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'There was an elephant in the court room': Reflections on the role of Judge Sir Percy Spender (1897–1985) in the *South West Africa Cases* (1960–1966) after half a century

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Abstract

This article argues that the *South West Africa Cases* were brought to an ignominious end because the cases were about self-determination as much as they were about apartheid. For liberals like Judge Sir Percy Spender, the President of the Court, political systems based on majority rule looked suspiciously like authoritarian regimes modelled on the Soviet Union during the Cold War. It is submitted that, given the controversy surrounding self-determination in international law, Sir Percy wanted to avoid addressing the merits of the cases. Self-determination was the proverbial 'elephant in the court room' that Sir Percy wanted to avoid at all costs. This article builds upon earlier archival research on the *South West Africa Cases* by taking a closer look at Sir Percy's role in the cases and his views on self-determination. It is argued that what 'killed' the cases was Sir Percy's belief that Ethiopia and Liberia were seeking to 'legalize' self-determination with a view to further uniting the Afro-Asian bloc at the United Nations with the Soviet Union against the West.

Keywords

Communism; Cold War; self-determination; Sir Percy Spender; *South West Africa Cases*

1. NEW LIGHT ON THE *SOUTH WEST AFRICA CASES*

The fiftieth anniversary of the *South West Africa Cases* provides a prescient moment to revisit a lingering controversy that has haunted the International Court of Justice (ICJ) since 1966. Why did the ICJ refuse to address the merits of the dispute on the ground that Ethiopia and Liberia 'cannot be considered to have established any legal

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right or interest appertaining to them in the subject-matter of the present claims',[1] when the same Court had already ruled in 1962 that: 'the Members of the League [of Nations] were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members'?[2]

The argument here is that Judge Sir Percy Spender, the President of the Court, whose casting vote decided the cases in favour of South Africa, did not want to address the merits of the dispute in the *South West Africa Cases*, because the cases were about self-determination, as much as they were about apartheid. It is argued that in Sir Percy's view, self-determination had been hijacked by the Soviet Union and the Afro-Asian bloc at the United Nations (UN), which he had been observing with concern as Australia's chief diplomat to the UN from 1950–1957. It could be said that the link in Sir Percy's mind between self-determination, the Soviet Union, and the anticolonialism of the Afro-Asian bloc at the UN also provides another perspective to the 'recusal' controversy of Judge Sir Mohammad Zafrulla Khan. As I have written elsewhere:

> Sir Percy's period as Australia's ambassador to the US coincided with the hysteria of the "McCarthy era", when Communism affected not only domestic US politics but also the foreign policy establishment. Although Sir Percy and Zafrulla had both forged close relationships with the US government, a relationship that in Zafrulla's case helped secure his election to the Presidency of the UN General Assembly, as well as to the ICJ, they were divided on the question of decolonization. Despite a shift in US policy favouring decolonization in the early 1960s, Sir Percy nonetheless maintained his "reputation for trying to slow down the process of decolonization".[3]

The only reason the ICJ was able to reverse the 1962 decision was because three of the judges who had taken part in that decision were absent during the subsequent phase through death, illness, and the 'recusal' of Zafrulla Khan. In the early 1960s, self-determination was a controversial doctrine because it had become associated with international Communism and with those states that had joined the alliance with the socialist bloc at the UN in supporting resolutions aimed at undermining Western imperialism. One such example was Resolution 1514 containing 'The Declaration on the Granting of Independence to Colonial Countries and Peoples' (Decolonization Declaration).[4]

Self-determination was at the heart of the *South West Africa Cases* because Ethiopia and Liberia, in addition to claiming that apartheid was contrary to international law, were also claiming that South Africa was violating the right of the population of South West Africa to self-determination; which they understood to apply to the

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1 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, at 51, para. 99.

2 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1966] ICJ Rep. 319, at 343.

3 V. Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa Cases*', (2015) 5 *Asian Journal of International Law* 310, at 332–3 (footnotes omitted).

4 UN General Assembly Resolution 1514, 14 December 1960, UN Doc. A/RES/15/1514.

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population as a whole.[5] The Applicants' argument was not only directed at South Africa's retention of the Mandate of South West Africa and its refusal to subject that Mandate to the scrutiny of the UN, but was also directed at the nature of the regime administering South West Africa.

This article builds upon earlier research on the influence of decolonization on international law,[6] by shedding light on Sir Percy's role in the second phase of the *South West Africa Cases* with reference to correspondence he retained in his personal papers, which were donated to the National Library of Australia and made available to the public, as well as his speeches and writings from his time as Australia's Minister of External Affairs (1949–1951), Ambassador to Washington (1951–1957), and Chairman of Australia's Delegation to the UN General Assembly (1950–1957).[7] These speeches were delivered before Sir Percy was appointed to the ICJ, where he was a judge from 1957–1967, serving as President from 1964–1967, when the second phase of the *South West Africa Cases* were heard. Sir Percy believed that self-determination, far from being a human right, was a political doctrine aimed at introducing a totalitarian government in South West Africa.

To understand the extent to which self-determination was the proverbial 'elephant in the court room' we need to consider the bigger picture before taking a closer look at Judge Sir Percy Spender's views before he moved to the ICJ. For what transpired in the second phase of the *South West Africa Cases* cannot be explained by the 1966 judgment alone, since it barely addressed the merits. Rather, what the Court did not say in 1966 was as important as what it said. In other words, we need to appreciate the judgment's subtext and not just the text.

2. Self-determination before the *South West Africa Cases*

Although there was no general right of self-determination in international law in the era of the League of Nations, a right of *self-government* did apply by way of exception to those territories and peoples provisionally recognized as independent nations by the mandatory system as provided for in Article 22 of the Covenant of the League of Nations.[8] This is important to highlight because the principles expressed in Article 22 would find expression in Chapters XI, XII, and XIII of the UN Charter.[9]

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5 Compare para. 10. H. of the Application Instituting Proceedings to submission 5 in the Memorial of Ethiopia, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, [1966/Vol. I] ICJ Pleadings, Oral Arguments, Documents, at 22 and at 198.

6 See V. Kattan, 'Self-determination as ideology: The Cold War, the end of empire, and the making of UN General Assembly Resolution 1514 (14 December 1960)' in L. Pasquet, K. Polackova Van der Ploeg, and L. Castellanos Jankiewicz (eds.), *International Law and Time: Narratives and Techniques* (not yet published). See further, V. Kattan, 'Self-Determination during the Cold War: UN General Assembly Resolution 1514 (1960), the Prohibition of Partition, and the Establishment of the British Indian Ocean Territory (1965)', (2015) 19 *Max Planck Yearbook of United Nations Law* 419–68.

7 The papers are kept in numbered boxes. See P. Spender and J.M. Spender, 'Papers 1937-1978', *MS 4875, National Library of Australia, Canberra.* The author visited the National Library of Australia in July 2014.

8 Art. 22, Covenant of the League of Nations, 1 League of Nations Official Journal 9 [1920].

9 See N. Matz, 'Civilization and the Mandates System under the League of Nations as Origin of Trusteeship', (2005) 9 *Max Planck Yearbook of United Nations Law* 47, at 55.

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These provisions would form the basis of the complaint in the *South West Africa Cases* against South Africa for its apartheid policy and its refusal to confer self-government upon the population of South West Africa as a whole.

In the inter-war years, self-government was expressed in the form of the League of Nations Mandates system that categorized the territories entitled to self-government in the form of A-, B-, and C-class Mandates. According to the text of Article 22 of the Covenant, independence was only a goal in the case of the A- and B-class Mandates, although at a later and indeterminate point in time, but self-government was not foreseen for the C-class Mandates. Article 22 was explicit with regard to the latter:

> There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory subject to the safeguards above mentioned in the interests of the indigenous population.

Inequality was a hallmark of international relations in this period: all peoples were manifestly not entitled to self-government; some peoples were more equal than others; and any doctrine that suggested anything else was to be kept away.[10] Thus, the Soviet Union was only invited to join the League in 1934 after Germany and Japan had left, and it would be expelled after it invaded Finland in 1939.[11] The Soviet Union was never an original member of the League of Nations nor was Moscow consulted or involved in the drafting of the Covenant.

