THE INTERNATIONAL COURT AND SOUTH WEST AFRICA: LATEST PHASE

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With the dissolution of the League of Nations and the establishment of the United Nations, the question arose whether the United Nations had succeeded to the supervisory powers over the League mandate territories. The League made no express transfer of such powers; nor did the Charter of the United Nations express an obligation for member states to convert their League mandates into United Nations trusteeships. Nevertheless, all mandates eventually either became independent or were converted into trusteeships, with one exception: the mandate over South West Africa administered by South Africa. Though initially it reported to the United Nations on the administration of its mandate, the government of South Africa, on July 11, 1949, informed the Secretary-General that it could "no longer see that any real benefit is to be derived from the submission of special reports on South West Africa to the United Nations and [had] regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded."

From 1950 to 1971 the International Court of Justice has rendered six opinions dealing directly with this issue of mandate

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1After the first world war the German colony of South West Africa became a mandate territory administered by South Africa under supervision of the League of Nations. South Africa's obligations in administering the territory were laid down in article 22 of the League Covenant, and in the mandate drawn up by the League Council.

LEAGUE OF NATIONS COVENANT art. 22, para. 1:
To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and 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 civilisation and that securities for the performance of this trust should be embodied in this Covenant.

LEAGUE OF NATIONS MANDATE art. 2, para. 2:
The Mandatory shall promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory subject to the present Mandate.

Art. 7 para. 1:
The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.


3In the context of this dispute the General Assembly has sought three Advisory Opinions; Advisory Opinion on International Status of South West Africa, [1950] I.C.J. 128; Advisory
territory. The most recent of these, delivered June 21, 1971, was the first advisory opinion ever requested by the Security Council. The question presented by the Security Council to the Court was:

"What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)?"  

In its response to the Security Council the Court dealt with a range of important legal questions, the implications of which justify the importance ascribed to this advisory opinion. This article will discuss four of the issues raised by the Court:

1. The power of the International Court of Justice to review General Assembly and Security Council resolutions;
2. The revocability of the Mandate by the General Assembly;
3. The violations of South Africa's international obligations which

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'During the interval between the Advisory Opinions requested by the General Assembly and that sought by the Security Council, actions were brought by Ethiopia and Liberia against South Africa in 1960, seeking to have the Court declare that South Africa had acted against its obligations as a Mandatory Power both under art. 22 of the Covenant and arts. 2 and 7 of the Mandate, supra, note 1. They based their actions on art. 7 para. 2 of the Mandate, which provides: “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 or 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 provided for by article 14 of the Covenant of the League of Nations,” in conjunction with art. 37 of the Statute of the International Court of Justice, which in turn provides: “Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.”

A decision by the International Court in 1962, South West Africa Cases, Preliminary Objections, [1962] I.C.J. 319, in which the Court rejected South Africa’s preliminary objections, seemed to pave the way for a decision on the merits. However, in 1966 the Court decided that Ethiopia and Liberia had no legal interest in having decided the issue as presented to the Court. South West Africa Cases, [1966] I.C.J. 6.


In resolution 276 (1970) the Security Council declared “that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid.” The Security Council called on “all states, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of this resolution.”
were the basis for General Assembly Resolution 2145 (XXI), terminating the Mandate over South West Africa;

THE POWER OF THE INTERNATIONAL COURT OF JUSTICE TO REVIEW GENERAL ASSEMBLY AND SECURITY COUNCIL RESOLUTIONS

The reference by the Security Council to its resolution 276 (1970) in the question presented to the Court indicated the Security Council's belief that the validity of that resolution was beyond doubt and was therefore above scrutiny by the International Court. Resolution 276 of the Security Council in turn relied upon the validity of the termination of the Mandate by the General Assembly. Therefore, if Security Council resolution 276 (1970) enjoyed immunity from judicial examination, the validity of General Assembly resolution 2145 (XXI) was also beyond scrutiny. Of course, if these resolutions were data whose legal validity could not be questioned, there would be no reason to call for an advisory opinion.

In the course of the debate in the Security Council, on July 29, 1970, several representatives had discussed the phrasing of the question to be presented to the Court. From these debates it appears clear that the request for an advisory opinion was considered by various delegates as the chance for the Court to rehabilitate itself after its much criticized judgment of 1966. The restrictive phrasing of the question presented to the Court was meant to prevent it from going "the wrong way" again.

The French representative, Mr. Bouquin, attempted to eliminate the wording "notwithstanding Security Council resolution 276 (1970)" from the request in order to widen the scope of judicial inquiry by the International Court. But following a separate vote on this element of the question it was retained. No member of the Security Council voted against the retention of this phrasing of the question; France, Poland, the USSR and the United Kingdom abstained.

