the Rights of Man filed with the International Court of Justice in the Namibia Question*, 4 N.Y.U.J. INT'L L. & Pol. 355, 402 (1971).

165. [1971] I.C.J. 56-57. Cf. Judge Dillard, *id.* at 150.

166. *Id.* at 57. See also Judge Khan, *id.* at 61-64.

167. This is made clear in the separate opinions of Judges Ammoun, *id.* at 80-85, and Nervo, *id.* at 123.

General Assembly will seek to assert its "secondary responsibility" by recommending coercive measures under the Uniting for Peace Resolution. However ineffective such a course might be, it would undoubtedly embarrass the Western powers.

Against this background there is an urgent need for statesmanship on the part of the political leaders of South Africa and her trade partners. A *via media* must be found between the Scylla of the *status quo* and the Charybdis of violent confrontation. The delegation of authority to the Secretary-General to negotiate a settlement on behalf of the United Nations is a welcome step in this direction, provided that the major Western powers make it clear that this is not simply a facade for a continuation of the *status quo*.

Prima facie the post-war history of South West Africa suggests that all avenues of negotiation have been closed and that coercion remains the only cure. This view is not shared by the present writer. Recent domestic developments, such as the acceleration of the South African Government's "homelands" policy and the new political awareness in Namibia, and international events, such as the Court's 1971 Opinion and the South African Government's recent attempts to win friends in Africa, have provided fresh scope for political manoeuvre. This is reflected in the new approach of white opposition leaders in South Africa.

For years there has been little divergence of opinion between the Government and the two white opposition parties—the United Party and the Progressive Party—over the Government's handling of the South West African question. Now, prompted by the Court's latest Opinion and by the new signs of hostility to the Government's policies among the inhabitants of the territory, opposition spokesmen have put forward views which envisage far-reaching changes in the existing order and perhaps the ultimate independence of Namibia. This chief United Party spokesman on foreign affairs, Mr. Japie Basson,¹⁶⁸ who at one stage himself represented a South West African constituency, and the leader of the Progressive Party, Mr. Colin Eglin,¹⁶⁹ have put forward remarkably similar views in recent times. Both have advocated the removal of racial discrimination in South West Africa, the immediate creation of a body representing the leaders of all the

168. Address to the South African Institute of International Affairs, Johannesburg, November 18, 1961.

169. Address to the South African Institute of International Affairs, Cape Town, February 1, 1972.

peoples of South West Africa to consult with each other¹⁷⁰ and the Government of South Africa on the future of the territory, and the holding of a plebiscite within the foreseeable future (within five years in the case of Mr. Eglin) to enable the people of South West Africa to exercise their right of self-determination.

Although the proposals put forward by these two leaders lack the spectacular effect of immediate withdrawal they do offer a realistic program for social change and self-determination in Namibia. The United Nations might be better advised to support proposals of this kind, which have some prospect of success, rather than to continue to engage in the political rhetoric of immediate, total withdrawal which offers little amelioration to the position of the indigenous inhabitants of Namibia.¹⁷¹ The danger of the extremist stance on Namibia is that coercion is seen as a means of altering the political order of Southern Africa as a whole and not as a catalyst for change in Namibia itself. If more limited goals were set, such as those proposed by Mr. Japie Basson and Mr. Colin Eglin, self-determination for the peoples of South West Africa might well be realized during the nineteen-seventies.

The cornerstone of the Basson-Eglin proposals is the plebiscite. Unfortunately the Afro-Asian States appear to be opposed to any plebiscite co-sponsored by South Africa and prefer, like Sir Muhammad Zafrulla Khan,¹⁷² to insist on South Africa's withdrawal from the territory as a prerequisite to any plebiscite. The mounting internal opposition to South African administration may have altered this inflexible demand on the part of Afro-Asian States. On the other hand, it has resulted, predictably, in a less enthusiastic approach to a plebiscite on the part of the South African Government. The major Western powers should however, use all their influence to induce both parties to accept a plebiscite—held under proper conditions. Any plebiscite agreement should include the following terms:

- (1) The people must be permitted to choose between the *status quo*, United Nations trusteeship and immediate independence.
- (2) The plebiscite must take the form of a free vote by all inhabitants

170. Significantly, in February 1972, non-white political leaders representing different population groups and political organizations in Namibia held their first consultation on the future of the territory. Later they presented a joint petition to the Secretary-General in which they gave priority to the withdrawal of the South African administration: *The Star*, Mar. 10, 1972, at 23, col. 4.

171. See Kennan, *Hazardous Courses in Southern Africa*, 49 *FOR. AFF.* 218, 227-230 (1971).

172. Declaration appended to the 1971 Opinion: [1971] *I.C.J.* 65-66.

of South West Africa above the age of 18 or 21. This would seem to be acceptable to the South African Government which has denied¹⁷³ that it envisages the type of consultation with the tribal leaders staged by General Smuts for the benefit of the United Nations in 1946.

- (3) The United Nations and South Africa must agree to accept the decision of the majority of the voters.
- (4) There must be a joint United Nations-South Africa committee charged with the task of supervising the campaign.
- (5) The plebiscite must not be held immediately but should be set for a date between one and three years hence in order to give both the United Nations and the South African Government ample opportunity to put their views to the people.
- (6) All political leaders must be allowed to express their views freely provided this is done without threats or intimidation. (The main task of the joint United Nations-South Africa supervising committee would be to control campaigning.)
- (7) All South West African political prisoners must be released and exiles permitted to return to enable them to participate in the campaigning which would precede the plebiscite.
- (8) Consultation must be held between the leaders of all groups in South West Africa to enable them to discuss their future and to formulate the alternatives to be placed before the people. (For instance, if immediate independence is preferred by some leaders, it would be essential to decide in advance whether a federal or unitary form of government were envisaged.)

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

173. See South Africa's plebiscite proposal to the International Court of Justice, *supra* note 150.