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THE 1971 I.C.J. ADVISORY OPINION ON SOUTH WEST AFRICA (NAMIBIA)

*Preston Brown**

I. Introduction

South Africa has administered the adjoining territory of South West Africa (Namibia) for over fifty years.[1] Initially, that administration was granted to South Africa when it was designated a mandatory by the League of Nations. Since the dissolution of the League 25 years ago, South Africa's administration of the territory and, more recently, its right to administer, have been the subject of continued and escalating controversy.

The most recent development in this confused situation is the advisory opinion that was rendered in June, 1971, by the International Court of Justice.[2] That opinion was requested by the Security Council of the United Nations[3] and dealt with the question of South Africa's right to continue to administer Namibia. It also confronted the consequences of the Court's conclusion that the right no longer exists. While it is not clear what the practical effect of the opinion will be because of South Africa's refusal to accept it,[4] the opinion does raise important questions not only with respect to the Namibian situation, but also regarding the Court's role in the development of international law.

The latter consideration is currently receiving a great deal of attention.[5] Of particular concern has been the widespread failure of member states to use the Court to resolve their disputes. This disuse is evidenced by the fact that the I.C.J.'s predecessor, the Permanent Court of International Justice, decided considerably more cases than the present Court despite the fact that it had a shorter lifetime.

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1. The former German Territory of South West Africa is now referred to as Namibia. This symbolically reflects the widening emphasis on the territory's potential "nationhood" status.

2. [1971] I.C.J. 16.

3. The Security Council's request was made pursuant to U.N. CHARTER art. 96, para. 1.

4. Advisory opinions are not binding on member states of the United Nations.

5. *See, e.g.*, Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971).

Moreover, at the time that the I.C.J. was considering the Security Council's advisory request on Namibia, that was the only proceeding pending before it.

Widespread concern over the status of the Court culminated in the adoption of General Assembly resolution 2723 on December 15, 1970. That resolution authorized the preparation and distribution of a questionnaire inviting all member states to submit their views and suggestions on methods of enhancing the efficacy of the I.C.J. The judges of the Court were naturally aware of this inquiry well before the Namibian question was put to them again. In fact, it seems reasonable to believe that they were anxious to have the opportunity of readjudicating that question in the context of concern over the Court's future. Thus, a consideration of the opinion's impact on the future role of the Court is germane to an analysis of the opinion itself. Before undertaking such an analysis, however, the legal and historical background of the Namibian situation prior to the Court's decision is presented in order to put the discussion in a proper context.

II. Historical Background

A. *The Mandate and the Mandate System*

By virtue of the Treaty of Versailles at the conclusion of World War I, Germany renounced all rights and titles to her overseas possessions, including South West Africa. While it was agreed at the time that these possessions should not be annexed by the victorious powers, it was also accepted that many were inhabited by peoples not "yet able to stand by themselves under the strenuous conditions of the modern world. . . ."[6] Accordingly, article 22, paragraph 1, of the Covenant of the League of Nations articulated at the outset "the principle that the well-being and development of such peoples form[ed] a sacred trust of civilization and that securities for the performance of this trust should be embodied in [the] Covenant." Article 22, paragraph 2, added that the best method of giving practical effect to that principle was to entrust the tutelage of such peoples to advanced nations acting "as Mandatories on behalf of the League." The article went on to classify the mandates according to the stage of development, geographical situation and economic condition of each particular territory.[7] In this regard, the Covenant specified that South West Africa and certain other territories, given their low level of development, could be "best administered under the laws of the Mandatory as

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

7. League of Nations Covenant art. 22, para. 3.

integral portions of its territory," subject to certain safeguards "in the interests of the indigenous population."[8] Article 22 then concluded by requiring each mandatory to submit annual reports on the territory committed to its charge,[9] and by establishing a permanent commission to review the annual reports.[10] Finally, article 22 charged the Council of the League to define the degree of authority, control and administration to be exercised by the mandatory in the absence of express agreement.[11]

On December 17, 1920, the Council of the League confirmed the mandate agreement with Great Britain for the administration of South West Africa by the Union of South Africa. The mandate, together with the Covenant, set forth the principles and defined the terms under which South West Africa was to be administered. Specifically, the mandate provided that:

> The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modification 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 subject to the present Mandate.[12]

Articles 3, 4 and 5 of the mandate set forth specific obligations of the mandatory.[13] Article 6 required South Africa to make 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." The concluding article stated in part that the "consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate."[14]

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8. LEAGUE OF NATIONS COVENANT art. 22, para. 6.
9. LEAGUE OF NATIONS COVENANT art. 22, para. 7.
10. LEAGUE OF NATIONS COVENANT art. 22, para. 9.
11. LEAGUE OF NATIONS COVENANT art. 22, para. 8.
12. LEAGUE OF NATIONS COVENANT annex B (Mandate for German South West Africa), art. 2 [hereinafter cited as Mandate].
13. Prohibition of slave trade, sale of intoxicating beverages to natives, and control of arms traffic is provided by article 3 of the mandate. Article 4 prohibits military training or the installation of military bases within the territory of the mandate. Article 5 guarantees freedom of worship, freedom of conscience and free access by missionaries.
14. Mandate, art. 7. On January 31, 1923, the Council of the League adopted rules requiring mandatory governments to transmit petitions to the League from communities or sections of populations of mandated territories.

B. *Dissolution of the League: Advisory Proceedings in the Court*

The League of Nations was formally dissolved by its Assembly pursuant to the dissolution resolution of April 18, 1946.[15] The relevant portions of that resolution dealing with the question of mandates stated that the League:

> 3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII, and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League:
>
> 4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates until other arrangements have been agreed between the United Nations and the respective mandatory Powers.[16]

As the resolution indicated, the United Nations had already set up its trusteeship system—in part to deal with the territories still held under mandate. Article 77 of the Charter of the United Nations provided that the trusteeship system "shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (a) territories now held under mandate. . . ."[17] Despite the import of these provisions, South Africa took the position that the mandate had lapsed with the dissolution of the League and that all duties pursuant to the mandate had terminated. At the first session of the General Assembly, South Africa submitted a proposal that it should annex South West Africa.[18] The proposal was rejected.[19] South Africa subsequently refused to execute a truesteeship agreement and discontinued sending any reports to the United Nations.[20]

Efforts to resolve the matter through negotiation and debate proved fruitless in the face of South Africa's intransigence. Consequently, in 1949, the General Assembly requested an advisory opinion from the I.C.J. on the various aspects of the legal status of South West Africa.

15. The Assembly of the League by resolution of April 12, 1946, attributed to itself the responsibilities of the Council.

16. League Resolution of April 18, 1946.

17. U.N. CHARTER art. 77, para. 1.

18. 1 U.N. GAOR Annex 13A, at 235, U.N. Doc. A/C.4/41 (1946).

