POLITICAL JUSTICE AT THE HAGUE

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In an article in *The Times* (29th June, 1971) on the Advisory Opinion just then given by the International Court of Justice, Dr. Rosalyn Higgins, of Chatham House, recalled warningly that British governments had always theretofore treated such Opinions as authoritative statements of the law. This time, nevertheless, Her Majesty's Government rejected the Court's Opinion, statedly "on the basis of the law as we understand it in this country".[1] The question suggests itself—Was this rejection really necessary?

In October 1966 the General Assembly of the United Nations had purported to terminate the Mandate granted to South Africa in 1920 for the administration of South West Africa.[2] Early in 1970 the Security Council had declared South Africa's presence there, in consequence, no longer lawful, calling on all member States of the United Nations to treat it as such.[3] And, South Africa not responding, in July 1970 the Council had sought the Court's advice on "the legal consequences for States" of the resulting situation.[4] The Court replied to the effect that South Africa's presence there was in its view indeed unlawful and that member States, and others also, were under an obligation to act and withhold action, accordingly.[5] Two judges[6] dissented in respect of the first, and four[7] in respect of the second, of these findings.

Of the issues on which the judges will have needed individually to take a view, some could be differentiated as essential to the Court's line of reasoning on the central question, some as relatively secondary in this regard, and some as touching procedural matters bearing chiefly on the composition of the Court.

The preliminary issues were mostly of South Africa's raising. Whether the Court would have had much to lose by a more accommodating treatment of these may be doubted. But the judges, it might seem, were in no mood for taking chances: and if in their wisdom they estimated that discretion was the better part of magnanimity, that of course was up to them. What need had they, anyway, for further information about South Africa's policies? What need for light on the wishes of the inhabitants? Given the wording of the question addressed to them, the answer to both these suggestions was, None. And, South Africa seeking further time for preparing a statement, she was not permitted all that she was asking for.

Though not always together on the preliminary issues, there was one on which the judges were, it seems, predictably unanimous. Given the improper pressures to which it was patently being subjected, ought not the Court to be disinteresting itself in the whole affair? The reply was vacuously conventional: "It would not be proper for the Court to entertain these observations . . ." The Court acted "only on the basis of the law, independently of all outside influence or interventions whatsoever . . ." No comment?

But what of the Security Council's resolutions? Had these been

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effectively adopted? Ought they not to have had, as they had not, the concurring votes of all the permanent members? Ought not those States there with an interest in the dispute to have abstained, as they had not, from voting? Ought not South Africa, as also an interested State, to have been invited, as she had not, to be there? Concurring votes? Was South Africa not aware that in the practice of the Security Council abstention and concurrence had long since become assimilated? And, if she had wished to have re-scheduled as a "dispute" what had figured, on the Council's agenda, as a "situation", she ought to have said so sooner. She had missed, on that point, the procedural bus.

Of particular significance was the Court's negative response to South Africa's application for leave to nominate, *ad hoc* for these proceedings, a South African judge. Five only, out of the 15 judges, were for granting the request. "By depriving South Africa of this procedural safeguard, the Court, in my view", wrote Judge Petren, the Swede, "has failed to observe its Rules of Court". And Judge Gros: "The Court finds in its Opinion that the question is not a dispute between States, nor even one between the Organisation and a State. That is a purely formal view of the facts of the case which does not to my mind correspond to realities".

And finally, those three judges, the Court's President himself and two others, who had participated at the United Nations in debates about the question now before the Court. "The old saying that not only must justice be done but that it must be seen to be done would to my mind", wrote Judge Petren, "have required a stricter application of Article 17 paragraph 2 of the Statute prohibiting members of the Court from participating in the decision of any case in which they have previously taken part in any capacity whatsoever."

It may be said, no doubt, that the retention of the three challenged judges and the denial to South Africa of leave to choose a judge *ad hoc*—apart from impairing such respect as the Court might still enjoy, and creating unhappy precedents for the future—can have made little difference to the 1971 outcome. The only obviously important consequence of the Court's rejection of South Africa's submissions regarding its composition is to be seen in the absence from the record of what might have been the rather instructive dissenting opinion of a South Africa judge. As between a 13-2 result reached in so apparently high-handed a manner and a hypothetical 10-3 result achieved with a more evident desire to do impartial justice, which should South Africa's ill-wishers have preferred? Not necessarily the former, which is what they now have got.

Coming now to the main line of reasoning, it may be convenient to begin by trying to fix that shortlist of crucially pertinent questions which the Court could not have answered differently without disappointment for the parents of the original proposal for seeking its advice. Their purpose was, manifestly, to secure from the world's most elevated judicial body a ruling that United Nations members had as such a duty to deny to South Africa what she could normally be expecting of them assuming her presence in South West Africa were understood as warranted by international law. And if, in this their desire, they were to suffer no rebuff, it behoved the Court to find: (*a*) that South Africa's presence there had indeed ceased to be lawful: for which purpose it would have needed to find either (*b*) that the Security Council's 'declaration' to that effect had of itself served to render that presence unlawful, or (*c*) that the 'declaration' was simply declaratory of the effect of the General Assem-

bly's action on 27th October, 1966; for which purpose it would be necessary to have found (*d*) that, apart from the Mandate, South Africa had had no right to be administering the Territory, and (*e*) that the General Assembly's resolution 2145 had sufficed to end the Mandate; for which purpose it must have found (*f*) that the General Assembly had indeed the necessary competence, in the relevant circumstances, to end the Mandate, and (*g*) that those circumstances had indeed in this instance arisen. To establish (*f*) it was necessary to have found (*h*) that the League Council could in like circumstances have ended the Mandate, and (*i*) that the powers respecting mandates previously residing in the League Council had come to be vested in the General Assembly. Regarding (*g*) it would be necessary to find South Africa to have been "in material breach" of the Mandate, whether by virtue of her policies or otherwise. While opting out of formal reliance on (*b*), the Court caused misgivings in several of its members by eschewing its sufficiently outright rejection.

