THE SOUTH WEST AFRICA CASES

I INTRODUCTION

Namibia became independent on 21 March 1990. The story of the Namibian struggle for independence, which stretched over seven decades, belongs to the past and will, of course, always be of immense historical interest. For purposes of this note, historical data will only be brought in, as far as it relates to the South West Africa cases.

In *International Law – a South African Perspective*, John Dugard remarks:

South Africa’s contribution to the development of international law during this period (ie the period after 1945 when the United Nations was inaugurated) was enormous, although unintended. New rules of treaty and customary law to promote human rights, racial equality, and decolonisation evolved as a result of international opposition to apartheid. The prohibition on interference in the domestic affairs of states, enshrined in article 2(7) of the Charter, was substantially weakened by a succession of resolutions condemning apartheid … In addition, South Africa’s six appearances before the International Court of Justice over South West Africa/Namibia enabled the Court to formulate new rules of law on the status of international territories, the powers of the United Nations, human rights and self-determination. While apartheid undermined and discredited the law of South Africa, it succeeded, perversely, in injecting notions of racial equality, self-determination, and respect for human rights into an international legal order that in 1945 had few developed rules on these subject.

The purpose of this note is to investigate the scholarly manner in which John Dugard in relation to the South West Africa/Namibia cases through his publications, conference papers and lectures not only predicted these international law developments, but also guided and steered previously existing ideas and conventional wisdoms.

South Africa appeared six times before the International Court of Justice in the South West Africa cases. Its refusal to account to the UN on its administration of the Territory, led to the first advisory opinion of the Court to the General Assembly on the *International Status of South West Africa*. The opinion held that the Mandate continues in force and that South Africa is obliged to account to the UN on its administration of the Territory. In 1955 the Court advised on the voting procedure of the General Assembly and agreed that the procedure of the Charter should apply. In its advisory opinion on the

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1 3 ed (2005).
2 This 20th century period can be considered as the age of modern international law.
3 Note 1 above 20-1.
5 For a brief chronology of the cases, see Dugard (1973) 478. See also M Wiechers Staatreg 3 ed (1981) 445–87.
6 (1950) *ICJ Reports* 128.
7 (1955) *ICJ Reports* 67.
Admissibility of Hearings of Petitioners by the Committee on SWA,
the Court confirmed the right of the General Assembly to grant hearings and receive petitions from the inhabitants. In 1960, Liberia and Ethiopia, both former members of the League of Nations, instituted legal proceedings and requested the Court to find that the Mandate still remains in force, that the Mandatory must account to the United Nations (UN) and that the policy of apartheid as applied in the Territory, violated the Mandate. The Court, in 1962, dismissed South Africa’s preliminary objections to admissibility of the applicants’ claims, SWA cases, preliminary objections. But in 1966, the Court’s majority (with the vote of the President), refused to pronounce on the merits of Liberia and Ethiopia’s claims on the ground that they have no legal interest in the matter, SWA, second phase.

In South Africa the judgment was hailed as a victory. But in the UN, the Court’s decision, which was based on an essentially preliminary issue, created a furore. In 1966, the General Assembly revoked the Mandate in Resolution 2145 (XXI) and in 1968, changed the name of the Territory to Namibia.

The Security Council in its Resolution 276 (1970) then declared South Africa to be an illegal occupant of Namibia. In its advisory opinion to the Security Council of 1971, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, the Court advised that South Africa is in illegal occupation of Namibia and must withdraw its administration immediately. Also, that states must adhere to the Security Council resolution.

After the 1971 opinion and its endorsement by the UN, eventual Namibian independence became a foregone conclusion. However, it would take another 20 years of intense lobbying on the part of the Western powers, resistance by the South African government, internal political developments and turmoil and a UN Transition Assistance Group (UNTAG) presence to oversee elections as well as the writing of a constitution, before Namibia gained its independence as a sovereign state and became a full member of the family of nations. In this respect, John Dugard has a very apt remark:

It is true that the enforcement of the 1971 Opinion took nearly 20 years, but it is unlikely that this process would have been quicker if the Court had rendered a binding judgement against South Africa in 1966. This is historical speculation, but it does serve to emphasize that there is little practical difference between the legal effect of an enforceable judgment and that of an advisory opinion.

