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Whither Now Namibia?*

JOHN F. MURPHY**

Superficially, it would be hard for anyone to imagine Namibia, or as it was previously called, South West Africa,¹ as a focal point of international tension. The 318,261 square miles of the territory—a total area about equal to that of Italy and France—is small in terms of the total African continent, and most of this land is largely desolate desert and mountains. Its location, far from the United States and the major trading nations of Europe, and its population of only 749,000 people (including 90,000 whites)² seem to diminish further its international significance.

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1. On June 12, 1968, the United Nations General Assembly adopted Resolution 2372 changing the name of South West Africa to Namibia. 22 U.N. GAOR Supp. 16 A, at 1, U.N. Doc. A/6716 Add. 1 (1968). South Africa has refused to recognize the validity of this name change and, in its advisory opinion of June 21, 1971, the International Court of Justice referred to the Territory as "Namibia (South West Africa)." Advisory Opinion on Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16 [hereinafter referred to as [1971] I.C.J. Rep. 16]. In order to avoid clumsy terminology, "Namibia" shall be used throughout this article, except when reference is made to the history of the territory in which event the term "South West Africa" may be employed.

These peripheral attributes, however, belie the importance of Namibia. Its location—bounded by Angola on the north, Zambia on the northeast, South Africa on the east and south, and the Atlantic ocean on the west—is of strategic importance, both to South Africa and to revolution-minded peoples in the "third world." Its potential mineral wealth invites exploitation by the mineral-thirsty nations of the developed world. Of perhaps greater importance, Namibia is a test of the ability of South Africa to impose Apartheid upon another nation, and raises profound questions of the efficacy of the international legal process. Consequently, for the last twenty years Namibia has been a cause for heated debate in the United Nations and other international forums. These disagreements have sharply exacerbated tensions between the "third world" states of Africa, Asia and Latin America and the United States and Europe, have inflamed tensions between whites and blacks in the southern part of the African continent, and have created a situation fraught with the potential for violence.

The International Court of Justice has been the forum for many confrontations between South Africa and world community over Namibia. The latest result of these legal skirmishes in the Court was the advisory opinion of June 21, 1971.4 Previously, the Court had considered Namibia on five occasions since 1950 and had rendered two judgments5 and three advisory opinions6 covering a variety of issues pertaining to the territory. Nevertheless, in spite of this prodigious expenditure of judicial time and effort, the problem appears no nearer resolution than it was prior to institution of the first proceedings before the Court in 1950.

In its opinion of June 21, 1971, the Court advised the Security Council, by thirteen votes to two that:7 (1) South Africa's continued presence in Namibia is illegal; and therefore (2) South Africa is under an obligation

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to withdraw its administration from Namibia immediately and to end its occupation of the territory. The Court further advised the Council, by eleven votes to four that: 8 (1) member states of the United Nations are obliged to recognize that South Africa's presence in Namibia, and its acts on behalf of or concerning Namibia, are illegal and invalid, and they must refrain from any relations with South Africa implying recognition of, or lending support to, South Africa's presence in Namibia; and (2) states not members of the United Nations are obliged to lend assistance to United Nations action taken with respect to Namibia.

Since the Court's opinion is advisory only and not directly binding on South Africa, 9 and South Africa has categorically rejected the opinion, 10 the Namibia question has now, in effect, been remanded 11 to the United Nations for a political solution. In considering the Namibia question, and various options for United Nations action, the General Assembly and the Security Council will have to take into account the advisory opinions and judgments of the International Court of Justice, as well as the resultant legal situation existing with regard to the territory.

After a brief discussion of historical background, this article will evaluate the advisory opinion of June 21, 1971, and set it in historical and contemporary perspective in order to highlight some of the primary problems facing the United Nations in its deliberations on Namibia. The article will then consider alternative courses of action available to the United Nations and the world community in light of judgments and opinions of the International Court of Justice, Charter principles, political feasibility and the perceived interests of all parties to the dispute. Lastly, it will suggest a new approach to the problem, with a view to ending the present impasse between South Africa and the United Nations and furthering the cause of human rights in Namibia.

8. Id.
I

HISTORICAL BACKGROUND

Prior to World War I, South West Africa (as Namibia was then called) was a German protectorate. During the war it was conquered and occupied by South African forces. When the war ended, South Africa surrendered the territory to the Allies, with the expectation that it would later annex the territory in accordance with secret wartime agreements. But President Wilson's policy of "no annexations" prevailed at the Paris Peace Conference, and the mandates system of the League of Nations was established. Under this system, "advanced nations" were to govern former colonies and territories whose inhabitants were considered not yet able to govern themselves, in accordance with the principle that "the well-being and development of such peoples form a sacred trust of civilization." The mandates were to be designated as "A," "B" or "C" depending on "the state of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances."

"C" mandates, which included South West Africa and the Pacific Islands, were regarded as "best administered under the laws of the mandatory as integral portions of its territory" because of such factors as sparse population, small size, remoteness of the territory from "the centers of civilization" or their geographical contiguity to the territory of the mandatory. South Africa was to serve as mandatory over South West Africa and administer the territory under the terms set forth in article 22 of the Covenant of the League and in the Mandate for South West Africa.

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13. LEAGUE OF NATIONS COVENANT art. 22, para. 1. 1 M. Hudson, INTERNATIONAL LEGISLATION (1931).
14. Id. para. 3.
15. Id. para. 6.
16. The Mandate for South West Africa provided in pertinent part:

Article 2

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

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. . . .
At the end of World War II, and upon dissolution of the League, all mandated territories except South West Africa either became independent or were placed under the trusteeship system of the United Nations. In 1946, South Africa, with the alleged concurrence of the inhabitants of the territory, announced its intention to annex South West Africa, and asked the General Assembly for its consent to this action. The General Assembly rejected this request as being incompatible with the Covenant and the mandate as well as the wishes of the people of the territory. Instead it urged South Africa to transfer its mandate to the trusteeship system.

South Africa, however, refused to put the territory under trusteeship. In 1947, it did submit one annual report—which was severely criticized—to the General Assembly, but maintained it was under no obligation to do so. Then in 1948 the Nationalist government came into power in Pretoria and established the policy of Apartheid. Thereafter, Apartheid was gradually extended to South West Africa, and the Nationalists took a number of steps which the General Assembly regarded as equivalent to de facto annexation of the territory.

Article 4
The military training of the natives, otherwise than for purposes of internal police and local defense of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 6
The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5.

Article 7
The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate. The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation of the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.

Hudson, supra note 13, at 57.

On the mandates system of the League generally, see, e.g., H.D. Hall, Mandates, Dependencies, and Trusteeship (1948); Hales, The Creation and Application of the Mandate System, 25 TRANSACT. GROT. SOC'Y 185, 204 (1939); Q. Wright, Mandates Under the League of Nations (1930), Potter, Origin of the System of Mandates Under the League of Nations, 16 AM. POL. SCI. REV. 563 (1922).

17. The former "A" mandates all became independent.
18. See U.N. CHARTER arts. 75-81.
Prior to 1948, South Africa had grudgingly accepted the notion that the United Nations at least had an "interest" in South West Africa, which was somehow derived from the League. This is most evident in its submission of the request for annexation to the United Nations. Beginning in 1948, however, South Africa shifted its position and denied any United Nations' interest in or authority over South West Africa. It contended that the South West African mandate had lapsed upon dissolution of the League, and that South Africa therefore had no obligation to report to, or consult with, the United Nations on its administration of the territory. The United Nations insisted that the mandate remained in full force and effect, that the United Nations had succeeded to the supervisory functions of the League, and that South Africa's refusal to cooperate with the United Nations on South West Africa was a violation of its international obligation. Faced with these irreconcilable positions, the General Assembly requested the International Court of Justice to render an advisory opinion on the territory's legal status. In 1950, the Court advised the Assembly that:

(1) South West Africa remained a territory under mandate (unanimously).
(2) The international status of the Territory could be modified by the South African government only with the consent of the United Nations (unanimously).
(3) "[T]he Union ... continues to have the international obligations stated in Article 22 of the Covenant ... and in the mandate ... as well as the obligation to transmit petitions ... the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted..." (12-2)
(4) The trusteeship provisions of the Charter were available for South West Africa (unanimously), but South Africa was under no obligation to place the Territory under trusteeship (8-6).

In 1955 and 1956, the Court issued two supplementary advisory opinions on procedural matters, the former advising that the United Nations could adhere to Charter-prescribed procedures in voting on South West African questions and did not have to apply the unanimity rule followed by the Council of the League, and the later advising that the United Nations could grant oral hearings to petitioners from the territory.

South Africa not only refused to accept any of the Court's advisory opinions on South West Africa, but also rejected United Nations resolu-

22. Id. at 143-44.
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...tions on the subject. Similarly, United Nations efforts during the twelve-
year period ending in 1959 failed to resolve the problem; the Assembly
thereupon invited\textsuperscript{25} legally qualified states\textsuperscript{26} to undertake contentious
proceedings against South Africa in the International Court of Justice
to obtain a "binding"\textsuperscript{27} resolution of the issues outstanding between
United Nations members and the Union.