The Soviet Union was only able to influence the new world order after the Second World War, when it was invited to participate in the drafting of the UN Charter. This explains why self-determination is referenced twice in the Charter in Articles 1(2) and 55 in contrast to the Covenant of the League of Nations where self-determination was conspicuously absent.[12]

Before the First World War, Russian revolutionary V.I. Lenin had expressed his vision of self-determination which was at opposites to the vision of self-determination later articulated by President Wilson and only half-heartedly accepted by the allies in the form of *self-government* that applied to the Mandates.[13] In contrast to Wilson, Lenin's form of self-determination demanded a complete and immediate end to European colonialism and made no distinction between different classes of Mandates or colonies. Given these differences, it is not surprising that self-determination is not defined in the Charter. By not defining self-determination, the West could

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[10] President Woodrow Wilson, supposedly the 'father' of self-determination, famously opposed including Japan's racial equality clause in the Covenant. See Kattan, 'Self-determination as ideology', *supra* note 6. The text of the equality proposal is reproduced in *The Colonial Problem: A Report by a Study Group of Members of the Royal Institute of International Affairs* (1937), 59. See also, N. Shimazu, *Japan, Race and Equality: The Racial Equality Proposal of 1919* (1998).

[11] See I. Plettenberg, 'The Soviet Union and the League of Nations', in *The League of Nations in Retrospect/La Société des Nations: rétrospective. Proceedings of a Symposium organized by the United Nations Library and the Graduate Institution of International Studies* (1983), 146–7.

[12] See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), 38. See also, G.I. Tunkin, *Theory of International Law* (1974), 62.

[13] See J. Fisch, *The Right of Self-determination of Peoples: The Domestication of an Illusion* (2015), 132. See also, Kattan, 'Self-determination as ideology', *supra* note 6.

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claim that self-determination only applied to trust territories as provided for in Article 76 of the Charter (which mentions independence as a possibility along with self-government), namely to the former Mandates. But it also meant that the Soviet Union could claim that self-determination meant something else. Given Lenin's and other Communists' copious writings on self-determination,[14] many of the judges participating in the *South West Africa Cases* would have understood the difference between the League of Nation's approach to self-government and the Soviet Union's doctrine of self-determination.[15] This was especially so since some of them had been involved in the drafting of the UN Charter or were present in early debates on self-determination at the UN.[16]

When relations between the Soviet Union, the United States, and the United Kingdom deteriorated following Winston Churchill's 'Iron Curtain' speech in Fulton, Missouri in 1946, excoriating Communist 'fifth columns' and calling for a union of 'English-speaking peoples',[17] an alliance between the Soviet Union and the newly-independent states in Africa and Asia re-emerged.[18] Significantly, in his speech Churchill warned that 'in a great number of countries, far from the Russian frontiers and throughout the world, Communist fifth columns are established and work in complete unity and absolute obedience to the directions they receive from the Communist centre'.[19] Churchill's reference to the 'Communist centre' was a reference to the Comintern or the Communist International – a worldwide organization headquartered in Moscow – to which all workers' parties were invited as members.[20]

The alliance between the Soviet Union and the Afro-Asian bloc can be traced back to the inter-war years and the conferences clandestinely organized through the Comintern by the League against Imperialism in the 1920s.[21] This alliance gathered momentum following the independence of India, Pakistan, Burma, and Indonesia.

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[14] Fisch, ibid., at 119–22. See also, *Lenin's Collected Works* (1972), Vol. 20, at 393–454. J. Stalin, *Marxism and the National and Colonial Question* (2003, reprinted from the 1935 edition). G. Starushenko, *The Principle of National Self-Determination in Soviet Foreign Policy* (1962). V.I. Lenin, 'The Socialist Revolution and the Right of Nations to Self-Determination', in G. Hanna (ed.), *Lenin, Collected Works, 4th English edition* (1964), Vol. 11, at 151. *Selected Works of Mao Tse-Tung* (1975). J.V. Stalin, *The Problems of Leninism* (1976).

[15] See, e.g., M. Lachs, 'The Law in and of the United Nations (Some Reflections on the Principle of Self-Determination)', (1960–1961) 1 *The Indian Journal of International Law* 433.

[16] According to the *Yearbook of the International Court of Justice*, Judge Jessup had been 'United States representative at various sessions of the Security Council and the General Assembly of the United Nations, 1948–1953', as well as 'Ambassador-at-Large from 1949-1953'. See (1960–1961) 15 *Yearbook of the International Court of Justice* 7. Judge Koo participated in the drafting of the UN Charter, and was head of the Chinese delegation to the First, Second, and second part of the Third Session of the UN General Assembly. Judge Gros was a member of the French delegation to various sessions of the United Nations General Assembly and Security Council. Judge Padilla Nervo was Mexico's delegate to the League of Nations Assembly, the UN General Assembly, and Security Council. See (1964–1965) 19 *Yearbook of the International Court of Justice* 10–22.

[17] See W. Churchill, 'The Sinews of Peace', Westminster College, Fulton, Missouri, 5 March 1946, available at www.winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/120-the-sinews-of-peace.

[18] See D. Kimche, *The Afro-Asian Movement: Ideology and Foreign Policy in the Third World* (1973), 94; C. Andrew and V. Mitrokhin, *The World was Going our Way: The KGB and the Battle for the Third World* (2005), 1–24; O.A. Westad, *The Global Cold War: Third World Interventions and the Making of our Time* (2007), 49–57; Kattan, 'Self-determination as ideology', *supra* note 6.

[19] Churchill, 'The Sinews of Peace', *supra* note 17.

[20] See Westad, *supra* note 18, at 49.

[21] See Kimche, *supra* note 18, at 1–13. Andrew and Mitrokhin, *supra* note 18, at 1–5. Kattan, 'Self-determination as ideology', *supra* note 6.

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Following Stalin's death in 1953, Soviet premier Nikita Khrushchev embarked on a strategy to 'capture' the Third World.[22]

In November 1960, when Ethiopia and Liberia instituted proceedings against South Africa, 16 African states had joined the UN, fundamentally altering the balance of power in the General Assembly.[23] This was when the General Assembly adopted the Decolonization Declaration. This declaration was closer to the Soviet Union's vision of self-determination and differed in important respects from the model of self-government that had been applied by the League of Nations in respect of the Mandates and that also found expression in the UN's Trusteeship system.[24] In the interwar years, the conferral of self-government on the people of a Mandate was at the discretion of the Mandatory. In contrast, self-determination as promoted by the Soviet Union took away that discretion and sought an immediate end to European colonialism in Africa and Asia. While the United States also aspired to end European colonialism in Africa and Asia, its motivations and methods differed from those of the Soviet Union.[25] Under the Soviet vision of self-determination that found support in the Third World, it was for the 'people' alone, not the administering power, to determine when colonialism should come to a 'speedy end' – by armed struggle, if necessary.[26] It was the Soviet model that found expression in the Decolonization Declaration through its alliance with the Afro-Asian bloc whose draft declaration was adopted by the General Assembly after the topic of colonialism had been placed on the agenda of the assembly by the Soviet Union.[27]

3. Cold War self-determination: The views of Sir Percy Spender

The Decolonization Declaration describes Western colonialism as being associated with 'alien subjugation, domination and exploitation'.[28] It also states that colonialism 'constitutes a denial of fundamental human rights'.[29] Significantly, the Decolonization Declaration declares categorically that colonialism is 'contrary to the Charter of the United Nations'.[30] Sir Percy likely would have disagreed with this description of colonialism, having told the General Assembly in 1952, when he was arguing against the adoption of the first draft resolution on self-determination, that:

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22 Westad, *supra* note 18, at 67–8. Andrew and Mitrokhin, *supra* note 18, at 5.

23 In 1960, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Niger, Nigeria, Senegal, Somalia, Togo, and Upper Volta, all became members of the United Nations. See 'Growth in United Nations membership, 1945-present', *United Nations*, available at www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html#1960s.

24 See Lachs, *supra* note 15. See also, Kattan, 'Self-determination as ideology', *supra* note 6.

25 See Westad, *supra* note 18, at 131–43. See also, Kattan, ibid.

26 See W.J. Pomeroy (ed.), *Guerrilla warfare and Marxism: a collection of writings from Karl Marx to the present on armed struggles for liberation and for socialism* (1968). See also, E.B. Firmage, 'The "War of National Liberation" and the Third World', in John Norton Moore (ed.), *Law and Civil War in the Modern World* (1974), 304–47.

