The ICJ and South West Africa (Namibia): A Retrospective Legal / Political Assessment

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Abstract: No single political issue has engaged the ICJ more than that of South West Africa (Namibia). Over a period ranging from 1949 through 1971, recourse was had to the Court, both in its advisory and contentious capacities, on various aspects of the problem. Even today, after Namibia attained independence, the Court's jurisprudence and the saga of UN-Court relations in this matter continue to intrigue. This is because the questions raised have continuing relevance to many issues bearing on international law and international relations.

Much has been, and will be, written on the approach of the Court and of individual judges to a panoply of international legal questions raised in the course of the judicial proceedings. But, in fact, the long tale also offers researchers an enticing fountain of material on the role of law and adjudication in international relations, on the interaction between the UN judicial and political fora and, more broadly, between law and politics. This article focuses mainly on these latter, relatively neglected, aspects because it is with respect to these that the benefit of hindsight offers the ability to reassess and revise some of the earlier assumptions and to note some interesting paradoxes not readily discernible at the time. Perhaps revision of some of the axiomatic propositions long perpetuated in the field will offer better guidance to those seeking to enhance the role of international adjudication in world affairs.

1. Continuing Significance of the South West Africa (Namibia) Saga

No single political issue has engaged the ICJ more than that of South West Africa (Namibia). Over a period ranging from 1949 through 1971, recourse was had to the Court, both in its advisory and contentious capacities, on various aspects of the problem. Four advisory opinions[1] and two judgments[2] were deliv-

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1. International Status of South West Africa, Advisory Opinion of 11 July 1950, 1950 ICJ Rep. 128; Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955, 1955 ICJ Rep. 67; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of 1 June 1956, 1956 ICJ Rep. 23; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, 1971 ICJ Rep. 16.

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ered. Even today, after Namibia attained independence, the Court's jurisprudence and the saga of UN-Court relations in this matter continue to intrigue. This is because the questions raised have continuing relevance to many issues bearing on international law and international relations.

In the legal sphere, the Court's proceedings and the rich lode of majority and minority opinions are cited on such questions as (to name a few): objective regimes in international law; the 'consensus' method of law-creation; the grounds for distinguishing binding from mere recommendatory resolutions of the Security Council; the ability of the General Assembly to interpret the UN Charter authoritatively; the legal status of the principle of self-determination; the existence and contours of an international norm of non-discrimination; advisory pronouncements as *res iudicata* in relation to later contentious proceedings; and the validity of a distinction between standing to sue and standing to receive a judgment on the merits.

The long tale also offers researchers an enticing fountain of material on the role of law and adjudication in international relations, on the interaction between the UN judicial and political forums and, more broadly, between law and politics. This article will focus mainly on these latter aspects because it is with respect to these that the benefit of hindsight offers the ability to reassess and revise some of the earlier assumptions and to note some interesting paradoxes not readily discernible at the time. However, the content of the 'law' applied by the Court is, as will be seen, an integral factor in the equation, and it too requires some retrospective scrutiny. Perhaps revision of some of the axiomatic propositions long perpetuated in the field will offer better guidance to those seeking to enhance the role of international adjudication in world affairs.

2. THE COURT'S INVOLVEMENT: AN OVERVIEW

The first three pronouncements of the Court were advisory opinions. In 1950, the Court rendered its landmark opinion regarding the status of the territory of South West Africa after the demise of the League and the refusal of South Africa to place the territory under the new trusteeship system.[3] The Court, with near unanimity, proclaimed what it felt were the continuing obligations of the mandatory to the inhabitants of the territory and to the new world organization,

2. South West Africa Cases (Ethiopia *v.* South Africa, Liberia *v.* South Africa), Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Rep. 319; and South West Africa Cases (Ethiopia *v.* South Africa, Liberia *v.* South Africa), Second Phase, Judgment of 18 July 1966, 1966 ICJ Rep. 6.
3. International Status of South West Africa, *supra* note 1. For the events leading up to the opinion, *see* M. Pomerance, The Advisory Function of the International Court in the League and UN Eras 107-117 (1973); S. Slonim, South West Africa and the United Nations: An International Mandate in Dispute 75-109 (1973); and J. Dugard, The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations 89-127 (1973).