Ethiopia and Liberia responded to the Assembly's call. In 1960, they
filed applications with the Court contending South Africa's imposition of
Apartheid upon South West Africa violated its obligation in article 2 of
the mandate to "promote to the utmost the material and moral well-
being and the social progress of the inhabitants of the territory. . . ."
South Africa in reply filed preliminary objections, alleging that the
applicants had no jurisdiction over the subject matter. By an eight to
seven vote, the Court, in December, 1962, dismissed all preliminary ob-
jections and found that it was competent to hear the dispute on the
merits.\textsuperscript{28}

However, when the Court considered the case on the "merits" in July,
1966, it in effect reversed the earlier decision and held that Ethiopia and
Liberia had no "legal right or interest . . . in the subject-matter of the
present claims . . . ."\textsuperscript{29} i.e., in South Africa's observance of its obligations
under the mandate. The vote was again eight to seven, but this time the
President of the Court, Sir Percy Spender, broke a tie by casting his vote
in favor of dismissal of the case.\textsuperscript{30} In support of its decision, the Court

\begin{footnotes}
\footnote{26. By the terms of Article 7 of the mandate, it was clear that only states which
were members of the League of Nations would have any chance of challenging South
Africa's administration of the territory before the International Court of Justice. See
Mandate for South West Africa, supra note 16.}
\footnote{27. Under art. 94(2) of the Charter a judgment in a contentious case is enforceable
by reference to the Security Council.}
\footnote{28. SWA Cases 1962.}
\footnote{29. SWA Cases 1966 at 51, § 99.}
\footnote{30. It should be noted that the inconsistency between the Court's 1966 judgment and
its 1962 decision may be explained by the intervening change in the composition of the
bench. Judges Badawi and Bustamente, who had both voted against South Africa's pre-
liminary objections, did not participate in the proceedings because of poor health
(Judge Badawi died during the pendency of the proceedings). Judge Zafrulla Khan
was disqualified on the ground that he had been named (but had not sat as) judge
\textit{ad hoc} by the Applicants before he was elected to the Court. Judge Khan subsequently
indicated that he had not disqualified himself voluntarily but had been informed by
Sir Percy Spender that the Court had decided he should not participate. Pakistani
correspondent of Dawn, on July 25, 1966. For a view that the applicants would not
necessarily have won easily if the three judges had participated, see D'Amato, \textit{Legal and
Political Strategies of the South West Africa Litigation}, 4 L. in TRANS. Q. 8, 41 (1967).}
\end{footnotes}
distinguished between "conduct" provisions and "special interest" provisions of mandates. It found that "conduct" provisions defined the mandatory's obligations toward the inhabitants of the territory while "special interest" provisions conferred rights regarding the territory directly upon members of the League as individual states, or in favor of their nationals. The South West Africa dispute, according to the Court, related only to the conduct provisions of the mandate and these provisions did not confer any legal right or interest in individual members of the League, as differentiated from residents of the territory itself. The Court responded to the charge that it was reversing its 1962 decision by suggesting that the earlier ruling was limited to a holding that the applicants were members of the League and that the dispute did concern a provision of the mandate. The decision did not, determined the Court, examine the question of standing. This, the Court concluded, was a question which had been left for judgment at the merits stage.

In his closely reasoned dissent, Judge Jessup pointed out that the standing argument had not even been advanced by South Africa in its final submissions to the Court, and that both parties assumed this issue had been settled by the 1962 decision. More importantly, by deciding that Ethiopia and Liberia had no "standing," the Court avoided deciding what most people regarded as the two primary issues in the case—the accountability of South Africa to the United Nations for its administration of the mandate, and the compatibility of its application of Apartheid to the territory with its obligations under the mandate and international law.

The 1966 judgment of the Court has been exhaustively and critically

31. It is interesting to note that the only "special interest" provision of the South West Africa mandate would appear to be art. 5, which requires the mandatory to allow missionaries and nationals of members of the League into the Territory for purposes of pursuing their calling.

32. For a concise yet thorough summary of this part of the Court's opinion, see Landis, supra note 11, at 645. Also, see Dugard, The South West Africa Cases, Second Phase, 1965, 83 S. Afr. L.J. 429, 446 (1966).

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


35. In their memorials, applicants relied on two contentions to attack South Africa's application of Apartheid to the territory. They argued, first, that it violated a general standard or norm of international law and, second, that it resulted in below standard treatment for the "natives" contrary to South Africa's obligation under art. 2 of the mandate to promote the well-being and racial progress of the inhabitants of the territory to the utmost. In the course of the oral proceedings, apparently to induce the Court to reject a suggestion by South Africa that it visit the territory itself to examine conditions there, the applicants largely abandoned their second contention and relied instead on an international norm or standard of non-discrimination as the basis of their arguments. See D'Amato, supra note 30, at 22-36.
discussed elsewhere. For present purposes, it is sufficient to note that the effect of the judgment was primarily threefold. First, it had no effect on the substantive issues the applicants tried to raise; second, it significantly undermined confidence in the impartiality and judicial ability of the Court; and third, it generated considerable emotional and highly political activity in the United Nations.

The Afro-Asian bloc reacted to the Court's judgment by taking greater care in subsequent elections of judges to secure a Court more favorably disposed to Afro-Asian interests. In the 1966 elections, for example, three out of a total of five judges elected were from the Afro-Asian bloc, and another judge from Africa was elected in the nineteen sixty-nine election. Although the results of these elections may be partially defended as efforts to effectuate article 9 of the Court's Statute and to bring about a more equitable representation in the Court of various political and social systems, in some instances insufficient attention was paid to the qualifications of the individual judges elected, as required by article 2 of the Court's Statute. Moreover, some candidates were rejected primarily or even solely on the basis of their nationality.

36. See, e.g., D'Amato, supra note 30; Dugard, supra note 32; Murphy, The South West Africa Judgment: A Study in Justiciability, 5 Duquesne L. Rev. 477 (1966-67); Landis, supra note 11; Gross, supra note 34; Higgins, The International Court and South West Africa: The Implications of the Judgment, 42 Int'l Aff. 573 (1966); and ABA International and Comparative Law Section symposium on the South West Africa Cases, The World Court's decision on South West Africa, 1 Int'l L. 573 (1966).

37. Fouad Ammoun (Lebanon), Cezar Benzon (Philippines) and Charles I. Onyeama (Nigeria). See annex 1 to Gross, The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order, 65 Am. J. Int'l L. 253, 324 (1971). Strictly speaking, of course, Lebanon is not within the geographical confines of either Africa or Asia. However, it may be said that, as a general rule, Lebanon tends to identify and vote with African and Asian interests in the United Nations.

38. Louis Ignacio Pinto (Dahomey).

39. Article 9 provides:

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.


41. See annex 2, Gross, supra note 37, at 325 for qualifications of the judges.

42. Article 2 provides:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

43. In the 1966 elections Sir Kenneth Bailey of Australia, generally regarded as the
In further reaction to the Court’s judgment, on October 27, 1966, the General Assembly adopted Resolution 2145(XXI) purporting to terminate South Africa’s right to administer the territory. In pertinent part, the Assembly declared:

South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate.

and concluded:

The Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations.

To implement this resolution, the Assembly established an ad hoc committee for South West Africa consisting of fourteen states “to recommend practical means by which South West Africa should be administered, so as to enable the people of the territory to exercise the right of self-determination and to achieve independence.” On May 19, 1967, the Assembly established a United Nations Council for Namibia to take over the administration of the territory from South Africa.

In response to the call of the Assembly, the Security Council, in a series of meetings on the situation in Namibia, “took note” of Resolution 2145(XXI) and called upon South Africa to withdraw its administration from Namibia immediately, declaring that “the continued presence of the South African authorities in Namibia is illegal” and that therefore all acts taken by South Africa “on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid.” The Council further called upon “all States, particularly those which have economic and other interests in Namibia,” to refrain from any dealings which would in any way support South Africa’s continued presence in the territory.

most qualified jurist among the candidates, failed of election because of the intense feeling against Australia generated by Sir Percy Spender’s tie-breaking vote in the South West Africa Cases. Also, Antonio De Luna of Spain was not elected, at least in part due to feeling against Spain’s status as a colonial country.

49. Id.
South Africa, however, continued its defiance and cited the alleged illegality of Resolution 2145(XXI) as justification for its position. In response, the Security Council decided, on July 29, 1970, to request an advisory opinion from the Court on the question:

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

By letter of July 29, 1970, the Secretary-General transmitted the Council's request to the Court; the President of the Court, by order of August 28, 1970, set November 19, 1970, as the final date for submission of written statements. In addition to that of South Africa, written statements were submitted to the Court by the Secretary-General and by Czechoslovakia, Finland, France, Hungary, India, The Netherlands, Nigeria, Pakistan, Poland, the United States, and Yugoslavia.

II

THE COURT'S OPINION

A. PRELIMINARY AND INCIDENTAL MATTERS

At the outset, South Africa challenged the participation of three judges of the Court pursuant to article 17(2) of the Court's Statute. She questioned the ability of these judges to act impartially because each had participated in debates on Namibia in his former capacity as representative of his government at the United Nations. Judge Zafrullah Khan was particularly objected to because of his designation (though not participation), prior to being elected to the Court, as judge ad hoc of Ethiopia and Liberia in the South West Africa cases. The Court rejected all three objections on the ground that service as a representative of one's government does not in itself furnish the basis for disqualification under article 17. The Court took no note of Judge Khan's designation as a

52. Id.
53. Id.
54. Zafrullah Khan (Pakistan), Padilla Nervo (Mexico) and Morozov (USSR).
55. Article 17(2) provides:
   No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.
judge ad hoc nor of his having disqualified himself in 1966.\textsuperscript{58} The Court also denied South Africa’s application for appointment of a judge ad hoc to sit in the proceedings under articles 31(2)\textsuperscript{59} and 68\textsuperscript{60} of the Court’s Statute, and article 83 of the Court’s rules of procedure,\textsuperscript{61} apparently on the ground that the Namibia question did not involve a “legal question actually pending between two or more states.”\textsuperscript{62}

By letters of January 27, 1971, and February 6, 1971, South Africa proposed that a plebiscite be held in Namibia under the joint supervision of the Court and South Africa to determine whether the inhabitants wished “That the Territory should continue to be administered by the South African government or should henceforth be administered by the United Nations.”\textsuperscript{63} South Africa also asked to be allowed to supply the Court with further factual material concerning the situation in the territory. At the close of a hearing on March 17, 1971, the President announced that the Court had decided to defer decision on the South African proposal for a plebiscite on the ground that the Court could not rule on this request without anticipating its decision on one or more of the main issues then before it.\textsuperscript{64} He further stated that the Court had also decided to defer decision on South Africa’s request to supply the Court with additional factual material concerning the situation in Namibia until it had had an opportunity to examine the legal issues to determine whether it

\textsuperscript{58} See supra note 30.