19. G.A. Res. 65, U.N. Doc. A/64/Add.1, at 123 (1946).

20. South Africa was the only mandatory that refused to execute a trusteeship agreement.

This opinion, which was rendered in 1950,[21] articulated the basic legal principles that still control the situation in the opinion of all member states except South Africa and its partisans, who have repeatedly refused to be bound by the decision.

In its 1950 opinion, the Court rejected South Africa's contention that the mandate lapsed with the dissolution of the League of Nations. The Court noted that the mandatory was created "in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization."[22] The Court reasoned that international supervision of the mandatory constituted a necessary security for the effective performance of the mandate. Therefore, the United Nations as an international organ performing similar, if not identical, functions to the League was entitled to exercise such supervision on behalf of the international community.[23] The Court also advised, however, that the Charter did not obligate South Africa to place South West Africa under the trusteeship system.[24] Moreover, it concluded that the competence to determine and modify the international status of South West Africa rested with South Africa, acting with the consent of the United Nations.[25]

South Africa ignored the advisory opinion. The primary concern of the member states, of course, was South Africa's increasingly rigorous application of its policies of *apartheid* in South West Africa. By 1957, the General Assembly's Special Committee on South West Africa was instructed to undertake a study of the legal actions available to that body and to concerned states.[26] The Committee concluded that at least those former members of the League who were then members of

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21. [1950] I.C.J. 128.
22. [1950] I.C.J. 128, 132.
23. [1950] I.C.J. 128, 137.
24. [1950] I.C.J. 128, 140.
25. [1950] I.C.J. 128, 143. In 1955 and 1956 the I.C.J. issued two further advisory opinions supplementing the 1950 opinion. [1955] I.C.J. 67; [1956] I.C.J. 23. The first opinion upheld the voting procedure adopted by the General Assembly on mandate questions. The League had required unanimity, but the Court held that the General Assembly need only require a two-thirds majority. The League's unanimity requirement may or may not have applied to mandate questions. For a discussion of this question see text pp. 231-32 *infra*. South Africa's argument that this constituted a substantive change was rejected. The 1956 opinion confirmed the right of the General Assembly to hear oral presentations from the territorial petitioners.
26. *See generally* Gross, *The South West Africa Case: What Happened?*, 45 FOREIGN AFFAIRS 36, 39-42 (1966).

the United Nations could invoke article 7 of the mandate,[27] thereby permitting them to submit a dispute relating to the mandate to the I.C.J. Any favorable judgment obtained in such a proceeding, unlike an advisory opinion, would be binding on the parties.[28]

C. *Litigation and the U.N. Reaction*

Ethiopia and Liberia commenced proceedings against South Africa before the I.C.J. in November, 1960. Essentially, there were three questions presented: Was the mandate still in force? Did the United Nations have supervisory authority? Was South Africa violating its obligations by imposing *apartheid* upon the non-white inhabitants of the territory?

South Africa challenged, first, the standing of those states to sue and, second, the Court's jurisdiction to adjudicate the issues raised. This latter assertion was based in part on the theory that the mandate was not a treaty under article 37 of the Statute of the I.C.J.[29] In late December, 1962, the Court rejected South Africa's position and found, by a vote of eight to seven, that it had "jurisdiction to adjudicate upon the merits of the dispute."[30] Its decision encompassed a finding that the mandate was an "international agreement having the character of a treaty or convention"[31] in satisfaction of article 37 of the I.C.J. Statute.

On July 18, 1966, after the parties had expended inordinate amounts of time and money developing their arguments on the merits, the Court rejected the claims of Ethiopia and Liberia.[32] It did so, to the surprise of both parties,[33] by concluding that neither Ethiopia nor

27. "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 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 provided for by Article 14 of the Covenant of the League of Nations." Mandate, art. 7.

28. I.C.J. STATUTE art. 59.

29. "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." I.C.J. STATUTE art. 37.

30. [1962] I.C.J. 319, 347.

31. [1962] I.C.J. 319, 347.

32. [1966] I.C.J. 6.

33. South Africa had not argued on these grounds, apparently assuming the matter settled.

Liberia had sufficient legal interest in the subject matter of their claims to entitle them to a judgment. The Court reasoned that although they had standing to "activate" the Court, they could not obtain a decision on the merits.[34] Thus, the Court's opinion was delivered "without pronouncing upon, and wholly without prejudice to, the question of whether the Mandate is still in force."[35] The result, as Judge Jessup of the United States remarked in his dissent, was a "procedure of utter futility."[36] Although South Africa considered it a vindication of its position, the general reaction to the Court's 1966 decision was one of dismay.[37]

D. *Termination of the Mandate*

At the fall, 1966, session of the General Assembly, after much debate and criticism of the I.C.J., resolution 2145 was passed. That resolution terminated South Africa's mandate over Namibia and shifted the direct responsibility for that territory's administration to the U.N. An examination of the progress of the debates preceeding its passage provides a revealing glimpse into the General Assembly's law-making procedures, as well as setting the foundation for a consideration of the legal validity of the resolution itself. The first stages of the debate focused on the question of whether the General Assembly could simply declare a unilateral termination of the mandate by virtue of its own authority. The initial draft of resolution 2145 proposed that the General Assembly, recognizing South Africa's failure to fulfill its obligations, should declare the mandate terminated and should itself assume administration. It provided that the General Assembly:

> 3. *Declares* that South Africa has failed to fulfill its obligations in respect of the administration of the mandated Territory and to ensure the moral

34. [1966] I.C.J. 6, 39.

35. [1966] I.C.J. 6, 19.

36. [1966] I.C.J. 6, 382. *See generally* Blemming, *South West Africa Cases Ethopia v. South Africa; Liberia v. South Africa Second Phase,* 5 CAN. Y.B. INT'L L. 241 (1967); Friedmann, *Jurisprudential Implications of the Southwest Africa Cases,* 6 COLUM. J. TRANSNAT'L L. 1 (1967); Landis, *Southwest Africa Cases: Remand to the U.N.,* 52 CORNELL L.Q. 627 (1967); Murphy, *Southwest Africa Judgment: A Study in Justiciability,* 5 DUQUESNE U.L. REV. 477 (1967).

37. *See generally* Green, *South West Africa and the World Court,* 22 INT'L J. 39 (1966); Gross, *supra* note 24; Manning, *The South West Africa Cases, A Personal Analysis,* 3 INT'L RELATIONS 98 (1966); Verzijl, *The South West Africa Cases (Second Phase),* 3 INT'L RELATIONS 87 (1966).

