SOUTH WEST AFRICA AND THE WORLD COURT
A COMMENT ON THE CURRENT CONSULTATION

by Prof. C. A. W. Manning

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On July 29, 1970, the Security Council of the United Nations adopted a resolution deciding to submit to the International Court of Justice for an advisory opinion 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)? " In proposing this resolution the Finnish representative Ambassador Jakobson disclosed his delegation's "expectation" that "an advisory opinion could underline the fact (sic) that South Africa had forfeited its mandate... because of its violation of the terms of the mandate itself, because South Africa had acted contrary to its international obligations, contrary to the international status of the territory and contrary to the international law". It was, he said, "important to expose the 'false front of legality' which the South African authorities had attempted to present to the world".

It is with some of the background and implications of this decision that this article is concerned.

This is not the first time that the International Court will have had its notice drawn to the South West Africa problem. It gave advisory opinions about it in 1950, 1955 and 1956, and a decision about it in 1966.

Between 1884 and 1915 the old Imperial Germany had acquired sovereignty over the part of Africa here in question. On the outbreak of the 1914-18 war General Botha's government in Cape Town, at the request of Mr. Asquith's government in London, undertook an invasion of German South-West, which resulted in 1915 in the elimination there of German rule. In 1919 the Principal Allied and Associated Powers agreed that South Africa should remain in control of the territory under a mandate eventually to be drawn up. The Treaty of Versailles of January 10, 1920, confirmed this decision, and in the following December the mandate was established in a form agreed between South Africa and the Council of the League of Nations.

Prime Minister of South Africa at the time was General J.C. Smuts, a remarkable man, with whose name the story of the mandate is indissociably

linked. He it was to whose role in the planning of the League of Nations the League's historian F.P. Walters was to pay homage: "Smuts's work was from every point of view the climax of all the thought and labour expended on the League idea before the Paris Conference... Here at last was a work worthy of the greatness of its subject... The purpose, and to a great extent the consequence of Smuts's proposals was to raise the discussion on to a new plane... The essential substance of the 'Practical Suggestion' will remain true as long as the world is organised into separate and independant States". He too it was who later in San Francisco was to introduce the wording which was to become the preamble to the United Nations Charter. He it was who in London in 1917 had explained the need in South Africa for a policy of parallel, or as it is nowadays termed separate, development of the races.It was his policies, based in South West Africa on a recognition of the deep differences between the several ethnic groups, that his successors would be concerned, in the 1960-66 proceedings at the Hague, to vindicate. Smuts it was who in London in 1921 advised his fellow Premiers of the Commonwealth that the South African situation should be understood for what it was. "Inequality", he said, "is the bedrock of our Constitution". He was referring to the structure bestowed by Britain upon South Africa in 1909-10, which left to the European-descended minority the choice of when, if ever, to move in the direction of democracy. "Under certain conditions", wrote the late Robert MacIver of Columbia University, "the only possible form of government is some kind of oligarchy: for instance where the people are deeply divided by racial, religious or caste differences". By "people" here MacIver would appear to have meant population. South Africa is a land of many peoples, each a minority: and it is the white minority still that rules. It was to this white-governed South Africa that, as an "advanced nation", there was given the mandate to administer South West Africa "as an integral portion" of its own territory and "under its own laws".

It was out of General Smuts's own thinking that the mandates system had been born, though not originally as an answer to the "colonial" problem. President Woodrow Wilson, though precluded by his famous Fourteen Points from assenting to annexation in a formal sense, was content to see South West Africa covered by a "C" class mandate, providing for the "moral and material well-being and social progress" of the inhabitants but with nothing said about their eventual independence.

It should perhaps be here explained that there can, in the writer's belief, hardly exist in all the world a country where no-one has his readily intelligible reservations about the historically-given political order. And if any such countries there be, South Africa is not among them. In her case indeed the interest in change, even revolutionary change, is not limited to those with personal knowledge of the country. It is widespread throughout the world, perhaps more especially among those without personal knowledge of the country. At the United Nations in particular its critics abound. A main objective there of many busy delegations over many years has been to accomplish the replace-

ment in South Africa of the constitutional system dating from 1910.