\textsuperscript{59} Article 31 (2) provides:

If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

\textsuperscript{60} Article 68 provides:

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

\textsuperscript{61} Article 83 provides:

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

\textsuperscript{62} The Court’s opinion does not give any reasons for the rejection of South Africa’s application. See, however, Separate Opinion of Judge Ammoun, [1971] I.C.J. 16, 67-68.

\textsuperscript{63} Judges ad hoc are normally not required in advisory proceedings, and, prior to the proceedings on Namibia, none had been requested. However, under art. 68 of the Court’s Statute, and art. 83 of its rules, it is clear that, if an advisory opinion is requested upon a legal question actually pending between states, the provisions of art. 31 of the Statute regarding judges ad hoc shall apply. See 2 S. Rosenne, supra note 9, at 206.

\textsuperscript{64} Id. at 21.
would need additional factual data. On May 14, 1971, the President announced that, "... the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

South Africa next contended that the Court was not competent to deliver the opinion because Security Council Resolution 284, which contained the request for the opinion, was invalid. The resolution was alleged to be invalid because the abstention of two permanent Council members prevented its adoption by an affirmative vote of nine members, including the concurring votes of the permanent members of the Council, as required by article 27(3) of the Charter. In rejecting this argument, the Court noted that the consistently accepted practice of the Security Council had been to interpret a voluntary abstention by a permanent member as a concurring vote within the meaning of article 27(3).

South Africa also challenged the validity of Resolution 284 on the ground that the Security Council, in violation of article 32, failed to invite South Africa, a party to the dispute, to participate in discussions on the resolution. It further alleged a violation of article 27(3) of the

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65. Id.
66. Id. at 21, 56-57. Specifically, South Africa had offered to supply the Court with further information concerning the purposes and effects of Apartheid and had contended that, in order to establish a breach of its obligations under the mandate, it would be necessary to show that South Africa's acts were motivated by a purpose other than that of promoting the interests of the inhabitants of the territory. The Court, however, stated that the intent of South Africa in applying its policy of Apartheid was irrelevant to the question whether such actions violated its obligations under the mandate. Nor, said the Court, was it necessary to determine the effects of such actions upon the welfare of the inhabitants. To the Court it was axiomatic that "distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin [constituted] a denial of fundamental human rights [and] a flagrant violation of the purposes and principles of the Charter." Id. at 57.
67. The United Kingdom and France.
68. Article 27(3) provides:
   Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.
70. Article 32 provides:
   Any member of the United Nations which is not a member of the Security Council or any state which is not a member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a member of the United Nations.
Charter in that members of the Security Council which were parties to the dispute did not abstain from voting on it.

The Court rejected both these arguments on the ground that the question of Namibia should be defined as a "situation," as it was characterized on the Security Council agenda, and not as a "dispute" within the meaning of articles 27(3) and 32 of the Charter. Absent a "dispute," articles 32 and 27(3) did not apply; South Africa's failure to object to that characterization of the matter before the Council precluded its raising the issue at this later stage before the Court.\(^7\)

South Africa's request that the Court should in any event exercise its discretionary powers under article 65(1) of the Statute\(^7\) and decline to give an advisory opinion was based on a contention that immense political pressures surrounding the situation precluded an impartial adjudication of the issues. The Court summarily refused to consider this allegation.\(^7\)

South Africa further argued that the Court should decline to issue an advisory opinion on the basis of the decision of the Permanent Court of International Justice in the Eastern Carelia case.\(^7\) The International Court of Justice found Eastern Carelia inapposite, distinguishing that case from the Namibia situation on several grounds. South Africa had been a member of the United Nations at the time the situation in

72. Article 65(1) provides:
The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
73. In the words of the Court:
It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.
74. Advisory Opinion on Eastern Carelia, [1923] P.C.I.J., ser. B, No. 5, at 27. In that case, the Council of the League had requested an opinion on whether the Russo-Finnish Peace Treaty of 1920 regarding the autonomy of Eastern Carelia required Russia to carry out the Treaty's provisions concerning that region. Russia, not a member of the League of Nations, had refused to participate in the League's consideration of the dispute and had objected to the Permanent Court's hearing the case on the ground that it was a matter falling solely within Russia's domestic jurisdiction. The Permanent Court declined to give an advisory opinion. It noted that the opinion would advise the Council of the League on an actual dispute between Russia and Finland, that no state could, without its consent, be compelled to submit its disputes with other states to peaceful settlement, and that, in the absence of Russia's participation, the Court would not be able to satisfactorily determine the factual issues in the case.
Namibia was under consideration, had appeared before the Court and participated in both written and oral proceedings and, although objecting to the competence of the Court, had addressed itself to the merits. The Court repeated its conclusion that the situation in Namibia did not constitute a dispute between South Africa and the United Nations. In the Court's view the possibility it might have to pronounce on legal issues on which South Africa and the United Nations held different views did not convert the case into a dispute within the meaning of articles 82 and 83 of the Rules of the Court. It noted that different views among states on legal issues were often the reason resort to the Court for an advisory opinion was necessary.

B. MATTERS OF SUBSTANCE

Having disposed of preliminary matters, the Court turned to a consideration of the question submitted to it and to a number of contentions raised by South Africa. South Africa had contended that "C" mandates differed in their purpose and legal effect from "A" and "B" mandates under the League mandates system and that "C" mandates were in effect tantamount to annexation. Recalling its 1950 advisory opinion, which noted that the principle of nonannexation and the principle that the well-being and development of the people of the territory formed a "sacred trust of civilization" were of fundamental importance in the setting up of the mandates system, the Court concluded it was "unable to accept any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B' mandates." To find otherwise, the Court said, would "mean that territories under 'C' mandates belonged to the family of mandates only in name, being in fact the objects of disguised cessions. . .".

Similarly, as it had in its 1950 opinion, the Court summarily rejected South Africa's allegations that the mandate had lapsed upon dissolution of the League or that, in the alternative, the United Nations had not
succeeded to the supervisory functions of the League over the mandate. In the opinion of the Court, "an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose." To accept South Africa's contention on this point, the Court said, "would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates regime by annexation, so determinedly excluded in 1920." The Court further opined that the effect of article 80(1) of the Charter was to ensure that the rights of the inhabitants of Namibia would be safeguarded by continued international supervision over the territory by the United Nations in its role as successor to the supervisory responsibilities of the League of Nations.

The Court also rejected South Africa's argument that "new facts" not fully before the Court in 1950 indicated the supervisory power of the League over mandates did not pass to the United Nations. Specifically, South Africa alleged that rejection of proposals introduced by the Chinese delegation at the final assembly of the League and by the Executive Committee to the United Nations Preparatory Commission, providing in explicit terms for the transfer of supervisory functions over mandates from the League to the United Nations, compelled a conclusion that no such transfer was intended. To the Court, however, it was not possible to infer from the rejection of these proposals that no transfer of supervisory responsibility had taken place. The Court noted that the Chinese proposal was never considered, but rather was ruled out of order because it would have subjected mandated territories to a form of supervision by the United Nations going beyond the scope of the existing supervisory authority of the League. As for the proposal of the Executive Committee, which called for the establishment of a temporary trusteeship committee, the Court pointed out that it was rejected on the ground that setting up such an organ might delay the negotiation and conclusion of trusteeship

80. Id.
81. Id. at 33.
82. Article 80(1) provides:
Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.
agreements, especially with mandatory states. It noted that in discussions on the proposal the South African representative himself had declared that “it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report.” In fact, the Court found a general assumption of the delegates to the United Nations Preparatory Commission that the supervisory powers of the League over mandates were to be exercised by the United Nations.

The Court next turned to the South African and French contention that the General Assembly acted ultra vires in adopting Resolution 2145 (XXI) terminating the mandate. At the outset, it noted that some representatives argued that the ultra vires issue could not even be considered by the Court since the question submitted by the Security Council did not cover the validity of Resolution 2145(XXI) and the Court was not authorized to assume a power of judicial review of the actions of United Nations organs. The Court acknowledged the force of these arguments, but decided, “in the exercise of its judicial functions,” to consider the objections nonetheless.

The Charter, according to the Court, contemplated a two step procedure with reference to League mandates. Initially, the mandatory powers assumed an obligation under article 80 to preserve the rights of the peoples of the mandated territories as well as the rights other states claimed in those territories. Ultimately, it was expected that trusteeship agreements would be concluded to restructure the mandatory’s relationship to the newly created United Nations. Since a trusteeship agreement had not been concluded, paragraph 3 of Resolution 2145(XXI) declared both that South Africa had failed to fulfill its mandate obligations with respect to the administration of Namibia and that South Africa had in fact disavowed the mandate. Therefore, South Africa had lost whatever rights it had under the mandate. This conclusion was reached on the theory that “a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.” The termination action of the General Assembly was consistent, according to the Court, with general principles of inter-

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84. Id. at 36.
85. See 10 INT'L LEGAL MATERIALS 302, 304 (1971).
87. Id. at 46.
national law regulating termination of a treaty relationship on account of breach. In support of this statement, the Court referred to the conclusion in its 1962 opinion that the mandate was an international agreement having the character of a treaty or convention and to the provisions in the Vienna Convention on the Law of Treaties justifying termination of a treaty in the event of material breach.

South Africa argued strenuously that the Council of the League had no power to terminate a mandate in case of misconduct by the mandatory, and therefore, could not transfer such a power to the United Nations. It relied upon the failure of the Paris Peace Conference to adopt a proposal regarding a right of appeal by the people of Namibia for the substitution of some other state or agency as mandatory. But such rejection did not, in the Court's view, indicate that the drafters in the mandates system intended to exclude application of general principles of treaty law concerning termination from the system. Rather, the proposal was rejected because some states were concerned that, if it were adopted, there would be no guarantee of long-term continuation of administration by the mandatory. According to the Court, the compromise solution adopted was that the Council of the League would not interfere with the day-to-day administration of the territories, but would intervene under general principles of treaty law in case of a fundamental breach of the mandatory's obligations.

The Court also rejected South Africa's argument that, even if the Council of the League had the power to revoke the mandate in an extreme case, it could not have exercised this power without the consent of the mandatory. In the Court's view, acceptance of this position would, "... not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility." Accordingly, the consent of the wrongdoer to termination of a mandate based on its failure to fulfill its responsibilities could not be required.