the UN, which formally had not inherited the supervisory functions of its predecessor, the League of Nations.[4] This opinion, though accepted and acted on by the General Assembly,[5] was considered ineffective, because South Africa refused to accept its validity and ultimately refused to participate in the special supervisory machinery which the UN devised to oversee South African administration of the territory. In order to maintain the new machinery in accordance with ICJ guidelines, and in the face of South Africa's adamant stance, the Court was called upon on two further occasions during the mid-1950s to interpret and apply the original *International Status* opinion.[6]

As the 1950s drew to a close, the frustration of the UN majority with the obvious ineffectiveness of the Organization in relation to the former mandate fueled a search for new, hopefully more effective, legal and judicial alternatives to the methods previously utilized.[7] The new démarches, launched in 1960, were premised on several, commonly held assumptions. First, the previous Court pronouncements were ineffective primarily because they were given in the form of advisory opinions rather than binding judgments. Second, since the mandate itself contained a compromissory clause giving the PCIJ compulsory jurisdiction

4. The Court held unanimously that the South West Africa mandate continued, that South Africa was incompetent to modify the territory's status unilaterally, and that such modification required that South Africa act only with UN consent. By a 12-2 vote, the Court affirmed the continuing obligation of South Africa to submit annual reports on its administration of the territory and to transmit petitions from the territory's inhabitants, with the UN exercising, for this purpose, the supervisory functions previously attached to the organs of the League of Nations. And by a closer majority (8-6), the Court considered that South Africa was not legally obligated to place the territory under the Trusteeship System. International Status of South West Africa, *supra* note 1, at 143-144. In an important passage, included in the *ratio decidendi,* rather than the operative part, the Court stipulated that "the degree of supervision to be exercised by the General Assembly should not [...] exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations", *id.,* at 138. The attempt to adhere to these guidelines formed the basis for the following two Assembly requests for advisory opinions.

5. Upon receipt of the opinion, the General Assembly adopted Resolution 449A (V), UN Doc. A/RES/449A of 13 December 1950, by which it 'accepted' the opinion; urged the South African government "to take the necessary steps to give effect" to it, "including the transmission of reports [...] and of petitions"; and set up the first of several organs established *seriatim,* over the years, to assist the General Assembly with its supervisory functions. For subsequent Assembly resolutions and actions, *see* Pomerance, *supra* note 3, at 345-348 and Slonim, *supra* note 3, Chaps. 6-8.

6. Voting Procedure, *supra* note 1, and Admissibility of Hearings of Petitioners by the Committee on South West Africa, *supra* note 1. In the first case, the Court upheld the validity of a special voting rule permitting the Assembly to adopt by a two-thirds majority (rather than the League rule of unanimity) resolutions on reports and petitions concerning South West Africa. In the second opinion, the Court held that it would be consistent with the Court's 1950 International Status opinion for the Assembly to authorize the Committee on South West Africa to grant oral hearings to petitioners who had already submitted written petitions, despite the fact that oral hearings had not been part of the League supervisory practice.

7. *See* General Assembly Resolution 1142A, UN Doc. A/RES/1142A(XII) of 25 October 1957; Resolution 1361 (XIV), UN Doc. A/RES/1361(XIV) of 17 November 1959; and Resolution 1565 (XV), UN Doc. A/RES/1565(XV) of 18 December 1960. *See also* Pomerance, *supra* note 3, at 346-347; Slonim, *supra* note 3, at 173 and 179-180; and Dugard, *supra* note 3, at 214-215.

with respect to the conduct of the mandate,[8] and since the ICJ Statute preserved that clause intact as between UN members,[9] the affirmation of ICJ jurisdiction would be a foregone conclusion. The 1950 Court's statements on the matter need only be repeated.[10] Third, since the 1950 Court had already upheld several propositions relating to the survival of the Mandate and of UN supervision in relation to it, reiteration of the same propositions in the form of a binding judgment would present no particular difficulty. Moreover, while apartheid in South Africa itself could not be directly tackled in a judicial forum, for lack of any basis of jurisdiction, the similar discriminatory practices within the former mandated territory would indirectly provide judicial condemnation of the practice within South Africa itself. And the norms of self-determination and non-discrimination would be powerfully boosted.[11] In general, it was assumed, the Court, an integral part of the World Organization, would continue, as in the past, to reinforce judicially the aims of the UN in relation to South West Africa. Politically, the judicial imprimatur would be crucial, since a binding judgment would be enforceable by the Security Council, acting under the rubric of Article 94 of the UN Charter.[12] Thus, supervision of the former mandated territory, the

