COMMENT

1971 ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON NAMIBIA (SOUTH WEST AFRICA)

By WILLIAM E. HOLDER*

On 21 June 1971 the International Court of Justice pronounced—for the sixth time—on questions relating to Namibia.[1]

Namibia, which still clings to its former name of South West Africa, lies on the west coast of Africa between South Africa and Angola. Before World War I it had been a German possession. As such, South West Africa came within the policy of the victors, which aimed to deprive the enemies of their colonial benefits. At this time, also, evolved the idea that this deprivation could be imposed without annexation of the territories, and that independence of the peoples concerned could eventually be achieved.

The mandate system provided the mechanism. Article 22 of the Covenant of the League of Nations established the objectives and the general rights and duties, and resolutions of the League Council contained the terms of each mandate. Thus, for South Africa, the Mandate for South West Africa was conferred on His Britannic Majesty, to be executed on his behalf by the Government of the Union of South Africa. The League Council, on 17 December 1920, approved the installation of South Africa as the effective mandatory, endorsing "the principle that the well-being and development of such peoples form a sacred trust of civilization".[2]

The Second World War disrupted both civilization and the mandate system. The demise of the League of Nations brought the birth of the United Nations, and with it a new system of territorial occupation without annexation. The trusteeship system depended on express agreements between the overlord states and the United Nations. With one exception all of the mandatory powers (for those territories which had not yet reached the stage of independence) heeded the call of the United

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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)* (1971) I.C.J. Reports 16. The Court comprised: President Sir Muhammad Zafrulla Khan, Vice-President Ammoun, Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga.

[2] Art. 22, Covenant of the League of Nations.

Nations to formalize their tenure and entered trusteeship agreements.[3] South Africa declined to enter a trusteeship agreement for South West Africa. She continued, however, to occupy the Territory—and still does so.

South Africa was quickly forced to defend her position before the jury of the United Nations. At the same time the United Nations began its long trail of resolutions designed to prise South West Africa away from South African hegemony. These annual resolutions, which in the 1960's became—like the debates—increasingly acrimonious, accused South Africa of practising *apartheid,* of inhibiting the right of self-determination and of breaching the spirit and the letter of the Mandate. This growing condemnation of South Africa by the international community failed to influence the deviant state. Instead, South Africa continued to perpetrate *apartheid* and to increase its governmental organization over the area.

Legal arguments about South West Africa also proliferated. As early as 1950, the International Court of Justice was asked for advice. By this time South Africa had come to deny the supervisory competence of the United Nations—an argument based on the disappearance of the League of Nations. In its 1950 Advisory Opinion on the *International Status of South-West Africa*[4] the Court strongly affirmed the continuation of the obligations of South Africa and of the supervisory power of the United Nations in general and of the General Assembly in particular. The Court noted, also, that the mandatory relationship could not be terminated unilaterally, but only by agreement of the mandatory power and the United Nations.[5] In its two further Advisory Opinions of 1955 and 1956 the Court again confirmed the legitimacy of reasonable United Nations supervision.[6]

South Africa remained contemptuous of the exhortations of the General Assembly, and of the non-binding Court observations. Consequently, impatient African states prompted Ethiopia and Liberia, who had both been members of the League of Nations, to initiate a contentious case, the outcome of which (it was hoped) would legally bind South Africa. Despite a positive finding by the International Court on the issue of jurisdiction,[7] four years later a divided Court dismissed the complainant states' arguments without reaching the merits.[8] In legal

[3] Only two trusteeships remain: the Trust Territory of New Guinea (Australia) and the Trust Territory of the Pacific Islands (U.S.A.).

[4] (1950) I.C.J. Reports 128.

[5] *Id.*, 143.

[6] *South-West Africa—Voting Procedure* (1955) I.C.J. Reports 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (1956) I.C.J. Reports 23.

[7] *South West Africa Cases* (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), *Preliminary Objections* (1962) I.C.J. Reports 319.

[8] *South West Africa Cases* (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), *Second Phase* (1966) I.C.J. Reports 6. The casting vote of the President, Sir Percy Spender of Australia, was decisive.

terms, the majority opinion found that Ethiopia and Liberia lacked a sufficient legal right or interest. Vigorous dissents highlighted the Court's resort to such an anachronistic, Anglo-Saxon legal device.

The 1966 opting out by the Court was not one of its most popular verdicts. Later that year a disgruntled General Assembly, by resolution 2145 (XXI), decided to terminate the Mandate for South West Africa and to assume administrative responsibility for the Territory pending its independence. In 1967 the Territory was renamed Namibia by the General Assembly.[9] Two resolutions of the Security Council in 1969 recognized the General Assembly action. Resolution 264 (1969) called upon South Africa to withdraw its administration from Namibia immediately. Resolution 269 (1969) noted South Africa's defiance and again called for withdrawal. This involvement of the Security Council culminated, the following year, in resolution 276 (1970), which declared that "the continued presence of the South African authorities in Namibia is illegal" and deduced that all acts taken by the Government of South Africa "on behalf or concerning Namibia after the termination of the Mandate are illegal and invalid". Finally, the Security Council called upon all states "to refrain from any dealings with the Government of South Africa which are inconsistent" with its earlier findings.