27 See Kattan, 'Self-determination as ideology', *supra* note 6.

28 The Decolonization Declaration, *supra* note 4, para. 1.

29 Ibid.

30 Ibid.

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> It is not so long ago when Australians were 'colonials' in the same sense as those who support this resolution speak of. Within the living memory of many in my country we were conscious not only of the protection given to us against external aggression by our Mother Country, but of the general assistance given us in achieving our own complete *self-government*. I do hope it will not be misunderstood if I say that it could well be that those under such constant attack may be forced to engage in the distasteful task of pointing to the existence of oppressed people in countries now juridically independent.[31]

Sir Percy had long been concerned about Soviet designs in South East Asia and was a leading figure in the Liberal Party's plan to outlaw the Communist Party of Australia.[32] In the same year that Sir Percy sought to outlaw the Communist Party of Australia, the South African Parliament passed an Act outlawing the Communist Party of South Africa.[33] In his landmark speech on Australia's foreign policy that Sir Percy delivered to the House of Representatives in March 1950, he echoed Churchill when he warned that Soviet policy was global in character, controlled from the centre, and sought the universalization of Communism.[34]

3.1. Sir Percy's article in *Foreign Affairs*

Given the Soviet Union's role in promoting self-determination in the Western colonies but not in its own sphere of influence, Sir Percy had reason to believe that self-determination was a Communist doctrine being advanced at the UN with a view to ending European colonialism and advancing 'Soviet imperialism'. What else could explain the forthright anti-Communism that Sir Percy expressed in the pages of *Foreign Affairs* in 1951?

Written at the height of the Korean War (1950–1953), just before Sir Percy was appointed Australia's Ambassador to the United States, he warned Americans that:

> International Communism is not passive. Its agents move among the Asian people preaching doctrines of national independence, of reform, of social equality, of economic development, and the elimination of the evils of landlord-tenant relations and other material burdens that weigh upon the people.[35]

In his view, Communism was an instrument of internal intervention.

> It works with and among the people. It exerts its influence on the minds and political life of the community by methods which the non-Communist world must avoid at

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31 P. Spender, *Self-determination: Statement by the Chairman of the Australian Delegation in the Third Committee of the General Assembly*, 14 November 1952, at 3 (emphasis added). A copy of the speech is available in Rights of Peoples and Nations to Self-Determination, Series Number A1838, Control symbol 856.13.16. PART1, Australian National Archives.

32 See D. Lowe, *Australian between Empires: The Life of Percy Spender* (2010), 128. See also, D. Lowe, *Menzies and the 'Great World Struggle': Australia's Cold War 1948-1954* (1999), 65–70.

33 See 'Act to declare the Communist Party of South Africa to be an unlawful organization; to make provision for declaring other organizations promoting communistic activities to be unlawful and for prohibiting certain periodical or other publications; to prohibit certain communistic activities; and to make provision for other incidental matters' (Assented to on 26 June 1950).

34 See P. Spender, 'Statement on Foreign Policy by the Minister of External Affairs in the House of Representatives 9 March 1950', reproduced in P. Spender (ed.), *Politics and a Man* (1972), 307, at 310.

35 P. Spender, 'Partnership with Asia', (1951) 29(2) *Foreign Affairs* 206.

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> peril of arousing the resistance of government and people determined to reject all forms of 'Western imperialism'.[36]

He thought that Asian nationalism was particularly susceptible to Communism:

> Some examination of the main ingredients in Asian nationalism will suggest how readily a Communist minority can win support and eventual power when it is organised internally and is prepared to use force in pursuit of its aims, and is also subtle in its appeal to the desires and fears of the masses.[37]

Communism was attractive to Asians, Spender reasoned, because liberalism was difficult to reconcile with a social system centring in most cases upon the family unit within the larger organism of paternalistic government.[38]

Sir Percy was concerned with Asian nationalism in the 1950s given the conflicts in Korea, Indonesia, and Indochina, and Australia's quest for an arc of security from Malaya to the Pacific, but his concerns were valid elsewhere.[39] It does not appear to have occurred to Sir Percy that Communists like Ho Chi Minh and Mao Tse-tung only turned towards Communism after the West had rejected their appeals for self-determination.[40] In the black-and-white world that Sir Percy inhabited in 1950s America, liberalism and Communism were irreconcilable.[41] There could be no middle path. Political neutrality in the Cold War was therefore a dangerous deception, as Sir Percy observed:

> [T]here is a belief that the new nations of Asia stand exposed to the continuous pressure of Soviet Communist intervention, and that their prospects of withstanding it are not encouraging so long as they resist cooperation with the non-Communist world, particularly since an agency of Communist penetration lies ready at hand in the Chinese minorities throughout Southeast Asia. According to this view, political neutrality in the global conflict, which many Asians see as the only condition under which they can apply themselves to the immense task of improving economic welfare, is a dangerous deception. Communist imperialism will not accept a power vacuum in Asia.[42]

Although Sir Percy was principally concerned with Asian Communism when he wrote this article, the Cold War would move from Asia to Africa in the 1960s during the *South West Africa Cases*.[43] Notably, after the Sharpeville Massacre (21 March 1960) the South African Government declared that the Pan-Africanist Congress of Azania

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36 Ibid., at 206–7.
37 Ibid., at 207.
38 Ibid., at 208–9.
39 See Lowe, *supra* note 32, at 123–41. See also, J. Crawford, '"Dreamers of the Day": Australia and the International Court of Justice', (2013) 14 *Melbourne Journal of International Law* 530.
40 See E. Manela, *The Wilsonian Moment. Self-Determination and the International Origins of Anticolonial Nationalism* (2007), 2–3, 195–6.
41 See C. Waters, 'After Decolonization: Australia and the Emergence of the Non-aligned Movement in Asia, 1954-55', (2001) 12 *Diplomacy & Statecraft* 153, at 161–2.
42 Spender, 'Partnership with Asia', *supra* note 35, at 211.
43 See Andrew and Mitrokhin, *supra* note 18, at 423–49. See also, C. Andrew, *The Defence of the Realm: The Authorized History of MI5* (2010), 452 (writing that the KGB established a foreign intelligence arm on sub-Saharan Africa in 1960).

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(PAC) and the African National Congress (ANC) were illegal organizations under the Suppression of Communism Act.[44]

3.2. Sir Percy addresses the American Society of International Law

In 1952, Sir Percy gave a lecture on 'Law, Morality, and the Communist Challenge' to the annual meeting of the American Society of International Law.[45] Sir Percy explained that he did not speak of Communism as a political philosophy but of the practice of 'imperialistic Communism' that was 'challenging the free world'.[46] In Sir Percy's view, Moscow had been challenging the basic 'substratum of the Charter' since 1946.[47] This was the year when Churchill gave his 'Iron Curtain' speech. Even more disturbing, in Sir Percy's view, was the influence that Communist Russia was having on the new nations of the UN:

> [W]ithin the United Nations today there are some nations which – perhaps unconsciously taking a leaf from Russia's book – are less concerned about the principles of the United Nations than they are with getting something for themselves out of the United Nations. There are some nations which are less concerned with obligations under the Charter than they are with rights under the Charter. And there are a few nations, I regret exceedingly to say, which are prepared to use the United Nations, exercising pressure, exercising duress, exercising means which are commonly used by Russia, for the purpose of advancing their own ends.[48]

Sir Percy was not alone in seeing self-determination as a Communist doctrine that was being used to advance Soviet imperialism. As W.J. Hudson explained: 'Anti-colonialism, necessarily anti-Western in part, was made almost entirely anti-Western by the Cold War and Australia saw herself very much as a Western power sharing the fate of the West.'[49]

The view that the Soviet Union had hijacked the cause of anticolonialism through its vision of self-determination continued to be advanced in Australia long after Sir Percy had left the Foreign Service. Following the adoption of the Decolonization Declaration, four years after Sir Percy had been elected to the ICJ, Australia's Department for External Affairs requested a Departmental study paper on Communist attitudes to self-determination.[50] The author of the study paper concluded that the Soviet Union's support for self-determination in Africa and Asia was inconsistent and tactical; its aim was to inspire 'world socialist revolution' and amounted to

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44 'S. Africa bans negro groups', *The Washington Post*, 9 April 1960, A4; 'S. African government bans two negro groups: situation is tense: arrests continue', *Times of India*, 9 April 1960, 1; 'South Africa seizes 100 and bans two groups: we'll go underground negro leader says', *Chicago Daily Tribune*, 9 April 1960, 3.

45 P. Spender, 'Law, Morality, and the Communist Challenge', (1952) 46 *Proceedings of the American Society of International Law at its Annual Meeting* 190.

46 Ibid., at 190.

47 Ibid., at 194.

48 Ibid., at 194.

49 W.J. Hudson, *Australia and the Colonial Question at the United Nations* (1970), 175.

50 Department of External Affairs, 'Self-determination and Communism', Canberra, 8 August 1961, Circular Memorandum No. 79, Australian Archives: Series Number A1838, Control symbol: 563:6:13:1; Although the study paper was classified as Restricted, it was sent to overseas posts (especially those in Asia and Africa).