Meanwhile, for background, a word on how the "situation" had come about.

When, in 1919, General Smuts got back from Versailles, he was able to announce, in substance: 'We are *not* being permitted to annex South West Africa, but we *are* being allowed to retain it—being authorised to do so, not indeed *as* being but *as if* being, a part of our own domestic territory. It is in short annexation in all but name.' As we have it from David Hunter Miller, it was Smuts himself who in Paris had proposed that the word "if" should be added after "as" in the proposed wording of Article 22. Since South West Africa was not to be a part of South Africa's own territory, it might have been better to have this specified with less ambiguity in the text. But the Japanese, in the person of Baron Makino, raising a formal objection to any alteration, at that stage, in the wording of the proposed article, the point could not be pressed: and "as", and not "as if", is what the Covenant was made to say.[7a] (Yet is there not a manifest difference between the living together of couples "as", and "as if", man and wife?)

When, in 1945, General (now Field-Marshal) Smuts got home from San Francisco, he was able, in substance, to announce: "Even though declining to place South West Africa under the proposed trusteeship system, we *are* being accepted as a founder member of the United Nations. True, there will soon be no longer any League Council for us to be reporting to, but we shall continue to comply with the requirements of the Mandate so far as that still can be done. And we shall not think to annex the Territory unless (*a*) the inhabitants, being consulted, are found to favour the change, and (*b*) the United Nations, being consulted, gives its blessing to the idea".

In the event, the former of these conditions being realised, but not the latter, Smuts dropped the idea. South Africa would simply continue to administer the Territory in the spirit of the Mandate. And, one may venture to add, with her 19 years of experience of doing this in fruitful consultation with the League's Permanent Mandates Commission, she had little to learn from the radical politicians in New York as to what compliance with the spirit of the Mandate should be taken to involve. If, for instance, with the concurrence of the PMC, the various communities in the Territory had been provided for each according to its apparent needs, and not as though all interchangeably the fellow-dwellers in a single arbitrarily delimited land, South Africa would have no qualms about

continuing so to see and treat them—as respectively Ovambo, that is, and Bushmen, and Bastards, and Germans, and Hereros, and the rest. If ' separate development ' was not then yet a term of art, it was, as in this part of Africa it appeared from time immemorial to have been, a fact of life.

In the meantime, and given the Charter's requirement[8] that information of certain limited categories, concerning ' non-selfgoverning territories ', such as Gibraltar, should be furnished on a routine footing to the United Nations, General Smuts's government, acting in obvious good faith and counting upon the United Nations equally to do so, proceeded in respect of South West Africa to transmit to New York that relevant kind of report. But alas for her too trusting disposition : no longer was she dealing with the League. A new institution, imbued with a new sort of ethos, misdelivered her plainly-addressed communication into the ' In-tray ' of, if you please, the Trusteeship Committee, with the implication that it was not for South Africa to ordain what should be done with such a document. And so she learnt a lesson that she was unlikely to forget.

It was then that at home, by the narrowest of margins, General Smuts was to lose power for the final time. New men, reacting to their country's recent disenchanting experience, resolved that no further such reports should be sent. And they adopted officially the view that, the Mandate having been, as they judged, a kind of contract, one party to which, the League Council, having died, the bond had *eo ipso* been dissolved. The Mandate, as they chose to see it, was no more. And so they have insisted ever since, even when having perforce to argue issues, as in the 1960-66 Hague proceedings, upon the opposite assumption.

Much of the interest, in the records of these proceedings, is to be found in the separate opinions contributed by individual judges, whether dissenting or not. Without questioning in any of these his sense of judicial responsibility, it is permissible to note in what various ways they revealed it. Whereas the Court as a whole could not shrink from exhibiting, in all their frequent poverty, the arguments upon which it had had to rely, resorting only occasionally to bare assertion, some of its individual members were less generous to potential critics of their view. Judge Dillard, for instance : was he, in its so vulnerable logic, everywhere at one with the Court ? His "own reading", he merely stated, had led him, on several specified points, to share the Court's conclusions. Suppose the other judges had all been as unexpansive as that ! Judge Ammoun, by contrast, used the occasion for proclaiming what reads like the full substance of his personal political *credo*, including some systematically untraditional notions on the functions in international politics of international law. It was no wonder that Sir Gerald Fitzmaurice, stout champion and worthy exponent of the autonomy, the rigour and the integrity of law as a distinctive way of thinking, felt his opinion and that of the Court to be "operating on different wavelengths".