Findings of the Court

The Security Council, in seeking its first advisory opinion from the International Court of Justice, asked:

> What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?[10]

This time the Afro-Asian group within the United Nations was not to be disappointed. The Court—which had changed its composition substantially since 1966[11]—directly responded to a wide range of legal issues thrown up by the arguments and the context. In brief, the majority found that the General Assembly had been justified in terminating the Mandate, that the continued occupation of South Africa was illegal, and that other states must so recognize.[12]

In reaching its conclusions, the majority Opinion built upon the following legal (and other) findings.

[9] G.A. Res. 2372 (XXII).

[10] S.C. Res. 284 (1970).

[11] Only four judges participated in both the 1966 and 1971 decisions. In 1966 Judges Fitzmaurice and Gros joined the majority, while Judges Padilla Nervo and Forster dissented. In 1971 the roles were reversed.

[12] Only two members of the Court, Judges Fitzmaurice and Gros, dissented from the majority findings that the General Assembly had validly terminated the Mandate and that South Africa could not justify its continued occupation of the Territory. In resisting the Court's conclusion that other states were obligated to respond appropriately, they were joined by Judges Petrén and Onyeama.

1. Prior to termination of the Mandate, the obligations under it survived the collapse of the League of Nations, with the General Assembly enjoying supervisory competence. This had been the crux of the 1950 Opinion. In so holding, however, the 1971 majority rejected a South African argument that that earlier Opinion should be re-examined[13] and seems to have reacted to judicial hints by the Spender Court of 1966 that the continuation of the scheme might be questionable.[14] It followed, therefore, that South Africa could not legally annex the Territory.[15]

2. General Assembly resolution 2145 (XXI) terminated the Mandate. South Africa, joined by France, had argued strenuously that that key resolution was *ultra vires*. This argument raised two issues: whether the General Assembly had jurisdiction to pass the resolution, and if it did, whether the resolution was a valid exercise of the Assembly's powers. On the first issue, the Court followed its previous jurisprudence to hold that the United Nations could pronounce "on the conduct of the mandatory with respect to its international obligations".[16] Consequently, the General Assembly had the competence to terminate the Mandate and to control otherwise the legal situation. The Court commented, for instance, on the Assembly's assertion in resolution 2145 (XXI) that apart from the Mandate, "South Africa has no other right to administer the Territory". The Court said:

> This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.[17]

Secondly, the Court held that a finding by the General Assembly of material breach was a proper ground of mandate termination. By reference to the draft Vienna Convention on the Law of Treaties, which "may in many respects be considered as a codification of existing customary law on the subject",[18] the Court accepted that a material breach justified treaty termination. Furthermore, the same rule applied to mandates "in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship".[19] The competence of the General Assembly was not to be impeded merely because there had been no provision made

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[13] (1971) I.C.J. Reports 16, 35-41.

[14] The 1966 majority judgment stated, for example, that in finding the claims of the applicant states non-justiciable, it did so "without pronouncing upon, and wholly without prejudice to, the question of whether that Mandate is still in force"; *South West Africa Cases* (*Ethiopia* v. *South Africc; Liberia* v. *South Africa*), *Second Phase* (1966) I.C.J. Reports 6, 19.

[15] (1971) I.C.J. Reports 16, 41-43.

[16] *Id.*, 49-50.

[17] *Id.*, 50.

[18] *Id.*, 47.

[19] *Ibid.*

for such revocation.[20] Nor was concurrence of the defaulting state, or further proof of the facts constituting the material breach, necessary for termination of the Mandate.[21]

3. Security Council resolution 276 (1970) (which espoused and affirmed General Assembly resolution 2145 (XXI)) was both a valid exercise of the Security Council's function to maintain peace and security and was an appropriate and legally binding measure to terminate an illegal situation. The Court found that Article 24 of the Charter should not be interpreted restrictively and that it therefore covered the present case of Security Council activity.[22] In addition, Article 25 of the Charter, which obligates members "to accept and carry out the decisions of the Security Council in accordance with the present Charter", applies to all "decisions" of the Security Council and not just to enforcement measures adopted under Chapter VII.[23] But when has a "decision" been made? This has

> to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[24]

Resolution 276 (1970), as well as resolutions 264 (1969) and 269 (1969), while containing some exhortatory language (for example, "calls upon"), fell within Articles 24 and 25 of the Charter and consequently bound member states.[25]

4. South Africa is in illegal occupation of the Territory and is obliged to withdraw from it. In failing to withdraw, South Africa incurs international responsibility:

> By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia[26]

South Africa does not avoid this international responsibility because it lacks title, for that international responsibility rests on physical control of the area, not on legal sovereignty.