8. The relevant clause of Art. 7 of the Mandate reads: "[t]he Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice". LN Doc. 21/31/14D (17 December 1920),reproduced in M.O. Hudson (Ed.), International Legislation 57, at 60 (1931).
9. According to Art. 37 of the Statute of the ICJ, "whenever a treaty or convention in force provides for reference of a matter to [...] the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."
10. For the Court's affirmation of the continued force of Art. 7 of the Mandate and of South Africa's obligation to accept the concomitant compulsory jurisdiction of the ICJ, *see* International Status Opinion, *supra* note 1, at 138 and 143. In their separate opinions, Judges McNair and Read placed special emphasis on the continuation of "judicial supervision" of the mandate, even while they dissented from the majority's conclusion affirming a UN role in the administrative supervision of the territory, International Status Opinion, *id.*, 146, at 155-162 (Judge McNair, Separate Opinion), and, *id.*, 164, at 164-173 (Judge Read, Separate Opinion).
11. *See, e.g.*, the discussion of some of these considerations in A. D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 Law in Transition Quarterly 1, at 17-18 (1967) (citing a memorandum of law presented to the OAU by Ernest A. Gross [later, counsel to Ethiopia and Liberia in the Court litigation]); E.A. Gross, *The South West Africa Case: What Happened?*, 1966 Foreign Affairs, at 39-42. *See also* with respect to the apartheid issue, E.S. Landis, *The South West Africa Case: Remand to the United Nations*, 52 Cornell Law Quarterly 633 (1967); R.N. Nordau, *The South West Africa Case*, The World Today, March 1966, 123; and Slonim, *supra* note 3, at 353-354.
12. Art. 94 of the UN Charter which, in para. 1, affirms the obligation of UN members to comply with ICJ decisions in cases to which they are parties, provides, in para. 2, that if a state fails to fulfill this obligation, "the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations *or decide upon* measures to be taken to give effect to the judgment" (emphasis added). The question arose, both at San Francisco and its immediate aftermath, whether this provision endowed the Security Council with an independent basis for taking binding decisions, even in the absence of a threat to international peace and security. The *travaux préparatoires* offer no definitive answer to this question. *See* M. Pomerance, The United States and the World Court as a

self-determination of the inhabitants, and their liberation from the apartheid régime would be enforced against the will of South Africa, by means of sanctions rather than cooperation.[13]

The failure of the 1960s initiative to bear fruit is well known. The unanimity of the ICJ bench of 1950 was replaced by the split Court of 1962;[14] and in 1966, the Court refused to give judgment in the case.[15] The post-mortems, in the immediate aftermath and long thereafter, were legion;[16] but many of these, whether conducted by political observers or legal analysts, fell short of the mark. Above all, few knew or appreciated the weakness of the legal claims of the Applicants, the strength of the legal assertions of the Respondents, and the misguided litigation strategy pursued by the Applicants. Few were aware of the extent to which the case was evolving as a test case, not only of racial policies in South West

'Supreme Court of the Nations': Dreams, Illusions, and Disillusion 192-196 (1996). In the early postwar period, the US legal experts who had participated in the drafting of the provision categorically denied that there was any intention to increase the Council's powers. *See* the testimony of Green Hackworth (Legal Adviser of the State Department and key participant in the committee at San Francisco [IV/1] which dealt with the International Court of Justice), *in* Charter of the United Nations, Hearings Before the Senate Committee on Foreign Relations, 79th Cong., 1st Sess., at 331-332 (1945); and L. Pasvolsky, *id.*, at 286-287. The Council, Pasvolsky assured the Senate, was "not a sheriff". It "may [...] call upon the country concerned to carry out the judgment, but only if the peace of the world is threatened, and if the Council has made a determination to that effect". *See also* Senator Connally's report, filed on the basis of the Hackworth-Pasvolsky testimony, S. Exec. Rept. 8, 79th Cong., 1st Sess., at 14 (1945); and the statement of Charles Fahy *in* Compulsory Jurisdiction, International Court of Justice, Hearings Before a Subcommittee of the Senate Committee on Foreign Relations, on Senate Resolution 196, 79th Cong., 2nd Sess., at 142 (1946). While the purport of the provision is still not free of controversy, the predominant opinion today sees in Art. 94(2) an additional, non-Chapter VII-linked basis for having the Security Council render legally binding decisions. *See* L.M. Goodrich, E. Hambro & A.P. Simons (Eds.), Charter of the United Nations: Commentary and Documents 556-557 (1969); O. Schachter, *Enforcement of International Judicial and Arbitral Decisions*, 54 AJIL 1, at 18-22 (1960); H. Kelsen, The Law of the United Nations 540-542 and 543 n.1 (1950); and N. Bentwich & A. Martin, A Commentary on the Charter of the United Nations 168 (1950).