"To put the matter in proper perspective", wrote Judge Jessup of the United States in his dissenting opinion in the South West Africa cases, "it is necessary to recall that the question of South African racial discrimination was first brought before the General Assembly in 1946 by India" *(I.C.J. Reports 1966, p.415).* True enough. As was lately recounted by Mrs. Lakshmi Pandit, in a BBC "The Time of My Life" programme, she had at the instance of Mahatma Gandhi been sent to draw the attention of the General Assembly to the situation of the Indian minority living chiefly in Natal. She had been expressly enjoined to keep the discussion on an emotional level and not to let legal niceties get in her way. To this directive she seems loyally to have adhered, and the precedent she so successfully established has been respected by the General Assembly ever since. "There can be no doubt", wrote Josef Kunz, "that interpretations of the United Nations Charter by the organs of the United Nations cannot always be defended from a legal point of view". *(American Journal of International Law, Vol. XLVI p.506).* "We see many delegates in the United Nations growing annoyed and impatient when legal considerations are voiced" *(Ibid. 3, p.507).*

And the trouble of course is that, although there was nothing to prevent the United Nations from becoming, in its practice, a law unto itself, it could not simply so, and as by the same token, become a law for the individual members of the United Nations. It has never, in particular, been in a position to substitute ideas and standards of its own for those prescribed, for a mandated territory, by the language of the mandate and of the Covenant of the League. Hence much of that annoyance and impatience to which Kunz referred. "It cannot be ignored", wrote Judge Padilla Nervo of Mexico, "that the status of the mandated territory of South West Africa is the most explosive international issue of the post-war world" *(I.C.J. Reports, 1966, p.452).*

Basically the clash over South West Africa between South Africa and her assailants in New York can be expressed as the difference between two interpretations - one on the face of it authentic, the other less obviously so - of the Charter. It is of the self-determination of "peoples", and not of populations, that the Charter speaks; and the possible compresence within a particular territory of more peoples than one is also accepted in the Charter. It was to the Irish people, from within the limits of the United Kingdom, that self-determination had eventually been conceded. It is, comparably, to the several African peoples comprised within South West Africa, as within South Africa itself, that there is today being offered at least the prospect of that self-determination which, from within the United Kingdom, the Irish got. But this does not suit the ideas of South Africa's adversaries. What they favour is self-determination not for the "peoples" of South West Africa as such but for an entity designated as "the" people (in the singular) of Namibia (their new appellation for the country). This moreover they demand, ironically enough, in the name of the

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Charter.

There were those of us who, in the Organisation's earliest days, foresaw and foretold that the moral authority of the United Nations would increase and diminish according as it was prudently or improvidently invoked. In practice it has been so incontinently squandered that there may well now be some countries, South Africa among them, where it stands to all intents at zero.

And this is very sad, for the path pursued by the United Nations had been paved with many good intentions. By no means all its attitudes, even towards South Africa, have been actuated by envy, hatred or malice. Not that it is always a simple matter establishing the motivations behind this move or that at this meeting or that. Things are so rarely what on the surface they might seem to be. As well as the true reasons for things done there are commonly the ostensible ones, whose privilege it is to leave the curious in doubt. Even so one is here speaking only of the posturings of individual delegations. What emerges as a General Assembly resolution is the outcome of a confluence of many streams of diplomatic endeavour. As likely as not it can satisfy no-one entirely. Maybe what one sees is essentially a face-saver, or consolation prize, for someone who has been denied what he had instructions to demand. More profitable, in such cases, than the inquiry *Why?* is the question *How?* - meaning How did a certain manifestation come about? And, perhaps more to the point - what good can it be expected to do? What -and whose - purpose can it be expected to serve?

What the recent Security Council resolution says, in effect, to the International Court is - Despite all the forms of moral suasion that we have tried against her, South Africa, who occupied South West Africa by force of arms 55 years ago, but was not authorised thereafter to annex it, is still there. Surely this is wrong. Surely someone should be doing something to end this unorthodox state of affairs. Can you not provide us with a theory that we may employ to embarrass the leading powers with, a theory implying that it is both morally and legally incumbent upon them to get South Africa out and to make trouble for any who may think to withhold their cooperation to this desirable end? Can you tell us that South Africa has, legally speaking, no longer any right to be there, that she is indeed a trespasser in territory not her own and ought to be treated as the miscreant that she thus manifestly is? And, though making no direct reference to the General Assembly resolution of October 27, 1966, which had *inter alia* envisaged the administration of South Africa under direct United Nations control, this recent one referred back to Security Council resolution 276 (1970), which in turn had presupposed the relevance and effectiveness of that General Assembly resolution 2145 (1966).