In its barest essentials the Court's position in this Advisory Opinion appears reducible to the following propositions : (1) The Mandate was basically a kind of contract between South Africa and the League Council ; (2) Material breach by one of two contracting parties entitles the other to terminate their contract ; (3) South Africa's failure to render reports to the General Assembly constituted in the relevant sense a material breach of the Mandate, entitling the General Assembly to end the Mandate ; (4) This the General Assembly did on 27th October, 1966 ; (5) Apart from

the Mandate South Africa had no right to be administering the Territory ; (6) South Africa's presence in the Territory is therefore now unlawful ; (7) Article 24 of the Charter empowers the Security Council, when acting for the maintenance of peace, to make decisions binding on all the members of the Organisation ; (8) In adopting resolution 276 the Security Council is to be seen as having acted for the maintenance of peace ; (9) The Security Council in this resolution declared South Africa's presence in the Territory unlawful ; (10) This declaration constituted a ' decision ' binding upon all member States ; (11) The Council also decided that all member States should treat South Africa's presence there as unlawful ; (12) All member States are accordingly bound to do so ; (13) So also are non-member States.

There arise, amongst others, the following questions : (*a*) Was the Mandate indeed a kind of contract ? (*b*) Does material breach by one party to a contract necessarily empower the other party to end it ? (*c*) Was South Africa's failure to report to the General Assembly indeed a breach, specifically, of the Mandate ? (*d*) Was the General Assembly a contracting party to the Mandate ; (*e*) Did the General Assembly in 1966 see itself as being such a contracting party and as availing itself of the power of such a contracting party to end the Mandate ? (*f*) Why is it suggested that, but for the Mandate, South Africa would have had no right to be administering South West Africa ? (*g*) What evidence is there that the Security Council, in adopting resolution 276, conceived itself as acting for the maintenance of peace ? (*h*) Does a declaration by the Security Council that something is unlawful constitute for the purposes of Article 24 a ' decision ' binding upon all member States ? (*i*) What authority is there for the Court's interpretation of Article 24 ?

Let it be supposed that an affirmative answer is given to questions (*a*), (*b*), (*e*) and (*h*), and that answers are found to questions (*f*), (*g*) and (*i*), it still remains to see what solutions the Court put forward to questions (*c*) and (*d*).

Regarding (*c*) the truth seems to be that, could South Africa's alleged reporting duty be shown as having arisen, specifically, from the Mandate, so that her reporting failure would be a breach, specifically, of the Mandate, there would then have been little point in the Court's ingenious attempt to show the reporting duty as having been created by Articles 10 and 80 of the Charter, with the logical implication that the reporting failure could be a breach, not, presumably, after all, of the Mandate, but, if anything, of the Charter only.

The answer to (*c*) is thus not clearly shown to be yes.

Regarding (*d*), so far from the General Assembly's having been shown by the Court as having been a party to the inauguration of the Mandate, the General Assembly is not shown as having even been a party to the establishment of the Charter. Indeed the Court fails so much as even to notice the theoretical problem of how the General Assembly could possibly have been a party to the establishment either of the one instrument or the other. How then, on the basis of (*b*) could the General Assembly have been in a position to terminate either the one arrangement or the other ?

Regarding (*f*), so far from examining seriously South Africa's grounds for claiming entitlement, even in the absence of the Mandate, to remain in administration of the Territory, the Court contents itself with recalling its own past "decisions" (sic) in the sense of proposition (5) above. The question of how its past opinions could by being thus re-christened as

"decisions" become endowed with the force of law was not even so much as touched upon by the Court—which merely invoked those its own "decisions" as if having the force of law.

Regarding (*h*), it is worth remarking that even the Court itself has never claimed, and certainly has never been credited with, competence to make decisions on disputed points of fact or law with effects binding upon all member States of the United Nations. Yet it is just such a competence that the Court itself has here imputed to the Security Council, provided it is seen as being employed for the maintenance of peace.

Regarding (*i*)—given that it occurs only in an advisory opinion—it will be interesting to see by how many of the Organisation's member States this interpretation of Article 24 will come to be espoused. It involves far-reaching possibilities into which it is perhaps unnecessary to enter here.

Many other points could be mentioned, including the doubts recorded by individual judges, such as those of the French Judge Gros regarding in particular questions (*a*), (*b*), (*e*), (*g*), (*h*) and (*i*).

The main point to be made is that either the judges were so intellectually ill-equipped as not to have been conscious of the quality of some of the arguments to which they were subscribing; or else that they appreciated fairly exactly just what, in their capacity as judges, they were collectively at. One would naturally prefer to adopt the less uncharitable of these alternative explanations, whichever that may be.

At no point in these proceedings was the professional austerity of the Court displayed to less advantage, or its unprofessional temerity to greater, than in its effort, indispensable to the anti-South African case, to show the role, in respect of mandates, of the League Council as having been transferred to the General Assembly, and the reporting duty of the Mandatory, formerly owed to the Council, as having been transformed into something owed, in the person of the General Assembly, to the United Nations. It was not, as Judge Fitzmaurice insisted, "too much to say that, in colloquial terms, the founders of the United Nations bent over backwards to avoid the supposed taint of any League connexion". And yet the Court must now contrive to discover, in the admitted absence of anything explicit, something implicit in the Charter about succession, in this single matter of mandates, by the General Assembly, to the responsibilities and authority of the League. It is 'not too much to say' that for this purpose the Court staked its title to the veneration of posterity on a reading of Articles 10 and 80 of the Charter which made nonsense of the ordinary understanding of language.

