The South West Africa Cases: Remand to the United Nations

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THE SOUTH WEST AFRICA CASES: REMAND TO THE UNITED NATIONS

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The author examines the proceedings before the International Court of Justice in the South West Africa cases. Particular emphasis is given to the arguments of the parties and to how their positions developed during the course of the litigation. The author then compares the Court's holding and rationale with its prior holding in the litigation, and concludes by considering the probable effects of the outcome of the case.

> "Myself when young did eagerly frequent
> Doctor and Saint and heard great argument
> About it and about: but evermore
> Came out by the same Door as in I went."

After more than five-and-one-half years of proceedings,[1] two judgments,[2] two declarations,[3] seventeen concurring and dissenting opinions,[4] more than a dozen volumes of written pleadings,[5] and ninety-nine sessions of oral arguments,[6] the International Court of Justice has now, apparently

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1 The dispute was submitted to the Court on November 4, 1960, and the second judgment, on the "merits," was delivered on July 18, 1966.

2 South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, [1962] I.C.J. Rep. 319 [hereinafter cited as SWA Cases 1962]; South West Africa, Second Phase, Judgement, [1966] I.C.J. Rep. 6 [hereinafter cited SWA Cases 1966].

3 SWA Cases 1962, at 347 (Judge Spiropoulos); SWA Cases 1966, at 51 (President Spender).

4 SWA Cases 1962: concurring ("separate") opinions of Judge Bustamante at 349, Judge Jessup at 387, and Judge ad hoc Mbanefo at 437; dissenting opinions of President Winiarski at 449, Judge Basdevant at 459, Judges Spender and Fitzmaurice at 465, Judge Morelli at 564, and Judge ad hoc van Wyk at 575.

SWA Cases 1966: concurring opinions of Judge Morelli at 59, and Judge ad hoc van Wyk at 67; dissenting opinions of Vice President Koo at 216, Judge Koretsky at 239, Judge Tanaka at 250, Judge Jessup at 325, Judge Nervo at 443, Judge Forster at 474, and Judge ad hoc Mbanefo at 484.

5 Ethiopia and Liberia submitted a one-volume memorial and a one-volume reply on the merits. The South African government submitted nine volumes of counter-memorials and a copious index; it also submitted a two-volume rejoinder. The written pleadings on the preliminary objections were in addition.

6 They ran, with various adjournments, from March 15 through July 14, 1965, and from September 20 through November 15, 1965.

finally,[7] ended all *contentious* proceedings[8] in the *South West Africa Cases* by refusing to go into their merits[9] on the basis of a "matter . . . [of] an antecedent character"[10] which was not argued by either of the parties.[11]

This particular resolution of the litigation, which appears not to have been anticipated by anyone,[12] has sent "the South West African question" back to the United Nations for a political solution. But its immediately apparent effects by no means stop there: It has stunned international lawyers everywhere, as well as other legal experts who awaited with great interest the Court's analysis of the many novel problems which the *Cases* presented. It has frustrated and enraged politically conscious Africans.[13] It has undermined the confidence of nonwhites generally in the Court, in the fundamental concepts of traditional international law, and in the ability of nonwhites to obtain justice in a world dominated economically, technologically, and conceptually by whites.[14] It has destroyed the complacent hopes of the American State Department that it could win support for a policy of sanctions against South Africa by invoking the (anticipated) International Court decision condemning apartheid in South West Africa.[15] It has strengthened the South African government's "moral" and political stance at home and abroad[16] and has encouraged the Smith regime in Rhodesia and the Portuguese in Angola and Mozambique.

This article will try, in much less than the book-length analysis which the *Cases* indeed deserve, to evaluate the 1966 judgment, to set it in perspective, and to suggest the kinds of problems facing the UN as it takes

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[7] The possibility of new contentious proceedings based on claims which come within the limitations of the 1966 judgment still exist, at least in theory. See note 260 infra and accompanying text.

[8] Prior to the commencement of the contentious proceedings, the UN had taken closely related issues to the World Court three times. See notes 26-28 infra and accompanying text.

[9] The Court found that Ethiopia and Liberia had no "legal right or interest . . . in the subject-matter of the present claims . . . ." SWA Cases 1966, at 51, § 99. See text accompanying notes 164-87 infra.

[10] SWA Cases 1966, at 18, § 4.

[11] See note 166 infra and accompanying text.

[12] See notes 163-64 infra and accompanying text.

[13] See, e.g., the Independence Day Message of President Tubman of Liberia, July 26, 1966, at 11-15 (mimeo.) on file in the Cornell Law Library.

[14] Letter from a conservative African to the author:

> I believe that the image of the Court has been seriously tarnished by this decision and that the important role that the rule of law could play in the maintenance of international peace has been set back for a rather long period.
>
> People in the third world have had their confidence shaken in the Court, for no one will lose sight of the fact that the prevailing Judges were all Europeans and/or of European descent . . . .

[15] American State Department representatives, on and off the record (though not on the floor of the UN or in any major policy speech), have repeatedly expressed the view that a decision favoring the applicants would give the United States a "handle" for effective (if indirect) action against the apartheid-dominated South African government.

[16] Cf., e.g., statement of the South African State President on the opening of Parliament in July 1966. South African Information Service Press Release, July 29, 1966.

up the problems of South West Africa again on remand from the World Court.

I

HISTORICAL BACKGROUND

The gravamen of the Ethiopian and Liberian complaints[17] in the *South West Africa Cases* was that the South African government, by applying apartheid[18] to South West Africa, was violating the obligations of the "mandate" under which it administered that Territory.

South West Africa, a German protectorate before World War I, was conquered and occupied by South African forces in 1915.[19] Like all other German overseas possessions, it was surrendered to the Allies at the War's end; but South Africa expected to annex the Territory in accordance with secret wartime agreements. Under strong pressure from President Wilson, however, the Allies finally agreed to a peace of "no annexations." German and Turkish colonial possessions, whose inhabitants were considered insufficiently advanced to be granted self-government, were made, in effect, the wards of "advanced nations," which were to govern them in accordance with the principle that "the well-being and development of such peoples form a sacred trust of civilization . . . . "[20] South Africa thus grudgingly agreed to administer South West Africa as a territory "under mandate" from the League of Nations.

The terms under which South Africa was to administer the Territory are found in Article 22 of the Covenant of the League and in the mandate for South West Africa. The key provisions, around which the Cases centered, include:

Article 22 of the Covenant

> 1. To those colonies and territories . . . which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.
>
> 2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it,

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17 The two governments filed separate but substantively identical memorials, and their cases were joined by the Court.

18 Racial segregation. The preferred South African usage now is "separate development."

19 For a survey of the history of the period, see Applicants' Memorials, pp. 3-58 SWA Cases 1966; cf. Counter-Memorials, vol. II, pp. 3-97.

20 League of Nations Covenant art. 22, para. 1.

and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The Mandate for German South West Africa

Article 2

The Mandatory shall have full power of administration and legislation over the territory . . . as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory,[21] subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . . .

Article 4

The military training of the natives, otherwise than for purposes of internal police and local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5.[22]

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation of 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 . . . .

At the end of World War II all mandated territories except South West Africa either became independent[23] or were placed under the trusteeship system[24] of the United Nations, which, in practical effect,[25] replaced the already moribund League. At that point South African spokesmen announced their government's intention of annexing South West Africa—a step which they stated was ardently desired by the inhabitants of the

[21] This provision was applicable to South West Africa as among those territories:

> [W]hich, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, 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 . . . .

League of Nations Covenant art. 22, para. 6. Unofficially these territories were referred to as "C" mandates. The Near Eastern possessions of the former Turkish Empire became the so-called "A" mandates, and the other German colonies in Africa became "B" mandates. The South Pacific German colonies also became "C" mandates.

[22] Paragraph 7 of article 22 of the Covenant provided that "In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

[23] The former "A" mandates achieved this status.

[24] See U.N. Charter chs. XII, XIII.

[25] If the UN had been the legal successor to the League, the entire legal situation as to South West Africa would have been transformed. It was admitted, however, that no claim to legal succession could be made. In fact, the dying League coexisted with the new United Nations until the dissolution of the former in April 1946.

Territory—as soon as the UN consented. But the General Assembly did not approve and, instead, urged the then Union to transfer its mandate to the trusteeship system. South Africa refused. It submitted one annual report—which was severely criticized—to the UN, although denying any obligation to do so. Then, with the establishment of a blantantly racist regime in Pretoria, it began to extend to South West Africa new, far more drastic, apartheid measures, first worked out at home. UN criticism was ignored, and the Nationalist government began a course of conduct that the General Assembly deemed equivalent to de facto annexation of the Territory.

By this time South Africa was claiming that the South West African mandate had lapsed upon dissolution of the League and that it therefore had no obligation to consult with the UN on its administration of the Territory. Unable to reach any understanding with the Nationalist government on the problem, the Assembly sought an advisory opinion from the International Court clarifying the Territory's legal status. The Court advised unanimously that South West Africa remained a territory under mandate, the international status of which could be modified by the South African government only with the consent of the United Nations. By a 12-2 vote the Court advised further that:

> [T]he Union . . . continues to have the international obligations stated in Article 22 of the Covenant . . . and in the Mandate . . . as well as the obligation to transmit petitions . . . the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted . . . .[26]

Subsequently, in two further extensions of its 1950 opinion, the Court held that the UN might follow its Charter-prescribed procedure in voting on South West African questions[27] and that it might grant oral hearings to petitioners from the Territory.[28]

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[26] International Status of South-West Africa, [1950] I.C.J. Rep. 128, 143-44 (Advisory Opinion) [hereinafter cited SWA Status]. It also held unanimously that the trusteeship provisions of the Charter were available for South West Africa, but, by an 8-6 vote, that South Africa was under no obligation to place the Territory under trusteeship.

[27] South-West Africa—Voting Procedure, [1955] I.C.J. Rep. 67 (Advisory Opinion). The question arose because the 1950 opinion (which South Africa did not recognize as binding) specified 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 . . . ." SWA Status 138. Since Council decisions had had to be unanimous, South Africa claimed that the UN must also apply a unanimity rule. The Court held that the "degree of supervision" referred to substantive, not procedural, matters; and anyway its 1950 opinion had required conforming procedure only "as far as possible." Id. at 74, 77.

[28] Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. Rep. 23 (Advisory Opinion). The problem here was that the League had never granted oral hearings to petitioners, but had required them to submit written requests or complaints to the mandatory power, which would forward them, with comments, to the League's Permanent Mandates Commission. Noting that the South African government no longer forwarded petitions, the Court, again relying on the qualifying phrase

South Africa refused to accept the Court's ruling on South West Africa, as it had refused to accept UN resolutions on the subject. All further UN action, whether conciliatory or critical, proved futile. After twelve years of increasingly exacerbated relations, in 1959 the Assembly finally invited[29] legally qualified states to undertake contentious proceedings against the Union in the International Court, so that a "binding"[30] judgment might be obtained. A year later Ethiopia and Liberia, the two African states which were apparently qualified under article 7 of the mandate,[31] filed their applications.

The South African government responded by denying the jurisdiction of the Court to hear the proceedings, a standard gambit in the International Court, and certainly not surprising in view of the novelty of the *Cases*.[32] It alleged that the applicants had no locus standi and the Court no jurisdiction because:

> *Firstly*, the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court, this Submission being advanced
> (*a*) with respect to the Mandate as a whole . . . and
> (*b*) in any event, with respect to Article 7 itself;
> *Secondly*, neither . . . Government . . . is "another Member of the League of Nations," as required . . . by Article 7 . . . ;
> *Thirdly*, the conflict or disagreement alleged by . . . Ethiopia and Liberia to exist between them and . . . the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 . . . more particularly in that no material interests of . . . Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;
> *Fourthly*, the alleged conflict or disagreement is . . . not a "dispute" which "cannot be settled by negotiation" within the meaning of Article 7 . . . .[33]

In December, 1962, the Court, by an 8-7 vote, dismissed all the preliminary objections. It found that it was competent to hear the dispute on the

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"as far as possible" in its 1950 opinion, held that the change of procedure (to grant petitioners oral hearings) was proper under the changed circumstances. Id. at 31.

[29] U.N. Gen. Ass. Res. 1361, 14th Sess. (Nov. 17, 1959).

[30] I.e., enforceable by appeal to the Security Council under article 94(2) of the Charter.

[31] To qualify, a state must have been a member of the League at its dissolution and be currently a member of the UN. It was decided not to join Egypt (in view of its transformation into the UAR) or any recently independent African state (which might claim derivative membership in the League through its former colonial ruler) since the question of qualification might distract the Court from the substantive issues involved in the proceedings.

[32] Compromissory clauses similar to that in article 7, para. 2 of the South West African mandate occurred in the other mandates, but only one proceeding was ever brought under any of them: Mavrommatis Palestine Concessions, P.C.I.J., ser. A, No. 5 (1925), No. 2 (1924) (involving the commercial rights of a Greek citizen in Palestine). Since the mandated countries either gained their independence or were transformed into trust territories after World War II, any litigation involving such a clause necessarily dated from before the War.

[33] SWA Cases 1962, at 327-28.

merits, based on its conclusions that "Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation."[34]

II

DEVELOPMENT OF THE ISSUES

Political Considerations

As of the beginning of 1963, therefore, the parties had to evaluate the entire situation anew, in the light of two years of sparring over the jurisdictional issue and of the Court's decision. Of the pleadings on the merits, only the applicants' memorials, drafted early in 1961, had been filed. The maneuvering for legal advantage had just begun.

One point was apparent: For the applicants and their zealous partisans, as well as for the respondent, the crux of the *Cases* was judicial evaluation of apartheid. Although the proceedings were limited to South West Africa, South Africa and its basic political and social philosophy were on trial.[35]

It was also clear that any arguments on the merits would be made before a Court which had been deeply divided in 1962. It seemed unlikely that a judge who had written an individual opinion supporting one party on the jurisdictional issues in 1962 would decide for the opposite party thereafter on the merits. The election of new judges[36] for the 1964 term seemed unlikely to resolve the jurisprudential and general philosophic differences within the Court, but it did appear likely to improve slightly the applicants' chances for a favorable decision on the merits.

In the light of this situation there was some question whether the South African government would proceed to contest on the merits. (Its conduct and pronouncements had already strongly suggested that it would not accept an unfavorable judgment, although the general speculation was that it would attempt to stall and obfuscate rather than openly defy the Court.) Assuming that the South Africans could not predict the biological

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[34] Id. at 347.