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'naked opportunism'.[51] As the author of the study paper observed, the Soviet Union was very flexible when it came to defining 'the people' entitled to self-determination.[52]

What Australia's Department for External Affairs and other foreign ministries did not appear to appreciate was that many of the leaders in Africa and Asia found Communism attractive, not because they wanted to emulate the politics of the Soviet Union, China, and Cuba, but because Communism was an ideology that appeared to support their claims to independence and included Africans and Asians as peoples entitled to self-determination.[53]

3.3. Australia defends South Africa at the UN

Throughout the 1950s, Australia opposed African self-determination and stood by South Africa despite increasing international criticism of apartheid. Tucked away with Sir Percy's papers at the National Library of Australia is a copy of a speech delivered on 14 November 1952 by Patrick Shaw, Australia's delegate to the UN Political Committee defending South Africa's right to pass racially discriminatory legislation within its domestic jurisdiction:

> With reference to the South African legislation, I would remark merely that each country has its own political and moral philosophy, its own economic and social history and consequently its own laws and customs. It would be remarkable if we here were collectively or individually to approve fully all the laws and customs of other countries. In fact, there may be cases where a number of us disapprove quite strongly, but the merit or demerit of domestic laws is not the point at issue. The point is whether they come within the competence of the United Nations Charter.[54]

When the speech was delivered, Sir Percy was Australia's Ambassador to the United States, but he was also chairman of Australia's delegation to the UN where he exerted great influence. According to David Lowe, Sir Percy had requested the post of Ambassador when he realized there was no immediate prospect of Robert Menzies stepping aside as Prime Minister to make way for him.[55] Although the speech was delivered by Shaw, who was then permanent delegate to the European headquarters of the UN, it is likely that Spender would have reviewed it, given that he was chairman of Australia's delegation to the UN. Sir Percy was known to 'keep a close eye on all of the most significant matters'[56] in the cables between Canberra and Washington, and 'regarded himself less an ambassador than a second Minister of External Affairs'.[57]

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51 Ibid., at 8.
52 Ibid.
53 See N. Mandela, *The Autobiography of Nelson Mandela: Long Walk to Freedom* (2013), 335. See also Kattan, *supra* note 6.
54 P. Shaw, 'Apartheid: Statement by the Australian Delegate', 14 November 1952, in Personal papers of Sir Percy Spender, National Library of Australia, File 4875, Box 14, at 3.
55 Lowe, *supra* note 32, at 141.
56 D. Lowe, 'Percy Spender, Minister and Ambassador', in J. Beaumont et al. (eds.) *Ministers, Mandarins and Diplomats: Australian Foreign Policy Making, 1941-1969* (2003), 62, at 77.
57 D. Lowe, 'Australia at the United Nations in the 1950s: The Paradox of Empire', (1997) 51 *Australian Journal of International Affairs* 174.

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This was much to the chagrin of Richard Casey, Sir Percy's successor, whose cables to Spender 'soon bore Menzie's signature' in addition to his own.[58]

Australia did not think that the UN had the competence to pass judgment on South Africa's legislation on the basis of the provision enshrined in Article 2(7) of the Charter, which provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter[.][59]

As Annemarie Devereux explains, Sir Percy was the 'driving force' behind Australia's statements opposing self-determination and defending South Africa on the basis of the domestic jurisdiction provision in Article 2(7) of the UN Charter throughout the 1950s.[60]

Sir Percy and other Australian officials probably also had Australia's restrictive immigration policy in mind in formulating Australia's position towards South Africa's right to adopt its own legislation. In 1950, Sir Percy told the House of Representatives in Canberra that 'the White Australia Policy was based on the homogeneity of our people and that policy would be continued, whatever government was in power in Australia'.[61] When Sir Percy delivered this speech, he had just returned from a goodwill trip to Asia where he had attempted to convince Australia's sceptical neighbours that the White Australia Policy was not targeted at them. Judging by the press reactions in these countries he was not successful. *The Singapore Morning Post*, for example, warned Australians: 'Asia's anger is growing faster than Australia's population. One day the people of Asia will be compelled to rise and crush this insulting ideology.'[62] As Sean Brawley explains, the Liberal Party did not repeal the most egregious elements of Australia's restrictive immigration legislation after they won the 1949 election which 'continued to be as discriminatory as their Labor predecessors had been'.[63]

The White Australia Policy was a contentious issue between Australia and India with New Delhi comparing Australia's policy to those of South Africa. In 1946, India even 'threatened a trade embargo and promised to turn up the heat on the White Australia Policy in the General Assembly'.[64] Australia subsequently abstained from a resolution criticizing South Africa – shocking South Africa and the old dominions. Australia would only resume its policy of voting against resolutions critical of South Africa when the Liberal government came to power following the 1949 general election. Australian votes at the UN would remain pro-South African until Australia

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58 Ibid., at 174.
59 Shaw, *supra* note 54, at 6.
60 A. Devereux, *Australia and the Birth of the International Bill of Human Rights, 1946-1966* (2005), 110.
61 See P. Spender, 'Statement made in Parliamentary Debates', House of Representatives, Parliament of Australia, 23 February 1950, Hansard, at 5.
62 Quoted in S. Brawley, *The White Peril: Foreign Relations and Asian Immigration to Australasia and North America 1919-78* (1995), 250.
63 Ibid., at 253.
64 Ibid., at 285.

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found itself isolated in the General Assembly in 1961.[65] This was the year South Africa left the Commonwealth. Tellingly, South Africa's lawyers referred favourably to the White Australia Policy in their Rejoinder to the Applicants' arguments in the *South West Africa Cases* as a necessary measure of 'devising immigration policies in such a way as to preserve Australia's national homogeneity and to prevent the immigration of inassimilable elements'.[66] It was not until 1967 that the Holt Government saw Australians vote by a 90 per cent majority to change the Australian constitution to include all Aborigines in the national census and allow the Federal Parliament to legislate on their behalf.[67]

Sir Percy even received support from South Africa's Prime Minister J.G. Strydom – known for his uncompromising Afrikaner nationalist views – during his election to the ICJ in 1957, even though South Africa was boycotting the UN at the time.[68] Eric Louw, South Africa's Foreign Minister had to make a special exception to lobby for Sir Percy.[69] The exception was worth making because South Africa realized that it 'would be unlikely to get a more favourable judge than Sir Percy on legal issues affecting Article 2(7) and South Africa'.[70]

Invoking Article 2(7) was also useful to Australia in contesting Indonesia's claims to Dutch New Guinea/Irian Jaya. During the Cold War, control of the whole of the island was considered essential to Australia's security.[71] In his landmark speech to the House of Representatives in 1950, Sir Percy explained that Australia would do whatever was necessary to defend New Guinea and the rest of Melanesia from attack to avoid a repeat of the Second World War:

> These islands are, as experience has shown, our last ring of defence against aggression, and Australia must be vitally concerned with *whatever changes take place in them*. It is not to be assumed by any one that should fundamental changes takes place in any of these areas, Australia would adopt a purely passive role. I have in mind particularly, but not exclusively, New Guinea, which is an absolutely essential link in the chain of Australian defence. The Australian people are deeply interested in what happens *anywhere in New Guinea*. As regards Australian New Guinea it is our duty to ensure that it is administered and developed in a way best calculated to protect the welfare of the native inhabitants and at the same time to serve Australia's security interests.[72]

Note that Sir Percy was not just speaking about Australian New Guinea but New Guinea as a whole. In 1950, this would have included Dutch New Guinea. For Sir

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65 Ibid., at 286–7.

66 See Rejoinder of South Africa, *South West Africa Cases*, [1966/Vol. V] ICJ Pleadings, *supra* note 5, at 195–6, para. 17.

67 G. Bolton, *The Oxford History of Australia: Volume 5: 1942–1995. The Middle Way* (2005), 190–4.

68 See Inward Telegram to Commonwealth Relations Office from Acting UK High Commissioner in South Africa 27 July 1957 (copied to Fitzmaurice, among others) in FO 371/129893, TNA.

69 See letter from Vincent Evans to Francis Vallat, 3 July 1957, FCO 371/129892, TNA.

70 See the memo (No. 335) dated 13 July 1957 from H. Gilchrist to Canberra, summarizing a conversation he had with Botha, Counsellor in charge of the International Organizations Division at the Foreign Ministry, regarding an Australian aide memoire seeking South Africa's support for Sir Percy's candidature at the International Court. International Court of Justice – Nomination of Australian Candidate (part 4) Series number A1838 Control symbol 852/18/4/1 PART 4, Australian National Archives.