> and material well-being and security of the indigenous inhabitants of South West Africa;
>
> 4. *Decides* to take over the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa and to assume direct responsibility for the administration of the Mandated Territory . . . . [38]

As the debates progressed, however, the emphasis shifted. The draft resolution was amended to state that the General Assembly:

> 3. *Declares* that South Africa has failed to fulfill its obligations in respect of the administration of the mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, *and has, in fact, disavowed the Mandate;*
>
> 4. *Decides* that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of 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 . . . .[39]

The resolution as passed thus reflected not a unilateral termination, but the recognition that because South Africa had "disavowed" the mandate, the United Nations was justified in considering it terminated. Implicit in this position was the legal argument that the U.N. was not terminating on the basis of some inherent power that it possessed as the institutional representative of the international community. Instead, it was merely declaring its termination in accordance with international treaty law.

This shift in emphasis made resolution 2145 more acceptable to many delegates. To begin with, those in favor cited the I.C.J.'s 1962 opinion, wherein the Court found that the mandate was a treaty or convention within the meaning of article 37 of the I.C.J. Statute.[40] From this, the advocates of this argument reasoned that the U.N., as successor to the League of Nations, was a party to that treaty. As a party to an international treaty confronted with violations and rejections by the other party, the U.N., through the General Assembly, had full authority to terminate the treaty and thereby end South Africa's right as the lawful mandatory.[41]

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38. 21 U.N. GAOR 2 (1966).

39. 21 U.N. GAOR 22 (1966) (emphasis added).

40. [1962] I.C.J. 319, 386. Judge Jessup's concurring opinion in that decision expands and re-enforces that finding by examining the validity of other arrangements which can be taken to constitute treaties or conventions under international law.

41. *See, e.g.,* Statement of the United Kingdom Representative, 21 U.N. GAOR 5 (1966); Statement of the Israeli Representative, 21 U.N. GAOR 10-11 (1966).

In asserting South Africa's breach as grounds for termination, the proponents of the argument relied upon fundamental principles of international law that are set forth in article 57 of the Revised Draft Articles on the Law of Treaties, adopted by the International Law Commission in 1966. Article 57 provides in part that:

> 3. A material breach of a treaty, for the purposes of the present article, consists in:
>
> (a) A repudiation of the treaty not sanctioned by the present articles; or
>
> (b) The violation of a provision essential to the accomplishments of the object or purpose of the treaty.[42]

Some of the delegates emphasized South Africa's failure to submit reports and accept supervision, and its continued imposition of *apartheid.* Others stressed South Africa's outspoken statements rejecting the mandate.[43] Although there were varying characterizations of disavowal and material breach in the Assembly's record, it was clear that the concept of "disavowal" contained in amended resolution 2145 was included within both article 57 definitions of a "material breach."

Having thus shown the existence of a breach, proponents of the revised argument then turned to another section of article 57 that provides:

> I. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part . . . .[44]

Accordingly, the termination of the mandate as declared by the amended resolution also was authorized under the Revised Draft Articles of the Law of Treaties. Persuaded by this argument and its concomitant shift of emphasis, the General Assembly passed the resolution, as amended, in late October, 1966.

E. *Security Council Resolutions*

South Africa refused to recognize the validity of the General Assembly's action despite continued pressure from various members

42. 21 U.N. GAOR Supp. 9, at 28, U.N. Doc. A/6309/Rev.1 (1966).

43. The South African spokesman made his country's position bluntly clear to the General Assembly: ". . . as 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,* together with South Africa's openly declared and consistent practice of continuing to administer the territory as a sacred trust toward the inhabitants." 21 U.N. GAOR 24 (1966) (emphasis added).

44. 21 U.N. GAOR Supp. 9, at 35, U.N. Doc. A/6309/Rev.1 (1966).

and organs of the international community. In response, the Security Council adopted resolution 264, which recognized that "the United Nations General Assembly terminated the Mandate of South Africa over Namibia" and called on South Africa "to immediately withdraw its administration from the territory." South Africa, however, ignored this request. The Security Council, "mindful of its responsibility" under article 25[45] and article 6[46] of the United Nations Charter, declared that South Africa's continued occupation of Namibia constituted "an aggressive encroachment on the authority of the United Nations, a violation of [Namibia's] territorial integrity and a denial of political sovereignty to Namibia's people."[47] Accordingly, it called on South Africa to leave Namibia by October 5, 1969.

South Africa did not leave, and on January 30, 1970, the Security Council passed resolution 276, which figured so prominently in the advisory proceedings discussed herein. After reaffirming General Assembly resolution 2145 and its earlier resolutions recognizing the termination of the mandate, Security Council resolution 276 stated that the Council:

> 2. *Declares* 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;
>
> . . . .
>
> 5. *Calls upon* 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 operative paragraph 2 of this resolution . . . .[48]

South Africa's response was predictable. Therefore, on July 29, 1970, the Security Council passed two further resolutions dealing with the Namibian problem. The first, resolution 283, requested in somewhat stronger terms that all member states take action, including refraining from "any relations—diplomatic, consular or otherwise with South Africa implying recognition of the authority of the South

45. "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.

46. "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." U.N. CHARTER art. 6.

47. Security Council Resolution 269, 24 U.N. SCOR, 1497th meeting 1 (1969).

48. Security Council Resolution 276, 25 U.N. SCOR, 1529th meeting 2 (1970).

African Government over the territory of Namibia."[49] It also called upon member states to take positive action in a number of areas, the collective effect of which would pressure South Africa to withdraw from Namibia. The second, resolution 284, requested the Court to render an advisory opinion on the following question: "what are the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)?"

III. The Advisory Opinion of 1971

The Court's advisory opinion was handed down on June 21, 1971. In three operative clauses, the Court held:

> (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;
>
> (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.[50]

In the course of reaching these conclusions, the Court considered a number of issues. Four have been selected for a limited discussion on the basis of their importance not only to Namibia, but also with respect to the Court's role in the development of international law. The one procedural issue to be discussed dealt with South Africa's request for a judge ad hoc. The Court's decision to deny that request was based on a formal, legalistic analysis. However, in its handling of the three substantive issues—the transfer of supervision to the United Nations; the termination of the mandate; and the effect of resolution 276—the Court's analysis was more concerned with fundamental objectives than with technical niceties. This equitable approach enabled the Court to reach its conclusions despite a powerful legal

49. Security Council Resolution 283, 25 U.N. SCOR, 1550th meeting 1 (1970).

50. [1966] I.C.J. 6, 58.

argument set forth in a dissent by Sir Gerald Fitzmaurice. The Court's non-technical approach may reflect, at least in part, an underlying attempt to re-establish the Court as a viable and sympathetic institution for the development of modern international law, particularly in the eyes of the third world. Whatever the motivation, however, the Court's approach, in contrast to that of the dissents and some concurring opinions, is worth examining as a development in I.C.J. jurisprudence.