[35] At the heart of these proceedings there lies the Applicants' charge that . . . South Africa has violated its fundamental sacred trust obligation under the Mandate . . . . All other issues and aspects of this case are subservient to this particular one, at any rate as far as their practical significance are [sic] concerned . . . .
Verbatim record, oral hearings, 7th sess., at 5 (March 30, 1965) [hereinafter cited C.R. 65/ (session number) (page) (date)]. All references are to the uncorrected record.

It should be noted that in the oral arguments reference was constantly made to South African philosophy *and practice* since the application of apartheid to South West Africa has lagged behind its application in the Republic. A number of the witnesses had little or no personal knowledge of South West Africa.

[36] Gros (France); Tanaka (Japan); Nervo (Mexico); Forster (Senegal); Khan (Pakistan).

accidents which would give them an advantage in the final Court line-up, why, then, did they decide to proceed, apparently against the odds?[37]

Several reasons may be postulated: (*1*) Several top officials, probably including the then Prime Minister, Verwoerd, really believed their own arguments and felt that a proper exposition of their cause would convince impartial judges and perhaps even world opinion. (*2*) The South African government has on various occasions shown surprising respect for established courts.[38] (*3*) A long trial, during which UN discussion of South West Africa would be blocked,[39] would give South Africa time, first, to implement its apartheid policies in South West Africa[40] and, second, to strengthen its own military and economic position against possible future sanctions.[41] (*4*) While South Africa could easily afford the costs of a long trial,[42] the financial drain on the applicants was bound to weaken them for any future contest, military or political.[43] (*5*) Even if apartheid was not vindicated, a forceful South African defense, particularly if it subtly intimated a determination not to yield in any circumstances, might suggest the political wisdom of a non-committal decision on procedural grounds or of a judgment splitting the points between the litigants (whereas in a judgment by default the Court was more likely to accept the applicants'

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37 The South Africans did all in their power to shorten the odds by seeking to have Judge Nervo disqualified. See notes 160-61 infra and accompanying text. It is not clear whether the South Africans also sought the disqualification of Judge Khan (see note 159 infra and accompanying text) or whether this disqualification was sought by President Spender and/or the Court without the urging of the respondent.

38 See, e.g., the history of Minister of the Interior v. Harris, [1952] 4 So. Afr. L.R. 769 (AD); May, The South African Constitution 61-65; Griswold, "The Demise of the High Court of Parliament in South Africa," 66 Harv. L. Rev. 864 (1953); Comment, "Minister of the Interior v. Harris and the South African High Court of Parliament Act," 1 Sydney L. Rev. 113 (1953).

This respect does not, however, necessarily cause the government to abide by the decision. For disturbing comments on double jeopardy in South Africa, see South African Institute of Race Relations, A Survey of Race Relations in South Africa 1965, at 54-55; South African Defence and Aid Fund, The Case of Willie Mbolompo and Others ats. The State 1, 6 (mimeo., April 1965).

39 South Africa tried to block all discussion of its administration of South West Africa by claiming that the subject was sub judice. This did not prevent UN discussion of the subject, but it clearly did have a dampening effect.

40 Although the effectuation of the so-called "Odendaal Plan" (intended to implement separate development in South West Africa by, inter alia, dividing the entire Territory into racial "homelands") was postponed after the applicants threatened to seek interim injunctive relief from the Court (and, it is rumored, the United States and Britain brought diplomatic pressure to bear on South Africa), certain preparatory steps were nevertheless carried out. See Reply of the Governments of Ethiopia and Liberia, Annex 10, SWA Cases 1966.

41 The frantic continuing search for oil deposits within the Republic is an example. South Africa is now substantially self-sufficient as to military equipment and supplies.

42 It is rumored that the government spent at least one million dollars on the Preliminary Objection phase of the Cases.

43 The other African States made a financial contribution to the applicants at the outset, but the extent of subsequent assistance probably was not great. None of the countries directly or indirectly involved had financial resources which were not desperately needed for internal development.

position in toto). (*6*) The 1962 dissent of Spender and Fitzmaurice had suggested—or encouraged—a strong line of defense[44] which affected the subsequent pleadings of both parties.

The Applicants' Case

The applicants' theory of the *Cases*, as it had been formulated in 1961, was laid out in their first four submissions:

> 1. South West Africa is a territory under . . . Mandate . . . ;
> 2. the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant . . . and in the Mandate . . . , the supervisory functions to be exercised by the United Nations . . . ;
> 3. the Union, in the respects set forth in Chapter V of this Memorial . . . , has practised *apartheid*, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations . . . [in the Mandate and Covenant]; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory;
> 4. the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described . . . in Chapter V . . . , has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations . . . ; and that the Union has the duty forthwith to cease its violations . . . and to take all practicable action to fulfill its duties under such Articles.[45]

The remaining five counts listed other, generally more specific, violations, *viz.*, treating the Territory in a manner inconsistent with its international status, thereby impeding opportunities for self-determination; establishing military bases within the Territory; failing to submit annual reports to the UN; failing to transmit petitions from inhabitants of the Territory to the UN; and attempting to modify substantially the terms of the mandate without the consent of the UN.[46]

The Court, of course, had, substantially unanimously, upheld the existence of the mandate and of the mandatory's obligations thereunder in 1950;[47] but South Africa had refused to accept that advisory opinion. Hence the applicants first asked the Court to confirm (this time in a binding judgment) the relevant parts of its 1950 Opinion.

Respondent's Case

(*1*) *"Accountability."* As indicated above,[48] South Africa had challenged the continued existence of the mandate in its preliminary objections, but its arguments then had been directed to proving that its "con-

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[44] I.e., that the apartheid issue was non-justiciable.
[45] Applicants' Memorials, p. 168, quoted in SWA Cases 1966, at 12.
[46] Applicants' Memorials, p. 169, quoted in SWA Cases 1966, at 12-13.
[47] See text accompanying note 26 supra.
[48] See text accompanying note 33 supra.

sent" to be sued (as derived from the compromissory clause of article 7) was no longer—if it ever had been—valid. In its counter-memorials, the Respondent's submissions on the issue of "accountability" read:

> 1. That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations, and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.
> 2. In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League . . .
> (a) Relative to Applicants' Submissions Nos. 2, 7 and 8, that Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League . . . , lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision of any organ of the United Nations or any other organization or body.[49]

Although the Respondent argued forcefully throughout that it was presenting new facts which would have led the Court to a different conclusion if they had been presented in 1950,[50] the Court scouted this argument in its 1962 decision.[51] Respondent's arguments—in the merits phase, on the lapse of the mandate,[52] on the lapse of the obligation to account (regardless of the possible continued existence of the mandate),[53] and on the non-transferability of that obligation, in any case, from the League Council to the UN, except with South African consent[54]—rung only slight modifications on its 1962 arguments as to the Court's jurisdiction. Since the 1966 judgment did not pass on the merits, no one can state with assurance whether, at that latter date, the Court would have come to a different conclusion as to "accountability;"[55] but it was clear that the real guts of the litigation centered not on the existence or non-existence of respondent's obligations, but on whether the respondent had fulfilled them if they did exist.[56]

(*2*) *Apartheid.* The South African defense to the apartheid issue was essentially two-pronged: *first*, to persuade the Court, along the lines suggested in the Spender-Fitzmaurice 1962 dissent,[57] that the issue was non-justiciable, and, *second*, to defend its "separate development" policy (if justiciable) as desirable.

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[49] SWA Cases 1966, at 14.
[50] C.R. 65/7, at 44 (March 30, 1965).
[51] "All important facts were stated or referred to in the proceedings before the Court in 1950." SWA Cases 1962, at 334.
[52] C.R. 65/16-17 passim (April 12-13, 1965). See also II Counter-Memorials passim and I Rejoinder passim, SWA Cases 1966.
[53] C.R. 65/7-15 passim (March 30-April 9, 1965). See also II Counter-Memorials passim and I Rejoinder passim, SWA Cases 1966.
[54] Ibid.
[55] See text accompanying notes 211-18 infra.
[56] See note 35 supra and accompanying text.
[57] SWA Cases 1962, at 514, 518; cf. Pres. Winiarski, dissenting, at 452.

Respondent's argument that the apartheid issue was not justiciable was based essentially on three different grounds: (*1*) The supposed intentions of the drafters of the mandate did not envision the exercise of jurisdiction.[58] (*2*) The nature of the issue was essentially political or social, not legal.[59] This position had been vigorously propounded by Judges Spender and Fitzmaurice in their 1962 dissent.[60] (*3*) The nature of the Court's role precluded an attempt to adjudicate the apartheid issue. The rationalization of this point was itself complex and subtle, as may be seen from the respondent's arguments quoted in the following paragraph.

Fundamentally, the South African point on this aspect of the non-justiciability argument was that the *only* way the Court could evaluate the respondent's promotion of well-being and progress was by judging the good faith of the respondent in performing each act involved: there was no other standard.[61] The South African chief counsel laid out the argument as follows:

> Our contention is that Article 2, paragraph 1, of the Mandate conferred full power of administration and legislation. This . . . covered the whole field of possible governmental action . . . —nothing was withheld. . . .
> Now, this grant of full power . . . included the necessary discretion . . .

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[58] "[T]he authors of the Mandate did not intend the Court to exercise jurisdiction at all in respect of the alleged breaches of Article 2, paragraph 2, of the Mandate . . . ." C.R. 65/18, at 6 (April 14, 1965). But counsel for the applicants argued:

> Respondent's contention that disputes . . . [as to article 2] are not justiciable, attributes to the authors of the Mandates System a denial to the inhabitants of the Territory of judicial protection of the rights . . . described in 1950 as "the very essence of the sacred trust of civilization."
>
> Acceptance of Respondent's contention . . . would lead to the anomalous result that protection by this Court of rights and obligations going to the very essence of the Mandate would be subject to administrative supervision alone, whereas rights of lesser stature . . . in Articles 3-5 of the Mandate, would be subject both to administrative supervision and to judicial protection . . . .

C.R. 65/2, at 26 (March 18, 1965). Following the Spender-Fitzmaurice 1962 dissent (see note 57 supra), respondent was adamant that the mandate must be construed as of the date of its creation. C.R. 65/18, at 5, 33-34 (April 14, 1965).

[59] This was implicit, rather than explicit, in the arguments concerning justiciability. But the applicants replied to the argument by citing Brown v. Board of Education, 347 U.S. 483 (1954), as one of the authorities "showing that obligations of a scope and nature comparable, in certain general respects, to those embodied in . . . Article 2 of the Mandate, are justiciable . . . ." C.R. 65/2, at 28 (March 18, 1965). Further, they added:

> The Applicants . . . cite . . . numerous judicial authorities, as well as scholarly writers, confirming that the judicial process in civil law systems, as well as other systems, draws upon humane, moral, political and scientific standards as sources of law, and does so particularly where legal rights are broadly formulated . . . .

Id. at 30-31.

For a brilliant exposition of the "'naturalization' between legal and other cultural norms," see SWA Cases 1966, at 281-301 (Tanaka, J., dissenting).

[60] "The proper forum for the appreciation and application of a provision of this kind is unquestionably a technical or political one . . . ." SWA Cases 1962, at 467 (dissenting opinion); see id. at 466.

[61] "Respondent's . . . argument . . . is . . . in effect, that unreviewable discretionary powers over the Territory are vested in the Respondent . . . subject only to the question whether such powers are exercised . . . 'in good or bad faith.'" C.R. 65/2, at 34 (March 18, 1965).

inherent in all powers of this nature . . . to decide what action to take and how. . . .

The only limitations . . . therefore the only basis upon which action . . . could possibly be regarded as . . . in contravention of its obligations, are . . . expressed in the mandate itself. . . . [T]he first . . . are "particular obligations" . . . relating to the slave trade, provision of liquor and so forth. The other . . . was the general obligation set out in Article 2, paragraph 2 . . . . [Its] effect . . . is to limit . . . the Mandatory's discretionary powers in one way only, . . . by prescribing the object or the purpose for which the Mandatory is obliged to use its powers. . . . [T]he very generality of the obligation makes it clear that one deals here merely with a matter of objective or purpose, and not with . . . detail concerning method of achieving the purpose. . . .

In the result . . . except for Articles 3-5, . . . nothing . . . impairs the Mandatory's discretion to decide on specific actions . . . and the methods to be applied in pursuance . . . [thereof] in seeking to obtain this general, prescribed objective. . . . [A]s long as the Mandatory honestly attempts to achieve the result, its conduct cannot be regarded as a violation of its obligation.[62]

The South African counsel then elaborated on the consequences:

[W]hen the Mandatory acts honestly with a view to fulfilling his function, he acts legally. . . .

[I]t is the discretionary nature of the Respondent's powers which gives rise to the basic consequence . . . that the Court is not entitled to express a judgment on what it regards as the merits of an exercise of the discretion; the only function of the Court is to determine whether or not any of the limits imposed in regard to the discretion were exceeded. . . . If the Mandatory exercises it within a sphere in which it is intended that the Mandatory should exercise that discretion, the Mandatory acts legally, and whether the Court thinks it acts wisely, whether the Court likes the policy applied or does not like it is, legally speaking, irrelevant.[63]

In addition to the defense of non-justiciability, the respondent put forward equally a mixed offensive-defensive argument, to the general

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[62] C.R. 65/19, at 5-7 (April 22, 1965). But the applicants stated:

[T]he question at issue is not the subjective motivation of a particular government . . . .

[A test] of Respondent's obligations under Article 2 . . . in terms of good or bad faith would necessarily confront this honourable Court . . . with the task of judging the Mandatory's conscience, rather than its conduct . . . .

The policy and practice of apartheid . . . are in violation of the terms of the Mandate, not subjectively determined in accordance with . . . good or bad faith tests, or motivation, but as objectively interpreted in accordance with generally accepted standards . . . .

C.R. 65/2, at 35 (March 18, 1965).

[63] C.R. 65/18, at 49-50 (April 14, 1965).

Whether a court, or anybody else agrees, or disagrees with the methods and policy . . . [or] likes those policies, or dislikes them, that does not matter. The legality of the action of the mandatory is not affected as long as it honestly attempts to achieve . . . [mandate objectives].

Stated conversely . . . violation of that obligation can occur only if the mandatory makes no genuine attempt at all to fulfill its obligation, or . . . directs its measures and its policies at some other unauthorized objective or purpose.