5. Members of the United Nations are

> under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also

[20] *Id.*, 47-49.
[21] *Id.*, 49-50.
[22] *Id.*, 52.
[23] *Id.*, 52-53.
[24] *Id.*, 53.
[25] *Ibid.*
[26] *Id.*, 54.

> under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia. . . .[27]

While it rested with the Security Council to determine what precise acts should be prohibited or allowed,[28] the Court felt free to observe that member states must refrain from dealing with South Africa when transactions purported to apply to Namibia. These transactions included entering treaties, the invocation of existing bilateral treaties, diplomatic representation and economic dealings.[29]

6. States which are not members of the United Nations, although not bound by Articles 24 and 25 of the Charter, cannot contest the termination of the Mandate and the illegality of South African occupation. In short, "it is for non-member States to act in accordance with those decisions".[30] For this conclusion the majority injected the concept of "opposability":

> In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof.[31]

Observations of the Court

In addition to these judicial premises and conclusions, the 1971 Opinion contains numerous other observations of substantive law.[32]

1. In various ways the Court affirmed the general legal competence of the political organs of the United Nations. Thus the Court initially invoked a strong presumption of procedural validity.[33] For the General Assembly, it admitted the competence of that organ to make "judicial" decisions and to adopt resolutions "which make determinations o

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[27] *Ibid.*

[28] *Id.*, 55.

[29] *Id.*, 55-56. The Court suggested exceptions to this general rule of non recognition when demanded by the predominant interest of the people of Namibia. Thus multilateral treaties "such as those of a humanitarian character the non-performance of which may adversely affect the people", could extend to Namibia (*id.*, 55). Likewise, the invalidity of South African legislation "cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory" (*id.*, 56).

[30] *Id.*, 56.

[31] *Ibid.*

[32] The Court also ruled on a number of procedural aspects, including the right of South Africa to appoint a judge *ad hoc*, disqualification of judges for bias, judicial abstention and questions of proof of facts. On all of these points the Court found against South Africa.

[33] *Id.*, 22.

have operative design".[34] The Security Council, meanwhile, was free to categorize a situation as "illegal" and in the instant case it was for the Council to decide upon necessary consequent action.[35] The Court summarized: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".[36]

2. The majority Opinion reflects a dynamic view about the nature of the international legal system. Interpretation of legal institutions, therefore, will be affected by subsequent developments of law, both through the United Nations Charter and by changing customary international law. Specifically, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[37]

3. The practice of *apartheid* in the Territory, the Court held, offended the Charter of the United Nations. Furthermore, the Court felt that the record amply showed the Government's policy of complete physical separation of races and ethnic groups. There was no scope for argument, as urged by South Africa, that further factual evidence should be admitted to show its good faith in pursuing *apartheid*. For it was the practice of separation itself which was perverse:

> Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[38]

Conclusion

The majority Opinion presents, of course, a consensus view. Within the nine separate opinions of the remaining 286 pages one finds a considerable diversity of viewpoint—about the role of the Court, the proper powers of the United Nations and the nature of international law.

From Vice-President Ammoun, for example, comes an invitation to consider the historical context of black African suppression. With bitterness, he recalls the partition of Africa, the imposition of slavery and colonialism and the destruction of earlier, sophisticated civiliza-

[34] *Id.*, 49-50.
[35] *Id.*, 55.
[36] *Id.*, 45.
[37] *Id.*, 31.
[38] *Id.*, 57.

tions.[39] For Judge Ammoun, therefore, this Opinion needed historic pronouncements on many important issues.

> These are, in particular, the sovereignty of dependent peoples, the mandate institution, its nature and its objects, the right of peoples to self-determination and decolonization, equality between nations and between individuals, racial discrimination as expressed in the doctrine of *apartheid* in South Africa and in Namibia and, in sum, the whole body of human rights and their imperative universal character.[40]

The majority consensus did not include Judge Fitzmaurice (who dissented, with Judge Gros, from all major findings of the majority). Indeed, the United Kingdom representative on the Court studiously differs on almost every point, whether legal reasoning, legal conclusion or value judgment. In particular, he attacks the two "assumptions" upon which the majority proceed; namely, that there must have been an inherent right vested in the United Nations unilaterally to revoke the Mandate in the event of fundamental breach, and, secondly, that there had been such breach.[41] The finding of fundamental breach, Fitzmaurice concludes

> has been reached on a basis that must endanger [the Opinion's] authority on account of failure to conduct any adequate investigation into the ultimate foundation on which it professes to rest.[42]

Appraised from the standpoint of Anglo-Saxon common law legalism, the Opinion of the Court and the concurring opinions appear to embrace many unsupported generalizations touching upon complex questions of history, law and policy. As the assault by Judges Fitzmaurice and Gros conveniently shows, some of the general propositions of the Court may not have been quite so inevitable.[43] It may be tempting, therefore, to dismiss the reasoning and findings as "special pleading".[44] In rejecting the Opinion, South Africa pointed to its highly political content:

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[39] *Id.*, 85-87.