Characteristic of that last-mentioned resolution was an apparent ambiguity. Though it is consistently spoken of as having revoked, cancelled, terminated or put and end to the mandate, this is not what it purported *expressis verbis* to do. What it rather assumed to itself was the competence to

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place upon something either done or said by the mandatory a construction such as to have involved the mandate's termination. Thanks whether to its violation or simply to its disavowal by the mandatory, the mandate, declared the General Assembly, was no more. Power itself to end the mandate the General Assembly did not explicitly lay claim to. What it did by implication ascribe to itself was competence to attest with legal conclusiveness the fact of the mandate's having died. But this difference has been generally ignored. The mandate is commonly referred to as if having ended on October 27, 1966, and not before.

The preamble to that 1966 resolution, though in general comparatively trite, included echoes of an idiom sufficiently familiar to the student of latter-day refinements in the diplomatic art. What it so reflected was a simplistic, heady, mental-habit-forming mythology into whose pathogenesis it might be instructive to inquire, and whose point is in its availability at every debate, where it serves in the business of the fomenting of ill-feeling a purpose parallel to that of evidence in the proceedings in a court of law. It is like the language in which the person one disagrees with is, as though by definition, a "fascist beast".

It is not as if any of the accusations commonly levelled against South Africa had anywhere as yet been conclusively authenticated. No findings to her disadvantage were announced at The Hague in 1966. True, Judge Jessup, for one, had been ready even from beforehand with a verdict. Quite correctly this judge had insisted that the issue was indeed justiciable, and therefore proper to be passed upon by a court. No mention, nevertheless, from him, of the evidence so plentifully presented by South Africa, as well at the pleadings stage as thereafter at the oral hearings. No word of South Africa's unaccepted invitation to the judges to come out and see the territory for themselves, or of her unheeded suggestion that the so-called petitioners, upon the basis of whose capricious allegations so much official disapproval of South Africa had been organised over the years at the United Nations, should be called to testify, and stand cross-examination, at The Hague. This judge was content with what he had read, and listened to, elsewhere. And this in a court still, titularly, of justice. Meanwhile, in the record, for those, the fairminded, who may wish to consult it, the evidence is there.

And now, for a further inquiry, the judges are once more back there on the bench. Is South Africa, or is she not, a trespasser?

In order for the Court to see South Africa as a trespasser, it must either conclude that she has long since been such, or else see her presence in the territory as having lost its legitimacy with the passage of some resolution in New York. The question however is whether any such resolution can be held to have had any such effect. In order to find, say, a General Assembly resolution

such as that of October 27, 1966, to have had such an effect, the Court must avail itself, it would seem, of three not unchallengeable assumptions, namely, (a) that the 1950 Advisory Opinion was indeed correct; (b) that South Africa is not legally at liberty to question its correctness; and (c) that what the General Assembly purported to do in 1966 was no more than what in a similar situation the League of Nations could with constitutional and legal effectiveness have done. The Court must, that is, assume that, although the League had certainly never attempted unilaterally to terminate a mandate, it might, at need, have done so; that the General Assembly has indeed the powers in respect of mandates that formerly were those of the League; and that the Court's 1950 finding to the latter effect, though merely in the form of an opinion, was nevertheless binding upon South Africa. It remains to be seen whether anyone thinks to suggest that the Court do now accept even two, let alone all together, of these three assumptions.