C.R. 65/19, at 8 (April 22, 1965).

effect that "separate development" was good rather than evil.[64] The argument was offensive insofar as it posited the following: *First*, that the inhabitants of South West Africa fall naturally into "a number of separate groups . . . largely living in different regions. . . . The groups differ widely amongst themselves. They maintain different institutions; they are at different stages of development; they regard themselves as being different from one another in important respects *and they wish to retain their separate identities* . . . ."[65] *Second*, that separation protects the Africans from the more skilled and highly competitive whites.[66] *Third*, that separation keeps the country from chaos on the one hand (example: the Congo)[67] and from domination by a single group on the other[68] (the "Ovambo menace"[69]). *Fourth*, that separation protects the country from the inevitable technological, economic, and general decline that would occur if the whites left (as they surely would if separation were ended).[70] *Finally*, that as a result of the application of separate development Africans of South West Africa are better off than those in other parts of Africa where other political and social systems are in effect. [71] Defensively, the respondent attacked the character and motives of the petitioners from South West Africa. It was only on the basis of their ill-informed or lying testimony, backed by representatives of "certain" (read "Communist"(?) or "black African"(?)) states, counsel argued, that the UN had misguidedly condemned South Africa for oppressive conduct;[72] had the true facts, set

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[64] I Rejoinder, pp. 276-77, SWA Cases 1966; C.R. 65/25, at 34-36 (May 3, 1965).

[65] C.R. 65/99, at 17 (Nov. 15, 1965). [Emphasis added.]

[66] What would the Respondent be required to do if the Court were to grant an order simply in terms of [amended] Submissions Nos. 3 and 4? . . .

[T]he Respondent would have to repeal all its measures which have as their object the protection of the indigenous groups . . . .

C.R. 65/98, at 46-47 (Nov. 12, 1965).

[67] In short, separate development is intended . . . , negatively, to avoid the human tragedies which have occurred, and are occurring, in African territories such as the Congo, the Sudan, Rwanda, and others, as well as in the systems of ruthless dictatorship found necessary in so many other territories with a view to maintaining even a semblance of order . . . .

I Rejoinder, pp. 277-78, SWA Cases 1966.

[68] C.R. 65/99, at 17 (Nov. 15, 1965).

[69] The Ovambo constitute nearly half the African population of South West Africa and were therefore repeatedly cited by the respondent as potential tribal overlords under any "one man, one vote" system. C.R. 65/77, at 42-43 (Oct. 8, 1965) (Dahlmann, Editor of a German-language newspaper in South West Africa, testifying); C.R. 65/49, at 36 (June 21, 1965)(Eiselen, Commissioner-General for the Northern Sotho ethnic unit in South Africa, testifying).

[70] We demonstrated that they [Whites] had a right to be there. We demonstrated what harm would result to the whole community if it were not made possible for them to remain. . . . We demonstrated how attempted integration would prevent their remaining . . . whether that attempt is of an immediate or gradual nature.

C.R. 65/99, at 17 (Nov. 15, 1965). See also C.R. 65/21, at 42 (April 26, 1965)(protection of minority, developed, groups).

[71] C.R. 65/98, at 16 (Nov. 12, 1965) (by implication).

[72] [W]ho are they [the petitioners]? . . . [T]hey constitute a small body of men, a large percentage of them not in South West Africa. . . . Secondly, what are their

forth above in this paragraph, been before UN members, the resolutions cited by the applicants would never have been passed.[73]

The Substantive Issue: International Legal "Standards" or "Norm" Prohibiting Discrimination

Although, as has been suggested, the odds had seemed somewhat against South Africa at the end of the Preliminary Objections in 1962,[74] applicants could not have been unaware that only a slight shift in the balance of the Court could result in the transformation of majority into minority. They were attempting to present a novel case; the problems were not only new in international law but were unfamiliar also in the national legal systems of many of the judges. Race, the key underlying factor, is an explosive subject, which may arouse unanticipated subterranean reactions. The political implications of the decision—*any* decision—would be enormous. The better part of judicial valor might well be finding the apartheid issue non-justiciable.

As a consequence,[75] the applicants began the gradual modification of their case that led to the concept which they finally spelled out in their oral arguments.[76] Their reply continued to detail discriminatory and oppressive treatment of nonwhites, but it began specifically to emphasize international standards or an international norm of non-discrimination against which the conduct of the South African government could be objectively evaluated by a court of law:

> [I]t is submitted that as a generally accepted legal norm, non-discrimination imparts a specific and objective content to Article 2, paragraph 2, of the Mandate.
>
> . . . .
>
> Applicants accordingly submit that, by undertaking a legal commitment to promote the welfare of the inhabitants of South West Africa "to the utmost," Respondent has obligated itself, at the very least, to carry out in the Mandated Territory the generally recognized minimum basic norm of non-discrimination on the basis of membership in a group or race.
>
> [U]nder any conception of current standards, a policy so extreme in its discriminatory and repressive character as *apartheid*, must be found

objectives? . . . [T]o seize power and achieve African rule over the whole of South West Africa. As regards objectives there is a clear common purpose between the petitioners on the one hand and the leaders of the campaign [against South Africa] on the part of certain States on the other.

C.R. 65/88, at 26 (Oct. 27, 1965). See also VIII Counter-Memorials, pp. 51-52, SWA Cases 1966.

[73] "The delegates who voted for the resolutions condemned Respondent's policies or apartheid by name . . . upon the basis of acceptance that such policies were designed to and did in fact oppress the indigenous inhabitants of the Territory for the benefit of the White group." C.R. 65/89, at 44 (Oct. 28, 1965); see id. at 45.

[74] See text accompanying note 36 supra.

[75] For a discussion of other reasons affecting the applicants' final statement of their legal theories, see text accompanying notes 147-50 infra.

[76] See text accompanying note 110 infra.

> to violate even the most minimal standards universally accepted (except by Respondent) as governing the relations between a State and its subjects.[77]

In its rejoinder the respondent pointed up the new emphasis; but, to the extreme annoyance of the applicants, it continued to pound away at the question of motive or of good or bad faith as "the only basic factual issue" between the parties.[78]

By the time the oral arguments opened in the spring of 1965, the applicants' concept of an international legal norm or of international legal standards of non-discrimination had become the heart of their case on the apartheid issue. Although respondent had been sufficiently aware of the evolution of the concept to line up witnesses to testify that "there is no international custom evidencing a general practice by which a norm and/or standards . . . is accepted as law, and that there is no support for the existence of such a norm in the principles of law recognized by civilized nations,"[79] it lost no opportunity to complain to the Court about the change in the applicants' case.[80] (It conveniently ignored the fact that in the jurisdictional round it had amended its submissions at the *end* of the oral arguments on the basis of questions propounded by the Court.[81]) Even after the applicants' counsel had presented his opening arguments, the respondent was still seeking tactical advantage from its alleged position as defendant in a two-front battle against "standards and/or norm" on the one hand and charges of old-fashioned oppression on the other.[82]

Under the applicants' theory, as it finally evolved, the extension of apartheid to South West Africa by the respondent violated, *as a matter of law*,[83] the mandate injunction to promote to the utmost the material and moral well-being and social progress of the inhabitants.[84] This theory was based on alternative but cumulative premises: (*1*) As a matter of simple interpretation of the mandate, article 2, read in the light of modern standards of governmental conduct toward citizens or subjects, prohibited official discrimination on the basis of race or color (the "international legal standards" argument).[85] (*2*) Official discrimination on the basis of

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77 Applicants' Reply, pp. 291-93, SWA Cases 1966; see generally id., ch. V.

78 C.R. 65/2, at 25 (March 18, 1965); id. at 35.

79 C.R. 65/48, at 15 (June 18, 1965).

80 See, e.g., C.R. 65/20, at 20-26 (April 23, 1965); C.R. 65/35, at 73 (May 19, 1965); C.R. 65/36, at 7 (May 24, 1965); C.R. 65/40, at 5-9 (June 8, 1965); C.R. 65/42, at 24-29 (June 10, 1965); C.R. 65/52, at 15 (June 30, 1965).

81 See SWA Cases 1962, at 327; C.R. 65/52, at 12 (June 30, 1965).

82 C.R. 65/19, at 19 (April 22, 1965); cf. C.R. 65/7, at 18 (March 30, 1965).

83 C.R. 65/25, at 6-7 (May 3, 1965).

84 Applicants alleged that various other provisions of the mandate had also been violated, but the arguments as to the violation of article 2 were the crux of the case. See C.R. 65/35, at 69-70 (May 19, 1965).

85 This argument was more heavily relied on by the applicants.

race or color was contrary to international law, which is binding on all nations, and a fortiori on a country exercising an international trust (the "international legal norm" argument).

Both the international legal standards referred to in (*1*) and the international norm referred to in (*2*) prohibited "official governmental allocation of status, rights, duties and privileges upon the basis of membership of a group, class or race, without regard to individual merits, capacity or quality."[86] Therefore they were repeatedly cited as, respectively, "[international legal] standards of non-discrimination" and "[international legal] norm of non-discrimination." However, the use of the terms "standards" and "norm" throughout the pleadings and oral arguments on both sides was something less than consistent.

(*1*) *International Legal Standards.* Although both standards and norm prohibited official discrimination, the standards had not achieved the "degree of authoritativeness" of the legal norm, the applicants explained,[87] and therefore had to be applied in a different manner, as a matter of legal theory.

The applicants used "standard" in a dictionary sense—as something established as a rule or basis of comparison in measuring or judging; a criterion. Standards of non-discrimination could be used to evaluate the respondent's conduct in the same manner that the standard of a "reasonable man" is traditionally used to evaluate human conduct in a variety of situations.

The respondent contended that, in the absence of its consent to a change in the mandate *contract*—it used contract language continually, giving a rigid, common-law flavor to its arguments—the only standards which could be applied to its conduct were those contemplated by the drafters of the mandate in 1920.[88] For the Court to apply any current standards—assuming, as respondent did not,[89] that there were any contemporary standards of non-discrimination—would be "to indulge in judicial legislation in that regard. In other words, to state or find the existence of restrictions or limitations upon no known process of interpretation . . . pertaining to the origin of obligations or limits upon powers."[90]

Replying directly to this argument, the applicants boldly stated that a proper interpretation of article 2 would make it read as if it explicitly con-

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[86] C.R. 65/6, at 6 (March 24, 1965). Thus the *contents* of the standards and the norm are identical. C.R. 65/31, at 40 (May 13, 1965); C.R. 65/35, at 48 (May 19, 1965).
[87] C.R. 65/31, at 40 (May 13, 1965).
[88] C.R. 65/18, at 33-34 (April 19, 1965); C.R. 65/19, at 21, 30-31 (April 22, 1965).
[89] C.R. 65/48, at 15 (June 18, 1965).
[90] C.R. 65/19, at 19 (April 22, 1965); id. at 20-21.

tained the following proposal: "The Mandatory shall . . . give effect to such standards or norms as may at the time of such exercise be generally applied by . . . the competent international organs."[91] Drawing an analogy to *Brown v. Board of Education*,[92] the applicants contended that article 2 ought to be interpreted *ratione temporis*,[93] since the mandate was, after all, "a constitutional type document."[94] It had to be viewed, they added, in the context of article 22 of the Covenant, which

> [I]mplies a dynamic environment of international supervision; one that evolves with the contemplated progress of the inhabitants. . . .
>
> If Article 2 . . . has any meaning at all, therefore, that presupposes the application of evolving and dynamic standards . . . governing the welfare of the mandated territories . . . .[95]

Although respondent had denied ever consenting to the application of such standards, applicants alleged (alternatively and cumulatively) that, by adhering to the UN and the ILO, South Africa had automatically consented to the "processes of such institutions for giving authoritative, evolving and dynamic content to the provisions of a constituent charter, or ordinances, of such institutions."[96] And even if there was no actual consent, they held that "the will of the organized international community,[97] expressed particularly by virtue of unanimity, may serve as a quasi-legislative substitute for the consent of each and every state."[98]

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91 C.R. 65/34, at 21 (May 18, 1965).

92 347 U.S. 483 (1954). This case was, in a sense, an unacknowledged spectre at the proceedings. Implicit in the applicants' case was the never specifically stated assumption that the International Court could act as the American Supreme Court had acted in a case which involved many of the same theoretical and practical considerations. See note 59 supra. The respondent was at great pains to exorcise the decision without quite admitting its presence.

93 C.R. 65/2, at 29-30 (March 18, 1965).

94 C.R. 65/34, at 22 (May 18, 1965).

95 Id. at 20-21.

96 C.R. 65/31, at 43 (May 13, 1965); see id. at 32.

97 International lawyers will be fascinated by the respondent's reaction to the concept of "the organized international community":

> We might ask . . . what is comprised by this concept "the organized international community . . ."?
>
> The League and the United Nations are examples of organized international communities in that sense, [i.e.,] contractually established. . . . *The* organized international community has never been contractually established, it has no institutional existence, it has no constituent instrument, it can never be said to be something of the nature of an artificial person, or an unincorporated association. . . . It could, perhaps, be said to be something in the nature of a social concept . . . a sociological phenomenon, and in that sense . . . something real, but if it is not something real in that sense . . . then it must be either just a dream or nothing. . . .
>
> When writers like the late Judge Lauterpacht speaks [sic] of the international community . . . they are speaking metaphorically of the aggragate [sic] of sovereign States, they are not speaking of something in an institutional sense.

C.R. 65/44, at 11, 14 (June 14, 1965).

98 C.R. 65/31, at 42 (May 13, 1965). Counsel for the applicants added:

> The standards thus prescribed by the organized international community, which is vested with the responsibility and which bears the burden of supervision and safeguarding the sacred trust, are so clear and so firmly rooted as to obviate any basis

Having demonstrated that a proper interpretation of article 2 prohibited official discrimination by reason of race or color, the applicants referred to the documentary evidence appended to their pleadings—the "record of laws and regulations and the official methods and measures, the existence of which is conceded by Respondent."[99] They contended that this evidence showed that:

> [T]he policy and practice of apartheid . . . are extreme forms of *official* discrimination in which race and colour are the primary determinants of individual rights, burdens, status and privileges, and form a systematic basis for imposing disabilities upon individual persons without regard to their individual quality or capacity.[100]

This was the conclusion reflected in the "consistent, explicit and overwhelming judgment of the competent supervisory organ [the UN], as well as the official condemnation of governments expressed both severally and through collective judgment . . .," and "authoritative weight should be given . . . in the interpretation of article 2 obligations to the judgments thus expressed. The violation . . . is so clear as to constitute, *ipso facto*, a violation of the Mandate."[101]

Thus, following the applicants' theory, apartheid violated article 2 as a matter of law. And if that interpretation was accepted, the Court had a concrete *legal* standard by which to evaluate the administration of the Territory (eliminating the plea of non-justiciability), and the respondent could not claim that it had discretion to introduce apartheid because in good faith it thought separate development desirable.[102]

(*2*) *International Legal Norm.* The argument as to the international legal norm of non-discrimination was both novel and daring.