As recorded in Goodrich and Hambro,[9] the relevant Committee at San Francisco had endorsed by 32 votes to 5 an American statement to the effect that Article 80 would leave everything exactly as it stood—adding nothing and taking nothing away. "Any change", this had said, "is left as a matter for subsequent agreements". Yet now, so far from leaving unaltered the rights of states and peoples affected by the mandates system, this article is construed by the Court as doing just the opposite thing: namely, altering those rights, by imposing upon South Africa a new reporting duty her neglect of which must be accepted as having justified the purported cancellation of her mandate. It is rather as if the words 'Stand still and await further orders' had been understood as saying 'Take to the boats'. Article 80 made in fact no pretence of providing for what was to happen upon the League's demise should some

particular territory under mandate not be brought within the trusteeship system of the United Nations.

And as for Article 10, "The whole argument" founded thereon was declared by Judge Fitzmaurice to be "essentially circular and question-begging". The words "The General Assembly may discuss . . . and make recommendations . . ." were now being read as if saying " . . . shall be competent to supervise and make decisions . . ." In neither the one article nor the other is anything expressly added either to the duties of mandatory powers or to the task of the United Nations organisation. Or so, to simple common sense, it might seem.

Had General Smuts, himself a principal architect of the Charter, for one moment supposed that he would be expected to render mandate-type reports to the United Nations, is it conceivable that he would have courted a rebuff by sending along instead the significantly different kind of report that Britain, for example, would be providing for Gibraltar, and specifying, as he did so, that it was precisely this Gibraltar-type report that he was assuming to provide? And had the officials of the United Nations for one moment supposed that it was a mandate-type report that, by the terms of the Charter, South Africa was committed to supplying, is it believable that his document would not have been politely returned to him with a request that he do his mandate-type reporting in the appropriate way?

In the winding-up proceedings of the League in 1946 the Chinese delegate drew attention to the absence as yet of any arrangement for the continued supervision, after the League's demise, of the administration of any mandates not converted into trusteeships; and he made a proposal, subsequently withdrawn, for the filling of this hiatus. Had it at that time been by anyone understood that the need had in fact been already provided for, by Articles 10 and 80 of the Charter, one might surely expect news of someone's having said so at the time. But no-one seems to have thought of that one up to then. And why, in such circumstances, was the Chinese suggestion not proceeded with? Judge Fitzmaurice explains: "Despite various warnings, there was an expectation—or hope—that, in the end, trusteeship for all mandates would come about: but the risk that it might not do so had to be accepted. In short, so far as South West Africa was concerned the United Nations backed the wrong horse—but backing the wrong horse has never hitherto been regarded as a reason for running the race over again".

But suppose now, notwithstanding everything, that the General Assembly had indeed succeeded, in mandates matters, to the powers of the League Council. Did it follow that the General Assembly could therefore validly revoke the Mandate? Had the Council itself ever done such a thing? Had it ever claimed the power to do such a thing? Had the General Assembly, prior to 1966, ever claimed such a power? "It will," wrote Judge Gros, "be sufficient to observe that between 1950 and 1960, the date of the applications filed by Ethiopia and Liberia . . .no-one claimed that there existed a power of revocation of the mandate by the organs of the United Nations". It was "not consistent with any reasonable interpretation of the powers of the General Assembly in the field of mandates to discover today that it had had for 25 years what the Council of the League of Nations had never claimed . . ." All of which sounds pretty cogent. And yet . . . Why should not a power, unsuspected even for 25 years, have all the time existed all the same? The question is, Had it indeed existed? It was in aid here of its needed affirmative answer

that the Court invoked its aforesaid breach-of-contract theory. But what it somehow entirely failed to perceive was the formal insufficiency of this theory for the purpose in hand. For whatever else Articles 10 and 80 might be considered to have accomplished no-one claimed that they made a General Assembly established in 1945 into a contracting party to a mandate declared in 1920. And even if, though itself not a party to the Mandate, the General Assembly were to be assumed competent to end the Mandate in the event of its violation by South Africa, what bearing had this upon the situation in which the violation, if any, had been not in any event of the Mandate, but, at most, of Articles 10 and 80 of the Charter? The breach-of-contract theory, upon which the Court staked the entirety of its case, might, *in extremis*, have served its purpose sufficiently well, if only it had fitted the facts! But on no such theory could the General Assembly be mistaken for a party to the Mandate, or South Africa's failure to report to that body be transmuted into a breach of anything other than the aforesaid two articles of the Charter.

Nor was this all. This breach-of-contract theory, even if accepted, left unanswered a further question quite crucial for the Court. Assume that the League Council at any rate, by acting to end the Mandate, might in the appropriate circumstances effectively have done so: What if a doubt remains as to the Council's capacity so to act? Of what use is freedom of speech if a man be dumb? As Judge Fitzmaurice pointed out, the Court had failed to explain how the Mandate could in practice have been ended by a Council at whose table the Mandatory was entitled to sit and vote, in proceedings where only by unanimity could the needed decision have been made. Incidentally, the existence of that voting situation had been confirmed by the Court itself "not only in its judgment of 1966 but also in that of 1962". To this it was hardly sufficient for the Court to reply that the right of revocation simply *must* have been there, since the mandate must else have been a sham. To argue, retorted Judge Gros, for a power's existence simply by pointing to the *need* for it was "to step outside the law". The Security Council may be said to have needed in recent months the power to prevent the Indo-Pakistani war. But had it therefore the power?