What, then, about the alternative possibility, namely, that even before the 1966 resolution South Africa's presence in the territory had been an abuse, an anomaly and a defiance of international law? Did not the 1966 resolution, on a literal reading of its terms, declare that to have been the case? Did it not purport to find South Africa, whether by violation or by repudiation, herself to have put an end to the mandate? But here again there immediately arises a question as to the competence of the General Assembly. And, incidentally, that of the Court as well. Although, in a different kind of case, the Court might with legal conclusiveness adjudge South Africa's alleged repudiation or violation of the mandate to have effected its termination, this finding, if occurring merely in an opinion, must remain a matter merely of opinion. And this would *a fortiori* be true of a finding in similar terms by the General Assembly. The assumption by that body, as even by the Security Council, of a general competence to pronounce with legal conclusiveness upon the significance in law of developments in the political field could be made to seem somewhat intemperate. If that sort of thing is to become the business of the General Assembly, where exactly does the Court come in?

No doubt if, by a sufficient majority involving the concurring votes of all its permanent members, the Security Council were to "determine" that the presence of say Patagonian fishing-vessels in the Arctic was a "threat to the peace", legal consequences would follow under Articles 25, 27 and 39 of the Charter - for Articles 25 and 39 equip the Security Council, in such a matter, with a wholly exceptional quasi-judicial capability for coming to possibly far-fetched factual findings which have consequences, when so arrived at, in point of law. These follow, as by legal magic, from the adequacy, in a formal sense, of the findings. But this is only for the purposes of Article 39. And it concerns only the Security Council. And, on the other hand, even assuming the correctness of the 1950 opinion, ascribing to the General Assembly capacities in mandates matters, formerly those of the League, the troublesome point remains that it never was the habit of the League to furnish findings in the

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manner of a court.

In the manner of a court. But it is, after all, with the Court that this study is immediately concerned. For all that has above been said, there is nothing in principle to prevent the Court from now declaring, though only of course in the form of an opinion, either that the mandate died with the League (the South African contention), or that South Africa should be considered, whether

in 1948 or later, and whether by repudiation or otherwise, as having herself brought the mandate to an end. And on this question it may thus become appropriate for the Court, and each member of it, to form a view, in the light, one must resolutely assume, of a sufficient, and sufficiently independent, investigation of the historical facts. Thus it might be that the Court would after all be found subscribing to the General Assembly's interpretation of certain events and agreeing that, by the virtue of the mandatory's own past deeds or words, the mandate was dead. In the light, one must assume, of an independent study of the facts.

For the Court now to hold, instead, that the mandate had died with the League would however be difficult if not in principle then in practice, since it has itself already on some three occasions given expression to the contrary view. And it is not unnaturally reluctant to devalue its own past pronouncements. It prefers to reaffirm them. Yet the only basis, one might have thought, on which judges of today can with propriety applaud and make their own the opinions of their predecessors is the soundness, as they genuinely see it, of those opinions. The alternative would be to maintain that if they thought those opinions wrong it would be wrong for them to say so. If the Court's advisory opinions are to stand uncontested they should be required to do so on their merits; and the moral of this is that the judges should have a zealous concern to see that their reasoning is such as the profession cannot but admire.

Certainly it would seem necessary for each member of the Court to form a judgment as to whether the mandate any longer exists. For if it did still exist, it is hard to see that South Africa's continued presence in the territory could have any notable "legal consequences for States" And if it does not, but would do were it not for something that South Africa herself had said or done, this will only be so as a matter of opinion- in this case the Court's. And, even were South Africa to accept this, it would yet remain to be shown what, if any, effect this could have upon South Africa's pre-mandatory rights. For, as Judge van Wyk of South Africa, in his separate, concurring, opinion, pointed out, South Africa was not claiming any rights under the Mandate Declaration, which she contended had lapsed. "Respondent bases its claim to administer the territory on the events which preceded the mandate, and on the fact that it has at all material times been in *de facto* control of the territory". It was only "in the alternative" that South Africa was saying that "if the mandate should be held to be in force, it would have rights and obligations under the mandate, but that these would no longer include an obligation to report and accounta-

bility". *(I.C.J. Reports 1966, p.127).*

Not that South Africa could very logically accept a mere opinion to the effect that she, whether by word or action, had at some later stage terminated a mandate which, on the view for which she has so long stood, had died with the League. And, for whatever else South Africa might be reproached, it could hardly be for the League's demise. She it was, among all the member States, who alone stood out in 1936 against the calling off of sanctions and the abandonment of Ethiopia to its fate.