A. *The Rejection of South Africa's Request for the Appointment of a Judge Ad Hoc*

The articles of the I.C.J. Statute provide a clearly defined procedure whereby countries such as South Africa, which are not represented on the bench, may have a judge appointed. Article 83 of the Rules of the Court provides:

> If the advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article.

Article 31 of the Statute entitles a party, as a matter of right, to choose a person to sit as a judge when no judge of the party's nationality is included upon the bench. While it is clear that the 1971 advisory opinion was requested upon a legal question,[51] rule 83 applies and the right to select a judge ad hoc exists only if the legal question is "actually pending between two or more States." The Court, however, was reluctant to conclude that the legal question before it was actually pending between two states because that determination could well have had a bearing on South Africa's argument that the matter was a "dispute" within the meaning of article 32 of the Charter, which requires a member of the United Nations that is not on the Security Council to be invited to participate on a non-voting basis in that body's discussions of any dispute to which it is a party. Since South Africa was not invited and did not participate in any Council discussions relating to Namibia, then, even if the question were a "dispute," some doubt might be cast on the validity of the Security Council's action.

While rule 83 deals only with the right to appoint judges ad hoc, article 68 of the Statute gives the Court discretion to be guided in advisory proceedings by the contentious proceeding provisions of the Court's statutes "to the extent to which it recognizes them to be

51. The Court may give advisory opinions only on "legal" issues. I.C.J. STATUTE art. 65, para. 1.

applicable." Rule 82, however, seems to add a caveat similar to that of rule 83. It states that the Court, in applying any contentious proceeding provisions to advisory proceedings, is "above all" to consider "whether the request . . . relates to a legal question actually pending between two or more states." On the basis of this apparent flexibility, several judges argued in the advisory opinion that the Court could have granted South Africa's request not as a matter of right pursuant to rule 83, but as a matter of the Court's discretion under article 68 of the Statute and rule 82. Even assuming that the question does not relate to a "legal question actually pending," they argued that rule 82 would still leave room for the exercise of discretion. The legal pendancy test should be considered "above all"—but it is not determinative.

The Court declined to exercise this discretion, apparently on the grounds that the Rules of the Court did not permit it to do so. It concluded that only under rule 83 could a judge ad hoc be appointed. Since the legal question on which its opinion was requested was not actually pending between the states, rule 83 was, therefore, inapplicable. But, as the dissent pointed out, rule 83 deals only with the situation in which a judge ad hoc, if requested, *must* be appointed. Article 68 of the Court's Statute gives the Court a measure of flexibility in making such an appointment under other circumstances.

Of equal significance for purposes of this discussion, Judge Dillard in his concurrence properly underscored the importance of the selection of a judge ad hoc to the reception of the opinion and to the Court's image of fairness:

> Since the interests of South Africa were so critically involved the appointment of a judge *ad hoc* would have assured the Court that those interests would have been viewed through the perspective of one thoroughly familiar with them. Furthermore should the Opinion of the Court have been unfavorable to the interests of South Africa the presence on the Court of a judge *ad hoc*, even in a dissenting capacity, would have added rather than detracted from the probative value of the Opinion. Whatever may be thought in general about the institution of a judge *ad hoc*, as to which opinions vary, it seemed to me that one of its justifications, namely that it is important not only that justice be done but that it appears to have been done, would have justified the use of the Court's discretionary power without attracting the theoretical and practical difficulties invited by assimilating the proceeding to a larger extent into one comparable to a contentious case.[52]

South Africa's request for a judge ad hoc was the first time such a request had been advanced in an advisory proceeding.[53] Ironically, its

52. [1971] I.C.J. 16, 153.

failure to request an appointment in previous appearances before the Court was relied upon, along with the inapplicability of rule 83, as an additional reason for denying South Africa's request in the present proceeding.

The Court's disposal of this question on such technical grounds contrasts sharply with its handling of the three substantive issues discussed. In those instances, with its fundamental objective of securing the fulfillment of the sacred trust firmly in mind, the Court looked to the equities in construing the documents before it. It seems unfortunate that the Court did not take the same approach on the procedural issues since a more consistent analysis would have enhanced its credibility as a viable forum of equity.

B. *Transfer of Supervision over the Mandate to the United Nations*

While South Africa argued the contrary, even the two dissents to the Court's opinion accepted the position that the mandate survived the dissolution of the League. Judge Fitzmaurice stated explicitly, "The various Mandates comprising the League of Nations mandates system survived the dissolution of that entity in 1946. . . ."[54] This is of particular interest in view of the Court's statement in its 1966 opinion that it was leaving that precise question open.[55]

The issue, however, became a part of the more important question of whether the General Assembly was invested with the power of supervision over the mandatory previously exercised by the Council of the League. Moreover, the passage of supervisory functions was crucial to any consideration of the General Assembly's power to revoke the mandate. The 1950 opinion concluded that supervisory functions had passed to the General Assembly. The opinions of 1955, 1956 and 1962 confirmed this conclusion. It is noteworthy, however, that the later decisions did not treat the 1950 opinion as setting forth the law of the case.[56] In confronting the issue again in 1971, the Court felt obliged to reaffirm its original reasoning.

53. A request for a judge ad hoc in an advisory proceeding had been submitted to the Permanent Court of International Justice and denied. Case of Danzig Legislative Decrees, [1935] P.C.I.J., ser. A/B, No. 65 Annex 1, at 69. The Court in its 1971 advisory opinion seems to have relied somewhat on this case. [1971] I.C.J. 16, 27. Judge Dillard quite rightly pointed out that the advisory procedures were quite different at the time of the *Danzig* decision and thought it distinguishable. [1971] I.C.J. 16, 153 n.1.

54. [1971] I.C.J. 16, 224.

55. [1966] I.C.J. 6, 19.

56. *See, e.g.,* [1971] I.C.J. 16, 190. Judge de Castro stated that "the authority of the 1950 Opinion has been firmly established." *Id.*

As a preliminary matter in the present case, the Court was faced with South Africa's contention that new facts not before the Court in 1950 justified a conclusion opposite from that reached in the earlier opinion. South Africa called the Court's attention to the "Liang" proposal introduced by the Chinese delegation at the final assembly of the League of Nations and to another proposal submitted by the Executive Committee to the United Nations Preparatory Commission.[57] Both proposals provided explicitly for the transfer of supervisory functions over mandates from the League of Nations to the United Nations. Since neither proposal was adopted, South Africa argued that no transfer of supervisory functions was intended. The Court, however, did not accept this argument. It pointed out that the Executive Committee's proposal was rejected because it was felt that its terms might delay negotiations over trusteeship agreements and that the "Liang" proposal was ruled out of order and never considered. Thus, despite Judge Fitzmaurice's challenge to this latter observation as a matter of fact,[58] the Court eventually concluded that the League did intend supervision to be transfered to the General Assembly.