8 (1956) ICJ Reports 23.
9 (1962) ICJ Reports 318.
11 (1971) ICJ Reports 16.
13 Dugard (note 1 above) 476.
II MODERN INTERNATIONAL LAW: TWO DIVERGENT APPROACHES

Dugard, quite correctly, states the following:

The political-legal dispute over the international status of South West Africa, or Namibia, has featured regularly on the agenda of the General Assembly since 1946, has been considered annually by the Security Council since 1968, and has been the subject of six appearances before the International Court of Justice. Without doubt it has prompted more resolutions, promoted more committees, and produced more judicial decisions than any other matter to come before the organs of the United Nations.

It would be totally impossible, within the scope of one note, to analyse the various trends in and approaches towards international law and international adjudication in the Court’s mammoth South West Africa jurisprudence as manifested in its judgments and opinions as well as in the many dissenting and separate opinions of individual judges. However, broadly speaking, two approaches can be discerned.

The first approach can be called the conventional or more positivist approach. Actions and resolutions of the UN are assessed and their legal validity judged in terms of the Charter and accepted principles of international law. A clear example of this approach manifested itself in 1950 in the separate opinions of judges Read and McNair who were of the opinion that although the Mandate as an institution survived, the Mandatory’s obligation to submit to the supervision of the General Assembly lapsed since the UN was not the successor to the League of Nations. In the following opinions and judgments, this more legalistic approach – which could be traced to an Anglo-Saxon tradition – appeared regularly. It culminated in the 1966 decision of judges Fitzmaurice and Spender when it was decided, in true conventional fashion, that Liberia and Ethiopia have no legal interest in the matter.

I must admit that for myself, in my own writings, I also adhered to this approach and was therefore opposed to the General Assembly’s unilateral revocation of the Mandate in view of the fact that no such power existed under the Charter and that South Africa was not afforded a hearing, which the Charter prescribes. Also, the extent of the General Assembly’s supervisory powers and...
the Security Council’s reliance on its peace-keeping powers raised some strong doubts in my mind.\textsuperscript{16}

However, in a later article on the 1971 Opinion,\textsuperscript{17} although severely critical of the Court’s reasoning, I had to admit that the revocation of the Mandate could not become undone and that South Africa must face up to its consequences. I based my view on the principle that unauthorised and even unlawful legal acts, especially in the international realm, still have legal effects and that the existing law could be transformed and broadened to accommodate these acts if supported and given effect by an overwhelming majority. This was particularly true in the case of South West Africa since the Charter did not provide for the continuation and supervision of the Mandate. Looking back, it can be said the 1971 Opinion, endorsing the revocation of the Mandate, was not contrary to the Charter but rather a supplement or extension of inchoate Charter provisions.

The other approach to be discerned in the Court’s jurisprudence, could be labelled the progressive, policy-orientated\textsuperscript{18} approach. International lawyers who espouse this approach, look at the international community and see the UN as a motoring and progressive force to shape a new world legal order. They are opposed to the classic doctrine of state sovereignty in international relations and the exclusion of domestic affairs from the UNs’ jurisdiction. They are furthermore conscious of the need to protect human rights, also on international level, the participation of new world countries in the UN and the overwhelming demand for decolonisation, the strengthening of international adjudication and generally, the creation – albeit gradually – of that new universal legal order that will secure peace, equality and the re-distribution of the world’s natural resources and wealth.

This explicitly progressive approach can from the beginning first be found in the separate opinion of Judge Alvarez in the 1950 South West Africa case before the Court. According to him, there has come about a new international law, which also takes political, psychological, sociological and economic factors into consideration. In his opinion, ‘(b)esides legal obligations there are also moral obligations and obligations of a political international character or duties. The latter derive from the interdependence of States and the international organization’.\textsuperscript{19}

\textsuperscript{16} Wiechers (note 5 above) 468–9. See also Wiechers ‘South West Africa: The Decision of 16 July 1966 and its Aftermath’ (1968) \textit{CILSA} 408; and S Slonim \textit{SWA and the United Nations An International Mandate Dispute} (1973). Judge Fitzmaurice explicitly criticises the opinion: ‘The present proceedings represent an attempt to use the Court for a purely political end, namely as a step towards the setting up of the territory of South West Africa as a new sovereign independent state, to be called “Namibia” irrespective of what the consequences of this might be at the present juncture’ (1971) \textit{ICJ Reports} 304.

\textsuperscript{17} ‘South West Africa: The Background Content and Significance of the Opinion of the World Court of 21st June 1971’ (1971) \textit{CILSA} 123.