Having disposed of South Africa's objection to the validity of the United Nations' actions regarding Namibia, the Court turned to a con-

88. SWA Cases 1962, at 331.
91. Id. at 49.
92. Id.
sideration of the legal consequences arising for states from South Africa's continued presence in the territory. Once a United Nations organ makes a binding determination that a situation is illegal, the Court said, the primary obligation of member states is to bring that situation to an end.\textsuperscript{93} South Africa, the Court continued, having created and maintained the illegal situation, has the obligation to withdraw its administration from Namibia. At the same time, although South Africa has no title or right to administer the territory by continuing in \textit{de facto} occupation, it remains under international obligation toward other states with respect to its administration of the area, and accountable for any violations of the rights of the people of Namibia.\textsuperscript{94} Other member states were required to recognize the illegality of South Africa's continued presence in Namibia, and to refrain from actions that might lend support to South Africa's occupation of Namibia. The political organs of the United Nations were to determine precisely what actions would be permissible or impermissible.

For its part, the Court specified as impermissible only dealings with South Africa that might imply a recognition that South Africa's presence in Namibia was legal or serve to entrench South Africa's authority over the territory.\textsuperscript{95} On the other hand, the Court said, non-recognition of South Africa's administration of Namibia should not deprive the people of the territory of any of the advantages of international cooperation. As examples, the Court pointed out that non-recognition of the validity of South Africa's registration of births, deaths and marriages in Namibia could only redound to the detriment of the inhabitants of the territory.\textsuperscript{96}

III

THE DISSENTING OPINIONS

Sir Gerald Fitzmaurice of the United Kingdom and Andre Gros of France filed dissenting opinions. Judge Fitzmaurice criticized the Court's opinion on nearly every issue. In particular, he denied that South Africa had any obligation to the United Nations as successor to the League

\textsuperscript{93} \textit{Id.} at 54. In so ruling, the Court rejected a contention that art. 25 of the Charter applies only to enforcement measures adopted under ch. VII of the Charter. \textit{Id.} at 52-53.

\textsuperscript{94} \textit{Id.} at 54.

\textsuperscript{95} \textit{Id.} at 54-56.

\textsuperscript{96} \textit{Id.} at 56.
relative to Namibia, and that, in any event, neither the League nor the United Nations had the power to unilaterally terminate the mandate.

Tracing the history of mandates after the demise of the League, Judge Fitzmaurice found that while the mandates survived dissolution, the United Nations did not succeed to the League's supervisory functions because (1) no special arrangement providing for such succession had in fact been made; indeed, several specific proposals to this effect had been made and rejected; (2) such a succession could not in any way be implied; and (3) any such succession required South Africa's consent to the substitution of the United Nations as supervisor for the League, which had not been given. It was only if a mandated territory was placed under United Nations trusteeship that a supervisory relationship could arise because no mandates were ever, as such, administered on behalf of the United Nations.

Even assuming arguendo that the United Nations succeeded to the supervisory powers of the League, Judge Fitzmaurice continued, these did not include any power of unilateral revocation of a mandate, and United Nations powers of supervision over the mandate, which were derived from the League, were no broader. He further rejected the majority's premise that the law regarding breach and termination of private contracts and ordinary international treaties and agreements, under which fundamental breaches by one party would release the other from its own obligations, was applicable to the institutional structure of the mandates system. Indeed, such an approach involved a "total inconsistency," since, if fundamental breaches could justify unilateral revocation on the basis of contractual principles, these same principles would preclude substituting a new party to the contract for an old one without the latter's consent.

In Judge Fitzmaurice's view, the basic fallacy of the Court's opinion lay in failing to recognize that the parties involved in the mandates system were sovereign states—and not private parties subject to a higher authority in the state—and that the real issue was whether a state could be ousted from an administrative responsibility it had voluntarily undertaken. Such an unusual grant of power, to make an assignment revocable upon the unilateral pronouncement of another party, he stated, could

98. Id. at 264.
99. Id. at 267.
only be found in an express provision for unilateral termination and could not be based on implied or inherent powers.100

Such a conception of the lack of League power to unilaterally terminate a mandate was found in the non-peremptory nature of the mandates system. Thus, the sole function of the Council of the League was to examine reports from the mandatory and petitions from the inhabitants concerning the mandatory's administration of the territory. The Council could require that the mandatory's reports contain full information, and the Council could comment on these reports and indicate disapproval of certain measures, but, Judge Fitzmaurice said, these suggestions would have no binding effect unless the mandatory agreed.101

Especially noteworthy, in Judge Fitzmaurice's view, was the League's rejection of President Wilson's proposal that the mandates system contain provisions for the replacement of mandatories in the event of breach of obligations. He pointed out that specific objections to the concept of revocability were made by all the eventual holders of "C" mandates, and by most of the eventual holders of "A" and "B" mandates. Specifically, he referred to the statements of France and of Great Britain concerning the economic and other difficulties that would arise if the mandatories did not have complete security of tenure. In his view, "... the classic instance of the creation of an irrebuttable presumption in favor of a given intention is, precisely, where a different course has been proposed but not followed."102

Such a power of termination was most doubtful in cases of "C" mandates such as South Africa's. Paragraph 6 of article 22 of the League Covenant, which described "C" mandated territories as territories that could "be best administered under the laws of the Mandatory as integral portions of its territory," was incompatible with the concept of unilateral revocability. Judge Fitzmaurice acknowledged that this provision did not amount to an authorization for de jure or at least de facto incorporation because a purpose of the mandates system was to avoid annexation or cession in sovereignty of the mandated territory. But, he said, it did preclude any interim change in administration of the territory without the consent of the mandatory.103

100. Id.
101. Id. at 269-70.
102. Id. at 274.
103. Id. at 274-75.
104. Id. at 275-76.
Lastly, Judge Fitzmaurice contended that the mandates system represented a compromise between President Wilson's desire to place these territories under direct League administration and the desire of some of the Allied countries, like South Africa, to obtain a cession to themselves of these territories. In his view, this compromise was only reluctantly accepted by some of the mandatories. Further he believed that the holders of the “C” mandates in particular would never have agreed to a system whereby sometime in the future at the will of the League Council, they might find themselves displaced from the territories in favor of a new and possibly hostile or unfriendly administrator. In further support of this contention, he noted that no provision for unilateral revocation by the United Nations had been included in the stronger and more centralized trusteeship system. The most reasonable inference to draw from this, he said, was that there was no intent to give the United Nations such a power, and not that it was unnecessary because all international mandates and trusts are inherently subject to unilateral revocation.

Judge Fitzmaurice further argued that, even if the General Assembly inherited a supervisory role over the mandate, it could exercise it only within the limits of its competence under the Charter and, except with respect to specified subjects, the powers of the Assembly were solely those of discussion and recommendation. According to him, the Assembly had no authority to act, in effect, as both complainant and judge with respect to a subject. Moreover, while the Assembly had express power under articles 5 and 6 of the Charter to suspend or expel a mandatory from the United Nations, it did not have any implied power to evict a mandatory from the administration of its territory.

105. Id. at 277.
106. Id. at 278.
107. In a footnote to his opinion, Judge Fitzmaurice listed as the only provisions of the Charter conferring executive or quasi-executive powers on the Assembly: Articles 4, 5 and 6, which enable the Assembly to admit a new member, or suspend or expel an existing one—in each case only upon the recommendation of the Security Council; and Article 17, under paragraph 1 of which the Assembly is to consider and approve the budget of the Organization, with the Corollary (paragraph 2) that the expenses of the Organization are to be borne by the members “as apportioned by the Assembly.” Under paragraph 3, the Assembly is to “consider and approve” financial arrangements with the specialized agencies, but is only to “examine” their budgets “with a view to making recommendations” to them.

Id. at 282, n.62, para. (d).
108. Id. at 283.
The Security Council, according to Judge Fitzmaurice, had promulgated "consequential" resolutions on Namibia in that the Council had no independent authority to terminate South Africa's mandate. Rather, he said, the Council's resolutions proceeded on the basis of a valid termination already declared by the Assembly. Further, the Council did not have the authority under its peacekeeping power to effect definitive changes in territorial sovereignty or administrative rights. The Council might order the occupation of a country or territory in order to restore peace and security, but it had no power thereby to alter territorial rights.\(^{109}\)

In an annex to this opinion,\(^{110}\) Judge Fitzmaurice concluded: (1) the Assembly had exceeded its powers by adopting Resolution 2145(XXI) in that it had acted as a court of law; (2) the Court was correct in considering the validity of Resolution 2145(XXI); (3) the Court was correct in complying with the request for an advisory opinion; and (4) the Court's rejection of South Africa's request for appointment of a judge \textit{ad hoc} was wrong in law and unjustified as a matter of equity and fair dealing.

In his dissent, Judge Gros argued that the Court's rejection of the challenges to certain members of the Court and its refusal to grant a request by South Africa for the appointment of a judge \textit{ad hoc} did not "... satisfy the requirements of that good administration of Justice which it is the purpose of the Statute and Rules to secure."\(^{111}\) Turning to a consideration of Resolution 2145(XXI) Judge Gros, like Judge Fitzmaurice, viewed it as merely a recommendation with no binding force on member states of the United Nations. He pointed to the 1950 advisory opinion of the Court which stated that the status of Namibia could be modified only by South Africa with the consent of the United Nations.\(^{112}\) Conceding that the Court's conclusion at that time related only to South Africa's claim to be able to modify the status of the territory unilaterally, Judge Gros noted that the problem was raised before the Court although never put directly in issue,\(^{113}\) and found that the statement also applied to the issue of United Nations power to revoke the mandate unilaterally.