Nor was even this all, either. Even on the breach-of-contract theory, the condition precedent for termination by one party was fundamental, or material, breach by the other. And where, on South Africa's part, had such breach occurred? In her application in the Territory of her policies of apartheid? That was certainly what the General Assembly had said. But the Court contented itself with pointing, as constituting the necessary breach of South Africa's mandate, to her failure to render reports to the General Assembly. Her failure, that is, to do what in 1950 the Court had declared it her duty to do. At least on this point the facts were undisputed: she *had* rendered no reports—and this despite that 1950 Opinion. Which was, however, after all, a mere opinion, and not a binding decision of the Court. "There cannot be a fundamental breach", maintained Judge Fitzmaurice, "of something that has never—in a manner binding upon the entity supposed to be subject to it—been established as being an obligation at all—which has indeed always been, as it still is, the subject of genuine legal contestation". A telling argument, obviously.

It is true that Judge McNair in 1950 and Judge Tanaka in 1966—the former critically the latter with approval—saw the 1950 Advisory Opinion as having the nature of judicial legislation: but in this these two judges

would appear to have overlooked what would appear to be Judge Fitzmaurice's point, namely that legislation, as such, is something binding at least on somebody, and susceptible therefore of being breached, whereas a mere advisory opinion is binding upon nobody. And there can obviously be no breach, whether fundamental or otherwise, of what, by its very nature as mere opinion does not bind.

And now that further problem, and perhaps the most blatant example of the audacity of the Court. Concede, just for argument's sake, that the General Assembly may indeed, after all, have succeeded in ending the mandate. What follows? The illegality of South Africa's further presence in the Territory? Yes, precisely that, according to the Security Council. And now, Yes, according to the Court. But why this unqualified yes? For answer we are referred to the Court's own assertions on other occasions in the past. These the Court's earlier dicta had been to the effect that, the Mandate apart, South Africa had had 'no other right' in South West Africa.

It does not enhance one's confidence in the Court's dependability to find it now alluding to those its own previous mere expressions of opinion as "decisions". It might have been more seemly if South Africa's view of the matter had at least been more responsibly discussed. It was surely not quite good enough simply to recall that annexation of the territory, had South Africa ever claimed to have effected this, might not have been in order. What required to be disposed of was the lesser submission, that a combination of factors had sufficed to differentiate her position from that of an unauthorised possessor. It should be enough to cast an eye back to the interval of time between the ratification, in January 1920, of the Treaty of Versailles and the League Council's declaration of the mandate in the December of that year. Since mid-1915, when her invasion, at Britain's urging, of South West Africa had put an end there to German rule, South Africa had provided, as still she does, the administration of the territory. Is it now to be accepted that during that period preceding the entry into effect of the mandate her presence there was legally without warrant? And, if not then, why now? It is not simply by the verbal upgrading of the Court's own deliverances to the status of supposed 'decisions' that such a question could appropriately be met. The truth surely is that, even if, as South Africa herself has long contended, the Mandate now no longer exists, it does not by any means automatically follow that her continuance in the Territory is therefore bereft of legal basis. And it is remarkable that the Court should have thought to sidestep in so easygoing a fashion so meaty and momentous an issue, an issue which is technically just as open today as it was before the aforesaid decisions (*sic*) of the Court.

Having thus disposed, to its own ostensible satisfaction, with the question of the formal propriety of South Africa's presence in South West Africa, it remained, if the Court was to complete its assignment, for the position to be considered of the generality of member States? What now, in view of resolution 276, was it up to them to do? Were they now, as Judge Nervo maintained, "obliged to support the United Nations in securing the withdrawal of the South African administration from Namibia". By 11 votes to 4 (not, that is, 13 to 2) the Court declared its opinion that they were. For the Security Council had called upon them to adopt certain attitudes and to do or rather to refrain from doing certain things. And in terms of the doubtfully axiomatic interpretatation

which the Court was placing upon Articles 24 and 25 of the Charter it was legally incumbent upon them to comply. For, according to the Court's unexplicated reading of the facts, it emerged (*sic*) "that the Security Council, when it adopted these resolutions, 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". Therefore the Security Council's declaration on the matter of illegality, being re-classified by the Court as a "decision", had become conclusive for, and binding upon, the many member States. Not that the majority judges, with the interesting exception of Judge Onyeama, the Nigerian, showed much consciousness of what was being implied. He alone identified as distinctively "judicial" in type the function that the Court was now ascribing to the Security Council, and if only for that reason declined on this important matter to go along with the Court. Not even to the Court itself, even when giving judgment in a contentious case, is there given formal competence for making, on disputed legal or factual issues, decisions binding upon the generality of member States. Yet here we find such competence attributed, and this by the Court itself, to a body charged with acting not even ostensibly in the cause of truth and justice, but simply in the interests of peace.

Whether the Security Council, or whether any of its members, can have suspected what view might come subsequently to be taken of what was being done, the Court does not consider. Had the Security Council seen Article 24 as bearing the meaning now ascribed to it, and had it wished to avail itself of the power it is now said to afford, is it likely that it would not have looked for clearer language in which to make its intention plain?