Presented with this restrictively phrased question, the Court appeared

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*Action in the International Court having been unsuccessful, the General Assembly chose to carry its supervisory powers to an extreme; on October 6, 1966, it passed G.A. Res. 2145, U.N. GAOR Supp. at, U.N. Doc. (1966), which terminated South Africa's mandate over South West Africa, stating that South Africa had no other right to administer the Territory and that henceforth South West Africa would come under the direct responsibility of the United Nations.*

*S/PV/1550, paras. 157-59.*
to take the position that the International Court of Justice is without power to examine the legality of the underlying resolutions 2145 (XXI) of the General Assembly and 276 (1970) of the Security Council:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.8

Apparently the Court took the view that it had no power, at least in the context presented, to review the legality of the resolutions adopted by the General Assembly and the Security Council. Nevertheless, the Court reviewed the legality of the revocation of the Mandate by the General Assembly, and the subsequent Security Council resolutions. This is a strange approach. The Court denied having powers to review the resolutions and at the same time examined their legality, revealing perhaps an effort to come out on the "right side"—that is, the side of the political organs of the United Nations.

Several judges, in their individual opinions, dealt with the question of the propriety of the question presented. Judges Onyeama and Dillard, both in favor of judicial review, based their opinions on their ideas of the judicial function. Judge Onyeama wrote: "I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts." And Judge Dillard wrote: "This function precludes it [the Court] from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and the scope of the legal consequences flowing from it."10 Judge Fitzmaurice drew attention to the fact that in the jurisprudence of the Court, it had been emphasized that even in advisory proceedings the International Court must still act as a court of law and not as a panel of jurists set up by a political organ of the United Nations to render advice on one or more legal questions. He wrote: "But the Court, which is itself one of the six original main organs of the United Nations, and not

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8Advisory Opinion, supra note 2, at 45.
9Id. at 144.
10Id. at 151.
inferior in status to others, is not bound to take instructions from any of them, in particular as to how it is to view and interpret its tasks as a court of law, which it is and must always remain, whatever the nature and context of the task concerned . . . .” It is precisely the fact that the Court is equal to the other organs of the United Nations that makes it possible for the Court not to limit itself to a narrowly phrased question presented to it.

Judge de Castro saw the dilemma very clearly, describing the question as a conflict between two principles: First, the principle of “separation of powers,” in the sense that the General Assembly, the Security Council and the International Court of Justice each have the final say in the sphere of their own competence and none is subordinate to any of the others; and second, the principle of “‘legal-ness’—the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law.” What Judge de Castro appears to have meant was that the International Court cannot accept the legality of a resolution which, in the opinion of the Court, is ultra vires.

Having pointed out the dilemma, Judge de Castro decided in favor of the separation of powers, relying upon the exclusion of judicial review of statutes:

Before ordinary municipal courts, the result of the interplay of these two principles is that such courts refrain from passing judgment on the validity of laws, with the sole exception of cases in which it is clear and indisputable that the alleged law does not in fact rank as a law, in which there is only an apparent law. In any other case, in general, either the courts refrain from considering the question of the validity of laws, or they consider that they must indicate the reasons for their validity; there is always a presumption in favour of the validity of laws.

The Court may derive inspiration from this example. Should it decline to give an opinion on the validity of the resolutions? The Court is not, in the structure of the United Nations, a super-organ, and it is not entitled to give any sort of “counter-opinion.”

THE REVOCABILITY OF THE MANDATE BY THE GENERAL ASSEMBLY

In its Advisory Opinion on the Status of South West Africa, rendered in 1950, the Court held that the United Nations succeeded to the League’s supervisory functions over the Mandate of South West Af-

\[1\] Id. at 303.
\[2\] Id. at 180.
\[3\] Id. at 181.
The Court's first step in its 1971 decision was to subscribe to that earlier holding. However, this affirmation alone does not approve the power of the United Nations to terminate the Mandate. The vital question follows whether the League had the power to terminate the Mandate as part of its supervisory function. If the League could not revoke the Mandate, neither could the United Nations. The 1950 Advisory Opinion states that the United Nations cannot exercise a degree of supervision greater than that exercised by the League and the principle, \textit{"nemo plus iuris in alium transferre potest quam ipse habet,"} reinforces that holding.