71 See Lowe, *supra* note 56, at 85.

72 See 'Statement on Foreign Policy by the Minister of External Affairs in the House of Representatives 9 March 1950' reproduced in Spender, *Politics and a Man*, *supra* note 34, at 320 (emphasis added).

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Percy, New Guinea was as important to Australia as South West Africa was to South Africa. Moreover, Australian rule in Australian New Guinea was not so different from South Africa's rule in South West Africa.[73]

3.4. Self-determination in the service of world Communism

On the day Patrick Shaw delivered his statement on South Africa to the Political Committee, Sir Percy was giving a statement to the Third Committee on a draft resolution that sought to apply self-determination to non-self-governing territories and not just to trust territories, which he saw as a dangerous departure from the Charter. In this speech, Sir Percy admitted that:

> The question of minority groups in a country is a difficult one, and is one to which the United Nations has given and is still giving much consideration, and it cannot be solved by a facile reference to the principle of self-determination. In other words, in the modern world in which we dwell, a country must be of such a size, in area and population, and in natural and potential economic resources, as to permit it to survive. *I know the leaders of one great country, the Soviet Union, would welcome the fragmentation of existing nations, since it would facilitate their aggressive designs, but we should not allow the benign principle of self-determination, to be used in the interests of world communism.*
>
> An attempt is being made in the resolution before us *to distort the principle of self-determination further, by confusing it with the relationship between territories, whether Trust Territories or non-self-governing territories, and the Powers administering them.* This relationship is a distinct one, and indeed, the Charter has devoted three Chapters [Chapters XI, XII and XIII] to principles and procedures applicable in such cases. These chapters are carefully drafted, and represent a workable code for ensuring that territories develop and advanced towards such a state when they can govern themselves. *To extend or alter this code is both dangerous and unwise.* This is particularly so when it is done in disregard of the Charter. To endeavour to apply the principle of self-determination, *which has nothing to do with the attainment of self-government by territories*, or to extend or alter these provisions, will not serve the best interests of the territories, nor the United Nations.[74]

Sir Percy was insisting on maintaining the distinction between self-government that had found expression in the League of Nations Mandates system and in Chapters XI, XII and XIII of the UN Charter as opposed to the Soviet Union's doctrine of self-determination that sought immediate independence for all territories regardless of whether they were categorized as trust or non-self-governing territories. But he did not get his way. Instead, the General Assembly adopted Resolution 637 (VII) A, which recommended that the states responsible for the administration of non-self-governing and trust territories 'take practical steps, pending the realization of *the right of self-determination* … to ensure the *direct participation of the indigenous populations* in the legislative and executive organs of government … [and] to

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73 For a description of Australia's administration of Mandate New Guinea see S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015), 299–314. See also, D. Ryan, 'Preparing for self-government? Black v. white in New Guinea', *The Observer*, 7 February 1959, in 'New Guinea and Nauru Trust Territories – Self-government', Series Number A463, Control symbol 1957/1410 National Archives of Australia.

74 Self-determination: Statement by the Chairman of the Australian Delegation (Sir Percy Spender) in the Third Committee of the General Assembly 14 November 1952 at 5. A copy of the speech is available in Rights of Peoples and Nations to Self-Determination, Series Number A1838, Control symbol 856.13.16. PART1, Australian National Archives (emphasis added).

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prepare them for *complete* self-government or independence'.[75] This is quite different from what the UN Charter says about non-self-governing territories in Article 73, which uses the word self-government, not self-determination. The association of self-determination with the necessity of taking practical steps to ensure the direct participation of the indigenous populations in the legislative and executive organs of government with a view to preparing them for complete self-government or independence posed a conundrum for those states like Australia, Canada, South Africa, and the United States, which did not allow their indigenous populations to participate in the legislative and executive organs of government in the 1950s.

Part C of the same resolution called on the Economic and Social Council to ask the Commission on Human Rights to continue preparing recommendations concerning international respect for right of peoples to self-determination.[76] This took the form of a draft convention on human rights to which it was proposed that self-determination find expression in the very first article. Importantly, the draft did away with the distinction between trust and non-self-governing territories that would eventually find expression in Common Article 1 of the Human Rights Covenants.[77] Unsurprisingly, given Sir Percy's punctilious interpretation of the UN Charter and his sensitivity towards self-determination he opposed the suggestion to include an article on self-determination in the draft Human Rights Covenants.

3.5. Self-determination is not a human right

Accordingly, in 1955, when the UN took up the General Assembly's recommendation to include an article on self-determination in the draft human rights covenant, Sir Percy, still chairman of the Australian delegation to the Third Committee, explained that he wanted to delete all references to self-determination. The reason for deleting the article on self-determination, in Australia's view, was because self-determination was not a human right:

> Now it has been argued by several of my distinguished colleagues in this Committee who favour the inclusion of Article 1 in the Covenants, that self-determination is a condition for the enjoyment of basic human rights. This assertion can certainly not be upheld by reference to the Charter and it is certainly curious, as was pointed out a few days ago by the representative of the United Kingdom in his very comprehensive review of the issue before us, that the Universal Declaration of Human Rights which was adopted in 1948, did not contain an article on this so-called right of self-determination if, as is now contended, it is a condition for the enjoyment of all other rights.[78]

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75 UN General Assembly Resolution 637 (VII) A, 16 December 1952, UN Doc. A/RES/7/637, (emphasis added). The Resolution was adopted by 40 in favour to 14 against with six abstentions. Australia, Belgium, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Sweden, South Africa, United Kingdom, and the United Sates voted against the Resolution.

76 Ibid.

77 See Common Art. 1(3) in UN General Assembly Resolution 2200A (XXI), 'International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR) and Optional Protocol to the International Covenant on Civil and Political Rights', 16 December 1966, UN Doc. A/RES/21/2200.

78 Draft International Covenants on Human Rights. Article 1 – self-determination. Statement in the Third Committee by the Chairman of the Australian Delegation (Sir Percy Spender), 29 October 1955, 4. Australian National Archives: Rights of Peoples and Nations to Self-determination, Series Number: A1838, Control symbol: 856:13:16 Part 2.

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What Sir Percy and the representative of the United Kingdom did not mention is that an article on self-determination was proposed for inclusion in the Universal Declaration of Human Rights by the Soviet Union in 1948 but this was opposed by the United Kingdom and the other European colonial powers at the time who prevented the proposal from being adopted.[79]

4. Self-determination during the *South West Africa Cases*

Ethiopia and Liberia instituted proceedings against South Africa on 4 November 1960, six weeks *before* the General Assembly adopted the Decolonization Declaration on 14 December that defines self-determination.[80] Therefore, the Applicants could not refer to the Decolonization Declaration in their Application but had to argue instead that South Africa was:

> [S]uppressing the rights and liberties of inhabitants of the Territory essential to *their orderly evolution* toward *self-government*, the right to which is implicit in the Covenant of the League of Nations, the terms of the Mandate, and *currently accepted international standards*, as embodied in the Charter of the United Nations and the *Declaration of Human Rights*.[81]

The Declaration of Human Rights was a reference to the Universal Declaration of Human Rights, which in contrast to the Draft Human Rights Covenants, does *not* mention self-determination.

Accordingly, the Applicants argued that actions by the Union of South Africa breached its obligations under Article 2 of the Mandate for South West Africa and Article 22 of the Covenant of the League of Nations – neither of which mention self-determination.[82]

4.1. The Applicants omit the Decolonization Declaration

Importantly, Ethiopia and Liberia did not reference the Decolonization Declaration in the Memorial they submitted to the ICJ on 15 April 1961, even though this was submitted to the ICJ five months *after* the UN General Assembly had adopted the Decolonization Declaration on 14 December 1960.[83] The omission of the Decolonization Declaration from the Memorial submitted by Ethiopia and Liberia was significant, as the General Assembly would make explicit reference to the

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79 On the Soviet proposal see J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999), 101.

80 *South West Africa Cases*, [1966/Vol. I] ICJ Pleadings, *supra* note 5, at 3.

81 Ibid., at 22, para. H (emphasis added).

82 The full text of the Mandate for South West Africa is reprinted in J. Dugard, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (1973), 72–4.