[40] *Id.*, 67.

[41] *Id.*, 220-221.

[42] *Id.*, 223.

[43] *E.g.*, the Court's concession of such wide powers of the United Nations under Art. 10 of the Charter for the General Assembly, under Arts 24 and 25 for the Security Council, and under Art. 80 for the protection of rights originally within the mandate system; the rule of "dynamic" interpretation for legal institutions; and the mechanism of termination of treaty obligations for material breach.

[44] *Cf.* the reaction of one critic that

> the Opinion appears to proceed from a desire to create a receptive climate, and to make up in this way for the lack of substance in an argument which professes to be judicial. Claiming to base its reasoning on the Charter itself, it in fact adds to it, having failed to find support there. This is not logical reasoning but special pleading. [*Translation*]

J. Nisot, "La Namibie et la Cour Internationale de Justice: L'Avis Consultative du 21 Juin 1971" (1971) 75 *Revue Générale de Droit International Public* 933, 943.

> Indeed, the way in which it studiously evaded or simply glossed over the most fundamental issues in dispute (in contrast with the cogently reasoned dissents); its pronouncements in regard to matters on which it refused to hear evidence; and its actions in the early stages of the proceedings; all lead irresistably to the conclusion that the Court succumbed to the powerful political pressures to which it was subjected.[45]

Despite these weaknesses of legal reasoning and political content, the good sense of the general propositions and the specific responses of the Opinion will be warmly received by the many verbal critics of the 1966 decision. The authority of any court decision depends on the combination of its competence to interpret contemporary community expectations—called legal—and the acceptance of those pronouncements by the relevant community. Significantly, this acceptance does not depend upon the categorization of a particular decision as "binding" as distinct from "advisory".[46]

By endorsing broad United Nations competence, the World Court has again added its authority to the already substantial past trend of decision relating to South African control over South West Africa. By returning the question to the political forum, the problem is again one of enforcement. Now, it is not only the propriety of the Court's Opinion that is at stake. The legitimacy of the United Nations has been put in question. It is possible, in light of the growing isolation of South Africa at the United Nations, that (as posed by Judge Dillard) South Africa "will respect the judicial pronouncement of this Court and the almost unanimously held view in the United Nations that its administration of Namibia must come to an end".[47] If this does not take place, then the Afro-Asian groups can be expected to be increasingly impatient at their unmet demands. Consequently, the commitment of the Western, capitalist (United Nations) alliance, and especially of such countries as France, the United Kingdom and the United States—and Australia—becomes crucial. Without their sincere and active support the united front of United Nations condemnation of South Africa cannot progress beyond the domain of rhetoric. These next few years will show whether these states are prepared, on an issue such as South West Africa, which involves fundamental issues of human dignity, to conform to majority opinion—of the General Assembly, the Security Council and of the International Court of Justice. If they are not so prepared, then it is likely that South Africa will weaken its hold on the territory of

[45] *South West Africa Case 1971* (a pamphlet apparently published by the Government of South Africa) 22.

[46] *Cf.* the long-standing South African argument that it is under no obligation to abide by advisory opinions. This has been repeated for the 1971 Opinion:

> It must, of course, not be forgotten that this Opinion of the Court, like all its Advisory Opinions, has no legally binding force and therefore no State is or can be *obliged* to abide by or give effect to it. (*Id.*, 1.)

[47] (1971) I.C.J. Reports 16, 168-169.

Namibia. Accordingly, the United Nations—and not the International Court—will have failed its most important task of law enforcement to date.[48]

[48] Both the General Assembly and the Security Council welcomed the 1971 Opinion: G.A. Res. 2871 (XXVI) and S.C. Res. 301 (1971). Another General Assembly resolution continued the activities of the United Nations Fund on Namibia: G.A. Res. 2872 (XXVI). Meanwhile, the United Nations Council for Namibia reported that the Court Opinion affirmed the Council's authority as the (interim) *de jure* Government of Namibia (para. 190); further, the Council proposed an array of future activities to implement the Court Opinion: *Report of the United Nations Council for Namibia* G.A.O.R., Twenty-sixth Session, Supp. No. 24 (Doc. No. A/8424).