The Court construed a relationship of a treaty character between the members of the United Nations and each Mandatory Power under article 80 of the Charter. Article 80 was interpreted as creating an obligation for the Mandatory Power to continue to carry out its duties under the terms of the Mandate and article 22 of the Covenant, as well as its obligations under the Charter in the Mandate Territory.

Having established the treaty nature of South Africa's obligations under article 80 of the Charter, the Court turned to article 60 of the Vienna Convention on the Law of Treaties of 1969. Article 60 of that Convention deals with the termination or suspension of a treaty as a consequence of its breach and is considered by the Court to be a codification of a rule of customary international law. Only a material breach by one party to a treaty justifies termination by the other party. Such a breach is defined in the Convention as:

(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

According to the Court, the General Assembly had determined that both forms of material breach had occurred and had exercised its right to terminate the Mandate in resolution 2145 (XXI). South Africa's

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\(n\) 1950 the Court dealt with the legal situation created by the dissolution of the League and South Africa's refusal to convert its mandate to a trusteeship, holding that South West Africa remained a Mandate Territory in spite of the dissolution of the League, and stating that the United Nations had succeeded to the League's supervisory functions regarding the Mandate. Advisory Opinion on International Status of South West Africa, [1950] I.C.J. 128.

\(Id.\) at 138; see also Advisory Opinion, \textit{supra} note 2, at 47.

\(\text{"No man may transfer to another more right than he has himself."}\)

\(Advisory Opinion, \textit{supra} note 2, at 47.\)

\(Vienna Convention on the Law of Treaties, \text{art. 60, para. 3 (1969).}\)

\(Advisory Opinion, \textit{supra} note 2, at 47.\)
failure to report annually to the United Nations on South West Africa as required under article 22 of the Covenant and article 6 of the Mandate was a fundamental breach of the kind described in (a) above, and South Africa’s policy of *apartheid* was a fundamental breach of the kind listed under (b) above.

There are, no doubt, difficulties in this construction. As Judge de Castro pointed out, the Mandate was not simply a treaty between the League and South Africa:

> It was brought into being, like the other mandates, as follows. Germany ceded German South West Africa to the Principal Allied and Associated Powers to be administered by the mandatory in accordance with Article 22 of the Covenant. The Principal Powers agreed that a mandate should be conferred on His Britannic Majesty to be exercised on his behalf by the Union of South Africa, in accordance with Article 22 of the Covenant. His Britannic Majesty, acting for South Africa, undertook to accept the Mandate and exercise it on behalf of the League of Nations. The Council of the League of Nations, having regard to Article 22, paragraph 8, took a decision on the points referred to in that provision and confirmed the Mandate.\(^2\)

However, the Court construed article 80 of the Charter as placing South Africa under treaty obligations vis-à-vis the rest of the United Nations membership, rather than according a treaty character to the Mandate itself. In 1962 the Court had made a reference to this aspect of the Mandate, indicating that it was, "like practically all other similar Mandates . . . a special type of instrument composite in nature and instituting a novel international regime. It incorporates a definite agreement."\(^2\)

Judge Gros, referring to the assumed treaty character of the Mandate and not to the wider international obligations of South Africa construed by the Court as based on article 80 of the Charter, denied the General Assembly the right to terminate the Mandate by unilaterally invoking violations allegedly committed by South Africa. He wanted to apply the principle *audi et alteram partem*, and thus, wanted a decision by a third party as to whether the violations by South Africa had actually occurred.\(^2\)

Indeed, the Vienna Convention on the Law of Treaties, through articles 65 and 66, established procedural safeguards against a unilateral termination by one party following a fundamental breach allegedly committed by the other party. It seems, however, that in this

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\(^{20}\) *Id.* at 210.

\(^{21}\) *Id.* at 46, citing The South Africa cases, [1962] I.C.J. 331.

\(^{22}\) Advisory Opinion, *supra* note 2, at 339.
respect the Vienna Convention is not a codification of existing customary international law. The rule of customary international law seems to be that a state can unilaterally declare a treaty terminated if the other side has committed a fundamental breach of its treaty obligations, without recourse to conciliation, arbitration or adjudication. Unfortunately, Judge Gros did not state his authority when he argued that such a unilateral declaration is not allowed.