First among the assumptions which were above referred to as debatable was the correctness of the advisory opinion of 1950. Since this description of it will hardly go unquestioned, something had better now be offered in explanation. The opinion covered various points, but what is here in question was its attribution, not unanimous, of responsibilities in respect of mandates to the United Nations, an attribution South Africa's rejection of which has occasioned so much tension ever since. It was criticised, influentially, at the time. Why? Because in the winding up of the League, as previously in the founding of the United Nations, no express provision had been made for the replacement of the League by United Nations organs in the exercise of supervisory functions under the mandate. There was what Judge Tanaka of Japan was frankly to recognize as a lacuna, or gap, in the arrangements made regarding the future of mandated territories not converted into trusteeship territories. The theorising invoked in the advisory opinion for the attempted bridging of this gap was ingenious rather than self-evidently sufficient. It was called into question in the 1960-66 proceedings, but neither reaffirmed nor repudiated in the eventual judgment of the Court. And, if comfort was expected by the friends of United Nations supervision, there was little enough of this in any of the dissenting opinions, for them. Four only of these, out of the seven, made mention of the question. Judge Wellington Koo of China disposed of South Africa's arguments by recalling, accurately enough, that the Court was under no compulsion to adopt the South African interpretation of certain events. He said essentially nothing to meet the points that South Africa had made. So did Judge Padilla Nervo of Mexico. And Judge Jessup likewise saw no need to discuss those points. The 1950 opinion existed, and that for him was sufficient.

It was Judge Tanaka who, by his discourse on the occasionally creative quality of judicial decision-making, merely highlighted the precariousness of the 1950 view. For, unless creatively extended by the quasi-legislative action of a court, the law, as he evidently understood it, on this issue, was marginally but definitively insufficient to afford the basis for a United Nations role. But, it may be asked, was this not precisely what the Court had done, to the satisfaction of a majority of its members, in 1950? And had not the needed basis been so provided for the desired United Nations role? It would be easy, too easy, to answer yes to these two questions.

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The thesis elaborated by Judge Tanaka was, and is, familiar among legal philosophers, whether or not they see it as applying in a given constitutional context. But it is a theory having obvious relevance, if any, to judicial decisions to findings, that is, which become binding upon the parties in a contentious case. Where an advisory opinion is all that is being asked for there can, *ex hypothesi*, be no judicial decision. And the difference this must mean is, submittedly, crucial.

For the parties in contentious proceedings a "creative" decision, however audaciously innovative is, creative of law. But in advisory proceedings, since in these there are no decisions, audacity is not enough. The more palpably creative a mere opinion the more optional is its acceptance by the legal world. It is thus one thing for a court, in a contentious case, to take, so to say, the bit between its teeth and arrive, by a *tour de force* of ingenuity, at some decision from which there can be no appeal yet for which it is hard to see a basis in point of law. In advisory proceedings, the conditions are different. Even in contentious proceedings it is, submittedly, the decision and not the reasoning that it rests upon which becomes law for the parties, in respect of the matters involved, in the case. The opinions voiced whether in the contentious context or the advisory, are persuasive either inherently or not at all. The acceptance of an advisory opinion is, even in principle, discretionary, a matter of policy, for the interested states. The acceptance of a decision is a question not of preference but of jural necessity, for the parties in the case. The difference between law and mere opinion is one of kind and not just of degree. The authority of law is derivative from its technical status, as law, and not from its intrinsic plausibility. The cogency of opinion is dependent upon its intrinsic plausibility.

If, for example, in some contentious case, the International Court were to have found that the substitution of hard for dusty roads in South West Africa amounted to a militarisation of the territory, and a violation therefore of the mandate, such finding, however palpably unrealistic and unconvincing, would have been technically judicial, and law for and as between the contending parties. And similarly, had the Court in 1966 committed itself, as it had done in 1950, to the resourceful doctrine of the organised international community, represented in turn by the League of Nations and by the United Nations, that likewise, for the parties, would have been decisive. But figuring in a mere advisory opinion, whether in 1950 or in the 1970s, it must remain, technically speaking, a horse of a different hue.