Having rejected South Africa's claim that new facts justified a reversal of the 1950 opinion, the Court proceeded to rearticulate its earlier reasoning. It is in this analysis that the differences in approach between the Court and Judge Fitzmaurice dramatically emerged. The Court, as it did in 1950, built its analysis on a consideration of the nature and purpose of the mandate and the sacred trust that it represented. Within that broad context, it analyzed the effect of the April 18, 1946, League resolution, as well as article 80 and article 10 of the U.N. Charter. The Court did not look initially to the words of the governing instruments, but considered them only in the context of the fundamental objectives of the mandate. As will be noted, a literal reading of the League's final resolution and the Charter articles does not offer a particularly persuasive basis on which to conclude that supervisory functions were intended to pass to the General Assembly. As in 1950, however, that perspective was evidently ignored because the Court stated emphatically:

> It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one regime by another designed to improve international supervision should

57. Judge Fitzmaurice reproduced the texts of these proposals in his dissent. [1971] I.C.J. 16, 245-46, 248.

58. Judge Fitzmaurice asserted that the reason that the proposal was not adopted "does not appear upon the record." [1971] I.C.J. 16, 248.

have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision.[59]

The Court mustered an additional argument under article 80, paragraph 1. That article adds a caveat to chapter XII dealing with the establishment of the trusteeship system. It stipulates that:

> Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system and until such agreements have been concluded, nothing in this Chapter [XII] shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.[60]

The Court stressed the words "rights . . . of . . . any peoples" and agreed with the 1950 opinion, which stated that the obvious intention of article 80 was ". . . to safeguard the rights of States and peoples *under all circumstances* and *in all respects*, until each territory should be placed under the Trusteeship System."[61] Judge Fitzmaurice, on the other hand, stressed the fact that the language of this article was limited to the effects that chapter XII would have on existing rights and the terms of existing agreements. Despite these textually sound arguments to the contrary, the Court gave article 80 the broad reading necessary for the Court to achieve its fundamental purpose of preserving the rights of the Namibian people.

South Africa argued further that even if supervision had passed to the U.N., article 80 could not be read as transferring the duty to report under the mandate itself. The Court rejected this contention by reading article 80 together with article 10, which authorizes the General Assembly to discuss any question or make recommendations on any matter within the scope of the Charter.[62] The Court reasoned

59. [1971] I.C.J. 16, 33. In commenting on the 1950 opinion, Sir Hersh Lauterpacht noted that the Court essentially applied the *cy pres* doctrine to an international situation. In rendering effective a general charitable intention in spite of apparent legal obstacles to its fulfillment, the Court acted as a classic court of equity. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 279 (1958).

60. U.N. CHARTER art. 80, para. 1.

61. [1950] I.C.J. 128, 134 (emphasis added).

62. "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters." U.N. CHARTER art. 10.

that since article 80 preserved the obligations of the mandatory and the United Nations was the appropriate supervisory forum,

> by virtue of Article 10 of the Charter, South Africa agreed to submit its administration of South West Africa to the scrutiny of the General Assembly on the basis of the information furnished by the Mandatory or obtained from other sources. The transfer of the obligation to report, from the League Council to the General Assembly was merely a corollary of the powers granted to the General Assembly.[63]

Although not stressed, article 6 of the mandate provides additional support for this proposition. That article required South Africa to report annually "to the satisfaction of the Council" on measures being taken to carry out its obligations. Since the report had to be approved, it seems clear that the Council was intended to exercise supervision. Thus, if supervision had passed to the U.N., the text of the mandate itself established the responsibility of South Africa to report and the obligation of the General Assembly to scrutinize such reports in light of the fundamental principles underlying the mandate. But the Court did not choose to follow that rationale. Instead, it reaffirmed the line of reasoning first adopted in 1950 and founded on the U.N. Charter. The Court's response was simply a restatement of its position that, without supervision, the mandate's administration would be disguised annexation and that supervision was a corollary to the reporting obligation required by article 10.

Judge Fitzmaurice, however, disagreed with the Court's broad reading of article 10.[64] He argued that not only are mandates without the "scope of the present Charter," but also that the power to discuss and make recommendations simply cannot be read to vest the General Assembly with supervisory functions. Even more fundamentally, he argued that such general language could not oblige the mandatories to accept General Assembly supervision. In this regard, Judge Fitzmaurice reiterated South Africa's argument that the duty to report did not mean the obligation to accept supervision. His argument proceeds from an initial analysis of the League's intentions at the time it dissolved. He stated that even if the resolution of April 18, 1946, is read to mean that the mandate survived the League's dissolution, it still would not support the conclusion that the mandatories had become accountable to the U.N. as mandatories. He argued that the reference in the resolution to chapter XI might at best be taken as an understanding that mandatories would supply technical reports "for information purposes" as provided under article 73 of that chapter.

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63. [1971] I.C.J. 16, 37.
64. [1971] I.C.J. 16, 236-37.

He also urged that a more realistic analysis would conclude that the reporting obligation, if it did survive the League, became dormant because there was no international body to which the reports could be submitted. Indeed, he hypothesized that the mandatories themselves could have set up some vehicle for making information regarding their administration available to the public. Judge Fitzmaurice made a number of other arguments to show that supervisory functions were not transferred to the General Assembly. In one of them, he referred to an early General Assembly resolution[65] dealing with the limited functions that the General Assembly undertook to assume from the League. He also examined the statements of South African authorities immediately after World War II and concluded that while they might be taken as acknowledging the existence of the mandate, they do not constitute consent to U.N. supervision. All of these factors led Judge Fitzmaurice to a conclusion fundamentally at odds with the objectives of the Court's majority. He rejected the Court's position that the reporting obligation is a function of the supervision of the mandatory by the international community—which, in turn, is security for the performance of the sacred trust. The differences in approach proceed ultimately from the degree of importance attached to achieving the execution of that trust.

C. *The Validity of the Termination of the Mandate*

The initial question presented to the Court concerned the legal consequences for states of South Africa's continued presence in Namibia, notwithstanding Security Council resolution 276. That resolution assumed that the mandate had been validly terminated and declared all acts taken by South Africa thereafter to be illegal.[66] If, however, that assumption was itself unwarranted, then the basis for declaring South Africa's actions illegal and invalid after that resolution

65. General Assembly resolution 14 of February 12, 1946, states in part: "3. The General Assembly declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations and adopts the following decisions set forth in A, B and C below.... C. Functions and Powers under Treaties, International Conventions, Agreements and other Instruments Having a Political Character. The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character."

66. See text pp. 221-22 *supra*.

would have been removed. Consequently, the Court had to consider the validity of the termination before it could proceed to analyze the effect of resolution 276.[67] The Court's opinion, however, does not indicate clearly whether it was accepting the findings of the General Assembly in justifying termination[68] or whether it was independently reviewing and then agreeing with them. The result is the same, but the matter is of significance in an examination of I.C.J. jurisprudence.