13. On the hoped-for US involvement in enforcing sanctions against South Africa, once a binding judgment was secured, *see* D'Amato, *supra* note 11, at 17 and Slonim, *supra* note 3, at 353.
14. Dismissing every one of South Africa's four preliminary objections, the Court decided, by a vote of 8-7, that it had jurisdiction to adjudicate upon the merits of the dispute, South West Africa Cases, Preliminary Objections, *supra* note 2, at 319-348.
15. By a vote of 7-7, with the casting vote of the President, the Court held that Ethiopia and Liberia were not entitled to receive a judgment on the merits, since they had not "established any legal right or interest appertaining to them in the subject-matter" of the claims, South West Africa Cases, Second Phase, *supra* note 2, at 6-51. The reasoning of the Court resembled that of the Spender-Fitzmaurice joint dissent of 1962 with respect to South Africa's third Preliminary Objection. (In that Objection, South Africa had contended that the compromissory clause of the Mandate, Art. 7, related to disputes bearing on states' material interests and was not intended to be a vehicle for judicial supervision of the general conduct of the Mandate). South West Africa Cases, Preliminary Objections, *supra* note 2, at 547-560.
16. *See*, in general, the bibliography on the litigation *in* Dugard, *supra* note 3, at 554-559; and Slonim, *supra* note 3, at 282-283 n. 13. *See also*, for a more recent analysis, R. Falk, Reviving the World Court (1986).

Africa (or even South Africa), but also of new processes of norm-formation. Judicial sanction was being sought for allowing a new consensual international law, based on General Assembly resolutions, to replace (or at least supplement significantly) traditional international law and its requirement of state consent to new legal rules.[17]

Disillusionment with the Court – indeed, a feeling of betrayal – permeated the halls of the UN in the immediate aftermath of the 1966 judgment.[18] Henceforth, the Assembly would act on its own to divest South Africa of its mandate, seeking neither the judicial imprimatur nor the shackles of legal restrictions.[19] At

17. The analysis of Slonim, *supra* note 3, Chaps. 10 (The Court Battle: The Metamorphosis of Nuremberg into Brown *v.* Board of Education) and 11 (The Second Phase: The 1966 Judgment – The Court Retreats) was exceptional in this regard. Falk, one of the primary shapers of the Applicants' litigation strategy, denies that that strategy contributed in any way to the 1966 outcome. Yet his analyses of the 1966 Judgment and of the dissenting opinions obliquely but powerfully reinforce the assumption that the Applicants' presentation of their case was misguided. Acceptance of their thesis, Falk suggests, would have required the Court to abandon an 'outmoded' Anglo-American (and European) jurisprudential approach and to embrace, instead, a more universalist, collectivist, Third-World approach which does not dichotomize between law, politics, and morality, and which accords more "weight to the international community's collective processes of norm-formation." (The ICJ Judges whose opinions on the South West Africa issue are lauded, in this regard, are Alvarez, Padilla Nervo, and Tanaka.) Falk acknowledges that the Court, as then (and indeed even today) constituted, was not receptive to this new 'metalegal' orientation. "A new adjudicative paradigm" was and is still "struggling to come into being." Falk, *supra* note 16, at 100-119. *See also* Falk, *The South West Africa Cases: The Limits of Adjudication, in* Ethiopia and Liberia *vs.* South Africa: The South West Africa Cases, UCLA African Studies Center, Occasional Paper No. 5, at 32-33 (1968).

18. An illustrative compendium of statements made in the General Assembly, reflecting the depth of disappointment felt (particularly by representatives of the African states), appears *in* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Pleadings, Oral Arguments, Documents, Vol. 1, at 426-433 and 451-473. *Inter alia*, the Judges of the majority (and especially the President, Sir Percy Spender) were accused of personal corruption; of perverting justice and bringing upon the Court "the greatest opprobrium in its history"; and of representing an "alliance of colonial and racist forces with illegitimate interests of an obsolete world." *Id.;* and *see*, especially, the statements of the Congo (Brazzaville), Guinea, Liberia, and Libya, *id.,* at 455-456, 459-460, and 464.