How far the member States will go along, on this crucial question of the Security Council's powers, with this opinion of the Court, must remain to be seen. The vistas opened up are extensive, and the possibilities revolutionary, at least for those contexts and occasions with respect to which the major powers are found to be at one.

But to return to the Court's main line of argument, and the intellectual level on which it can be seen to proceed. All too often the reasoning is of the type—The contrary cannot be demonstrated: therefore such-and-such can be taken to be so. It is as if someone were to demand his baggage at a luggage-counter, without producing any evidence of his having left it there, basing his claim for its recovery on the attendant's manifest inability to prove that he had not had the intention of doing so. Too often the facts of history are refashioned to suit a particular book, as when the Court claims to show that there had never been any essential difference between mandates 'B' and 'C', or when it affects not to know that, in Judge Fitzmaurice's words, "the founders of the United Nations" had "bent over backwards to avoid the supposed taint of any League connexion". And, regarding the interpretation of the Mandate, "My reading of the situation", wrote Judge Fitzmaurice, "is based—in orthodox fashion—on what appears to have been the intention 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 intention of new and different entities and organs 50 years later".

Let those who find it in them, without embarrassment, professedly to believe—(*a*) that Article 10 of the Charter could possibly have sufficed to

augment the General Assembly's powers of decision; (*b*) that Article 80 could possibly have added to South Africa's obligations; (*c*) that South Africa's non-acceptance of an artificial and technically non-compulsory interpretation *of the Charter* could constitute, in law, a violation on her part *of the Mandate*; (*d*) that the League Council's unanimity rule could in practice have been ignored and so might just as well not have existed; and (*e*) that, were it not for the Mandate, South Africa's presence in South West Africa would have been illegal all along—let those who can positively believe all this plurality of propositions by all means endorse the Court's conclusions: but they will need for this purpose to believe every one of them, for all were alike vital links in the Court's argumentative chain. And a chain whether of metal or of reasoning is never any stronger than its weakest link.

Judge Fitzmaurice was to write of "a different and to me alien philosophy". "My own reading", stated Judge Dillard without elaboration, "has led me to believe . . . that a restrictive interpretation of Article 80 . . . is not justified." An alternative to what this judge referred to as the "restrictive" method of treaty interpretation—which takes a document as meaning what its words can be seen as saying—would be the judicial practice which seeks wishfully between the lines of the given language for what it might perhaps more propitiously have been intending to say. Sometimes indeed it has looked as if individual judges, fired perhaps by the example of progressive members of the United States Supreme Court, have seen themselves as called to put their personal stamp upon the future evolution of international law. And this could no doubt be quite effective in decisions to which the parties, if only they, had no option but to bow. A decision handed down in a contentious case is binding no matter how implausible the reasoning upon which it rests. But that same line of reasoning, offered as basis for an advisory opinion may serve merely to discredit the opinion.

There will no doubt be particular governments which, until the end of time, will affect to find persuasive this 1971 Opinion. Were it convincingly reasoned and were South Africa even so to be ignoring it, her diplomatic credit might be taking, at the least, a grievous knock. As it is, the general feeling may well be that she is only too abundantly justified in treating the strange pronouncement with disdain. Perhaps we shall not now be hearing very much more about an anti-South African *legal* case concerning 'Namibia'. A toy pistol ceases to be effective for the hijacker's purpose once it has been identified for what it is. The war will no doubt continue unabated: but less hopefully on the distinctively legalistic front.

For even on the prime issue of apartheid this latest major effort had been relatively unrewarding. "The question whether the official policy of apartheid as practised in the Territory is or is not compatible with the principles and legal provisions stated in the Covenant, in the Mandate and in the Charter" had, insisted Judge Nervo, begged an answer from the Court. It was that doctrine's application, protested Judge Ammoun, that had been "the underlying cause of the United Nations' action ever since the earliest days". It was, he declared, "inadmissible to choose the easy way out and justify the revocation of the mandate by reference to the refusal to report . . ." Why then the Court's recourse to this "easy way out"? Why the Court's almost ostentatious omission to express any opinion on the consistency of South Africa's apartheid policies with the requirements of the Mandate as such?

On the subject of apartheid there obtains at the United Nations a conventional wisdom derogatory to its practitioners whether in the Territory under mandate or within the Mandatory's own domestic domain. In the abortive 1960-66 proceedings it was on the alleged inhumanity of these policies that the charge of mandate-violation had been principally founded. But no judgment on the merits was ever arrived at in that context. Only in such an opinion as Judge Jessup's was the policy then condemned, and this on the basis, as he candidly showed, not of evidence given and tested before the Court, but of what he took to be matters of common knowledge—on the faith, that is, of the aforesaid conventional wisdom. Significantly, his compatriot Judge Dillard saw objections, in the 1971 context, to taking so specious a line. It would not, he said, have been compatible with its judicial function for the Court to have determined the issue of breach of the Mandate on those grounds "in the absence of a full exposure of all relevant facts". So, though Judge Jessup's doubtfully professional example was followed by the Court's President, individually, in his separate opinion, as well as by certain of his colleagues, it was avoided by the Court, as a court.