As the first step in its analysis, the Court had to determine whether the League, as the General Assembly's predecessor, had the power to terminate a mandate. The conclusion that the League's supervisory powers had passed to the United Nations did not reach this fundamental question, for even if the United Nations could supervise, it could not exercise any powers exceeding those of the League.[69] The Court picked up the basic line of reasoning employed by some of the delegates during the General Assembly debates. While the Covenant's silence regarding revocation could be taken as an indication that the power did not exist, the Court argued that such a conclusion would overlook "the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties."[70]

Once again Judge Fitzmaurice locked horns with the majority. He presented a tight argument based upon a close reading of the governing instruments and on an analysis of the mandate system as conceived by its founders. Initially, he pointed out that none of the League instruments mentioned revocation and argued that for such a significant power to exist, it would have to have been specifically conferred. Secondly, with regard to the Court's assertion of a right of termination under treaty law, Judge Fitzmaurice attacked the Court's inconsistency:

> If, on the basis of contractual principles, fundamental breaches justify unilateral revocation, then equally is it the case that contractual principles require that a new party to a contract cannot be imposed on an existing one without the latter's consent (novation). Since in the present case one of the alleged fundamental breaches is precisely the evident non-acceptance of this new party, and of any duty of accountability to it (such an acceptance being *ex hypothesi*, on contractual principles, not obligatory), a total inconsistency is revealed as lying at the root of the whole opinion of the Court in one of its most essential aspects.[71]

67. *See* [1971] I.C.J. 16, 130-31 (Petren, J. concurring).
68. See text p. 220 *supra*.
69. [1950] I.C.J. 128, 138.
70. [1971] I.C.J. 16, 47.
71. [1971] I.C.J. 16, 267.

The application of treaty principles is acceptable in this context, he argued, only if those principles had likewise been applied in considering whether supervision had passed to the United Nations. This is a facile argument, but it is persuasive only in the legalistic context in which it is made.

The Court did not even discuss the dissent's point in its opinion. As in its discussion of U.N. supervision, the Court's primary objectives were to secure the rights of the people of Namibia and to fulfill the purposes of the sacred trust.[72] In concluding that supervision had been transferred, the Court looked essentially at the institutional aspects of the mandate. In considering the question of revocation, however, it took another tack that may not have been consistent in Judge Fitzmaurice's eyes, but that was calculated to achieve the Court's consistent objectives. It looked beyond the institutional aspects of the mandate to its treaty features:

> [E]ven if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application.[73]

Having applied the law of treaties to the general question of whether a right to revoke the mandate existed, the Court still faced the specific consideration of the League's power to revoke under its own Covenant. Article 4, paragraph 5 and article 5, paragraph 1, of the Covenant[74] were read together historically to require unanimous voting for Council decisions on all but certain specified matters, which did not include mandate questions.[75] But had unaniminity been required to revoke the mandate, then the League's power to revoke would have rested upon South Africa's consent. The Court brushed this line of reasoning aside:

> . . . revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To

72. *See, e.g.,* note 59 *supra.*

73. [1971] I.C.J. 16, 46.

74. "Any Member of the League 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 specifically affecting the interests of that Member of the League." LEAGUE OF NATIONS COVENANT art. 4, para. 5.

"Except where otherwise expressly provided in this Covenant . . . decisions at any meeting of the . . . Council shall require the agreement of all the Members of the League represented at the meeting." LEAGUE OF NATIONS COVENANT art. 5, para. 1.

75. This was the unanimity under discussion in a different context in the 1955 opinion. There the question was whether the United Nations could vote with its two-thirds majority rule on mandate matters. It could, the Court opined, as a matter of procedure.

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.[76]

While the Court was able to conclude with relative ease that the League had the power to revoke the mandate, the next question of whether the exercise of that power by the United Nations was warranted under the circumstances caused it some difficulty. The problem came not so much in answering the question, but rather in determining which organ of the United Nations was competent to provide an answer. The Court thus faced the recurring question of whether it could review the determinations made by the General Assembly. At best, its answer was confused.[77] The Court directed the discussion not in terms of its right to review, but as a response to the objection that the General Assembly had made pronouncements that it had no competence to make because it was not a judicial organ. The Court's defensive response virtually disregards the question implicit in this objection regarding the role of the Court in reviewing the General Assembly's findings:

To deny to a *political organ of the United Nations* which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

The Court is unable to appreciate the view that the General Assembly acted unilaterially as party and judge in its own cause. In the 1966 Judgement in the South West Africa cases, referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League in the pursuit of its

76. [1971] I.C.J. 16, 49.

77. As a preliminary matter, the opinion examined the wording of the resolution and the principles of international law regulating the termination of a treaty on account of breach. It referred specifically to the provisions of the Convention on the Law of Treaties. Its discussion concludes by stating that resolution 2145 "is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship." [1971] I.C.J. 16, 40. Then, having decided that the international law of treaties was applicable to its analysis, the Court regresses into an equivocal discussion concerning which organ of the United Nations is competent to determine that such severe violations have occurred.

> collective, institutional activity, to require the due performance of the Mandate in discharge of the "sacred trust," was specifically recognized. Having regard to this finding, the *United Nations* as a successor to the League *acting through its competent organs*, must be seen above all as the supervisory institution, competent to pronounce in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly.[78]

In the first part of this pronouncement, the Court asserts the right of the political organ of the United Nations to act in the face of a breach. In the last sentence, however, it equivocally refers to those organs as "competent to pronounce."

The Court is, of course, an organ of the United Nations[79] and an appropriate final arbiter of whether there had been a material breach justifying termination under principles of international law. But confusion as to whether it acted in that capacity is compounded in the next paragraph of the opinion. The Court turned to South Africa's argument that paragraph three of General Assembly's resolution 2145—the declaration of South Africa's failure to fulfill its mandate obligations—called for the development of further facts before the General Assembly could adopt the resolution or the Court could pass on its validity. The Court answered:

> The failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the *Court adheres to its own jurisprudence.*[80]

The failure to submit reports is one of the principle grounds for a claim of material breach. The Court, therefore, seems to be making an independent finding on a fundamental question. Since this was done in the context of denying South Africa the opportunity to present more facts, however, the matter is far from clear.