19. Immediately following the 1966 Judgment in South West Africa Cases, Second Phase, *supra* note 2, on 27 October, the Assembly adopted Resolution 2145 (XXI), UN Doc. A/RES/2145(XXI), declaring that South Africa's mandate over South West Africa was terminated and that henceforth the territory "comes under the direct responsibility of the United Nations." It later established a UN Council for South West Africa (later rechristened the UN Council for Namibia) to administer the territory until independence, General Assembly Resolutions 2248 (S-V), UN Doc. A/RES/2248(S-V) of 19 May 1967, and 2372 (XXII), UN Doc. A/RES/2372(XXII) of 12 June 1968. Suggestions for referring to the Court in its advisory capacity the questions left unanswered by the Court in its contentious capacity were fleetingly raised but never formally presented as draft resolutions. *See, e.g.,* the statements of the representatives of Japan, Ireland, Brazil, Italy, and Canada, UN GAOR (XXI), Plenary, 1419th Mtg,. 27 September 1966, at 15; 1427th Mtg., 3 October 1966, at 5 and 14; 1431st Mtg., 5 October 1966, at 18; and 1433rd Mtg., 7 October 1966, at 5. The Assembly made no attempt to receive from the Court a revision of its 1950 Opinion in which modification of the status of the mandate was held to be dependent on joint South African-UN action.

the same time, it would strive to transform the Court itself into a forum more attuned to the dominant political concerns of the UN majority.[20]

Several years later, the Court was turned to one last time in the matter of Namibia, and again, as in the early UN period, for an advisory opinion rather than a binding judgment. The Court was now asked, in essence, to reformulate, in light of the intervening political developments, the conclusions of its 1950 *International Status* opinion – to determine the new status of South West Africa (Namibia) following the Assembly's revocation of the mandate and the concomitant obligations of South Africa and other states in respect of the territory.[21] But primarily, the Security Council (which requested an advisory opinion for the first, and to date, last time) resorted to the Court for the sake of the Court itself. The tribunal, in its new composition, was to be afforded the opportunity to "redeem its impaired image".[22] And this time, the Court did not disappoint.[23]

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20. As reconstituted, the Court was to "reflect the current range of legal and political trends in the United Nations." It was to include more "men of agile mind and with the courage to adapt to the evolving norms of the international community" and fewer judges who adhere to "a narrow, static and anachronistic interpretation of international law." The weight of the "imperialist and colonialist powers" was to be diminished and that of the Third World and Socialist states correspondingly increased. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 27 (1970), Pleadings, Oral Arguments, Documents, *supra* note 18, at 451-473, and, especially, the statements of Albania, Algeria, Brazil, Central African Republic, Czechoslovakia, Ethiopia, Ghana, Guinea, Ivory Coast, Kenya, Mali, Mongolia, Senegal, Sudan, Tunisia, and Upper Volta, *id.*, at 451-455, 457-458, 460, 464-466, and 469-472. On the careful screening of all five candidates for the bench in the November 1966 elections and its impact on the Court, *see* Landis, *supra* note 11, at 668; L.C. Green, *The United Nations, South West Africa and the World Court,* 7 Indian Journal of International Law 521 (1967); G. Fischer, *Les Réactions devant l'Arrêt de la Cour Internationale de Justice concernant le Sud-Ouest Africain,* 12 Annuaire Francais de Droit International 154 (1966); R.P. Anand, Studies in International Adjudication 145 (1969); R.A.Falk, *The South West Africa Cases: An Appraisal,* 21 International Organization 1, at 18-19 (who predicted that "the triumph of judicial conservatism in 1966 will be the last such triumph in the ICJ for many years to come").

21. In Security Council Resolution 284, UN Doc. S/RES/284 of 29 July 1970, the Security Council requested the Court's opinion on the question: "[w]hat are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)?" In Resolution 276, UN Doc. S/RES/276 of 30 January 1970, the Council had, *inter alia,* declared "that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid"; and all states were called upon to refrain from any dealings with South Africa that were inconsistent with the Council's declaration of illegality.