\textsuperscript{18} The two most well-known exponents of the policy-oriented approach is Professor Myres McDougal and his pupil Professor Michael Reisman of Yale University. According to this approach, international law in order to be effective, must be the practical and feasible embodiment of foreign policies.

\textsuperscript{19} (1950) \textit{ICJ Reports} 176.
In the ensuing opinions and judgments, this progressive approach can constantly be detected. To me, this line of argument culminated in the monumental dissenting opinion of judge Tanaka in the 1966 judgment in which he assiduously and in view of modern developments, found apartheid to be a breach of the Mandate, justifying its revocation. Perhaps the remark by judge Dillard succinctly underwrites this approach by finding that ‘law and what is legally permitted may be determined by what a court decides, but they are not only what a court decides’.

There is no doubt that John Dugard’s approach as it appeared in his writings, is much more akin to the progressive line of thinking about the SWA/Namibia cases. That is why he constantly emphasised the continuation of the Mandate, the existence of supervisory powers, the obligation of South Africa to desist from apartheid laws and practices in the Territory and why he in principle supported the revocation of the Mandate. But this did not prevent him from showing his respect for established norms and rules, whether they are contained in the Charter or whether they are founded upon custom, and to be critical of some of the UN resolutions and the manner in which the General Assembly and Security Council acted unilaterally after the 1966 judgment. In this regard, he remained on the solid ground of sound legal reasoning and certainly did not with starry eyes simply preach a new international legal order.

The outstanding feature of Dugard’s approach and which made it unique, is that he looked at South Africa’s duty to fulfil the sacred trust of civilisation as the abiding and unalienable purpose of the Mandate. This clear and strong teleological approach guided and allowed him to accept the binding force of the General Assembly’s resolutions as well as the advisory opinions of the Court as an evolving body of international law. This is why he could hail the 1971 Opinion of the Court as ‘the Teleologist’s triumph’.

III THE CONVERGENCE OF THE TWO APPROACHES

The fascinating aspect of the SWA/Namibia dispute is that the divergence of opinion subsisted to the very last moment. On the one hand, South Africa insisted that its presence in and administration of the Territory is lawful and should be so recognised. The UN and South West Africa People’s Organisation (SWAPO), on the other hand, relentlessly claimed that such presence is unlawful and that South Africa’s presence should be terminated. In other words, the divide between the legalistic and progressive approach subsisted up to the date of independence.

This divergence could have led to the total collapse of the final stages of the Namibian peace programme. Fortunately, through the good offices of the Five Western Powers and the consummate diplomatic skills of Martii Ahtisaari, the UN Secretary General’s special representative, a pragmatic solution was

21 Dugard ‘The Teleologist’s Triumph’ (note 4 above) 460.
found. While it was accepted that South Africa and its representative the Administrator-General would remain in control of the administration of the Territory, it was at the same time agreed that UNTAG and the Special UN representative would oversee the process.

The end result was an agreement that all existing laws and all existing powers remained in force except in so far as they are incompatible with the Constitution, which in other words, constituted a totally evolutionary transition. However, in the same breath, it was added: ‘Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia’.

Finally, the deep divergence of approaches and viewpoints has been resolved. All is well that ends well.

IV CONCLUSION

The struggle for Namibian independence must be seen in its broader context of the Cold War, the thrust of anti-colonialism and the protection of human rights. Dramatic events accompanied the Namibian liberation. On the last day of the Namibian elections, the Berlin Wall fell and a couple of months later, Nelson Mandela came out of prison.

Namibia provides shining proof that an African state, given the necessary support and encouragement, can solve its own problems. It remains to see whether the Namibian example of solving its political turmoil by means of free and general elections and the adoption of a democratic constitution with a multi-party system of government, will remain a guiding light for the rest of the African continent.

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22 See M Ahtisaari ’Foreword’ (1989–90) 15 SA Yearbook of International Law ix.
23 Section 140 Constitution of Namibia.
24 Section 145(2) Constitution of Namibia. This is a clear example of the principle that a factual situation, which is considered to be unlawful, could have normative force and be accepted as binding law. In German legal thinking, this principle is known as the ‘normative Kraft des Faktischen’.
25 It is my conviction that the Namibian experience and political evolution, in many respects, served as a strong incentive and example for South Africa’s own constitutional processes.