The theory was, in essence, that the international standards of non-discrimination had evolved beyond the status of mere criteria applied by the Court to elucidate the meaning of article 2 of the mandate into a true norm or rule of international law.[103] The applicants argued that rules of international law were implicitly defined in Article 38(1) of the Statute

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for a reasonable doubt concerning the proper interpretation of the Mandate in the sense contended for by the Applicants.

Id. at 43. But the respondent answered:

> Applicants' argument as regards standards was met by us by showing not only that there are no longer any organs possessing supervisory authority in respect of the mandates . . . but that even had such organs existed they would not have been entitled in law to lay down objective rules enforceable by law against the mandatory.

C.R. 65/87, at 10 (Oct. 26, 1965).

[99] C.R. 65/25, at 22 (May 3, 1965).

[100] C.R. 65/52, at 12-13 (June 30, 1965). [Emphasis added.]

[101] Id. at 13.

[102] "Applicants deny that Respondent possesses any discretion relevant to the obligations under the Mandate in the face of a complaint . . . of a qualitative violation of Article 2, one which, in the submission of the Applicants, involves an inherently impermissible course of conduct." C.R. 65/34, at 11 (May 18, 1965).

[103] C.R. 65/35, at 42 (May 19, 1965).

of the Court, which provides that the Court, "whose function is to decide [disputes] in accordance with international law," shall apply:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. judicial decisions and the teachings of the most highly qualified publicists of the various nations . . . .

Counsel for Ethiopia and Liberia cited evidence as to all the sources listed in that article to prove the existence of the norm.[104] Nevertheless, they admitted that they rested "perhaps . . . upon a law-creating process which has not heretofore been considered or passed upon by this honourable Court . . . ."[105]

This postulated norm was binding on every country, whether it had consented thereto or refused its consent, just as are the prohibitions against piracy and genocide.[106] But in the case of the respondent, applicants pointed out, the norm would also control on the ground that, in undertaking the mandate, South Africa "must be conclusively presumed to have undertaken and agreed to comply with international law in the exercise of the Mandate . . . ."[107] Further, they argued, when even sovereign states are required to govern in accordance with international law:

> Certainly something more is to be expected of a mandatory, which is performing the duties of a trust on behalf of the organized international community . . . without an independent legal title. Respondent cannot be heard to say that its obligations as Mandatory are not affected by the international legal norm.[108]

The norm propounded by the applicants necessarily precluded exceptions by way of administrative discretion, since there is no discretion to violate international law. Vitally important to the international community, it provided an absolute legal standard against which the conduct of the South African government could be judged—*as to its own citizens in South Africa* as well as to inhabitants of South West Africa.[109]

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104 Id. at 5-38; C.R. 65/34, at 45-65 passim (May 18, 1965).
105 C.R. 65/31, at 43 (May 13, 1965).
106 Id. at 38-39.

> The organized international community . . . has stated its judgment in respect of . . . apartheid. No clearer judgment probably has ever been expressed . . . on any question in the history of the international community. It is no longer a matter . . . upon which reasonable men can differ, that a policy which allots rights, burdens and privileges, on the basis of membership in a group rather than on the basis of individual merit and capacity and quality, is permissible. It has moved into the domain of genocide.

C.R. 65/32, at 12 (May 14, 1965).
107 C.R. 65/33, at 42-43 (May 17, 1965).
108 C.R. 65/31, at 38 (May 13, 1965).
109 "[T]he existence of an international legal norm prohibiting separation and discrimination, or either of them, would indeed be of universal application." C.R. 65/31, at 40-41 (May 13, 1965).

Restating their submissions 3 and 4 at the end of their oral reply on the basis of these theories which they had constantly refined throughout their arguments, the applicants asked the Court to find:

> 3. Respondent, by laws and regulations, and official methods and measures, which are set out in the pleadings herein, has practised apartheid, *i.e.*, has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory . . . .
> 4. Respondent, by virtue of economic, political, social and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures . . . set out in the pleadings herein, has, in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory.[110]

As the applicants summed up their case, all the "decisively relevant facts" were undisputed. These, of course, comprised the documentary record of laws, regulations, etc., the existence of which was conceded by the respondent.[111] The applicants therefore declared that they would call no witnesses and that they were prepared to have the Court judge their case on the record "read in the light of the applicable legal norm and the international standards for which the Applicants contend . . . ."[112] It could only conclude, they felt, that apartheid constituted "racial discrimination of an extreme and virulent nature"[113] and that "such a policy, established by that evidence, is inherently and *per se* incompatible with moral well-being and social progress, not only in a mandated territory but . . . anywhere, at any time, and under any circumstances."[114] On this

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[110] C.R. 65/35, at 69-70 (May 19, 1965). Each submission contained a clause requesting the court to find the described practice a violation of article 2 of the mandate and article 22 of the Covenant and another requesting the Court to order the respondent to cease the practice involved and to take all practicable action to fulfill its duties under the provisions involved.

Other amended submissions specified violations of other provisions of the mandate, corresponding in all important details to the identically numbered submissions first set out in the memorials.

In reply to an inquiry from the Court as to the difference between submissions 3 and 4, counsel for the applicants stated:

> There is no distinction intended by the Applicants to be made . . . explicitly or implicitly, which has any bearing upon that theory of the case. Although expressed in different form . . . the submissions rest upon exactly the same legal basis . . . [i.e.,] that the laws, administrative measures, and the official methods and measures by which they are carried out which comprise the policy of apartheid constitute a *per se* violation of Article 2 of the Mandate and Article 22 of the Covenant.

C.R. 65/24, at 5 (April 30, 1965).

For respondent's analysis of the difference between the original and the amended submissions, see C.R. 65/42, at 27-29 (June 10, 1965), emphasizing that the concept of apartheid has changed from one involving deliberate oppression to one limited strictly to "the allotment of rights and obligations, privileges, and burdens, on the basis of membership in a race, group or class." Id. at 29.

[111] See note 99 supra.

[112] C.R. 65/25, at 22 (May 3, 1965).

[113] C.R. 65/96, at 23 (Nov. 9, 1965).

[114] Ibid.

basis the applicants did not make any allegations of oppression of the nonwhite majority by the white minority ("mere conclusory facts").

The applicants went further and declared that, "without conceding the relevance of facts contained in respondent's pleadings . . . the facts—as distinct from the inferences which may be drawn therefrom—are not contested by the Applicants except as otherwise indicated."[115] As counsel explained this step:

> [T]he character of the international standards and/or of the international legal norm of the same content . . . entail [sic] a condemnation of apartheid in such absolute terms that it excludes reasonable possibilities of justifying or extenuating the practice by reference to other considerations which become extraneous as a matter of law . . . [*e.g.*,] good faith, local conditions, material progress.[116]

The respondent's attack on the applicant's theory of an international legal norm of non-discrimination was multi-faceted. Counsel charged that what the applicants referred to as a reasonable law-creating process was, in stark reality, the assignment to the Court of:

> [A] most unworthy role . . . , that of a revolutionary tribunal to aid and abet, and to rubber-stamp, the usurpation by the political majorities in international tribunals of legislative powers which have not been granted to them in the constitutive instruments or by the consent of the States who have created them.[117]

Emphasizing the "ought" as opposed to the "is" in the applicants' arguments,[118] respondent harked back to the issue of social and political,

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[115] C.R. 65/2, at 25 (March 18, 1965). This "admission" led, however, to repeated wrangling over the "relevance" of "facts" and the distinction between "facts" and "inferences therefrom." Thus counsel for applicants attacked "Respondent's repeated treatment of averments of fact, inferences to be drawn therefrom, arguments with respect thereto, comments made thereon, the Respondent's treatment of all of these entirely different elements, as being legally synonymous . . . ." C.R. 65/96, at 26 (Nov. 9, 1965).

Apparently, one additional reason for making the "admission" was to avoid bickering over the specific statutes, regulations, etc., applicable to South West Africa since those in effect in South Africa generally were not automatically applicable to the Territory and the existence of the necessary proclamations or statutory form to extend them to the mandate was often a matter of considerable doubt. Thus counsel for applicants referred at one point to "the measures of implementation, the laws, regulations, administrative practices—none of which is in dispute, and if any is in dispute, the Applicants do not rely on them." C.R. 65/22, at 38 (April 27, 1965).

[116] C.R. 65/35, at 48 (May 19, 1965). Respondent's counsel scorned a proposition which, he said, "applies even if the facts should be that Respondent's policies viewed as a whole are intended to inure and in fact do inure to the benefit of the population as a whole." C.R. 65/24, at 21 (April 30, 1965). But the applicants replied that:

> No standards of achievement anywhere in the world would be high enough or low enough, as the case may be, to justify and extenuate the policy of apartheid. . . . The international legal norm and standards which exist are not subject to, or conditioned by, or affected in any manner by, any question concerning standards of achievement. . . .

C.R. 65/23, at 38 (April 28, 1965). See also id. at 34, 36; C.R. 65/96, at 20 (Nov. 9, 1965).

[117] C.R. 65/48, at 9-10 (June 18, 1965).

[118] C.R. 65/44, at 45 (June 14, 1965).

versus legal, concerns stressed in the Spender-Fitzmaurice dissent in 1962.[119]

In addition to belittling the process of judicial legislation which might bring any such norm or standards into existence, the respondent vigorously attacked the very concept of "international standards and/or norm."[120] It also called witnesses to establish that "there is no international custom evidencing a general practice by which a norm and/or standards . . . is accepted as law, and that there is no support for the existence of such a norm in the principles of law recognized by civilized nations . . . ."[121]

Counsel attempted to confuse, and thereby to undermine, the concepts by arguing that they would invalidate protective legislation, such as child labor laws or the minorities treaties, and would even prevent the separation of public facilities for men and women![122]

Witnesses testified to the facts, *inter alia*, that discrimination existed throughout the world, including the United States and the applicant countries;[123] that the UN resolutions condemning apartheid were not

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119 SWA Cases 1962, at 466, 467 (dissenting opinion).

120 The use of the phrase "international standards and/or norm" was particularly annoying to the applicants as suggesting that they were more or less interchangeable concepts, whereas the applicants had developed separate, alternative (if cumulative) theories as to international standards and the international legal norm.

121 C.R. 65/48, at 15 (June 18, 1965). Respondent admitted, however, that its:

> [P]olicies and practices in South West Africa do distinguish as to racial or ethnic origin in establishing the rights and duties of the inhabitants, and, therefore, if a legal norm and/or standards . . . were in existence and were binding . . . it would follow that Respondent's policies would be in conflict with such a norm and/or standards.

Ibid.

122 C.R. 65/98, at 12 (Nov. 12, 1965). In response to a question by Judge Fitzmaurice on this issue, counsel for applicants said:

> [A] policy which differentiates among individuals as such, or as members of identifiable groups, would be permissible and indeed desirable in appropriate circumstances. We have in that connection cited the Minorities Treaties, . . . the protection of minors, the protection of other segments of the population. . . .
>
> . . . .
>
> A policy of differentiation, however, which allots rights, burdens, status, privileges, and duties on the basis of . . . race, colour or other circumstances of a similar nature . . . is . . . an impermissible policy at all times, under all circumstances and in all places.

C.R. 65/23, at 32-33 (April 28, 1965).

123 C.R. 65/90, at 13-17 (Oct. 29, 1965), summarizing the testimony of Professor Possony, C.R. 65/83-86 passim (Oct. 18-21, 1965).

In relation to international legal standards, applicants replied:

> [N]o evidence is relevant . . . concerning the extent to which international standards pertaining to racial discrimination . . . are applied in practice. If the Court should find that such standards exist . . . then the extent to which such standards are violated in practice is irrelevant . . . [just] as . . . failure to observe . . . standards [of negligence, reasonable care, etc.] in practice makes them more, not less, necessary.
>
> [E]vidence [led by Respondent] . . . which did relate to practice of States proved the obvious fact . . . that it is frequently necessary to protect individuals from racial discrimination.

C.R. 65/96, at 16-17 (Nov. 9, 1965).

based on any international norm, but on the misleading information—supplied by petitioners from South West Africa—that nonwhites were being oppressed in the Territory;[124] that most of the South West African petitioners themselves favored tribal separation,[125] as did the Territory's other nonwhite inhabitants;[126] that separate development benefited—not oppressed—the overwhelming majority of nonwhites, although a handful concededly might suffer;[127] and that integration (in accordance with the norm) would be "detrimental, catastrophically detrimental, to the well-being and progress of the population as a whole . . . ."[128]

Respondent, citing the (favorable) facts about separate development in South West Africa as set out in its pleadings[129] and elicited in the testimony of its expert witnesses, contended that the applicants had changed their legal theory so that they could profit from the emotions engendered by their criticism of racial discrimination while at the same time avoiding any factual inquiry into conditions in South West Africa (which would, of course, support respondent's position).[130] It alleged further that Ethiopia and Liberia had been compelled to give up their charges of oppression of nonwhites in South West Africa by the evidence which it had adduced[131] and the applicants had had to admit:

> The abandonment of that charge of oppression, and the admission of the true facts which so abundantly refutes that charge, had a very important practical effect on the Respondent's position . . . because that had the effect of clearing the Respondent's name of these charges. . . . The abandonment of their charge and the . . . admission of the facts, constitutes [sic], at the same time, acknowledgement of the falsity or the incorrectness of the factual basis upon which the Respondent's policies have been condemned at the United Nations over all these years.
>
> And . . . the acknowledgement came . . . from representatives of the whole collectivity of African States . . . from States whose representatives claim . . . that they seek to uphold the interests also of all other Members of the United Nations, and indeed of the Organization itself.[132]

(*3*) *The "Safari" Proposal.* Directed essentially to the same line of argument was the respondent's dramatic master stroke, called by ob-

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124 C.R. 65/89, at 44-45 (Oct. 28, 1965); C.R. 65/90, at 10 (Oct. 29, 1965).
125 C.R. 65/77, at 42-46 passim (Oct. 8, 1965).
126 See, e.g., C.R. 65/49, at 33-37 passim (June 21, 1965).
127 C.R. 65/98, at 30 (Nov. 12, 1965).
128 C.R. 65/91, at 41 (Nov. 1, 1965); cf. C.R. 65/47, at 61 (June 17, 1965).
129 I Rejoinder, pp. 276-77, SWA Cases 1966; C.R. 65/25, at 34-35 (May 31, 1965).
130 C.R. 65/24, at 36-37 (April 30, 1965).
131 C.R. 65/40, at 8-10 (June 8, 1965); C.R. 65/42, at 24 (June 10, 1965); C.R. 65/89, at 44 (Oct. 28, 1965). See also respondent's comments on the changes in applicants' amended submissions, cited in note 110 supra.
132 C.R. 65/91, at 45 (Nov. 1, 1965).