22. Statement of Nepal, UN Doc S/PV.1550, 29 July 1970, at 38-40. Similarly, it was said, the Court was being afforded "a crucial opportunity to restore world public confidence in its very existence" (statement of Zambia, *id.*, at 54-55); and that if it rendered the opinion expected of it, this would be a means "of rehabilitating the prestige of the International Court" and of "harmonizing" its position with that of the General Assembly (statement of Burundi, *id.*, at 71). On the context in which the requesting resolution was adopted, *see* Pomerance, *supra* note 3, at 148-157 and Slonim, *supra* note 3, at 322-332.

23. The Court announced its opinion on 21 June 1971 (probably not coincidentally, while the OAU was in session). By a vote of 13-2 (Judges Fitzmaurice and Gros, dissenting), the Court held that "the

From that point onward, there was no further judicial involvement. Ostensibly, the fate of the territory was determined purely by political and military developments in the white redoubt of southern Africa and by international pressures. In a desperate policy of 'damage control', South Africa disengaged from South West Africa in the hope that by relinquishing that territory, it would salvage South Africa itself for continued white rule. Ultimately, of course, that hope proved to be vain indeed.

3. CONTEMPORANEOUS ASSUMPTIONS REGARDING THE USE OF THE COURT'S ADVISORY AND CONTENTIOUS JURISDICTIONS REEXAMINED

The various stages of the Court's involvement in the protracted South West Africa dispute and the post-adjudicative developments generated a body of commonly held assumptions which, with the perspective of time, require revision. Both the tendency to overrate the potential or actual contribution of the Court at certain times and to underrate it at others were, most likely, misplaced. A more realistic picture would include more complex propositions, including, paradoxically, some which are the reverse of those held at the time.

Undoubtedly, the dispute was ultimately settled by purely political developments in which the Court played no obvious role. However, to deduce from this that the judicial involvement was negligible is probably unwarranted. Military and political disputes, especially in the world community of today, are never devoid of the dimension of legitimacy as an important component of the conflict.[24] And though the impact of the Court's pronouncements is not quantitatively measurable, the judicial imprimatur did strengthen the resolve of the UN political organs, and especially, of a middle group of influential wavering states (including, most importantly, the United States) whose pressure on South Africa was an acknowledged factor in the final denouement. In the battle over the le-

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continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory." By a slightly narrower margin of 11-4 (Judges Fitzmaurice, Gros, Onyeama, and Petrén), the Court pronounced itself upon the obligations of third states. Specifically, UN member states were held to be "under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to" South Africa's "presence and administration." Non-members of the UN were held to be similarly obligated to assist the UN in its actions with respect to Namibia. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), *supra* note 1, at 16 and 58.

24. For a most incisive discussion of the factor of 'legitimacy' in international relations, *see* I.L. Claude, Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 International Organization 367 (1966), reproduced *in* I.L. Claude, Jr., States and the Global System: Politics, Law and Organization 145-159 (1988).

gitimation and delegitimation of opposing stands, the UN majority became the winner; South Africa, the loser.

This was so despite the fact that from a strictly legal standpoint, the South African view was not unsustainable. On many particulars, it was probably stronger than theses which triumphed in the end.[25] In fact, it is arguable that there was an inverse relationship between the strength of the legal position and victory in the political arena. The involvement of the Court, in rendering advisory opinions especially, led to the enunciation of some questionable propositions which later became new mantras, oft-quoted, unquestioningly accepted, and incorporated in a kind of new international law, or at least a new 'UN Law'. Propositions which may have been more solid legally, in terms of traditional international law, were ignored or discarded, casualties of the fact that they were attached to an unpopular cause.

From this standpoint, the assumption that the contentious jurisdiction of the Court would be more effective than the advisory was fundamentally mistaken, for several reasons. If the desideratum was the strengthening of the political position of the UN majority by the addition of the judicial imprimatur, that was more easily attained by the 'advisory' than the 'contentious' route. 'Big cases', such as those involving self-determination and non-discrimination, are more readily taken on by the Court in its advisory than in its contentious capacity; and the Court's substantive view of the law in advisory cases also tends to be more expansive. As Leo Gross recognized long ago, in advisory opinions, the 'U.N.-organ role' of the Court tends to dominate. In contrast, where the contentious jurisdiction is invoked, the Court, at least up to 1966, tended to be more conservative and cautious, both as to matters of jurisdiction and matters of substance.[26]