However, having established the succession of the United Nations to the League's supervisory powers, the Court had to take another hurdle to legitimize the action of the General Assembly, namely article 5, paragraph 1 of the Covenant:

Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

Read in conjunction with article 4, paragraph 5, which gave South Africa the right to sit on the Council whenever its Mandate over South West Africa was discussed, South Africa would seem to have a right of veto on the League Council. Since the United Nations, according to the Court's Advisory Opinion of 1950, cannot exercise a degree of supervision greater than that of the League, it is at least open to doubt whether the General Assembly could terminate the Mandate over South West Africa without the concurring vote of South Africa. The Court brushed this argument aside:

To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

It is surprising that only Judge de Castro referred to the individual opinion of Judge Lauterpacht in 1955, concerning the voting procedure

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25"Any member not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League." League of Nations Covenant art. 4, para. 5.
26Advisory Opinion, supra note 2, at 49.
27Id. at 90.
relating to South West Africa. In that opinion Judge Lauterpacht dealt extensively with the rule of unanimity and showed that exceptions had been made to the unanimity rule by application of the principle *nemo judex in sua causa.*

Faced with the question, “Did the Rule of Absolute Unanimity obtain in the Council of the League acting as a Supervisory Organ of the Mandates System?” Judge Lauterpacht relied upon the 1925 Advisory Opinion of the Permanent Court of International Justice on the interpretation of the Treaty of Lausanne (The Mosul case). In that opinion the Permanent Court gave an extensive interpretation to the exception to the unanimity rule embodied in article 15, paragraph 6 of the Covenant which reads:

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more parties to the

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29“‘No man shall judge his own cause.’ This principle had been spelled out by the Permanent Court of International Justice in its advisory opinion of 1925 on the interpretation of the Treaty of Lausanne. The Mosul Case, [1925] P.C.I.J., ser. B, No. 12.

30In 1955 the International Court of Justice in an advisory opinion requested by the General Assembly dealt with the voting procedure adopted by the General Assembly with regard to reports and petitions relating to South West Africa. The General Assembly had decided that it would take decisions concerning such reports and petitions by a 2/3 majority, in accordance with art. 18, para. 2 of the United Nations Charter. The General Assembly then requested the International Court of Justice to render an Advisory Opinion whether this rule was in conformity with the previous Advisory Opinion of 1950. The underlying problem was that the Council of the League, according to art. 5 of the Covenant, could take a decision only by a unanimous vote. Since the Mandatory Power would be invited to participate in the debate and the vote on such a question, it might be concluded that the Mandatory Power had a right of veto on the League Council in questions concerning its own mandate. The real question therefore was whether the General Assembly through its less strict voting rule could exercise a greater degree of supervision over the Mandate than the League Council. In 1950 the Court also had held that the degree of supervision by the United Nations to be exercised through the General Assembly should not exceed that of the League, and at the same time, should conform “as far as possible” to the procedure followed by the Council of the League of Nations. The Court considered that the statement of 1950 concerning the degree of supervision referred to substantive matters and was not related to the system of voting followed by the Council of the League. The statement by the Court that the United Nations should conform “as far as possible” with the procedure followed in supervisory matters by the Council of the League of Nations, referred to the way in which supervision was to be exercised, a matter which is procedural in character. To conform “as far as possible” the Court did not require the General Assembly to deviate from the voting rules laid down in art. 18 of the Charter. The Court considered that the voting system of the General Assembly had not been in contemplation when the Court rendered the 1950 opinion. Judges Lauterpacht and Klaestadt pointed out in their individual opinions, that the distinction between the substance of supervision and the procedure followed in the exercise of this supervision is artificial. As decisions are more easily taken because of procedural rules, the degree of supervision becomes greater. The 1955 Opinion played a role in the background of the latest Opinion in so far as it concerned the question to what extent the difference in voting rules between the League Council and the U.N. General Assembly could affect the validity of General Assembly resolution 2145 (XXI). [1955] I.C.J. 98.

dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

The Permanent Court held that the principle enshrined in article 15 of the Covenant excluded the votes of parties to the dispute from the requirement of unanimity as a condition of the validity of a recommendation made by the Council and was of general application, as it embodied the "well-known rule that no man can be judge in his own suit." The Permanent Court considered this rule to be of general application for the decisions of the Council when acting in a judicial capacity. According to Judge Lauterpacht, that holding was not limited to cases brought before it by virtue of an extraneous treaty, as was the case with the Treaty of Lausanne.

After examining the practice of the League of Nations Judge Lauterpacht wrote:

The fact which thus emerges with some clarity from a survey of the practice of the Council of the League of Nations on the subject is that it supplies no conclusive or convincing evidence in support of the rule that as a matter of practice the rule of unanimity operated and was interpreted in a manner substantiating any right of veto on the part of the Mandatory Power. It would probably be more accurate to say that, assuming that it existed during the initial period of the functioning of the League, that right fell into desuetude and lapsed as a result.