Even so astute a commentator as the editor of the International Lawyer accepted this representation of the situation at face value when he defended the majority opinion in an ABA International and Comparative Law Section symposium on the South West Africa Cases. "The World Court's Decision on South-West Africa," 1 Int'l Lawyer 12, 17-18 (1966).

servers the "safari proposal." Counsel for South Africa requested the Court, or a committee of the judges, to take an "inspection tour" of South West Africa,[133] of "limited" portions of South Africa,[134] of Ethiopia and Liberia, and of one or two other sub-Saharan countries selected by the Court, preferably from among former mandated and trusteeship territories.[135] The object, said counsel, would be to experience "African reality,"[136] so that the Court could "evaluate well-being and progress in an African territory like South West Africa fairly and in a proper perspective,"[137] and to "enable the Court . . . to form a general impression of comparable conditions and standards . . . [in the applicant states]."[138]

The applicants opposed the request on the grounds that it was untimely;[139] that its purposes were vague[140] and could not "aid in a judicial evaluation of the degree or quality of frustration . . . inflicted . . . by a policy which for any reason based upon race, or tribal accident, inhibits or forbids the realization of individual capacity, merit and potential . . . ;"[141] and that "the standards of achievement in comparable territories . . . in Africa . . . would seem . . . to be irrelevant to any issue presented to the Court by the Applicants' submissions, or the legal propositions on which they are grounded."[142] The shoe was at least temporarily on the other foot, however, as a result of the applicants' query as to how the Court could determine from whom to take testimony in South West Africa;[143] respondent's counsel indignantly protested that he had "never heard of the concept of an inspection including . . . the taking of evidence. . . . [T]here was never any such suggestion from our side . . . ."[144] The Court reserved decision on the request until oral arguments were completed;[145] and eventually it voted 8-6 not to take the "safari."[146]

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133 C.R. 65/7, at 21-25 (March 30, 1965).

134 Id. at 22. By "limited" portions it was quite obvious that the respondent was referring to the Transkei, where the first allegedly self-governing African "homeland" has been established in the general form which the South African government foresees for all group homelands in South Africa and South West Africa.

135 Id. at 21.

136 Id. at 20.

137 Id. at 23.

138 Ibid.

139 C.R. 65/22, at 7-14 (April 27, 1965).

140 C.R. 65/25, at 12 (May 3, 1965).

141 C.R. 65/22, at 56 (April 27, 1965).

142 C.R. 65/23, at 38 (April 28, 1965).

143 Applicants' counsel simply "assumed" that the inspection would involve discussion with the inhabitants of South West Africa and therefore went on to ask:

> How many members of the population would be heard? How would they be selected for this purpose? What procedure would be appropriate for ascertainment of their views? Would they be consulted in the form of a plebiscite, or by any other means, to assure a fair appreciation and evaluation of . . . their own assessment of Respondent's policies and practices of apartheid?

C.R. 65/23, at 41 (April 28, 1965).

144 C.R. 65/25, at 55 (May 3, 1965).

145 C.R. 65/36, at 6 (May 24, 1965).

146 SWA Cases 1966, at 9. The decision was handed down at a public sitting on November 29, 1965.

(4) *Summary.* In view of the problems inherent in trying to persuade *any* court to accept a really novel legal theory, why did the applicants decide to rely exclusively on the theory that apartheid violated the mandate obligations *as a matter of law* based on application of international legal standards or the international norm of non-discrimination?

The pleadings, the oral hearings, and the known extraneous facts suggest the following reasons: *First* and foremost, fear of the defense of non-justiciability, particularly as it was advanced in connection with respondent's claim of administrative discretion limited only by proper motivation.[147] *Second*, concern that the proceedings could drag on interminably if both sides attempted to bring in supporting evidence concerning conditions in South West Africa.[148] *Third*, the conclusion, based on a realistic appraisal of the pressure which the South African government could exert on inhabitants of the mandate, that the respondent would be able to produce far more witnesses to support its position than the applicants could to oppose it.[149] *Fourth*, the respondent's persistent and persuasive campaign to discredit the South West African petitioners,[150] on whose testimony the applicants would certainly rely strongly.

The applicants applied their tactical theory, that facts other than the documentary evidence were irrelevant to their submissions, not only by refusing to call any witnesses[151] but also by urging the respondent to do likewise.[152] At the very least they urged their opponent to produce its evidence by deposition and offered to stipulate for the admission of such depositions without demanding to be present at their taking or to examine the witnesses by interrogatories or otherwise.[153] However, the respondent stood on its right to produce its witnesses before the Court.[154]

Apparently still following out their theory, counsel for applicants did not cross-examine the first witness. However, he subsequently changed

147 See text accompanying notes 57-63 supra.

148 The extension of the Cases would have been devastating, financially, to the applicants; would have given South Africa additional time to develop its economy and its military strength to defy any judgment rendered for the applicants; and probably would have made the Court increasingly restive and, quite possibly, unsympathetic to the perpetrators of the proceedings.

149 Among the powers which the South African government can exert, directly or indirectly, through local officials, are: power to appoint and depose chiefs (hence the applicants foresaw the production of hundreds of "happy chiefs" while they could find only unhappy exchiefs); the power to move and to join or split tribes, as well as to exile individual tribal members; the power to expel Africans from "white areas," particularly the urban centers. For a study of some of the powers exercised by the government in relation to Africans in the Republic, see Landis, "South African Apartheid Legislation I: Fundamental Structure," 71 Yale L.J. 1, 29-37 (1961).

150 See, e.g., C.R. 65/25, at 56-57 (May 3, 1965); C.R. 65/88, at 26-51 (Oct. 27, 1965); C.R. 65/76-80 passim, esp. 76th and 77th sess. (Oct. 7-13, 1965) (testimony of Kurt Dahlmann, Editor of a German-language South West African newspaper).

151 C.R. 65/2, at 24 (March 18, 1965); C.R. 65/22, at 44 (April 27, 1965).

152 C.R. 65/22 at 44 (April 27, 1965).

153 Id. at 44-45; C.R. 65/32, annex 1 (May 14, 1965).

154 C.R. 65/32, at 28-30 & annex 2 (May 14, 1965).

his tactics and cross-examined all the other witnesses at great length. Direct and cross-examination of the witnesses, who were all qualified as "experts," generally followed predictable patterns, marked by prolixity and repetitiveness. There were, however, occasional dramatic highlights, as when the American professor, Dr. van den Haag was led into accusing Dr. Kenneth Clark of *faking* the evidence that supported a brief amicus curiae which was a principal supporting document in the decision of the American Supreme Court in *Brown v. Board of Education*.[155]

The summations of counsel put the points which they had sought to elicit in perspective. Respondent's was a straightforward, but lengthy, recapitulation of the testimony of his government's witnesses. In contrast, counsel for the applicants made a relatively brief exposition, brilliantly expounding the point which his seemingly pointless cross-examination had been able to extract from every hostile witness:

> The witnesses, both by admission and evasion, strikingly confirm . . . Applicants' basic contention and legal premise that apartheid by its very nature is an extreme . . . form of racial discrimination which is inherently incompatible with the moral well-being and social progress of the persons whom it affects. . . .
>
> . . . .
>
> The impact . . . upon individuals . . . is precisely what the Applicants are talking about. . . . The heart of the matter, as the evidence brings out time and time over, is summarized . . . in a sentence of the credo . . . of apartheid . . . : "the individual is essentially looked upon as a Native; the Native is not looked upon as an individual."[156]

III

THE DECISION

The Court's Opinion

More than half a year elapsed between the end of the oral arguments and the delivery of the judgment in July 1966. Sometime in mid-spring 1966 rumors began circulating in Dar-es-Salaam that the decision would go against the applicants. Their source was not known,[157] but a simple

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[155] C.R. 65/60 at 77-78 (July 12, 1965). On questioning by the President, he withdrew the term. Id. at 89-93. See Clark, "The Desegregation Cases: Criticism of the Social Scientist's Role," 5 Vill. L. Rev. 224 (1960); van den Haag, "Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark," 6 Vill. L. Rev. 69 (1960).

[156] C.R. 65/96, at 29-31 (Nov. 9, 1965).

[157] It is interesting to speculate whether it arose out of an attempt by Judge Bustamante to participate in the decision. While his absence from the oral hearings would seem to make this unlikely, it is clear that attendance at *every* session is not required; and Judge Bustamante, who had sat through the hearings on the preliminary objections and therefore had some background concerning the facts and the legal issues, undoubtedly had received the verbatim record of the proceedings, since his return to the Court was expected when it opened in the spring of 1965. C.R. 65/1, at 10 (March 15, 1965). Apparently he was present in the Hague in the spring of 1966—in connection with the South West Africa Cases one would assume. Did the Court at that time vote on his right to participate in the decision, splitting, quite possibly, 7-7, with Sir Percy Spender having the casting

nose-count of the judges whose positions were relatively predictable led to the conclusion that the Court would, as indeed it did, split 7-7. In this case, of course, the implacable dissenter of 1962, Sir Percy Spender, would have the casting (second, tie-breaking) vote.

As is now apparent, this result was made possible only by the adventitious coincidence of four separate events: the illness of Judge Bustamante, which prevented his sitting in the proceedings; the death of Judge Badawi during the proceedings; the disqualification of Judge Zafrulla Khan; and the election of Sir Percy Spender as President.[158] Judge Khan, who was disqualified on the ground that he had been named (but had not sat as) *ad hoc* judge by the applicants before he was elected to the Court by the UN, told a press conference that he had *not* recused himself voluntarily, but had been informed by the President that the Court had decided he should not participate.[159] It should be noted in this connection that the respondent asked the Court to disqualify Judge Nervo,[160] who had previously been a member of the Mexican delegation that had debated and voted on apartheid and South West African questions at the UN. This motion was rejected 8-6.[161] (It is interesting that the argument made to disqualify Judge Nervo might have been used against Sir Percy Spender as well, since he was a former head of the Australian delegation to the United Nations; if both had been disqualified, instead of both participating, the Court would certainly have found that applicants had a sufficient interest in the subject-matter, since the Vice President, who dissented, would then have had the casting vote.)

(*1*) *Applicant's Lack of Standing.* In view of the known predilections

vote? Such a vote, if leaked, would have been sufficient to start the Tanzanian rumors, which, as purveyed around the UN somewhat later, did not suggest any reasoning on which the rumored decision against Ethiopia and Liberia was based.

The confusion is only compounded by Judge Khan's statement at his press conference (see note 159 infra and accompanying text) that Judge Bustamante was ill "during the first half" of the hearings.

158 Had Wellington Koo been elected President and Spender Vice President, the decision would have been the reverse on the issue of standing. This does not mean, however, that the judgment would have been for the applicants on all points of their submissions.

159 Pakistani Press Release, citing interview given by Judge Khan to Mr. Nasim Ahmed, London correspondent of Dawn, on July 25, 1966. Judge Khan was anxious to refute the story that he had voluntarily recused himself; the interview and subsequent stories have suggested that Sir Percy Spender had, in fact, not consulted the court on Judge Khan's disqualification although he led Judge Khan to believe that he had done so.

As to disqualification of judges, see Statute of the Court art. 24 (2)-(3), and I Rosenne, The Law and Practice of the International Court 196-97 (1965). Query: should the terms relating to disqualification (acting previously as "agent, counsel, or advocate for one of the parties, or as a member of a national or international court . . . or in any other capacity" (art. 17 (2)) apply to mere *designation* as a judge ad hoc?

160 In fact, the Court did not indicate the nature of the question, on which it held closed hearings, nor did it identify the judge involved; but as Rosenne indicates, it is not difficult to determine the question on which the judges voted in view of the roster of judges present at the public hearings and those present for the order on the issue involved. See I Rosenne, supra note 159, at 196.

161 C.R. 65/2, at 5-6 (March 18, 1965).

of the judges who would participate in the decision, there was common speculation among those who did not know of or who ignored[162] the Tanzanian rumors that the Court would decide for the applicants on the accountability issue[163] but would hold apartheid non-justiciable. No one, including the African rumormongers, appears to have anticipated the actual grounds on which the judgment was based: the applicants' lack of legal interest in the subject-matter of their claim.[164]

Both parties assumed that this question had been settled in 1962, and it was not argued in the hearing on the merits.[165] Nor did any of the judges question counsel at any time on the issue. Indeed, the Court in its opinion stated that it was raising the issue *proprio motu*.[166]

The Court's opinion was vigorous, but, on the whole, tortuous and ex-

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[162] Dar-es-Salaam, as the true center for refugees from all of southern Africa, constantly seethed with rumors, most of which were, of course, not true.

[163] Few persons expected the Court to reverse its 1950 advisory opinion on this point.

For the actual effect of the 1966 decision on the 1950 opinion, see text accompanying notes 211-18 infra.

[164] SWA Cases 1966, at 51, § 99.

Until the 1966 decision it was assumed that the mandate jurisprudence on this question had been definitively stated by Professor Quincy Wright:

> The members of the League are also entitled to invoke the jurisdiction of the Permanent Court . . . for any dispute with the mandatory involving the interpretation or application of the mandate which diplomacy has failed to settle. . . .
>
> Every member of the League can regard its rights as infringed by every violation by the mandatory of its duties under the mandate, even those primarily for the benefit of natives, and can make representations which if not effective will precipitate a dispute referable to the Permanent Court of International Justice if negotiation fails to settle it.