Since the legal hurdles before the Court of the 1960s were formidable and, on a firm legal, positivistic, basis, not easily overcome, it would have been better not to attempt to involve the Court in its contentious capacity, since a failed attempt was worse than none, both for the political organs and for the Court itself. Moreover, the expectation that sanctions against South Africa would be

25. *See, e.g.,* the academic criticism of the 1950 International Status Opinion by M.O. Hudson & J. Nisot, cited and excerpted in Dugard, *supra* note 3, at 156-162; the powerful joint dissent of Judges Spender and Fitzmaurice, South West Africa Cases, Preliminary Objections, *supra* note 2, at 465-563; and the analysis of the legal positions of the states involved, at each stage in the controversy, presented objectively and exhaustively by Slonim, *supra* note 3.

26. *See,* generally, L. Gross, *The International Court of Justice and the United Nations,* Hague Academy, 120 Recueil des Cours 314 (1967/I) (and especially the discussion of the tension between the Court's two roles, at 319-322, 325-327, 330-332, 338-350, 370-371, 377-380, 385, 404, and 430-431). Interestingly, Falk, a principal actor in the Applicants' team in the South West Africa Cases, *supra* note 2, came belatedly to acknowledge this fact, arguing that the Court would best be 'revived' by having recourse to its advisory jurisdiction in 'big' cases (*i.e.,* cases generally deemed to be 'political') and predicting that such a course would be likely to alienate (at least temporarily) the traditional Western clients and supporters of the Court. *See,* generally, Falk, *supra* note 16.

more readily forthcoming with a Court judgment than without was also questionable in the extreme. If there were to be sanctions (as there later were), the judicial input was not necessary; and a judicial decision which remained unenforced would merely advertise the impotence of both the judicial and political arms of the UN.

In retrospect, the search for judicial pronouncements with 'teeth' was misguided and based on a simplistic understanding of the role of international adjudication and the Court. There is a fundamental difference between turning to the Court for judicial clarification and employing the Court as a vehicle for legitimation of a preconceived firm political stand. Arguably, the original recourse to the Court which led to the 1950 *International Status* advisory opinion combined both purposes, in terms of the questions posed and the mixed motives of the various groups supporting the consultation of the Court.[27] With time, however, the legitimating purpose came to predominate. For that, the advisory jurisdiction was the more advisable one to utilize, although this was not recognized at the time. It was in its advisory capacity that the Court could best lend the desired weight of a judicial forum to the continuing political battle of the UN to liberate the former mandated territory from South Africa's grip. But in giving the 'desired' correct answers to political fora, the Court pays a price, in future coinage. Particularly among its traditional clientele, its long-term usefulness and its acceptability as an impartial arbiter may be impaired.

4. SOUTH WEST AFRICA AND THE STATUS OF THE COURT: INTO THE FUTURE

The 1966 *South West Africa* judgment and its aftermath represented a watershed in the history of the ICJ, though this was not properly recognized at the time, nor even subsequently when the signs of the upheaval became more manifest. During the protracted pleadings on the merits of the case, counsel for Ethiopia and Liberia had propounded what was seen then as a radical line of reasoning and which even among the 'liberal' contingent of the deeply divided bench of 1966 found barely an echo. The Court had been urged to attribute quasi-legislative powers to the General Assembly; to recognize that a new dynamic method of norm-formation by 'consensus' had replaced the previous system which was premised on state 'consent' to new legal rules; and to agree that the 'organized international community', a new legal construct, possessed law-generating ca-

27. The division in the Assembly between the Western group of genuine 'doubters' and the Latin-American/Asian anti-colonial bloc was reflected both in the formulation of the questions addressed to the Court and in the actions taken pending receipt of the Court's opinion. *See, in general*, Pomerance, *supra* note 3, at 107-117.