The Court's handling of the question of *apartheid* is even more puzzling. In the contentious proceedings, the Applicants claimed that the imposition of *apartheid* was a per se violation of the mandate[81] and that there was no reason to look at the intent or effect of the laws reflecting that policy. In this proceeding, South Africa again maintained that further inquiry was necessary before the Court could properly determine whether that policy constituted a material

78. [1971] I.C.J. 16, 49-50 (emphasis added).
79. U.N. CHARTER art. 92, para. 1.
80. [1971] I.C.J. 16, 50 (emphasis added).
81. *See* Mandate, art. 2.

violation of the mandate. The Court's opinion does not mention the subject of *apartheid*, except in dealing with this specific South African request. Its discussion on the point follows the Court's ruling on the legal consequences to states of South Africa's continued Namibian presence in spite of resolution 276, which is the heart of the question presented. Nonetheless, despite their different locations in the opinion, the Court's comment concerning *apartheid* should be considered along with the comment on South Africa's failure to render reports because both were advanced only in response to a request for the chance to submit further factual information. The Court, in concluding that no further evidence was needed to determine "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,"[82] stated that:

> ... 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.[83]

It is debatable whether the Court, in this portion of its opinion, was simply rejecting South Africa's bid to submit further evidence or whether it was articulating an independent, fundamental basis for its opinion. Judge Dillard felt sufficiently troubled by this language to comment that the Court did not purport to validate the termination of the mandate on the basis of South Africa's imposition of *apartheid*. He stated that it "would not have been compatible with its judicial function to have determined the issue of breach of these grounds in the absence of a full disclosure of all relevant facts."[84] He felt that the opinion justified revocation on the basis of South Africa's failure to accept supervision and submit reports.[85] Although this analysis may have been satisfactory to Judge Dillard, it should be reiterated that the Court's comment on South Africa's failure to submit to supervision was also made solely as a response to a request for the chance to submit further factual information. Therefore, even if Judge Dillard's analysis is accepted, the Court's language, coupled with its

82. [1971] I.C.J. 16, 57.
83. [1971] I.C.J. 16, 57.
84. [1971] I.C.J. 16, 138.
85. [1971] I.C.J. 16, 138. The language to which he referred is quoted, nearly in full, at text accompanying note 80 *supra*.

earlier equivocal remarks, still leaves in doubt the validity of the analytical process through which it reached its decision.

The Court acted much more definitively in handling the final challenge to the General Assembly's authority to terminate the mandate. The French, in their written statement,[86] and the South Africans, in both their presentations, argued that the General Assembly acted ultra vires in adopting resolution 2145. The Court stated:

> [The I.C.J.] undoubtedly 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.[87]

In its next sentence, however, the Court stated that since they had been advanced, it would "in the course of its reasoning . . . consider these objections before determining any legal consequences arising from those resolutions."[88]

Judge Fitzmaurice articulated the objections with great clarity. He reviewed the powers of the General Assembly under the Charter and concluded that the "Assembly is either limited to making recommendations or, where it can do more, it is as a result of specific power conferred by the express terms of some provision of the Charter."[89] Since the Assembly does not have the specific authority to take the executive action reflected in the resolution, he argued that resolution 2145 was outside the General Assembly's competence.

The Court, however, continued to be reluctant to be drawn into a discussion of the General Assembly's competence. It made only one passing comment implying the existence of an inherent Assembly power to act in specific cases within its Charter-granted authority.[90] It is not clear why the Court took this cautious approach, particularly when it could easily have concluded on the basis of its earlier reasoning that the General Assembly had power to act in the exercise of its unique supervisory authority. Whatever the reasons for this approach, the basic conclusions were unchanged. The Court was able to decide in the face of a number of compelling legal arguments that the mandate had been validly terminated.

86. Member states are invited to submit written statements to the Court within a specified time after a request for an advisory opinion is received.

87. [1971] I.C.J. 16, 45.

88. [1971] I.C.J. 16, 45.

89. [1971] I.C.J. 16, 280 n.62.

90. [1971] I.C.J. 16, 50.

D. *Security Council Resolution 276*

As the prelude to its discussion of the legal consequences to states of South Africa's continued presence in Namibia, the Court concluded that resolution 276 was binding on states who were members of the United Nations. To reach this conclusion, the Court indulged in a very broad reading of the Charter which not only concerned Judge Fitzmaurice, but also forced Judge Dillard to comment that the conclusion reached was applicable only to the unique Namibian situation.

In reaching its decision, the Court reviewed the various Security Council resolutions in order to determine the context in which they were passed. Relying on the text of the resolutions, as well as on the background surrounding their adoption, the Court concluded that when the Council adopted the resolutions, it "was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security which, under the Charter, embraces situations which might lead to a breach of the peace."[91]

Having established this point, the Court directed its discussion to article 24 of the Charter through which United Nations members confer on the Security Council the primary responsibility for "the maintenance of international peace and security." That article reflects a consensus that in "carrying out its duties under this responsibility," the Security Council acts on the member's behalf. Paragraph (2) of article 24 further provides that:

> In discharging *these duties* the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of *these duties* are laid down in Chapters VI, VII, VIII and XII.[92]

The Court concluded that while this paragraph authorized the exercise of certain specific powers, it did not preclude the existence of other general powers that the Council might exercise in undertaking its peacekeeping responsibilities. Of equal significance, the Court held that if the Security Council decided to exercise that power, its decisions would be binding on member states by virtue of article 25.[93]

Again, Judge Fitzmaurice's dissent meets the issue head on. In the first instance, he did not accept the broad reading that the Court gave to article 24. That article, he argued, limits the type of action that the

91. [1971] I.C.J. 16, 51-52.

92. U.N. CHARTER art. 24, para. 2 (emphasis added). The words "these duties" appear to relate to the duties specified in article 24, paragraph 1.

93. [1971] I.C.J. 16, 53.

Council can take in the discharge of its peacekeeping responsibilities. To the extent that the power to bind members is given to the Council in its peacekeeping functions, it is conferred not by the interaction of articles 24 and 25, but rather by the particular chapters invoked. His discussion of article 25 articulated this position and illustrated his judicial technique:

> If, under the relevant chapter or article of the Charter, the decision is *not* binding, Article 25 cannot make it so. If the effect of that Article were automatically to make *all* decisions of the Security Council binding, then the words 'in accordance with the present Charter, would be quite superfluous. They would add nothing to the preceding and only other phrase in the Article, namely 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council, which they are clearly intended to qualify. They effectively do so only if the decisions referred to are those which *are* duly binding 'in accordance with the present Charter.' Otherwise the language used in such parts of the Charter as Chapter VI for instance, indicative of recommendatory functions only, would be in direct contradiction with Article 25—or Article 25 with them.[94]

The potential significance of the Court's position is emphasized in a further comment. Judge Fitzmaurice urged that limitations on Security Council powers are necessary because of the "all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one."[95]

In his discussion of this point, Judge Dillard emphasized the uniqueness of the Namibian situation. By invoking articles 24 and 25 of the Charter, he maintained that the Court was not implying that the United Nations had broad powers of a quasi-legislative nature.[96] Despite Judge Dillard's caveat, the Court's language, as previously noted, is not qualified and did not rest upon the singular nature of the Namibian situation. In fact, the Court's analysis of articles 24 and 25 was in the context of establishing whether a general power to bind existed. The Court spoke in general terms of the applicable principles:

> The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the questions whether they have been in fact 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

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94. [1971] I.C.J. 16, 293.
95. [1971] I.C.J. 16, 294.
96. [1971] I.C.J. 16, 138.

assist in determining the legal consequences of the resolution of the Security Council.[97]

The Court then proceeded to apply these "tests"[98] to resolution 276 in order to determine whether the Security Council intended to exercise its power in that instance. It concluded that the decisions set forth in paragraphs two and five of that resolution[99] were adopted in conformity with the principles of the Charter and articles 24 and 25, and that they were consequently "binding on all States members of the United Nations, which are thus under obligation to accept and carry them out."[100]

This conclusion enabled the Court to define the legal consequences to states in much broader terms than would otherwise have been possible. Had the Court found that resolution 276 was merely recommendatory, the legal consequences to states would have proceeded solely from the termination of the mandate and its reaffirmation by the Security Council. While states technically would have been obliged not to recognize South Africa's administration of Namibia, such a policy of non-recognition has limited boundaries. As Judge Petren observed, under today's international law "non-recognition has obligatory negative effects in only a very limited sector of governmental acts of a somewhat symbolic nature."[101] By concluding that Security Council resolution 276 was binding, the Court not only required member states not to recognize South Africa's administration, but also imposed an affirmative obligation to apply pressure in order to force South Africa out of Namibia.[102] As an example of the zeal with which the Court pursued its goal, its treatment of this issue is one of the most positive in the advisory opinion. As an exercise in judicial ground-breaking, it may have great significance for the future operations of the Security Council. More important, however, the reaction of member states to its reasoning on this issue will be

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97. [1971] I.C.J. 16, 53.
98. [1971] I.C.J. 16, 53.
99. See text p. 222 *supra*.
100. [1971] I.C.J. 16, 53.
101. [1971] I.C.J. 16, 122.
102. *See* [1971] I.C.J. 16, 136-37 (Petren, J. concurring); [1971] I.C.J. 16, 165-67 (Dillard, J. concurring). It is interesting that the Court drew the line in refusing to comment on Security Council resolution 283. That resolution spelled out in detail positive steps which member states were to take in applying pressure on South Africa. While an argument could be made that a consideration of that resolution was as relevant to the question as a consideration of the basic General Assembly resolution, the Court's reluctance to address that question is understandable.

interesting not only because of the effect that acceptance of this reasoning could have on the Namibian situation, but also because of the effect that its rejection might have on the Court's future.

IV. CONCLUSION

The questions raised by the Court's opinion concerning resolution 276 are reflected in the opinion as a whole. While showing a reluctance to review certain determinations by the General Assembly, the Court showed a great liberality in developing its general construction of the Charter and the Covenant. It similarly gave a broad interpretation to the Security Council's resolutions, providing them with far-reaching effects. Thus, the Court's rearticulation in 1971 of the consistently broad approach previously utilized since 1950 may emphasize the futility of resorting to that institution if South Africa continues to ignore its conclusions. The language employed and the conclusions reached are, by themselves, of little comfort.

Of course, much depends on the acceptance by member states of the Court's conclusion that Security Council resolution 276 is binding. If a number of states agree not only to refuse recognition of South Africa's Namibian administration, but also take positive action to end it, then any forthcoming concessions from South Africa will tend to enhance the position of the Court. On the other hand, rejection of the Court's conclusions regarding resolution 276 will result in continued South African presence in Namibia as a conspicuous example of the Court's ineffectiveness. Even apart from its consequences, the rejection by member states, in itself, will be damaging to the Court's prestige. As a final response to such a possibility, on October 20, 1971, the Security Council adopted resolution 301, which reiterated the Council's opposition to South Africa's presence in Namibia and expressed agreement with the Court's 1971 advisory opinion.[103] Significantly, no member of the Security Council voted against resolution 301. Although France and the United Kingdom abstained, thirteen members voted in the affirmative. This favorable vote, when considered together with the language of the resolution, seems to indicate that the Council was clearly relying on the advisory opinion in seeking to resolve the Namibian situation. In so doing, the Council

103. Security Council Resolution 301, paras. 4 & 6, U.N. Doc. S/RES/301 (1971).

declared that any further refusal of South Africa to withdraw "could create conditions detrimental to the *maintenance of peace and security in the region. . . .*"[104] Having established an apparent legal foundation that would render subsequent provisions binding on member states pursuant to the advisory opinion of 1971,[105] the resolution sets forth its charges to those states in reference to Namibia:

(a) it reaffirms the provisions of resolution 283;[106]

(b) it "calls upon" all states, subject to the provisions of paragraphs 122[107] and 125[108] of the advisory opinion, to undertake a number of specific actions, including abstention from treaty and economic relations with South Africa that would recognize or entrench South Africa's authority over Namibia;[109]

(c) it declares that franchises, rights, titles or contracts relating to Namibia granted by South Africa *after* General Assembly resolution 2145 "are not subject to protection or espousal by their states against claims of a future lawful Government of Namibia."[110]

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104. *Id.* para. 9 (emphasis added).

105. See pp. 237-40 *supra.*

106. Security Council Resolution 301, para. 10, U.N. Doc. S/RES/301 (1971). For a discussion of resolution 283, see p. 222 *supra.*

107. "122. For the reasons given above, and subject to the observations contained in paragraph 125 below, member states are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia which involve active inter-governmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect." [1971] I.C.J. 16, 55.

108. "125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory." [1971] I.C.J. 16, 56.

109. Security Council Resolution 301, para. 11, U.N. Doc. S/RES/301 (1971).

110. Security Council Resolution 301, para. 12, U.N. Doc. S/RES/301 (1971).

The I.C.J.'s 1971 opinion seems to have precipitated more forceful action by the Security Council based on the legal validity of the Council's power to act. Consequently, Namibia's future would appear, in the short run at least, to be tied more closely than ever to the future of the Court.

Even if the member states accept the opinion and take action consistent with the Security Council's resolution, however, the outlook for the Court may still be cloudy. While progress in resolving the Namibian situation based on acceptance of the 1971 advisory opinion will enhance the Court's stature to some extent, the more fundamental problems afflicting the Court remain. For example, there can be no assurance that member states will utilize the Court as a forum for settling disputes, despite the passage of General Assembly resolution 2723. That resolution represented little more than a recognition that the judicial organ of the United Nations is withering on the vine. In the long run, the Court's future will depend on its ability first, to revise its procedures to encourage the swift, flexible and fair handling of difficult questions on the marits; and second, to convince the international community that disputes not only can, but should, be settled by the Court.