Wright, Mandates under the League of Nations 475 (1930).

[165] Gross, "The South West Africa Case: What Happened?" 45 Foreign Affairs 36, 44 (1966). See note 226 infra.

A thorough search of the entire record of the oral hearings reveals the following references to the subject:

> [I]f it were to be held that the Court was intend to possess jurisdiction regarding disputes arising from the interpretation or application of Article 2 . . . even in cases where no interests or rights of the Applicant States are directly involved, then the question arises.

C.R. 65/18, at 32 (April 14, 1965).

> The most careful reading of Applicants' pleadings does not reveal any practical reason why the Applicants particularly have come forward to institute these proceedings. . . .
>
> [T]here are . . . some references . . . to a so-called legal interest . . . . But otherwise we find that the proceedings are . . . directed to the benefit and interests of the inhabitants of the Territory, and nowhere do the Applicants offer the least practical reason as to why they particularly have come to be the champions of the inhabitants . . . . There are no cultural, economic or other ties between the Applicant States and South West Africa . . . and . . . no first-hand experience of conditions in South West Africa.

C.R. 65/87, at 48-49 (Oct. 26, 1965).

> Now, in regard to Submission Nos. 3, 4, 5, 6, and 9 . . . there are general grounds upon which all these submissions may be dismissed. One of them would be that the Mandate as a whole has lapsed. . . . Another may be that the Court has no jurisdiction generally, on the basis that was argued in the Preliminary Objections.

C.R. 65/95, at 47 (Nov. 5, 1965). See also SWA Cases 1966, at 19, § 8, 68 n.1, & 69 n.1 (separate opinion of ad hoc Judge van Wyk).

[166] SWA Cases 1966, at 19, § 7.

cessively technical. Time and again passages echoed the Spender-Fitzmaurice dissent of 1962,[167] with only the slightest modifications to make them applicable to the 1966 issue, as the Court defined it.

The opinion began with an analysis of the mandates system, highly reminiscent of the 1962 dissent. It categorized mandate obligations into two groups: "conduct" provisions ("relating to the carrying out of the mandates as mandates")[168] and "special interest" provisions (limited, in "C" mandates, to the provision as to missionaries).[169] Obligations arising under the latter, the Court held, ran to the League members individually; thus they had a legal interest in their implementation and could invoke the compromissory clause of article 7 to enforce them.[170]

This, however, was not true of the obligations arising under the conduct provisions. Based on a new reading of the history and nature of the mandates system, the Court concluded that these obligations did not run to the League members severally, but only to the League *qua* League.[171] Therefore the individual League members had no interest in their enforcement.[172] Since the case against South Africa concerned alleged violations of the conduct provisions only,[173] the conclusion necessarily followed that Ethiopia and Liberia did not have the requisite interest to obtain a judgment.

The Court reinforced this interpretation of the mandate by pointing out that the League itself had been limited to negotiation, conciliation, and persuasion in attempting to enforce the conduct provisions, since the mandatory had a veto power under the League's rules.[174] League members were certainly not entitled to undercut the mandatory's veto by seeking a judicial resolution of a situation which the League itself was compelled to settle by political means.[175]

(*2*) *Effect of the 1962 Decision.* Most of the remainder of the Court's decision was devoted to supporting its conclusions without specifically reversing its 1962 opinion, with which it seemed to clash in both spirit and logic.

(*a*) The Court first distinguished between the holding of the 1962 decision on the second and (particularly) the third preliminary objections and its current holding. The earlier ruling had been limited, it said,

167 See note 208 infra.
168 SWA Cases 1966, at 20, § 11.
169 Id. at 20-21, §§ 10-11; see South West Africa Mandate art. 5.
170 SWA Cases 1966, at 45, § 83.
171 Id. at 28-29, §§ 32-34. But cf. SWA Cases 1962, at 337-38.
172 SWA Cases 1966, at 28-31, §§ 31-40.
173 Id. at 22, § 14.
174 Id. at 31, § 39; 44-45, §§ 81-82; 46-47, §§ 86-87; 50, § 98.
175 Id. at 30-31, § 38. But cf. SWA Cases 1962, at 337-38.

to finding that the applicants were "members of the League, constructively if not actually,"[176] and that the dispute did concern a provision of the mandate.[177] Its conclusion was simply that since these requirements were satisfied, it had jurisdiction "to hear and determine the merits *without going into the question of the Applicants' legal right or interest relative to the subject-matter of their claim* . . . ."[178] The current judgment found that the applicants, although they had a dispute within the meaning of article 7, did not have any interest in the subject-matter: the enforcement of the conduct provisions of the mandate.[179]

The compromissory clause itself could not confer the requisite interest on the applicants, the Court continued, for it was "adjectival not substantive in . . . nature and effect. . . . Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal."[180]

(*b*) In any case, the Court added, "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits . . . ."[181] The entry of preliminary objections caused a suspension of the proceedings on the merits, and any judgment on the preliminary objections which touched on the merits could do so "only in a provisional way . . . . Any finding on the . . . merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection. . . . It cannot rank as a final decision on the . . . merits involved.[182]

(*c*) The Court held that the very broad language of the compromissory clause ("any dispute whatever . . . relating . . . to the provisions of the Mandate") did not permit reference to itself of *any* dispute about *any* provision of the mandate.[183] A legal right or interest still was a prerequisite to an action: otherwise "by conferring competence on the Court, a jurisdictional clause can thereby and of itself confer a substantive right . . . [a proposition] which the Court must decline to entertain."[184]

(*d*) "The whole 'necessity' argument" (that ultimately enforcement

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176 SWA Cases 1966, at 38, § 60.

177 Ibid. But cf. SWA Cases 1962, at 343:

For the manifest scope and purport of the provisions of this Article indicate that the Members of the League 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.

178 SWA Cases 1966 at 38, § 60. [Emphasis added.]

179 An analogy may be found in the taxpayers' suits of municipal law where the plaintiff, though indeed a taxpayer, may be held not to have a sufficient interest in the government conduct he complains of to support his action. See, e.g., Doremus v. Board of Education, 342 U.S. 429 (1952). But cf. Judge Jessup's comments on the problem of "standing" in municipal law, SWA Cases 1966, at 385-88 (dissenting opinion).

180 SWA Cases 1966, at 39, §§ 64-65.

181 Id. at 37, § 59.

182 Ibid. But cf. id. at 334 (Jessup, J., dissenting) as to the effect of suspending a hearing on the merits in order to try a preliminary objection.

183 SWA Cases 1966, at 41-42, § 72.

184 Id. at 42, § 73.

of the conduct provisions by individual states was necessitated by the mandatory's veto in the League), said the Court, "falls to the ground for lack of verisimilitude in the context of the economy and philosophy of that . . . [mandates] system."[185] The argument, it added, "appears . . . to be based on considerations of an extra-legal character, the product of a process of after-knowledge."[186] This was in line with its narrow concept of legal, as opposed to political, moral, or humanitarian considerations, and its refusal to engage in any law-creating or expanding activity.[187]

The Dissenting Opinions

All seven "minority" judges filed dissenting opinions. These opinions made it clear that the judges did not merely disagree with the rejection of the applicants' claim on the narrow ground of their lack of legal interest, but that they also felt that a favorable judgment should have been given on the accountability issue and also on the apartheid issue, in large part at least.[188] Substantially all cited the 1950 Advisory Opinion and the 1962 judgment with approval, both as to the points decided therein and also as to the spirit in which the mandate was construed.[189] Although each dissenter advanced separate reasons for his position, certain common ideas ran through most of the opinions.

The dismay which Judge Jessup expressed in one short paragraph was explicit or implicit in the opinion of all the dissenters:

> The Court now in effect sweeps away this record of 16 years and, *on a theory not advanced by the Respondent in its final submissions of 5 November 1965*, decides that the claim must be rejected on the ground that the Applicants have no legal right or interest.[190]

The seven were virtually unanimous in scouting the distinction made by the Court between the point decided in 1962 on the third preliminary objection and that decided in 1966 as the basis for rejecting the applicants' claim.[191] Again and again they referred to the 1966 judgment as a reversal not made in accordance with required procedure.[192]

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185 Id. at 47, § 88. But see SWA Cases 1962, at 336-38.

186 SWA Cases 1966, at 47, § 89. The "necessity" argument would lead to the Court's upholding an equivalent of an *actio popularis*, the majority added, in dismay at the very thought. Id. at 47, § 88; cf. SWA Cases 1962, at 452 (Winiarski, Pres., dissenting).

187 SWA Cases 1966, at 34, §§ 49-51; 35, § 54; 36, § 57.

188 Id. at 238 (Koo, Vice Pres., dissenting); 286-324 (Tanaka, J., dissenting); 418-42 (Jessup, J., dissenting); 457, 460-61, 464-70 (Nervo, J., dissenting); 480-83 (Forster, J., dissenting); 489-90 (Mbanefo, J. ad hoc, dissenting). Only Judge Koretsky limited his opinion strictly to the issue as framed by the majority. As to the propriety of going beyond that issue, see the declaration of President Spender, id. 51-57. His position was either repudiated or ignored by most of the dissenting judges and particularly by ad hoc Judge van Wyk in his separate opinion.

189 See passages cited in note 188 supra.

190 SWA Cases 1966, at 328 (Jessup, J., dissenting).

191 Id. at 239, 248 (Koretsky); 329, 425-29 (Jessup); 450, 452-53 (Nervo); 482 (Forster); 490, 496 (Mbanefo).

192 Id. at 239 (Koretsky); 250 (Tanaka) (reversal only; see note 234 infra); 330-38

Their dissents indicated that they thought the 1962 judgment neither "provisional" nor "hypothetical."[193] Thus Judge Koretsky stated:

> The reason of the 1962 Judgment relating to "a legal right or interest" of the Applicants served as a ground for the Court's decision to dismiss the third preliminary objection . . . . [W]hat was then decided with the reasons "on which it is based" is finally not provisionally decided. . . . [T]hese reasons cannot be reversed in the way chosen by the Court.[194]

And Judge Jessup insisted: "*something* must have been finally decided by the 1962 Judgment."[195] Elaborating, he applied this argument to each preliminary objection made by respondent and decided by the Court in 1962. As to the third he found that:

> The Court . . . expressly decided that the objection must be dismissed because there was a dispute within the meaning of Article 7. This decision that the dispute could concern "the well-being and development of the inhabitants" and need not include material interests of the Applicants, is *res judicata*.[196]

Each dissenter had, in addition, more or less individual grounds for finding that the applicants had a legal right or interest in the subject matter of their claim. Several judges emphasized that the compromissory clause related to "provision*s*" of the mandate, whereas it would have read "provision" had only the special interest clause been involved.[197] Judge Tanaka analogized the proceeding brought by the applicants (in their capacity as League members) and their interest to the position and interest of stockholders in a representative action to protect a corporation's rights.[198] Judges Koretsky,[199] Jessup,[200] and Mbanefo[201] emphasized that the applicants had sought, in effect, a declaratory judgment (an interpretation of the mandatory's obligations), not an award for themselves. Under these circumstances, all argued, no legal interest in the subject-matter could possibly be required beyond that which gave the Court jurisdiction to hear the case.

By far the longest dissents were written by Judges Jessup and Tanaka. Both make extremely interesting reading for lawyers.

(Jessup); 450, 452-53 (Nervo). Ad hoc Judge van Wyk also viewed the 1966 judgment as a reversal of the 1962 decision; see note 231 infra.

193 "I am at a loss to understand how the Court can say that the Court's disposal of these first submissions in its 1962 Judgment was merely basing itself upon an hypothesis or some sort of provisional basis. No such thought is expressed in the Court's 1962 Judgment." SWA Cases 1966, at 336 (Jessup, J., dissenting).

194 Id. at 241.

195 Id. at 333.

196 Id. at 336.

197 See, e.g., id. at 219-20 (Koo, Vice President, dissenting).

198 Id. at 254 (Tanaka, J., dissenting).

199 Id at 248.

200 Id. at 328.

201 Id. at 493.

Judge Jessup analyzed and replied to the Court's opinion point by point, though not necessarily in the same order (the Court's opinion did not, in fact, seem entirely logically ordered). He had studied carefully the documents relating to the inception and development of the mandates system, and his presentation of the historical case opposing the Court's reading (and much that the respondent had argued) was persuasive. He accepted the applicants' argument that South African administration of its mandate was to be measured against current international standards of non-discrimination;[202] but he conservatively denied the existence of the governing international legal norm which the applicants had postulated.[203]

Judge Tanaka, by contrast, in a long argument of great interest, supported the concept of the international legal norm.[204] Having posited the norm, he thereupon proceeded to evaluate the applicants' last seven submissions against that norm and to indicate how he would decide as to each one on the basis of the evidence submitted by the parties.[205] For creativeness, subtlety, and careful reasoning this opinion will probably long be cited as a master exemplar.

IV

Evaluation of the Court's Opinion

This critique will be directed to a limited number of issues: (*1*) What did the Court really decide? (*2*) Why did it decide as it did? (*3*) Was it right?

What Did the Court Decide?

This question has itself two separate facets, the second depending upon the answer to the first. That first is whether the 1966 judgment reversed the 1962 judgment.

As has been indicated above,[206] the Court went to considerable lengths to avoid any suggestion of a reversal. Such an approach was in line with the conservative temperament of the majority and may be in large measure responsible for the tortuous reasoning and the tortured prose of so much of the Court's opinion.

Nevertheless, most of the dissenters quite frankly characterized the 1966 judgment as a "reversal" of the earlier decision.[207] Comparison of

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202 Id. at 433, 441 (Jessup, J., dissenting).
203 Id. at 432-33, 441.
204 Id. at 280-300 (Tanaka, J., dissenting).
205 Id. at 286-224.
206 See text accompanying notes 176-82 supra.
207 See note 192 supra and accompanying text; Dugard, "The South West Africa Cases, Second Phase, 1966," 83 So. Afr. L.J. 429, 431, 439 (1966).

passages from the two opinions relating to almost any point treated in both decisions compels the conclusion that the entire 1966 opinion can only be described as an inverse image of the earlier one.[208] Moreover, the realities of the composition of the majority and minority cannot be ignored. Of the ten judges[209] who sat in both phases of the proceedings, all who were members of the minority in 1962 became members of the "majority" in 1966, and vice versa.