Instead the Advisory Opinion dwelt—and this with questionable relevance, given the form of the 'request'—upon the bearing on apartheid of the Universal Declaration of Human Rights. That the Declaration was not binding upon anybody, and least of all upon those like South Africa whose special circumstances and susceptibilities had been ignored in its compilation, was a point not touched upon by the Court.

The Declaration, though often referred to in association with the Charter, is in no sense a chapter thereof. And had what it says been there already in the Charter, what point could there have been in its repetition? South Africa is bound, like any member State of the United Nations, by the references in the Charter to the subject of human rights. The terms of the Declaration, on the other hand, she would be formally at liberty to flout. She is used, nevertheless, to hearing herself described, with loudly simulated indignation, as having violated (*sic*) this or that of its clauses. This is an obvious tactic, sedulously exploited, for the perennial propaganda war. But South Africa will hardly have thought to see it descended to by the Court. And it lost little of its cheapness when indifference to the Declaration was impugned as defiance of the Charter itself. Though not, be it conceded, of the Mandate.

It is apt to be overlooked, though scarcely by South Africans, that it was "under its own laws" that their country was authorised by the Mandate to administer the Territory—and that these were well known as the laws of a country whose constitution was hinged upon a differentiation between persons "of European descent" and persons not so descended.[10] And all too commonly the assumption seems to be that, with the Permanent Mandates Commission no longer available for consultation, the appropriate way for the Mandatory to implement its duties to the population of the territory must be to harken to the voices in New York. To pander to the utmost to the predilections of politically-motivated anti-colonialists and to "promote to the utmost the moral and material well-being and social progress of the inhabitants" may alike be worthy ambitions: but they are not indentical, and only one of them is mentioned in the Mandate.

The country, South Africa, to which, as an "advanced nation", the custody of South West Africa was in 1919-20 assigned, was unmistakably

then what still it is, an oligarchically-structured society practising responsible parliamentary rule—the responsibility being owed, through an entirely white parliament, to an electorate then almost entirely, and now entirely, white. It presented then in effect, as still it does, the now exceptional spectacle of a democracy governing an empire. No amazement will thus have been felt when, under South Africa's own laws, the differentiation between race and race, a built-in feature of her domestic system, became characteristic of the way of life in South West Africa too. Certainly the Permanent Mandates Commission, under whose continuing surveillance the Mandatory's policies were pursued, showed no such amazement. And the distinction established in the Covenant between 'C' and 'B' class mandates being then a commonplace, there was in those days no thought of any eventual independence whether for the several peoples of the territory or for the territory as a whole. Only in recent decades have a new generation of South Africa's leaders embarked, as had the British in their imperial twilight, upon a programme of self-determination for the peoples under their rule.

Whether, if proposed for application in South West Africa, this policy would have suffered the censure of the PMC, who can say? There is certainly no obvious reason for assuming that that body would have demanded, as do alas even the British today, that the self-determination to be envisaged for the inhabitants of South West Africa be "territory-wide"[11] rather than pertinent to the possibly differing aspirations of the several peoples having their habitat within given geographical confines. And this notwithstanding the fact, apparently forgotten, that even the Charter itself speaks of territories as though possibly accommodating more peoples than one—and of peoples, specifically, rather than agglomerations thereof, as the units whose self-determination it favours.

Wherein, then, has South Africa so offended? In her indifference to the requirements of the Mandate? It is this that is forever being suggested. But when has this been proved? To those who knew the system in the 1920's or have read their Hunter Miller, the distinction between the 'C' and 'B' class mandates was a familiar fact of life. Nothing is more symptomatic, in the recent Advisory Opinion, of the crumbling of the old understandings on the nature of law, than its capricious and crudely anti-historical rejection of that distinction. The 'C' mandate is a relic of the League of Nations past. The Court in 1971 showed itself the product of the United Nations present. As British experience has abundantly shown, the transition from good government to self-government, though difficult and delicate, may if not too eagerly effected, be propitiously and creditably creative. But the United Nations does not hold with creative disengagement. Its slogan is self-government NOW. Hence the philosophy of the Trusteeship Committee. Hence too the fewness of the remaining trusteeships. And hence the clash with the one remaining mandatory power. For the trusteeship system is one thing, the 'C' mandate system another. The 'C' mandate is a paternalistic hang-over from the era of good government first. Wherein then has South Africa so offended? In her indifference to what? To the requirements of the Mandate? Or to the modernity of its opponents? Is it for her disloyalty to her mandatory obligations that South Africa is condemned, or is it for her fidelity thereto?

It is not at bottom against her alleged lawlessness that South Africa's adversaries inveigh, but against her exasperating correctitude. Dourly

legalistic in her stances, she braves the world's displeasure, and gets on with her job. And the sources of that displeasure are twofold. They reside respectively in her mandate which authorises her to do what she does, and in her constitution which largely accounts for her being what she is. And the objective to be finally achieved by the political warfare so resolutely waged against her is not just a change in her behaviour, but the dismantlement of her very system, and the undoing of what was begun by the statesmen of a Britain not yet then fully democratic even at home, the Liberal government, that is, of 1909—and consummated by the Labour Government of twenty years later. South Africa's critics are not interested in the programme of progressive devolution, or separate development for peoples as peoples, by the means of which she is in process of disembarrassing herself, British fashion, of her inherited portion of the one-time British Empire. The slogan is indeed self-government NOW. And by this what is meant is immediate transfer of control from the minority now constitutionally on top to whoever may, in the name of the majority, gain access to their place.