The law respecting mandates thus still awaited quasi-legislative application before anyone need defer to the views, respecting mandates, of the United Nations. "The Court's judgment today", wrote Judge Jessup, "does not pass upon the question of the survival of the mandate or its Article 6 which contains the provision requiring annual reports to the League Council. The authority of the earlier pronouncements therefore rests unimpaired. Accordingly I do not find it necessary to deal with the extensive argumentation of

Respondent about the lapse of the League's supervisory powers". *(I.C.J Reports 1966, p.388).* Unimpaired? Authority? The relevant question, surely, in a dissenting opinion, was not whether the 1950 opinion still existed for what persuasiveness it might possess, but whether on the crucial question the arguments advanced against it by South Africa in the 1960-66 proceedings had not exposed it as anything but persuasive. And yet that 1950 opinion remained the sole foundation upon which the United Nations must take its stand if it were to function in the matter of mandates at all.

It is in the circumstances hardly surprising that the Court is not now being asked, as the British representative would have wished it to be, to investigate the technical status of the 1966 resolution. For the General Assembly was claiming under title-deeds in which, were they to be impartially examined, there might be found to be a flaw. Better henceforth to approach the problem afresh, and from a different angle entirely.

South Africa is at present assuming, and the United Nations questioning, the propriety of her continued presence in the territory, and this irrespective of what the General Assembly may be considered in 1966, to have done. So there does appear to be scope for some authoritative clarification of the position, even if only in the shape of an advisory opinion- yet another- of the Court.

But of what use, someone may be tempted to ask, are advisory opinions? Has not South Africa demonstrated that they can with equanimity be flouted? Will not other countries take an example from her?

The obvious answer is that if "flouted" were here the appropriate word it is to be hoped that thay would not. All too freely has it been suggested that there has been something derogatory in the South African stance, as if, in not going along with the views of the International Court in the matter of the mandate, the mandatory was somehow not "playing the game". The question is not of course whether South Africa was bound by the advisory opinion of 1950. No-one could seriously have suggested that she was. The question is, how strong, morally, was her case for non-compliance with it? When Judge Lauterpacht, in an often quoted dictum, described that opinion as "the law which is recognised by the United Nations", this may have served to underline South Africa's political isolation, but it can in no way have qualified her right. There can be no objection to the United Nations as a body, through one or other of its organs, endorsing views not shared by all its members. What is not however legitimate is for other members of the United Nations to question the freedom of the specially situated individual member to stand upon that interpretation of international law to which it has independently come.

The opinions of judges, like those of other learned writers, are a source of important indications as to what the law may very possibly be. But as

formulations of the law they are ever testable, discussable and challengeable, in respect of their inherent plausibility. And the more enterprising they are in their originality the less conclusive do they remain as evidence for what is already the law.

Had it indeed been the understanding in San Francisco or in Geneva that the United Nations was to succeed the League in what someone was to refer to as "the policing of the sacred trust", this should surely by now, in the course of these many years of eager inquiry, have become apparent beyond further doubt. In 1945-46 it had been for South Africa to choose whether to become a member of the United Nations. And, having done so, it had been for her to choose whether to place South West Africa under the trusteeship system. South Africa had chosen membership under a Charter which did not require her to accept United Nations supervision of the mandate. Yet in 1950 she was in effect asked to agree that this was nevertheless what she in effect had done. General Smuts had been as much as anything a diplomat. It has been said of the diplomat that when he says yes he means perhaps, and when he says perhaps he means no. But here it was being suggested that when General Smuts had said no, he must be presumed to have meant yes.

There is a *genre*, or quality, of thought which can perhaps best be described as politically opportune but philosophically inadequate. Newspapers can with relative impunity avail themselves of it, since it is in their discretion whether to print any letters protesting at what they may have said. When a judge provides,

in his written opinion, examples of such thinking, it is seemly to assume that it is through inadvertence, and not advisedly, that he has done so. One must not impute to partisanship what might more respectfully be attributable to a natural imprecision of mind. Without mention of names, it is enough to say that there were more symptoms of this sort of inconsequence among the opinions in the South West Africa cases than could appear propitious for the future of the Court. Any stick, it may no doubt be said, is good enough to beat a dog with. But intellectual analysis is not physical assault, and a point of law or logic, however inconveniently viable, is not a dog.