Judge Gros also rejected the argument that the General Assembly had

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110. \textit{Id.} at 299-317.
113. Dissenting Opinion of Judge Gros, \textit{supra} note 111, at 335.
the power to revoke unilaterally the mandate under general principles of treaty law. In his view, it is not correct to equate a mandate with a treaty. Moreover, he said, even if one concedes that a mandate is a form of a treaty, there is no rule in the law of treaties that enables our party at its sole discretion to terminate a treaty in any case in which it alleges a breach by the other party. Rather, according to Judge Gros, such an action can only be taken pursuant to the decision of a third party.\textsuperscript{114}

In the final analysis, Judge Gros contended, the argument for the unilateral power of revocation of the mandate by the Assembly was based solely on the concept of necessity. Such an argument, he contended, admitted the non-existence of any legal justification and "indeed to invoke necessity is to step outside the law."\textsuperscript{115}

IV
EVALUATION OF THE COURT'S OPINION

At the outset of this critique of the Court's opinion, it is perhaps desirable to note the difficulties inherent in such an exercise. The salient fact of the Namibian situation is that it involves the extension of Apartheid beyond the borders of South Africa. Apartheid is in turn inextricably intertwined with the emotionally laden issue of racial discrimination and represents an especially vicious instance of discriminatory practices. Therefore, there is a substantial danger that one's antipathy for Apartheid may cloud one's judgment on the legal issues and hinder objective analysis of the full implications of a particular decision or course of action. It is the contention of this writer that, notwithstanding one's possible personal abhorrence of Apartheid, the Court's opinion is subject to serious criticism from several perspectives. Rather than attempting to evaluate all the numerous and complicated facets of the Court's opinion, this critique will highlight those areas of primary concern.

A. PRELIMINARY AND INCIDENTAL MATTERS: DISQUALIFICATION OF JUDGES, APPOINTMENT OF A JUDGE AD HOC AND THE PROPOSAL FOR A PLEBISCITE

The Court's rejection of South Africa's challenges to the participation of Judges Khan, Nervo and Morozov was based on the principle that

\textsuperscript{114} Id. at 338-39.

\textsuperscript{115} Id. at 339.
service as a representative of one's government in discussions on a matter before the Court does not in itself require disqualification under article 17 of the Statute.\textsuperscript{116} However, the Court failed to evaluate the possible prejudicial nature of the three judges' service. For example, Judge Khan actively participated in the drafting and was a co-sponsor of Security Council Resolution 246 which noted and approved the Assembly's termination of the mandate. As observed by Judge Gros,\textsuperscript{117} Judge Khan's speeches at the time of drafting the Resolution left no doubt as to his position on the substantive issues later before the Court. Indeed, the Court does not even mention that Judge Khan disqualified himself from sitting in the 1966 contentious proceedings. Similarly, there was no comment by the Court on South Africa's allegations that Judge Morozov's activities as representative of his government at the United Nations continued through the time when the General Assembly adopted Resolution 2145(XXI) and that, since all three judges played leading and outspoken roles in the attack on South Africa, their activities far exceeded the bounds of representative advocacy. It is noteworthy that Judges Fitzmaurice,\textsuperscript{118} Gros,\textsuperscript{119} Onyeama,\textsuperscript{120} and Petren\textsuperscript{121} all expressed serious reservations regarding the Court's summarily rejecting South Africa's objections to the composition of the bench.

The same jurists plus Judge Dillard,\textsuperscript{122} all dissented from the order of the Court\textsuperscript{123} denying South Africa's application for appointment of a judge \textit{ad hoc}. By its terms,\textsuperscript{124} article 31(2) of the Court's Statute applies only to contentious proceedings. But, under article 83 of the Rules of Court, application of article 31 of the Statute is also mandatory if an "... advisory opinion is requested upon a legal question actually pending between two or more States..." The Court's determination that

\textsuperscript{117} Dissenting Opinion of Judge Gros, supra note 111, at 323-24.  
\textsuperscript{118} Dissenting Opinion of Judge Fitzmaurice, supra note 97, at 308-09.  
\textsuperscript{119} Dissenting Opinion of Judge Gros, supra note 111, at 311-12.  
\textsuperscript{122} Separate Opinion of Judge Dillard, [1971] I.C.J. 16, 152-53; Dissenting Opinion of Judge Fitzmaurice, supra note 97, at 308-17; Dissenting Opinion of Judge Gros, supra note 111, at 325-31; Separate Opinion of Judge Onyeama, supra note 120, at 139-41; Separate Opinion of Judge Petren, supra note 121, at 129-130.  
\textsuperscript{123} Order of January 29, 1971.  
\textsuperscript{124} Article 31(2) provides:  
If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.
there was no legal question actually pending between South Africa and other member states of the United Nations, nor between South Africa and the organization itself, seems, as pointed out by Judge Gros, to fly in the face of reality. The validity of the General Assembly's unilateral revocation of the mandate was the legal issue actually pending between South Africa and other interested parties, and efforts of the Court to justify its position by classification of the Namibia problem as a "situation" instead of a "dispute" are an exercise in legal sophistry.

In rejecting South Africa's request for the appointment of a judge ad hoc pursuant to article 68 of the Statute the Court apparently determined that Rule 83 of the Court's Statute limited its discretion to appoint a judge ad hoc to cases involving a legal question actually pending between two or more states. Judge Fitzmaurice, however, cogently refutes this argument by pointing out that the "... object of the Rule was not to specify the only class of case in which the Court could so act, but to indicate the one class in which it must do so..." Moreover, the language of article 82, paragraph 1, of the Court's Rules supports this view. This language, as Judge Fitzmaurice explains, clearly makes the test of a legal question actually pending between states a primary, but not exclusive, factor in the Court's determination whether to apply any of the contentious proceeding provisions, not only those of article 31.

If the Court did not lack the power to grant South Africa's request for a judge ad hoc, appointment of such a judge seems the only course compatible with concepts of minimal due process and fundamental fairness. In this connection, Judge Onyeama's observation appears particularly apt:

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125. Dissenting Opinion of Judge Gros, supra note 111, at 326.
126. Article 68 provides:
In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.
127. See supra note 62.
128. Dissenting Opinion of Judge Fitzmaurice, supra note 97, at 310 (emphasis in original).
129. Article 82(1) provides:
In proceedings in regard to advisory opinions the Court shall, in addition to the provisions of Article 96 of the Charter and Chapter IV of the Statute, apply the provisions of the Articles which follow. It shall also be guided by the provisions of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable; for this purpose it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.
130. Dissenting Opinion of Judge Fitzmaurice supra note 97, at 310-11.
I am of the opinion that the circumstance of South Africa's special interest in the present request should have prevailed with the Court, and, so that Justice may not only be done but manifestly be seen to be done, the discretion of the Court should have been exercised in favour of the application by South Africa to choose a judge ad hoc.\textsuperscript{131}

As indicated earlier,\textsuperscript{132} the Court initially deferred decision on South Africa's proposal for a plebiscite and its request to be allowed to supply the Court with further factual material regarding the situation in Namibia on the ground that the Court could not rule on these requests without anticipating its decision on one or more of the main issues then before it. The Court, however, did not indicate what these issues were. The only issue to which further information on the situation in Namibia would be relevant would be the compatibility of South Africa's application of Apartheid to Namibia with its obligation under the mandate, but this was not in fact an issue before the Court. At no point did the Court indicate that the competence of the General Assembly to unilaterally revoke the mandate was in any way dependent on the validity of the Assembly's finding that South Africa had failed to fulfill its obligations in respect of the administration of the mandated territory. Although the Court states that the practices of Apartheid "constitute a denial of fundamental human rights" and "a flagrant violation of the purposes and principles of the Charter,"\textsuperscript{133} there is no indication that, in so stating, the Court was reviewing the similar finding of the Assembly, and that this statement appears to be dictum. Rather, the Court, in its deliberations, assumed arguendo the validity of this finding, and considered the competence of the Assembly to unilaterally revoke the mandate.

The more fundamental question, however, is whether the compatibility of South Africa's application of Apartheid to Namibia with its obligations under the mandate was in fact irrelevant, or whether it should have been an issue before the Court. Later discussion\textsuperscript{134} will suggest that a judicial determination on this issue was an indispensable precondition to the Assembly's power to terminate the mandate. If this analysis has merit, it follows that a plebiscite in the territory and the submission of further factual information by South Africa would be highly relevant to the Court's proceedings.\textsuperscript{135}

\textsuperscript{131} Separate Opinion of Judge Onyeama, supra note 120, at 140 (emphasis added).
\textsuperscript{132} See notes 63-66 supra and accompanying text.
\textsuperscript{133} [1971] I.C.J. 16, 57.
\textsuperscript{134} See infra notes 152-57 and accompanying text.
\textsuperscript{135} It is no answer to argue that South Africa should submit any proposal for a
B. MATTERS OF SUBSTANCE: VALIDITY OF UNILATERAL REVOCATION OF THE MANDATE

The substantive issue of overriding importance, which received lengthy consideration in each of the opinions, was the competence of the United Nations to unilaterally revoke the mandate. This same issue of the Assembly's power of unilateral revocation has been considered in other forums and it does not seem useful to exhaustively review the arguments here. This is a subject on which reasonable men can and do differ.

Perhaps it would be appropriate, however, to focus for a moment on one consideration which has not been previously treated in detail. As Judge Fitzmaurice noted, under the trusteeship system of the United Nations, none of the trust agreements give the General Assembly, the Security Council or any other United Nations organ unilateral power of revocation of the trusteeship. The language of article 79 of the Charter implies that revocation of the trusteeship can occur only with the agreement of the administering authority, and, in some instances, trusteeship agreements expressly provide that the agreement cannot be altered or amended except in accordance with article 79.

Moreover, this construction of article 79 finds strong support in the negotiating history of the trusteeship provisions. In preliminary discussions at San Francisco among the Five Powers, China proposed that provision be made for action against violators of a trusteeship agreement. The United States, however, strongly objected and no reference to criteria plebiscite to the United Nations, the supervisory authority over the Territory. See Panel on the Future of South West Africa (Namibia), 1971 Proc, Am. Soc'y Int'l L. 164. The Court has need for information on conditions in the territory to make a determination on the issue of Apartheid, and a fairly conducted plebiscite would greatly assist the Court in gaining further insight into those conditions.