In an early commentary on the decision, Dr. Higgins agreed that it constituted a reversal:

> [T]he Court knew in 1962 that Ethiopia and Liberia were claiming no "special" or "national" interest in the Mandate, but only that legal interest inherent in all former members of the League. Moreover, in 1962 the Court had heard much argument on the point of whether a dispute sufficient to institute proceedings existed between the Applicants and the Respondent.
>
> . . .
>
> It thus remains baffling for the Court to assert that it was now dealing with a new point, which had not been covered in 1962.[210]

Assuming, therefore, that the 1966 judgment did reverse the 1962 decision on the third preliminary (jurisdictional) objection, what effect did it have on the substantive issues which the applicants had tried to raise?

The easy, technical answer is that it could and did have no effect whatsoever since it did *not in any way* pass on the merits of the applicants' claims. The Court itself carefully and emphatically stated that the question of the admissibility of the claim was a matter of an "*antecedent* character."[211]

The American State Department took this position in a release which declared that the 1950 Advisory Opinion was unaffected by the 1966 judgment and therefore remained the authoritative judicial pronounce-

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208 "The majority of the Court is reproducing on the present occasion the arguments adduced in dissenting opinions against the Judgment of 1962." SWA Cases 1966, at 447 (Nervo, J., dissenting).

209 Spender, Koo, Winiarski, Siropoulos, Fitzmaurice, Koretsky, Jessup, Morelli, Mbanefo, and van Wyk.

210 Higgins, "The International Court and South West Africa: The Implications of the Judgment," 42 Int'l Aff. 573, 580-81 (1966).

> The Third Preliminary Objection consists essentially of the proposition that the dispute brought before the Court . . . is not a dispute as envisaged in Article 7 . . . more particularly in that the said conflict or disagreement does not affect any material interests of the Applicant States or their nationals.

SWA Cases 1962, at 342-43.

> It is admitted that the Applicants have no direct material interests involved in this case. Neither their own national interests nor those of any of their nationals . . . are affected. They are appearing . . . solely for the purpose of defending or upholding the Mandate, in the interest not of themselves, but of the inhabitants of the Mandated territory . . . .

Id. at 548 (Spender and Fitzmaurice, JJ., dissenting).

211 SWA Cases 1966, at 18, § 4.

ment on the issue of South African accountability under the mandate.[212] And Judge Jessup recited a virtual litany on the subject:

> The Court . . . has *not* decided . . . "that the whole Mandate for South West Africa lapsed . . . and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder."
>
> Further, the Court has *not* decided . . . that the Mandatory's former obligations to report, to account and to submit to supervision had lapsed . . . .
>
> The Court has *not* rendered a decision contrary to the fundamental legal conclusions embodied in its Advisory Opinion of 1950 . . . .
>
> [T]he Court has *not* decided that the Applicants are in error in asserting that the Mandatory . . . has violated its obligations . . . in the Mandate and in Article 22 of the Covenant . . . . In other words, the charges by the Applicants of breaches of the sacred trust which the Mandate imposed on South Africa are not judicially refuted or rejected by the Court's decision.[213]

Although Court, judges, and other analysts[214] have all indicated that the 1966 judgment did not in any way affect the merits of the applicants' claims, it would seem that the decision has, in reality, somewhat weakened the authority of the 1950 advisory opinion. Thus, the Court's statement that its decision was "without pronouncing upon, and wholly without prejudice to, the question of whether the Mandate is still in force,"[215] hints that the "majority," if it had reached that issue, might well have come to the conclusion that it was not. The following statement, that the 1962 decision on the question of competence was "equally given without prejudice to that of the survival of the Mandate, which is a question appertaining to the merits,"[216] reinforces that conclusion. To the extent, moreover, that the 1966 judgment is recognized as a reversal of the 1962 judgment, which strongly approved the 1950 advisory opinion, the current judgment must be viewed as a once-removed disapproval of the 1950 opinion.

These considerations cannot possibly, in the writer's opinion, support the public position of the South African government that the decision was a thorough-going victory on all counts.[217] However, they do invite the speculation that the applicants and their partisans were extremely fortunate that the Court did not, in 1966, pass on the accountability and apartheid issues.[218]

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212 N.Y. Times, July 28, 1966, p. 11, col. 3.

213 SWA Cases 1966, at 330-31.

214 Higgins, supra note 210, at 594-95; Dugard, supra note 207, at 459; Manchester Guardian Weekly, July 21, 1966, p. 2., col. 1.

215 SWA Cases 1966, at 19, § 7.

216 Ibid.

217 See, e.g., statement of South African President opening Parliament in the summer of 1966, quoted in South African Information Service Press Release, July 29, 1966.

218 Gross, "The South West Africa Case: What Happened? 45 Foreign Affairs 36, 46 (1966); Dugard, supra note 207, at 457-58; Manchester Guardian Weekly, supra note 214.

Why Did the Court Decide as It Did?

Why did the court decide (*a*) contrary to the entire spirit and rationale, if not the exact holding, of the 1962 decision, and (*b*) on a hypertechnical "antecedent" question basis rather than on the merits?

(*a*) The short answer to this facet of the general question is, of course, that the change in the Court's opinion reflected the change in its composition. Yet this is not a sufficient response: what were the philosophy, attitudes, and extra-legal considerations which moved the 1962-minority-become-1966-majority?

Judge Tanaka stated the fundamental philosophical problem in his dissenting opinion: "the difference of opinions on the questions before us is in the final instance attributed to the difference between two methods of interpretation: teleological or sociological and conceptional or formalistic."[219] The 1966 majority reflected the positivistic school of jurisprudence, with its emphasis on state sovereignty;[220] hence its continuing emphasis on the need for consent to bind South Africa. This philosophy appears to have been coupled with generally narrow views on the role of law in international affairs and probably with a vague but powerful distrust of judge-made law on the part of jurists who lacked intimate experience with judicial review.

To these factors must have been added, in several cases, the natural conservatism of old age,[221] coupled with the fact that the cultural attitudes of the judges probably were formed before World War I or at least reflected pre-War views, which simply did not rate individual rights, particularly of the "lower classes," so high on the scale of human values as they are today. Without attempting to specify the personal reactions of the judges to apartheid as a policy and practice, it may be assumed that few of them had been totally unmoved by ideas of "the white man's burden," empire, the good native "who knew his place," and similar concepts.

The greatest, by far, of the extra-legal considerations must have been the fear of delivering an unenforceable judgment.[222] The Court must have been haunted by the failure of its advisory opinion on UN peace-keeping expenses[223] to provide a basis for political accommodation in the United Nations. If within a few years a supposedly binding judgment was to be defied—successfully, the majority may well have predicted—they feared that the authority of the Court would be hopelessly undermined.

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219 SWA Cases 1966, at 278.

220 See Dugard, supra note 207, at 448.

221 Of the elected judges sitting in 1966, the youngest was 59, the oldest 82, and five (including, however, Koo, Jessup, Koretsky, and Tanaka!) were in their 70's. See biographical sketches of the judges in N.Y. Times, July 19, 1966, p. 16, col. 3.

222 See Higgins, supra note 210, at 589-90.

223 Certain Expenses of the United Nations, [1962] I.C.J. Rep. 151 (Advisory Opinion).

(*b*) Since there clearly was strong pressure to support the repeated UN condemnations of South African administration of its mandate, the majority of the judges may have decided to take what they hoped would be the *least unpopular* method of disappointing world opinion—a decision which did not deny the merits of the applicants' claim (but which did, much to the Court's relief, make it impossible for *anyone* to bring the subject before the Court again in contentious proceedings).

This hypothetically least unpopular negative decision may also have commended itself as the best way of avoiding an actual reversal; the conservatism of the majority may have shrunk from the suggestions of instability and of judicial law-making implicit in an outright reversal of the 1962 decision. Furthermore, by distinguishing away, rather than reversing, the earlier judgment, the Court may have hoped to obscure the effect of the adventitious change in its composition, which made possible the change in its opinion.

Finally, as Professor Falk has suggested,[224] the Court may have adopted that particular approach as the lowest common denominator among competing reasons. As noted above, it appears certain that at least some of the majority would have decided against the applicants on the merits—if they had been reached—but there may have been difficulties in reaching a consensus on any other point.

Was the Court's Decision Correct?

Was the decision correct, or was it, as Judge Jessup claimed, "completely unfounded in law?"[225] The answer to this question involves, of course, both legal and policy considerations.

First, it seems clear that the Court erred in deciding on the basis of an issue never advanced or argued by the parties, who indeed obviously acted on the assumption that argument thereon had been foreclosed by the earlier decision on the third preliminary objection.[226] The Court was, of course, correct in stating that it is entitled to select the basis for its decision *proprio motu*: it may—indeed, should—employ the strongest available rationale to support its decisions without being bound by the reasoning advanced by counsel. But this principle seems to have little relation to the Court's action in the *South West Africa Cases*. As Dr. Higgins asked:

> [W]hen there has already been a judicial decision on preliminary questions, and when the Court has failed to avail itself of its right to declare

[224] Falk, The Southwest Africa Cases: A Preliminary Cost Accounting 17 (unpub.).
[225] SWA Cases 1966, at 323 (dissenting opinion).
[226] See note 166 supra. "The view that the question of the applicants' interest was finally decided in 1962 appears to have been shared by South Africa, for the issue was not *expressly* raised in her final submissions in 1965." Dugard, supra note 207, at 446.

> that certain outstanding preliminary points shall be attached to the subsequent case on the merits, is it really open to the Court to rely, after four years of litigation, upon the *proprio motu* principle to discover an outstanding "antecedent question pertaining to the merits . . . ?" The *proprio motu* principle is not a license to ignore established legal concepts, nor to avoid issues upon which one has legal jurisdiction to pronounce; it is a principle designed to affirm the Court's superior understanding of the law to that of the parties before it.[227]

Second, it seems that, in effectively reversing the 1962 decision on the third preliminary objection, the 1966 judgment offended the principle of res judicata.

The majority opinion attempted to evade this issue by distinguishing the 1966 judgment and by terming any 1962 pronouncement on the merits merely "provisional" or "hypothetical."[228] Judge Morelli, concurring, appeared to agree with this approach. Although he found the 1962 judgment, "particularly as regards the third preliminary objection, . . . far from easy to interpret,"[229] he came to the conclusion that "in the merits phase of the proceedings the Court was completely unfettered . . . [as to] whether it was necessary for the Applicants to have a substantive right in order that the claim might be upheld."[230] *Ad hoc* Judge van Wyk argued for the best of both positions. After admitting that much of the reasoning of the 1966 opinion was in conflict with that of the earlier opinion, "so much so that the inescapable inference is that in 1962 the Court assumed a jurisdiction it does not possess," [!] he concluded that:

> [T]hese considerations cannot in any way preclude the Court from now basing its judgment on the merits on its present reasoning. The Court is not bound to perpetuate faulty reasoning, and nothing contained in the 1962 Judgment could constitute a decision of any issue which is part of the merits of the claim.[231]

Judges Koretsky[232] and Jessup,[233] on the other hand, argued strongly that the decision of the third preliminary objection covered precisely the point at issue and was binding unless revised in accordance with Article 61 of the Statute of the Court. According to their rationalization, not only the *dispositif*, but also the essential reasoning (that the applicants had a

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227 Higgins, supra note 210, at 582.

228 Under article 62(5) of the Rules of the Court, the Court may join any or all preliminary objections to the case on the merits if this appears to be the most satisfactory way to handle them. But it seems doubtful that the Court decided to do this in 1962 since the 1966 judgment states that the question of the applicants' legal interest in the subject-matter has been raised by the Court *proprio motu*. For if the decision was made in 1962, the question surely is: "[W]hy were the parties given no warning in 1962 that an 'antecedent question' remained to be answered . . .?" (Higgins, supra note 210, at 579.)

229 SWA Cases 1966, at 60, § 3 (separate opinion).

230 Id. at 63, § 7.

231 Id. at 67, § 2.

232 Id. at 240-41 (dissenting opinion).

233 Id. at 331-37 (dissenting opinion).

"legal right or interest" in the observance of the mandate) supporting the dismissal of the preliminary objection, became res judicata, and bound not only the parties, but also the Court itself.[234]

In a situation where jurisdictional and merits issues were so closely intertwined, and where the crucial fact (*i.e.*, that the applicants had no special interest) was before the Court and was fully argued in 1962, the better rule clearly seems to be that the first decision should be final and not subject to change except through established procedures for revision. This point has been considered at some length by Dugard, who concluded that "the Court, in reversing the 1962 finding on the applicants' interest—*even if this finding was based on 'faulty reasoning'*—offended the rule of *res judicata* . . . ."[235]

Third, the decision seems clearly wrong on substantially every policy consideration involved. It has damaged the standing of the Court and denigrated the whole concept of international law more than any unenforceable judgment possibly could have.[236] It has made the Court a symbol of reaction and trickery, of the white man's successful manipulation of "justice."[237] (The applicants, poor countries, have wasted years and untold money—which they needed for internal development—to be made out quixotic fools by a decision which decided, in effect, nothing except that they were out of court.) It has, temporarily at least, choked off the development of international law which the 1962 decision foreshadowed. It has discouraged the new countries from seeking judicial relief from the Court.[238] And although the Court is an arm of the UN, its decision has thwarted that organization's attempt to find a peaceful solution to one of today's most pressing problems.[239]

There may be one small back-handed benefit to be derived from the decision—renewed interest in various reforms which a decision favoring the applicants would have made no less vital, but which might nevertheless have been glossed over under those circumstances. Such reforms include: modification of the court's procedure to avoid wasteful, long-drawn-out and repetitious proceedings; increased sympathy for the problems of new (underdeveloped) countries; and permission for the UN to appear as a party in certain contentious proceedings.[240]

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234 But see id. at 59, § 2 (separate opinion of Morelli, J.); 261 (Tanaka, J., dissenting).
235 Dugard, supra note 207, at 447; accord, Higgins, supra note 210, at 580.
236 Id. at 590-91.
237 Id. at 592-93; see notes 13, 14 supra.
238 Higgins, supra note 210, at 593.
239 For a realistic estimate of the obstacles involved in implementing a judgment favoring the applicants, see text accompanying notes 264-65 infra.
240 For criticisms made following the South West Africa decision, see Gross, supra note 218, at 46-48; Higgins, supra note 210, at 593. But cf. II Rosenne, The Law and Practice of the International Court 757 (1965).