83 Richard Falk, who was later brought in as one of the counsels for Ethiopia and Liberia, suspects that Ernest Gross, the lead counsel, did not want to upset the US State Department where he had close ties, having previously worked for them. This might explain why the Decolonization Declaration was not referenced in the Memorial but it does not explain why the word 'self-government' was replaced with 'self-determination'. Email correspondence between the author and Falk dated 3 August 2017 (on file with author).

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Decolonization Declaration in the resolution revoking the Mandate in 1966 following the ICJ's decision in the second phase of the *South West Africa Cases*.[84]

The omission of the Decolonization Declaration in the Memorial is surprising given that Ethiopia and Liberia claimed in the same document that 'the Union, by word and by action … has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for *self-determination* by the inhabitants of the Territory'.[85] The applicants had replaced the word 'self-government' in paragraph H of the Application Instituting Proceedings with 'self-determination' in paragraph 5 of the Memorial. Gone was the reference to the '*orderly evolution* toward *self-government*' that had been replaced with an explicit reference to self-determination that might not be so orderly. The decision to include a reference to self-determination in the Memorial without referring to the Decolonization Declaration is startling when we bear in mind that self-determination had just been defined in that declaration, which made headline news all over the world.[86]

In the Memorial, the reference to 'the orderly development of self-government in the territory' was changed to the 'duty to accord full faith and respect to the international status of the Territory'.[87] The reference to 'full faith' and 'respect' for the status of the territory appeared to imply that South Africa was obliged to terminate the Mandate as soon as possible. When we consider that the applicants had also asked the Court to adjudge and declare that South Africa cease practising apartheid,[88] the conferral of self-determination on the people of South West Africa would have resulted, once South Africa had ceased practising apartheid in South West Africa and once 'full faith' and 'respect' had been accorded to the territory, in political power being transferred from the European minority to the African majority.

The leading South African counsel, D.P. de Villiers, had clearly done his homework and skilfully played to Sir Percy's concerns by linking Ethiopia's and Liberia's demands for self-determination in South West Africa to Communism, alleging that they sought the 'abolition of all differentiation between groups, treatment of the whole population as a unit, and universal adult male suffrage' which South Africa noted had 'also been pressed by majority groups at the United Nations in recent years'.[89] South Africa also claimed that Ethiopia and Liberia wanted to create 'one single and integrated society in which all individuals have identical rights'.[90] Ernest Gross responded by describing this claim as a parody of the applicant's true

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84 See UN General Assembly Resolution 2145 (XXI), 27 October 1966, UN Doc. A/RES/21/2145, para. 1.

85 See Memorial of Ethiopia, *South West Africa Cases*, [1966/Vol. I] ICJ Pleadings, *supra* note 5, para. 5 (emphasis added).

86 See 'Soviet initiative pleases Africans: Plea for Independence to Colonial People', *The Times of India*, 27 September 1960, at 7; 'Freedom for all colonies is very essential: Soviet premier urges UN Assembly debate', *The Times of India*, 14 October 1960, at 7; J. Zullo, 'Red liberation banner a lie, US tells UN', *Chicago Daily Tribune*, 7 December 1960, at A4; 'UN to Publicize Declaration', *The New York Times*, 31 October 1961, at 5.

87 Memorial of Ethiopia, *South West Africa Cases*, [1966/Vol. I] ICJ Pleadings, *supra* note 5, at 198, para. 5.

88 See the Application Instituting Proceedings, ibid., at 20, para. F; and the Memorial of Ethiopia, ibid., at 197, para. 3.

89 See Rejoinder of South Africa, *South West Africa Cases*, [1966/Vol. V] ICJ Pleadings, *supra* note 5, Ch. IV, at 243, para. 3.

90 See ibid., at 48.

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position ('no such society has ever existed in the history of man'[91]) and referred to the judgments of various UN organs in support of their claims.[92]

Although the words self-government and self-determination were used interchangeably in the interwar years, the concept of self-determination had acquired a new and different meaning on 14 December 1960 in the Decolonization Declaration. And this is where the problem lay, because self-government and self-determination are, in fact, very different things.

4.2. Political change outside the court room

Arguably, for many of the judges in The Hague, steeped in the history of nineteenth century liberalism, the demand for majority rule was too much. The early 1960s would have been a frightening time for some of these judges who were not acclimatized to the social unrest and political changes that were unfolding before their eyes not only in the colonies but also in the major cities of North America and Europe. Between 1960 and 1966, there was the Cuban Missile Crisis, President John F. Kennedy and Malcolm X were assassinated, Congress passed the Civil Rights Act, and the United States became involved in the Vietnam War to protect South Vietnam from North Vietnamese Communist 'aggression' following the Gulf of Tonkin Resolution.

On the African continent, the Algerian War of Independence was also galvanizing the cause of anticolonialism and provided further succour to the call for self-determination. The Cuban Revolution would have also been viewed with suspicion given Castro's close relations with the Soviet Union. Khrushchev was pictured with Castro and Malcom X at the Hotel Theresa in Harlem, New York, in the same session of the General Assembly that produced the Decolonization Declaration.[93] In one of the longest plenary speeches in UN history, delivered by Castro to the General Assembly that produced the Decolonization Declaration, he explained that the right of a people to self-determination, by means of revolution if necessary, to throw off colonialism or any type of oppression, was recognized in Philadelphia with the American declaration of 4 July 1776.[94] Sir Percy had spent many a holiday in Cuba before the Revolution enjoying the delights of Havana when he was Australia's Ambassador to the United States.[95] It is doubtful whether he would have viewed the Cuban Revolution with equanimity.

Sir Percy's opposition to self-determination in the draft Human Rights Covenants has already been mentioned. He would not soften his opposition to self-determination when he became a Judge. We can have an inkling of what was going on in the minds of close confidants of Sir Percy during the *South West Africa Cases*, and what they thought of the political and social changes taking place outside the

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91 See the reply of Mr. Gross in *South West Africa Cases*, [1966/Vol. IX] ICJ Pleadings, *supra* note 5, at 249.

92 Ibid., at 248–9.

93 See W. Taubman, *Khrushchev* (2003), 475; V. Skierka, *Fidel Castro: A Biography* (2004), 96–8; R. Gott, *Cuba: A New History* (2004), 225; J.L. Anderson, *Che Guevara: A Revolutionary Life* (2010), 459–60.

94 See F. Castro, 'Speech at the United Nations General Assembly, New York, September 26, 1960', in D. Deutschmann (ed.), *Fidel Castro Reader* (2007) 137, at 175.

95 In 1957, 'Sir Percy had toured the nightclubs of Havana'. See Lowe, *Australian between Empires*, *supra* note 32, at 147.

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court room, from correspondence Sir Percy kept in his papers at the National Library of Australia. Consider the correspondence Sir Percy kept with Walter Crocker, Australia's Ambassador in The Hague. In a letter dated 23 September 1963, just before Sir Percy was elected President of the Court, Crocker wrote Sir Percy a reply in response to Sir Percy's request for more information on the principle of 'one man, one vote'. The letter was written after Sir Percy had persuaded the Court to question Zafrulla's suitability to become Judge *Ad Hoc* in the first phase of the cases but came before Zafrulla's re-election when Sir Percy would pressure Zafrulla to recuse himself.[96] Ambassador Crocker explained to Sir Percy that:

> A considerable number of the evils from which we now suffer come from the French Revolution, including Communism or Bolshevism. But some of the ideas go back much further, e.g., the movements launched by the translation of the Bible into the vernacular by the Lollards and others (cf. Jack Cade's or the Peasant's Revolt), and even into the heresies of the Middle Ages … The theme of 'One Man One Vote' is worth your pen and your intelligence. It has become enormously mischievous, and with the increasing pressure of the population problem, the pampered Welfare State urban proletariat, and Admass societies (i.e., mass culture), risks wrecking democracy – risks paving the way for plebiscitary dictatorships of tyrannies.[97]

After the 1966 decision was delivered, a similar sentiment was conveyed to Sir Percy by Basil Hone, a friend from Havana, where Sir Percy had spent many a holiday before the Revolution:

> When I had the pleasure of meeting you at the British Embassy ten years ago, I offered one piece of advice. It was to beware your dealings with those countries which do not play cricket! Reading of your decisive vote on the subject of S.W. Africa, I wish to convey my admiration for the courage your decision showed, in which countless of our countrymen join. Our hard won rights to live under the Rule of Law are often overlooked. To grant equal voting rights to everyone, however, ignorant or unprepared they may be, is one of our greatest dangers.[98]

Sir Percy kept these letters along with other correspondence, including letters from Sir Gerald, and the scorecard for the 1966 decision, in his personal files that have been preserved at the National Library of Australia.[99] He therefore must have attached some importance to them.