137. Compare Dugard, supra note 136 with Dissenting Opinion of Justice Fitzmaurice, supra note 97.

138. Dissenting Opinion of Justice Fitzmaurice, supra note 97, at 278.

139. Article 79 provides:

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

or methods for terminating a trust or for transferring it from one admin-
istering authority to another was included in the Five Powers Working
Paper.141 During discussion of the Working Paper in committee, the
United States representative said that termination of a trust or a change
in the administering authority would constitute “alterations” of the
trusteeship agreement. In such event, it would be necessary for the states
originally concerned to agree to changes which could then be approved by
the organization. Compulsory transfer of a territory, the United States
representative said, could only be effected by the Security Council if
necessary to quell a breach of the peace. In response to a question whether
the Assembly could take action against an administering authority that
violated its obligations, the only United States response was that, in such
event, the people of the territory (if nonstrategic) would have the right
of petition.142

Egypt thereupon offered an amendment that would have expressly
given the Assembly the authority to transfer a territory under trustee-
ship to another administering authority in the event of a violation of the
terms of the trusteeship agreement by the original administering au-
thority. Both the United States and Great Britain strongly opposed this
amendment, arguing that unilateral termination or transfer of trust areas
would be contrary to the voluntary basis of the trusteeship system and
that it would obviously be difficult to take a trusteeship area from a state
unwilling to surrender it.143 No formal action was ever taken on the
Egyptian proposal.144

142. Id. at 837; 10 U.N.C.I.O. Docs. 506, 507 (1945).
143. 10 U.N.C.I.O. Docs. 510, 548 (1945).
144. Instead, the committee chairman asked the United Kingdom and the United
States to prepare a response to two questions:

If a state withdraws from the United Nations Organization and continues
to hold a trust territory under the Charter, how is the Organization to con-
tinue to exercise its responsibilities with respect to the administration of that
trust territory? And if a state administering trust territory commits an act of
aggression, what consequences will follow in relation to its trust?

Id. at 548.

To the first question the response of the two Powers was that the withdrawing state
would be under an obligation to continue to cooperate with the United Nations with
respect to its trust responsibilities. To the second the Powers answered that the
Security Council could act as with any other threat to the peace. If the administering
state’s violation of the trust did not amount to a threat to the peace, the Powers said,
the resulting situation “could only be judged by the General Assembly and the Se-
curity Council on its merits,” and, “[I]t is impossible to make provision in advance
for such a situation.” Id. at 601-02. The Committee included the statement in its re-
port, with a note that it was not an official committee position. Id. at 620-21.
In the words of Judge Fitzmaurice, if no trusteeship can be terminated without the consent of the administering authority, "why should it be so unthinkable that a mandate should not be terminable without the consent of the mandatory?"145 Nowhere in the discussions on the Egyptian proposal does one find a reference to a power of unilateral revocation of mandates on the part of the League of Nations. It is therefore reasonable to infer that the purpose of the Egyptian proposal was to remedy a deficiency of the mandates system which would presumably continue to exist under the proposed trusteeship arrangements, rather than to transfer to the United Nations a power enjoyed by the League.

It is also worth noting that article 15 of the United Nations Trusteeship Agreement on the Trust Territory of the Pacific Islands146 specifically provides that, "The terms of the present Agreement shall not be altered, amended or terminated without the consent of the Administering Authority." The Trust Territory of the Pacific Islands has been designated a "Strategic Trusteeship." Although the concept of strategic areas did not find formal expression in the mandates system, surely South Africa has always regarded Namibia as a strategic area in terms of its own territorial security. Also, as we have seen,147 South Africa fully expected ultimately to be permitted to incorporate Namibia into its own territory. It is therefore not reasonable to conclude that South Africa accepted the mandate on the understanding that the League had the power unilaterally to revoke the mandate and transfer the territory to another, potentially hostile power.

The question remains whether the League might still have some recourse against South Africa if it violated its obligations under the mandate. The answer may be that the League qua League was to have no recourse except by way of exhortation, but individual members of the League could proceed against South Africa in the Permanent Court of International Justice under article 7 of the mandate and, in the event of a decision against South Africa, the Council of the League would have the power under article 13(4) of the Covenant148 to enforce the judgment.

145. Dissenting Opinion of Justice Fitzmaurice, supra note 97, at 283, n.64.
147. See notes 12-13 supra and accompanying text.
148. Article 13 (4) provided:
The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the
of the Court by revocation of the mandate. This is the view of leading writers on the mandates system.149

This view was, of course, seriously undercut by the 1966 decision of the Court that individual members of the League had no legal right or interest in the mandatory's administration of the mandate. As wrong as that decision may have been, the fact is the Court rendered it, and the effect of the 1966 decision was to deny standing to any member state to enforce the mandatory's obligations. This left three remaining possibilities: first, the United Nations might still have the standing to enforce the mandatory's obligations which member states lacked; second, the Court might have delegated judicial power to the United Nations to determine whether South Africa violated its obligations under the mandate and, in the event of such a determination, unilaterally to revoke the mandate in order to carry out its decision; third, the decision might have made any termination of the mandate impossible.

The third possibility can be easily rejected on the grounds set forth above, viz., that the draftsmen of the League provisions contemplated actions against violators of the mandate. The second possibility, that of allowing unilateral United Nations termination, would contradict (1) the intention of the drafters of the mandates system not to subject mandates to unilateral modification or termination of mandates by the League and (2) the separation of powers between the United Nations and the Court set forth in the Charter and the Court's Statute, especially the Court's role as the principal judicial organ of the United Nations.150 Indeed, such a result would be contrary to the Court's statements in its 1966 opinion that the powers of the League were limited to negotiation, conciliation, and persuasion in attempting to enforce South Africa's obligations under the mandate, particularly since South Africa had a veto power under the League's rules.151

In the opinion of this writer, the only course of action available to

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150. See art. 92 of the Charter and art. 1 of the Court's Statute. For a discussion of the role of the Court in the United Nations system, see S. ROSENNE, supra note 9, at 63-100.

the United Nations at the time of its deliberations on termination of the mandate compatible with the mandates system, the Charter and the Statute of the Court was to request the Court to issue an advisory opinion on (a) the compatibility of *Apartheid* with South Africa's obligations under the mandate; and (b) the authority of the United Nations to unilaterally revoke the mandate in the event of finding by the Court that South Africa had violated its obligations. An opinion favorable to the United Nations, it is submitted, would have given the organization a sound juridical basis for termination of the mandate.

It has been contended elsewhere that, although the General Assembly was entitled to seek an advisory opinion from the Court on the compatibility of *Apartheid* with obligations under the mandate, it might have bypassed the Court and still validly revoked the mandate.\(^\text{152}\) In support of this position it has been argued: (1) the Court could have declined to give such an opinion on the ground of the rule set forth in the *Eastern Carelia* case that an advisory opinion should not be issued regarding a situation involving an actual dispute between states; (2) advisory opinions are not binding—South Africa had refused to accept three previous opinions on strictly legal points, so it was reasonable for the Assembly to assume that South Africa would likewise not accept one of a politico-legal nature advising that *Apartheid* failed to promote the welfare of the inhabitants of Namibia; and (3) the Assembly already had substantial judicial assistance to guide it in its deliberations because five of the six judges who considered the issue in 1966 found *Apartheid* incompatible with South Africa's obligations under the mandate.\(^\text{153}\)

What these arguments boil down to is that the Court might not give an opinion, or South Africa might ignore it, and, in any event, the conclusion of such an opinion was a certainty. None of these, however, is an excuse for dispensing with a judicial opinion when that opinion, structurally, is a necessary basis for legislative action. Moreover, the premises themselves are faulty. The *Eastern Carelia* opinion, issued by the Permanent Court of Justice, has been limited to its peculiar facts by the International Court of Justice.\(^\text{154}\) The Court in effect so indicated in

\(^{152}\) Dugard, *supra* note 136, at 79.

\(^{153}\) Id. at 82-83. Only the South African Judge ad hoc, Van Wyk, found *Apartheid* compatible with the mandate. Judges Wellington Koo, Tanaka, Padilla Nervo, and Forster, as well as Judge ad hoc Mbanefo found to the contrary.

issuing the instant opinion. As already noted, South Africa's probable rejection of an advisory opinion finding that *Apartheid* was incompatible with its obligations under the mandate would not in any way lessen the significance of the opinion as a juridical foundation for the Assembly's actions\(^{155}\) and a negation of charges that it had proceeded in disregard of the requirements of due process. Finally, individual opinions of judges are no substitute for an opinion of the Court and cannot serve as an authoritative guide for Assembly action.\(^{156}\)

It is most unfortunate that the world community has to date been deprived of an authoritative judicial determination of the compatibility of *Apartheid* with South Africa's obligations under the mandate. Most of the 1962-66 proceedings were devoted to hearing evidence on this issue, but the Court never reached the merits in its decision. For its part, the General Assembly, through its adoption of Resolution 2145(XXI), made a determination that *Apartheid* violated the mandate, but it made this determination without the benefit of a hearing or of judicial assistance. In its advisory opinion of 1971, the Court states by way of dictum that *Apartheid* violates the mandate, but no evidence was presented on this point in the proceedings, and it was not an issue before the Court.

This is not to suggest that South Africa's claim that *Apartheid* is compatible with the mandate has any merit. It is to say that international due process required a judicial determination on this issue based on a fair hearing.\(^{157}\)

\(^{155}\) In this connection, it is interesting to compare the United Nations response to the Court's Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151, where the Assembly "recognized its need for authoritative legal guidance" and accepted the opinion of the Court. G.A. Res. 1854 A (XVII), 17 U.N. GAOR 1193, U.N. Doc. A/pv 1199 (1962). In the debates on the resolution France, the Soviet Union and various communist countries argued against the Assembly's accepting the opinion on the ground that, since it was not binding, Assembly acceptance would be tantamount to amending the Charter. Jordan proposed amending the draft so that the Assembly would only "take note" of the Court's opinion. The Jordanian amendment was defeated by a vote of 68 against, 28 for and 14 abstentions. 17 U.N. GAOR, 964th meeting of the Fifth Comm., para. 4.