From the political standpoint, the decision has discouraged the non-whites of South West Africa and has led Africans generally to contemplate military means of succoring their "brothers" in Southern Africa. Conversely, of course, the decision has encouraged the South African government, which has interpreted it as a moral, as well as a legal, victory.[241] It has given that government nearly six years to strengthen its defenses against any attempt by the international community to compel it to treat South West Africans according to those standards of non-discrimination for which the applicants contended.

Practically, however, it is open to question whether the consequences for the mandated territory would have been much different[242] if the Court had found for the applicants and if, as anticipated, the respondent government had refused to accept the judgment. Outright defiance would, of course, have sent the question to the Security Council; but the Council would have faced the same inertia, apathy, fear of economic retaliation, and threats of sanction-breaking-for-profit which now plague the Assembly as it struggles with the South West Africa issue.[243] If South Africa, rather than openly defying the Court, were to stall and obfuscate and disguise its non-compliance (as most observers anticipated), there might have been a long period of frustrating delay before the non-compliance could have been satisfactorily established and the Security Council thereupon seised of the problem.

V

Action on Remand

The 1966 decision left the embittered African states determined to wrest legal control of South West Africa from the South African government. Several proposals to that end were put before their delegations as they gathered before the next General Assembly session in the fall. The most popular, because it seemed such a simple solution, on paper at least, was a resolution revoking the mandate. By and large it was assumed, by analogy to the municipal law of trusts or contracts, that a gross breach of trust by the mandatory-trustee constituted grounds for rescission or revocation of the trust. This argument was supported by a passage in Judge Alvarez' 1950 dissenting opinion: "It may happen that a mandatory State does not perform the obligations resulting from its Mandate.

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241 See note 217 supra.

242 Except for the psychological effect, of course.

243 The American government, however, would have welcomed a favorable decision to strengthen domestic political backing for any action it might agree to take against the South African government. See note 15 supra.

In that case the United Nations Assembly may make admonitions, and if necessary, revoke the Mandate."[244]

There was, however, a compelling argument against this course of action. Upon revocation South Africa might claim the absolute right to govern the former mandate untrammeled by any international restraints on the basis of its "right of conquest." (Such a consideration had been involved in the applicants' decision not to ask the Court, as one form of relief, to rescind the mandate.) This fear was not unwarranted. A hint of this claim was found in the respondent's rejoinder,[245] and the position was made clear in counsel's response to Judge Koretsky's question by what right South Africa claimed to administer South West Africa if the mandate had lapsed as the government claimed:

> The legal nature of its right . . . is recognized in international law as flowing from military conquest. South Africa's right of administration originated in the . . . surrender of the German forces in 1915, in pursuance of which the Territory was lawfully governed . . . by the South African Government . . . until the Mandate arrangement. . . .
>
> Upon the postulated lapse of the Mandate in 1946 . . . then in law the *status quo ante* revived.[246]

The final resolution[247] supported by the Africans attempted to avoid this problem by removing the mandatory while maintaining the mandate. Thus, it reaffirmed that South West Africa "is a territory having international status until it achieves independence."[248] It proceeded to declare that South Africa had failed to fulfill its obligations, and had thereby "in fact, disavowed the Mandate."[249] In operative clause 4 it decided, as a consequence, that the mandate conferred on South Africa "is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations." To enable the UN to discharge

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244 SWA Status 182, § 8 (dissenting opinion). It was his opinion that the Assembly could terminate a mandate if it found the inhabitants capable of self-government, even if the mandatory held to the contrary, and that it could also terminate a mandate for "political considerations."—"The Assembly having the faculty to confer that trust has also the faculty to revoke it. In so doing, however, it must not abuse its right." Id. at 183, § 10.

245 I Rejoinder, pp. 90-91, SWA Cases 1966.

246 C.R. 65/39, at 37 (May 27, 1965). A South African spokesman confirmed this position in the UN: "[A]s is well known, South Africa has for a long time contended that the mandate is no longer legally in force, and that South Africa's right to administer the Territory is not derived from the mandate, but from military conquest . . . ." UN Gen. Ass. Prov. Verb. Rec. 118 (A/PV. 1413) (Oct. 5, 1966 (XXI)).

247 A/RES./2145 (XXI) 28 Oct. 1966. There were many earlier drafts, most of which circulated privately and never became official UN documents. The original draft was A/L. 483 (26 Sept. 1966)(XXI). It should be noted that the "South West Africa question" was handled by the Assembly in plenary session, rather than being first referred to the Fourth (Trusteeship) Committee, which is the normal procedure.

248 Operative clause 2. The first clause held that the Assembly resolution (A/RES./1514 (XV)) relating to self-determination and independence applied to South West Africa.

249 Operative clause 3.

its responsibilities in relation to South West Africa[250] the resolution then established an *Ad Hoc* Committee for South West Africa, composed of fourteen members,[251] to "recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence" and to report thereon to a special session of the Assembly to be held in April 1967.[252]

A last-minute attempt was made to amend operative clause 4[253] in the hope of gaining British support, but it did not succeed. The unamended resolution passed 114-2 (Portugal and South Africa dissenting) with three abstentions (Britain, France, and Malawi).[254]

African initiatives vis-à-vis South Africa did not end with the passage of this resolution, however. Since the election of new judges to the International Court was scheduled for the 1966 Assembly session, Africans for the first time carefully screened all candidates, and, with the assistance of their Asian colleagues, blocked the election of Antonio de Luna of Spain,[255] presumably because he was a national of a colonial power.[256] They also succeeded in electing a second sub-Saharan African to the Court.[257]

While the elections took some of the sting out of the complaints against the Court, the African states nevertheless contemplated an attempt to amend the Statute of the Court to increase its membership, so that Asian and African countries could have greater representation on it.[258] (The Afro-Asian bloc had recently been successful in increasing the member-

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250 Operative clause 5 provided that "in these circumstances" (i.e., as set forth in clause 4), the UN had to undertake the responsibility of administering South West Africa.

251 Canada, Chile, Czechoslovakia, Ethiopia, Finland, Italy, Japan, Mexico, Nigeria, Pakistan, Senegal, United Arab Republic, United States, and USSR.

252 Operative clause 6. The remaining clauses called on South Africa not to take any action which will "in any manner whatsoever alter or tend to alter the international status of South West Africa"; called the attention of the Security Council to the resolution; requested all states to cooperate; and asked the Secretary General for administrative assistance.

253 The proposed alterations were: (a) to change the phrase from "the Mandate . . . *is* therefore terminated" to "*has* therefore terminated"—the latter apparently suggesting an automatic operation of law rather than an action taken by the UN; (b) to substitute for the last phrase beginning "henceforth . . ." the longer phrase, "in these circumstances the United Nations has a direct responsibility to preserve the international status of South West Africa under conditions which will enable South West Africa to exercise its rights of self-determination and independence."

254 Malawi, one of the poorest of all African countries, with substantially no natural resources, depends on the good will of neighboring Portugal (Mozambique) and Rhodesia for (economic) survival.

255 N.Y. Times, Nov. 3, 1966, p. 11, col. 8; id., Nov. 4, 1966, p. 2, col. 4.

256 Spanish possessions in Africa include: Rio Muni (Spanish Guinea), Fernando Poo, Spanish Sahara (Rio de Oro), Ifni, Ceuta, Melilla.

257 Charles D. Onyeama of Nigeria.

258 According to Mr. Wodajo of the Ethiopian delegation to the United Nations at a forum sponsored by the African-American Institute, New York City, Sept. 28, 1966.

ship of the Security Council for the same reason.) This remains, of course, a long-range objective.

Throughout the Assembly session there were repeated suggestions, from non-African sources, that the unresolved questions in the *South West Africa Cases* be taken back to the Court in one way or another.[259] Although most suggestions seem to have been framed in terms of an Assembly request for another advisory opinion, several other schemes, from the ingenious if impractical to the purely hare-brained, were bruited about. Among them were a request, in essence, for a rehearing on the grounds that the Court had not heard arguments on the issue on which it decided the *Cases*, and a new contentious proceeding based on a manufactured "special interest."[260] However, the Africans were not in the mood to go back to the Court about anything. And although the balance of the Court *probably* reverted, immediately after the decision, to one favoring the 1962 majority again,[261] it seemed wiser, in any case, to wait until the arch-villains were replaced and the new judges safely installed.[262] After the *Ad Hoc* Committee makes its report in April, new judicial initiatives may again be considered—particularly if they are taken at UN expense.

Although the 1966 Assembly session was, on its face, a successful one for the Africans, their victories were, in words which the Court used in another connection, largely "provisional" or "hypothetical."

As far as the Court is concerned, the jurisprudential orientation of its members has been affected as permanently as, it seems fair to guess, the political orientation of the United States was affected by the New Deal.[263]

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259 See also Higgins, supra note 210, at 595-97.

260 Thus an Ethiopian or Liberian missionary (more specifically, according to one plan, the Rev. Michael Scott—who once worked among the Herero before the South African government refused him permission to continue, and who has represented them as a petitioner at the United Nations—who would be granted Ethiopian or Liberian citizenship for the purpose) would request permission from the South African government to pursue his missionary work in South West Africa. Upon the anticipated refusal, the affected government could bring a proceeding under article 7 to vindicate its admitted special interest ("admitted" in the sense that the Court opinion in 1966 referred to article 5 as being a special interest clause. SWA Cases 1966, at 20-21, § 11.)

Rev. Scott has already applied to the Ad Hoc Committee of Fourteen for permission to go to South West Africa to pursue his work with the Herero.

261 Judge Zafrulla Khan and Judge Fouad Amoun, elected to fill out the unexpired term of Judge Badawi, both presumably sympathetic to the 1962 majority, were, at that point, apparently eligible to sit on future cases.

262 Judges Spender, Winiarski, and Spiropoulos did not seek re-election. Their terms expired Febuary 5, 1967.

263 It will, indeed, be a tragic irony if the 1966 decision, which may indirectly lead to the end of judicial conservatism, at the same time has permanently dissuaded Asian and African countries from bringing proceedings before a Court now virtually sure to be more sympathetic to their aspirations. On the other hand, concern has been expressed that "if the balance of the Court thus moves drastically away from its [present] weighting and standards, it is likely that the older nations . . . will become less and less inclined to submit to international adjudication. . . ." Higgins, "The International Court and South

But by now another advisory opinion, however favorable to the Africans, can do little more than bolster their moral position. (And in view of the court's flip-flops after each change in composition, even its moral effect might be limited.) The problem which the UN now faces is the South African position that it can be driven out of South West Africa only by force.

The question of what the UN should do is thus, in the first instance, in the hands of the *Ad Hoc* Committee. As of the writing of this article, committee members have agreed that their agenda must start with the establishment of some sort of interim administration for the Territory and proceed to the question of how to take over the Territory from South Africa—but they have not yet agreed on how the administration shall be constituted.

The so far unsuccessful sanctions against Rhodesia suggest that any action against South Africa which does not involve military force—at least in the form of a blockade to make sanctions effective—is likely to fail.[264] It is also clear that all the states of Africa combined are not strong enough to take on South Africa militarily or to conduct by themselves an effective blockade. Furthermore, the Committee must take into account Britain's shaky economic condition, vulnerable to South African retaliation; general French hostility to collective security measures; and American preoccupation with Vietnam. Thus a recommendation of mandatory sanctions is unlikely to be accepted by the Security Council.

The Committee is therefore likely to search for means by which the UN can exert its "presence" in South West Africa from the outside without leading to physical confrontation. To be successful they must not demand difficult or expensive forms of implementation by UN members.[265]

West Africa: The Implications of the Judgment," 42 Int'l Aff. 573, 592-93 (1966); cf. "The World Court's Decision on South West Africa," 1 Int'l Lawyer 12, 30 (Carey) (1966).

This suggests a fear that political viewpoint (including, apparently, amenability to the wishes of the majority of the General Assembly!) will be substituted for the "high moral character" and competence required by article 2 of the Statute of the Court. Unless, however, it is assumed that (a) there are no jurists from the "new" countries who meet those qualifications and/or (b) such countries will not proudly back such candidates, the necessary conclusion to be drawn from such concern is that the "older nations" have exercised a subtle kind of politics, not within the "in-group," but vis-à-vis all "out-groups." The selection of more judges from the new Asian and African countries may, indeed, bring the Court more in conformity with article 9 of the Statute, which requires that in the Court as a whole "the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

[264] For serious studies of sanctions, see Segal (ed.), Sanctions against South Africa (Penguin 1964), and Leiss (ed)., Apartheid and the United Nations: Collective Measures, an Analysis (Carnegie Endowment for Peace 1965).

[265] It might be suggested: (a) That all persons and organizations in South West Africa be directed to pay their taxes to a UN "administering authority" (to be created) rather than to representatives of the South West African or South African government. Cooperating countries could implement this provision by refusing foreign tax credits (or equivalent advantages) to their nationals who fail to obey the directive and, instead, remit payments

Actions of this type will certainly not bring about the "right of self-determination" or "independence" for the people of South West Africa; but they are perhaps not too different from those which would have been used to commence implementation of a favorable decision, if one had been obtained, and the South African government had defied the Court. (The factors which face the *Ad Hoc* Committee today would undoubtedly have faced the Assembly or Security Council and would have constituted equally grave considerations however favorable the judgment that might have been rendered.)

The bitter truth is that in South West Africa the United Nations is faced with a choice—at least an apparent choice—between peace and justice. This is the dilemma which the Court has handed to the UN by remanding the *South West Africa Cases* to the political forum.

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to the local or South African government. (b) That the administering authority issue visas for travel or residence in South West Africa and passports for persons considered citizens of South West Africa. Cooperating countries could implement this provision by appropriate legislation recognizing UN documents and refusing recognition to competing South African documents. (c) That the UN administering authority refuse to recognize any titles to real property not granted by itself after its creation and that it insist on the right to validate all titles to land previously granted in connection with the implementation of group "homelands" schemes. Cooperating countries could implement this provision by refusing to approve for any domestic purpose (such as the approval of prospectuses in connection with the issuance of securities) land titles which were not approved by the administering authority. (d) That the UN administering authority beam special educational radio programs to South West Africa to supplement the inferior "Bantu education" provided for Africans. (e) That the UN administering authority or some other appropriate agency institute "crash" programs to train large numbers of South West African refugees to fill technical and administrative positions in a future South West African civil service.