In face, for instance, of a reminder that what South Africa had accepted in 1920 was a mandate imposing certain specific, and no other, obligations, it was surely not quite good enough to assert, as one dissenting judge rather didactically did, that, South Africa having once agreed in principle to become e mandatory, at a stage when the terms of her prospective mandate remained for negotiation, she could from then on no longer have had any freedom of choice, that in the framing of the mandate she could no longer have any independent say, that obligations other than those in the eventual mandate might alternatively or additionally have been written into it, against her will, and that it was therefore as if such terms had indeed been so written into it, though no-one

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had known about this at the time. Yet it was to reasoning of this vulnerable order that some found it suitable and sufficient to resort as if so to establish for the United Nations at least a semblance of justification for its claim to a supervisory role. And the theory of the "organised international community", represented now by one association of states now by another, was scarcely more impressive. It was hardly the sort of artificially postulated *tertium quid* to which anyone would be likely to have turned who was not otherwise at the bottom of this barrel.

Much of which no doubt is ancient history, mere muddy water under the bridge. Yet it could also be a portent of things, and words and attitudes, to come.

In his time, as Shakespeare noticed, one man may play more parts than one. And for each there is an acceptable ethic. All's fair in war; and on some topics proceedings at the United Nations are not far removed from war. Men with experience of that theatre are to be found among the judges at the Court. At the Court not all is fair. On whether South Africa, for example, can be considered to have forfeited the mandate, the same individual who, as a participant in New York, might have voiced the conventional wisdom to the effect, let us say, that apartheid is "well known" to be a "crime against humanity" and must therefore, whether authorised by the mandate or not, be anathematised as a violation of the mandate will feel constrained, as a judge at the Court, to approach the same question in a significantly different way. And if, analysing the issues, he comes eventually to a consideration of what will have been the *status quo ante mandatum*, he will have several questions to answer before concluding that South Africa has simply no right to be there. There had never been any question, in the crucial pre-mandatory period, of South Africa's not remaining in control. It is true that the terms of her entitlement to the administration of the territory were to be affected by her eventual assent to conditions yet to be formulated in the mandate. Those conditions she shared in defining, and in due timing freely accepted. If these must now be held to have lapsed, what follows?

No doubt were South Africa some fine morning simply to withdraw from the territory, as did France for instance, from Guinea, it might possibly become appropriate for the United Nations, through one or other of its organs, to intervene in the supposed interests of the country's multifarious inhabitants. But that is not presently the question.

Like the rest of us, the judges are but human. And political non-involvement is as non-natural for them as for anyone else. Only, they know what it is that they ought to be eschewing. They understand that ideal of resolute and uncomfortable impartiality to which it is their solemn duty to aspire. They are there to appreciate the issues, not least the legal ones, on their essential merits, to the best of their disciplined abilities for the job. The prestige of the Court is

in their keeping, as speakers in the recent Security Council debate were not slow to recall. But alas this will hardly have helped them. For there were those who were saying, virtually in so many words, that they might be prepared te renew their confidence in the "impartiality" of the Court when they could be sure that it was impartial on their side. In their sight this consultation was a test case to establish whose camp the Court was in.

This of course was not particularly flattering to the judges. As professionals, they are answerable to their conscience alone, and not to any constituency or camp, even though they must hope to deserve the good opinion of those, the cool and cautious connoisseurs, to whose guidance the governments will look when considering whether themselves to adhere, say, to the Optional Clause-accepting within specified limits the Court's compulsing jurisdiction- or to submit a particular controversy to adjudication by the Court.

Yet to judge by certain of the statements in the said debate, it would seem, to be expected at least of some of the judges, that they will show themselves responsive to the pressures of those who look self-confessedly for "political" rather than legal answers to legal issues.

It has to be doubted if many, nay if any, of them will.

As to professor Manning's essay, the editors are well aware of the fact that it is a juridical remonstrance with political overtones. They have the idea that this article mainly effects South Africa's point of vieuw. Ofcourse the author is responsible for the views expressed in his essay. The editors welcome professor Manning's contribution because 1) this magazine is interested in the furure of South West Africa whose population belongs doubtlessly to the "plural societies" in the world; 2) it is topical, a current problem since the Security Council of the United Nations decided to ask for an "advisory opinion" about certain legal consequences of South Africa's continued presence in "Namibia".