He stated further:

In so far as the principle nemo judex in re sua is not only a general principle of law, expressly sanctioned by the Court, but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application. This, too, is a general principle of law recognized by civilized States.

Assuming that the League had the power to revoke the Mandate, and following the reasoning of Judge Lauterpacht, one may conclude that the League Council could have revoked the Mandate without South Africa's concurring vote. Thus a revocation by the General Assembly

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33Id. at 103.
34Id. at 105.
under its inherited supervisory function over the League Mandates would be valid without the concurring vote of South Africa.

The President of the Court, Sir Mohammed Zafrulla Khan, avoided the rule of unanimity in a different way. With reference to the fact that a Mandatory Power had never vetoed a decision of the Council, he concluded that in practice the last word always rested with the Council of the League and not with the Mandatory. Moreover, he reasoned a Mandatory Power could have been expelled from the League of Nations under article 16, paragraph 4 of the Covenant, with subsequent termination of the Mandate.36

THE VIOLATIONS OF SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS WHICH WERE THE BASIS FOR GENERAL ASSEMBLY RESOLUTION 2145 (XXI)

The Court assumed that the General Assembly had found two fundamental violations of South Africa's international obligations related to the Mandate—its failure to report to the United Nations and its continued policy of apartheid, both of which independently justified the termination of the Mandate by the General Assembly.

Concerning its obligation to report on South West Africa to the United Nations, there could be no question as to whether South Africa had denied its responsibility. Judge Fitzmaurice pointed out that South Africa offered in 1946, 1947 and 1948, information about the Mandate Territory on the basis of article 73(e) of the Charter without recognizing thereby the supervisory functions the General Assembly claimed over the Mandate Territory.37 However, the General Assembly insisted on dealing with these reports through the Trusteeship Council. According to Judge Fitzmaurice, this treatment was the reason for South Africa's refusal to submit any further information to the General Assembly.38

As to the second alleged breach, that South Africa had acted against its obligations under the Mandate in pursuing its policy of apartheid, the South African government argued that

35 "Any member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representative of all other Members of the League represented thereon." LEAGUE OF NATIONS COVENANT art. 16, para. 4.
36 Advisory Opinion, supra note 2, at 59, 60.
37 "... the South African proposal originally made in November 1946 [was] to transmit information of the same type as was required by article 73(e) of the Charter in respect of so called 'non-self-governing territories.' Such information, given about colonies, protectorates, etc., does not imply accountability, and is not in the formal and technical sense 'reporting.'" Id. at 259-60.
38 Id. at 259-62.
to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants.39

But the Court refused to examine the evidence offered by the government of South Africa:

\[ \ldots \text{the Court finds that no factual evidence is needed for the purpose of determining whether the policy of apartheid as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.}^{40} \]

Again it seems the Court referred to South Africa's international obligations whereas South Africa was only concerned with its obligations under the Mandate.

Apart from its reporting obligations, South Africa had, according to the Court, violated other international obligations:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.41

This is language which will be welcomed by many favoring the international protection of human rights. It fits well a political manifesto for

39 Id. at 56.
40 Id. at 57.
41 Id. at 57. It must be noted that it is not perfectly clear whether this language is holding, in the sense that South Africa's violations of the Charter are considered an independent second ground for termination of the Mandate by the General Assembly, or whether it is dictum, in the sense that the Court only rejected South Africa's offer to provide it with evidence concerning the nature of its administration of South West Africa. Judge Dillard maintains this language is only dictum. [1971] I.C.J. 16, 16, 138. But cf. Schwelb, The International Court of Justice and the Human Rights Clauses of the Charter, 66 A.J.I.L. 337 (1972), at 350.
the promotion of human rights, but whether it will strengthen the status of the provisions in the Charter concerning human rights is very doubtful. The Court could at least have specified the article of the Charter requiring South Africa to observe and respect in Namibia human rights and fundamental freedoms regardless of race. The Court could have also made explicit which purposes and principles of the Charter had been violated. Had the Court been more specific, there would be some direction as to what legal obligations are created for member states by certain provisions in the Charter. The sweeping language of the Court may be helpful for the purpose of condemning South Africa, although it can hardly be relied upon in the future. Moreover, this sweeping language condemns South Africa's policy of apartheid in South West Africa only because that territory has an international status; it says nothing of South Africa itself. Had the Court held that the policy of apartheid violates, per se, one or more express provisions of the Charter, the Court would have condemned that policy within South Africa as well.