pabilities.[28] Following the shock and disillusionment of the 1966 judgment, the states comprising the Assembly majority resolved to transform the Court into a tribunal more hospitable to the prevailing currents in the Assembly.[29] Before too long the reconstituted bench would be embracing many of the assumptions regarding the process of law-formation which appeared so radical when espoused during the *South West Africa* litigation and would also be reordering the hierarchy of substantive legal norms. Thus, the perspective of the UN majority which increasingly accorded pride of place to the principle of self-determination as a kind of 'supernorm', capable of overriding the primary Charter prohibition against the use of interstate force, would come to dominate judicial thinking as well. While early indications of a new judicial direction surfaced in the *Namibia* and *Western Sahara* advisory opinions,[30] it was in the much-misunderstood Court judgment on the merits in the *Nicaragua* case that the new judicial course reached fruition and became most apparent. It was manifested, for example, in the judicial sanction given to non-Western, UN majoritarian views regarding the formation of customary international law; the willingness to see in the 'consensus' procedure a legitimate substitute for genuine state consent as expressed in state practice; the concomitant acknowledgment of the possibility of deducing *opinio iuris* from votes cast by states on General Assembly resolutions (especially those termed 'declarations'); and the implication that intervention exercised in the process of decolonization might be exempt from the general norms proscribing the use of force.[31] In this case, apparently, though it was a conten-

28. *See, e.g.,* South West Africa Cases, Pleadings, Oral Arguments, Documents, Vol. 9, at 259-263, 342-352. For a thorough and incisive discussion of the thesis presented by the counsel for Applicants, and the judicial response, or lack of response, *see* Slonim, *supra* note 3, Chaps. 10 and 11. *See also*, for demolition of the concept of the 'organized international community' as a legal construct, G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, Hague Academy, 137 Recueil des Cours 460-469 and 629-742 (1972/III).

29. *See supra* note 20, and accompanying text.

30. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), *supra* note 1, para. 53; Western Sahara, Advisory Opinion of 16 October 1975, 1975 ICJ Rep. 12, paras. 52-59 and 70. And, for a discussion of the purport of these pronouncements, *see* M. Pomerance, Self-Determination in Law and Practice: The New Doctrine in the United Nations 69-70 (1982).

31. The dissenting opinions of Judge Schwebel at all stages of the proceedings merit careful reading in this regard. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Provisional Measures, Order of 10 May 1984, 1984 ICJ Rep. 169, at 190-207 (Dissenting Opinion, Judge Schwebel); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 ICJ Rep. 392, at 558-637 (Dissenting Opinion, Judge Schwebel); and Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 259-527 (Dissenting Opinion, Judge Schwebel). *See also,* in general, the scholarly criticism in the American Journal of International Law, especially, A. D'Amato, *Trashing Customary International Law,* 81 AJIL 93, at 101 (1987); T.M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations, id.*, at 116; and J.L. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense, id.*, at 135.

tious one, the Court's 'UN-organ role' (generally more evident in the advisory capacity) overpowered the Court's 'international-law application' role.

To the extent that the post-*South West Africa Cases* Court has become less positivistic and less conservative, both in matters of jurisdiction and substance, a shift in the clientele of the Court can be expected. The international legal community is today deeply rent over the content of international law and the legitimate processes of law-formation. In these circumstances, any decision to opt for the majority view means the attenuation, and perhaps even the obliteration, of the line dividing the judicial from the political process. Understandably, those in the minority, defensive position, far from welcoming the 'judicial option' as an enticing alternative to a political forum, come to reject it, seeing in it yet another method of legitimating UN majoritarian political decisions, especially in such highly sensitive political spheres of law as self-determination and the use of force. It is still too early to tell whether the *East Timor* decision heralds a reversion to a more conservative pre-*Nicaragua* stance or is an isolated instance, signifying little.[32] In any event, the long history of Court involvement in the South West Africa issue has thrown into high relief a dilemma which is certain to continue to bedevil UN-Court relations: How will the Court's participation in the legitimation of political desiderata affect the long-term legitimacy of the Court as an authoritative judicial forum?[33]

32. East Timor (Portugal *v.* Australia), Judgment of 30 June 1995, 1995 ICJ Rep. 90. The Court held that it was barred from exercising jurisdiction because such an exercise would be tantamount to ruling on the legality of Indonesia's conduct without that state's consent. For the view that Court was reverting to a more conservative pre-1966 stance, *see* J. Dugard, *1966 and All That: The South West Africa Judgment Revisited in The East Timor Case*, 8 African Journal of International and Comparative Law 549 (1996).

33. For further consideration of the problem of resorting to the Court for the purpose of obtaining a specific response, *see* M. Pomerance, *The Advisory Role of the International Court of Justice and Its 'Judicial' Character: Past and Future Prisms, in* A.S. Muller *et. al.* (Eds.), The International Court of Justice: Its Future Role after Fifty Years 295, at 295-296, 311-313, and 323 (1997).