\(^{156}\) Some might argue that a return to the Court would not have been possible in light of the strong reaction against the Court after its 1966 decision. Admittedly, this could not have been done until after the election of several new judges and the cooling of passions. But the return to the Court in 1970 indicates that, with time, it might have been possible to resubmit the issue of *Apartheid's* compatibility with the mandate.

It might also be argued that resubmission of this issue to the Court would have resulted in protracted proceedings similar to those conducted by the Court in the contentious phase of the case. However, the Court could have met the time objection by basing its opinion primarily on the record of the earlier proceedings, which exhaustively considered the issue, and limiting new evidence to testimony as to changes in Namibia since 1966.

\(^{157}\) It is noteworthy also that the Court rejected *every* claim of South Africa, often
V
THE FUTURE OF NAMIBIA

A. IMPLICATIONS OF THE COURT’S OPINION:
ALTHERNATIVES FOR RESPONSE

Whatever the merits of the Court’s opinion, the salient fact is that the Security Council now has an authoritative legal statement that South Africa is in illegal occupation of Namibia and is under an obligation to withdraw immediately. South Africa, on the other hand, has categorically rejected the Court’s opinion and refuses to give up Namibia. South Africa also continues to apply Apartheid to the territory and has taken steps to establish bantustans or “homelands” along the lines of those in South Africa. The confrontation between the United Nations and South Africa over Namibia thus continues with no apparent resolution in sight. In light of this continued stalemate, perhaps the crucial questions at this juncture are: what courses of action are open to the United Nations, and which would be most compatible, in the language of article 2 of the mandate, with the “material and moral well-being and the social progress of the inhabitants of the territory?”

In response to the Court’s opinion, the Security Council on October 21, 1971 adopted a resolution which, inter alia, (1) recognizes “the legitimacy of the movement of the people of Namibia against the illegal occupation of their territory by the South African authorities and their right to self-determination and independence,” (2) agrees with the Court’s opinion that South Africa is under an obligation to withdraw its administration from Namibia immediately, and (3) requests the Ad Hoc Sub-Committee on Namibia “to study appropriate measures for the fulfillment of the responsibility of the United Nations towards Namibia.” Except for the reference to the Court’s opinion, this resolution amounts to little more than still another call upon South Africa to withdraw from the territory, in the face of categorical statements by South Africa that it will not do so.

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in the most categorical and summary fashion. One may question whether the Court was a bit “too avid” in this respect. See Gordon, Old Orthodoxies Amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice, 1 DEN. J. INT’L LAW AND POLICY 65, 91 (1971).

At the time of this writing,\textsuperscript{161} the Security Council has further determined that South Africa's continued occupation of Namibia "creates conditions detrimental to the maintenance of peace and security in the region."\textsuperscript{162} However, it appears that the Council is unwilling to take the steps which follow inexorably from the logic of its conclusions. If South Africa is actually in illegal occupation of Namibia, and South Africa indicates clearly that it has no intention to withdraw from the territory, it follows that there is a "threat to international peace and security" calling for Chapter VII measures. Although the world community has never been able to agree on a definition of aggression, there is unanimous agreement that illegal occupation by one state of another state or territory is a classic case of aggressive behavior.\textsuperscript{163} Indeed, if the situation in Rhodesia constitutes a threat to the peace, it follows a fortiori that South Africa's illegal occupation of Namibia must be similarly classified.\textsuperscript{164}

The reason for the failure of the Security Council to follow the logic of its conclusions is of course simple: Great Britain, France and the United States, among others, have made it clear that they will not support application of Chapter VII measures against South Africa. Moreover, in light of the United Nations' unhappy experience with sanctions against Rhodesia, it is highly questionable whether economic sanctions against South Africa would be in any way effective.\textsuperscript{165}

It is time the world community recognized the realities of the situation in Namibia. Under present circumstances South Africa is not going to heed United Nations' demands that it withdraw from Namibia, and the Security Council is not going to apply Chapter VII sanctions against South Africa to enforce its demands. Is one then forced to conclude that there is no way to avoid South Africa's annexation of the territory and that until such time as Namibian liberation movements gain sufficient

\textsuperscript{161} March 20, 1972.
strength to drive South Africa out of the territory, the people of Namibia will be subjected to the evils of Apartheid? Is it correct to say that in Namibia, "... the United Nations is faced with a choice—at least an apparent choice—between peace and justice?" ¹⁶⁶

Perhaps this Hobson's choice between peace and justice is more apparent than real. It is true that the cynic could see, in Namibia, a fatal blow to the international legal system as a means of resolving disputes between nations. Certainly, the International Court of Justice's performance has left something to be desired. But perhaps this was because the parties directly concerned tried to resolve their differences by litigation and confrontation, rather than by searching for other approaches of the international legal system that might prove more promising. Perhaps the Namibian cases are an example of the international application of elementary principles taught law students, namely, that litigation is a last resort, and it is the good lawyer who keeps his client out of court. In the final analysis, it may be that too much was asked of the system in its present state of development. But even if that is so, must we abandon it, or may there be alternative courses of action which might utilize international law and procedures more effectively?

A first step might be to heed the suggestion of the British representative to the Security Council "... that it is by dialogue rather than by confrontation that progress can be made. ..." ¹⁶⁷ In this connection, it is encouraging to note that, pursuant to Security Council Resolution 309,¹⁶⁸ Secretary-General Waldheim has initiated discussions with South Africa over Namibia and South Africa has indicated its willingness to accept a special United Nations representative to consult with South Africa con-

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¹⁶⁶ See Landis, supra note 11, at 671.

"The Security Council,

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1. Invites the Secretary-General, in consultation and close cooperation with a group of the Security Council, composed of the representatives of Argentina, Somalia and Yugoslavia, to initiate as soon as possible contacts with all parties concerned, with a view to establishing the necessary conditions so as to enable the people of Namibia, freely and with strict regard to the principles of human equality, to exercise their right to self-determination and independence, in accordance with the Charter of the United Nations;
2. Calls on the Government of South Africa to co-operate fully with the Secretary-General in the implementation of this resolution;
3. Requests the Secretary-General to report to the Security Council on the implementation of this resolution not later than 31 July 1972."
cerning the future of Namibia. At the same time, one wonders how meaningful any dialogue between the United Nations and South Africa will be if both parties maintain their present positions, i.e., the United Nations continues to demand that South Africa withdraw immediately from Namibia in the face of South Africa's adamant refusal to do so. What steps might be taken to allow a meaningful dialogue to begin?

First, it must be realized that South Africa has certain legitimate interests in the disposition of Namibia, but these do not include the perpetuation of a system of racial discrimination and oppression such as Apartheid. However, South Africa is understandably concerned with its own territorial security in the light of the exceedingly hostile attitude toward it of most other African states. A hostile government in power in Namibia might allow the territory to be used as a base for guerrilla incursions into South Africa.

Another legitimate interest of South Africa is the welfare of the approximately 90,000 white inhabitants of Namibia under a new government controlled by non-whites. There is substantial sentiment in the United Nations that administration of the territory by the organization should be only for a brief transitional period before independence. Indeed, the United Nations has neither the financial base nor the technical competence to administer the territory for more than such a period. This procedure, however, would not allow sufficient time for working out arrangements for a smooth transition from mandate status to self-government, and South Africa and the white inhabitants of Namibia are dearly determined to prevent what they regard as precipitous independence and self-government for Namibia. What alternative administrative arrangements, if any, might be available to break this deadlock?

Given a measure of flexibility by both sides, it might be possible for the United Nations and South Africa to agree on an arrangement

On September 25, 1972, Secretary-General Waldheim appointed Alfred M. Escher, a retired Swiss diplomat, as his special representative. South Africa has refused to allow Mr. Escher to open an office in Namibia. But, after six months of private negotiations, Mr. Waldheim has announced that South Africa agreed to permit his representative to make visits to the territory. N.Y. Times, September 26, 1972, at 6, col. 1.
170. At the end of his preliminary talks with South Africa on Namibia, Secretary-General Waldheim was reported as acknowledging the "deep gulf" between the United Nations position and that of South Africa. N.Y. Times, March 11, 1972, at 2, col. 3.
173. See e.g., United Nations Council For Namibia, Report, supra note 165, at 32.
whereby South Africa would continue to administer Namibia, but with the understanding that it would do so under United Nations supervision. The goal of such an arrangement would be to enable inhabitants of the territory, at the earliest possible date, to reach a level of self-government sufficient to enable them to exercise the right of self-determination—whether that exercise should result in a choice for independence or for incorporation into South Africa. It would also be necessary for South Africa to agree to easing and gradually eliminating Apartheid practices in the territory.

Although South Africa has consistently refused to submit to United Nations supervision of its activities in Namibia, and has strongly defended its Apartheid practices, it might be willing to change its position in exchange for meaningful guarantees for its own territorial security and the interests of the white inhabitants of Namibia. The problem of South Africa's territorial security would arise only if the people of Namibia eventually opted for independence as opposed to incorporation into South Africa. In that event, before agreeing to independence for Namibia, South Africa would require guarantees that the new state would not pose a threat to South Africa and assurances that the lives and property of the white population in Namibia would be protected. For its part, Namibia would wish to ensure freedom of its territory from South African encroachment, and full participation in the economic, social, and political life of the country by its non-white population.

A possible solution to the problem of South Africa's and Namibia's territorial security would be to establish Namibia, as a concomitant of its independence, as a permanently neutralized state along the lines of Switzerland. Neutralization of Namibia might serve the primary objective of neutralization in international law, that is, managing, if not entirely avoiding, conflict through the creation of "buffer states" in order to stabilize balance-of-power rivalries and/or remove a state as a focal point of international conflict. A neutralized Namibia might be regarded as a "buffer state" between South Africa and antagonistic guerrilla groups in Angola and Rhodesia, and it would clearly be less of a focal point of international conflict.