Here was an opportunity for the Court to solve at least part of the controversy which has existed since the Charter was written, that is whether the human rights provisions in the Charter are merely general guidelines or whether they create direct legal obligations for member states. According to Kelsen, the language in the Charter concerning human rights does not create obligations for the members of the United Nations. He considers such language as merely establishing purposes or functions of the United Nations. Lauterpacht, however, has maintained that these provisions do create obligations in spite of the fact that they are vague. Judge Ammoun, in his individual opinion, was more specific. He built his argument on article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights." Interestingly the judge refuted the argument usually made that the Universal Declaration is merely a resolution by the General Assembly and creates no binding obligations for member states:

Although the affirmations of the Declaration are not binding qua international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article,
whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention of the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute. One right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.45

Thus, Judge Ammoun did not hold that the Universal Declaration of Human Rights is part of customary international law, but that at least the right to equality is. This view has consequences also for South Africa’s domestic policies. South Africa, in his opinion, is violating a norm of customary international law by practicing apartheid, a policy that is condemned no less when pursued at home.

However, it is arguable that the majority of the Court rejected Judge Ammoun’s view as to the binding legal effect of provisions in the Universal Declaration. The Court referred to one of the preambles of General Assembly resolution 2145 (XXI) as follows: “‘Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary’ to the two basic international instruments directly imposing obligations upon South Africa, the Mandate and the Charter of the United Nations as well as to the Universal Declaration of Human Rights.”46 The Court thus distinguished between the Mandate and the Charter which are said to be binding on South Africa, and the Universal Declaration, the status of which is left unclear. It might be argued that by making the distinction, the Court by implication denied the binding effect of the Universal Declaration.

**The Relationship between General Assembly Resolution 2145 (XXI) and Security Council Resolution 276 (1970), and the Effect of Security Council Resolutions in General**

It appears from the various opinions that there was disagreement among the judges as to the relationship between General Assembly resolution 2145 (XXI) and Security Council resolution 276 (1970). The question is whether the General Assembly needed the co-operation of the Security Council to terminate the Mandate.

It would seem that if the General Assembly of the United Nations

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45id. at 76.
46Id. at 46.
succeeded to the supervisory functions of the League Council, assuming that the League Council could terminate the Mandate, the United Nations General Assembly alone would be able to terminate the Mandate. Therefore, one must conclude that the General Assembly did not need the Security Council to make its decision binding upon South Africa. However, generally speaking, the resolutions of the General Assembly only have the force of recommendations and create no legal obligations for the member states. When adopting resolution 2145 (XXI), however, the General Assembly was acting in an extraordinary capacity, namely as the successor of the League of Nations Council in its supervisory functions with regard to the Mandate Territory. This is an action *sui generis* by the General Assembly. The power to revoke the Mandate was conferred on the General Assembly from outside the Charter through the unique situation created by the Mandate in conjunction with article 80 of the Charter.  

However, having reached the conclusion that the General Assembly could terminate the Mandate, the Court inserted a passage in its judgment which was again unclear: “By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter’s attention to the resolution, thus acting in accordance with article 11, paragraph 2, of the Charter.”

In spite of the construction of a treaty relationship between South Africa and the United Nations which the General Assembly could terminate on behalf of the United Nations, the General Assembly apparently is still considered to be limited by the restrictions imposed by the Charter. Hence resolution 2145 is only a recommendation and has no binding effect. To make the termination of the Mandate binding on South Africa, as well as third parties, the General Assembly needed the co-operation of the Security Council. Another explanation for the Court’s treatment of this issue is that the termination of the Mandate by the General Assembly was legally binding, but the General Assembly had no power to enforce it and therefore sought the co-operation of the Security Council. Whether the Security Council actually had the pow-

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47*See id.* at 163, Judge Dillard calls this his first approach; *see also id.* at 146-47 (Judge Onyeama).  
48*Id.* at 51.  
49*Id.* at 164 (Judge Dillard, concurring).  
50*Id.* at 133 (Judge Petren, concurring). He draws the analogy with the enforcement of judgments of the International Court of Justice in contentious cases dealt with in art. 94, para. 2 of the Charter.
ers to render to the General Assembly the assistance expected remains to be examined.

The question the Court had to examine was whether the whole series of Security Council resolutions, resolution 276 (1970) in particular, adopted after resolution 2145 (XXI) of the General Assembly were binding upon South Africa and upon the other member states. The argument was made that only Security Council resolutions adopted under Chapter VII of the Charter (after the Security Council had determined the existence of a threat to the peace, breach of the peace, or act of aggression) have a binding effect upon the member states. This question turns on the interpretation of article 25 of the Charter, and the words "in accordance with the present Charter" in particular.\(^ \text{51} \) On this question the Court stated:

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

It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have in fact been exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.\(^ \text{52} \)

It now seems settled that the Security Council can indeed pass resolutions in addition to those passed under Chapter VII of the Charter which will nevertheless be binding on member states. The binding char-

\(^{51}\) "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. Charter art. 25.