4.3. The Soviet Union and South Africa

The view that 'one man, one vote', risked wrecking democracy and paving the way for plebiscitary dictatorships of tyrannies, and that granting equal voting rights to everyone was dangerous, would find support in South Africa's pleadings: 'experience has shown that major ethnic differences need much more delicate handling than the crude principle one man one vote in an integrated society which is proposed

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96 See Kattan, 'Decolonizing the International Court of Justice', *supra* note 3, at 337–45.

97 Letter from Walter Crocker, Australian Embassy, The Hague to Sir Percy Spender, 23 September 1963 in the personal papers of Sir Percy Spender, National Library of Australia, File 4875, Box 14.

98 Letter from Basil Hone, Lloyd's Agent, Havana, Cuba to Sir Percy Spender, 23 August 1966 in the personal papers of Sir Percy Spender, National Library of Australia, File 4875, Box 14.

99 See P. Spender and J.M. Spender, Papers 1937–1978, MS 4875, National Library of Australia, Canberra.

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by the Applicants'.[100] South Africa referred to examples in other African countries where 'the creation of dictatorial single party systems of government in a number of African territories may well be the necessity of curbing inter-group frictions'.[101] F.W. de Klerk, the last head of state of South Africa under the apartheid era, recalls that in the 1960s South African newspapers:

> were full of horror stories brought back by white refugees from the Congo and other newly independent territories, where the hasty transfer of power to former revolutionaries had led in many instances to the collapse of effective government and law and order.[102]

He added: 'I – like most whites – was also deeply concerned about the influence of the South African Communist Party on the ANC'.[103]

Dictatorial single party systems of government were associated with Communist regimes during the Cold War, because Lenin had argued that a dictatorship of the proletariat was the intermediary period that was necessary for states to pass through in their transition from capitalism to Communism.[104] From a young age, Lenin had been opposed to the United States policy of racial segregation.[105] He had also been interested in developments in South Africa because of the size of its indigenous labour force, its small European population, and its importance to the global economy.[106]

In 1928, Comintern's Sixth Congress decreed that:

> [T]he Communist Party of South Africa must combine the fight against all anti-native laws with the general political slogan in the fight against British domination, the slogan of an independent native South African Republic as a stage towards a workers' and peasants' republic with full rights for all races, black, coloured and white.[107]

This resolution was drafted by James La Guma, one of the leaders of the Communist Party of South Africa, and Nikolai Bukharin, chairman of the Comintern.[108] The Communist Party of South Africa was a branch of the Communist International.[109]

In 1949, the radical Programme of Action, adopted by the ANC under the influence of its Youth League contained the demand for self-determination and proclaimed, 'national freedom' as its main principle. 'By national freedom' the document continued, 'we mean freedom from White domination and the attainment of political independence'.[110] In 1955, the Congress of the People, organized by the ANC and its

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100 Rejoinder of South Africa, *South West Africa Cases*, [1966/Vol. V] ICJ Pleadings, 198, para. 18.
101 Ibid., at 200, para. 22. The Rejoinder mentions the Central African Federation, Kenya, and the Congo.
102 F.W. de Klerk, *The Last Trek – A New Beginning* (2000), 38.
103 Ibid.
104 V.I. Lenin, *The State and Revolution* (1926), 194.
105 When Lenin was a young boy his favourite book was H. Beecher Stowe's *Uncle Tom's Cabin* (1852); see R. Service, *Lenin: A Biography* (2000), 43.
106 Andrew and Mitrokhin, *supra* note 18, at 423.
107 A. Davidson et al.(eds.), *South Africa and the Communist International: A Documentary History (1919-1939), Vol. I* (2003) 155, 194, quoted in I. Filatova, 'The Lasting Legacy: The Soviet Theory of the National-Democratic Revolution and South Africa', (2012) 64 *South African Historical Journal* 511.
108 Ibid., at 511.
109 Ibid., at 512, note 13.
110 Ibid., at 522.

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allies, adopted the Freedom Charter.[111] The Freedom Charter demanded full equality for all racial groups – not just political and social equality, but economic equality as well. These goals were very close to the goals of the Communist Party.[112] Also in 1955, the Soviet Union terminated its diplomatic relations with South Africa in protest of its apartheid laws.[113] According to Tom Lodge, the South African Communist Party maintained its links with the Soviet Union throughout the 1950s even though it had been banned, and sponsored visits for members of the party to travel to the Soviet Union and the German Democratic Republic for 'technical training'.[114] Soviet officials even provided money for the purchase of a farm in Rivonia, one of Johannesburg's most affluent suburbs, to serve as headquarters for the ANC in the early 1960s.[115] This was where Walter Sisulu, Govan Mbeki, Raymond Mhlaba, Elias Motsoaledi, Ahmed Kathrada, Denis Goldberg, Harold Wolpe, and other high-ranking leaders from the ANC and the Communist Party were captured.[116]

On 20 January 1960, 11 months before Ethiopia and Liberia instituted proceedings against South Africa at the ICJ, the Central Committee of the Communist Party of the Soviet Union issued a secret decree *On the Broadening of Cultural and Public Ties with Negro Peoples of Africa and Strengthening of Soviet Influence on these Peoples.*[117] In July 1960, Yusuf Dadoo, chairman of the underground South African Communist Party visited Moscow. There he discussed the trade boycott of South Africa, the opening of Radio Moscow broadcasting to South Africa, the distribution of the *Africa Communist* in the Soviet Union, and other matters, including putting forward a policy of armed struggle.[118] In the *Rivonia* trial (1963–1964), Mandela and the others captured at Rivonia were accused, *inter alia*, of conspiracy, engaging in guerrilla warfare aimed at violent revolution, and furthering the aims of Communism.[119] The trial was widely reported in South Africa and overseas.[120] On 25 March 1966, four months before the ICJ delivered its decision in the second phase of the *South West Africa Cases*, Ambassador Nikolai Fedorenko, the Soviet Union's permanent representative to the UN in New York, wrote a letter to UN Secretary-General U Thant explaining that:

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[111] The Freedom Charter, Adopted at the Congress of the People, Kliptown, on 26 June 1955, available at www.marxists.org/subject/africa/anc/1955/freedom-charter.htm.

[112] Filatova, *supra* note 107, at 524.

[113] E. Fein, 'Soviets Move to Re-establish Ties With South Africa', *The New York Times*, 27 February 1991.

[114] See T. Lodge, 'Secret Party: South African Communists between 1950 and 1960', (2015) 67 *South African Historical Journal* 444.

[115] Ibid., at 457–8.

[116] Mandela had not been in the farm on the day of the arrest as he was already in prison. See J. Joffe, *The State vs. Nelson Mandela: The Trial that Changed South Africa* (2007), 13.

[117] Filatova, *supra* note 107, at 515.

[118] Ibid., at 528.

[119] Joffe, *supra* note 116, at 41–2.

[120] See, e.g., the special reports by *The New York Times* in '17 seized in raid in South Africa: Large part of hard core in resistance group held', *The New York Times*, 13 July 1963, 3; '10 on trial again in South Africa: Men accused of sabotage renew attack on charge', *The New York Times*, 26 November 1963, 18; 'Charge outlined at Pretoria Trial', *The New York Times*, 4 December 1963, 16. See also A. Sampson, 'The time bomb ticks: The country's white minority seem more firmly in control than ever, but as independent Black Africa spreads southward, a day of crisis approaches', *The New York Times*, 12 April 1964, SM11; see further 'Lawyer arrested in Johannesburg: counsel in sabotage trial a champion of Africans', *The New York Times*, 10 July 1964, 2.

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> [T]he Soviet Union supports the use of the most determined measures, *including force*, against the South African government in order to compel it to apply the principles of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples to South-West Africa.[121]

As Australia's chief diplomat in the 1950s, Sir Percy had security clearance and would have been privy to information circulated by Australia's Security Intelligence Organisation.[122] We can only speculate what information Sir Percy would have been privy to when he was working at the UN, but it is likely that it would have addressed the Soviet Union's clandestine activities in South Africa as well as its clandestine activities in South East Asia.[123]

4.4. The law of yesterday, not today

The political orientation of the UN had undergone a fundamental change in the 1960s with many of the newly independent states demanding equal rights and majority rule. These changes were not limited to the colonies but were also influencing developments in the United States that had adopted the Civil Rights Act in 1964. The applicants in the *South West Africa Cases* were basing their arguments on recent legal changes and innovations that were new, if not radical, in the early 1960s. In contrast, South Africa was resisting these changes.