"I have no doubt", declared Judge Fitzmaurice, "that the present proceedings represent an attempt to use the Court for a purely political end, namely as a step towards the setting up of the territory of South West Africa as a new sovereign independent State, to be called Namibia, irrespective of what the consequences of this might be at the present juncture". Aptly said ! For the Security Council's recourse to the Court was patently but the latest move in a campaign waged relentlessly over the years since 1945, for the putting down, by fair means or foul, of the mighty, in a certain stark, remote and unfamiliar region, from their seats. An error, it may well have been, to suppose that in South West Africa would be found the target country's Achilles' heel : to suppose, that is, that international law would necessarily be found marching with the big battalions in New York. In the eye of the International Court South Africa's presence in the territory might now be unlawful. But must it therefore be equally so in the sight of international law ?

Whether therefore on balance and on the whole South Africa's well-wishers need be worried by the outcome of the Hague proceedings is a hard one to answer. That her adversaries should now have been furnished with the irksome argument of her having been declared by the Court a trespasser in the territory is a development not any the less depressing for having been fairly foreseeable from the start. But against this they can set the fact that never until now had they been in possession of so decisive a demonstration of the impregnability in strict law of her position as the administering power and former mandatory in this still so passionately disputed domain. Had there been an at all presentable case to be made against her position this must surely on this occasion have been done. Thus for South Africa, foiled in 1966 in her hopes of having then from the Court a full and cool analysis of this question, the 1971 Opinion is, in its palpable inadequacy, an encouragement indeed. What would happen to a white South African presenting himself, say, at Kennedy Airport with papers even half so unimpressive it is hard to imagine.

The discovery, so late in the day, that, unbeknownst to themselves, the framers of the Charter had intended to enshrine in that document undertakings on South Africa's part which no-one can be shown in fact to have had in mind, and which certainly find little reflection in the wordings they employed, could, for South Africa, have been awkward, to say the

least, had it occurred in the course of a judgment in a contentious case. But figuring only in an advisory opinion, its effect, so far from being dispiriting for South Africa, must be more like the tidings of a free pardon after a period 'inside'.

For as, when in the early days the call had been for a South West Africa trusteeship, it was a relief for South Africa when the Court disposed finally of the false assumption about her alleged Charter obligation to come into that particular scheme,[12] so now is it a boon for her that the Court should have had the opportunity of showing, had that been possible, the illegality of her presence in the Territory. The Security Council's question to the Court was nothing if not opportune, if four years overdue. In 1971, if disappointment ensued, this was not owing to any laxness in the lately elected judges but rather to the weakness of the case that they were being invited to underpin. For no-one who reads the Opinion will deny the verbal virtuosity with which they fashioned their straw-free bricks. What men could do they did. But the facts were against them : and it is intriguing to wonder how the match would have gone had it been, as it were, South Africa's turn to select the referee.

What then, if anything, was amiss with the Court ? When the late General Smuts said of the League of Nations that, so far from its having failed the nations it was rather they, the nations, that had failed the League, he was pointing to how given machinery may be put to worse, no less than better, uses. When an election to Hague judgeships is on the General Assembly's agenda, it is the member governments that severally decide for whom their respective delegations shall vote. If the trend in the Assembly is towards the displacement of international law in its traditional manifestations, with the substitution for it of standards determined by the revolutionary urges of the numerically influential, the effects of this will become apparent in the opinions to be expected from the Court. And equally in such decisions, if any, as it may still have the opportunity to give. But these will hardly be many, for a court of overt manipulaters, votaries of the arts of social engineering, would scarcely have much in the shape of strict decision-making, to do.

What is wrong with the Court ? What is wrong with yon computor, turning out those curious results ? They are not the fault of the computor. Ask rather, Who is it that has been feeding those funny figures in ? Teachers are accustomed to the temptation to let their political affiliations affect their social-science approach. Judges in applying their specialist expertise may be presumed to have comparable temptations. Sound judicial practice, while marginally artistic, is basically dependent upon the scrupulosities of legal science. And, to conclude with a remark of the lamented S. H. Bailey, "when politics and science are drunk together, only the taste of politics remains".

NOTES

[1]House of Commons Debates, 19th October, 1971, Column 681.
[2]Resolution 2145 (xxi).
[3]Resolution 276 (1970).
[4]Resolution 284 (1970).
[5]Advisory Opinion of 21st June, 1971.
[6]Judges Sir Gerald Fitzmaurice (U.K.) and Gros (France).
[7]The judges above (N. 6) and Judges Petren (Sweden) and Onyeama (Nigeria).
[7a]D. Hunter Miller, *The Drafting of the Covenant*, Vol. I, pp. 186, 190. A question remains, however, as to the relation between these particulars recorded by Hunter Miller at the time and things said by Smuts himself in Parliament in later years. House of Assembly Debates, July 13, 1925, Columns 5930, 5931 and March 15, 1946, Column 3674.
[8]Article 73(e).
[9]Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents*, Boston, World Peace Foundation, 1946, p. 423.
[10]South Africa Act, 1909, Section 44, and as amended by The Status of the Union Act, No. 69 of 1934, section 6.
[11]*The Times*, 14th October, 1971.
[12]The Court's 1950 Advisory Opinion.