\(^{52}\) Advisory Opinion, supra note 2, at 53.
acter depends on the intention of the Security Council and must be determined on an *ad hoc* basis, according to whether the Security Council wanted its language to be recommendatory or mandatory.

The real problem in interpreting article 24 is whether the Security Council has only the powers conferred on it by Chapters VI, VII, VIII and XII, or whether it possesses wider powers. If the Security Council has only the powers of the enumerated Chapters, it would seem that only under Chapter VII could the Security Council make decisions which are binding on the members of the United Nations. Consequently, the obligation of the member states imposed in article 25 of the Charter "to carry out the decisions of the Security Council in accordance with the present Charter" would relate only to those decisions which are made binding upon the member states by Chapter VII. Judge Fitzmaurice took this position.\(^5\)

The court's decision on this issue is in effect to broaden the power of the Security Council and, thereby, strengthen the United Nations as a supranational organization. Generally, the big power states tend to resist efforts at converting the United Nations into a world government, even where the strengthening efforts are directed toward the Security Council, where they have the right of veto. It is interesting to see how the various judges coming from the big power countries react to the broadening of the powers of the Security Council. Although these judges do not speak for their respective governments, they nevertheless bring their own national background to the Court.

The position taken by Judge Fitzmaurice, limiting the power of the Security Council, has already been described. The American judge on the Court, Judge Dillard, at the very outset of his individual opinion denied that the Security Council has "broad powers of a legislative or quasi-legislative character" and emphasized that the Advisory Opinion is concerned with a unique case of a territory with *international status*, the administration of which engaged the supervisory authority of the United Nations.\(^6\)

The French judge on the Court, Judge Gros, was also opposed to a wider interpretation of article 25 of the Charter in conjunction with article 24:

> The degree of solidarity accepted in an international organization is fixed by its constitution. It cannot be subsequently modified through

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\(^5\) *Id.* at 293.

\(^6\) *Id.* at 150.
an interpretation based on purposes and principles which are always very broadly defined, such as international co-operation or the maintenance of peace. Otherwise an association of States created with a view to international co-operation would be indistinguishable from a federation. It would be precisely the "super-State" which the United Nations is not.\textsuperscript{55}

Unfortunately the Russian judge on the Court, Judge Morozov, did not write an individual opinion; therefore, his exact views are not reflected in the opinion.

It may be sheer accident that all the judges of the big powers, whose personal views were expressed, are opposed to the broadening of the powers of the Security Council. It might also be a reflection of thinking in their respective countries about the role of the United Nations.

**THE COURT'S REPLY TO THE QUESTION PRESENTED TO IT**

At the end of its Advisory Opinion the Court gave a specific reply to the question presented to it, that is "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?" The Court replied:

(by 13 votes to 2)

(1) that the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

(by 11 votes to 4)

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration; (3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.\textsuperscript{56}

The judges dissenting from part (1) were Judges Gros and Fitzmaurice. These judges refused to recognize the power of the General Assem-

\textsuperscript{55}Id. at 341.
\textsuperscript{56}Id. at 58.
bly to revoke the Mandate. Judges Fitzmaurice, Gros, Petrèn and Onyeama dissented to the Court’s conclusions in parts (2) and (3) of the reply based on its wide interpretation of article 25.

The Court reached the conclusion that the Security Council wanted its resolution 276 (1970) to be binding upon the member states. Therefore, from the binding resolution that South Africa’s continued presence is illegal, the International Court derived an obligation for member states to bring that situation to an end. The specific determination as to whether certain acts are allowed is the concern of the Security Council. The obligation of nonrecognition should be carried out with due regard to the interests of the population of South West Africa.

The opinion also had consequences for states which are not members of the United Nations. In the Court’s view, the illegality of South Africa’s administration over South West Africa as determined by the United Nations is opposable erga omnes. Consequently, non-member states who enter into relations with South Africa concerning Namibia may not expect the United Nations or its members to recognize the validity or effects of such acts.

The dissenting votes as to parts (2) and (3) of the reply are due wholly or in part, to a restrictive interpretation of articles 24 and 25 of the Charter. That Judges Gros and Fitzmaurice dissented from these parts of the reply was not surprising after their denial that the General Assembly could terminate the Mandate. After all, resolution 276 (1970) depended upon the validity of the termination of the Mandate by the General Assembly.