174. The following discussion of neutralization is taken in large part from Murphy, Neutralization of Israel, 65 AM. J. INT'L L. 167 (1971).
175. See generally, BLACK, FALK, KNORR & YOUNG, NEUTRALIZATION AND WORLD POLITICS (1968); I M WHITEMAN, supra note 149, at 342-64 (1963); Kunz, Austria's Permanent Neutrality, 50 AM. J. INT'L L. 418 (1956).
Neutralization, as distinguished from a policy of neutrality, can be brought about only by treaty and not by unilateral declaration. Under present international law and practice, the procedure would be to conclude a treaty of neutralization between Namibia and other interested states or entities with Namibia's consent. It is no longer supportable for the great powers, by treaty among themselves, to impose the status of neutralization upon weaker states, as the European Powers did in the nineteenth century with regard to Belgium and Luxembourg.

The parties to a treaty neutralizing Namibia would at a minimum have to include Namibia, South Africa and the United Nations, i.e., the primary protagonists in the conflict over Namibia. It might also be desirable, and perhaps indispensable, to include the United Kingdom, France, and the United States, because of the role they might play in maintaining and guaranteeing the neutralization of Namibia.

As a neutralized state, Namibia would be required to abstain from going to war except in self-defense, and to avoid policies and actions that might involve it in hostilities. If a war or armed conflict were to break out between other states, Namibia would be required to remain neutral in the strict, classic sense.

At the same time, neutralization does not necessarily mean demilitarization. On the contrary, the neutralized state not only has a right, but an obligation, to defend its neutrality, by armed force if necessary. Most important for the present discussion, Namibia would be under an obligation to prevent use of its territory as a base for hostile incursions into

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176. A distinction is usually drawn between “neutralization” and “neutrality.” Neutrality is defined as a voluntary policy that a state may adopt in time of war with respect to belligerents. Neutralization, on the other hand, refers to a permanent status, acquired by agreement with other states, which cannot be relinquished without their consent. “Permanent neutrality” is often used in the same sense as neutralization. See 1 M. Whiteman, supra note 140, at 342-43.

Arguably, Austria should be classified as an example of neutrality instead of neutralization because the State Treaty with Austria contains no reference to Austria’s neutralization. Rather, the terms of Austria’s neutralization are found in a Constitutional Federal Statute enacted by the Austrian Parliament. It has been contended, however, that the Austrian statute is more than a unilateral declaration of policy because (a) it was enacted pursuant to an international obligation, the so-called Moscow Memorandum of April 15, 1955, between Austria and the Soviet Union, and (b) the neutralization of Austria has been generally recognized by member states of the international community. See Kunz, supra note 175, at 419-22.

177. E.g., adherence to a treaty entailing a political commitment, especially a defensive alliance, a treaty of guarantee, or a collective security arrangement.

178. As a neutral, its duties would include refraining from joining an international military action, whether it be under the aegis of the United Nations or any other international organization, and from allowing passage of troops of a belligerent through, or the flying of a belligerent's planes over, its territory.
South Africa. For its part, South Africa would be under an obligation to refrain from any acts incompatible with Namibia's neutral status.

It would be imperative that the other parties to the treaty be required to guarantee the neutralization of Namibia as well as to recognize it. A state simply recognizing the neutrality of another country is only obliged to refrain from taking any action that might violate that neutrality. Only a guarantee of the neutralization of a state gives rise to an obligation to defend it. Such a guarantee can be given by states severally or collectively. If it is collective, the guarantors must act as a body; but if the guarantee is given by states severally, each state is under a duty to act in a way which is peculiar to it. In view of the unhappy historical experience with unanimity voting requirements, it is likely that both Namibia and South Africa would insist that the guarantee be several or collective and several. In particular, South Africa would probably require substantial assurances that friendly powers such as the United States, the United Kingdom and France would be under an obligation to guarantee Namibia's neutrality and thereby South Africa's territorial security.

How might neutralization of Namibia be supervised? Until the three-member Commission for Supervision and Control of Laos, established under the Geneva Agreement of 1954, was assigned the task of enforcing the neutralization of Laos, there was no provision in international law or practice to ensure the maintenance of a treaty of neutralization. That Commission, however, has proven ineffective in controlling repeated interventions by several guarantor states, largely because of a lack of access to parts of the country controlled by Communist forces, dissension among the members of the Commission, and the unanimity requirement for determining whether a violation of the agreements occurred. Moreover, as an instrument of the guarantor states, the Commission has not been able to play an independent role in determining whether these states are fulfilling their obligations.

Namibia and South Africa would surely demand a more impartial commission with more effective powers. To ensure impartiality, such a commission might be established under United Nations auspices with

179. See 1 M. WHITEMAN, supra note 140, at 350.
181. See A. DOMMEN, CONFLICT IN LAOS: THE POLITICS OF NEUTRALIZATION 247-50 (1964) for a discussion of the failure of the Commission to control the conflict.
members selected from states not parties to the treaty of neutralization. If a majority of commission members determined that there had been a possible violation of the treaty, the commission would then investigate the situation. Namibia and the other parties to the treaty would be under an obligation to provide the commission with the resources and authority necessary to carry out its duties. In particular, the commission would have to be granted free access to all parts of the territory of Namibia, as well as adequate transportation and communication facilities.

The United Nations experience with peacekeeping operations and the experience in Laos indicate that the parties would be unlikely to agree that the commission itself should have power to decide whether a violation of the treaty had occurred. Rather, the functions of the commission would probably be limited to observation, fact-finding, and the submission of reports to a plenary meeting of the parties or to the United Nations for further action. In any case, some provision should be made for finally determining whether a violation of the treaty has occurred, and this decision should be made by a majority, or perhaps a two-thirds, vote not subject to veto. Provision should also be made for some enforcement mechanism in the event a violation is found.

Any treaty of neutralization for Namibia must also provide for periodic review of its provisions, and meetings to consider revisions, in the treaty should be called within a certain period after the receipt of a request for such a meeting from any party to the treaty. However, modification or abolition of the status of neutralization should be precluded except with the consent of all parties to the treaty, including Namibia.

**B. Toward a Multiracial Society in Namibia**

In addition to guarantees of the territorial inviolability of Namibia and South Africa, the elimination of *Apartheid* practices, and measures to protect the lives and property of the white population in the territory would be indispensable conditions of an agreement among South Africa, the United Nations and other interested parties on continued South African administration of Namibia. It seems unlikely that agreement could be reached at this time on the precise details of, or a timetable for, the elimination of *Apartheid* in Namibia. However, it might be feasible to reach agreement in principle on the eventual elimination of *Apartheid* in Namibia, and on first steps to this end, in exchange for effective security guarantees for South African territory and the lives and property
of whites in Namibia. The details and timetable of the *Apartheid* elimination program would be the subject of continuing negotiations. Disagreements among the parties on details and timetable might be resolved by reference to third party arbitration procedures.

What steps might South Africa initially take regarding the elimination of *Apartheid* in Namibia? Perhaps the problem could be approached in two basic stages. First, South Africa could move toward greater economic equality and opportunity. Measures to this end might include recognition and encouragement of black trade union activity; payment of equal wages and wages reflecting reasonable rates for the job; equal access to promotion and training facilities; full and equal provision for health, insurance, transport, housing, and benefits and services to both employees and dependents; and, the nullification of laws designating particular jobs for whites and blacks.  

In the second stage, South Africa would abrogate restrictions upon the individual liberties of non-whites, such as the Suppression of Communism Act, the Ninety Day Detention Law, the 180-Day Detention Law, the Terrorism Act, and the forced resettlements of non-whites in bantustans, and area restrictions. All of these measures, and others, are presently intended to safeguard the security of the white population in Namibia by maintaining absolute control over the movements and concentration of the non-white population.

Some might argue that, even if agreement could be reached on the present status and procedures for future disposition of Namibia, any arrangement enhancing the territorial security of South Africa, and hence maintaining *Apartheid* practices there, is unacceptable. This argument misses the mark. The point is that successful modification and at least partial elimination of *Apartheid* in Namibia may induce South Africa to reconsider its own internal practices. The situation in Namibia

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182. See Curtis, *South Africa: The Politics of Fragmentation*, 50 FOREIGN AFF. 282 (1972). Thus, for example, South Africa might agree to discontinue practices in the civil service field limiting participation by "natives" to the lowest and least-skilled categories, such as messengers and cleaners. Similarly, in the mining industry South Africa might cease excluding "natives" from such occupations as prospector for precious and base minerals, dealer in unwrought precious metals, manager, assistant manager or sectional manager and lift "ceilings" presently placed on the promotion of the "natives." Other practices which might be eliminated at an early date would include confinement of "natives" to unskilled labor in the fishing industry and reservation of all graded posts in the Railways and Harbour's Administration to "Europeans." See Dissenting Opinion of Judge Tanaka, SWA Cases 1966, at 311-13.

183. For a general discussion of this legislation, see Comment, supra note 20.

might be regarded as an experiment in multiracial living in Southern Africa. Should such an experiment prove successful, the more enlightened and moderate elements in South Africa might be greatly strengthened and encouraged to push for similar reforms in South Africa itself. In any event, it is hard to resist the conclusion that half a loaf (Namibia) is better than none.

It might also be contended that instant elimination of Apartheid in Namibia and immediate independence are the only solutions acceptable under the Charter and the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples. In light of the underdeveloped nature of the territory, the desirability of immediate independence for Namibia is debatable. At any rate, present South African and white Namibian attitudes preclude either immediate independence for Namibia or instant elimination of Apartheid as possibilities. The United Nations is not negotiating from a position of strength, and the realities of the situation demand some accommodation with South Africa if any reforms in Namibia are to be effected or if bloodshed in the territory is to be voided. Because of its position of strength, South Africa may choose to be totally unyielding and insist on administering Namibia without outside interference. If so, the blame for failure to take any steps toward resolution of the dispute or for any resulting violence in the area may be placed squarely on South Africa. However, it is incumbent upon the United Nations and the world community—particularly the Great Powers—to explore all possibilities of resolving the problem without violence. Any other course of action is incompatible with United Nations responsibilities for maintaining international peace and security and promoting respect for the principle of equal rights and self-determination of peoples.

186. See U.N. CHARTER art. 1, paras. 1, 2.