It is worth remembering that human rights law was in its infancy in the 1960s. It was still *lex ferenda*. The applicants, therefore, had to prove that a norm of non-discrimination existed. This was a tall order at the time because the norm could only be shown to exist by reference to customary international law whose development is based on state practice and *opinio juris*.[124] This meant that the ICJ would have to consider the views of those states that had recently joined the UN in its assessment of customary international law. Many of these states had aligned themselves with the Soviet Union at the UN in opposing colonialism.

Given that human rights law was in its infancy during the *South West Africa Cases*, Ethiopia and Liberia did not have much to rely on by way of customary international law, and could only reference as general principles of law the following: the Universal Declaration of Human Rights; the Draft Declaration on Rights and Duties of States;

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[121] Filatova, *supra* note 107, at 527, citing *The Soviet News*, 25 March 1966 (emphasis added).

[122] The Australian Government has retained two wholly exempted folios – numbers 57 and 58 under Section 40(5) of the Archives Act 1983 from the following file: International Court of Justice – Ethiopia, Liberia v South Africa, Record Series: A432, Control symbol: 1966/3180. The reason given for the refusal to publish the folios is that their publication would 'damage Australia's security, defence or international relations' under Section 33(1)(a) of the Act. Among the grounds for refusal is the following: 'Intelligence and / or information the disclosure of which could cause damage to Australia's international relations'. The file is dated from 1966. The author's request for an internal reconsideration of the refusal to publish the folios was rejected on 18 July 2014.

[123] According to Westad, 'the CIA kept warning about the increasing radicalization of the African majority – especially after the young Nelson Mandela and others got the African National Congress to adopt a "Program of Action" in 1949[.]' See Westad, *supra* note 18, at 133.

[124] There had been comparatively few studies on the influence of the Afro-Asian bloc on customary international law before 1966. One exception is O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966). See also, C.J.R. Dugard, 'The Legal Effect of United Nations Resolutions on Apartheid', (1963) 83 *South African Law Journal* 44. R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

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the Trust Territory Agreements; other Resolutions of the UN General Assembly (not including the Decolonization Declaration); Resolutions of the Security Council; the Constitution of the International Labour Organization and its resolutions; the Draft Convention on the Elimination of All Forms of Racial Discrimination, (which mentions the Decolonization Declaration in its preamble); the Draft Covenant on Civil and Political Rights and the Draft Covenant on Economic, Social and Cultural Rights (both of which explicitly mention self-determination in Common Article 1); and regional human rights treaties and declarations.[125] And it is significant in this regard, although the applicants do not mention it, that the definition of self-determination in Common Article 1 to the Human Rights Covenants is taken from paragraph 2 of the Decolonization Declaration.

Referencing the Draft Human Rights Covenants would not have been viewed favourably by Sir Percy, who had spent a large part of his diplomatic career vocally attacking the claim that self-determination was a human right in the Third Committee of the UN.

5. The 1966 judgment: A shock and surprise

The *South West Africa Cases* would have provided a good opportunity to address the formation of customary international law in light of the changing composition of the UN General Assembly, especially the opening for signature and ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 21 December 1965.[126] They would have also provided a good opportunity to address the status of self-determination in international law that would find expression in the Human Rights Covenants.[127] But, as is well known, the majority refused to address the merits. Only Judge Van Wyk addressed the merits of the cases from the perspective of the majority:

> The detailed and uncontradicted evidence placed before this Court reveals that these resolutions [referring to UN resolutions and reports about South West Africa] were mainly the result of *concerted action*, by a large number of African States, *assisted by many others*, designed to bring about the *immediate independence* of South West Africa

[125] See the Reply of Ethiopia and Liberia, *South West Africa Cases*, [1966/Vol. IV] ICJ Pleadings, *supra* note 5, at 501–12.

[126] Among the first states to sign ICERD on 7 March 1966 were Belarus, Poland, the Soviet Union and Ukraine. The United Kingdom ratified ICERD on 7 March 1969, Australia on 30 September 1975, and the US on 21 October 1994.

[127] The ICJ would address the formation of customary international law in the *North Sea Continental Shelf Cases* and the *Nicaragua* judgments. See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, [1969] ICJ Rep. 3, at 43–4, paras. 74–7; *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Rep. 14, at 98–101, paras. 186–90. On the status of self-determination, see *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] ICJ Rep. 16, at 31, para. 53; *Western Sahara*, Advisory Opinion, [1975] ICJ Rep. 12, at 31–2, paras. 51–6; *East Timor (Portugal v. Australia)*, Judgment, [1995] ICJ Rep. 90, at 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136, at 171–2, para. 88.

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> *as a single unit* to be governed by the indigenous peoples on the basis of *universal adult suffrage*.[128]

This would appear to indicate that there was a perception by some of the Judges, in addition to Sir Percy, that these cases were part of a concerted effort by the Afro-Asian Bloc to further the aims of international Communism by applying self-determination in South West Africa with a view to ending white minority rule.

On 27 October 1966, the General Assembly reacted to the decision by revoking South Africa's Mandate over South West Africa.[129] After affirming its right to revert to itself the administration of South West Africa, the General Assembly reaffirmed that:

> [T]he provisions of General Assembly Resolution 1514 (XV) [the Decolonization Declaration] are fully applicable to the people of the Mandate territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to *self-determination*, freedom and independence in accordance with the Charter of the United Nations.[130]

Only in paragraph 3, did the General Assembly declare that South Africa had 'failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and had, in fact, disavowed the Mandate'.[131] The General Assembly then purported to terminate the Mandate.[132]

6. Conclusion

During the *South West Africa Cases* (1960–1966) the model of self-government in the League of Nations Mandates system that finds expression in Chapters XI, XII, and XIII of the UN Charter and the model of self-determination that finds expression in the Decolonization Declaration overlapped. This article has shown that, to Sir Percy the arguments advanced by the applicants would have looked like the arguments advanced by the Soviet Union in the 1940s and 1950s that he had observed first hand as Australia's chief diplomat to the UN in the 1950s. The arguments advanced by Ethiopia and Liberia arguably would have appeared problematic to him because they were directed at the nature of the South African regime in South West Africa.[133] The Applicants were arguing that South Africa was not only required to withdraw from South West Africa by ending the Mandate, but that it was also obliged to dismantle the apartheid regime it had established in the territory. This was an argument that had implications for the nature of the system in South Africa itself.

It would have been difficult for the majority to have addressed the merits of the arguments advanced by the Applicants in the *South West Africa Cases* without also

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[128] *South West Africa Cases*, Second Phase, *supra* note 1, 67, at 171 (Judge Van Wyk, Separate Opinion) (emphasis added).
[129] UN General Assembly Resolution 2145 (XXI), 27 October 1966, UN Doc. A/RES/21/2145.
[130] Ibid., para. 1 (emphasis added).
[131] Ibid., para. 3.
[132] Ibid., para. 4.
[133] See also *South West Africa Cases* (Judge Van Wyk, Separate Opinion), *supra* note 128, at 171.

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taking the opportunity to say something about the status of the self-determination in international law and the process of forming customary international law. This meant they would have had to take into account the changing composition of the UN whose membership had increased from 82 members when Sir Percy first joined the court in 1957 to 122 members by 1966 when the judgment was delivered. The refusal of the court to address the status of self-determination in international law in the second phase was made all the more remarkable by the fact that within six months of the ICJ's decision in the second phase of the *South West Africa Cases*, the UN General Assembly adopted the Human Rights Covenants *unanimously*, including Common Article 1, which defined self-determination as the primordial human right that applied to *both* trust territories and to non-self-governing territories.[134]

Sir Percy had misread the changing political scene in the 1960s that had been ushered in by the Decolonization Declaration. The political orientation of the international community had been fundamentally altered and could not be arrested by a single court decision, even if that court was the principal judicial organ of the UN. That Sir Percy went so far as to lecture his colleagues not to address the merits of the cases in their separate opinions was testimony to the pugnacious nature of his personality; one that did not escape comment.[135]

[134] See UN General Assembly Resolution 2200A (XXI), *supra* note 77.

[135] *South West Africa Cases*, Second Phase, *supra* note 1, at 51–7 (Declaration of Judge Sir Percy Spender). See the comments by Crawford, *supra* note 39, at 536. Sir Percy was known to have an irascible personality. See, e.g., the comments by British officials in 'Secret: Sir Percy Spender', DO 35/10789, TNA.

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