Judge Petrèn in his dissent considered resolution 2145 of the General Assembly to have validly terminated the Mandate, and therefore that states in general are under an obligation not to recognize South Africa’s administration over South West Africa. This is a purely negative duty. In his opinion resolution 276 of the Security Council contains “duties” which go further. Judge Petrèn adhered to the limited interpretation of article 25 that because the Security Council was not acting under Chapter VII of the Charter, resolution 276 was not binding, but

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57See text accompanying notes 11 & 21, supra.
58Advisory Opinion, supra note 2, at 53.
59Id. at 54.
60Id. at 55.
61Id. at 56.
62Id.
63Id. at 134.
64Id. at 135.
a mere recommendation. Judge Petrén thought that parts (2) and (3) of the reply impose obligations which go beyond the duty of nonrecognition. While members of the United Nations may be obligated to take active measures against South Africa under Chapter VII of the Charter, that can never be true for non-members. Judge Onyeama reasoned along the same line.

CONCLUSIONS

This advisory opinion provided, as was suggested in the Security Council, the opportunity for the International Court to rehabilitate itself in the eyes of all those who had attacked it for its judgment of 1966. However, even if the Court wished to cooperate with the political organs of the United Nations, it was not necessary to issue an opinion which, though pleasing in its conclusions, is often disappointing in its reasoning.

The Court did not limit itself in determining South Africa's international obligations to the intentions of the drafters of the covenant, nor to the terms of the Mandate. It rather took the position that it cannot disregard a development in history and law of more than fifty years. For as Judge de Castro observed, the Court is sitting in 1971 and not in 1920. The Court tried to update the Mandate obligations of South Africa by interpreting the obligations in the light of the present situation and by adding new obligations created by the Charter and by rules of customary international law.

Comparing the philosophy of the Court with that of Judge Fitzmaurice, it is not surprising that they reached different results. Judge Fitzmaurice declared:

My reading of the situation is based—in orthodox fashion—on what appears to have been the intentions of those concerned at the time. The Court’s view, the outcome of a different, and to me alien philosophy, is based on what has become the intentions of new and different entities and organs fifty years later.

[Notes and references]

"Id. at 136.
"Id. at 148-49.
"See text accompanying notes 7-10, supra.
"Advisory Opinion, supra note 2, at 112.
"Id. at 223. The difference between Judge Fitzmaurice and the majority is fundamental. Judge Fitzmaurice's approach was completely different; he disagreed with the majority on almost all points and could not even accept the 1950 Advisory Opinion of the Court on the Status of South West Africa. His dissenting opinion of almost 100 pages is a true "counter-opinion." The accusations he made regarding the address of the majority are very serious indeed. He accused his colleagues, not of reaching the wrong conclusions, but of not applying a legal technique at all.
However, the difference between Judge Fitzmaurice and the majority of the Court is perhaps diminished when the philosophies of Judge Fitzmaurice and Judge Ammoun are compared. Judge Ammoun seemed to propose making legal reasoning subservient to political desirability:

The Court is not a law-making body. It declares the law. But it is a law discernible from the progress of humanity, not an obsolete law, a vestige of inequalities between men, the domination and colonialism which were rife in international relationships up to the beginning of this century but are now disappearing, thanks to the struggle being waged by the peoples and to the extension to the ends of the world of the universal community of mankind.\(^\text{70}\)

If Judge Ammoun means that the International Court should produce judgments which are politically acceptable to the majority of the member states of the United Nations, he is choosing a dangerous course. For should the Court become an institution which gives the “right result,” that is, a result that is politically acceptable irrespective of the reasoning, the Court is not going to gain in stature. It will lose exactly that asset which makes it a court of law: compelling legal reasoning. Declarations which are pleasing politically can be obtained elsewhere.

It is hoped that in the future the Court will be given cases which are not as politicized as the problem of South West Africa.\(^\text{71}\) The Court would be better served by a continuous flow of small technical cases that would allow the Court the time and the materials to gradually build up a body of jurisprudence, rather than one highly political case per year. A larger body of jurisprudence will make future decisions by the Court more predictable, which hopefully would be an incentive for countries to refer disputes to the Court. Giving the Court spectacular politicized cases at this stage will not pull the Court out of its present crisis.

\(^\text{70}\)Id. at 72.

\(^\text{71}\)The cases currently before the Court seem to fall within this category: Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), [1971] I.C.J. 347 and Application instituting Proceedings concerning Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1972] I.C.J. 2